

# **Edinburgh Student Law Review**

**2015**

**Volume II | Issue 4**

**2014 Edinburgh Postgraduate  
Law Conference Edition**



## Acknowledgement

The Edinburgh Postgraduate Law Conference Committee 2014 wishes to thank the University of Edinburgh Law School and the Institute for Academic Development for their financial assistance.



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## Foreword by Professor Richard Sparks

It gives me great pleasure to welcome the publication of this special conference edition of the *Edinburgh Student Law Review*, containing a range of pieces written by speakers at the second Edinburgh Postgraduate Law Conference, held in December 2014. Having had the great pleasure of formally opening the conference, I have had the opportunity to see first-hand how much work went into the two-day event.

Postgraduate law conferences, which have proliferated in recent years, offer a useful training ground for budding scholars, allowing them to hone presentation skills and exchange ideas in a supportive environment. The fact that participants at the 2014 conference came from over 30 universities across the UK and Europe demonstrates the value of providing *fora* for engagement and discussion between peers, making postgraduate students active agents in their own development as scholars.

The breadth of articles in this collection attests to the quality of research showcased at the 2014 conference, and the extent to which contributors engaged with the conference theme of ‘Innovation in the Law’. A number of distinct trends can be observed. Human rights protection is a particular focus, including the rights implications of the so-called ‘war on terror’, the elderly as rights-holders and the new and controversial ‘right to be forgotten’ online. The law’s relation to, and regulation of, the internet, comes to the fore in articles on artificial intelligence and the internet, and the relationship between online activism and democratisation in China. A further grouping of pieces explores the capacity of law to regulate cultural and financial affairs, concerning the commodification of cultural products as well as the ongoing fall-out of the economic downturn for regulation of corporations and financial products. The final two articles, on the attempted invalidation of federal law by US states and the right to secession in international law, speak to two fundamental issues which gain currency in the contemporary Scottish context: the frictions generated in federal constitutional structures and the limits of law in governing what are essentially political questions.

From its inception the *Review* has been produced for, and by, students. A thriving postgraduate research community is a central part of what makes our School the exciting and outward-looking place that it is today. The Editorial Board of the *Review* and the Conference

Organising Committee 2014 are to be congratulated on this collaboration, which may serve as a model for future postgraduate conferences, both here in Edinburgh and elsewhere.

Professor Richard Sparks  
Head, Edinburgh Law School

*June 2015*

## **Note from the Conference Organising Committee 2014**

This special edition of The Edinburgh Student Law Review is devoted to a selection of research papers presented by postgraduate scholars (LL.M and Ph.D researchers) at the second annual Edinburgh Postgraduate Law Conference, which took place at Edinburgh Law School on 1-2 December 2014 on the theme ‘Innovation in the Law: New Challenges, New Perspectives’, funded by Edinburgh University’s Institute of Academic Development (IAD) and the Law School.

The 2014 conference featured thirty-six postgraduate speakers, selected from a pool of almost two hundred abstracts, grouped into twelve panels covering a range of subjects, including: the commodification of culture in the area of intellectual property; the legal framework governing ‘killer robots’; the democratisation of authoritarian regimes; and the so-called ‘right to be forgotten’ online. The selection here comprises thirteen of the original thirty-six presentations, re-worked as articles, having originally been posted as 1000-word blog posts on the conference blog at [www.lawphd.conference.ed.ac.uk/speakers-blog/](http://www.lawphd.conference.ed.ac.uk/speakers-blog/).

The quality of the articles here attests to the significant value of holding events to bring postgraduate legal scholars together. Speakers and participants at the 2014 conference hailed from 19 different UK universities, as well as 13 different non-UK universities, and the event provided a space for young scholars to obtain feedback on their research, connect with other researchers in their area, and leave behind the general solitude of postgraduate (especially Ph.D) life for two days.

The success of the two Edinburgh Postgraduate Law conferences to date underscores the vibrancy of the postgraduate research community at Edinburgh, not least its variety of student-run discussion groups and the Review itself, which is also entirely student-run. This edition, a testament to the hard work of those at the Edinburgh Student Law Review and the fruits of 2014 Conference, are further evidence of this vitality. We are greatly indebted to the conference speakers for contributing their pieces, and to the Editorial Board of the Review for bringing it to completion.

Edinburgh Postgraduate Law Conference Organising Committee 2014  
Humberto Carrasco, Tom Gerald Daly, Laura Downey, David Komuves,  
Ekrem Solak and Leslie Stevens

*June 2015*



## Editorial

For the last two years, the Edinburgh Postgraduate Law Conference has provided a highlight of the winter academic (and social) calendar at the University of Edinburgh Law School.

When we were approached by the 2014 Committee with an offer to collaborate on a special edition consisting of research papers from the 2014 Conference, we did not hesitate to accept. Many of our Board members had greatly enjoyed the Conference, and as a publication produced and written entirely by students, we welcome any opportunity to exhibit the work of our peers. This issue has allowed the *Edinburgh Student Law Review* to work with postgraduate students from thirteen different universities, and we have been greatly impressed by the diversity and quality of the articles submitted for this special issue.

We would like to thank some particular people for their contributions to this issue. The work of our Copy Editors has ensured that this publication is of an exceptionally high quality in the field of student journals. Mr Neil Davidson's assistance with the *Review's* website, the primary means of dissemination for this issue, is much appreciated. We are grateful for the support and encouragement of our Honorary President, Lord Hope of Craighead, and our Honorary Secretary, Dr Andrew Steven. Our sponsors, Turcan Connell LLP, Thomson Reuters, DLA Piper LLP, and the University of Edinburgh Law Students' Council, have offered invaluable encouragement and financial support.

Finally, we thank the Conference Committee 2014 for suggesting that we work together to produce this issue, and echo their thanks to the Law School and the Institute for Academic Development, without whose support the Conference and this resulting issue would not have been possible. It is our hope that future Boards and Conference Committees will produce further special editions showcasing the excellent standard of research presented at the Law School through the Postgraduate Law Conferences.

The *Edinburgh Student Law Review* Board 2014-15

May 2015





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# The ‘War on Terror’: Perpetual Emergency

*Ben Stanford\**

## A. INTRODUCTION: PERPETUAL WAR

In Orwell’s *Nineteen Eighty-Four*, under the ever-gazing eyes of Big Brother, the citizens of super-state Oceania are brutally brainwashed into obedience through constant surveillance, scrutiny and fear. Even prior to the attacks against the United States of America on 11 September 2001 (‘9/11’), many of Orwell’s prophetic ideas have come to fruition, ranging from the utterly trivial and entertaining, exemplified by television shows such as *Big Brother* and *Room 101*, to the gravely serious and chilling, demonstrated by draconian counter-terrorism legislation and State surveillance.<sup>1</sup>

This article focuses on one particular aspect of the Orwellian dystopian world, summarised in the political manifesto of the orchestrated enemy of Oceania’s citizens, Emmanuel Goldstein, in the following terms: “It does not matter whether the war is actually happening, and, since no decisive victory is possible, it does not matter whether the war is going well or badly. All that is needed is that a state of war should exist.”<sup>2</sup>

This need for a “state of war” which justifies exceptional measures in the contemporary post-9/11 world sees a parallel in the seemingly perpetual state of quasi-emergency under which citizens of many States live. This situation and its impact on the legal framework have been neglected in legal commentary. One of the reasons for which exploration of this phenomenon is crucial is the fact that “there is a frequent and perhaps understandable link between states of emergency and situations of grave violations of human rights.”<sup>3</sup>

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<sup>1</sup> The WikiLeaks and Edward Snowden revelations have played a pivotal role in exposing the extent of post-9/11 surveillance.

<sup>2</sup> G Orwell, *Nineteen Eighty-Four* (1989 edn) 200.

<sup>3</sup> International Commission of Jurists, *States of Emergency — Their Impact on Human Rights: A Comparative Study by the International Commission of Jurists* (Geneva: International Commission of Jurists, 1983. 477 p SF.40) i.

Following this introduction, the notion of a state of emergency and the way it is understood in international law will be discussed in section B. Section C will analyse the way in which post-9/11 environments in Western States are emerging in perpetual quasi-emergencies, and section D shall offer concluding comment.

## **B. STATES OF EMERGENCY**

Under international law, declaration of a public emergency is the only avenue through which States are permitted to derogate from certain aspects of their international human rights obligations to the extent required to tackle the emergency in question.<sup>4</sup> However, it is a truism that an emergency situation often occurs when human rights abuses are involved. On the face of the more and more frequent use of terms such as ‘war,’ ‘national emergency,’ and ‘threat to the nation’ in the political and legal arenas, it is important to reflect on what exactly a public emergency entails. A rigorous examination of the historical development and global jurisprudence of what constitutes a state of emergency is beyond the scope of this article; thus discussion is limited to the key universal aspects and cases.

### **(1) An “exceptional situation” which affects the “whole population” and constitutes a “threat to the organised life of the community”**

The first characteristic of a state of emergency which has emerged from various jurisprudential theories is the fact that it must amount to an *exceptional situation*. In *Lawless v Ireland (No. 3)*, which was the first judgment issued by the European Court of Human Rights (‘ECtHR’) in 1961, Lawless was a member of the Irish Republican Army who was arrested on a number of occasions.<sup>5</sup> On appeal, Lawless complained of having been detained without trial for almost five months in a military detention camp, in violation of his rights under Articles 5, 6 and 7 of the ECHR. The Court considered at length whether Lawless’ detention was justified in light of the UK’s power of derogation under Article 15 of the ECHR. The Court referred to the “natural and customary

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<sup>4</sup> States must formally lodge derogation. See International Covenant on Civil and Political Rights (GA Res. 2200A XXI, 16 December 1966;), 999 UNTS 171 (hereinafter ‘ICCPR’) Art 4; European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), ETS no 5 (hereinafter ‘ECHR’) Art. 15; American Convention on Human Rights (San José, 22 November 1969;), 1144 UNTS 123 (hereinafter ‘ACHR’) Art 27.

<sup>5</sup> *Lawless v Ireland (No. 3)* (App. no. 332/57) ECtHR 1 July 1961 1 EHRR 15.

meaning” of the words “other public emergency threatening the life of the nation”, and stated that they “refer to an exceptional situation of crisis or emergency.”<sup>6</sup>

In *The Greek Case* of 1969, four European States filed applications to the European Commission of Human Rights (‘ECmHR’) alleging that the Greek Government had violated its obligations under the ECHR.<sup>7</sup> The four governments referred to, *inter alia*, suspension of certain articles of the Greek Constitution, prohibition of ordinary political activities, establishment of extraordinary courts martial, imprisonment of thousands for long periods, censorship, and restriction of free expression and assembly.<sup>8</sup> The ECmHR indicated that states of emergency may be seen to have, in particular, four characteristics- the fourth being that:

“The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate.”<sup>9</sup>

Jurisprudence deriving from the Inter-American human rights system has also referred to the “exceptional” nature of an emergency situation. In its Advisory Opinion on Habeas Corpus in Emergency Situations handed down in 1987,<sup>10</sup> the Inter-American Court of Human Rights (‘IACtHR’) considered Article 27 of the ACHR, which provides the legal basis for derogations. The Court held the following:

“[Article 27] is a provision for exceptional situations only. It applies solely in time of war, public danger, or other emergency that threatens the independence or security of a State Party.”<sup>11</sup>

The second characteristic of a state of emergency is the fact that the exceptional situation must affect the *whole population*; either regarding the entire nation, or the specific area to which

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<sup>6</sup> *Lawless v Ireland (No. 3)* (App. no. 332/57) ECtHR 1 July 1961 1 EHRR 15 at para 28.

<sup>7</sup> *Denmark v Greece* (App. no. 3321/67); *Norway v Greece* (App. no. 3322/67); *Sweden v Greece* (App. no. 3323/67); *Netherlands v Greece* (App. no. 3344/67) (1969) 12 Yearbook ECHR 1 (hereafter ‘*The Greek Case*’).

<sup>8</sup> *Ibid.* at para 40.

<sup>9</sup> *Ibid.* at para 153.

<sup>10</sup> *Habeas Corpus in Emergency Situations* (Arts 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, Inter-American Court of Human Rights Series A No 8 (30 January 1987).

<sup>11</sup> *Ibid.* at para 19.

the state of emergency applies.<sup>12</sup> Finally, the third characteristic means that the exceptional situation, which affects the whole population, must constitute a *threat to the organised life of the community*.<sup>13</sup>

## **(2) The margin of appreciation and deference of the courts**

Despite the courts embracing these three core characteristics of a state of emergency, a court will rarely enquire into the circumstances in which a government declares such a state. In that sense the courts grant a wide margin of appreciation to the State.

For example, the ECtHR was faced with the issue of derogation in the landmark case dealing with the British use of certain methods of detention in Northern Ireland.<sup>14</sup> The Government of Ireland alleged that the powers of extrajudicial deprivation of liberty applied in Northern Ireland between August 1971 and March 1975 contravened Article 15.<sup>15</sup> The methods included wall-standing, hooding, subjection to noise, deprivation of sleep, and deprivation of food and drink.

The Chamber had no difficulty in finding that “the existence of such an emergency is perfectly clear from the facts”, citing the numerous deaths, injuries and instances of damage to property during the Troubles.<sup>16</sup> However, the Irish Government maintained that the British had gone beyond the “extent strictly required” by the exigencies of the situation. The Court began by immediately recognising that each Member State is in the best position to judge the sensitive situation faced by that country, stating that it falls in the first place to each Contracting State, with its responsibility for “the life of [its] nation”, to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency.<sup>17</sup>

However, this recognition was not an unqualified one, as the Court continued:

“States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (Art. 19), is empowered to rule on whether the States have gone beyond the “extent strictly

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<sup>12</sup> See *Lawless v Ireland (No. 3)* at para 28; and the second of four characteristics stated in *The Greek Case* at para 153.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ireland v United Kingdom (App. 5310/71)* ECtHR 18 January 1978.

<sup>15</sup> *Ibid.* at para 202.

<sup>16</sup> *Ibid.* at para 205.

<sup>17</sup> *Ibid.* at para 207.

required by the exigencies” of the crisis. The domestic margin of appreciation is thus accompanied by a European supervision.”<sup>18</sup>

The IACtHR offered further useful analysis in *Zambrano Vélez* in 2007, which concerned the alleged extrajudicial executions of three individuals in 1993 and the subsequent lack of investigation into the deaths.<sup>19</sup> The Court made reference to the ECHR and the criteria asserted in *Lawless* for a state of emergency to exist, before appearing to introduce a paler version of the margin of appreciation. The Court held the following (emphasis added):

“It is the obligation of the State to determine the reasons and motives that lead the domestic authorities to declare a state of emergency and it is up to these authorities to exercise appropriate and effective control over this situation and to ensure that the suspension decreed is limited to the extent and for the period of time strictly required by the exigencies of the situation...*States do not enjoy an unlimited discretion*; it is up to the Inter-American system’s organs to exercise this control in a *subsidiary and complementary manner*, within the framework of their respective competences.”<sup>20</sup>

From a brief assessment of case law and commentary from several jurisdictions,<sup>21</sup> it is evident that the judiciary, for the most part, has taken a cautious and deferential approach to the question of whether an emergency exists; creating the impression that declaring a public emergency is a political determination. Perhaps at one extreme, as Haile argues: “Judges have been

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<sup>18</sup> *Ireland v United Kingdom* (App. 5310/71) ECtHR 18 January 1978 at para 207.

<sup>19</sup> *Zambrano Vélez et al v Ecuador*, Judgment: Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No 166 (4 July 2007).

<sup>20</sup> *Ibid.* at para 47.

<sup>21</sup> For further expert opinion see: N Questiaux, “Study of the implications for human rights of recent developments concerning situations known as states of siege or emergency”, UN Doc E/CN.4/Sub.2/1982/15 (27 July 1982); United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, forty-first session, (28 September 1984); RB Lillich, “The Paris Minimum Standards of Human Rights Norms in a State of Emergency” (1985) 79 Am. J. Int’l L. 1072; Turku Declaration of Minimum Humanitarian Standards of 1990; Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)* (UN Doc. CCPR/C/21/Rev.1/Add.11, 24 July 2001); and Council of Europe, Commissioner for Human Rights, “Opinion of the Commissioner for Human Rights, Mr Alvaro Gil-Robles, on certain aspects of the United Kingdom derogation from Article 5 para 1 of the European Convention on Human Rights”, CommDH (2002)7 (28 October 2002).

overly deferential to the measures adopted by the executive.”<sup>22</sup> Lord Steyn similarly suggested that “judicial branches of government, although charged with the duty of standing between the government and individuals, are often too deferential to the executive in times of peace.”<sup>23</sup> This could be for several reasons, but perhaps most of all such behaviour indicates that political decisions should be handled by politicians. In *A v Secretary of State for the Home Department*, Lord Bingham- who gave the leading judgment - addressed this politically-shaded argumentation, having held that:

“The more purely political...a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political and not judicial bodies to resolve political questions.”<sup>24</sup>

Indeed, the courts might lack sensitive information to which the security services are party. This “information poverty” might make a judge unwilling to “risk their credibility” and thus defer to the executive, rather than “risk a wrong decision that may put the nation in danger.”<sup>25</sup> Alternatively, as illustrated above, by leaving to the state the primary determination of whether there is a public emergency, the judiciary is clearly deferring to the sovereignty of the state.”<sup>26</sup>

### **(3) Addressing the scrutiny gap**

This deferential approach taken by the ECtHR, replicated to a less severe degree by the IACtHR, has nevertheless opened up such situations to potential human rights abuses. However, these precarious gaps left by the regional courts have been narrowed somewhat by bodies such as the Human Rights Committee (‘HRC’).<sup>27</sup> Nevertheless, the fact that the decisions and observations of

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<sup>22</sup> M Haile, “The judicial management of states of emergency: reinforcing or curtailing the judiciary’s role?” (2005) *Coventry Law Journal* 19 at 25.

<sup>23</sup> J Steyn, “Guantanamo Bay: The legal black hole” Twenty-Seventh F.A. Mann Lecture, 25 November 2003.

<sup>24</sup> *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* [2004] UKHL 56 at para 29.

<sup>25</sup> Haile (n 22) at 25-26.

<sup>26</sup> R Burchill, “When does an Emergency Threaten the Life of the Nation? Derogations from Human Rights Obligations and the War on International Terrorism” (2005) 9 *Yearbook of New Zealand Jurisprudence* 95 at 103.

<sup>27</sup> See M Scheinin & M Vermeulen, “Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism” (2011) 8 *Essex Human Rights Review* 20 at 46.



the HRC are not legally binding upon States provides an obvious caveat to the argument that the scrutiny gap is addressed to a satisfactory degree by the HRC.<sup>28</sup>

Despite its limitations, the HRC has arguably best attempted to address this scrutiny gap in the form of its Concluding Observations of States Parties reports,<sup>29</sup> and the hearing of individual complaints.<sup>30</sup> For instance, Conte argues that whilst the ECtHR offers a wide margin of appreciation to States in determination of the existence of a state of emergency, “the Human Rights Committee has taken the view that compliance with all aspects of Article 4, including the determination of whether a state of emergency exists, is a matter of respect of which it has final say.”<sup>31</sup> For example, one of the most significant HRC responses came regarding the Syrian Arab Republic in 2001. The HRC observed the following:

“The Committee is concerned at the fact that Legislative Decree No. 51 of 9 March 1963 declaring a state of emergency has remained in force since that date, placing the territory of the Syrian Arab Republic under a quasi-permanent state of emergency, thereby jeopardizing the guarantees of Article 4 of the Covenant.”<sup>32</sup>

The Committee expressed similar concerns regarding the Netherlands Antilles in 2001, voicing unease “as to the breadth of Article 137 of the Constitution, which regulates the imposition of a state of emergency without taking into account the limitation imposed by Article 4 of the Covenant for the proclamation of a state of emergency to exceptional circumstances endangering the life of the nation.”<sup>33</sup> The Committee expressed concern regarding Yemen in 2002, noting “the lack of clarity in the legal provisions permitting the declaration of a state of emergency and

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<sup>28</sup> Regarding the individual complaints mechanism under the Optional Protocol to the International Covenant on Civil and Political Rights, para 5(4) states: ‘The Committee shall forward its *views* to the State Party concerned and to the individual.’

<sup>29</sup> Art 40 ICCPR.

<sup>30</sup> Optional Protocol to the International Covenant on Civil and Political Rights (GA RES 2200A XXI, 16 December 1966).

<sup>31</sup> A Conte and R Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2009) 45.

<sup>32</sup> Human Rights Committee, *Concluding Observations on the Syrian Arab Republic*, 71st session, UN DocCCPR/CO/71/SYR (24 April 2001) para 6.

<sup>33</sup> Human Rights Committee, *Concluding Observations on the Netherlands*, 72nd session, UN DocCCPR/CO/72/NET (27 August 2001) para 16.

derogation from the obligations established in the Covenant.”<sup>34</sup> The Committee again articulated its concerns regarding Algeria in 2007, as the “state of emergency proclaimed in Algeria in 1992 has remained in force since then, as evidenced, for instance by the continued delegation of the functions of the police to the Intelligence and Security Department.”<sup>35</sup> In the same vein, the Committee again criticised Syria in 2005 for its elongated state of emergency, noting with worry that:

“[T]he state of emergency declared some 40 years ago is still in force and provides for many derogations...without any convincing explanations being given as to the relevance of these derogations to the conflict with Israel and the necessity for these derogations to meet the exigencies of the situation claimed to have been created by the conflict.”<sup>36</sup>

One of the most significant complaints heard by the HRC was in *Silva v Uruguay*.<sup>37</sup> The complainants were all candidates in the 1966 and 1971 elections whose political groups were declared illegal in 1973, and who were deprived of their “right to engage in any activity of a political nature, including the right to vote for a term of 15 years.”<sup>38</sup> The Committee refused to accept that the requirements under Article 4 ICCPR were met by Uruguay. Crucially, this was because no factual details regarding the emergencies were given and “no attempt was made to indicate the nature and the scope of the derogations actually resorted to with regard to the rights guaranteed by the Covenant, or to show that such derogations were strictly necessary.”<sup>39</sup> The HRC nevertheless attempted to balance this critique by stating that “the sovereign right of a State party to declare a state of emergency is not questioned”, before insisting that State parties must provide the Committee with “full and comprehensive information”.<sup>40</sup> Finally, the Committee indicated that

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<sup>34</sup> Human Rights Committee, *Concluding Observations on Yemen*, 75th session, UN DocCCPR/CO/75/YEM (12 August 2002) para 14.

<sup>35</sup> Human Rights Committee, *Concluding Observations on Algeria*, 91st session, UN Doc. CCPR/C/DZA/CO/3 (12 December 2007) para 14.

<sup>36</sup> Human Rights Committee, *Concluding Observations on the Syrian Arab Republic*, 84th session, UN DocCCPR/CO/84/SYR (9 August 2005) para 6.

<sup>37</sup> Human Rights Committee, *Jorge Landinelli Silva v Uruguay*, Communication No. R.8/34 (1981), UN DocSupp No 40 (A/36/40) at 130.

<sup>38</sup> *Ibid.* para 2.

<sup>39</sup> *Ibid.* para 8.2.

<sup>40</sup> *Ibid.* para 8.3.

there were no grounds for the complete political disenfranchisement of the complainants for fifteen years regardless of whether or not an emergency situation genuinely existed in the country.<sup>41</sup>

## C. PROLONGED EMERGENCIES

### (1) Post-9/11 Rhetoric and Action

“Our war on terror begins with Al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated.”<sup>42</sup>

From a purely semantic perspective, President Bush’s deeply hyperbolic and infinitely-scoped declaration of war which *heralded* a new era of counter-terrorism, was peppered with analogies of religious struggle, notions of “good” versus “evil,” and abstract ideals such as “freedom” and “justice”.<sup>43</sup> Specifically, President Bush spoke of “enemies of freedom [who] committed an act of war against our country” and the fact that “freedom itself is under attack.” However, the speech is most memorable for the assertion that the war would not end with Al Qaeda, but rather, only when every terrorist group on the planet had been beaten.

Dealing with abstract notions however, creates a whole raft of problems. As McDonnell has helpfully reflected, “we can claim we are fighting a war against poverty or drugs or ignorance, but we know deep down that when we use such language, we are really engaging in rhetorical hyperbole – exaggeration to make a point.”<sup>44</sup> A war on an abstract concept such as “terrorism” is evidently of a completely different scope to a war against a nation-state such as Nazi Germany. When fighting terrorists, generally speaking, we cannot witness the collapse of governments, the redrawing of borders or the signing of armistices. As Byford convincingly argued:

“Wars have typically been fought against proper nouns (Germany, say) for the good reason that proper nouns can surrender and promise not to do it again. Wars against common nouns (poverty, crime, drugs) have been less successful. Such opponents never give up. The war on terrorism, unfortunately, falls into the second category.”<sup>45</sup>

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<sup>41</sup> Human Rights Committee, *Jorge Landinelli Silva v Uruguay*, Communication No. R.8/34 (1981), UN DocSupp No 40 (A/36/40) at 130 para 8.4.

<sup>42</sup> President GW Bush, Address to a Joint Session of Congress and the American People (20 September 2001).

<sup>43</sup> See R Jackson, *Writing the War on Terrorism: Language, Politics and Counter-terrorism* (2002).

<sup>44</sup> T McDonnell, *The United States, International Law, and the Struggle Against Terrorism* (2011) 36.

<sup>45</sup> G Byford, “The Wrong War”, *Foreign Affairs* (July-August 2002) at 34.

Prior to the purported declaration of war, an official White House Proclamation declared a state of emergency<sup>46</sup> which has to the present day been renewed through successive Presidencies.<sup>47</sup> Specifically, in Proclamation 7463, the *Declaration of National Emergency by Reason of Certain Terrorist Attacks*, President Bush said that the emergency existed because of the attacks as well as the “continuing and immediate threat of further attacks on the United States.”<sup>48</sup>

After Bush’s infamous declaration, more war-like rhetoric and action soon followed. This was first evidenced by a Military Order on 13 November 2001 which declared that non-American citizens would be “detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”<sup>49</sup> Thus, the criminal law and the law-enforcement paradigm as the traditional avenue to pursue and prosecute crimes were immediately pushed to the side in favour of a war-model approach, drawing upon military tribunals as the principal means of judging suspected terrorists. The US approach to the “war on terror” could thus be summarised in the following ways: the “war” was a genuine armed conflict under international law to which international humanitarian law (the laws of war) would apply; in the context of activities carried out abroad - such as detention at Guantanamo Bay - international human rights law would not apply. Going further, the first recorded missile strike from a Predator drone occurred in November 2002 in the province of Maarib, Yemen, although there was no recognised armed conflict in which a high-profile al Qaeda operative in the country was killed.<sup>50</sup>

Complementing these war-like actions, Jackson notes how, in the aftermath of 9/11, members of the armed forces who died whilst rescuing civilians trapped in the burning rubble of the World Trade Center and Pentagon were posthumously awarded medals.<sup>51</sup> The deceased soldiers were awarded Purple Hearts, usually reserved for those who were injured or died in battle, whilst the Department of Defense created the Defense of Freedom Medal which was awarded to

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<sup>46</sup> President GW Bush, Proclamation 7463: Declaration of National Emergency by Reason of Certain Terrorist Attacks, 14 September 2001 available at: <http://www.presidency.ucsb.edu/ws/?pid=61760>.

<sup>47</sup> See the most recent renewal: President BH Obama, Notice – Continuation of the National Emergency with Respect to Certain Terrorist Attacks, Federal Register vol 79 no 173 (8 September 2014).

<sup>48</sup> Ibid. at 46.

<sup>49</sup> Military Order of 13 November 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism. 66 Fed Reg 57833 (16 November, 2001). See further ME O’Connell, “When is a War not a War? The Myth of the Global War on Terror” ILSA Journal of International and Comparative Law 2.

<sup>50</sup> O’Connell suggested from this that “the world learned how serious the Administration really was about treating the entire world as a war zone”: O’Connell (n 49).

<sup>51</sup> Jackson, *Writing the War* (n 43) 38-39.

civilians within the Department who were killed.<sup>52</sup> Additionally, in subsequent military operations post-9/11, Presidential Executive Order 13289 created two medals to be awarded to military servicemen and women who served in expeditions or operations to combat terrorism.<sup>53</sup> Thus, from several angles it could be said that the USA was genuinely acting as if it was in the midst of a war.

## **(2) Manifestations of Prolonged Emergencies**

In 2009, the International Commission of Jurists (ICoJ) followed up their 1983 study with a substantial report in which the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights discussed a wealth of contemporary issues concerning counter-terrorism and human rights.<sup>54</sup> Amongst other issues, the Report discussed the notion of a “prolonged emergency” and suggested that:

“A prolonged emergency is characterised by the assumption of greater executive powers, legal frameworks that create an environment prone to human rights violations (including torture and ill-treatment), limitations on accountability mechanisms, and eventually a detrimental effect on the wider criminal justice system.”<sup>55</sup>

Detailed illustration of how these four characterisations have been demonstrated in post-9/11 Western practice is beyond the scope of this paper. However, one may only need to consider examples such as, *inter alia*, executive orders,<sup>56</sup> proscription,<sup>57</sup> closed martial procedures,<sup>58</sup> rendition, drone strikes and surveillance,<sup>59</sup> and “legal black holes”,<sup>60</sup> in order to argue that these characterisations have been met to some extent.

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<sup>52</sup> US Department of Defense, Press Operations News Release, “Defense of Freedom Medal Unveiled” (Release No: 463-01, 27 September 2001) available at: <http://www.defense.gov/releases/release.aspx?releaseid=3068>.

<sup>53</sup> President GW Bush, Executive Order 13289 of 12 March 2003, Establishing the Global War on Terrorism Medals, 14 March 2003 & US Department of Defense, Press Operations News Release, “DoD Announces Criteria for Global War on Terrorism Medals” (Release No: 128-04, 26 February 2004), available at: <http://www.defense.gov/Releases/Release.aspx?ReleaseID=7092>.

<sup>54</sup> International Commission of Jurists, “Assessing Damage, Urging Action – Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights”, (Geneva, 2009).

<sup>55</sup> *Ibid.* at 41.

<sup>56</sup> For example: Indefinite detention, control orders and TPIMs in the United Kingdom.

<sup>57</sup> Otherwise known as blacklisting or a “Terror List”. See UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267 & UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373.

<sup>58</sup> See its origins in the Special Immigration Appeals Commission Act 1997, and extended by the Justice and Security Act 2013.

<sup>59</sup> See the US Patriot Act 2001 and the UK Regulation of Investigatory Powers Act 2014.

<sup>60</sup> The most infamous being Guantanamo Bay.

The implications of emergency situations were emphasised in a British parliamentary Human Rights Joint Committee ('HRJC') 2010 report which reprimanded the attitude shown by the British government in the following statement (emphasis added):

“The Government's position that there is a public emergency threatening the life of the nation is important because it *determines the starting point in any debate about the justification for counter-terrorism powers*. Like the language of the “War on Terror”, it asserts the existence of a state of exception, which *implies that exceptional measures require less justification than when times are normal*. It amounts to a permanent claim that courts and other accountability mechanisms should defer to the Government's assessment of what measures are required.”<sup>61</sup>

The emphasis on a lengthy and far-reaching campaign first uttered by President Bush has been recently rekindled in relation to new threats posed by the Islamic State of Iraq and the Levant (ISIL), or simply, Islamic State. On numerous occasions British Prime Minister David Cameron spoke of a “generational struggle”,<sup>62</sup> whilst in the lead-up to the British parliamentary vote on bombing Islamic State targets in Iraq, Cameron stated that “whether we like it or not, they have already declared war on us. There is not a ‘walk on by’ option; there is not an option of just hoping this will go away.”<sup>63</sup> In this respect, it may be helpful to consider the recommendations of the IComJ of 1983 comparing the situations that exist today across several States, which arguably demonstrate a state of permanent legal emergency. The IComJ suggested that national constitutions “should specify that no state of emergency has legal force beyond a fixed period of time, which should not exceed 6 months. Every declaration of emergency should specify the duration of the emergency.”<sup>64</sup>

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<sup>61</sup> House of Lords and the House of Commons Human Rights Joint Committee, Counter-Terrorism Policy and Human Rights (Seventeenth Report): *Bringing Human Rights Back In* (Sixteenth Report of Session 2009-10, HL Paper 86 HC 111) at para 16.

<sup>62</sup> D Cameron, HC Deb 26 September 2014, vol 585, col 1266. See also BBC News, “UK in ‘generational struggle’ against terror, says PM” (21 January 2013) at <http://www.bbc.co.uk/news/uk-politics-21130484> & C Hope, “Our generational struggle against a poisonous ideology”, *The Daily Telegraph* (16 August 2014) at <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/11039214/Our-generational-struggle-against-a-poisonous-ideology.html>.

<sup>63</sup> D Cameron, HC Deb 26 September 2014, vol 585 col 1263. See also S Swinford & G Graham, “Britain goes to war against ISIL”, *The Daily Telegraph* (26 September 2014) at <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/11125226/Britain-goes-to-war-against-Isil.html>.

<sup>64</sup> IComJ, *States of Emergency*, Recommendation 4, 459.

Particularly, graphic evidence of perpetual quasi-emergencies in the West can be seen with the enigmatic use of terror threat levels managed by State security agencies. In the UK the Security Service (or MI5) has maintained a five-tier threat level system separately covering international terrorism threats and Northern Irish-related threats since August 2006.<sup>65</sup> A similar system which operated in the USA between 2002 and 2011, referred to as the Homeland Security Advisory System, offered five tiers of threat level.<sup>66</sup> In both the UK and the US, the two lowest tiers have never been adopted, leading us to believe, rightly or wrongly, that citizens in both countries live in a permanent and unwavering era of grave risk.<sup>67</sup> Thus, in the UK, the official threat from international terrorism has never been lower than “Substantial”; whilst in the USA, when a similar system existed for almost a decade, the threat from terrorism was never lower than “Elevated” (entailing a “Significant risk of terrorist attacks”).<sup>68</sup> It is remarkable that following the ten year period in the USA, when there was never anything less than an officially stated significant risk of terrorist attacks; four years have passed without a single warning issued under the new threat-specific system. This observation comes despite the Boston Marathon bombing in April 2013, the existence of a “credible” terrorist threat leading to the ban on aircraft of electronic devices that were not charged in July 2014,<sup>69</sup> and the increasing threat from the Islamic State.

These ominous schemes once again crashed into the public consciousness in August 2014 after a short period of dormancy. When the role of British citizens who had left the country to fight in the conflicts in Iraq and Syria became clearer, the UK terror threat was raised from “substantial” to “severe”.<sup>70</sup> Speaking shortly after the announcement of the increase in the UK terror threat level, the Home Secretary stated that “the increase in the threat level is related to developments in Syria and Iraq where terrorist groups are planning attacks against the West. Some of these plots are likely

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<sup>65</sup> The Security Service (MI5), Terrorism: Threat Levels, available at: <https://www.mi5.gov.uk/home/the-threats/terrorism/threat-levels.html>.

<sup>66</sup> The colour-coded level system was replaced on 20 April 2011 by the National Terrorism Advisory System. See further: <http://www.dhs.gov/national-terrorism-advisory-system>.

<sup>67</sup> Similar threat level systems operate in Australia and the Netherlands.

<sup>68</sup> Chronology of Changes to the Homeland Security Advisory System, available at: <http://www.dhs.gov/homeland-security-advisory-system>.

<sup>69</sup> Statement by Secretary J Johnson, Department of Homeland Security, 2 July 2014, available at: <http://www.dhs.gov/news/2014/07/02/statement-secretary-johnson>.

<sup>70</sup> The Security Service, Threat level update, Threat level to the UK from international terrorism raised to SEVERE (29 August 2014), available at: <https://www.mi5.gov.uk/home/news/news-by-category/threat-level-updates/threat-level-to-the-uk-from-international-terrorism-raised-to-severe.html>; Statement by Home Secretary T May, The Home Office, News story, Threat-level from international terrorism increased (29 August 2014), available at: <https://www.gov.uk/government/news/threat-level-from-international-terrorism-increased>. This, according to the threat level system, “means that the threat of a terrorist attack is considered to be highly likely”.

to involve foreign fighters who have travelled there from the UK and Europe to take part in those conflicts.”<sup>71</sup>

For Western States to be bandied together in discussion with objectionable or questionable regimes may unsettle some. The 2009 IComJ Report listed the examples of prolonged emergencies in the past including the following countries: Algeria, Argentina, Chile, Egypt, Indonesia, Malaysia, Northern Ireland, Peru, Sri Lanka, Syria, Turkey, and Uruguay.<sup>72</sup> In the view of the IComJ, these States “all experienced years and decades of ‘emergency’ measures. Measures that often were presumably intended to be temporary gradually became the norm.”<sup>73</sup> It is for this reason that the institutionalisation of permanent emergency and gradual normalisation of exceptional measures are arguably the most crucial themes to reflect upon, which may vindicate why the USA and UK merit membership of this undesirable club. Indeed, the excessive duration of a state of emergency is often a decisive factor indicating that a prolonged emergency is imminent, or is actually in existence. Similarly, if measures that are sold as being temporary become entrenched and normalised, this may reveal that a prolonged emergency is at risk of developing. For example, in the British HRJC Report in 2010, the HRJC offered an aptly-named section entitled “Normalising the Exceptional”,<sup>74</sup> suggesting that such extraordinary measures post-9/11 may indeed have already been normalised.

#### D. CONCLUSION

“Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.”<sup>75</sup>

In one of the seminal cases concerning post-9/11 counter-terrorism, *A v Secretary of State for the Home Department*,<sup>76</sup> and, subsequently, *A v United Kingdom*,<sup>77</sup> the issue concerned the power of the British Home Secretary to indefinitely detain non-British subjects pending deportation, when the principle of *non-refoulement* would prohibit such a transfer. In the House of Lords, Lord Hoffmann, although having agreed with the majority that the appeal should be

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<sup>71</sup> Ibid.

<sup>72</sup> International Commission of Jurists (n 54) at 28-29.

<sup>73</sup> Ibid. at 29.

<sup>74</sup> House of Lords and the House of Commons Human Rights Joint Committee (n 61) at paras 7-28.

<sup>75</sup> *A v Secretary of State for the Home Department* (n 24) at para 96.

<sup>76</sup> Ibid.

<sup>77</sup> *A v United Kingdom* (App No 3455/05) ECtHR [GC] 19 February 2009.



allowed. The core of Lord Hoffmann's argument focussed on whether or not "such a power can be justified on the ground that there exists a 'war or other public emergency threatening the life of the nation.'"<sup>78</sup> Crucially, Lord Hoffmann differed from the majority, who allowed the appeal based on the discriminatory nature of the Anti-terrorism, Crime and Security Act 2001. Rather, Lord Hoffmann held that a public emergency did not exist in the aftermath of 9/11, which led to the subsequent British legislation. He held the following:

"This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda."<sup>79</sup>

However, the defining and most memorable passage of Lord Hoffmann's speech came at his conclusion:

"The real threat to the life of the nation...comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory."<sup>80</sup>

Such a warning serves as a pertinent conclusion to this article. The pressure upon States to combat terrorism remains one of the most vital contemporary global challenges, which is often expressed as striking a balance between liberty and security. However, Western States must reflect upon contemporary counter-terrorism policy and the question of where the real threat to the life of the nation (if any) arises. The possibility for a State to derogate from certain aspects of its international human rights obligations exists for a legitimate reason: to provide means by which States can confront a threat and maintain the rule of law. By institutionalising a sense of permanent threat, and by normalising exceptional counter-terrorism methods, the emergence of a perpetual quasi-emergency may indeed constitute a greater threat to the life of the nation than the terrorist

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<sup>78</sup> *A v Secretary of State for the Home Department* (n 24) para 88.

<sup>79</sup> *Ibid.* at para 96.

<sup>80</sup> *Ibid.* at para 97.

threat it seeks to overcome. States must become more willing to properly utilise the legal means of derogation when it is needed, whilst Courts must also resist the pressure to overly defer to the executive.

# Capabilities: A New Approach to Human Rights for the Elderly

*Rosalind Butler\**

## A. INTRODUCTION

The “general conditions of a certain part of the population prevent or impair their enjoyment of human rights.”<sup>1</sup>

If human rights are to be considered entitlements of the human being, this observation of the United Nations Human Rights Committee warns of inequalities in said entitlement. Subsistence of such inequality by virtue of “conditions” has served to impose a human rights experience of “a downward spiral of persistent violations”<sup>2</sup> on the elderly.<sup>3</sup> There exists, therefore, a challenge in human rights to ensure equality in access such that human rights afford the same standard of human dignity to all, negating the effects of any prevailing conditions. It is in response to this that this paper turns to the capabilities approach. With its origins in human development, and its focus squarely on conditions which create and perpetuate vulnerability and inequality, it is an approach which has been considered by various philosophies of social equality and applied in policies aiming for equality in opportunity and advancement. Grounded in human dignity, it has found increasing favour in theories of human rights, thus consideration is made here of its potential to provide the solution to the challenge posed by the blight upon the human rights of the most fragile of lives.

Explanation of the core concepts of the approach relevant to the task is followed by discussion of how change can be influenced by the interaction of the same, with particular reference made to some of the ways in which Nussbaum has developed the original themes of Sen

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<sup>1</sup> General Comment 18 UN GAOR Human Rights Committee 37th Session at 26 para 12 UN Doc. HRI/GEN/Rev. 1 (1994).

<sup>2</sup> Follow-up to the Second World Assembly on Ageing: Report of the Secretary-General, Submitted to the United Nations General Assembly, A/64/127 (July 2009).

<sup>3</sup> For the purpose of this article, “the elderly” are those aged 65 and over displaying combined effects of the ageing process.

to address issues of inequality in human rights. The focus falls on principal departures from traditional thinking. Suggestions of parity between first and second generation rights, together with central capabilities fundamental to human dignity and function to underpin human rights, combine to set the foundation upon which deficiencies in rights provision can be corrected. From this point the argument that the duty to equalise discrepancies in capability to secure human rights lies with the State is traced through submissions for resource distribution, opportunity for choice, legal provision and judicial interpretation. Ultimately, it is proposed that to view human rights provision and interpretation through the lens of the capabilities approach will facilitate equality in substantive freedoms and fundamental entitlements. Most importantly, it will secure equality in the opportunity to choose between them, and the capability to safeguard those rights of most importance to individual human need and dignity.

## **B. CAPABILITIES APPROACH**

“[E]nhancing the lives we lead and the freedoms we enjoy”<sup>4</sup> was the inspiration for the approach founded by Sen, and pivotal is what the person is able to do and be. The freedom of which he speaks is that of the individual to embody and action all that is of value to him or her.<sup>5</sup> At the heart of these ideals, and the theme that binds the capabilities approach, is equality. Indeed, capabilities could be described as an approach to achieve equality. Sen’s vision was to promote and enable equality in the freedom a person has to choose and realise the life he or she wants, an outcome wholly dependent upon the interplay of the core tenets of the capability concept.

Sen’s terminology is, by his own admission, clumsy, with many of the components existing as very close relatives. Therefore, for purposes of clarification I shall treat them as falling into two principal categories, those of “functionings” and those of “capability.” In brief, “functionings” comprise the “beings and doings” which a person values, whether in the form of state or action, and “capability” the ability to achieve them.<sup>6</sup>

The collection of functionings which a person can do or be occupies two categories: those that are achieved, and potential functionings.<sup>7</sup> A functioning that remains potential does so for one

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<sup>4</sup> A Sen, *Development as Freedom* (1999) 14.

<sup>5</sup> A Sen, “Equality of What?” Tanner Lecture, Stanford University (May 1979).

<sup>6</sup> A Sen, “The Standard of Living” The Tanner Lectures on Human Values, Clare Hall Cambridge University (March 1985).

<sup>7</sup> I Robeyns, “The Capability Approach” (2005) 6 (1) *Journal of Human Development* 93-114 at 100.

of two reasons. Either it holds insufficient value to the individual, a situation that is subject to change during the life course, or it is beyond reach.

Sen and others provide more than notional direction with regard to the subject matter of functionings. Specified states of being include: being healthy and nourished; surviving premature morbidity; being housed; being a member of a community.<sup>8</sup> Beyond this, being educated and able to express opinion can allow the individual a more advanced ‘state of being.’ Acts or ‘doings’ have also been variously suggested: casting a vote, earning an income, founding a family, practicing one’s religion.<sup>9</sup>

It is through “capability” that life is given to functionings; it provides that aspect of freedom required to realise all that is held valuable known as “opportunity,” described thus by Sen, as “the opportunity to achieve valuable combinations of human functionings: what a person is able to do or be.”<sup>10</sup> Thus we are presented with the deciding factor between *valuing* beings and doings and *ability* to be and do. Each person has multiple “capability sets,” or collections of potential functionings, which present the “alternative lives open to her,”<sup>11</sup> alternative lives which are meaningless without the opportunity to choose between them. It is the fact that such opportunity is not equally available that accounts for inequality between individuals, groups and nations in achieving functionings;<sup>12</sup> inequality afforded by legislation, policy and personal ability.

Nussbaum is in agreement on what constitutes “capability” and the role it plays in the approach. She develops the ability and opportunity principles of “capability”, and refers to them in the plural; terminology which will be adopted henceforth in this work. With the foundation of the capabilities approach laid by Sen, it is Nussbaum’s interpretation of what capabilities comprise, in terms of both ability and opportunity, and how they interact that largely informs the argument that capabilities is a viable approach to solving the challenge faced by the elderly in accessing equality of human rights.

Categorising capabilities as basic, internal and combined, she describes the significance of each. It is the “innate equipment” with which each person is born that she terms “basic capabilities.” The substance of the person, innate equipment is indicative of the abilities and

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<sup>8</sup> F Comm, M Qizilbash and S Alkire, *The Capability Approach* (2008) 2.

<sup>9</sup> Robeyns (n 6) at 95.

<sup>10</sup> A Sen, “Elements of a Theory of Human Rights” *Philosophy and Public Affairs* (2004) 32 (4) 315 at 331.

<sup>11</sup> D Gasper, “Working Paper” Series no 428 at 9.

<sup>12</sup> Sen (n 10) at 335.

characteristics of the individual.<sup>13</sup> Internal capabilities are those which a person possesses as a result of the maturity of the innate equipment. They can be quoted as including, “personality traits, intellectual and emotional capacities, states of bodily fitness and health, internalized learning, skills of perception and movement,”<sup>14</sup> and as being variable; fluctuating in accordance with stage and state of the life course. The maturation of innate faculties is not to be understood purely in terms of chronological age, but something which occurs as a consequence of numerous interventions, including those of family, society, culture and political and economic policy.<sup>15</sup> Therefore, the abilities and traits a person holds are, to a large extent, in the hands of opportunity. It is the collaboration between external opportunity and internal capability which comprise “combined capabilities,” and which is instrumental in the freedom to be and do valuable things. When one or both parties to the partnership is deficient, the person lacks capability. Internal capabilities can be undeveloped or regress. Alternatively, innate equipment might be developed to its optimal level. Yet without the prospect to act upon them, internal capabilities are ineffectual and no more than “incapabilities,”<sup>16</sup> a fact which should be viewed in light of Nussbaum’s opinion of entitlement to capabilities. Basic capabilities, she claims, are the entitlement of all human beings by fact of being human; the innate equipment is born with the person, it is their entitlement and as such is not to be removed. By extension, it could be claimed that its advantage or exercise is not to be limited or prevented, and that the developed internal capabilities are also entitlements of the human person. As such, in the same way that it is the duty of the State to provide access to human rights, the duty exists to make capabilities available.

A key addition to the original capabilities approach is the list of central capabilities produced by Nussbaum; capabilities deemed “central” by virtue of the claim that they are essential to human dignity and function. Fundamental to equality in the same, they are seen as inclusive of everything that is necessary or is reasonable to expect, existing in addition to any other functionings that the individual might wish to achieve.<sup>17</sup> Furthermore, it is via the central capabilities that all functionings and claims to human entitlements are accessed; they make

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<sup>13</sup> MC Nussbaum, *Creating Capabilities The Human Development Approach* (2011) 24

<sup>14</sup> *Ibid.* 21.

<sup>15</sup> *Ibid.* 24.

<sup>16</sup> See generally MC Nussbaum, “Capabilities and Human Rights” *Fordham Law Review* (1997) 66 (2) 273-300.

<sup>17</sup> Nussbaum (n 13) at 290.

valuable functionings, dignity and rights a reality, an assertion which will be explored in more depth in the next section.

The aim of the capabilities approach is, it must be remembered, equality. The equality is that of the freedom to be and do all that is of value to the individual, achieved via equality of combined capabilities and capabilities central to human functioning. However, if the success of capabilities approach is to be established, equality must be measured. Both Sen and Nussbaum reject equality of financial means and distribution of resources as the standard of measurement. Similarly, expressed satisfaction is not accepted as a metric of equality, the issue of “adaptive preference” the main influence. Put simply, there exists concern for the individual who for reasons of: lack of information; societal attitude; discriminatory policy, amongst others, are unaware of their entitlements, potential functionings and opportunities which are, or should be, available to them. For this person, the smallest improvement in their well-being could generate expressions of satisfaction despite continuing violations of rights and equalities. Additionally, the person who has been conditioned to believe, via traditional societal opinion or principles of learned self-perception, that impaired internal capabilities beget corresponding levels of well-being and entitlement, can prove an unlikely candidate for considering a change of capability set.<sup>18</sup> Finally settling upon well-being<sup>19</sup> as the measure of equality, Sen, followed by Nussbaum, ventured into the arena of human rights.

### **C. CAPABILITIES APPROACH, HUMAN RIGHTS AND THE ELDERLY**

The beacon of hope to the vulnerable elderly that is human rights, these standards of moral behaviour to which nations must adhere, increasingly with the support of international and domestic law, could possibly be unable to end the downward spiral spoken of by the United Nations due to “being intellectually frail – lacking in foundation and perhaps even in coherence and cogency.”<sup>20</sup> It was this weakness which prompted both Sen and Nussbaum to consider the capabilities approach in the space of human rights. Immediate likenesses can be drawn between the capabilities approach and human rights; both are motivated by human dignity, grounded in morality and the subject matter of human rights is to be found in capabilities. To the extent that

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<sup>18</sup> Nussbaum (n 13) at 84.

<sup>19</sup> See generally Sen (n 5).

<sup>20</sup> Sen (n 10) at 151.

the capabilities approach has the potential to support human rights, Nussbaum claims it to be “one species of a human rights approach.”<sup>21</sup>

### **(1) Capabilities and both generations of human rights**

The common ground that is shared by the topics of functionings, capabilities, particularly central capabilities, and human rights is fundamental to the relationship. Of most importance is that those of the capabilities approach find company in both categories of rights; in civil and political and socio-economic rights. It is this recognition of the heterogeneous nature of functionings and capabilities that accounts for one of the major distinctions between the capabilities approach and other human rights approaches; its refusal to distinguish on the basis of importance between first generation civil and political and second generation socio-economic rights.<sup>22</sup> The logic lies in the affiliation between the two types of rights. The capabilities approach denies the implication that civil and political rights have no economic and social element or prerequisite. Nussbaum is particularly vocal in this regard, stating that “All entitlements require affirmative government action, including expenditure, and thus all, to some degree, are economic and social rights.”<sup>23</sup> Furthermore, this approach identifies specific capabilities that are essential to human dignity and function, with Nussbaum introducing a list of “central capabilities” which combine the two generations of human rights. The list of capabilities “that a decent political order must secure to all citizens” includes: “not dying prematurely, or before one’s life is so reduced as to be not worth living; bodily health; bodily integrity; being able to use the senses; freedom of expression...and freedom of religious exercise; human association; practical reason; affiliation; control over one’s environment.”<sup>24</sup> Additionally, capabilities approach tells us that if human dignity is to be anything other than partially achieved then single capabilities are not interchangeable.<sup>25</sup> A government’s inability or unwillingness to provide one from this list cannot be counterbalanced by over provision of another. The State that does not make it possible for a person to live to the end of their natural life, or to access necessary healthcare cannot discharge its duty in this regard by, for example, making it more possible to have control over one’s environment. Similarly, each capability must receive equal treatment. The person to whom exercise of freedom of expression is a valuable

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<sup>21</sup> MC Nussbaum, *Frontiers of Justice* (2006) 98.

<sup>22</sup> Nussbaum, *Creating* (n 13) 67.

<sup>23</sup> *Ibid.* 67.

<sup>24</sup> Nussbaum (n 16) at 287-288.

<sup>25</sup> *Ibid.* at 288.



“doing” has that freedom which lies at the heart of the capabilities approach violated regardless of the fact that they may enjoy bodily integrity.

That central capabilities themselves are either socio-economic in nature or allied to socio-economic rights<sup>26</sup> makes this approach more relevant to vulnerable groups such as the elderly, for whom socio-economic rights are of more value but often rationed on the basis of prohibitive cost,<sup>27</sup> as it works to fill “needs gaps” in current human rights provision, which treats the first generation of rights as the more urgent. By placing the two categories of rights on the same footing, the capabilities approach takes fuller account of “beings and doings” which are of value to this group, thereby reducing the potential to dictate the functionings and human rights available to the individual, the capabilities sets from which to choose, and those lives which might be worth living; it would present to the elderly equality in these substantive freedoms. It is only when individual need such as to provide human dignity in each central capability is met that real equality in human rights is achieved. In furtherance of this Nussbaum suggests minimum thresholds for capabilities;<sup>28</sup> minimum standards which dictate when one’s right to each capability and to human dignity has been violated. Actual standards are yet to be determined, but the principle is supported here as a means of enabling and measuring equality in dignity and those human rights of most relevance to the individual elderly person.

## **(2) Right to the capability to secure human rights**

A major strength of the capabilities approach, and one which makes it immediately attractive to those whose “general conditions...prevent or impair their enjoyment of human rights” is its recognition of the varying degrees of ability each person possesses to translate valuable functionings from their status of “potential” to “achieved.” Its response to this is influenced by Nussbaum’s belief that entitlement to capabilities can be claimed by virtue of being human. Human rights and capabilities therefore enjoy the same status and are of the same relevance to a person, to their human dignity, and in the same way as human rights are universal, so are capabilities. More than this, capabilities approach views human rights as dependent upon capabilities if they are to be realised. The nature of this entitlement leads the capabilities approach to place the duty

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<sup>26</sup> Central capabilities include: being able to have good health; to be adequately nourished; to have adequate shelter: Nussbaum, *Creating* (n 13) 33.

<sup>27</sup> CE Harnacke, “Disability and Capability: Exploring the Usefulness of Martha Nussbaum’s Capabilities Approach for the UN Disability Rights Convention” *The Journal of Law, Medicine & Ethics*, 41 (4) (2013) 768 at 774.

<sup>28</sup> Nussbaum, *Creating* (n 13) 32.

for ensuring all capabilities fundamental to human life to all individuals on the State, a duty which it necessarily sees as a positive one.<sup>29</sup> The nation or regime that does not provide the opportunity to give effect to internal capabilities does not give effect to freedom or equality, creating situations in which functionings cannot be chosen, nor potential functionings achieved. Alternatively, choice might be granted, but to those whose innate faculties have not been allowed the opportunity to develop. Participation might be encouraged, yet be stifled by policies grounded in principles of wider societal benefit or an insistence on rationality.<sup>30</sup> The duty of the State is to provide the “right to the capability to secure the [human] right.”<sup>31</sup> This principle of a right to the capability necessary to secure human rights requires that each person is “in a position of capability to function”<sup>32</sup> in addition to being put in a position to choose. With regard to the first of these requirements, it has been previously mentioned that each capability must be provided such that a minimum threshold is achieved. Since Nussbaum takes this point no further in terms of identifying the necessary minimum, it is suggested here that the threshold is that which ensures non discriminatory levels of human rights; it secures a universal standard despite the inability of the individual to access the right unaided.

### **(3) Positive state duty to achieve the right to the capability to secure human rights**

Both of the main protagonists of the capabilities approach agree that the State duty involves government policy and the correct distribution of resources. Nussbaum adds the need for legal provision and judicial interpretation of human rights to this list.

#### **(a) Distribution of resources**

Turning to the duty to ensure the correct distribution of resources, it is informative to the issue to bring in Sen’s search for a measurement of equality. Delving into the space of resources when looking for an answer to the question he posed in the subject of the Tanner Lecture, “Equality of What?” he dispensed with resources. To ensure equality in ownership or distribution of resources would not address the issue of disproportionate need, nor enable equality in standards of human dignity or access to those human rights most relevant to need. His focus often settles on the child and the developing world: the child whose need for nutrition is greater than that of the adult; the paralysed man whose need for resources to facilitate mobility is greater than the need of the able-

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<sup>29</sup> Nussbaum, *Creating* (n 13) 65.

<sup>30</sup> *Ibid.* 22.

<sup>31</sup> P Lloyd-Sherlock, “Nussbaum, Capabilities and Older People” *J. Int. Dev.* (2002) 14, 1163-1173 at 1169

<sup>32</sup> Nussbaum (n 16) at 30.

bodied person, but the principle is transferrable to the older person.<sup>33</sup> To make available the same level of resources to all might make for equality of allocation, but would not be an equitable response to need.<sup>34</sup> Capabilities approach also stops the march of distribution of resources in accordance with wider societal benefit which would see younger people, more able to contribute to the economy, given priority over the elderly for resources and services. With the capabilities approach, the only basis for prioritisation would be need. To borrow from the rationale of the Convention on the Rights of Persons with Disabilities, the elderly person made physically or mentally infirm, made poor or a victim of abuse “should simply receive more resources”<sup>35</sup> that they might function on the same level as others free of such “conditions.”

(b) Opportunity to choose

Being given the opportunity to choose is, as has been noted, part of the essence of the capabilities approach. Of significance to the elderly in this element of having the right to the capability to human rights is Nussbaum’s concept of minimal agency. As a standard of decision-making capacity, minimal agency disregards “rationality or any other specific property” as pre-requisites,<sup>36</sup> thereby allowing individuals with cognitive disability to be involved in decisions which concern them and their well-being.<sup>37</sup> Reasoning associated with this approach describes decision-making capacity not in terms of being an absolute, rather being something that exists at different levels<sup>38</sup> which are often associated with age and stage of life, but are undoubtedly a matter of internal capability. If the State is to enable minimal agency in decision making in the human rights arena for the elderly person whose decision-making capacity exists at a new level due to compromised internal capability, it need look no further than the Convention on the Rights of the Child for inspiration. Concerned with what it terms the “physical and mental immaturity” of the child, something that calls for “special safeguards and care,” the Convention reflected the philosophy of capabilities approach by not equating this concern with the need for all decisions to be made on behalf of the child. A fundamental principle of the UNCRC is that of “evolving capacity,” which informs parties to the Convention to; “assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the

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<sup>33</sup> See generally Sen (n 5).

<sup>34</sup> Harnacke (n 27) at 772.

<sup>35</sup> Ibid. at 772.

<sup>36</sup> Nussbaum, *Creating* (n 13) 63.

<sup>37</sup> Ibid. at 63.

<sup>38</sup> D Crocker, *Ethics of Global Development: Agency, Capability, and Deliberative Democracy* (2009) 22.

child being given due weight in accordance with the age and maturity of the child.”<sup>39</sup> Here it is possible to hear capabilities approach speaking directly to “evolving capacity,” in order that the under developed internal capability of decision making be provided sufficiently “suitable external conditions” in which to ensure equality of the right to freedom of expression. The experience of the elderly person is likely to be the mirror image to that of the child; one of “regressing capacity,” yet the logic of the UNCRC combined with minimal agency can save the opportunity to choose between substantive freedoms and their associated human rights for the elderly person lacking full decision-making capacity. The point from which regression is made is one of physical and mental maturity, one of capability from which the person travels equipped with fully formed values, opinions and wishes. It is suggested here that the merit of these should endure, and the principles of minimal agency and due weight in accordance with maturity of capability be employed at such time that new decisions are required; thereby saving the choices of those suffering even the severest forms of dementia and cognitive impairment from suffering the fate of a non-human being.<sup>40</sup>

(c) Judicial interpretation of human rights

Uniquely, Nussbaum suggests that the duty to provide the right to the capability to secure human rights might be facilitated by means of judicial interpretation. In this regard she advocates that the language of capabilities be part of the constitutional framework, as only by interpreting human rights from the vantage point of capabilities will we “understand what questions judges should be asking” and will equality in human rights be achieved.<sup>41</sup> Such questions should centre on achieving minimum thresholds of central capabilities, providing the capability to secure human rights, the application of universal non-discriminatory standards and how equality in capabilities and rights is measured. If a lesson were needed in how the interpretation of human rights might engage with capabilities thinking such that any incapacity in the access of rights be avoided, we need only to turn to the reasoning of Lady Hale in *Cheshire West and Chester Council v P*,<sup>42</sup> considered below.

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<sup>39</sup> United Nations Convention on the Rights of the Child, Article 12, Respect for the views of the child.

<sup>40</sup> An important point to be made here is that simply because an individual’s decision fails to meet with general approval, that decision should not be dismissed as being incorrect, the caveat being that it must not result in harm to the decision maker.

<sup>41</sup> Nussbaum (n 16) at 30.

<sup>42</sup> *Cheshire West and Chester Council v P* [2014] UKSC 19.

This case involving Article 5 of the European Convention on Human Rights dealt with the deprivation of liberty of an adult male whose internal capabilities were limited by means of cerebral palsy and downs syndrome drew together all of these issues. The finding of the Court of Appeal which appeared before the Supreme Court saw the standard of the right he was able to access being one to which he was entitled not by virtue of being human, but of being a human with disabilities. The man at the centre of this case was not elderly, but in suffering from severe cognitive and physical disadvantage, shared some of the conditions of this vulnerable group. His human rights position is, therefore, of relevance to them. It could be said that P was “elderly” in all but age.

The dicta of the Lord Justices in the finding of the Court of Appeal show them to be largely influenced by matters of relative normality, a lack of capacity by P to understand or object to his situation and adapted preference. In commenting on the decision which brought the case to the Supreme Court, Lady Hale said; “The first and most fundamental question is whether the concept of physical liberty protected by article 5 is the same for everyone, regardless of whether or not they are mentally or physically disabled.” Of one of the judges hearing the case on appeal she concluded, “Munby LJ in P's case appears to have thought that it is not,” noting that he was of the opinion that, “P is inherently restricted in the kind of life he can lead. P’s life, wherever he may be living...is...dictated by his disabilities and difficulties.” Lady Hale seems to be suggesting that Munby LJ’s decision was of the “entitlement by virtue of being a rational human being” school of thought with regard to human rights. In this case, Lord Justice Munby considered the degree of human right to which the person was entitled to be directly dependent upon his internal capabilities.

Her attack on the rationale continued in light of Munby LJ’s development of the principle of “relative normality” from the case of *Surrey CC v P and Q*,<sup>43</sup> which lead Lloyd LJ to say of P, “It is meaningless to look at the circumstances of P in the present case and to compare them with those of a man of the same age but of unimpaired health and capacity...the right comparison is with another person of the same age and characteristics as P.”<sup>44</sup> Such conclusion would not be drawn if the right to the capability to secure the right had been influential in the interpretation and application of Article 5. Instead, the focus would have been the need to ensure a minimum threshold of capabilities via external conditions suitable to facilitate P’s right to liberty to a

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<sup>43</sup> *Surrey CC v P and Q* [2011] EWCA Civ. 190.

<sup>44</sup> *Cheshire West and Chester Council v P* [2011] EWCA Civ. 1257 at para 120 per Lloyd LJ.

universal standard. Had this been the approach taken, the worrying suggestion of discriminatory application of human rights by the courts would most likely not be mooted.<sup>45</sup>

Further parallels may be drawn between the capabilities approach of Sen and Nussbaum and the human rights approach of Lady Hale in this case, particularly in the spheres of minimal agency and measurement of equality. That this individual had not complained of his treatment<sup>46</sup> received the response that “it is quite clear that a person may be deprived of his liberty without knowing it.” The analogy she went on to draw with the “mentally disordered person who has been kept in a cupboard under the stairs (a not uncommon occurrence in days gone by)” who “may not appreciate that there is any alternative way to live, but he has still been deprived of his liberty”<sup>47</sup> resonates with her opinion given in a previous human rights lecture, the “degradation of an incapacitated person shames us all even if that person is unable to appreciate it.”<sup>48</sup> It resonates also with the thinking of Sen and Nussbaum when discarding satisfaction with, or lack of objection to, one’s situation as a gauge of equality in standards of capabilities and human rights. It seems that one of the reasons that P’s case was given a hearing from the Court of Appeal was its falling foul of the pitfalls inherent in “adapted preference.” Most certainly, as was decided by the Supreme Court, the individual’s lack of objection to his treatment took place whilst violations of his human right to liberty continued.

Nussbaum recommended that judicial interpretation of human rights take place in the space of capabilities; Lady Hale in *Cheshire West*, provides an example, of how the approach could work to overcome challenges when faced with conditions which prevent or impair enjoyment of human rights. The conditions of the elderly will continue to be exacerbated if the courts adopt discriminatory practices against people of minimal agency and physical capacity, which the capabilities approach argues against. Indeed, it is timely to remind ourselves of Lady Hale’s concord with Nussbaum’s principles of central capabilities, minimum threshold, minimal agency and right to capability, “the whole point about human rights is their universal character... premised on the inherent dignity of all human beings whatever their frailty or flaws.”<sup>49</sup>

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<sup>45</sup> “What was a deprivation of liberty for some people might not be a deprivation for others.” *Cheshire West and Chester Council v P* [2001] EWCA Civ. 1257 at para 33 per Lady Hale.

<sup>46</sup> P was prevented from leaving his home and subjected to physical restraint, handling which included having fingers forced in his mouth to prevent his ingesting continence pads and being dressed in a body suit, all to manage his difficult behaviour.

<sup>47</sup> *Cheshire West and Chester Council v P* [2001] EWCA Civ. 1257 at para 35 per Lady Hale.

<sup>48</sup> Baroness Hale, “What can the Human Rights Act do for my mental health?”, Paul Sieghart Memorial Lecture (2004)

<sup>49</sup> *Cheshire West and Chester Council v P* [2001] EWCA Civ. 1257 at para 36 per Lady Hale.

(d) Legal provision

Nussbaum's insistence on the duty of the State to equalise the capabilities of individuals and ensure minimum thresholds of central capabilities being a constitutional one would be best achieved if the advice of the United Nations were to be heeded, and a convention of bespoke human rights created. If the elderly are to feel the advantages of a capabilities approach to human rights such a convention would need to be grounded in a set of central capabilities able to deliver "human dignity and function" to the elderly, as only then would rights be structured in such a way that minimum thresholds of central capabilities would be incorporated. With the enforcement and monitoring mechanisms of a convention to support it, the full benefits of a capabilities approach to equality in human rights for the elderly can be attained if a duty is placed on States to maintain minimum thresholds for all people and compensate, if necessary, for "frailty and flaws." Pressure would be exerted over policy and the distribution of resources based on need. Finally, its influence would be felt in the interpretation of human rights so that issues of "relative normality" and "adapted preference" are replaced by the logic of capabilities in decisions of access to and enjoyment of the same.

**(4) Weakness of the capabilities approach**

Mention must be made, however, of a weakness in the approach if it is to fully assist the elderly in their quest for equality of rights. Nussbaum is forthright in her claim that central capabilities serve the individual, and only serve groups of people derivatively. She does not advocate sets of central capabilities in response to the unique and specific needs of human groups, trusting unwaveringly in their universal nature. However, just as human rights are not encompassing of all needs of all human groups,<sup>50</sup> nor can central capabilities be. Sen warns against a "fixed list" of capabilities "for all societies for all times to come, irrespective of what the citizens come to understand and value."<sup>51</sup> By not acknowledging the potential to expand capabilities to vulnerable groups the approach will not be in a position to support the human rights allocated to them often by means of charter or convention. To not extend the rationale of Sen to human groups with vulnerabilities would provide no benefit to the elderly beyond that which it provides for the world at large. With the United Nations leading the call for a convention on the rights of older people, Nussbaum's claim that human rights must be interpreted and applied through the language and vehicle of the capabilities

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<sup>50</sup> Examples include children and persons with disabilities.

<sup>51</sup> Sen (n 5) at 158.

approach if equality in human rights is to be achieved, is open to question if a convention containing bespoke human rights is not supported by a set of central capabilities tailored to the “human dignity and function” of the elderly.

#### **D. CONCLUSION**

This examination of the capabilities approach within the space of human rights has highlighted ways in which it might facilitate equality in access to and enjoyment of human rights, and, therefore, equality in human dignity by securing access to those rights of most value to the individual and overcoming conditions of incapability. It adds to existing approaches to human rights, and specifically to human rights provision for the elderly by, inter alia; creating parity between the two generations of rights; advancing a set of central capabilities essential to human dignity and function; recognising the entitlement to the capability to secure human rights and; the state duty to compensate for compromised capability.

By taking the step to consider both generations of human rights equally, the capabilities approach immediately removes the potential for discriminatory provision of those rights upon which the elderly heavily rely for dignity and function. Beyond this is the issue of securing rights. To be capable of securing a valued functioning, the subject of which also exists as a human right, is itself an entitlement held in the bare fact of being human. With the entitlement to the capability to secure the right enjoying parity with the right itself, the elderly person should be able to unlock those human rights, be they civil and political or socio-economic, most urgent to need and dignity. Whilst State duty exists for human rights provision, the capabilities approach is specific as to the form this should take. Always positive, the duty to equalise capability is financial, provides opportunity for choice, expects legal provision and is guided by the logic of the capabilities approach in judicial interpretation of rights.

If resources are the means required to compensate for compromised capability, the basis upon which this should be distributed is, according to capabilities approach, need. Therefore, the elderly person would not suffer the indignity of rationed human rights. If capability of choice is compromised, this is saved by the principle of minimal agency, allowing the cognitively impaired to be involved in decisions of human rights, and to choose between those of most value to them. The role of the judiciary, claims the approach, is to view human rights through the core concepts of capabilities, and interpret them with reference to no less than central capabilities, minimum



threshold, minimal agency, and right to capability. It is only when the right to the capability to secure the human right has been achieved to universal standards demanded by central capabilities, in accordance with the individual's choice of valued rights, has human dignity equal to that of the person whose capability is complete been secured.

The final word regarding how the capabilities approach can contribute to resolving the challenge in human rights faced by the elderly is Nussbaum's insistence on constitutional recognition of capabilities. For all of the strengths of this contribution to provision and interpretation of human rights of the elderly, it highlights the weakness which threatens the very promise of the approach to deliver equality in human dignity and human function and thereby shorten the downward spiral of violations suffered. For this reason, it is suggested that an area of future research lay in testing the viability of an adapted set of central capabilities, with minimum thresholds, aimed at fulfilling the needs and compromised capabilities of the elderly.

# Slipping Down the Slopes: The Vices and Virtues of Forgetting Online

*Magdalena Jozwiak\**

## A. INTRODUCTION

Robert Post once compared the slippery slope mechanism to the Spanish Inquisition in the 16th century.<sup>1</sup> Inquisitors, suspicious of earnestness of the Moorish and Jewish converts' faith, gradually tightened the surveillance of their orthodoxy in adherence to the new rules, eventually resolving that taste for couscous or dislike for pork were the valid signs of heresy. But the number of metaphors for what is commonly called the slippery slope phenomena is much larger.<sup>2</sup> The reason for such plethora of vivid analogies lays surely in the fact that making the slippery slope argument ("SSA") is both a common and complicated way of reasoning in the legal field. Such rhetoric can be particularly convincing when applied both to cases of general legal rules that leave open various paths for interpretation and also to cases of new situations that put into doubt the future *modus operandi* of existing rules. SSAs are pervasive, and can be found, for example, in discussions on biotechnology, euthanasia, and limits on free speech.

This article concerns the much-debated measure for the protection of online privacy – the so called "right to be forgotten" – introduced by the recent judgment of the Court of Justice of the European Union ("CJEU").<sup>3</sup> It aims at scrutinizing the SSAs raised in the wake of the CJEU judgment, claiming the ensuing danger for freedom of speech online. Internet completely changes the mechanisms of communication and these changes might have their virtues and vices from the societal point of view. On the one hand, internet is an embodiment of the free speech ideal and for this reason any limitation of online speech is often perceived by the supporters of its strong protection as a first step right down the slippery slope towards the bottom at which the internet

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<sup>1</sup> R Post, "Racist Speech, Democracy, and the First Amendment" (1991) 32 William & Mary Law Review 270.

<sup>2</sup> One comes across expressions including the genie is out of the bottle, the camel's nose is in the tent, thin edge of the wedge, and snowball effect.

<sup>3</sup> Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] 3 CMLR 27.

freedom that they celebrate no longer exists. There is, however, a second side to this story. Slippery slopes can indeed be two-sided. Just as limiting speech can potentially cause the slippage towards ‘tyranny’ and censorship, certain kinds of speech might provoke negative speech-related social consequences.

Drawing on the established theory of the slippery slope reasoning and using the “right to be forgotten” as a test case, the article will make some broader observations on different interests at play in regulating online speech. Part B discusses the theory of slippery slope reasoning. Part C sets out the main issues to be taken into account when examining the merits of the SSAs, and Part D looks at the slippery slope reasoning in the context of the “right to be forgotten” and attempts to assess its validity.

## **B. SLIPPERY SLOPE ARGUMENT IN LEGAL THEORY**

### **(1) The logic of SSAs**

The main characteristic of slippery slope reasoning is that it involves two distinct scenarios, “A” and “B,” and the claim that an indirect connection between A and B exists. Scenario A carries a certain legal rule departing from the *status quo*, and is a measure creating certain new rights or obligations. Scenario B enters into discussion only through the SSA, as a long-term, undesirable (or even tragic) result of A. Typically the argument would hold that regardless of the desirability of A, it should not be introduced as it would induce a chain of different events leading eventually to the bottom of the slope, at which the plainly wrong scenario, B, materializes. One of the key characteristics of the SSA is that it is not the first scenario that is directly challenged. If that were the case there would be no need to advance an SSA in the first place. In fact, situation A might be far from objectionable; it might be a desirable solution to the problem at hand, but still objected to due to its potential consequences. Another characteristic of slippery slope reasoning is the indirect relation between A and B. If B were an inevitable and direct consequence of A, the argument would be “more reminiscent of a cliff or a wall than a slope.”<sup>4</sup> Thus, the situation at the bottom of the slope must materialize gradually through several different phases starting with A.

The relation between A and B might be based on factual causality, where A triggers the causal chain of actions leading to B (empirical slippery slopes). According to Schauer, slippery slopes actually reflect the view that most people share of “how decision makers think and behave.

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<sup>4</sup> E Lode, “Slippery Slope Arguments and Legal Reasoning” (1999) 87 California Law Review 1477.

The slippery slope phenomenon although not logically compelled, appears to describe a behavioral reality.”<sup>5</sup> Thus, the SSAs are not inherently fallacious; their strength depends, however, on the possibility of their predictive claims.

## **(2) The sources of slippery slopes**

In his study on slippery slopes, Schauer distinguishes three possible explanations of why slippery slopes might materialize based on the observation of the behavioral processes. Firstly, there is the issue of linguistic imprecision. For example, in the case of *Animal Defenders International v. United Kingdom*<sup>6</sup> before the European Court of Human Rights (“ECtHR”), an advertising ban which only applied to certain political advertisements, leaving advocacy groups out of its reach, was considered ineffective in practice due to the linguistic imprecision that that distinction would contain: “Once the absolute bar is removed, the broadcasters...would at the very least be open to challenge if they refused to accept political adverts. We are then on a slippery slope...”<sup>7</sup> The linguistic imprecision might be the result of applying vague terms open for interpretation and inviting much arbitrariness (for example, terms like offensive, outrageous, or proportionate) or it might be due to the fact that certain terms have open texture (i.e., over time they might gain a new meaning which could not have been foreseen by the legislators at the time of enacting a given rule).<sup>8</sup>

Linguistic imprecision is not itself enough to make certain reasoning slippery as a rule. After all, it is not always the case that a notion that has a certain meaning when drafted will gain a different meaning when applied in the future by the same person. For example, even if the term “hate speech” is not easy to define, one can claim to “know the hate speech when he sees it” and thus apply the ban on hate speech consistently. The problem arises when another person is supposed to categorize given behavior. In fact, what is implied in SSA is the mistrust for the person applying a given rule in the future. Schauer calls it a limited comprehension: SSA necessarily assumes at least two different parties, the one constructing the rule and the one applying it. Even if the rule is sufficiently clear at the outset, with time its original meaning might be distorted when applied by different people and in different circumstances, especially if the rule draws some

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<sup>5</sup> F Schauer, “Slippery Slopes” (1985) 99 Harvard Law Review 370.

<sup>6</sup> *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21

<sup>7</sup> *Animal* (n 6) at para 47.

<sup>8</sup> Schauer (n 5) at 371. For example, the concept of ‘marriage’ which, until not so long ago, was unanimously understood as the union of man and woman, but now, in some States, also embraces same sex unions.

arbitrary distinctions. Such structure of argument is illustrated in reasoning adopted by Glenn Greewald in his article against regulation of online hate speech. He claimed that the French government was:

“happy to criminalize ‘hate speech’ because majorities - at least European ones – happen to agree with their views on gay people and women's equality. But just a couple decades ago, majorities believed exactly the opposite: that it was ‘hateful’ and destructive to say positive things about homosexuality or women's equality. And it's certainly possible that, tomorrow, majorities will again believe this, or believe something equally bad or worse.”<sup>9</sup>

The third practical reason advanced by Schauer is based on the observation that some instances are particularly susceptible to SSAs.<sup>10</sup> It is no coincidence that SSAs are raised in matters that are controversial and often require counterintuitive claims. As aptly noticed by Sandel, “liberals often take pride in defending what they oppose.”<sup>11</sup> Such is often the role of people bringing the SSA in the context of free speech, which sometimes requires defending the rights to speak of “not very nice people.”<sup>12</sup> It is precisely the commonly unpopular character of speech that might cause the slope to become slippery and thus warrants extra attention when attempts at silencing are made.

### **(3) The critique of slippery SSAs**

The SSAs gained quite negative reputations in legal scholarship. This seems to be correct for at least three reasons. First, slippery slopes often serve only as the guise for the reluctance towards situation A or aversion for social change in general. In discussions on very difficult issues of law or social policy, where many do not have unambiguous views on the rule behind scenario A, it might be strategically easier to attack A indirectly by introducing B – a list of indisputably unwelcome consequences which A could possibly entail.<sup>13</sup> As such, opponents of progressive social movements often use SSAs to cast actual trends in society in slippery slope frames, inflating possible dangers of accepting scenario A and preying on the fact that the actual results of these trends are hard to foresee.

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<sup>9</sup> G Greenwald, “France's censorship demands to Twitter are more dangerous than 'hate speech'” (2013) *The Guardian*, available at: <http://www.theguardian.com/commentisfree/2013/jan/02/free-speech-twitter-france>.

<sup>10</sup> F Schauer (n 5) at 376.

<sup>11</sup> M Sandel, “Morality and the Liberal Ideal” (1984) 190 *New Republic* 15.

<sup>12</sup> As famously remarked by Justice Frankfurter in his dissent in *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950).

<sup>13</sup> E Volokh, “Same-sex Marriage and Slippery Slopes” (2005) 33 *Hofstra Law Review* 1157.

Second, slippery slopes can be two-sided in the sense that any decision by the court or regulation by the lawmaker is a zero-sum game. Just as much as any action might be charged of causing slippage in one direction, one may confront this charge with a similar argument that inaction will cause slippage in the other. If a departure from a legal *status quo* (e.g., through new legislation) might trigger slippage towards the bottom, maintaining the *status quo* might have similar negative consequences. This is because if the societal, technological or ethical environment in which law is embedded is not static, not responding to these factors is, itself, a response. Such a situation is common in the context of speech regulation. Again, *Animal Defenders International v. United Kingdom*, decided by a narrow 9 to 8 majority of ECtHR Grand Chamber, might serve as an example. In its judgment, the ECtHR decided that the blanket ban on broadcasting of advertisements of a political character did not infringe Article 10 of the ECHR (right to freedom of expression). The Court accepted the United Kingdom's ("UK") explanation that such ban was necessary in order to avoid the situation in which "well-endowed interests which are not political parties are able to use the power of the purse to give enhanced prominence to views which may be true or false, attractive to progressive minds or unattractive, beneficial or injurious."<sup>14</sup> This is what the bottom of the slope (headed at in case of legislative inaction) looked like from the UK's perspective.

However, one may approach this issue differently. Three years prior to this ECtHR judgment, the United States Supreme Court dealt with a similar issue (with a narrow majority of 5 to 4) in the *Citizens United v. FEC* case.<sup>15</sup> In this judgment, the Supreme Court ruled that laws that prohibited or limited using corporate funds for "electioneering communications" in the period before the elections infringed the First Amendment of the United States Constitution. Just like in the UK, the rationale for the ban was to ensure that the depth of the pockets would not play too big of a role in shaping public opinion, allowing for more inclusive and objective public discourse. However, rather than considering the possible positive impact of such regulation, the Supreme Court took an absolutist approach towards free speech protection, prohibiting any restriction of funding of electioneering communications. Implicitly, the judgment was based on the SSA:

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<sup>14</sup> *Animal* (n 6) at para 22.

<sup>15</sup> *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

restriction of speech will start its “ongoing chilling,” eventually undermining the idea of democratic self-governance.<sup>16</sup> This is what the bottom looks like according to the Supreme Court. Clearly, both courts had different visions of what the worst-case scenario could be. These examples show that SSAs are weak ones in most cases, and certainly in the case of freedom of speech, as it is easily possible to debunk them by arguing the other side of the slope. That is, of course, unless some factual basis makes the argument particularly pertinent. Thus, the question is what is at the bottom of each side of the slope and, more importantly, how probable it is to arrive at it: empirical grounding of the argument is crucial. As Schauer noticed:

“Unless this underlying empirical reality offers some persuasive reason why one danger case seems either more likely, or more dangerous, or both, then every argument of the form “if this, then that, and then that” can be met with an equally logical and equally plausible “if not this, then not that, and then not that.”<sup>17</sup>

Thirdly, and in connection with the previous paragraph, the reason why SSAs tend to be unconvincing is that, as already pointed above, they are often made in a way completely detached from any empirical basis. For example, Glenn Greenwald writes (in the context of the French initiative to curb out the homophobic hate speech from Twitter):

“It is not possible, nor probable, but certain - 100% inevitable - that empowering the state to imprison people for the expression of “hateful” ideas will be radically abused, will be exploited to shield power factions from meaningful challenge. Demanding that Google or Twitter suppress ideas specified by the state is the hallmark of tyrants.”<sup>18</sup>

But how does one arrive at ‘tyranny’ from blocking homophobic speech on social media according to Greenwald? Such a fatalistic vision surely does have much appeal for supporters of a more *laissez-faire* approach towards the Internet, but it still constitutes an oversimplified leap in argument. After all, France already heavily regulates speech and hate speech prohibition is nothing new in most European countries. This is all done, of course, without abating their democratic

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<sup>16</sup> J Gardner, “Anti-regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope” (2011) 20 Cornell Journal of Law and Public Policy 673.

<sup>17</sup> Schauer (n 5) at 382.

<sup>18</sup> Greenwald (n 9).

ideals.<sup>19</sup> Similarly, lack of any empirical basis for the rationale of the broadcasting ban was one of the reasons for scepticism by the dissenting judges in *Animal Defenders International v. UK*.<sup>20</sup>

In conclusion, the main premise of the SSA is that for different reasons people “are liable to fail to abide by proper distinction” between unobjectionable situation A and objectionable situation B.<sup>21</sup> Such a failure might have different sources and it is for the SSA to provide some empirical evidence why, in a given case, the process of making distinctions is particularly prone to failure. Although not all SSAs are weak, they tend to be so precisely because they lack any such empirical underpinning.

In the following parts of this article, I analyse SSAs in the context of measures aimed at limiting online privacy infringement (i.e., the right to be forgotten). I will look at the structure of such arguments and their regulatory environment, and will subsequently try to determine whether there are certain plausible mechanisms that might lead to the races to the bottom in this particular case.

### **C. SLIPPERY SLOPE ARGUMENTS IN THE CONTEXT OF OFFENSIVE ONLINE SPEECH: THE BACKGROUND**

Regulation of ‘offensive speech’<sup>22</sup> is, to a certain extent, a common feature of western legal systems. Various provisions sanctioning defamatory speech, infringement of privacy, violation of personal honour and the like aim at limiting speech when the harm it inflicts is greater than its own value. The decision on where to draw the line between allowed and banned speech requires reference to very vague and subjective concepts leaving much space for slippery slope reasoning. There is an ongoing legal discussion on how to reconcile the values behind the right to free speech with the interests of individuals in not having their personality rights violated. Naturally, not every kind of speech has the same value (consider, for example, political speech and backyard chatter), nor does every kind of harm caused by offensive speech have the same degree of gravity.

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<sup>19</sup> There is wide support in Europe for measures aimed at fighting different manifestations of such speech, specifically in the context of the internet (Additional Protocol to the Convention on cybercrime related to the prosecution of acts of racist and xenophobic nature through computer systems, adopted on 28 January 2003 and entered into force on 1 March 2006).

<sup>20</sup> *Animal* (n 6) at para 11 as per the Joint dissenting opinion of judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano

<sup>21</sup> D Enoch, “Once You Start Using Slippery Slope Arguments, You’re on a Very Slippery Slope” (2001) 21 *Oxford Journal of Legal Studies* 633.

<sup>22</sup> I.e., speech infringing personality rights: privacy, dignity, honor, and reputation.



Eventually, the balance needs to be struck between the underlying values and one of them will be given a priority in a particular case.

The Internet – a regulatory *tabula rasa* at first – has now been filled with local values underlying legal orders. It seems that the nexus of the problem of balancing privacy and free speech on the Internet derives precisely from the inherent conflict between the way that the Internet operates and the spirit of these local values. In the quest for the solution to this problem two different scenarios could be envisaged. First, the balance once found in the offline world locally would need to be readjusted to take into account the new characteristics of the online environment – in particular the fact that internet technology gives tools for practically unbound freedom to speak, often at the expense of other values (e.g., privacy). Pursuant to the second scenario, some measures would need to be introduced in order to impact online discourse in such a way as to establish a balance between free speech and privacy in accordance with those local values. It could be argued that both these scenarios unfold currently in parallel in Europe. Lawrence Lessig noticed that “[w]e have exported to the world, through the architecture of the Internet, a First Amendment in code more extreme than our own First Amendment in law”<sup>23</sup> and indeed the internet reshapes the way that people exercise and perceive their free speech rights. On the other hand, such legal transplantation of freedom of speech rules distorts the European *status quo*: an idea about how the balance between the free speech and personality rights should be struck.<sup>24</sup> This is the underlying reason why European legislators and courts might feel compelled to move towards situation A (which here represents the introduction of the right to be forgotten).

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<sup>23</sup> L Lessig, “The Code version 2.0” (2006) Basic Books 236.

<sup>24</sup> It is interesting to see that many proposals for limiting online speech refer explicitly to certain local values. For example, see N Vallaud-Belkacem, “Twitter doit respecter les valeurs de la République” (2012) *Le Monde*: [http://www.lemonde.fr/idees/article/2012/12/28/twitter-doit-respecter-les-valeurs-de-la-republique\\_1811161\\_3232.html](http://www.lemonde.fr/idees/article/2012/12/28/twitter-doit-respecter-les-valeurs-de-la-republique_1811161_3232.html) where the French Minister of Women’s Rights, quoted by Greenwald, states that “Twitter needs to respect the values of the French Republic”; see also V Reding, “Better Regulation for Europe’s media industry: the Commission’s approach” (2005) *European Commission Press Release Database*, available at [http://europa.eu/rapid/press-release\\_SPEECH-05-532\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-05-532_en.htm) where she claims “It is the duty of the Commission to propose a framework under which these shared European values are protected. But I have no intention to ‘regulate the Internet!’” See also H M Watt, “Yahoo! Cyber-Collision of Cultures: Who Regulates?” (2003) 24 *Michigan Journal of International Law* 673. There is also a reach scholarship analyzing the differences between the so called “European” and “US” approach towards the understanding of privacy and its balancing against the freedom of speech; see for example R Errera, “Freedom Of Speech in Europe and The USA”, in G Nolte (ed), *European and U.S. Constitutionalism* (2004) 23; J Q Whitman, “Enforcing Civility and Respect: Three Societies” (2000) *Faculty Scholarship Series* 1287; J Q Whitman “The Two Western Cultures of Privacy: Dignity versus Liberty” (2004) 113 *The Yale Law Journal* 1151.

There are thus two potential slippages: towards erosion of the right to privacy (if no measures are undertaken at all) and towards large-scale censorship (as a result of situation A). The SSAs advanced in the context of limits of offensive speech on the internet are compelling only if they take two factors into account: (1) that there are two sides of the slope and (2) that they present some empirical support for why it is that one slippage is more likely than the other. To quote Schauer again, SSA “depends for its persuasiveness upon temporally and spatially contingent empirical facts.”<sup>25</sup> Thus, arguments for or against certain internet-implemented measures will be weak, unless we can demonstrate that the empirical circumstances are such that danger of a given slippage is particularly high in comparison with the other one.

Consequently, there are three factors to be considered when assessing a SSA: (1) legal and cultural background, (2) scenario A and how possible it is to arrive at scenario B – the first side of the slope, (3) changing environment which renders the *status quo* suboptimal in case of lack of action A – second side of the slope. To translate it into the more straightforward case of offensive internet speech: (1) means the way in which different legal systems currently strike the balance between the right to free speech and different personality rights, accommodating also cultural and historical sensibilities of a given society; (2) means the introduction of the right to be forgotten and the likelihood that it will lead to the large-scale internet censorship; (3) means the possible costs of inaction, taking into account the scale of privacy infringement online and the way in which it may cause a different kind of slippage towards eradication of privacy altogether.<sup>26</sup> When taking these three factors into account we can have a better overview of the merits of the SSAs raised in the context of the “online forgetting.”

#### **D. THE RIGHT TO BE FORGOTTEN AND THE MECHANISMS OF SLIPPERY SLOPE**

As discussed above, slippery slope reasoning gained a bad reputation in scholarship. However, the argument can be saved: the decisive factor in making a good SSA turns on its empirical basis.

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<sup>25</sup> Schauer (n 5) at 381.

<sup>26</sup> The popular opinion often expressed by press commentators is that we might have already arrived at the bottom of this slope; see A Preston, “The Death of Privacy” (2014) *The Observer*, available at: <http://www.theguardian.com/world/2014/aug/03/internet-death-privacy-google-facebook-alex-preston> (where Preston writes “Insidiously, through small concessions that only mounted up over time, we have signed away rights and privileges that other generations fought for, undermining the very cornerstones of our personalities in the process.”)

In this part I will analyse a measure aimed at protecting internet privacy that has been recently introduced through the case law of the CJEU: the right to be forgotten (scenario A), drawing on the theoretical analysis developed in the previous part of this article. In order to make an assessment of the SSAs raised in this context I will look at mechanisms which might come into play leading to the slippage from such scenario A towards internet censorship (scenario B), taking into account the probable costs of maintaining the legal status quo in Europe, in the absence of the right to be forgotten.

### **(1) Introducing the “right to be forgotten”**

The heated debate on the so-called “right to be forgotten” exploded ever since the European Commission’s Proposal for a Regulation on General Data Protection was released.<sup>27</sup> Article 17.1 of the Proposal introduces a provision that grants the data subject the right to require, under certain circumstances, the removal of personal data processed by the data controller. Even before the Proposal is officially adopted, the right to be forgotten is already a *fait accompli* in the EU law, at least in the context of the information displayed in the search engine results listings, following the judgment of the CJEU in the case *Google Spain v. AEPD*.<sup>28</sup> The legal basis for the right to be forgotten was the 1995 Data Protection Directive.<sup>29</sup> In its judgment, the Court recognized that the search engine’s activities can be subsumed to the definition of data processing indicated in the Directive and that it plays the role of data controller.<sup>30</sup> Further, the Court found that pursuant to Art. 12 (b) and 14 (a) of the Directive, Google is obliged to remove from the list of search results, generated by using a person’s name as a search term, the links to websites containing personal data of that person, especially where it is “inadequate, irrelevant or no longer relevant, or excessive.”<sup>31</sup> The right to be forgotten coined by the Court is very broad, stemming from the fundamental right to privacy and data protection (Articles 7 and 8 of the Charter of Fundamental Rights) and, as specifically noticed by the Court, overrides, as a general rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that

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<sup>27</sup> Proposal for a *Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)* (European Commission COM(2012) 11 final, 2012), available at [http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_11\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf).

<sup>28</sup> *Google* (n 3)

<sup>29</sup> Council Directive 95/46/EC OJ L 281 23/11/1995 P 0031 – 0050.

<sup>30</sup> Contrary to the opinion of the Advocate General N. Jääskinen who found that Google is not a controller of personal data that is processed in a “haphazard, indiscriminate and random manner”; see *Google* (n 3) at para 81

<sup>31</sup> *Google* (n 3) at para 93

information. However, the interference with the right to privacy of a data subject could be legitimized if there is a certain special public interest in accessing the given information (e.g., as a result of a role that given person plays in the public life).<sup>32</sup> The Court thus introduces the familiar balancing of the right to privacy with the right of freedom of speech, tackled previously in the case law of the ECtHR. In this respect the Court indicates that a fair balance needs to be struck between the conflicting interests of protecting the privacy and public's right to access information<sup>33</sup> without, however, giving any guidance of how such balance is to be struck.

What is apparent from the ruling is that the Court applied a functional interpretation of the right to privacy on the Internet, taking into account the role that search engines play in the proliferation of information.<sup>34</sup> In the judgment, the Court clearly put the emphasis on ensuring the effective enforcement of the fundamental right of privacy, which indeed is only illusory absent the cooperation of the search engines. Under the current legal *status quo*, and taking into account technological development, the Court made a decision that inaction is more threatening towards common European values than implementing scenario A. At the same time, however, many commentators raised a concern that scenario A – the right to be forgotten – might be the first step setting the slippery slope into motion. Below I will discuss the main concerns raised in this context.

## **(2) The right to be forgotten and the slippery slope arguments**

The idea of the right to be forgotten proposed in the EU has struck some commentators as appalling. According to renowned privacy scholar Jeffrey Rosen, the right to be forgotten “represents the biggest threat to free speech on the Internet in the coming decade.”<sup>35</sup> In the context of the new data protection regulation proposed by the Commission, Rosen warned already in 2012 that “unless the right is defined more precisely when it is promulgated over the next year or so, it could precipitate a dramatic clash between European and American conceptions of the proper

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<sup>32</sup> *Google* (n 3) at para 81

<sup>33</sup> The Court failed to invoke the right of freedom of expression anywhere in the judgment, which does not detract from the fact that the competing value at stake, framed as a “interest of the general public in finding that information,” is in fact one of the building blocks of the right to freedom of expression. In this respect, it has been long recognized by the ECtHR that the freedom of speech includes not only right to impart the ideas but also the right of the public to receive them (see for example *Von Hannover v. Germany (No.2)* (2012) 55 EHRR 15 at para 102 and *Bladet Tromsø and Stensaas v. Norway* (2000) 29 EHRR 125 at para 59 and para 62).

<sup>34</sup> *Google* (n 3) at para 80: “the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous.”

<sup>35</sup> J Rosen, “The Right to Be Forgotten” (2012) 64 Stanford Law Review Online 88

balance between privacy and free speech, leading to far less open Internet.”<sup>36</sup> Other commentators perceived the CJEU judgment as a “direction of travel that leads us very quickly down the road of greater and greater censorship of the Internet”<sup>37</sup> or “censorship machinery.”<sup>38</sup> Some were more cautious, underlining the deep differences across the Atlantic in the way the balance between privacy and freedom of speech is struck, those differences being expressive of various perceptions of “different rights, values, and interests - indeed different philosophies - at stake.”<sup>39</sup>

One should first analyse the structure of the argument against the right to be forgotten that makes it the slippery one. Scenario A is the introduction of a measure, the right to be forgotten and, more precisely, allowing for the removal of certain incorrect or outdated personal information, potentially infringing the privacy of its subject, from the search results’ listing. It seems that it is not the fact of deleting such data itself that is objectionable by the critics but the fact that the ruling itself does not give a very precise definition of which data should be covered by the right to be forgotten. Hence, the judgment, they claim, due to its vagueness, leaves the door open for future abuses. Moreover, the important decision on balancing between competing rights of data protection and access to information is left in the hands of a company, rather than a judicial body that would usually be making these kinds of distinctions. The bottom of the slope (i.e., scenario B, the wide scale Internet censorship) is thus, in this view, a possible result of the lack of ability overtime to make proper distinctions by Google. Implicitly, the argument claims that the risk for online freedom of expression inherent in the introduction of scenario A is greater than the risk of not doing anything at all and thus maintaining the online *status quo*, where data protection and privacy rights are especially vulnerable.

But how exactly would such a “censorship machine” come about? How would the threat materialise? Which mechanisms could cause Google and Europeans’ fall down the slippery slope towards large-scale censorship as a result of adopting the right to be forgotten? This is just such

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<sup>36</sup> Rosen (n 35)

<sup>37</sup> G Vassall-Adams, “How Far Will EU Citizens’ ‘Right to Be Forgotten’ Extend?” (2014) *Reuters*, available at [http://www.nytimes.com/reuters/2014/06/05/technology/05reuters-google-eu-privacy.html? r=2&utm\\_source=OII+Newsletter&utm\\_campaign=811d2c7bb3-OII Newsletter 20140701&utm\\_medium=email&utm\\_term=0\\_aa8d7ff5b8-811d2c7bb3-70509581](http://www.nytimes.com/reuters/2014/06/05/technology/05reuters-google-eu-privacy.html? r=2&utm_source=OII+Newsletter&utm_campaign=811d2c7bb3-OII Newsletter 20140701&utm_medium=email&utm_term=0_aa8d7ff5b8-811d2c7bb3-70509581).

<sup>38</sup> S Baker, “Inside Europe’s censorship machinery” (2014) *The Washington Post*, available at <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/09/08/inside-europes-censorship-machinery/>.

<sup>39</sup> L Floridi, “Google ethics adviser: The law needs bold ideas to address the digital age” (2014) *The Guardian*, available at [http://www.theguardian.com/technology/2014/jun/04/google-ethics-law-right-to-be-forgotten-luciano-floridi?utm\\_source=OII+Newsletter&utm\\_campaign=811d2c7bb3-OII Newsletter 20140701&utm\\_medium=email&utm\\_term=0\\_aa8d7ff5b8-811d2c7bb3-70509581](http://www.theguardian.com/technology/2014/jun/04/google-ethics-law-right-to-be-forgotten-luciano-floridi?utm_source=OII+Newsletter&utm_campaign=811d2c7bb3-OII Newsletter 20140701&utm_medium=email&utm_term=0_aa8d7ff5b8-811d2c7bb3-70509581).

an empirical link that could make this SSA strong but which, as I will discuss below, is missing. At the same time, the costs of maintaining *status quo* are great and hard to ignore.

### **(3) Slippery slope mechanisms**

The first point to be made is that the name “right to be forgotten,” memorable as it is, might also be misleading. As mentioned above, the CJEU ruling does not grant the online right to forget but the rather limited right to delete specific search results that reveals certain personal data. The right is thus not so much about censorship or deletion of history, as is being claimed, but rather about making certain information harder to find. The SSA claims that people will want to hide more and more information about them from the search result while Google will fail to distinguish which of these requests meet the vague criteria set forth by the CJEU. Consequently, Google would start massively granting baseless, as well as substantiated, requests.

However, it seems plausible that Google will apply the right to be forgotten narrowly. First, it is in every search engine’s interest to provide as robust an index of results as possible. Thus, massive deletion of results would be, in fact, self-defeating from the standpoint of Google. Moreover, such deletion does not create any efficiencies, as it is less costly to simply reject the request for removal of a search result than to grant it. This is especially so since potential litigation is not very likely: costumers will be adverse to engaging in costly and time consuming law suits where their requests have not been granted. After all, the result of any litigation in this area would be far from certain as the courts are, by default, equally committed to the right of freedom of expression and privacy and, just like Google, would approach each removal request on the case-by-case basis.

It is equally uncertain whether Internet users would start massively filing the requests with Google. The only way the two mechanisms discussed above could materialize is through intensive use and abuse of the right to be forgotten by the data subjects and Google. Currently, a shift in online social norms seems to go towards less privacy as the norm and it may well turn out that the right to be forgotten will in fact be used more and more sporadically over time. Media reported<sup>40</sup> that in first few days following the introduction of the official removal request process on 29 May 2014, Google received 41,000 removal requests. In its most recent transparency report dating from

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<sup>40</sup> J Halliday, “Google search results may indicate ‘right to be forgotten’ censorship” (2014) *The Guardian*, available at: <http://www.theguardian.com/technology/2014/jun/08/google-search-results-indicate-right-to-be-forgotten-censorship>.

23 March 2015, Google informed that it has received a total of 232,836 requests for removal since May 2014 (covering the total of 843,398 URLs); 59% of requested URLs were removed.<sup>41</sup> This number, given the amount of personal data processed by the search engine pursuant to the CJEU judgment, and given the amount of embarrassing data found online, does not strike the author as particularly high. It seems that thus far there is neither a steep rise in the number of removal requests nor is Google massively removing all the requested URLs. In comparison, according to Google's statistics on requests to remove search results linking to copyright infringing content, over the period of one month from 26 February 2015 it received requests to remove 32,301,346 copyright-infringing URLs.<sup>42</sup>

#### **(4) The cost of maintaining the *status quo***

Internet makes important changes in both the scale and the substance of the communication processes and thus impacts the way public discourse is shaped. One such change is the lack of gatekeepers. There is no centralized system of editorial control, no scarcity of signal or bandwidth; everyone can be a publisher globally at little to no cost. What changed the character of public discourse is, in particular, the development of the web 2.0, which is based on user-generated content and allows direct participation and interaction between users. The kind of language or range of topics in different blogging and social media platforms is more similar to everyday private conversation and yet it has global coverage. Moreover, everything that is being published is also recorded in permanent fashion and searchable, available everywhere at any time. These features do have an impact on how the balance between free speech and privacy is struck and should be taken into account when assessing the SSAs put forward against the right to be forgotten.

Being the apotheosis of liberty, the Internet also gives more opportunity for spreading speech that harms people. Indeed, in recent years many commentators underline the increased vulnerability of privacy in the cyberspace. People can fall victims to Internet 'angry mobs' that organize shaming and bullying campaigns. The Internet does not forget or give second chances and a juvenile mistake can become a curse for a lifetime, which was in fact one of the most pertinent rationales for implementing the "right to be forgotten" in the Proposal for a Regulation on General Data Protection. Surely, problems of privacy infringement and defamation are not

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<sup>41</sup> Report on *European privacy requests for search removals* (Google Transparency Report, 2015), available at: <https://www.google.com/transparencyreport/removals/europeprivacy?hl=en-GB>.

<sup>42</sup> Report on *Requests for URL Removals Due to Copyright* (Google Transparency Report, 2015), available at: <https://www.google.com/transparencyreport/removals/copyright/>.

inherent solely in the Internet. However, the particular features of the Internet bring some additional problems to the fore and make the old ones more flagrant. Thanks to Google, the information that would be long forgotten in the regular press is perpetuated online – but so is the eventual harm.

It seems only logical that if the EU is to take its privacy rights seriously, it should adapt the law so it is responsive to the changing circumstances arising with the spread of online communication. If no actual remedies are put in place, the notion of the right to privacy becomes empty and illusory. It seems that in the *Google Spain v. AEPD* judgment, the CJEU made its decision as to the risks associated with the online communications and found that it is privacy that occupies more probable side of the slope. The judgment is thus a pragmatic response to prevent the complete slippage.

## **E. CONCLUSION**

This article aimed at underlining different interests and concerns at stake in the discussion on the so-called “right to be forgotten” recently introduced by the CJEU. The theoretical framework adopted for this purpose derives from the legal scholarship on slippery slope arguments. According to this scholarship, the main condition for making a successful SSA is to provide some empirical evidence about why introducing a certain measure (scenario A) is particularly likely to lead towards the bottom of the slope (scenario B). Transposing this theoretical analysis into the context of the “right to be forgotten” (which here takes the place of scenario A), it was argued that so far there is no convincing empirical ground for claiming that such a measure would trigger the slippage towards internet censorship (scenario B). Nor does there seem to be convincing evidence that such slippage is particularly more likely than the slippage towards the other side of the slope (where situation B would mean the erosion of privacy). The article thus implies that rather than making one-sided arguments against the right to be forgotten, the discussion should evolve around the proper way to balance between different interests at stake so that either slippage is avoided.

In his paper arguing against balancing the right of free speech with the right to privacy, Volokh conceded that there is one such situation where he could see how development of technology will overly empower in such a way as to threaten a person’s dignity: “Perhaps at some unknown future time information technology might get so powerful that these values will indeed



be threatened with “destruction” by such speech. I doubt it, but who can know for certain?”<sup>43</sup> Perhaps that unknown future is now. It seems that over the last ten years the development of technology distorted the balance between freedom of speech and personality rights previously attained in Europe. Perhaps the most serious criticism that can be levelled against the CJEU judgment is that what was missing in it is judgment was some indication on how such balance can be struck in the new realm of the internet.

I would like to conclude with two alternative ideas. One is that recent European campaigns championing the protection of privacy and dignity online are rightly directed at restoring and protecting these values deeply rooted in the European culture. The second observation might be more subversive: what if deeply rooted European values are outdated and the Internet helps to modernize them to better reflect underlying social trends? It could be the case, then, that by putting pressure on the protection of personality rights vis-à-vis freedom of speech, Europe is in fact going against natural social change triggered by the development of new technologies.

Whichever of the two ideas is correct, I think that thorough understanding of the character of the slippery slope argument in the context of offensive online speech puts into light many nuances that underlie current discussions. Regarding slippery slopes as two-sided concepts and evaluating them empirically helps to avoid the blind absolutism towards either of the sides.

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<sup>43</sup> E Volokh, “Freedom of Speech, Information Privacy, And the Troubling Implications of a Right to Stop People From Speaking About You” (2000) 52 Stanford Law Review at 53.

# Penal Populism Online and the Democratisation of Authoritarian Regimes: The Case of China

*Qi Chen*\*

During the past few decades, penal populism, or populist punitiveness, has been a frequently used theoretical concept to describe a particular stance on crime and punishment. In Bottoms' original writing, he mainly referred to 'populist punitiveness' as a political factor in the making of penal policies.<sup>1</sup> It is defined as the punitive stance adopted by politicians to gain 'electoral constituency' through populist support.<sup>2</sup> However, subsequent writings suggest that the effects of penal populism have gone far beyond the electoral field and constitute a threat to democratic governance. This article applies this concept to examine whether populist movements online have contributed to China's democratisation, or has only reinforced the authoritarian rule. For this purpose, it uses penal populism in its broader sense.

## A. AN INTRODUCTION TO PENAL POPULISM

Following Bottoms' study, Pratt and Clark argued that penal populism had led to a decline in the credibility of formal bureaucratic organisations in New Zealand.<sup>3</sup> The public distrust, first in the judiciary and then proliferated to politicians and parliamentary institutions, jeopardised the democratic process in the country.<sup>4</sup> Similar de-democratisation tendency was also reported by US-based studies. For example, in his monograph titled *Governing Through Crime*, Simon pointed out that the 'war on crime' had made the US less democratic and more polarised.<sup>5</sup> When depicting this transition process, he highlighted how the populist view of "judges [as] too soft on crime" had contributed to the decline of 'judicial governance' in America, and meanwhile gave rise to a more authoritarian executive.<sup>6</sup> The implications of this transition are more than the well-known 'mass

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<sup>1</sup> A Bottoms, "The Philosophy and Politics of Punishment and Sentencing", in C Clarkson and R Morgan (eds), *The Politics of Sentencing Reform* (1995) 17 at 39.

<sup>2</sup> *Ibid.* at 39-40.

<sup>3</sup> J Pratt and M Clark, "Penal Populism in New Zealand" (2005) 7(3) *Punishment and Society* 303.

<sup>4</sup> *Ibid.* at 307-310.

<sup>5</sup> J Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (2007) 6.

<sup>6</sup> *Ibid.* 113-138.

imprisonment' phenomenon: studies suggest that exacerbated racial inequality<sup>7</sup> and reinforced social stratification<sup>8</sup> are also attendant consequences.

Moreover, penal populism has undermined the "implicitly inclusionary ideals of democratic criminal justice."<sup>9</sup> Goals such offender rehabilitation and social reintegration, which used to be the integral part of democratic values and shared pursuit of criminal justice academics, are now compromised by populist movements for victims' rights.<sup>10</sup> As a result, the resentment between average people and figures of criminal justice increased. The distrust among social members also grew.<sup>11</sup> It is submitted that these consequences can eventually make democratic societies less civilised, less inclusionary, less liberal, and, in short, less democratic.

Moreover, authors believe that these effects of penal populism cannot be separated from the influences of mass media. They hold the view that media reporting of crime stories is often selective and biased, and such distortion may 'frame' the audiences' reactions to crime-related issues.<sup>12</sup> Beale's study, for example, showed that media groups in the US were driven by economic pressure to report more 'tabloid-style' crime stories, even when the crime rates were falling.<sup>13</sup> The media narratives not only make people more cynical, emotive and punitive about crime, they even have a direct impact on the choice of words when people talk about crime and punishment.<sup>14</sup>

The distorting and framing effects raised the question of whether the punitiveness mobilised by the mass media has truly reflected the majority's judgement. For instance, Green argued that the 'new mediascape' might have made it harder for citizens to move beyond mere 'public opinion' to achieve informed 'public judgement.'<sup>15</sup> Moreover, empirical study highlighted that the punitive sentiments on mass media, which usually echoed by grassroots audiences, had

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<sup>7</sup> B Petti and B Western, "Mass imprisonment and the life course: race and class inequality in U.S. incarceration" (2004) 69(2) *American Sociological Review* 151.

<sup>8</sup> S Wakefield and C Uggen, "Incarceration and Stratification" (2010) 36(1) *Annual Review of Sociology* 387.

<sup>9</sup> N Lacey, *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies* (2008) 12-13.

<sup>10</sup> AW Dzur, "The Myth of Penal Populism: Democracy, Citizen Participation and American Hyperincarceration" (2010)24(4) *The Journal of Speculative Philosophy* 354.

<sup>11</sup> J Pratt, "Punishment and 'The Civilizing Process'", in Jonathan Simon and Richard Sparks (eds), *The SAGE Handbook of Punishment and Society* (2013) 90 at 106.

<sup>12</sup> RM Entman, "Framing: Toward Clarification of a Fractured Paradigm" 1993 43(4) *Journal of Communication* 51 at 52; EM Ferse, *Media Effects and Society* (2001) 106.

<sup>13</sup> SS Beale, "The News Media's Influence on Criminal Justice Policy: How Market-driven News Promotes Punitiveness" 2006 48(2) *William & Mary Law Review* 397 at 424.

<sup>14</sup> M Gillespie and E McLaughlin, "Media and the Shaping of Public Attitudes" 2002 49(1) *Criminal Justice Matters* 8.

<sup>15</sup> DA Green, "Feeding Wolves: Punitiveness and Culture" 2008 6(6) *European Journal of Criminology* 517 at 532.

blocked the influence of the professional middle classes on criminal policy matters.<sup>16</sup> This elite class, according to Garland, are incidentally the major supporters of inclusionary penal policies.<sup>17</sup> Therefore, in Western literature, discussions on penal populism have gone far beyond the term's original definition. Instead, this theoretical concept has been applied to explore interactions between the state and the grassroots, social forces concerned in the making of penal policies, and the relationship between professional elites and average citizens. Weber once stressed that the governance in modern democracy depended on three interconnected dimensions, namely, electoral representation, professional bureaucracy, and the rule of law.<sup>18</sup> As the aforementioned literature suggests, penal populism has posed challenges to all three dimensions. It undermined the credibility of parliamentary institutions and professional bureaucracy, especially the judiciary. Through media impact, penal populism also prioritised emotive responses over the rationality of law. In short, the social changes incurred by penal populism have threatened the traditional governance in Western democracies.

This paper paradoxically applies penal populism theory to the study of an authoritarian regime: China. Due to the popularisation of the Internet, collective actions online have become increasingly common in China. Although many studies argue that online activism may contribute to the democratisation of this country, the paper suggests the opposite by analysing two influential criminal cases that have attracted major attention online. It argues that penal populism on the Internet constitutes an obstacle to the democratisation of China in three ways. Firstly, by amplifying anti-intellectualist sentiments and reinforcing the public's cynicism about the judiciary, penal populism online undermines the fragile foundation of the rule of law. Moreover, the pressure of online populism can stimulate the government to impose stronger control over judges and judicial affairs, therefore making 'judicial independence' a more distant goal. Lastly, occasional success of online petitions tends to restore the public's confidence in authoritarian adaption, leaving democratisation less appealing to Chinese people.

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<sup>16</sup> EK Brown, "The dog that did not bark: Punitive social views and the 'professional middle classes'" 2006 *Punishment & Society* 287 at 307.

<sup>17</sup> D Garland, *The Culture of Control: Crime and social order in contemporary society* (2001) 50-51.

<sup>18</sup> M Weber, *From Max Weber: Essays in Sociology* (translated by HH Gerth and C Wright Mills) (1948) 216-224.

## B. BACKGROUND: POPULISM AND NETIZENS IN CHINA

Populism is a very important ideology in post-1949 China. According to Arendt, populist support is the cornerstone of authoritarian rule. In history, effective manipulation of populist opinions lay at the core of authoritarian governments' success.<sup>19</sup> Unlike democratic governance that relies on elections and representation, an authoritarian rule pursues a classless society and a government that directly responds to 'the masses,' instead of parliaments and elected representatives.<sup>20</sup> However, the history of Nazi Germany indicated that 'the masses' were usually constituted by the 'politically indifferent majority' in a country, who had no rational demands for a better society, but only cynicism and contempt for party politics, parliamentary institutions, and the bureaucratic government.<sup>21</sup> In this sense, 'the masses' do not represent the interests of any class in a society, but it can somehow address the shared discontent of all classes.

The history of post-1949 China saw one of the most famous populist movements in world history, i.e. the Great Cultural Revolution (1967-1977). During this period, China exiled the intellectual class and essentially demolished the national judicial system.<sup>22</sup> Since this time, anti-intellectualism and distrust in the judiciary have become entrenched populist beliefs in the local context. However, after 1989, collective actions, either populist or pro-democracy, became rare in China, until the Internet was introduced to the country in the mid-1990s.

The quick increase of Chinese Internet users, or 'netizens', is staggering. By 2010, the number of netizens in China had reached 384 million.<sup>23</sup> The International Telecommunication Union ('ITU') suggested that by 2013 about 45.8% of the Chinese population had become Internet users.<sup>24</sup> In 2013 the total population in China was about 1.36 billion.<sup>25</sup> This means that the number of Chinese netizens has almost doubled between 2010 and 2013. Moreover, besides the dramatic increase in the number of Chinese netizens, the way netizens communicate and network has also developed. Instant message software such as QQ has been in use for more than one decade. In

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<sup>19</sup> H Arendt, *The Origins of Totalitarianism* (1951) 407-417.

<sup>20</sup> Ibid. 415-418.

<sup>21</sup> Ibid. 414-415.

<sup>22</sup> J Robinson, "The Culture Revolution in China" 1968 44(2) *International Affairs* 214.

<sup>23</sup> Z Pan, W Yan, G Jing and J Zheng, "Exploring structured inequality in Internet use behaviour" 2011 21(2) *Asian Journal of Communication* 116 at 127.

<sup>24</sup> The ITU, *Percentages of Individuals using the Internet 2013*, available at: <http://www.itu.int/en/ITU-D/Statistics/Documents/Percentage%20of%20Individuals%20using%20the%20Internet.xls> .

<sup>25</sup> Statistics released by the China National Bureau of Statistics (2013), available at: <http://data.stats.gov.cn/workspace/index?a=q&type=global&dbcode=hgnd&m=hgnd&dimension=zb&code=A030101&region=000000&time=2013,2013>.

2009, Weibo, a Chinese equivalent of Twitter, was introduced to the local market. By 2012, users of this social network service exceeded 324 million.<sup>26</sup>

As a result, a new social phenomenon emerged and attracted widespread interest. Yang conceptualised the phenomenon as ‘online activism,’ and spoke positively about its effects on empowering citizens to press for more government transparency through collective petitions.<sup>27</sup> Chinese NGOs have also benefited from the development of Internet, as it enabled them to gain public support and make a greater impact.<sup>28</sup> Moreover, commentators also noticed that netizens’ criticism online had diminished the state’s ability to monopolise public agendas. For fear of ‘mass Internet incidents,’ the Government were pressed to re-shape their policy preferences according to the public attitudes expressed on the Internet.<sup>29</sup> All of these studies seem to suggest that the increase in number of Chinese netizens and their activism online are contributing to the democratisation of this authoritarian regime, although this transition is gradual.

However, other commentators have expressed contrary opinions. Zheng and Wu argue that online actions of Chinese netizens led to the adaption of current government, resulting in a new strategy of ‘liberated authoritarianism.’<sup>30</sup> They admit that the Internet has opened a public space for Chinese netizens to discuss politics, express their opinions, and communicate with state authorities, however, they submit that the Internet did not change the unequal positions of government and citizens in the context of such communication. Relying on its superiority in information, technology and various resources, the state can stay in control of the online interaction between government and netizens. Mackinnon’s theory of ‘networked authoritarianism’ takes a similar standpoint.<sup>31</sup> She argues that the Internet gave Chinese netizens a greater sense of freedom and made them blind to the reality that the authoritarian government could easily control cyberspace through various technological measures. When necessary, the government could even shut down the Internet connection in a specific region and disabled online actions completely, as it once did in 2010.

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<sup>26</sup> H Zhang, *The financial stress of Xinlang does not harm the market of its Weibo service* (2012), available at: <http://stock.eastmoney.com/news/1437,20120523207387516.html>.

<sup>27</sup> G Yang, “Online activism” 2009 20(3) *Journal of Democracy* 33.

<sup>28</sup> G Yang, “Environmental NGOs and Institutional Dynamics in China” 2005 181 *The China Quarterly* 46 at 58.

<sup>29</sup> A Esarey and X Qiang, “Digital Communication and Political change in China” 2011 5 *International Journal of Communication* 298.

<sup>30</sup> Y Zheng and G Wu, “Information Technology, Public Space, and Collective Actions in China” 2005 38(5) *Comparative Political Studies* 507 at 512.

<sup>31</sup> R MacKinnon, “Networked Authoritarianism in China and Beyond”: Implications for global Internet freedom” 2010 Paper presented at *Liberation Technology in Authoritarian Regimes Conference*, Stanford University.

This article does not side itself with any party in the dispute between the ‘cyber-utopian’ and the ‘cyber-realist.’<sup>32</sup> Rather, it strikes at the heart of their disagreement: do the online actions of Chinese netizens play a constructive role in democratisation, or do they merely constitute a new form of populist movement and reinforce the authoritarian rule?

To answer this question, two criminal cases that have raised wide discussions online are analysed. It is not submitted that Chinese netizens are only interested in criminal justice issues. Instead, they pay equal attention, if not more, to the corruption and malfeasance of government officers, and the widening income gap in China.<sup>33</sup> However, as the penal populism theory suggests, the public’s attitude towards crime and punishment best reflects their opinions about the law, the judiciary, professional elites, and social justice. Traditionally, Chinese citizens have always relied on ‘authoritarian benevolence’ of political leaders to realise social justice.<sup>34</sup> They prefer petitions to lawsuits as the reliable channel to relieve their concerns.<sup>35</sup> In contemporary China, these cultural beliefs have become important obstacles to the rule of law and democracy. If netizens’ online actions do not change these entrenched perceptions, but only reinforce the interconnection between populism and authoritarian rule highlighted by Arendt, they can hardly be seen as pro-democracy. The following section explores the real impact of online actions by analysing Tang Hui and Lin Senhao’s cases.

### **C. TWO CASES: ON THE TWO SIDES OF DEATH PENALTY**

Both Tang Hui and Lin Senhao’s cases revolve around the death penalty. They are selected for two reasons. Firstly, there is no better example than the death penalty to illustrate the conflict between democratic criminal justice and local values in China. The death penalty, as a punishment that aims to eliminate the physical existence of offenders hence forever excluding them from the society, is completely incompatible with the inclusionary ideals of ‘democratic criminal justice.’<sup>36</sup> However, it is an inherent characteristic of authoritarianism, because, by relying on populist punitiveness, the death penalty justifies the authoritarian government’s power to inflict extreme

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<sup>32</sup> J Sullivan, “China’s Weibo: Is faster different?” 2014 16(1) *New Media & Society* 24 at 25.

<sup>33</sup> *Ibid.* at 31.

<sup>34</sup> AJ Nathan, “Chinese Democracy in 1989: Continuity and Change” 1989 *Problems of Communism* 16 at 18.

<sup>35</sup> CF Minzner, “China’s Turning against Law” 2011 59 *The American Journal of Comparative Law* 935 at 938.

<sup>36</sup> Lacey, *Prisoners’ Dilemma* (n 9) 13. She explained that inclusionary ideals did not only derive from liberalism. Instead, exclusionary penal policies could negate democratic membership and entitlements of offenders. In this sense, inclusionary ideals were an integral part of democratic criminal justice. Death penalty is an extreme example of her argument.

violence on social members. Contrasting the conflicting values concerned in discussion on the death penalty can highlight whether online actions are leading to more mature governance in China. Secondly, online campaigns raised by Chinese netizens played an important role in both Tang and Lin's cases. The public outcry for perceived injustice in these cases had significant ramifications. The contending forces underlying these online actions are far more complicated than the 'cyber-realist' and 'cyber-utopian' literature suggest. Therefore, the two cases are ideal for the purpose of this study.

### **(1) The Tang Hui Incident**

In October 2006, Mrs Tang's ten-year-old daughter L ran away from home to be with her male friend Zhou Junhui, with whom she had previously had consensual sex.<sup>37</sup> Zhou introduced L to work in a nightclub, which was also an under-cover brothel. Owners of the brothel, Qin Xing and Chen Gang, introduced L to clients and shared the proceeds of her prostitution with Zhou. This situation continued until December 2006, and L saw more than 100 clients. During this period, L was allowed to go out with co-workers and play in near-by cybercafés. She did not try to contact her parents, who lived in the same city, or the police. Qin, Chen, and Zhou did not inflict violence on L other than one incidence of slapping her. On 30 December 2006, Mrs Tang and two male relatives found L and took her away from the brothel. She was later diagnosed with post-traumatic stress disorder and various sexually transmitted diseases.<sup>38</sup>

The police filed L's case six days later. Qin, Chen, Zhou and three clients who allegedly raped L during a 'transaction' were identified as suspects. The first instance trial took place on 6 June 2008. Before trial, Mrs Tang kneeled before the Municipal Prosecution Department of Yangzhou for eighteen hours, pleading for harsh punishment. The prosecution department was forced to change prosecutor and amend indictments. During trial, the Intermediate People's Court of Yangzhou found the clients guilty of rape.<sup>39</sup> One of them was sentenced to life imprisonment, and the other two were given sixteen years' and fifteen years' prison sentences respectively. Qin and Chen, the brothel owners, were convicted of organising prostitution and forcing others to

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<sup>37</sup> Sex with females under the age of fourteen constitutes rape in Chinese criminal law (Article 236), if the male partner knows or is reasonably believed to know that the girl is under fourteen. The crime of rape carries a sentence ranging from three years' imprisonment to death penalty.

<sup>38</sup> Facts are based on the verdict released by the High People's Court of Hunan Province after the final trial, available at: [http://www.court.gov.cn/zgcpwsw/hun/xs/201409/t20140905\\_2831287.htm](http://www.court.gov.cn/zgcpwsw/hun/xs/201409/t20140905_2831287.htm), and the published interview with the Supreme People's Court judge, available at: [http://china.cnr.cn/gdgg/201406/t20140612\\_515656387.shtml](http://china.cnr.cn/gdgg/201406/t20140612_515656387.shtml).

<sup>39</sup> One client, who was underage at that time, fled. He later got a fifteen-year prison sentence.



prostitute, and were sentenced to the death penalty and life imprisonment respectively. Zhou was found guilty of rape and forcing others to prostitute. He was sentenced to death without having had legal representation during the trial. This violation of procedural justice<sup>40</sup> was discovered by the High People's Court of Hunan Province, and the case was sent back for re-trial. The intermediate court affirmed the previous sentence during re-trial. This time Mrs Tang occupied the presiding judge's office and stayed there for eighteen days, demanding the death penalty for all six offenders. The court refused.<sup>41</sup>

Mrs Tang did not stop petitioning higher-level authorities. She also began to contact journalists and posted information online to gain wider attention.<sup>42</sup> Meanwhile, the offenders appealed, and the case was sent back by the High Court for the second re-trial. The Intermediate Court increased original the prison sentences received two of the clients to life imprisonment.<sup>43</sup> However, this decision violated procedural law and was invalidated by the High Court.<sup>44</sup> Finally, in June 2012, the High People's Court of Hunan Province held a second instance hearing for the case, and they affirmed the original sentences passed in the first instance trial.<sup>45</sup> According to Chinese law, this should be the final decision,<sup>46</sup> but the two death penalty sentences had to be submitted to the Supreme People's Court for approval.<sup>47</sup>

Nonetheless, Mrs Tang's petition continued and she kneeled before the Provincial Government of Hunan Province, demanding death for all of the offenders, including a client who was underage at the time of crime. This time she was sent to a labour camp by the Reform-through-labour Committee of Yongzhou.<sup>48</sup> This decision resulted in online campaigns; netizens viewed her as a brave mother seeking justice for her abused daughter.<sup>49</sup>

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<sup>40</sup> Article 34 of the Criminal Procedural Law of China stipulates that offenders who may receive the death penalty or life imprisonment must have a defence lawyer representing him or her. If he or she cannot afford the costs, the court should appoint a lawyer.

<sup>41</sup> Facts are based on a report published on the government's official site Xinhua.net, "Tang Hui has won, but does the rule of law win as well", available at: [http://news.xinhuanet.com/legal/2013-08/01/c\\_116778563\\_2.htm](http://news.xinhuanet.com/legal/2013-08/01/c_116778563_2.htm).

<sup>42</sup> Facts are based on a report published by a mainstream media group in China, Southern Weekly. See Chai huiqun and Shaoke, "What makes Tang Hui's Success", available at: <http://www.infzm.com/content/93030>.

<sup>43</sup> (n 41).

<sup>44</sup> Article 226 of the Criminal Procedural Law of China stipulates that courts should not punish offenders with harsher sentences for appealing.

<sup>45</sup> (n 41).

<sup>46</sup> Article 10 of the Criminal Procedural Law of China.

<sup>47</sup> Article 239 of the Criminal Procedural Law of China.

<sup>48</sup> M Moore, "Chinese mother sent to a labour camp for complaining of daughter's rape 'utterly broken by the system'" (16 July 2013) available at: <http://www.telegraph.co.uk/news/worldnews/asia/china/10182631/Chinese-mother-sent-to-a-labour-camp-for-complaining-of-daughters-rape-utterly-broken-by-the-system.html>.

<sup>49</sup> Ibid.

Tang's story was the subject of over two million posts on Weibo.<sup>50</sup> As a result of the public outcry, she was released from the labour camp within a week. She sued the government for illegally detaining her and won the lawsuit.<sup>51</sup> Microbloggers sympathised with Tang and her daughter, criticised the labour camp system, and demanded formal apologies from government officers who criminalised Tang.<sup>52</sup> Meanwhile, major websites began to publish stories asserting that "judicial corruption is staggering"<sup>53</sup> and that "policemen conspired with judges to get defendants lenient sentences."<sup>54</sup> Outraged netizens also demanded that all of the clients who engaged in sexual relations with L should be punished.<sup>55</sup>

Notwithstanding the pressure, the Supreme People's Court decided that the seriousness of Qin and Zhou's criminal acts did not merit the death penalty. The case was returned to the High Court of Hunan Province for re-trial. In 2014, the High Court reduced the two death penalty sentences to life imprisonment, concluding eight years of legal proceedings.<sup>56</sup> Meanwhile, online commentators began to change sides as more details about Tang's case were exposed. Influential microbloggers questioned the eventual destination and purpose of the money Tang received from donors. Some microbloggers admitted that they had been 'brainwashed' by emotive comments online. They also suggested that various ill-intentioned 'rights activists' had deliberately spread fabricated stories about Tang's case.<sup>57</sup>

Interest in Tang's case is now 'cooling off.' A more controversial case has dominated Chinese cyberspace since late 2013.

## (2) Lin Senhao's Case

Lin Senhao and Huang Yang, the victim, were two medical students of Fudan University in Shanghai. Lin grew jealous of his roommate Huang's academic performance. The animosity

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<sup>50</sup> A Wu, "Case of Tang Hui, A Petitioning Chinese Mother, Highlights Labor Camp System" available at: <http://www.thepochothimes.com/n3/151035-case-of-tang-hui-a-petitioning-chinese-mother-highlights-labor-camp-system/>.

<sup>51</sup> Moore (n 48).

<sup>52</sup> BBC, "China court compensates labour camp mother Tang Hui", available at: <http://www.bbc.co.uk/news/world-asia-china-23311391>.

<sup>53</sup> The People, "Details in the Yongzhou prostitution case", available at: <http://edu.people.com.cn/n/2012/0807/c1053-18683212.html>.

<sup>54</sup> Wangyi, "Five questions about the Yongzhou prostitution case", available at: [http://news.163.com/12/0807/13/88AE6BFH00011229\\_all.html](http://news.163.com/12/0807/13/88AE6BFH00011229_all.html).

<sup>55</sup> Tencent, "What about the other clients", available at: <http://news.qq.com/a/20120815/003026.htm>.

<sup>56</sup> (n 38).

<sup>57</sup> W Digest, "The collapse of Tang's image as the great mother", available at: <http://star.news.sohu.com/s2013/wbzi24/>.

peaked when Huang received a Ph.D. offer, whereas Lin was forced to abandon his plans for doctoral study due to family and financial issues. On 31 March 2013, Lin stole a lethal chemical, NDMA, with which he had familiarised himself during his studies, from a university laboratory. He slipped it into a water dispenser shared by the students. The next day, Huang drank the poisoned water and was sent to hospital immediately. Police questioned Lin twice as a key suspect but he stayed silent until he was formally arrested on 11 April. However, Lin's confession did not save Huang's life. He died in hospital five days later.<sup>58</sup> In February 2014 the first instance trial found Lin guilty of murder and sentenced him to the death penalty. Lin appealed to the High Court of Shanghai.<sup>59</sup>

By the time of writing, Lin's case has got over ten million hits on Weibo. In particular, a Fudan professor's action fuelled online discussions about Lin's case. Professor Xie Baisan collected 177 signatures from students for a petition letter addressed to the High Court of Shanghai, pleading with the court to spare Lin's life. Baisan explained in his blog that life was precious and that China should abolish the death penalty in the interests of the country's civilisation.<sup>60</sup> He also stressed that the petition was for neither fame nor money, but solely motivated by the compassion they felt for Lin.

However, his explanation did not eliminate the public's cynicism and suspicion. There were concerns that the professor may have been bribed by the defendant's lawyer, and that he manipulated students to join the petition.<sup>61</sup> Later investigation proved that neither claim was true.<sup>62</sup> Nonetheless, truth did not stop topics such as 'Fudan University Please Fire Xie Baisan' appearing on Weibo and getting tens of thousands of hits. Baisan's own post about the death penalty received 3672 comments, which were dominated by insults and invectives directed at him and his family. More moderate microbloggers asked him to stop challenging the bottom line of public conscience. The second instance trial started as online campaigns went on. The defendant's lawyer introduced new evidence, arguing that the victim's death may have been caused by the hepatitis B virus instead of the poisoned water. This was also one of the early diagnoses made by doctors after

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<sup>58</sup> Facts based on the verdict released by the Second Intermediate People's Court of Shanghai after the first-instance trial, available at: <http://shanghai.kankanews.com/c/2014-02-18/0014245147.shtml>.

<sup>59</sup> Ibid.

<sup>60</sup> X Baisan, "About the 177 students' petition letter", available at: <http://xiebaisan.blog.cnstock.com/2697137.html>.

<sup>61</sup> Shanghai City News, "Professor admits helping death sentence petition", available at: <http://www.shanghai.gov.cn/shanghai/node27118/node27818/u22ai76130.html>.

<sup>62</sup> Y Piao, "177 students and their petition for Lin Senhao", available at: <http://www.infzm.com/content/100662>.

Huang was sent to hospital. Lin's lawyer stressed that the NDMA used by Lin was produced by an unlicensed factory, stored in an unfavourable environment for two years, and might have expired. An expert witness testified, suggesting that it was difficult to confirm the causal relationship between Huang's death and the poisoning by Lin.<sup>63</sup> However, Huang's health record was lost by the university, and it was uncertain whether he had contracted the hepatitis B virus before the crime. Moreover, the prosecutor refused to provide the mass spectrum of the substances collected from the water dispenser, which meant that a crucial chemical analysis was missing from the chain of evidence. Nonetheless, the verdict on 8 January 2015 of the High Court affirmed the death sentence.<sup>64</sup> The sentence is now awaiting the final approval by the Supreme People's Court.

#### D. DISCUSSION

The discussion approaches Tang and Lin's cases from two perspectives. Firstly, it examines whether online actions raised by them have promoted the deeply held values of contemporary democracies, for example, the spirit of equality and the rights consciousness among Chinese netizens. Secondly, it analyses whether online actions have made a qualitative difference in China by undoing the interlocking relationship between populism and authoritarian rule, or are they merely populism movements taking another form, therefore only reinforcing the current government.

##### (1) Equality and the Rights of Others

Does democracy mean that the majority can legitimately determine the fate of the minority, relying on its sheer advantage in number? The answer is definitely 'no' if one reflects on famous authoritarian regimes in history, for example Nazi Germany and China's own Cultural Revolution era. When elaborating on the relationship between democracy and bureaucracy, Weber stressed that the main achievement of mass democracy was *not* majoritarian representation, but the concept of 'equality before the law.'<sup>65</sup> According to him, the entrenchment of this concept ensured that modern bureaucracy only operated according to abstract regulations and laws, rather than the personal authority of executive leaders. In this sense, bureaucratization and democratization were

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<sup>63</sup> W Hongyi, "Second trial hears fresh details on student's death", available at: [http://www.chinadaily.com.cn/china/2014-12/09/content\\_19046208.htm](http://www.chinadaily.com.cn/china/2014-12/09/content_19046208.htm).

<sup>64</sup> Facts based on the live report on the second-instance trial: H Wu and H Tang, "Second trial result is out and the death penalty is affirmed", available at: <http://shanghai.kankanews.com/c/2014-12-08/0016043527.shtml>.

<sup>65</sup> Weber, *From Max Weber* (n 18) 224-226.

parallel phenomena, and the rule of law was gradually established during the two intertwined developments.

However, the concept of ‘equality before the law’ is intriguing. The idea of citizens’ rights against the state is embodied in the concept, but it also contains the rationale that citizens should respect each other’s rights as the equal subject before the law. Cyber-utopia writers are correct in arguing that online actions in China can enable citizens to assert their rights against the state. Netizens’ support for Tang after she was imprisoned and the demand for a formal apology from the local government can be interpreted as a sign of rising rights consciousness. However, from another perspective, compassion for the misery of those living in poverty and cynicism towards government agencies are *not* new in China. Rather, they have always existed, as ‘liberated elements’ in an authoritarian regime,<sup>66</sup> and populist sentiments shared by the ‘politically indifferent’ majority.<sup>67</sup>

The majority’s indifference stands out in the context of the rights of ‘others’. For them, the ‘others’ can be offenders or social elites who dare to challenge populist opinions. In sharp contrast to their sympathy to Tang and Huang, Chinese netizens showed total indifference, if not utter cruelty, to people who were classified as ‘others.’ For example, the populist pressure caused by Tang’s repetitive petitions had forced the local court to violate due procedure twice. It is stipulated in Chinese law that a defendant facing the death penalty has the right to a counsellor, and appealing offenders are exempted from the risk of being given harsher sentences, for the sake of guaranteeing their rights under procedural justice. However, for most netizens who insisted on justice for Tang and her daughter, these rights deserved no protection. In Lin’s case, the prejudice was amplified. The offender Lin as well as those who expressed different opinions from the punitive majority were attacked. Relying on social networking sites such as Weibo, Chinese netizens crushed those holding ‘minority’ opinions without any respect for their equal rights to free speech.<sup>68</sup> From this perspective, Green is correct in arguing that ‘new mediascapes’ are not helping the public to reach informed judgements.<sup>69</sup> On the contrary, it only makes the domination of the majority easier, and leaves the minority in more vulnerable positions.

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<sup>66</sup> Zheng and Wu (n 30) at 512.

<sup>67</sup> Arendt, *Origins* (n 19) 414.

<sup>68</sup> Article 35 of the Chinese Constitution Law stipulates that citizens have the right to free speech.

<sup>69</sup> Green (n 15) at 532.

This consequence can be particularly detrimental to China's democratisation, because the supporters of democracy, such as intellectuals and students, have always been in the minority.<sup>70</sup> For the majority of Chinese citizens, benevolent authoritarian leaders are far more trustworthy than courts, laws, rights activists, and professional elites. Conspiracy theories spread over the Internet only reinforce these populist beliefs. In Tang's case, online commentators questioned the integrity of judges, suspecting that they had conspired with the police to give defendants lenient sentences. When the rumours were proved to be untrue, they pointed at rights activists, arguing that they had manipulated Tang. Likewise, in Lin's case, netizens believed that Professor Baisan must have been bribed by the defendant's lawyer. Baisan's arguments about humanitarianism and civilisation did not convince them at all. Nor did the pure compassion a teacher felt for his student touch their hearts. They inflicted devastating verbal abuse on a person solely because he did not agree with them, just as an authoritarian government would crush a protestor solely because he challenged its righteousness. In this sense, Arendt's argument that populism and authoritarian rule are interlocked phenomena certainly finds proof in the Chinese context. Moreover, if judges, rights activists, lawyers, and intellectuals are all suspect, as Chinese netizens tend to believe, the only trustworthy element left is authoritarian leaders. The following discussion elaborates on how this populist belief has been utilised by the government to strengthen control over the judiciary.

## **(2) Tightened Control over the Judiciary**

Chinese courts have always been subject to political control. Interviews with Chinese judges and prosecutors reveal that they are given strict performance indicators as to how many non-custodial sentences could be passed per year, how many appeals were allowed, and how many verdicts could be overturned in second instance trials.<sup>71</sup> These qualitative findings are echoed by national statistics shown below:<sup>72</sup>

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<sup>70</sup> Nathan (n 34) at 17.

<sup>71</sup> Based on the fieldwork the author carried out for her Ph.D. project "Chinese Legal Reform and Social Control: A Case Study of Community Sanctions and Measures".

<sup>72</sup> The following three charts are compiled by the author based on statistics released by the China Law Society's open publication *Law Yearbook of China* series. The series is available online at: <http://tongji.cnki.net/kns55/navi/HomePage.aspx?id=N2011120151&name=YZGFL&floor=1>.

Chart One Criminal Sentencing in China (2003 - 2010)

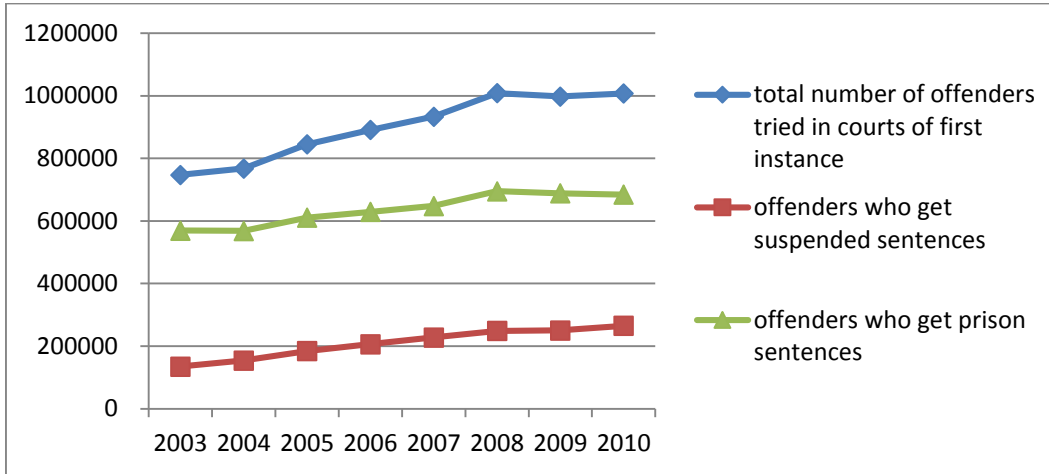


Chart Two First and Second Instance Criminal Cases (2003 - 2010)

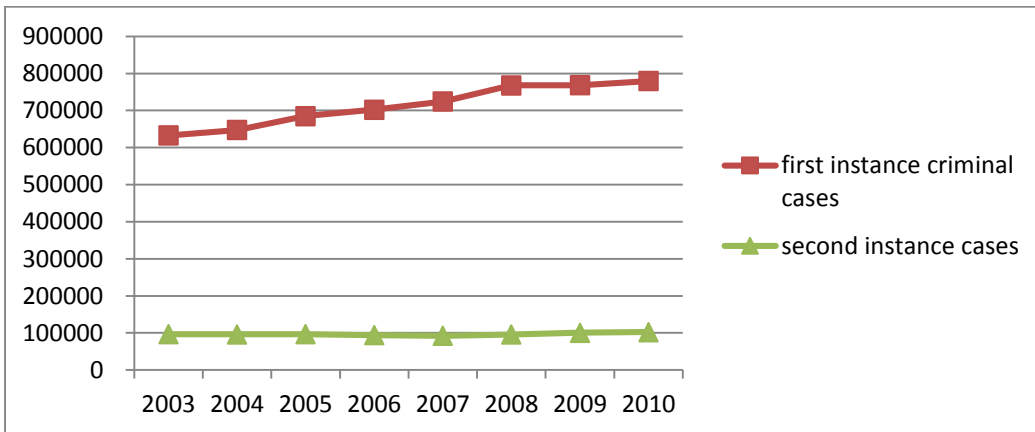
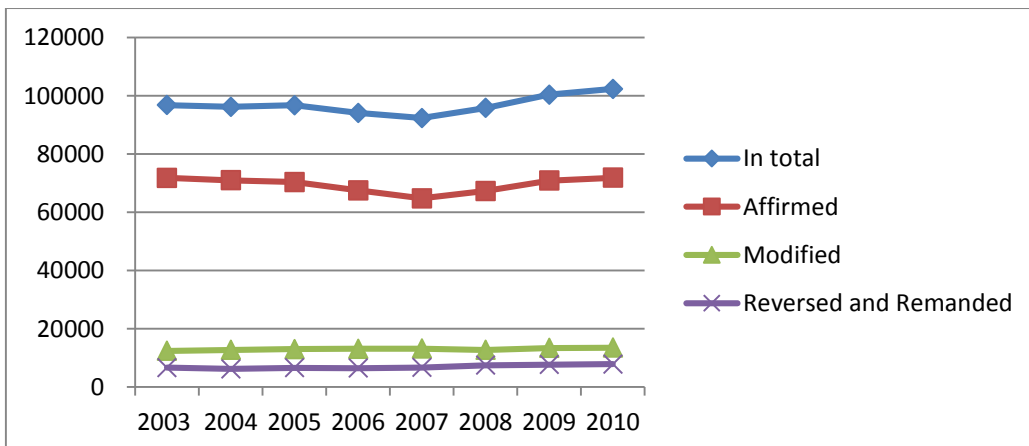


Chart Three Outcomes of Second Instance Cases (2003~2010)



According to Chart One, although the total number of first instance criminal trials increased between 2003 and 2010, the ratio of non-custodial sentences to prison sentences remained stable. Meanwhile, the number of appeal cases was unchanging, as Chart Two shows. Moreover, Chart Three further illustrates that the outcome of appeals was strictly controlled according to determined proportions.

These performance indicators restricted Chinese judges' discretion and undermined their professionalism. Moreover, such control has been strengthened as social instability grew in China. Journalists' report suggests that there are over 180,000 petitions per year.<sup>73</sup> In 2009, the Supreme People's Court explicitly required courts and judges to be more efficient in solving collective actions both online and offline.<sup>74</sup> The reinforced control over the judiciary leads to the 'petitionisation'<sup>75</sup> of court work, which means that judges have to prioritise the task of preventing petitions over making judgements according to the law. This is exactly what has happened in Tang's case. The local court violated criminal procedural law twice to cope with the populist pressure caused by Tang's petition. In practice, these reactions tend to undermine the credibility of court even further, and lead to more petitions. For example, Tang's neighbours told journalists that the lesson they learnt from her was that petitions work. Moreover, after the second instance trial, the families of the offenders in L's case also began to petition.<sup>76</sup> It is uncertain whether their petitions have influenced the Supreme People's Court's refusal to approve the death sentences. However, it is certain that a petition-trap is taking shape in China. It tends to undermine the fragile foundation of rule of law, but reinforce the interdependency between populist actions and authoritarian rule. In this sense, Chinese netizens' contribution to authoritarian resilience far exceeds their impact on democratisation.

## E. CONCLUSION

Online actions raised by Chinese netizens have been seen as a sign of democratisation. However, in-depth analysis suggests that instead of democratisation, these actions are more likely to result in a phenomenon known as penal populism. This phenomenon, which has threatened democratic

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<sup>73</sup> T Orlik, "Unrest Grows as Economy Blooms", available at: <http://www.wsj.com/articles/SB10001424053111903703604576587070600504108>.

<sup>74</sup> The Supreme People's Court, "The People's Courts should be more active in addressing people's anxieties", available at: [http://news.xinhuanet.com/politics/2009-09/10/content\\_12031656.htm](http://news.xinhuanet.com/politics/2009-09/10/content_12031656.htm).

<sup>75</sup> S Trevaskes, E Nessossi, F Sapio and S Biddulph, "Stability and Law" in S Trevaskes, E Nessossi, F Sapio and S Biddulph (eds), *The Politics of Law and Stability in China* at 1-17.

<sup>76</sup> Tencent, "Families of offenders in Tang's case took her track", available at: <http://news.qq.com/a/20130801/016799.htm>.



governance in western countries, tends to reinforce the authoritarian rule in China. It is true that online populist movements can occasionally force the government to react. However, due to the quick flow of information on the Internet, these short-lived 'hot topics' can hardly lead to sustainable development towards democracy. On the contrary, they stimulate the government to tighten control over the judiciary. Consequently, judicial independence and the 'rule of law' become more distant goals. Such a result could hardly be described as pro-democracy, because without the judiciary as an active and independent social force, the accountability of the Government to its citizens will remain an unsolved issue in China. From this perspective, the long-term losses incurred by online penal populism significantly outweighs its short-term impact in individual cases. Moreover, online protests lacking a full perspective on a particular situation, and driven by individual cases, can stimulate anti-intellectualism and conspiracy theories. These populist sentiments, concurring with the nationalistic and collectivistic values rooted in the Chinese society, tend to strengthen the authoritarian rule in China. In conclusion, the article argues that in comparison to online petitions, legal and political reforms are more important the democratisation of China.

# Artificial Legal Intelligence on the Internet: The Next Approach to Enforcing the Law Online

*Jesus Manuel Niebla Zatarain\**

## A. INTRODUCTION

One of the most important creations in human history is the Internet. Almost every single aspect of everyday life is now related to it. However, this network also has enabled unethical and illegal activities. Among the most notorious cases is copyright infringement. This issue has become a considerable concern for authors, musicians and copyright holders. Traditional forms of law enforcement have been unable to deal with this problem. As a response to this, an approach based on the concept of “law compliance through code” was introduced in the form of Digital Rights Management (DRM) but it failed, due to the lack of clarity on what a user can or cannot do with a file that has been legally acquired. To solve this, it is proposed that the implementation of tools based on artificial intelligence (AI) should be used as a technological approach that will provide DRM with the capacity of reasoning explicitly about the law.

## B. INTERNET AND SOCIETY: BUILDING A TECHNOLOGICAL RELATION

The Internet is regarded as the human invention that has had the greatest impact in human society in the previous century: it offers lots of possible uses, such as electronic mail services, electronic transactions, educational sessions and even government services.<sup>1</sup> Slowly but steady, this digital service was adopted by several industries. Instantly the market expanded, and the number of possible clients grew exponentially with the number of opportunities.<sup>2</sup> Suddenly, providers could not only sell their products through physical devices, but in digital forms as well, which was a new and almost cost-free way to reach potential clients. The Internet was received as not only

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<sup>1</sup> T Baiget and A Keefer, *How It All Began: A Brief History of the Internet* (2001) 90-124.

<sup>2</sup> M Lemley and R Reese, “Reducing Digital Copyright Infringement Without Restricting Innovation” 2004 *Stan L Rev* 1345 at 1356.

innovative technology but also a life changing tool. However, regardless the initial impact, it became evident during the first years that the use of these technologies lacked a proper approach to deal with un-ethical aspects, such as the proliferation of copyright violations and cybercrime. Several industries responded to this by implementing security strategies and by improving their business schemes. This allowed them to protect their transactions and their clients; however, the industries related to copyright such as movies, software and music failed to do so and they soon became a target for illegal distribution<sup>3</sup>. This unethical aspect of the Internet has resulted in a very profitable business, capable of producing billions of dollars in illegal revenues.<sup>4</sup>

### **C. INTERNET AND THE LAW: THE EFFECT ON THE INDUSTRY**

With the arrival of the Internet, it became evident that using new technologies to produce copyrighted material resulted in negligible costs, this made illegal distribution a very attractive prospect for piracy distributors.<sup>5</sup> After the potential for copyright infringement became apparent, several industries started to demand legal action against the increasing numbers of downloads of copyrighted material. Numerous approaches were analysed in order to allow creators and rights holders to regain control through online copyright enforcement.<sup>6</sup> On one hand, there are those who claimed that in order to find a proper way to deal with piracy, the first step should be to understand as much as possible about the source from which the piracy stemmed. In the following lines, the implementation of technological devices to protect copyrighted material will be described.

### **D. THE ARRIVAL OF DRM: THE INDUSTRY STRIKES BACK**

Although there is not a general definition for DRM the one proposed by Becker will be taken “Digital rights management (DRM) is a type of server software developed to enable secure distribution — and perhaps more importantly, to disable illegal distribution — of paid content over the Web”.<sup>7</sup> It is designed to prevent consumers from using digital technology in ways that do not

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<sup>3</sup> D Lichtman and W Landes “Indirect liability for copyright infringement: an economic perspective” Harvard. Journal of Law & Technology 16 (2002) 258.

<sup>4</sup> See further: Global Intellectual Property Centre, “Digital piracy costs global economy \$75 billion” (8 January 2013), available at: <http://www.theglobalipcenter.com/digital-piracy/>.

<sup>5</sup> RK Sinha, MK Machado and C Sellman, “Don't think twice, it's all right: Music piracy and pricing in a DRM-free environment” (2010) Journal of Marketing, 74(2) at 40-54.

<sup>6</sup> D Kay “OCI Tracker Benchmark Study” Q3 2012I Kentar Media Custom (2012) at 12.

<sup>7</sup> E Becker (ed), *Digital rights management: technological, economic, legal and political aspects* (vol 2770) Springer Science & Business Media (2003) at 3.

correspond to the business agenda of a content provider or device manufacturer.<sup>8</sup> The expectations of these electronic devices was very high: Samuelson stated “Copyright industries are hoping that DRM technologies will prevent infringement of commercially valuable digital content, such as music and movies”,<sup>9</sup> and George and Chadnak addressing this situation from the perspective of the music industry stated that, “typical usage rights focus on the amount of computers the songs can be played on; the amount of burns allowed to a CD, and the number of times the songs can be transferred to digital music players.”<sup>10</sup> For consumers as well as for producers, the implementation of DRM technology provided several advantages, notably that the material that would be distributed would be without viruses or any other security threat.<sup>11</sup> From the perspective of the authors, it allowed them for the first time to have an actual counter measure against illegal digital copies and thus, copyright infringement.<sup>12</sup> As a result of this, providers started to offer improved versions of an already existing product a phenomenon called “versioning”<sup>13</sup>. This then paved the way for the first attempt to create an *ex ante* legal device through online development. The general idea of DRM consisted in technological tools that combine both software and hardware, in order to prevent illegal distribution of copyrighted material.

As Lanella and Higgs mention, DRM’s work through the following levels:<sup>14</sup>

- *Establishing a copyright for a piece of content*: When a person agrees to acquire protected material, it becomes the subject of particular rights and obligations: a person would be entitled to use the material on any of his personal devices, but he is not allowed to distribute.

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<sup>8</sup> Free Software Federation Europe, “DRM The strange, broken world of Digital Rights Management” European Digital Rights Papers (2004) at 2.

<sup>9</sup> P Samuelson “DRM {and, or, vs.} the law”, Communications of the ACM, 46(4), (2003) at 1.

<sup>10</sup> C George and N Chandak *Issues and Challenges in Securing Interoperability of DRM Systems in the Digital Music Market*. International Review of Law Computers & Technology, vol 20, no 3 (2006) at 273.

<sup>11</sup> N Zingales, “Digital Copyright, “fair access” and the Problem of DRM Misuse” Boston College Intellectual Property & Technology Forum (2012) at 5.

<sup>12</sup> M Peitz and P Waelbroeck, “Piracy of Digital Products: a Critical Review of the Theoretical Literature” Information Economics and Policy vol 18 (2006) at 449–476.

<sup>13</sup> C Shapiro and HR Varian, “Versioning: The Smart Way to Sell Information” (1998) Harvard Bus. Rev 76:5 106-114. An example of this when a software producers improves an already existing operative system and he advertises as basically a new version, p.e. operative system 6, replaces operative system 5. The sequence of the numbers will take the level of enhancing, if the number is small, p. e. from 8.0 to 8.1, it means minimal changes, but if it is like in the first example, this represents major changes in the product.

<sup>14</sup> R Lannella and P Higgs, “Driving Content Management with Digital Rights Management” IPR Systems Whitepaper Series (2003) at 3-4.

- *Managing distribution of that copyrighted material.* Most of the time, a customer gets limited distribution allowance, and through this he can only enjoy that material for his/her personal use, but it is prohibited for him to share it or distribute it in any form.
- *Controlling what a consumer can do.* It is important to keep the original state of the acquired material and to know what the user is allowed to do with it.
- *Ensure content authenticity.* It is important to mention that DRMs have also the task of providing original material to customers; this also functions as a security provision for clients.

### **E. THE DRM SETBACK**

One of the biggest issues DRM has to overcome is interoperability, which can be defined contextually as follows:

“In the context of DRM the term interoperability encompasses consistent functioning of the overall system including security and access, such that the system is able *mutually to use* information in the form of usage rules, content and technical measures “in all the ways in which they are intended to function.”<sup>15</sup>

This applies even when content from different interoperable services is used and when such content is used on different interoperable devices. For the consumer, interoperability means he or she can choose different devices and use them with different services. For the content producer or content aggregator, interoperability means he or she is not ‘locked in’ to one distribution channel that acts like a gatekeeper to the marketplace. For the device and Information and Communication Technologies (ICT) developer, interoperability enables his products to be used with different content services, and prevents a specific DRM technology from becoming a gatekeeper to development. Related to online music distribution, the issues of DRMs interoperability were limited to: a number of devices to play the music file; the numbers of times it can be burned to a CD; and also the impossibility to use it in a portable device.<sup>16</sup>

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<sup>15</sup> High Level Group on Digital Rights Management, “Final Report”, March-July 2004 at 9-10.

<sup>16</sup> U Gasser and J Palfrey, *DRM-protected Music Interoperability and e-Innovation* Berkman Publication Series (2007) 1-4.

A key element for the DRM approach to work properly is interoperability: by achieving this, a device can acknowledge as compliant two different files coming from different providers. A general approach of licensing appears as the core element to resolve this situation.<sup>17</sup> This is an important aspect that needs to be taken into consideration in order to build devices that are law-compliant.<sup>18</sup> Another important element is the general approach that DRM technology should have in order to avoid possible claims related to unwanted operative performance. In the following section the first attempts to implement the law on the Internet will be described.

## **F. COPYRIGHT ENFORCEMENT ONLINE: THE LAW ENGAGES THE INTERNET**

Copyright infringement became the most common illegal conduct that took place on the Internet, and right holders started to report that they were facing enormous losses, for example the music industry reported losses as high as £180 million.<sup>19</sup> Some sections of the industry even stated that they may have to reduce the number of jobs they produced as a direct effect of piracy this is included in a 2014 study by IFPI that states that 26% of the users of the Internet around the world regularly access unlicensed sites.<sup>20</sup> As a consequence of this, the industry started traditional legal procedures with the aim of producing an impact that would be strong enough to force users to not engage in such conduct.<sup>21</sup>

At the international level, copyright is protected by several treaties,<sup>22</sup> which have been implemented in local jurisdictions such as the UK<sup>23</sup> and in the United States.<sup>24</sup> According to these statutes, civil<sup>25</sup> and criminal<sup>26</sup> liability are possible, even though the latter goes beyond the control of the rights-holder. This provided two possible consequences in the case of illegal distribution:

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<sup>17</sup> S Arbanowski and JC Simmons, “Interoperability, Digital Rights Management and the Web”, Microsoft and Fraunhofer FOKUS (2013) at 3.

<sup>18</sup> SH Kwok, “Digital Rights Management for the Online Music Business” ACM SIGecom Exchanges vol 3 no 3 (2002) at 18-19.

<sup>19</sup> IFPI, *Digital Music Report 2009: New Business Models for a Changing Environment* (2009) 5.

<sup>20</sup> *International Federation of the Phonographic Industry (IFPI), Digital Music Report 2014: Lighting Up new Markets* (2014) at 40.

<sup>21</sup> M Shatzkin, “DRM may not prevent piracy, but it might still protect sales” (2011), available at: <http://www.idealogy.com/blog/drm-may-not-prevent-piracy-but-it-might-still-protect-sales/>.

<sup>22</sup> Among these there are: Berne Convention for the Protection of Literary and Artistic Works; Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); WIPO Copyright Treaty.

<sup>23</sup> Copyright, Designs, and Patents Act 1988, Part I.

<sup>24</sup> Digital Millennium Copyright Act, Title I.

<sup>25</sup> UK Copyright, Designs, and Patents Act 1988 s 96; 17 US Code § 411 - Registration and civil infringement actions.

<sup>26</sup> UK Copyright, Designs, and Patents Act 1988 s 107; 18 US Code § 2319 - Criminal infringement related to copyright.

the first one being compensation for the harm caused and orders to stop further dissemination; the second being increased risk associated with this type of conduct. Strategies to deter future infringements are based on traditional conceptions of legal consequences of committing crimes, such as fines based on the number of downloads caused by the initial sharer but also, the possibility of time in prison<sup>27</sup> and educating the public of the legal consequences of illegal sharing.<sup>28</sup> These efforts were aimed at three different categories: services that disseminate those works; individuals involved directly in sharing such works; and those who facilitated the dissemination of those works. The impact of this legal litigation varied depending on the industry in which it is aimed and, in some cases, the law needed to be adapted to provide a better framework in which these types of disputes could be resolved<sup>29</sup>. The first target for litigation were those services that were distributing copyrighted material specifically music, the first major case was Napster in the US<sup>30</sup> this service provided infrastructure for its users to share musical material among them. After a highly publicised procedure, in which the service declared that they were not responsible for distribution of illegal material, since it was up to the user what would be shared, the court ordered the company to pay compensation to copyright holders, this first success was perceived as a starting point in controlling illegal distribution and was promptly imitated by other rights holders.<sup>31</sup>

Regardless of the apparent positive effect, in the long term this proved to be ineffective, as there was no reduction in the use of technology to distribute copyrighted material illegally. As a matter of fact this trend only evolved and made these services even more technically complex.<sup>32</sup> This forced rights-holders to redefine their legal strategy in order to obtain a lasting effect, and this led to a focus on users who upload the files to the Internet, rather than upon users that accessed them, in order to stop the supply chain of these works. The classic example of this is the approach

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<sup>27</sup> AM Polinsky, and S Shavell, “The Economic Theory of Public Enforcement of Law” (1999) National Bureau of Economic Research, no w6993 at 4; MA Lemley, and RA Reese, “Reducing Digital Copyright Infringement Without Restricting Innovation” (2004) 56 Stanford Law Review 1345 at 1345-1346; GS Becker, “Crime and Punishment: An Economic Approach” in G Becker and M Landes (eds), *Essays in the Economics of Crime and Punishment* (2002) at 134.

<sup>28</sup> KF Natividad, “Stepping It Up and Taking It to the Streets: Changing Civil and Criminal Copyright Enforcement Tactics” Berkeley Technology Law Journal vol 23 (2008) at 478.

<sup>29</sup> Some of these cases are: *MGM Studios, Inc. v Grokster, Ltd.* 545 U.S. 913 (2005) ; *In re Aimster Copyright Litigation* 334 F.3d 643, *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (with Corrigendum dated 22 September 2005) [2005] FCA 1242. Also see David Kravets, “File Sharing Lawsuits as a Crossroads, After 5 years of RIAA Litigation” Wired Blog (8 September 2008), available at: <http://www.wired.com/2008/09/proving-file-sh/>.

<sup>30</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001).

<sup>31</sup> *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (with Corrigendum dated 22 September 2005) [2005] FCA 1242.

<sup>32</sup> See, generally, N Anderson, *Darknets and the future of P2P investigators* (2009).

taken by Recording Industry Association of America (RIAA).<sup>33</sup> Instead of suing an undetermined number of users it narrowed them down to 35,000.<sup>34</sup> This had an immediate effect, illegal downloading is reduced in some cases by around two thirds<sup>35</sup> and also caused a wave of education among the users who feared the consequences that they might experience if they kept downloading copyrighted material.<sup>36</sup> However, this failed to achieve a long term detrimental effect, since it was virtually impossible to reach all of the users who were uploading material and, in some cases, these consumers were located in other jurisdictions such as Asia<sup>37</sup> or the Middle East.<sup>38</sup>

Technical difficulties also played a role in undermining the effect of these legal strategies. While IP identification is possible, Internet Service Providers (ISPs) offered a dynamic ID to users so that every time they went online<sup>39</sup> the infringer would have a new address. This means that in the long term it is very unlikely that right holders can identify those users that illegally upload and download content more frequently. Further, the method used to identify potential distributors was not accurate and generated a large number of false positives<sup>40</sup>. However, this approach had a deep educational impact as it has seen in the US arising the awareness of the possible consequences of distributing copyrighted material<sup>41</sup>.

Intermediaries (ISPs) also received legal attention. The objective was to force them to stop providing their services to customers who have engaged in illegal online copyright distribution.<sup>42</sup> Several cases based on this approach had a significant success during its early stage.<sup>43</sup> However, technical limitations played against the traditional legal approach; basically, every time a user was

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<sup>33</sup> For further information, see their homepage: <https://www.riaa.com/>.

<sup>34</sup> W Moseley, "A New (Old) Solution for Online Copyright Enforcement After Thomas and Tenenbaum" (2010) 25:1 Berkeley Technology Law Journal 311-346 at 331.

<sup>35</sup> S Bhattacharjee, RD Gopal, K Lertwachara and JR Marsden, "Impact of Legal Threats on Online Music Sharing Activity: An Analysis of Music Industry Legal Actions" 2006 49:1 Journal of Law and Economics 49:1 at. 99.

<sup>36</sup> CR La Roche, MA Flanigan and MB Marks, *Online Music Piracy: Are Lawsuits the Best Approach?* 2004 Journal of Business & Economics Research, 2(9) 1 at 5.

<sup>37</sup> J Leitner, Legal and Cultural Comparison of File-Sharing Disputes in Japan and the Republic of Korea and Implications for Future Cyber-Regulation A Columbia Journal Asian Law 22 1 (2008) at 8.

<sup>38</sup> J Carroll, "Intellectual property rights in the Middle East: A cultural perspective" Fordham Intellectual Property Media & Entertainment Law Journal 11 (2000) at 561.

<sup>39</sup> Y Xie, F Yu, K Achan, E Gillum, M Goldszmidt and T Wobber, *How dynamic are IP addresses?* (2007) 37:4 Computer Communication Review 301-312.

<sup>40</sup> AM Mateus, *Copyright Violation on the Internet: Extent and Approaches to Detection and Deterrence* (2011) 71.

<sup>41</sup> C Arthur for the Guardian, "Had a copyright letter from your ISP? Do tell..." (2008), available at: <http://www.theguardian.com/technology/blog/2008/jul/03/hadacopyrightletterfromyo>.

<sup>42</sup> Moseley (n 34) at 334.

<sup>43</sup> See, for example, *EMI Records Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch).



blocked due to copyright infringement, they migrated to another ISP, or used other distribution technologies.<sup>44</sup>

In an overall evaluation, the effect that these different approaches had was far from successful; it eventually made the situation worse for the right holders due to the economic effect that litigation had which meant that not only they need a full time law firm but also a technical team to investigate and identify possible infringement sites.<sup>45</sup> Moreover, it is highly unlikely that all infringers are able to pay. The only result that had a lasting effect as a result of legal action was that the general population seem to be more educated about the consequences of infringing copyright. However, education gain cannot justify the costs economic and reputational damage that this approach had.

### **G. GRADUATED RESPONSE: AN OPPORTUNITY APPROACH**

After the technological and the traditional legal approach failed to make a lasting effect to decrease the number of copyright infractions that take place online, a new approach was implemented, known as the “graduated response.”<sup>46</sup> This approach was aimed at addressing difficulties involved in scaling up legal action by offering the potential for enforcement that is both significantly cheaper and much easier to apply against a large number of infringers, this was achieved by a several measures aimed to leave the legal trial as the very last resource after a number of accusations, usually three, the individual can face the suspension or termination of their internet connection in addition to fines and other measures.<sup>47</sup> Another effect is the potential educational value, due to the fact that infringers are given several opportunities to change their behaviour before a legal process begins. Several countries decided to take this approach in order to deal with copyright infringement online; among those that have taken this method and adapted it to their own approach are the US,<sup>48</sup>

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<sup>44</sup> M Brinkmann, “Kickass Torrents, H33T, and Fenopy blocked in the UK” (2013), available at: <https://torrentfreak.com/uk-isps-start-blocking-kickasstorrents-h33t-and-fenopy-130321/>.

<sup>45</sup> D Lee for BBC News, “Court orders UK ISPs to block more piracy sites” (28 February) 2013, available at: <http://www.bbc.co.uk/news/technology-21601609>.

<sup>46</sup> N Suzor and F Brian, “The Legitimacy of Graduated Response Schemes in Copyright Law” 34:1 University of New South Wales Law Journal (2011) 1-40.

<sup>47</sup> A Bridy. “Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement” 89 Oregon Law Review (2010) 81-132.

<sup>48</sup> BBC News, “US internet ‘six strikes’ anti-piracy campaign begins” (26 February 2013), available at: <http://www.bbc.co.uk/news/technology-21591696>.

Ireland,<sup>49</sup> France,<sup>50</sup> New Zealand,<sup>51</sup> and South Korea.<sup>52</sup> France was among the first countries to implement it, as stated in the HADOPI scheme.<sup>53</sup> The impact was largely considered positive, with an increment on French music sales through iTunes of between 22.5% and 25%.<sup>54</sup> Sometime after the implementation of this scheme HADOPI reported that a significant number of users who had received a warning had changed their behaviour and decreased their consumption of infringing material.<sup>55</sup> Regardless of this initial success, several opinions started to emerge regarding the credibility of the reports made by HADOPI and, what was more worrying, the compatibility of this approach with due process. In regards to the latter point, there was concern related the collateral effect that it might have; the potential abuse that lies within this scheme, is that the process of detection identifies a device not a user failing in providing certainty about for due process and also shifts the burden of proof to the user.<sup>56</sup> The graduated approach also lacks a proper strategy to minimize false-positive identification of recurring infringers, as the software used to follow these activities usually produces the false-positives mentioned previously;<sup>57</sup> added to this it is only the device that is identified, leaving the possibility of not being able to identify the user who actually performed the activity. Finally, there was the issue of proportionality: this was observed in a United Nations Rapporteur in which was argued that disconnection is a disproportionate response and therefore a violation of International Covenant on Civil and Political Rights.<sup>58</sup> The most prominent example is that on the 9 of July 2013, the French Ministry of Culture

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<sup>49</sup> EIRCOM, *Statement on Illegal File Sharing* (2013)

<sup>50</sup> T Meyer, and L van Audenhove, "Surveillance and Regulating Code: An Analysis of Graduated Response in France" 2012 9:4 *Surveillance & Society* 365 at 368.

<sup>51</sup> New Zealand Copyright (Infringing File Sharing) Amendment Act 2011.

<sup>52</sup> Republic of Korea Copyright Act of 1957 (Act No. 432 of January 28, 1957, as last amended by Act No. 9625 of April 22, 2009), Articles 103 - 104, in conjunction with: Enforcement Decree of the Copyright Act (as last amended by Presidential Decree No. 22003 of January 27, 2010), Article 46.

<sup>53</sup> BBC News, "UK piracy warning letters delayed until 2015" (6 June 2013), available at: <http://www.bbc.co.uk/news/technology-22796723>

<sup>54</sup> B Danaher, MD Smith, R Telang and S Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*. *Journal of Industrial Economics* (2012) issue 3 vol 62 541-553 at 542-543.

<sup>55</sup> HADOPI 4-6.

<sup>56</sup> Digital Economy Act 2010 s 13(6)(a).

<sup>57</sup> PK Yu, *The Graduated Response*, Fla. L. Rev. 62:5 (2010) 1373-1430 at 1394 -1395.

<sup>58</sup> F La Rue, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2011) 21 para 78, available at: [http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf).

published the official decree No. 0157, removing from the law “the additional misdemeanour punishable by suspension of access to a communication service.”<sup>59</sup>

## **H. UNDERSTANDING CYBERSPACE: THE USE OF ARTIFICIAL LEGAL INTELLIGENCE**

Enforcement strategies based on law or technology alone have failed. In the case of DRM, for example, devices have failed to understand the legal uses open to users and, as a result, have become restrictive tools instead of effective guardians,<sup>60</sup> being the classic example when they only allow a user to play a file in particular type of device.<sup>61</sup> DRM has also proven incapable of adapting to the dynamics of cyberspace and, rather than providing protection, has even been used by hackers as a point of access to compromise the security of an entire device.<sup>62</sup> Likewise, graduated response and legal actions have also failed to create a lasting impact. While graduated response measures offered a dynamic framework based on educational notices rather than legal litigation they failed to provide sufficient certainty that the sanctioned user was the true person responsible for the copyright infringement. For many sectors this causes concerns about their potential for abuse. Legal actions showed some initial success at the beginning of the Internet mass distribution phenomenon - achieving victories in court against some services and users and warning others of the potential consequences of these kinds of activities - but as technology evolved and the (easily targeted) central distribution points became substituted with decentralised systems legal actions struggled to keep up. Their initial detrimental effect vanished as piracy swiftly exceeded the capacity of the courts to keep up. One key reason why these approaches failed can be found in the lack of interdisciplinary cooperation between legal and technological experts: either field, it has become clear, cannot deal with copyright infringement alone. In such a situation however a solution may emerge from the bringing together of these two disciplines, using artificial legal intelligence as an approach to deal with the situation in a scalable, effective, and yet context appropriate manner. Artificial legal intelligence is defined by Gray as: “the computer simulation of any of the

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<sup>59</sup> Décret n° 2013-596 du 8 juillet 2013 supprimant la peine contraventionnelle complémentaire de suspension de l'accès à un service de communication au public en ligne et relatif aux modalités de transmission des informations prévue à l'article L. 331-21 du code de la propriété intellectuelle.

<sup>60</sup> See PJ Huffstutter and J Healey for the LA Times, “Suit Filed Against Record Firms” (14 June 2002), available at: <http://articles.latimes.com/2002/jun/14/business/fi-music14>.

<sup>61</sup> JE Cohen, “Pervasively Distributed Copyright Enforcement” Georgetown Law Journal (2006) 95.

<sup>62</sup> JA Halderman and EW Felten, “Lessons from the Sony CD DRM Episode” USENIX Security (2006), available at: [https://www.usenix.org/legacy/event/sec06/tech/full\\_papers/halderman/halderman.html/](https://www.usenix.org/legacy/event/sec06/tech/full_papers/halderman/halderman.html/).

theoretical and practical forms of legal reasoning, or the computer simulation of legal services involving the communication of legal intelligence.”<sup>63</sup> While the idea of having all legal procedures and enforcement based on human operators seems suitable when it comes to daily human based conducts, this approach fails to be set on the cyberspace reality, and this new paradigm demands new challenges and new perspectives that have not been seen before in the history of law.

## I. CONCLUSION

Enforcing copyright law on the Internet is not a task that can be completed by using the traditional approach of law enforcement. The amount of information that is transmitted online is such that it is impossible for a human operator to process it alone, this limits considerably his capacity to detect conducts that may constitute copyright violations. The answer is not only technological; DRM was an attempt to stop illegal distribution, but resulted in causing a negative effect on the market due to their lack of capacity in understanding what a lawful user can or cannot do. Law itself has been proven inefficient, regardless of the several proposals and strategies that were aimed at stopping these actions they have not produced a lasting effect. Focussing on producing an immediate response to threats, legal procedure has failed to provide a definite deterrent, even though as has been mentioned before it has indeed arise conscience and education among a certain sector of Internet users. As mentioned earlier, to effectively minimize the distribution of copyrighted material on the web, cooperation between technology and legal science is required; however, this method needs to be able to understand every situation that is presented to it, in other words it has to be smart enough to comprehend the particularities of each case. In order to integrate the capacity for understanding outlined above, this approach has to be modelled to take in to consideration the analytical and rational processes that take place within the human operator in charge of enforcing the law. This is possible if such implementation is based on artificial legal intelligence; this area is focused on producing implementations that are based on legal knowledge, legal reasoning and that can emulate human thinking processes.<sup>64</sup> A proper response to deal with copyright infractions online is to develop devices based on this technology that not only will enforce law in cyberspace

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<sup>63</sup> PN Gray, *Artificial Legal Intelligence* (1997) 1.

<sup>64</sup> EL Rissland, “Artificial Intelligence and Law: Stepping Stones to a Model of Legal Reasoning” 1990 Yale Law Journal vol 99, no 8 (Jun., 1990) at 1961-1962

but will also be able to address each case properly, understanding the particularities related to them and providing the parties involved with a greater certainty.

# The Value Problem in Law and Intangible Cultural Heritage

*Megan Rae Blakely\**

## A. INTRODUCTION

Value holds specific and narrow academic meanings in the disparate fields of law, economics, and culture. It can provide great benefits in the depth understanding of these fields, but can also cloud the true interdisciplinary nature of effects and application in practice. In the functioning world, the pertinent disciplinary theories of value do not operate in isolation. Terminology is of particular importance in every academic field, and specialists share insights through communications evolving from lengthy study. Digitisation and technological advances have only accelerated the infusion of international cultural and legal systems, a homogenisation leaning precariously towards uniformity and a loss of cultural diversity.<sup>1</sup> This increasing breadth of practical implications require policymakers, lawmakers, and academics to expand interpretations and understandings of discipline-specific terminology; “[t]here is an obvious need for clarifying the generic tools and terminology of the social sciences across the disciplines, as academics argue past each other, using identical terms but attaching different meanings to them.”<sup>2</sup>

When policymakers design and enact law, especially in rapidly evolving areas of law, they are increasingly seeking evidence to justify funding for particular courses of action.<sup>3</sup> Often numerical values – in the form of direct economic income, participatory numbers, or other such

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<sup>1</sup> “In synthesis, the rich cultural variety of humanity is progressively and dangerously tending towards uniformity. In cultural terms, uniformity means not only loss of cultural heritage – conceived as the totality of perceptible manifestations of the different human groups and communities that are exteriorized and put at the others’ disposal – but also standardization of the different peoples of the world and of their social and cultural identity into a few stereotyped ways of life, of thinking, and of perceiving the world.” F Lenzerini, “Intangible Cultural Heritage: The Living Culture of Peoples” 22(1) IJIL (2011) 101 at 103.

<sup>2</sup> J Grix, “Introducing Students to the Generic Terminology of Social Research” 22(3) Politics (2002) 175–86 at 175.

<sup>3</sup> Copyright and other fields related to intellectual property are now beginning to seek evidence to justify policies and ensure that the law is implementing effective means to reach desired ends: I Hargreaves for the UK Intellectual Property Office, “Digital Opportunity – A Review of Intellectual Property & Growth” (May 2011).

calculable method – are seen as most persuasive.<sup>4</sup> However, assigning this type of value can be problematic for areas that do not lend themselves well to quantification, notably intangible cultural heritage (‘ICH’).

In no way should the following arguments be taken as a call for the evolving practices of modern communities to subsume the preserved or safeguarded heritage of the past, movable or immovable, tangible or intangible. Rather the aim is to highlight that when culture intersects with law and economics, false linguistic dichotomies and interdisciplinary communication challenges emerge that influence our perceptions of culture, value and legal status.

The article will proceed as follows: Part II will examine the interplay between ICH and intellectual property; Part III will trace the interdisciplinary challenges amongst law, culture, and economics when researching and communicating about ‘value’; Part IV considers differing communities and by whom the value is measured; and Part V concludes and discusses moving forward with value and culture.

## **B. INTANGIBLE CULTURAL HERITAGE AND INTELLECTUAL PROPERTY**

Intellectual property and ICH are not easy bedfellows. Nonetheless, ICH faces progressive incorporation under monopolised intellectual property protections. This is becoming the socially normalised manner in which to protect or exploit creative, artistic, or cultural works, which may or may not properly fall under intellectual property or copyright auspices. Intellectual property protection is fully codified under domestic legislation<sup>5</sup> and international legal instruments like the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>6</sup> These instruments have facilitated legal and political consensus on what constitutes intellectual property and acquires limited exclusionary rights to ultimately serve the public good through furthering contributing to societal knowledge and progression.

In contrast with a relatively fully developed, modern concept like intellectual property, even the perfunctory exercise of applying a working legal definition to ICH poses challenges. For

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<sup>4</sup> While policymakers may consider using research as evidence upon which to base policy, many other factors influence decision-making. Thus even well researched and clearly communicated evidence is not determinative in policymaking. Hargreaves (n 3).

<sup>5</sup> Copyright, Design & Patents Act 1988 (hereinafter ‘CDPA’).

<sup>6</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (hereinafter ‘TRIPS’).

the purposes of the 2003 ICH Convention for the Safeguarding of Intangible Cultural Heritage ('the 2003 ICH Convention'), ICH means:

“the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”<sup>7</sup>

Indeed, scholars have inquired as to whether the 2003 ICH Convention definition can be considered a legal definition at all.<sup>8</sup> However, it may be remiss to consider the definition in isolation as it formulated and ratified a largely reactive notion that heritage is built and immovable. This concept is reflected in the primary international heritage instrument preceding the 2003 ICH Convention, the 1972 World Heritage Convention.<sup>9</sup> The World Heritage Convention aims to “encourage the identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity.”<sup>10</sup> The World Heritage Convention defines ‘cultural heritage’ as monuments, sites, and groups of building with universal value.<sup>11</sup> A number of member states expressed concern that the definition was too narrow and heavily favoured developed, European and Eurocentric manifestations of culture and heritage.<sup>12</sup> Even at the 2004 UNESCO Convention, the Greenlandic Minister of Culture, stated, “[g]lobalization is nothing but another form of colonization” and emphasized the importance of language in ICH and law as Greenlandic has “dozens of names for snow and ice because it is important to the hunters to differentiate them, but many children today know only a few of these names.”<sup>13</sup>

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<sup>7</sup> Convention for the Safeguarding of Intangible Cultural Heritage 2003 (hereinafter the 2003 ICH Convention).

<sup>8</sup> L Prott, “Hunting as Intangible Heritage: Some Notes on Its Manifestation”, 14 Int’l J. of Cultural Prop (2007) 385.

<sup>9</sup> The World Heritage Convention 1972.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid. Art. I.

<sup>12</sup> UNESCO World Conference on Cultural Policies, Declaration on Cultural Policies (1982).

<sup>13</sup> Ibid.



Nonetheless, by nature, the law cannot protect what it cannot define; statutes must precisely define what falls under legal protection by way of consensus, and case law will flush out fact-specific applications in Common Law jurisdictions. Language is thus crucial to the law, and imprecise language leads to uncertainty and unenforceability. Due to the intrinsic ambiguity and social oscillation of ICH itself, law and economics is understandably difficult to apply but nonetheless is relevant and influential in practice. This does not negate the necessity of having a working definition and a demonstrable value to garner appropriate legal safeguarding, and so it is beneficial in an academic context to pursue a common ground on value surrounding ICH.

From a legal standpoint, in some cases ICH overlaps with intellectual property law and the intellectual property regime is the best legal avenue for safeguarding. However, ICH does not easily meet subject matter, authorship, or duration requirements in copyright law. For instance, oral or folk traditions may not be considered ‘fixed,’ a requirement for copyright in most jurisdictions.<sup>14</sup> They may be of collective or uncertain authorship or simply be too old to be protected under copyright law and are considered to be public domain material.<sup>15</sup> This lack of appropriateness for existing intellectual property protection does not mean that the ICH, by default, should then be given no form of legal protection; it simply means that the current framework is unfit for ICH.

Nonetheless, the danger of misuse and propertisation – or re-propertisation – for economic, commercial exploitation remains, and ICH can be fundamentally altered to gain protection under the intellectual property framework, such as the recording of oral histories to obtain fixation. Some communities may alter the ICH to retain control over the cultural practices, to prevent outside entities or persons from co-opting the ICH, which also can have the effect of shutting off or narrowing access to the community and public. Additionally, the evolving nature of living histories can be stagnated by such fixation, unnaturally ossifying the ICH.<sup>16</sup>

The existing penumbra between intellectual property and ICH has resulted in unique legal compromises. For instance, in 2008, Scottish lawmakers tackled an ICH-laden issue, legislating on national regulation of tartan patterns. Tartan manifests naturally (unlike some ICH) as a tangible, salable item but still encompasses much direct and indirect ICH practices. Tartan has a rich history in Scotland, reflecting British royal and political influences in the Highlands. ICH

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<sup>14</sup> For example, CDPA (n 7).

<sup>15</sup> Ibid.

<sup>16</sup> L Lixinski, *Intangible Cultural Heritage in International Law* (2013).

elements include generational weaving traditions, regional and subsequent clan associations,<sup>17</sup> and the community and artistic practices that encircle and bloom from long-standing societal traditions. One of these modern traditions has been community regulation of tartan registration, especially that of clans. However, community-run registers were subsumed by the Tartan Act, which created a government-run register of tartans under the National Records Service.<sup>18</sup><sup>19</sup> Other fabrics from the same country are regulated differently. The UK government regulates Harris Tweed through its own act, which essentially codifies the production qualities and legal trademark protections for Harris Tweed, including a certification mark.<sup>20</sup> Further, paisley seems to have garnered no additional protections at this point, despite a Paisley Museum in Scotland, commemorating the weaving traditions and the historical furtherance of the craft.<sup>21</sup> Thus even within a single country, cultural materials from a similar genre, such as fabrics, can spur creative legal solutions or be left to the sparse or inutile intellectual property protections, seemingly without credence to the value of the attached ICH.

Whether ICH is altered in form to meet the intellectual property criteria for protection or exploitation or whether a creative legal compromise is rendered, intellectual property law will impact cultural practices and outputs to conform, to achieve exclusionary, inclusionary, or exploitative ends. The question how to best protect ICH within such a legal framework remains open to debate, but so long as intellectual property laws are utilised in conjunction with ICH, ICH will be molded and ossified within intellectual property structures.

### **C. INTERDISCIPLINARY DEFINITIONAL CHALLENGES SURROUNDING VALUE**

Academics have the opportunity to shape policymaking and socio-legal research approaches by identifying the role and value of ICH, a subject that often permeates legal cultural safeguarding but is generally not specifically named during accepted legal and heritage discourse. Policymakers and researchers should explore interdisciplinary definitions of value to ensure consistency and

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<sup>17</sup> H Roper, “The Highland Tradition of Scotland”, in E Hobsbawm and TO Ranger, *The Invention of Tradition* (2012).

<sup>18</sup> The Scottish Register of Tartans Act (2008).

<sup>19</sup> The Scotland Act 1998.

<sup>20</sup> Harris Tweed Act 1993.

<sup>21</sup> Weavers in Scotland expanded the Persian design’s colour palette from two to fifteen colours and built up an entire industry around the quality of the weaving. This production lead to the Westernised name for the pattern, ‘paisley’, but the fabric has no additional legal protections in Scotland or the United Kingdom, other than that already offered by intellectual property laws. K Campbell, “Paisley Before the Shawl: The Scottish Silk Gauze Industry” (33)2 *Textile History* (2002) 162-76.

clarity of communication.<sup>22</sup> Three primary fields intersect ICH in practice: law, economics, and cultural heritage studies. Each discipline defines ‘value’ in a different manner contextual to the field.

The law interprets value often in context of consideration, or exchange of one thing for another. Common and Civil Law systems – and even legal scholarship, in fact – bother very little with the esoterica of value, focusing instead on precedent or practical codification. Black’s Law Dictionary defines value as “the utility of an object in satisfying, directly or indirectly, the needs or desires of human beings, called by economists ‘value in use;’ or its worth consisting in the power of purchasing other objects, called ‘value in exchange.’ Also the estimated or appraised worth of any object of property, calculated in money.”<sup>23</sup>

Despite the fact that Black’s Law Dictionary references economists’ definition of value, economics delves far more into nuanced structures of value that exceeds the concept of legal consideration and utility.<sup>24</sup> Even the burgeoning field of ‘law and economics’, originating from the Chicago School with Professor William Landes and Judge Richard Posner, may fail to satisfy both strict economists and doctrinal legal scholars by the necessary compromises in practice, a fate often suffered by interdisciplinary approaches.<sup>25</sup> These compromises, however, allow for a more holistic view and realistic insight into how research and academia interacts with and facilitates change in practice and policy.

*The Wealth of Nations* is generally agreed to have established the field of classic economics, the foundation for value theory in economics.<sup>26</sup> Since Adam Smith, Karl Marx, and other influential scholars, the expansion of economics and value theory has become heavily contested amongst competing theories. Despite value as a core principle in the field, even primary introductory economics textbooks shy away from a succinct definition, instead exploring in depth ‘price.’<sup>27</sup>

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<sup>22</sup> “In order to produce good, clear scholarship, researchers need to fully understand the language with which they are working.” Grix (n 2) at 184.

<sup>23</sup> “What Is Value?” in Black’s Law Dictionary Online, 2nd edn (2015), available at: <http://thelawdictionary.org/>.

<sup>24</sup> It is worth noting that “[t]he debate on value in economics is an old one, called the “paradox of value” by Adam Smith in *The Wealth of Nations*; it hinges on the divergence of intrinsic value and price as a measure of value – value in use versus value in exchange – as illustrated in the case of water (high use value, low price) and diamonds (low use value, high price).” R Towse, *Advanced Introduction to Cultural Economics*, (2014) 4-5.

<sup>25</sup> W Landes and R Posner, “An Economic Analysis of Copyright Law” 18 JLS (1989) 325.

<sup>26</sup> A Smith, *The Wealth of Nations* (1776).

<sup>27</sup> P Samuelson and W Nordhaus, *Economics* (2010).

Through a contemporary lens, modern economists have illustrated value as varying types of utility via an examination of unlawful filesharing behaviour.<sup>28</sup> Here, economists measured value by the types of categorical benefit the user gained through different aspects of utility: financial and legal, experiential, technical, social, and moral utility.<sup>29</sup> While these aspects were applied to benefits or value of illegal filesharing, so too could these utilities be relevant in a broader sense to deriving an otherwise amorphous value in an interdisciplinary context.

Further still, albeit less specifically than utility categorisation, economic value could be communicated under a ‘pluralist’ theory of value, “to value something is to have a complex of positive attitudes toward it, governed by distinct standards for perception, emotion, deliberation, desire, and conduct.”<sup>30</sup>

The 2013 New Palgrave Dictionary of New Economics, originally published in 1894, reveals over 1,900 articles in an eight-volume set, regarded as a “definitive scholarly reference work for a new generation of economists.”<sup>31</sup><sup>32</sup> A quick search returns 120, 109 results from the full text. When tackling the Palgrave, “one expects to find an environmental impact statement and a request for a zoning variance.”<sup>33</sup> Thus economics offers a plethora of theories on definitions and calculations of values, so this article will proceed by highlighting two areas of economics that might best lend to a greater understanding of value and ICH.

Two areas of economics – beyond impact reporting of a single event – are most useful relating to ICH: welfare economics and contingent valuation. Welfare economics deals with market failure, which we might expect to see with ICH. It also addresses achieving an overall net social benefit and is more concerned with resource allocation rather than individual equity, which can distort incentives and measurements of economic value. Contingent valuation measures willingness to pay for cultural heritage by participants/visitors and non-participants, such as funders acknowledging indirect values of ICH and paying for ‘option demand’ or the option to visit in the future.

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<sup>28</sup> S Watson, D Zizzo, and P Fleming, *Determinants and Welfare of Unlawful Filesharing*, CREATE Scoping Report (2014), available at: <http://www.create.ac.uk/publications/determinants-and-welfare-implications-of-unlawful-file-sharing-a-scoping-review/>.

<sup>29</sup> Ibid.

<sup>30</sup> E Anderson, *Value in Ethics and Economics* (1996).

<sup>31</sup> D Durlauf and L Blume, *The New Palgrave Dictionary of Economics* (2013).

<sup>32</sup> Ibid. at “About”, available at: <http://www.palgrave.com/page/about-us/>.

<sup>33</sup> R Solow for The New York Times, “The Wide, Wide World of Wealth” (20 March 1988).

Both welfare economics and contingent valuation methods can stimulate willingness to support arts and culture through taxation and thus are an important measure for legal policy makers. However, when considering the breadth of ICH value, economic measurement fails to encompass creative and cultural value, “nor do they reflect the wider significance of creativity and culture to society, which is not amenable to that sort of measurement.”<sup>34</sup> Utilising willingness to pay, contingent valuation, and more traditional economic impact studies may, however, work to complement cultural policy.<sup>35</sup>

The heritage sector has the luxury of defining value in a more holistic sense, sometimes referred to as “cultural significance.”<sup>36</sup> However, this definition may be less luxurious and inclusive than it appears *prima facie*.<sup>37</sup> The societal and legal dialog surrounding cultural significance is highly dependent upon historical definitions of cultural value, reflected in costly displays of ‘high’ culture, as are protected through the World Heritage Convention.<sup>38</sup> This translates to the longevity of *economic* standing of a country correlating to its legally and financially supported culturally significant heritage as it will be prioritised for safeguarding, protection, and public (and even private) funds.<sup>39</sup>

In 2008, Smith identified this formative, institutional dialog as Eurocentric authorised heritage discourse.<sup>40</sup> This discourse demonstrates how cultural establishments prioritise immovable, tangible heritage, such as monuments – which are better suited to economic evaluation and return – and is bereft of acknowledgement of diverse intangible cultural manifestations.

“Western Europe is imagined to have discovered heritage, almost as if there were no other cultures or groups already conceiving of the past and its role in the present. As a

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<sup>34</sup> R Towse, *Advanced Introduction to Cultural Economics* (2014) 78.

<sup>35</sup> B Frey, “What Values Should Count in the Arts? The Tension Between Economic Effects and Cultural Value” (Working Paper) at 8, available at: <http://www.crema-research.ch/papers/2005-24.pdf>.

<sup>36</sup> The Getty Museum/The J. Paul Getty Trust, *Assessing Cultural Heritage* (2002), available at: [http://www.getty.edu/conservation/publications\\_resources/pdf\\_publications/pdf/assessing.pdf](http://www.getty.edu/conservation/publications_resources/pdf_publications/pdf/assessing.pdf).

<sup>37</sup> “...policies ostensibly about social inclusion are effectively reducing ideals of participation, involvement and plurality to mere rhetoric, or empty words.” E Waterton, *Politics, policy, and discourses of heritage in Britain* (2010) 74.

<sup>38</sup> World Heritage Convention (n 11) Art. I.

<sup>39</sup> “... aesthetically pleasing material objects, sites, places and/or landscapes that current generations ‘must’ care for, protect and revere so that they may be passed to nebulous future generations for their ‘education’, and to forge a sense of common identity based on the past.” L Smith, “Class, Heritage & Negotiation of Space” (Conference Paper) (2006), available at: [https://www.english-heritage.org.uk/content/imported-docs/a-e/Smith\\_missing\\_out\\_conference.pdf](https://www.english-heritage.org.uk/content/imported-docs/a-e/Smith_missing_out_conference.pdf).

<sup>40</sup> Smith has labelled this phenomenon ‘Authorized Heritage Discourse’ [hereinafter ‘AHD’]: Smith (n 2).

consequence, the dissemination of ‘best practice’, well-intentioned though it may be, is perhaps better understood as a form of conceptual imperialism, through which a limited understanding of heritage has been used to provide the terms by which the rest of the world must come to identify and manage heritage.”<sup>41</sup>

Rather than relying upon objects and obligations thereto, ‘... space can be encountered in a process of spacing’ and nature in a process of ‘naturing’, so too can heritage be experienced and encountered in a process of ‘heritaging’ or as a social practice.”<sup>42</sup> These concepts of ‘spacing’ and ‘heritaging’ are values more prominently identified with ‘culture-producing’, as opposed to ‘knowledge-producing’ societies but are ubiquitous across cultural practice, simply identified by discordant discourse.<sup>4344</sup>

The United Kingdom is not a signatory to the 2003 ICH Convention, and in 2005, a UK heritage representative stated that “The UK has no intangible heritage.”<sup>45</sup> Even in context of the entire quote, could this assertion be attributed to a misunderstanding of terminology surrounding ICH? Is the immersion in a heritage practice of dichotomous knowledge and culture divide so complete that it is no longer visible to its own practitioners?

In the worst case, this resistance to inclusion of ICH becomes ‘othering’ in its most damaging form: “Do you want us to go out and collect, like stories from Gypsies or something? Who? Where? ... At that time it was just, it was like ... what is this? It was unfathomable to be talking about something like this, there was, kind of, no sense of relevance.”<sup>46</sup> This sentiment seems to validate Greenland’s Minister of Culture, when referring to globalization as an alternative form of cultural colonization, as surely there are British gypsies, as well as of other national origin, whose ICH is relevant to global heritage.<sup>47</sup>

The power to sign the United Kingdom – England, Wales, Scotland, and Northern Ireland – onto international treaties remains with the British Parliament in London. Scotland recently held

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<sup>41</sup> Waterton, *Politics, policy, and discourses* (n 37) 70.

<sup>42</sup> D Crouch, “Spacing, Performing, and Being” 35 *Environment and Planning* (2003) 1945-60.

<sup>43</sup> Waterton, *Politics, policy, and discourses* (n 37) 63-5.

<sup>44</sup> The 2003 ICH Convention was partially spearheaded as a response to the World Heritage Convention, which is built-heritage focused. H Deacon, “The Subtle Power of Intangible Heritage”, *Human Sciences Research Council* (2004) 2.

<sup>45</sup> L Smith and E Waterton, “The Envy of the World?” in L Smith and N Akagawa, *Intangible Heritage* (2008) at 297.

<sup>46</sup> *Ibid.* at 299.

<sup>47</sup> Lenzerini (n 1).

a vote to gain independence from the UK, which was defeated with 55% against. However, the election provided an unusual opportunity for the country to publicly present what national policies would be if governed from Holyrood and not Westminster. An independent Scottish government would have signed onto the 2003 ICH Convention,<sup>48</sup> and thus Scotland evidenced its interest and desire to safeguard intangible cultural heritage in a 2008 listing, in accordance with the requirements to sign on to the international treaty.<sup>49</sup> Cultural heritage, tangible or intangible, is only disserved if dictated and fostered through the majority. It truly is a disservice to both, further widening existing gaps – recognised through mainstream cultural heritage preservation laws and agencies, which tend to focus on minority indigenous culture.

Under myriad established legal theories, it is well recognised that intellectual property has tangible and intangible aspects and that rightsholders hold interest and limited exclusionary rights in the intangible aspect.<sup>50</sup> Despite subject matter and practical overlaps, cultural items are presented as dichotomous – movable or immovable, tangible or intangible, societies as knowledge producing or culture producing.<sup>51</sup> This false dichotomous vernacular of cultural heritage shapes perception and practice is circularly reinforced by international treaties, legal protections, and cultural branding.<sup>52</sup>

#### **D. VALUE TO WHOM?**

In addition to the problem of interdisciplinary definitions of value, ICH also must balance the problem of ‘value to whom’. There are two predominant approaches to this issue, which often result in not only very different methods of safeguarding but also different aspects of ICH falling under protection.

From the common heritage of humanity (‘CHH’)<sup>53</sup> perspective, equal efforts should be put into salvaging all ICH that does not violate internationally mandated human rights protections.<sup>54</sup>

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<sup>48</sup> The Scottish Government, “Scotland’s Referendum”, available at: <https://www.scotreferendum.com/questions/will-an-independent-scotland-honour-existing-international-treaties-agreements-and-conventions-around-culture-and-heritage/>.

<sup>49</sup> UK National Committee for UNESCO, “ICH in Scotland Wiki Inventory”, available at: [http://www.unesco.org.uk/ich\\_in\\_scotland\\_wiki\\_inventory](http://www.unesco.org.uk/ich_in_scotland_wiki_inventory).

<sup>50</sup> For example, The Berne Convention (n 5).

<sup>51</sup> Deacon (n 44) at 2.

<sup>52</sup> Ibid.

<sup>53</sup> This concept is also known as the ‘common heritage principle’ and was first mentioned in legal documents in 1954 in the Preamble to the *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*, as the ‘common heritage of mankind’.

<sup>54</sup> For example, female genital mutilation.

Conversely, if ICH is based solely on what an autonomous, practising community deems valuable, then presumably more developed countries would choose to enact more insular ICH legislation. However, the practising community approach may mean the death of important ICH through cultural evolution; then so be it – if the ICH no longer has value to the relevant community. As the intangible and tangible are inexorably intertwined, culture safeguarding efforts can face problematic results when preservationists and communities themselves do not account for the living heritage and evolving nature of the ICH attached to tangible or immovable heritage.

Moving forward on the principle that ICH is enmeshed with, and categorically ignored in many developed countries,<sup>55</sup> conflicts between CHH and practising communities are surfacing. UNESCO designated the New and Old Towns of Edinburgh, Scotland, as World Heritage sites in 1995.<sup>56</sup> This designation led to residential and commercial building modification restrictions, which some in the community deemed ‘draconian’.<sup>57</sup> These development restrictions are aimed at preserving the historic structures and heritage environment in Edinburgh that arguably gives the city much of its appeal. However, there is an impact on evolving community needs versus CHH, and in these instances, the CHH appears to be prevailing ‘blighted’ by World Heritage status.<sup>58</sup> The prioritisation of historically unregulated community building, reflecting the ways of life and tastes of the day are preserved, inconsistently, at the expense of modern evolution of the city.

Also in the United Kingdom, the tradition of the Eisteddfod has been practiced for centuries in Wales.<sup>59</sup> The Eisteddfod is a festival which showcases Welsh song and dance as well as the language. However, during the early 1990s, Welsh interest in continuing the traditional singing waned.<sup>60</sup> In efforts to attract young Welsh to the event, the Eisteddfod organisers added modern music and dancing categories, including hop hip alongside pop music alongside traditional Welsh throat singing.<sup>61</sup> This evolution, not without its critics, allowed the Eisteddfod to again thrive.<sup>62</sup> Proponents of the category expansions emphasize that, while the modern additions may provide

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<sup>55</sup> Smith and Waterton (n 45).

<sup>56</sup> Edinburgh World Heritage, “Highlights of the World Heritage Site”, available at: <http://www.ewht.org.uk/highlights-of-the-world-heritage-site>.

<sup>57</sup> J Bradley for The Scotsman, “Edinburgh ‘Blighted’ by World Heritage Status” (16 February 2015), available at: <http://www.scotsman.com/lifestyle/heritage/edinburgh-blighted-by-world-heritage-status-1-3691241>.

<sup>58</sup> Ibid.

<sup>59</sup> D Howell, “The Intangible Cultural Heritage of Wales: A Need for Safeguarding” 8 Int’l J. of Cult. Heritage 104 (2013) at 107.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid. at 108.

<sup>62</sup> Ibid.



an initial draw, attendees and participants also are exposed to the traditional Welsh arts and language, an opportunity that may have otherwise been lost.<sup>63</sup> In this case, the category expansion reflects needs of the community but the CHH may be upheld, rather than eroded by the inclusion of non-traditional music and dance.

## **E. CONCLUSION: MOVING FORWARD WITH VALUE AND CULTURE**

Interdisciplinary work requires a certain level of comfort with ambiguity, and this state can make researchers, particularly in well-defined fields such as economics and law, hesitant to expand beyond existing subject matter boundaries. However, the reality of the impact of globalisation and social technologies on cultural practices defy academic compartmentalisation. Thus, legal researchers also must gain flexibility and greater knowledge of intersecting fields, especially economics and heritage fields in relation to intellectual property and culture, and much policy and dialog pivots on ‘value’. Acknowledging the conflicts and commonalities related to interdisciplinary definitions and collaboration on how to reconcile and communicate value is essential to moving forward with proper legal safeguarding for ICH.

One approach to bridge this cultural gap is to increase the recognition of include notions such as ‘spacing’ or ‘heritaging’<sup>64</sup> as intrinsic to tangible or immovable cultural heritage, no matter the geographical origin. A gradual redirection of which parts of the fully integrated cultural practices are emphasised could help to correct misconceptions and othering regarding ICH. This would address concerns expressed by scholars WIPO consulted about the 2003 ICH Convention, related to creating a separate legal instrument for ICH.<sup>65</sup>

The issue of partitioning off tangible manifestations and ICH does not persist only of national economic station and Eurocentric authorised heritage discourse. It also extends to undervaluation of diverse ICH in unions, such as the UK, and the interests of its constituent states. While urgent safeguarding for countries lacking basic infrastructure and losing valuable ICH is crucial, developed countries without representation are exposed to erosion of ICH through commodification and even championing of tangible, immovable cultural heritage. Developed countries with less political power but distinctive ICH experience a similar to funnel towards Westernised, homogenised globalisation through legal and social discourse and practice. This acts

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<sup>63</sup> Howell (n 59) at 108.

<sup>64</sup> Crouch (n 42) at 2.

<sup>65</sup> Deacon (n 44).

as a circular reinforcement of recognition and reward of built heritage and formalised legal structure, leading to subtle erosion of living ICH.

# The Protection of Geographical Indications: Ambitions and Concrete Limitations

*Andrea Zappalaglio*\*

## A. INTRODUCTION

Today, the protection of Geographical Indications (“GIs”), through trademarks, *sui generis* rules, or other means, is quite popular. GIs are names of geographical places that consumers tend to associate with niche products sold on the market place. For instance, “Champagne,” a prestigious sparkling wine from the homonymous French region; Parmigiano Reggiano, a famous cheese from Parma in Italy; Murano glass, from the town of Murano near Venice. There are also “indirect” GIs, which are much rarer, that although they are not geographical names link a product to a specific area, for instance “Feta” for a traditional Greek cheese.

In Europe in particular, the policy on which GI protection systems are based maintains that they can be useful instruments not only to protect the names of products linking them to their place of origin, but also to achieve other policy goals such as fostering rural development and protecting Traditional Knowledge (“TK”). The aim of this article is to compare and contrast the European Union (“EU”) rhetoric on GI protection with some concrete practical cases that show the results achieved (or not achieved) by the protection of geographical names worldwide. It will be concluded that, although GIs are an innovative strategic asset to achieve modern goals, they are not by themselves decisive and can be truly effective only when they are part of a broader successful action.

This thesis will be demonstrated in four sections. Section B will present the different ways used to protect Indications of Geographical Origin (“IGOs”); Section C will describe the important role that GI rules should play according to the EU Commission in the context of the European Common Agricultural Policy (“CAP”); Section D will describe some practical case studies that

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show the discrepancy between the expectations of the Commission and what can concretely be achieved; Section E will reflect on what the analysis of the cases can teach us.

## **B. SYSTEMS FOR THE PROTECTION OF GEOGRAPHICAL NAMES: TAXONOMY**

GI regimes have existed for a long time. However, they started being widely discussed at an international level only after their introduction into the Trade-Related Aspects of Intellectual Property Rights (“TRIPs”) Agreement<sup>1</sup> of a *sui generis* form of protection for IGOs. Since the minimum standards introduced by this treaty are far from detailed, the complex landscape of pre-existing institutes of GI protection – whether *sui generis*, trademark-based, or other form - has been preserved. Indeed, there is no international consensus on the methods to protect IGOs at local level; therefore, a summary description of the international and of some national regimes has to be provided in extreme synthesis in order to clarify the taxonomy of this large family.

A good starting point to define GIs is Article 22(1) TRIPs that provides their key international definition:

“Geographical indications are...indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”

As anticipated in the introduction, GIs are nothing but names of places, regions, localities, and other identifying characteristics of that type. However, they are names that consumers associate with various goods, including drinks, foodstuffs, and handicrafts. For this reason GIs have a value and need to be protected because they inform consumers not only about the geographical origin of the product but also about the link between the product and the place that influences the quality of the goods that consumers want.

The TRIPs system of rules can be located in-between its two predecessors, Indications of Source (“IS”) and Appellations of Origin (“AO”). IS are mentioned both in the Paris Convention

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<sup>1</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights is an international agreement that came into force on 1 January 1995 and is administered by the World Trade Organization. It sets the minimum standards of intellectual property protection that every WTO Member State (158 so far) must respect domestically. For more information, see World Trade Organization, *The TRIPs Agreement*, available at [https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm).

in Articles 1(2) and 10 and in the Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods (1891). These two treaties, however, do not specifically provide a definition. Under section 1 of World Intellectual Property Organization (“WIPO”)<sup>2</sup> Model Law for Developing Countries on Appellations of Origin and Indications of Source, IS are described as an “expression or sign used to indicate that a product or service originates from a country, region or specified place.” Thus, IS have the function of promoting transparency and truth telling in relation to the origin of the goods without providing information on the substantive quality of the product. They primarily consist of familiar labels such as “Made in France” or “Produced in Italy.” However, the term “indication” is broad enough to refer not only to geographical names but also to images that consumers can immediately link to a place (e.g., the Egyptian Sphinx or the Great Wall of China).<sup>3</sup>

AO appears, without being defined, in the Paris Convention. Instead, Article 2(1) of the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (1958) defines it as the “...geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors.”

The purpose of the Lisbon Agreement is much more ambitious than IS. In fact, in order to be considered AO, the goods bearing the geographical name have to exhibit quality and characteristics essentially attributable to the designated area of origin. The territory and the characteristics of the product have to be linked by a causal relationship.<sup>4</sup> Under Article 1(2) Lisbon Agreement, the products that qualify as AO and are recognised and protected in a member state are eligible for registration in the International Register of Appellations of Origin (“IRAO”) and then will enjoy international protection against misappropriation.

The TRIPs Agreement sets minimum standards of protection only. Whilst acknowledging the variety of tools employed for protecting IGO in the pre-WTO era, it does not specify how these

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<sup>2</sup> The World Intellectual Property Organization was established in 1967 as a UN agency specialised in intellectual property law with the mission of encouraging creative activity and promoting the protection of intellectual property throughout the world. For more information, see World Intellectual Property Organization, *WIPO: The World Intellectual Property Organization*, available at <http://www.wipo.int/portal/en/index.html>.

<sup>3</sup> A complete description of IS both under the Paris Convention and the Madrid Agreement can be found in D Gangjee, *Relocating the Law of Geographical Indications*, (2012) ch 2; see also MA Echols (ed), *Geographical Indications for Food Products: International Legal and Regulatory Perspectives* (2008) ch 3.

<sup>4</sup> AO as they appear in the Lisbon Agreement descend from the French tradition that has always emphasised the one-to-one correspondence between a product and the territory (*terroir*) that has generated it.

standards have to be met. Therefore, each WTO Member is free to choose the level of protection as well as the instruments to achieve the minimum standards. For this reason a coordinated model of protection of traditional names and designations does not exist.<sup>5</sup>

In particular, the WIPO IP Handbook authoritatively mentions three main ways to protect GI applied at domestic level, each one belonging to a very different genus: (1) unfair competition law and case law based instruments; (2) collective and certification marks typical of the common law tradition; and (3) special titles granted at the end of an administrative procedure typical of a civil-law/continental European background.<sup>6</sup> This work will focus predominantly on the (1) EU *sui generis* GI regime. However, an overview of (2) certification and collective marks is necessary to provide a broader picture of the protection of GI that will be useful when different case studies will be presented in Section C.

### **(1) PDO/PGI: a description of the EU *sui generis* system**

Regulation 1151/2012 is dedicated to the protection of foodstuffs and agricultural products.<sup>7</sup> Following Article 2(1), it applies to “...agricultural products intended for human consumption...and other agricultural products and foodstuffs...” Namely, it provides for two different forms of GI certifications, Protected Designations of Origin (“PDO”) and Protected Geographical Indications (“PGI”).<sup>8</sup> Article 5(1) and (2) define them. In particular, PDO are modelled according to the *terroir*-based French/Southern European tradition of AO and consist of:

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<sup>5</sup> For a comparative review, see I Kireeva and B O’Connor, “Geographical Indication and the TRIPS Agreements: What Protection is Provided to Geographical Indications in WTO Members?” (2010) 12 *The JWIP* 275; see also L Montén, “Geographical Indications of Origin: Should They Be Protected and Why? – An Analysis of the Issue from the US and EU Perspectives” (2005) 22 *Santa Clara Computer & High Technology Law Journal* 315; E Nation, “Geographical Indications: The International Debate Over Intellectual Property Rights for Local Producers” (2011) 82 *U Colo L Rev* 959; and E Thévenod-Mottet and D Marie-Vivien, “Legal Debates Surrounding Geographical Indications” in E Barnham and B Sylvander (eds), *Labels of origin for food: local development, global recognition* (2011) at 13.

<sup>6</sup> World Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use*, 2nd edn (2004) para 2.695.

<sup>7</sup> Other three registrations-based systems of GI protection exist in Europe for wines, spirits and aromatic wines.

<sup>8</sup> However, the regulation introduces also the less used and residual category of Traditional Specialities Guaranteed (TSG).

1. ...a name which identifies a product:
  - (a) originating in a specific place, region or, in exceptional cases, a country;
  - (b) whose quality or characteristics are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and
  - (c) the production steps of which all take place in the defined geographical area.<sup>9</sup>

PGI, instead, reflect a northern European approach that has always privileged a more subjective and reputation-based system where the association made by consumers between a product and a place was enough to trigger protection in case of confusing or misleading practices.<sup>10</sup>

In the Regulation 1151/2012 PGI are defined as:

2. ...a name which identifies a product:
  - (a) originating in a specific place, region or country;
  - (b) whose given quality, reputation or other characteristic is essentially attributable to its geographical origin; and
  - (c) at least one of the production steps of which take place in the defined geographical area.

The registration procedure is state-based. The application has to be filed to the competent public authority designated by each member state. That authority will scrutinise the application and then, if all conditions are met, forward it to the Commission who will analyse it for a second time. Every observation and opposition by third parties takes place within this institutional framework.<sup>11</sup> The quasi-public character of registration-based system marks a profound difference between it and private-based IGO systems like collective and certification marks.

## **(2) A different philosophy: collective and certification marks**

Collective and certification marks are another common way to protect IGOs, especially in the common law world.<sup>12</sup> Despite their peculiarities, they completely belong to the trademark family, hence they are ontologically distinct from *sui generis* GI regimes. They are not completely alternative to the latter as all these systems are sometimes combined together. However, even if

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<sup>9</sup> However, Article 5(3) provides that, under certain conditions, raw materials can be sourced from a different geographical area.

<sup>10</sup> For an analysis of the historical genesis of PDO and PGI, see Gangjee (n 3) at 224 to 231. See also D Gangjee, "Melton Mowbray and the GI Pie in the Sky: Exploring Cartographies of Protection" (2006) 3 IPQ 291.

<sup>11</sup> See Articles 5-7. For a guide, see A Kur and T Dreier, *European Intellectual Property Law: Text, Cases and Materials*, (2013) at 338 to 353.

<sup>12</sup> In particular, the US is the symbol of the preference for a trademark system to protect and enforce GI. See Echols (n 3) at 135 to 137. However, different groups of producers of PDO/PGI products, e.g., the consortium of the producers of Grana Padano cheese, use both *sui generis* and trademark protection.

the concrete regulation of these peculiar trademarks depends, in last analysis, on each single domestic or regional provision, WIPO and other scholars have identified some common features.<sup>13</sup> These will be described in this article with no ambition for completeness.<sup>14</sup>

Collective marks are special marks that inform consumers about certain characteristics of the product that bears them. The use of collective marks is only allowed to the members of a collective body (e.g., an association or cooperative of producers, manufacturers, or traders) that grants or denies access to new members on the basis of their compliance with regulations of the collective body itself. This body can consist of associations of artisans, indigenous artists, or craftsmen. However, it has to be specified that, unlike certification marks, collective marks do not necessarily need to set standards to be met in order to use the mark. Therefore, a collective mark can also have a certification function, but this is not mandatory.<sup>15</sup>

Certification marks are not held by a collective body such as an association of producers but by a certification authority. Such an authority is the proprietor of the mark. It may be a local council or an association that is not engaged in the production or trade of the concerned products. It must ensure that the goods bearing the mark possess the certified qualities. This is the “certificatory function” that assures the origin and/or the manufacture of the goods but, unlike collective marks, it does not necessarily denote a common origin as the mark can be used by anyone who qualifies and not only by members of the same association or group.<sup>16</sup>

### C. SUI GENERIS GI RULES IN EU LAW: HIGH HOPES

In Europe, the introduction of a *sui generis* form of protection for GIs on 14 July 1992 with the Council Regulation 2081/1992 marked a turning point in the restrictive EU approach to GIs.<sup>17</sup> The Regulation that introduced the Quality Schemes described above into EU Law formed part of the

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<sup>13</sup> For a focus on the US, see United States Patents and Trademark Office, *Geographical Indication Protection in the United States*, available at <http://www.uspto.gov/ip/global/geographical>.

<sup>14</sup> For a broader description see Echols (n 3) at 137-146.

<sup>15</sup> D Zografos, *Intellectual Property and Traditional Cultural Expressions*, (2010) at 104 to 105.

<sup>16</sup> *Handbook* (n 4) paras. 2.702 to 2.703. For a monograph entirely dedicated to Certification Marks, see J Belson, *Certification Marks*, (2002) and N Dawson, *Certification Trade Marks: Law and Practice* (1988).

<sup>17</sup> A recount of the history of the EU Common Agricultural Policy would exceed the purpose of this paper. For an exhaustive description see JA McMahon, *EU Agricultural Law* (2007) ch 2. For some cases that show the early approach of the European Court of Justice to GI rules see Case 12-74 *Commission v Germany* [1975] ECR 181 (Sekt); Case 16/83 *Criminal Proceedings v Karl Prantl* [1984] ECR 1299 (Bocksbeutel); Case C-47/90 *Etablissements Delhaize frères and Compagnie Le Lion SA v Promalvin SA and AGE Bodegadas Unidas SA* [1992] ECR I-3669 (Rioja I).



1992 CAP Reform Package.<sup>18</sup> According to this program of reform, farmers had to bear the responsibility for looking after the countryside and its biodiversity and for using natural resources such as soil, air and water prudently.<sup>19</sup>

This was in line with the principle of sustainable development adopted at the 1992 Earth Summit in Rio de Janeiro<sup>20</sup> that has been incorporated into all EU policy areas, including agriculture. This led to a new conception of farmers that, according to the policy of the Commission, should become managers of the rural environment providing a public service such as the preservation of environment and of biodiversity.<sup>21</sup> This was only the first step of a new trend in the evolution of the EU CAP. In 2000, the Commission began to focus on rural development; in 2003 the agricultural sector was made more market-oriented and the income aid for farmers became conditional upon the respect of clear environmental and animal-welfare standards.<sup>22</sup> Finally, in 2013, the policy was reformed a last time in order to improve food security, environmental protection, climate change, growth, and jobs in rural areas.<sup>23</sup> In the meantime, some academics, usually from continental Europe, started advocating that GIs are crucial to link a product with its territorial and cultural origin, hence they are very important for the preservation of local history and tradition.<sup>24</sup>

This is the context in which the EU Quality Schemes, and in particular the PDO/PGI labels, operate. Their main goal is to encourage the diversification of products and protect producers and consumers by preventing the misuse of the name of the product itself.<sup>25</sup> In addition, GIs are promoted as a strong instrument of development.<sup>26</sup> Accordingly, Regulation 1151/2012 of 21

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<sup>18</sup> The so-called “MacSharry Reform”. For an analysis of this and previous CAP reforms, see J A McMahon, *Law of the Common Agricultural Policy*, (2000) at 166-168.

<sup>19</sup> European Commission, “The Common Agricultural Policy: A Story to be Continued” (2012) at 10-11.

<sup>20</sup> For a focus on the Earth Summit, its results and consequences, see R K L Panjabi, *The Earth Summit at Rio: Politics, Economics, and the Environment* (1997).

<sup>21</sup> European Commission, “The EU Explained: Agriculture” (2014).

<sup>22</sup> European Commission (n 19) at 4.

<sup>23</sup> European Commission (n 21) at 16.

<sup>24</sup> L Bérard and P Marchenay, “Local Products and Geographical Indications: Taking Account of Local Knowledge and Biodiversity” (2006) UNESCO; see also A Pacciani and others, “The Role of Typical Products in Fostering Rural Development and the Effects of Regulation (EEC) 2081/92” (2001).

<sup>25</sup> See in general European Commission, *Geographical Indications and Traditional Specialities*, available at [http://ec.europa.eu/agriculture/quality/schemes/index\\_en.htm](http://ec.europa.eu/agriculture/quality/schemes/index_en.htm).

<sup>26</sup> This becomes evident in the external relations of the EU, where GIs are strongly promoted as an instrument of rural development, see European Commission, *Geographical Indications*, available at <http://ec.europa.eu/trade/policy/accessing-markets/intellectual-property/geographical-indications/>.

November 2012 “On Quality Schemes for Agricultural Products and Foodstuffs,”<sup>27</sup> especially in its Preamble, acknowledges that “...consumers in the Union increasingly demand quality as well as traditional products,” that producing “...a diverse range of quality products can benefit the rural economy,” and that the EU policy includes the aim of “...achieving a competitive economy based on knowledge and innovation and fostering high-employment economy delivery social and territorial cohesion.”

Therefore, there is a general emerging trend according to which GIs, far from being merely trade-related labels, are indeed the strategic instruments for achieving goals such as the protection of environment, rural development, and or cultural origin of the product. The latter point is very meaningful since it could lead to a “genetic mutation” of GIs due to the marginalisation of the (traditional) key concept of *terroir*<sup>28</sup> (i.e., the place where the product is made characterised by specific physical and environmental features, in favour of the “human element” embodied into the product).<sup>29</sup> This evolution is confirmed by the fact that the EU Commission is discussing extending GI protection to handicrafts as well (i.e., to goods that are not essentially related to the physical characteristics of the land and of its environment).<sup>30</sup>

Thus, in Europe, *sui generis* GI protection systems are increasingly becoming a crucial tile of an ambitious mosaic for promoting a new way of producing goods by respecting and protecting the tangible and intangible context in which the production traditionally takes place. Is this rhetorically justified? What results can be realistically achieved? The next section will provide some examples of attempts to protect traditional products through the different ways of IGO protection discussed in Section A and will comment on the results.

#### **D. THE GAP BETWEEN PLANS AND REALITY: WHAT HAS GI PROTECTION ACHIEVED SO FAR?**

The present section will synthetically present some experiments made in order to protect traditional goods of varying nature (e.g., foodstuffs, drinks, and handicrafts) using various GI rules in

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<sup>27</sup> The current EU regulation on GIs after Regulation 2081/1992, already mentioned, and the subsequent Council Regulation 510/2006 (20 March 2006).

<sup>28</sup> For an exhaustive presentation of the concept of *terroir*, see Gangjee (n 3) at 77-80.

<sup>29</sup> A critical view of the traditional concept of *terroir* can be found in D Marie-Vivien, “The Protection of Geographical Indications for Handicrafts or How to Apply the Concepts of Natural and Human Factors to All Products” (2013) 4 WIPO Journal 191.

<sup>30</sup> This trend is not a complete novelty. For instance, India already protects handicrafts through its *sui generis* GI regime. See, Articles 1(3)(e) and (f) Indian GIs Act 1999.

different jurisdictions. These goods belong to the cultural heritage of different areas and embody technical and traditional knowledge, and therefore their protection is/was meant to foster the preservation of tradition and environment. Attention will be paid to the reasons of the success or of the failure of each initiative. First, cases where (1) *sui generis* GI rule were applied will be presented, then it will be turn (2) collective and (3) certification marks. The conclusions that can be drawn from this collection of case studies will be developed in Section E.

### **(1) Geographical indications: Mexico, France, Switzerland, Morocco**

Mexico, a founding member of the Lisbon Treaty (1958), uses AOs to protect “Tequila.” Tequila is a spirit produced in various regions of Mexico by distillation. It must be distilled using the fermented heart of a plant known as the ‘blue agave’ and owes its name to a region in the municipality of Jalisco. The making of Tequila, especially the production of the key ingredients, involves traditional knowledge that dates back to the mid-16th century. However, even if the Mexican GI law is formally very strict, the concrete protection of Tequila is an example of how GI rules might not work. As shown by Bowen, the history of the tequila industry is characterized by intense conflicts and deepening inequality between the agave farmers (i.e., the custodians of the methods for growing agave since 16th century) and tequila companies. The former have never had real representation. In addition, the State does not have an agency specifically dedicated to GI and has never intervened on farmer’s side. As a consequence, the products sold under “Tequila” AO are becoming more and more different from the traditional standards.<sup>31</sup>

In France, Roquefort cheese has been produced since 3,500 BC. King Charles VI regulated its production for the first time in 1411 and, together with Champagne, is the product that consumers are most likely to associate with France.<sup>32</sup> Today, its production employs approximately 10,000 workers in an area characterised by a low-density population. The PDO, granted in 2008, is very well managed and self-organised by collective bodies and significantly contributes to the development of the region.<sup>33</sup>

In L’Étivaz, Switzerland, a community of 150 people started making a special kind of Gruyere cheese whose production is crucially related to the specific tempo of the mountain life

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<sup>31</sup> S Bowen, “Development from Within? The Potential for Geographical Indications in the Global South” (2010) 13 JWIP 231.

<sup>32</sup> K Masui and T Yamada, *French cheeses* (2000) at 178.

<sup>33</sup> J Frayssignes, “Sistem IV: Roquefort Cheese (France)”, in C Barham and N Sylvander (eds), *Labels of origin for food: local development, global recognition* (2011).

during the summer period. It was the first PDO registered by Switzerland with the aim of improving the reputation of the product and of its area of production. These goals have been successfully achieved thanks to the well-coordinated association of producers and the effort of the State.<sup>34</sup>

In Morocco, the Government, advised by the French government, filed an application for protecting Argan as a PGI within the EU. If approved, Argan could be one of the first PGIs from Africa to receive such protection within the EU regulatory framework. As WIPO points out, the work of the cooperatives of Argane producers is crucial for the preservation of rural society, traditional knowledge, and environment in different areas. The production of Argan-based products (e.g., oil) has had a positive economic impact and the granting of a PGI would strengthen and protect this value (at least in the EU).<sup>35</sup>

## **(2) Collective marks: Peru**

In Peru, the Chirimoya Cumbe collective mark is registered to protect the name of an area in which a rural community of 106 residents produce high quality types of fruit. These farmers refused to protect their products through AO and chose instead to register a collective mark, specifying that only members of the community or other authorised individuals could use it.<sup>36</sup> The results have been successful since the mark has allowed the trademark owners to gain a competitive edge over other fruit producers.

## **(3) Certification marks: Alaska, New Zealand, Australia**

In the “New World,” especially in common law countries,<sup>37</sup> there were attempts to protect traditional knowledge using certification marks. These attempts have had varying degrees of success.<sup>38</sup> In Alaska, the “Silver Hand” certification mark was introduced in 1961 in order to

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<sup>34</sup> S Révion, “System II: L’Etivaz Cheese”, in Barham and Sylvander (eds), *Labels of origin for food: local development, global recognition* (2011).

<sup>35</sup> World Intellectual Property Organization, *Protecting Society and the Environment with a Geographical Indication*, available at <http://www.wipo.int/ipadvantage/en/details.jsp?id=2656>.

<sup>36</sup> The local community considered that the registration of an AO would have allowed too much State intervention. However, Peru is a Member of the Lisbon Treaty and successfully uses AO for protecting traditional goods whose origins dates back to pre-Inca times such as Chulucanas ceramics.

<sup>37</sup> However, this method is not adopted in common law countries only. For the case of Venezuela, see D Zografos, “The Branding of Traditional Cultural Expressions: To Whose Benefit?”, in S Frankel and P Drahos (eds), *Indigenous peoples’ innovation: intellectual property pathways to development* (2012) 247.

<sup>38</sup> For a recount see C B Graber and J C Lai, “Indigenous Cultural Heritage and Fair Trade: Voluntary Certification Standards in the Light of WIPO and WTO Law and Policy-Making”, in S Frankel and P Drahos (eds), *Indigenous peoples’ innovation: intellectual property pathways to development* (2012) at 220 to 234.

protect traditional indigenous products. It still exists today and it is advertised by the State to encourage tourists to buy goods bearing that mark. This scheme has had good results.<sup>39</sup>

In New Zealand, “Māori Made” *Toi Iho* certification mark certified that a specific work was made by a member of the Maori community who follows traditional methods and has the authorisation of the community. Launched in 2002, the scheme was disinvested by the Government in 2009 as it had not achieved any increase in sales of Māori art and a new private-owned certification authority oversees it.<sup>40</sup>

In Australia, the Australian Authenticity Label was launched in 2000 in order to identify original creations made by an Australian indigenous person. The label was registered as a “certification mark” as owned by its certification authority, the National Indigenous Arts Advocacy Association (“NIAAA”).<sup>41</sup> This institution established a strict regulation for being authorised to use the mark, not too different from the rules governing the *Toi Iho* certification mark. In particular, the artist, whether living in urban or traditional areas, had to prove he or she was of indigenous descent and that the indigenous community approved of his or her creations. This experiment, however, lasted for only two years and failed. The reasons for its failure were twofold: a lack of public funding and problems with the definition of the concept of “authenticity” that, according to many traditional artists, was considered to be too rigid, inaccurate, and unable to reflect the complexity of the indigenous society. As a consequence, many creators did not adopt the mark and chose to market their products under other labels instead.<sup>42</sup>

## **E. WHAT LESSONS CAN BE DRAWN FROM THE CASE STUDIES?**

As shown by case studies above, GIs are frequently adopted in order to improve the reputation of traditional products, thus trying to achieve developmental goals and gather resources for preserving the related TK. However, they are not magical symbols that can, alone, foster

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<sup>39</sup> State of Alaska, “Alaska Native Arts Programme”, available at <http://education.alaska.gov/aksca/native.html>. See also, Zografos (n 15) at 113-119. For the case of Canada, see D Spratley, “Protecting Aboriginal Knowledge, Culture and Art under Canadian Intellectual Property Laws” (2005) Davis & Company LLP.

<sup>40</sup> Toi Iho Kaitiaki Incorporated, *Toi Iho Maori Made*, available at <http://www.toiho.co.nz>. For a detailed overview, see Zografos (n 15) at 109-113; see also E Gray, “Maori Culture and Trademark Law in New Zealand”, in C Heath and AK Sanders (eds), *New frontiers of intellectual property law: IP and cultural heritage, geographical indicators, enforcement, overprotection* (2005) 92.

<sup>41</sup> See T Janke, “Case Studies on Intellectual Property and Traditional Cultural Expression” (2003) WIPO 135.

<sup>42</sup> See Zografos (n 15) at 120-129; Graber & Lai (n 37) at 175-179; and J Anderson, “Indigenous/Traditional Knowledge & Intellectual Property” at 19, available at [http://web.law.duke.edu/cspd/pdf/ip\\_indigenous-traditionalknowledge.pdf](http://web.law.duke.edu/cspd/pdf/ip_indigenous-traditionalknowledge.pdf).

development.<sup>43</sup> In this regard, the analysis carried out in the previous Section provides good guidance.

It has already been shown that different attempts to promote traditional products through branding were unsuccessful. In New Zealand the *Toi Iho* certification mark was disinvested by the State because it was too expensive and unable to achieve the expected results. Something similar occurred in Australia. As for the US, although the “Silver Hand” initiative has been successful, Dutfield recounts that different experiments to promote trade of indigenous peoples’ products through labelling have failed because consumers did not know or did not pay attention to the marks.<sup>44</sup>

The same concepts apply to registration-based *sui generis* GI systems. As a matter of fact, GIs are mostly used in rural areas that are already dynamic and fit to start developing. This has led Belletti and Marescotti, commenting on the European situation, to effectively argue that GIs are “more of the effect than the cause of development of a rural area.”<sup>45</sup> Of course, the list of relevant practical cases is long and this statement cannot amount to a general rule. Nevertheless, case studies show that the strength of the IGOs itself is seldom decisive.

For instance, in the case of the Peruvian collective mark Chirimoya Cumbe, the communities of producers are extremely small and living in remote areas but their agricultural products had already enjoyed a niche reputation in the South American market. Another relevant case is the one of the Swiss L’Étivaz Cheese that was protected first by a trademark and then by a PDO with the specific aim to increase the reputation of the product and of all the surrounding area. Despite the fact that the community of producers is very little and the product was not as famous as other local cheeses, these goals were achieved. This success was possible thanks to a very strong collective organisation that monitored all the aspects of the production from the first step to the marketing and the promotion of the territory, and state investment. The application for a PDO was only a part of this broader strategy and not the primary reason of the success.<sup>46</sup> Similar considerations can be made in relation to a famous product of craftsmanship like Murano glass,

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<sup>43</sup> For a more optimistic assessment, see Echols (n 3) at 24-27.

<sup>44</sup> G Dutfield, *Intellectual Property, Biogenetic Resources, and Traditional Knowledge* (2004) at 106-107.

<sup>45</sup> G Belletti and A Marescotti, “Origin Products, Geographical Indications and Rural Development”, in A Barham and N Sylvander (eds), *Labels of origin for food: local development, global recognition* (2011) 85.

<sup>46</sup> Révion (n 34) at 168-169.

protected by a collective mark with a certificatory function and by a broader project named European Glass Experience, financed by the EU.<sup>47</sup>

It could be concluded that the usefulness of GI rules largely depends on the strength of the reputation of the name or, if the name has to be promoted, on the organisation that manages it and the resources that can be privately invested by the community or by the State.<sup>48</sup> It is a difficult challenge because GI is not a synonym for “investment.” Two surveys conducted in Italy emphasised how hard it is for a GI to adequately reach, inform, and convince consumers about the special characteristics of the goods. The surveys concluded that even if consumers were increasingly appreciating typical/traditional products, despite all the investments and efforts, they remained largely unable to recognise the quality of an OP.<sup>49</sup> If the situation in Italy, a leading European country in this area, is similar to this, it can be argued that GI would hardly help to achieve developmental, environmental, and competitive goals without huge organizational and economic efforts that have to precede and are not based upon GI systems.<sup>50</sup>

## F. CONCLUSIONS

This article aimed at demonstrating that the protection of geographical names, both through *sui generis* rules and through trademarks, although useful, cannot *per se* live up to the huge expectations that an emerging rhetoric, especially in the EU, assigns to it. Indeed, the protection of GIs can be effective and successful only as the final point of a broader and an expensive strategy of valorisation of the land, of the product and of its cultural importance.

In order to demonstrate this thesis, Section B has proposed a synthetic taxonomy of GI systems of protection; Section C presented the role that, according to the EU commission, *sui*

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<sup>47</sup> European Glass Experience, available at <http://egeglass.eu>.

<sup>48</sup> B Sylvander and G Allaire, “Globalisation and Geographical Indications” in A Barham and N Sylvander (eds), *Labels of origin for food: local development, global recognition* (2011) 114; see also Bowen (n 31) at 245, Dutfield (n 45) at 31, and D Rangnekar, “The Socio-Economics of Geographical Indications: A Review of Empirical Evidence from Europe” (2004) UNCTAD-ICTSD Issue Paper No. 8 at 6-7.

<sup>49</sup> F Arfini, L M Albisu and C Giacomini, “Current Situation and Potential of Geographical Indications in Europe”, in Barham and Sylvander (eds), *Labels of origin for food: local development, global recognition* (2011) 30. Another study revealed that in the whole EU only 8% of consumers recognised either PGI or PDO symbols. See London Economics, “Evaluation of the CAP Policy on Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI): Final Report”, (2008) European Commission at 160-162; see also H Ilbert, “Products with Denominations of Origin and Intellectual Property Rights – the International Bargaining Process”, in L Augustin-Jean, H Ilbert, and N S Rivano (eds), *Geographical indications and international agricultural trade the challenge for Asia* (2012) at 101-102.

<sup>50</sup> For more doubts concerning the realistic developmental vocation of GI, see Gangjee (n 3) at 280-284.

*generis* GI rules should play in the context of the newest reforms of the European CAP; Section D contrasted this European rhetoric with some case studies showing the results concretely achieved by GI protection in different areas of the world; and finally, Section E provided some reflections on the results of the analysis.



# Utilising Item Response Theory in Computing Corporate Governance Indices

*Navajyoti Samanta*\*

## A. INTRODUCTION

Scholars<sup>1</sup> have been at this for quite some time: how does one properly characterise the amalgamation of management, accounting, law, finance, economics, sociology, business ethics, and organisational behaviour? Although new in relative terms, corporate governance seems to provide an appropriate umbrella term, which combines all these interdisciplinary elements.<sup>2</sup>

With this in mind, and by no means exhaustive, corporate governance has been described in a few ways that merit restatement. Firstly, the *Cadbury Report* terms it as ‘the system by which companies are directed and controlled’.<sup>3</sup> Daily sees it as the ‘determination of the broad uses to which organisational resources will be deployed and the resolution of conflicts among the myriad participants in organisations’.<sup>4</sup> Likewise, Shliefer and Vishny view it as the way ‘in which suppliers of finance to corporations assure themselves of getting a return on their investment’.<sup>5</sup> OECD, interestingly, style it as a ‘set of relationships between a company’s management, its board, its shareholders and other stakeholders...that provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance.’<sup>6</sup>

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\* PhD Candidate in Law, University of Sheffield. The origins of this paper stem from a presentation entitled ‘Company Law: New approaches to unsolved questions’, which was presented at the Edinburgh Postgraduate Law Conference (2014). Special thanks to Mr David Cabrelli for providing insightful suggestions. I would also like to mention Professor Andrew Johnston and Dr Lindsay Stirton, my PhD supervisors, for their advice and comments. Of course, any errors that have crept into the body of this article are solely mine.

<sup>1</sup> See generally A Smith, *An Inquiry into the nature and causes of the Wealth of Nations* (1776); and A Berle and G Means, *The Modern Corporation and Private Equity* (1932).

<sup>2</sup> DR Fischel, “The Corporate Governance Movement” (1982) 35 *Vanderbilt Law Review* 1259.

<sup>3</sup> *Financial Aspects of Corporate Governance*, the Committee on the Financial Aspects of Corporate Governance (1992) para 2.5.

<sup>4</sup> CM Daily, DR Dalton, and AA Cannella, “Introduction to Special Topics Forum – Corporate Governance: Decades of Dialogue and Data” (2003) 28 *Academy of Management Review* 371.

<sup>5</sup> A Shliefer and R W Vishny, “A Survey of Corporate Governance” (1997) 52 *Journal of Finance* 737.

<sup>6</sup> OECD, *Principles of Corporate Governance* (2004).

For this reason, it is fair to say (especially with the wide range of definitions attached to corporate governance) that the aims and the tools of corporate governance implementation also vary widely, and are especially dependent on the legal, cultural and structural implications of the corporate form in any given context.<sup>7</sup> And due to the broad effects of corporate governance, there have been numerous empirical and comparative studies<sup>8</sup> conducted, which, taken together, have sought to find correlative relationships between a range of factors: financial performance;<sup>9</sup> firm value;<sup>10</sup> access to finance;<sup>11</sup> executive remuneration;<sup>12</sup> accounting standards;<sup>13</sup> mergers and acquisitions;<sup>14</sup> behaviour compliance;<sup>15</sup> and shareholder activism.<sup>16</sup> This has been done through both a micro and macro-economic lens.

Notwithstanding, the earlier data were collected from a single country, or terribly similar groups of countries. To expound on this, until the mid-1990s little effort was made to publish quantitative research in comparative corporate governance. A seminal reason for this trend is centred on the fact that the comparative study of corporate governance was limited to four key

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<sup>7</sup> OECD, *Principles of Corporate Governance* (2004).

<sup>8</sup> See generally U Bhattacharya and H Daouk, "The World Price of Insider Trading" (2002) 57 *Journal of Finance* 75; S Claessens, S Djankov and LHP Lang, "The separation of ownership and control in East Asian Corporations" (2000) 58 *Journal of Financial Economics* 81; A Dyck and Z Luigi, "Private Benefits of Control: An International Comparison" (2004) 59 *Journal of Finance* 537; M Faccio and LHP Lang, "The Ultimate Ownership of Western European Corporations" (2002) 65 *Journal of Financial Economics* 365; M Pagano and P Volpin, "The Political Economy of Corporate Governance" (2005) 95 *American Economic Review* 1005; M Siems, "Shareholder Protection Around the World" (2008) 33 *Delaware Journal of Corporate Law* 111.

<sup>9</sup> T Aksoy and S Bozkus, "The Impact of Corporate Governance on accounting measures of financial performance, credit usage and trade and openness: an empirical study on Turkish SMEs" (2007), available at [www.cass.city.ac.uk/data/assets/pdf/file/0006/37338/T-Aksoy.pdf](http://www.cass.city.ac.uk/data/assets/pdf/file/0006/37338/T-Aksoy.pdf).

<sup>10</sup> KV Lins, "Equity Ownership and Firm Value in Emerging Markets" (2003) 38 *Journal of Finance and Quantitative Analysis* 159; A Parthasarathy, K Menon and D Bhattacharjee, "Executive Compensation, Firm Performance and Corporate Governance: An Empirical Analysis" (2006), available at [www.ssrn.com/abstract=881730](http://www.ssrn.com/abstract=881730); R Morck, "Management Ownership and Market Valuation: An Empirical Analysis" (1998) 20 *Journal of Financial Economics* 293.

<sup>11</sup> R La Porta, F Lopez-de-Silanes, A Shleifer and RW Vishny, "Law and Finance" (1998) 106 *Journal of Political Economy* 1113; R La Porta, F Lopez-de-Silanes, A Shleifer and RW Vishny, "Legal Determinants of External Finance" (1997) 52 *Journal of Finance* 1131.

<sup>12</sup> ID Gregory-Smith, "Empirical Studies in UK Corporate Governance and Executive Remuneration" (2008), available at [www.theses.nottingham.ac.uk/666/1/ianthesis.pdf](http://www.theses.nottingham.ac.uk/666/1/ianthesis.pdf).

<sup>13</sup> K Shankaraiah and DN Rao, "Corporate Governance and accounting standards in Oman: An empirical study on practices" (2004), available at [www.akamaiuniversity.us/forms/ShankaraiahRao\\_051.pdf](http://www.akamaiuniversity.us/forms/ShankaraiahRao_051.pdf).

<sup>14</sup> S Rossi and P Volpin, "Cross-country determinants of mergers and acquisitions" (2003), available at [www.ssrn.com/abstract=395020](http://www.ssrn.com/abstract=395020); A Bris and C Cabolis, "Adopting better corporate governance: evidence from cross-border mergers" (2008) 14 *Journal of Corporate Finance* 224.

<sup>15</sup> G Laan, "Behavioural Corporate Governance: Four Empirical Studies" (2009), available at [www.dissertations.ub.rug.nl/FILES/faculties/feb/2009/g.van.der.laan/00titlecon.pdf](http://www.dissertations.ub.rug.nl/FILES/faculties/feb/2009/g.van.der.laan/00titlecon.pdf).

<sup>16</sup> E Bengtsson, "Organisational approaches to corporate governance: an empirical study on shareholder activism" (2007) 3 *International Journal of Business Governance and Ethics* 238.

countries: the United States, United Kingdom, Germany and Japan.<sup>17</sup> And given the narrow approach to the study of these jurisdictions, the studies focused on the qualitative rather than quantitative method. There is another attribution factor for the low academic output in quantitative corporate governance research: the unavailability of an acceptable uniform standard to judge the law and policy adopted by different legal systems. This was remedied, partially, by the 1992 *Cadbury Report*<sup>18</sup>, which acted as a catalyst for a wave of academic treatments associated with the investigation into the health of shareholder and investor rights<sup>19</sup> across nation-state boundaries. The standstill on quantitative comparative corporate governance research was finally broken by the publication of ‘Law and Finance’<sup>20</sup> in 1998. Since then, there has been an oversaturation of academic research that focuses on quantifying comparative corporate governance traits, and studying its impact on various indicators.<sup>21</sup>

Consequently, this paper will discuss how to improve data aggregation for the purpose of creating a scientifically robust, unambiguous methodology in the pursuit of quantifying multi-country indices utilising item response theory (IRT). Moreover, the paper addresses how it is advantageous to operate IRT, rather than classical test theory (CTT), which is commonly used by a sizable group of researchers. More specifically, the paper highlights the differences between the uses of both methods on the same datasets, ultimately comparing the results.

## B. DATA SET I<sup>22</sup>

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<sup>17</sup> See generally B Grossfeld and W Ebke, “Controlling the modern corporation: a comparative view of corporate power in the United States and Europe” (1978) 26 *American Journal of Comparative Law* 397; J Charkham, “The American Corporation and the Institutional Investor: Are There Lessons from Abroad” (1988) 3 *Columbia Business Law Review* 765.

<sup>18</sup> *Financial Aspects of Corporate Governance* (n 3).

<sup>19</sup> See generally L Bebchuk, “Efficient and inefficient sales of corporate control” (1994) *Journal of Quarterly Economics* 957; L Bebchuk and L Zingales, “Corporate Ownership Structures: Private v Social Optimality” (1995) National Bureau of Economic Research, available at [www.nber.org/papers/w5584.pdf](http://www.nber.org/papers/w5584.pdf) and D Gromb, “Is One-share-One-Vote Optimal?” (1993) *Financial Markets Groups*, LSE, available at [www.insead.edu/faculty/research/personal/dgromb/research/documents/1s1v.PDF](http://www.insead.edu/faculty/research/personal/dgromb/research/documents/1s1v.PDF).

<sup>20</sup> La Porta et al., “Law and Finance” (n 11).

<sup>21</sup> R La Porta, F Lopez-de-Silanes and A Shefler “Economic Consequences of Legal Origins” (2008) 46 *Journal of Economic Literature* 285.

<sup>22</sup> Original data set, available at [www.faculty.tuck.dartmouth.edu/images/uploads/faculty/rafael-laporta/LegalDeterminShareCredits.xls](http://www.faculty.tuck.dartmouth.edu/images/uploads/faculty/rafael-laporta/LegalDeterminShareCredits.xls). This was mirrored, with minor adjustments, available at <https://drive.google.com/open?id=0Bwa6if0xMceTWhwX3c2bEMwTIE&authuser=0>.

The 1998 paper worked on the hypothesis that countries with poorer investor protection have smaller, and, more importantly, thinner capital markets. The authors coded for forty-nine countries, using eleven factors to describe the corporate governance of each country. The variables were:

- One share-One vote<sup>23</sup>
- Anti-director rights index<sup>24</sup>
  - Proxy by mail<sup>25</sup>
  - Shares not blocked before meeting<sup>26</sup>
  - Cumulative voting or proportional representation<sup>27</sup>
  - Oppressed minorities mechanisms<sup>28</sup>
  - Pre-emptive right to buy new issues of stock<sup>29</sup>
  - Percentage of share capital to call for extra-ordinary general meeting<sup>30</sup>
- Creditor rights index containing four
  - Restrictions on filing a reorganisation petition<sup>31</sup>

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<sup>23</sup> Var: *c1sh\_1vo* - Equals 1 if the company law or commercial code of the country requires that ordinary shares carry one vote per share, and 0 otherwise. Equivalently, this variable equals 1 when the law prohibits the existence of both multiple-voting and non-voting ordinary shares and does not allow firms to set a maximum number of votes per shareholder irrespective of the number of shares owned, and 0 otherwise.

<sup>24</sup> La Porta et al., “Law and Finance” (n 11) at 1134-38: describes ADRI in Table I as a cumulative of 5 variables based on the 1996 working paper; but in the calculation in Table II the ADRI consists of 5 variables, and theoretically the value can range between 0 and 6. The pre-emptive right to buy new shares is used in ADRI calculations in Table II, but not stated in Table I.

<sup>25</sup> Var: *mail\_prx* - Equals 1 if the company law or commercial code allows shareholders to mail their proxy vote, and 0 otherwise.

<sup>26</sup> Var: *nshsbloc* - Equals 1 if the company law or commercial code allows firms to require that shareholders deposit their shares prior to a general shareholders meeting, thus preventing them from selling those shares for a number of days, and 0 otherwise.

<sup>27</sup> Var: *cumu\_vot* - Equals 1 if the company law or commercial code allows shareholders to cast all of their votes for one candidate standing for election to the board of directors, and 0 otherwise.

<sup>28</sup> Var: *oppr\_mi2* - Equals 1 if the company law or commercial code grants minority shareholders either a judicial venue to challenge the management decisions, or the right to step out of the company by requiring the company to purchase their shares when they object to certain fundamental changes, such as mergers, asset dispositions and changes in the articles of incorporation, and equals 0 otherwise.

<sup>29</sup> Var: *preempt* - coded as 1 when the pre-emptive right to buy new issues of stock which can only be waived by a shareholder vote, and 0 otherwise.

<sup>30</sup> Var: *Esmvotes* - It is the minimum percentage of ownership of share capital that entitles a shareholder to call for an extraordinary shareholder meeting. Coded 1 when the minimum percentage of shareholder vote is ten per cent or less.

<sup>31</sup> Var: *ch11\_res* - Equals 1 if the reorganisation procedure imposes restrictions, such as creditors’ consent or minimum dividend to file for reorganisation, and 0 otherwise.

- Secured creditors gain possession of security once the reorganisation petition has been approved, with no automatic stay on secured assets<sup>32</sup>
- Secured creditors first in distribution of proceeds from reorganisation<sup>33</sup>
- Debtor management does not stay in control<sup>34</sup>

Thus the relevant corporate government data was in an **N x M** matrix of 49 x 11 data points.<sup>35</sup> A typical line of data is presented below:

Cou ntry	c1sh_ lvo	oppr_ mi2	esmv otes	mail_ prx	cumu _vot	pre mpt	nshsb loc	secu _1 <sup>st</sup>	ch11 _res	mgt_ nost	nauto _st
Chil e	1	1	1	0	1	1	1	1	1	0	0
Anti-director rights index = 5								Creditor rights index = 2			

### (1) Classical Theory Test

For over a century, CTT has been the mainstay of social science measurement. CTT grew out of the work of Charles Spearman, in which he showed how to extract the correlation coefficient and obtain an index of reliability.<sup>36</sup> The basic postulate of CTT is usually expressed as  $X = T + E$ , which translates to ( $X$ ) being the sum of true score/component ( $T$ ) plus a random error ( $E$ ). CTT theory led to factor analysis and related developments.<sup>37</sup> In its simplest form, researchers assume that ( $E$ ) is inconsequential, and that all observed variables have equal weight on ( $X$ ). La Porta, Lopez-de-Silanes, Shleifer and Vishny used this simple variation of CTT and calculated the anti-

<sup>32</sup> Var: nauto\_st - Equals 1 if the reorganisation procedures impose an automatic stay on the assets of the firm upon filing the organisation petition. This restriction prevents secured creditors from gaining possession of their security, and 0 otherwise.

<sup>33</sup> Var: secu\_1st Equals 1 if secured creditors are ranked first in the distribution of the proceeds that result from the disposition of the assets of a bankrupt firm. Equals 0 if non-secured creditors, such as the Government and workers, are given absolute priority.

<sup>34</sup> Var: mgt\_nost - Equals 1 if the debtor keeps the administration of its property, pending the resolution of the reorganisation process, and 0 otherwise. Also, this variable equals 0 when an official appointed by the court or by creditors is responsible for the operation of the business during reorganisation.

<sup>35</sup> Edited dataset, available at <https://drive.google.com/file/d/0BwXa6if0xMceMn16V1ROY3RJdzg/view>.

<sup>36</sup> C Spearman, "The proof and measurement of association between two things" (1904) 15 The American Journal of Psychology 72.

<sup>37</sup> RE Traub, "Classical test theory in historical perspective" (1997) 8 Educational Measurement: Issue and Practices; K Bollen and R Lennox, "Conventional Wisdom on measurement: a structural equation perspective" (1991) 110 Psychological Bulletin 305.

director rights index and the creditor rights index, by merely adding all the variables represented under them. To illustrate, using the above data line as a point of reference, ADRI for Chile is five and the creditor rights index is two. Hence, an overall corporate governance index would comprise of equal representation from all eleven variables, and Chile’s corporate government index would be eight as a result.<sup>38</sup>

## (2) Item Response Theory

IRT houses several mathematical models that describe, in terms of probability, the association between observed variables and the inborn latent trait being measured. Louis Thurstone developed the conceptual basis for IRT in the 1920s.<sup>39</sup> His findings focused on the connection between the success in test items and the distribution of successive age or grade groups.<sup>40</sup> So, under IRT it is assumed that all observed factor values are expressions of the underlying latent trait of the object being tested. Resultantly, from a frequentist – or classical – perspective, IRT is a probabilistic factor analysis, which uses Bayesian analysis to estimate factor loading. In the context of the LLSV data assessment, again using the previous example, an IRT researcher would assume that the latent trait for Chile is  $\theta_{\text{Chile}}$ . Due to this, observed items, like *c1sh\_1vo*, *oppr\_mi2*, *esmvotes*, *mail\_prx*, *cumu\_vot*, and *preempt*, assume the response pattern of  $Y_{\text{Chile}} = \{1,1,1,0,1,1\}$ . A two-parameter IRT model for one observed variable mathematically manifests as expressed below:

$$P(c1sh_1vo = 1|\theta, \alpha_{c1sh_1vo}, \beta_{c1sh_1vo}) = \frac{1}{1 + e^{-\alpha_{c1sh_1vo}(\theta - \beta_{c1sh_1vo})}} \quad 41$$

Where probability of the value of *c1sh\_1vo* is to be 1, and dependent on three parameters, which is the latent trait being measured,  $\alpha_{c1sh_1vo}$  is the discrimination parameters of variables *c1sh\_1vo* and  $\beta_{c1sh_1vo}$ ; these also act as the difficulty parameter of *c1sh\_1vo*. Put differently, if the underlying corporate governance trait of Chile is  $\theta_{\text{Chile}}$ , then the probability of *c1sh\_1vo* having a value of 1 or 0 depends on the unknown discrimination parameter,  $\alpha_{c1sh_1vo}$ , and the unknown

<sup>38</sup> La Porta et al., “Law and Finance” (n 11) did not calculate an overarching corporate governance index; they used ADRI, creditor rights index and one share-one vote, to act as separate proxies for investor protection.

<sup>39</sup> LL Thurstone, “A Method of Scaling Psychological and Educational Tests” (1925) 16 *Journal of Educational Psychology* 433.

<sup>40</sup> D Thissen and L Steinberg, “Item Response Theory”, in RE Millsap and AM Olivares (eds), *The Sage Handbook of Quantitative Methods in Psychology* (2013).

<sup>41</sup> BB Reeve and P Fayers, “Applying item response theory modelling for evaluating questionnaire items and scale properties”, in P Fayers and R Hays (eds), *Assessing Quality of Life in Clinical Trials: Methods of Practice*, 2nd edn (2005).

difficulty parameter,  $\beta_{c1sh\_1vo}$ , of the observed variable. This can also be written as: the probability of whether Chile will have regulations that state that one share should equate to one vote.

Weighing this against the findings in ‘Law and Finance’<sup>42</sup>, the data set includes forty-nine countries apart from Chile. In a similar vein, the equation to predict whether Argentina would have a regulation for  $c1sh\_1vo$  would be:

$$P(c1sh\_1vo, Argentina = 1 | \theta_{Argentina}, \alpha_{c1sh\_1vo}, \beta_{c1sh\_1vo}) = \frac{1}{1 + e^{-\alpha_{c1sh\_1vo}(\theta - \beta_{c1sh\_1vo})}}$$

For  $x$  countries, the following must be taken into account:

- $Y_i$  denotes the observed response pattern of corporate governance indicators
- $j$  describes the individual corporate governance items
- $\alpha_j$  represents the discrimination for  $j$
- $\beta_j$  signifies the difficulty for  $j$

And trait  $\theta_i$  can be estimated as:

$$\ell(Y_i | \theta_i, \alpha_i, \beta_i) = \prod_{j=1}^i P(Y_{ij} = 1 | \theta_i, \alpha_i, \beta_i)^{43}$$

The problem with executing IRT was simple: algebraically, it is impossible to solve an equation with one known value, pitted against three unknown values. Ultimately, this means that either: 1) difficulty and discrimination parameters should be known; or 2) their distribution pattern should be estimated;<sup>44</sup> or 3) it should involve iterative simulations under Markov Chain Monte Carlo (MCMC) algorithms to converge to an approximate integration over the distribution.<sup>45</sup> A

<sup>42</sup> R La Porta et al., “Law and Finance” (n 11).

<sup>43</sup> F Baker and S Kim, *Item Response Theory*, 2nd edn (2004).

<sup>44</sup> See generally FM Lord, “Maximum Likelihood and Bayesian Parameter Estimation in Response Theory” (1986) 23 *Journal of Educational Measurement* 157.

<sup>45</sup> See generally W Gilks, S Richardson and DJ Spiegelhalter, *Markov Chain Monte Carlo in practice* (1997).

Bayesian estimation of IRT<sup>46</sup> was also developed to complement the MCMC simulation; but this process was computer-intensive. Its full potential was only realised in the late 1990s, when processing power became more conventional.<sup>47</sup>

The advantages of using IRT over CTT, where the model fully fits the data<sup>48</sup> set, are manifold. To begin with, there is item parameter invariance, which means that ‘while all CTT concepts are specific to a given sample, the parameters of an IRT model hold for an entire population’.<sup>49</sup> This translates to item difficulty parameters being independent of subject ability, and subject abilities being independent of the items being observed. Secondly, CTT researchers are forced to do an arbitrary factor analysis on parameter value to realise the final index; but this never fully explains why certain factors are more important than others. It also fails to proffer an explanation as to why when using MCMC in IRT, in explaining the underlying trait, and assuming that each parameter has equal importance and discriminatory power, it is possible to simulate the probable values of parameters, and then extract the values that best fit the response pattern.

### **C. LLSV DATA: COMPARISON OF THE CORPORATE GOVERNANCE INDEX**

In the ‘Law and Finance’ dataset, there were forty-nine countries and eleven data indicators per country. Therefore there was a 49 x 11 data matrix. In this section, the corporate governance traits of forty-nine countries is estimated using a fully Bayesian algorithm.<sup>50</sup> 10,000 iterations each are run, across three chains of the algorithm. *R* is within parameter, and the trace plot indicates the chains have properly converged. The results are then traced in the caterpillar plot. The countries are stacked in two columns, with ascending corporate governance traits. The line represents the ninety-five per cent credible interval for each estimated value of corporate governance. The filled-up dot represents the mean, or true value, of the corporate governance trait for any given country.

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<sup>46</sup> H Swaminathan, “Parameter estimation in item response model”, in R Hambleton (ed), *Application of Item Response Theory* (1983).

<sup>47</sup> S Kim, “An evaluation of a Markov chain Monte Carlo method for the Rasch model” (2001) *Applied Psychological Measurement* 163; R Patz and BW Junker, “A straightforward approach to Markov chain Monte Carlo methods for item response theory models” (1999) *Journal of Educational Behavioural Statistics* 146; D Clayton, “Generalized linear mixed models”, in WR Gilks, S Richardson and DJ Spiegelhalter (eds), *Markov Chain Monte Carlo methods in practice* (1999).

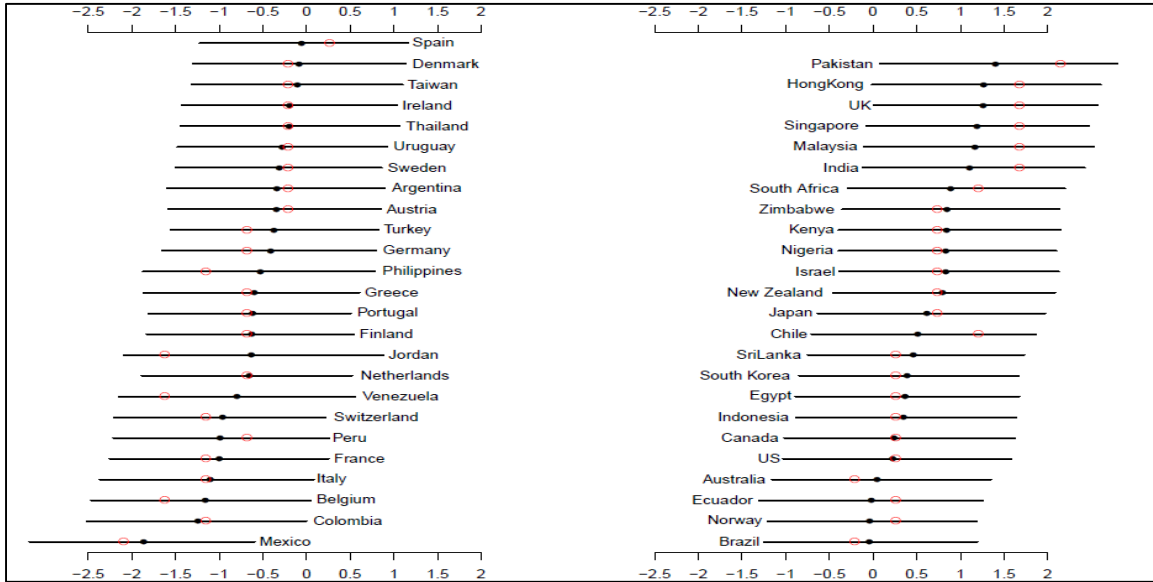
<sup>48</sup> R Hambleton, H Swaminathan and HJ Rogers, *Fundamentals in Response Theory* (1991).

<sup>49</sup> AD Mead, “Test Construction using CTT and IRT with Un-representative samples”, available at [http://mypages.iit.edu/mead/Mead\\_and\\_Meade-v10.pdf](http://mypages.iit.edu/mead/Mead_and_Meade-v10.pdf).

<sup>50</sup> The statistical programme *R* was used to write the codes, in conjunction with *JAGS*, which is a programme used to analyse the Bayesian hierarchical models within the context of the MCMC simulation.

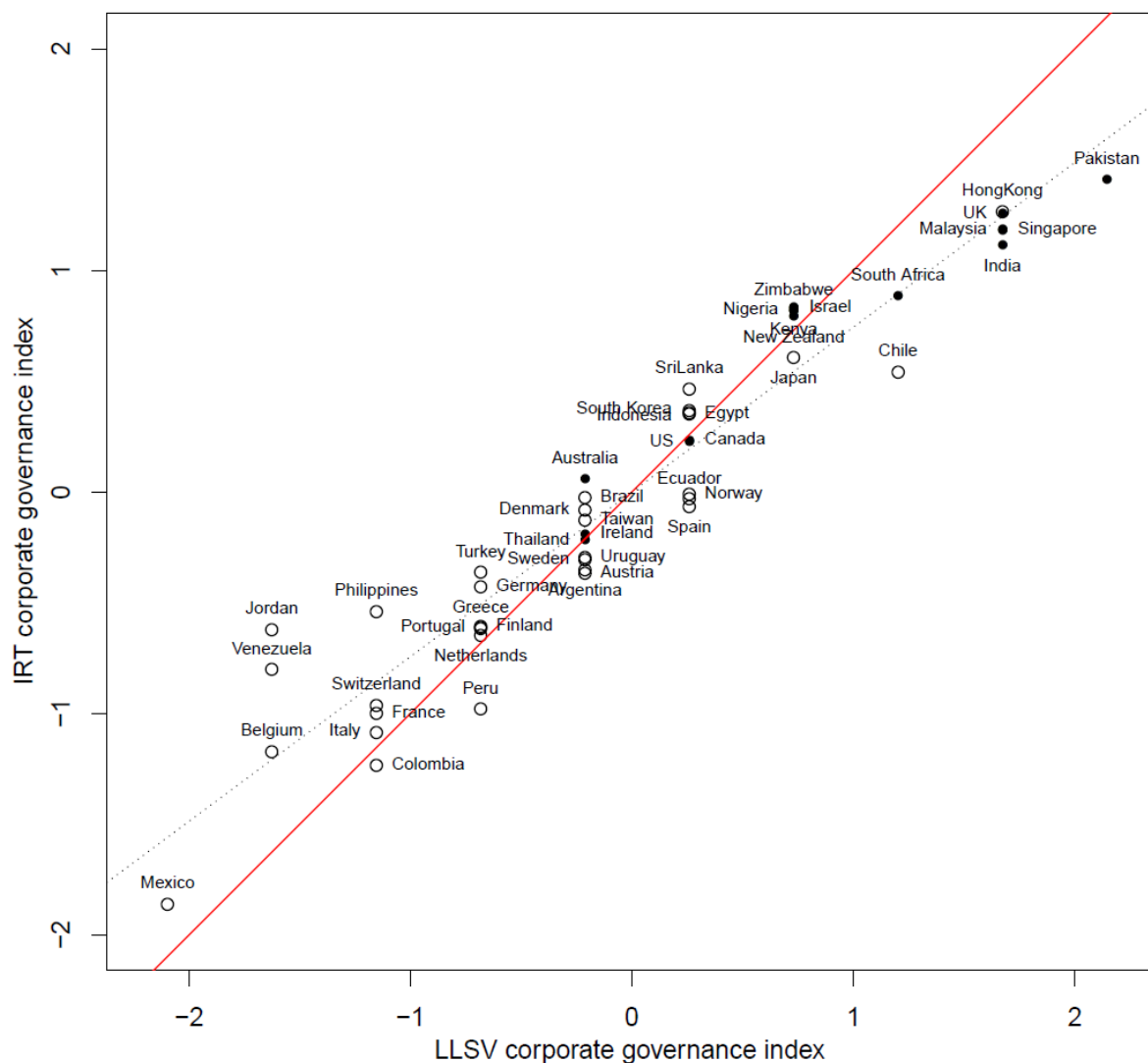


The empty circle represents the estimation of corporate governance traits using CTT. All data have been standardised<sup>51</sup> for comparison.



The standardised score is also traced on the scatter plot, with the IRT-based scores on the Y-axis and the CTT-based scores on the X-axis. The dotted line is the regression line, whilst the solid line is the (0, 1) index line.

<sup>51</sup> The classical test scores were calculated by adding up the values from eleven corporate governance variables, and then the mean and standard deviations were calculated. The standard scores were calculated by using the following formula: (country score- mean score)/standard deviation.



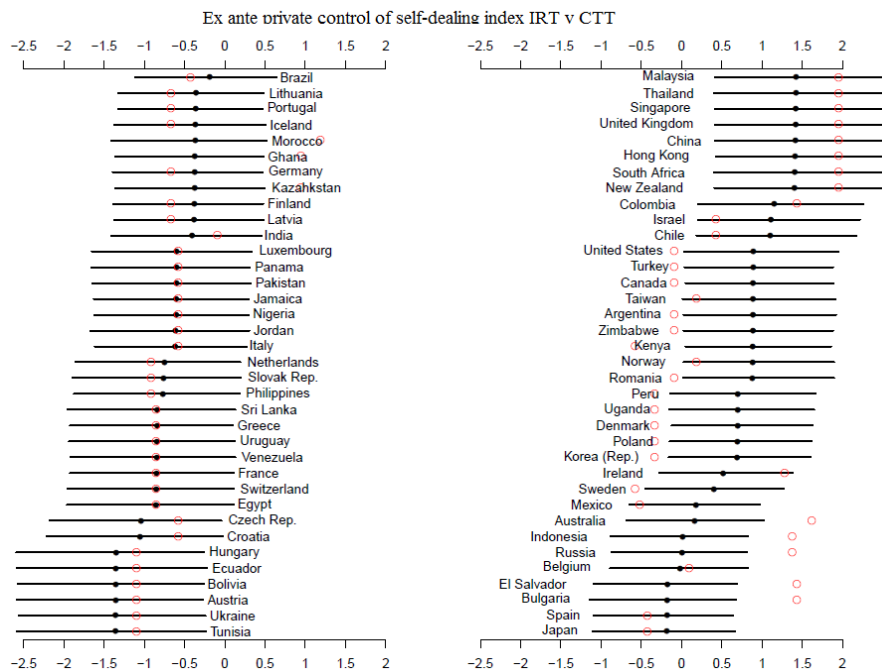
Common law jurisdictions have been represented with a filled-up dot, and other jurisdictions are represented as hollow dots.

Both the caterpillar plot and the scatter plot use the same corporate governance data set produced by LLSV, and compare the IRT estimates against the CTT values of the corporate governance index used by LLSV. From the plots it is clear that later criticisms of LLSV are true

concerning the propositions put forward about common law jurisdictions.<sup>52</sup> Most of the represented countries towards the top right corner of the diagram are over-estimated under CTT, and all of them are common law jurisdictions. At the same time, LLSV seems to have under-approximated corporate governance for most civil law countries. This shows that, even when data are inconsistent and biased, it is possible to get an accurate picture by using IRT instead of CTT.

#### D. THE LAW AND ECONOMICS OF SELF-DEALING

Djankov, La Porta, Silanes and Shleifer<sup>53</sup> devised a novel index on the ‘legal protection of minority shareholders against exploitation by corporate insiders’, which they called the anti-self-dealing index. They coded for twenty-seven variables, which ranged from public and private enforcement of controls, to expropriation by management, across seventy-two countries. They also re-coded the LLSV ADRI from 1998, but improved this with more consistent coding. Nonetheless, in compiling the index, they still relied on factor analysis and CTT. The plots below explain how the index on *ex ante* private control would vary if IRT had been used in the first instance.



<sup>52</sup> H Spamann, “On the insignificance and/or endogeneity of La Porta et al.’s Anti-Director Rights Index under Consistent Coding” (2006), available at <http://ssrn.com/abstract=894301> and H Spamann, “The Anti-Director Rights Index” (2010) 23 Review of Financial Studies 467.

<sup>53</sup> S Djankov, R La Porta, FL Silanes and A Shleifer, “The Law and Economics of Self-Dealing” (2005), available at <http://www.nber.org/papers/w11883.pdf>.

The caterpillar plot manifests an interesting result: there is wide dispersion of mean indices; but the country trend, approximately, remains the same. One methodological reason for the minor dispersion can be attributed to the breakup of factorial items into binomial variables, which was reflected in the 2005 findings.

### **E. SPAMANN (2006)**

To correct the inherent flaws in the data collection that stemmed from LLSV (like the inconsistent coding and common law bias), Spamann focused on ADRI and coded for forty-six of the forty-nine countries from the original experiment.<sup>54</sup> Spamann used the original component variables of ADRI:

- Whether proxy vote by mail is permitted
- Whether shares can be blocked before a general meeting
- Whether cumulative voting is allowed
- Whether the oppressed minority shareholders are allowed an appropriate relief mechanism
- Whether shareholders have pre-emptive rights to new issues
- The percentage of share capital required to call an extraordinary general meeting

He also added two more variables to investigate:

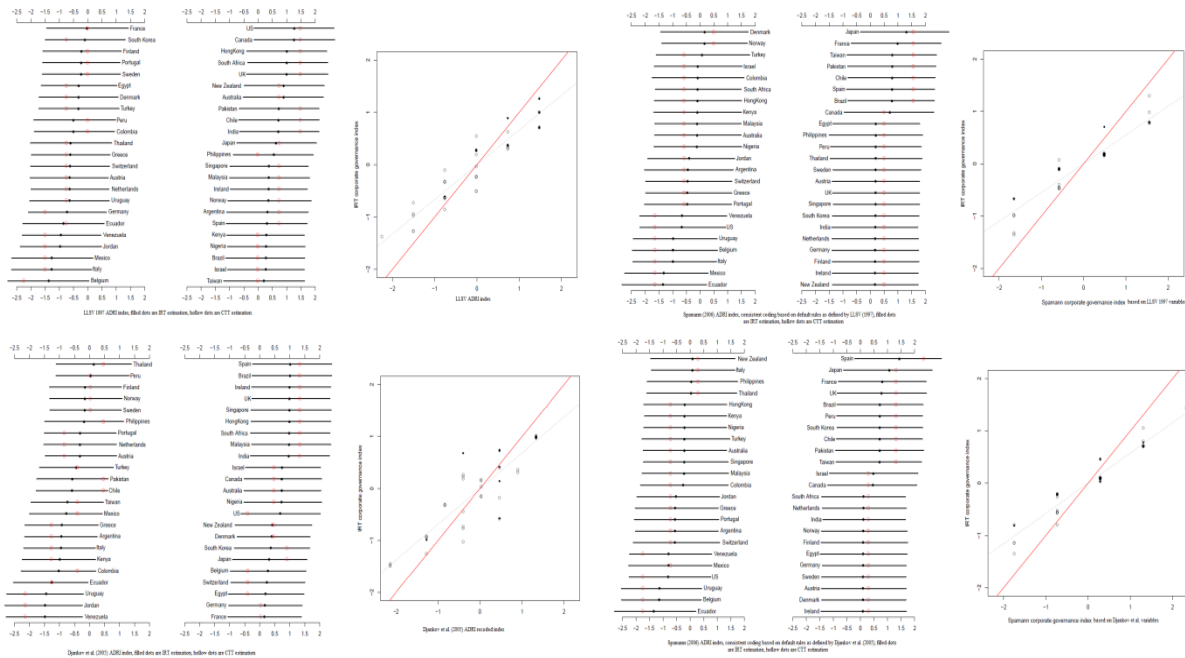
- Whether one share affords one vote
- Whether country laws stipulate for mandatory dividends

Spamann concluded that the LLSV data contained errors, and therefore empirical studies based on that data were susceptible to erroneous results. Aside from this, Spamann also employed CTT to calculate his index. Here, the Spamann data are put through IRT, and are similarly scrutinised for dispersal problems like those found in LLSV. Critically, only ADRI values are addressed, and run through comparative IRT and CTT simulations. This is done for the six data

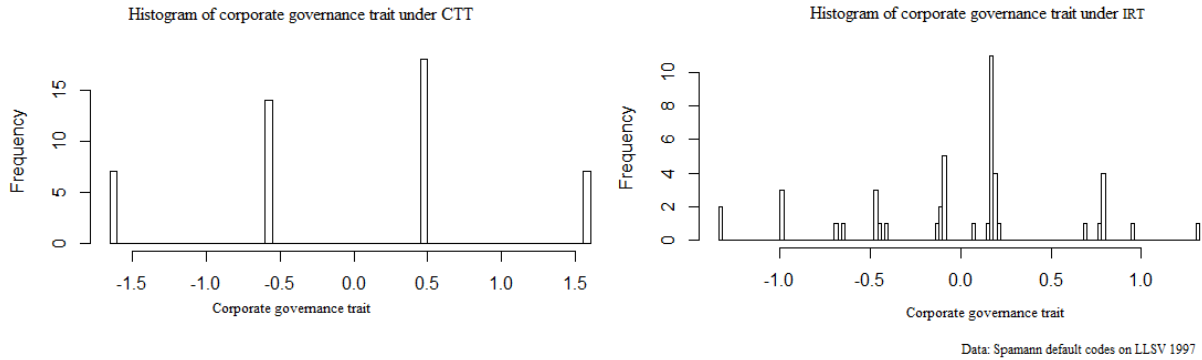
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<sup>54</sup> Djankov, La Porta, Silanes and Shleifer (n 53).

items coded by Spamann in a cumulative index, followed by the Spamann coding of the work done by Djankov, La Porta, Silanes and Shleifer, plus the original data.



The graphs show a correlation of .93 between the IRT and CTT estimations of ADRI in the LLSV data. There is a correlation of .88 for the re-coded ADRI *vis-à-vis* the Djankov, La Porta, Silanes and Shleifer data. And there is a correlation of .96 for the Spamann data, which is based on the definition used in the 2005 paper. This shows that consistent data shorten the gap between IRT and CTT estimation. But this correlation does not explain the whole story. If one looks at the plotting of the density graphs of traits derived under IRT and CTT, the picture is far clearer.



Instead of bunching the countries into neat categories, as done with CTT, IRT breaks down the categories, and provides a wider range of groupings. Thus, IRT creates more intuitive and realistic indices that provide accurate representations of the transition between corporate governance traits across different countries.

## F. CONCLUSION

In closing, from the comparison, it is clear that corporate governance indexes utilising IRT enjoy advantage over those using CTT. Instead of having a rigid quantitative category, IRT affords a gradual range, which increases the inherent explanatory power of an index. This allows for the adjustment of rater reliability. Furthermore, IRT calculations do not execute arbitrary factor analysis, but instead use probabilistic modelling to estimate the parameter value for increased scientific robustness and indexing accuracy. This is not to say that IRT does not suffer from drawbacks. The learning curve is steep, and it is ever important to consistently monitor whether the models have converged before drawing conclusions. And it must be borne in mind that larger sample sizes have more explanatory power in providing credible intervals. It follows that, on balance, it is beneficial to utilise IRT to compute indices on corporate governance.

# Rating the EU Regulatory Framework on the Liability of Credit Rating Agencies – “Triple A or Junk”?

*Jan de Bruyne\* and Cedric Vanleenhove\*\**

## A. INTRODUCTION

Credit rating agencies (“CRAs”) evaluate the creditworthiness of financial instruments or issuers of such instruments.<sup>1</sup> They examine the risk that the payment of interests and capital will not or will not completely take place at the promised time.<sup>2</sup> By rating financial instruments, CRAs help to reduce informational asymmetries between lenders and investors on one side and borrowers or issuers on the other side.<sup>3</sup> Investors, who in most cases do not have the capacity or time to examine and evaluate the quality of financial instruments or the creditworthiness of the issuer of such instruments, use the ratings issued by the CRAs to make investment decisions.<sup>4</sup>

Incorrect ratings of structured products contributed to the collapse of the subprime-mortgage market in the United States (“US”), which eventually led to the financial crisis.<sup>5</sup> Investors are increasingly trying to hold CRAs liable for their role in the global crisis. However, imposing liability on CRAs has not been a straightforward task for a long time. CRAs argue that their ratings are only predictive opinions and thus protected speech under the First Amendment of

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<sup>1</sup> JC Coffee, *Gatekeepers: the role of the professions in corporate governance* (2006) 283-284.

<sup>2</sup> M Kruithof and E Wymeersch, “The Regulation and Liability of Credit Rating Agencies in Belgium”, in E Dirix and YH Leleu (eds), *The Belgian Reports at the Congress of Utrecht of the International Academy of Comparative Law* (2006) at 351 (henceforth Kruithof and Wymeersch, “Liability of Credit Rating Agencies in Belgium”).

<sup>3</sup> H McVea, “Credit Rating Agencies. The Subprime Mortgage Debacle and Global Governance: The EU Strikes Back” (2010) 59 ICLQ at 706-707 (henceforth McVea, “The EU Strikes Back”); F Partnoy, “The Siskel and Ebert of Financial Markets: Two Thumbs Down for the Credit Rating Agencies” (1999) 77 Wash ULQ at 628-638.

<sup>4</sup> Kruithof and Wymeersch, “Liability of Credit Rating Agencies in Belgium” (n 4) at 353; A Darbellay, *Regulating Credit Rating Agencies* (2013) 38 (henceforth Darbellay, *Credit Rating Agencies*).

<sup>5</sup> See for a discussion on the role of CRAs in the financial crisis: NS Ellis, LM Fairchild and F D’Souza, “Is Imposing Liability on Credit Rating Agencies a Good Idea?: Credit Rating Agency Reform in the Aftermath of the Global Financial Crisis” (2012) 17 Stan J L Bus Fin at 192-203.

the US Constitution. Furthermore, CRAs often invoke broad disclaimers accompanying their ratings to refute any liability towards investors.

Following the 2008 financial crisis, several changes have occurred in case law dealing with the liability of CRAs. Courts in the US, for instance, no longer accept that CRAs can always shield behind the First Amendment to refute liability for inaccurate ratings given to mortgage-backed securities.<sup>6</sup> In addition, the Australian *Bathurst* case imposed liability on Standard & Poor's because the CRA did not have reasonable grounds to issue the rating.<sup>7</sup> At the same time, there have also been regulatory "innovations" regarding the liability of CRAs at the international and supranational level. This article examines some of the problems that occur in the application of this legislation. More specifically, part B discusses how the International Organisation of Securities Commissions ("IOSCO") regulates CRAs. Although its activities do not explicitly cover the liability of CRAs, the IOSCO implemented principles that can be relevant to determine whether CRAs acted negligently. The European Union, on the other hand, has adopted a regulation which imposes liability upon CRAs if strict requirements are met. These requirements, as well as issues of private international law arising under the application of the regulation, are discussed in part C.

## **B. THE LIABILITY OF CRAS FROM AN INTERNATIONAL PERSPECTIVE**

There is currently no international legislation covering the (third-party) liability of CRAs. The IOSCO<sup>8</sup> has only adopted measures to improve the quality of ratings and the rating process (e.g., on the independence of CRAs and the management of conflicts of interest).<sup>9</sup> Reference can, in this regard, be made to the 2004 IOSCO Code of Conduct Fundamentals for CRAs.<sup>10</sup> The Code has

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<sup>6</sup> See for example: *Abu Dhabi Commercial Bank v Morgan Stanley & Co. Inc.*, 651 F. Supp. 2d 155, 175-176 (SDNY 2009); *In Re National Century Financial Enterprise Inc.*, 580 F. Supp. 2d 630, 640-648 (SD Ohio 2008); *Anschutz Corp. v Merrill Lynch & Co.*, 785 F. Supp. 2d 799, 831-832 (N.D. Cal. 2011); *California Public Employees' Retirement System v Moody's Corp.*, Docket No. A134912, No. CGC-09-490241, para. 30-34 (Cal. Ct. App. 2014). See for a discussion: C Deats, "Talk that Isn't Cheap: Does the First Amendment Protect Credit Rating Agencies' Faulty Methodologies from Regulation?" (2010) 110 Colum L Rev 1818 at 1818-1864; T Nagy, "Credit Rating Agencies and the First Amendment: Applying Constitutional Journalistic Protections to Subprime Mortgage Litigation" (2009) 94 Minn L Rev at 140-167.

<sup>7</sup> *Federal Court of Australia, Bathurst Regional Council v Local Government Financial Services Pty Ltd* (No 5) [2012] FCA 120; *ABN AMRO Bank NV v Bathurst Regional Council* [2014] FCAFC 65.

<sup>8</sup> For an in-depth discussion of IOSCO initiatives in the field of CRAs: G Baber, "The role and responsibility of credit rating agencies in promoting soundness and integrity" (2014) 17 JOMLC 34 at 34-49.

<sup>9</sup> See for example: IOSCO (Technical Committee), "IOSCO Statement of Principles Regarding the Activities of Credit Rating Agencies" (2003), available at [www.iosco.org/library/pubdocs/pdf/IOSCOPD151.pdf](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD151.pdf).

<sup>10</sup> IOSCO (Technical Committee), "Code of Conduct Fundamentals for Credit Rating Agencies" (2004), available at [www.iosco.org/library/pubdocs/pdf/IOSCOPD180.pdf](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD180.pdf).



been updated after the 2008 financial crisis to cover the rating of structured finance products and related transactions.<sup>11</sup> CRAs are expected to give full effect to the Code of Conduct as investors might view compliance with it as a sign of good governance. CRAs have to disclose how each Fundamental is addressed in their own codes of conduct. They should explain if their codes deviate from the Fundamentals. If this is the case, CRAs must show how the objectives laid down in the IOSCO Code are achieved by the deviations (the so-called “comply or explain” principle).<sup>12</sup>

As previously mentioned, none of the IOSCO initiatives cover the liability of CRAs. Moreover, several shortcomings remain with regard to the Code of Conduct Fundamentals itself. Besides the fact that several CRAs fail(ed) to fully implement the Code,<sup>13</sup> it uses undefined terms<sup>14</sup> and “*suffers from critical limitations.*”<sup>15</sup> The 2008 financial crisis revealed that CRAs failed to properly identify and address the risks created by structured finance products.<sup>16</sup> The Code is based on voluntary compliance by CRAs and cannot be enforced by the IOSCO.<sup>17</sup> The Code does not contain sanctions or a liability regime that regulators can use if CRAs breach one of the Fundamentals.<sup>18</sup> Nonetheless, the Code encloses provisions that can be used by courts to determine the (appropriate) level and standard of care for a reasonable and prudent CRA.<sup>19</sup> In this regard, the IOSCO encourages national legislators to implement the Fundamentals in their own legislation.<sup>20</sup>

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<sup>11</sup> IOSCO (Technical Committee), “Code of Conduct Fundamentals for Credit Rating Agencies” (2008), available at [www.iosco.org/library/pubdocs/pdf/IOSCOPD271.pdf](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD271.pdf).

<sup>12</sup> Darbellay, *Credit Rating Agencies* (n 6) at 64; U Blaurock, “Control and Responsibility of Credit Rating Agencies” (2007) 11 EJCL 26 at 26-27. See in this regard also para 4.1 and the discussion at 2 in the introduction of the 2008 IOSCO Code of Conduct Fundamentals.

<sup>13</sup> See in this regard: IOSCO (Technical Committee), “A Review of Implementation of the IOSCO Code of Conduct Fundamentals for Credit Rating Agencies” (2009) at 8-9, available at: [www.iosco.org/library/pubdocs/pdf/IOSCOPD286.pdf](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD286.pdf); KS Charles, “Regulatory Imperialism: The Worldwide Export of European Regulatory Principles on Credit Rating Agencies” (2010) 19 Minn J Int’l L 409 at 409-410 (henceforth Charles, “Regulatory Imperialism”).

<sup>14</sup> McVea, “The EU Strikes Back” (n 5) at 718.

<sup>15</sup> McVea, “The EU Strikes Back” (n 5) at 719; Charles, “Regulatory Imperialism” (n 15) at 409-410.

<sup>16</sup> Darbellay, *Credit Rating Agencies* (n 6) 66; McVea, “The EU Strikes Back” (n 5) at 719.

<sup>17</sup> J de Haan and F Amtenbrink, “Credit Rating Agencies” (DNB Working Paper No. 278, 2011) at 17-18, available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1760951](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1760951); Charles, “Regulatory Imperialism” (n 16) at 409-410.

<sup>18</sup> MB Hemraj, “Soft law regulation of the credit rating agencies” (2014) 35 Co Law 2014 at 15-16.

<sup>19</sup> See in this regard also the case *U.S. v. McGraw-Hill Companies*, CV 13-0779 DOC(JCGx), Order Denying Defendant’s Motion to Dismiss, 7-11 (C.D. Cal. 2013). The District Court emphasised that the statements in the codes of conduct (which are based on the IOSCO Code of Conduct Fundamentals) are not general or subjective claims about the management of conflicts of interest but instead guarantees that CRAs established policies and procedures to avoid such conflicts of interest. Moreover, the court examined whether the alleged behaviour of S&P corresponded to the current and on-going policies set out in its code of conduct. This is an indication that the codes can be used to define how a reasonable and prudent CRA should act.

<sup>20</sup> IOSCO (Technical Committee), “Code of Conduct Fundamentals for Credit Rating Agencies” (2008) at 2.

Furthermore, national legislation in the jurisdiction where CRAs operate prevails over the Code of Conduct Fundamentals.<sup>21</sup> The extent to which CRAs can be held liable in tort or contract is thus primarily determined by EU or national law. Against this background, the European Commission adopted a regulation which contains provisions on the liability of CRAs. This is remarkable because the EU is often not clear on the private law effects of its financial market legislation.<sup>22</sup> Such a liability regime for CRAs is even more surprising considering that supranational regulators were unable to regulate the third-party liability of other certifiers such as auditors<sup>23</sup> and classification societies.<sup>24</sup>

### **C. THE LIABILITY OF CRAS FROM THE SUPRANATIONAL PERSPECTIVE**

#### **(1) Regulatory framework prior to EU Regulation 1060/2009 on CRAs**

Until recently, the EU did not regulate the liability of CRAs.<sup>25</sup> The Commission, based on a report issued by the Committee of European Securities Regulators (CESR),<sup>26</sup> concluded in 2006 that legislative intervention was not necessary. The combination of the different Financial Service Directives (e.g., the Market Abuse Directive, the Capital Requirements Directive, and the Markets

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<sup>21</sup> IOSCO (Technical Committee), “Code of Conduct Fundamentals for Credit Rating Agencies” (2008) at 2.

<sup>22</sup> W Den Hollander, “European tort law through the front door: civil liability for credit rating agencies” (2013) Leiden Law Blog, available at [leidenlawblog.nl/articles/european-tort-law-through-the-front-door-civil-liability-of-credit-rating-a](http://leidenlawblog.nl/articles/european-tort-law-through-the-front-door-civil-liability-of-credit-rating-a). See in this regard for example the discussion on the private law effects of the Markets in Financial Instruments Directive (MiFID): M Tison, “The Civil Law Effects of MiFID in a Comparative Law Perspective” (Ghent Financial Law Institute Working Paper No. WP 2010-05); D Busch, “Why MiFID matters to private law—the example of MiFID’s impact on an asset manager’s civil liability” (2012) 7 CMLJ 386 at 386-413.

<sup>23</sup> The EU has only adopted a Recommendation on the limitation of the civil liability of auditors and audit firms (Commission Recommendation 2008/473 OJ 2008 L162/39).

<sup>24</sup> The EU enacted Directive 2009/15 OJ 2009 L131/47 and Regulation 391/2009 OJ 2009 L 131/11 that deal with the role, recognition and liability of classification societies when acting on behalf of the Flag State (the so-called “public role” of recognised organisations). Article 5.2(b) of the Directive regulates the financial liability of ROs when their activities cause harm for which the government has been held liable. However, the Directive remains silent on the liability of classification societies towards shipowners or third parties (when classification societies perform their so-called “private role”). As such, courts have to rely on domestic principles of contract and tort law to determine the classification society’s liability. See for a comparison between different certifiers: J De Bruyne and C Vanleenhove, “An EU perspective on the liability of classification societies: selected current issues and private international law aspects” (2014) 20 JIML 103 at 103-120.

<sup>25</sup> See for an extensive discussion on how the EU regulated the liability of CRAs: F De Pascalis, “Civil Liability of Credit Rating Agencies from a European Perspective: Development and Contents of Art 35(a) of Regulation (EU) No 462/2013” (University of Oslo Faculty of Law Research Paper No. 2015-05).

<sup>26</sup> Committee of European Securities Regulators, CESR’s Technical Advice to the European Commission on Possible Measures Concerning Credit Rating Agencies, CESR/05-139b March 2005 available at [www.esma.europa.eu/system/files/05\\_139b.pdf](http://www.esma.europa.eu/system/files/05_139b.pdf).

in Financial Instruments Directive) with the IOSCO Code of Conduct Fundamentals adequately covered the working of CRAs.<sup>27</sup>

This non-intervention approach changed following the role of CRAs in the US subprime-mortgage crisis and the subsequent collapse of financial markets. Based on an extensive consultation process, the Commission adopted a proposal for a Regulation on credit rating agencies.<sup>28</sup>

## **(2) EU Regulation 1060/2009 on credit rating agencies**

Regulation (EC) 1060/2009 on CRAs was adopted by the European Parliament and the Council on September 16 2009.<sup>29</sup> The Regulation is based on the IOSCO Code of Conduct Fundamentals and has four objectives: ensuring that CRAs avoid or adequately manage conflicts of interest, improving the quality of credit ratings and rating methodologies, enhancing the transparency of the rating process through disclosure obligations, and establishing efficient registration and surveillance mechanisms.<sup>30</sup> The (original) Regulation, however, did not contain provisions on the liability of CRAs. Recital (69) of the Regulation only stated that claims against CRAs in relation to infringements of the Regulation had to be made according to national legislation on civil liability.

The Commission launched a consultation process on regulatory reform of CRAs in 2010. The Commission noted that legislation on the liability of CRAs varied between the EU member states. Consequently, CRAs had the possibility to shop around and choose jurisdictions under which their liability was less likely. Therefore, the Commission asked the respondents whether

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<sup>27</sup> European Commission, “Communication from the Commission on Credit Rating Agencies” COM 2006/C 59/02 (11.03.2006)

<sup>28</sup> European Commission, “Proposal a Regulation of the European Parliament and of the Council on Credit Rating Agencies” COM(2008) 704 final (12.11.2008).

<sup>29</sup> Parliament and Council Regulation 1060/2009 OJ 2009 L302/1.

<sup>30</sup> See for a discussion on the application of the Regulation on CRAs: I H Y Chiu, “Regulating Credit Rating Agencies in the EU: In Search of a Coherent Regulatory Regime” (2014) 25 EBLR 269 at 269-294 (arguing that the regulation pursues two objectives that conflict with and undermine each other. While the first objective is to enhance rating accuracy, the second objective is to restore market. The Regulation places more emphasis on the regulating of rating accuracy which results in a form of product regulation for credit ratings, raising the public interest profile of ratings); B Haar, “Civil Liability of Credit Rating Agencies after CRA 3– Regulatory All-or-Nothing Approaches Between Immunity and Over-Deterrence” (2014) 25 EBLR 315 at 315-334 (noting that the liability of CRAs as provided for in Article 35(a) of the Regulation on CRAs does not solve problems arising from issues of privity of contract, from difficulties of proof under tort law and from the risk of a market freeze resulting from over-deterrence on ratings. Liability caps based on the concept of disgorgement of profits of CRAs may help to strike an adequate balance between the danger of macroeconomic harm created by reckless CRAs and the threat of a market freeze resulting from over-deterrence); Darbellay, *Credit Rating Agencies* (n 6) 72-76; McVea (n 5) at 720-728.

there was a need to include a liability regime in the Regulation on CRAs.<sup>31</sup> Many stakeholders favored the incorporation of a regime under which CRAs would be liable for gross negligence and intention.<sup>32</sup> This eventually resulted in (a proposal of) article 35a included in Regulation 462/2013 on the liability of CRAs.<sup>33</sup>

### **(3) Article 35a – liability regime for credit rating agencies**

Based on the findings of the consultation process, the European Commission adopted draft proposals for a Regulation and Directive amending Regulation 1060/2009 on CRAs.<sup>34</sup> Based on the amendments expressed by the EU Council<sup>35</sup> and the Parliament<sup>36</sup> against the stringent rules in the proposal, the final Directive<sup>37</sup> and Regulation<sup>38</sup> were published in the Official Journal of the European Union on May 31 2013 and entered into force on June 20 2013.

Recital (32) in Regulation 462/2013 on CRAs underlines the importance of ratings for investors and issuers. Ratings have a significant impact on investment decisions and on the image and financial attractiveness of issuers. As such, CRAs have an important responsibility towards investors and issuers to ensure that they comply with the applicable requirements in the Regulation and that their ratings are independent, objective and of adequate quality.<sup>39</sup> At the same time, recital (32) acknowledges that it remains particularly difficult for investors to establish the liability of CRAs in the absence of a contractual relationship. The Regulation therefore establishes a right of redress for investors who have reasonably relied on a rating issued in breach with Regulation

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<sup>31</sup> European Commission, “Public Consultation on Credit Rating Agencies” (2010) at 24-25, available at [ec.europa.eu/internal\\_market/consultations/docs/2010/cra/cpaper\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2010/cra/cpaper_en.pdf).

<sup>32</sup> European Commission, “Overview of responses to Public Consultation on Credit Rating Agencies” (2011) at 3 available at:

[ec.europa.eu/internal\\_market/securities/docs/agencies/summary-responses-cra-consultation-20110704\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/agencies/summary-responses-cra-consultation-20110704_en.pdf).

<sup>33</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies, COM(2011) 747 final, 2011/0361 (COD).

<sup>34</sup> The European Commission adopted a Proposal for a Regulation of the European Parliament and of the Council amending Regulation 1060/2009 on credit rating agencies and a Proposal for a Directive amending Directive 2003/41 on the activities and supervision of institutions for occupational retirement provision, Directive 2009/65 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and Directive 2011/61 on Alternative Investment Funds Managers in respect of over-reliance on credit ratings.

<sup>35</sup> Council of the European Union, “Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies. General approach”, Inter Institutional File: 2011/0361 (COD), May 25 2012 at 44-45.

<sup>36</sup> European Parliament, “Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 1060/2009 on credit rating agencies” A7-0221/2012, August 23 2012 at 82-83.

<sup>37</sup> Parliament and Council Directive 2013/14 OJ 2013 L145.

<sup>38</sup> Parliament and Council Regulation 462/2013 OJ 2013 L146/1.

<sup>39</sup> Also see paragraph 3.4.7 in the Proposal for amending Regulation 1060/2009 on credit rating agencies, COM(2011) 747 final, 2011/0361 (COD).

1060/2009.<sup>40</sup> Against this background, article 35a on the liability of CRAs was included in Regulation 462/2013. It contains the core provision on the liability of CRAs towards both the issuers and investors.<sup>41</sup> Investors bringing an action against CRAs under article 35a have to prove several elements that are discussed in the following paragraphs.

As was the case under the proposal, CRAs will only be liable when they intentionally or with gross negligence commit any of the infringements listed in Annex III.<sup>42</sup> CRAs will not face liability for simple negligence or simply because they issued the “wrong” rating. The Regulation does not impose liability on CRAs when they commit the infringement by mistake or because they did not demonstrate reasonable care.<sup>43</sup> This standard of fault is appropriate as rating activities involve a degree of assessment of complex economic factors. The use of different rating methodologies might lead to different results none of which can be considered as incorrect.<sup>44</sup> Contrary to the situation under the proposal,<sup>45</sup> CRAs are able to limit their liability in advance where that limitation is reasonable and proportionate, and allowed by the applicable national law.<sup>46</sup> Any limitation that does not comply with these requirements or any contractual exclusion of the liability is deprived of legal effect.<sup>47</sup>

The infringement of the Regulation must also have (had) an impact on the rating. It is the investor who has to present accurate and detailed evidence indicating that the CRA has committed an infringement of the Regulation and that this infringement had an impact on the rating.<sup>48</sup> Contrary to the situation under the proposal, the Regulation does not contain a reversal of the burden of proof for claims against CRAs.<sup>49</sup> The competent court is required to assess whether the

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<sup>40</sup> Recital (32) Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>41</sup> Article 35a Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>42</sup> Article 35a, 1 Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>43</sup> European Commission, “New rules on credit rating agencies (CRAs) enter into force – frequently asked questions”, MEMO/13/571, June 18 2013, 1 available at [europa.eu/rapid/press-release\\_MEMO-13-571\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-571_en.htm).

<sup>44</sup> Recital (33) Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>45</sup> The draft stipulated that a CRA could not exclude or limit its civil liability in advance by an agreement on pain of being null and void. See in this regard: Article 35a (5) Proposal for a Regulation on CRAs amending Regulation 1060/2009 on CRAs.

<sup>46</sup> Article 35a, 3 Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>47</sup> Article 35a, 3 Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>48</sup> Art. 35a, 1 & 2 Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>49</sup> The draft provided for a reversal of the burden of proof if the investor established facts from which it could be inferred that a CRA committed any of the listed infringements. If the investor proved such facts, the CRA had to demonstrate that it did not commit the infringement or that the infringement did not have an impact on the issued rating. See in this regard: Article 35a, 4 Proposal for a Regulation on CRAs amending Regulation 1060/2009 on CRAs.

presented information is accurate and detailed, taking into account that the investor or issuer might not have access to information that is purely within the sphere of the CRA.<sup>50</sup>

Finally, the Regulation also requires a causal link between the infringement and the loss suffered by the investor in two ways. First, the investor has to establish that he reasonably relied on the rating in accordance with article 5a, first paragraph of the Regulation<sup>51</sup> or otherwise with due care.<sup>52</sup> What is to be understood under the notion “reasonable reliance” is unclear and not defined in the Regulation. It could imply that a CRA will not incur liability if the investors mentioned in the Regulation (e.g., investment firms or insurance undertakings) did not make their own credit risk assessment but relied solely on ratings to assess the creditworthiness of an entity or financial instrument.<sup>53</sup> Second, the investor must have reasonably relied on the rating for a decision to invest into, hold onto or divest from a financial instrument covered by that rating.<sup>54</sup>

If all these requirements are met, namely (1) intentional or gross negligent infringement, (2) impact of the infringement on the rating, and (3) reasonable reliance on the rating for (4) an investment decision, then the investor may claim compensation from the CRA for its financial losses.<sup>55</sup> Several problems, however, remain with regard to the application of the Regulation. In addition to the high threshold of proof for third parties (e.g., reasonable reliance on the rating and the impact on decision-making processes),<sup>56</sup> the Regulation refers to national law for the interpretation and application of essential notions such as “damages”, “gross negligence”, “reasonably relied”, “due care” and “impact”. Moreover, matters concerning the liability of CRAs

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<sup>50</sup> Article 35a, 2 Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>51</sup> This article tries to overcome over-reliance by financial institutions on credit ratings.

<sup>52</sup> Article 35a, 1 Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>53</sup> Article 5a, 1 Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>54</sup> Article 35a, 1 Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>55</sup> Article 35a, 1 Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>56</sup> In this regard, Moellers and Niedorf conclude that the requirement for investors to show that they exercised due care when using the rating “*in practice restricts liability claims to private investors, which was not initially intended by the legislature. A liability claim by those most likely to sue is thus practically prevented*” and that the liability regime in Article 35a remains a “*theoretical claim*”. See in this regard: TMJ Möllers and C Niedorf, “Regulation and Liability of Credit Rating Agencies – A More Efficient European Law?” (2014) 11 ECFR 333 at 347-348. Also see: J Kleinow, “Civil Liability of Credit Rating Companies: Quantitative Aspects of Damage Assessment from an Economic Viewpoint” (University of Oslo Faculty of Law Research Paper No. 2015-03) (proposing a market price-oriented approach for the assessment of damage and urging regulators to develop a well-thought-out liability regime); A Horsch, “Civil Liability of Credit Rating Companies – Qualitative Aspects of Damage Assessment from an Economic Viewpoint” (University of Oslo Faculty of Law Research Paper No. 2015-08) (arguing that the liability regime in article 35a is too inaccurate and insufficient regarding several aspects of damage assessment. Consequently, the rule does not make sense from an economic perspective).

that are not covered by the Regulation (e.g., causation and liability for ordinary negligence) are governed by national law.<sup>57</sup>

#### **(4) Private international law issues**

Article 35a of the Regulation on CRAs relies heavily on rules of private international law, both in the area of jurisdiction as in the field of the applicable law. The application of the rules of private international law to the field of financial law can be rather complex. The localisation of pure economic loss, for instance, often raises problems. It is therefore interesting to explore the private international law dimension of the provision in a bit more detail.

##### **(a) Jurisdiction**

As to jurisdiction, the last sentence of article 35a, paragraph 4, provides that the court that is competent to decide on a claim for liability brought by an investor or issuer shall be determined by the relevant rules of private international law. The Brussels *Ibis* Regulation,<sup>58</sup> which replaced the Brussels I Regulation as of 10 January 2015, will be of limited importance in this regard as the major CRAs (Standard & Poor's, Moody's, and Fitch) are all located in the US. The Regulation only applies if the defendant is domiciled within the EU (article 4). For companies domicile is to be understood as the place of its statutory seat, its central administration or its principal place of business (article 63.1).

If the CRA does have its domicile in the EU, the Regulation governs the competence of the European courts. Depending on the circumstances of the case, Fitch might fall under the scope of the Regulation because it has headquarters in London as well as in New York. The courts of the domicile of the CRA will have general jurisdiction over the dispute (article 4.1). Additional grounds of specific jurisdiction are available to the plaintiff. Article 7.1 of the Brussels *Ibis* Regulation offers jurisdiction in contractual disputes (i.e., for solicited ratings) to the place where the services were provided.<sup>59</sup> For actions of a non-contractual nature article 7.2 points to the place where the harmful event occurred. In *Bier* the European Court of Justice explained that the place of the harmful event should be understood as both the place of the damaging event (*locus acti*) and

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<sup>57</sup> Article 35a 4 Regulation 1060/2009 as amended by Regulation 462/2013.

<sup>58</sup> Parliament and Council Regulation 1215/2012 OJ 2012 L351/1.

<sup>59</sup> Deipenbrock argues that the European civil liability regime should fall outside the ambit of the Rome I Regulation on the law applicable to contractual obligations because it does not expressly presuppose a contractual relationship between the investor or issuer and the credit rating agency: G Deipenbrock, "The European Civil Liability Regime for Credit Rating Agencies from the Perspective of Private International Law – Opening Pandora's Box?" (University of Oslo Faculty of Law Legal Studies Research Paper Series no. 2015-02) at 9. Under this reasoning article 7.1 Brussels *Ibis* Regulation would also not be applicable.

the place of the damage (*locus damni*).<sup>60</sup> This is referred to as the so-called double forum. In case of a claim based on the liability of a CRA, the place where the damaging event took place will be the domicile of the CRA because it issued its rating there. The place of the damage will be the location where the issuer or investor suffers its financial loss.<sup>61</sup>

In one instance the Regulation does not require the defendant to be domiciled in the European Union. When parties incorporate a jurisdiction clause in favour of a court of a member state into their agreement, this choice is validated by the Regulation (article 24). This scenario, however, seems highly unlikely given the legal reality. Issuers are mostly forced to enter into a contract on the economically powerful CRA's standard terms. These terms are geared towards the rating agency's interests and will not confer jurisdiction to a European court but rather to the American courts.<sup>62</sup> Therefore, the possibility for issuers and investors to sue the big players on the rating market in the courts of a European country will in most cases depend on that member state's national rules of private international law.

(b) Applicable law

Although article 35a offers a liability framework for CRAs, the provision is not all embracing but is supplemented by the applicable national law. Again, private international law intervenes to support the functioning of the article. Article 35a, paragraph 4, first sentence, for instance, specifies that terms such as "damage", "intention", "gross negligence", "reasonably relied", "due care", "impact", "reasonable" and "proportionate" which are referred to in the article but are not defined, shall be interpreted and applied in accordance with the applicable national law as determined by the relevant rules of private international law.

When the suit is brought before the court of a member state, the judge will apply the Rome II Regulation<sup>63</sup> to determine the law governing the dispute.<sup>64</sup> It should be emphasised that this does not need to be the law of a member state as the Regulation has universal application (article 3). Article 4, providing the general rule for torts, is the controlling provision. The article gives precedence to the law of the country where both parties have their habitual residence (article 4.2).

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<sup>60</sup> Case 21/76 *Handelskwekerij G. J. Bier BV v. Mines de potasse d'Alsace SA* [1976] ECR 1735.

<sup>61</sup> See in this regard *infra* for the *locus damni* in the context of applicable law.

<sup>62</sup> This point is made under the assumption that a contractual claim is possible under article 35a CRA Regulation. But even if article 35a CRA Regulation is to be construed as a strictly tortious claim, article 24 Brussels *Ibis* Regulation can have its relevance as parties could, at least theoretically, agree on a forum after the dispute has arisen.

<sup>63</sup> Parliament and Council Regulation 864/2007 OJ 2007 L199/40.

<sup>64</sup> Denmark is the only Member State that does not apply the Regulation.



When a European company is seeking to establish the liability of an American CRA this paragraph obviously does not apply.

Instead, article 4.1 leads to the law of the country in which the damage occurs (*lex loci damni*). The place where pure economic loss, which is the nature of the damages suffered as a result of the CRA's infringement, is to be located has been clarified by the European Court of Justice. The cases arose under the Brussels I Regulation but the rulings can be transposed to the field of applicable law as well. This follows from recital 7 of the Rome II Regulation which lays down parallel interpretation as it states that the provisions of the Rome II Regulation should be consistent with the Brussels I (now Brussels *Ibis*) Regulation and the Rome I Regulation.

In *Kronhofer v Maier* the Court of Justice made clear that the domicile of the investor or the place where his assets are concentrated could not be equated to the place of financial damage. The connecting factor is the place where the loss of the relevant part of his assets is incurred.<sup>65</sup> Almost a decade earlier, in *Marinari v Lloyds*, it was already held that the *locus damni* cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere. The *locus damni* does not cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another member state.<sup>66</sup>

#### D. CONCLUSION

Several suggestions have been made to increase the accuracy of ratings: creating a European or governmental CRA,<sup>67</sup> enhancing competition in the rating sector,<sup>68</sup> re-establishing the investors-pays business model or re-organising the rating process,<sup>69</sup> implementing other compensation

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<sup>65</sup> Case C-168/02 *Rudolf Kronhofer v Marianne Maier and Others* [2004] ECR I-6009.

<sup>66</sup> Case C-364/93 *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company* [1995] ECR I-2719.

<sup>67</sup> See in this regard: X, "EU-based credit rating agency buried", EUobserver, Brussels, May 1 2013; M Gudowski, "Mortgage Credit Ratings and the Financial Crisis: The Need for a State-Run Mortgage Security Credit Rating Agency" (2010) 1 Colum Bus L Rev at 101.

<sup>68</sup> See in this regard: C Hill, "Regulating the Rating Agencies" (2004) Wash ULQ at 83; JT Gannon, "Let's Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model" (2012) 31 Rev Banking & Fin L at 1015.

<sup>69</sup> See in this regard: ND Horner, "If You Rate It, He Will Come: Why Uncle Sam's Recent Intervention with the Credit Rating Agencies Was Inevitable and Suggestions for Future Reform" (2014) 41 Fla St U L Rev at 489; J Grundfest and EE Hochenberg, "Investor Owned and Controlled Rating Agencies: A Summary Introduction", Stanford Law and Economics Olin Working Paper No. 391; O Schmid, "Rebuilding the Fallen House of Cards: A New Approach to Regulating Credit Rating Agencies" (2012) (3) Colum Bus L Rev at 994; FP Hosp, "Problems and Reforms in Mortgage-Backed Securities: Handicapping the Credit Rating Agencies" (2010) 79 Miss L J at 531.

schemes for CRAs<sup>70</sup> and rewarding or sanctioning CRAs.<sup>71</sup> Some have argued that the liability of CRAs is an important way to improve the accuracy of ratings.<sup>72</sup> From this perspective, article 35a might indeed be effective to enhance the quality of ratings and should thus be applauded. Several problems, however, remain with regard to its application such as the enormous burden of proof for investors and the reliance on national law. In addition, scholars have expressed concerns on the application of article 35a from a more economic<sup>73</sup> and legal point of view.<sup>74</sup> Finally, concerns arise with regard to the private international law dimension of article 35a. In sum, the supranational regulatory framework on CRAs is not worth a “triple A rating” but, when comparing it with the (often non-existing) liability regimes for other certifiers, cannot be classified as a “junk rating” either.

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<sup>70</sup> See in this regard: J Manns, “Rating Risk after the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability” (2009) 87 NCL Rev at 1011; Y Listokin and B Taibleson, “If You Misrate, then You Lose: Improving Credit Rating Accuracy Through Incentive Compensation” (2010) 27 Yale J on Reg at 92.

<sup>71</sup> See in this regard: JP Hunt, “Credit rating Agencies and the “Worldwide Credit Crisis”: The Limits of Reputation, the Insufficiency of Reform, and a Proposal for Improvement” (2009) 1 Colum Bus L Rev at 1; JT Gannon, “Let’s Help the Credit Rating Agencies Get it Right: A Simple Way to Alleviate a Flawed Industry Model” (2012) 31 Rev Banking & Fin L at 1015.

<sup>72</sup> See for example: Ellis, Fairchild and D’Souza, “Credit Rating Agency Reform” at 210-222; K Dennis, “The Ratings Game: Explaining Rating Agency Failures in the Build Up to the Financial Crisis” (2009) 63 U Miami L Rev at 1148-1150; R Jones, “The Need for a Negligence Standard of Care for Credit Rating Agencies” (2010) 1 Wm & Mary Bus L Rev at 226-231; S Harper, “Credit Rating Agencies Deserve Credit for the 2007–2008 Financial Crisis: An Analysis of CRA Liability Following the Enactment of the Dodd-Frank Act” (2011) 68 Wash & Lee L Rev at 1957-1971; B Haar, “Civil Liability of Credit Rating Agencies after CRA 3– Regulatory All-or-Nothing Approaches Between Immunity and Over-Deterrence” (2014) 25 EBLR at 315-334; AM Paccès and A Romano, “A Strict Liability Regime for Rating Agencies”, European Corporate Governance Institute (ECGI) - Law Working Paper no 245/2014.

<sup>73</sup> See references in (n 58).

<sup>74</sup> See references in (n 32).

# Does Legal Innovation Cope with Financial Innovation?: Product Intervention Powers in Post-Crisis EU Financial Markets Regulations

*Michael Wolfgang Müller\**

## A. INTRODUCTION

In their tale of “The Hare and the Hedgehog,”<sup>1</sup> the Brothers Grimm tell a version of Aesop’s famous fable of the tortoise and the hare.<sup>2</sup> In a Sunday racing duel for a *louis d’or* and a bottle of brandy, the hedgehog realises that he will never be able to keep up with the hare unless he uses a trick: he places his wife at the finish and tells her to shout “I’m already here” whenever the hare approaches – “as everyone knows, a hedgehog’s wife looks just like her husband.” During the seventy-fourth round of the duel, the hare falls dead in the field.

The tale of the hare and hedgehog might characterize the uneasy relationship between innovation and law, which is the central focus of this conference.<sup>3</sup> One understands innovation, at least since Schumpeter, as the “doing of new things or the doing of things that are already being done in a new way”<sup>4</sup> or, more simply, as “ideas, successfully applied.”<sup>5</sup> If everything goes well,

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<sup>1</sup> J Grimm and W Grimm, “Der Hase und der Igel”, in *Kinder- und Hausmärchen*, 5th edn (1843), no 187; in the following, all quotes are from the English translation by DL Ashliman, “The Hare and the Hedgehog” (2000), available at <http://www.pitt.edu/~dash/grimm187.html>.

<sup>2</sup> Perry Index 226.

<sup>3</sup> On the “race” between law and technology see, in German legal scholarship, W Berg, “Der Wettlauf zwischen Technik und Recht” (1985) 40 *Juristenzeitung* 401.

<sup>4</sup> JA Schumpeter, “The Creative Response in Economic History” (1947) 7 *The Journal of Economic History*, 149 at 151.

<sup>5</sup> M Dodgson and D Grant, *Innovation: A Very Short Introduction* (2010) at xi.

innovation leads to changes in efficiency, productivity, quality or competitiveness of an enterprise and, on a macro-level, stimulates economic growth.<sup>6</sup>

The law, of course, is relevant when certain things do not go well. Innovation might come with negative externalities: for example, health risks created by medical products<sup>7</sup> or environmental concerns arising out of nuclear technologies.<sup>8</sup> As Burkhard Schafer put it in the Keynote Panel to this conference: “Lawyers always have concerns.”<sup>9</sup> However, if the law stays responsive the fear is that it will run behind new developments as the hedgehog would in an open race with the hare.

The law also has some tricks at its disposal. A famous one is the application of the so-called precautionary principle by European Courts.<sup>10</sup> They interpret this principle as allowing for prohibitions of new technologies if there is just some concern about potential risks; scientific evidence is not required.<sup>11</sup> In fact, this often leads to a shifting of the burden of proof against the inventor.<sup>12</sup> Instead of running behind, the law shouts: “I’m already here.” Without wanting to judge this strategy,<sup>13</sup> it shows the dilemma the law faces in view of innovative technologies: it runs the risk of being either too restrictive or too late. The task of lawmakers and legal scholars is to look for ways out of this dilemma. Strategies created to deal with risks while at the same time not prohibiting ideas from being applied is what we might call “legal innovation.”<sup>14</sup> This paper will

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<sup>6</sup> M Greenstone and A Loomey, *A Dozen Economic Facts About Innovation*, (2011) at 2, available at [http://www.brookings.edu/~/media/research/files/papers/2011/8/innovation-greenstone-looney/08\\_innovation\\_greenstone\\_looney.pdf](http://www.brookings.edu/~/media/research/files/papers/2011/8/innovation-greenstone-looney/08_innovation_greenstone_looney.pdf).

<sup>7</sup> See, e.g., the contribution to this conference by M Shimwell, “Eyes Wide Open – A Legal and Sociological Understanding of Falsified Medicines Regulation” (2014), available at: <http://www.lawphdconference.ed.ac.uk/2014/11/19/eyes-wide-open-a-legal-and-sociological-understanding-of-falsified-medicines-regulation/>.

<sup>8</sup> See DL Olson, JR Birge, and J Linton, “Introduction to risk and uncertainty management in technological innovation” (2014) 34 *Technovation* 395.

<sup>9</sup> See [http://www.lawphdconference.ed.ac.uk/files/2014/01/EPGLC2014\\_Programme\\_Final.pdf](http://www.lawphdconference.ed.ac.uk/files/2014/01/EPGLC2014_Programme_Final.pdf).

<sup>10</sup> Cf Article 191 para 2 Treaty of the Functioning of the European Union (“TFEU”): “Union policy on the environment... shall be based on the precautionary principle...” The European Court of Justice held the precautionary principle to be a general principle of European Law beyond environmental policy, Case C-157/96 *National Farmers’ Union* [1998] ECR I-2211, para 63; Case C-180/96 *United Kingdom v Commission* [1998] ECR I-226, para 99; Case C-41/02, *Commission v Netherlands* [2004] ECR I-11375, para 44.

<sup>11</sup> Case C-157/96, *National Farmers’ Union* [1998] ECR I-2211, para 61; Case C-180/96, *United Kingdom v Commission* [1998] ECR I-226, para 98.

<sup>12</sup> MS Kayıkçı, “The Burden of Proof within the Scope of the Precautionary Principle: International and European Perspectives” (2012) at 27, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2101613](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101613).

<sup>13</sup> For the most nuanced criticism of the precautionary principle see C Sunstein, *Laws of Fear: Beyond the Precautionary Principle*, (2005).

<sup>14</sup> Cf A Scherzberg, “Risikosteuerung durch Verwaltungsrecht: Ermöglichung oder Begrenzung von Innovationen?” (2003) 63 *Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer* 214 (235).

address the question whether the law copes with new products with regard to a very particular sort of innovation. During the global financial crisis, it was doubted whether what was previously called financial innovation was innovative at all.<sup>15</sup> Financial innovation, in general, refers to all sorts of new products, processes, and technologies in the area of finance.<sup>16</sup> It is common, however, to restrict the focus of financial innovation to new, purportedly inventive, structured financial products.<sup>17</sup> The following section will describe some recent forms of structured financial products and explain how they were meant to help with diversifying individual risk. Thereafter the paper will address how, at the outset of the global financial crisis, this diversifying function did not work and how, instead, systemic risk built up and then materialized in global financial markets. Against this background an attempt to address adverse consequences of financial products in post financial crisis EU regulation will be discussed: the possibility of product intervention under the new framework of the Markets in Financial Instruments Regulation. The paper will conclude with some remarks on the relationship between law and financial innovation in this Regulation.

## **B. FUNCTIONS AND EXAMPLES OF FINANCIAL INNOVATION**

In his paper “In Defense of Much, But Not All, Financial Innovation,” Robert Litan distinguishes four functions financial innovations can serve.<sup>18</sup> Basically, he identifies them as the four functions of finance, but according to Litan, the history of finance is the history of financial innovation.<sup>19</sup>

First, financial innovation provides means of payment facilitating exchanges: early innovations in this regard were coins and paper money, followed by the automatic teller machine and credit and debit cards,<sup>20</sup> and potentially payment systems on the Internet.<sup>21</sup>

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<sup>15</sup> For recent criticism, including Paul Voleker’s: “How many other innovations can you tell me that have been as important to the individual as the automatic teller machine, which in fact is more of a mechanical than a financial one,” see R Litan “In Defense of Much, But Not All, Financial Innovation” (2010), available at <http://www.brookings.edu/research/papers/2010/02/17-financial-innovation-litan> at 1.

<sup>16</sup> Litan (n 15) at 2; E Avgouleas, “Regulating financial innovation. A multifaceted challenge to financial stability, consumer protection, and growth”, in N Moloney, E Ferran and J Payne (eds.), *The Oxford Handbook of Financial Regulation* (2015), draft version available at <http://ssrn.com/abstract=2458335>.

<sup>17</sup> See, e.g., D Awrey, “Toward a supply side view of financial innovation” (2013) 41 *Journal of Comparative Economics* 401.

<sup>18</sup> See Litan (n 15) at 2, 7 et seqq. Of course, these potential benefits of financial innovation are seen from a demand-side perspective; the suppliers of the respective innovations will look at their own profit, and, perhaps, as in the case of collateralized debt obligations at relief from capital requirements.

<sup>19</sup> For a similar description, albeit with slightly different categorisations, see also Avgouleas (n 16) at 1.

<sup>20</sup> Litan (n 15) at 7, 11 et seqq.

<sup>21</sup> For a recent overview see B Fung, M Molico, and G Stuber, *Electronic Money and Payments: Recent Developments and Issues* (Bank of Canada Discussion Paper 2014-II, 2014), available at <http://www.bankofcanada.ca/wp-content/uploads/2014/04/dp2014-2.pdf>.

Second, financial innovation can encourage saving by offering interest, dividends and capital gains on invested money. While this category traditionally includes banks and their various services, in more recent times funds have gained importance: Litan refers to money market funds, indexed mutual funds, exchange-traded funds and financial limited partnerships (i.e., venture capital funds, hedge funds, and private equity funds).<sup>22</sup> This “decentralized provision of financing outside of traditional banking channels”<sup>23</sup> (so-called shadow banking) poses a number of serious legal questions which, however, will not be considered in this paper. Analysing innovation in financial products leads to the third and fourth function of financial innovation Litan names. Both are combined in a number of products, particularly in collateralized debt obligations, which will be addressed in part C of this paper.

The third function of financial innovation refers to investment: financial innovation can help “to channel savings...into productive investments.”<sup>24</sup> This is a traditional function of financial intermediation: by providing long-term investment funding based on short-term deposits, banks turn depositors’ savings into investment credit.<sup>25</sup> As one of several developments in this regard, Litan names the securitization of loans:

By bundling many individual, heretofore illiquid (difficult to sell) loans into packages on which securities could be issued (passing through the loan payments, pro rata, to the purchasers of the securities, securitization was thought to considerably expand the supply of funds available for lending beyond the deposits available in the banking system (which in fact it has done).<sup>26</sup>

This was specifically done with mortgages for private households, which led to the creation of mortgage-backed securities.<sup>27</sup> The idea of pooling various credits together leads to the fourth function of financial innovation: allocating financial risk to those parties who can most effectively bear it. Of course, the overall risk in the financial system cannot be reduced, but risk can be spread among parties and can be channelled to those able to bear or insure against the materialization of risk.<sup>28</sup> This insurance function is, most importantly, fulfilled by derivative financial instruments.

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<sup>22</sup> Litan (n 15) at 15 et seqq.

<sup>23</sup> SL Schwarcz, “The Governance Structure of Shadow Banking: Rethinking Assumptions About Limited Liability” (2015) 90 Notre Dame Law Review forthcoming, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2364126](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2364126).

<sup>24</sup> Litan (n 15) at 7.

<sup>25</sup> T D Simpson, *Financial Markets, Banking, and Monetary Policy* (2014) at 46.

<sup>26</sup> Litan (n 15) at 30.

<sup>27</sup> *Ibid.* at 30 et seqq. For an introduction based on examples see AB Ashcraft and T Schuermann, *Understanding the Securitization of Subprime Mortgage Credit* (2008) at 25 et seqq.

<sup>28</sup> Litan (n 15) at 8.

The shifting and spreading of financial risk will now be explained by way of example of a traditional derivative contract, before mortgage backed securities are addressed in more detail. In a simple derivative contract, a party insures against future development of, for example, market prices or indices (this value, from which the value of a derivative contract is derived, is called the underlying). The basic forms to do that are futures (contracts on the future sale for a price that is already specified at present), options (the right of one party to sell at a specified price) and swaps (two parties exchange one stream of cash flow for another).<sup>29</sup> An almost epic (in the traditional sense) description of how derivatives evolved to serve the need of farmers to insure against the uncertainty of selling prices for corn can be found in Peter Bernstein's bestseller, *Against the Gods*.<sup>30</sup>

Farmers cannot tolerate volatility, because they are perennially in debt... Before the farmer sees any money coming his way, he has to pay for his inputs, plant his crop, and then, constantly fearful of flood, drought, and blight, wait months until harvest time.

What the farmer can do is to sell "his crop when he plants it, promising future delivery to the buyer at a pre-arranged price. He may miss out on some profit if prices rise, but the futures contract will protect him from catastrophe if prices fall."<sup>31</sup> The contract partners in this example could be food producers whose income is inversely proportional to the farmer's: they benefit from low corn prices and, by concluding the derivative contract, insure against rising prices.<sup>32</sup> In the above-mentioned example of asset-backed securities, risk shifts from the issuing banks to the securities purchasers. As various mortgages are bundled together in packages, risk is supposed to be diversified in the sense that an individual default does not matter that much for the overall investment.<sup>33</sup> Moreover, by selling the securities on the markets, risk is spread among various investors so that defaults would not matter that much as they might for an individual institute. In addition, with another form of financial innovation, so called collateralized debt obligations ("CDOs") securities purchasers could be divided into "tranches" according to their risk appetite.

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<sup>29</sup> T V Somanathan and V Anantha Nageswaran, *The Economics of Derivatives*, (2015) at 10.

<sup>30</sup> P Bernstein, *Against the Gods: The Remarkable Story of Risk* (1996) at 305, 306.

<sup>31</sup> Bernstein (n 30) at 306.

<sup>32</sup> Of course the other party can also be a speculator, the role of which is highly disputed. Again, this paper cannot go into detail; for an overview on this issue see LA Stout, "Risk, Speculation, and OTC Derivatives: An Inaugural Essay for Convivium" (2011) 1 Accounting, Economics and Law 1 at 2.

<sup>33</sup> Litan (n 15) at 30 et seqq. For an introduction to the economic concepts see A Cifuentes and B K Pagnoncelli, "Demystifying Credit Risk Derivatives and Securitization: Introducing the Basic Ideas to Undergraduates" (2014) 22 The Journal of Derivatives 110.

In a CDO-structure, payments made on the mortgages are not distributed to all holders of securities but go to more risk-averse investors first.<sup>34</sup> Thus, once more, various investors could be attracted and the higher risk would be placed upon those better able, or willing, to bear it.

### C. FINANCIAL INNOVATION AND THE FINANCIAL CRISIS

Mortgage-backed securities thus show two of the above functions of financial innovations: by allowing credit risk to be spread on the markets they are meant to make more money available for loans to homeowners than traditional bank finance.<sup>35</sup> However, mortgage-backed securities are commonly referred to as the trigger point of the global financial crisis. The story of collateralized debt obligations, which Litan calls a “financial mutation” of asset-backed securities and “financial alchemy at its best,”<sup>36</sup> provides a case study on negative externalities of financial innovations. Lawyers should be careful not to side with any school of economic thought. Therefore, this section will stick closely to the official reports on the financial crisis that have stimulated post-crisis regulatory reforms, namely the *Financial Crisis Inquiry Report* in the United States<sup>37</sup>, the *Turner Review* in the United Kingdom<sup>38</sup>, and the *de-Larossière-Report* for the European Union.<sup>39</sup>

Starting from the basic idea of collateralized debt obligations, the next step was to bundle high-risk mortgages (the lower tranches in the ordinary CDO structure described in Section B) into new products and provide them with insurance – this is where derivative contracts as described in Section B came into play. Despite the high risk on the individual mortgages, these products received high ratings.<sup>40</sup>

When the US housing price bubble burst, this led to serious losses: the credit risk of various housing mortgages was, one is tempted to say, highly correlated.<sup>41</sup> Moreover, contrary to the pre-existent belief, the risk was not really spread among many investors, as the securitization market was mainly concentrated on a number of large financial institutions in the United States and in

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<sup>34</sup> Litan (n 15) at 34.

<sup>35</sup> Ibid. at 30.

<sup>36</sup> Ibid. at 30 and 34.

<sup>37</sup> *The Financial Crisis Inquiry Report*, (National Commission on the Causes of the Financial and Economic Crises in the United States, 2011), available at [www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf](http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf).

<sup>38</sup> *A Regulatory Response to the Global Banking Crisis* (Financial Services Authority - The Turner Review, 2009), available at [www.fsa.gov.uk/pubs/other/turner\\_review.pdf](http://www.fsa.gov.uk/pubs/other/turner_review.pdf).

<sup>39</sup> The High-Level Group on Financial Supervision in the EU, Report (2009), available at [http://ec.europa.eu/internal\\_market/finances/docs/de\\_larossiere\\_report\\_de.pdf](http://ec.europa.eu/internal_market/finances/docs/de_larossiere_report_de.pdf).

<sup>40</sup> *Financial* (n 37) at 127; The de-Larossière-Report (n 39) at 10, speaks of “camouflage” of risk.

<sup>41</sup> *Financial* (n 37) at 129.



Europe.<sup>42</sup> The rest of the story is well known: when they came close to failure they were rescued by expensive sovereign bail-outs turning what was a housing price crisis into a crisis of public finance.<sup>43</sup>

The Financial Crisis Inquiry Commission quotes former Bear Stearns's manager Ralph Ciotti: The CDO system "functioned fine up until one day it just didn't function."<sup>44</sup> This abrupt development shows the materialization of what has been called systemic risk in financial markets:<sup>45</sup> an individual shock triggering large effects on the whole financial system caused by inter-institutional contagion.<sup>46</sup>

#### **D. THE REGULATION OF FINANCIAL INNOVATION AFTER THE FINANCIAL CRISIS**

Various attempts at "Regulation in the Wake of the Financial Crisis", as this panel is called, aim at mitigating systemic risk. While the market for CDOs is "essentially dead"<sup>47</sup> these attempts include the search for strategies to deal with financial innovation. Reminding us of the race between the hare and the hedgehog, a 2014 EU Commission Staff Working Document reviewing the Financial Regulation Agenda states: "Policymakers, regulators and supervisors failed to assess and adequately address the risks building up in the global financial system. They failed in macroprudential surveillance and in keeping up with financial innovations."<sup>48</sup>

The question must be asked, what has EU regulation done in order to keep up with financial innovation or in order to even get some steps ahead of it? Out of various initiatives,<sup>49</sup> this paper will elaborate on one which might be most interesting from the overall perspective of this conference: the possibility of administrative product interventions. Title VII of the new Markets in Financial Instruments Directive ("MiFIR") provides the European Securities and Markets Authority ("ESMA"), the European Banking Authority ("EBA") and competent national authorities with product monitoring tasks (Article 39 MiFIR) and intervention powers (Articles 40

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<sup>42</sup> *Financial* (n 37) at 227.

<sup>43</sup> *Ibid.* at 228 et seqq.

<sup>44</sup> *Ibid.* at 134.

<sup>45</sup> Cf. *Regulatory* (n 38) at 43. On financial innovation as a source of systemic risk see also Avgouleas (n 16) at 13.

<sup>46</sup> MF Hellwig, "Systemic risk in the financial sector: an analysis of the subprime-mortgage financial crisis" (2009) 157 *De Economist* 129 at 182. On the various definitions of "systemic risk" and their use for legal scholarship see SL Schwarcz, "Systemic Risk" (2008) 97 *The Georgetown Law Journal* 193.

<sup>47</sup> Litan (n 15) at 35.

<sup>48</sup> European Commission, Commission Staff Working Document: Economic Review of the Financial Regulation Agenda, 15 May 2014, SWD (2014) 158 final.

<sup>49</sup> For an overview see Avgouleas (n 16) at 23 et seqq.

to 42 MiFIR).

According to Articles 40(2)(c)(7) and 41(2)(c)(7) MiFIR, intervention by European authorities is possible, but is subsidiary to actions by national authorities. European authorities may only act if member state authorities have not taken action or their actions do not adequately address the threat.<sup>50</sup> Under Article 42(1) MiFIR, national authorities may prohibit or restrict “(a) the marketing, distribution or sale of certain financial instruments or structured deposits or financial instruments or structured deposits with certain specified features; or (b) a type of financial activity or practice.” While the rest of Article 40(1) and 41(1) are in similar terms, the competences on the European level are shared between ESMA and EBA. While ESMA is entitled to take measures with regard to “certain financial instruments or financial instruments with certain specified features”, EBA’s competences are limited to “certain structured deposits or structured deposits with certain features”. While this division of competences can be explained with regard to the different functions of a market and a bank supervisor<sup>51</sup>, a uniform approach by the European Union might have been favourable with regard to identifying systemic risk. This approach might even have been linked to the newly created European Systemic Risk Oversight Board.<sup>52</sup>

These institutional aspects of the supervisory structure are of high relevance for the development of EU financial markets law. In the remainder of this paper, however, some substantive aspects of product intervention shall be addressed. Article 40(2), (3) and 41(2), (3) MiFIR (and in a quite similar way Article 42[2]) stipulate the following criteria:

Article 40(2) [Article 41(2)] MiFIR:

ESMA [EBA respectively] shall take a decision under paragraph 1 only if all of the following conditions are fulfilled:

- (a) the proposed action addresses a significant investor protection concern or a threat to the orderly functioning and integrity of financial markets or to the stability of the whole or part of the financial system of the Union;

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<sup>50</sup> On their coordination role with regard to national authorities’ actions see Article 43 MiFIR.

<sup>51</sup> Cf. Regulation 1093/2010 of the European Parliament and of the Council OJ 2010 L 331/12; Regulation 1095/2010 of the European Parliament and of the Council OJ 2010 L 331/84.

<sup>52</sup> Regulation 1092/2010 of the European Parliament and of the Council OJ 2010 L 331/1.

(b) regulatory requirements under Union law that are applicable to the relevant financial instrument or activity [the relevant structured deposit or activity] do not address the threat;

[(c) deals with the relationship with national authorities, see above]

When the conditions set out in the first subparagraph [i.e., Article 40(2)(a)/Article 41(2)(a) MiFIR] are fulfilled, ESMA [EBA] may impose the prohibition or restriction referred to in paragraph 1 on a precautionary basis before a financial instrument has been marketed, distributed or sold to clients.

The characteristics of product interventions that can be seen from the two paragraphs are remarkable. Administrative bodies can temporarily limit, modify or even ban the sale of either a particular financial product or, maybe more interestingly, financial products that show certain common features, if these products cause concerns for creditor protection or financial market integrity or stability. From a perspective of systemic risk, the latter is particularly important – as systemic risk builds up in the financial system over time, not all products that may have negative effects on financial stability are detrimental to the individual investor. Article 40(8)/41(8) refers to delegated acts adopted by the Commission that help in determining scenarios in which there is a significant investor protection concern, threat to the orderly functioning and integrity of financial markets or commodity markets or to the stability of the whole or part of the financial system. Until now, no such delegated acts have been published. However, ESMA and EBA recently published technical advice to the Commission drawing on the outcomes of a public consultation process that was carried out earlier in 2014.<sup>53</sup>

Article 40(2)/41(2) MiFIR allows for measures only when existing regulatory requirements do not address the threat. This provision responds to the fact that innovation is always ahead of legislation (remember the hare and the hedgehog) and that financial innovation is already known for being used to circumvent existing rules.<sup>54</sup>

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<sup>53</sup> European Banking Authority, Technical advice on possible delegated acts on criteria and factors for intervention powers concerning structured deposits under Article 41 and 42 of Regulation (EU) No 600/2014 (MiFIR), 11 December 2014, Op/2014/13; European Securities and Markets Authority, Final Report. ESMA's technical advice to the Commission on MiFID II and MiFIR, 19 December 2014, ESMA/2014/1569.

<sup>54</sup> Awrey (n 17) at 410; see also J Caruana, "Financial regulation, complexity and innovation" (2014), available at <http://www.bis.org/speeches/sp140604.pdf> at 3: "as soon as a rule, simple or complex, becomes a binding financial regulation, it will cause change in financial institutions' risk management that will make it less binding and less effective."

The last sentence of Article 40(2)/41(2) MiFIR explicitly allows for precautionary measures (i.e., actions taken before the financial instrument is even marketed). However, it does not go as far as the strong version of the precautionary principle in other areas of EU policy would recommend (remember “I’m already here”): There is no mandatory approval process for all financial products, as has been recommended in response to the financial crisis.<sup>55</sup> However, the possibility of supervisors interfering whenever they become aware of potential dangers comes close, particularly as under Article 16 of the Markets in Financial Instruments Directive there are additional rules for an internal product approval process that requires manufacturers of financial instruments to identify target markets and to assess relevant risks.<sup>56</sup> The fact that sellers are not required to prove the safety of their products may be justified with regard to the differences between systemic risk in financial markets and environmental or health risks: while nuclear or medical technologies can have serious consequences from their first use, systemic financial risk builds up over time depending on the number of financial products being sold.<sup>57</sup>

The provision therefore seems to strike a balance between allowing financial innovation to win every race and letting it run until it dies. In a similar vein, Article 40(3)/41(3) oblige the authorities to take into account the danger of regulation having negative effects on financial markets, creating regulatory arbitrage or being disproportionate with regard to investor rights. It remains to be seen whether workable solutions can be found in practice: MiFIR will apply from 3 January 2017.<sup>58</sup>

## **E. FINANCIAL INNOVATION AND LEGAL INNOVATION**

This paper tried to contribute to the question of how the law can respond to innovation with regard to regulation of financial markets. The relationship of innovation and the law has been visualized as the race between a hare and a hedgehog: while the hedgehog will always lose in an open race,

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<sup>55</sup> See J Crotty and G Epstein, “A Financial Precautionary Principle: New Rules for Financial Product Safety” (2009) Wall Street Watch Working Paper No. 1, available at <http://people.umass.edu/crotty/Crotty-Epstein%20Financial%20Precautionary%20Prin%20-%20WWW%20July%202009.pdf> at 7; ST Omarova, “License to Deal: Mandatory Approval of Complex Financial Products” (2012) 90 Washington University Law Review 64 at 85; ST Omarova, “From Reaction to Prevention: Product Approval as a Model of Derivatives Regulation” (2013) Harvard Business Law Review Online, available at <http://www.hblr.org/2013/03/from-reaction-to-prevention-product-approval-as-a-model-of-derivatives-regulation/> 98 at 99.

<sup>56</sup> See also Avgouleas (n 16) at 30.

<sup>57</sup> J Lerner and P Tufano, “The Consequences of Financial Innovation: A Counterfactual Research Agenda” (2011) National Bureau of Economic Research, available at <http://www.nber.org/papers/w16780> at 19.

<sup>58</sup> Article 55 MiFIR

he may apply tricks to win. These tricks, however, might kill the hare.

Financial innovation can be defined as all sorts of new products or processes that aim to: enable new or more efficient ways of making payments; earn money on savings; channel savings into investments; and distribute risk across financial market participants. The latter two functions have been discussed with regard to some examples leading to the description of collateralized debt obligations as purportedly innovative forms of investment and risk allocation, which, however, caused systemic risk and ultimately played an important role in the global financial crisis.

What should have become clear from that analysis is that financial innovation (like any other innovation) is not inherently good or bad: while it aims at improvements, it may have negative externalities. The paper discussed one way in which regulation in the wake of the financial crisis has tried to respond to investor protection and stability concerns arising out of financial innovation: public intervention powers under Article 40 MiFIR.

While, in general, the framework allows for new financial products to be sold on the markets, sellers have to report to European and national authorities which can then intervene. With the targeted balance between allowing innovation and mitigating systemic risk, the framework has at least some potential for legal innovation.

# **Export Cartels: Analysing the Gap in International Competition Law and Trade**

*Tiffany Kwok\**

An export cartel is an agreement or arrangement between exporters to act collusively in respect of any of their export activity. Because export cartels are often perceived as having little to no effect on the domestic market in which they operate, jurisdictions are often less incentivised to pursue an export cartel in their territory than they would a traditional hard core cartel. Indeed, some countries, such as the United States, even exempt export cartels from their antitrust laws so long as those cartels do not have a substantial effect on the American market. While this ‘beggar thy neighbour’ approach was considered the norm for decades, with the development of globalisation and international trade, many are calling for a more unified system when dealing with export cartels.

The calls for reform are particularly pertinent for developing countries as they are more likely to suffer the effects of an export cartel while not having the ability to challenge these cartels themselves. This inability to prosecute cartels stems from both a lack of a comprehensive competition or antitrust law system as well as a lack of resources to gather the evidence necessary to bring a claim. As such, more understanding is needed concerning the effects export cartels have on both individual and the global market and what, if anything, can be done about them.

This article will explore the effects of export cartels in both the domestic and foreign markets in Part A, with a discussion on the qualitative and quantitative effects in these markets. Part B will analyse the different ways export cartels are regulated under competition law by comparing the approaches in the United States and the European Union. Finally, Part C will discuss export cartels in the context of international trade laws, specifically within the WTO.

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## **A. THE EFFECTS OF EXPORT CARTELS ON BOTH THE DOMESTIC AND FOREIGN MARKET**

An analysis of the effects of export cartels is crucial in understanding both the impact these cartels have on the parties involved as well as the implications on international trade. Export cartels can have a variety of effects on the exporting, or domestic market as well as the importing, or foreign market.

The effects of these cartels can be divided into two categories: qualitative effects and quantitative effects. Qualitative effects are defined as effects that do not have a quantifiable measurement in affected jurisdictions, such as food shortages and increased tensions between trading partners. Quantitative effects are defined as effects that have a quantifiable measurement in affected jurisdictions such as decreases in supplies and increased prices.

### **(1) Quantitative Effects of Export Cartels on Domestic Markets**

It is widely accepted that collusion between firms in one jurisdiction that negatively affect competition in its internal market is anti-competitive. Countries that have established competition or antitrust law policies generally outlaw such practices as price fixing and market allocation through the imposition of heavy fines and sometimes even cartelising these behaviours. Undertakings involved in these practices are also called hard-core cartels.

Export cartels can have direct and indirect effects on the market in which they operate. Charles Schultz posited that if the markets are similar in the domestic and importing markets, or if there are constant returns to scale, firms tend to reduce production in both markets.<sup>1</sup> In this situation, due to a decrease in production, an export cartel can lead to an increase in prices in the importing market, thereby placing a heavier burden on consumers in both the domestic and foreign markets.

### **(2) Qualitative Effects of Export Cartels on Domestic Markets**

Export cartels can have indirect ‘spillover’ effects of tacit collusion, which is facilitated by monitoring defections more efficiently.<sup>2</sup> These effects can encourage the formation of hard-core cartels in the exporting country. According to David Larson’s analysis of American antitrust exemptions for export cartels, it would be ‘naive to expect association members to ignore the domestic market while they freely discuss prices and quotas for exports...we are left with the

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<sup>1</sup> C Schultz, “Export cartels and domestic markets”, (2002) 2 J Industry, Competition and Trade 3 at 53.

<sup>2</sup> Ibid.

conclusion that the creation of an export association provides an excellent chance for large oligopolists to peacefully coexist both at home and abroad.<sup>3</sup> These effects were found to have occurred in the American soda ash and caustic soda export cartel. In *U.S. v. United States Alkali Export Association*,<sup>4</sup> the Supreme Court held that members of the export cartel were ‘removing surplus caustic soda from the domestic market in order to maintain the current price.’

Export cartels operating in a market with substantial product homogeneity, high levels of seller concentration, high transaction frequency and visibility, and high entry barriers are more likely to succumb to the temptation of successfully cartelising the domestic market as well as the importing market.<sup>5</sup> It has been suggested that by promoting cooperation between producers from one country in a foreign market, small and medium-sized firms can overcome the barriers to foreign trade, decrease the costs of exporting goods and resist the power of foreign buying cartels.<sup>6</sup> However, larger firms engaged in export cartel behaviour can also monopolise the importing market.

For the large part, most export cartels have few effects in the domestic markets in which they operate. The majority of the effects export cartels inflict are felt in the foreign markets these cartels export to.

### **(3) Quantitative Effects of Export Cartels on the Foreign Market**

There have been extensive studies conducted on the quantitative effects of export cartels in foreign markets. A study conducted by the OECD’s Competition Committee from 1996-2000 found that sixteen larger cartels out of a larger 119 case sample of export cartels had a direct impact on international commerce that exceeded fifty-five million USD.<sup>7</sup> While such an amount may not appear significant in comparison to the larger global trading economy, such seemingly negligible figures can quickly exacerbate what began as a minor issue. The OECD’s Committee of Experts on Restrictive Business Practices noted that export cartels could create or maintain barriers to trade.<sup>8</sup> Consumers are forced to pay higher, non-competitive prices if an export cartel operates to increase export costs or limit the quantity of imports.<sup>9</sup> These effects are more likely to occur in

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<sup>3</sup> DA Larson, “An economic analysis of the Webb-Pomerene Act”, (1970) 13 JL & Econ 2 at 497-98.

<sup>4</sup> *United States v. United States Alkali Export Association*, (1945) 325 US 196 at 198.

<sup>5</sup> E Gellhorn et al, *Antitrust Law and Economics in a Nutshell*, 5th edn (2004) 197.

<sup>6</sup> B Sweeney, ‘Export cartels: is there a need for global rules?’ (2007) 10 J Intl Econ L 1 at 88.

<sup>7</sup> OECD, Competition Committee. *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*, DAF/Comp (2002) 7, (Paris: OECD, 2002) at 2.

<sup>8</sup> OECD, Committee of Experts on Restrictive Business Practices, *Export Cartels* (Paris: OECD, 1974) at 50.

<sup>9</sup> Larson (n 3) at 463.



situations where export cartels operate in oligopolistic industries, producing homogeneous products.<sup>10</sup>

These effects can have a particularly devastating effect on developing markets. This is because firms in developing countries are usually ‘price takers,’ in that they have little to no control over the prices set by these cartels and are therefore forced to accept them without the possibility of negotiation.<sup>11</sup> It is almost intuitive that the less competition an export cartel faces in a developing country’s market, the more able it is to exert its market power. Therefore, countries with industries that have yet to develop are more likely to suffer harm from an export cartel than countries where there is a strong and diverse industrial economy.<sup>12</sup> In a developing country, an export cartel operating from a developed country can be extremely detrimental. Cartel practices such as the refusal to sell certain materials or equipment or setting minimum prices can affect the prices and supply of such goods used in exporting and domestic industries of developing countries.<sup>13</sup> There is also the possibility that an export cartel in a developed country that has a proportionately larger market share may engage in monopolistic attacks against the members’ weaker competitors in the developing market. Because a developing country is not likely to have an established competition law regime, it is often far more difficult for it to successfully prosecute an export cartel operating in a developed country since any evidence of collusion would likely be contained in another jurisdiction.

#### **(4) Qualitative Effects of Export Cartels on Foreign Markets**

Export cartels can also have qualitative effects on the market in addition to the heavy economic burden already sustained, particularly in developing countries. For instance, Canada’s potash export cartel, which was in operation for forty years, faced significant criticism from the media and academics alike. PotashCorp used its jointly owned subsidiary Canpotex in order to coordinate sales with American companies Mosaic Co. and Agrium Inc. into export markets beyond North America.<sup>14</sup> Uralkali, Russia’s largest producer of fertiliser quickly followed with a similar strategy of price fixing and production cuts. These cartels accounted for approximately 70% of the global

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<sup>10</sup> A Bhattacharjea, “Export cartels – a developing country perspective” (2004) 38 J World Trade 2 at 351.

<sup>11</sup> F Desmarais, “Export cartels in the Americas and the OAS: is the harmonization of national competition laws the solution?” (2009) 33 Manitoba LJ 1 at 58.

<sup>12</sup> U Immenga, “Export cartels and voluntary export restraints between trade and competition policy” (1995) 4 Pac Rim L & Pol’y J 1 at 126.

<sup>13</sup> OECD (n 8) at 52.

<sup>14</sup> The Conference Board of Canada, “Saskatchewan in the spotlight: acquisition of potash corporation of Saskatchewan inc. – risks and opportunities” (1 October 2010) at 5.

trade in potash.<sup>15</sup> Due to the nature of potash itself, the geographical supply is highly concentrated, with Canada owning 52% of the world's known reserves, Russia owning 21%, Belarus owning 9% and Germany owning 8.4%.<sup>16</sup> Therefore, countries without such reserves would be more heavily dependent on imports from other countries in order to meet their needs. This is problematic as potash is essential in the production of fertiliser used in the agricultural industry.

During a period of eighteen months, between January 2008 and October 2009 while the cartel was active, the price of potash increased by more than 400%.<sup>17</sup> In order to maintain these high prices, both PotashCorp and Uralkali announced temporary production cuts in January 2012.<sup>18</sup> These decisions had a devastating effect on developing countries such as India and China, who rely on imports in order to sustain their demands and are one of the largest consumers of potash in the world.

In 2011, Feng Mingwei, the deputy general manager of Sinofert Holdings Limited, the largest fertiliser importer in China stated, 'our dependence on imported potash fertiliser is a threat to our national food security.'<sup>19</sup> The issue with China's food supply was attributed to the monopolisation of the international exporters and the resultant increases in the international prices of potash.

Frederic Jenny identified three factors that an export cartel in the agricultural industry could contribute directly to food shortages in developing countries.<sup>20</sup> First, higher incomes in developing economies, such as China and India, necessitate an increased demand in food consumption. Second, global population will increase from seven billion to more than nine billion by 2050, resulting in a further increase in demand for food. Third, due to industrial development, the amount of land available for agricultural purposes is steadily shrinking, placing a greater burden on the remaining farmland. This is especially problematic for developing countries as agricultural yields are typically much lower than those in developed countries. The problem is further exacerbated by

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<sup>15</sup> M Trebilcock for the Financial Post, "Cartel hypocrisy" (27 January 2011).

<sup>16</sup> F Jenny, "Export cartels in primary products: the potash case in perspective" in Centre for Economic Policy Research, *Trade, Competition, and the Pricing of Commodities* (2012) at 108.

<sup>17</sup> Presentation by F Jenny, "Price instability and competition law: the case of the potash cartel", presented at the OECD Global Forum on Trade and Competition (2012) at 4.

<sup>18</sup> F Kayakiran for Bloomberg Business, "Uralkali ready to cut potash output to shield price: commodities" (25 January 2012).

<sup>19</sup> C Muyuan for China Daily, *Fertilizer costs threaten China's food security* (25 June 2011), available at: [http://www.chinadaily.com.cn/business/2011-07/25/content\\_12979049.htm](http://www.chinadaily.com.cn/business/2011-07/25/content_12979049.htm).

<sup>20</sup> Jenny (n 16) at 109.

the fact that potash has no convenient substitutes and therefore, in the long run, demand is fairly inelastic.<sup>21</sup>

It follows therefore that if consumers of potash in developing countries are forced to pay a higher price on potash imports, they may not be able to afford the quantities of potash needed in order to sustain their food supply.

In response to the potash export cartel, India temporarily ceased its imports in 2009 and threatened to do so again in 2010.<sup>22</sup> However, the country is entirely dependent on potash imports in order to meet the food needs of its population. As a result, its withdrawal from importation had little effect on the potash producers given their awareness that India could not sustain it for long without endangering its own crops. In such a situation, imposing Indian competition law and sanctioning the potash cartel would likely have created more problems than solutions. Export cartel members may have reacted to such a strategy by raising export prices to India in order to recover any monetary fines that may be imposed on them. It is also difficult to guarantee that sanctioning one export cartel will prevent cartelists from employing similar anticompetitive behaviours in India in the future.<sup>23</sup>

If an export cartel affects the imports of the foreign country to which the cartel is exporting, the importing country may be tempted to take *retaliatory* action. For instance, industries in the importing country may form a buyers' cartel in order to offset the effects of any export association.<sup>24</sup> Jurisdictions with established competition law regimes can also apply their laws extra-territorially and prosecute cartels exporting into their territories. These instances of litigation can create significant trade tension and in any event, cases where an export cartel is challenged by an importing country are seldom successful.

In the *Daishowa* case, a group of U.S. wood pulp exporters formed an export cartel as permitted by the exemptions in their domestic antitrust laws.<sup>25</sup> Japanese wood pulp importers took retaliatory action through the formation of an import cartel in order to boycott American wood pulp production. At the same time, they sought to challenge the validity of the U.S. export cartel under U.S. antitrust laws, alleging price fixing and refusal to supply. The U.S. exporters counter-

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<sup>21</sup> Jenny (n 16) at 109.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid. at 110.

<sup>24</sup> P Victor, "Export cartels: an idea whose time has passed" (1992) 60 Antitrust LJ at 571; see also MD Taylor, *International Competition Law: A New Dimension for the WTO?* (2006) 233.

<sup>25</sup> *Daishowa International v North Coast Export Co* (1982-83) Trade Reg Rep (CCH) 6.

sued the Japanese importers through the extraterritorial application of their antitrust laws. A federal district court held that under U.S. domestic laws, the American export cartel was exempted from antitrust law but the Japanese import cartel was not. Damages were subsequently awarded to the U.S. exporters. Unsurprisingly, this decision was perceived as decidedly unfair by the Japanese and triggered an international diplomatic incident.<sup>26</sup>

## **B. EXPORT CARTELS AND COMPETITION LAW**

Despite evidence of negative effects on domestic and foreign markets, most competition and antitrust law systems explicitly or implicitly exempt export cartels from their cartel sanctions. These exemptions are employed for a number of reasons. The United States has long argued that explicit exemptions for export cartels are necessary in order to support smaller firms. The EU's implicit approach on the other hand exempts most export cartels from scrutiny on the basis that they have no direct effect on the common market.

### **(1) Export Cartels in the United States**

The U.S. Export Trading Company Act of 1982 (ETC Act) provides exemptions for American export cartels through the issuance of certificates of review by the Secretary of Commerce. The certificate provides immunity from criminal and civil actions brought by the government for conduct covered in it.<sup>27</sup> In order to obtain such a certificate an application must be submitted to the Secretary of Commerce containing any information that was relevant to the overall market in which the export cartel would be operating. The Secretary of Commerce would then publish a notice in the Federal Register announcing an application for a certificate of review had been submitted with the names of each person submitting the applications, and the conduct for which the application was submitted. These measures were intended to ensure greater transparency and certainty for firms seeking to obtain exemptions from the application of antitrust laws for their export cartels. However, despite the ambitious expectations Congress had of the ETC Act, it failed to generate the results that were initially predicted at its inception.

Under the ETC Act, export cartels are exempted from U.S. antitrust laws unless the conduct has a direct impact on the domestic market. However, critics have pointed out some problems in

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<sup>26</sup> See discussion in A Fels, "Trade and Competition in the Asia Pacific Region: Speech by the Chairman of the Australian Trade Practices Commission" (28 September 1995).

<sup>27</sup> WL Fugate, "The export trade exception to the antitrust law: the Old Webb-Pomerene Act and the new Export Trading Company Act" (1982) 15 Vand J Transnat'l L at 699-700.

the way the exception has been worded. The second requirement of the domestic injury exception mandates that the effect of the defendants' conduct on the American markets give rise to an antitrust claim under the Sherman Act, which is the main body of legislation governing U.S. antitrust law and is separate from the ETC Act, despite the general rule that conduct involving trade or commerce with foreign nations is excluded from the Sherman Act and thus may not be subject to such a claim.<sup>28</sup>

Despite the criticisms, it is evident that this circular interpretation is not how the Act is to be read. Firstly, U.S. public antitrust enforcement agencies, rather than private plaintiffs, may bring actions in the American courts in order to address foreign conduct that substantially injures a foreign party regardless of whether the domestic injury exception is satisfied.<sup>29</sup>

Secondly, the Supreme Court has affirmed that the requirement that a domestic effect give rise to a Sherman Act claim requires that the conduct "have an effect of a kind that antitrust law considers harmful."<sup>30</sup> This suggests that a foreign plaintiff's antitrust or competition injury can satisfy the second stage of the domestic injury exception when considered on its own.<sup>31</sup>

Between the issuance of the first certificate on 26 October 1983 and May 2006, 198 ETC certificates were granted.<sup>32</sup> Certificates granted by the ETC Act can expire, be revoked by the Department of Commerce or the companies involved can voluntarily relinquish them. As of 2007, there were 78 active certificates issued under the ETC Act. These figures accounted for only \$1 billion of American exports. Some of the explanations given in the response to the lacklustre participation from American businesses included a fear of disclosing confidential business information to the government in order to receive certification; the lack of a definitive precedent interpreting the scope of protection provided by the certification; and a widening of the trade deficit.<sup>33</sup>

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<sup>28</sup> E Taffet, "The foreign trade antitrust improvements act's domestic injury exception: a nullity for private foreign plaintiffs seeking access to American courts" (2012) 50 Colum J Transnat'l L 1 at 220.

<sup>29</sup> *Hoffman-La Roche Ltd v Empagran S.A.* (2004) 542 US 155 at 170-71.

<sup>30</sup> *Ibid.* at 162.

<sup>31</sup> Taffet (n 28) at 220-21.

<sup>32</sup> MC Levenstein and VY Suslow, "The economic impact of the US Export Trading Company Act" (2007) 74 Antitrust LJ 2 at 345.

<sup>33</sup> Export Trading Company Act Title II: Hearings before the Sub-Committee on Financial Institutions and Supervision, Regulation and Insurance of the House Committee on Banking, Finance and Urban Affairs, 100th Congress, 1st Session (24 March, 1987).

## (2) Export Cartels in the EU

Export cartels can also be implicitly exempt from a jurisdiction's competition law rules.

As previously stated, implicit exemptions, like those in the EU, occur where a competition law or antitrust statute is applied only to anticompetitive behaviour that affects the domestic market, with no mention of conduct affecting foreign markets.<sup>34</sup>

Article 101 of the Treaty of the European Union (TEU) prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have their object or effects the prevention, restriction, or distortion of competition within the common market. Therefore, in the European Union, export cartels that restrict exports from one member country to another are prohibited.

While the European Union does not explicitly exempt export cartels from its competition law regime, the nature of the way in which cartels are prosecuted by the European Commission means that export cartels are often indirectly or implicitly exempt. The European Commission will often only pursue anticompetitive behaviour if it has a significant effect on the Common Market. This is known as the effects doctrine.<sup>35</sup> The Commission has acknowledged the importance of the effects doctrine in EU law in both the *Wood Pulp*<sup>36</sup> case as well as in the *Dyestuffs*<sup>37</sup> case. Given that a pure export cartel will only have a substantive effect on a foreign market, it is unlikely that any export cartel operating within the EU would be brought to the attention of the Commission unless it specifically affects trade between member states. These effects on trade can occur if traders in third-party countries are prevented from re-importing into the EU.

Given the implicit nature of EU exemptions, there are no notification or registration requirements an export cartel must comply with and no supervision of any export cartel operating in the EU exists. As a result, there is a dearth of empirical data on the economic effects of export cartels within the EU.<sup>38</sup>

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34 S Evenett et al. "International cartel enforcement: lessons from the 1990s" (2001) 24 *World Economy* 1225 at 1230-31.

35 R Whish and D Bailey, *Competition Law* (2012) 496.

36 Case 114/85 *Ahlström Oy v Commission* [1988] ECR 5193.

37 Case 48/69 *Imperial Chemical Industries Ltd. v Commission of the European Communities* [1972] ECR 619.

38 M Martyniszyn, "Export cartels: is it legal to target your neighbour? Analysis in light of recent case law" (2012) 15 *J Intl Econ L* 1 at 182; see also D Sokol, "What do we really know about export cartels and what is the appropriate solution?" (2008) 4, *Journal of Competition Law and Economics* at 967.

It may be unfair to expect jurisdictions to pursue export cartels themselves, especially if that cartel has no impact on their domestic markets. However, gaps in competition law regimes are evident when considering most developing countries have little to no effective competition law system of their own and are thus unable to address any export cartel affecting their markets.

### **C. EXPORT CARTELS AND INTERNATIONAL TRADE LAW**

Exemptions from the application of competition or antitrust laws for export cartels can have significant effects on international trade. In a submission to the WTO Working Group on Trade and Competition Policy in 2000, the European Union stated that export cartels “had a clear distortionary effect on international trade as well as a harmful impact on development.”<sup>39</sup>

It has also been argued that export cartel exemptions can have far-reaching consequences for developing countries. Delegates from developing countries often expressed support for the eradication of export cartel exemptions in industrialised or developed countries while still allowing developing countries this right. At a 2002 WTO meeting, the delegate from Thailand maintained that most cartels exporting to developing countries damage their economies and should therefore be illegal; however, developing countries themselves should be able to exempt export cartels in order to increase their bargaining power.<sup>40</sup> In 2003, at a meeting of the WGTCP, Thailand argued that exporting firms “should not benefit from a blanket exemption from competition laws, which would exclude them from scrutiny under a case-by-case approach.”<sup>41</sup> At the same meeting, China stated that it agreed with Thailand’s views and that “the future multilateral framework on competition policy should incorporate restrictions on the maintenance of export cartels by developed country members.”<sup>42</sup>

Because the very nature of an export cartel entails the exportation of cartelised goods or services from one jurisdiction to another, it is not enough simply to discuss the competition law implications of this practice. Cross-border cartels, or international cartels, can have numerous trade repercussions as well. Indeed, scholars have long considered international competition policy and international trade policy to be irretrievably linked. The most common forum for discussing

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<sup>39</sup> Bhattacharjea, *Export Cartels* (n 10) 334.

<sup>40</sup> World Trade Organisation, “Report on the Meeting of 26-27 Sept. 2002”, WTO Doc. WT/WGTCP/M/19 (15 November 2002) at 6.

<sup>41</sup> World Trade Organisation, “Report on the Meeting of 20-21 February”, WTO Doc. WT/WGTCP/M/21 (26 May 2003) at 16.

<sup>42</sup> *Ibid.*

competition law issues in the context of international trade policy is the World Trade Organisation (WTO). After some contention, most scholars now accept that international trade law, and by proxy WTO law, forms an important part of international law. Provisions in the WTO must therefore be interpreted in accordance with the other rules of international law.<sup>43</sup> This principle is reiterated in Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU), which states that existing provisions of the WTO agreements must be interpreted in accordance with the customary rules of interpretation in public international law.<sup>44</sup> It stands to reason therefore that the WTO does not exist as a purely separate entity but rather serves as a cog in the larger sphere of international law.

Ulrich Immenga proposed three possible outcomes in his assessment of an export cartel's effects on world trade.<sup>45</sup> First, that the importing country may benefit from quality improved exports or lower export prices. Second, the importing country may suffer harm through the imposition of price restrictions such as tariffs and increases in export price. These losses can potentially outweigh any perceived benefits exporting country may gain from allowing the formation of an export cartel in the short term. However, losses arising in this situation can eventually be recouped. For instance, exemptions granted to an export cartel might give exporting producers time to invest in their product and become internationally competitive through the imposition of export restrictions, such as raising prices. Once this happens, the cartel would then reduce the overall disadvantages suffered by importing countries by lifting the temporary restrictions placed on exports. Third, importing countries' losses caused directly by aggressive behaviour from export cartels can ultimately outweigh the benefits accrued in the exporting country due to "deadweight losses" or loss of economic efficiency. This occurs when consumers in the foreign market are unable to afford the rising price set by an export cartel and are ultimately excluded from the market. While only the last of these outcomes contains long-term negative effects, Immenga suggested this was likely the most common given the previous evidence of other trade restraints such as the numerous anti-dumping cases that have come before the WTO panels.<sup>46</sup>

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<sup>43</sup> G Marceau, "Conflicts of norms and conflicts of jurisdictions: the relationship between the WTO Agreement and MEAs and other treaties" (2001) *J World Trade* 1129.

<sup>44</sup> Article 3.2 of the DSU states: "The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."

<sup>45</sup> Immenga (n 12) at 128.

<sup>46</sup> *Ibid.* at 129.



Economic theory can also be used to assess whether there are any indirect economic effects on a global scale that can be attributed to export cartel activity. Game theory and the prisoner's dilemma as applied to cartels can be summarised thusly: each member of the cartel has the incentive to cheat and increase their profits by either producing a greater quantity or selling the product at a lower price than that agreed upon by the cartel. However, if all the members of the cartel cheat, the cartel will collapse and they members will collectively be worse off. Through the application of these theories, Immenga concluded that exemptions for export cartels, whether explicit or implicit, could encourage the formation of more cartels and restrict international trade in three ways.<sup>47</sup> First, foreign exemptions granted to export cartels create incentives for the domestic importing country to grant similar exemptions in order to give their firms the same opportunities when trading internationally. Second, export cartel exemption can increase the trend towards the creation of international cartels, decreasing international output and trade volume. The formation of more international cartels occurs because indirect international collusion made up of various export cartels operating in the same country are often more stable, both legally and economically, than a direct international cartel with member firms coming from different countries. Lastly, mechanisms or regulations that grant explicit immunities for export cartels in one country can incentivise more active control of export cartels in bordering countries by blurring the distinction between “encouraging” and “compelling” the formation of export cartels<sup>48</sup> - which can be a crucial element for the application of both antitrust and trade laws.

Export cartels controlled or operated by a central government can already fall under several agreements contained in the WTO. For instance, Article 11(1) of the Safeguards Agreement prohibits the seeking, taking or maintaining of voluntary export and import restraints.<sup>49</sup> Such export cartels could potentially fall under the category of voluntary export restraints. More interestingly, the central provision of GATT Article XI, which prohibits both import and export quotas, comes into play when dealing with export cartels.

### **(1) Application of GATT Article XI to Export Cartels**

Article XI:1 of the General Agreement on Tariffs and Trade 1947 (GATT) states:

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<sup>47</sup> Immenga (n 12) at

<sup>48</sup> See D Rikesh, “Extraterritoriality versus sovereignty in international antitrust jurisdiction” (1994) 14 W Comp 44.

<sup>49</sup> Marrakesh Agreement establishing the World Trade Organization, Annex 1 A: Multilateral Agreement on Trade in Goods, Agreement on Safeguards, 15.04.1994, 1869 UNTS 154 (1995).

“No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

Article XI:2 goes on to prohibit import and export restrictions, which are common behaviours export cartels commonly adopt.

In order to trigger the application of GATT Article XI, it is necessary to prove there has been sufficient governmental involvement in the establishment or maintenance of the export cartel in order to ensure the measure is regarded as a governmental one. GATT Article XI would therefore be more appropriately applied to public conduct that could be categorised under cartel behaviour, such as export quotas. This remains the most appropriate forum given the substantial effect that such conduct has on international trade. However, in some cases, it may be possible to attribute private conduct to government involvement. In the *Japan – Film* case, the Panel assessed the possibility of ruling on private conduct if there is sufficient government involvement.<sup>50</sup> Nevertheless, they also remarked on the difficulties in imputing private conduct to that of the government and stressed that this possibility would have to be examined on a case-by-case basis. The difficulty in making such an assessment lies in determining whether the facts in each case meet the level of government involvement that would constitute as “sufficient”, thus making private party actions challengeable measures.<sup>51</sup> Therefore, while the WTO remains a promising gateway to addressing the current imbalance in the law, other avenues, such as international antitrust cooperation must also be explored.

GATT Article XI was employed in the *China – Raw Materials* case, where the Panel held that China had violated the provision by imposing a Minimum Export Price (MEP) on all exporters of certain materials.<sup>52</sup> The MEP was regulated through a “system of self-discipline” based on “informal statements and oral agreements between traders and export regulators.” It is important

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<sup>50</sup> *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998 at para. 10.56.

<sup>51</sup> P Van Den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2nd edn (2009) 187.

<sup>52</sup> World Trade Organization, *China – Measures Related to the Exportation of Various Raw Materials*, Panel Report, WT/DS394/R adopted 5 July 2011 para 7.1082.

to note however, that on appeal to the Appellate Body, it was held that because DSU Article 6, governing the establishment of Panels, was not complied with. As a result, the Appellate Body declared that the Panel's findings regarding the MEP issues to be "moot and of no legal effect."<sup>53</sup> Nevertheless, the wording of GATT Article XI:1 along with the Panel ruling in *China – Raw Materials* suggests that firms owned or controlled by a state cannot be a party to an import or export cartels. Some commentators have proposed that simply allowing a private import or export cartel to function would amount to a "restriction" within the meaning of GATT Article XI:1.<sup>54</sup> In the *Japan – Semiconductors* case, the GATT panel interpreted the term 'restriction' to have a wider meaning than terms such as "law", "regulation", or "requirement", which appear in other GATT provisions like Article III:4.<sup>55</sup> On the other hand, the Panel in *Argentina – Hides* definitively stated that GATT Article XI does not contain any obligations for WTO members "to assume a full due diligence burden to investigate and prevent cartels from functioning as private export restrictions."<sup>56</sup>

#### **D. CONCLUDING REMARKS**

Countries that exempt or protect export cartels from their own antitrust or competition law regimes while at the same time prosecuting international cartels exporting to their territories are often accused of hypocrisy.<sup>57</sup>

For developing countries that lack an effective competition law regime, often the only other alternative is to pursue the matter through trade mechanisms. However, this route can present its own challenges. For instance, the WTO does not explicitly prohibit the formation of an export cartel, although provisions governing similar behaviour can be used in order to challenge the cartel. Furthermore, the WTO, like most international trade organisations, only governs the actions of governments of member states, not private undertakings. This can be problematic, as most export cartels are comprised of private entities. Only by proving an export cartel has some element of

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<sup>53</sup> World Trade Organization, Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R adopted 30 January 2012 paras 234-235.

<sup>54</sup> See EM Fox and M Trebilcock, *The Design of Competition Law Institutions: Global Norms, Local Choice* (2012) 455.

<sup>55</sup> GATT Panel Report, *Japan – Trade in Semi-conductors*, L/6309, adopted 4 May 1988, 35S/116, 153-5 paras 104-109.

<sup>56</sup> World Trade Organization, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, Panel Report, WT/DS155/R, adopted 19 December 2000 para 11.52.

<sup>57</sup> M Trebilcock for the Financial Post, "Cartel hypocrisy" (27 January 2011).

state involvement, whether through governmental encouragement or through state sanctioned or state owned entities, can a member state legitimately bring a claim in the WTO against another member state. Like in the international competition law community, there appears to be little consensus regarding the prohibition of export cartels in international trade and few opportunities for recourse for aggrieved parties, particularly developing countries.

It is clear that both the international competition law system and the international trade law system are need of more reform in order to better address the needs of developing countries. Some strategies of reform may include a harmonised competition law agreement or more likely, cooperation between trading partners to regulate the behaviour of export cartels. How these reforms will take place and how effective they may be remains to be seen.

# When Liberty subverts Federalism: Is Nullification of Federal Law Legitimate?

*Ilaria Di Gioia\**

## A. INTRODUCTION

The United States is in the middle of a federal revolution. The idea of liberty, which animated the Declaration of Independence and created the basis of the nation, is now being used to subvert federalism. “Liberty” has become a synonym of state self-government, of freedom from big government’s encroachments. In the last decade, several states have maintained policies inconsistent with federal statutes and considered measures aimed at defying federal regulations in different areas: gun control, government-issued identification cards, marijuana legalization, the Common Core State Standards Initiative (that sets standards for K12 students in English and mathematics) and, most pertinently for this paper, healthcare.

The recent opposition to the reform of the private health insurance market is perhaps the most instructive example of this scepticism of federal authority; states are reluctant to accept federal funds and to cooperate for the implementation of core measures of the Affordable Care Act (ACA).<sup>1</sup> Not happy with the result of legal challenges,<sup>2</sup> a number of state legislatures are also considering bills aimed at nullifying federal intervention within their boundaries. Nullification, in this paper, is the term used to describe a formal declaration by a state legislature that a specified federal regulation is void within its borders. The main argument put forward by these measures is the defence of a founding fathers’ principle, the idea that vertical separation of powers would best

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<sup>1</sup> Patient Protection and Affordable Care Act of 2010, Pub L No 111-148, 124 Stat 119, amended by Health Care and Education Reconciliation Act of 2010, Pub L No 111-152, 124 Stat 1029.

<sup>2</sup> As soon as it was signed into law, the constitutionality of the ACA was challenged extensively in federal courts on the grounds that it exceeded the legitimate bounds of federal power mentioned in Art 1 section 8 of the US Constitution. The controversy was resolved by the Supreme Court’s decision upholding the reform as constitutional in the *Sebelius* case but pending lawsuits are still challenging various portions of the law, including a new pending case before the Supreme Court challenging the legality of IRS subsidies in federal exchanges: *King v Burwell* No 14-1158 (22 July 2014).

suit American diversity and protect individual liberty. But what kind of liberty are these measures really invoking? Liberty from a “coercive” federal government that “exceeds the bounds of its limited powers and encroaches on the authorities reserved to the states under the Tenth Amendment”.<sup>3</sup> It is therefore evident that the principle of individual liberty is being used to justify a revival of states’ rights. In this conception, ‘liberty’ is interpreted as freedom from the authority of the federal government, not from that of the state authority. Some states strongly believe that healthcare regulation should be their exclusive province and the most radical bills against the ACA recall Madison’s theory of interposition and Jefferson’s theory of nullification.

This work provides a portrait of the current nullification movement and sheds light on the constitutional controversies that surround it.

## **B. THE NOBLE ORIGINS OF NULLIFICATION: FOUNDING FATHERS**

The term nullification was first used by founding father Thomas Jefferson in his Kentucky Resolution (1798) and the concept of states’ rights against the encroachment of the federal power was recalled by James Madison in his Virginia Resolution (1798).

Jefferson formally used the term nullification in his original draft of the Kentucky Resolution<sup>4</sup> and defined it as “a natural right” on the part of a sovereign state to self-defence from the usurpation of the federal government. He argued that “where powers are assumed which have not been delegated, a nullification of the act is the rightful remedy” and that the states “are not united on the principle of unlimited submission to their general government” but “they constituted a general government for special purposes” and “delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self-government.” Relevant literature<sup>5</sup> tends to interpret Jefferson’s Resolution only as a plea for a joint nullification by the states but it seems to me that Jefferson was also in favour of nullification by a single state within its borders and was only calling for the cooperation of other states:

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<sup>3</sup> Georgia House Resolution 1045, introduced 13 Jan 2014.

<sup>4</sup>Jefferson’s Draft, [before 4 Oct. 1798] in *The Papers of Thomas Jefferson, Volume 30: 1 January 1798 to 31 January 1799* (2003) at 536-43.

<sup>5</sup> See R Card, “Can states ‘just say no’ to federal healthcare reform? The constitutional and political implications of state attempts to nullify federal law” (2010) 2010 BYU LR 1795-1803 and A Johnston, *American political history 1763–1876* (1905) 197-198.

“every State has a natural right in cases not within the compact, (*casus non fœderis*) to nullify of their own authority all assumptions of power by others within their limits...that nevertheless, this commonwealth, from motives of regard and respect for its co-States, has wished to communicate with them [the other states]on the subject.”<sup>6</sup>

In his Virginia Resolution Madison did not use the word “nullification” but introduced the term “interposition”, conceived as a joined intervention of the states to stop the violation of the Constitution and invalidate the law:

“in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states who are parties thereto, have the right, and are in duty bound, to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties appertaining to them.”<sup>7</sup>

The Virginia Resolution, rather than nullifying the law straight away, declares its unconstitutionality and invokes the concurrence of other states to take “the necessary and proper measures...for co-operating with this state, in maintaining the Authorities, Rights, and Liberties, referred to the States respectively, or to the people.” It is Madison’s formulation, I suggest, that has inspired a recent Virginia Senate Joint Resolution<sup>8</sup> which does not openly declare opposition but makes application to Congress for calling an amendment convention pursuant to Article V of the United States Constitution aimed at restraining the power of the federal government. The convention would be “limited to proposing amendments to the United States Constitution that impose fiscal restraints on the federal government, limit the power and jurisdiction of the federal government, and limit the terms of office for its officials and for members of Congress”.<sup>9</sup> Professor Levinson also described a new convention as an “opportunity for a thorough discussion about the

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<sup>6</sup> T Jefferson, *Kentucky resolutions* (Nov 10, 1798 & Nov 14, 1799).

<sup>7</sup> J Madison, “Virginia resolutions against the Alien and Sedition Acts” reprinted in JN Rakove, *James Madison, writings* (1999) 589–591.

<sup>8</sup> 2015 Virginia Senate Joint Resolution no 269, Virginia 2015 Regular Session.

<sup>9</sup> *Ibid.* 24-27

genuine meaning of a federal system in the twenty-first century and what kinds of institutions are best designed to implement that meaning”.<sup>10</sup>

Also, there is a possibility that the Kentucky and Virginia Resolutions’ call for a joint effort by the states and for the protection of states’ rights has inspired recent bills establishing a union of states against the ACA. I am referring to the so-called Health Care Compact, an agreement of a group of states joining together to establish broad healthcare programs that operate outside of the ACA.<sup>11</sup> To date, nine states have joined the Health Care Compact (Oklahoma, Alabama, Georgia, Indiana, Missouri, South Carolina, Texas, Utah and Kansas), and a total of 26 states have considered interstate compact legislation.<sup>12</sup> However, the Compact remains only a proposal for now; in order to come into effect it must be passed by both chambers of Congress.<sup>13</sup>

The current use/misuse of Jefferson and Madison’s nullification and interposition language demonstrates that not only the seeds of such a controversial phenomenon can be found in the early days of the federation, but also that the debate about the meaning of the federation is still alive and reiterates the same arguments.

### C. THE NULLIFICATION PHENOMENON

In my research of legislation in 50 states I have examined nullification bills proposed and enacted in 2014 against the ACA. From my data, collected using the NCSL Affordable Care Act Legislative Database powered by LexisNexis StateNet, it emerges that the legislatures of 26 states have considered at least 120 bills aimed at nullifying the ACA; 37 bills have been signed into law by ten state legislatures. My analysis of these nullification measures not only reveals common “noble” ideological origins but also identifies a common argument, two common philosophical underpinnings and a common starting point:

- Common argument: healthcare regulation should be the exclusive province of the states as no police power is conferred to the Congress by Article 1 Section 8 of the US Constitution.

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<sup>10</sup> S Levinson, “The twenty-first century rediscovery of nullification and secession in American political rhetoric: frivolousness incarnate or serious arguments to be wrestled with?” (2014) 67 Ark LR 17.

<sup>11</sup> Defined by R Cauchi in “State laws and actions challenging certain health reforms”, NCLS website (22 February 2015), available at: <http://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx>.

<sup>12</sup> Ibid “26 States consider health compacts to challenge federal PPACA”, available at <http://www.ncsl.org/research/health/states-pursue-health-compacts.aspx>.

<sup>13</sup> Article 1, Section 10 of the United States Constitution provides that "no state shall enter into an agreement or compact with another state" without the consent of Congress.



- Two philosophical underpinnings: the originalist interpretation of the Commerce Clause<sup>14</sup> and the call for protection of state rights under the Tenth Amendment<sup>15</sup>.
- Starting point: alleged unconstitutionality of a federal bill/measure: the state legislature believes that a measure is unconstitutional and approves a bill to nullify its effects within its borders.

In spite of the above mentioned common grounds, the content and aims of the bills varies greatly and I would suggest a classification into three groups:

1. Bills declaring the ACA and its core provision “the individual mandate” unconstitutional and therefore inapplicable within the state;
2. Bills adopting measures to prohibit state agencies or employees from implementing the individual mandate within the state;
3. Bills establishing membership of the interstate health compact, a project that would transfer the authority and responsibility to make healthcare decisions from federal control to the member states.

An instructive example of bills of the first group is South Carolina Senate Bill n. 147/ 2014 which declares that the ACA “is not authorized by the Constitution of the United States and violates its true meaning and intent as given by the Founders and Ratifiers, and is invalid in this State, is not recognized by this State, is specifically rejected by this State, and is null and void and of no effect in this State.”<sup>16</sup>

For the second group, the most recently approved nullification bill is Arizona’s Proposition 122, approved on 4th November 2014 general election ballot. The proposition amended Article 2, Section 3 of the Arizona Constitution to declare the ability of the state to “exercise its sovereign authority to restrict the actions of its personnel and the use of its financial resources to purposes that are consistent with the Constitution” and that “this state and all political subdivisions of this

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<sup>14</sup> Article 1, Section 8. “The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

<sup>15</sup> “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

<sup>16</sup> Section 38-71-2120.

state are prohibited from using any personnel or financial resources to enforce, administer or cooperate with the designated federal action or program.” The amendment enshrines the so called anti-commandeering doctrine, according to which the federal government cannot impose targeted, affirmative, coercive duties upon state legislators or executive officials.<sup>17</sup>

Finally, with regards to the third group of bills, intended to authorize joining the Interstate Compact, Louisiana House Bill 1909 reads:

“The federal government has enacted many laws that have pre-empted state laws with respect to healthcare and placed increasing strain on state budgets, impairing other responsibilities such as education, infrastructure, and public safety. The member states seek to protect individual liberty and personal control over healthcare decisions and believe the best method to achieve these ends is by vesting regulatory authority over healthcare with the states. The Interstate Health Care Compact is hereby enacted into law and entered into by the state of Louisiana with any other states legally joining the compact in a form substantially similar to the form contained in this Part.”

Most of the nullification bills have been proposed by Southern States, with Tennessee, Oklahoma and Georgia in the front line (respectively, 14, 12 and 10 bills). Significant absences are Texas and Florida. Five of the states proposing nullification bills used to be part of the Confederacy and all the states proposing nullification bills are red, i.e. Republican, states.

#### **D. NULLIFICATION: CONSTITUTIONAL PROFANITY OR CONSTITUTIONAL LEGITIMACY?**

Up until this point, my paper has provided a portrait of the nullification phenomenon and discussed its origins. In light of the current size of the phenomenon and its “noble” origins, it is now paramount to explore the constitutional controversies that surround the movement. Hence, the rest of this paper is an effort to answer the following question: is nullification a legitimate exercise of states’ rights?

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<sup>17</sup> M D Adler, “The Supreme Court's federalism: real or imagined?” in *Annals of the American Academy of Political and Social Science* vol 574 (Mar 2001) at 158.

The anti-commandeering doctrine found modern expression in *New York v United States*, 505 US 144 (1992) and *Printz v United States*, 521 US 898 (1997), which will be discussed below.

My findings differ greatly depending on the type of nullification bill in question. For this reason, I will examine the constitutionality of three different types of nullification measures in turn.

Specifically, referring to my previous classification, *bills of type 1* (declaring the ACA and its core provision “the individual mandate” unconstitutional and therefore inapplicable within the state) would not be a valid exercise of states’ rights according to the Supremacy Clause<sup>18</sup> which clearly establishes the pre-eminence of federal law over state law. As UCLA professor Adam Winkler comments: “Any law that interferes with a valid federal law is unconstitutional.... The federal government can pass legislation in an area, and people who are citizens of the states have to obey that legislation.”<sup>19</sup> At this point, supporters of nullification bills would object that they are only invalidating legislation that they deem unconstitutional and therefore not supreme; that sovereign states created and ratified the Constitution and therefore retain the prerogative to interpret the Constitution. Considering this objection, the key question turns out to be: do state legislatures have the authority to declare federal legislation unconstitutional? In the American constitutional tradition, judicial review<sup>20</sup> is a prerogative of the Supreme Court (*Marbury v Madison*)<sup>21</sup> and claiming that states can declare federal law unconstitutional would also ignore the unanimous *Cooper v Aaron*’s<sup>22</sup> holding, according to which state attempts to nullify federal law are ineffective as the states are bound by US Supreme Court rulings. There are, as a consequence, two constitutional “obstacles” to the legitimacy of type 1 nullification bills: *judicial review* and *judicial supremacy* of the Supreme Court. Can these obstacles be overcome? What follows is a brief review of the literature dealing with those two principles.

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<sup>18</sup> Article 6, Clause 2 of the United States Constitution. “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.”

<sup>19</sup> Quoted in K Mahnken, “Red states’ legally dubious strategy to destroy ObamaCare” (28 January 2014), New Republic, available at <http://www.newrepublic.com/article/116373/red-states-wage-legally-dubious-war-nullify-obamacare>.

<sup>20</sup> The power of the federal courts to review the constitutionality of laws.

<sup>21</sup> *Marbury v Madison* 5 US 137 (1803), the decision formally established the principle of judicial review. “It is emphatically the province and duty of the judicial department to say what the law is.”

<sup>22</sup> *Cooper v Aaron*’s 358 US 1 (1958). Cooper announced that “the federal judiciary is supreme in the exposition of the law of the Constitution” and further that an “interpretation of [the Constitution] enunciated by th[e] Court...is the supreme law of the land.” More importantly, the Supreme Court unanimously rejected the doctrines of nullification and interposition: “the Brown case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation.”

With regard to *judicial review*, relevant conservative literature<sup>23</sup> seems to be sceptical of *Marbury* and has developed arguments against the attribution of this power to the Supreme Court itself. One of the main arguments is that the Constitution does not grant this power expressly. Article III reads: “The judicial Power of the United States, shall be vested in one Supreme Court, and in such Courts as Congress may from time to time ordain and establish” but never mentions judicial review. Also, originalists argue that the founders did not contemplate judicial nullification of legislation enacted by the states and by Congress. The distinguished historian Leonard Levy asserted: “The evidence seems to indicate that the Framers did not mean for the Supreme Court to have authority to void acts of Congress.”<sup>24</sup> William Crosskey, one of the most provocative legal historians of recent times<sup>25</sup>, reaches the same conclusion: “The rationally indicated conclusion is that judicial review of congressional acts was not intended, or provided, in the Constitution.”<sup>26</sup> A more recent publication by Prof. William Nelson reads: “What makes [*Marbury*] even more important is the absence of any clear plan on the part of the Constitution’s framers to provide the Court with this power”.<sup>27</sup>

On the other hand, modern scholarship<sup>28</sup> alleges that *Marbury* is a victim of contemporary revisionism and supports the legitimacy of judicial review in light of the assumption that there was a historical practice of judicial review in American courts before the decision in *Marbury*. Unexpectedly, even the originalist Randy Barnett supports this view: “Judicial nullification of unconstitutional laws is not only consistent with the frame provided by original meaning, it is expressly authorized by the text and is entirely justified on originalist grounds.”<sup>29</sup> Who is right and who is wrong? Maybe the Supreme Court’s judicial review power is a distortion; maybe it is the natural creature of the ideologies and legal philosophies that surrounded the formation of the US

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<sup>23</sup> CS Hyneman, *The Supreme Court on trial* (1963) 125; HL Boudin (1911) in 26 *Polit Sc Qtly* 238-248; JB McDonough, “Usurpation of Power by Federal Courts” (1912) *AMLR* 45; J Choper, *Judicial Review and the National Political Process* (1980) 62-63.

<sup>24</sup> L Levy, *Original intent and the Framers’ Constitution* (1988) 100.

<sup>25</sup> So defined by A Krash in “The Legacy of William Crosskey” (1984) 93 *Yale LJ* 959.

<sup>26</sup> W Crosskey, *Politics and the constitution* (1953) 1000.

<sup>27</sup> W Nelson, *Marbury v. Madison: The origins and legacy of Judicial Review* (2000) 1.

<sup>28</sup> See S Snowiss, *Judicial review and the law of the constitution* (1990) 89; JE Pfander, “Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers” (2001) 101 *Colum LR* 1515; WM Treanor “Judicial Review before Marbury” (2005) 58 *Stan LR* 455; C Sloan & D Mckean, *The great decision: Jefferson, Adams, Marshall, and the battle for the Supreme Court* (2009).

<sup>29</sup> R Barnett, “The original meaning of the judicial power” (2004) 12 *Sup Ct Econ R* 115 at 120.

constitutional system;<sup>30</sup> what is certain is that it is a 200 years old legal tradition and factual reality in the US. Nullification is clearly hitting right at the top of the constitutional pantheon.

With regard to *judicial* supremacy, academic criticism<sup>31</sup> has strongly opposed the idea that the Supreme Court should serve as the final, highest arbiter of the Constitution, as expressed in *Marbury* and *Cooper v Aaron*. A provocative argument is put forward by Prof. Paulsen<sup>32</sup> who contends that *Marbury* has created a myth and that a proper reading of Marshall's decision would actually suggest that judicial review is not an "exclusive" power of the judiciary but should be shared between the three institutional branches and the states' government. In his view, judicial *jurisdiction* does not imply judicial *supremacy* over the other branches of government:

"none of the hypotheticals posed by Marshall remotely suggests judicial exclusivity or even judicial priority in constitutional interpretation. They all involve constitutional questions of a type that could (and should) be considered in the ordinary course of business of the legislative and executive branches. There is nothing uniquely judicial about them, so as to suggest in any way that constitutional interpretation is a uniquely judicial activity."<sup>33</sup>

A more specific argument for judicial deference to the Congress finds corroboration in particular provisions of the Constitution, notably Section Five of the Fourteenth Amendment.<sup>34</sup> As Prof. Kermit Roosevelt<sup>35</sup> suggests, this assertion advances the argument that the Court should defer to the congressional interpretations upon which enforcement legislation is based. However, in my ACA nullification case study there is no inter-branch conflict within the federal government but a conflict between the federal judiciary and state legislatures representing the people. Hence, more pertinent to this paper, which depicts nullification as a movement aimed at protecting individual liberty and therefore empowering "The People", is another challenge to interpretive judicial

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<sup>30</sup> I am also referring to the influence in the United States of Coke's decision in *Dr. Bonham's Case* 8 Co Rep 107/ 77 Eng Rep 638 which, despite disputes and following development of UK law, is widely recognized as establishing judicial review.

<sup>31</sup> See M Tushnet, *Taking the Constitution Away from the Courts* (1999) 8-9, 14-15 and 22-23, and E Meese III, "The Law of the Constitution" (1987) 61 Tul LR 979, 986. In support of judicial supremacy arguments see L Alexander and F Schauer, "On Extrajudicial Constitutional Interpretation" (1997) 110 Harv LR 1359 at 1361.

<sup>32</sup> M Paulsen, "The irrepressible myth of *Marbury*" (2003) 101 Mich LR 2706.

<sup>33</sup> *Ibid.* at 2721.

<sup>34</sup> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

<sup>35</sup> K Roosevelt, "Judicial supremacy, judicial activism: *Cooper v. Aaron* and *Parents Involved*" (Summer 2008) 52 St Louis U LJ 1191, 1197.

supremacy which finds its ideological roots in the so called “popular constitutionalism”, the idea that ordinary citizens, rather than the courts, are the most authoritative interpreters of the Constitution. A recent elaboration of this argument can be found in an acclaimed 2004 book by Larry Kramer<sup>36</sup> and in the work of Edward Hartnett: “With a Constitution made in the name of ‘We the People,’ all of us are legitimately interested in the meaning of the Constitution--all of us must be welcome participants in the conversation.”<sup>37</sup>

My findings are different with regard to *type 2 bills* (establishing measures to prohibit state agencies or employees from implementing the individual mandate within the state). Bills of this type<sup>38</sup> justify the refusal of the states to comply with federal law with a long-standing legal doctrine which would allow the states to decide whether or not it is appropriate to participate in a federal act: the anti-commandeering doctrine. The doctrine claims to find its legal foundation in three decisions of the Supreme Court which established that states cannot be required to help the federal government enforce federal acts or regulatory programs. Mike Maharrey,<sup>39</sup> Communications Director for the Tenth Amendment Center, cites to *Prigg v Pennsylvania*<sup>40</sup> (1842), an early decision in which Justice Joseph Story declared the pre-eminence of federal law but acknowledged that states could not be compelled to enforce federal slave rendition laws. However, the revival of the Tenth Amendment as a limit on the power of the federal government really dates from two cases, *New York v United States*<sup>41</sup> (1992) in which Justice Sandra O’Connor affirmed that Congress could not require states to “take title” to radioactive waste and therefore to compel them to participate in the federal regulatory program: “Either type of federal action would ‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments”; and *Printz v United States*<sup>42</sup> (1997) in which Justice Antonin Scalia confirmed that Congress does not have the power to direct the actions of State executive officials and therefore cannot require

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<sup>36</sup> Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004) 221.

<sup>37</sup> EA Hartnett, “A Matter of Judgment, Not a Matter of Opinion” (1999) 74 NYU LR 123.

<sup>38</sup> Cfr. 2014 South Carolina House Bill No. 4979, 2014 South Carolina Senate Bill 1164, 2014 Tennessee Senate Bill No. 2450, 2014 Tennessee House Bill 2440, 2014 Tennessee Senate Bill 1680.

<sup>39</sup> M Maharrey, “Anti-commandeering: the legal basis for refusing to participate”, Tenth Amendment Center, available at: <http://tenthamendmentcenter.com/2015/02/03/anti-commandeering-the-legal-basis-for-refusing-to-participate/>. The Tenth Amendment has become the flag of an activist nullification think tank, the Tenth Amendment Center which provides model legislation and tips to state legislatures, and keeps track of nullification bills across fifty states via its website which publishes weekly updates, video, articles and book reviews.

<sup>40</sup> *Prigg v Pennsylvania* 41 US 539 (1842).

<sup>41</sup> *New York v United States* 505 US 144.

<sup>42</sup> *Printz v United States* 521 US 898 (1997).

“local chief law enforcement officers” (CLEOs) to perform background-checks on prospective handgun purchasers. The anti-commandeering principle can also be found in the recent *National Federation of Independent Business v Sebelius*<sup>43</sup> (2012) decision. The main argument concerned the extent to which the single mandate provision of the ACA could be said to be authorized by the Commerce Clause power of the federal government. Roberts CJ, who thought that the single mandate was outside the scope of the Commerce clause power, sided with the liberal wing by upholding it as a valid exercise of the taxing power. A majority of the justices however agreed that another challenged provision of the ACA, a significant expansion of Medicaid, was not a valid exercise of Congress's spending power as it would coerce states to either accept the expansion or risk losing existing Medicaid funding. Justice Anthony Kennedy, found that compelling the states to participate in the ACA Medicaid expansion was coercive and unconstitutional under the Spending Clause<sup>44</sup> thus leaving the states with a “genuine choice whether to participate in the new ACA Medicaid expansion.”<sup>45</sup>

In light of the above, the question must be: does the anti-commandeering doctrine, as developed by the Supreme Court in *Sebelius*, solve the constitutionality of type 2 bills?

Yes, this class of bills would survive the scrutiny under the Supreme Court anti-commandeering doctrine because the doctrine provides that states (and state officials) are not compelled to enforce federal law and that a state can refuse to use its resources to attain federal goals. In other words: as long as the states engage in a passive resistance, their (in)actions will be constitutional; but they cannot impede the implementation of valid federal law by the federal government in their territory. *Sebelius* allowed the states to opt out of Medicaid expansion but states cannot avoid the implementation of the individual mandate and the creation of federal exchanges operating in their territory (fully administered by the federal government). Indeed, in case a state decides not to establish a state exchange (a marketplace where people can compare and purchase health coverage) the federal government will provide a “fall back” exchange for that state,<sup>46</sup> usually through the well-known platform Healthcare.gov.

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<sup>43</sup> *National Federation of Independent Business v Sebelius* 567 US \_\_\_\_ (2012), 132 SCt 2566 (unreported).

<sup>44</sup> See KS Swendiman and EP Baumrucker, “Selected issues related to the effect of NFIB v Sebelius on the medicaid expansion requirements in section 2001 of the Affordable Care Act.” (16 July 2012) Congressional Research Service.

<sup>45</sup> *Sebelius*, Roberts, C J, slip opinion at 57.

<sup>46</sup> If a state fails to create an Exchange under Section 1311 of the ACA, the Act directs the federal Department of Health and Human Services to create an Exchange for that state. See Health Care and Education Reconciliation Act, Pub L N 111-152, §1204, 124 Stat 1029, 1321 (2010).

With regards to *type 3 bills* (establishing membership of an interstate compact for multiple states opposing enforcement), they are certainly constitutional as state compacts are provided by Article 1 Section 10 of the United States Constitution: "no state shall enter into an agreement or compact with another state" without the consent of Congress. The matter here is not the constitutionality of interstate compact applications but the likelihood of congressional consent to a parallel and independent health care system. At first reading, the compact clause would seem to establish that any agreement within two or more states requires congressional consent. However, in *Virginia v Tennessee* the US Supreme Court concluded that not all interstate agreements require congressional consent and that such consent was required only with respect to those joint state agreements "which may tend to increase and build up the political influence of the contracting states so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control."<sup>47</sup> It would therefore appear that there are two kinds of compacts: those that require congressional consent because they affect federal interests and those that do not because no federal interests are affected.<sup>48</sup> The Health Care Compact would, in light of this premise, fall within the first category because it aims at transferring the authority on healthcare from federal control to the member states and to create an independent healthcare system. Would the Congress ever approve an interstate health compact? It is the opinion of the author that this is quite improbable. However, with the prospect of a Tea-party advancement in 2016 elections, supported by the candidature of Tea-Party Senator Ted Cruz as president<sup>49</sup>, that improbability might be much more conceivable.

## E. CONCLUSION

Much of the debate, both scholarly and political, considers nullification as buried in 1789,<sup>50</sup> a non-starter,<sup>51</sup> an antebellum relic,<sup>52</sup> a discredited theory risen from the grave,<sup>53</sup> one example of

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<sup>47</sup> *Virginia v Tennessee* 48 U.S. 503, 517-518 (1893).

<sup>48</sup> CN Broun, MH McCabe, ML Buenger and RL Masters, *The evolving use and the changing role of interstate compacts* (2007) 48.

<sup>49</sup> W Andrews, A Parlapiano and K Yourish for The New York Times, "Who is running for president (and who's not)?" (23 March 2015).

<sup>50</sup> ME Brandon, "Secession and nullification in the twenty-first century" (2014) 67 Ark L Rev 91-97.

<sup>51</sup> J Dinan, "How states talk back to Washington and strengthen American federalism" (3 December 2013) no 744, Policy Analysis by Cato Institute.

<sup>52</sup> JH Read and N Allen, "Living, dead, and undead: nullification past and present" (Fall 2012) American Political Thought, vol 1, No 2, 263-297.

<sup>53</sup> RS Hunter, "Sound and fury, signifying nothing: nullification and the question of gubernatorial executive power in Idaho" (2013), 49 Idaho L Rev 659-692.



contemporary zombie (or dinosaur) constitutionalism.<sup>54</sup> Nonetheless, my research of legislation in 50 states demonstrates that nullification is very much a live issue that has even penetrated certain state legislatures. Beyond the nature of the phenomenon itself, this paper is concerned with the theory of nullification and, ultimately, with the controversies of such a radical assertion of states' rights for American federalism. In particular, the revival of nullification raises deep vertical separation of powers questions: namely the adequacy of a growing regulatory role for the federal government and the desirability of federal intervention in matters of social policy in such a way as to materially interfere with the traditional powers of the states. On the other hand, it is also possible to recognize a veiled horizontal separation of powers issue<sup>55</sup>: state legislatures are claiming for themselves the ability to pronounce upon the constitutionality of federal laws, effectively trying to usurp the judicial function.

In conclusion, a consideration, a conjecture and an admonition.

A consideration: *rebus sic stantibus*, the debate on radical states' rights movement (i.e. nullification) has captured the attention of enthusiastic constitutional theorists and of states' legislators but has not yet reached Washington. A conjecture: in the current highly polarized political climate, with a Republican Party agenda dominated by the increasingly influential libertarian Tea Party, this is arguably what Jason Frank<sup>56</sup> would call "a constituent moment" and therefore, a period of turbulence in federalism, American-style. I am referring to the same conjecture that I have introduced when discussing the possibility of a Congressional approval of the Interstate Health Care Compact. Given the rise of popular constitutionalism and originalism,<sup>57</sup> promoted mainly by the Tea- Party, there are reasons to speculate on the possibility that the dispute over the role of the federal government and its relationship to individual rights (culminated in the nullification discourse) could effectively evolve from mere constitutional argument to constitutional change. An admonition: the constitutional change would be successful and enduring as long the movement is able to solve the libertarian paradox that Prof. Rebecca E. Zietlow has delineated in her article "Popular originalism? The Tea Party movement and constitutional

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<sup>54</sup> Levinson (n 15) at 48.

<sup>55</sup> Paulsen (n 32). He pleads for a shared judicial review power between the three branches of government and the state governments.

<sup>56</sup> J Frank, *Constituent Moments: enacting the people in postrevolutionary America* (2010).

<sup>57</sup> The term popular originalism is used by JA Goldstein, "Can popular constitutionalism survive the Tea Party movement?" (2011) 105 N w U LR Colloquy 288 at 298.

theory.”<sup>58</sup> The paradox consists in the simultaneous embracing of two different doctrines: originalism (the doctrine according to which the interpretation of a written constitution should seek the original public meaning of the words of the text or be consistent with what was meant by those who drafted and ratified the original meaning of the provisions at the time that they were adopted) and popular constitutionalism (i.e. the idea that it is desirable for people other than judges to engage in constitutional interpretation<sup>59</sup>). The advocates of nullification will have to make a choice: originalism or popular constitutionalism. This is to avoid a clash of the two holdings which would result in judicial activism. As Professor Zietlow has commented, those two doctrines are indeed incompatible:

“Originalists believe that a single fixed meaning exists and is discernible by examining the text and the intent of the Framers or the original public meaning of the text. By contrast, popular constitutionalists accept the possibility that the text has multiple meanings and that the meaning of the text may change through the process of construction by the political branches. To that extent, popular constitutionalism is premised on the existence of a living Constitution, a concept that is antithetical to most originalists.”

The nullification controversy demonstrates a fundamental concern over the role of the federal government and the limits of congressional power. The ACA is not the only battlefield, constitutional conservatives have numerous issues of concern: drug control, Second Amendment rights,<sup>60</sup> Right to Try,<sup>61</sup> Agenda 21,<sup>62</sup> Common Core.<sup>63</sup> This debate deserves academic attention as it is likely to affect lawmakers and the broad US political landscape in coming years with the potential to radically reshape our understanding of American federalism.

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<sup>58</sup> RE Zietlow, 64 Fla LR 483 (2012).

<sup>59</sup> See LD Kramer, *Popular constitutionalism* (n 48).

<sup>60</sup> Nine states have passed “Firearms Freedom Acts (FFAs)” which render federal laws regarding firearms inapplicable to firearms and ammunition produced, sold, and used exclusively within state borders.

<sup>61</sup> “Right to Try” bills allow extremely sick people to use treatments that are not currently allowed to them under federal regulations, effectively nullifying in practice some FDA restrictions. See the Tenth Amendment Center website, available at: <http://tracking.tenthamendmentcenter.com/issues/right-to-try/>.

<sup>62</sup> These bills would prohibit the state, as well as cities and counties, from adopting and developing environmental and developmental policies known as Agenda 21 (action plan of the United Nations with regard to sustainable development agreed in Rio de Janeiro, Brazil, in 1999).

<sup>63</sup> Bills are aimed at delaying or banning implementation of the Common Core State Standards Initiative (set of learning goals for students K12 in mathematics and English language arts/ literacy).

# **The Constitutional Prohibition of Secession under the Prism of International Law: The Cases of Kosovo, Crimea, and Cyprus**

*Nikolaos A. Ioannidis\**

## **A. INTRODUCTION**

The principle of territorial integrity (Article 2(4) UN Charter) is enshrined in most constitutions worldwide, with a view to hampering the dismemberment of a state's territory. Nevertheless, although the principle of territorial integrity holds a prevalent position in international law, academic discourse and state practice, such constitutional provisions do not appear sufficient to deal with self-determination or secessionist claims.<sup>1</sup>

The looming right of ethnic minorities and/or indigenous peoples to “remedial secession” as a response to the denial of effective “internal” self-determination in case of grave violations of human rights<sup>2</sup> (i.e. ethnic cleansing, genocide, war crimes, crimes against humanity) poses serious challenges to domestic lawmakers as well as to the international community. On the one hand, states have the right to defend the indivisibility of their territory (even though it is argued that the state has the responsibility to observe human rights within its borders with respect to the entirety of its population in order to be entitled to invoke the principle of territorial integrity when confronting secessionist assertions). On the other hand, the suppression of ethnic minorities may trigger unrest and give rise to self-determination or secessionist claims. The growing trend towards fragmentation of existing states emphasises the need to strike a balance between these two opposing positions.

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<sup>1</sup> The right of self-determination is not identical to the right to secession, however - as will be discussed below - a people/ethnic minority group in exercising its right of self-determination may (and should) under specific preconditions be eligible to seek separation from the central state.

<sup>2</sup> The term ‘grave’ is used in this paper as also entailing the terms ‘serious’, ‘massive’, ‘flagrant’, ‘widespread’, and ‘systematic’ since all of these terms, with slight variations, are used interchangeably in order to describe human rights violations.

A scrutiny of the pertinent constitutional provisions in Kosovo, Ukraine and Cyprus will provide us with useful tools in our attempt to outline the connection between the right of self-determination and the principle of territorial integrity as well as to examine the efficiency of the constitutional prohibition of secession in multi-ethnic states. In this paper, an endeavour will be undertaken so as to define the conceptual framework of the two notions (territorial integrity and self-determination) and to suggest in what fashion incidents where these principles are found to be in conflict in terms of both domestic and international law should be dealt with.

## **B. TERRITORIAL INTEGRITY V THE RIGHT TO SELF-DETERMINATION/SECESSION**

In the aftermath of World War II, the international community emphasised the prohibition of the use of force and the protection of the territorial integrity of states, considering these elements as essential prerequisites for the maintenance of world peace and order; Article 2(4) UN Charter - which forms part of customary international law<sup>3</sup> - reflects this position. Quite often, though, the principle of territorial integrity seems to be at odds with another well-established principle of international law, namely, self-determination. Apart from the inclusion of the principle of self-determination in the UN Charter<sup>4</sup> as well as in the International Covenant of Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR')<sup>5</sup> international jurisprudence has also recognised self-determination as a basic principle of contemporary international law.<sup>6</sup> What is more, the International Law Commission ('ILC') in 1988 opined as follows:

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<sup>3</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 at para 190.

<sup>4</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Articles 1(2), 55, 73(b).

<sup>5</sup> International Covenant on Civil and Political Rights (signed 16 December 1966, entered into force 23 March 1976) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (signed 16 December 1966, entered into force 03 January 1976) 993 UNTS 3: "1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

<sup>6</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970) (Advisory Opinion) [1971] ICJ Rep 16 at paras 52-53; *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12 at paras 54-59; *East Timor (Portugal v. Australia)* (Judgment) [1995] ICJ Rep 90 at para 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 at paras 155-156.

“The principle of self-determination, proclaimed in the Charter of the United Nations as a universal principle, had been applied mainly in eradicating colonialism, but there were other cases in which it had been and could and should be used. By not tying it exclusively to colonial contexts, it could be applied much more widely. In that connection, *all members of the Commission believed that the principle of self-determination was of universal application* (emphasis added).”<sup>7</sup>

In a period where the anti-colonial sentiment was on the rise, the UN General Assembly Resolution 1514/1960 on decolonisation provided numerous peoples under colonial rule with the legal framework according to which they could assert the right of self-determination, namely the capacity to “freely determine their political status”.<sup>8</sup> As a result, the said resolution paved the way for the independence of many colonies and, consequently, their separation from their metropolitan states. In addition, Resolution 1541/1960 stipulated three different outcomes with regard to the application of self-determination: independence; free association with another state; integration with another state.<sup>9</sup>

Arguably, self-determination can also be exercised out with the colonial context,<sup>10</sup> as evinced by the inclusion of the principle in legal texts and case law subsequent to resolutions 1514 and 1541.<sup>11</sup> Nonetheless, self-determination claims set forth under the decolonisation process should not be confused with separatist assertions on the part of peoples residing in non-colonial territories with a view to seceding from the central state. According to Crawford, “secession is the process by which a particular group seeks to separate itself from the State to which it belongs and

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<sup>7</sup> ILC, ‘Report of the International Law Commission on the Work of its 40th Session (9 May - 29 July 1988) UN Doc A/CN.4/SER.A/1988/Add.1 (Part 2) at para 266.

<sup>8</sup> Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960).

<sup>9</sup> UNGA Res 1541/1960 (15 December 1960).

<sup>10</sup> *Reference re Secession of Quebec* [1998] 2 SCR 217 para 133; M Shaw, *International Law*, 7th edn (2014) 211.

<sup>11</sup> “By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. The Final Act of the Conference on Security and Cooperation in Europe (01 August 1975) 14 ILM 1292, VIII; All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have chosen”. Organisation of African Unity, African Charter on Human and Peoples' Rights (signed 27 June 1981, entered into force 21 October 1986) 21 ILM 58 Article 20.

to create a new State”.<sup>12</sup> Further, secession (a unilateral action) is distinguishable from devolution or the grant of independence, namely when a state affords independence on a particular territory and people through constitutional procedures (i.e. following a democratic referendum<sup>13</sup>): it should be borne in mind that international case law has accentuated the importance of holding a plebiscite in respect of the proper application of the principle of self-determination;<sup>14</sup> such cases were those of Saar and Scotland.

In the wake of World War I, the Saar territory was given over to France from 1920 until 1935, when it was returned to Germany after a plebiscite.<sup>15</sup> Following World War II, France and Germany agreed to a Statute, which would have granted autonomy to Saar, and put it to vote; however, the people of Saar rejected autonomy and, instead, chose incorporation into Germany.<sup>16</sup> More recently (on 18 September 2014), a referendum was held on whether Scotland should become an independent country or remain within the United Kingdom (‘UK’), with the latter option gaining the support of the majority of the Scottish people.<sup>17</sup> At any rate, had the Scottish people opted for independence that would not have been considered as an act of secession as the UK government had consented to the holding of the referendum by virtue of the Edinburgh Agreement (2012).<sup>18</sup> Hence, the right of self-determination of the Scots was legitimately exercised within the ambit of the UK’s legal order. Additionally, the organisation of the Scottish referendum reaffirms the position that the right of self-determination can be pursued outside the decolonisation context as well. Prior to 1945 there was no right to secession; as stressed in the *Aaland Islands Case*:

“the right of disposing of national territory is essentially an attribute of the sovereignty of every state. Positive International Law does not recognise the right of national groups, as such, to separate themselves from the State of which they form part by the simple

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<sup>12</sup> J Crawford, “State practice and international law in relation to secession” (1998) 69(1) *British Yearbook of International Law* 85.

<sup>13</sup> J Crawford, *The Creation of States in International Law*, 2nd edn (2006) 330ff.

<sup>14</sup> *Western Sahara* (n 6) at paras 58-59; *Quebec Case* (n 10) at para 150.

<sup>15</sup> Crawford, *Creation of States* (n 13) 233-234.

<sup>16</sup> E W, ‘Causes and Consequences of the Plebiscite in Saar’ (1955) 11(12) *The World Today* 530; R Emerson, “The logic of secession” (1980) 89(4) *Yale Law Journal* 813; Council of Europe, “The Saar Question” (2009), available at: [http://www.coe.int/t/dgal/dit/ilcd/Archives/selection/Saar/Default\\_en.asp](http://www.coe.int/t/dgal/dit/ilcd/Archives/selection/Saar/Default_en.asp).

<sup>17</sup> BBC News, “Scotland Decides” (September 2014), available at: <http://www.bbc.com/news/events/scotland-decides/results>.

<sup>18</sup> The Scottish Government, *Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland* (15 October 2012), available at: [www.scotland.gov.uk/resource/0040/00404789.pdf](http://www.scotland.gov.uk/resource/0040/00404789.pdf).

expression of a wish... Generally speaking, the grant or the refusal of such a right to a portion of its population of determining its own political fate by plebiscite or by some other method, is, exclusively, an attribute of the sovereignty of every State”<sup>19</sup>

Nonetheless, in the post-1945 era the above stance has been moderated as it has been accepted that secession is neither prohibited nor allowed under international law.<sup>20</sup>

Secession might be asserted within the realm of self-determination, even though the international community has been hostile towards any secessionist attempts opposed by the interested state, and that no secessionist entity has ever been admitted to the UN.<sup>21</sup> As a matter of fact, the UN Committee on the Elimination of Racial Discrimination noted that:

“international law has not recognised a general right of peoples to unilaterally declare secession from a state” and that “fragmentation of states may be detrimental to the protection of human rights as well as to the preservation of peace and security.”<sup>22</sup>

Furthermore, the Friendly Relations Resolution contains a ‘safeguard’ clause aimed at protecting the territorial integrity of states, although the second part of the clause might be deemed a loophole allowing for secession when the government of a state follows a discriminatory policy against its citizens.<sup>23</sup> The *Quebec Case* is of relevance here: the Court stressed that “a state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity.”<sup>24</sup> In other words, as a

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<sup>19</sup> *Aaland Islands Case* (1920) League of Nations Official Journal Spec. Supp. 3 at 5.

<sup>20</sup> *Quebec Case* (n 10) at para 140.

<sup>21</sup> *Crawford* (n 13) 390.

<sup>22</sup> UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation XXI on self-determination’ (1996), UN Doc A/51/18, Annex VIII, para 6.

<sup>23</sup> Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 Oct 1970). “Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour (emphasis added)”; see also United Nations World Conference on Human Rights, Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF.157/23.

<sup>24</sup> *Quebec Case* (n 10) at paras 130, 154.

precondition for sustaining its territorial integrity a state is obliged to secure the effective participation of its citizens in the administration of the state through democratic procedures, namely to respect what is called “internal” self-determination.<sup>25</sup>

### **(1) Responsibility to protect**

Despite the significance of the preservation of the territorial indivisibility for a state, this aim should never be pursued at the expense of fundamental human rights. Over the last twenty years, in view of the Rwandan genocide and other atrocities, the international community has contemplated the promulgation of a scheme that would respect territorial integrity of states but at the same time would contribute to the prevention of grave violations of human rights, especially those of minorities, given that the rules concerning respect for the rights of minorities are now deemed peremptory.<sup>26</sup> Therefore, the “responsibility to protect” notion was initially elaborated in the final report of the International Commission on Intervention and State Sovereignty (‘ICISS’) in 2001.<sup>27</sup> Later on, the Secretary-General’s High-Level Panel on Threats, Challenges and Change endorsed the views propounded by ICISS.<sup>28</sup> Finally, in 2005, the General Assembly’s World Summit took up the baton and refined the “responsibility to protect” concept, the ultimate purpose of which is to prevent grave human rights violations.<sup>29</sup>

On the whole, this doctrine encompasses the customary principle that sovereignty entails the positive duty of states to protect their own citizens; in cases where they fail to do so, the international community should take action through the Security Council in accordance with the Charter, so as to impede genocide, war crimes, ethnic cleansing and crimes against humanity. Notwithstanding the enthusiasm surrounding this nascent doctrine, responsibility to protect does not appear to have attained the status of a norm of international law;<sup>30</sup> nevertheless, its conception could be considered a hallmark in terms of the efforts made by the international community to regulate the oscillation between the preservation of the inseparability of states’ territory on the one hand and the protection of human rights on the other. In any event, the gist of the matter is that

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<sup>25</sup> ICCPR (n 5) Article 25; *Quebec Case* (n 10) para 126.

<sup>26</sup> Conference on Yugoslavia, Arbitration Commission, Opinion No 2 (11 January 1992) 31(6) ILM 1498.

<sup>27</sup> International Commission on Intervention and State Sovereignty, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (International Development Research Centre 2001).

<sup>28</sup> *A More Secured World: Our Shared Responsibility*, Report of the High-Level Panel on Threats Challenges and Change (2004) UN Doc A/59/565.

<sup>29</sup> UNGA, 2005 World Summit Outcome: resolution adopted by the General Assembly (24 October 2005) paras 138-139.

<sup>30</sup> S Zifcak, “The Responsibility to Protect” in MD Evans (ed), *International Law*, 4th edn (2014) 529-530.



state sovereignty does not imply impunity in case of grave violations of human rights; conversely, a state is entitled to maintain its sovereignty and territorial integrity only when it provides its population with effective protection.<sup>31</sup>

## **B. THE CASES OF KOSOVO, CRIMEA AND CYPRUS**

Usually when secessionist claims arise, the government recalls the state's constitution in order to prevent fragmentation of its territory. The rationale of protecting the territorial integrity as set forth in 2(4) UN Charter is embodied in many states' constitutional texts. Nevertheless, as the Canadian constitutional court aptly put it, a unilateral declaration of independence – even if it is effected contrary to constitutional provisions – cannot be ruled out; actually, it may even acquire legal status if it is recognised on the international plane.<sup>32</sup> Hence, the invocation of constitutional provisions purporting to hamper secession does not seem adequate to deal effectively with the matter. Besides, it would be absurd to insist on observing constitutional rules if such practice may lead to violations of other fundamental rights protected by the constitution, with human rights affected first and foremost. As every state's domestic authority stems from the sovereign people, every action on the part of the government should be carried out to the benefit of its people; otherwise, the soundness of the state's legal order would be undermined. The examples of Kosovo, Crimea, and Cyprus offer useful conclusions with regard to the efficacy of the constitutional prohibition of self-determination or secession, and highlight the necessity of regulating the matter.

### **(1) Kosovo**

By virtue of the Yugoslav Constitution of 1974, Kosovo had obtained an autonomous status without having the right to secede. In 1989 the Serbian government revoked Kosovo's autonomy and took a range of repressive measures against the population of Kosovo,<sup>33</sup> 90% of which, at the time, consisted of ethnic Albanians, although the province had been the cradle of the Serbian civilisation for centuries. In 1999 following Milosevic's – the Serbian Premier at the time - denial to concede the deployment of NATO forces in Kosovo, the Alliance waged an airstrike campaign against Serbia in order to protect the ethnic Albanians' human rights, which were at stake due to

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<sup>31</sup> UN Secretary-General Report, "Implementing the responsibility to protect" (12 January 2009) UN Doc A/63/677 at paras 10-11, 13-14 and 16.

<sup>32</sup> *Quebec Case* (n 10) at para 155.

<sup>33</sup> JI Charney, "Self-Determination: Chechnya, Kosovo, and East Timor" (2001) 34 *Vanderbilt Journal of Transnational Law* 460.

the oppressive measures undertaken by the Serbian government. The controversial notion “humanitarian intervention” was used, but still the lack of a prior Security Council authorisation (despite the *ex post facto* authorisation granted by SC Resolution 1244/1999) generated serious doubts in terms of the legality of those operations. With respect to the “humanitarian intervention” concept, the UN Secretary-General, in his 2009 Report on the implementation of the responsibility to protect, referred to it as a “false choice between two extremes”, those “extremes” being passive reaction when human rights violations occur on the one hand and the use of military force to prevent such unlawful actions on the other.<sup>34</sup> Eventually, Kosovo unilaterally declared its independence in 2008. Despite the 2010 International Court of Justice (‘ICJ’) Kosovo opinion, which stipulated that international law does not prohibit unilateral declarations of independence (and thus provided that the declaration of independence of Kosovo is not contrary to international law<sup>35</sup>), the matter of Kosovo’s statehood to date remains unclear.

## (2) Crimea

As late as 1954, when Nikita Khrushchev, the Soviet leader at the time, allocated Crimea to Ukraine, the province formed part of Russia. Despite several efforts on the part of Russia in 1992 and 1993 to overturn that transfer, Crimea was granted an autonomous status within Ukraine in 1996; this was confirmed by a treaty between Russia and Ukraine in 1997, whereby Russia acknowledged the Ukrainian borders.<sup>36</sup> Therefore, despite the historical ties between Russia and Crimea, there is no legal title justifying the Russian claims over Crimea, and Russia cannot invoke the principle of reversion.<sup>37</sup>

Against the backdrop of the clashes between the government of Ukraine and protesters seeking closer ties with the EU, the Crimean Parliament adopted the Declaration of Independence on 11 March 2014.<sup>38</sup> Five days later, a referendum was held in order for the Crimean population to decide whether it wished accession to Russia; 97% of the participants voted in favour of

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<sup>34</sup> UN Secretary-General Report (n 31) at para 7.

<sup>35</sup> *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (Advisory Opinion) [2010] ICJ Rep 403 at para 84.

<sup>36</sup> Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation (1997) Article 2 in DB Stuart, “The Russian Ukrainian Friendship treaty and the search for stability in Eastern Europe” (1997) Appendix, available at: <http://www.dtic.mil/dtic/tr/fulltext/u2/a341002.pdf>.

<sup>37</sup> On top of that, international jurisprudence does not recognise the existence of a ‘right of reversion’ under international law. *Eritrea-Yemen Arbitration*, Phase I: Award on Territorial Sovereignty and Scope of the Dispute (1998) XXII RIAA 211 at paras 125 and 443.

<sup>38</sup> Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol (11 March 2014), available at: <http://www.voltairenet.org/article182723.html>.

integration into Russia.<sup>39</sup> Although Article 73 of the Ukrainian Constitution provides that an all-Ukrainian referendum is required in cases of alteration of the Ukrainian territory,<sup>40</sup> the Crimean referendum could not be obstructed; ergo, the acquisition of Crimea by Russia was accomplished by the conclusion of a treaty on 18 March 2014. As mentioned above, the ICJ opined that a unilateral declaration of independence is not forbidden by international law; however, such a declaration cannot be valid if it ensues from threat or use of force. Some argue that Russia used force to detach Crimea from Ukraine, and thus the annexation of the former by Russia is not valid under international law;<sup>41</sup> this argument will not however be addressed in this article. In any case, the point at issue is that no authority was able to deter the Crimean referendum and the subsequent incorporation of the region into Russia.

### (3) Cyprus

In 1960, subsequent to the EOKA (National Organisation of Cypriot Fighters) revolution against the British colonial rule, Cyprus gained its independence. The Constitution of the Republic of Cyprus was the result of a compromise between the United Kingdom, Greece, and Turkey;<sup>42</sup> quite surprisingly, the Cypriot people did not have input on the drafting and conclusion of the constitution. The population of Cyprus consists of the Greek majority (82%) and the Turkish minority (18%), which, by virtue of the 1960 Constitution, was upgraded to a ‘community’. In an effort to counterbalance the aspirations of the Greek Cypriots for union with Greece (‘Enosis’) on the one hand and the demand of the Cypriot Turks for partition (‘Taksim’) on the other, Article 185(2) of the Constitution envisages the prohibition of both union with another state and secession. At this juncture, it must be said that there are no distinct ‘peoples’ in Cyprus entitled to a separate right of self-determination; instead, there is a single people, which is composed of Cypriot Greeks and Cypriot Turks. Therefore, no segment of the Cypriot population can set forth any secessionist claims. Nonetheless, given that the option of joining another state is an aspect of self-determination (Resolutions 1514/1960, 1541/1960, 2625/1970), Article 185(2) seems to pose serious restrictions on the right of self-determination of the Cypriot people as a whole.

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<sup>39</sup> C Walter, “Postscript: Self-determination, Secession and the Crimean Crisis 2014” in C Walter et al (eds), *Self-determination and Secession in International Law* (2014) at 297-298.

<sup>40</sup> Constitution of Ukraine, Article 73, available at [http://www.justice.gov/eoir/vll/country/foreign\\_law/ukraine/constitution.pdf](http://www.justice.gov/eoir/vll/country/foreign_law/ukraine/constitution.pdf).

<sup>41</sup> Walter (n 39) 303.

<sup>42</sup> Constitution of the Republic of Cyprus, available at [http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/\\$file/CY\\_Constitution.pdf](http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/$file/CY_Constitution.pdf).

#### **(4) Definition of the right to secession**

The aforementioned cases lead to several conclusions: a) grave human rights violations cannot be tolerated for the sake of retaining the indivisibility of a state's territory - when the only way to safeguard a persecuted group of persons' rights is separation, no constitutional provision could be invoked with a view to inhibiting such an option; b) even though a self-determination referendum may be deemed unconstitutional, the constitutional prohibition does not always have the capacity to hinder the occurrence of the results of such a referendum; c) constitutional provisions cannot purport to restricting the right of self-determination of a people as the foundation of any given legal order and, consequently, of its constitution, is the sovereign people of that state the will of which supersedes any constitutional text.

Owing to the fact that in the post-1945 era several minority groups sought the right to separate themselves from the central state on the basis of self-determination, there has been a trend towards the demonization of the right of self-determination in all its manifestations. Although self-determination does not grant a general right to secession,<sup>43</sup> contemporary international law seems keen on recognising particular cases when separation might be permitted; this is the case with grave violations of fundamental human rights and under-representation of some groups that may trigger a right to "remedial secession".<sup>44</sup> However, the vague legal framework addressing the right to secession generates serious predicaments. In order to strike a balance between the necessity to protect human rights and to maintain territorial integrity of states as well as to impede the denigration of the right of self-determination in general, the international community should set the precise context within which the right to secession should be employed. Only when the law is clarified both unfounded secessionist claims and grave human rights violations are likely to be adequately tackled.<sup>45</sup>

In light of the above, it is argued that a people is entitled to claim separation from the central state solely when the following prerequisites are met:

- a) a serious likelihood or actual commission of grave human rights violations,
- b) a persistent denial of internal self-determination (i.e. participation of a minority group in the decision-making mechanisms of a state),
- c) the separatist assertions represent the will of the majority of the interested group, and

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<sup>43</sup> Walter (n 39) at 305-306.

<sup>44</sup> Ibid at 306.

<sup>45</sup> Charney (n 33) at 458.

d) separation is the last resort in order to protect a people's human rights.

### **C. CONCLUDING REMARKS**

In summary, it should not escape notice that so long as the notion of self-determination remains vague it will cause constant friction.<sup>46</sup> On the one side of the spectrum, the universal principle of self-determination should not be used as a pretext for the advancement of groundless separatist claims, which could lead to the refashioning of geography and further fragmentation of states. On the other side of the spectrum, the international community cannot remain inert when confronted with grave violations of human rights and/or under-representation of certain groups of people within a state.

The cases of Kosovo, Crimea and Cyprus aptly illustrate the inadequacy of constitutional provisions aiming at restricting the right of self-determination in all of its aspects. Instead of trying to thwart the exercise of the right of self-determination in general with a view to preserving the territorial integrity of states, domestic legislators as well as the international community should focus on how to define in a precise manner the cases in which the right to secession is to be exercised. That way both self-determination and territorial integrity would be efficaciously safeguarded.

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<sup>46</sup> C Warbrick, "Recognition of States" in VA Lowe and C Warbrick (eds), "Current Developments: Public International Law" (1992) 41(2) *International and Comparative Law Quarterly* 473 at 480.

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