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Front Pages

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The current issue is the second of the seventh volume of the *Athens Journal of Law (AJL)*, published by the *Business and Law Division of ATINER*.

Gregory T. Papanikos
President
ATINER

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12-15 July 2021, Athens, Greece

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- Submission of Paper: **14 June 2021**

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The Management of the Coronavirus Emergency by the Italian Government and the Relationship between State and Regions

By Gloria Marchetti[*]

The essay analyses how the health emergency due to the spread of Covid-19 was handled in Italy. It is aimed at examining: the regulatory framework relating to the management of the pandemic; the role of State and Regions in adopting measures to contain the virus; the coordination between State and Regions to deal with the health emergency. In particular, the aim of the essay is to verify whether the State, in managing the pandemic, has respected the constitutional principles that underpin the Italian regional system.

Keywords: *Coronavirus Emergency Regulation, State and Regions competences, State and Regions coordination, Italian Regional System, Principle of Loyal Cooperation.*

Introduction - The Regulation of the Emergency in Health Matters

The aim of this essay is to offer a contribution to the ongoing debate on Italy's management of the Coronavirus emergency. This issue has sparked a wide debate among constitutional law scholars — as well as in public opinion — in relation to various problematic aspects, such as: respect of the system of sources of law in the period of the pandemic; the constitutional legitimacy of the suspension of fundamental rights and freedoms by the so-called «emergency measures»; the dialogue between Government and Parliament, within a parliamentary system, in emergency management; the relationship between the State and the autonomy system in the adoption of legislation aimed at tackling the health crisis.

This essay focuses on the latter of these problematic aspects. In this regard, it should be noted that, in the period of the pandemic, the issue relating to the role of the State and the Regions, in adopting emergency measures, has assumed a particular importance. This at least for two reasons. The first reason is that the spread of the virus has occurred in different ways in the regional territories and this has imposed the need to adopt different measures in the Italian Regions. The second reason is that, within the framework of a regional state model, the Italian Regions have important competences related to the health emergencies.

Therefore, it is useful to recall what the role of the State and the Regions is in the management of emergencies in general and, more specifically, in the field of health.

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With regard to the distribution of administrative functions, the Constitutional Law no. 3 of 2001 (reform of Title V, part two, of the Constitution, governing the autonomy system) has enhanced the role of the entities closest to citizens, introducing the principle of subsidiarity. According to this principle, the administrative functions are attributed to the Municipalities, except in cases in which, in order to ensure their unitary exercise, they are assigned to larger territorial levels (Provinces, Metropolitan Cities, Regions and State), in application of the principles of subsidiarity, differentiation and adequacy (art. 118.1, Constitution).

As for the division of legislative powers between the State and Regions, the Constitutional Law no. 3/2001 has significantly strengthened the legislative autonomy of the ordinary Regions[1]. Following this reform, art. 117 of the Constitution contains: a list of matters in which the State has exclusive legislative power (art. 117.2); a list of matters in which the Regions have concurrent legislative power (art. 117.3), i.e. they can legislate but in compliance with the «fundamental principles of the matter» established by the State; a residual clause for which, in all matters not included in the two previous lists, the Regions have exclusive or residual legislative power (attributed only to Regions with special autonomy, with their own Statute containing the division of legislative powers, before the 2001 reform). In this general framework, the matters indicated in art. 117 of the Constitution concerning the health emergency are the following: the «protection of health» which is a concurrent competence of the State and Regions[2]; the «public order and security» and «international prophylaxis» which are the exclusive competence of the State. This interweaving of competences makes it difficult to clearly define who is responsible for adopting legislation aimed at dealing with the COVID emergency. In addition, the Constitution contains a provision that allows the State to intervene to ensure adequate uniformity, on the national territory, in the protection and enjoyment of social rights.

The State, in fact, has exclusive competence to determine «the essential levels of services concerning civil and social rights that must be guaranteed throughout the national territory» (art. 117.2, lett. *m)*, Constitution)[3]. The State, again in order to guarantee uniformity on the territory, can also legislate on regional matters, applying the mechanism of the so-called «attraction in subsidiarity». This mechanism was elaborated by the Constitutional Court, starting from sentence no. 303 of 2003; according to this mechanism, when the State, in application of the principle of subsidiarity, attracts administrative functions of the Regions (as required by art. 118 of the Constitution which, as we have seen, governs the division of administrative competences between the levels of government), it can also exercise legislative power in regional matters, in compliance with the principle of loyal collaboration with the Regions.

Furthermore, the Constitution enhances the role of the State in the management of emergencies, providing, for this purpose, a specific state source

[1]See Bilancia P. & Scuto (2015).
[2]See Morana (2002); Ferrara (2012).
[3]See Papa (2019).

of law. Art. 77 of the Constitution, in fact, gives the Government the power to adopt provisional measures having the force of law, in the form of law decrees, in «extraordinary cases of necessity and urgency»; these decrees must be presented on the same day for conversion to the Chambers, which must, within 60 days, convert them into law, otherwise they lose their effectiveness *ex-tunc*[4]. The law decree, therefore, is the most appropriate tool for dealing with situations of extraordinary emergency, also in order to «authorise» the use of the additional instrument that the legal system provides for dealing with such situations, namely the ordinances of necessity and urgency.

Ordinances of necessity and urgency are «extraordinary» administrative acts that can be adopted by the State, by the Regions and by local authorities in the cases expressly provided for by the law or, as we have seen, by a law decree, to deal with situations of needs that cannot be solved with the «ordinary» remedies provided for by the legal system. The ordinances, which represent the *extrema ratio*, allow the administration to deal with exceptional, serious and non-predeterminable situations by law[5], also through the adoption of acts that can derogate the current legislation.

The problem is that ordinance powers are attributed, as will be seen below, to various institutional subjects and at various territorial levels. This can result in a fragmentation of the activity of adopting measures capable of compromising the adequate management of an emergency at a national level, such as that caused by COVID.

Law no. 833 of 1978 (that had established the Italian National Health Service (SSN)) attributes the power to adopt urgent ordinances in the field of «public health» to the Minister of Health, the President of the Region and the Mayor, depending on the territorial area concerned (art. 32). This provision is subsequently taken up — as well as by Legislative Decree no. 267 of 2000 (art. 50.5), in relation to the Mayor[6] — by Legislative Decree no. 112 of 1998 which divides the competence to issue ordinances of necessity and urgency between the Ministry of Health, the Presidents of the Regional Councils and the Mayors, respectively on the national, regional or municipal territory (art. 117)[7].

The Civil Protection Code (Legislative Decree no. 1 of 2018) provides that, upon the occurrence or imminence of one of the events expressly indicated, the Council of Ministers deliberates the national «state of emergency» (art. 24) which must be addressed with civil protection ordinances (art. 25). The latter are adopted by the Head of the Civil Protection Department, after having acquired the agreement of the Regions and Autonomous Provinces territorially concerned, in order to coordinate the interventions to be carried out during the state of emergency. Civil protection ordinances can be adopted in derogation from the provisions in force[8] but within the limits and in the manner indicated

[4]See Tripodina (2020) at 82.
[5]Morbidelli (2016).
[6]Cavaggion (2017).
[7]Mangiameli (2006).
[8]See Constitutional Court ruling no. 44/2019.

in the state of emergency resolution and in compliance with the general principles of the legal system (art. 25).

The Italian Constitution, therefore, unlike, for example, the German, French and Spanish ones, does not provide for a specific discipline for emergency[9]. In fact, in order to deal with «extraordinary» emergency situations, it only provides for the instrument of the law decree, while ordinary legislation provides, as mentioned above, the ordinances of necessity and urgency[10].

On the other hand, finally, the Constitution provides for the possibility for the Government to intervene, as a substitute, in the case of inaction of the local authorities in the face of a «serious danger to public safety and security» (art. 120.2).

From the regulatory framework described so far, a model of emergency management emerges, in health matters, which does not provide for a separation of powers and competences between the levels of government, but for their integration[11]. Consequently, even if an emergency situation, such as that due to the pandemic, requires a unitary action by the State, it must, in any case, respect the principles of autonomy and decentralisation, contained in art. 5 of the Constitution, and the constitutional principle of loyal collaboration between the State and the Regions. This principle was first developed by the Constitutional Court and subsequently introduced into the Constitution by the 2001 reform.

Therefore, the essay is aimed at analysing the measures adopted in the emergency period, in order to assess whether the State, faced with the need to manage the pandemic in a unified manner, has respected the constitutional principles of autonomy, decentralisation and loyal collaboration between the State and the Regions.

Methodology in the Analysis of Topics covered and Expected Results

The methodology used in the research on problems related to the management of the COVID emergency includes a careful analysis of the measures adopted, by the State and the Regions, to contain the virus. In addition, the essay takes into account the updated literature, capable of expressing the theoretical and scientific, as well as practical, findings of the problematic aspects addressed in this study.

A reconstruction of the legislation relating to emergency management is carried out, in order to assess how this legislation has disciplined the role of the State and the Regions, in adopting emergency measures, and defined their relations. Furthermore, the concrete behaviours of the subjects involved are analysed.

[9]Studies on the emergency regulation in Italy, on the occasion of the pandemic, have conducted by: Azzariti (2020); Cardone (2020) at 343; Caretti (2020); De Minico (2020); Comazzetto (2020); De Martin (2020); Onida (2020); Ravì Pinto (2020); Silvestri (2020); Sorrentino (2020). See also Bonetti (2020); Calamo Specchia (2020); Caravita (2020) at v-vi; Grosso (2020) at vi-vii.
[10]Raffiotta (2020).
[11]See Dell'Atti & Naglieri (2020).

A) The methodological approach is the legal and practical one and the conclusions are aimed at demonstrating how the management of the emergency has further contributed to highlighting the limits of a structure of relations between the State and the Regions that has actually been created, over time, but which, very often, does not appear consistent with constitutional principles.

B) Therefore, the expected result of the research is to identify some possible solutions that could be adopted, in dealing with the health emergency that would be more respectful of the autonomy principle that characterises the Italian Constitution.

The Legislation on Pandemic Management: The Role of the State and the Regions and their Weak Coordination

Therefore, the legislation relating to the management of the pandemic, the role of the State and the Regions in the adoption emergency measures and their coordination will be reconstructed below.

The first state measure relating to the pandemic was adopted on 31 January 2020 by the Council of Ministers; the latter approved a «state of national emergency» for six months — subsequently extended — due to the health risk associated with COVID-19, providing for the adoption of ordinances by the Head of the Civil Protection Department, «in derogation of existing provision and in compliance with the general principles of the legal system»12. It has been seen that the Civil Protection Code provides that for the adoption of the ordinances it is necessary to acquire the agreement of the Regions and Autonomous Provinces territorially concerned. However, the state of emergency resolution does not mention this obligation, indeed it does not provide for any form of consultation with the Regions13.

In the first phase of the emergency, numerous measures were adopted that included severe restrictions on freedoms, up to the point of introducing the lockdown throughout the national territory. Initially, the emergency was dealt with by the State through the adoption of two law decrees: the Law Decree of 23 February 2020, no. 6 and the Law Decree of 25 March 2020, no. 1914.

The Law Decree no. 6/2020 has regulated the role of the State and the Regions in adopting emergency measures and their mutual relations. The decree shows the will of the Government to play a strong role in the management of the emergency. The decree, in fact, provided that the emergency measures were adopted by the President of the Council of Ministers

[12]See: Algostino (2020) at 117-121; Dolso (2020).

[13]See Catelani (2020b).

[14]See: Belletti (2020); Cherchi & Deffenu (2020); Cintioli (2020); De Siervo (2020); Di Cosimo (2020). In particular, the following authors have analysed the problems linked to the use of the law decree and the decrees of the President of the Council of Ministers to deal with the emergency, also in relation to the system of sources of law: D'Aloia (2020); Fabiano (2020); Lauro (2020); Longo & Malvicini (2020); Lucarelli (2020); Massa Pinto (2020); Mazzarolli (2020); Mobilio (2020); Ronga (2020); Rossi (2020); Trabucco (2020); Tresca (2020) at 207-211.

with one or more decrees, after a simple consultation of the Regions (art. 3.1). On the other hand, the decree authorised the Presidents of the Regions and the Mayors to issue, even in the emergency phase, ordinances on health matters, on the basis of the pre-existing legislation (examined above) (art. 3.2). The decree, however, provided for two limits to the power of ordinance of Regions and Municipalities: it could only be exercised until the adoption of the decree of the President of the Council of Ministers and only in cases of «extreme necessity and urgency». Therefore, the measures contained in the regional ordinances would have been applied until the adoption of a conflicting discipline through a decree of the President of the Council of Ministers. The purpose of these limitations on the powers of ordinance was to prevent the decrees of the President of the Council of Ministers from being overwhelmed by a series of ordinances of the Regions and Municipalities[15]. In reality, the decree in question, providing for the possibility of adopting, in a generic way, «further measures», still left the Regions with a rather vast power of ordinance, not subject to any control or to the obligation of collaboration with the State. For this reason, in the period following the decree, many contingent and urgent ordinances have been adopted by the Regions[16]. In some cases, regional ordinances have provided for more restrictive measures on citizens' freedom than State ones[17]. This situation has created tensions in the relations between the Government and some Regions (in particular with Lombardy and Campania) since the first days of the emergency[18].

Subsequently, the Law Decree no. 19/2020 further strengthened the role of the Government, in emergency management, and better defined the relations between the State and the Regions. Similarly to the previous one, the decree provided for a limited involvement of the Regions in State decisions. The competence of the President of the Council of Ministers to adopt decrees containing measures to limit the spread of the virus has been confirmed, after consulting the Presidents of the Regions or the President of the Conference of Regions and Autonomous Provinces (the body that represents the respective interests), depending on the territory concerned (individual Regions or the entire national territory) (art. 2). Furthermore, the decree, in order to standardise the virus containment measures, at a national and regional level, and to limit the interventions of the Regions, introduced more stringent limits to the power of regional ordinance. In fact, the possibility was envisaged for the Regions to introduce further restrictive measures, compared to those provided for by the decree, only in the context of the activities within their competence (with the exclusion of productive activities and of strategic importance for the national economy) exclusively in case of an aggravation of the health risk on

[15]Carlesimo (2020).

[16]See Bartolini & Ruggiero (2020); Bignami (2020); Di Capua (2020) and Musella (2020), who have conducted studies on the use of regional ordinances in the emergency period.

[17]See Pinelli (2020).

[18]The following authors in particular have highlighted the problems related to the relations between the State and the Regions in the management of the health emergency: Cortese (2020); Ferraiulo (2020); Mandato & Stegher (2020).

their territories (or in a part of them) (art. 3.1). It was also confirmed that regional ordinances can only be adopted pending the adoption of the Decree of the President of the Council of Ministers and that, subsequently, they lose their effectiveness19. Finally, the decree, unlike the previous one, provided that, pending the adoption of the Decree of the President of the Council of Ministers, the competence to adopt acts, with limited effectiveness until that moment, in cases of «extreme necessity and urgency», for unexpected situations, is of the Minister of Health20 and no more of the President of the Region and the Mayor. The provision of a power of the Regions to derogate in peius highlights the will of the legislator to centralise the choices in the hands of the Government21.

Nevertheless, the decree did not precisely define the conditions and limits for the adoption of regional measures and did not provide for forms of preventive collaboration with the State (not even a consultation). The Regions, therefore, have continued to adopt ordinances which, in many cases, have introduced further limitations with respect to those envisaged at the State level22; this is because the Presidents of some Regions regarded the Government measures as inadequate and insufficient. Some of these ordinances, however, did not respect the limits identified by Law decree no. 19/2020, having been adopted even in cases where there was no worsening of the health situation.

With the launch of the so-called «phase 2», the State legislation, in order to weaken emergency measures, has outlined a different structure of relations between the State and the Regions to cope with the pandemic23. The Law Decree of 16 May 2020, no. 33 established that, from 18 May to 31 July 2020, with State, Regional or Municipal decrees and ordinances, the movement of people and the methods of carrying out economic, productive and social activities could be regulated. In this framework, greater powers of monitoring the epidemic have been attributed to the Regions and the possibility of adopting, consequently, adequate measures. The Regions were called to monitor the progress of the epidemiological situation of their territories, on a daily basis, and to communicate the relevant data to the Minister of Health, the Italian National Institute of Health and the Technical-Scientific Committee set up at the Department of Civil Protection (which provides advice on the adoption of emergency measures). The Regions were given the possibility, in relation to the progress of the epidemiological situation in their territories and pending the adoption of the Decree of the President of the Council of Ministers, to introduce derogatory, broadening or restrictive measures, compared to those established at the State level24. Some Regions, however, had already begun, even before the Decree no. 33/2020, to adopt less restrictive

[19]See: Luciani (2020); Pollicino & Vigevani (2020).
[20]Pursuant to art. 32, l. 833/1978.
[21]Boggero (2020).
[22]See De Marco (2020) at 373.
[23]See D'Amico (2020) at 22-25.
[24]Salerno (2020).

measures than those envisaged by the State (e.g. the Veneto and Campania Regions). As for the collaboration between the State and the Regions, the decree provided that: the ordinance of the Minister of Health identifying one or more Regions in which additional measures (identified by a decree of the President of the Council of Ministers) may be applied, with respect to those provided on the national territory, are adopted after hearing the Presidents of the Regions concerned; the ordinances of the Minister of Health which provide for the application, in relation to specific parts of the regional territory, of measures envisaged for the entire national territory, are adopted in agreement with the Presidents of the Regions concerned. Greater collaboration between the State and the Regions had already been contemplated also by the Decree of the Minister of Health of 30 April 2020; it provided that, at central level, any re-evaluation of health risks takes place in agreement with the Region concerned and the collection of the necessary information to classify the risk takes place through a specific Control Room, which involves the Regions and the Italian National Institute of Health. Despite these provisions, however, the conflict between the Government and the Regions continued even during «phase 2» of the pandemic. In some cases, in fact, the Presidents of the Regions have continued to adopt ordinances that do not comply with the limitations envisaged by the Government[25].

So much so that the State has, in some cases, appealed these ordinances before the competent Administrative Judge. The Courts have sometimes recognised the validity of regional ordinances — as they are based on the power to adopt further measures related to specific situations of the Regions — while, in other cases, they have, instead, agreed with the State. For the purpose of greater coordination between the State and the Regions, a Document of «Prevention and response to COVID-19: evolution of strategy and planning in the transition phase for the autumn-winter period» was therefore prepared, shared by the Conference of Regions, composed of Presidents of the Regions, on 8 October 2020. In this regard, it appears positive that there has been a sharing between the State and the Regions on the tools and measures aimed at a remodelling of the containment measures of the pandemic, based on the risk situation in each Region.

Finally, starting from November 2020, in conjunction with the increase in the number of COVID cases, a new phase in the management of the pandemic has begun which has provided for the territorial mini-lockdowns and the return to severe restrictions on economic, productive and social freedoms and activities. In this context, measures have been adopted that are no longer aimed, as in the first phase of the emergency, at closing activities and limiting freedoms in a generalised manner. With the adoption of the Decree of the President of the Council of Ministers on 3 November 2020, a national emergency management model was adopted: national rules were introduced and apply to the whole territory, which can be modulated in areas of different colours (yellow, orange, red), corresponding to different levels of criticality in

[25]Significant, for example, the adoption, by the Calabria Region, of a provision which, anticipating decisions that would then have also adopted by the Government, has authorised the reopening of certain commercial activities, suspended by the decree no. 19/2020.

the Regions, and increasing restrictions are applied in relation to the risk. The risk areas are determined on the basis of data provided by the Regions and are considered according to the Risk Index (i.e. the contagiousness index) and other risk factors (21 factors, including, e.g., the employment rate of intensive care). The involvement of the Regions in the adoption of the decrees of the President of the Council of Ministers is guaranteed through participation in the decisions of the Control Room and by the procedural process that foresees hearing the President of the Conference of Regions. Similarly, the ordinances of the Minister of Health are adopted after consultation with the Presidents of the Regions concerned, on the basis of the Document of prevention and response to COVID and of the data processed by the Control Room. In the case of ordinances by the Minister of Health that exempt some parts of the regional territory from compliance with certain measures, due to the trend of epidemiological risk, an agreement is envisaged with the Region concerned. In this framework of national emergency management, the Regions have been entrusted with a monitoring role and the possibility of adopting more restrictive measures than those of the State.

The Decree of the President of the Council of Ministers of 14 January 2021 also introduced the possibility of providing a «white zone», which is added to the three coloured area, yellow, orange and red. In this area, in the face of a sharp decline in infections and a low risk (with an incidence of infections for two consecutive weeks of less than 50 cases per 100,000 inhabitants), almost all activities may be able to resume and restrictive measures can cease to apply. In any case, ad hoc restrictive measures linked to the relevant activities from an epidemiological point of view may be adopted in the white zone, again with Decree of the President of the Council of Ministers. The mechanism for inserting a Region in the white zone is the same used up to that moment to insert the Regions in the yellow, orange or red zone: an ordinance of the Minister of Health must be adopted. Therefore, at the time of writing, each Region is expected to be included in one of the four areas, each of which has different rules to respect.

The Regions, however, always have the power to issue more restrictive measures than those decided by the Government. In addition to the measures envisaged for each area, there are also limitations that apply throughout the national territory. These measures — contained in the Decree of 14 January 2021 and valid until 5 March 2021 — are, at the time of writing, contained in the Decree of the President of the Council of Ministers of 2 March 2021 and applied from 6 March 2021 to 6 April 2021. Even in this phase there have been conflicts between the Regions and the State. Some Regions have harshly criticised the decisions of the Government that have foreseen their insertion in a specific area and have appealed to the Administrative Judge against the State provision (e.g. Lombardy and Sardinia Regions). On the other side, the Government appealed to the Constitutional Court against the Valle d'Aosta Regional Law of 9 December 2020, n. 11 — which allowed the carrying out of a series of activities in derogation from the provisions of State legislation — and the Court suspended, for the first time, a regional law as a precautionary

measure (ordinance no. 4 of 2021)26. More generally, then, the Presidents of some Regions (Lombardy, Friuli Venezia Giulia, Sardinia, Calabria, Umbria and Veneto) have asked the State to review the procedures for determining the colour of the Regions; they claimed the need to provide for procedures aimed at ensuring a greater regional role, with regard to choices relating to their territories, and an effective participation in the adoption of State decisions.

Research Results. The Violation of the Constitutional Principles of the Regional System by the Emergency Legislation

To cope with the pandemic, the State has adopted a model of centralisation of competences[27] accompanied by weak collaboration between the Government and the Regions[28].

On the one hand, the emergency decrees have left the Regions a residual role, allowing their intervention only in the cases and within the limits expressly regulated. The State discipline should have left the Regions with greater possibilities of intervention, both because of their competences in health matters and because the spread of the virus took place differently in the various regional territories. This might have avoided the adoption of regional ordinances that were not in line with State measures[29]. Furthermore, the limited role of the Regions has prevented the development of more targeted territorial policies which would probably have made even the State measures more efficient.

On the other hand, the State legislation on the emergency provided for a weak collaboration between the Government and the Regions, based on a mandatory but not binding comparison[30]. No institutionalised procedures for comparison with the Regions have been regulated[31]. For the adoption of Government decisions, in fact, an opinion or an agreement was not required; the Regions were asked to share the choices of the Government, since the latter could adopt the measure even in case of disagreement[32].

This has led to have only an informal cooperation between the Government and the Regions[33]. And even if, in the second phase of emergency management, there was greater consultation with the Conference of Presidents of the Regions, this always took place at an informal level. The Government's measures, therefore, were not the result of a joint and coordinated activity with the Regions, within the system of Conferences[34]. In Italy, in the absence of a Chamber of Autonomies, the system of Conferences (consisting of the State-Regions and Autonomous Provinces Conference, the State-Local Autonomies Conference,

[26]See Dickmann (2021).
[27]Cavino (2020).
[28]Longo (2020).
[29]See Melzi d'Eril & Vigevani (2020).
[30]See Di Cosimo & Menegus (2020); Clementi (2020); Formisano (2020).
[31]Camerlengo (2020).
[32]Severa (2020).
[33]See Delledonne & Padula (2020); D'Orlando (2020).
[34]Catelani (2020a).

representative bodies of the respective levels of government, and the Unified Conference which brings together the members of the other two conferences) represents the interests of the various levels of government at central level.

Greater consultation, moreover, would have allowed the Government to take into greater consideration, at least in the first phase of the emergency, the needs of individual Regions that have been most affected by the pandemic. Instead, the Government, until the autumn of 2020, preferred to deal with the emergency in a uniform way, providing for the same measures in all Regions, and unilaterally, in the absence of a real agreement with the latter. The Regions have reacted to State centralisation by adopting, as we have seen, many ordinances that were not always in line with the indications of the Government. Furthermore, an attitude of protagonism of the Presidents of the Regions has often emerged; they have tried to demonstrate their commitment in the fight against the pandemic — by contrasting with the decisions of the Government — also in order to have visibility on the media and obtain consensus35. Moreover, even the Regions have adopted measures without coordination with the Government; in fact, only in a few cases Regional ordinances have been adopted in agreement with the State (e.g. the ordinances of the Emilia-Romagna, Friuli Venezia Giulia, Liguria, Lombardy, Piedmont and Veneto Regions, adopted on 23 February 2020). In this regard, it is evident that the contrasts between the Regional ordinances and the Decrees of the President of the Council of Ministers were the consequence of inadequate coordination between the various levels of government. This has led — as we have seen above — the State and some Regions to confront also before the Administrative Judge and the Constitutional Court. It cannot therefore be denied that the dialogue between the State and the Presidents of the Regions has often been difficult and conflicting even if the will, on the part of both levels of government, seems to have prevailed, to avoid an institutional breakdown in managing an unprecedented emergency in the republican history.

What we want to highlight in this essay is that it does not seem that the State, in managing the pandemic, has respected the constitutional principles that underpin the Italian regional state. It is true that the State had to consider the need for a unitary management of the epidemic throughout the country and the urgency to act quickly. It is also true, however, that an excessive sacrifice of regional autonomy and of the constitutional principle of loyal cooperation between the State and the Regions is not admissible, not even in the face of the urgency of providing for the unitary measures36. Nevertheless, from the analysis carried out, it emerges that the State, in dealing with the health emergency, has not respected the constitutional principles that characterise the Italian regional system.

[35]See Bilancia F. (2020); Bin (2020); Furlan (2020).

[36]Many authors have analysed the issue of centralised or decentralised management of the pandemic: Allegretti (2020); Betzu & Ciarlo (2020); Balboni (2020); Di Cosimo & Cossiri (2020); Chieffi (2020); Buzzacchi (2020); Lanzafame (2020); Malo (2020); Morelli & Poggi (2020); Pagano (2020); Palermo (2020); Staiano (2020).

Firstly, the emergency decrees have excessively limited the role of the Regions, in violation of the autonomy principle. Especially in the first phase of the pandemic, in fact, there was a progressive centralisation of powers, in order to manage the emergency, by the National Government and, in particular, by the President of the Council. Nonetheless, one of the cardinal principles of the Italian Constitution is the autonomy principle which must be implemented through a pluralism of entities: State and Regional and Local Autonomies which enjoy, pursuant to art. 114 of the Constitution, the same constitutional dignity and are placed in a relationship of equi-ordination and not of sub-ordination.

Secondly, the emergency legislation has not adequately taken into account the Italian regional state model which requires, among other things, that relations between the State and the Regions are based on the principle of loyal collaboration. A collaboration based only on the obligation to hear the Regions does not seem able to guarantee effective coordination between the levels of government. Being measures adopted in matters in which, as we have seen, there is an intertwining of state and regional competences, the application of the principle of loyal cooperation between the State and the Regions would have required the provision of stronger cooperation instruments[37], such as the agreement or understanding; tools, therefore, aimed at obtaining a consensus from the Regions and addressing the emergency in a more coordinated manner[38]. In fact, the principle of collaboration between entities, as often recalled by the Constitutional Court, must be applied in cases of exercise of competences and functions affecting the different levels of government, in order to avoid overlapping of competences and invasions of the sphere of regional autonomy.

Conclusions

The picture that emerges is that of an emergency regulation of a competitive and conflictual nature between the State and the Regions.

Although there was a willingness, on the part of both levels of government, to avoid an institutional breakdown, there was not even a coordinated action of co-management of the emergency and an effective involvement of the Regions in the adoption of State measures, nor of the Government, for the adoption of the Regional ones[39]. Therefore, a State and Regional attitude which largely neglected the Constitutional principles that underpin the Italian regional system, prevailed, in the name of greater effectiveness of the respective actions.

This has fuelled the tension between unity and autonomy that characterises the Italian regional system40. Faced with an intertwining of competences between the State and the Regions, in the field of health emergencies, and a different degree of risk in the various regional territories, both the central

[37]Equizi (2020).
[38]Mandato (2020).
[39]Poggi (2020).
[40]Baldini (2020).

instances of unity and homogeneity and the local instances should have been considered. It does not seem, however, that the two fundamental needs of a regional system have been balanced: the need for unity and the need for differentiation.

The unitary and centralised management of the emergency and the absence of adequate legislation that respects the principle of loyal collaboration between the levels of government have demonstrated the limits of the effective functioning of the Italian regional system. Even if the Constitution, after the 2001 reform, outlines a cooperative regionalism, in reality this has never been realised. In this vein, even on the occasion of the management of the COVID emergency, the need to respect the principle of loyal collaboration between the State and the Regions was not adequately taken into account, in order to prevent one level from prevailing over another, reinforce a non-competitive cooperative regionalism model41. Indeed, it seems that during the period of health emergency, a model of cooperative regionalism was neglected42. This model could have limited the conflicts between the State and the Regions and would have better reconciled the need to manage the epidemic in a unitary manner, throughout the national territory, and the need to recognise adequate regional powers to deal with the specific health situations of some territories. Moreover, the failure to comply with the principle of loyal collaboration between the State and the Regions has led to a myriad of legislative acts that have caused interpretative doubts and coordination difficulties, with inconveniences for citizens43.

The attitude taken during the pandemic requires a conclusive reflection on State-Regions relations within the Italian regional system. Somehow the exceptional nature of the health situation may suggest that it is permissible to neglect a concrete collaboration between the State and the Region in the adoption of the related measures. But this approach would not be compatible with the Italian constitutional model. The principle of loyal collaboration is essential for the maintenance of State-Regions relations and also of a decentralised constitutional system. Therefore, as it has already been highlighted, the unitary needs of the emergency do not justify either a centralisation of the Government's powers or the lack of effective coordinated action between the State and the Regions44. Indeed, it is especially in emergency situations that the separation of competences model is inadequate to cope with it but, on the contrary, coordinated action between the entities is required to adopt more effective solutions; solutions capable of reconciling, in fact, the need for centralised decisions which, however, take into account local needs.

[41]Cosulich (2020).
[42]In the opposite sense, Allegretti & Balboni (2020).
[43]Rescigno (2020).
[44]Ruggeri (2020).

References

Algostino, A. (2020). 'Covid-19: primo tracciato per una riflessione nel nome della Costituzione' (Covid-19: first path for a reflection in the name of the Constitution), in *Osservatorio AIC* 3: 116-125. Retrieved from: https://www.osservatorioaic.it/.

Allegretti, U. (2020). 'Una normativa più definitiva sulla lotta all'epidemia del coronavirus?*'* (A more definitive legislation on the fight against the coronavirus epidemic?) in *Forum di Quaderni Costituzionali* 1:519-520.

Allegretti, U. & E. Balboni (2020). 'Autonomismo e centralismo nella lotta contro la pandemia coronavirus' (Autonomism and centralism in the fight against the coronavirus pandemic) in *Forum di Quaderni costituzionali* 1:536-546.

Azzariti, G. (2020). 'Il diritto costituzionale d'eccezione' (The constitutional law of exception) in *Costituzionalismo.it* 1: I-V.

Balboni, E. (2020). 'Autonomie o centralismo contro il coronavirus*'* (Autonomies or centralism against the coronavirus) in *Quaderni Costituzionali* 2:373-375.

Baldini, V. (2020). 'Emergenza sanitaria nazionale e potere di ordinanza regionale. Tra problema di riconoscibilità dell'atto di giudizio e differenziazione territoriale delle tutele costituzionali' (National health emergency and regional ordinance power. Between the problem of recognisability of the judgment act and territorial differentiation of constitutional protections) in *Dirittifondamentali.it* 1 885-892.

Bartolini, A. & Ruggiero, F. (2020). *'*Sull'uso (e abuso) delle ordinanze emergenziali regional*'* (On the use (and abuse) of regional emergency ordinances) in *Rivista Giustizia insieme*, April 23. .

Belletti, M. (2020). 'La "confusione" nel sistema delle fonti ai tempi della gestione dell'emergenza da Covid-19 mette a dura prova gerarchia e legalità*'* (The "confusion" in the system of sources at the time of the emergency management from Covid-19 puts a strain on hierarchy and legality) in *Osservatorio AIC* 3:174-199.

Betzu, M. & P. Ciarlo (2020). 'Epidemia e differenziazione territoriale*'* (Epidemic and territorial differentiation) in *BioLaw Journal* 1: 201-208. http://dx.doi.org/10.15168/2284-4503-577

Bignami, M. (2020). 'Le fonti del diritto tra legalità e legittimità nell'emergenza sanitaria' (The sources of law between legality and legitimacy in the health emergency) in *Questione giustizia* 2:11-20.

Bilancia, F. (2020). 'Ragionando "a freddo": gli effetti della crisi emergenziale sui rapporti istituzionali Stato-Regioni' ("Cold" reasoning: the effects of the emergency crisis on State-Regions institutional relations) in *Le Istituzioni del federalismo*, special iusse: 29-38.

Bilancia, P. & F. Scuto (2015). 'La riforma costituzionale tra superamento del bicameralismo paritario e riordino delle competenze Stato-Regioni' (The constitutional reform between overcoming the equal bicameralism and reorganizing the State-Regions competences), Research Paper, Centro Studi sul Federalismo. http://www.csfederalismo.it/it/pubblicazioni/research-paper/1106-la-riforma-costituzionale-tra-superamento-del-bicameralismo-paritario-e-riordino-delle-competenze-stato-regioni

Bin, R. (2020). 'Se la nostra salute è minacciata da uno spot politico' (If our health is threatened by a political spot) in *LaCosituzione.info* 9 March.

Boggero, G. (2020). 'Un decentramento confuso, ma necessario. Poteri di ordinanza di Regioni ed enti locali nell'emergenza da COVID-19' (A confused but necessary decentralisation. Ordinance powers of Regions and local authorities in the COVID-19 emergency) in *Il Piemonte delle Autonomie* 1:1-8.

Bonetti, P. (2020). 'La Costituzione regge l'emergenza sanitaria: dalla pandemia del coronavirus spunti per attuarla diversamente*'* (The Constitution governs the health emergency: from the coronavirus pandemic, ideas for implementing it differently) in *Osservatorio sulle Fonti* 2:689-739.

Buzzacchi, C. (2020). 'Coronavirus e territori: il regionalismo differenziato coincide con la "zona gialla"*'* (Coronavirus and territories: differentiated regionalism coincides with the "yellow zone") in *LaCosituzione.info* 2 March.

Calamo Specchia, M. (2020). 'Principio di legalità e stato di necessità al tempo del "COVID-19"*'* (Principle of legality and state of necessity at the time of "COVID-19") in *Osservatorio AIC* 3: 142-173.

Camerlengo, Q. (2020). 'Il governo della pandemia tra Stato e Regioni: ritorno al coordinamento tecnico' (The government of the pandemic between State and Regions: return to technical coordination) in *Le Regioni* 4:739-752.

Caravita, B. (2020). 'L'Italia ai tempi del coronavirus: rileggendo la Costituzione italiana' (Italy at the time of the coronavirus: re-reading the Italian Constitution) in *federalismi.it* 6:iv-x.

Cardone, A. (2020). 'Il baratro della necessità e la chimera della costituzionalizzazione: una lettura della crisi delle fonti del sistema di protezione civile contro le battaglie di retroguardia' (The abyss of necessity and the chimera of constitutionalisation: a reading of the crisis of the sources of the civil protection system against the rearguard battles) in *Osservatorio sulle fonti*, special issue:313-350.

Caretti, P. (2020). 'I riflessi della pandemia sul sistema delle fonti, sulla forma di governo e sulla forma di Stato' (The reflections of the pandemic on the system of sources, on the form of government and on the form of state) in *Osservatorio sulle fonti*, special issue:295-298.

Carlesimo, V. (2020). 'La gestione della pandemia da parte del Governo e il rapporto Stato-Regioni*'* (The government's management of the pandemic and the State-Regions relationship) in *Diritto.it*:October 16.

Catelani, E. (2020a). 'Centralità della Conferenza delle Regioni e delle Province autonome durante l'emergenza Covid-19? Più forma che sostanza' (Centrality of the Conference of Regions and Autonomous Provinces during the Covid-19 emergency? More form than substance) in *Osservatorio sulle fonti*, special issue:501-515.

Catelani, E. (2020b). 'Il rapporto tra Stato e Regioni al tempo del Coronavirus: una premessa' (The relationship between State and Regions at the time of the Coronavirus: a premise) in *Rivista del Gruppo di Pisa* 2:3-10.

Cavaggion, G. (2017). 'L'abuso delle ordinanze sindacali contingibili e urgenti, non rimediato dal d.l. Minniti' (The abuse of contingent and urgent ordinances of the Mayors, not remedied by the legislative decree Minniti) in *Il Piemonte delle Autonomie* 2:1-15.

Cavino, M. (2020). 'Sulla illegittimità costituzionale dei decreti legge adottati per fronteggiare l'emergenza Covid-19' (On the constitutional illegitimacy of the law decree adopted to deal with the Covid-19 emergency), in M. Malvicini, T. Portaluri & A. Martinengo (Eds) *Le parole della crisi. Le politiche dopo la pandemia.* (The words of the crisis. Politics after the pandemic) pp. 49-58. Naples: Editoriale Scientifica.

Cherchi, R. & A. Deffenu (2020). 'Fonti e provvedimenti dell'emergenza sanitaria Covid-19: prime riflessioni' (Sources and measures of the Covid-19 health emergency: initial reflections) in *Diritti regionali* 1:648-678.

Chieffi, L. (2020). 'La tutela del diritto alla salute tra prospettive di regionalismo differenziato e persistenti divari territoriali' (The protection of the right to health

between perspectives of differentiated regionalism and persistent territorial divides) in *Nomos. Le attualità del diritto* 1:1-37.

Cintioli, F. (2020). 'Sul regime del lockdown in Italia (note sul decreto-legge n. 19 del 25 marzo 2020)' (On the lockdown regime in Italy (notes on decree-law no. 19 of 25 March 2020)) in *federalismi.it. Osservatorio Emergenza Covid-19*:1-16.

Clementi, F. (2020). 'Resta debole il coordinamento tra il governo e le Regioni' (Coordination between the Government and the Regions remains weak) in *Il Sole 24 Ore*, March 26.

Comazzetto, G. (2020). 'Lo stato di eccezione nell'ordinamento italiano. Riflessioni a partire dalle misure di contenimento dell'emergenza epidemiologica da CoViD-19' (The state of exception in the Italian legal system. Reflections starting from the containment measures of the epidemiological emergency from CoViD-19) in *BioLaw Journal* 1:35-42. http://dx.doi.org/10.15168/2284-4503-558

Cortese, F. (2020). 'Stato e Regioni alla prova del coronavirus' (State and Regions to the test of coronavirus) in *Le Regioni* 1:3-10.

Cosulich, M. (2020). 'Lo Stato regionale alla prova dell'emergenza virale' (The regional state to the test of the viral emergency) in *Amministrazione In Cammino*: 1-5.

D'Aloia, A. (2020). 'Postilla. Costituzione ed emergenza: verso la fine del tunnel, con qualche speranza e (ancora) con qualche dubbio' (Postil. Constitution and emergency: towards the end of the tunnel, with some hope and (still) with some doubts) in *BioLaw Journal* 1: 7-12.

D'Amico, M. (2020). 'Emergenza, diritti, discriminazion' (Emergency, rights, discrimination) in *Rivista Gruppo di Pisa* 3:16-42.

Dell'Atti, L. & G. Naglieri (2020). 'Le fonti della crisi. Fra esigenze unitarie e garanzie costituzionali nel governo dell'emergenza da Covid-19' (The sources of the crisis. Between unitary needs and constitutional guarantees in the government of the emergency from Covid-19) in *BioLaw Journal* 1:135-143.

Delledonne, G. & Padula, C. (2020). 'Accentramento e differenziazione nella gestione dell'emergenza pandemica' (Centralisation and differentiation in pandemic emergency management) in *Le Regioni* 4:753-780.

De Marco, E. (2020). 'Situazioni di emergenza sanitaria e sospensioni di diritti costituzionali*'* (Health emergency situations and suspensions of constitutional rights) in *Consulta Online* 2:369-377.

De Martin, G.C. (2020). 'Democrazia e stato di emergenza' (Democracy and a state of emergency) in Amministrazione *In Cammino*:1-6.

De Minico, G. (2020). 'Costituzionalizziamo l'emergenza?*'* (Shall we constitutionalise the emergency?) in *Osservatorio sulle fonti*, special issue: 541-564.

De Siervo, U. (2020). 'Emergenza Covid e sistema delle fonti: prime impressioni' (Covid Emergency and system of sources: first impressions) in *Osservatorio sulle fonti*, special issue:299-312.

Di Capua, V. (2020). 'Il nemico invisibile. La battaglia contro il Covid-19 divisa tra Stato e Regioni' (The invisible enemy. The battle against Covid-19 divided between State and Regions) in *federalismi.it, Osservatorio Emergenza Covid-19*:1-28.

Dickmann, R. (2021). 'Il potere della Corte costituzionale di sospendere in via cautelare l'efficacia delle leggi (Osservazioni a margine di Corte cost., ord. 14 gennaio 2021, n. 4)' (The power of the Constitutional Court to suspend the effectiveness of the laws as a precaution (Observations on the sidelines of the Constitutional Court, Ord. 14 January 2021, no. 4) in *federalismi.it* 4:117-125.

Di Cosimo, G. (2020). 'Tra decreti e decreti: l'importanza di usare lo strumento giusto' (Between decrees and decrees: the importance of using the right tool) in *lacostituzione .info* 22 April.

Di Cosimo, G. & A. Cossiri (2020). 'Fase 2. Cioè?' (Phase 2. That is?). in *lacostituzione.info* 29 April.

Di Cosimo, G. & G. Menegus (2020). 'L'emergenza coronavirus tra Stato e Regioni: alla ricerca della leale collaborazione*'* (The coronavirus emergency between the State and Regions: in search of loyal collaboration) in *Biolaw Journal* 1: 183-199. http://dx.doi.org/10.15168/2284-4503-576

Dolso, G.P. (2020). 'Coronavirus: nota sulla dichiarazione dello stato di emergenza per rischio sanitario' (Coronavirus: note on the declaration of a state of emergency for health risk) in *Ambiente diritto*. https://www.ambientediritto.it/dottrina/coronavirus-nota-sulla-dichiarazione-dello-stato-di-emergenza-per-rischio-sanitario/

D'Orlando, E. (2020). 'Emergenza sanitaria e Stato regionale: spunti per una riflessione' (Health emergency and the Regional state: ideas for reflection) in *Osservatorio sulle fonti* 2:577-594.

Equizi, C. (2020). 'Il difficile dialogo tra Stato e Regioni al tempo del coronavirus: dov'è la leale collaborazione?*'* (The difficult dialogue between the State and the Regions at the time of the coronavirus: where is the loyal collaboration?) in *Dirittifondamentali.it*, June 10.

Fabiano, L. (2020). 'La catena della normativa emergenziale in risposta alle minacce di diffusione del Covid-19. Riflessioni sulla tenuta in termini di legittimità e di opportunità delle scelte normative del Governo italiano' (The chain of emergency legislation in response to the spread threats of Covid-19. Reflections on the legitimacy and appropriateness of the Italian Government's regulatory choices) in *BioLaw Journal* 1:105-118. http://dx.doi.org/10.15168/2284-4503-567.

Ferraiulo, G. (2020). 'Nazionalismo banale e livelli di governo dell'emergenza (Banal nationalism and emergency government levels), in S. Staiano (ed.) *Nel ventesimo anno del terzo millennio. Sistemi politici, istituzioni economiche e produzione del diritto al cospetto della pandemia da Covid-19'* (In the twentieth year of the third millennium. Political systems, economic institutions and production of law in the face of the pandemic from Covid-19) pp. 113-148. Naples: Editoriale scientifica.

Ferrara, R. (2012). 'Rapporti Stato-Regioni in materia di sanità' (State-Regions relations on health matters) in *Diritto online Treccani*. Retrieved from: https://www.treccani.it/enciclopedia/rapporti-stato-regioni-in-materia-di-sanita_%28Il-Libro-dell'anno-del-Diritto%29/.

Formisano, A. (2020). 'La gestione dell'emergenza durante il Covid-19 tra uniformismo e decentralismo. Considerazioni sull'A.S. 1825 e effetti sul regionalismo differenziato' (Emergency management during Covid-19 between uniformism and decentralism. Considerations on the A.S. 1825 and effects on differentiated regionalism) in *Nomos. Le attualità del diritto* 2:1-20.

Furlan, F. (2020). 'Il potere di ordinanza dei Presidenti di Regione ai tempi di Covid19' (The power of ordinance of the Presidents of the Region at the time of Covid19) in *Federalismi.it* 26:1-8.

Grosso, E. (2020). 'Legalità ed effettività nel tempo del diritto costituzionale dell' emergenza' (Legality and effectiveness over time of the constitutional law of emergency), in *federalismi.it* 6: iv-x.

Lanzafame, A.G. (2020). 'Il lockdown, l'avvio della fase due, e i problemi della fase tre. La gestione dell'emergenza, sanitaria ed economica, da Covid-19 tra disuguaglianze ingiuste e disuguaglianze necessarie' (The lockdown, the start of phase two, and the problems of phase three. Health and economic emergency management, from Covid-19, between unjust inequalities and necessary inequalities) in *Diritti Fondamentali* 2:468-469.

Lauro, A. (2020). 'Urgenza e legalità ai tempi del COVID-19: fra limiti imprescindibili e necessaria flessibilità*'* (Urgency and legality at the time of COVID-19: between essential limits and necessary flexibility) in *BioLaw Journal* 1:45-152. http://dx.doi.org/10.15168/2284-4503-570.

Longo, E. (2020). 'Episodi e momenti del conflitto Stato-Regioni nella gestione della epidemia da Covid-19' (Episodes and moments of the State-Regions conflict in the management of the Covid-19 epidemic*)* in *Osservatorio sulle fonti*, special issue: 377-407.

Longo, E. & M. Malvicini M. (2020). 'Il decisionismo governativo: uso e abuso dei poteri normativi del Governo durante la crisi da COVID-19' (Government decision-making: use and abuse of the regulatory powers of the Government during the COVID-19 crisis) in *federalismi.it* 28:212-233.

Lucarelli, A. (2020). 'Costituzione, fonti del diritto ed emergenza sanitaria' (Constitution, sources of law and health emergency) in *Rivista AIC* 2: 558-583.

Luciani, M. (2020). 'Il sistema delle fonti del diritto alla prova dell'emergenza' (The system of sources of the right to emergency proof) in *Rivista AIC* 2:109-141.

Malo, M. (2020). 'Le Regioni e la pandemia. Variazioni sul tema' (The Regions and the pandemic. Variations on the theme) in *Le Regioni* 2:231-234.

Mandato, M. (2020). 'Il rapporto Stato-Regioni nella gestione del Covid-19' (The State-Regions relationship in the management of Covid-19) in *Nomos. Le attualità del diritto* 1:1-8.

Mandato, M. & G. Stegher (2020). 'La Repubblica al banco di prova più difficile: cronaca costituzionale di un'emergenza sanitaria' (The Republic at the most difficult test bench: constitutional chronicle of a health emergency) in *Nomos. Le attualità del diritto* 1:1-38.

Mangiameli, S. (2006). 'Lo stato di emergenza e le competenze regionali' (The state of emergency and the regional competences) in *Giurisprudenza costituzionale* 4:2926.

Massa Pinto, I. (2020). 'La tremendissima lezione del Covid-19 (anche) ai giuristi' (The tremendous lesson of Covid-19 (also) to jurists) in *Questione Giustizia:* March 18.

Mazzarolli, L. (2020). '«Riserva di legge» e «principio di legalità» in tempo di emergenza nazionale. Di un parlamentarismo che non regge e cede il passo a una sorta di presidenzialismo extra ordinem, con ovvio, conseguente strapotere delle pp.aa. La reiterata e prolungata violazione degli art. 16, 70 ss., 77 Cost., per tacer d'altri' («Legal reserve» and «principle of legality» in times of national emergency. Of a parliamentarism that does not hold up and gives way to a sort of extra ordinem presidentialism, with obvious, consequent excessive power of the pp.aa. The repeated and prolonged violation of Articles 16, 70 ss., 77 of the Constitution, to keep silent about others) in *federalismi.it. Osservatorio Emergenza Covid-19*:1-20.

Melzi d'Eril, C. & G.E. Vigevani (2020). 'Polifonia stonata tra Governo e Regioni*'* (Out of tune polyphony between the Government and the Regions). *Il Sole 24 Ore,* March 29.

Mobilio, G. (2020). 'La decretazione d'urgenza alla prova delle vere emergenze. L'epidemia da Covid-19 e i rapporti tra decreto-legge e altre fonti' (The emergency decree to prove real emergencies. The Covid-19 epidemic and the relationship between the law decree and other sources) in *Osservatorio sulle fonti*, special issue: 351-376.

Morana, D. (2002). *La salute nella Costituzione italiana. Profili sistematici* (Health in the Italian Constitution. Systematic profiles). Milan: Giuffrè.

Morbidelli, G. (2016). 'Delle ordinanze libere a natura normativa' (On free ordinances of a normative nature) in *Diritto Amministrativo* 1:33-70.

Morelli, A. & A. Poggi (2020). 'Le Regioni per differenziare, Lo Stato per unire. A ciascuno il suo' (The Regions to differentiate, The State to unite. To each his own) in *Diritti regionali* 2:1-6.

Musella, F. (2020). 'I poteri di emergenza nella Repubblica dei Presidenti' (The emergency powers in the Republic of Presidents), in S. Staiano (ed.) *Nel ventesimo anno del terzo millennio. Sistemi politici, istituzioni economiche e produzione del diritto al cospetto della pandemia da Covid-19'* (In the twentieth year of the third millennium. Political systems, economic institutions and the production of law in the face of the Covid-19 pandemic) pp. 701-722. Napoli: Editoriale Scientifica.

Onida, V. (2020). 'La Costituzione e le lezioni dell'emergenza' *(The Constitution and the lessons of the emergency)*, in M. Malvicini, T. Portaluri & A. Martinengo (Eds) *Le parole della crisi. Le politiche dopo la pandemia* (The words of the crisis. Politics after the pandemic) pp. 37-48.

Pagano, F.F. (2020). 'Il principio di unità e indivisibilità della Repubblica ai tempi dell'emergenza Covid-19' (The principle of unity and indivisibility of the Republic at the time of the Covid-19 emergency) in *Biolaw Journal* 1:209-218.

Palermo, F. (2020). 'Il virus è centralista?' (Is the virus a centralist?) in *la rivista il Mulino* February 26.

Papa, A. (2019). 'Regionalismo differenziato e garanzia dei livelli essenziali delle prestazioni: il caso paradigmatico della tutela del diritto alla salute' (Differentiated regionalism and guarantee of the essential levels of services: the paradigmatic case of the protection of the right to health), in AA.VV., *Regionalismo differenziato: un percorso difficile, Atti del Convegno "Regionalismo differenziato: opportunità e criticità"* pp. 63-70 (Differentiated Regionalism: A Difficult Path, Proceedings of the Conference "Differentiated Regionalism: Opportunities and Criticalities").

Pinelli, C. (2020). 'Il precario assetto delle fonti impiegate nell'emergenza sanitaria e gli squilibrati rapporti fra Stato e Regioni' (The precarious structure of the sources used in the health emergency and the unbalanced relations between the State and the Regions) in *Astrid Rassegna* 5:1-8.

Poggi, A. (2020). 'Tornare alla normalità dei rapporti Stato-Regioni. Errori da evitare e lezioni da meditare' (Return to the normality of State-Regions relations. Errors to avoid and lessons to meditate) in *federalismi.it* 25: iv-xii.

Pollicino, O. & G.E. Vigevani (2020). 'Gli studi professionali restano aperti. Prevalgono le indicazioni del Governo' (The professional offices remain open. The indications of the Government prevail). *Il Sole 24 Ore*, March 24.

Raffiotta, E. (2020). *Norme d'ordinanza. Contributo ad una teoria delle ordinanze emergenziali come fonti normative* (Ordinance Rules. Contribution to a theory of emergency ordinances as normative sources). Bologna: Bonomia University Press.

Ravì Pinto, R. (2020). 'Brevi considerazioni su stato d'emergenza e stato costituzionale' (Brief considerations on the state of emergency and the constitutional state) in *BioLaw Journal* 1:43-50.

Rescigno, F. (2020). 'La gestione del coronavirus e l'impianto costituzionale. Il fine non giustifica ogni mezzo?' (Coronavirus management and the constitutional framework. Doesn't the end justify every means?) in *Osservatorio AIC* 3: 253-271.

Ronga, U. (2020). 'Il governo nell'emergenza (permanente). Sistema delle fonti e modello legislativo a partire dal caso Covid-19' (Government in (permanent) emergency. System of sources and legislative model starting from the Covid-19 case) in *Nomos. Le attualità del diritto* 1:1-35.

Rossi, E. (2020). 'Appunti sull'abrogazione di decreti-legge in sede di conversione ad opera di successivi decreti-legge nell'emergenza Coronavirus)' (Notes on the repeal

of law decree during conversion by subsequent law decrees in the Coronavirus emergency) in *Osservatorio sulle fonti*, special issue: 641-657.

Ruggeri, A. (2020). 'Il coronavirus contagia anche le categorie costituzionali e ne mette a dura prova la capacità di tenuta' (The coronavirus also infects constitutional categories and puts a strain on their resilience) in *Diritti regionali* 1:367-378.

Salerno, G.M. (2020). 'Alle Regioni il compito di stabilire misure più o meno restrittive' (The Regions have the task of establishing more or less restrictive measures) in *Guida al diritto* 24:111.

Severa, F. (2020). 'Sui raccordi tra livelli di governo in tempo di emergenza' (On the connections between levels of government in times of emergency) in *BioLaw Jo*urnal 1:219-226.

Silvestri, G. (2020). 'Situazioni di emergenza e garanzie costituzionali' (Emergency situations and constitutional guarantees), in M. Malvicini, T. Portaluri & A. Martinengo (Eds) *Le parole della crisi. Le politiche dopo la pandemia* (The words of the crisis. Politics after the pandemic) pp: 21-35.

Sorrentino, F. (2020). 'Riflessioni minime sull'emergenza' (Minimum reflections on the coronavirus emergency) in *Costituzionalismo.it* 1:130-139.

Staiano, S. (2020). 'Né modello né sistema. La produzione del diritto al cospetto della pandemia' *(Neither model nor system. The production of law in the presence of the pandemic)*, in ID. (ed.), *Nel ventesimo anno del terzo millennio. Sistemi politici, istituzioni economiche e produzione del diritto al cospetto della pandemia da Covid-19* (In the twentieth year of the third millennium. Political systems, economic institutions and the production of law in the face of the Covid-19 pandemic), pp: 11-44.

Trabucco, D. (2020). 'Sull'(ab)uso dei decreti del Presidente del Consiglio dei Ministri al tempo del Coronavirus: tra legalità formale e legalità sostanziale' (On the (ab)use of the decrees of the President of the Council of Ministers at the time of the Coronavirus: between formal legality and substantial legality) in *Astrid Rassegna* 5.

Tresca, M. (2020), 'Le fonti dell'emergenza. L'immunità dell'ordinamento al covid-19' (The sources of the emergency. The immunity of the legal system to covid-19), in *Osservatorio AIC* 3: 200-213.

Tripodina, C. (2020). 'La Costituzione al tempo del Coronavirus' (The Constitution at the time of the Coronavirus) in *Costituzionalismo.it* 1:77-88.

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The Rule of Law and National Security in Nigerian Democracy: A Contemporary Issue under the Aegis of International Law

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Although brutality can repress a society, it never assures the sustainability of that conquest. Tyranny steers the hopeless to despair, edges to rebellion, and could open the door for a new tyrant to rise. Law becomes a limiting factor that must act as a stopgap to the avaricious intentions of a dictator. A democratic leader must incorporate the supremacy of the law and honest officials into his government. He shall also create courts of law, treat the poorest citizens with fairness and build a hall of justice to bring the society to modernity with the operation of the rule of law enshrined in the constitution. Legislation is nothing without enforcement and Law is no law if not accepted and respected by the people. The rule of law cannot be said to be working in a country where the government continues to violate the orders of the court, unlawfully detain its citizens, abuse human rights including arbitrary and extra-judicial executions, unlawful arrests and detentions, embargo on freedom of speech and press, impunity and inhumane torture, degradation of people or exterminations. This treatise will argue on the supremacy of the "Rule of Law" as it impacts Nigerian democracy.

Keywords: *Rule of Law; Democracy; Judiciary; Supremacy; Government; Tyranny; Nigerian Constitution.*

Introduction

The rule of law got to its crescendo in the 19th century through the British jurist A.V. Decey. Although the credit to modern 'Rule of Law' is given to A. V. Decey[1] the development of the concept can be linked through the civilisation history of ancient Greece; Mesopotamia, Rome, China and India.[2] Nonetheless, the phrase was acknowledged by prehistoric sages and philosophers like Aristotle who wrote *"it is more proper that law should govern than any one of the citizens."*[3] Law is collection of rules created and enforceable through the government institutions or social entities to regulate behaviour. It is a system that monitors and makes sure citizens and governments conform to due process. Enforceable laws are made by legislatures or by legislator, resulting in statutes, by executives by way of decree or regulations or through judicial precedents established by Judges, usually in jurisdictions under common law. Individuals can

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[1]See Wormuth (2010).

[2]See Black (2009).

[3]See Aristotle at 16.

create laws in the form of legally binding contracts and arbitration agreements which are normally enforceable through a regular court process. Laws are formulated in line with the constitution, written or unwritten and address complex issues concerning equality, fairness and justice. The law moulds society, history, economics, and politics in diverse ways and operates as a mediator of relations between individuals. Rule of law connotes that everyone is subject to the law.[4] According to John Marshall,

> *"the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."*[5]

Opposed to the rule of law is autocracy, dictatorship or oligarchy, a system that holds the leader above the law. Plato advocated for respect to the law and opined that without the law in the society the collapse of the state is imminent, but the presence of law in a state makes the government subservient to the law and enables the citizens to fully benefit the advantages of that state.[6] Plato believed that a leader should be loved by his citizens and the leader's personal interest should not be above the interest of his citizens. Whilst Niccolo Machiavelli took the opposite view and arrived at a different conclusion that leaders should be better feared and respected by his citizens than loved,[7] otherwise, his people might think he is weak and take advantage of him. His conclusion was informed by his believe that men are naturally wicked and in order to be in control, the leader needs to be feared.[8] Marcus Aurelius believed that the law is supreme and above everybody. Although Aurelius agreed with both Plato and Machiavelli in so far as the leader is doing the right thing within the law. He stated that it does not matter what others think about the leader as long as the leader is acting in accordance with the law. Aristotle however, vehemently was opposed to giving ultimate power to a leader above the law rather he opined that such leader's power should be beneath the law. In order words, Aristotle was an advocate of the rule of law and he said:

> *"that it is more proper that law should govern than any one of the citizens: upon the same principle, if it is advantageous to place the supreme power in some particular persons, they should be appointed to be only guardians and servants of the laws."*[9]

In the Roman Empire period, the sovereign was not personally subject to the laws, nevertheless, where there is grievance, those affected can sue the treasury.[10] It is often roughly stated after Cicero – a Roman statesman that *"we are all servants of the laws in order to be free."*[11] The School of legalism in Ancient

[4]See Hobson (1996) at 57.
[5]Ibid, at 57.
[6]See Cooper & Hutchins (1997).
[7]See Dalter (2016).
[8]See Machiavelli (1882).
[9] See Aristotle (1988) at 16
[10]See Bingham (1949) at 28
[11]See Cicero: "The Magistrates who administer the law, the Judges who act as its spokesman, all the rest of us who live as its servants, grant it our allegiance as a guarantee of our freedom."

China argued that law should be used as a tool of governance, and thus implemented "rule by law" and not "rule of law", which by implication kept the aristocrats and emperor immune before the law.[12] In the middle ages Islamic jurisprudence, the law was formulated to be above everyone including the Caliph[13] It does not relate to secular law, but refers to Sharia law.[14] In the 9th Century, Alfred the Great, Anglo Saxon King of England held in his reformed kingdom code of law (the Doom Book) that the application of law should be equal to all persons, whether rich or poor, friends or foes. The law of his kingdom was motivated by Leviticus, 19:15:

> *"You shall do no iniquity in judgement. You shall not favour the wretched and you shall not defer to the rich. In righteousness you are to judge your fellow."*[15]

In the early modern age, Samuel Rutherford in Lex Rex (1644) stated that the King is under the rule of law.[16] However, it is difficult to juxtapose the kings from the law where in Latin *lex, rex* means [the law is king], which in traditional Latinic maxim *rex lex* means [the king is Law].[17]

Britain, France and USA played a pivotal role in spreading the principles of the rule of law across the countries of the world.[18] The notion that no one is above the law was popularised in 1776 during the founding of the United States and this influenced Thomas Paine's pamphlet "Common Sense" and he stated that:

> *"in America, the law is King. For as in absolute governments the King is law, so in free countries, the law ought to be king, and there ought to be no other."*[19]

This was followed suit by John Adams "a government of laws and not of men," expressed in the Massachusetts constitution:

> *"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."*[20]

This paper will examine the concept "Rule of Law" in general terms, as a model of governance and articulate its applicability in a democratised society with particular emphasis to Nigeria. The paper will critically explore the theoretical and philosophical basis of rule of law as it impacts on democracy and use it to analyse the Nigerian government. Finally, the paper will attempt to argue the supremacy of

[12]See Zhang (2002).
[13]See Weeramantry (1997).
[14]See Wael (2003).
[15]See Alter (2004).
[16]See Rutherford (1644).
[17]See Montesquieu (1748). See also Tamanaha (2004).
[18]See Winks (1993); Billias (2011).
[19]See Lieberman (2005).
[20]See Adams (1779).

the "Rule of Law" over and above "National Security or 'National Interest" under the constitution of the Federal Republic of Nigeria.

Rule of Law: A Necessary Part of Democracy

In a democracy, the rule of law should be supreme to the capricious authority of any individual. The rule of law is the supreme check on political power used against people's rights. Without the regulation of state power by a system of laws, procedures, and courts, democracy could not survive. As the rule of law protects the majority from arbitrary power and tyranny, it must also protect the minority from arbitrary power and the "tyranny of the majority."[21] This scenario was further elegantly articulated in the words of John Adams when he said:

> *"Now to what higher object, to what greater Character, can any Mortal aspire, than to be possessed of all this [legal] Knowledge, well digested, and ready at Command, to assist the feeble and Friendless, to discountenance the haughty and lawless, to procure Redress of Wrongs, the Advancement of Right, to assert and maintain Liberty and Virtue, to discourage and abolish Tyranny and Vice."*[22]

As a corollary, John Lock said: "where-ever law ends, tyranny begins."[23] The actual foundation of democracy is anchored on two pillars, the majority rule and the right of the minority protected. Notwithstanding that the majority rule, the rights and freedom of minority is preserved under the constitution. Although in making of policies, decisions or public issues, it is the majority that prevails but it covers the minority. In a democracy, it is what majority decides that wins, but it does not mean that the rights of the minority will be taken over. Essentially, the constitution protects the rights, liberties of the minority and allows them to have a voice in political decisions. One can become a minority for the reasons of gender, religious affiliation, ethnic origin, geographical location, sexual orientation, cultural minorities, language or even income level. Nonetheless, the government uses majority rule but give minority rights of equality protected under the constitution. The absence of the rule of law is likely to be mob rule or dictatorship. The rule of law should protect the majority from arbitrary power and tyranny of the majority against the minority.[24] Aristotle was not a big fan of democracy because to him it is a bad form of government where everyone votes for everything which becomes tyranny of the majority and leaves minority at the whims of the masses. Democracy to him undermines the rule of law, whereas a functioning government shall be governed by laws.[25] Incidentally, the minority rights' was protected under the UN's International Convention on Civil and Political Rights ("ICCPR").[26]

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[21]See McDuffie (2009).
[22]See Adams (1966).at 124; For further reading see Adams (2000).
[23]See Locke (1980) at 202.
[24]See Eze (1984).
[25]See Barnes (2005).
[26]See ICCPR (1966).

When a society's legislation does not carry the interest of all the citizens along, it is malign and can often lead to revolution which no doubt breeds mob rule. In that case, some revolutionary thinkers regard "mob rule, or anarchism as the ultimate form of political and social justice."[27] Another name for mob rule is political chaos or violence which leads to dictatorship, in order words, the exercise of arbitrary power and refusal of private rights. Law is law when it is accepted by the people involved who are obligated to respect, keep and abide by it. These individuals submit to the notion that the breaking of such laws carries punishment administered by a constituted authority or law Courts in order to maintain peace and protect the lives and properties of the members of such a society. When the acceptability of the law is not unanimous by all and some minority voices dissents, it is no longer the law as it tends to be for a certain group of people only.

Rule of Law and National Security in Nigeria

A Nation is made up of the Citizens and these Citizens are the Nationals controlled by the law of the Nation which is enshrined in a legal document called the Constitution. The national security can only be invoked when the liberty of the citizens are at risk and a state of emergency is required or that the act perpetrated by an individual is felonious or an act of war against the country. At that point, it becomes a crime and an issue of national security, because the security of the nationals or citizens is likely to be breached. In such a case, it becomes the concern of the entire people who are the nationals. If the act perpetrated is of national security, it must follow due process of law. National security has no precise definition. It is a State-Centred concept in terms of military defence and security to protect national security by defending external aggression, maintaining Nigeria territorial integrity and securing its boarders from violation on land, sea or air. It is embedded within the Constitution and cannot be activated or invoked outside the Constitution of the land which is the pinnacle of rule of law.[28] The call for National Security is relative depending on what constitutes national security and who interprets what a national security should be. Caution must be drawn here to discountenance any attempt to subjugate the rule of law under the aegis of national security because this will breed tyranny, anarchism or dictatorship which is alien to a democratic government. National security cannot be interpreted independently the constitution, it is within the constitution and can only be given the force of law by the constitution which is the supreme law of the state. The inclination to invoke national security in isolation of the rule of law could take us to Plato's warning in his very last book, where he summarised his understanding of law and said that:

> *"where the law is subject to some other authority and has none of its own, the collapse of the state, in my view is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and*

[27]See Ranney(1975) at 528.
[28]See Section 217 (2) (a) (b) Nigerian Constitution 1999 (as amended).

> *men enjoy all the blessings that gods shower on a state."*[29] To Plato, law can eliminate possibility of tyranny in a democracy. He referred to the law as an *"external authority" that exists as the "ally of the whole city."*[30]

Any suggestion of supremacy of the national security over the constitution is inconsistent with Section 14(1)(2)(b) (c) of the Constitution of the Federal Republic of Nigeria. Section 14(1) says:

> *"The Federal Republic of Nigeria shall be a State based on the principles of democracy and social justice." Section 14(2)(a) declares that "sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority."*

While Section 14(2)(b)(c) says that: *"the security and welfare of the people shall be the primary purpose of government: and the participation by the people in their government shall be ensured in accordance with the provisions of this Constitution."*[31]

Section 14(1) *automatically makes Nigeria a federation governed within the tenets of democracy and social justice.* Whilst Section 14(2)(b)(c) makes it abundantly clear that every authority and power of the individual or government must be in accordance with the provisions of the constitution. The question now is, what is "National Security" or what constitutes "National Security" and who determines what constitutes "National Security" in the Nigerian context in accordance with the Nigerian Constitution. There have been different reactions and understanding of the concept "National Security" and "National interest." Nigerian former Inspector General of Police ("IGP"), Ibrahim Idris recently defined "national Security" and "national interest" and said that leaking his memo to acting President- Yemi Osinbajo on the siege to the National Assembly was *"a threat to national security."*[32] The IGP for this reason attacked, harassed some key editorial staffs, detained reporter Samuel Ogundipe and froze his bank account. The question is, why and under what law were these actions justified within the parameters of the country's rule of law or could it be the invocation of a colonial law termed criminal sedition which provided that publication of truth, whether it is convenient or not, is a threat to "national security."[33] But in a democratic government, it is not the President, neither the IGP nor any of the ruling government bodies that determines what constitutes "threat to the national security and national interest," it is the exclusive reserve of the Courts in accordance with the rule of law enshrined in the constitution. President Muhammadu Buhari of Nigeria once said that the rule of law must be under the supremacy of the national security and national interest.[34] This statement caused a stir from the Nigerian

[29]See Plato at 227.
[30]Ibid, at viii.
[31]See The Constitution, Federal Republic of Nigeria, (1999 as amended), Section 14. (1) and Sections (2) (a) (b) (c).
[32]See Ishiekwene (2018).
[33]See Halperin (2016).
[34]See Anaba, Akinrefon, Nochiri, Nwabughiogu, Yakabu & Ojelu , (2018).

lawyers on 28th August 2018 at the Nigerian Bar Association ("NBA") Conference in Abuja.

Simply put, the rule of law comes second when national security and interest is threatened. The President was relying on the Supreme Court's decision delivered by Ibrahim Tanko Muhammad, Justice of the Supreme Court ("J.S.C") in *Dokubo-Asari v Federal Republic of Nigeria*,[35] which according to him, has been settled by the apex Court of the land that national security and interest prevails over rule of law. It must be noted that in the case, it was for him to be granted bail and according to the rules of Courts, practice and procedure, bails are discretionary no matter the gravity of the offence. In Dokubo's case, he was accused of threatening to start a war against the country and the court decided that if he is granted bail, he may still carry out his threat and therefore refused him bail on grounds of national security and interest over and above his fundamental human rights, constitutional guaranteed personal liberty under Section 35(1) of the Constitution of Nigeria 1999 (as amended). It seems the Court did not consider that the law recognizes presumption of innocence of the individual, which is a known principle of law that an accused person is presumed innocent until proven guilty.[36] The Court however took the view that "It is better to preserve the liberty of many than a few antagonists to the law in the face of felony."[37] If caution is not taken in the interpretation of national security over and above the rule of law, it could lead to abuse of power which can come in the form of Executive Orders to matters already in court or arbitrary arrest of the citizens in the name of threat to national security or national interest. Where such orders are given or arbitrary arrest carried out against the citizens, it will amount to breach of the principle of separation of powers. Executive Orders become permissible if it is issued for good governance and to direct the conscientious running of the government. It should not be to encroach or usurp the reserved powers under the constitution for other arms of government. Under a democratic government, Executive Orders are well guided by the rule of law, otherwise, it becomes a decree-making which can be termed autocracy.

In Marx's critique of Hegel's legal sophistry,[38]

> *"a constitution that expresses social form to reason must be the outcome of self-conscious human beings acting and living as members of a self-legislated polity "[...]" this polity can be nothing other than a "true democracy."*[39]

To Marx, the people are the advancement of the society and the people are the constitution. The human rights and national security are contiguous and cannot be competing with each other. The practice of human right in any society will eliminate issues of national security as both goals are complementary. These are multiplicities of norms which forms the basis of a community's legal system.

[35]See *Dokubo-Asari v Federal Republic of Nigeria (2007). 12 NWLR (PT 1048) 320 at 357 para A-C.*
[36]See *Enebeli v Chief of Naval Staff (2000). 9 N.W.L.R (Pt 671) 119 at 124-125*
[37]See *Dokubo-Asari v Federal Republic of Nigeria (2007). 12 NWLR (PT 1048) 320 at 357*.
[38]See Marx & Engels (1975).
[39]See Alexandros (2018).

These legal norms are formed through other norms and not independent of each other.[40] The decision of the Nigerian apex Court has not rendered the supremacy of the rule of law moribund when it contradicted Citizens liberty guaranteed under the constitution, but could have been reached as a matter of discretionary circumstances to dispense justice based on reasoning not legalism.

Freedom of Press in Nigeria

One of the latest Rule of Law abuse in connection with 'National Security' has been orchestrated in the recent arrest and re-arrest of Omoyele Stephen Sowore, a journalist, owner and publisher for online news agency Sahara Reporters[41] which demonstrates a clamp down on the freedom of press in Nigeria. Sowore and Olawale Adebayo Bakare (aka Mandate) were arrested in Nigeria on the 3rd of August 2019 charged with attempt to overthrow the government of Nigeria using a protest tagged "Revolution Now" in a bid to demand good governance for Nigerians. The arrest of Sowore and Bakare took place the same date the protest was scheduled to take place. Accordingly, they were detained by State Security or Department of State Service ("DSS") punitively for weeks without bail. On 24 September 2019, they were arraigned before a judge sitting in Abuja High Court and was granted bail on Seven count charge marked FHC/ABJ/CR/235/2019 which ranges from treasonable felony to overthrow the administration of the Government contrary to section 516 of the criminal Code Act Cap C38 Laws of the Federation of Nigeria, 2004, and punishable under the Act; charged with crimes related to transfer of funds contrary to Section 15(1) of the Money Laundering (Prohibition) Act, 2011 punishable under the same Act; and "Cyber-Stalking" contrary to section 24 (1) (b) of the Cybercrimes (Prohibition, Prevention) Act, 2015, punishable under the same Act.[42] The government ignored the bail granted to Sowore by a Court of competent jurisdiction in Federal Capital territory Abuja and took Sowore to a different High Court where he was charged with the same offences. On October 4th 2019, Sowore was granted bail by a different judge under stringent conditions and on November 6, 2019, his release from the DSS was ordered by the Court after perfecting his bail conditions.

Unfortunately, Sowore was not released and an attempt by activist's demonstration at State Security headquarters Abuja for Sowore's release met an open Gun fire and physical assaults by DSS on the protesters. It is unclear if the detention of Sowore is related to his profession as a journalist or his political activism since he took part in the last 2015 presidential election as a Presidential candidate but lost. It is difficult to say that his arrest and detention was in connection with the Public Order Act, an Act of National Assembly, deriving its powers from Section 45(1) of the 1999 Constitution of Nigeria and became an existing law of Nigeria under Section 315 of the Constitution. Notably, the Nigeria

[40]See Cotterrel (2001).
[41]See Ikenwa (2019).
[42]See Nnochiri (2019).

law of Public Order Act[43]is provided to encourage peaceful conduct of meetings, public assemblies and processions. In order to convene a public gathering or conduct procession, a license must be sought and obtained from the Police by the conveners. The process of obtaining this license was cumbersome and led to Police continual illegal arrest of citizens conducting public protest and claim that the citizens did not obtain license from the Police and/or Governor to embark on such rallies, assemblies or protests. Thus, the implementation of this Public Order Act became questionable and led to Civil liberty Organizations suing for a repeal of the Act to protect the Citizens constitutional rights of association and assembly. The legality of civil protests and demonstrations in Nigeria is enshrined in the Nigerian Constitution to protect freedom of expression, assembly and peaceful protests. Interestingly, Section 39 of the Constitution of the Federal Republic of Nigeria (CFRN) 1990, provides that:

> *"Every person shall be entitled to freedom of expression; every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions."*

Similarly Section 40 of the 1999 Nigerian Constitution, (as amended) provided that:

> *"Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any association for the protection of his interest […]".*

Accordingly, the Public Order Act was quashed in 2007 by Court of Appeal – Abuja Division in IGP v ANPP and 11 Others.[44] The respondent in this case challenged the constitutionality of the Public Order Act which required a permit or license of the Police and/or Governor before assemblies, procession and rallies can be held. The Court of Appeal – the Abuja Division Per Adekeye JCA held that:

> *"[T]he Constitution should be interpreted in such a manner as to satisfy the yearnings of the Nigerian society. The 1999 Constitution is superior to other legislation in the country and any legislation which is inconsistent with the Constitution would be rendered inoperative to the extent of such inconsistency. Section 1(2), (3), (4), (5) and (6) and sections 2, 3 and 4 of the POA are inconsistent with the constitution – they are null and void to the extent of their inconsistency."*[45]

It is evident from recent arrests and rearrests of citizens exercising their constitutional rights under the Sections 39 and 40 of the 1999 Constitution of Federal Republic of Nigeria, that the Police has refused to implement the Court ruling on the Public Order Act, perhaps because the Nigerian Police is more interested in protecting the government than the rights of the citizens. However, in order to avert a repeat of Sowore's incident and to prevent critics against

[43]See *Nigeria Public Order Act (1990). Laws of the Federation of Nigeria, Chapter 382*.
[44]See *IGP v ANPP and 11 Others (2007). 18 NWLR (Pt 1066) 457 CA*.
[45]Ibid.

government authorities, new bills were recently formulated and brought before the Nigerian Senate to be passed into law. The bills proposed are for National Commission for the Prohibition of Hate Speech bills and the Protection from Internet Falsehood and Manipulation and Related offences bills that could impose death sentence or long term imprisonment for accused persons if convicted.[46] Essentially, this bill will be in breach of freedom of expression and the right to free speech which are recognised both under National and International law.

Amnesty International reacting to the bill said:

> *"Social media is one of the last remaining places where Nigerians can express their opinions freely. The harassment of journalists and bloggers and the introduction of the Cyber Crimes Act have already shrunk the civic space and created a climate of fear. We are urging the Nigerian authorities to drop these bills, which are open to vague and broad interpretations and impose incredibly harsh punishments simply for criticizing the authorities."*[47]

Hate Speech and International Law

Hate Speech according to Max Planck Encyclopedia of Comparative Constitutional Law ["MPECCoL"], consists of verbal or non-verbal communication that involve hostility directed towards particular social groups, most often on grounds of race and ethnicity (racism, xenophobia, anti-Semitism, etc., gender (sexism, misogyny), sexual orientation (homophobia, transphobia), age (ageism), disability (ableism) etc.'[48] Hate speech is not regulated under liberal democracies like America as right to free speech is enshrined in the American Constitution and protected under the First Amendment. In support of free speech [49] as it relates to democratic citizenship vis-à-vis hate speech, it should be viewed in relation to equal respect for all citizens and respect to the rule of law. This is an essential approach as we are not dealing with hate speech in isolation of free speech. Generally, a right to free speech was not recognised by common law.

As United Kingdom has no written constitution, the only constitutional protection created to freedom of expression which applied to only Members of Parliament ("MPs")[50], was in the Bill of Rights (1689) at the advent of the Human Rights Act 1998.[51] A workable compromise that gives due cognisance to a variety of values must be taking in to consideration especially when free speech is to be diluted for the utter implementation of hate speech with regards to national security. John Milton argued that freedom of speech does not only mean right to express or disseminate information and ideas, it also includes the right to seek

[46]See Ross, Reynolds & Trager (2018).
[47]See Bakare (2019).
[48]See Belavusau (2018); Belavusau (2013); Dworkin (1992).
[49]See Van Mill (2018); Sorial 2012).
[50]See *Bill of Rights, Chapter 2, Article 9 (1689). States: "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."*
[51]See *Human Rights Act. (1998). UK Public General Acts,(1998) Chapter. 42.*

information and ideas; the right to receive information and ideas; and the right to impart information and ideas. The harm principle proposed by English philosopher John Stuart Mill states that people should be free to express themselves or act as they wish unless such action or free speech will cause harm to others or somebody else. This principle is anchored on the tenets of political philosophy of liberalism. The harm principle is not contemplated to direct the actions of individuals, but to unfree the quantum of criminal law and government interventionism on personal liberty. The question remains, does the speech pose an imminent danger or does it incite violence? It is Mills' view with many politicians, philosophers and legal theorists that the disapproval of social action of a person is not enough to justify government intervention, unless it harms someone. John Stuart Mills 'harm principle' views freedom of speech as a non-absolute right and presents a way by law in which power can be legitimately exercised by society over the individual.[52] Mill opined that the only grounds to which power can be justifiably used over any members of a civilised society, against his will, is to avoid harm to others. That is to say that the actor cannot be absolved from the rightful exercise of power over him because of his own good, whether physical or moral as it is not enough justification.[53] The limitation of freedom of speech sometimes waters down the essence of freedom of speech which protects and upholds peoples' rights to express themselves against outrageous, racists, unpopular or unorthodox practices that goes on in the society. It is understandable if freedom of speech is limited in order to avert criminality or protect the rule of law especially when such speech poses an imminent danger or inciting violence against somebody.[54] Ordinarily, freedom of speech should be upheld in the law of the society to embolden individuals to speak out without fear or favour against the ills, acts and practices of the society or government which adversely affects them or the society.[55] In line with the foregoing, the government of Nigeria has proposed a regulation of the social media and the information shared on them; but the bill was withdrawn for reasons of conflict with the laws of the federal Republic of Nigeria. Section 39 (1) of the Constitution of Nigeria states clearly that:

> *"Every person shall be entitled to freedom of expression, including freedom to hold opinion and to receive and impart ideas and information without interference."*[56]

Essentially, International law and standards does not condone hate speech, but prohibits the advocacy of hate speech. On the other hand, International law and standards prohibits divisive speeches of hatred that could be deemed to be hostility or violence, or incitement to discrimination. Hate speech may be harmful, but if it does not reach the threshold of incitement, it may not be prohibited by International law. Hate speech laws could be within the governing laws of nation states but must be clearly formulated as carrying a lesser weight to incitement. By

[52]See Skorupski (1998).
[53]See Mill (1859).
[54]See Hamburger (1985).
[55]See Belavusau (2017).
[56]See *The Constitution of the Federal Republic of Nigeria, Section 39(1) (1999 as amended).*

and large, such laws shall also be in tandem with the freedom of expression rights, and shall be consistent with these rights recognised in International Law and Regional Human Rights Law and enshrined in Article 19 (1,2 and 3) of the International Covenant on Civil and Political Rights (CCPR),[57] Article 10 of the European Convention on Human Rights(ECHR),[58] Article 13 of American Convention on Human Rights (ACHR),[59] and Article 9 of the African Charter on Human and Peoples Rights (ACHPR).[60] The right to freedom of Speech is also recognised as a human right under Article 19 of the Universal Declaration of Human Rights (UDHR).[61] Nonetheless, freedom of speech aforesaid, is not absolute, as it has limitations and boundaries when it conflicts with other peoples' rights and freedoms like in the cases of libel, obscenity, pornography, slander, sedition, incitement, non-disclosure agreements, rights to privacy, dignity, perjury, fighting words, classified information, intellectual property rights such as copyright violations, trade secrets and public security. These limitations are articulated in terms of harm principle proposed by John Stuart Mill 'On Liberty', which implies that:

> *"the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."*[62]

But the harm to others has to be specified as to what constitutes harm to others and what does not.[63] In most cases, we are likely to fail in this task as it could lead to a slippery slope.[64] The inevitable consequences of limiting speech could end up to tyranny. Nevertheless, to allow government interventions on free speech could slide into censorship of anarchy or a state of life *"solitary, poor, nasty, brutish and short"* as described by Hobbes in Leviathan.[65] The free speech should not require such strong barrier as the harm principle to limitation of free speech. The U.K. Public Order Act 1986 states that*:*

> *"A person is guilty of an offence if he displays any writing, sign or other visible representation which is threatening, abusive or insulting, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby."*[66]

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[57]See ICCPR (1966) Article 19.
[58]See ECHR (1953) Article 10
[59]See ACHR (1969) Article 13
[60]See African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), article 9
[61]See Universal Declaration of Human Rights(1948). Adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) article 19. Article 1 of the UDHR
[62]See Mill (1978) at 9.
[63]See *James v Commonwealth of Australia (1936). UKPCHCA 4 AC 578 at 627:*
[64]See Schauer (1986); Schauer (1982).
[65]See Hobbes (1986).
[66]See The U.K. Public Order Act (1986). Section 5 (1) (b) as amended 1994; Van Mill (2017). For a Court decision angle, see: *Mark Anthony Norwood v. Director of Public Prosecutions (2003). EWCH 1564 (QB) para. 16*.

No democracy can survive without its tenets of respect for the rule of law, judicial independence, due process, media freedom and of course political freedom. The actions of the ruling government on human rights violations is clearly in breach of the Section 143 (11) of the 1999 Constitution of Nigeria (as amended) and can be termed a "gross misconduct" which could attract impeachment process. Nonetheless, Omoleye Sowore and Sambo Dasuki were released on 24th December 2019 by the federal government of Nigeria after threatening pressures from International Community, particularly, the involvement of America[67] and NGO's like Amnesty International against the violation of Court Orders and infringement of rule of law by Nigerian government. Amnesty International tweeted and said:

> *"The attempted abduction and eventual rearrest of prisoner of conscience Omoyele Sowore and Olawale Bakare, including the desecration of the Nigerian judiciary by SSS officials tells a bigger story of impunity and flagrant disregard for the rule of law by the Nigerian government."*[68]

The question still remains whether the government of Nigeria will now start adhering to the rule of law or is it just bowing to the pressure of the International Community. The release of Sowore and Dasuki is just a tip of the iceberg considering the plethora of violated Court Orders or deluge of journalists being detained for speaking out, political activists and individuals who in one way or the other are still in detention. A lot of Nigerian Citizens are being incarcerated because they vented out their anger or opinion against the government maladministration and clamp down on rule of law. Benjamin Franklin warned that the citizens should not be forced to give up their freedoms and he said:

> *"In those wretched countries where a man cannot call his tongue his own, he can scarce call anything his own. Whoever would overthrow the liberty of a nation must begin by subduing the freeness of speech."*[69]

Synthesis of National Security

In a democratic government like Nigeria, what constitutes national security will be determined by a court of competent jurisdiction. It is within the ambits of the legislative body of the government to make the law and define what constitutes national security, while the judicial body of the government interprets what constitutes national security and the Executive arm of government implements and enforces it. It will amount to usurpation of power for one arm of the government to exceed its power or use its power to intimidate or frustrate another arm of government in the day to day administration of the country. In order to curtail the powers of the three tiers of government, there must be respect to each arm,

[67]See Maclean. (2019).
[68]See Amnesty International Nigeria (2019).
[69]See Franklin (1722).

separation of powers and checks and balances to avoid arbitrary use of power. Separation of powers was coined by French political Enlightenment thinker Baron de Montesquieu as a model for democratic governance. However, it was first developed by the Greeks and gained notoriety by Roman Republic who adopted it in the constitution of the Roman Republic.[70] The intent of the proponents of separation of powers is for it to protect democracy and prevent tyranny. The idea behind separation of powers is to prevent so much power on a single person or group as they are likely to become dangerous to citizens. Therefore separation of powers limits arbitrary use of powers by any arm of government and also helps to check corruption and unlawful actions against the citizens whom the government ordinarily supposed to preserve. Separation of power is the principle that requires the three tiers of government to undertake independent yet interdependent roles that must remain separated, with systems of understandable checks and balances on no account should all power rest with a single arm of government, neither should any single arm of government dominate authority. Nevertheless, authority should be limited, apportioned and checked among the three branches of government. A nation can only achieve these if only the rule of law is supreme over and above any other laws within the confines of the constitution.

In support of the supremacy of the rule of law, Justice Walter Onnoghen JSC (as he then was) in AG Abia State v Attorney General Federal Republic of Nigeria, said that:

> *"where the rule of law reigns, political expediency ought to be sacrificed on the altar of the rule of law so as to guarantee the continued existence of democratic institutions fashioned to promote social values of liberty, orderly conduct and development, particularly in a republic founded on the principle of federalism where power is further apportioned among three arms of government, termed legislature, Executive and judiciary. See Sections 4, 5 and 6 of the 1999 constitution[71] (as amended)."*[72]

Besides, the learned Justice Kayode Eso ("JSC") had this to say about the rule of law:

> *"The rule of law knows no fear, it is never cowed down; it can only be silenced by the only arm that can silence it, it must be accepted in full confidence to be able to justify its existence. It is the duty of the government to allow the law to take its course or allow the legal and judicial process to run its full course."*[73]

It is trite that the three arms of government are equal partners without any usurpation of power from one to another. Eso, JSC noted in Ojukwu v Military Governor of Lagos State that:

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[70]See Wade & Forsyth (2009). See also Takwani (2004).
[71]See *The Constitution of the Federal Republic of Nigeria (1999). Chapter 1, Part II, Sections 4,5, and 6 (Powers of the Federal Republic of Nigeria).*
[72]See *A.G Abia State v Attorney General Federal Republic of Nigeria (2006) 16 NWLR, PT 1005.*
[73]See *Saidu Garba v Federal Civil Service Commission (1988) 1NWLR (pt.71). P. 449.*

> *"Under the Constitution, the Executive, the Legislature and the Judiciary are equal partners in the running of a successful Government. The powers granted by the Constitution to these organs are classified under an omnibus umbrella known under Part 11 of the Constitution of Federal Republic of Nigeria. The organs wield these powers and one must never usurp the power of the other or else there is chaos."* [74]

The Court warned in A.G. Federation v ANPP (2003), that the Constitution should not be given a political interpretation, matters should be resolved without partisan interest invoked in the interpretation of the constitution or such political interpretation will open doors to bad governance, misrule of the masses and the State.[75] The rule of law must not at any event be jettisoned on the altar of national security but shall be guarded within the provisions of the law. The rule of law is the Grundnorm[76] of any society and remains the *primus inter pares* in all laws of the country.

The subjugation of the rule of law to national security will breed anarchism because the coercive power of a State is empowered by law. Lawlessness is a situation where the law ceases to work, citizens obeys not the State and does not respect the rights of others. This no doubt will be the antithesis of Hobbesian state where life was:

> *"continual fear, and danger of violent death; and the life of man solitary, poor, nasty, brutish and short."*[77]

Hobbes, warned against statecraft, security and rule of law in a society. He cogitated that in such a world of violence and horror, can we stop ourselves from descending into anarchy. Hobbes, in his book The Leviathan postulated that man is naturally evil, a derivative from God in the book of Genesis 6:5, where he said:

> *"And God saw, that the wickedness of man was great in the earth, and that every imagination of the thoughts of his heart was only evil continually."* [78]

Hobbes argues, that man's life in a state of his nature, is a life of no control and miserable. Hobbes implied that man's innate tendency is to accumulate power and wealth and use it to lord over others. He suggested that man's attitude is only tamed by law which helps to regulate his hidden evil nature, otherwise if man finds himself in an environment where there are no laws, the true nature of man will take over him by way of war, violence, greed for power for self against others. He posited that what holds man's evil nature is fear of death or punishment by the law. Hobbes solution to mankind in a circle of selfish nature is the presence of absolute sovereignty to regulate the conduct of man in the society. To Hobbes, in the absence of the sovereign, there will be no right or wrong, every act is

[74]See *Ojukwu v Military Governor of Lagos State (1986) 1NWLR (18) P. 62.*
[75]See *Attorney General Federation v ANPP (2003) FWLR (pt. 169), P. 703 at 878.*
[76]*See* Kelsen (1945).
[77]See Hobbes [1651], Hobbes (1962), and Hobbes (2017).
[78]See Hobbes [1651]; Hobbes (1962). Ch. 13 p.92; Hobbes (2017).

acceptable, because there is no justice or injustice, no societal values, liberties will be non-existent and man face commodious living.[79] Hobbes pontification is that the ideal situation is to draw a contract for mankind with "absolute power" given to the sovereign to regulate the activities of the mankind to obey the contract with fear of punitive repercussions expressed against non-performance of the contract. Hobbes understanding of sovereignty is not necessarily a person but the law giver, a King or person in a position of deity or custodian of the law that can unleash punishment if there is disobedience to the law.[80]

Hobbes ideal of social contract is to end dictatorship of the Leviathan to create peaceful coexistence of the citizens to ensure respect and development of human society.[81] The absolute sovereignty in a modern day democracy is the constitution of a country which is the overarching document that personifies a nation as sovereign. The rule of law is the principles of law, supreme and above any individual or government. Every democracy should strive to institute three objectives to enable the attainment of rule of law in the society. There must be symmetry between the legal structure in the short term and long term; between the citizens and the society; and to ensure the protection of minority rights. The presence of rule of law in any society leads to good governance because such laws must be implemented and enforced fairly repeatedly in a crystalline manner, otherwise, such laws becomes obsolete, archived, jettisoned laws or regrettably oppressive weapons. Additionally, there must be avoidance of fusion of powers through the institution of an independent Judiciary and the decisive fight against the endemic corruption in the community. Secondly, the law should be able to create a short term and long term plan between the concerns of the individuals and the interest of the society in order to attain recognition for Human Right and dependability. Thirdly, the interest of the minority shall be protected with the short term and long term legal plan of the country.

The law should not be used as a tool for persecution of opposition members and perceived political opponents. The government agencies originally created with good intentions should not lose its essence or metamorphosed into a draconian agency with little regard to the rule of law and human rights. Such governmental agencies shall not be used as a media show to intimidate or embarrass or disparage reputation of key opposition members or government agencies deemed to be averse to the whims and caprices of the electoral goals of the party in power. Placing the national security above the constitution will create consequences of arbitrariness since the rule of law is the antithesis of arbitrariness. After all, who invokes what constitutes National Security in Nigeria, in most cases, it is the country's Chief Executive. He can pick and choose who to arrest or indict especially when the unprotected actor is trying to open "Can of Worms" in his administration. Nigeria can be described as the Animal Farm of George Orwell where all the animals were said to be equal but some are more equal than others.[82] Nonetheless**,** the Supreme Court of India says that the essence of rule of law is to

[79]See Tuck (1996); Hobbes: (1651).
[80]See Tuck (1996); Hobbes: (1651) at 268-269
[81]See Bewaji (2016).
[82]See Orwell (1946).

protect individual liberty against arbitrary exercise of power at any place and time.[83]

Conclusion

This treatise has not left democracy in isolation of the rule of law, both are interlaced as core universal values of a civilized world. This paper has explored the rule of law as inalienable rights of the citizens, a paramount factor in constitutionalism, supreme, or impeccable principles of law of any given society. This paper has questioned the possible imposition of the national security or national interest in utter disrespect to the rule of law in Nigeria. Nonetheless, the author has juxtaposed the rule of law with national security and has taken a view that the national security is embedded in the rule of law and cannot override the supremacy of the constitution. The implementation of rule of law will ensure peace, rapid economic growth, development, respect to human rights, respect to civil liberty, freedom of press and the restoration of human dignity within Nigerian populace.

References

Adams J. (1779). The Report of a Constitution or Form of Government for the Commonwealth of Massachusetts, 28-31 October, Harvard University Press

Adams, J. (1966). *Diary and Autobiography of John Adams [1759]*. (Edited by L. H. Butterfield). Cambridge, MA: The Belknap Press of Harvard University Press.

Adams, J. (2000). *The Revolutionary writings of John Adams.* (Edited by C. Bradley Thompson). Indianapolis: Liberty Fund.

Alexandros, C. (2018). *True Democracy' as a Prelude to Communism. The Marx Democracy*, Palgrave Macmillan.

Alter, R. (2004).*The Five Books of Moses: A Translation with Commentary.* New York, NY: W.W. Norton & Company.

Aristotle (c. 350 BC). *The Politics* [c. 350 BC], (Stephen Everson trans) (1988). Cambridge: Cambridge. University Press, Politics 3

Bakare, S. (2019). 'Nigeria: Bills on hate speech and social media are dangerous attacks on freedom of expression' in *Amnesty International Nigeria* (4 December).

Barnes, J. (2005). 'Aristotle and Political Liberty' in Richard Kraut & Steven Skultety (eds.) *Aristotle's Politics: Critical Essays* pp. 185-201. New York. NY: Rowman & Littlefield.

Belavusau, U. (2013). *Freedom of Speech: Importing European and US Constitutional Models in Transitional Democracies* . Routledge.

Belavusau, U. (2017).Hate Speech. Max Planck Encyclopedia of Comparative Constitutional Law. Oxford University Press.

Bewaji, L.A.I. (2016). *The Rule of law and Governance in Indigenous Yoruba Society: A Study in African Philosophy of Law*. Lanham, Md: Lexington Books.

[83]See *Raman Dayarem Shetty v International Airport Authority of India*. (1979). Air 1628, 1979 SCR (3) 1014

Billias, G.A. (2011). *American Constitutionalism heard round the world, 1776 – 1989: a global perspective.* New York: New York University Press.

Bingham, T. (1949) .*The Rule of Law*. London: Penguin Books

Black, A. (2009). *World History of Ancient Political Thought.* Oxford: Oxford University Press.

Cicero, M.T. (106-43 BC) *Murder Trials. Penguin Classics.* (Translated by Michael G.H.) (1975). London: Penguin Books.

Cooper, J. & D. Hutchins (1997). *On Complete Works by Plato*. Indianapolis/Cambridge: Hackett company Publishing Inc.

Cotterrel, R. (2001). *Jurisprudence*. 2nd ed. Butterworths Lexis Nexis.

Dalter, K. (2016). *The Power Paradox: Does Absolute Power Corrupt Absolutely.* London: Penguin Press.

Dworkin, R. (1992). 'The Coming Battles over Free Speech' in *The New York Review,* June 11, 1992 issue/

Eze, O. (1984). *"Human Rights in Africa: Some Selected Problems."* Lagos: Nigerian Institute of International Affairs.

Franklin, B. (1722). "US Founding fathers." (1706-1790) Dogwood Papers. Available at: http://libertytree.ca/quotes/Benjamin.Franklin.Quote.4003.

Halperin, T. D. (2016). *The Alien and Sedition Acts of 1798: testing the Constitution*. John Hopkins University Press.

Hamburger, P.A. (1985). 'The Development of the Law of Seditious Libel and the control of the Press' in *Stanford Law Review* 37(3):661-765.

Hobbes, T. [1651]. Leviathan or the Matter, Forme and Power of a Commonwealth Ecclesiastical and Civill, London: London, printed for Andrew Crooke, at the Green Dragon in St. Pauls Church-yard.

Hobbes, T. (1986). *Leviathan*'. Edited by C.B. Macpherson, London: Penguin Books.

Hobbes, T. (2017). *Leviathan*. Edited by Christopher Brooke, London: ed. Penguin Classics.

Hobson, C. (1996). *The Great Chief Justice: John Marshall and the Rule of Law*. Kansas: University Press of Kansas .

Ikenwa, C. (2019). 'Omoyele Sowore Biagraphy & Network' in *Nigerian Infopedia,* December 6.

Ishiekwene, A. (2018). 'Lawyers, Buhari and the ruins of Law' in *Nigerian Vanguard Newspape*r, August 31.

Kelsen, H. (1945). *General Theory of Law and* State. (Translated by Anders Wedberg). Cambridge: Harvard University Press.

Lieberman, J. (2005). *A Practical Companion to the Constitution*. California: University of California Press.

Locke, J. (1980). *Second Treatise of Government*. Indianapolis: Hackett Publishing Co. Inc.

Machiavelli, N. (1882).*The Historical, Political, and Diplomatic Writings of Niccolo Machiavelli.* Translated by Christian, E. Detmond). Volume 2. Boston: J.R. Osgood and Company Inc.

Maclean, R. (2019). 'Nigeria Releases Leading Critic on Bail After a Campaign on Ocean Away' in. *New York Times* 24 December. Available at: Nigeria Releases Leading Critic on Bail After a Campaign an Ocean Away - The New York Times (nytimes.com)

Marx, K & F. Engels (1975). In *Marx & Engels Collected Works*.(1975) Vol. 3. Karl Marx March 1843- August 1844. Lawrence & Wishart. Independent Radical Publishing.

McDuffie, N. (2009). *'Majority Rule with Respect to Minority Rights'* 16 February. http://www.associatedcontent.com/article/1016764/majority_rule_with_respect_to_minority_pg3

Mill, J.S. (1859). *On Liberty. Introductory* (2001). Batoche Books: Kitchner Ontario, Chapter 1, pp. 1-18.

Mill, J.S. (1859). *On Liberty* (1978). Indianapolis: Hackett Publishing.

Montesquieu, C. (1748). T*he Spirit of the Laws*. Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone (eds) (1989). Cambridge: Cambridge University Press.

Nnochiri, I. (2019). 'FG slams 7-count money laundering, conspiracy charges against Sowore'. *Vanguard Newspaper*. September

Oakeshott, M. (1962). *Rationalism in Politics and Other Essays*. London: Melthuen and Co.

Plato (Aristocles). *The Republic* 227. (c 360 B.C.) Translated by Francis, M. Cornford (1951). Oxford: Oxford University Press.

Ranney, A. (1975). *The Governing of Men.* London: The Dryden Press.

Ross, S.D., Reynolds. A.L. & R.E. Trager (2018). *The Law of Journalism and Mass Communication,* 7th ed**.** Thousand Oaks, Calif.: Sage Publications Inc.

Rutherford, S. (1644). *Lex, Rex, or The Law and the prince; a dispute for the just prerogative of king and people; containing the reasons and causes of the defensive wars of the kingdom of Scotland, and their expedition for the aid and help of their brethren of England*. Reprinted in 1843 by Edinburgh: A. Murray.

Schauer, F. (1982). *Free Speech: A Philosophical Enquiry*. Cambridge: Cambridge University Press.

Schauer, F. (1986). 'Slippery Slopes' in *Harvard Law Review* 99 (2):361-383.

Skorupski, J. (1998). 'Liberty and democracy' In Mill, John Stuart (1806-73)' in Routledge Encyclopedia of Philosophy, Taylor and Francis. Available at: https:// www.rep.routledge.com/articles/biographyical/mill-john-stuart-1806-73/v-1/ section/liberty-and-democracy

Sorial, S. (2012). *Sedition and the Advocacy of Violence: Free Speech and Counter-Terrorism*. London: Routledge.

Takwani, C.K. (2017). *Lectures on Administrative Law*. 6th ed.. Lucknow: Eastern Book company

Tamanaha, B. Z. (2004). *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press.

Tuck, R. (1996). *Hobbes: Leviathan*. (1651). Revised Student Edition. Cambridge Texts in the History of Political Thoughts. Cambridge: Cambridge University

Van Mill, D. (2017*). Free Speech and the State, An Unprincipled Approach*. Palgrave Macmillan.

Van Mill, D. (2018). 'Freedom of Speech' in Edward N. Zalta (eds.). *The Stanford Encyclopedia of Philosophy*. https://plato.stanford.edu/archives/sum2018/entries/ freedom-speech/

Wade, H.W.R. & C. F Forsyth, (2009). *Administrative Law*. 10th eds. Oxford: Oxford University Press.

Wael, H. (2003). *The Impossible State: Islam, Politics and Modernity's Moral Predicament*. New York, NY: Columbia University Press.

Weeramantry, C. (1997). *Justice without Frontiers. Furthering Human Rights.* Kluwer Law International.

Winks, R.W. (1993). *World Civilization: a brief history*. 2nd ed. San Diego, CA: Collegiate Press.

Wormuth, F. (2010). *The Origins of Modern Constitutionalism.* New York, NY: Harper and Brothers.

Zhang, X. (2002). 'On Two Ancient Chinese Administrative Ideas: Rule of Virtue and Rule by Law' in *Culture Mandala: Bulletin of the Centre for East-West Cultural and Economic Studies*. Article 7, Volume 5 Issue 1.

Cases

A.G Abia State v Attorney General Federal Republic of Nigeria (2006) 16 NWLR, PT 1005.

Alhaji Mujahid Dokubo-Asari v Federal Republic of Nigeria (2007). S.C. 208/20006 NGSC 106, 8 June.

Dokubo-Asari v Federal Republic of Nigeria (2007). 12 NWLR (PT 1048) 320 at 357 para A-C.

Enebeli v Chief of Naval Staff (2000). 9 N.W.L.R (Pt 671) 119 at 124-125

Garba, S. v Federal Civil Service Commission (1988) 1NWLR (pt.71). p. 449.

IGP v ANPP and 11 Others (2007). 18 NWLR (Pt 1066) 457CA. Available at: https//judgements.lawnigeria.com/2018/05/04/3plr-inspector-general-of-police-v-all-nigeria peoples-party-ors/. [19 September 2020].

James v Commonwealth of Australia (1936). UKPCHCA 4 AC 578.

*Mark Anthony Norwood v Director of Public Prosecution*s (2003). EWCH 1564 (QB) para. 16.

Ojukwu v Military Governor of Lagos State (1986) 1NWLR (18) P. 62.

Raman Dayarem Shetty v International Airport Authority of India (1979). Air 1628, 1979 SCR (3) 1014

Legislation, Conventions, Charters

African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter), article 9.

Amnesty International Nigeria (2019). Tweet @Amnesty Nigeria December 6, available at: https://twitter.com/AmnestyNigeria/status/1202998312812589056

Constitution, Federal Republic of Nigeria, [Nigeria], Act No. 24, 5 May (1999 as amended).

ECHR -uropean Convention on Human Rights (ECHR) Article 10, European Court of Human Rights. Updated 31 August 2020. Available at: https://www.echr.coe.int/documents/convention_eng.pdf

Human Rights Act (1998). UK Public General Acts (1998) Chapter. 42. *Available at:* http://www.legislation.gov.uk/ukpga/1998/42/contents

ICCPR (1966). International Covenant on Civil and Political Rights. (1966). Adopted by the General Assembly of the United Nations, Part 1, Article 27 & 19, 19 December.

Multilateral American Convention on Human Rights (ACHR). "Pact of San Jose, Costa Rica" article 13, signed at San Jose, Costa Rica on 22 November 1969. Available at: https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf

Nigeria Public Order Act (1990). Laws of the Federation of Nigeria, Chapter 382.

U.K. Public Order Act (1986). Section 5 (1) (b) as amended 1994.

Universal Declaration of Human Rights (1948). Adopted 10 December 1948.

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Regional Cooperation and State Sovereignty

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Bearing in mind that international cooperation and solidarity are fundamental principles underlying the endeavour of international law, reflected in General Assembly Resolution 2625 (XXV) which affirms the duty of states to cooperate with one another in accordance with the Charter, as well as international agreements, such as the United Nations Convention on the Law of the Sea, the Treaty on Principle Governing the Activities of States in the Exploration and Use of Outer Space including the Moon and Other Celestial Bodies, and the Antarctic Treaty which reflect and address global concerns. This paper is a desk-based (non-empirical) research which examines the impacts and implications as well as theories of regional integration or cooperation on the member state's sovereignty, among others. It reveals regional cooperation has both the upside and downside. It concludes that regional cooperation is global trend; it will have different effects in different regions and development issues.

Keywords: *Obstacles; Impacts State Cooperation; Regionalism; Rational; Supranationalism; State Integration; State Sovereignty.*

Introduction

Regional integration is an attempt to realise mutual gains from cooperation within a group of self-motivated states in an anarchical international system[1]. In order to attain successful regional cohesion, the states have to overcome collective action problems that are endemic to international cooperation. Regional cooperation is often promoted by both academics and politicians as a way for states to address important developmental challenges. However, the willingness to cooperate on different issues varies greatly across different policy fields[2]. Regionalism across national borders has become a global phenomenon, there is no single nation sovereign state that has not joined some Trans-national Regional Organisations (TRO).[3] Crisis and urgency are today the "new normal" of politics, a phenomenon experienced at the local, national and international levels. When this breach with the "normalised" framework of politics ceases to be temporary and when crises and urgency become a constant mode of political organisation, then the question of the relationship between crises, urgency and sovereignty arises.[4]

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Email: babalola.abegunde@eksu.edu.ng.
[1]Yoshimatsu (2008).
[2]Soderbaum & Spandler (2019).
[3]Schmitter (2007).
[4]Blouin-Genest,Wagner &Verjans (2020).

This paper specifically examines to how and to what extent regional cooperation/integration affects national sovereignty. The paper shows that even in hard times, regional cooperation/integration is and remains a structural and changing feature of a multilayered global governance.[5]

Conceptual Evaluation

The following concepts, namely: state sovereignty, regional cooperation and regional integration appear in this chapter, hence the need to understand their meaning.

State Sovereignty

State Sovereignty is the concept that states are in complete and exclusive control of all the people and property within their territory[6]. State sovereignty also includes the idea that all states are equal as states[7], when nations join with others in a trade or political bloc, they give up some national sovereignty. In a globalising world, nations feel pressure to join trade and political pacts. Often, those international groupings erode national sovereignty while offering diminished accountability at the wider policy-making level.[8]

A state may acquire sovereignty over territory if that territory is ceded or transferred to it by another state. Cession is typically affected by treaty. Territory (sovereignty) can also be acquired by conquest. Positively, sovereign states are able to provide fundamental political goods such as welfare, security and rule of law, to their own citizens and to take advantage of their negative sovereignty in order to choose, pursue and realise self-imposed goals by means of effective public policies.[9]

The purpose of government is to secure people's rights. Legitimately, sovereign governments derive "their just powers from the consent of the governed".[10]

Accordingly, sovereignty is a power, rather than a rights.[11] Sovereignty is the ability of a state to make laws for its citizens without external interference. Sovereignty both grants and restricts/limits powers, it gives states complete control over their own territory while restricting the influence that states have on one another.[12]

Sovereignty has two basic aspects, external and internal. Internally speaking, it means that state has supreme power over the people within its territorial domain,

[5]Telo' (2020).
[6]The Issue of Sovereignty (2016).
[7]Ibid.
[8]Political Integration and National Sovereignty (2011).
[9]Ronzoni (2012).
[10]Groves (2010).
[11]UK Essays (2018).
[12]Maftef (2015); Grooves (2010).

and externally, it implies complete freedom from foreign rule.[13]Hence, the basis of freedom, equality and justice is national sovereignty.[14]

Regional Cooperation

Regional cooperation refers to the political and institutional mechanisms that countries in a general geographical region devise to find and strengthen common interests as well as promoting their national interests, through mutual cooperation and dialogue.[15] World leaders recognise the crucial role of regional cooperation in implementing and assessing progress. Regionalism is being harnessed in addressing issues like trade, food and energy, security, climate change, connectivity and the outbreak of health epidemic.[16] Regional cooperation refers to any form of working together by various countries to achieve a common objective without sacrificing their diverse individual interests.[17]

Regional Integration

Regional integration is a process in which neighbouring states enter into an agreement in order to upgrade cooperation through common institutions and rules.[18] Regional integration is also known as the process by which two or more nation states agree to cooperate and work closely together to achieve peace, stability and wealth[19]. Regional integration has generally followed the logical progression from cooperation to integration.

Distinction between Cooperation and Integration

One can distinguish between regional cooperation and regional integration and lay the foundation to analysing their distinctive dynamics, as well as their eventual inter-connections. Much transnational regional cooperation, only a few of them constitute regional integration.[20] The former seems to be a precursor to the latter, i.e. states in a specific region seem to find it necessary to engage first in cooperation in order to build up mutual trust among elites and sufficient interdependencies among broader publics, before plunging into the much more risky and potentially rewarding business of integration, but the relation between the two seems highly contingent.[21] One of the major objectives of a comprehensive theory of regionalism should be precisely to specify the conditions that make this possible. Withdrawal from regional cooperation is relatively easy, while the costs

[13]Berger (2010).
[14]Sharma (1951).
[15]Metzger (2008).
[16]Ki-Moon (2016).
[17]Akokpari (2008).
[18]Farida (2015).
[19]Farida (2015); Schiff (2003) at 9; Malthi (1999) at 13.
[20]Schmitter (2007) at 8-10
[21]Ibid.

of withdrawing from regional integration are prohibitively high.[22] The concepts of regional cooperation and integration tend to evolve very different sets of actors. While the former tend to be confined to a restricted set- usually ministers (and especially, if not exclusively, those of foreign affairs)- the latter not only penetrate more deeply into the ranks of the civil service of the respective member states, but also bring into the process representatives of class, sectoral and professional interests and eventually, those of a variety of social movements. One remarkable feature of regional integration is the participation of mass public.[23]

It is pertinent to mention, that the concepts of cooperation and the concept of integration overlap sometimes. In this paper, both concepts are use loosely and interchangeably.

Theories of State/National Sovereignty

There are various theories that explain the concept of sovereignty.

Instrumental Notion of Sovereignty

Under this notion, the primary purpose of the state is in its ability to provide public goods to the people living under its rule following a straight-forward cost-benefit calculus. Hence, cooperation is allowed to solve transboundary problems like externalities and collective resources and achieve economies of scale. It is desirable if these benefits outweighs the cost of ceding national control over goods provision.[24]

Principled Notion of Sovereignty

Under this notion, the state appears as the natural representative of the notion as an "imagined community" and as the guarantor of its integrity and autonomy.[25] Hence, regional cooperation is allowed to maintain national integrity and autonomy of the state.

Status Notion of Sovereignty

Status sovereignty seeks to portray the state as a legitimate member of the international community of states. This notion emphasises that the essence of sovereignty is recognition by domestic and international audiences, who judge a states' authority against internationally shared legitimacy criteria like human rights, good governance, etcetera.[26] Cooperation is permitted to signal state legitimacy as rightful member of the international community.

[22]Ibid.
[23]Ibid.
[24]Schmitter (2007) at 6
[25]Schmitter (2007); Anderson (1983) at 72; Wiener (2009).
[26]Reus-Smit (2001).

Theories of Regionalism

International relations theories have provided an explanation of how and under what conditions states have promoted cooperation to achieve collective interests of the entire region. There are various theories of regionalism[27] or schools of thought which dominate discussions about how national sovereignty hangs together with regional cooperation and integration (that is regionalism).

The Neo-Liberal Institutionalist and Neo-Functionalist Theories

Neo-Liberal Institutionalism believes that states behaviour is not determined by absolute gains but by relative gains in interaction with other actors on international system. Neo-Functionalism believes in the functional benefits states cooperation. These theories have significant influence on both scholarship and policy-making. These theories generally posit that successful regionalism depends on the extent to which states respond to interdependencies by transferring national sovereignty to regional institutions and governance mechanisms.[28] Once this decision is made, spillover effects across policy fields may create incentives to broaden the scope of regional cooperation, and because policy makers are the participants in regional cooperation, they gradually shift their political loyalties from the state/national to the regional level, thereby inducing rising level of regional cooperation and integration.[29]

Intergovernmentalism Theory

According to this school of thought, international norms do not matter much and nation states remain very protective of their sovereignty, especially in the developing world. This makes any form of deeper international cooperation and community building extremely difficult.[30] There are two variants of this theory: (a) Classical Intergovernmentalism-in which the relation between national sovereignty and regional cooperation is usually a trade-off. (b) Instrumentalist Intergovern-mentalism- in which it is only under favourable conditions that states commit to regional and international cooperation, namely when a collective solution outweighs the costs of ceding state sovereignty.[31] Regime-boosting regionalism contains a narrower conceptualisation of the "national interest" compared to liberal intergovernmentalism, both approaches reject the competition between sovereignty and cooperation which are emphasises in neo functionalist and institutionalist theories.[32]

[27]Spendler.& Soderbaum (2019); Börzel & Risse, (2016) at 49; Soderbaum & Shaw at 22
[28]Langenhoven (2011) at 87; Lenz & Marks (2016),
[29]Spandler & Soderbaum (2019); Burley & Mattli(1993).
[30]Spandler & Soderbaum (2019) at 18.
[31]Spandler & Soderbaum (2019) at4.
[32]Spandler & Soderbaum (2019) at 4; Acharya (2016); Börzel & Risse (2019).

Diffusion Theory

This theory argues that global action has led to the spread of a "global script" of norms that prescribe transboundary cooperation as an effective solution to many policy challenges. Through diffusion, policy makers adopt similar and mutually compatible ideas about the governance of different policy fields among government elites (e,g. human rights, democracy, governance, environment, security, etcetera) and became less concerned about costs of ceding national sovereignty, which emphasis the intensification of regional cooperation across the world.[33]

Realism and Neo-Realism

The basic assumption of realist claims is that international relations should concern itself with national interests and security over ideological or moral concerns[34]. The international system of states is in constant state of anarchy and "international politics like all politics, is a struggle for power"[35]. Realism views war and power as "inescapable in a system where sovereign states compete for power and advantage to one another's detriment"[36]. The foundations of the realist theory of international politics are traced to the classical accounts of Thucydides, Machiavelli and Hobbes[37]. Realists claim that there is no actor above the state capable of regulating state interactions[38]. Realism is against the accumulative regional integration process that would result in loss of state sovereignty.[39]

Other Variants of Regionalism and Corresponding National Sovereignty Understanding

Other variants or ideal types of regionalism and corresponding national sovereignty understandings are worthy of mention here, namely: (a) Problem-solving regionalism corresponds to instrumental sovereignty notion. This paper is guided by this combination of understanding; (b) Autonomy-oriented regionalism corresponds to principled sovereignty notion; (c) Hollow Regionalism corresponds to status sovereignty notion; (d) Fragile regionalism corresponds to instrumental and principled sovereignty notion; (e) Integrative regionalism corresponds to instrumental and status sovereignty notion, and (f) Regime-boosting regionalism corresponds to status and principled sovereignty notion.[40]

[33]Börzel & Van Hullen (2015).
[34]Mastandumo (1998).
[35]Morgenthau (1954).
[36]Booth (1991).
[37]Barkin (2010) at 3-15.
[38]Booth (1991),
[39]Donnely .(2000) at 38.
[40]Spandler & Soderbaum at 6.

Types of Regional Cooperation

Regional cooperation/integration takes a number of forms[41], it can come in different forms, shapes and ways as follows:

i. Free Trade Area – This is the most basic form of economic cooperation, free trade of goods and services, removal of tariffs and quotas within the group.
ii. Custom Union- free flow of factors of production (capital and labour); common market-represents a complete liberalisation.
iii. Economic Union – Common market, including the unification of economic policy which in its final phase can lead to the unification of domestic economic policies at the community level;
iv. Political Union- Involves the gradual transfer of power and legislative authority (parliament, government, jurisprudence, etc.) to the community level. It assumed the establishment of "supranational structures" which can make decisions which are mandatory for all the member states.[42] There can also be cooperation over transboundary water resources management. Regional cooperation on transboundary waters is a public good that benefits all parties and can open new opportunities for riparian states to sustainably develop their water resources.[43] Water is one of the most shared resources on earth. If strategically managed, however, transboundary river-basins can be a source of cooperation.[44] Transboundary basins account for roughly 60 percent of global fresh water resources. Of 192 countries, 153 share 310 rivers and lakes and 592 aquifers. These water resources serve 2.8 billion people, or 42 percent of the global population.[45] Modes of regional cooperation are endless. Hence, generally, regional integration can be political, economic, social or cultural. [46]

Globalisation and State Sovereignty

At the centre of globalisation discourse is the notion about the "decline of the state".[47] Given the retreat, the requirement of global challenges in different regions of the world will require different state capacities.[48] Similarly, the process of globalisation, it is argued, has limited the authority of the state to make decision of policy[49]. The challenges raised by globalisation as a process, yield no easy

[41]Marinov(2015).
[42]Di-Fillippo(2005); Tejedor(2017).
[43]Cooperation over Shared Waters.
[44]The United Nations World Water Development Report 2014; Peterson-Perlman, Veilleux & Wolf (2017).
[45]Transboundary Water Cooperation, Global Water Partnership (GWP)
[46]Olu-Odeyemi & Ayedele (2007) at 214.
[47]Strange(1996).
[48]Notshulwana(2015).
[49]Mishra (1999).

answers. The process of globalisation strains the abilities of states and governments to confront them independently.[50] According to Bond,[51] "globalisation is a phenomenon that we cannot deny. All we can do is accept it". Implicit here is the fact that globalisation is here to stay in spite of attacks on it. Globalisation as increased interdependencies among nations.

Supranationalism

One of the major critiques of inter-governmentalism is that it ignores or underestimates the power of supranational institutions and transnational actors in the process of regional integration.[52]

Supranationalism approach returns the direction of the research back to neo-functionalist perspective.

By including supranational institutions and a transnational actor, integration is again conceptualised as being self-perpetuating. The primary focus of the supranational approach to regional integration is captured by Hass,[53] thus:

> *political integration is the process whereby political elites in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards the centre, whose institutions possesses or demand jurisdiction over the pre-existing nation state*

Supranationalism benefits from the work of Lindberg[54], a prominent example of a supranational institution is the European Union. Unlike members of most international organisations, the member states of the European Union have agreed by treaty to shared sovereignty through institutions of the European Union in some (but by no means all) aspects of government.[55] While the member states of the European Union are sovereign, the Union partially follows a supranatural system for those functions agreed by treaty to be shared.[56]

Comparative Regionalism

The provision on European Union citizenship in Part Two of the Treaty of Maastricht conferred the rights of free movement and residence, voting in local elections in the country of residence, petition and diplomatic protection on all

[50]Notshulwana (2015) at 88-89.
[51]Bond (2000) at 200-320.
[52]Weiler(2009); Gstohl(2008).
[53]Haas(1958) at 12-49.
[54]Lindberg (1970).
[55]See The Treaty of European Union (EU), (akaThe Maastricht Treaty 1992) and Treaty on Functioning of the European Union (aka Treaty of Rome 1958), are the two principal Treaties on which the EU is based.
[56]Articles 4 & 5 of Treaty of European Union, akaThe Maastricht Treaty 1992.

citizens of the Union's member states.[57] It created the position of an ombudsperson, who represents the citizens' interests at community level, constituting supranational actors as legitimate subjects of regional politics, the treaty enhanced and consolidated regional legal order supplementing national constitutions and the inter-state structures of conventional international law.[58]EU is a supranational body with the community law, European Court of Justice, Common Currency (Euro), European Union Citizenship, EU Parliament, etc. EU is an example of regional integration and indeed a leading and classical example.[59]

Another close example is the Association of South East Asian Nations (ASEAN). The Charter of ASEAN was signed in 2007 to establish ASEAN community and deepen cooperation in politico-security economic and socio-cultural spheres. In the political cooperation ASEAN does political and security dialogue to promote regional peace and stability by enhancing regional resilience.[60]

Regional Cooperation and Integration in Africa

Armed conflict, climate change, trade banners and lack of respect for human rights are cross-border problems that hinder development in Africa. The economic and political context in African countries is constantly changing. Peoples living conditions and challenges differ between regions, countries and even within individual.[61]

A number of initiatives by the African Union (AU) and the Regional Economic Communities (RECs) have increased opportunities for economic integration and free trade; better environment & sustainable use of natural resource; strengthened democracy; gender equality and increased respect for human rights etc.[62]

In 2018 the Free Trade Agreement AfCFTA was launched, to date AfCFTA has been signed by over 50 countries. The agreement is considered to be an important tool to increase regional trade and economic development.[63]

Allowing the free movement of goods, services, people and capital between national markets, has been a key aspiration of African countries since the achievement of independence some 50 years ago.[64] Platforms for an eventual monetary union have been set up in East and West Africa.[65]

In Southern Africa, the regional integration grouping is the thirteen-nation Southern Africa Development Community (SADC). It was set up in 19991 as a long term multilateral development project based on cross-border cooperation in

[57]Spandler (2019).
[58]Ibid.
[59]European Council, Presidency Conclusions (Special Meeting) Dublin, 28 April, 1990.
[60]Murau & Spandler (2016).
[61]Sida-Regional Cooperation in Africa. (2019).
[62]Ibid.
[63]Ibid.
[64]Kayizzi-Mugewa,Anyarwu & Conceição (2014).
[65]Ibid.

all aspects of the economies and societies of the member states[66]. The New Partnership for Africa's Development (NEPAD) is a comprehensive programme for the whole continent. Although based on encouraging market forces and foreign investment, it has positive economic, security and governance elements. NEPAD seems to have displace the established African Economic Community (AEC) programme.[67]

While African Union (AU) is leading overreaching efforts to establish continent-wide norms for acceptable political conduct, regional institutions are also contributing substantially to democratisation and peace building in their neighbourhoods.[68] Bodies such as the Economic Community of West Africa, States (ECOWAS) has been actively managing conflicts and preventing movements towards authoritarianism. Among the Regional Economic Communities (ESC), ECOWAS has been the most effective, with Nigeria serving as a strong anchor and advocate for democratisation and peace keeping. ECOWAS has intervened against, sanctioned and condemned actions taken by most of its member states over the past two decades.[69] It has organised peaceful resolutions and restored constitutional governments in Burkina Faso, Cote d'Ivoire, Gambia, among others.[70] In West Africa, though ECOWAS is not a supranational entity, its member states enjoy ECOWAS passport visa free movement of persons in the sub-region, it has ECOWAS Parliament[71], ECOWAS Court[72], an agenda for common market and common currency(with the proposed name ECO)[73], joint security (called ECOWAS Joint Border Posts),[74] among others.

Although other bodies such as the Southern African Development Community (SADC) and East African Community (EAC) have also organised collective stabilisation efforts and sought to advance democratic governance, they have been less successful.[75]

Obstacles to African Regional Cooperation

There are several challenged to regional cooperation. In the past policies that were anti-market, anti-private sector and anti-foreign investment contributed to Africa's stunted growth. There was also lack of trust and faith in the cooperation or integration process, such that countries were unwilling to yield sovereignty to a

[66]Keet (2004).
[67]Ibid.
[68]Khadiagala (2018).
[69]Ibid.
[70]Ibid.
[71]Established under Articles 6 and 13 of the ECOWAS Revised Treaty of 1993, ECOWAS Parliament is a forum for dialogue, consultation and consensus for representatives of the people of West Africa. The current speaker of the Parliament is His Excellency Sidie Muhammed Tunis from Sierra-Leone. Available online at https://www.parl.ecowas.int
[72]Established under Articles 6 and 15 of the Revised Treaty of ECOWAS 1993, founded in 2001, located in Abuja , Nigeria.
[73]CNN (2019).
[74]ECOWAS-(2018).
[75]Ibid.

supranational regional body[76]. The concept of sovereignty constitutes a major challenge to regional integration in Africa. The idea of sovereignty is associated with the preservation of national identity.[77] Adherence to sovereignty is very strong. Weak infrastructures constitutes another challenge, most African countries are characterised by deficiencies and poor infrastructures.[78] These have posed serious challenges to regional integration and development process. Weak institutions – the institutions of most of the regional institutions are weak. Human resources capacity is inadequate for efficient running of the institutions. The institutions do not have the manpower for technical studies and implementation of measures on integration and development. Other challenges are weak implementation of protocols that are addressed to specific integrative measures and deepen integration.[79] Multiplicity of regional economic cooperations and integration in the region with the attendant overlapping membership by countries, also constitute a challenge.

Also, integration agenda in Africa is rendered extremely complex due to the multiplication of processes. Another challenge is the lack of trade complimentarity among African countries, with most exports focussing on extractive industry or agricultural commodities, which implies that the natural markets for Africa are often external to the continent.[80] Apart from ECOWAS, regional bodies often lack strong champions for democratic norms. Both SAD and EAC tolerate authoritarian members and have witnessed the erosion of democracy in potential anchor states like South Africa and Kenya.[81] Regional institutions are unable to fulfil their core mandated largely because they are underfunded by global standard and tend to lack common identities or share value.[82] Finance or funding is an important determinant of the process of regional integration. Contributions from member states are either irregular or in arrears, which implies that operational and program activities of these institutions are being compromised.[83] Little cooperation among the regional economic cooperation occurs. Several of them such as the Arab Maghreb Union and Economic Community of Central African States, show minimum interest in democratisation and peace building.[84]

In most African regions where states face long-running conflicts and politicians are fearful of relinquishing sovereignty, progress towards integration and multilateralism is limited.[85]Political instability is another main challenge to African regional integration. Not all countries enjoy political stability, rather, repeated civil disorder and war have been the feature of Africa which severely disrupt regional cooperational integration. Enduring solutions to Africa's Security and Political problems will require placing regional institutions at the centre of

[76]Qobo (2007).
[77]Olaniyan(2008).
[78]Ibid
[79]Ibid
[80]ICTSD (2016). See Olu-Odeyemi & Ayodele (2017); Melo &Tsikata (2014).
[81]Ibid.
[82]Ibid.
[83]Olaniyan (2008).
[84]Ibid.
[85]Ibid.

stabilisation efforts. But they cannot play a leading role without further buying from individual states and renewed international engagement. In addition to infrastructural development, trade facilitation, and peacekeeping, external actors need to invest in ideas, activities and programmes that foster linkages among African States.[86]

Africa indeed has a long tradition of regional cooperation, its trade and monetary integration schemes being the oldest in the developing world.[87] African states therefore need to keep pressing forward in the overall interest of the continent.

Rationale for Regional Cooperation

There are several reasons for regional cooperation, some of them are itemised below:[88]

a. Governments wish to bind themselves to better policies, including democracy and to signal such bindings to domestic and foreign investors.
b. A desire to obtain more secure access to major market
c. The pressures of globalisation forcing firms and countries to seek efficiency through larger markets, increased competition, and access to foreign technologies and investment.
d. Governments' desire to maintain sovereignty by pooling it with others in areas of economic management where most nation-states are too small to act alone.
e. A desire to jog the multilateral system into faster and deeper action in selected areas.
f. A desire to help neighbouring countries stabilises and prosper.[89]

Impacts of Regional Cooperation on the Cooperating States

Regionalism or regional cooperation has several impacts on the states involved. While some are positive, others are negative.

Positive Impacts of Regional Cooperation

Joining a regional integration agreement necessarily requires surrendering some immediate control over policy making and losing some political autonomy. Some regional cooperation, however, goes deeper than that and create institutions for joint decision making. For instance, as the EU's integration has deepened, decision making has increasingly moved away from national capitals to Brussels

[86]Ibid.
[87]Metzger (2008).
[88]Farida (2015); SeeSchiff (2003) and Anwar (2000).
[89]Farida (2015).

and much of the current debate is shaped by the belief that some form of political unification must eventually follow the creation of an integrated economic unit.[90] By pooling sovereignty, members of a regional integration agreement may be able to preserve and enlarge it and thus strengthen themselves by creating a united front against external pressures or by joining forces in international negotiations.[91]

Besides that, regional cooperation can strengthen the voices of all small or weak nations. These small countries often face severe disadvantages in dealing with the rest of the world because of their low bargaining power and high negotiation costs.[92]Regional economic cooperation rests on the premise that some sovereignty is best exercised at the regional level. In the language of economics, this is because the action of one economy can produce externalities that affect others particularly as neighbouring economies grow closely connected. Some democratic societies (including Japan, not to mention Greece) have proven to be totally incapable of providently exercising sovereignty over fiscal policy at the national level, by being too ready to spend but too reluctant to tax. For them, some loss of sovereignty would be a good thing.

The regional integration also can accelerate the economic growth, social progress and cultural development in the region through joint endeavours in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of nations[93].

The regional integration promote regional peace and stability through abiding or everlasting respect for justice and rule of law in the relationship among countries in the region.

A country with a higher economic rate will have more power and authority than other member states. It can increase competition in tradeable goods sector, so also increased competition may induce improvements in efficiency, and a larger demand for inputs in those sectors, further increasing the relative demand for capital. Another impact is that there will be trade globalisation (free-trade area) among members.[94]Regional cooperation and integration expands markets, inputs resources beyond national boundaries, better allocation of resources across the region and accelerating economic growth. It appears to reduce income inequality between countries.[95]

Risk sharing is another possible benefit of regional integration. Intuitively more risk sharing through cooperation or integration makes sense. Regional cooperation can help resolve the problems of trust, expertise and financing.[96]

There is a considerable body of literature on the impact of regional cooperation on prosperity and political stability.[97] Regional cooperation and integration enhances political cooperation, leads to political and security dialogue which having the aim to promote regional peace and stability by enhancing

[90]Ibid.
[91]Ibid.
[92]Ibid.
[93]Ibid.
[94]Ibid.
[95]Ben-David (2001).
[96]Maurice &Winters (2012).
[97]Strachan (2018).

regional resilience,[98] which is achievable by cooperating in all fields based on the principles of self-confidence, self-reliance, mutual reslect, cooperation and solidarity as foundation for a strong and viable community of nations.[99]

Negative Impacts of Regional Cooperation

On the contrary, cooperation among countries can lead to competition for power. This can impact negatively on poor country as a member. Even though they have natural resources in sufficiency, yet they cannot compete favourably with richer countries. It tends to increase inequality within countries. When nations join with others in a trade or political bloc, they give up some national sovereignty. EU started out as a free trade zone and built considerable political integration over a period of several decades. However, EU is far from a united community of states, and far from a satisfactory Europe-wide democratic order. These regional or global groupings erode national democracy while offering diminished accountability at a wider policy- making level.[100]

The unfolding Euro crisis (BREXIT) makes clear the difficulty of managing a single monetary policy among a group of countries that retain separate fiscal policies and regulatory frameworks over national banking system. In order to save the Euro, in December 2011, European leaders agreed to impose binding limits on national budgets and borrowing, with penalties for those who violate them. The only EU member to reject the deal was the United Kingdom, which, in so doing, highlighted what most people do not always appreciate about the nature of any regional economic cooperation.[101] When defending his decision on BREXIT (i.e Britain exiting EU), the then British Prime Minister- David Cameron characterised the proposed Europe Treaty as tantamount to the loss of sovereignty. In an ensuing parliamentary debate, he also claimed to be protecting the British national interest.[102] One should however not be deceived into thinking that sovereignty and national interest are the same thing.[103] The phrase "give me liberty or give me death", famously uttered by Patrick Henry prior to the American Revolution, may have been good war-time rhetoric but it cannot serve as a sensible guide to peace-time economic decision making. Which is better, to live free but impoverished, or to prosper but with some limitations on freedom?

A related question is, how could retaining sovereignty be in the national interest if it makes the country works off?[104] Britain had already given up considerable sovereignty by being a member of the EU. Regional economic cooperation rests on the premise that some sovereignty is best exercised at the regional level. Europe has been a model of regional economic cooperation to which other regions, like Asia and Africa, look for inspiration. Its approach was to

[98]Farida (2015).
[99]Rachman, Khan & Sadique (2020).
[100]Political Integration and National Sovereignty (2012).
[101]Takagi (2012).
[102]Ibid.
[103]Ibid.
[104]Ibid.

create regional institution to which member states yield sovereignty in specific areas. But strengthening of sovereignty at the supranational level (supra-nationalism) is counterbalanced by parallel principle of inter-governmentalism, allowing each sovereign member state to veto a decision to move supra-nationalism a step further.[105]The Euro crisis has revealed how inept Europe's supranational institutions are in dealing with a regional problem of this proportion. Instead, inter-governmentalism is currently at the centre stage as the mechanism for conflict management.

Conclusion

This paper has examined and shed light on some grey areas of regional cooperation. Before states negotiate or enter into regional cooperation they need to take a balanced look at various facets of regional integration and do a comparative analysis of regionalism (comparative regionalism), by gauging both benefits and costs carefully in evaluating suitable proposals for regional cooperation and integration to be adopted.

The regional cooperation varies from region to region depending on the drivers or theories guiding each cooperation. Regardless of the type of regionalism adopted the overall aim of regional integration/cooperation initiative, like any developmental agenda, is to boost prosperity, welfare, reduce poverty and inequality, boost democratic governance, security and infrastructural development. Welfare is the ultimate goal like any policy or strategy, the goal of integration must be an improvement of welfare and quality of life- especially the largest segment of the society.

References

Acharya, A. (2016). 'Regionalism beyond EU-centrism' in Tanja A. Börzel and Thomas Risse (eds), *The Oxford Handbook of Comparative Regionalism* ch. 7, 109-130. Oxford: Oxford University Press.

Akokpari, J. (2008) 'Dilemmas of Regional Integration and Development in Africa', in J. Akokpari, A. Ndinga-Muvumba & T. Murithi (eds) *The African Union and its Institutions,* Auckland Park: Fanele, pp. 85-110.

Anderson, B. (1983). *Imagined Communities: Reflections on the Origin and Spread of Nationalism.* (London & New York: Veerso).

Anwar, D.F. (2000).*Indonesia in ASEAN: Foreign Policy and Regionalism*. Institute of Southeast Asian Studies,(ISEAS), Singapore/P.T. Pustaka Sinar Harapan/St Martin's Press, New York.

Barkin, J.S. (2010). *Realist Constructivism: Rethinking International Relations Theory*. Cambridge: Cambridge University Press.

[105] Ibid.

1.1

Ben-David, D. (2001). "Trade Liberalisation and Income Convergence: A Comment" in, *Journal of International Economics* 55(1):229-234

Blouin-Genest, G., Wagner, P.F. & P. Verjans (2020). 'Sovereignty in Crisis- Crisis, Cooperation and Organisations' at https://www.ipsa.org/fr/wc/panel/sovereignty-and-crisis-sovereignty-crisis-crisis-cooperation-and-organizations

Booth, K. (1991). 'Security and Emancipation' in *Review of International Studies* (RIS) 17:38-65.

Börzel, T.A. (2015). 'Patching Together a Global Script: The Demand for and Supply of Governance Transfer by Regional Organizations' in T.A. Börzel & V. van Hüllen (eds), *Governance Transfer by Regional Organizations: Patching Together a Global Script*, 245-259. Basingstoke: Palgrave Macmillan, Governance and Limited Statehood.

Börzel, T.A. & T. Risse (2016). *The Oxford Handbook of Comparative Regionalism*. Oxford: Oxford University Press.

Börzel, T.A. & T. Risse (2019).'Grand Theories of Integration and Challenges of Comparable Regionalism' in *Journal of European Public Policy* 26(8):1231-1252.

Burley, A.M. & W. Mattli.(1993).'Europe before the Court' in*International Organisation* 47(1):41-76.

CNN (2019), 'West African countries choose new 'ECO' single trade currency' at https:// www.kbzk.com/cnn-europe-mideast-africa/2019/07/09/west-african-countries-cho ose-new-eco-single-trade-currency

Cooperation over Shared Waters, Stockholm International Water Institute, at https://www. siwi.org/priority-area/transboundary-water-management

Di-Fillippo, A. (2005) 'Two Types of Regional Integration Process (The FTAA and its Comparism with the EU and MERCOSUR', Stanford Centre for International Development, Working Paper No. 225, pp.1-33.
DOI: 10.1093/oxfordhb/9780199687107.013.014

Donnely, ,J. (2000). *Realism and International Relations*. Cambridge: Cambridge University Press.

Farida, M.A. (2015). 'The Regional Integration: The Impact and Implications in Member States Sovereignty' at https://medium.com/pangripta-loka/the-regional-integration-the-impact-and-implications-in-member-states-sovereignty-5679ebe0990.

Groves, S. (2010). 'Why Does Sovereignty Matter to America?' at www.heritage.org/ research/reports/2010/12/why-does-sovereignty-matter-to-america

Gstohl, S. (2008). 'Patchwork Power Europe: The EU's Representation in International Institutions'." *Bridges Regional Integration & Global Governance Papers 2/2008 {Working Paper}. College of Europe, United Nations University, pp.1-32.*

Haas, E. (1958). *The Uniting of Europe: Political, Social and Economic Forces*. Stanford: Stanford University Press.

ICTSD (2016). 'African Integration Facing up to Emerging Challenges TRALAC. https://www.tralac.org/news/article/11045-african-integration-facing-up-to-emerging-challenges.html

Kayizzi-Mugewa, S., Anyarwu, J. & P. Conceição (2014). 'Regional Integration in Africa-An Introduction' in *African Development Review* 26(S1):1-6.

Keet, D. (2004).'The Strategic Aims of Regional Cooperation and Integration in Africa', *Alternative Information and Development (AIDC) Regional Briefing* 1/2004, pp.1-2.

Khadiagala, G.M. (2018). 'Regional Cooperation on Democratisation and Conflict Management in Africa' in *Carnegie Endowment for International Peace*, www.car negieendowment.org/2018/03/19/regional-cooperation-on-democratization-and-con flict-management-in-africa-pub-75769

Ki-Moon, B. (2016). 'Underlining Importance of Cooperation:Regional Partnerships Can Build Better Future by Helping States Implement 2030 Agenda', at https://www.un.org/press/en/2016/sgsm18136.doc.htm

Langenhoven, L. (2011). .*Building Regions*. Ashgate: Farnham-Burlingtin

Lenz, T. & G. Marks (2016). *Regional Institutional Designs in the Oxford Handbook of Comparable Regionalism*, pp.513-537.

Lindberg, L. (1970).*'Political Integration as a Multidimensional Measurement* in *International Organisation* 24(4):649-731.

Maftef, J. (2015) 'Sovereignty in International Law' in *Acta Universitatis Danubius Juridica* 11(1):54-65.

Malthi, W. (1999). *The Logic of Regional Integration*. Cambridge, UK: Cambridge University Press.

Marinov, E. (2015). 'Economic Determinants of Regional Integration in Developing Countries' *in International Journal of Business and Management* 3(3):22-35.

Mastanduno, M. (1998). 'Economics and Security in Statecraft and Scholarship' in *International Organization* 52(4):825-854.

Maurice, S. & L.A. Winters (2012). 'Regional Cooperation and the Role of International Organisations and Regional Integration', *Policy Research working Paper World Bank, Washington, DC. https://openknowledge.worldbank.org/handle/10986/19263*

Melo, J. de & Y. Tsikata (2014). 'Regional Integration in Africa: Challenges and Prospects' in *Célestin Monga & Justin Yifu Lin* (eds.)*The Oxford Handbook of Africa and Economics* Vol 2, Politics and Practice.

Metzger, M. (2008). "Regional Cooperation and Integration in Sub-Sahara Africa" *United Nations Conference on Trade and Development (UNCTAD)*Discussion Paper No. 189.

Mishra, R. (1999). *Globalisation and Welfare State*. Chattenham, London: Edward Edger.

Morgenthau, H. (1954). *Politics Among Nations* 2nd ed. New York: Alfred Knopf.

Berger, A. (2010). 'The United Nations, National Sovereignty and the "Responsibility to Protect"' in *German Development Institute (DIE) The Current Column.* https://www.die-gdi.de/en/the-current-column/article/the-united-nations-national-sovereignty-and-the-responsibility-to-protect/

Murau,S.&K. Spandler (2016). 'EU, US, ASEAN Actorness in G20 Financial Policy Making Bridging the EU Studies- *New Regionalism Divide'* in *Journal of Common Market Studies* 54(4):928-943.

Rahman, M., Khan, T.I. & Md. Z. Sadique (2020). 'Regional cooperation essential to implementing the SDGs in Asia' in Financial Times, November 09. https://www.thefinancialexpress.com.bd/views/regional-cooperation-essential-to-implementing-the-sdgs-in-asia-1603637251

Notshulwana, M. (2015). 'State Sovereignty and Regional Integration in South Africa 1980-2015.' Unpublished Dissertation submitted in fulfilment of the requirement of the Degree of Doctor of Philosophy (Ph.D) at the University of Witwatersrand-School of Governance, in September 2015.

Olaniyan, R.O. (2008). 'Challenges of Achieving Regional Integration in Africa' Keynote Address delivered at the Southern African Development Forum on Progress and Prospect in the Implementation of Protocols in Southern Africa, Organised by UNECA-SA, Lusaka, Zambia, 29-31 May 2008, pp.1-14.

Olu-Odeyemi, L.& B. Ayedele (2007). 'The Challenges of Regional Integration for Development in Africa: Problems and Prospects' in *Journal of Social Sciences* 15(3):213-218.

Peterson-Perlman, J., Veilleux, J.C. & A.T. Wolf (2017). 'International Water Conflict and Cooperation: Challenged and Opportunities' in *Water International* 47(2):105-120.

Political Integration and National Sovereignty (2011), *Global Policy Forum.* https://www.globalpolicy.org/nations-a-states/political-integration-and-national-sovereignty-3-22.html#A2011

Qobo, M. (2007). 'Challenges of Regional Integration in Africa: in the Context of Globalisation and the Prospects for a United States of Africa*', Institute for Security Studies, Paper 145* www.*issafrica.org/research/papers/the-challenges-of-regional-integration-in-africa-in-the-context-of-globalisation-and-the-prospects-for-a-united-states-of-africa*

Reus-Smit, C. (2001). 'Human Rights and the Social Construction of Sovereignty' in *Review of International Studies* 27(4):519-538.

Risse, T. (2016). *Oxford Handbook of Comparative Regionalism*/Oxford: Oxford University Press, 87-108.

Ronzoni, M.(2012). 'Two Conceptions of State Sovereignty and Their Implications for Global Institutional Design' in *Critical Review of International Social and Political Philosophy* 15(5):573-591.

Schiff, M. & L.A. Winters (2001). 'Regional Integration and Development' .The World Bank, Washington, DC.

Schmitter, P.C. (2007). 'Regional Cooperation and Regional Integration: Concepts, Measurements and a Bit of Theory', *European University Institute* https//:ecpr.eu/Filestore/paperproposal/eed849f1-d92b-4daf-a3e7-0cf6d1cf7e52.pdf

Sharma, B.M (1951). 'National vs State Sovereignty' in *The Indian Journal of Political Science* 12(3):1-18.

Soderbaum, T. & T.M. Shaw (eds.) (2003). *Theories of New Regionalism*. London Palgrave Macmillan.

Spandler, K. & F. Soderbaum (2019). 'Why Cooperate? National Sovereignty Understandings and Regionalism'. Paper presented at the 5th Joint Nordic Conference on Development Research, Copenhagen Business School.

Spandler, K. (2019). 'Regional Integration through Normative Arguing: Legitimating Legalisation' in ASEAN and the EU", paper for presentation at the 5th Joint Conference on Development Research, held at Copenhagen 27-28 June.

Strachan, A.L. (2018). 'Relationship between regional cooperation and political stability and prosperity'. K4D Helpdesk Report. Brighton, UK: Institute of Development Studies.

Strange, S. (1996). *The Retreat of the State:The Diffusion of Power in the World Economy*. Cambridge: Cambridge University Press, pp. 210-222

Takagi, S. (2012). 'Regional cooperation and national sovereignty: Asia and the euro crisis' in *EastAsiaForum - Economics, Politics and Public Policy in East Asia and the Pacific* at https://www.eastasiaforum.org/2012/01/08/regional-cooperation-and-national-sovereignty-asia-and-the-euro-crisis

Tejedor, J.M. (2017). 'Theories and Methods of Regional Integration' in *Revista De Economia Mundial* 47:223-242.

Telo', M.L. (2020). Sovereignty and Regional Integration/Cooperation https://www.ipsa.org/wc/panel/sovereignty-and-crisis-sovereignty-crisis-crisis-cooperation-and-organizations

The Issue of Sovereignty/Globalisation (2016). http://www.globalization101.org/the-issue-of-sovereignty

The Treaty of European Union (EU), (aka The Maastricht Treaty 1992)

The Treaty on Functioning of the European Union (aka Treaty of Rome 1958).

The United Nations World Water Development Report 2014.

Transboundary Water Cooperation, Global Water Partnership (GWP), https://www.gwp.org.wa.act.fra

UKEssays (2018). Sovereignty Such an Important Political Concept Politics Essay. https://www.ukessays.com/essays/politics/sovereignty-such-an-important-political-concept-politics-essay.php?vref=1

Weiler, Q. (2009).'The European Union and Security Sector Reform in Africa: A leader in Theory, a Laggard in Reality?' *Bruges Regional Integration & Global Governance Paper*, College of Europe, United Nations University, pp. 1-34.

Wiener, A. (2009). 'Enacting Meaning-in-Use: Qualitative Research on Norms and International Relations' in*Review of International Studies* 35(1):175-193.

Yoshimatsu, H. (2008). 'State Sovereignty, Collective Action Problems and Regional Integration in Southeast Asia' in *The Political Economy of Regionalism in East Asia,* pp. 24-43. London:Palgrave Macmillan.

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Morality in Competition Law: The Culture of Honesty and Trust in Consumer Protection

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Recent works in legal scholarship have shifted the focus of competition law to the economic analysis of law. Yet today we face the revival of the fairness concerns in competition polices. This article concerns itself with the nature of the interdependent relationship between competition law and consumer protection law as ancillary to the necessary relationship between law and morality. Hereby it aims to revisit their raison d'être to discuss that fairness and equity do not lack economic foundations. For an efficient market structure, private property and good faith in contractual relations are essential. This article aims to scrutinise the latter, while showing its objective criteria: Honesty, trust and reasonableness, as the moral essence of competition and consumer protection laws. These criteria provide efficient means to address moral aspects of fairness in competition law as it is best illustrated within its relation to consumer protection without compromising their economic foundations.

Keywords: *competition law, consumer protection, fairness, good faith, honesty, trust*

Introduction

Many scholarly works have already examined the co-existing relationship between competition policy and consumer protection within the discourse of neo-classical economics. Competition law is remarkably different from the consumer law. While the former refers to the body of regulatory initiatives aiming to promote efficient competition, the latter refers to the rules directed to protect the interests of the consumers as a special group of market actors. Competition law is directed to secure the competition in the market as a whole and hence, is not class-specific. As such, it may create negative effects for the consumers in the short run. Harm to consumers and harm to competition is not always equal. However since 1980s, the goals of competition law started to be linked with the consumer welfare standard. Consumer protection began to be referred as the fundamental objective of competition law.[1] This article aims at dwelling into the nature of this existing relationship, rather than challenging this idea or scrutinising its contemporary manifestations. It argues that the relationship between competition policy and

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[1]NCAs Opinion of Advocate General Kokott delivered on 19 February 2009 in Case C-8/08 (2009) ECR I-4529, p. 85, Cseres (2013) at 9. Also see T-Mobile Netherlands and Others, Case C-8/08, (2009) ECR 0000.

consumer protection is also a question of morality, as well as being a question of law and economics.

Law and economics scholarship suggests that the interdependent relationship between these two normative rule systems is based on their effects on the market. Competition and consumer protection laws both exist because of the market failures. While anti-competitive practices distort the supply side of the market, deceptive practices to the detriment of the consumers distort the demand side.[2] If the temporal considerations are set aside, consumer protection and competition policies do not demonstrate a friction in the legal system. They are directed to the efficient allocation of the resources, increase of production and innovation. Competition law aims at increasing social welfare as a whole, and this also applies to consumer welfare as its extension. However from a historical perspective, one basic foundation on which they are built on is usually forgotten by the economists and legal scholars. They are oriented to correct the market failures and whereby to do it, they protect honesty and trust in the contractual relationships.

This article argues that honesty and trust are the moral basis of competition law as well as being the tokens which tie the competition policy to the consumer protection. This requires considering the society as a whole, simultaneously an object and a subject in the market and addressing the fairness problems from a perspective of a holistic notion of social justice. Seeing competition and consumer protection laws as agents of social justice, requires to re-calibrate the place of moral values for a stronger market order. Honesty and trust as moral values are transmitted into the legal realm via general principles such as good faith (*bona fides)* and the prohibition of the abuse of rights as its application. Such rules of conduct carry a core role in consumer-related contracts as the direct reflections of the fairness and social justice concerns.3 Understanding the hermeneutic frame of *bona fides* and its fertility gives us freedom to understand not only the pivotal role of distributive concerns within the dynamics of competition law and consumer protection but also within the European legal culture as a whole.[4] As such the article approaches the problem of social justice from its multipolarity: The economic, moral and historical foundations of competition and consumer protection as different yet parallel examples of market fairness.

One question needed to be addressed is the definition of morality and its role in safeguarding social justice. The murky terrain of morality and social justice results with the plurality of the opinions. Friedrich Hayek famously criticises the concept of social justice and its perception as a moral virtue, which eventually leads to self-contradiction. This article takes social justice not as virtue but as the legal standards whereby the distribution of power is regulated. While acknowledging the role of the external drives in guiding the conducts of the market actors, it discusses the role of the rules of conduct and their underlying moral values.[5] For the purpose of this article, the concept of social justice refers to the system of legal standards that guarantee the equality of opportunity in the

[2]Leary (2005) at 1147-1148.
[3]Study Group of Social Justice of European Private Law (2004) at 664.
[4]Mak (2012) at 331-332.
5Hayek (1978).

distribution of power in the market, whereas fairness and distributive justice are taken as its ancillary.

As such, the article adopts a definition of morality to fit the target of moral theorising: Concretising the necessary relationship between law and morality as illustrated by the competition law and consumer protection. Morality in a descriptive sense refers to the normative social conduct rules, put forward by a society/a group of individuals, sustained by moral sanctions by that particular society or group. In other words, the article takes morality in a descriptive sense, as what is morally accepted in the society rather than its normative understanding that focuses on what is good or bad.[6] It is beyond the scope of this article to explore the extent of divergent views on the relationship between law and morality. Law serves to the binary code of legal and illegal but the limits of morality is more blurry. Yet, the article is based on the premise that law and morality have contextually different yet common cores even though they differ from the perspective of institutional recognition.[7]

It is also nearly impossible to suggest a satisfactory legal definition for the moral values like honesty and trust. For this reason, this paper uses the Roman concept of *bona fides*: good faith as a behavioural standard that catches their meaning best holistically and universally. Roman legal tradition sets forth the criteria of *bona fides* as *honesty, loyalty* and *reasonableness* in contractual relationships between rivals. While loyalty refers to the trust on the efficient fulfilment of the promises, honesty and reasonableness together relate to the justice problem as they address the information asymmetry and the disclosure of efficient information between parties. This requires to adopt an Aristotelian idea of justice that revolved around proportionality and balance. The Aristotelian idea of 'just as proportional' and its transformative effect in European legal history helps us creating a link between the balance of interests and the contemporary understanding of equity.[8] Commutative (or rectifying – in Latin *rectum*) justice referring to the idea of 'correction' in private exchanges is derived from distributive justice as social justice. As such the three components of *bona fides* touch upon the problematique of distributive and commutative justice altogether.

Comparative studies are essential in the legal analysis of the interdependent relationship between consumer protection and competition policy. Hereby, the reference to *bona fides* is used to show how honesty and trust as moral values are translated into the legal practical sphere. Legal history is one way of showing that legal systems and legal disciplines differ, yet they share substantial motives. Choosing a common terminology is also useful for demonstrating the symbiotic relationship with law and language. From a Derridean sense, language is the means by which law is created and transmitted to today's world. Therefore, *bona fides* should not be understood as a homogeneous legal tool but rather, a fertile source of values that should be contemplated while addressing the fairness and

6Durkheim (1973) at 63.

[7]Honoré (2002) at 491; Hart (1994) at 268.

[8]See Aristotle, Book X, Chapter 3, sec. 1; Book V, Chapter 3, sec. 2; Book V, Chapter 4, sec. 1; Book V, Chapter 5, sec. 1-3; Book V, Chapter 6, sec. 1-2.

social justice concerns through the topography of competition and consumer protection laws.

The Culture of Honesty and Trust

The era of circular economy and sustainability started to remind us the moral concerns that are once pushed to periphery. Since last five years we witness the change in the competition and consumer protection narrative for the sake of fairness, especially by the Commissioner Vestager in the EU level.[9] The fairness concerns in the contemporary market order are usually addressed by the distributive effects. As such, we witness the significantly increasing role of general principles of private law like *bona fides* whereby they shape the power dynamics both in the supply or demand side in today's neo-classical market.[10] The reflections of social justice in European legal culture are essentially visible in the establishment of the economic order as they constantly shape each other. This makes the economic justice a concomitant of social justice as best illustrated in the relationship between competition and consumer protection.

Although having different histories and patterns, competition and consumer protection policies are essential in today's economic paradigm. They protect the free market economy from artificial constraints created by the individuals or collective bodies, and ideally they work in harmony. Their shared aim of increasing the consumer welfare, although with different methodologies and in different scales, make them relevant for social justice concerns.[11] They are also closely linked to market morality, shaped around the culture of trust as the loyalty to the market and market actors, and honesty as the disclosure of essential information to prevent misperceptions.

The European legal culture dates back to classical Roman law of contracts and its legal remedies, especially *bona fides* as the ethical safeguard of the 'market'. In the classical era, the price in a sales contract did not need to be just; on the contrary rivalry was encouraged. However deceit *(dolus)* was prohibited by procedural mechanisms of case law mainly through the applications of the behavioural standard of *bona fides* and *exceptio doli* (exception of deceit).[12] The idea behind was providing praetorian equity which was rooted in the Greek concept of *epieikeia*.[13] As opposed to the antiquities, the early modern commercial world in Europe was shaped by the Christian natural law doctrine of market justice. Yet with the integration of classical remedies to 17th century commercial

[9]Vestager M, Competition is a Consumer Issue, *BEUC General Assembly*, 13 May 2016, Working together for a Fair Competition Worldwide, *UCL Jevons Institute Conference*, 3 June 2016, Competition for a Fairer Society, *10th Annual Global Antitrust Enforcement Symposium*, Georgetown, 20 September 2016, *Protecting Consumers from Explotation, Chillin' Competition Conference*, Brussels, 21 November 2016. For the texts https://ec.europa.eu/competition/speeches/index_2016.html

[10]Study Group of Social Justice of European Private Law (2004) at 664.

[11]Cseres (2013) at 15, Cseres (2011) at 205-238.

[12]Ucaryilmaz (2020) at 43-59; Winkel (2010) at 155-156.

[13]Chroust (1942) at 124.

practice the European commercial culture was formed around the idea of freedom: The free determination of price while safeguarding honesty and trust in contractual relations. The European legal culture as shared economic and legal knowledge is the result of social and economic interactions taking place since antiquities. This Weberian narrative reminds us that seeing law as a temporal/historical constant is over-simplification. When it comes to analyse the paradigms that experience dramatic shifts, we encounter that they are not that dramatic after all.

Law and economics scholarship is focused on the concept of efficiency as the normative goal of law. Recent works explain the focus of competition law and consumer protection with the economic analysis of law, sometimes forgetting their *habitus*: European legal culture. However today we face the revival of the fairness and moral concerns in competition policies. This creates the need to reconcile different approaches, or rather puts us into the difficult terrain of meta-interdisciplinarity. Professor Ugo Mattei regularly emphasises that as historical and comparative evidence show, efficiency and equity are closely linked.[14] Efficiency is doomed to lose its scientific rigour and objectivity when it enters the social realm of law. In the final analysis, they are both doctrinal techniques that should be considered in relation to the theory of legal transplants.[15] Therefore the basic moral concepts that are embedded in western legal culture are key in this discussion.

The European legal tradition understands honesty as an objectified moral value that is translated into the legal realm as the disclosure of the necessary information to the other parties of the contractual relationship that might otherwise harm them. On the other hand trust indicates the environment of legal and moral security that protects the reliance on the promises. It is never considered as altruism, rather it refers to securing the legitimate interests that are worth being protected. Together with reasonableness, they are essential components of the objective good faith principle and the safeguard of social justice in contractual relations. Hereby, the Roman roots of competition law and consumer protection become a potentially valuable illustration of how to understand fairness in contract law, while not compromising the motivation of profit-seeking. This does not undermine the obvious fact that law is more complex in today's social-political ecology than in the past. Rather dwelling on its roots aims to emphasise the common core of the cosmopolitan nature of today's law.

Competition law and consumer protection law intersects at certain concerns such as the increase of consumer welfare in the long run, yet they are different in their basic enforcement methods or primary target group. However, there is a common moral basis they share: They protect honesty and trust in the market. Without considering its historical relationship with contractual morality, many scholars accept the ultimate role of truthfulness in competition law from an economic perspective. As Muris says, 'competition motivates sellers to provide truthful information about their products and drives them to fulfil their promises to consumers'.[16] The consumer misperception results with inefficient competition.

[14]Mattei (1994) at 157.
[15]Mattei (1994) at 158.
[16]Muris (2005) at 168.

The sellers are motivated by profit-maximisation, as the benefits they gain from the consumers which is translated in price. From a demand perspective, competition can only be efficient when the consumers accurately perceive their net benefit in both price and non-price terms.[17] What would reduce the consumer misperception is to increase seller's incentives to correct the misperception. Legal norms that are based on honesty and trust as moral values correct such market failures. Commercial morality requires the contract not to be a source of unfair profit. Historically this view of equity which owes its existence to Greek *epieikeia* was provided through *bona fides* that protect honesty, loyalty and reasonableness. As an objective rule of conduct it was seen as the conceptual antonym of *dolus* (deceit).[18] It is today an essential component of the European legal identity and central for regulating and de-regulating the contemporary market society.

The references to legal history are crucial as they constitute European legal culture and set forth the core principles of European legal order applicable to private relations.[19] Such cosmopolitan view of private law is not limited to the Continental Europe. Although Anglo-American legal tradition is dramatically different than the civilian tradition in terms of legal history, methodology, and governance patterns, they share a common fairness discourse that sits in the middle of competition and consumer protection policies. The general rules of conduct which directly derive from the moral realm and later adopted by the legal instruments juxtapose the Continental contractual morality to Anglo-American concept of equity. They give the judiciary the necessary legitimacy to provide case-based legal solutions that is already intrinsic to the Anglo-American tradition.[20] The equitable remedies in Anglo-American tradition owe their ultimate victory to their more efficient legal organisation.[21] General principles like good faith that once belonged to the moral realm in Continental tradition also provide such efficiency in their flexible application. Competition and consumer protection laws, as established examples, internalise these moral principles and apply it to contemporary market concerns.

Not oddly, the idea of codification the competition rules first emerged in the US with the Sherman Act of 1890 where good faith had almost no practical role in the contractual relationships. However today the concerns of fairness, honesty and trust gained a central role in imposing control measures in Anglo-American competition laws to protect consumers.[22] For example the American federal trade regulation focuses on the objective truthfulness or the 'honesty in fact' as one of its major considerations and evaluate the fraudulent behaviour of the market actors from a perspective of consumer protection.[23] On the other hand the Competition law in Europe has been demonstrating a more interventionist approach, since it has weaker trust to the market forces compared to the US and a deeper tradition to

[17]Bar-Gill (2011) at 13, 35.
[18]Whittaker (2019) at 409.
[19]Collins (2012).
[20]Mak (2007) at 69.
[21]Mattei (1994).
[22]Whittaker (2019) at 439.
[23]Alexander (1962) at 141.

protect market morality as a result of 2500 years of experience[24] The Continental practice demonstrate the interdependent relationship between competition and consumer protection from the perspective of their shared 'goal' for which values play an essential role, whereas the Anglo-American tradition adopts a more result-oriented approach.[25] In any case, the protection of honesty and trust intersects on their shared perspective on rivalry and freedom in liberal commercial life. For the competition to persist in the long run, honesty and trust between rivals oil the wheels of the market economy.

Efficiency and Morality

Honesty, loyalty and trust are integrated in the European commercial culture since antiquity.[26] Being intrinsically moral concepts, they do not lack economic foundations. Institutional economics explains 'trust' as the antonym of opportunism in relation to honesty. According to Williamson opportunism is the lack of honesty in commercial transactions. In other words, opportunism is often paired with strategic dishonesty guided by egoistic motives. It is the economic reflection of the Roman *dolus* as it refers to withholding or distorting information to mislead and deceive other actors. In a contractual setting, opportunism signifies dishonest and disloyal behaviour that is against the other party's reasonable expectations based on their agreement, previous conduct or conventional morality.[27] Williamson's transaction cost economics takes the economic interaction as a contractual problem.[28] In this puzzle abstaining from opportunistic conduct is a requirement of efficient market exchanges and the moral standard of general principles are well-equipped whereby to provide this. Competition law and consumer law together protect the honest sellers from the costs of over-investing for the extra-ordinary measures to create the minimum level of trust.

According to Summers, *bona fides* is an exclusionary concept.[29] It excludes a heterogeneous set of *mala fide* behaviours. The idea of the prohibition of the *mala fid*e behaviours such as dishonesty and furtive behaviour of the competitive actors makes business ethics vital in competition and consumer protection. Efficiency as a standard of legal scholarship is seen as a peculiarity of the American system as a result of the works of Demsetz, Posner and other members of the Chicago School starting from 1970s but efficiency as a way of reasoning comes from the Continental legal history. Equity requires the social loss to be minimised, accompanied by the meta-standard of reasonableness.[30] The social aspect of competition law shows itself in its idea of protecting the consumers as an independent yet, retrospectively structured aim. In other words, competition law

[24]Leary (2005) at 1147.
[25]Leary (2005) at 1147.
[26]Schiller (1930) at 845,
[27]Cohen (1992) at 957.
[28]Williamson (1975) at 25, Williamson (1985) at 47.
[29]Summers (1982) ,the *Ghosh* test in English law also requires honesty to be determined by the meta-standard of reasonableness. MacCulloch (2007) at 357.
[30]Mattei (1994).

protects the consumers with instrumental motives. Long term efficiency goals are the main reason why competition authorities, policy makers and politicians regularly place the consumers at the centre of their competition policy. Competition and consumer protection have a symbiotic, organic and living relationship that determines the development of law as a social artefact.

Following this Euro-centric culture, Atkinson, Stiglitz, Deaton and many others reminded us the relationship between consumer protection and competition law. They focused on 'consumer interest' with the common sensical premise that the consumers benefit from an honest competition in the long-run. Yet, today the debate is more relevant than ever because of three highly intricate reasons. First, honesty and trust are the moral foundations of the private legal regulations and they provide competition and consumer protection laws moral legitimacy. For example the moral nature of competition infringements manifests itself clearly where cartel offences are criminalised to increase deterrence or rather, change the modus of deterrence.[31] Cartel offences create a "spiral of delinquency", whereby dishonesty, illicit planning and secretive implementation add a further layer.[32] Ideally, honesty should be protected because it is seen as morally superior. In a discussion related to Sherman Act, Posner openly explained that the rule against price fixing had become a part of the law of conspiracy instead of the law of monopoly.[33]

Second, their clear effects demonstrate themselves in the economic realm. They are essential components of the neo-liberal market as they fuel the mechanism to function well in local and global levels. Today *bona fides* evolved into a general principle of European private law and it can be read through the lens of one microeconomic assumption: Honesty and trust is efficient.[34] Any market requires a reasonable amount of information disclosed to its participants to function well. If the market provided perfect information, there would be no need for contractual good faith and its corrective functions. Market rules would easily replace moral norms that are translated into hard or soft law. Yet, real life markets contain market failures, and the corrective role of general principles become pivotal. *Bona fides* secures contractual freedom, saves contractual parties from additional costs of achieving honest and transparent information and protects their legitimate interests. It sustains the efficient co-operation in the society and limits the negative externalities. It decreases the transaction costs arising from the information asymmetry due to bounded rationality and opportunism, whereby it demonstrates the economic value of honesty and trust.

Last but not least, it is a question of social justice. It is about the inequalities of opportunity and the prohibition of exploitation of market power.[35] The rationale of consumer law lies on the protection of the weaker party as a primarily moral concern with economic effects. The protection of the weaker party is a manifestation of keeping the contractual balance. On the other hand, providing

[31]MacCulloch (2007) at 355.
[32]Harding (2009) at 304.
[33]MacCulloch (2007) at 358.
[34]Hesselink (2011); Ucaryilmaz (2018).
[35] Bertola (2000), Deaton & Muellbauer (1980) and Dixit & Stiglitz (1977).

contractual fairness is an effective way of sustaining social cooperation.[36] 'Cooperation' being the key word, refers to the plurality of the actors and ties competition and consumer protection concerns together. Market failures that fall under the jurisdiction of competition law generally appear as compound problems. They are often joined with unfair contract terms or trade practices which are morally and ethically unjustifiable.[37] As they are intertwined, the competition policy organically promotes the consumer welfare standard. As a reflection of ordoliberalism of Freiburg school, it creates a compromise between market structures and protection of the interests of small producers and consumers.[38]

The protection of honesty and trust in economic relations should not be understood as altruism. The opposite, market morality focuses on a reasonable level of honesty and protection of trust, as ideationally historical *bona fides* assumes a rivalry relationship.[39] It assumes that human society consists of a series of market relations guided by the rationale of increasing the expected utility. Contractual relations are read through high transaction costs and legal rules aim to decrease the transaction costs, via protecting the legitimate expectations. In competitive markets the undertakings can prosper by surpassing their rivals in identifying and serving the consumer needs. Simply put, rivalry decreases the prices and increases the quality and hence, benefits the consumers as a group. Yet we should remember that it is not any type of rivalry that is beneficial for the consumers. Rather, the market and the economic society need honest rivalry. The European legal tradition as the essential core of the global legal paradigm is based on contractual freedom and cherishes the competition.

The modern consumer protection policy consists of preventing the sellers from increasing their sales by lying, giving incorrect information about their products or engaging in unfair practices. The economic reason behind this moral condemnation is the role of deceptive practices in creating negative externalities for the society. Such negative externalities created by acts of *dolus* are addressed from competition and consumer protection laws altogether since they not only affect the positions of honest competitors and consumer choice but also create consumer cynicism.[40] The consumers are willing to give up short term material benefits such as price concerns for a fairer market.[41] This also explains the success of corporate social responsibility initiatives like fair trade, rainforest alliance, Utz Kapeh or clean clothes campaign. As the contracts are ontologically incomplete and information is limited in a market setting, general principles with moral nature give the freedom and flexibility to the judges to apply the intrinsic value system they entail.[42] This value system is essential for social justice concerns, when the justice at stake resonates not as mere equality but as equality of opportunity in the contemporary market society.

[36]Ducci & Trebilcock (2019) at 84.
[37]Cseres (2013) at 13.
[38]Ducci & Trebilcock (2019) at 94.
[39]Macpherson (1962).
[40]Leary (2005) 1150, fn 17.
[41]Graef, Clifford & Valcke (2018) at 288.
[42]Mak (2012), Mak (2020).

Interdependencies of Competition and Consumer Protection

Law and economics scholarship explains the goal of competition law as securing efficient allocation of resources. This means allocating them to whomever value those most, irrespective of how wealth is distributed among different stakeholder groups.[43] Yet, competition law also seeks to prevent harm to the competition in general and as a consequence the consumer welfare is aimed to be maximised.[44] In a competitive economy, the total consumer and producer rent being at the highest possible level is the goal of the policy makers. The interdependent nature of the relationship between competition and consumer protection first shows itself in their common *ethos.* They share a common character motivated by economic and moral reasons. Economically speaking, distorted competition generates distorted prices in the market. This may cause the consumers to have distorted incentives to choose the product that costs more than its actual worth.[45] These webs of failures are the source of allocative inefficiency which disrupts distributive justice in the market society. This makes it possible to read the interdependencies through the light of the problem of economic justice.

The position of the consumer class in competition law is today stronger than ever.[46] From a moral perspective, consumers are protected because they are assumed to be economically weaker in the contractual relationships compared to the producers or intermediaries. Because they do not have enough sectoral knowledge, they are easily manipulated and their interests are easily instrumentalised with profit-maximising concerns of the sellers. The emergence of the consuming class is a result of the evolution of the capitalist economies from a Weberian perspective. Yet, the protection of the weaker party is the basic mandate of the Roman *bona fides* when applied to the contemporary private relations. Throughout legal history this protection is provided by the standard of honesty as an essential requirement of the functioning of the market, as a component of the functioning social order. Consumers constitute one essential shareholder group in the competitive market paradigm as there cannot be a functioning competition without 'free' consumers. Consumer protection in the EU falls within the framework of the European competition policy that aims at prohibiting all market obstacles so that consumers can gain optimal benefit in the marketplace.[47]

Securing the competition in the market is a way of enhancing the consumer welfare.[48] In other words, the pivotal role of consumer welfare in competition law is a question of social justice. Competition law condemns the horizontal agreements that hinder the consumers to benefit from the consumer surplus formed by the competitive price mechanism of the free market economy. To

[43]Cooter & Ulen (2016) at 4 et seq.; Ducci & Trebilcock (2019) at 84.
[44]Huffman (2010) at 13-14.
[45]Bar-Gill (2011) at 34.
[46]Hutchins & Whelan (2006) at 182.
[47]See the Paris Summit of the EC, 19-21 October: 1972, ·Gurkaynak (2004) at 24. About product safety and competition see Hilti AG v Commission Case C-53/92P, [1994] ECR I-667 and T-30/89 Eurofix Banco v. Hilti AG [1991] ECR II-1439. In these cases, the entities were not allowed to hide behind a consumer protection justification for product tying.
[48]Hutchins & Whelan (2006) 182.

illustrate, the TFEU art. 101 prohibits the horizontal agreements and concerted practices between the undertakings which actually or potentially distorts the competition such as price fixing, limiting the production or technical development, sharing markets or sources of supply, applying dissimilar conditions to equivalent transactions by creating competitive disadvantage and so on. Discriminating practices are strictly penalised under the EU law.[49] Yet, the primary emphasis is not on the consumer welfare but on the free competition.

However if the agreement or concerted practice contributes to the new developments or techno-economic improvements and allows the consumers to get a share from the resulting benefit, the legal approach changes drastically. In such cases the competition authority is given the discretion to give an exemption to the rule as long as such practices or agreements do not induce a substantial restraint on the competition in the relevant market.[50] Consumer welfare is therefore also a standard for the assessment of mergers and acquisitions. The mergers that efficiently combine using a cutting-edge technology with guaranteeing lower prices for the end-consumers are acceptable under the logic of competition law.[51] Therefore the 'unwanted' horizontal agreements that may possibly benefit the consumer welfare are not prohibited *per se* but are generally assessed under the *rule of reason* analysis.[52] The basic distinction of *per se* and *rule of reason* approaches coming from the American anti-trust discourse is based on a *bona fide* elaboration of the effects of anti-competitive practices.[53]

Nonetheless sometimes the dynamics of the market itself is an obstacle for the consumers. Competition law intervenes when such obstacles reaches to a level of *mala fide* exploitation. Art. 102 TFEU prohibits any abuse of a dominant position such as directly/indirectly imposing unfair prices or other unfair trading conditions, limiting production, markets or technical development to the prejudice of consumers and so on. The *ratio legis* of the article lies on the concept of 'abuse', referring to unreasonable and bad faith exploitation of a legitimately earned position. The abuse of a dominant position protects trust and honesty in relationships with unbalanced power dynamics. This is an illustration of how competition law mechanisms act as an agent of Roman *bona fides* and its correcting function.[54] In parallel the first legislative controls on the terms of the consumer contracts was also based on the prohibition of abuse of rights/ imbalanced bargaining position. The excessive advantage attained to the detriment of the consumers creates the need to correct *strictum ius.*[55] This is an example of how does the protection of honesty and trust with legal norms correct the market failures caused by incorrect-incomplete information and opportunism.[56]

[49]See the EU Commission Decision. 2000/12/EC and Commission Decision. IP/98/94.
[50]Haracoglou (2007) at 204. See the EU Commission Decision 1999/210/EC.
[51]Averitt & Lande (2007) at 182; Weber (2005) at 633.
[52]About the rule of reason analysis in EU substantive law, see the Cassis de Dijon case. Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein C-120/78), 1979:42,[1979]
[53]Kate & Niels (2004) at 20.
[54]About the close relation between good faith and the doctrine of abuse of right see Whittaker (2019) at 409 and Hesselink (2011) at 641.
[55]Whittaker (2019) at 409.
[56]Mackaay (2012) at 161.

Although the prohibition of the abuse of dominant position is directed at the imbalance between market actors, consumers are the essential component of the market dynamics. As such the consumer preferences are essential in evaluating the abuse. First, the dominant position is determined within the limits of the relevant product/service market, based on consumer preferences. Special characteristics of certain products or services affect the cross-price elasticity and therefore constitute a separate market for a special group of consumers.[57] Enforcing consumer laws concerning advertising and marketing practices shape the understanding of how those relevant markets operate. Second, the consumer harm is essential in evaluating the level of exploitation. The abuse of a dominant position which does not directly restrict the competition in a relevant market is also prohibited in case it substantially harms the consumers. To illustrate, if the dominant undertaking in a relevant product market consciously stops the ReDe activities that would otherwise provide innovative efficiency to hinder new undertakings entering in the market, either by a concerted practice or a horizontal agreement, it will be held responsible by the competition authorities. The reason behind the idea is that consumers as the major stakeholder group in today's commercial society benefit from improved goods and services. The social aim of the protection of the consumers stems from the economic notion of innovative and allocative efficiency.[58] Yet, its vitality and legal legitimacy comes from the idea of social justice.

The legal significance of honesty and trust in establishing patterns manifests itself mostly in the prohibition of exploitation.[59] Competition regulation is aimed at reaching a balance between the market interests and moral values.[60] Their interdependent relationship is primarily visible when deciding whether certain market conduct is considered to be anti-competitive or not. Honesty and trust are the primary normative criteria in evaluating the *mala fide* market behaviour whereby it is aimed to prevent the artificial distortions of the fair division of the joint market gains by exploitation.[61] It is mistaken to assume that the distortion of competition *per se* harms the consumers or a conduct is anti-competitive because it is not consumer friendly. On the contrary, it is the distortion of the honest competition that harms the consumers. Consumer protection is a function in the equation of competition law. It sometimes manifests itself as the reason and sometimes as the result of the competition policies. Yet, morality gives its characteristics to the equation.[62]

Therefore *de facto* dominant position is not prohibited. The opposite, the competition is a process whereby actors compete to gain the most powerful market position by honest means. Competition policy prohibits the abuse of the dominant position because of the *mala fide* market conduct. Accepting otherwise would result with the competition authorities being merely price regulators. Similarly,

[57]United Brands v. Commission. C-27/76 [1978] ECR 207.
[58]Gurkaynak (2004) at 28.
[59]Ducci 7 Trebilcock (2019) at 88.
[60]MacCullough (2007) at 355.
[61]Mackaay (2012) at 171; Alexander (1962) at 148.
[62]Hutchins & Whelan (2006) at 182.

consumer protection is a direct application of the prohibition of exploitation and the protection of the weaker party in market relations. Another characteristic of the interdependent relationship between competition and consumer protection lies on their shared *ethos* as their inherent purpose. Honesty and trust sit in the middle of their ontology applicable to both competition and consumer protection.[63]

Their interdependencies are also supported by the institutional design. Lately, EU Member States started to integrate their consumer protection agencies to competition authorities. As Professor Cseres puts, consumer law protects the inner rules of commercial transactions while competition law concerns itself with the external effects.[64] As they are closely interlinked from the perspective of the undisturbed application of contractual and property rights they often fall under each other's category and it is difficult to make a clear separation. Many consumer codes protect the economic order alongside with the consumers as a special group of stakeholders. This presents an example of strategic compliance to the good faith principle in consumer protection. Therefore, the adoption of separate consumer codes in national or supranational levels cannot be necessarily seen as the clear separation between consumer policy and competition law.

Consumer protection is necessary for the free market economy in the paradigm of neoclassical economics to provide a standard of social justice. Effective and institutional protection of honesty and trust is more important in commonplace contracts since they face a wide range of legal problems arising from the naivety of the parties to deceitful practices causing consumer misperception. Different bargaining positions of the parties emphasise the importance of the role of 'correction' as providing fairness among consumers, sellers and producers.[65] This is applicable in competition and consumer protection in different scales. Consumer law protects in the micro-level individual transactions made by consumers as a stakeholder group in today's political ecology. But it also protects their decision making ability in the macro-level, which is an essential component of competition policy.[66] The EU legislature constantly refers to the role of consumer law in building consumer confidence, as an integral part of competition. This highlights the importance of the protection of the consumer choice, as well as providing the necessary conditions to protect it.

Consumer Choice as a Compromise

Microeconomics provides us with the 'the consumer choice theory' that helps moving the idea of consumer confidence which is social by nature to a more 'scientific realm'. While competition law indirectly protects the consumers, it directly protects the consumer choice. The consumer choice theory assumes that

[63]In Ryan v. Sanders, the objective behavioural standard was determined as the standard of honesty for ordinary people. The court wanted to determine whether the "ordinary person" had a particular view of honesty. MacCulloch (2007) at 357.
[64]Cseres (2013).
[65]Ducci & Trebilcock (2019) at 94.
[66]Van Loo (2019) at 215.

the competition works efficiently if the consumers have a freedom to compare different products and their respective costs/benefits. Such freedom is sustained by providing reasonable information and the prohibition of exploitation. As such the theory emphasises the role of encouraging the suppliers to engage in honest, loyal and reasonable behaviour and hence, providing the consumers with the useful information about the prices and quality of the relevant products. This requires the prevention of false advertising and deceitful or non-verifiable information that may create disproportional advantages for certain market actors. Such information failures generated by practices of *dolus* eventually distort the market.

Competition law provides consumers with the choice of competing products and services, while consumer law allows the consumers to exercise that choice free from fraud, coercion, deception or demonstrably false information. An Expected economic benefits of honesty and trust imposes a disciplinary power as an external coercive force on each seller to satisfy the consumer interest. As a result, a well functioning competition creates the incentive to protect honesty and trust. It motivates the sellers to give accurate and useful information about their products and to fulfil their promises. The institutional protection of trust and honesty secures the market efficiency where the market incentives fail to promote them In parallel, the principle of good faith secures the ability of the consumers the ability to fairly negotiate the terms of the transaction whereby it protects them from entering into transactions that they would not enter if they knew the truth. As the ancient legal form of opportunism, *dolus* is the underlying motive behind the consumer choice. It explains why certain profit maximising competitive practices are prohibited such as the abuse of the dominant position.

The consumer choice theory highlights the synergies between the competition and the consumer protection.[67] It assumes that the protection of honesty and trust has a pivotal role in providing social justice as it aims at the reduction of the total welfare cost. This requires competition and consumer protection to operate together to ensure the consumers to have the options and the ability to choose. With its focus on the observable demand patterns, it provides us with a fruitful standard of behaviour for the consumers with respect to preference relations and price systems. According to the consumer choice theory competition and consumer protection laws perform complementary tasks.

Ideally adopting 'consumer choice' as a standard in competition law may result with the direct increase of allocative efficiency and indirect increase of productive efficiency, since the cost savings result in lower prices for the consumers and the optimal distribution of goods is secured. In other words, the production continues until the marginal consumer benefit is equal to the marginal cost of production. Consumer choice standard is also well-suited to increase the innovation by encouraging technological and social improvements. It aims at providing options for the consumers in the short run, while ensuring the innovative efficiency in the relevant market in the long term. The consumer choice standard presupposes the idea of customer freedom, based on adequate knowledge about products and services. It requires the behavioural market failures such as consumer

[67]Averitt & Lande (1997). See National Society of Professional Engineers v. *US* 435 US 679 (1978), *Detroit Auto Dealers' Association* 955 F.2d 457 (6th Cir.), cert. denied, 506 US 973 (1992).

misperception to be minimised to be applicable. It also requires the inclusion of the societal benefits in the cost/benefit calculus. Therefore, it is suitable to be read through the lens of moral values of honesty and trust with which it is highly intertwined.

The evaluation of the societal benefits from the lens of morality sets the standard about which kind of innovations the policy maker prefers to encourage. For example, in today's data economies, corporate surveillance and transformation of the consumers into anonymous data banks are major concerns in consumer protection, and therefore should be carefully examined. The most recent example dealing with the relationship of competition law, consumer protection and privacy is the Facebook decision of the German Federal Competition Authority *Bundeskartellamt*.[68] In 2019, Facebook was found in infringement of the German Competition Act *(Gesetz gegen Wettbewerbsbeschränkungen)* GWB due to the abuse of the dominant position in the private social network market by tying the services of the Facebook social network to the collection of the user related data by other services that are owned by Facebook itself such as WhatsApp and Instagram. The rationale of *Bundeskartellamt* was focused on the prohibition of exploitative practices to the detriment of consumers which are primarily referred as a contracting parties entering into an unbalanced negotiation. The Facebook decision is a milestone to understand the relationship among freedom, the prohibition of the abuse and privacy.[69]

The fundamental changes in information society changed the understanding of privacy and its narrative as a primary social and political issue. Yet, privacy has always been a societal good with a high social value. Reading competition and consumer protection from the same lens contributes in understanding the social costs of privacy infringement. Competition law uses the cost-benefit calculation as its assessment method. If the societal costs of the anti-competitive contracts are greater than the benefits of them, it is efficient not to enforce such contracts.[70] Recent decisions support the idea that privacy having the 'high social value' is a component of consumer welfare and ergo, a parameter of competition in terms of product and service quality.[71] Privacy as a social and political issue shed the economic value of societal phenomena in this calculus. This made it an integral part of the fairness/efficiency discussion, as well as demonstrated the role of non-economic factors in the constitution of consumer welfare. The consumer choice theory has less econometric grounds than the pure efficiency or price models, which makes it more approachable to social theorists. It addresses the undervalued issues that are difficult to translate into terms of price.[72]

Protecting consumer choice revolves around the idea that both competition and consumer laws should shield the consumers from artificial constraints such as

[68]Facebook Decision, Bundeskartellamt, 6 February 2019, B6-22/16 at https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.html?nn=3591568.
[69]Arendt (1998) at 38, Posner (2008), Averitt & Lande (1997), and Cseres (2006) at 6.
[70]Cseres (2006) at 15.
[71]Reyna (2019) at 1-2.
[72]Averitt &Lande (1997) at 178, 182.

deception or dishonesty. Inefficient competition harms the society and the consumers as its extension. Inefficient consumer policy reinforces information asymmetries and behavioural biases, causing inefficient competition.[73] The high information asymmetry in a market increases the search costs, diminishes the incentives to attain objective information and eventually distorts the decision making capacity of the consumers. The sellers have an incentive to exploit systematic biases and misperceptions to have maximum gain.[74] The biased decisions of the consumers lead to allocative inefficiency. Therefore the market needs effective tools to increase the compliance to the ethical values such as honesty and trust to reconcile the social benefits of competition and consumer protection.

On the other hand, consumer law prohibits deceptive practices because they are immoral. Practices containing *dolus* are condemned because the moral blame of deception determines the outcome. Even in the US, many non-verifiable advertising cases are challenged on *per se* grounds by the Federal Trade Commission for this reason.[75] Other unfair practices face a *rule of reason* analysis if they are *prima facie* not deceptive and the consumer harm is not reasonably avoidable.[76] In this regard the 'consumer choice' perspective inflicts questions of consumer harm into competition law. This perspective does not require the number of consumer options to be maximised, but it does protect the types of options that are important to the consumers.[77] Hereby, the non-price competition such as innovation, quality, privacy and safety play a major role especially when there is little price competition in highly regulated markets. Such product attributes and innovation are ways of focusing on expected future competition.[78]

Consumer choice theory prohibits the harmful conduct that significantly limits the range of choices that the free and honest market would normally provide for the consumers. Such harmful conduct generally manifests itself in tying or resale price maintenance that distort the clear decision making abilities of the consumers.[79] Yet, certain market activities which may result in loss can still be permissible under the consumer choice approach only if their benefit to the consumers outweighs the costs.[80] The choice standard protects not only the final "consumers" but all intermediary entities in the value chain. This creates another link between competition and consumer laws today as the boundaries between 'end customers' and 'producers' are disappearing.

The basic weakness of the theory is that it assumes the consumers to be capable of fully understanding their preferences and making rational comparisons between different goods and services to choose the best option for themselves

[73]Van Loo (2019) at 215, 219.
[74]Bar-Gill (2011) at 28.
[75]California Dental Associations v. Federal Trade Commission. 526 U.S. 756 (1999), Leary (2005) at 1148.
[76]Leary (2005) at 1149.
[77]Averitt & Lande (1997) at 182.
[78]Landman (1999) at 838, 850.
[79]Haracoglou (2007) at 197.
[80]Averitt & Lande (1997) at 178.

within the paradigm of the competitive market.[81] Overcharge or lowered quality products are expected to result with the instant loss of consumers and require the market to self-regulate. It is assumed that when the consumers have adequate information that might affect their future choices, the information obtained can be reasonably understood by themselves. On the other hand, behavioural economics demonstrates that consumers are not necessarily rational actors and they are open to manipulation. Unlike the *mercator prudens* model that dominate the competition policy paradigm, the consumers have different levels of individual knowledge and sophistication. Yet, ignoring the model based on this criticism would be oversimplification of its goals. This does not require an essentialist view about the consumers being rational/irrational. Rather, what behavioural economics shows us is there is no objective homogeneous understanding of rationality in terms of human behaviour. Consumers are imperfectly rational. They are simultaneously rational and irrational, and this inescapably creates market failures and biased demand. The model of consumer choice requires the exogenous bias to be minimised.

From a competition policy perspective, limiting consumer choices creates additional anti-competitive effects in the society.[82] The legal tools built upon the moral requirements of honesty and trust prevent the sellers from taking advantage of the lack of rationality of the consumers. Competition law guarantees that the biased options in the market are not diminished by external artificial restrictions such as price fixing or anti-competitive mergers. Consumer choice standard as its ancillary aims at consumer options to be as objective as possible. The moral nature of the duties arising from good faith (e.g. duty to inform, duty to protect, duty to cooperate etc.) shifts the focus on the emphasis on the micro-level harms to consumers to the macro-level implications such as privacy, environmental effects or gender inequalities. Honesty and trust are essential in consumer protection in the competition law narrative for two main reasons. First, they legitimise the prohibition of deceitful conduct that create exogenous bias. Second, they shield against social consumer harm which is not immediately visible in price and other output effects.[83]

Competition law prevents undertakings from the *mala fide* acquisitions or exploitations facilitated by their dominant positions. The dominant market power is perfectly legitimate if and only if it is the result of an honest, reasonable and loyal competition. On the other hand, the consumer choice theory has a different focus. It assumes that the bad faith market power can be used to create negative effects on the price, quality and variety choices in a particular market to the detriment of the quality and quantity of the consumer decisions. Yet, two focal points complete each other. In other words, the consumer choice standard should not be reduced to a mere arithmetic of consumer options. In case of a legitimately attained dominant market position, the consumer welfare will not be in danger

[81]Reyna (2019) at 1.
[82]United States v. Dentsply, 399 F.3d 181, 194 (3d Cir. 2005).
[83]As noted by the Director General of the European Commission's competition department, Johannes Laitenberger. Reyna (2019) at 2. The proof of actual consumer harm is not required because it is inferred from injury. Houck (2001) at 596.

although the consumer choice would be limited from a quantitative perspective. Rather, the consumer choice standard should be seen from a social justice perspective whereby its protection within the framework of the contractual relationships is based on an ethical competition policy raising consumer awareness. It is open to dispute whether the consumer choice paradigm should be explicitly introduced in national competition policies.[84] Nonetheless, contemplating its role will help the competition authorities to re-evaluate the possible tools of consumer protection and its relation to social justice.

Conclusion

The abandonment of the normativity of moral theories in economics is as old as its perception as a positive science. Yet, the economic order in the market is regulated by legislative tools which provide legal normativity whereby laying down rules of just market conduct. As such, this paper concerns itself with two specific examples and their economic relation to morality: Competition and consumer protection laws, and their interdependencies. Both competition and consumer laws deal with the distortions in the market, yet with different enforcement methods and different target groups. They both aim at providing fairness in the current economic paradigm but their moral roots are often ignored. This article proposes to read competition and consumer protection through the lens of European legal culture. The protection of honesty and trust in consumer protection and competition reminds us the moral perspectives that once pushed to periphery.

Competition law is concerned with the competitive process, and a healthy and unimpaired competitive process is presumed to be in the consumer interest.[85] Consumer benefits are essential in deciding on the scale of harm to competition, as well as on the exemptions for anticompetitive behaviour. In other words, consumer detriment legitimises the prohibition of permitted conduct.[86] From a teleological perspective, it is not disputable whether or not competition policy in general is directed to consumer protection. Rather the question is whether consumer protection is a primary or a secondary concern.[87] The role of morality sits in the middle of this discussion. As John Vickers puts, competition and consumer protection policies 'work together in tandem if not as one'.88 This is well illustrated in the consumer choice standard which might operate as a bridge between consumer protection and competition policies. It aims at innovative, productive and allocative efficiency, as well as creating potential Pareto improvements in economy.[89] Whereby to do this, it emphasises the role of

[84]About its contemporary impact on EU competition policy see Behrens (2014) at 5.
[85]Fishman v. Estate of Wirtz, 807 F2d 520, 536 (7th Cir. 1986).
[86]Haracoglou (2007) at 197.
[87]Leary (2005) at 1148.
[88]John Vickers, Opening remarks to the European Competition and Consumer day, 15 September 2005 at www.oft.gov.uk.; Haracoglou (2007) at 177.
[89]Stavins, Wagner & Gernot (2003).

information provided to consumers as an essential part of competition and emphasises the place of honesty as transparency in the competition regulation.

The requirement of disclosure of reasonable information and the prohibition of exploitation are the two major implications of translating the moral values of honesty and trust into the legal/economic realm. The aim is to provide an Aristotelian balance in contractual relationships between different market actors. The tendency towards social cooperation reminds us the historical role of honesty and trust, and from their perspective we witness competition and consumer laws as two sides of a coin. This also contributes in understanding their key role in case of non-price competition. The effect of sustainability and corporate social responsibility is increasingly becoming a major core in this legal regime, juxtaposing consumer protection and competition. In the future we will witness more consumer friendly markets which revolve around a fair competition policy, where efficiency and fairness go hand in hand in hand to provide the 'social solidarity'. The complementary nature of competition and consumer protection from a moral point of view is necessary to be remembered when confronting the need to create a well-balanced social justice system that is also extended to the economic justice.

References

Alexander, G. (1962). 'Honesty and Competition: Some Competitive Virtues in the False Naming of Goods' in *Santa Clarita Law Review* 31:141-160.

Arendt, H. (1998). *The Human Condition*. Chicago: University of Chicago Press.

Aristotle, *Nicomachean Ethics* (translated and introduced by Sir W.D. Ross, 2009) London: Oxford University Press.

Averitt. N.W. & R.H. Lande (1997). 'Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law' in *Antitrust Law Journal* 65:713-753.

Bar-Gill, O. (2011). 'Competition and Consumer Protection: A Behavioral Economics Account' in *NYU Law and Economics Research Paper Series:*11-42.

Behrens, P. (2014). 'The "consumer choice" paradigm in German ordoliberalism and its impact Upon EU competition Law', Discussion Papers 1/14, Europa-Kolleg Hamburg, Institute for European Integration.

Bertola, G. (2000). 'Macroeconomics of Distribution and Growth' in A. Atkinson & F. Bourgignon (eds) *The Handbook of Income Distribution,* Vol. 1. 477-540. Amsterdam: Elsevier.

Chroust, A.H. (1942). 'Aristotle's Conception of Equity (Epieikeia)' in *Notre Dame Law Review* 18(2):119-128.

Cseres, K.J. (2006). 'The Impact of Consumer Protection on Competition and Competition Law: The case of Deregulated Markets'. *Amsterdam Center for Law & Economics*, Working Paper No. 2006-05.

Cseres, K.J. (2011). 'Contract law and competition law' in A.S. Hartkamp, E.H. Hondius, M.W. Hesselink, C. Mak & C.E. du Perron (eds), *Towards a European Civil Code,* 4th ed. 205-238. The Hague: Kluwer Law.

Cseres, K.J. (2013). 'Integrated or Separate: Institutional Design for the Enforcement of Competition Law and Consumer Law'. *Amsterdam Centre for European Law and Governance Working Paper Series,* no. 1.

Cohen, G.M. (1992). 'The Negligence- Opportunism Trade-off in Contract Law' in *Hofstra Law Review* 20(4):941-1016.

Collins, H. (2012). 'Cosmopolitanism and Transnational Private Law' in *European Review of Contract Law* 8(3):311-325.

Cooter, R. & T. Ulen (2016). *Law and Economics,* 6th ed. Berkley: Berkley Law Books, 4 ff.

Deaton, A. & J. Muellbauer (1980). *Economics and Consumer Behavior,* Cambridge: Cambridge University Press.

Dixit, A. & J. Stiglitz (1977). 'Monopolistic Competition and Optimum Product Diversity' in *American Economic Review* 67(3):297–308.

Ducci, F. & M. Trebilcock (2019). 'The Revival of Fairness Discourse in Competition Policy' in *The Antitrust Bulletin* 64(1):79-104.

Durkheim, É. (1973) (ed. by R.N. Bellah). *On Morality and Society.* Chicago: University of Chicago Press.

Gurkaynak, G. (2004). *Turk Rekabet Uygulaması Icin Hukuk ve Iktisat Perspektifinden Amac Tartismasi.* Ankara: Rekabet Kurumu.

Hart H.L.A. (1994). *The Concept of Law.*2nd ed. Oxford: Oxford University Press.

Haracoglou, I. (2007). 'Competition Law, Consumer Policy and the Retail Sector: The Systems' Relation and the Effects of a Strengthened Consumer Protection Policy on Competition Law' in *Competition Law Review* 3(2):175-208.

Harding, C. (2009). "Capturing the Cartel's Friends: Cartel Facilitation and the Idea of Joint Criminal Enterprise" in *European Law Review* 34 (2):298-309.

Hayek, F. (1978). *Law, Legislation and Liberty, The Mirage of Social Justice.* Chicago: University of Chicago Press.

Hesselink, M.W. (2011). 'The Concept of Good Faith', in A.Sa Hartkamp, M.W. Hesselink, E.H. Hondius, C. Mak & C. E. du Perron (eds), *Towards a European Civil Code.* 619-649. Alphen aan den Rijn: Kluwer Law International.

Honoré, T. (2002). 'The Necessary Connection between Law and Morality' in *Oxford Journal of Legal Studies* 22 (3):489-495.

Houck, S. (2001). 'Injury to Competition/Consumers in High Tech Cases' in *St. John's Law Review* 75: 593-614.

Huffman M (2010). 'Bridging the Divide: Theories for Integrating Competition Law and Consumer Protection' in *European Competition Journal* 6 (1):7-25.

Graef, I., Clifford, D. & P. Valcke (2018). 'Fairness and Enforcement: Bridging Competition, Data Protection and Consumer Law' in *International Data Privacy Law* 8:200-223.

Kate, A. & G. Niels (2004). 'Introduction: Antitrust in the U.S and the EU Converging or Diverging Paths?' in *The Antitrust Bulletin 49* (1-2):1-27.

Landman, L.B. (1999) *Innovation and the Structure of Competition: Future Markets in European and American Law.* Patent. & Trademark Office Society.

Leary, T.B. (2005). 'Competition Law and Consumer Protection Law: Two Wings of the Same House' in *Antitrust Law Journal* 72 (3) 1147-1151.

MacCulloch, A. (2007). 'Honesty, Morality and Cartel Offence' in *European Competition Law Review* 28(6):355-363.

Macpherson, C.B. (1962). *The Political Theory of Possessive Individualism: From Hobbes to Locke.* Oxford: Clarendon.

Mak, C. (2007). 'Harmonising Effects of Fundamental Rights in European Contract Law' in *Erasmus Law Review* 1(1):59-80.

Mak, C. (2012). Europe-building through private law. Lessons from Constitutional Theory' in *European Review of Competition Law* 3:326-341.

Mak, C. (2020). 'Civil Courts as Constitutional Courts: Polity-building Through Private Law in Europe' in *European Review of Private Law* 4:953–972.

Mattei, U. (1994). 'Efficiency as Equity: Insights from Comparative Law and Economics' in *Hastings International and Comparative Law Review* 18 (3):57-173.

Muris, T.J. (2005). 'Principles for a Successful Competition Agency' in *The University of Chicago Law Review*, 72:165-187.

Posner, R.A. (2008). 'Privacy, Surveillance, and Law' in *The University of Chicago Law Review* 75(1):245-260.

Reyna, A. (2019). 'The Shaping of a European Consumer Welfare Standard for the Digital Age' in *Journal of European Competition Law & Practice* 10 (1):1-2.

Schiller, A.A. (1930). 'Trade Secrets and the Roman Law; The Actio Servi Corrupti' in *Columbia Law Review*, 30(6):837-884.

Stavins, R., Wagner, A. & C. Wagner (2003). 'Interpreting Sustainability in Economic Terms: Dynamic Efficiency Plus Intergenerational Equity' in *Economic Letters* 79(3):339-343.

Study Group of Social Justice of European Private Law (2004). 'Social Justice in European Contract Law: A Manifesto' in *European Law Journal* 10(6):663-674.

Summers, R.S. (1982). 'The Duty of Good Faith: Its Recognition and Conceptualization' in *Cornell Law Review* 67(4):810-841.

Ucaryilmaz, T. (2020). 'The Principle of Good Faith in Public International Law' in *Deusto Law Journal* 68(1):43-59.

Van Loo, R. (2019). 'Broadening Consumer Law: Competition, Protection, and Distribution' in *Notre Dame Law Review* 95(1):211-262.

Weber, S.W. (2005). 'In Search of Economic Justice: Considering Competition and Consumer Protection Law' in *Chicago Law Journal* 36:631-639.

Whittaker, S. (2019). 'Unfair Terms in Commercial Contracts and the Two Laws of Competition: French Law and English Law Contrasted' in *Oxford Journal of Legal Studies* 39(2):404–434.

Williamson, O.E. (1975). *Markets and Hierarchies: Analysis and Antitrust Implications.* New York, Free Press.

Williamson, O.E. (1985). *The Economic Institutions of Capitalism-Firms, Markets, Relational Contracting*, New York, Free Press.

Winkel, L. (2010). 'Forms of Imposed Protection in Legal History, Especially in Roman Law' in *Erasmus Law Review* 3(2):154-162.

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The Disassembly of the Greek Welfare State under the Troika

By Yianni Tsesmelis[*]

Having broken from half a century of binary political choice between Greece's two established political parties, SYRIZA's rise to power in the 2010s represented an opportunity for the country's welfare state to resist intrusions by European entities and institutions. This paper analyses Greece's history and political interaction during this period, arguing that Greece has now, in folding to the EU, completed its transition from a relatively liberally-spending welfare state to what Wolfgang Streeck calls a "consolidation state." Relevant to this analysis is a set of historical details leading up to the SYRIZA election and the 2015 referendum—seen as the high-water mark of opposition to austerity and cuts to the welfare state. In turn, the impact of austerity on the Greek population is quantified and substantiated, demonstrating that austerity measures predominately impacted the welfare state, more often than not resulting in direct reductions to pension and other monetary payments to the citizenry. Finally, these factual conditions are squared with theoretical descriptions and conceptualisations of the welfare state as existing under neoliberalism. Ultimately, what can be drawn from this research is that Europe's institutions are unyielding in their prioritisation of an ordoliberal, single-market ideology over individual Member States' varying conceptions of locally implemented fiscal policy.

Keywords: *Austerity; Consolidation state; Neoliberalism; Ordoliberalism; Referendum; Welfare state; SYRIZA*

Introduction

In 2015, after battling with the European Union and its related institutions for the better part of five years, the Greek citizenry famously voted 'No' in response to proposed EU bailout and debt restructuring agreements.[1] Since Greece's descent into dictatorship from 1967 to 1974, a period that involved the en masse imprisonment of communists, leftist sympathisers, and political opponents in labour camps,[2] the country spent its forty years of post-dictatorship liberation operating under a two-party, centre-left and centre-right binary political system.[3]

Having established a party based on a platform of anti-austerity, Prime Minister Alexis Tsipras may have been justified following the 2015 referendum in expecting the outcome to provide his government's negotiators with leverage to

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[1]Arnett, Sedghi, Galastidas & Clarke (2015).
[2]Kaloudis (2000) at 41.
[3]Vasilopoulou & Halikiopoulou (2015).

protect Greece from EU-imposed austerity measures.[4] Indeed, while the actual results of negotiations with the EU were rarely positive for Greek citizens, Tsipras's Coalition of the Radical Left[5] party at least nominally promised a platform that refused to cave in to European demands seen as unreasonable by the Greek citizenry.[6] Rather, the specific focus of SYRIZA, as legitimated by both their successful 2015 election to power *and* by the result of the 2015 referendum, was to propose "an anti-establishment agenda whose main goal was to renegotiate austerity **at any cost**."[7]

In advancing such a position in its negotiations with the EU, SYRIZA's ill-fated promise was to restore the "independence, dignity, and sovereignty of the Greek nation."[8] Rather than resulting in the feared "Grexit," SYRIZA's opposition to austerity was ultimately overpowered[9] and overcome by pressures exerted by the EU and the Troika.[10] Having miraculously broken forty years of binary political control by voting SYRIZA into power in 2015, the Greek citizenry was at the time optimistic about its potential to collectively organise opposition to EU-imposed austerity and to protect its once-robust welfare state from the ever-expanding reach of neoliberalism.[11] Anti-climactically, Tsipras's time as Prime Minister of Greece is most commonly associated not with his initial animated opposition to the political status quo in Greece, but instead with his capitulation to the Troika "just hours after [the] referendum on July 5, 2015 in which 61% of Greeks refused a fresh round of austerity."[12]

The intention in this paper is to analyse Greece's history and political interaction during the 2010s, arguing that Greece has now, in folding to the EU, completed its transition from a relatively liberally-spending welfare state to what Wolfgang Streeck calls a "consolidation state."[13] Streeck describes the transition from tax state, to debt state, to consolidation state in Europe to have occurred as follows:

> *"Both the long-term increase in public debt and the current global attempts to bring it under control were intertwined with the "financialization" of advanced capitalism and its complex functions and dysfunctions. The ongoing shift towards a consolidation state involves a deep rebuilding of the political institutions of post war democratic capitalism and its international order. This is the case in particular in Europe where consolidation coincides with an unprecedented increase in the scale of*

[4]Vasilopoulou & Halikiopoulou (2015) at 14.
[5]"ΣΥΡΙΖΑ" in Greek, translated and referred to as "SYRIZA" in English and throughout this paper.
[6]Vasilopoulou & Halikiopoulou (2015) at 17.
[7]Ibid. (Emphasis added).
[8]Ibid. at 14.
[9]Varoufakis (2020).
[10]The "Troika" is the word used to refer to the group of creditors with which Greece was primarily negotiating for improved bailout conditions. Ordinarily, the Troika refers to the European Central Bank, the European Union, and the International Monetary Fund. See Mexi (2018) at 98.
[11]Varoufakis (2020).
[12]Ibid.
[13]Streeck (2015).

> *political rule under European Monetary Union and with the transformation of the latter into an asymmetric fiscal stabilization regime*."[14]

This paper first sets out additional relevant historical details leading up to the SYRIZA election and the 2015 referendum—seen as the high-water mark of opposition to austerity and cuts to the welfare state. Next, the impact of austerity on the Greek population is quantified and substantiated, demonstrating that austerity measures predominately impacted the welfare state, more often than not resulting in direct reductions to pension and other monetary payments to the citizenry.[15] Finally, the paper concludes by attempting to square the factual conditions introduced earlier with theoretical descriptions and conceptualisations of the welfare state as existing under neoliberalism.

Greece's Political History as Relevant to its Welfare State

Despite political choice in Greece operating solely as a binary between relatively moderate centre-left politics and centre-right politics,[16] this is not to suggest that Greek political parties prior to SYRIZA were unconcerned by EU pressure to impose austerity measures upon the country. Indeed, in circumstances eerily similar to the lead up to the 2015 referendum, in 2011, PASOK Prime Minister George Papandreou called a national referendum on proposals related to a Eurozone bailout for Greece, with the consequences of accepting the proposals including lengthened periods of austerity and other EU-imposed policies that would be applied internally in Greece.[17]

Just days after Papandreou's announcement, what resulted was a barrage of EU pressure, exerted not only behind the scenes but also outwardly and overtly through European media: then-French President Nicolas Sarkozy and German Chancellor Angela Merkel were reported as extending to the democratically elected leader of Greece both *warnings* and *ultimata* contingent upon an outcome that Europe deemed favourable from the referendum.[18] In fact, the ultimatum posed by Germany and France boiled down to the following: if Papandreou could not ensure that Greeks would vote *as Europeans* rather than as local Greek constituents, EUR 8 billion of bailout funds would not be extended to Greece. The

[14]Ibid.

[15]Vasilopoulou & Halikiopoulou (2015) at 14.

[16]See generally Chryssogelos (2015) at 29. Chryssogelos reaffirms the notion that the key feature of the Greek political party system is its binary polarisation. Although the parties have somewhat fluctuated in their political orientations since the 1967-74 junta, New Democracy ("ND") has most commonly occupied space as a centre-right party whereas Panhellenic Socialist Movement ("PASOK") occupies space as a centre-left party. Note, however, that both ND and PASOK have given in to EU pressures to impose austerity measures within Greece, dating back to at least 1986 and being exacerbated by Greece's adoption of the euro in January 2002. See Carpenter (2003) at 263.

[17]Vogel (2011). Note that, while "austerity" and "austerity measures" are not substantiated here, specific examples of cuts to the welfare state and of implemented policies will be introduced in the section entitled "The Greek Welfare State, as Affected by Austerity."

[18] Treanor et al. (2011).

specific reported language states that the bailout funds would only be extended if there was a "swift yes vote in the referendum."[19]

In stark contrast to the binary system that had dominated the 20th century in Greece, the rise of SYRIZA was received as a political breakthrough in Greece, particularly in the 2012 national election where the party earned 26.89% of the votes, falling only 3% short of the votes earned by the evergreen and omnipresent ND.[20] Only three years later, in the 2015 national election, SYRIZA, led by Tsipras, gained 36.34% of the national vote, entitling them to 149 seats in parliament, just two shy of forming a majority government.[21] Again, even before the idea of a referendum was considered, voters understood SYRIZA as having promised an anti-austerity platform that primarily meant "standing up" to European-imposed policies and ultimata in exchange for bailout funding.[22] What the Greek vote in the general election of 2015 indicated was that Greek citizens were ready and willing to mobilise behind a political sensitivity that rejected neoliberal governance by austerity, where costs were routinely shifted from the public sector to the private sector,[23] and, once the private sector collapsed in Greece due to the Global Financial Crisis ("GFC"), onto the struggling Greek family.[24]

[19]Ibid.
[20]Vasilopoulou & Halikiopoulou (2015) at 15.
[21]Vasilopoulou & Halikiopoulou (2015) at 14.
[22]Ibid.
[23]See generally Kamekis & Tzagkarakis (2017). Their focus is on the deleterious effect that the deregulation and subsequent privatisation of the Greek welfare state has had for beneficiaries dependent upon its services. While the focus of this paper is on the interaction of politics, the EU, and the Greek welfare state particularly and limited to the 2010s, they convincingly analyse the relationship between conditions for entry into the Eurozone and austerity measures, whereby the Greek government in the early 1990s was encouraged to shift public spending away from the welfare state in order to satisfy the Eurozone's condition that entering countries satisfy a 3% level of public deficit. While deregulation might have ultimately played a part in Greece's accession to the Eurozone, they lament the fact that deregulatory practices were rarely, if ever, paired with rational and effective policy changes in order to ensure that deregulation could coexist with an "economically and institutionally rationalized system."
[24]The issue of the dynamics between member states and the EU as an entity is, while interesting, not within the scope of this paper. For literature focused on how the Greek executive representative has been dulled in their dealings with the EU and on why this might be significant, given Greece's relatively recent adoption of its modern constitution in 1975, consider Kalyvas (2000) at 1533-34 as well as Tassopoulos (1999) at 227. To put it briefly, these articles, when put in conversation with one another, work toward building an argument that, by requiring legitimately-elected Greek politicians to choose between ultimata issued by the EU and national insolvency, the Greek sovereign—the people—had their sovereign will abrogated and nullified. More problematic is the likelihood that the Troika not only abrogated the popular sovereign will of the Greek people, as manifested through their executive representative, but also insisted upon austerity measures whose effectiveness or damaging impact upon the Greek people was entirely unknown by the IMF. Žižek (2015) at 25.

The Greek Welfare State, as Affected by Austerity

The Welfare State prior to the 2000s

Partially due to Greece's late industrialisation as compared with many other European countries, the Greek welfare state is characterised as temporally lagging far behind its counterparts in Northern and Western Europe.[25] In categorizing the country's welfare state as either liberal, conservative, or social democratic,[26] Maria Petmesidou, Emeritus Professor of Social Policy at Democritus University of Thrace, describes the ways in which Greece's welfare state is properly considered to be a hybrid regime. Firstly, the Greek regime depended upon income transfers, most commonly pensions, arranged in line with the Bismarckian model of continental Europe;[27] that is, a conception of social insurance that has as its objective the tempering of the workers' revolutionary potential rather than affecting any redistributive purpose.[28] Even this element of the Greek regime was not without its problems: as Petmesidou describes, the early Greek social insurance system was "highly polarised and fragmented," meaning that the social insurance to which a Greek citizen was entitled and its conditions of receipt would be almost entirely contingent upon which social insurance fund—out of as many as *one hundred and thirty* funds—was applicable.[29]

The Greek regime developed toward including aspects of the social democratic regimes following the end of the junta in 1974. Indeed, Petmesidou recognises this trend as having spread throughout all of Southern Europe whereby, in the late 1970s and early 1980s, national healthcare systems were introduced to the Southern European countries, including Greece.[30] Again, these services were not rolled out without flaws: while the intention was for services to be free at the point of use, Greece's shift to universal healthcare remains somewhat incomplete due to gaps missing in public coverage, the continuous filling of these gaps by a generally expanding private health sector, and public social health insurance schemes that are highly fragmented.[31]

Finally, Greece's welfare state can safely be characterised as liberal (in the classical liberal sense) due to its underdevelopment of social care services and social assistance. Rather than providing the poorest Greeks additional benefits through means-testing or other similar mechanisms, both Greece's past austere political orientation combined with Greek Orthodoxy's historical stranglehold over social policy has precluded expansions in these areas.[32]

[25]Livaditi & Petmesidou (2018).
[26]See generally Esping-Andersen (2014).
[27]Livaditi & Petmesidou (2018).
[28]Van Kersbergen & Vis (2013) at 38-43.
[29]Livaditi & Petmesidou (2018).
[30]Ibid.
[31]Ibid.
[32]Ibid.

The Welfare State during the 2000s

For a fleeting moment immediately following the GFC, income inequality between the top 10% and bottom 50% of income earners found itself at its lowest point (meaning the least inequality) since the junta.[33] However, once both the United States and European governments bailed out failing industries following the aberration of the GFC, the status quo was resumed with the bottom 50% enjoying an average of just 17-18% of the country's pre-tax national income from 2010 to 2015.[34] In that same time period, the top 10% had seen their earnings increase from a proportionate low of just ~32% of the country's pre-tax national income in 2011 to closer to ~38% in 2015.[35]

While the GFC increasingly became a memory of distant history for the nation's top earners, the average Greek citizen found the aftermath of the GFC pushing them into higher degrees of dependency upon the welfare state. Further highlighting the increased dependency upon the welfare state in Greece, beginning with the GFC unemployment skyrocketed across all age groups, initially at a contextually reasonable 9.6% in 2009, doubling to 17.9% in 2011, and almost tripling the 2009 figure by reaching 27.5 % in 2013—or, to truly appreciate the gravity of such a figure, one in four Greeks capable of work found themselves unemployed by 2013.[36]

Greeks' willingness to accept a relatively radical leftist platform in 2015 can be rationalised against this context. Such a platform was welcomed by the Greek constituents, who had suffered through the brunt of the economic crisis followed by the insulting blow of added, foreign-imposed austerity measures in exchange for the mere economic survival of the country itself. Outside of unemployment, austerity measures meant palpable and often drastic changes to local policy: increased taxes on income and property, increases to sales taxes, decreases to tax concessions and the tax-free threshold, etc.[37] Large increases in property taxes impacted the middle class most acutely, causing many Greeks to lose their homes at the hands of EU-imposed austerity.[38] Public-sector, private-sector salaries, and pensions alike were ruthlessly slashed, with public-sector salaries and pensions reduced en masse in some cases by up to 50%.[39]

To provide more specifics as to the changes made within the Greek welfare state in the 2010s, consider the changes made just three days after the July 2015 referendum to reject austerity measures. On the 8th of July 2015, the SYRIZA government, fearing national insolvency, agreed to an adjustment of its existing obligations to creditors on the condition that VAT and pensions be reformed in order to reduce public spending[40] and increase public revenue.[41] One of the most

[33]World Inequality Database.
[34]Ibid.
[35]Ibid.
[36]Vasilopoulou & Halikiopoulou (2015) at 14.
[37]Ibid.
[38]Ibid.
[39]Ibid.
[40]Note that, while the focus of this paper is not to pinpoint the exact meaning of "neoliberalism" as applied to a criticism of EU policies, it is still helpful to explain more carefully what is meant by the

significant changes to Greek life came in the form of the enormous reduction in the number of Greeks employed by the public sector as opposed to the private sector. In 2010, Greece's public sector employed a considerable ~28% of the population, compared to just ~18% in 2015.[42] As a percentage, just over ~53% of public sector employees in 2010 remained employed in the public sector in 2015.[43] As a result, any enhanced benefits associated with governmental work either have been abandoned due to shifts in employment by sector, or are now reliant upon the private sector for their disbursement. Of course, in the face of shifts away from enhanced benefits reserved for governmental employees, another potential solution would be for the welfare state to intervene in one of several methods.[44] Even if Greece's welfare state may have been able to absorb such a shift in responsibility over benefits *prior* to the economic and social crisis of the 2010s, the welfare state could not possibly bear the cost of any shift in responsibility over benefits during the 2010s considering the way in which the already underfunded scheme had been

word "neoliberal" throughout this paper. Generally, I have attempted to describe the real-world change made by an austerity measure rather than to first classify it as neoliberal. As such, here, an example of an austerity measure is a requirement that pensions be slashed in order to reduce public spending. Now, it is far easier to match this description with one of the four more specific conceptions of neoliberalism as provided by Rodgers (2018). Most notably, the imposition of austerity in Greece—even as far back as austerity measures introduced in the 1990s in connection with Greece's introduction into the Eurozone—most often comes in the form of "neoliberalism as policy," existing within the setting of "disaster capitalism." Ibid. It is not the case that Greek politicians—even those from the centrist parties PASOK and ND—sought to push neoliberalist economic policy due to the appeal of neoliberalism as an intellectual project or as a cultural regime. Rather, as the history behind SYRIZA's election should demonstrate, neoliberalism has most often been implemented in Greece in response to either external economic conditions—the GFC—or through ultimatum—as seen throughout the entire negotiating process between Greece and the Troika lasting the majority of the previous decade.

[41]Kraatz & Dessimirova (2012).

[42]Ibid. at 4.

[43]Ibid.

[44]As just one example, however impractical it may be in reality, the welfare state could intervene by attempting to test for eligibility (i.e., former status as a governmental employee) before providing the same set of enhanced benefits to those who, arguably through no fault of their own, no longer are able to rely on benefits through governmental employment. Just this one example, however, demonstrates how unsurmountable such a financial undertaking would be. Consider that, in terms of the increase in actual individuals the welfare state would have to cover, the decrease in government employment from ~28% in 2010 to ~18% in 2015 could represent as many as 1.07 million additional claimants reliant upon the welfare state. Bearing in mind Greece's population ordinarily hovers around 11 million and has been on a steady descent since the economic and social crisis began, requiring the welfare state to absorb as many as 1.07 million people's shift of benefits from the governmental sector would undoubtedly overwhelm the country's welfare state. Further still, some may argue that there are serious issues of equity involved where the welfare state appears to intervene with the specific intention of protecting a particular class of citizens as opposed to others. Specifically in a country like Greece, where the migrant refugee crisis followed almost immediately after the most severe periods of the economic and social crisis began to ease, those solely focused on equity might argue that Greece's base social solidarity income would be more deserving of an increase as opposed to any plan for the welfare state to absorb and cover former governmental employees' benefits, since social solidarity income is far more broadly available than benefits contingent upon one's work sector. For context, the social solidarity income (Κοινωνικό Επίδομα Αλληλεγγύης or "KEA" in Greek) provides for a minimum of EUR 200 per household, regardless of any individual's work status; see also European Commission (2019).

continually gutted by the Troika during this period. Unsurprisingly, the majority of the evidence points to welfare benefits—not only limited to the governmental sector, but across the board—as having been slashed as a central part of the country's attempts to avoid insolvency.[45]

Historic features of the Greek welfare state were decimated in response to negotiations with the Troika. Most notably, the payments of what were known as the "thirteenth and fourteenth pension" were eradicated.[46] For the average Greek household, undeniably generous retirement pensions formed as much as 24.1% of a family's disposable income and, as such, the removal of 1/7th of a family's total pension—by ceasing to pay these thirteenth and fourteenth pensions—represents a significant change to a family's available resources.[47] To further complicate the matter, consider the fact that Greece has an aging population characterised as one of the oldest in Europe,[48] *and* the fact that youth unemployment in Greece is so significant that expectations that the younger generations will be able to supplement cuts made in the public sector through their own contributions to the pension scheme must be discounted as unrealistic and unfeasible, at least if current trends hold.[49] This problem is further compounded by the fact that the Greek welfare state spends EUR 7.5 for each euro spent on *all* non-retirement pension benefits. As such, Manos Matsaganis, Professor at Athens University of Economics and Business, chastises the history of the Greek welfare state as evincing a strong, and unwise, prioritisation of retirement benefits over the prevention of unemployment.[50] Of course, such a practice can be criticised even when the country is *not* facing economic crises and uncontrollable unemployment by attacking the system's failure to properly *safeguard* against unemployment when it is *employment* itself that necessarily—through taxing or through the new contributory pensions that have been introduced since 2015[51]—is responsible for *funding* retirement benefits.

Finally, in summarizing the rather complex changes made to the Greek pension scheme during 2015 and following the July referendum, rather than receiving pensions financed directly from the State budget, Greek pensions are now broken down into two streams: one base pension and one contributory

[45]See generally OECD (2013).

[46]Ibid. This "thirteenth and fourteenth pension" describes a set of two additional monthly pension payments, fit within a twelve-month period. Effectively, eligible beneficiaries were entitled to fourteen months of pension payments over a single year. This practice ceased in 2013.

[47]Matsaganis (2011) at 501-502. Note a related point: not only do retirement benefits account for a disproportionately large amount of an average Greek family's disposable income, but so too do other social transfers commonly associated with the welfare state (i.e., benefits attributable to family status, sickness, housing needs, unemployment, etc.) account for just 3.2% of average household disposable income. Therefore, on average, the Greek budget provides seven times as much funding to retirement benefits as it does to *all* other redistributive transfers of resources throughout the welfare state.

[48]Bouloutza (2018).

[49]OECD (2019). Greece's youth unemployment rate as of 2019 is reported as being 35.23%. For context, the other "PIIGS" countries exhibit youth unemployment rates of 9.88% (Portugal), 12.43% (Ireland), 29.18% (Italy), and 32.58% (Spain) respectively.

[50]Matsaganis (2011) at 503-505.

[51]OECD (2017).

pension. Most problematic in this scheme is the possibility for extreme poverty to proliferate amongst those dependent upon pension benefits. Specifically, the base pension ensures a minimum of just EUR 345.60 a month, on top of which certain percentages of an individual's earnings over an eligible earnings period are added, to comprise that individual's total monthly pension.[52] Given the aforementioned unemployment statistics, the fact that Greece's population is severely aging and will become more and more dependent upon its youth, and these changes to the structure of the pension scheme, it remains to be seen how sufficient retirement benefits will continue to be paid if high unemployment means significant groups of Greeks will retire with next to no meaningful contributory pension. Through this perspective, Matsaganis' criticism of the focus of Greece's welfare state appears proper: that is, by focusing solely on retirement benefits, the Greek welfare system depends upon an assumption of at least a regular state of employment for its citizens. Instead of looking to uphold that assumption by focusing the welfare state toward achieving that end—i.e., propping up entitlements to education, enlarging employee protections in the workplace, etc.—the welfare state's preoccupation with retirement benefits has meant that as soon as that assumption is no longer in place, the welfare state will no longer provide meaningful insurance against unforeseen economic risks for the average Greek household.

The Psychological Impact on Greeks

The shift away from working in the public sector has also meant a shift in the relationship between Greece's constitutional commitments and its realisation of its citizens' rights as related to welfare. Specifically, as already alluded to by Petmesidou, Greek pensions and social insurance grew out of a conception of social solidarity—albeit of a Bismarkian orientation—which ensured that minimum pensions were established whereby pensions would be issued without premising entitlement upon compensation into the pension scheme.[53] As the governments of the 2010s sheepishly backpedalled on promises to oppose austerity measures only to see those measures come into effect, the psychological impact on the Greek populace has been devastating. Before laying out several of the ways in which the imposition of austerity measures has, in turn, resulted in drastic impacts to mental health in Greece, it is worth noting an idiosyncratic nationalism that exists in Greece. Indeed, even throughout the economic and social crisis of the 2010s, Greeks surveyed continued to report strong feelings of pride in their Greek culture and their history.[54]

Perhaps the antithesis of this pride is the sense of deep, troubling embarrassment painfully experienced by Greek workers—often those in their fifties or above—who had worked the majority of their lives only to find themselves out of work during or after the GFC. The *New York Times* reports an all too familiar anecdote: Anna, 68, finds herself a widow after her husband, a retired bus driver, publicly committed suicide at age 66 following substantial cuts

[52]Ibid.
[53]Mexi (2018) at 97.
[54]Dixon, Hawkins, Juan-Torres & Kimaram (2019).

to his pension.[55] More famous, perhaps, was Dimitris Christoulas, who was 77 years old when he committed suicide in front of Syntagma Square, the national parliament building.[56] In linking pride to the despair and ultimate suicides these (more often than not) men experienced, Basta et. al researched a specific region in Greece in order to analyse the relationships between demographics and suicide rates following the crisis.[57] What this research concluded was that, while women were responding to the crisis with lowered suicide rates across all ages and although it was young men and women who saw the most significant increases in unemployment, it was middle-aged men forty years and over who exhibited a sizeable increase in suicides during the relevant time period.[58] For these men, their embarrassment was not in their dependency upon the welfare system; after all, even in a non-contributory system, there are arguments to be made that, merely by working, paying taxes, and broadly contributing to the country's GDP, these men were entitled to support in their retirement in the form of a state-issued pension. Rather, these men more often than not took their lives in order to avoid the further embarrassment of complete destitution, having worked a life often of forty or more years of labour. Consider Anna's husband, questioning how his situation could have arisen at all: "I've worked so many years. What will I have to show for it? How are we going to live?"[59]

Cruelly ironic is the fact that it is Greece's preoccupation with retirement benefits that has prevented the country from putting in place more significant measures to protect employment and to assist those seeking to re-enter into employment. Faced with no job prospects at an age when most were expecting they would soon be retiring, the under-preparedness of the welfare state to embrace and manage underemployment, particularly amongst middle-aged workers, has undoubtedly contributed to the 40% increase in suicides between 2010 and 2015.[60] Furthermore, as both birth rates decrease and as suicide rates increase considerably from within an already aging population, researchers have observed the emergence of a diminishing workforce, even at a time when many Greeks are desperate for meaningful employment.[61] To make the situation even less optimistic, recall the considerably high youth unemployment and the impact unemployment has had on Greek emigration to other EU member states. Between just 2009 and 2011, roughly 120,000 Greeks, mostly men in their thirties with tertiary education, emigrated to Western and Northern European countries, as well as to the United States.[62]

A somewhat unexpected consequence of the failure of the welfare state to properly protect Greek citizens is the way in which family structures have adjusted in response. Prior to the crisis Greece operated primarily in a "male breadwinner/

[55]Kitsantonis (2019).
[56]Maltezou (2012).
[57]See generally Basta, M., Vgontzas, A, Kastanaki, A., Michalodimitrakis, M., Kanaki, K., Koutra, K., Anastasaki, M. & P. Simos (2018).
[58]Ibid.
[59]Kitsantonis (2019).
[60]Ibid.
[61]Aspridis, Strolias, Vasiliadsis & Kyriakou (2014) at 173.
[62]Ibid.

familiarist regime."[63] Petmesidou describes this regime as based on the stereotypical patriarchal family construct, whereby the family's income is dependent solely upon the male breadwinner and, crucially, where any women within the family are entitled *only* to derived, rather than individual, social insurance or welfare rights.[64] That is, women within families under this regime are entitled to benefits *only* if they are able to prove the necessary relationships to a *male* who is himself entitled to benefits.[65] Following the economic and social crisis, and the corresponding failure of the welfare state, more than half of Greek families receive over half of their income from a woman's income.[66] While the fact that 30.9% of employed Greek wives work in temporary positions may remain somewhat problematic, it is still remarkable that a society that has previously been so fundamentally male-dominated in absolutely all aspects of life has seen an almost instantaneous shift in gender dynamics and roles, at least within the context of labour statistics and relations.[67] As such, the average Greek woman now contributes a majority of her family's income, with 45.5% of Greek women providing *more* than 80% of their family's income.[68] Of course, while the increased role played by women both in their family's finances and in the workplace is a considerable achievement standing alone, it must be acknowledged that the increased role played by women has been engendered, at least in part, by the failure of the welfare state to provide certain benefits.[69]

The Elephant in the Room: Taxation in Greece

Before introducing the relevance of tax policy to the welfare state in Greece, it is worth forewarning that tax evasion in Greece has often been overstated as being a sole factor behind Greece's financial problems in the 2010s.[70] While this section will indeed cover the implications of tax evasion in Greece and revenues lost from unrecovered taxes, it should be noted that research has separately argued that *inequality*, rather than corruption or tax evasion, was a "root cause of the…crisis."[71] Indeed, even in an article from United States media declaring that Greece has "Too Many Tax Cheats," reporters found that those with higher incomes are significantly more likely to evade paying their taxes.[72] According to Costas Bakouris of Transparency International, while the self-employed—

[63]Livaditi & Petmesidou (2018).
[64]Ibid.
[65]Ibid.
[66]Aspridis, Strolias, Vasiliadsis & Kyriakou (2014) at 173-74.
[67]Ibid.
[68]Ibid.
[69]See, e.g., Hacker (2008) at 34. Hacker describes the shifting of risk as an ideological shift. That is, whereas formerly the promise of the welfare state or of one's government may have been "all of us are watching out for you, when things go back," once risk has been properly shifted away from the welfare state or the government, the promise to the population is simply that "you are on your own." As such, the issue of increased participation in certain domains particularly by women in Greece cannot be taken alone to an increase in the rights held by women.
[70]See, e.g., Phillips (2015); Westervelt (2010).
[71]Kramer (2015).
[72]Westervelt (2010).

tradespeople, taxi drivers, etc.—are found to regularly evade tax payments, "the biggest tax cheats come from high-paid, white-collar professions," including doctors, lawyers, architects, and engineers.[73] Their approach, Bakouris explains, is simply *not to provide receipts* unless they are asked, allowing some of the country's highest earners to minimize their reported income, leading to a lowered tax burden to the national government.[74]

Nonetheless, recognizing the country's failure to effectively recoup tax payments from liable citizens, in the 2000s, researchers Manos Matsaganis and Maria Flevotomou determined that income across the country had been underreported by as much as 10%.[75] The under-declaration of incomes by just 10% resulted in a 26% shortfall in tax revenues.[76] For a welfare state that necessarily depends upon taxation for its funding, such a shortfall would be expected to have a significant impact on the welfare state's ability to deliver its promised benefits. Separately, though, consider the fact that even this research further supports the notion that *inequality*, and not tax evasion or corruption, was the main culprit leading to Greece's financial woes of the 2000s. In fact, Matsaganis and Flevotomou's research explains that, while the *average* rate of underreporting was surveyed at approximately 10% across all income levels, it was the richest decile—and, much more specifically, the top 1% and top 0.1%—who were responsible for the largest differences between surveyed income and tax reported income.[77] As such, given the progressive tax scheme in Greece, while medium-low income earners' wages were underreported in line with the national average of 10%, it was the richest decile's underreporting of close to 15% that constitutes the majority of the 26% shortfall in realised tax revenues. To reach the same conclusion from a different direction, this research actually suggests that, even while underreporting their incomes by around 10%, medium and low income earners provide for an outsized proportion of tax revenues, when compared proportionally with higher income earners, who, given the progressive tax scheme in place, contribute proportionally less than their poorer Greek counterparts in virtue of reporting far less of their taxable income. While Matsaganis and Flevotomou report that, using income statements from 2005, the self-employed and those working agricultural or farming jobs are the most likely to under-report their incomes in tax returns, it simply cannot be accepted as true that unrealised tax revenues traceable to the self-employed and farmers are one of the sole causes of the crisis of the 2010s.[78]

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[73]Ibid.

[74]Ibid. See also the subsection entitled "The welfare state during the 2000s" on inequality between the country's top and worst earners.

[75]Matsaganis & Flevotomou (2010).

[76]Ibid. at iii.

[77]Ibid. at 20.

[78]Matsaganis & Flevotomou (2010) at 19. This is due to the fact that the country's tax system appears to already have been over-reliant upon medium and low-income earners prior to the crisis. The point to be made is that if a 10% underreporting of relatively low-income earners' wages causes a 26% reduction in collected tax revenues, the country's tax system is clearly disproportionally dependent upon taxes from these demographics and *not* from the country's highest earners. *See* World Inequality Database.

This idea is bolstered by the drama, predominately in the first half of the 2010s, surrounding the Lagarde List. This List contains the information of thousands of individuals who have moved accounts and monies outside of Greek banks and into Swiss or German banks in an attempt to evade tax liabilities in Greece.[79] Initially, as the crisis was escalating, the prospect of being able to recoup taxes owed by individuals holding secret offshore accounts was extremely appealing. Close to a decade later, those optimistic prospects have entirely faded, and the statute of limitations for prosecuting these individuals in Greek courts has now expired.[80] Simply put, without any high-profile tax evasion cases for the last decade and with the courts themselves often taking up to ten years to fully adjudicate cases related to tax evasion,[81] the Greek system of tax *enforcement* must be accepted as being underprepared to provide for services contingent upon taxation—namely, the welfare state.

Finally, and tying together the ideas of taxation and inequality once more, consider reports of the impact of higher taxes and increased enforcement, following the imposition of austerity measures in Greece.[82] As an example, restaurant owner Charalampos Bonatsos from Athens shared in mid-2018 how increased tax liability resulted in him having to fire half his staff and to further reduce any remaining employees' wages.[83] Encapsulating many Greeks' discontent with the SYRIZA government following the July 2015 referendum, Bonatsos explains that, for the Greek government, "[a]ll that matters is reaching the bailout goals. No one cares whether doing business is possible with this policy."[84] As wealth inequality continues to widen,[85] low and middle earners have felt the brunt of new tax policies, which, *inter alia*, impose the following new tax rates: 29% on corporate income; 15% on dividends; 24% on VAT; 45% on income tax for the highest bracket; extra 10% solidarity levies, related to improving the country's financial position; and, 27% social security levies for employers and employees. Describing those tax rates alone, one would expect that the tax system being described belongs to an extremely egalitarian, redistributive scheme, perhaps from one of Greece's Northern European neighbours. Indeed, Professor George Pagoulatos of Athens University of Economics and Business concludes just that: "Greece resembles Scandinavian-style taxation, but its welfare state has nothing to compare to theirs: You don't get anything in return."[86]

[79]Greece Gives Up Chasing Lagarde List, Borjans Tax Cheats (2019). To connect this argument to Mastaganis and Flevotomou's research from the previous paragraph, it should be plain to see that those appearing on the Lagarde List are, of course, those from the richest decile of Greek income earners.
[80]Ibid.
[81]Ibid.
[82]Stamouli (2018).
[83]Ibid.
[84]Ibid.
[85]See the subsection entitled "The welfare state during the 2000s" on inequality between the country's top and worst earners.
[86]Stamouli (2018).

Greece's Welfare State as Consolidation State

The intent in this section is to connect the factual history of both Greece's politics and its experiences throughout the economic and social crisis to conclude that, regardless of the incumbent political party, their tenacity, or their support, Greece's national government was and still is required by the Troika to maintain a "consolidation state" type of welfare state. In describing the transitions made between types of welfare states over time, Streeck introduces three eras, or kinds, of welfare states: the classical tax state, the debt state, and the consolidation state.[87] While picking any specific point in time as the moment where fiscal policy or the type of welfare state changed is sure to be artificial, it is nonetheless undeniable that some of the most fundamental changes to Greece's governance, fiscal policy, and principles underlying the welfare state occurred as Greece transitioned to become part of the Eurozone and, relatedly, to adopt the euro as its national currency.[88]

In devising the euro, Streeck and Mylonas both describe the nascent European Union as focused on organizing itself around ordoliberal principles[89] with the central goal being the protection of market freedom.[90] Without even invoking the more abstract issue of the interplay between Greek citizens' sovereignty and the imposition of austerity measures by the Troika,[91] it is possible to see how the EU's centralizing principles—of market freedom and of growth in these markets *without* direct local governmental intervention—could conflict with a Member State's own interest in the governance of its local national economy.[92] As the euro established itself, the EU and its institutions—the Troika, essentially—gained increased political power, further legitimizing the centralizing principles of liberal fiscal policy.[93] Streeck further describes actual implemented fiscal policies that demonstrate the liberal ideology that Member States' governments must adhere to;

[87]See generally Streeck (2015). While the actual process of transitioning from tax state, to debt state, to consolidation state is interesting and worth its own analysis, the focus here is on the way in which external political forces engendered the transition from debt state to consolidation state, specifically for Greece.

[88]Mylonas (2019) at 76.

[89]Matsaganis & Flevotomou (2010). Ordoliberalism here refers specifically to the German ideology under which it is thought that it is the government's role to regulate markets such that actual realised market outcomes closely match theoretical outcomes in a perfectly competitive market. Of course, ordoliberalism requires that the government *provide* a perfectly competitive market, by prohibiting cartels and monopolies, but otherwise an ordoliberal government will mirror a classically liberal government in rejecting government involvement in activist monetary or fiscal policies. See Dullien & Guérot (2012). Note, finally, how both ordoliberalism and classical liberalism differ from *neo*liberalism, which, as is seen even in the case of Greece, *can* involve activist monetary or fiscal policies, only in the name of austerity and reduced spending. See, e.g., Streeck (2015) describing the way in which reforms related to employment, and monetary and fiscal policy more generally, *have* been introduced under neoliberal governments, with these reforms limited to reducing spending or increasing austerity.

[90]Streeck (2016) at 161.

[91]See, e.g., Crespy & Ladi (2019).

[92]Mylonas (2019) at 76.

[93]Streeck (2016) at 113.

maintaining a state deficit of less than 3% and a public debt of less than 60% of the Member State's GDP are just two examples.[94]

Therefore, within the context of the EU, the Troika, and the organizing liberal fiscal policy underlying those institutions, the fiscal policy preferred by the Greek government or by its population can find—and has found[95]—itself subverted by EU interests. From the perspective of the EU's institutions, the proper role of any fiscal policy is, at its core, to protect the *single market*—that is, the EU's single market—from deleterious impacts originating out of individual Member States.[96] Indeed, grouping together and subsequently integrating each Member State's idiosyncratic form of capitalism was part of the very intention behind the creation of the EU.[97] As such, Mylonas' analysis results in the convincing conclusion that the euro operates as an instrument of policy rather than solely as a currency, providing the EU and its institutions with both the political power and the legitimacy to implement "European" fiscal policy, even within the properly elected national governments of its Member States.[98]

These theoretical connections can be further substantiated by reintroducing the factual history leading up to the national referendum of July 2015. Albeit under the far more centrist PASOK party, Greece's tortured history in conducting referenda related to European fiscal policy begins with Prime Minister Papandreou's bailout referendum, called in 2011.[99] Undeniable at the time was the connection between EU-imposed bailout conditions and PASOK's introduction of severe and seemingly continuous cuts to the welfare state.[100] As such, to summarise the context of the referendum succinctly, 2011's referendum proposed to Greek citizens a choice between the prioritisation of their rights to the benefits of the welfare state and their rights attributable to European identity, citizenship, participation, and financial protection. What the 2011 referendum demonstrates is the accuracy of Mylonas' and Streeck's arguments that the EU's centralizing principle demands that it protects what it considers the *single* market. To reiterate from earlier, Papandreou's announced referendum resulted in pressure exerted by EU elites.[101] By premising the delivery of bailout funds upon a "swift yes vote in the referendum," prominent members of the EU all too clearly demonstrated the way in which the EU seeks to integrate Member States' varying conceptions of capitalism to better fit its ordoliberal fiscal ideology.[102]

When SYRIZA came to power in 2015, the party emerged with the most advanced political opposition yet seen to the EU's imposition of its ordoliberal

[94]Ibid. at 130.
[95]See generally Varoufakis (2017) involving former Finance Minister of Greece's combative meetings with members of these EU institutions wherein he describes the ways in which Greek national and political ideology vastly differed from that of the EU, with Greek interests ultimately falling to EU interests.
[96]Mylonas (2019) at 76.
[97]Ibid.
[98]Ibid.
[99]Vogel (2011).
[100]Kyriakidou (2011).
[101]Treanor et al. (2011).
[102]Ibid.

organizing principles.[103] More than vaguely promising to reject austerity, SYRIZA's promises leading up to their successful election demonstrated an awareness of Greek citizens' reliance upon the welfare state. Specifically, part of SYRIZA's "Thessaloniki Programme" of reforms was a promise to "[r]ebuild[] the welfare state, restoring the rule of law and creating a meritocratic state."[104] Mentioned as part of the same plan are promises to "[g]radually restor[e] salaries and pensions so as to increase consumption and demand."[105] Here, SYRIZA's promise is intended not solely to increase salaries and pensions, but is further intended to impact the employment market so as to affect demand for certain positions. As such, SYRIZA's approach to expanding the welfare state, at least as presented in the Thessaloniki Programme, appears consistent with Julian Le Grand's choice and competition approach to the disbursement of public services.[106] Namely, Le Grand argues that "models that rely significantly upon user choice coupled with provider competition generally offer a better structure of incentives to providers…and, as a result, are more likely to deliver high-quality services efficiently, equitably, and in a responsive fashion."[107] Applied to SYRIZA's promises, the Thessaloniki Programme is cognizant of the relationship between improved salaries and pensions, as supported by the welfare state, and subsequent increased demand for those positions offering improved salaries and pensions. Therefore, under Le Grand's theory, increasing salaries and pensions can engender a cycle wherein improved wages and benefits increase interest in those positions, which in turn increases competition for those positions and impacts *other* employers' decisions on whether to match or better the improved conditions offered elsewhere. All this is to say that, while outwardly depicting themselves as a 'far-left' political party, SYRIZA's strongest proposals related to the refusal of austerity can nonetheless be squared with capitalist-oriented or even market-liberalist ideologies.

The relatively modest and apolitical conclusion to be drawn from this section of analysis is simply that Greek political will or ideology could not overcome that of the EU or the Troika. Whereas at least part of the blame for failing to bring the 2011 referendum could fairly be squared at PASOK, a party that was severely internally divided as to its stance toward the EU by the time of the proposed referendum,[108] it is difficult to treat SYRIZA as similarly internally divided in 2015. At least ostensibly, SYRIZA appeared to understand what the austerity measures had meant for Greeks since their introduction in 2010: namely, the SYRIZA slogan, "No to subjugation, No to the new occupation," aptly characterises how Greeks thought of the imposition of austerity by the EU.[109]

Leading up to the 2015 referendum, European politicians and elites acted substantially identically to the lead up to the 2011 referendum. Again indicating an

[103]Kouvelakis (2016).
[104]SYRIZA (2014).
[105]SYRIZA (2014).
[106]Le Grand (2007) at 39-62.
[107]Le Grand (2007) at 41.
[108]Erlanger & Donadio (2011).
[109]Casanas Adam, Kagiaros & Tierney (2018) at 261-270.

ardent commitment to the idea of a single European market, former President of the European Commission Jean Claude Juncker stressed that a Greek referendum would have consequences far beyond the interests of Greek constituents.[110] For Juncker, and other prominent critics within the EU, regardless of what Greeks sought to gain from their political mobilisation, their motivations had no bearing on the fact that such a local referendum was seen as impermissibly "self-interested" when compared with the ordoliberal and single-market interests of the EU itself.[111] Indeed, failing to so much as credit Greeks' demands for better protections within their welfare state, Juncker instead reduced the entire referendum down to a manoeuvre motivated by "populism and tactical gamesmanship."[112] At the time Juncker was exerting pressure on Greek voters to accept austerity and to condemn their welfare state, Greece was observing an unprecedented increase in suicides, as mental health plummeted between 2010 and 2015.[113] While remaining as apolitical as possible, this is only to show how deep and unfaltering other leaders' commitments to the EU's centralizing principles are, to the extent that theories of and approaches to fiscal policy dominate over the interests of a nation's voters in preserving and expanding their welfare state.

Going even further than Juncker, other European leaders responded to the 2015 referendum by imposing ultimata upon the country's government and people: essentially, either accept austerity or leave the EU. For example, in France, former President François Hollande inserted himself into Greek domestic affairs by characterizing the referendum as being "about whether the Greeks want to stay in the Eurozone or take the risk of leaving."[114] Italian Prime Minister Renzi stated that the referendum was not some political battle between the European Commission and SYRIZA's Tsipras but was rather a blunt question of "the euro versus the drachma."[115] Again, he concludes his characterisation with a veiled threat to the Greek constituents: "This is the choice," with the connotation that a rejection of the euro in favour of the former Greek currency would only further damage Greek financial and economic health.[116]

Conclusion

Ultimately, what followed the 2015 referendum was utter anti-climax. From the perspective of SYRIZA supporters eager to reclaim control and agency over their welfare state, a turnout of 62.5%, with the 'No' vote claiming 61.31% of all

[110]European Commiossion Press Release Database (2015).
[111]Ibid.
[112]Ibid.
[113]Kitsantonis (2019).
[114]Elliot et al (2015).
[115]Ibid. The "drachma" (δραχμή in Greek) is the form of currency used prior to the adoption of the euro. This comment by Prime Minister Renzi is made even more ironic by Italy's own tortured experiences in negotiating relief with the EU, particularly toward the end of the 2010s. See, e.g., Scalia (2019).
[116]Elliot et al (2015).

votes, should have represented an extremely successful campaign.[117] Instead, subject to the aforementioned pressures and the reality that the EU and its institutions would not succumb to one country's rejection of ordoliberalism, Tsipras and SYRIZA capitulated to the Troika, with new austerity measures approved in the Greek parliament as soon as July 16, 2015.[118] Then, just a month later, and still with a resounding victory in the referendum only a handful of weeks prior, August 2015 saw additional bailout measures approved by the Troika in exchange for, specifically, the following promises to gut the welfare state: [119]

1. Increases to VAT, impacting all Greeks but affecting those with lower incomes more significantly;
2. Cuts to the entire national pension system, to "improve long-term sustainability";
3. Stripping unions and labour movements of their effectiveness by 'modernizing' collective bargaining and industrial action, to align the Greek approach to labour with what is required by "European best practices";
4. Privatizing formerly public or government enterprises, resulting in the reduction of government pensions and benefits;
5. Selling off as many "valuable Greek assets" as possible so as to "monetize the assets through privatisation and other means";
6. Seemingly in response to the rise of an impermissibly leftist party like SYRIZA, the "de-politicizing [of] the Greek administration";
7. With regards to any rights to welfare or other benefits that were expanded prior to February 2015, "amending legislations" that conflict with EU demands.

What the outcomes of both the 2011 and the 2015 referenda demonstrate is the way in which the EU's centralizing principles dominate over the local interests of its Member States. While the lesson after the failure of 2011 may, legitimately, have been that any national government bringing a challenge to the EU's fundamental ideological commitments must do so as an organised, undivided party, the lesson after the failure of 2015 may be less optimistic or instructive for future movements. Rather, what the failure of 2015 appears to suggest is that, at least as far as fiscal policy balanced against a nation's interest in its own welfare state is concerned, the EU is untroubled by demanding that a Member State abandon its interest in its own welfare state if to abandon such an interest would work toward bringing the Member State in conformity with the EU's preferred fiscal ideology.

[117] Arnett, Sedghi, Galastidas & Clarke (2015).
[118] Council on Foreign Relations (2018).
[119] Euro Summit Statement from Brussels (2015).

References

Arnett, G., Sedghi, A. Galatsidas, A. & S. Clarke (2015). 'Greek referendum: full results" in *The Guardian* of 6 July. https://www.theguardian.com/world/ng-interactive/2015/jul/05/live-results-greek-referendum

Aspridis, G., Sdrolias, L., Vasiliadis, L. & D. Kyriakou (2014). 'Greece and Social Impacts under Economic Crisis: An Example to Avoid?' in *Academic Journal of Interdisciplinary Studies*, 3(3):171-176.

Basta, M., Vgontzas, A, Kastanaki, A., Michalodimitrakis, M., Kanaki, K., Koutra, K., Anastasaki, M. & P. Simos (2018). 'Suicide rates in Crete, Greece during the economic crisis: the effect of age, gender, unemployment and mental health service provision' in *BMC Psychiatry* 18:356-363. DOI: 10.1186/s12888-018-1931-4

Bouloutza, P. (2018). 'Greece's population shrinking, aging' in *Ekathimerini*.com (30 September). https://www.ekathimerini.com/233090/article/ekathimerini/news/greeces-population-shrinking-aging

Carpenter, M. (2003). 'On the Edge: The Fate of Progressive Modernization in Greek Health Policy' in *Int'l Pol. Sci. Rev*. 24(2):257-272.

Casanas Adam, E., Kagiaros, D. & S. Tierney (2018). 'Democracy in Question? Direct Democracy in the European Union' in *European Constitutional Law Review* 14(2):261-282.

Chryssogelos, A.S. (2015). 'Foreign policy change in a polarized two-party system: Greece and Turkey's EU candidacy' in *Southeast European and Black Sea Studies* 15(1):19-36. DOI: 10.1080/14683857.2014.1002293

Council on Foreign Relations (2018). 'Greece's Debt 1974-2018' at https://www.cfr.org/timeline/greeces-debt-crisis-timeline

Crespy, A. & S. Ladi (2019). 'In the name of 'the people'? Popular Sovereignty and the 2015 Greek referendum' in *Journal of European Integration* 41:871-885.

Dixon, T., Hawkins, S., Juan-Torres, M. & A. Kimaram (2019). 'Attitudes Towards National Identity, Immigration, and Refugees in Greece', *moreincommon.com* 0535+More+In+Common+Greece+Report_FINAL-4_web_lr.pdf

Dullien, S. & U. Guérot (2012). 'The long shadow of ordoliberalism: Germany's approach to the euro crisis' in Eur. Council on Foreign Relations ECFR/49. https://www.ecfr.eu/article/commentary_the_long_shadow_of_ordoliberalism

Elliot, L., et al. (2015). *Europe's big guns warn Greek voters that a no vote means euro exit*, The Guardian (Jun. 30, 2015) www.theguardian.com/business/2015/jun/29/greek-crisis-referendum-eurozone-vote-germany-france-italy

Erlanger, S. & R. Donadio (2011). 'Greek Premier Pledges Vote in December on Debt Deal' in *N.Y. Times* of 2 November. https://www.nytimes.com/2011/11/03/world/europe/greek-cabinet-backs-call-for-referendum-on-debt-crisis.html

Esping-Andersen, G. (2014). 'Three Worlds of Welfare Capitalism' in F. G. Castles, I. K. Naumann & Ch. Pierson (eds.*) The Welfare State Reader* 3rd ed. pp. 136-150. Cambridge, UK: Polity press.

European Commiossion Press Release Database (2015). Transcript of President Jean-Claude Juncker's press conference on Greece, 29 June 2015, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_15_5274

Euro Summit Statement from Brussels (2015), 12 July 2015 (SN 4070/15), https://www.consilium.europa.eu/media/20353/20150712-eurosummit-statement-greece.pdf

European Commission (2019). 'Employment, Social Affairs & Inclusion' at https://ec.europa.eu/social/main.jsp?catId=629&langId=en&callId=548&furtherCalls=yes

Greece Gives Up Chasing Lagarde List, Borjans Tax Cheats (2019) in *National Herald* of 9 June. https://www.thenationalherald.com/archive_politics/arthro/greece_gives_up_chasing_lagarde_list_borjans_tax_cheats-53688/

Hacker, J.S. (2008). *The Great Risk Shift: The New Economic Insecurity and the Decline of the American Dream*, 2nd ed. New York, NY: Oxford University Press.

Hellenic Republic Ministry of Labor and Social Affairs, *Information on the KEA,* (Ελληνική Δημοκρατία Υπουργείο Εργασίας και Κοινωνικών Υποθέσεων, *Πληροφορίες για το ΚΕΑ)* [In Greek]). https://keaprogram.gr/pubnr/Home/Contact

Kaloudis, G. (2000). 'Transitional Democratic Politics in Greece' in *International Journal on World Peace* 17(1); 35-59.

Kalyvas, A. (2000). 'Schmitt and the Categories of the Political: Carl Schmitt and the Three Moments of Democracy' in *Cardozo L. Rev*. 21:1525-1534.

Kamekis, A. & S.I. Tzagkarakis (2017). 'Social consequences of welfare state deregulation in Greece' at *Hellenic Observatory-LSE 7th PhD Symposium, 4-5 June 2015, London School of Economics and Political Science (LSE)* http://www.lse.ac.uk/europeanInstitute/research/hellenicObservatory/Events/HO%20PhD%20Symposia/7th-Symposium/Documents/Papers/Tzagarakis%20Stelios%20-%20Kamekis%20Apostolos.pdf

Kitsantonis, N. (2019). 'Greece, 10 Years Into Economic Crisis, Counts the Cost to Mental Health' in *N.Y. Times* of 3 February. https://www.nytimes.com/2019/02/03/world/europe/greece-economy-mental-health.html

Kouvelakis, S. (2016). 'Syriza's Rise and Fall' in *New Left Rev*. 97:45-70.

Kraatz, S. & D, Dessimirova (2012). Unemployment and Poverty: Greece and Other (Post-)Programme Countries 1, 2 in *European Parliament, Employment and Social Affairs Briefing* of 22 May. https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/602051/IPOL_BRI(2017)602051_EN.pdf

Kramer, S. (2015). 'Inequality as cause of the Greek Crisis' in Int'l Association For Political Science Students. https://www.iapss.org/2015/10/13/inequality-as-cause-of-the-greek-crisis

Kyriakidou, D. (2011). 'Newsmaker: Greece's Papandreou, Socialist scion, felled by debt' in *Reuters* of 6 November). https://www.reuters.com/article/us-greece-papandreou/newsmaker-greeces-papandreou-socialist-scion-felled-by-debt-idUSTRE7A060620111106

Le Grand, J.(2007). *The Other Invisible Hand: Delivering Public Services through Choice and Competition.* Princeton, NJ: Princeton University Press.

Livaditi, I. & M. Petmesidou (2018). 'Rethinking Greece: Maria Petmesidou on the past and the future of the Greek welfare state' in *Greek News Agenda*. https://greeknewsagenda.gr/index.php/interviews/rethinking-greece/6616-petmesidou

Maltezou, R. (2012). 'Greek pensioner kills himself outside parliament' in *Reuters* of 4 April. https://www.reuters.com/article/us-greece-suicide/greek-pensioner-kills-himself-outside-parliament-idUSBRE8330OB20120404

Matsaganis, M. (2011). 'The welfare state and the crisis: the case in Greece' in *Journal of European Social Policy* 21(5):501-512.

Matsaganis, M. & M. Flevotomou (2010). 'Distributional Implications of Tax Evasion in Greece', LSE GreeSE Paper No 31 Hellenic Observatory Papers on Greece and Southeast Europe January 2010. http://eprints.lse.ac.uk/26074/1/GreeSE_No_31.pdf

Mexi, M.M. (2018). 'Greece' in Veronica Federico & Christian Lahusen (eds.) *Solidarity as a Public Virtue? Law and Public Policies in the European Union*, pp. 91-108. Baden-Baden: Nomos.

Mylonas, Y. (2019). *The "Greek Crisis" in Europe: Race, Class and Politics.* Leiden: Brill,

OECD (2013). *Pensions at a Glance 2013: Country Profiles — Greece*, https://www.oecd.org/els/public-pensions/PAG2013-profile-Greece.pdf

OECD (2017). *Pensions at a Glance 2017: Country Profiles — Greece*, https://www.oecd.org/els/public-pensions/PAG2017-country-profile-Greece.pdf

OECD (2019). *Youth unemployment rate*, https://data.oecd.org/unemp/youth-unemployment-rate.htm

Phillips, M. (2015). 'Yes, Greece has a serious tax evasion problem' in *Quartz* (1 July). https://qz.com/441393/yes-greece-has-a-serious-tax-evasion-problem/

Rodgers, D. (2018). 'The Uses and Abuses of "Neoliberalism", in *Dissent Magazine* (winter). https://www.dissentmagazine.org/article/uses-and-abuses-neoliberalism-debate

Scalia, E.L. (2019). *Sovereign Debt, "Austerity," and Socio-Economic Rights: Italy's 2019 Budget between EU Fiscal Rules and International Human Rights Law*, 28 Italian Y.B. of Int'l L. Online 135.

Stamouli, N. (2018). 'Taxation Strangles Greece's Growth Prospects' in *Wall Street Journal* of 26 July. https://www.wsj.com/articles/taxation-strangles-greeces-growth-prospects-1532597400

Streeck, W. (2015). 'The Rise of the European Consolidation State' (MPlfG Discussion Paper, No. 15/1. Max-Planck-Institut für Gesellschaftsforschung, Köln. https://www.econstor.eu/handle/10419/107091

Streeck, W. (2016). *How Will Capitalism End? Essays on a Failing System*, London: Verso.

SYRIZA (2014). 'The Thessaloniki Programme', available at http://www.syriza.gr/article/id/59907/SYRIZA---THE-THESSALONIKI-PROGRAMME.html

Tassopoulos, I.A. (1999). 'New Trends in Greek Contemporary Constitutional Theory: A Comment on the Interplay Between Reason and Will' in *Duke J. Comp. & Int'l L.* 10: 223-248.

Treanor, J. et al (2011). 'Greece given €8bn referendum warning by Merkel and Sarkozy' in *The Guardian* of 2 November. https://www.theguardian.com/business/2011/nov/02/greece

Van Kersbergen, K. & B. Vis (2013). *Comparative Welfare State Politics: Development, Opportunities, and Reform*, chapter 3: *The Logics of the Welfare State: Why Did We Need a Welfare State in the First Place and How Did We Get It?* (pp. 31-52). New York, NY: Cambridge University Press.

Varoufakis, Y. (2017). *Adults in the Room: My Battle with the European and American Deep Establishment*. New York, NY: Farrar, Straus and Giroux.

Varoufakis, Y. (interviewed by G. Souvlis) (2020). 'Syriza Was a Bigger Blow to the Left Than Thatcher' in Jacobin (9 March). https://www.yanisvaroufakis.eu/2020/03/11/yanis-varoufakis-syriza-was-a-bigger-blow-to-the-left-than-thatcher-jacobin

Vasilopoulou, S. & D. Halikiopoulou (2015). 'Greek Politics: Economic Crisis or Crisis of Democracy?' in *World Affairs* 178(3):13-18.

Vogel, T. (2011). 'Papandreou calls off referendum' in *Politico* of 11 March., https://www.politico.eu/article/papandreou-calls-off-referendum/

Westervelt, E. (2010). 'Greece's Bottom Line: Too Many Tax Cheats' in *NPR* of 25 March. https://qz.com/441393/yes-greece-has-a-serious-tax-evasion-problem/

World Inequality Database, *Income inequality, Greece, 1980-2016*, World Ineq. Database. https://wid.world/country/greece/

Žižek, S. (2015). 'When the Blind are Leading the Blind Democracy is the Victim' *in* Žižek, S. & H. Srećko (eds.) *What Does Europe Want? The Union and Its Discontents,* pp. 21- 25. New York, NY: Columbia University Press.

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Jekyll, Hyde and the Victorian Construction of Criminal Working-Class Masculinities

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Violent crime has long been associated with ideas of insane and/or intrinsically dangerous masculinities in the global north. Victorian Gothic literature, generated during a period when positivist discourse around dangerousness, madness and crime was gaining in authority and coherence, provides particularly useful insights into the narratives underpinning these associations. This paper focuses on the Strange Case of Dr Jekyll and Mr Hyde (1886), which, being a work of cautionary horror written during an era of powerful cultural fascination with violent urban crime is particularly rich in such discourse. A range of methodological tools borrowed from literary criticism, legal studies and discourse analysis turn Stevenson's novella into a penetrative lens to examine the anxieties of 19th century medico-legal thinking. The many layers of the Jekyll-Hyde binary are analysed along a series of other relevant binaries that characterise many Victorian narratives around crime: reason against insanity, normativity against deviance, and respectable bourgeois masculinities against uncontrollable working-class masculinities, whose savage sexuality poses a threat to social order. Contextualised historically as part of the wider fin de siècle preoccupation with degeneration theory, as well as legally, having followed a long series of legislative and policing moves to control the disconcerting underclasses amassing in urban spaces, the Strange Case of Dr Jekyll and Mr Hyde arises as a uniquely informative testament of the profound contradictions of a terrified post-Industrial Revolution Europe – what Moretti (1982) would call a dialectic of fear. Narratives such as the ones unfurling in the Strange Case are not, however, taken as mere reflections of the activities and anxieties of the Victorian medico-legal apparatus. Rather, this paper finds that the tensions permeating the novella constitute elements of a wider narrative construct whose main achievement was the validation and naturalisation of a deeply rigid social taxonomy, justifying the exertion of social and legal control upon populations inscribed as monstrous and Other.

Keywords: *Law and Literature, Criminology, Victorian Studies, Masculinities, Legal Psychiatry*

Introduction

The Law and Literature Movement often focuses on two discrete elements of the interdisciplinary connection between law and literature, namely law in

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literature and law as literature; and *The Strange Case of Dr Jekyll and Mr Hyde*[1] does indeed delve into subjects of legal interest in even the narrowest sense, making for a tempting text. Not only does its first sentence consist of the detailed description of a practicing lawyer, it grapples with areas of enduring legal controversy, such as the tensions between constructions of criminal responsibility and moral evaluations[2], providing fertile soil for a study of issues of law as depicted in fiction.

However, the present paper proposes a slightly different approach, looking not so much at the place of law in Stevenson's novella, but at *Jekyll and Hyde* as a morsel of a wider narrative construct whose role was to legitimise new or evolving forms of social and legal control. To that end, the novella will be used as a penetrative lens into the emerging medico-legal and criminological narratives that influenced it and that it, in turn, contributed to, to reveal how Victorian criminal law was not formulated to be applied to pre-existing discursive subjects, but rather accompanied the process of constructing these subjects, and criminalizing the tensions of the Victorian socio-economic order in need of regulation.

If one considers Pashukanis' understanding of law not as an autonomous system of meanings or arbiter of justice, but rather, much like the aforementioned discourse that accompanies it, a largely derivative superstructure protecting and validating processes of state-making and accumulation of capital[3], then the Victorian era emerges as a particularly enlightening period to turn one's attention to. To clarify, such a viewpoint does not amount to espousing a form of crude legal instrumentalism, whereby law is to be perceived as no more than a tool of dominant social actors. Rather, law's own internal dynamics are indeed recognised; but so is its function as a mechanism that ultimately serves to operate a variety of transformations required for the smooth functioning of the capitalist system of production and the state, such as the transformation of human beings into right- and responsibility-bearing citizens[4]. To this, an additional function must be adjoined: the absorption, reproduction and indeed naturalisation of the hegemonic cultural narratives that permit in turn the reproduction of the socio-economic order, in a ceaseless reflexive relationship. Put in Althusserian terms, law is not merely a repressive state apparatus, but also an ideological one[5]. Therefore, in the wake of the Industrial Revolution, when Victorian England saw the makings of much of what evolved into contemporary state systems and socio-economic structures, it saw also the first blossoming of much of the discourse, legal and otherwise, that arose to accompany and legitimise them.

Stevenson was no stranger to such discourse. Though he did not ultimately follow a legal profession, he studied law for several years and passed the Scottish Bar in 1875, largely as a compromise with a traditional Presbyterian family that disapproved of his bohemian sensitivities. His personal familiarity with emerging

[1]Stevenson (1886), hereafter *Jekyll and Hyde*. Furthermore, all quotes without citation will hereafter be quotes from this text.
[2]Lacey (2010).
[3]Pashukanis (1924).
[4]Balbus (1977).
[5]Althusser (1970).

criminological and medico-legal narratives that centre on fears of a so-called criminal underclass and concerns around degeneration permeates *Jekyll and Hyde*, and his preoccupation with duality is tightly tied to the binaries that underpin the validity of contemporary criminal law.

The idea of duality serves as the primary framework through which *Jekyll and Hyde* not only examines, but also likens and connects, numerous pairs of oppositional concepts: good and evil in a more abstract sense, and perhaps more pertinently normativity and deviance/degeneration, bourgeois society and the criminal underclass, permissible masculinity and impermissible masculinity, reason and insanity, innocence and guilt. The boundaries of these binaries in *Jekyll and Hyde* present striking parallels with medico-legal discourse and, in certain cases, legislation contemporary to Stevenson. Yet, it would be too simplistic to presume them merely generated by legal discourse. More so, perhaps, these binaries serve as aspects of the complicated and sometimes contradictory ideological grounds upon which Victorian criminal law claimed some of its legitimacy. They spring forth from a potent admixture between some form of sensitive humanism, with an increasingly anxious and at times malicious need for more sophisticated social control, a desire for a form of 'public hygiene' in the backdrop of a *fin de siècle* obsession with 'criminality as a constant menace to the social body'[6]. Under such a light, *Jekyll and Hyde* emerges not only a text about duality, but a narrative about taxonomy and division, the necessity of veiling them with the authority of law, and the terrible dangers of daring to disrupt them.

External Divisions, Internal Divisions

Law requires recipients of law: human beings abstracted, made into legal subjects. One of the manners through which human beings are in such a way transformed, is, according to Foucault, division. 'The subject is either divided inside him or divided from others. This process objectivises him. Examples are the mad and the sane, the sick and the healthy, the criminals and the "good boys."'[7] In *Jekyll and Hyde*, the process of division is front and centre. A first reading seems to show Jekyll, through scientific progress in the advent of modernity, split into a subject who is sane, respectable, lawful, bourgeois and one who is mad, criminal, uncouth, horrifying. The vast majority of theatrical and cinematic adaptations, too, seem to follow this schema of Jekyll as divided from Hyde, presenting a narrative of conflict between two discrete subjects, and unsurprisingly, this is also the reading that has been imprinted upon the collective cultural consciousness[8]. Though some have claimed that true internal division is not only impossible, but also unintelligible[9], its symbolism and its fiction remain ever alluring.

With a closer reading, however, Foucault's distinction between internal division and division from others fades; the contradictions of the wider system, the

[6]Foucault (1978).
[7]Foucault (1982).
[8]Schwarz (2013).
[9]Olson (2003).

taxonomies it creates to process them, the socio-economic and discursive divisions of Victorian England, are active in their entirety within the person, internalised on a molar level inside Jekyll. Jekyll is divided from Hyde, but Hyde is simultaneously internal to Jekyll, a dialectic relationship where the further a system attempts to expel a structural contradiction, the deeper it finds it burrowed anew.

The text is clear in that Jekyll is not merely one side of the Jekyll-Hyde binary; he also in fact contains it. Even before his scientific experiment, Jekyll confesses readily to some of the vices that would come to characterise Hyde ('I concealed my pleasures', 'I stood already committed to a profound duplicity of life', 'such irregularities I was guilty of', 'so profound a double-dealer', 'lower elements of my soul'), and when Hyde is created from within him, it is not a transformation that he is passively subjected to, but rather a choice he repeats with clear agency ('my new power tempted me') in order to conceal aspects of himself and desires that would not be expressed lest he would 'assume, like a thick cloak, that [the body] of Edward Hyde'. Though in certain passages, Jekyll tries to distance himself from Hyde, to speak of him in third person, during the unguarded moments of penning a confession, he fully accepts that he, the gentleman, the doctor, the respectable man, is also Hyde, the criminal, the Other ("[i]nto the details of the infamy at which I thus connived (for even now I can scarcely grant that I committed it**)** I have no design of entering [...]", "gloating on my crime").

Furthermore, Jekyll as only Jekyll, as a single side of the binary, Jekyll as other-than-Hyde, seems to be as artificial a construct as Hyde himself. Not only does Jekyll readily admit that he is performing this respectable role very intentionally ('my imperious desire to carry my head high, and wear a more than commonly grave countenance before the public') and that he, in truth, feels alienated within it ('[e]ven at that time, I had not yet conquered my aversion to the dryness of a life of study'), but when the time for consequences seems nigh, he knowingly utilises the privilege of his Jekyll-skin as a hiding place ('Jekyll was now my city of refuge; let but Hyde peep for an instance, and the hands of all men would be raised to take and slay him').

This observation, that Jekyll is not just one side of the coin to be protected from the other, but rather he is both that and the very coin itself, can be applied more widely, to permit a less reductive reading of Victorian law and criminological discourse. Before preceding in that direction, however, a closer analysis and a brief contextualisation of some of the paired yet oppositional concepts symbolised by the Jekyll-Hyde binary is useful.

Facets of an Anxious Europe

Bourgeois Jekyll, Criminal Hyde

Simon notes that the narrative construction of a binary between civilised society and a dangerous, criminal underclass was an incredibly important process that offered new language, signs and archetypes for 19th century discourses

seeking to justify asymmetries in forms of legal, social or economic control[10]. It might, then, be useful to start with this particular incarnation of the Jekyll-Hyde binary: polite society in opposition to the criminal underclasses.

As shown in the previous section, Jekyll values being perceived as grave and accomplished in the public eye. He embodies, and furthermore desires to embody, a perfect representation of Victorian bourgeois masculinity; to occupy and safeguard the position of being 'well-known and highly considered'. His position in the highly class-divided society of *fin de siècle* London is made clear with an abundance of textual signs. The entrance to his house exudes 'a great air of wealth and comfort', his prestigious profession is repeatedly mentioned, he is described as living alone in a large property and comfortably able to afford the services of servants, lawyers, and more. The very title of the novella, *The Strange Case of Dr Jekyll and Mr Hyde*, includes the appropriate titles in order to explicitly communicate that Hyde is just some man, while Jekyll is respectable as well as accomplished.

As Crossick remarks, Victorian language and the narratives and stereotypes it spun played a key role in the emergence of powerful socio-economic and legal taxonomies, and even simple words such as 'respectable' or ''sinister' or 'gentile' or 'vermin' became entangled in an extremely powerful web of implications about class, and consequently moral character, profession, sexuality, and more[11]. Jekyll as much as Hyde is constantly showered with such loaded language, and as such deeply defined by their socio-economic class. For example, Jekyll is described as having a 'good name', being 'pink of the properties', 'celebrated', known for 'charities', having an 'honourable and distinguished future' – and much more explicitly, being born to a 'large fortune'.

A particularly telling element of the profoundly classed ways these characters are constructed even down to their contextual minutiae is the geographic positioning of Hyde and his safehouse in the 'dismal quarter of Soho'. Soho, once a relatively aristocratic neighbourhood, had, by the latter half of the 19th century, come to represent the very kind of degeneration Hyde himself is written to embody. According to Ransome, 'by the mid-19th century, all respectable families had moved away also, and prostitutes, music halls and small theatres had moved in'[12], and Soho's bad name only grew from there. At the time of the novella's penning, it had gained a strong association with prostitution, immigration, debauchery and the much hated French community of London, made even worse by the 1854 cholera outbreak of Broad street, which was readily blamed on the neighbourhood's moral bankruptcy, painting it as a danger to the social body[13]. It is a secret, ominous back door that leads from Jekyll's respectable house into the 'sinister' blocks of the 'dingy neighbourhood' where Hyde takes refuge; an ominous reminder of the dangers that lurk once one wanders away from polite society.

[10]Simon (1993).
[11]Crossick (1991).
[12]Ransome (1907).
[13]Pinot (1991).

Opposing Jekyll's bourgeoisie, Hyde is not primarily characterised as merely working-class, however - but rather as intrinsically criminal. This conflation is very unsurprising.

Lazos, examining a wide array of sources including Colquhoun, Thomas Malthus, Mayhew and others, shows how thoroughly convinced Victorian society was of some sinister link between poverty, moral destitution, and dangerousness[14]. European cities in the 19th century seemed to shiver with the fear of a terrible, bubbling, murderous underclass, advancing like a disease, seemingly ready to rise up and strangle polite society[15]. The ill-fated Paris Commune (1871), but also events such as the Hyde Park Demonstration (1866) and the Black Monday (1886) in England did nothing to alleviate growing bourgeois anxieties, and the narrative construction of a frightening underclass that is intrinsically, by birth, murderous and debauched made its way to medicine, anthropology, politics and law. An idea that had been gaining traction as early as 1868, when Sir Edward Sullivan was decrying the rise of an antisocial class, criminal by nature and averse to 'honest work'[16], became a cornerstone of Victorian criminology[17]. In this discursive context did the theory of degeneration blossom, whereby this alleged criminal class is understood as subhuman; a literal evolutionary regression, an urban parasite[18].

This naturalisation of class difference as some form of anthropological destiny was inexorably linked to new forms of social and legal control. The inherent criminal character of the underclasses made it not simply justified, but imperative to develop effective forms of repression. In the words of Lombroso, '[t]his discovery should not make us more compassionate toward born criminals (as some claim), but rather should shield us from pity, for these beasts are members of not our species but the species of bloodthirsty beasts'[19]. And Hyde is, indeed, a beast. He is repeatedly described to cause immediate, incomprehensible revulsion ('I never saw a man I so disliked, and yet I scarce know why'). His undignified figure and monstrous face betray his predestined inclination for crime. Nevertheless, nowhere is socio-economic class expressed as a conflict between civilised society and biological degeneration more obviously inscribed upon Jekyll and Hyde than in the comparison of their hands, a symbol of class as old as time: 'The hand of Henry Jekyll […] was professional in shape and size: it was large, firm, white and comely. But the hand which I now saw […] was lean, corded, and knuckly, of a dusky pallor and thickly shaded with a swarthy growth of hair. It was the hand of Edward Hyde'.

It should also be observed than in the passage above, as in most Victorian discourse around degeneration and crime, racialisation often plays a key role – even in the comparison between supposedly white subjects. Hyde, just like Lombroso's criminal, is shorter, hairier, and duskier. Hyde is undoubtedly a white

[14]Lazos (2011).
[15]Ransome (1907).
[16]Sullivan (1868).
[17]Davie (2003).
[18]Lankaster (1880).
[19]Lombroso (1871).

man, but his class denies him access to the full privileges of whiteness, for the criminal underclasses are coded as somehow too savage, too primitive for such a thing[20]. It is in part this same fervent desire to deny the dangerous underclasses full access to whiteness, to underline the allegedly biological truth of their Otherness that led Lombroso to conclude that their atavistic degeneracy must surely be linked to some form of racial mixing[21].

To Moretti, this contrast, the dialectic between Jekyll and Hyde, is thus a perfect mirror of the dialectic between capital and wage-labour, where the capital creates and ever needs a wretched overabundance of urban labour force, and yet also fears it and seeks to push it away: '[i]t is the same curse that afflicts Jekyll: "to put your good heart at rest, I will tell you one thing: the moment I choose, I can be rid of Mr Hyde." And yet it is Hyde who will become master of his master's life. The fear aroused by the monster, in other words, is the fear of one who is afraid of having 'produced his own gravediggers.'[22]

However, this can seem like an oversimplification that overlooks a variety of subtler elements in the novella, such as the fact that Jekyll had always also been Hyde to begin with, even before the division was made flesh. For that reason, it is necessary to acknowledge Hyde's more flexible role. He is at once an internal sense of desire and alienation disrupting the bourgeois individual, he is the criminal underclass that is loathed but needed and even, in an odd way, romanticised by the idle classes, and he is also a construct that allows so-called civilised society to reject any responsibility for violence, crime and degeneracy, to re-sanctify itself[23], attributing all that fascinates it but makes it uncomfortable to a terrible Other infiltrating their spaces.

Even further, argues Arata, Hyde's figure also incorporates a disdain for the aristocratic upper classes of pre-industrial England, the feudal status quo that the rise of a capitalist mode of production had had to in part demolish and delegitimise; '[i]n considering degenerationism as a class discourse, however, we need to look up as well as down. Both Lombroso and Nordau argue that degeneration was as endemic to a decadent aristocracy as to a troglodytic proletariat. And indeed, Hyde can be read as a figure of leisured dissipation. While his impulsiveness and savagery, his violent temper, and his appearance all mark Hyde as lower class and atavistic, his vices are clearly those of a monied gentleman.'[24] Arata's point is fair, and in adding it to the tally, one can only conclude that, ultimately, Hyde is constructed as something of a large trench coat; a veil underneath which the many and often contradictory threats to the smooth functioning of class relationships at the age of modernity lurked, ready to pounce upon a fragile sense of normalcy, and a socio-legal order struggling to retain its footing in the *fin de siècle* crisis.

[20]Green (2002).
[21]Davie (2003).
[22]Moretti (1983).
[23]Walker (2004).
[24]Arata (1996).

Psychiatrisation

The Victorian fear of monstrously other criminals and the spread of the theory of degeneration, touched in the section above, also served as points of entry for psychiatry to gradually inject itself into discursive spaces previously dominated by law alone. As Foucault notes, this was not a push merely motivated by the imperialistic desire for expansion on behalf of psychiatric experts[25]. Rather, it was part of a more general transformation in the form and function of different systems of control, interweaving into the more modern form of a medico-legal apparatus. It signaled the advent of an era during which a wide swarthy of phenomena previously understood in moral, social, religious or other terms came to be psychiatrised, and medical discourse became a prime instrument for the exertion of legal and political power, as well as an important companion to the maturation of the carceral system; the so-called golden age of psychiatry[26].

With such a process under way, a new link came to be chained to the chain of associations between poverty, moral character and criminality; that of insanity, or perhaps less restrictively and more accurately, of behaviour broadly perceived as mentally abnormal. In this facet, too, Hyde embodies the narrative of the Victorian criminal very effectively – he is a form of madness, a state of mind not only opposed but offensive to the ideals of sanity, reason, civility and restraint. It is no wonder that Stevenson's novella has been the object of repeated analyses within a psychiatric (or at times psychoanalytic) framework, at times touted as a striking narrative of dissociative identity disorder, or bipolar disorder[27], or even substance addiction[28]. Hyde's Otherness is written in terms that are extremely receptive to medicalisation ('unexpressed deformity', 'like a madman', 'abnormal and misbegotten in the very essence', 'I could hear his teeth grate', 'ape-like fury', 'cried out like a rat', etc.).

This figure of a criminal whose sudden and violent evil is seemingly inexplicable, the figure of Hyde, occupied a particularly meaningful position in Victorian psychiatry. Though the newly emboldened discipline turned its attention and discursive power to all sorts of dangerous disruptors of the normative ideals of the Victorian bourgeoisie, such as dissatisfied women, now labelled hysteric, or homosexual men, constructed as mentally diseased, no other figure produced quite the cultural rapture as monomania, 'a crime that is nothing but insanity, an insanity that is nothing but crime'[29].

In the view of Foucault, this notion of a madness that can cause a sudden, incomprehensible, dangerous explosion of pure evil without warning signs was crucial and transformative[30]. It not only seemed to prove the precious contribution of psychiatry in protecting the social body, promoted the necessity of its participation in the judicial apparatus, and validated its often cruel methods, but

[25]Foucault (1978).
[26]Unsworth (1993).
[27]Dell'Osso & Ketter (2015).
[28]Altschuler (2000).
[29]During (1988).
[30]Foucault (1978).

also brought about new ways to think about criminal responsibility, pushing the idea that though some people might not be properly responsible for their actions, and be guilty as such, they might still be so intrinsically dangerous that they would need to be permanently removed from society, further severing the link between moral consideration and the cold, managerial hand of law[31]. The Trial of Lunatics Act and its conception of the so-called criminal lunatic[32] is, perhaps, the best expression of these transformations.

Though the cruder conceptions of this alleged illness started falling out of favour during the final third of the 19th century, the idea that rose to occupy monomania's empty throne, that of moral insanity, retained many of the same functions, furthering even the conflation of insanity and crime. Maudsley, whose influence during that era was immense, described the morally insane as such: 'The social fabric is held together by moral laws; but we have here a being who, by reason of his insensibility to them, is practically outlawed from the social domain'[33]. Though he is one of the most measured among his peers, and did also clarify that crime in and of itself should not be deemed a sufficient symptom to diagnose some form of mental malady[34], his definition of moral insanity as a non-conformity to dominant norms of right and wrong was so vague that it 'threatened to swallow up most of crime'[35]. And as insanity was reaching out to swallow crime, so, too, did notions of the criminal underclass bleed into notions of insanity or mental defectiveness. In Maudsley's eyes '[h]abitual criminals are a class of beings [...] of distinctly weak intellect [...] they abound among vagrants', and are characterised by an "inability to apply themselves to steady and systematic work', but, in addition to that, are 'a class of people who, congenitally destitute of moral sense, have not the sensibilities to feel'[36].

To physicians who espoused the theory of degeneration, moral insanity and other failures of reason were without question linked to the evolutionary regression of the underclasses and the evils of urban overcrowding. 'In the mental development of these degenerates, we meet the same irregularity as we have observed in their physical growth' observed Nordau, later underlining that these wretched underclasses seemed to be characterised by an 'inability to resist any impulse to a deed'[37].

Hyde is also written thus – as a creature of crazed impulse. It can be argued that Hyde fits right in with this narrative of monomania and the notion of an explosive, unreasonable evil unleashed upon civilised society, especially since the novella offers very little concrete motive for his murderous acts. Nevertheless, the fact that (as shown in section 1) Hyde is not merely the opposite of Jekyll, but rather the reflection of both external and internal divisions that Jekyll is made to navigate, offers more nuance. It is not in fact Hyde that is a mad monomaniac, but

[31]Foucault (1978).
[32]Trial of Lunatics Act 1883.
[33]Maudsley (1879).
[34]Ibid.
[35]Malatesti & McMillan (2010).
[36]Maudsley (1885).
[37]Nordau (1895).

rather he is Jekyll's madness, and in that he fits in perfectly with the newer, more refined concept of moral insanity. Jekyll, though he should know better, cannot resist his desire to break the rules of right and wrong in order to pursue his most base impulses, and, victim to this disease of his moral fibre brings disaster by tearing holes into the boundaries of class, civility and reason.

Utterson the lawyer, a voice of order and reason through the viewpoint of which much of the plot of *Jeykyll and Hyde* is revealed, in wondering what could possibly be ailing Jekyll so and force him to associate with vile underclassmen, observes that the doctor 'was wild when he was young; a long time ago to be sure; but in the law of God there is no statute of limitations. Ay, it must be that; the ghost of some old sin, the cancer of some concealed disgrace, punishment coming, pede claudo'. It is blackmail, seemingly, that the lawyer suspects. But in designating Hyde as a cancer, an illness bursting from inside out, brought about by moral weakness, Utterson's cautionary words resonate very strongly with *fin de siècle* anxiety around disintegrating hierarchies and failing morals. To that narrative, however, Stevenson, through Utterson, adds a further addendum: that, as will be analysed in section 3, this moral defect must be faced with punishment, and the authority of law.

Disruptive Sexuality, Disrupted Masculinity

As observed above, Victorian preoccupation with crime and the rise of an uncontrollable, beastly underclass was steeped in notions of morality. Predictably, discourse around moral character and class difference also touched upon, sometimes explicitly but more often implicitly, matters of sexuality and gender roles. Where there is moral panic, these usual suspects are never far.

In studying *Jekyll and Hyde*, one would be quick to note the curious absence of any major female character, and the complete sexlessness of Jekyll's life, not only unmarried despite his advancing age, but also unwilling to discuss or ruminate on any such matter. Though this is not entirely rare in Victorian horror fiction, it is not entirely common either, as much of it is suffused with if not directly sexual themes like Stoker's *Dracula*, then at least overtones of romantic melancholy and vague longing. Not so in *Jekyll and Hyde*, where the story seems to unfold between a small group of old boys, with the very few female presences, such as the cook or the girl that Hyde 'tramples', remaining entirely unnamed and relegated mostly to a role of passive reactions.

In the setting of 'dismal' Soho this rule is partially broken; women seem active and present. That fact, however, is mostly utilised as an additional sign of Soho's moral depravity and its lower-class character. Hyde's landlady, the only property-owning woman in the novella, is described as repulsive and seemingly evil. Soho's status as a monstrous neighbourhood suitable for the monstrous Hyde is further consolidated by the implication of prostitution, such as when Utterson's notices 'many women of many different nationalities passing out, key in hand', while Jekyll, in his confession letter, recalls that 'once a woman spoke to him, offering, I think, a box of lights. He smote her in the face, and she fled.' Shuo and Dan argue that this latter passage not only alludes to solicitation, but furthermore

to the punishment of such a shameless display of female sexuality: 'since Jekyll remembers all the other particulars of his day as Hyde, why is he unsure what the woman offered Hyde? A woman who walks the streets late at night asking men if they need a light is offering quite another type of box. And Jekyll knows it. Jekyll does not want to admit that the violence of Hyde's response is directed against female sexuality'[38].

This coupling of criminal violence and sexual repression makes another subtle appearance. The first of Hyde's crimes to be made known to the reader, a physical assault against a young girl, is written in language that, by Victorian standards, seems particularly suggestive: 'the man trampled calmly over the child's body and left her screaming on the ground'. Along with the suspicious vagueness of the 'irregularities' and 'concealed pleasures' Jekyll admits to be tempted by, and the acknowledgement that wearing Hyde's skin permitted him to 'set aside restraints', it's unsurprising that even at the time of the novella's publication, many readers interpreted Hyde's urges as primarily sexual. Hyde, the morally defective underclassman, holds, in his repertoire of things that repulse but also fascinate so-called civilised society, not only murder, but also an unrestrained and even violent sexuality – a new link on the now long chain of discursive associations.

In addition to this, it is worth noting the possibility of certain homoerotic implications. Though sodomy had been outlawed for a good two centuries already[39], in 1885 an amendment act set an even stricter standard for the criminalisation of homoerotic activity, under the notoriously vague definition of 'gross indecency with male persons'[40]. The effect of this legislative change was a sort of homophobic witch-hunt. Weston notes that the relevant legal article became 'commonly referred to as the 'Blackmail Charter'' and that '[b]ecause of the harsh punishments endured by those found guilty and the great fear that gay men lived in, it allowed people to blackmail those who they knew, or even suspected, were gay. Blackmail happened often, between acquaintances, family and even lovers […] the basis of more than half of the prosecutions throughout the nineteenth century'[41]. In such a context, Utterson's concern over an ominous, young, working-class man that seems to be coming and going from his friend's house at strange hours, to whom Jekyll confesses to have 'taken a very great interest' and who does not 'stay to dine', along with his suspicion of blackmail, take a whole new meaning. And not, perhaps, so much a stretch when Utterson, in describing his fears of a blackmailing scheme, described Hyde as 'like a thief to Harry's [Henry Jekyll's] bedside'.

In many ways, it seems an irony that though in the Victorian bourgeoisie homosociality was the absolute rule (and Stevenson describes gentility as 'a company of all intelligent, reputable men'), homoeroticism was interpreted as a terrible danger to the social order; the line not to be crossed. And so again Hyde appears to embody a fear of disruption, disobedience personalised.

But though Hyde does, indeed, threaten Jekyll's reputable sexuality with his

[38]Shuo & Dan (2012).
[39]Buggery Act 1553.
[40]Criminal Law Amendment Act, 1885
[41]Weston (2014).

suspicious night visits and his strolls into the sexually disinhibited depths of Soho, I must argue that this is not his primary function. Linehan, too, maintains that Hyde is not written, at least primarily, as a means through which Jekyll can experience sexual deviance, though that seems to be an element of it, but rather an expression of Jekyll's self-alienation and his unstable sense of identity, and she mentions that Stevenson, as can be gleaned from his letters, was not pleased with how much his contemporary readership boiled Hyde's nature down to a matter of sexual drive[42].

Hyde, perhaps more pertinently, challenges the very type of masculinity Jekyll is set to embody. Though certain readings perceive this as a radical, liberating challenge towards the constraints of a patriarchal set of gender roles[43], according to Cohen, the novella rather expresses 'fears about the failure of masculinity as a coherent subject position' and 'literalises a struggle between normative and transgressive embodiments of late nineteenth-century English masculinity'[44]. He argues that, threatened from a multitude of sources, from organised working-class movements to Irish movements, tribulations in the colonies and dissatisfied women, bourgeois white masculinity's position as the truly default, natural way of embodying a human was in a desperate battle to reassert itself[45].

This is a convincing position that gains further meaning when put in the context of sections 2.1 and 2.2, tying in with the type of discursive environment created by the theory of degeneration, and influenced by the intense class conflicts and economic turbulences that characterised that era. Hyde, physically strong, unrelentingly sexual, savage, mad, without mercy and a standard bearer for the wretched underclasses, is here to tear down the hegemony of the Platonic philosopher-king masculinity of Jekyll. But this hegemonic masculinity, encapsulated not just in Jekyll but also in the other bourgeois gentlemen of the novella (whose professions as scientists, lawyers, doctors is not emphasised by coincidence) has a truly powerful weapon at its disposal. It is the social group that gets to construct dominant discourse and dispense ideology.

'The taxonomic regimes of medicine, law, anthropology, ethics, criminology... as the creators of such systems bourgeoisie men were able to create binaries of functional and dysfunctional, healthy and unhealthy; ultimately, good and evil', remarks Mycroft, and 'the "what" in the equation often seems to have been whatever is different from their own accepted lifestyles: sexually or socially empowered women, the degenerate men amongst the sub-human working class, or worse yet the degenerate men *not* of the working class – all could conveniently be recognised, diagnosed and dismissed by men appealing to their professional authority'[46]. Even though Hyde wins in Stevenson's novella, subsuming Jekyll into himself and assuming the hegemony of their masculine binary, on a discursive level he is defeated, as the entire novella is posed as a potent and effective

[42]Linehan (2003).
[43]Sandison (1996).
[44]Cohen (2003).
[45]Ibid.
[46] Mycroft (2010).

cautionary narrative against everything he represents. Ultimately, he is only ever permitted to inhabit the tainted categories assigned to him – troglodytic, evil, and monstrous.

Hyde is the Disease, is Law the Cure?

Having been dragged into the territories of literary analysis and Victorian studies, one might be inclined to ask what, if anything, does this exercise have to do with law? A lot, in truth.

In Stevenson's novella, law occupies a powerful position. The novella's innovative structure presents it less as conventional gothic horror and more as modernist mystery fiction – *The Strange Case of Dr Jekyll and Mr Hyde* is not merely a case as in a set of occurrences, but a case as in an investigation. In many ways, the novella reads as a police file: there are chapters named 'incidents', letters included as evidence, and a section named 'Henry Jekyll's full statement of the case'. And it is the lawyer, Mr Utterson, who is assigned the role of the detective, receiving also some the most affectionate descriptions Stevenson has to offer: 'dreary yet loveable', 'a lover of the sane and customary sides of life', 'modest', 'reputable' and 'austere with himself'. Nevertheless, though he is given one of the most realistic, grounded personalities in Stevenson's text, his personhood is often erased when he is called to carry out the functions of law, whereby he is only described by profession; to defend normativity ('[a] very good rule, too' said the lawyer'), gather information ('the amount of information that the lawyer carried back with him'), judge people ('the lawyer […] could see what manner of man he had to deal with'), and more. As an embodiment of law itself, Utterson is cold and a little emotionally stunted, admittedly, but also a beacon of reason and order amid circumstances of fear and madness.

This position of law as a force of sanity and stability, as the apparatus capable of regulating the sinister threats to the social body, the system of production and the mechanisms of the state, thereby saving the day, was (and still is) a very common sentiment. In fact, even those who wish to actually disrupt the socio-economic order often look to law as a means to that end. According to Douzinas, 'modernity can be described as the era of nomophilia'[47].

It is entirely predictable, then, that during a period of such instability and paradigm shifts as the second half of the 19th century, law would be one of the primary mechanisms called to save society from degeneration and the atavistic underclasses. After all, according to the theoretical framework of Balbus, restoring order, protecting organisational integrity and defending the legitimacy of an economic and political system by veiling the exertion power in 'formal legal rationality' is what law, especially criminal law, prioritises[48]. But law is not merely repressive – is it also ideological, and the formal legal rationality it employs is a discourse in flux, ever capable of adapting to different historical circumstances, and ever hand-in-hand with the dominant discourse generated from other powerful

[47]Douzinas (2005).
[48]Balbus (1973).

mechanisms it stands allied with.

Legislation such the New Poor Law[49] as well as the Vagrancy Act[50] had already been in effect since the first half of the century, of course, zealously guarding the boundaries between socio-economic classes, and attempting to force discipline to the underclasses through workhouses, restrictions in the use of urban space, medical control over the poor and other similar measures. In the words of Johnson, 'The law […] both embodied and justified middle-class views about the latent fecklessness and immorality of manual workers and the latent industry and honesty of property-owning classes'[51]. Still, these laws had not proved capable of regulating the rising tensions and conflict in the increasingly overcrowded capital, where the situation was becoming increasingly volatile and the population increasingly disillusioned, decrying the terrible living conditions and losing faith in modernity[52].

This was not a problem that a mere increase in repression could solve. In fact, there were more than a few pieces of legislation that can be seen in part as concessions, such as the three Reform Acts that extended voting rights to wider portions of the population[53] - though even then some think differently on the matter, such as Chesterton, who notes that 'It was never granted in reply to pressure from awakened sections of the democracy [...] The Great Reform Bill was passed in order to seal an alliance between the landed aristocrats and the rich manufacturers of the north (an alliance that rules us still); and the chief object of that alliance was to prevent the English populace getting any political power in the general excitement after the French Revolution.'[54] It is often under such conditions that law seems to lean more upon the ideological functions of the discourse it absorbs and generates, rather than the bare power of the judicial apparatus.

Even though, as has been noted throughout, it is simplistic to draw unilateral causal relationships, it is nonetheless no coincidence that out of the many complaints and fears of London's population, it was talk of crime that came to dominate newspapers, pamphlets, theatres and fiction (with the rise of the Victorian *Penny Dreadfuls*). This lifting of public scrutiny from the legal regulation of economic life and social power, and the focus, instead, on law as a protector from terrible harm, was suspiciously convenient. As Hyde allowed the bourgeoisie to re-sanctify itself, to expulse inherent contradictions of the wider system into the figure of a terrible criminal enemy, so did the Victorian obsession with degeneration and crime turn popular dissatisfaction from suffering and poverty to the suffering and the poor, now constructed as an inherently criminal class, a new subject for criminal law to regulate.

To paint over Hyde (and all the Hydes of London) with the hefty brush of criminalisation, where every other aspect of him becomes concealed under the label of congenital criminal insanity, permits the successful rebranding of class

[49]Poor Law Amendment Act, 1834.
[50]Vagrancy Act, 1824.
[51]Johnson (1993).
[52]For example see London Congregational Unit (1883).
[53]Reform Act of 1832, Reform Act of 1867, Reform Act of 1884
[54]Chesterton (1917).

tensions and political upheaval as matters of criminal policy and public hygiene. All forms of transgression are but one transgression: crime. 'Who is the enemy who has devastated this land? It is a mysterious enemy, unknown to history; his name is: the criminal'[55] proclaims Victorian discourse.

For a textual parallel, though at the time Utterson, the lawyer, held no proof of Hyde's criminal activity, his feelings towards the (in all ways legal and in accordance to form) will through which Jekyll declared Hyde his sole heir were intensely negative: '[t]he will was holograph, for Mr. Utterson […] had refused to lend the least assistance in the making of it', 'the lawyer's eyesore', 'it offended him both as a lawyer and as a lover of the sane and customary sides of life', 'indignation', 'detestable', 'obnoxious paper', 'I thought it was madness […] and now I begin to fear it is disgrace', 'startling clauses of the will', 'I never saw a man so distressed as you were by my will' . Seeing as Jekyll was otherwise without family, this could seem puzzling if the novella did not so explicitly provide the answer. Utterson resents Hyde's role in Jekyll's will before he's even met him because Hyde is an intruder. Hyde, in potentially inheriting Jekyll's large fortune, proves socio-economic taxonomy to be permeable, and dares to enter gentility though his name is unknown, his lineage untraced, and his reputation shadowy: 'it was already bad enough when the name was but a name of which he could learn no more…', laments Utterson. And yet, in retrospect, with Hyde shown to be criminal monster, the deeply classist lamentations of Utterson and his open disgust seem, instead, like the common sense of a sensible man with sixth sense for evil.

So successful was that ideological construct, that same open disgust towards the very same figure of an intrinsically criminal, savage, morally defective underclassman, a Hyde in all but name, can be heard discussed even within Victorian Parliament. In debating a new Vagrancy Act in 1898, the Home Secretary spoke in length of 'rogues and vagabonds' as 'enemies of society' and 'bullies', dangerous degenerates joined with 'men who lived by the disgraceful earnings of the women whom they consorted with and controlled', and of the need to punish indecent exposure as a means to protect social morals from the advent of libertines[56]. Even the MPs who did oppose the Act did not fundamentally challenge the narrative it was built upon – they merely sought to approach it with a little more empathy, a humanist concern that it might be too much 'for some poor insane wretch to be flogged'[57]. No one questioned that poverty, crime and squalor were, indeed, somehow inherently embodied in a category of monstrous humans, like rats carrying a Plague; they only dared suggest it might not be entirely their fault.

But fault was not a particularly popular consideration during the *fin de siècle* crisis, where morality was a matter of genetics and class. As mentioned in 2.2, psychiatry had played a crucial role in its decreased relevance. Psychiatric discourse, hard at work with the creation of new, convincing, frightening stereotypes to legitimise the enforcement of fresh taxonomies, offered entirely new ways to interpret deviant behaviour. The invention of diagnoses such as

[55]Garofalo (1887) in Foucault (1978).
[56]Ridley (1898).
[57]Pickersgill (1898).

kleptomania and exhibitionism removed all social elements from a series of disruptive actions, naturalizing them into the general degenerationist discourse as occurrences of biologically triggered crime, dragging a large number of criminal trials from an assessment of guilt to an assessment of risk. The M'Naghten rules[58], crucial as they were to English forensic psychiatry, mattered somewhat less when incarceration was decided not with regard to liability, but with regard to danger. A man with a monstrous Hyde inside of him cannot be permitted to roam society, even though he might be pitiable and himself a victim of sorts; the medico-legal apparatus must ultimately cleanse the social body of this horror.

Conclusion

In the final analysis, though *Jekyll and Hyde* has often been touted as a study of multiple dualities, reason and madness, gentility and the dangerous underclasses, good and evil, it is less a study and more a cautionary tale warning against breaking the law; the law here being not legislation in a narrow sense, but the hegemonic categories inscribed upon bodies by Victorian taxonomic regimes, like psychiatry, anthropology or legal discourse, as well as their state-empowered enforcement. Like Vagrancy legislation or the amendment to the Buggery Act, the novella suggests that you be satisfied in your own place, encourages you to appreciate the norm for the good thing it is, to not transgress – a lesson by an author who, disillusioned and regretful of his own youthful fascination with a way of life below his station, turned from bohemian socialist to devoted Conservative[59]. Let Hyde take but one breath, the narrative suggests, and he shall certainly overpower us all.

In many ways, this re-writing of socio-economic positions as an essential division of human nature itself, a thing both undeniably true and also in dire need of forceful regulation lest it brings about the end of civilised society, was an incredibly effective narrative. It flowered into an ideology that helped safeguard the rigid structures and categories of the English socio-economic system and, to this day, discreetly slithers its way into Parliament and Courts, in discussions of welfare law, immigration policy or the regulation of substance use. And if this should leave us with a lesson to heed, it is not to underestimate the sometimes sinister potential of a good, catchy story sufficiently repeated, especially when the socio-legal order finds itself pressed to deploy the subtler tendrils of its regulatory power.

References

Arata, S. (1996). 'The Sedulous Ape: Atavism, Professionalism, and Stevenson's Jekyll and Hyde' in *Fictions of Loss in the Victorian Fin de Siècle: Identity and Empire*, 33-53. Cambridge: Cambridge University Press.

[58]*M'Naghten* [1843] UKHL J16 House of Lords
[59]Stevenson (1877).

Altschuler, E.L & D. Wright. (2000). 'Dr Jekyll and Mr Hyde: A Primer on Substance Dependence' in *American Journal of Psychiatry* 157(3):484. DOI: 10.1176/appi.ajp.157.3.484.

Althusser, L. (1970). 'Idéologie et Appareils Idéologiques d'État (Notes pour une Recherche)'. *La Pensée* No 151. In ouvrage de Louis Althusser, POSITIONS (1964-1975), pp. 67-125. Paris : Les Éditions sociales, 1976.

Balbus, I. D. (1973). *The Dialectics of Legal Repression: Black Rebels before the American Criminal Courts*. New York: Russell Sage Foundation.

Balbus, I.D. (1977). 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law' in *Law & Society Review* 11(3):571-588.

Chesterton, G. K. (1917). *Utopia of Usurers and Other Essays*. New York: Boni and Liveright.

Cohen, E. (2003). 'Hyding the Subject?: The Antinomies of Masculinity in "The Strange Case of Dr. Jekyll and Mr. Hyde' in *Novel: A Forum on Fiction* 37(1-2):181-199.

Crossick, G. (1991). 'From Gentleman to the Residuum: Languages of Social Description in Victorian Britain' in Penelope J. Corfield (ed.) *Language, History, and Class*, 150-178. Oxford: Blackwell.

Davie, N. (2003). 'A "Criminal Type" in all but Name: British Prison Medical Officers and the "Anthropological" Approach to the Study of Crime (c.1865-1895)' in *Victorian Review* 29(1):1-30.

Dell'Osso, B. & T.A. Ketter (2015). 'Clinical observations about the strange case of Dr. Jekyll and Mr. Hyde in relation to bipolar disorder' in *Academic Psychiatry* 39(5): 607-608.

Douzinas, C. (2005). 'Oubliez Critique' in *Law and Critique* 16:47–69.

During, S. (1988). 'The Strange Case of Monomania: Patriarchy in Literature, Murder in *Middlemarch*, Drowning in *Daniel Deronda*' in *Representations* 23:86-104. DOI*: 10.1176/appi.ajp.157.3.484*.

Foucault, M.. (1978). 'About the Concept of the "Dangerous Individual" in 19th-Century Legal Psychiatry' (translated by A. Baudot & J. Couchman) in *International Journal of Law and Psychiatry* 1(1):1-18.

Foucault, M. (1982). 'The Subject and Power' in *Critical Inquiry 8*(4):777-795.

Green, J.F. (2002). 'White Primitives: The Ethnography of Class in the Late-Victorian City'. PhD dissertation at Brown University.

Johnson, P. (1993). 'Class Law in Victorian England' in *Past and Present* 141(1):147–169.

Lacey, N. (2010). 'Psychologising Jekyll, Demonising Hyde: The Strange Case of Criminal Responsibility' in *Criminal Law and Philosophy* 4(2):109-133.

Lankaster, R. (1880). *Degeneration: A Chapter in Darwinism*. London: MacMillan and Co.

Lazos, G. (2011). *Ταξιστικές Θεωρήσεις για τις Εργατικές Τάξεις κατά τον 19ο Αιώνα* [Classist Perceptions of the Working Classes in the 19th century]. Athens: Nomiki Vivliothiki.

Linehan, K. (2003). 'Sex, Secrecy, and Self-Alienation in Strange Case of Dr. Jekyll and Mr. Hyde' in *Strange Case of Dr. Jekyll and Mr. Hyde: an Authoritative Text, Backgrounds and Context, Performance Adaptations, Criticism*, 204-213. New York/ London: W.W. Norton & Company.

Lombroso, C. (1871). *Criminal man* [Edited and translated by Mary Gibson and Nicole Hahn Rafter (2006)]. Durham, NC: Duke University Press.

London Congregational Union (1883). *The bitter cry of outcast London: an inquiry into the condition of the abject poor*. London: James Clarke & Co.

Malatesti, L. & J. McMillan (2010). *Responsibility and Psychopathy: Interfacing Law, Psychiatry and Philosophy.* Oxford: Oxford University PressMaudsley, H. (1885). "The Moral Sense and Will in Criminals' in *The Medico-Legal Journal* Vol. II:1-9.

Maudsley, H. (1879). *The Pathology of Mind.* London: Macmillan or: Muadsley, H. (1885) *The Pathology of Mind. 2nd ed. London: Macmillan.*

Moretti, F. (1983). *Signs Taken for Wonders: Essays in the Sociology of Literary Forms* (translated by Susan Fischer, David Forgacs and David Miller). London: Verso.

Mycroft, H. (2010). 'Discuss the Intersection of Monstrous Appearance, Moral Action and Pride in The Strange Case of Dr. Jekyll and Mr. Hyde and Let the Right One In' in *Innervate* (2):332-338.

Nordau, M. (1895). *Degeneration*. London: William Heinemann.

Olson, E.T. (2003). 'Was Jekyll Hyde?' in *Philosophy and Phenomenological Research* 66:328-348.

Pashukanis, E.B. (1924). *The General Theory of Law and Marxism*. Reprint, New York: Routledge, e-book (2017) : https://doi.org/10.4324/9781315132181.

Pinol, J.-L. (1991). *Le Monde des villes au XIXe siècle*. Paris: Hachette.

Ransome, A. (1907). *Bohemia in London.* New York: Dodd, Mead & company.

Sandison, A. (1996). *Robert Louis Stevenson and the Appearance of Modernism*. London: Palgrave Macmillan

Schwartz, H. (2013). 'Beware of the Other Side(s): Multiple Personality Disorder and Dissociative Identity Disorder in American Fiction' in *American Culture Studies* 8:456.

Shuo, C. & L. Dan (2012). 'Femininity in The Strange Case of Dr. Jekyll and Mr. Hyde' in *English Language and Literature Studies Journal* 2(1):123-127.

Simon, J. (1993). *Poor Discipline: Parole and the Social Control of the Underclass.* Chicago: University of Chicago Press.

Stevenson, R.L. (1907) [originally written 1877]. 'Crabbed Age and Youth' in *Crabbed Age and Youth and Other Essays*. Portland, Maine: Thomas B Mosher: 11-12.

Stevenson, R.L. (1886). *The Strange Case of Dr. Jekyll and Mr. Hyde.* New York: Scribner.

Sullivan, Sir E. (1868). *Ten Chapters on Social Reform.* London: E. Stanford.

Unsworth, C. (1993). 'Law and Lunacy in Psychiatry's "Golden Age"' in *Oxford Journal of Legal Studies* 13(4):479-507.

Weston, P. (2014) 'Psychoanalytic and Queer interpretations of The Strange Case of Doctor Jekyll and Mister Hyde'. www.phenweston.wordpress.com accessed 31 January 2021.

Walker, R.J. (2004). 'He, I say – I Cannot Say I': Modernity and the Crisis of Identity in Robert Louis Stevenson's Strange Case of Dr Jekyll and Mr Hyde' in *Journal of Stevenson Studies* 1:76-102.

Legislation

Buggery Act, 1553
Criminal Law Amendment Act, 1885
Lunacy Act, 1845
Poor Law Amendment Act, 1834
Reform Act, 1832
Reform Act, 1867
Reform Act, 1884
Trial of Lunatics Act, 1883

Vagrancy Act, 1824
Vagrancy Act Amendment Bill, 1898

Case

M'Naghten [1843] UKHL J16 House of Lords

Parliamentary Debate

Sir Ridley, Vagrancy Act Amendment Bill, *House of Commons Debate*. 14 March 1898(54):1537-8.
Mr. Pickersgill, Vagrancy Act Amendment Bill, *House of Commons Debate* 09 August 1898(64):748-59

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Money Laundering using Cryptocurrency: The Case of Bitcoin!

By Gaspare Jucan Sicignano[*]

The bitcoin, one of the most discussed topics in recent years, is a virtual currency with enormous potential and can be used almost immediately with no intervention from financial institutions. It has spread rapidly over the last few years, and all financial and governmental institutions have warned of the risk of its use for money laundering. The paper focuses on this aspect in order to understand if any purchases of bitcoins, using illicit money, can come under the anti-money laundering criminal law.

Keywords: *Bitcoin; Money laundering; Italian law; Cryptocurrency.*

Introduction

The bitcoin[1] is a virtual, decentralised and partially anonymous currency based on cryptography and peer-to-peer technology[2]. With bitcoins it is possible to buy any type of good or service securely and rapidly. Transactions need not be authorised by a central entity; rather, they are validated by all users of the platform. The system is totally secure, since it is practically impossible to hack the protocol[3].

Bitcoin has been much criticised over the last few years; it has quickly become public enemy number one for everything from financing terrorism to drug dealing to money laundering. It has also recently been said that bitcoin would pollute the planet due to the resources required for mining[4].

This paper will attempt to analyse in depth the relationship between the bitcoin and money laundering in Italian law. It will analyse the warnings issued by authorities in various sectors, as well as the opinions expressed in Italian legal literature regarding the possibility of committing money laundering and self-laundering crimes in various operations carried out using virtual currency. Finally, it will compare the accusations levelled against Bitcoin today with those levelled against the Internet in the early 2000s.

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[1]By convention, the word "bitcoin", written in lower case, denotes the virtual currency, while the term "Bitcoin", with the initial capitalised, indicates the protocol, i.e. the technology and network used to generate and transfer money.

[2]Antonopoulos (2017) at 3; Wiseman (2016).

[3]Sicignano (2019).

[4]Mora, Rollins, Taladay, Kantar, Chock, Shimada & Franklin (2018) at 931-933.

The Risk of Money Laundering

According to many commentators, the primary risk associated with the use of bitcoins is money laundering.

In the 2013 Report of the Financial Intelligence Unit of Italy (UIF), the Bank of Italy announced that investigations were ongoing regarding the potential risk of money laundering and financing terrorism via Bitcoin. In particular, the Director of the UIF stated that the urgency of further investigations was confirmed by several reports of suspicious anomalous international transactions.

The European Banking Authority (EBA), together with the European Central Bank (ECB) and the European Securities and Markets Authority (ESMA), also emphasised the risks of virtual currencies. According to the head of the Attorney General's office in Rome, Bitcoin does not offer clear traceability and can be a means of laundering money, financing terrorism and the mafias, and trafficking illegal goods[5]. In a bitcoin transaction there is in fact no guarantee of being able to verify the real identities of those involved.

Bitcoin may be used as a tool for criminals, terrorists, financiers, and tax evaders, according to the Financial Action Task Force (FATF), the independent inter-governmental agency that develops and promotes policies aimed at protecting the global financial system against money laundering, financing terrorists, and arms proliferation[6].

The Italian agencies of the *Direzione Investigativa Antimafia* (Anti-Mafia Investigation Directorate) and the *Guardia di Finanza* (the Italian financial police) have also issued warnings on the risks connected with using bitcoins. According to a deputy national anti-mafia prosecutor, the bitcoin is an ingenious invention, *"it's just that it is a criminal invention!"* [7]. The commander of the Technology Fraud Unit of the *Guardia di Finanza* stated that *"money laundering lurks in that code"*[8]. According to the Director General of the Bank of Italy: *"Bitcoin and cryptocurrencies guarantee absolute anonymity and absolute impermeability, all of which is extraordinarily attractive for those who want to launder money"*[9].

The Crime of Money Laundering in Italian Law.

While financial authorities have warned of the risks of money laundering with bitcoin, opinions expressed in Italian legal scholarship have attempted to offer a solution to the problem by claiming that the various operations carried out using bitcoin can be included without difficulty under Italian law as part of the crimes of money laundering and self-laundering[10].

[5]Quarantino (2014).
[6]Mincuzzi & Galullo (2017).
[7]Stefanini (2018).
[8]Bonini (2014).
[9]Galullo (2017).
[10] Bechini & Cignarella (2018); Bocchini (2017) at 46; Capaccioli (2015) at 251; Capogna, Peraino, Perugi, Cecili, Zborowski & Ruffo (2015) at 3; Danielli, Di Maio, Gendusa & Rinaldi (2018) at 13; Da Rold (2019) at 12; Di Fizio (2018) at 21; Gasparri (2015) at 3; Ingrao (2019) at 148; Majorana

In Italian law, the crime of money laundering is established by Article 648-*bis* of the Italian criminal code, which punishes the behaviour of those who, in actions distinct from participation in the predicated offence, *"substitute or transfer money, goods, or other property from an intentionally committed crime, or carry out other related operations in order to prevent identifying their criminal origin".* Regarding the purchase of bitcoins with illicitly acquired money, such conduct would come under one of the three factual models of Article 648-*bis* of the Italian criminal code (i.e., substitution, transfer, or carrying out other activities). Under a provision making concealment behaviour regarding money, goods, or other property unlawful, Bitcoin may come under the first or the third of such typological models[11].

Purchasing bitcoins using illicitly obtained money would also constitute another element of the crime referred to in Article 648-*bis* of the Italian criminal code, namely, the suitability of the behaviour to obstruct identifying the criminal origin of the goods.

From this perspective it has been stated that: *"the probability that Bitcoin will become a system for laundering international illicit proceeds will be directly proportional to its ability to hinder identification of their origin. While it is undeniable that the blockchain mechanism is a valid tool for tracking online transactions carried out using Bitcoin, it has nevertheless been shown that this chain ultimately corresponds to a purely mathematical algorithm that is not only complex to resolve but frequently difficult to trace back to a clearly identifiable physical or legal person"*[12].

Thus, it would be *"misleading to argue that the a posteriori ability to reconstruct transactions and their digital agents is an absolute impediment to constituting it as a money laundering crime; in the case of virtual currencies, what is indeed not ensured is the link between the transaction addresses and the identity of those who actually control them, thus the possibility is highly developed that the transfer and the substitutions complicate identifying the criminal origins"*[13].

In the case at hand, *"it is able to 'obstruct' the identification of the origins, be they objective or subjective, of currency and 'assets', without the need for absolute impossibility, or there being a definitory constraint with regard to the physical nature of the subject matter of the conduct itself, which extends far beyond the traditional sphere of 'money' or currencies as they are traditionally understood"*[14].

It would thus be *"purely a diversionary tactic"* to object that, in reality, Bitcoin is not anonymous but pseudo-anonymous, because *"the 'pseudonym', or the Bitcoin account represented by a series of numbers and letters, once traced by law enforcement, does not allow any further tracing, and thus it continues to conceal the true physical identity of the identified account's owner. Furthermore,*

(2018) at 630; Molinaro (2014); Naddeo (2019) at 2447; Passarelli (2016) at 12; Picotti (2018) at 599; Plantamura (2019) at 883; Pomes (2019) at 2; Razzante (2018) at 63; Sabella (2018) at 545; Simoncini (2015) at 897; Sturzo (2018) at 19; Teti (2013) at 46; Vardi (2015) at 3.

[11]Pomes (2019) at 160; Di Fizio (2018) at 57; Sturzo (2018) at 24; Naddeo (2019) at 106.

[12]Sturzo (2018) at 22.

[13]Di Fizio (2018) at 58.

[14]Picotti (2018) at 608.

as if that were not enough, a single physical person can actually own multiple accounts and make multiple illicit transactions, each one traceable to a different account"[15].

A) Our Opinion on the Risk of Money Laundering.

There are various reasons why we are in disagreement with the considerations outlined above.

Above all, an attentive reading of the various warnings issued by the authorities in various sectors is sufficient to understand that, in many of them, either they are openly ignoring the historical and cultural context in which Bitcoin was created, or they are wildly confusing the actual characteristics of this new computer technology.

It is profoundly wrong to argue that the bitcoin was a criminal invention. Bitcoin was not created by criminals, traffickers, and/or drug dealers. It emerged from a community of computer activists called Cypherpunks who had been working on a digital money project since the 1990s. They were computer experts strongly committed to ensuring privacy; some had university experience while others were already very wealthy, thanks to the Internet. For them, anonymity was not a gimmick to escape control by police authorities but a way of countering the tyranny of surveillance.

At the same time, claiming that bitcoin does not offer clarity in tracking exchanges is to deny the way the entire system operates. All bitcoin transactions are public and are contained in a freely available distributed database. Anyone can check who sold a certain amount of bitcoins to someone else, and anyone can discover the history of every transaction. It is not particularly difficulty to check which wallet contains a certain bitcoin or the route a given amount followed to arrive at a particular destination.

The same alleged anonymity that Bitcoin guarantees to its users, which so frightens the authorities in various sectors, is more legend than fact. Bitcoin is not anonymous; it is pseudo-anonymous. This means that each user is linked to a given nickname, or pseudonym, constituted by a long string of numbers that make up the address linked to a certain wallet. It follows that it is possible to identify the originator of a given operation once the pseudonym used is known.

Numerous studies have worked out various techniques to discover the users concealed behind bitcoin addresses. Suffice it to mention BitIodine, an application created by three Italian scholars, which is capable of identifying the *"addresses in clusters that could belong to the same user or group of users, classifying such users and their nicknames, and even displaying complex data extracted from the Bitcoin network*[16]. Work presented by a team at the University of California produced similar results[17]

[15]Sturzo (2018) at 31.
[16]Spagnuolo, Maggi & Zanero (2014) at 457.
[17]Meiklejohn, Pomarole, Jordan, Levchenko, McCoy, Voelker & Savage (2013).

Recently, a study by AgiproNews in collaboration with the Polytechnic University of Milan showed that using Bitcoin for illicit purposes is even riskier than using electronic money or bank transfers. In particular, it emphasised that the bitcoin is one of the more traceable currencies, and that every transaction, whether licit or illicit, is always viewable at zero cost[18].

The study cited a 2015 report published by HM Treasury and the UK Home Office, according to which the riskiness of cryptocurrencies for money laundering and financing terrorism was evaluated as "low."

The same conclusion was reached in a report issued by Elliptic, a company that works with the risks of cryptocurrencies, and by the Centre on Sanctions and Illicit Financing, a programme by the Foundation for Defense of Democracies (FDD), a non-profit entity focused on foreign policies and national security. The study, which was an in-depth analysis of a narrow sample of transactions between 2013 and 2016, analysed the trends of illicit activities carried out using Bitcoin[19]. Yet, according to those same experts, the number of illicit operations committed using Bitcoin is quite low: around 1% of all transactions that enter the Bitcoin network.

The report takes advantage of several computer techniques that make it possible to identify suspicious bitcoin movements that involve Bitcoin forensics and Bitcoin intelligence. The former refers to *"the use of statistical tools for aggregating transactions and identifying the users"* [20]; the second refers to monitoring the blockchain in order to identify *"addresses at risk for money laundering"* and *"to provide a probabilistic estimate of the risk of each specific transaction"*[21].

Recently, many companies have specialised in this area, including providing consulting services to law enforcement agencies. The best known among them is Neutrino s.r.l., an Italian company that evaluates the risk of money laundering of each specific bitcoin transaction. The Blockchain Intelligence Group in Vancouver is also well known, which does the same analyses as Neutrino S.r.l.[22].

Thus, it does not seem like a gamble to argue that large criminal organisations still prefer dollars to Bitcoin. This is also because the bitcoin *"does not have market liquidity"* and thus could not be easily used for money laundering purposes[23].

B)Our Opinion on Money Laundering in Italian Law

The observations stated in Italian legal doctrine regarding the possibility of establishing the crime of money laundering do not seem convincing either.

While agreeing with the choice to classify the bitcoin as a form of "other asset"[24], we do not agree with the stated reasoning with regard to the other

[18]Tripoldi (2017).
[19]Fanusie & Robinson (2018).
[20]Perugini (2018).
[21]Danielli, Di Maio, Gendusa & Rinaldi (2018) at 40.
[22]Dal Checco (2017).
[23]Frediani (2014).

behavioural requirement of Article 648-*bis* of the Italian Criminal Code, namely that behaviour must be carried out in such a way that it obstructs identifying the criminal origin of the laundered goods.

On this point, while noting that bitcoin transactions are perfectly traceable, it can be inferred that an obstacle exists from the fact that virtual money transactions would ensure the anonymity of the various users.

We do not agree with this point of view.

Even setting aside the fact that Bitcoin does not ensure any anonymity, as previously stated, we should recall that in the case of money laundering the obstacle should not generically be the concern of investigations, but rather identifying the criminal origin of the goods[25]. This means that not all obstructive activities are punishable, but only those that *"affect, either materially or legally, the "other asset" itself in some way"*[26].

Legal scholars have argued that any operation that deceives or disguises reality, and which affects other aspects of the actual event, may be punished on other grounds, but such activity cannot constitute money laundering[27]. Someone who buys something of criminal origin, reports it to the authorities, and then assists with reconstructing its criminal origin while obstructing the search for the perpetrator, is not responsible for money laundering[28].

Consequently, if concealing the origin of an asset is done by obstructing the identification of the perpetrator of a crime (the so-called "concealment of the perpetrator" of the predicated offence), this cannot be constituted as money laundering[29].

Take the example of transferring a vehicle obtained fraudulently by several individuals who use a false document to take title of the vehicle, which they then sell. In this case the actions do not constitute money laundering because the actions taken to conceal reality do not regard the asset itself, but rather the perpetrators of the legal manoeuvres used to sell it[30].

This principle is confirmed regarding payments using stolen bank cheques after replacing the beneficiary's information. According to the *Corte Suprema di Cassazione* (the Supreme Court at the top tier of the Italian ordinary jurisdiction) *"when the accused only cashes cheques of illegal origin into their own bank account, after replacing the beneficiary's information with their own and endorsing the cheque, without tampering with the information identifying the issuing bank or the serial number of the cheques, such behaviour shall not be qualified as money laundering"*[31]

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[24]The term "*other asset*" seems to come closest to the concept of "*altra utilità*" used in Italian law, which uses *utilità* to refer to anything that can be used to replace what has been obtained through criminal activity.

[25]Maugeri (2016) at 140.

[26]Maugeri (2016) at 141.

[27]Razzante (2011) at 34; Faiella (2009) at 163; Magri (2007) at 442.

[28]Zanchetti, (1997) at 368.

[29]Faiella (2009) at 260.

[30]Razzante (2011) at 34; Magri (2007) at 455.

[31]Cass. Pen. sez. II, May 11, 2017, n. 30265 in *Italgiure*.

And yet, if the problem with Bitcoin is that it ensures its users anonymity, in the light of Italian legal scholarship and the ruling just cited, it seems clear that the obstruction referred to in Article 648 of the Italian criminal code does not apply in such cases. With Bitcoin, only the concealment concerns the possible owner of the virtual money, which could be concealed by pseudo-anonymity. From a physical point of view, the asset undergoes no concealment, resulting in perfectly traceable and visible transactions.

That said, however, a clarification is required: acquiring virtual money through online transactions does not seem to constitute the crime of money laundering; however, it may do so in the case of purely cash payments.

Cyberlaundering is traditionally broken down into two types: *"instrumental cyberlaundering"* and *"online cyberlaundering"*. The former is when at least one of the three phases of laundering (placement, layering, and integration) is carried out digitally. A typical example of instrumental cyberlaundering carried out via Bitcoin is purchasing virtual money with the cash proceeds of a crime.

In online cyberlaundering, all phases in the process of laundering dirty money take place digitally. The money to be laundered is already available in digital form, and the laundering procedures tend to be quick and easy[32]. Online cyberlaundering takes place when purchasing virtual money with money that is already virtual.

And yet, as previously mentioned, acquiring bitcoins with money of illicit origin, according to the definition of online cyberlaundering, does not seem to obstruct identifying the criminal origin of the asset. In this particular example, the entire operation is tracked. When purchasing bitcoins, there is no obvious concealment. Normally, a purchase is paid for by wire transfer or credit card, and law enforcement agencies can very easily trace it back to the alleged crime[33]. If one chooses to use a virtual currency, one must provide the identity of the user, as required by recent anti-money laundering regulations (Decreto Legislativo n. 90 of 25 May 2017).

Bitcoins are registered on the blockchain, and all transactions regarding every single unit are always visible at zero cost. The system is so transparent that, once a given suspicious bitcoin has been identified, it is possible to find out who has used it: all the way back to the origin of the blockchain. A case in point is the Silk Road issue; after the arrest of the site operator, investigators followed the bitcoins to track down everyone who had any role in the online platform operating in the deep web[34].

Instrumental cyberlaundering operations are a different matter. In such cases, users purchase virtual money using cash. This is not a widespread practice in the crypto-world, as cash exchanges presuppose physical encounters between the parties, and Bitcoin platform users typically interact virtually from their various corners of the world.

And yet, acquiring bitcoins using money of criminal origin from someone other than the perpetrator of the alleged crime does seem to constitute the specific case referred to in Article 648-bis of the Italian criminal code. In this case, with the

[32]Simoncini (2015) at 897.
[33]Capaccioli (2015) at 254.
[34]Frediani (2018).

transition from the physical to the virtual world, bitcoin is potentially capable of severing all links between the illicit proceeds and the alleged crime. This transition irremediably cuts off all ties between the substituted good and the predicated offence, constituting an example of actual concealment of the physical object of the crime.

In the case of a person who purchases a quantity of bitcoins using cash obtained as the result of a crime, if he or she makes the transaction by working with a private individual, without resorting to an official currency, it is not subject to any sort of control or reporting obligation.

The person could easily exchange money for bitcoins, with no tracking at all. Once the transaction has been completed, no one would be able to connect the bitcoins with the alleged crime. There would be no possible traceability of the bitcoin transactions, because the operation was anonymous at its source when the cash was converted into virtual currency.

Furthermore, since Bitcoin is based on a decentralised system incompatible with any intervention by any central authority, it ensures the impossibility of any physical goods being confiscated. Indeed, if the investigating agencies do not have individuals' passwords – or better yet, the encryption keys – of a given wallet, they cannot actually seize anything[35].

Lastly, the decentralised structure of Bitcoin makes oversight extremely difficult. There is no authority to which the State can turn to order that all suspicious transactions be reported. The system is based on a peer-to-peer network automatically managed by an algorithm[36].

C) Conclusions

This paper has attempted to analyse the relationship between Bitcoin and money laundering in Italian law. We have sought to show that using virtual currency does not pose serious laundering risks. Indeed, in this case virtual money, rather than being a tool for criminals and launderers, would truly be a Trojan horse. If money launderers were to invest significant capital in Bitcoin, in a single blow they would risk attracting the attention of all law enforcement agencies.

This is similar to what happened with the Internet in the early 2000s. At that time many commentators decried the risk of money laundering that lurked behind using the web.

Indeed, in an interview on 11 December 2000, Edward P. Rindler, a special adviser to Bill Clinton, then President of the United States of America, argued that the Internet was the new frontier of globalised crime and explained that it was possible to launder dirty money via the web[37]. Alessandro Scartezzini, of the Transcrime research centre at the University of Trento, was of the same view[38]. According to Alessandro Pansa, the Director of the Central Operational Service of

[35]Morone (2018); Frediani (2018).
[36]Tamburini (2014).
[37]Calabrò (2000) at 17.
[38]Montefiori (1998) at 23.

the Central Anti-Crime Directorate of the State Police, and Donato Masciandaro, a professor at the Bocconi University of Milan, the Internet would be favourable to an increase in laundering dirty money [39].

Today, however, there is unanimous belief that only the transition from cash to digital money is capable of defeating money laundering; thus the Internet has gone from being a dangerous tool to a valuable ally in the fight against money laundering. Who knows? Might something similar happen with Bitcoin?

D) References

Antonopoulos, A.M. (2017). *Mastering bitcoin: Programming the Open Blockchain.* 2nd ed. California, Sebastopol: O'Reilly Media, Inc.

Bagnoli R. (2000). 'Il paradiso fiscale giusto? Si trova in rete'. *Corriere della Sera*, August 9, 23.

Bechini, U. & M.C. Cignarella (2018). 'Antiriciclaggio – compravendita di immobile – pagamento del prezzo in bitcoin'.Quesito antiriciclaggio n. 3/2018 i*n Consiglio Nazionale del Notariato,* March 20.

Bocchini, R. (2017). 'Lo sviluppo della moneta virtuale: primi tentativi di inquadramento e disciplina tra prospettive economiche e giuridiche' in *Diritto dell'informazione e dell'informatica* 1:46.

Bonin, C. (2000). 'L'allarme del superpoliziotto: così i boss fanno affari con Internet e l'euro'. *Corriere della Sera,* June 16, 7.

Bonin, C. (2014). Bitcoin, l'investigatore della Finanza: "In quei codici si annida il riciclaggio'. *La Repubblica,* July 10.

Calabrò, M.A. (2000). '«Un'intesa per vigilare in rete». Il consigliere di Clinton: così su Internet il riciclaggio è diventato globale'. *Corriere della Sera,* December 11, 17.

Capaccioli, S. (2015). *Criptovalute e bitcoin: un'analisi giuridica*. Milano: Giuffrè.

Capogna, A., Peraino, L., Perugi, S., Cecili, M., Zborowski, G. & A. Ruffo (2015). 'Bitcoin: profili giuridici e comparatistici. Analisi e sviluppi futuri di un fenomeno in evoluzione' in *Diritto Mmercato Ttecnologia* 3:32-74.

Dal Checco, P. (2017). 'Nasce il Blockchain Intelligence Group Japan' in www.Bitcoin forensics.it, 27 aprile 2017.

Danielli, A., Di Maio, D., Gendusa, M. & G. Rinaldi (2018). *Bitcoin e Criptovalute. Funzionalità e rischi delle monete virtuali*. Montecatini Terme: Altalex.

Da Rold, M. (2019). 'Innovazione tecnologica ed implicazioni penalistiche. Le monete virtuali' in *Giurisprudenza penale web* 2:12.

Di Fizio, F. (2018). 'Le cinte diziarie del diritto penale alla prova delle valute virtuali degli internauti' in *Diritto penale contemporaneo, rivista trimestrale* 10:21-81.

Faiella, S. (2009). *Riciclaggio e crimine organizzato transnazionale*. Milano: Giuffrè.

Robinson & Fanusie (2018). "Bitcoin Laundering: an analysis of illicit flows into digital currency service". *Defenddemocracy.org*., January 12.

Frediani, C. (2014). 'Bitcoin non è il paradiso dei terroristi e della criminalità organizzata'. *Wired.it,* July 11.

Galullo, R. (2017). 'Padoan: "Le mafie sguazzano nella finanza opaca'. *Il sole 24 ore.it,* November 24.

[39]Bonin (2000) at 7; Bagnoli (2000) at 23.

Gasparri, G. (2015). 'Timidi tentativi giuridici di messa a fuoco del Bitcoin: miraggio monetario crittoanarchico o soluzione tecnologica in cerca di un problema?' in *Diritto dell'informazione e dell'informatica (Il)* 3:415-442

Ingrao, C. (2019). 'Gli strumenti di prevenzione nazionali ed europei in materia di valute virtuali e riciclaggio' in *Diritto penale contemporaneo, rivista trimestrale* 2:148-158.

Magri, P. (2007). *I delitti contro il patrimonio mediante frode*. Padua: Cedam.

Majorana, D. (2018). "Disciplina giuridica e fiscale delle criptovalute: sfida al legislatore dal web" in *Corriere tributario* 8:630-636.

Maugeri, A.M. (2016). 'L'autoriciclaggio dei proventi dei delitti tributari: ulteriore espressione di voracità statuale o utile strumento di politica criminale?' in E. Mezzetti & D. Piva (eds.) *Punire l'Autoriciclaggio. Come, quando e perché*. 100-140. Torino: Gappicelli.

Meiklejohn, S., Pomarole, M., Jordan, G., Levchenko, K., McCoy, D., Voelker, G.M. & S. Savage (2013). 'A Fistful of Bitcoins: Characterizing Payments Among Men with No Names' in *Proceedings of the 2013 Conference on Internet Measurement, ACM*. https://doi.org/10.1145/2504730.2504747 (pp. 127-139).

Mincuzzi, A. & R. Galullo (2017). 'Bitcoin, il riciclaggio invisibile di mafie e terrorismo internazional'. *Il sole 24 ore.it,* February 7.

Molinaro, G. (2014). 'Sono tassabili le manifestazioni di capacità economica emergenti nelle operazioni relative a bitcoin?' in *Il Fisco* 25:2447.

Montefiori, S. (1998). 'Casinò nuova mania su Internet'. *Corriere della Sera,* December 7, 23;

Mora C., Rollins R.L., Taladay K., Kantar M.B., Chock M.K., Shimada, M. & E.C. Franklin (2018). 'Bitcoin emissions alone could push global warming above 2°C' in *Nature Climate Change* 8:931-933.

Morone, R.M. (2018). 'Bitcoin e successione ereditaria: profili civili e fiscali' in *Giustizia civile.com,* 2/2018:1-12, February 23.

Naddeo, M. (2019). 'Nuove frontiere del risparmio, Bit Coin Exchange e rischio penale' in *Diritto penale e processo* 1:101.

Passarelli, N. (2016). 'Bitcoin e antiriciclaggio' in *Sicurezza.gov.it,* November 15.

Perugini, M.L. (2018). *Distributed Ledger Technologies e sistemi di Blockchain: Digital Currency, Smart Contract e altre applicazioni*. Vicalvi: Key.

Picotti, L. (2018). 'Profili penali del cyberlaundering: le nuove tecniche di riciclaggio' in *Rivista trimestrale di diritto penale dell'economia* 3-4:590-619.

Plantamura, V. (2019). 'Il Cybericiclaggio' in A. Cadoppi., S. Canestrari, A. Manna & M. Papa (eds.) *Trattato di Diritto penale, Cybercrime,* 850-890.Torino: Utet.

Pomes, F. (2019). 'Le valute virtuali e gli ontologici rischi di riciclaggio: tecniche di repressione' in *Diritto penale contemporaneo, rivista trimestrale* 2:159-176

Quarantino, E. (2014). 'Allarme del Pg di Roma, da bitcoin rischi riciclaggio e terrorismo' in *Ansa.it,* July 9.

Razzante, R. (2011). *Il riciclaggio nella giurisprudenza. Normativa e prassi applicative*. Milano: Giuffrè.

Razzante, R. (2018). 'L'utilizzo illecito delle monete virtuali' in R. Razzante *Bitcoin e criptovalute-Profili fiscali, giuridici e finanziari***.** Rimini: Maggioli.

Sabella, P.M. (2018). 'Vendita di società "ready made" ed obblighi di verifica della clientela nella disciplina sulla prevenzione di riciclaggio e finanziamento del terrorismo: contrasto all'anonimato e valute virtuali. Nota a C.G.UE Grande sezione 17 gennaio 2018 (causa C-676/16)' in *DPCE online,* 2: 545.

Sicignano, G.J. (2019). *Bitcoin e riciclaggio*. Torino: Giappichelli/.

Simoncini, E. (2015). 'Il cybelaundering: la nuova frontiera del riciclo' in *Rivista trimestrale di diritto penale dell'economia* 4:897-915.

Spagnuolo, M., Maggi, F. & S. Zanero (2014). Extracting Intelligence from the Bitcoin Network' in *Financial Cryptography and Data Security: 18th International Conference, FC*: 457-468. Heidelberg: Springr.

Stefanini, M. (2018). 'Il bitcoin? Un'invenzione criminale'. *Il foglio.it*, April 10.

Sturzo, L. (2018). 'Bitcoin e riciclaggio 2.0' in *Diritto penale contemporaneo* 5: 19-34.

Tamburini, F. (2014). 'Bitcoin, oltre 2 milioni e mezzo di persone nel mondo usano la moneta virtuale'. *Il fatto quotidiano.it*, April 26.

Teti, A. (2013). 'Bitcoin: la criptomoneta del cyberspazio che sfida banche e governi' in *Mondo Digitale* 46:1-16.

Tripodi, A. (2017). Gaming, la "nuova era" del Bitcoin. Gli esperti: rischio riciclaggio resta basso'. *Il sole 24 ore.it*, October 5.

Vardi, N. (2015). ' "Criptovalute" e dintorni: alcune considerazioni sulla natura giuridica dei bitcoin' in *Diritto dell'informazione e dell'informatica* 3:443-456

Wiseman, S. (2016). 'Property or Currency? The Tax Dilemma Behind Bitcoin' in *Utah Law Review* 2016(2):416-440

Zanchetti, M. (1997). *Il riciclaggio di denaro proveniente da reato*. Milano: Giuffrè.

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Access to Justice for People with Disability in Nigeria: Therapeutic Day Care Centre (TDCC) as a Case Study[1]

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Access to justice through the court system for non-disabled persons is trampled upon every day in Nigeria. One can then imagine the plight of the disabled persons most of whom live in abject poverty and constant discrimination from their respective families, religious congregation, educational sectors, Judicial practices and the ineffectiveness of the government policies, which clearly plummeted people's confidence in the social justice system as well as the entire political structure. Against this backdrop, this study presents the findings of the analyses of these discriminations and Injustices; stemming from basic amenities to prevailing cultural vices, religious practices and lack of commitment on the part of the government. To attend and implement the needs of the disabled persons, which are hindrances to access to justice for the disabled persons in Nigeria. Thus this writer used Therapeutic Day Care Centre (TDCC) as a case study by interviewing the people that work with them as well as primary and secondary data. The conclusion points to the needs of these 'special' groups or disabled persons that were explicitly listed herein to be strictly adhered and for the Nigeria Bar Association (NBA) to take a proactive stand to redress the lawful inadequacies so as to enhance their access to justice.

Keywords: *Alternative Dispute Resolution; Multi-door courthouse; Litigation; Access to Justice; Disabled Person; Therapeutic; Human rights.*

Methodology

To reiterate, in achieving the primary objectives of this study, this writer conducted an interview to reveal some of this untold hardship or people that work with them for so many years at the TDCC best describe issues facing these disabled persons. It is essential to point out the importance of an interview, is to provide credible research and gain an in-depth understanding of the prevailing issues that can contribute or hinders access for the disabled person, which is classified as a qualitative approach.

Consequently, employing qualitative research tools in data collection is vital; to add originality to this paper and fill the gap in the literature. However, due to

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COVID-19, the opinion of the participants was collected via Zoom and Whatsapp. Hence this writer could not reach more employees.

However, respondents were grouped under four categories. The Directress consists of (1) participant, the manager consists of (1) participant, the head teacher consists of (1) participant and teachers consist of (2) participants. All respondents are from the Therapeutic Day Care Centre (TDCC) Enugu - a school and workshop training for disabled and non-disabled persons in Nigeria.
All themes and sub-themes generated from the questions posed to the four categories of the interviews are analysed from page 8 of this work.

Introduction

It is a known fact that the court system in particular Nigeria, is currently congested and the time frame it takes to get justice from the courts is fast becoming a mirage than reality to the common man.[2] The collaboration of the Lagos state judiciary and NCMG[3] conceived the LMDC in a bid to proffer solution.

In simple terms, LMDC connotes the enhancement of dispute resolution practices with the integration of ADR in the court system. Certainly, this approach has enhanced access to justice to a great extent for the populace; however, it is rather unfortunate that there are no proper considerations for the disabled communities including the disabled in Nigeria to benefit from this laudable innovation. The above viewpoint was informed from my data collection in Lagos and Enugu. The question that comes to mind is if the non-disabled citizens' rights are not fully met, how then does the justice system seek to protect and preserve the rights of the non-disabled persons? In view of the foregoing, I would seek to engage with the idea of defining Access to justice, which is distinct from availability of access or accessibility. In so doing, I am going to point out the main traits, which are factors that also contribute in hindering access to justice for disabled citizens.

Concept of Access to Justice and Accessibility

Access to justice simply means the common man having the unequivocal right to access the court without obstructions.[4] In other words, the fundamental nature of the process of access to justice is undoubtedly hinged on the availability of its access to all. Hence, the denial of access to justice by any means whatsoever, whether by failure of the system to make alternative provisions in relation to high cost of litigation to support the indigent in the society, or by any form of discrimination or exclusion of certain categories of persons from getting access to

[2]Umegbolu (2019) at 9.
[3]Kehinde Aina is the founder of the Negotiation Conflict Management Group (NCMG).
[4]Onyema (2013) at 3.

justice, then the system is a monumental failure if the access to justice is not available to all its citizens whenever the situation arises.

The above viewpoint is backed by *Section 36 (1) of the 1999* which stipulates 'that the common man is entitled to be treated justly and get fitting remedy from the court, which is within the ambit of the law and within his constitutional right as a citizen of Nigeria.'[5] On the other hand, Cambridge dictionary defined accessibility as "*the fact of being able to be reached or obtained easily."*

Flowing from the above, it is regrettable to note that neither the Courts premises in Lagos State nor that of Enugu State observes or implement that provisions for the interests of disabled persons. In the same vein, accessibility or availability in this context is making sure that all persons can wholly and successfully dialogue or talk with everyone involved in the court or ADR process, without accessibility impediments.

However, at the courts in Lagos and Enugu there were no post barriers on gutters, no ramps or handrails to aid disabled persons in the courts. No instructions or guidelines for the hearing impaired, no recorders, no sign language interpreters, and no provision for the blind either. The writer also noticed that the disabled parties cannot access the offices, rooms, including toilets (is too small) and even the roads is filled with stones, so even if they can afford a mobile wheelchair, the road is unmotorable, hence cannot be used by the disabled. One can argue that the relatives can assist them to access the courts but it is about equality, their constitutional right and inclusion which they are entitled to and which is guaranteed in *section 36 (i)* of the 1999 constitution of the Federal Republic of Nigeria; it is about proper access in the real sense of it and it is about sense of belonging which Maslow pointed out as an essential element a human being needs. [6]

Suffice to say that Section 46 (4) (b) (i) & (ii) of the Constitution of the Federal Republic of Nigeria, 1999 has made the following provisions

> *(i) "for the rendering of financial assistance to any indigent citizen of Nigeria where his right under this Chapter has been infringed or with a view to enabling him to engage the services of a legal practitioner to prosecute his claim, and (ii) for ensuring that allegations of infringement of such rights are substantial and the requirement or need for financial or legal aid is real."*

Though the above provisions cover indigent citizen, however most disabled persons live in abject poverty in Nigeria,[7] hence accessing the court and basic services[8] like engaging a lawyer or getting financial aid is farfetched. It is essential to point out that there are more than one million disabled people in Nigeria and yet it was just in 2017 that they had access to vote.[9]

To buttress the point stated above, Lauren Moses elucidated that

[5]1999 Constitution of the Federal Republic of Nigeria.
[6]Mcleod (2016) at 2.
[7]Birchall (2019).
[8]World Bank Group (2020).
[9]Moses (2017).

> *"Most polling units were located in inaccessible places, and none provided braille or tactile ballots for voters who are blind or have low vision. At almost half of polling units in Edo, the placement of ballot boxes barred persons with disabilities from independently casting their ballots; this problem was even more acute in Ondo, where per`1sons with disabilities were unable to vote independently in 77 percent of polling units. Finally, observers' reports found that Form EC 40H, with which INEC records the participation of persons with disabilities on Election Day, was not used at 45 percent of the polling units observed in Edo and 70 percent of those observed in Ondo."*

The sentiment stated above could be likened to the state of the courts and the predicament faced by the disabled persons. To validate the above view is the assertions of Mr XY a beggar on the street of Ikeja. Whom I spoke with him on my way back from the courts and asked him if he knows about the MDC and he said no, that he has not heard about it before now. He went on to point out that he has no means of transportation, not to talk of money to pursue any sort of matter in any courts. He stated categorically that it is the same predicament for most disabled persons in Lagos State except for those born into wealth.'

Consequent upon that, one can contend that both access to justice and accessibility to the courts are far eroding the disabled persons in Nigeria. In the Nigeria courts, both access to justice and accessibility to justice can be said to be a challenge facing both the disabled and non-disabled persons, however, this discourse will focus on disabled persons.

The need for access to justice for disabled person should be of paramount interest to all and sundry especially the government and the judiciary because they are legitimate citizens of the country. Apart from that, the constitution of the Federal Republic of Nigeria under *section 36* provides for equal rights and protection without discrimination of her citizens to access the courts and the right to dignity of her citizens not to be subjected to inhumane treatment. In other words, that equally includes the barrier-free full access, equipment that will enable them to have their day in court and full participation in court proceedings and mediation.

However, recent cases show otherwise; for example, a lady in the END SARS protests with a single limb (one leg amputated) that came out for protests- trekked for so many miles in the not-so-good roads. The protesters saw her predicament and got her a prosthetic leg worth 1.6 million naira (equivalent to £3,258.63) in less than 24hours.[10]

Equally, cases reported by Egboka et al, about the predicament of disabled prisoners like Femi who was denied a crutches or any other mobility aid and Taheeb who has undiagnosed psychosocial disability though does not suffer from physical disability but cannot recall key details of his case or when last he met his lawyers.[11] This writer is of the notion that these cases go a long way to establish the fact that disabled persons suffer structural discrimination and marginalisation in Nigeria. However, the Inclusive Friends Initiatives have challenged the

[10]Umegbolu (2020).
[11]Egboka & Bogart (2016).

narratives of disabled persons to have access to basic needs of life, voting, and inclusion.[12]

Before that, it was a norm in Nigeria that the life or living conditions of a disabled person do not matter so much unless they were born into wealth.[13] The gut-wrenching examples of how they are left behind during violent conflict and difficulties in gaining employment validate the above-stated assertion.[14] Recently, the Association of Lawyers with Disabilities in Nigeria (ALDIN) with support of the Disability Rights Fund advocates for the marginalisation of lawyers by lawyers with disability.[15] To buttress their points and to further sensitize these issues, they printed out and circulated the disability rights protection acts and some of these highlights[16] of the Disability Act, which is as follows:

a) Seaports, Railways and Airport facilities shall be made accessible to persons with disabilities.[17]
b) Any general information shall be translated into the accessible format appropriate to the person with disability.[18]
c) A Person with disability shall have an unfettered right to education without discrimination or segregation in any form,[19] and Braille, sign language and other skills for communicating with person with disabilities shall form part of the curriculum of primary, secondary and tertiary institutions.[20]
d) In queues, person with disabilities shall be given first consideration and as much as possible, be attended outside the queue.[21]
e) A Public building shall be constructed with the necessary accessibility aids such as lifts. (Where necessary) ramps and other facilities that shall make them accessible to and useable by persons with disabilities.[22]
f) A person with disability has the right to work on an equal basis with others and this includes the right opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open.[23]
g) All employers of labour in public organisations shall as much as possible, have persons with disabilities constituting at least 5% of their employment.[24]

[12]Inclusive Friends: What Violence means to us: Women with Disabilities Speak (2015).
[13]Ibid.
[14]Ibid, p.15
[15]Pamphlet provided to this researcher by the school manager- *"this pamphlet was made available by one of our ex-students who an intelligent young man with speech and hearing impairment. He is currently studying physics education at the University of Ilorin."*
[16]Discrimination against Persons with Disabilities (Prohibition) Bill, 2018.
[17]Part V Section 3(1) Discrimination against Persons with Disabilities (Prohibition) Bill, 2018.
[18]Ibid.
[19]Ibid, at Section 20 (1)
[20]Ibid, at Section 21 (1)
[21]Ibid.
[22]Ibid, at Part II Section 4
[23]Ibid, at Part VI Section 28 (1).
[24]Ibid, at Section 38 (d).

h) Persons with disabilities shall be encouraged to fully participate in politics and public life.[25]

To validate the above viewpoints the current Nigeria's President Muhammadu Buhari signed into law this Discrimination against Persons with Disabilities (Prohibition) Act, 2018, following nine (9) years of advocacy by disability rights activists.[26] Despite this sensitisation and provisions of the constitution and disability act, these rights are not being implemented. Thus the disabled persons still face untold hardship in accessing the courts and other premises.[27] Nwachukwu Egbunike provided a first-hand account of the pains some parents of these disabled persons face. Mr L.E. Umego and Mr J.C.U. Igbokwe stated that

> *"Our children with special needs were unloved, discriminated, and our families stigmatised. There seemed to be an invisible iron curtain that cut our children with special needs off from the rest of the world*[28]

Flowing from the above, though this statement was made about eight years ago (2012) it seems that the stigmatisation and discrimination faced by both the disabled persons and their parents are still prevalent to date.

However, in recent years or in the 20's the disabled persons in Nigeria have been able to make their voices count by providing eye-opening details of what people with disability go through and they did not stop at that, they proffered a solution in a bid to eliminate these issues or to a certain extent curb it.

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2. Therapeutic Day Care Centre (TDCC) Nigeria as a Case Study

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4. This innovative centre, one of its kinds in Nigeria, has its main campus in Abakpa Nike, Enugu in the eastern part of the country for both the disabled and non-disabled students.[29] The school has been able to educate, provide amenities and take care of the disabled children that have been sent to them and those that were abandoned by their parents because of their disability for over forty (40) years now. The manager of the school was able to highlight some of the challenges that disabled persons face in Nigeria in particular Enugu State.

[25]Ibid, at Section 17.
[26]Ewang (2019).
[27]Whitehead (2015).
[28]Egbunike (2012) at 305.
[29]It is owned by a German woman - Mrs Hildegard Ebigbo - who worked for five years in Germany with persons with disabilities and had an in-service training as a speech therapist.' She was honoured with the National honour of Bundesverdienstkreuz (Federal Order of Merit) by the German Ambassador to Nigeria, Herr Joachim Schmillen, on behalf of the President of the Federal Republic of Germany, for giving countless scholarship to the disabled and creating an 'enabling environment (disabled friendly) where non-disabled and disabled could have equal opportunities and co-exist together.' She is married to Professor Peter Ebigbo, a professor of clinical Psychology, College of Medicine, University of Nigeria, Enugu Campus.

The Issues or Challenges facing the disabled Persons in Enugu

The Need to Practice both Integration and Inclusion

The manager and the Directress revealed, 'the meaning and the difference between integration and inclusion.'

The manager revealed,

> *"So what is integration? This can be illustrated by thinking of a school where disabled children can attend alongside the non-disabled children. It is a regular school, but the disabled persons have their classes to meet their level of needs. For example, let us say we have a class of hearing-impaired and we put them together, they have their sign language teachers and they are all in one place, so that is easier for them to learn at the same level and by the same teacher. They are allowed to come to a school where others who are non-disabled come to, interact with each other in the common areas and share the same experiences, but they still have their classrooms with their teachers. This is referred to as integration. However, we have now taken it further to practice both integration and Inclusion.*

On the other hand, she pointed out

> *"Inclusion means having both non-disabled and disabled children in the same class. For example, in a class the disabled children have their support teachers helping them through the classwork, like children with Autism sometimes they can become agitated as such needs their space, fresh air and they want to run and that disrupt the classes some times. It is still a challenge even in an advanced society like Germany, who has reached a very high level of accepting disabled in society. There are still not many schools that practice Inclusion because it is cost-intensive, and the government will have to pay for support teachers to sit with these children with disability in the same classroom as the non-disabled children. Hence, it is not very widespread, but the idea behind it is very well accepted. It has been proven that it is suitable for both the non-disabled and the disabled, though the more severe cases are paired in their classroom. So the disabled children assimilate more into society because the school is the micro cosmos of the world they go into because we do not want to prepare them to self-exclude themselves from society. However, persons with mild disability will quickly develop social skills that will enable them to be integrated or assimilated into society. What we want to do is to make them as independent as possible so that when they leave the school, they will be able to function in the society on their own, which starts from the class – that is Inclusion. So that is what we practice here. You can imagine when people come from abroad, and they marvel at our success, we usually hear 'you guys do these things that are not easy to do.' However, we also face other difficulties, like, some parents do not want their wards to be in the same class as the disabled students."*

The Directress revealed the 'positive impact of such a concept that turned out to be quite successful.' She opines, *"Because inclusive education stimulates the brain and brings out the numerous potential in these children."*

Evidently, this very bold and brilliant practices of the TDCC to ensure that disabled people in Nigeria do not feel discriminated, secluded or marginalized, is commendable and a step in the right direction.

There is a need for the government, to stretch its tentacles and reach out to the disabled persons taking into full consideration of the Federal Republic of Nigeria 1999, the need for integration and inclusion of the disabled persons fully into the society, its educational sector, its justice system and all facet of life and existence. Hence the TDCC standard practice for equal opportunity as stipulated in the 1999 constitution and the disability act for the disabled persons is worthy of emulation and should be encouraged for the advancement of society.

Educational Amenities not provided for disabled Persons

The directress offers insights 'that the disabled persons want to have their school leaving certificate and BECE. ' She went on to point out that

> *"Now tell me a child with cerebral palsy that cannot write but he has the knowledge in his head however there is no provision for them to be able to write under WAEC or under BECE. So what do we do? We have been going to the BECE office. The Manager had been fighting for this particular boy so that they could use a recorder and record him. There is hardly any provision for children with such disability. However, they have for the blind for BECE and extra minutes for the blind and deaf that is just it – they are not the only form of disability."*

Another example given by the Manager is a 'child that has muscular dystrophy.' She states,

> *"His whole body shakes, and his mother has lost her husband and even one of his siblings to the same illness – it is genetic in their family. He needs to be recorded, then transcribed into a paper, and the paper needs to be submitted, but there is no provision for this. No government has passed this into law because, in the WAEC script, no provision was provided for children with cerebral palsy or muscular dystrophy. There are no provisions for individual cases with different forms of disability.*
> *In the western world, there are provisions, and they have their exam tailored for speech and hearing impaired. They have sign time interpreters because sometimes they need someone to interpret, like a sign language interpreter, to interpret the instructions and all those kinds of things. Here in Nigeria, there is no provision for these officially in WAEC guideline."*

On the other hand, teacher 2 supported the overhead views. She opines

> *"These disabled people want to be integrated into society later, for them to be able to get a job and feel proud that they have what another person of their age have. Even in exams, there is no proper awareness that they are children with disability. Also, they have to write exams; the general exam organized by the Basic Education Certificate Examination (BECE) does not take into consideration all of these. There are other forms of impairment other than visual impairment. These children also deserve to be able to write their exams and have their certificate given to them."*

What this means is that the disabled persons are currently given the same exams that a non-disabled person is given. There is no provision for support during the exams, which is needed as a result of their disability.

Investing in the Education of the disabled is a Waste

Head teacher 1 elucidated that 'must parents do not want to bring their disabled children to the school, so they rather withdraw them from our school and leave them at home to deteriorate.' She states

> *"But we had noticed that some of them do come back to us when they realized the standards we use in teaching is better than other schools and if their wards are not showing much improvement their fancy schools after a few years."*

On the other hand, the manager revealed

> *"Basically, the school is built for the disadvantaged and the poor, but my vision is to bring it up the standard whereby the so-called poor are getting the best. Moreover, it does not matter what class they are; they can comfortably receive the best stimulation and education." When I came with my ideas and they said you are coming from abroad that is a different reality from the one here."*

However, teacher 2 revealed that 'parents do not like paying for these services.' In her words, the *"parents find it difficult to agree to pay school fees for their disabled children. They would pay for their non-disabled wards but would owe the school fees of their disabled child. To these parents, they feel that investing in such a child is useless."*

Following through teacher 1 indicate *"that some parents do not like to send their disabled children to school, and even when do they would refuse to pay their school fees."*

The school's manager provided additional evidence for the above-stated views

> *"It takes a lot of sensitisation and counselling through the directress, head teachers, parents-teachers association to achieve progress in that regard."*

Conversely, the directress elucidated, *"that in Africa, there is a general attitude that you train a child so that later the child can take care of you. However, since many disabled persons may not be able to meet these expectations, some parents feel no need to bring their disabled children to school. They feel it is a hopeless cause."*

The Government

Teacher 2 extends our knowledge on 'the lack of support from the government.' She pointed out "government offers little to no support to the school.

Instead, the school is taxed like a private business when the school survives as a result of funding from benevolent individuals.'

To buttress the points above, the school manager opined *"the government does not offer financial help or subsidies or support; instead, we are taxed heavily."*

The sentiments expressed above embodies the narrative of this theoretical study or reviewed literature that there is a clear indication of the lack of interest in the affairs and wellbeing of the disabled persons in Nigeria.

The Difficulty faced by both disabled and Non-disabled to Secure a Job in Nigeria

The directress evaluated the 'chances of non-disabled and disabled persons to get a job in Nigeria.' In her words,

> *"It is already difficult for non-disabled persons to find a job in Nigeria and so much more difficult for the disabled. We follow up with former students and see the difficulties they face in securing employment, especially with disabled persons. It is, therefore, our goal to train them to become self-employed. With help from their family members, they can open a small business that can help sustain their livelihood."*

On the other hand, teacher 2 revealed that 'due to the lack of employment for the disabled persons they offer jobs.'

She states, *"Some of the disabled persons that graduated from TDCC are offered employment here, in fact, they work here as we speak."*

Evidently, I believe that the challenge for some of this organisation who do not employ disabled persons because they are not enlightened or trained to work with the disabled persons. Hence, confirming they are no equal opportunities as stipulated by the constitution for both the non-disabled and this disabled persons – most especially for the disabled persons who need special care for them to function in their day-to-day activities.

A Right to Religion

On the contrary, Head teacher 1 indicates, *"some churches will not even want anything to do with our children, but the new bishop is open-minded."*

Conversely Teacher 1 illustrates how *"The parish next to us sends a Reverend father to us when there is a free one to come and celebrate mass."* She further revealed,

> *"You need to see how happy the children are each time we have a visit. Do you know why? Because they see themselves getting the same thing that non-disabled people get. They check the bible, and they ask what it is called. They dance and fellowship together in their own home (the school) because their parents leave them at home when they go to church because they embarrass them, they keep them at home and*

lock them up. For those that are Catholics, they go to church and see people receiving this bread on their tongue, and these are so interesting for them – so they want the same."

They wonder why they cannot receive the Holy Communion, and they even see their younger ones receiving it whenever they go to church or allowed to go to church. So we are able to get the church, the Bishop, to agree to give us the parish priest from the next station, to come and test them for catechism. Obviously testing them on a simpler level and beforehand we give them catechism lessons. The catechism lesson is based on their different level, so if they are non-disabled, we give them normal catechism. Those of our children who are non-disabled also enjoy the whole thing of receiving Holy Communion and therapy. Do you know it is such a big deal? Some of these students look up to it and those who have cognitive impairment and do not understand those doctrines are taught the simple things. Just come down to their level like who is God? Alternatively, how to make the sign of the cross, how to kneel. Then the reverend father comes and asks them these questions, and when it comes for receiving Holy Communion in Easter, they come to our station, which is called St Mary; they come and give our kids the first Holy Communion. Do you know how proud it makes their parents? Do you know how happy it makes these children? What their siblings can receive, they can now receive themselves. It is such an immense joy for everyone."

From the above, their religious communities who should be protecting and appealing on their behalf also marginalize the disabled persons.

Analysis of the Findings

From the above findings, there is sufficient evidence that corroborates with the reviewed literature or the theoretical perspectives in this work that demonstrates that the disabled persons in Nigeria suffer from structural discrimination, marginalisation and seclusion. Which is tantamount to no access to justice and accessibility for the disabled persons because if they have no access to education, employment, basic amenities and religion, what else do they have access to? Thus, I believe there is no justice in any shape or form for these special individuals.

Other Challenges or Issues Affecting or Infringing on the Access and Accessibility of the disabled Persons in Nigeria

Cultural vices: Teacher 2 revealed *"these parents they feel investing in such a child is useless."*

In view of this, I believe that cultural vices plummeted or reinforced why some parents feel this way- this is due to the stigmatisation faced by the parents of these disabled persons in some communities in Nigeria. For instance, in communities in the East while growing up I witnessed some parents locking disabled persons up in rooms for so many years - caned and chained because they

are seen as an 'alu' (abomination). If the community found out, they have such children they will be marginalised and in the same view they are stigmatised. While this last statement is unreported theoretically or in the reviewed literature, however, teacher 1 highlighted or revealed this in the findings "*They dance, fellowship together in their own home (the school) because their parents leave them at home. When they go to church because they embarrass them, they keep them at home and lock them up."*

Additionally, BBC buttresses this view –they reported a case in recent years 'why some Nigerian parents lock up children and the mentally ill which is as a result of the stigma associated with such illness.'[30]

These cultural vices have played a role in the lives of most disabled persons in Nigeria to resort to seclusion, which has been met with disproportionate backing from the government and the judiciary who have neglected, failed and /or refused to lend their respective voices, and/or push to enforce the provisions of the Constitution of the Federal Government and disability rights act which states that the rights of disabled persons are equally as important as that of the non-disabled persons. I believe that if the Federal Government plays a pivotal role in enforcing the rights of disabled persons. It will nudge the relevant bodies, stakeholders and organisations to uphold or implement these provisions in their various sectors. I believe that if this is duly observed and implemented, then it will nudge the state government to provide those amenities needed duly in the High court premises in each state and at the Multi-Door Courthouses.

Conclusion

This work has been able to reveal that there is discrimination because of legal barriers posed by non- accessibility depicted herein. The remote working and socialisation introduced by the COVID-19 pandemic may seem to have rectified or reduced these problems in some sense.

However, one of the problems that the change to a remote system of living seemed to be able to solve is with a party that has physical challenges, like somebody on a wheelchair (as such needs wheelchair ramp). Then they do not need to go into the courts or MDC; they can settle their cases online. Nevertheless, for one to be able to settle cases or matters online, they have to be able to access the technology because one of the good things about COVID-19 is that it has heightened the use of technology. However, most disabled persons in Nigeria live in abject poverty, though not all, and have no access to such luxury.

Moreover, what may happen after COVID-19 and things go back to normal? The element of technology to deliver court sessions may remain after the pandemic but how many of such disabled persons can afford the technology, let alone knowing how to use them? The issue of poverty raises its ugly head, and it raises other problems and other needs, which will be for future research. It is evident that more sensitisation from the part of stakeholders, government and the judiciary alike, are highly needed.

2. [30]Orjinmo & Adamu (2020).

This study proffers a solution for a practical way to establish a sense of inclusion or belonging by supporting this institute and by building more schools like TDCC. Furthermore, to provide an infrastructure that incorporates the utility mentioned herein for the disabled with support from prominent organisations, like the Nigeria Bar Association (NBA) for the needs of these special groups of our society to be specifically recognized and implemented in a bid to enhance their access to justice.

Thus, the need to push for an enactment by way of a legislation that will see to the integration, inclusion, safeguarding and upholding the rights of disabled persons as entrenched in the Constitution of the Federal Republic of Nigeria, 1999 is crucial and the impact of government at all level, other relevant groups and stakeholders like the NBA cannot be overemphasized in achieving this great feat.

References

Birchall, J. (2019). 'Overview of social exclusion in Nigeria. K4D Helpdesk Report'. Brighton, UK: Institute of Development Studies. https://assets.publishing.service.gov.uk/media/5df7b6f740f0b60948b22593/685_Overview_of_social_exclusion_Nigeria.pdf

Egboka, A. & J. Bogart (2016). 'Prisoners with Disabilities: Justice Delayed Means More than Justice Denied' in *This Day* 16.8.2016. https://www.pressreader.com/nigeria/thisday/20160816/281788513462437

Egbunike, N. (2012). *Dyed Thoughts*: *A Conversation in and from my Country*. Ibadan, Oyo State, Nigeria*:* Feathers & Ink.

Ewang, A. (2019). 'Nigeria Passes Disability Rights Law - Offers Hope of Inclusion, Improved Access' in *Human Rights Watch* 25.1.2019. https://www.hrw.org/news/2019/01/25/nigeria-passes-disabilit-rights-law

Inclusive Friends: What Violence means to us: Women with Disabilities Speak (Nigeria Stability and Reconciliation Programme 2015) http://www/nsrp-nigeria.org/wp-content/uploads/2015/09/What-Violence-Means-to-us-Women-with-Disabilities-Speak.pdf

McLeod, S. A. (2016). Maslow's Hierarchy of Needs. Highgate Counselling Centre www.simplypsychology.org/maslow.html

Moses, L. (2017). 'Nigerian Disability Advocates Conduct First-Ever Election Accessibility Audits' at DEM works – National Democracy Institute 30.11.2017). https://www.demworks.org/nigerian-disability-advocates-conduct-first-ever-election-accessibility-audits

Onyema, E. (2013). 'The Multi-door Court House (MDC) Scheme in Nigeria: A case study of the Lagos MDC.' In *Apogee Journal of Business, Property & Constitutional Law* 2(7):96-130

Orjinmo, N. & A. Adamu (2020). 'Why some Nigerian families lock up children and the mentally ill' (BBC News, 3 October 2020). https://www.bbc.co.uk/news/world-africa-53893271

Umegbolu, C. (2019). 'Dispensation of Justice: Lagos Multi-Door Courthouse as a Case study' (Ongoing PhD research at the University of Brighton) at http://blogs.Brighton.ac.uk/chinwe/2019/08/13/5/

Umegbolu, C. (2020). 'End SARS: A Revolution by the people for the people on police brutality in Nigeria' at https://research.brighton.ac.uk/en/publications/end-sars-a-revo

lution-by-the-people-for-the-people-on-police-brut
Whitehead, N. (2015). Wheelchair Beauty Queen Sings for Toilets' at KUER 3.8.2015. https://www.kuer.org/2015-08-03/wheelchair-beauty-queen-sings-for-toilets
World Bank Group (2020). 'Disability Inclusion - A Repaid Assessment'. https://openknowledge.worldbank.org/handle/10986/34073

Legislation

Constitution of the Federal Republic of Nigeria, 1999.
Discrimination against Persons with Disabilities (Prohibition) Bill, 2018