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Front Pages

Athens Journal of Law

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The ***Athens Journal of Law (AJL)*** is an Open Access quarterly double-blind peer reviewed journal and considers papers from all areas of law. Many of the papers published in this journal have been presented at the various conferences sponsored by the Business, Economics and Law Division of the Athens Institute for Education and Research (ATINER). All papers are subject to ATINER's Publication Ethical Policy and Statement.

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Editorial and Reviewers' Board

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

Gregory T. Papanikos
President
ATINER

Athens Institute for Education and Research

A World Association of Academics and Researchers

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11-14 July 2022, Athens, Greece

The Law Unit of ATINER, will hold its **19th Annual International Conference on Law, 11-14 July 2022, Athens Greece** sponsored by the Athens Journal of Law. The aim of the conference is to bring together academics and researchers from all areas of law and other related disciplines. You may participate as panel organizer, presenter of one paper, chair a session or observer. Please submit a proposal using the form available (https://www.atiner.gr/2022/FORM-LAW.doc).

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- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **13 June 2022**

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- **Dr. Gregory T. Papanikos**, President, ATINER.
- **Dr. Michael P. Malloy**, Director, Business, Economics and Law Division, ATINER & Distinguished Professor & Scholar, University of the Pacific, USA.
- **Dr. David A. Frenkel**, LL.D., Head, Law Research Unit, ATINER & Emeritus Professor, Law Area, Guilford Glazer Faculty of Business and Management, Ben-Gurion University of the Negev, Beer-Sheva, Israel.

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Why Judicial Education Institutions (JEI) must Focus Vulnerabilities faced on Account of Age, Economic Status, Sexual Orientation and Participation in Civil Society Movements?

*By Geeta Oberoi**

In this paper, the authoress points out relevance of some themes for present day judiciary and why judicial education (training) institutions must include some subjects in their yearly training agenda. The present judicial training system, as operational in different countries, is mostly designed and developed in content by the judges themselves. From past five years, in their rush to update and upkeep with the new technological and commercial environment that is daily unfolding, these institutions have almost sidelined the core commitment to produce a responsive judiciary. To remind the judges involved in policy making on judicial training about the need to focus on the justice as foundation for any training, author proposes some areas that cannot be negated from the training agenda for survival of democracy in future.

Keywords: *Judicial training; Judicial education institutions; Poverty; Private justice system; Social justice; Economic justice; Child sexual abuse; Sexual orientation; Utility of films for education; Training methodology*

Introduction

Guiora and Ingle observe that Mussolini and Hitler did not rise to power with the force of an army. Pre-existing democratic institutions provided ample means to establish their new political orders, and the consequences of their new political orders on societies have been thoroughly documented and endlessly discussed and analysed.[1] In future also, a threat to democracy will be more from the political and the privileged class than the foreign aggression or the terrorists. JEIs therefore will have to first decide whether they want to be blind to these threats, or whether they want to accept the challenge to prepare their judges to not take for granted the independence afforded to them due to democracy. It is up to a JEI to decide if it wishes to support the democratic ideals by raising better understanding of democracy amongst judicial fraternity. If so, then the JEI must give priority to prepare judges to remedy the injustices faced by marginalised, subordinated and underrepresented individuals and communities, for, democracy is reduced to a mere ideal on a paper where citizens are denied the justice.

*PhD; Professor, National Judicial Academy, Bhopal Area, India.
Email: geetaoberoi@ymail.com
[1]Guiora & Ingle (2019).

Louis Brandeis, as quoted by Collins and Yeskel[2], said that "*you can have wealth concentrated in the hands of a few, or democracy. But you cannot have both.*" However, political masters around the world are busy in persuading citizens that both are possible with a twist that the democracy will be afforded to only those few in whose hands political masters are shifting the wealth of the nation. In such different times, ordinary citizens all over the world are experiencing helplessness as the tag of democracy is reduced to a mere operational electoral machinery in their nation. The question therefore arises as to where all this leaves the fate of publicly funded court system? What kind of ideals are to be instilled in the judiciary by the JEI? Will dispute settlement machinery undergo a change and shred its previous image of protector of citizens against the mighty government? Will the courts be reduced to mere spectators of transformation around us?

The question for reflection for JEIs therefore is - what kind of training they are going to design for their judges without forgetting that universally judges are facing a complicated career situation in which they have to forgo their personal and individual freedom to survive, sustain and grow within the system. Further, growing clout of private entities and the compromised governments have time and again made it clear that they will not tolerate any decision making process that would harm the interest of the powerful and the privileged.

What if tomorrow the private justice system replaces the publicly funded court system? Whether the majesty of the courts would be eroded due to fewer opportunities presented to use the judicial acumen to bring back the governance on the right track? As of today, all over the world, the contracts are being created between the corporates, between the parties, between the individuals, between the government and the corporates, between the government and the private citizens to exclude the jurisdictions of public funded justice system. This in turn has potential to limit the jurisdiction of the courts to enforce the criminal law on behalf of the state and to recover the taxes/revenues for the government. If this becomes a reality, there would be a greater rift between the citizens and the courts as the courts would be seen as another set of oppressors. The citizen alienation would reduce class action litigation, normal civil litigation work and thereby reduce the public trust in the justice system further snowballing into reduced number of writ petitions, appeals and interlocutory applications.

Whether the social justice trainings to judges can save the publicly funded court system from its present downward spiral and if so, then how the same can be done - is the principal theme of this paper.

Utility of Social Justice Trainings for Strengthening the Judicial Branch of a Government

The survey of trainings offered by most of the JEIs all over the world raises a big concern around the nature of the discourse delivered by JEIs. The last decade, kept JEIs from around the world, busy in integrating innovation, business growth,

[2]Collins & Yeskel (2000).

protection of corporate rights, IPR protection, trade protection, IT revolution and IT integration in the judicial education discourse. The focus on these new areas at JEIs diminished the space, if any, allocated to the study of social justice ideals. JEIs remained occupied in preparation of IT savvy judges, gadgetry smart judges, IPR and trade protectionist judges, judges with skills in court and time management, judges with mediation and negotiation skills and so on. The term 'social justice' almost disappeared from the judicial education discourse or made some rare guest appearances in the form of multi-speaker conferences and webinars.

The last decade training priorities prove that most of the JEIs have presumed the judicial interest to attend the courses dealing with technical or commercial laws and they have excluded the social justice component from their yearly training agenda. The principal aim of any social justice related training is to acquaint the judges with the impact of their judicial decisions on the society. For instance, judicial decision to protect the environment mandating permanent closure of all the factories, industries and mills from the town will have unwanted consequences on lives of employees who are working in these establishments. By such protection of environment, a situation of taking away right to livelihood is created making lives of thousands miserable, pushing them to extreme poverty. Similarly, the judicial decision to clear all the slums and hutments near the railway tracks may be a prudent decision in terms of safety and security, but will render thousands residing in those slums without a roof over their head. Safety and security cannot be attained at the cost of such grave injustice to thousands. Such conflicts may not be brought to the notice of the court, and therefore, a judge is expected to discover such conflict.

The negation of social justice as a theme from the training discourse is resulting in judicial decisions losing the sight of conflicting positions, and thereby leading to imbalances due to ignorance of alternatives. Social justice related trainings could have helped judges in judicial integration of scientific devices to curb the pollution so that the livelihood of thousands is not lost. Such trainings could have helped judges in giving directions to the governments and railways to use the CSR funds or the environment cess or the funds from the Railway budgets for relocation of slum residents near the railway tracks. There are number of railway colonies where a vertical structure could have been directed by the courts to be raised for relocation of these slum inhabitants. In this way, both the security of railway tracks and the human rights of slum inhabitants could have been protected through a single order of the court.

The present legal education curriculum in which subjects are tightly compartmentalised in the name of specialisation is producing legal professional and future judges who did not study non-compulsory courses (elective courses). As a result we have lawyer and judge who is not exposed to intersections amongst different branches of law. Judges on their own cannot be expected to churn out the linkages due to failure of legal education in reflecting upon the synergies between divergent and convergent areas of law. To obviate this state of affairs, JEIs may expose judges to interdisciplinary nature of legal norms both vertically and horizontally so that the gap in appreciating the relationship between different

branches of law is bridged. They may fit in what Olawuyi says about intersection between environment law, international law and human rights law.[3] By establishing the linkages between different branches of law and how these intersections help to attain a balance in conflict between different rights, JEIs can prepare judges to strike a balance between conflicting positions. This would require JEIs to evolve courses to study the long term impact of judicial decisions that did not balance the conflicting positions.

The two years of pandemic isolation followed by an impending war like situation proves how we all are globally interconnected and that every phenomenon has a potential to repeat itself in different parts of the world. No country can remain isolated from events shaping at any one place. Violation of rights or their better protection at any place impact the whole world as judicial precedents are now making global impact on the lives. Therefore, even if one of the many JEIs in the world is able to design their trainings in such a way that it leads to judicial protection of vulnerable sections against their abuse, exploitation and discrimination, it will have a spiraling effect on lives of many similarly placed living beings in any part of the world.

Apart from familiarizing judges on the position of law within the bigger discipline of social justice, and on the art of balanced decision making to be learnt by knowledge on various interdisciplinary fields, JEIs must help judges to look beyond the glossy lenses to get a clear picture of the hardships that citizens are facing. Some areas which cannot be overlooked for training of judges could be: trials involving abused children, trials involving victims of poverty, trials concerning LGBT community, trials related to discrimination on the basis of caste, race or gender and the last but not the least the trials of activists tried for sedition for opposing the state policies.

Sensitisation on Child Sexual Abuse (CSA)

Recently, a Bombay high court judge in India invented new doctrine regarding CSA. She held that unless there is a 'skin to skin' touch by the accused, his vulgar actions of undressing before the child and making child undress would not amount to sexual assault on child strictly. She therefore reduced the punishment inflicted upon the accused by the trial court. This judgment was picked up by the media outlets all over the country and subjected to criticism from all the quarters. The criticism created so much pressure on the Supreme Court that she was not allowed to become a permanent judge of the high court. Till 11 February 2022, there was intense speculation as to whether she would be asked to stay as the high court judge or whether she would be demoted to her earlier post that of the district judge as she was elevated as an additional judge of the high court from the career judiciary branch. However, she resigned on 11 February 2022. Such career blocking for the judges was unheard of till this incident. This case makes it very obvious that the high court judges must undergo sensitisation

[3]Olawuyi (2014).

training on the complexities around the offence of CSA. Her case is not an isolated one calling for the training of appellate court justices. Recently, the Karnataka High Court (one of the appellate court from the southern states) had to expunge a remark of its own male judge that "it is unbecoming of Indian women to fall sleep after rape".

Sensitisation on LGBT Community and their rights

Way back someone said, rights mean nothing if nobody can enforce them.[4] Every kind of diversity is per se protected by all the constitutions of the world under the equality ideal. The right to equal treatment therefore includes the rights of LGBT community to exist amongst all the populations without facing any discrimination, stigma, disentitlement in any field. However, this has been not the case and the LGBT community has to approach the courts for enforcing their basic rights to equality, dignity and freedom. The courts, leaving aside some rare exceptions, have not shown the sensitivity as the majority of judges lack basic knowledge, awareness, or interest in challenges faced by the LGBT community and are reluctant to learn about the legal framework under which LGBT community's interest could be protected. This is because judges are disinterested in knowing the others, and in knowing anything that is beyond their geographical, cultural, political, historical understanding. There is a danger associated with this sensitivity deficit as it has potential to threaten the well-being and security of LGBT as a class. Therefore, it is important to raise both the capability and sensibility of judges to existential issues faced by LGBT as a class.

Further, from different jurisdictions of the world, we hear only about their highest court (most often the Supreme Court) showing some infrequent intervention to ameliorate the plight of LGBTs who face isolation and discrimination. The real insensitivity is faced at the trial court level and at the first appeal court level. Judges in these courts are acting overly provincial and holding on to cultural conservativism. It is with these judges that the JEIs must engage to provide them a discourse on LGBT movement. Such judges have to be infused with international and transnational dimensions of this movement. Greater knowledge and understanding on this subject from national, international, comparative and transnational perspective will surely dilute misconceptions that judges have about the community. In turn, judges will be helped in their task of delivery of justice to LGBT community. Sensitivity training also has a potential to allow greater participation of LGBT community more openly in the prominent legal and judicial positions.[5]

[4]Reynoso (1988).

[5]Recently in India there was a big debate on the appointment of openly gay advocate Saurabh Kripal as judge of Delhi High Court.

Why to Integrate the Poverty Law in Judicial Education Discourse?

Poverty has been described, among other things, as "a condition that lacks the necessaries of life."[6] Levels of poverty, in an era of economic growth and affluence, is directly contrary to much of the economic success the nation claims to have achieved.[7] Presently, even when the workers around the world are more productive than ever before, they continue to languish in poverty[8] and never before they have faced so much uncertainty, exploitation and denial of basic rights. In fact, their conditions turn into a compelling reason for the study of poverty law. Not only workers, even citizens with no income to low-income continue experience exploitation in the form of eviction, denial of wages, denial of compensation, denial of health care and safe environment, unjust removal from employment, false prosecution, exaggerated and inflated debt collection, frauds, cheatings, death in police custody due to police torture, death due to medical negligence and so on. They continue to suffer these injustices as there is always dearth of sensitive legal attorneys who will fight free legal battle for them. Nobody in legal profession seems interested in questioning why civil legal services are the least available to the people who often need them the most.[9]

Though the poverty law was invented in the US in 1960s based on Federal entitlement programs and supported by a progressive Supreme Court, and it even led to the establishment of Legal Services Corporation, the major source of funding for poverty lawyers over there[10], the interest in treating the law as an instrument of social change to handle legal cases for persons in poverty to address systemic roots of poverty and economic inequality waned in millennium century. The law schools stopped taking much interest in inculcating community and social responsibilities. The well-traveled path between high academic achievement in law school and practice at large firms, to serve corporate and commercial interests[11], almost pushed poverty law, to non-significant component of the typical law school curriculum.[12] This "corporate bias" in curriculum offerings at law schools took away the exposure to real-world issues of poverty and community engagement. In fact, the notion that the law is a pathway to power and prestige is truer today than at any time before.[13] Most of the law taught in law schools deal with "the law and the rich."[14] Due to such materialistic nature of legal education discourse, the subject of poverty is ghettoised to few courses and seminars on legal philosophy, race, gender, or disability issues.

With no encouragement from the law schools to use the law to serve the others and with complete focus on skills and projects that rewarded incentives on

[6]Munsterberg (1904).
[7]Gilmore (2016).
[8]Eckholm (2008); See Greenhouse & Leonhardt (2006).
[9]Neisel (2020).
[10]Trubek (1995).
[11]Hornstein (2009).
[12]Chaifetz (1993) at 1698.
[13]Ibid.
[14]Gilmore (2016).

performance in black-letter tests, law students, future lawyers and future judges could not learn any skill required to handle the cases of persons living in poverty so as protect them through tools of legal reasoning, analysis, legal writing, issue spotting, cultural competency, empathy. Poverty is invisible not just in law schools, but also from the JE discourse. JEIs therefore should take upon themselves the task of not only filling the gaps left by legal education but also design the discourse to acquaint the old judges (who had no such subject in their legal education) and train the new judges about imbalances created at the policy level that is pushing millions into the status of poverty. While billions are spent on corporate welfare and to manage the crisis created by nation's banking and financial institutions[15], years are devoted on debating the wisdom of providing basic needs at subsidised rates to the poor families.[16] For decades, corporate chief executives were handsomely rewarded for leadership that resulted in harm to their companies and the loss of thousands of jobs[17] but no one questioned. At the same time, great objections were raised on subsidies afforded to poor and middle classes by the governments even when these subsidies can help poor to come out of their inferior status with the help of free education and affordable basic living.

Even judicial branch suffers from elitism. After getting the taste of power of their position in the society, judges lose all kinds of concern, sensitivity, love, affection, empathy, sympathy, care for anyone except themselves and their relatives and the others become *neerjeev* (lifeless) for them. They don't care if the person accused of the crime is legally represented or not, a suspect is entitled to bail or not, a person bailed has capacity to furnish the surety amount or not, whether the victim is adequately protected from the physical harm or not, whether tenant will survive post-eviction or not, whether the dispute is between equal or unequal parties and so on. For such judges the only things that matter are the speed of trial, the vocabulary of the counsels, the pedigree of counsels, the comfort of at arriving decision and so on. The best example of such judicial elitism is Justice Antonin Scalia of the US Supreme Court who in September of 2008, while addressing a gathering of the Federalist Society at Chicago's Union League Club[18] took the view that the legal interests of the poor should rightfully occupy a peripheral, or perhaps even inferior, place in legal education and the legal system. Apart from this address, his judicial opinion in *Legal Services Corporation v. Velazquez*[19] finding no constitutional foul due to the possibility that an impoverished person could not find substitute counsel, makes it clear that for Justice Scalia, the possibility that a poor person would be unable to retain substitute counsel was irrelevant.[20] Attitude of Justice Scalia, if anything, shows that amongst judges, concern of poor have always remained secondary.[21]

[15]See Andrews & Dash (2008); Herbert (2007a); Herbert (2007b); Sorkin (2008); Super (2004); Scelfo (2008).
[16]See Goodman (2008); Swarns (2008).
[17]See Anderson (2008); Stolberg & Lebaton (2009).
[18]Pallasch (2008).
[19]531 U.S. 533 (2001).
[20]Hornstein (2009).
[21]Wax (2008).

JEIs therefore rather than consigning poverty law to the margins of their annual calendar of themes, must make poverty law as a prominent fixtures and central institutional concern. At present, JEIs are found not initiating institutional discussions on the role of a judge in fighting poverty and injustice.[22] This education policy of keeping judges aloof from the social and local context within which they operate will prove harmful for the whole legal system. It has potential to increase judicial illiteracy on the types of civil legal issues experienced by low-income individuals like health care, domestic violence, disability access, housing, children and custody, income maintenance, landlord/tenant issues, and veteran's benefits.[23] The JEIs need to design the courses to help judges in understanding why the low-income individuals and families are often unable to afford representation for necessary lawsuits, like landlord/tenant issues, health insurance or billing issues, probate matters, or consumer law issues[24] and how the courts can utilise legal aid machinery to prevent bankruptcy of people.[25]

Why JEI must focus on Human Rights Training?

In 2011, UN Declaration on Human Rights Education (HRE) and Training was adopted to encourage HRs related trainings. JEI must adhere to this convention even if it is non-binding on them so as build pro-rights cadre of judges. As noted by Struthers[26], pro-right education is important not only for allowing people to recognise rights violation in their own lives, but also for empowering them to stand up for protection of rights of others. That there is a bias against inclusion of HRE in JE discourse will be evident from the number of courses devoted to HR protection by JEIs from the past five years. The poor representation of HRE calls for positive steps to mainstream HRE discourse by JEIs. Further, international level organisations like IOJT can pass a resolution for integrating HRE in yearly discourse of JEIs all over the world. IOJT by such resolutions can be seen implementing both the UDHR and 2011 UN Convention of HR Education and Training.

HRE in JE discourse has potential to build a sustainable HRs culture and awareness that will help prevent HRs violations. The JEIs must incorporate HRE as part of its discourse for number of reasons. First being, it is an international obligation embodied in the UN instruments: UDHR, ICCPR and ICESCR. Secondly, the law schools do not have HRE as a compulsory but as an optional subject. Thirdly, HRs can be instruments in the hands of judges to check the abuse of power by the legislature or the executive. Fourthly, the humanism in HRE through the soft element of culture, promotes attention and pursuit of self-perfection, and can create understanding and respect towards human life and

[22]Hornstein (2009).
[23]See Rose (1992) at 450.
[24]See Bard & Cunningham (2017).
[25]42 U.S.C. § 2996.
[26]Struthers (2016).

development, needs and pursuits, freedom and creation, as well as character and dignity. Fifthly, as HRE can cultivate a culture of tolerance, rationality, compassion, respect for others, JEIs can push forward for the HR focused trainings to draw attention to socially disadvantaged groups, to prevent and protect them from cruel treatment, torture and abuse.

Why Sedition Trials must be included in the Judicial Education Discourse?

The offence of sedition is defined as lack of affection by a citizen towards the state. As such there is extreme subjectivity in prosecution of such offence. While some citizens are privileged to possess absolute freedom to criticise the state and its various instrumentalities at any length, others even for much less offensive criticism are prosecuted and jailed on the charges of sedition. Even bigger question than such bias is - how a democracy can even exist if the nation does not allow criticism of the government and its organs? Sedition and democracy cannot co-exist. In democratic framework, every citizen, howsoever, he or she may be ordinary and insignificant, must possess the freedom to criticise the state and all of its instrumentalities, on all the possible platforms available and that could be reached. If that be so, then it leaves no place for contempt and sedition trials. Written or spoken words cannot become excuses for prosecution of author or reader of those words. However, this is not the case and we have historically witnessed the British sedition trials and the American sedition cases that fined and imprisoned men under the guise of being punished for their bad motives or bad intent and ends, simply because the powers that be did not agree with their opinions. Men have been punished without overt acts, with only a presumed intention to cause overt acts, merely for the utterance of words which judge and jury thought to have a tendency to injure the state.[27]

Sedition trials to silence the opposition to the government is regular feature since ages. The spokesperson of minorities were terrorised and silenced when they were most needed by the community for protection against a hostile, arrogant majority. From documents we learn that the years 1793-94 witnessed long series of sedition trials in Scotland[28], Margarot, a Baptist minister of Dundee as quoted in the book: "Law and Laughter" also faced sedition trial,[29] Nelson faced his first sedition trial in 1925 for being organiser of the communist party in Chicago and for helping it to organise a massive demonstration in 1930.[30] Though he was acquitted by the jury, in 1950 he was again arrested and prosecuted for sedition against the state of Pennsylvania under the Federal anti-Communist Smith Act. These charges could not be overturned till 1956. This shows that substantial part of life of person accused of sedition goes in incarceration and in defending oneself. Only now, the legal community has started questioning the need to have such a

[27]Chafee Jr. (1918-1919).
[28]Roughead (1914).
[29]Morton & Malloch (1913).
[30]Mishler (2004).

law and trial[31] as it is contrary to the democratic principles which many nations claim to be based upon. Though the apex courts have been sensitive and limited the frequent curtailment of freedom of speech and expression under the guise of sedition trial, the same could not be assumed about the trial courts as demonstrated by the conviction of lawyer Thomas Muir on charges of sedition for his recommendation of Tom Paine's book *Rights of Man* to his friends and relatives by the High Court of Justiciary at Edinburgh. The JEIs must utilise all writings related to this trial to design their courses on the sedition law so that the grave illegalities, biases, reasoning bereft of logic are not repeated in the judicial history.

How to Design the Courses for enhanced learning and Positive Participation?

After the success of Langdell's case method for legal education discourse, clinical legal education (CLE) was the next pedagogical development by Russian professor Alexander Lyublinsky who suggested to develop law school education modeled on medical college education.[32] Pursuant to this, the law schools developed their own models of CLE. As part of CLE, some law schools asked the students to provide free legal services to the clients, some others stressed on one month to three months externships with senior lawyers, judges, trial courts, NGOs, legal aid departments and so on,[33] some law schools asked their students to take part in legal literacy to raise awareness on legal rights,[34] and some made students take part in simulation and role play based moot court courses, etc. CLE model provided experiential learning where entire focus was on student learning rather than faculty teaching.[35] It allowed the law schools to engage services of grassroot workers from different fields to provide inter-disciplinary experience to create understanding of non-legal actors in justice dispensation.

JEIs has lot to learn from the journey of legal education from case method to CLE for bringing innovations in delivery of its training courses. To offer the context and subtexts behind the litigation, JEI can design simulations, role plays, interviews with litigants, field visits and clinical observations. Opinions and viewpoints of diverse interest groups as well as experts from national and international organisations working on specific issues can be presented to raise greater understanding amongst judges on perspectives different than legal perspective.

[31]"Pity the nation that has to silence its writers for speaking their minds. Pity the nation that needs to jail those who ask for justice, while communal killers, mass murderers, corporate scamsters, looters, rapists and those who prey on the poorest of the poor, roam free." Public Statement of writer Arundhati Roy released on NDTV website and quoted by Narrain (2011).
[32]Wilson (2004).
[33]Milstein (2001).
[34]See www.streetlaw.org and http://www.wcl.american.edu/wethestudents/mbindex.cfm
[35]Wilson (2002).

Clinical designing of training courses by JEIs

Like medical students who have access to university-run hospitals, where they can accompany professors making rounds and treating patients, trainees at JEIs too have access to the courts as the judges who are managing the affairs of the JEI are most often the sitting judges who can facilitate an experiential learning in the court rooms. Such learning would involve taking down the notes of the court proceedings, doing research for the judgment writing, assisting the presiding judges in their case-court-record management, assisting the court administration in listing of cases, brainstorming with judges and their clerks on the nature of evidence collected for the cases to be taken up for hearing on the next day and so on.

Apart from offering experiential learning to new batch of judges, JEIs must think hard on the best method to sensitise senior and experienced judges so that they can comprehend the problems of vulnerable population who is forced to seek justice from the courts. CLE has the potential to transform legal culture by widening the perspective beyond an application of legal norm to a situation. CLE can raise consciousness to hurdles faced in securing justice from the courts. The clinical designing of courses will also give JEIs the freedom to invite for the purpose of training, the real litigants, or real victims, or accused persons who had a rough and long drawn battle before their vindication by the courts. Such hands on experience with injustice and its different manifestations would enlighten the senior judges on the need for careful analysis of facts and evidence presented before them.

For designing a successful training on social justice, the JEI must focus on (i) curriculum that coordinates theory with practice in the courts, (ii) faculty that has a huge experience of watching and critiquing judges for their poor performance in relation to protection of social justice, (iii) intellectual climate that allows free and fair discussion without anyone throwing tantrums about the power that they wield, (iv) extracurricular event that takes judges to actual places of violation of basic rights of human beings be they prisons, hospitals, trial courts, village meetings, police stations etc. The extracurricular activities can be treated as a link to curb professional alienation of judges and break the ice around them so that they can face the real world.

For designing a successful training on human rights protection, the JEI can initiate classroom interactions to understand the human rights ideology of individual judges which in turn would bring out their outlook to plight and misery of others. For effective training, JEI must not stand as mute party or simply as any event organiser. The JEI must step out of the comfort zone and push for experiments on HRE, engage consultants or researchers to document HR violations in different places and the failure of the justice system, as well as prepare the handbook on the best practices in the form of judicial precedents to intensify the learning amongst judges.

For designing a successful training on protection of the LGBT community, the JEI can devise a role play or a simulation wherein the participating judges can be asked to enact the role of oppressed and dispossessed member of LGBT

community who have been forcefully evicted from their rented premises by the resident welfare association after coming to know of their sexual orientation. In this role play, some judges could be asked to play the role of member of this resident welfare association, some to play roles of tenants, landlord, investigation officer, the LGBT couple and some to act as legal counsel for the parties involved. This whole role play exercise involving every judge participant in taking up some specific role for themselves whether of a client, attorney, witness, defendant and so on has potential to expose the judicial mindset on the status of LGBT in society, or whether the community should be protected against discrimination, etc. This role play participation would stay as an enduring experience with judges and improve their attitude in future litigation.

What should be the Content of Different Courses to be designed for the Judges?

An area of great concern as far as the content of JE discourse is concerned is related to the role of judges within constitutional and democratic framework. It is primary responsibility of JEI to distinguish and differentiate between role of judges and role of civil servants. Judges must be made to realise that they are different from the civil servants and therefore the society expects more from them. Their role does not finish just by applying the law produced by the parliament in a case before them. JEIs, therefore, need to develop their course content to explain judges how their role in the constitutional framework is different from that of any civil servant, parliamentarian and other professions. In fact, at least fifty percent of training material should be devoted to create this understanding among judges so that we don't end up having a bureaucratic judiciary.

Domselaar brings out a very important point before us about failure of legal and judicial profession in doing justice historically.[36] He provides many instances where both bar and the bench failed the citizens. Such examples are: during atrocities committed in times of the second world war, by not protecting legally Jews against the Nazi laws, during slavery system in the US and apartheid system in South Africa, at times of Watergate scandal in the US, during the times of war on terror under Bush and Obama administration, during many corporate and financial frauds that occurred such as Enron Bankruptcy scandal, GM ignition switch scandal, Volkswagen emission fraud scandal and so many others. Domselaar demonstrates how judges and lawyers did not act ethically in most difficult periods of history. JEIs can introduce a realistic didactic teaching materials to prove many ways in which judges failed to alleviate the suffering of its citizen or played a passive role in support of injustice.

Further, post pandemic, JEIs need to reform their course content. To begin with, they should increase emphasis on social justice element in their course curriculum to sensitise judges on the plight of marginalised, neglected, subordinated, under represented citizens and how by increasing access to justice to such citizens

[36]van Domselaar (2021).

procedural justice would be afforded. Judges will have to be introduced to the materials that can help them to pursue social justice goals and the materials that will guide them on the societal benefit that would follow by pursuing such goals.

The Course Content to Create Interest in Judges on the Poverty Law

Poverty law is about economic disadvantage. As a subject, it never became a mainstream part of the law school curriculum.[37] Because of which there is no standard, agreed-upon curriculum on poverty law[38] and this vacuum gives trainer/ instructor wider space to incorporate his or her interest and convictions. The contents could be around the political developments, or shifting notions on the causes and cures of economic disadvantage, or economic deprivation due to unjust economic and social system or inequities in policies, regulations, and programs designed by the government and the structure of society. The field is dynamic and ever-changing, so substantial revisions in teaching materials are required from year to year. The subject matter is far-ranging and calls for an interdisciplinary approach. The professor should of course be familiar with intricate federal and state benefits programs designed to address disadvantage and redistribute income.[39]

A critical part of the poverty law course would comprise an inquiry into (i) Who the poor are and theories of poverty; (ii) The topics of education, work, housing and homelessness, health, and welfare; (iii) On causes and approaches to poverty and (iv) Using the law as weapon against poverty. The session "Who Are the Poor?," can introduce various definitions of poverty and provide a conceptual framework for understanding poverty and the poor. The session, "Problems of Poor Families," can present specific problems relating to income, education, health, housing, parenting, and non-traditional family relationships to expose regulatory schemes and laws affecting the poor, such as legal aid and child custody laws. The reading materials can be prepared from multi-disciplinary essays on sociological, economic, anthropological studies; newspaper articles; and judicial opinions and law review articles. [40]

How such Courses are to be delivered?

One of the biggest drawback found in online delivery courses is alienation of participants. In online environment, trainee judges can only see faces of organisers, their colleagues and peers on computers. This is comparable to judges watching their television sets, with only difference that they can participate, if they wish, and present their side of the view. In physical settings, different experiments other than lecture method can be carried out. Judges learn from each other and not

[37]Wax (2008).
[38]Ibid.
[39]Ibid.
[40]Johnson & Trubek (1992).

only in classroom or clinical settings. Further, field visits designed as part of social justice curriculum has potential to fight alienation of judges from citizens. Thus field visit would be a vehicle to foster inclusion and to curb professional alienation. Field visits that promote consciousness to vulnerabilities of different groups be they juveniles, children in need of care and protection, old age population, disabled persons, woman destitute, refugee living in a camp will inculcate acceptance of diversity in judicial culture and help in checking on the human tendency to replicate comfortable networks that only mirror oneself.

How the Discourse on Poverty Law may be delivered to Judges?

The courses on poverty law must use an innovative approach aimed at encouraging critical thinking through observation of real life events, combined with seminar discussions and readings. The emphasis should be to change judicial culture in all its aspects, ranging from use of substantive law to empower communities, humanise legal fora, and use reality to transform the law. Judges can be given a copy of the book Evicted by Matthew Desmond, a Pulitzer Prize winning book that explores the issues of homelessness in U.S. cities and the pipeline to homelessness.[41] The book richly describes the stories of those living in poverty and on the verge of homelessness.[42] As part of the book, Desmond explores the root causes of poverty and homelessness, including the cycle of poverty, education, race, incarceration, and mental health. Further, it shows that low-income persons facing eviction almost always fared better when they had legal representation. In eviction proceedings described in the book, attorneys often appear for the landlords and rarely appear for the tenants.[43] Desmond tentatively introduces the concept of "exploitation" — "a word that has been scrubbed out of the poverty debate." The landlord who evicts Lamar, Larraine and so many others is rich enough to have a vacation in the Caribbean while her tenants shiver in Milwaukee. The owner of the trailer park takes in over $400,000 a year. These incomes are made possible by the extreme poverty of the tenants, who are afraid to complain and lack any form of legal representation.[44] After each judge has done reading of the book, a questionnaire can be framed and judges be divided into smaller groups to share their impressions on the issues of poverty, and how they could play a role in these situations. Some of these questions could be: How might a judge change the outcome in some of these situations? Which provisions of statutes allow you to fashion an appropriate remedy? What is the relationship between poverty and inequality as a whole? Or can robust capitalism co-exist comfortably with less poverty and more equality than is observed today? Whether poverty is an absolute or relative phenomenon. Will the people on the bottom rung of the ladder, even if reasonably well-provided for, necessarily view themselves as

[41]Desmond (2016).
[42]Blumgart (2016).
[43]Bezdek (1992) at 554.
[44]Ehrenreich (2016).

poor? Is self-direction a real possibility for most people within our society? Might extreme childhood deprivation, for example, significantly undermine the ability to exercise meaningful choice? Given their insular lives, can the poor really advance? Are all people really so free to climb or fall that they can reasonably be held responsible for where they end up? Whether the opportunity to achieve basic economic self-sufficiency is available to able-bodied persons of all backgrounds who are determined to make a decent life and get ahead. What circumstances would satisfy this condition? Is it really possible for everyone at the bottom to improve their situation or are there "structural" limits on how many people can do so? What is poverty? And what is the problem? Is poverty, like beauty, in the guilty eye of the beholder, or in the empty belly of the sufferer? How are poverty levels compared, across centuries and cultures, continents and countries? Is there an absolute standard of poverty, and if so, what is it? Or is it all relative, since the poor man only feels deprived when at the gate of the rich man's castle? What is the difference between deserving and undeserving poor, between those who labour but earn insufficient reward, and those who are impoverished because they cannot work? And how is poverty to be treated: by realistically diminishing desires, or by seeking to satisfy demands?[45]

JEI must make efforts to alter how poverty is perceived and what can and should be done by judges to comfort persons reeling under poverty. For this, the first thing to be accomplished is to increase the presence of poverty related issues as much as possible and in more ways as possible. In the spirit of this effort, part of the plan could be to organise a film-viewing series for "transformation of consciousness."[46] A film, or cinema, is an important component of clinical law teaching. A combination of sensitive lawyers and sensitive judge can turn the tables as we saw in a movie *Jai Bheem* based on true events related to police torture leading to death of a daily wage earner in a village in Tamil Nadu, India. The movie shows how poor are treated by the society and the government machinery and but for efforts of sensitive lawyer, justice would have remained a dream. The movie shows that the opposite of poverty is not wealth; the opposite of poverty is justice.

The course co-ordinators can collect a plethora of judgements from around the world to bring home a point that the true measure of commitment to justice, to the rule of law, fairness, and equality cannot be measured by how courts treat the rich, the powerful, the privileged, and the respected ones, but the true measure is how courts treat the poor, the disfavoured, the accused, the incarcerated, and the condemned. In this direction, discussions on judgments that - secured the right to legal counsel for the poor in criminal proceedings[47], obtained the right of the poor to due process in public assistance termination proceedings[48], secured important due process protections in landlord-tenant eviction actions[49] afforded the indigent

[45]Cannadine (1985).
[46]Gilmore (2016).
[47]*Gideon v. Wainwright*, 372 U.S. 335 (1986).
[48]*Goldberg v. Kelly*, 397 U.S. 254 (1970).
[49]*Javins v. First Nat. Realty Corp*., 428 F.2d 1071 (D.C. Cir. 1970).

the right to proceed without payment of costs in court matters [50] can be initiated by the JEIs to guide judges on how to provide remedy to poor and disadvantaged sections in the society.

Whether to Involve Judges in the beginning of their Career or at any Point of their Career?

More than fresh entrants, it is the mid-level judges who have spent more than a decade as a judge in the system, need to undergo social justice courses to break them away from their comfort zone and attitudinal rigidity earned by the power of the judicial post. Recently it has been found from the recorded court hearings that judges are just not ready to adjust and accept the requests of citizens or their representatives in litigation. One court hearing reflected rigid attitude in cost imposition and another court hearing reflected bias to languages when judge mocked the citizen who could not speak in English language and had appeared in person. Judge started speaking in his local language!

Who all should be involved for effective transfer of learning?

It was observed that in the US it is the people of colour who in numbers disproportionate to their white colleagues represent the interest of subordinated and underrepresented population before the courts.[51] Similar observation are made also on the state of affairs in other countries. Most of the JEIs are composed of the old, traditional, conservative and pro-government judges holding authoritarian position. Will this composition help in producing socially aware and courageous judges who will fear none and even risk their personal growth for adhering to and upholding the first principles of universal justice? Only time will prove.

Regarding poverty law course, as noted by Wax, JEI can engage persons learned in the aspects of tax law, administrative law, family law, constitutional law and those possessing more than a passing knowledge of social science subjects like labour economics, demography, social psychology, sociology, liberal political theory, and the sociology of education. The instructor should also have some familiarity-and comfort-with the methods of ethnography, statistics and regression analysis.[52]

Conclusion

JEIs are forced to believe that they are doing exceptionally well. The question that needs to be asked is if they are doing exceptionally well for themselves or for

[50] *Adkins v. E.I. DuPont de Nemours & Co.,* 335 U.S. 331 (1948).
[51] Lempert, Chambers & Adams (2000) at 401.
[52] Wax (2008).

the justice system. Further, denial of failures in transfer of learning, will prevent JEIs from innovations, improvements, revision. At international meetings, like the one IOJT organises, most JEIs compete to showcase their success and achievements. Hardly their representatives discuss threadbare how they failed in specific course design or course delivery. What tensions were involved in constructing an innovative approach to address the judges on any specific subject. How they failed to integrate practical and academic perspectives. What kind of resistance from judges the speaker faced in bridging the gap between the academic and practical approaches etc. There is no handbook developed to ease out these tensions so as to learn and improve. Nonetheless, it is hoped that in the future, international networks like IOJT will encourage the JEIs to bring forth these tensions so that the fellow JEIs and the IOJT network can learn and help the JEIs in constructing their courses in a manner that will ease out these tensions. At the same time JEIs will have to be guided on how best they can expose their judges on relationship between law and inequality, between globalisation of capital and labour, or how social justice can arrest the decline of labour unions, higher costs for basics like food, housing, education and health care, etc. It is very much within the domain of IOJT to encourage JEIs to train judges to develop jurisprudence to procure rights and resources for the poor and thereby secure the social justice.

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Socio-Economic Crimes: Analysis of Causation

*By Pradeep Kumar Singh**

Crime problem is a major obstacle for peace, development and overall wellbeing of public at large. Crime is universal reality; crime co-exist with the human existence. For crime two contrasting truth exist at the same time that not only crime is universal but also crime is relative. In previous society enmity, jealousy, need and necessity were prime reasons of crime commission but now in modern society mainly crime is committed due to the greed, avarice and rapaciousness. Impacts of crimes committed due to greed are more serious. Crimes committed due to greed are termed as socio-economic crimes. Socio-economic crimes are completely different from traditional crime and criminality in every reference whether victim or impacts over him, availability of evidences or nature of evidences, criminal or mode of commission of crime by him, therefore, for tackling of socio-economic crime and criminality completely different and effective measures have to be envisaged and used. Special penal statutes are enacted, specialised investigating agencies are established and special courts are constituted and conferred with special jurisdiction but socio-economic crimes are day by day creating more and more serious challenges before the society at large. Law and legal instrumentalities may better function to tackle any crime problem when enactment and enforcement of law are focused on causation of crime and criminality. Causation of socio-economic crime will be analysed in this paper.

Keywords: *Causation; Corporate crime; Criminal Justice system; Greed; Socio-economic crimes; Strain; Urbanisation*

Introduction

Socio-economic crimes are serious problem for wellbeing of society and members of society, nation and ultimately for world at large. For proper development and continued existence of civilised society effective tackling of socio-economic crime is necessary requisite. Penal or reformative measures prescription on the basis of symptomatic characteristics may only give some short term relief but it cannot effectively deal with the problem. Further, symptomatic dealing with the problem increases complications ultimately giving rise to uncontrolled crime waves. In case of socio-economic crimes such crime waves may completely hamper the whole societal process, badly affect societal members and destroy the wellbeing of nation. Study of causation and considering it for tackling socio-economic crime problem in effective manner has to be emphasised, otherwise root cause of criminality may not be identified and it may not be effectively dealt with. To clear the controversy regarding importance of causation

*PhD, Professor, Banaras Hindu University, Varanasi, Uttar Pradesh, India.
Email: pradeep@bhu.ac.in

in criminal justice system operations analogy may be made with medical sciences; now in cure of ailments symptomatic treatment administration is not considered appropriate, cause targeted treatment is better. In medical science it is appropriate that in the first instance cause of ailment has to be identified; whether ailment is due to the infection or malfunction of a body organ. When infection is cause of ailment, it has to be identified that by which parasite infection is caused and which medicine may be effective. When reason of ailment is malfunction of body organ, it has to be identified that by which body organ and what may be cure. In medical science treatment includes diagnosis, prescription of treatment, and administration of treatment; similarly in criminal justice system in sentencing there are three components – identification of criminality and reasons of criminality, determination of effective dealing measure whether it will be sentence or reformation. When it is identified that sentence may be appropriate then such determination includes determination of nature of sentence and determination of extent of sentence, and infliction of sentence. In case of socio-economic criminals, Supreme Court has decided that reformative measures are not effective and appropriate measure to deal with socio-economic criminals as they have no prospect of reformation and further special penal statutes prescribe minimum sentence, thereby, sentence application is mandatory[1]. In criminal justice system symptomatic dealing with crime problem, thereby, mechanistic approach to deal with crime problem may not be effective; individualised causation based treatment method of dealing with crime problem has to be used. Socio-economic crimes hamper whole societal development, seriously affect wellbeing of public at large, graver impacts are caused over public exchequer, safety and security of nation, and ultimately whole world is badly affected.

Socio-economic Crimes: Meaning

Socio-economic crimes are considered as by-product of modern society. Edwin Sutherland was first academician to study the crimes committed by upper class persons in course of performance of occupation and he named such crimes as white collar crimes. Before him, William Bonger, a Dutch criminologist, gave opinion regarding impact of capitalism on crime commission and observed that capitalism increases selfishness in the individuals; poor and rich both may commit crime. Opinion of Bonger was providing that rich person may also commit crime but his study was not detailed and further, it was not talking about crime committed in performance of occupation. Sutherland provided sufficient theoretical and empirical substratum to white collar crime. Sutherland defined White Collar Crime That White Collar Crime may be defined approximately as a

[1]*Pyarli K Tejani v Mahadeo Ramchandra Dange*, AIR 1974 SC 228; *State through S P New Delhi v. Rattan Lal Arora*, indiankanoon.org/doc/634266/; *Shyam Lal Verma v Central Bureau of Investigation*, Indiankanoon.org/doc/93520640/

crime committed by person of respectability and high social status in the course of his occupation.[2]

Analysis of definition given by Sutherland clear that on identifying of three elements, crime may be taken as white collar crime – 1. who committed crime, 2. what law was violated, and 3. when was the crime committed. Society has conferred status and position, and further, society has provided respectability to white collar person, thereby, he is always taken as person to act for betterment of society but he is affecting the society by crime commission. The description that the white collar criminal is person of high socio-economic status and respectability clearly establishes that this category of crime is completely different from traditional crime and criminal. Further, another distinctive feature of white collar crime is 'violation of law enacted to regulate occupational activities'. Generally, crime is defined as violation of provisions of criminal law. Sutherland himself has defined that criminal behaviour is violation of criminal law. Sutherland defined crime that crime is behaviour in violation of criminal law. No matter how immoral, reprehensible, or indecent an act may be, it is not criminal act unless it is outlawed by the state. But usually allegations are made against Sutherland that he brought business activities and some violations of law in category of crime. 'When crime was committed' is third essential requisite for white collar crime. Sutherland clearly described that law regulating occupational activities is violated in reference to performance of occupational activities. Only white collar person is not sufficient for commission of white collar crime; if he is doing his professional act and in course of it he has committed criminal act, it may constitute white collar crime; suppose medical practitioner physically assaults the patient in the hospital, act is committed by medical practitioner who is respectable professional person but his act is no way related to his occupational activities, thereby, it will not be white collar crime. In another instance same medical practitioner in performance surgery of abdominal part of body without any consent illegally removes some internal organ, it may constitute white collar crime.

Sutherland studied larger and well established corporate bodies and on this basis he gave his conception regarding white collar crime. In modern reference to socio-economic crime white crime is taken as occupational crime which is one important aspect of socio-economic crimes. Socio-economic crime has another important aspect is corporate crime. When study of Sutherland is taken in proper perspective it is about corporate crime; he studied corporate bodies and gave opinions regarding white collar crime.[3] Traditional crimes are usually committed by criminals individually or in loosely constituted group; contrast to aforesaid white collar criminals commit crime in organised manner after detailed planning. It makes availability of clues and evidences completely difficult, thereby, detection and prosecution of white collar criminal difficult ultimately tackling of white collar crime difficult. Prof. Marshall B Clinard highlighted that white collar crime is committed by organised gang and he in this reference observed that white collar crime is violation of law committed primarily by groups such as professional men, businessmen and politicians in course of their occupation. Marshall B Clinard

[2]Sutherland (1949) at 9.
[3]Clinard, Yeager & Blackburn Clinartd (2006) at 13..

opined that white collar crime is committed by professional person and it may be put in two categories occupational crime and corporate crime. When professional person commits criminal act as employee of corporate body which is identifiable by fact that criminal act is committed for benefit of corporate body then his act has to be taken as corporate crime. But when act of professional person is committed for his own benefit, it is occupational crime.[4] White collar crime in strict sense refers to occupational crimes only. Socio-economic criminals, particularly main perpetrators, do not physically participate and commit crime by concealment. Whenever need arises for physical participation or use of violence, it is by persons acting on lower rung or services of some professional criminals are hired. Group engaged in socio-economic crime form well organised gang as syndicate; in this syndicate main perpetrator forms upper rung and he determines for crime commission, prepare plan for execution of crime; crime commission is supervised and handled by person in syndicate at middle rung; crime plan is executed and crime is committed by person at lower rung in syndicate who works at ground level. Person in syndicate at upper rung act through concealment, to outside world he has personality of sober person but in practical reality and in the syndicate he is main culprit. H. Edelhertz observed that white collar crime is an illegal act or series of illegal acts committed by non-physical means and by concealment or guile, to obtain money or property, to avoid payment or loss of money or property, or to obtain business or personal advantages.[5] Mode of commission of socio-economic crime is non-physical and objective is monetary.

White collar crime term denotes crime committed by person with high socio-economic position only. Now it is fact that person with lower position are also involved in committing such crimes. Still main criminal making planning and running crime syndicate for commission of such crimes is person with higher position, person with lower position execute the planning and mere stooge. Socio-economic crimes are committed due to economic objectives to become richer by getting quick money. Socio-economic crimes seriously affect the whole society. Socio-economic crime is better term to denote the crime committed due to the greed, avarice and rapaciousness and causing serious problem for society at large.

Criminological Theories about Causation of Socio-economic Crimes

Socio-economic criminality may be explained on the basis of Strain Theory given by Robert Merton, Differential Association Theory given by Edwin H. Sutherland, sub-culture theory and opportunity theory. Anomie Theory and Strain Theory developed by Robert Merton taken together with Differential Association Theory given by Edwin H Sutherland provide sufficient explanation for socio-economic crimes. A concrete opinion for the first time about crime committed by upper class was given by Edwin H Sutherland; he gave name white collar crime to differentiate crime committed by lower class, generally, referred as traditional

[4]Ibid, at 18.
[5]Edelhertz (1970) at 19-20.

crime. Traditional crime is taken as offences committed on streets and white collar crime is taken as offences of suites. Further, traditional crime is also taken as offences of force and white collar crime as offences of fraud. Before Sutherland Dutch criminologist William Bonger also gave opinion about crime committed by richer person. Bonger in his book 'Criminality and Economic Conditions' written in 1916 opined that capitalism give rise to egoism (selfishness increases) and altruism comes to an end; in capitalism egoism grows on cost of altruism. He opined that in capitalism class person becomes selfish and jealous. Due to misery working class commits crime and similarly bourgeoisie due to capitalism have avarice and commit crime.

Sutherland's view is that not only poor persons commit crime, but also persons with position and respect commit crimes and their crimes are very destructive for world at large.

In modern era every person is undergoing strains and stresses due to goal and legitimate means disparity. Legitimate means available are not sufficient to satisfy goals; means are provided to person because of his status and position. Further, goals are also provided by society and out of those a person selects his own goal on the basis of his socialisation. Goal attaining willingness becomes desires and ultimately desire may take shape of passion. Generally means available which is used for attaining the goal is position and resource determined and goal is provided and then selected by person is of class superior to person. Suppose a person belongs to lower-middle class, he has means available to his class and his resources but his goal may be of upper-middle class or upper class. Such means and goal disparity creates strain; Robert Merton gave anomie theory which is also called as strain theory according to which such disparity resultant strain creates anomie which compels for adaptations. Such adaptations undergone by person may be conducive for crime commission and to progress in criminal career. Merton emphasised that high rate of deviance is expected when social expectations are not in balance with realistic opportunities available to the person to attain his goal. Unrealistic hopes and expectations are not natural but socially constructed and also promoted. When society has created lofty expectations in the persons but society fails to provide opportunities and resources; such situations create strain and ultimately anomie situation. Anomie Theory was given by Emile Durkheim and Robert Merton, both, but concept underlying their anomie concept differs. Emile Durkheim emphasised on society structural cause for anomie while Robert Merton opined on the basis of society structure cause and society process cause, giving more emphasis on society process cause. Now in the modern era of globalisation cultural norms itself has element emphasizing and praising for goal attainment filling persons with desires but real means available are not changed; in such situation attempts to attain goal may fail and cause frustration, stresses and anomie.[6]

The realisation of financial success purportedly is open to all, but actually opportunities to attain this goal are not distributed equally within social structure. This disparity between goal and means creates strain.[7] For richer person whose all

[6]Passas (2007) at 96-97.
[7]Merton (1964) at 218.

the needs are satisfied but also for him there is disparity between goals to have more and more money, more and more luxury and physical comforts available, and legitimate means available. When goal cannot be achieved by legitimate means then strain compel person to achieve it by adopting illegitimate means. For proper tackling of white collar crime problem, white collar crime has to be divided into organisational (corporate crime) and occupational crime.[8] John Braithwait gave opinion to explain the corporate crime which is one important aspect of white collar crime. According to John Braithwaite white collar criminals are motivated by disparity between corporate goal and limited opportunity available through conventional business practices. When goal is emphasised and pressures are created to attain the goal which may be unattainable within existing framework of laws and regulations, innovative officers turn to crime to attain the goal and for it corporate official learn the rationalisation and technique for crime commission. White collar criminals are person with status and position; they use their respectability and resources and whenever their criminal acts become identifiable, they try to show that they are innocent and do not have any information about such crime commission but all such criminal acts are committed by subordinates.[9]

Only strain due to disparity between goal and means is not sufficient for socio-economic crime commission but it is necessary that the persons with reputation and position have mental preparedness for socio-economic crime commission and specialisation in illegitimate techniques in such regards. Sutherland initially gave Differential Association Theory as general causation theory which is especially applicable for traditional criminality. In 1939 Sutherland gave Differential Association Theory. He was much influenced by Chicago School particularly work of Thrasher, Shaw and Kay who studied geographical distribution of delinquency in Chicago city; work of Thorsten Sellin, Wirth and Sutherland himself regarding culture conflicts; and Sutherland's own work on thieves that to become professional thief, one has to become member of group of professional thieves and learn the technique. Sutherland gave Differential association Theory for the first time in third edition of his book 'Principles of Criminology' in 1939 and then revised the theory in fourth edition of the book in 1947. This theory is considered as a rational theory to explain every kind of criminality from juvenile delinquency to white collar criminality. In his Differential Association Theory Sutherland emphasised that criminal is not trait determined but criminal behaviour is learned behaviour; it is learned in direct communication with intimate personal group. Every person has various personal groups; some of them have definition favourable to respect the law and some have definition favourable to violation of law. Thereby, a person for behaviour has criminogenic force and anti-criminogenic force acting at the same time. Which definition will be accepted means which force will be more conducive for the person concerned depends on priority, frequency and intimacy? When a definition favourable to violation of law is accepted, person develops drive and rationalisation for doing the act but it is not sufficient but further, person learns technique of commission of act.

[8]Braithwaite (1985) at 19.
[9]Ibid., at 7.

Later on when Sutherland developed concept of white collar criminality need arose to give causation theory to explain white collar criminality. Edwin H Sutherland extended his Differential Association Theory to explain white collar crime also and according to which white collar crime is also a learnt behaviour which is learnt in communication with the persons who are already practicing it. Edwin H Sutherland opined that white collar has its genesis in the same general process as other criminal behaviour, namely differential association.[10] Professional person having strain due to goal and means disparity with desire to achieve goal in communication with person already indulged in white collar crime learns drive, rationalisation and technique for commission of white collar crime. But white collar criminals do not consider themselves as criminal, merely they may consider that they may have violated the law. It happens because of differential enforcement of law, usually wrongful acts committed by white collar persons are not only covered by criminal law but also by civil, taxation and business law. Usually, law enforcement agencies enforce the law other than criminal law. White collar criminals have self-image and also public have such conception that such white collar persons are not a criminal but sober and civilised person with status. Sutherland observed that the white collar criminal does not conceive of himself as criminal because he is not dealt with under the same official procedure as other criminals and because, owing of his class status, he does not engage in intimate personal association with those who define himself as criminals.[11]

Travis Hirschi gave Control Theory to explain the crime causation and he opined that delinquent acts result when an individual's bond to society is weak or broken.[12] Stronger bond to society and member of society create conducive situation for a person to behave in conformist behaviour. Bond of person with his fellow citizenry and society determines behaviour and ultimately nature of person. Bond of person with society contains four inter-related components – attachments, commitments, involvements and beliefs. Attachment is main component and all others are strengthening it. Attachments to conventional others, commitments to conventional lies of action, involvements in conventional activities and belief in common value system make the social bond stronger and determine that the behaviour of person will be sober.[13] Stronger social bond determines that person shall not behave in manner affecting the society while weaker social bond make prone to become delinquent. Travis Hirschi and Michael Gottfredson extended the Control Theory to explain white collar crime.[14] Hirschi and Gottfredson opined that white collar criminals are motivated by same forces that drive other criminals – self-interest, pursuit of pleasure and avoidance of pain.

Travis Hirschi reinforced classical theory with rectifications of loopholes; he opined that all human behaviours are purposive and determined on the basis of self-interest. Criminal and non-criminal behaviours are result of pursuit of self-interest of pleasure or avoidance of pain. Persons think for themselves and never

[10]Sutherland (1949) at 234.
[11]Sutherland (1949) at 223.
[12]Hirschi (1969) at 16.
[13]Gottfredson & Hirschi (1990) at 16.
[14]Hirschi & Gottfredson (1989) at 371.

subordinate their own interest to interest of others.[15] Only proper socialisation may put restraint on acting and affecting the society, thereby, a person can be restrained by socialisation. By socialisation social bond becomes stronger; it restrains deviance. Hirschi and Gottfredson did not agree with classical school over-emphasizing on legal sanction to restrain deviance. They were of opinion that legal sanctions are redundant to social sanctions rooted in moral and religious sanctions. Person likely to commit crime less cares for legal sanctions and more controlled by family socialisation. Criminals have low self-control and they do not want to delay their gratification of self-interest, they never think for long term gain but concerned with immediate gain, and they are not sensitive to needs and suffering of others. These factors are also applicable for white collar crime; a general theory for crime applicable for all kinds of criminal act was tried to be developed by Hirschi and Gottfredson. They did not give importance to motivation element; more emphasised that the crime commission is product of low self-control of self interest in situation of availability of opportunity. Besides these factors, there are some additional elements in attracting well to do and educated persons towards white collar crime are –

(1) White Collar Crime commission is not so dangerous as other common criminality, traditional crime is committed by physical participation, thereby, always there is risk of reaction from victim and societal members, and further, witness and other evidences may be available, contrary to it white collar crime is committed by non-physical means, and further, it is not committed directly against individual, thereby, risk in commission of crime and availability of evidences may be lesser;
(2) White Collar Crime provides relatively larger rewards; traditional crimes relating to property are usually committed due to compulsions of need and necessity, and further, such offences are committed against individual, in such situation extent and impact of crime may be much lesser, it is also for offences against body but in case of white collar crime extent and impacts are larger as it is committed against public at large, nation and even against whole world due to the greed, avarice and rapaciousness;
(3) Rewards follow quickly to commission of crime;
(4) Sanctions associated with white Collar Crimes are vague or only rarely imposed; and
(5) Minimal effort is required who have skill of committing white Collar acts, white collar crimes are committed in course of occupation and acts committed in this reference are relating to occupational acts, thereby, doer has expertise and he need not have to put any extra efforts. When a person is attached with the society, a kind of deterrence is working over him, he is restrained from doing the offending act against the society.[16]

[15]Hirschi & Gottfredson (1989) at 5.
[16]Lasley (2007) at 360-361.

Reed and Yeager analysed opinion of Gottfredson and Hirschi regarding white collar crime commission particularly organisational offending and opined that some concepts given by them are not tenable as they observed that white collar offending is uncommon, simple in technique and condemned in business culture.[17]

Multiple Factors to Explain Causation behind Socio-Economic Crimes

Human behaviour has always been very complex behaviour; it is difficult to identify and precisely give one or other factor for a particular behaviour or behaviour pattern. A number of factors influence and exert impacts over person, thereby, a number of factors interact and determine behaviour of person; in such situation a person's behaviour is effectively determined and manifested by multiple factors.

Greed and Acquisitiveness

Social structure and social pressure determine social thinking which lays down nature of individual thinking, relationship and attachment with fellow citizenry and ultimately all culminates and determine nature and rate of criminal acts. External acts committed are manifestations of mentality and thought process taking place in the mind of person. Actually acts are committed in mind; external body only executes it. Agrarian and pastoralist societies have stronger kith and kinship relationship in which societal members have stronger social solidarity. In such societies generally productions are made for satisfaction of basic needs and in such case persons have no passion for money and richness. In this society all the persons whether owning the production means, working in such production means, operating the market and purchaser, all are connected with emotions of togetherness; no one can think to harm any other. In this kind of society there may be commission of some petty offence of lesser number satisfying characteristics of socio-economic crime but socio-economic crimes may not be problem. Society with stronger social solidarity may have problem traditional crime commission committed due to need, necessity, jealousy, enmity, and retribution. When social structure and social process change accordingly nature, rate and extent of crime problem also change.

In modern society market is main desiderata which constructs and determines everything in the society. In modern society market determines social structure, social process and social thinking. In such society social solidarity becomes weaker and relations are determined by egoism rather than altruism; productions are made for market; market determines what will be produced and in what quantity it will be produced. Such production means is used which may satisfy requirements of market; it gives rise to industrialisation. People migrate to and reside near industrial area and market which give rise to urbanisation. In industrialisation and urbanisation an individual has migrates from his own place and settles at new place where persons have migrated from various places; such

[17]Reed & Yeager (2007) at 96-97.

situation causes complete breakdown of social control mechanism at both the places, place from where person has migrated and the place where he settles after migration.

In present society everything is decided by market and because of it by money. The individual has left his permanent place and his nearly related persons only for working in industry and market for getting more and more money; in such situation for individual money is primary and in focus while all other considerations like value, norms, ethics and altruism are secondary. In the society everything like status, position, respect and behaviour is evaluated in money terms. In such society obsession for money becomes of insatiable; greed, avarice and rapaciousness are major causation for crime commission and economic crimes are committed without considering its harmful and serious impacts over fellow citizenry. Individuals want to enjoy physical commodities even at the cost of wellbeing of society and members of society. Greed and acquisitiveness for money and physical commodities are main causes of commission of socio-economic crimes.

Degradation in Ethical and Professional Values

In society a person's position, status and reputation have to be decided on the basis of character, behaviour, knowledge and nature of performed acts but in market oriented society person's pecuniary capacity and available physical commodities are used as criterion for aforesaid purposes. Previously in the society person was concerned with satisfaction of his bare needs of food, clothing and house but now in market oriented society a person's desire has become insatiable and his willingness is to possess all the luxuries. It creates a conducive environment for selfish behaviour focused for acquiring more and more money by indulging in any kind of act rather than emphasizing on taking care of fellow societal members. With industrialisation and urbanisation such behaviour pattern increases. Previously, persons in the society were related and even today in remote areas and in older part of urban area persons are related by stronger bond of affection and also socialisation pattern determine behaviour with stronger ethical and professional values. Because of stronger ethical values and professional values an individual cannot think to commit any act which may affect the public at large;[18] no doubt crime may be committed but that may be targeting to individual to whom culprit has enmity, jealousy or it may have committed due to need and necessity. In market oriented society where money has become means and end all, ethical and professional values are at lowest ebb; in such situation an individual for money may commit socio-economic crime even knowingly that it may affect the public at large and affect wellbeing of whole nation ultimately of world at large.

Previously religion and religious values were playing a crucial role in regulation of human behaviour; when formal legal measures were not properly developed particularly it was not possible to administer formal legal system in remote areas then by means of religious values and ethos human life and behaviours were regulated. Religion taught righteousness and thereby directed for

[18]Clinard & Yager (2017) at 300.

right path of life to be treaded, sin have to be avoided, self-content behaviour was promoted and obsession for luxuries was discouraged. For enforcing religious values, thereby, to regulate human behaviour religion shows fear that one has to pay for his sinful acts in this life and then after in other life too. Religious regulation in such manner was restricting persons from committing harmful acts particularly socio-economic crimes. Educated persons with reasoning particularly obsessed with goal to earn more and more raise suspicion for religious directions. Due to decrease in religious regulation effect such person may commit any kind of act even socio-economic crime to become rich quick.

Absence of Public Reaction

For tackling problem for crime problem whether it is of traditional crime or socio-economic crime important and crucial element is public reaction against crime. Absence of public reaction against crime is a major causation for criminality. Public reaction against crime is important for formal and informal, both the actions against crime. Public considers only traditional crimes as real crime; for socio-economic crime a general consideration is that it is common professional activity performed in better way by the person. Further, socio-economic crime is committed by reputed person indulged in some professional act who does not satisfy criminal stereotype as he is properly educated, socialised and indulged in some occupation, and furthermore, on success criterion used by modern society he is successful person as having money and physical commodities. Socio-economic criminal generally acts in two pronged one which is projected in public and other which is main source of his income that is of indulgence in organised economic crime commission. Socio-economic criminal does not consider himself as criminal; he has some rationalisation for his criminality and considers himself as a better skilled professional.

For tackling of crime problem it is necessary that public have to consider that the act committed is criminal act and person is criminal. Further, criminal also should consider that he has committed criminal act. When public treat any act as criminal act and doer of act as criminal, it may react against commission of act and also against doer of act. When doer of act treat himself as criminal and act as criminal act, he will receive reaction against his act and undergo punishment or reformation inflicted against him. Social reaction and social pressure are effective informal crime tackling measures which are even more effective than the formal measures of crime tackling. Further, effectiveness and successful formal criminal justice system depends on public reaction against crime by which law enforcement agencies may receive prompt information about crime commission, statements of person acquainted with fact and circumstances, information about other evidences – what are evidences available and where are evidences available, and further, before the adjudicatory agencies testimonies may be given which may led for conviction and sentencing of criminal. Sentence imposition creates general and specific deterrence, thereby, criminal may have lesson for future behaviour that crime should not be committed. In case of socio-economic crimes public do not consider it as criminal act and do not react, thereby, it is difficult for investigating,

prosecution and adjudicatory authorities to enforce and apply the law and cope the problem.

Industrialisation and Urbanisation

Industrialisation and urbanisation are major causes of commission of socio-economic crimes. History reveals that problem of socio-economic crime was felt with advent of industrialisation and urbanisation, and further, in industrial concern, nearby area, similarly, in the urban areas problem of socio-economic crime is dominant crime problem. It is evident that such places cannot be causation in itself but circumstances prevailing there may be causation. For such consideration support is available from Chicago School of Criminology which studied spatial distribution of crime problem in Chicago city, no doubt study was relating to distribution of traditional delinquency but it clearly established that in different parts of city circumstances may differ and accordingly rate of delinquency differs; failing of social control mechanism was identifiable fact behind problem in area with more delinquency rate. To work in the industry from various distant places person moves and settles near the industrial concern by which urban centres come into existences. Here persons have migrated and work for money, thereby, whole socialisation, working and thought are primarily concern with earning money; the goal becomes primary and means used becomes secondary. Such situation prevailing at industrial and urban place makes conducive situation for making of socio-economic criminals and commission of socio-economic crimes.

Welfare State Concept

Previously, states were functioning on the laissez faire state concept (police state) and accordingly state was only concerned with maintenance of law and order within the state and protection state territory against external aggression. Laissez faire state functions for internal and external security. Laissez faire state does not interfere in private business activities; such situation creates a situation for performance of business activities in any way but that may not be taken as criminal act. In 1776 Adam Smith wrote the book 'Wealth of Nations' in which he advocated doctrine of natural rights. Doctrine of natural right advanced by Adam Smith actually advocating for inalienable and inviolable individual rights; he opined that individual has right to life, liberty, property and trade provided by nature itself. Such natural rights cannot be interfered by the state, and thereby, acts committed in exercise of such rights committed by individual, indulged in business activities for maximisation of profit even though doing such acts may be graver and harmful, cannot be dealt and stopped by the state. Further, due to concept of *nellum crimen sine lege* (nothing is crime unless prohibited by provisions of law) *and nellum poena sine lege (*no penalty without law), such harmful acts even after causing serious impacts over societal wellbeing were not considered as criminal acts but considered as business acts committed in skilled

manner. Desire for maximisation of profit is one of the major causes of socio-economic crime.

In first half of twentieth century particularly around 1925 to 1930 state policy changed from laissez faire state policy to welfare state policy. Under Welfare State Policy state has responsibility to take care of all the needs of citizens and to take actions for their protections. During era of industrialisation in 18th and 19th century harmful and offensive acts were committed which were taken as sober and civilised acts but when state became welfare state, in 20th and now in 21st century after prescription of punishment same act became criminal acts. Legislature has been enacting law to regulate activities of professional persons, corporate bodies and organised criminality and in this regard harmful acts are declared crime and punishments are prescribed. Usually dishonest person performing his occupational activities improperly contend that state has not to interfere in business activities and should not have concern with property of private individual and for this purpose usually it is contended that state has to limit itself only up to maintaining of law and order and external and internal security. Whenever social structure, social thought, state policy, state actions change, legal responsibility of natural and legal person also change and particularly such changes are manifested in criminal law. When state was laissez faire state, society was mechanical society with stronger social solidarity, society was dominated by lower middle class culture considerations in which bravery, courage, violence, emotions of affection and hatred dominates, crime definitions and responsibilities are completely of one sort. But in industrialised, urbanised, globalised, organic society with weaker social solidarity with more emphasis on upper and upper middle class cultural norms in which success particularly pecuniary success becomes more important and individual consideration shifts from means orientation to goal orientation, crime definitions and criminal responsibilities becomes completely different. State cannot be silent spectator to the wrongful act commission and causing serious impacts over the society; in about last 100 years period state to tackle such problem has enacted many laws to declare the activities as crimes.[19] Now state is welfare state, it has responsibility to protect and take care of wellbeing of whole citizenry and also of oneself, therefore state has to make law and strictly regulate the harmful activities and enquire about property and trade illegally accumulated and conducted.

Penal Acts are enacted to penalise harmful economic activities but at the same time it is reality that such Acts rarely used; on the same subject matter besides criminal law civil, taxation, and administrative laws are also made and in such situation when harmful activities are identified, usually criminal law is not applied but some other law is used. Such situation creates situation of differential enforcement of law which affects efficacy of criminal justice system in dealing with serious problem of socio-economic crimes. Criminal law has important distinctive feature that it uniformly applies on whole citizenry without any differentiation on the basis of individual status and position. This fact may be proper for law enacted and contained in the bare provisions but when applied it may be differentially applied and create differentiation in reference to persons

[19]Chandra (1979) at 24.

against whom law is enforced. Uniformity of law is main characteristics of criminal law but in application of law a differential enforcement situation is created and practically law becomes completely different and treat persons differently on the basis of status.[20] In enforcement of criminal justice in reference to socio-economic crimes differential enforcement of law is conspicuous and practical fact. Activity is criminal but usually law other than criminal law is applied. In case criminal law is applied, applications of measures are completely different from same law applied against the person with lower status. Such application of criminal law or non-application of criminal law makes a complete the whole concept relating to crime and criminality. Further such differential enforcement of law also differs in respect of persons with status; when businessman has greater status, his treatment with law is different from businessman comparatively lower status. Sutherland observed that the differential treatment of the law as it applies to large corporations may be explained by three factors, namely, the status of businessman, the trend away from punishment, and relatively unorganised resentment of the public against white collar crimes (Sutherland, 1949, p. 46). Differential enforcement of law produces consequences that socio-economic criminal does not consider himself as criminal and further, public also does not treat him as criminal. When doer of criminal act considers himself as criminal, thereby, he has criminal self-image, then only he may not have any resentment for application of criminal measures and may subject himself to criminal justice measures applications. Public reaction against crime lowers the reputation and status of criminal, criminal becomes outcast; such situation acts as a social pressure against crime commission, and further, law enforcement agencies are also pressurised to take effective criminal justice action against criminal. Welfare state policy and public reaction against socio-economic crimes are mutually influencing each other; welfare state concept makes citizenry conscious and public reaction makes state a welfare state actively and effectively taking criminal justice actions against doer of criminal acts regardless of his status, means and position.

Welfare state policy is not cause of socio-economic crime commission but it is reason of declaration of harmful acts as criminal acts and prescription of punishment for such acts; previously the act which was not crime and doer was not criminal, is differently treated and the same act may be crime and doer may be criminal. In such situation, initially the act committed would be business act considered committed in skilled way to maximise profit, later on conducting it in wrongful manner would attract the civil actions but presently when state policy has shifted to welfare state policy the same act is declared as crime and committing such act may attract criminal liability, thereby, imposition of penal sanctions.

[20]Sutherland, Cressey & Luckenbill (1992) at 9.

Concluding Remarks

Socio-economic criminal commits crime during performance of occupational activities, he is expert person in performance of such acts, he is properly educated and socialised person, he is respectable and person with status, all these together make socio-economic criminal completely different and also a serious challenge for criminal justice system to deal effectively with such kind of criminal element who is in all references different from stereotype criminal. Society does not consider act constituting socio-economic crime as criminal act, and further, society does not consider socio-economic criminal as person with criminality. Generally, acts committed by socio-economic criminal are taken as performance occupational acts performed in better way. Socio-economic criminal has various qualities which are admired in the society like he is affluent, educated, properly socialised, status, position, means and he is suitably employed or engaged in some occupation; he is respected but he is not hated, condemned and proscribed, thereby, society does not react against socio-economic crime and socio-economic criminal. Effective criminal justice enforcement depends on reaction of society against crime and criminality. Law enforcement agencies are in need of receiving prompt information about crime commission, cooperation of persons acquainted with fact and circumstances particularly to get information about fact and circumstances of case, disclosure of information about evidences. Adjudicatory body is need of cooperation of societal persons for giving testimony and adducing of material and documentary evidences. All the aforesaid may be possible only when society reacts against crime and criminals. Because of expertise of criminal, commission of act during performance of occupation, act is committed in planned and organised manner, and act is committed by non-physical means by use of modern know-how, generally evidences are not available or if available those are of very technical nature.

Socio-economic crimes are serious challenge before the modern society and it poses graver problem for wellbeing of nation and citizenry both. Crime is ever present universal phenomenon; it is present in every society regardless of time and place but at the same time one more fact is absolutely true that content, nature and rate of crime change with change of time and place. In India before independence when society was predominantly agrarian society, traditional crimes were committed and whole criminal justice system was focused on traditional crime and criminality. After independence with emergence of industrialisation and urbanisation, Indian criminal justice system is facing serious challenge caused by socio-economic crimes and criminality.

It does not mean that before independence, in India socio-economic crimes were not committed, even in ancient India such types of crimes were committed as it is evident from prescription of punishments for crime committed by businessmen, corrupt officials and crimes committed in business transaction; number, seriousness and impacts of such crimes were nugatory. It does not mean that presently only socio-economic crimes are committed; Indian society is stratified society, upper and upper middle class may have more socio-economic criminality while lower and lower middle class have more problem of traditional crime. Upper and upper

middle class may also commit traditional crime; similarly lower and lower middle class may also be involved in socio-economic crime. In case lower and lower middle class person is involved, he participates in its execution as petty executor of crime but it is designed, planned and controlled by person with status and position.

Socio-economic crimes and traditional crimes are different in all the references of crime, criminal, criminality, impact, motive, objectives, concepts and principles, criminal proceeding, instrumentalities owing responsibilities to take actions, penal actions, and public reactions. Socio-economic crimes are mainly committed for greed satisfaction which is always insatiable; for criminal who is victim and what is impact of crime, are immaterial considerations; criminal is only concerned with monetary benefits obtained by perpetration of crime. Socio-economic crime cannot be tackled by same criminal proceedings and instrumentalities envisaged for traditional crime. Furthermore, one socio-economic crime is different from other socio-economic crime; thereby, for every socio-economic crime according to requirements specified criminal proceedings and specialised instrumentalities are needed to be provided. Socio-economic crimes are needed to be effectively dealt with and for that necessary requisite is to use proper and specialised criminal proceedings and instrumentalities.

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A History of the Common Law Double Jeopardy Principle: From Classical Antiquity to Modern Era

*By Ger Coffey**[1]

The double jeopardy principle is a guarantee of individual liberty that has ancient origins. The development of the principle has been incremental, and its meaning has varied through the ages. The research question and attending analyses presented in this article advances an examination of the evolution of the double jeopardy principle in historical context. Through doctrinal analysis the hypothesis advances the supposition that the common law principle was firmly established by the post-medieval period. Through an examination of landmarks in the development of the principle the article examines theoretical underpinnings and considers the extent to which the criminal justice system developed a public prosecution model of criminal justice. The incremental development of this fundamental principle of criminal justice can be explained in terms of the deficiencies in medieval criminal procedure, prejudices and practices of medieval trial procedure and punishments imposed on convicted offenders. Jurisprudence on the application of the principle indicates significant developments following the Restoration.

Keywords: *Double jeopardy; Ne bis in idem; Autrefois acquit; Autrefois convict; Criminous clerks; Restoration*

Introduction

With the establishment of the public prosecution model of criminal justice from the nineteenth century, liberal democratic states are imbued with constitutional and statutory obligations to detect, investigate, prosecute, and punish convicted offenders.[2] These obligations must be legitimately discharged in accordance with substantive and procedural safeguards to prevent injustices of wrongful convictions, and wrongful acquittals. Criminal justice processes should be realistic concerning pragmatic constraints on law enforcement and evidential burdens of proof. In this regard, the criminal justice and sentencing processes are conducive to the principled asymmetry of convictions and acquittals, provided that individual rights are respected and protected.

The principle of double jeopardy in common law adversarial jurisdictions, and its continental counterpart *ne bis in idem* in civil law inquisitorial jurisdictions,

[*]LL.B.; M.A.; Ph.D. Lecturer in Law and Course Director LLM/MA in Human Rights in Criminal Justice, Centre for Crime, Justice and Victim Studies, School of Law, University of Limerick, Limerick, Ireland. Email : ger.coffey@ul.ie

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[2]Ma (2008); Langbein (1973).

proscribe multiple trials and punishments for the same criminal offence.[3] The principle finds expression in the pleas in bar, *autrefois acquit* and *autrefois convict*. Although commonly referred to as 'the rule against double jeopardy' the proscription is more appropriately identified as a principle or maxim incorporating multiple rules of substantive and procedural law. A rule of law *simpliciter* would not incorporate fundamental procedural issues including the attachment of jeopardy to the original criminal trial, final verdict of acquittal or conviction, and the most litigated element of the principle regarding types of conduct that might constitute the same criminal offence.

Historical methodology allows legal researchers to evaluate a principle in its original context to develop a greater depth of understanding.[4] Through doctrinal analysis of legalistic sources, this article traces the historical development of the common law double jeopardy principle. The analysis reveals that the importance of the principle gained traction during the late medieval period and was firmly established in the common law by the late seventeenth century. The foundations of this incremental development were based on the status of the principle in classical antiquity, migration of Roman law scholars, church-state conflicts over clerical immunity, changes in medieval criminal procedure and harsh punishments. The hypothesis is augmented by the status of the principle having migrated to the American colonies and subsequently enshrined in the federal and state constitutions during this formative period.

Rationale of the Principle

Multiple prosecutions and punishments for the same conduct/offence is intrinsically unlawful from a deontological perspective.[5] Deontological ethics, and the nature of duty and obligation on states impacted on the prescriptive ethical theory that morality of conduct should be constructed on whether such conduct is right or wrong according to a series of rules, rather than based on the consequences of the proscribed conduct. This theoretical underpinning of criminal justice processes resonates with the development of the double jeopardy principle.

Contemporary policy considerations underlying the rationale of the double jeopardy principle were neatly encapsulated in *Green v United States*[6] where Black J. opined:

> *"The underlying idea, one that is deeply ingrained in at least the Anglo-American systems of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty*."

[3]Stuckenberg (2019).
[4]Reid (1993).
[5]Hurd & Moore (2021); Binder (2002).
[6](1957) 355 US 184 at 187-188.

Enhancing the possibility that innocent persons would be convicted and punished is pivotal as Friedland[7] writes:

> *"In many cases an innocent person will not have the stamina or resources effectively to fight a second charge. And, knowing that a second proceeding is possible an innocent person may plead guilty at the first trial. But even if the accused vigorously fights the second charge, he may be at a greater disadvantage than he was at the first trial because he will normally have disclosed his complete defence at the former trial. Moreover, he may have entered the witness-box himself. The prosecutor can study the transcript and may thereby find apparent defects and inconsistencies in the defence evidence to use at the second trial*."

The power imbalance and disproportionate resource allocation between prosecution authorities and accused persons clearly necessitated a formal limitation on states against multiple trials and harsh punishments. The wide-ranging resources available to prosecuting authorities in contrast with the adverse standing of accused persons necessitates a procedural bar against the ordeal of repeated criminal trials for the same criminal offence following an acquittal or conviction by a court of competent criminal jurisdiction. While the prohibition is firmly established in legal systems concerned with individual liberties, the incremental development of the principle in historical perspective reflects the social, political, and economic climates delimiting the contours of the proscription.

Origins of the Principle

A double jeopardy principle of sorts was evidenced by Law 5 of the nineteenth century BCE Code of Hammurabi:

> *"If a judge try a case, reach a decision, and present his judgment in writing; if later error shall appear in his decision, and it be through his own fault, then he shall pay twelve times the fine set by him in the case, and he shall be publicly removed from the judge's bench, and never again shall he sit there to render judgement*."

This edict prohibited judges from changing judgments once the issues of a case had been determined and reflects the doctrine of *res judicata* that prohibits the reopening of issues that have already been decided by courts of competent jurisdiction. *Res judicata* has broader application than the *ne bis in idem* principle and is also applicable in civil law. Nonetheless, one may speculate that Law 5 was one of the earliest recorded legal provisions recognising the injustice of repeated trials and punishments following conclusive judgments, and (presumably) influenced the recognition and development of the principle in western legal traditions.

[7]Friedland (1969) at 4.

Classical Antiquity

Formative legal cultures, traditions and customs that underpinned the development of written (as opposed to oral legal tradition) Greco-Roman laws expediated the formation of nation states advanced legal systems reflective of their own national identities. These guiding principles provided the rational character of legal systems and legalism of the western states.[8] The legal methodological approach to resolving social and economic conflicts not only by force, authority, or compromise, but also by the application of general conceptual principles and rules of law is the characteristic feature of contemporary western legal thought.

The existence of the *ne bis in idem* principle in western civilisations can be traced to the classical period of cultural history (c. 8th century BCE - 6th century AD). The development of the principle was evidently based on deontological precepts from its inception in classical antiquity as a primitive form of *res judicata*. Ancient Greco-Roman precepts can be traced to 355 BCE when Athenian statesman and orator Demosthenes proclaimed, "the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort,"[9] which is one of the earliest known references. Jones writes, "The law of Athens was that, once tried, a person could not be re-prosecuted on the same charge". [10]

In last century BCE, Roman statesman, lawyer, scholar, and philosopher, Cicero proclaimed the civil law maxim *non bis in idem*. The maxim may have influenced its adoption into the common law both directly and through ecclesiastical law where it was generally known.[11] There is a close analogy between the way Roman law and the common law of England evolved.[12]

The principle found expression in the pervasive nature of Roman law expressed in the *Digest of Justinian* (533) as "the governor should not permit the same person to be again accused of crimes of which he has been acquitted."[13] This incorporated the maxim *nemo debet bis puniri pro uno delicto*, which is a probable source for the introduction of principle in the common law.[14]

These declaratory statements indicate the principle was based on the universal law of reason, justice, and conscience common to all nations. Protection was not absolute however, as Jones writes:

> *"The main concern of a man brought into court was to win a verdict by one means or another, for once tried he could not be prosecuted again on the same charge, the rule ne bis in eadem being accepted in Athens if not in Sparta, though in this matter again the pleaders were not slow to find loopholes in the law and to employ various*

[8]Duxbury (1989).
[9]Demosthenes (trans. 1962) at 589.
[10]Jones (1977) at 148.
[11]Friedland (1969) at 6.
[12]Stephen (1883, vol. 1) at 49.
[13]Scott (1932, vol. II) at 17.
[14]See text accompanying footnotes 45-47.

> *devices, including charges of false witnesses, for reopening questions which had apparently already been disposed of by the courts*."[15]

In the Roman Republic, an acquittal could not be appealed. The laws of ancient Rome did however, recognise an exception to the concept in that judgement upon an action between an accused person and his accuser did not bind against a second accuser who was not a party to the first action, or at least was not aware that the first prosecution had being brought.[16] The purpose for this exception was to facilitate a second accuser with standing to prosecute the accused on a second occasion for the same criminal offence in circumstances where the second accuser may have had more conclusive evidence of the accused's guilt. Allowing accused persons who in all probability were guilty to remain unpunished would have brought the criminal justice system into disrepute. This in turn could have resulted in actions of 'private justice' by the person against whom the offence had been committed or by his next of kin if he had been murdered. Earlier forms of legal procedure were grounded in vengeance against perpetrators, which originated with the blood feud.[17]

Canon Law

Since the fall of Rome c. 476 the development of canon law opposed placing accused persons twice in jeopardy for the same offence. The ecclesiastical *ne bis in idem* principle of natural law, reason and justice is based on the interpretation by St. Jerome c. 391 AD on a passage from the Old Testament from the prophet Nahum (Nahum 1:9) '*For God judges not twice for the same offence*' (Duoay Rheims version), *affliction shall not rise up the second time*' (King James' version), '*No adversary opposes Him twice*' (New Jewish Publication Society translation), to mean that not even God judges twice for the same conduct. The canon law declaration was introduced into the church canons in 847 AD and accepted the interpreted to mean that 'not even God judges twice for the same conduct'. Thereafter the principle migrated into continental legal systems, and subsequently influenced the development of the principle in the common law of England.

Canon law influenced the gradual transition from imposing harsh punishments including the death penalty for an increasing number of offences instead advocating for imprisonment as the less draconian punishment. This transition was to ameliorate the harshness of the common law that dealt with offenders from the perspective of retribution. The Church stringently advocated treating offenders from the perspective of intention and sin and introduced the concept of imprisonment to facilitate repentance of the offender through solitary confinement and replaced harsh, and in many cases capital, medieval punishments.[18]

[15]Jones (1977) at 148-149.
[16]Scott (1932, vol. II) at 17-18.
[17]Holmes (1991) at 2-3.
[18] Plucknett (1956) at 305.

Late Antiquity

The transition from classical antiquity to the early medieval period was marked by the reign of Anglo-Saxons kings from the fifth to eleventh centuries, a period colloquially known as the 'Dark Ages' (originated with the Tuscan scholar Petrarch as a revisionist who regarded the post-Roman centuries as 'dark' compared to the light of classical antiquity) principally because of the scarcity of written sources.[19] This lacuna between the classical antiquity and medieval developments invariably leads to supposition as to the precise origins of the principle in modern area.

During the early medieval period, the punishment imposed upon a second conviction for every offence was death or mutilation, albeit there were few capital offences in existence at this time, such as murder and treason. In Ethelred II's (978-1016) laws, it is said of the accused that when convicted "let him be smitten so that his neck break."[20] The laws of Cnut (1016-1035) did not improve the situation of accused persons. Capital punishment seems to have been common after Cnut's time, notwithstanding his cautions against the abuse of it, as William the Conqueror found it necessary to forbid it.[21] Trials for criminal offences were by the ordeal in pre-Conquest criminal laws and habitual criminals were subjected to the 'triple ordeal.' Assumptions of guild following a second ordeal resulted in removal of the hands, feet, or both, and following a third ordeal punishments included blinding, excision of the nose, ears and upper lip, or scalping.[22]

The inference from the imposition of such draconian punishments is that the Anglo-Saxons did not attach much importance to individual rights or liberties of accused persons. The concept of a double jeopardy protection would not have been extant during this period, from which it may be concluded that it was not until the reign of the Norman Kings that an embryonic principle became evident. Moreover, the Anglo-Saxon Chronicle is a collection of annals in Old English, chronicling the history of the Anglo-Saxons, which did not document cases. This lacuna suggests the double jeopardy prohibition was not recognised, or not important enough to have been recorded during this period.

An embryonic double jeopardy principle does not appear to have been extant during this period given that the laws were void of basic tenets of fairness and justice. Prior to the Norman Conquest there was no true criminal procedure operative throughout the reign of the Anglo-Saxon Kings.[23] If an embryonic double jeopardy principle had existed during this period, then the prohibition on retrials and multiple punishments would (presumably) have carried over from the Norman Conquest and the inception of the common law. However, it was not until the late medieval period that the common law courts began to apply double jeopardy principles in a recognisable form.

[19]Nelson (2007); Higham (2004); Kallendorf (1996).
[20]Stephen (1883, vol. I) at 58.
[21]Stephen (1883, vol. I) at 59.
[22]Thorpe (1840) at 393-395.
[23]Holdsworth (1926, vol. II) at 108-110.

Benefit of Clergy

The Norman Conquest was completed with encouragement from Pope Alexander II, and William I was expected to reciprocate by permitting the development of ecclesiastical courts alongside the common law courts, although this practice did not continue indefinitely.

The complete rejection of a double jeopardy principle by Henry II (1154-1189) is evident in the Constitutions of Clarendon, 1164, that made provision to retry religious clerks who had formerly been acquitted in the spiritual courts. The Constitutions restricted ecclesiastical privileges, restrained the authority of ecclesiastical courts, and curtailed the extent of papal authority in England. The church had extended its jurisdiction by taking advantage of the weakness of royal authority during the anarchy of Stephen (1135–1154), Henry II's predecessor. The purpose of the Constitutions was to restore the law as it was observed during the reign of Henry I (1100-1135).

What appears to have been the development of a corresponding principle of the common law arose from the 12th century controversy between Archbishop Thomas Becket (Archbishop of Canterbury) and King Henry II. The influence of Roman law was significant on the early development of the common law especially following the posthumous victory of Archbishop Becket following the power struggle between the Church and Henry II.[24]

The principle that religious clerics should not be punished by the King's Courts after a trial in the ecclesiastical courts was a major source of the dispute between Becket and Henry II. The full extent of the clerical claim was that not merely every criminal charge but every personal action against a clerk was an issue that lay outside the competence of the temporal courts.[25] While the controversy over clerical immunity was not the crucial issue it was nonetheless the single aspect around which the quarrel was waged most bitterly.[26] This issue brought the disagreement between Henry II and Becket reached a crisis point. Finding a resolution was not going to be an easy task.

Becket's main argument in the dispute was that any further punishment of clerks in the King's Courts would violate the maxim *nemo bis in idipsum* no man ought to be twice punished for the same offence. This would violate ecclesiastical law prohibiting double punishment based on St Jerome's comment in AD 391 to I Nahum 9. He objected firstly to the summoning of clerks before a secular justice at the initial stage of the King's procedure; secondly, that no secular punishment should follow the deposition of a guilty clerk since secular judges had no jurisdiction over clerks (who were under the jurisdiction of the ecclesiastical courts); thirdly, that deposition was itself the penalty for the crime in question, to which no secular punishment could be legitimately added, for this would involve the imposition of a double punishment.[27] This approach underscores the rationale for the inception of the concept in classical antiquity based on the universal law of

[24]Friedland (1969) at 328 and chapter 1.
[25]Pollock & Maitland (1968, vol. I) at 446.
[26]Duggan (1962) at 2.
[27]Duggan (1962) at 4.

reason, justice, and conscience. This development is the earliest intimation in the common law of the inequity of the imposition of double punishment and multiple proceedings for the same criminal offence, influenced by ecclesiastical law.

The King's officials were notified of offences proffered against accused persons, and if convicted, the offenders' property was forfeit to the King.[28] The King's direct involvement in the administration of criminal justice ensured a continued major source of revenue. Breach of the King's peace was not considered a felony and was punished by a pecuniary penalty by way of damages, which provided much of the incentive for the King's involvement in law enforcement.[29]

Becket vehemently opposed the proposals in the Constitutions based on canon law and invocation of the maxim *nec enim Deus iudicat bis in idipsum.*[30] Becket prevailed albeit posthumously in 1176.[31] The King's judges thereafter applied the principle and henceforth the principle evolved a part of the common law. The concession between state and church meant that religious clerks accused of committing felonies were exempt from both trial and punishment in the King's court. This process established the immunity from secular prosecution known as the benefit of clergy (*privilegium clericale*) with the result that ecclesiastical courts would henceforth bring justice to religious clerks.[32] The punishment for all felonies was the death penalty that was unlikely to be commuted but for religious clerics who could avail themselves of *privilegium clericale*.[33] This operated as a 'structured bargain,' somewhat analogous to the scale of tariffs extant in Anglo-Saxon laws, whereby accused clerics received the benefit of the prearranged 'bargain' of being confined to the jurisdiction of ecclesiastic courts in exchange for his plea.[34] The plea in bar applied only to the first offence and offences committed thereafter would subject the cleric to the to the jurisdiction of the curia regis without placing him twice in peril of conviction for the same offence. Benefit of clergy was formally abolished in 1827.[35]

Henry II objected to the 'benefit of clergy' on the basis that it protected clerics from the authority of the King's courts. Punishments imposed by the ecclesiastical courts, deposition, would not be as severe as punishments imposed by the *curia regis* namely fines, and forfeitures. This might have encouraged criminal behaviour against the King's peace by clerics who would then claim the 'benefit of clergy' as a procedural defence to being tried for the same offence in the temporal courts.

Becket's successor, Archbishop Richard, was not opposed to dual punishment, and wanted laypeople who murdered clerks to be handed over to the temporal courts for punishment, who could impose more severe forms of punishment on the basis that 'there is no duplication where what is begun by one is completed by

[28]Milsom (1969) at 354.
[29]Bracton (1968, vol. II) at 411.
[30]Hunter (1984) at 6.
[31]Pollock & Maitland (1968) at 448-449.
[32]Hunter (1984) at 6.
[33]De Morgan (1900).
[34]Wishingrad (1974) at 11.
[35]7 & 8 Geo. IV, c. 28.

another.' This was Henry's position concerning offences committed by clergymen.[36]

Towards the end of the reign of Henry III (1216-1272) the King's courts were conducting their own 'trial' before handing the clerk over to the spiritual courts. This 'trial' was to determine whether the offender's goods should be forfeited to the Crown. Although the Church protested echoing Becket's argument based on *non bis in idipsum*, the King's courts did not desist.[37]

Becket was murdered in Canterbury Cathedral in December 1170, which 'earned him a martyr's crown and the church succeeded in making him England's most popular saint.'[38] Following Becket's martyrdom and Henry II's capitulation the Kings judges deemed the maxim Becket was championing worthy of consideration. Friedland[39] suggests the controversy was primarily responsible for the inception of the double jeopardy principle however, analyses of the development of the common law through the *curia regis*, evidences a gradual evolution as a procedural doctrine.

Influential Writers

The courts will typically have recourse to the writings of recognised and authoritative legal commentators where there is a *lacuna* of formal legal sources. Such commentaries were accorded a status akin to that of judicial decisions. A survey of medieval commentators reveals a developing principle of the common law, which suggests that the concept was not a pre-existing principle.[40]

Glanville was Chief Justiciar during the reign of Henry II (1154-1189). The treatise written in 1187 that was the first book on medieval English common law and is attributed to Glanville.[41] Written at the behest of Henry II as the culmination of his long-term endeavours to restore peace and prosperity following years of anarchy under Stephen I. The purpose of the Treatise was to implement Henry II's objectives. The treatise is mostly devoted to explaining the proper use of royal writs in actions that fell under the jurisdiction of royal courts. Mainly concerned with forms of actions (writ) and procedure in civil matters, is a complete statement of the law since the fall of Rome. This record of the proceedings of the *curia regis* does not reference the double jeopardy pleas in bar to a further prosecution for the same offence, which suggests the principle was not carried over as an established principle of law from the Anglo-Saxon period.

Glanville's Treatise was superseded by a treatise composed by Henry de Bracton (c. 1210 - c. 1268), which owes much of its heritage to the Treatise.[42] Bracton (writing in the 1220's and 1230's) composed soon after *Magna Carta* does not make any reference to the principle. Coke claims to have discovered

[36]Friedland (1969) at 7.
[37]Friedland (1969) at 7.
[38]Baker (2002) at 128.
[39]Friedland (1969) at 32.
[40]Wilson (1960).
[41]Woodbine (1780).
[42]Bracton (1968).

tenets of the principle in Bracton's works, however it has been suggested that this is a highly personal interpretation and not indicative of an embryonic double jeopardy principle.[43] Judicial pronouncements suggest that Bracton did recognise the urgency of a bar against multiple prosecutions for the same offence.[44] This uncertainty among leading common law writers and jurists suggests the prohibition on multiple trials and punishments was not an important principle of the common law during this period.

The Roman law influence on the development of the common law principle may have been introduced by the influx of Roman law scholars in the twelfth, thirteenth and fourteenth centuries,[45] or, alternatively that it was transposed to English common law through the influence of Canon law which had been introduced following the Norman Conquest in 1066.[46] This immigration influenced the writer and jurist Bracton et al who were enthusiastic to supplement the relatively unsophisticated common law with the doctrinal refinements of Roman jurisprudence.[47]

Britton is the earliest work on the common law of England at the behest of Edward I (1272-1307) and written in the French language, which declared that a former judgement barrier was perceptible during that period[48]. The Norman-French terminology of the pleas in bar, *autrefois acquit* and *autrefois convict*, might be attributable to this work and suggest that the common law principle migrated from the continent.

It was not until around the sixteenth century that the common law courts began to accord some recognition, albeit in a rudimentary form, to the development of a protection against multiple prosecutions (with the potential imposition of draconian punishments) for the same offence. The development of the prohibition was in response to the draconian penalties imposed upon conviction for criminal offences during the medieval period in addition to the increasing number of statutory provisions for the imposition of the death penalty on defendants convicted of most offences extant during this period.

By the seventeenth century, Lord Coke, Chief Justice declared the common law double jeopardy principle.[49]

Although the word 'jeopardy' began to have some significance during the earlier periods in the development of the common law, it was not originally concerned with the principle that a man's life should not be twice placed in jeopardy of conviction with imposition of punishment, for the same offence. It appears that the contemporary term 'double jeopardy' was unknown during the earlier periods of English legal history.[50] The principle against double jeopardy as expressed by the pleas in bar against a second criminal trial for the same offence,

[43]Sigler (1963) at 291.
[44]Bracton (1968) at 391.
[45]Barton (1993); Turner (1975); Re (1961).
[46]Sigler (1963) at 283-285.
[47]Hunter (1984) at 4.
[48]Sigler (1963) at 292.
[49]Coke (Reprint, 2018).
[50]Baker (2002) chapter 2.

autrefois acquit and *autrefois convict*, which are still referred to in contemporary criminal justice systems, are attributable to Blackstone, although the concepts probably existed before his time.[51]

The common law of England has a rich Christian heritage, a tradition that has been embodied in the drafting of *Magna Carta*. Eminent jurists, including Blackstone and Coke, frequently invoked their devout Christian faith when expounding and developing legal principles.[52] It is conceivable that canon law directly influenced the common law recognition of the double jeopardy principle.

Medieval Punishments

The necessity for a prohibition against double jeopardy became especially relevant during the late medieval period when the number of capital statutes increased exponentially. In England at the end of the thirteenth century, apart from treason and three offences that were transgressing into the category of misdemeanours, there were only six felony offences.[53] Capital punishment was imposed for a very few serious offences such as treason, murder, rape and the burning of a dwelling-house.[54] In 1688, notwithstanding the exceptionally rigorous laws enacted by the Tudors (1485-1603) and Stuarts (1603-1714)[55] no more than about fifty offences carried the death penalty. Stephen[56] notes that criminal law during the earlier periods of the common law imposed the most severe punishments, a situation which was further exasperated under the reign of the Tudors and from the time of Elizabeth I until the close of the seventeenth century there was slight change. The eighteenth century witnessed a spectacular increase in the creation of capital offences and most capital statutes in force during the 1820's had been enacted during the eighteenth century.

An examination of the rate of enactment of capital statutes imposing the death penalty or other draconian punishments for certain offences, evidence that it was not until the late seventeenth and early eighteenth centuries that the number of capital statutes increased at a staggering rate. From the accession of Edward III in 1327 to the death of Henry VII in 1509 only six capital statutes had been enacted. During the century and a half from the accession of Henry VIII in 1509 to Charles II in 1660 a further thirty capital statutes were enacted. From the Restoration of Charles II in 1660 to the death of George III in 1820 the number of capital offences had increased by about one hundred and ninety.[57] With the Restoration of Charles II the old forms of law were restored.[58]

[51]Sigler (1969) at 222.
[52]Zimmermann (2014).
[53]Pollock & Maitland (1968, vol. I) at 47.
[54]Sigler (1963) at 28.
[55]In *Conlin v Patterson* [1915] 2 IR 169 at 176-177 the Court of King's Bench *per* Dodd J. opined: 'This doctrine has been a shield and protection to the people in a time of stress, and especially in the time of the Stuart Kings.'
[56]Stephen (1883, vol. I) at 466.
[57]Radzinowicz (1948, vol. I) at 4.
[58]Baker (2002) at 214.

In 1810 Sir Samuel Romilly opined: '[…] there is probably no other country in the world in which so many and so great a variety of human actions are punishable with loss of life as in England.[59] By the same token, in 1821 Sir Thomas Fowell Buxton exclaimed during his great speech in the House of Commons on the law of forgery, that:

> "*Men there are living, at whose birth our code contained less than seventy capital offences; and we have seen that number more than trebled. It is a fact that there stand upon our code one hundred and fifty offences, made capital during the last century. It is a fact that six hundred men were condemned to death last year [1820] upon statutes passed within that century. And it is also a fact, that a great proportion of those who were executed, were executed on statutes thus comparatively recent*."[60]

The need for a protection against being placed in jeopardy for the same offence was especially marked during the earlier periods in the development of the common law. Following the Norman Conquest criminal procedure did not improve in the sense of recognising the individual rights of the accused answering a criminal charge, as opposed to the standing of the prosecution authorities with the power and resources available to them. Post-Conquest common law reflected pre-existing Anglo-Saxon law. Little attention was paid to individual wrongdoers or to the protection of individual rights, which suggests that the purpose of the criminal justice system at this time was in securing convictions, a process made easier by the prosecution having all the advantages in terms of procedural rules as opposed to the disadvantages of the accused. Accused persons were not afforded any of the privileges of criminal procedure such as having a detailed knowledge of the charges, not permitted to call witnesses, nor afforded a sufficient opportunity of preparing a defence. It is hardly surprising therefore that there are no references to double jeopardy rules being a key component of rudimentary medieval criminal procedure.

The law during the reign of Henry I (1100-1135) provided that the punishment upon a second conviction was death or mutilation for almost any offence.[61] The disastrous reign of Stephen (1135-1154) allowed the achievements of Henry I to disintegrate. During the reign of Henry III (1216-1272) the criminal law consisted of eleven known offences all of which were capital offences. Moreover, the definitions and doctrines of the criminal law extant during this period were crude and unsettled.[62]

By the fourteenth century all felonies were punishable by death. Misdemeanours and trespass such as petty theft (less that one shilling) were dealt with comparatively mildly, such as the loss of an ear. Treason, as a personal affront to the sovereign, merited dismembering, quartering, stoning, burning or any combination thereof.

During the earlier periods of the common law, the Norman Kings continued to impose cruel and inhumane punishments on those convicted of criminal

[59]Parliamentary Debates (1810), vol. 15, col. 366.
[60]Parliamentary Debates (1821), N.S. vol. 5, col. 926.
[61]Stephen (1883, vol. I) at 58-59.
[62]Stephen (1883, vol. II) at 219.

offences. From this, one may conclude that double jeopardy rules had not emerged as an important aspect of criminal procedure, at least from the early inception of the common law.

During the period of Coke's writings, the number of capital statutes had increased to twenty-seven and in Blackstone's day (broadly coinciding with the adoption of the Constitution of the United States 1789) there were 160 such statutes.[63]

Punishments were severe and by the eighteenth century over two hundred offences carried the death penalty.[64] Arguably the death penalty was a deterrent as many offenders had their sentences commuted and were 'transported'.[65] There was no police force in existence until the 19th century.[66] Nonetheless, capital punishment clearly necessitated a formal prohibition on retrials.

Medieval Criminal Procedure

The common law involved a dual system of prosecution, the appeal of felony by the victim or the victim's next of kin, and the King's indictment. A conviction in cases which could be prosecuted either by the appeal of felony or the King's indictment, resulted in the imposition of the death penalty.

The King was permitted to 'step into the position of the party to whom the suit rightfully belonged' to ensure that those who it was alleged had committed a felony were properly tried and punished.

Should the appeal fail at the pleading stage or if the appellor withdrew his appeal prior to a trial on the merits of the case, the appellee could not raise this failure or withdrawal as a plea in bar to a second appeal for the same offence. The appellor was prevented from bringing the appeal on a second occasion but this did not prevent another individual brining an appeal against the accused for the same crime so long as he had standing.[67] This procedure of allowing a second accuser to bring an appeal prosecute the accused for the same offence on a second occasion, undoubtedly placed the accused twice in peril of conviction for the same criminal offence. The inference from this procedure is that double jeopardy was not a recognised principle of the common law during the early medieval period.

During the thirteenth century, the century following the Henry II–Becket controversy, an acquittal or conviction following a suit commenced by an appellor prevented a second suit by the appellor, and a judgement in a suit brought on indictment by the King prevented a further suit by the King. However, towards the end of the thirteenth and for part of the fourteenth century, a suit by an appellor would not bar a suit by the king and *vice versa*.[68] This was especially true if the appellor's suit involved trial by battle.[69] This possibility of two trials for the same

[63]Stephen (1883, vol. II) at 219.
[64]Stephen (1885).
[65]Kercher (2003).
[66]Taylor (1997).
[67]*Seler v Limoges* (1321) 85 Selden Society, Eyre of London 14 Ed. II 87 at 89.
[68]Friedland (1969) at 8-9; Kirk (1934) at 607.
[69]*Bartkus v Illinois* (1958) 359 US 121 at151-152 *per* Black J.

offence, whether it be by the king's indictment following an appeal, or *vice versa*, undoubtedly negates the existence of the prohibition against placing an accused twice in peril for the same criminal offence during this period.

Kirk[70] and Friedland[71] suggest that the retention of the appeal of felony with the King's indictment imposed a system of dual prosecution thereby vitiating any notion of the double jeopardy prohibition extant during this period. However, the purpose of the dual procedure was to ensure that offenders were prosecuted either by the appeal of felony or King's indictment.

Criminal procedure required the King to wait a year and a day before initiating a prosecution, the interim period allowing for the appeal of felony to be commenced. The difficulty in prosecuting after a year and a day meant that many crimes went unpunished, principally due to the time lapse in prosecuting resulting in witnesses having vague recollections of the alleged criminal episode, not to mention the fact that such witnesses may have since died or could not be located.

The statute 3 Hen. VII, c. 1, 1487 permitted the King's indictment to be brought within the proscribed period (year and a day) in the case of homicide only, and an acquittal would not prevent the retrial of the accused by the process of appeal of felony. This enactment was in response the desire of the prosecution authorities to have the exclusive authority in the prosecution of crimes.

The statute of 1487 allowed the King to indict within the year and a day, and an acquittal would not prevent a second trial being initiated by the appeal of felony, clearly establishes that the principle against double jeopardy was not recognised nor indeed applied by the common law courts by the fifteenth century.

In the fifteenth century, before the Statute of Henry VII, an acquittal on an appeal after a trial by jury was a bar to a prosecution for the same offence by indictment and an acquittal on an indictment was a bar to a prosecution for the same offence by an appeal. However, after the Statute of 1487 neither a conviction nor an acquittal on an indictment could be raised as a bar to a subsequent prosecution for the same offence by an appeal, if the appeal was brought within the year and a day.[72] This procedure was followed until the late seventeenth century when in *Armstrong v Lisle*[73] the Court of King's Bench *per* Lord Holt opined: "The statute of 3 H. 7 is severe in overthrowing a fundamental point of law, in subjecting a man that is acquitted, to another tryal, which is putting his life twice in danger for the same crime; therefore the purview of 3 H. 7 ought to be taken strictly, and the exception favourably." Subjecting an individual who has been acquitted to another trial is wrong in law and an exception to this rule should be used 'favourably.' This judicial declaration indicates the Court of King's bench seems to be favouring the development of a principle against retrials for the same criminal offence following an acquittal. The phrase, 'putting his life twice in danger' had a literal meaning at this time when one considers the severity of the draconian punishments imposed for most offences.

[70]Kirk (1934) at 605.
[71]Friedland (1969) at 8-9.
[72]Kirk (1934) at 607, n. 26; Sigler (1963) at 289.
[73](1697) 84 ER 1096 at 1101.

In *Young v Slaughterford*,[74] Holt C.J. ordered an appeal to be brought against the accused for the same offence following an acquittal on indictment for murder. The accused was convicted and sentenced to death.[75] This provision clearly allowed a second prosecution of the accused for the same offence following an acquittal because of the dual system of prosecution operative during this period.

The statute 26 Hen. VIII, c. 6, 1534 the trial in England of felons who had committed offences in Wales, a procedure that totally disregarded the proscription against retrials.[76] This may have been in response to the less rigorous prosecutorial policies followed by the Welsh courts at this time. It is evident from this enactment that the double jeopardy principle was not an established cornerstone of English criminal procedure during this period.

Medieval criminal procedure did not provide accused persons with basic due process and fair trial guarantees and ambiguities were resolved in favour of the prosecution. Accused persons on trial for treason or felonies were denied the assistance of defence counsel and were also denied the opportunity to examine the indictment against them. The prosecution was permitted to call witnesses, but this privilege was not accorded to the accused. There was also some doubt as to the admissibility of evidence and the general conduct of the trial, but again these uncertainties were resolved in favour of the prosecution.[77] These inherent deficiencies in the medieval criminal trial are vividly illustrated in *Lisle's Case*,[78] as Stephen commented: "It was cruel, but legal, to sentence a woman to be burnt alive for harbouring two rebels for a night. The conviction was illegal on the grounds that Hicks, whom she harboured, had not been convicted before the trial."[79]

The development of the double jeopardy principle was prompted by such factors as the severity of punishments imposed on convicted offenders, the disproportionate trial advantages in favour of the prosecution and the procedural disadvantages for the accused throughout the medieval period. Accused persons indicted for felony offences were first granted the right to summon witnesses in 1702, and not until 1837 were they permitted representation by counsel, and not until 1898 onwards could they testify on their own behalf.[80] Accused persons were not afforded knowledge of the charges until the indictment was read to him immediately in open court before the trial and was never allowed to see the indictment, and were not permitted to have proper books or papers to assist their defence.[81] Apparently the reason for such procedures was that although the prosecution had the burden of proving its case against the accused, the accused was required to do nothing. An acquittal therefore was most unlikely given the resources of the prosecution and all the advantages of criminal procedure of which it could avail, as opposed to the adverse standing of the accused. Medieval

[74](1709) 88 ER 999.
[75](1709) 88 ER 1007.
[76]Friedland (1969) at 10.
[77]Holdsworth (1926, vol. IX) at 224.
[78](1697) 84 ER 1095.
[79]Stephen (1883, vol. I) at 413.
[80]Plucknett (1956) at 434-437, and 424-441.
[81]Stephen (1883, vol. I) at 330-332.

criminal procedure failed to accord individual due process and fair trial rights to the accused, which evidences the absence of the principle during the medieval period.

Moreover, statutes were passed making it more difficult for defendants to be released on bail pending trial; the practice of issuing warrants for the arrest of suspected persons was enhanced; an inquisitorial system was introduced whereby justices of the peace or judges could examine suspected persons.[82]

Common Law Evolution

The existence of the principle deeply rooted in legal history cannot be demonstrated with a sufficient degree of certainty, notwithstanding the fact that there have been numerous judicial statements[83] and academic commentaries[84] asserting that the concept is as old as the common law itself, which (presumably) stems from the beginning of legal memory in 1189 as with other customs and practices.[85]

The incremental development of the concept was in consequence the adverse standing of accused persons during the medieval period and procedural anomalies that undermined fair trials. The development of the principle was necessitated at a time when criminal procedure did not resolve disputes on the merits but according to the powers and resources available to the prosecution as opposed to the adverse position of the accused. In 1166, Henry II enacted in the Assize of Clarendon (remodelling of criminal procedure) that even though the accused was acquitted by the ordeal he must abjure the realm if he was of bad character.[86]

The concept was not incorporated in *Magna Carta* (1215) and is not inferred, which suggests the principle was not recognised as a fundamental right of accused persons during the formative period of the common law.

Because of the absence of plea rolls the extent to which the courts prevented double jeopardy from evolving before the twelfth century is difficult to ascertain. The earliest recording of court decisions began with the *Year Books* under the authority of the Norman Kings. The *Year Books* (1290-1535) written in the Anglo-Norman language were the earliest series of reported cases of the common law courts, which include eleven mentions the term 'jeopardy.' Embryonic criminal procedure extant during the period of the *Year Books* further evidence that the double jeopardy principle was not an established principle of liberty since the inception of the common law, but that the principle gradually evolved throughout the development of the common law as a procedural defence.

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[82]Holdsworth (1926, vol. IX) at 223.

[83]*The People (DPP) v Quilligan (No. 2)* [1989] IR 46 at 54 *Henchy J; United States v Jenkins (*1973) 490 F 2d 868 at 870 Friendly J; *Bartkus v Illinois* (1958) 359 US 121 at 151-152, Black J. (dissenting); *Green v United States* (1957) 355 US 184 at 200 Frankfurter J (dissenting); *Stout v State* (1913) 36 Okl 744 at 756 Ames J; *R (Hastings) v Justices of Galway* [1906] 2 IR 499 at 505 Palles CB.

[84]Fisher (1961) at 603.

[85]Wharam (1972).

[86]Friedland (1969) at 6.

The English Bill of Rights (1689) did not incorporate a double jeopardy provision. The principle does not appear to have been statute based prior to its inclusion in the Fifth Amendment to the United States Constitution 1787. This suggests a lack of political/criminal recognition of the importance of the concept as the law was more concerned with dealing with offenders.

Late-Medieval Period

From the late sixteenth century the courts began to recognise the importance of an acquittal, except where an acquittal was reached on a defective indictment. In 1591, the Court of King's Bench in *Vaux's Case*[87] held that a new trial could proceed following an acquittal because the indictment which charged the accused was defective in that it charged an offence unknown to the law. Since this acquittal was founded on an error of law the accused was prohibited from pleading *autrefois acquit* in bar to a subsequent trial for the same criminal offence.

An acquittal based on a defective indictment meant the accused was not formerly in jeopardy of conviction and punishment. However, if the former acquittal had been lawful, then the accused would have been permitted to raise this as a plea in bar against a second prosecution for the same criminal offence. It was also the year 1591 that the Court of King's Bench in *Wrote v. Wigges*[88] decided that '*auterfoits convict* of manslaughter, and clergy thereupon allowed, is a good bar in an appeal of murder.'[89] The Court further held that 'such bar is good at the common law, and not restrained by Stat. 3 H. 7, c. 1, and is also a good bar to an indictment for murder.'[90] A conviction for the lesser-included offence of manslaughter was pleaded in bar to a subsequent trial for the greater (compound) offence of murder.

In 1660, the Court of King's Bench held that the prosecution had no right to seek a new trial after an acquittal. In *R v Read*,[91] the Court of King's Bench held that '[...] new trials may be in criminal cases at the prayer of the defendant, where he is convicted (but) not at the suit of the King where he is acquitted.'[92] It was also during the 1660's the courts were faced with the task of finding a solution to the problem of re-indictment for a different offence, following an acquittal or conviction for a separate offence. In *R v James Turner and William Turner*,[93] the two accused were indicted for burglary resulting in the conviction of the first accused and the acquittal of the second. The prosecution sought to re-indict the second accused for the burglary with the additional charge of stealing money from a servant of the person whose property had been burgled. The Court of King's Bench held that having once been acquitted of the burglary he could not be re-

[87](1591) 76 ER 992 at 993.
[88](1591) 76 ER 994.
[89](1591) 76 ER 994 at 994.
[90](1591) 76 ER 994 at 994.
[91](1660) 83 ER 271.
[92](1660) 83 ER 271 at 271.
[93]*R v Turner* (1664) 84 ER 1068.

indicted for that offence, but he could be indicted for a different offence, in this case the offence of stealing.

This appears to be an application of the 'same elements' test of sameness of criminal offences for the purposes of double jeopardy jurisprudence as opposed to the 'same conduct' test, the latter affording greater protection to the accused against a second trial for a separate offence alleged to have been committed at or about the same time as the offence for which the accused had formerly been acquitted or convicted. Likewise in *R v Jones and Bever*,[94] two accused were indicted for burglary and acquitted. They were subsequently indicted for the same burglary with the additional count of stealing goods. The Court of King's Bench ruled that they could not be re-indicted for the same burglary but could be indicted on the count of stealing for which they had not previously been tried upon.

These cases are indicative that the common law courts were beginning to accord some degree of recognition to the gradual emergence of the prohibition against double jeopardy, albeit embryonically.

Prosecuting the accused for a different offence or for the same offence committed on a different occasion would not violate the double jeopardy prohibition. The purpose of the prohibition against double jeopardy is to prevent multiple trials and punishments for the same offence. However, the accused may be charged and convicted for the 'same' offence committed on a different occasion or indeed for a different offence committed on the same occasion as that for which he had formerly been acquitted without violating the double jeopardy maxim. In the latter scenarios the accused is not being placed twice in jeopardy for the 'same offence' both as a matter of law and fact. There must be both a factual and legal *nexus* before two offences will be deemed the same for the purposes of double jeopardy jurisprudence.

In 1662 the Court of King's Bench in *Sir Henry Vane's* case[95] refused to accept a bill of exceptions, which Friedland[96] suggests 'would have substantially widened the scope for the appeal by writ of error and would have had the effect of permitting further trials in cases of felony.' *Vane* had been indicted for high treason and after the indictment had been read out, he requested that it be read a second time, and this was done. He then requested that the indictment be read out a third time, but this time to be read in Latin, however, this request was denied by the trial court. He was tried and found guilty to which he entered a bill of exceptions, but the trial court refused to accept this, holding that a bill of exceptions does not lie in criminal cases, but only in actions between party and party.[97] *Vane* was executed by beheading. This is an early intimation of the increasing consciousness by the courts of the inherent injustice in permitting more than one criminal trial for the alleged commission of a criminal offence.[98]

[94](1665) 84 ER 1078.
[95](1662) 83 ER 300.
[96]Friedland (1969) at 11-12.
[97]The proper mode of appeal in such circumstances would have been to enter a writ of error.
[98]By refusing a bill of exceptions which would require a *trial de novo*.

In 1663 the Court of King's Bench in *Sir John Jackson's Case*[99] extended the application of the emerging principle against double jeopardy to misdemeanours, deciding that a retrial should be prevented following a conviction for perjury. Likewise in *R v Lewin*[100] the Court of King's Bench refused an indictment of the accused who had already been convicted of perjury and in *R v Marchant*[101] the Court of King's Bench again refused a trial *de novo* for perjury where the accused had already been convicted of that same perjury. In *R v Hannis*[102] the Court of King's Bench denied a retrial of the accused after a conviction on the charge of perjury.

Where a verdict of guilty has been set aside by the trial judge because of procedural irregularity this would not prevent a retrial of the accused as there was no formal verdict of either acquittal or conviction recorded by the court. The pleas in bar, *autrefois acquit* and *autrefois convict,* are predicated on a former acquittal or conviction for the same criminal offence as in a subsequent indictment. In *R v Smith*[103] the defendant was found guilty on a charge of perjury by a 'obstinate jury' against the direction of the trial Judge. The Court of King's Bench set aside this verdict and a new trial was ordered. The double jeopardy principle may only be raised as a plea in bar when the first trial of the accused was concluded following a lawful adjudication of the case.

Criminal trial procedure throughout the development of the common law progressed in a manner detrimental to the accused in that all the advantages vested in the prosecution, such as the ability to know the charges in the indictment so as to prepare their case accordingly; only the prosecution could call witnesses and related procedural issues.[104] It was the blatant discharge of the jury when it appeared that an acquittal was likely permit the prosecution to bring a further charge on more compelling evidence, a practice that continued up until the end of the seventeenth century, that resulted in the courts affording greater recognition to the emerging principle against double jeopardy.

This practice evidences the criminal justice system extant during the medieval period favouring the prosecution. A second prosecution in such circumstances must surely have been regarded as an abuse of the process of court, which undoubtedly would have resulted in a 'chorus of disapproval' with the result that the criminal justice system would have been brought into disrepute and reform was therefore inevitable. In *R v Roberts*[105] the accused was indicted as a principal on a count of burglary but from the evidence he was only an accessory in that he received the principals and the goods stolen but did not take any part in the actual burglary. It was doubted by the prosecution that if the jury acquitted him, as they were most likely to do, whether he would be subsequently indicted and convicted as an accessory. The Court of King's Bench discharged the jury and indicted him as an accessory to the burglary. This blatant discharge of the jury with the purpose

[99](1663) 83 ER 1157.
[100](1668) 84 ER 248.
[101](1668) 2 Keble 403.
[102](1671) 84 ER 483.
[103](1681) 84 ER 1197.
[104]Holdsworth (1926, vol. IX) at p. 224.
[105](1662) 84 ER 1066.

of seeking a new trial can also be evidenced in the infamous treason case of *R v Whitebread and Fenwick*[106] where the jury was discharged after evidence had been given and concluded by the prosecution which was insufficient to convict the accused. To allow such a procedure to have the force of law would render the entire criminal justice process futile as the prosecution would enter a *nolle prosequi* whenever an acquittal was likely, with the purpose of retrying the accused on a subsequent occasion for the same offence.

By 1660 the Court of Kings Bench had decided in *R v Read*[107] those earlier cases, which had permitted the prosecution to seek a new trial after an acquittal were no longer to be followed. This practice was followed in subsequent cases[108] and signalled the emergence of the double jeopardy principle.

Towards the end of the seventeenth century Lord Holt in *R v Perkins*[109] expressed a strong reaction against the early discharge of the jury with the objective of seeking a new trial.

Nevertheless, this procedure appears to have prevailed throughout the eighteenth century. In *R v Kinloch*[110] the Court of Crown Cases discharged the jury to allow the accused to enter a different plea. It was held that it was no answer to the original indictment that the jury had been discharged, for such a discharge did not amounting to an acquittal. This of course accords with contemporary double jeopardy jurisprudence which requires a final verdict of either acquittal or conviction before the accused may raise the pleas in bar to a second indictment for the same criminal offence. It was not until around the middle of the nineteenth century that the contemporary procedure of discharging a hung jury or the discharge of a jury for other legitimate reasons of necessity prevailed.[111] Retrials in these circumstances would not place an accused in double jeopardy due to the absence of a former verdict of either acquittal or conviction following a criminal trial on the merits.

The most important expansion in the recognition and application of double jeopardy occurred during the 1660's when the Court of King's bench began to recognise judgements in other jurisdictions, which would prevent a trial proceeding in England for the same offence. In *R v Thomas*[112] the Court of King's Bench held that the accused's acquittal in Wales on a charge of murder could be raised as a plea in bar to a second trial in England. Likewise, in *R v Hutchinson*[113] where the accused had been acquitted on a charge of murder committed in Portugal, the Court of King's Bench held that he could not be tried again for the same murder in England. These decisions are significant in that they evidence the embryonic common law principle against double jeopardy.

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[106](1679) 7 How. St. Tr. 311.
[107](1660) 83 ER 271.
[108]*R v Jackson* (1661) 83 ER 330; *R v Fenwick and Holt* (1663) 82 ER 1025.
[109](1698) 90 ER 1122.
[110](1746) 168 ER 9 (Crown Cases).
[111]Friedland (1969) at 13-14.
[112](1664) 83 ER 1180, see also, (1664) 83 ER 1147, (1664) 83 ER 1172.
[113](1677) 84 ER 1011.

The court had effectively ruled that if the accused's claim of former jeopardy could be substantiated then he would be permitted to raise this as the plea in bar, *autrefois acquit*. The procedure whereby an acquittal by a foreign court will be admitted preventing a domestic trial for the same offence was firmly established in *R v Aughet*.[114] A verdict of either acquittal or conviction by a foreign court must be verified by the production of a certificate of acquittal or conviction before it can be raised as a plea in bar in a domestic court.

Throughout the seventeenth century, however, protection was not absolute, such as where judges habitually discharged juries to enable prosecutors to present a stronger case on a retrial. Furthermore, in murder cases a private person could appeal after the accused had been acquitted following a trial on indictment. Nevertheless, it was during the seventeenth century that defendants were gradually afforded broader rights to appeal from a conviction. The latter half of the seventeenth century was a period of increasing consciousness by the courts of the importance of emerging double jeopardy jurisprudence. This was partly due to the writings of Lord Coke and partly as a reaction against the lawlessness in the first half of that century.

By the eighteenth century the Court of Queen's Bench recognised judgements given by other criminal courts in England for in 1726 Hawkins declared:

> *"Notwithstanding the opinion of the Book of Assizes (9 Assize 15), that no acquittal in any other court can be any bar to a prosecution in the Court of King's Bench, because that is the highest court, I take it to be settled at this day, that an acquittal in any court whatsoever, which has a jurisdiction of the cause, is as good a bar of any subsequent prosecution for the same crime, as an acquittal in the highest court."* [115]

In 1765, Blackstone affirmed that "the plea of *auterfoits acquit*, or former acquittal, is grounded on this universal maxim of the common law of England that no man is to be bought into jeopardy of his life, more than once, for the same offence."[116] The principle developed into the common law pleas in bar, *autrefois acquit*, *autrefois convict*, *autrefois attaint* and former pardon. Blackstone declared 'that no man is to be brought into jeopardy of his life, more than once, for the same offence' was a 'universal maxim of the common law of England.'[117] Furthermore, by 1776, in the *Duchess of Kingston's Case*[118] defence counsel could declare with confidence that: "[...] whenever, and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops."

The nature and scope of the protection afforded by the double jeopardy principle in Blackstone's day was quite restrictive in the light of the contemporary application of the proscription.

[114](1918) 13 Cr App R 101; see also, *R v Thomas* [1985] QB 604 (CCA).
[115]Cited by Friedland (1969) at 12.
[116]Blackstone (1772) at 335.
[117]Blackstone (1772) at 335-336.
[118](1776) 20 How St Tr 355 at 528.

Reception in the American Colonies

The origins of the double jeopardy principle in the American colonies are founded on the English common law formulation, and "the principle was brought to (America) by the earliest settlers as part of their heritage of freedom."[119] The principle was initially expressed in the Body of Liberties of Massachusetts 1641, Cl 42, *"No man shall be twise sentenced by Civill Justice for one and the same Crime, offence, or Trespasse"* and Cl 64 in more elaborate terms: "*Everie Action betweene partie and partie, and proceedings against delinquents in Criminall causes shall be briefly and destinctly entered on the Rolles of every Court by the Recorder thereof. That such actions be not afterwards brought againe to the vexation of any man*." The formulation of the principle in the codes of other colonies were influenced by the Massachusetts Code.[120]

The New Hampshire Constitution 1784 was the first bill of rights expressly adopting a codification of the principle in Article 1, *'No subject shall be liable to be tried, after an acquittal, for the same crime or offence*.' A more comprehensive protection was included in the Constitution of the Commonwealth of Pennsylvania 1790, Article IX that provided: *'No person shall, for the same offence, be twice put in jeopardy of life or limb*', language almost identical to the Constitution of the United States fifth amendment provision *'nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*'. It is notable that the terminology 'life or limb' had a literal meaning throughout the medieval period when harsh punishments were imposed.

Although technically negatively implied from the Statute of 1487 and Statute of 1534 the fact that the principle was not mentioned in English statute law prior to its inclusion in the Constitution of the United States suggests that the principle gradually evolved as a procedural defence throughout the development of the common law as opposed to being a 'cornerstone of the common law.'

Hypothesis

The sixteenth and seventeenth centuries witnessed an expansion of decisions applying and developing the principle through the pleas in bar autrefois acquit and autrefois convict. The incremental movement towards the elimination of multiple prosecutions, which seems to have coincided with the Restoration following the Interregnum (1649-1660), and from this start the double jeopardy principle began do develop into its modern form. The Restoration of the Stuart monarchy in the kingdoms of England, Scotland and Ireland took place in 1660 when Charles II returned from exile in Europe. This development might suggest that aspects of continental law and procedure might have impressed Charles II to the extent that these princciples were adopted in the common law of England.

[119]*Bartkus v Illinois* (1958) 359 US 121 at 152, Black J.
[120]Haskins & Ewing (1958).

Although beyond the scope of this article, it is noteworthy that the Renaissance 14th to 17th centuries culminating in the 'rebirth' following the Middle Ages, followed by the Age of Enlightenment / Age of Reason c. 17th and 18th centuries might also have impacted on judicial development of the double jeopardy principle. By the late eighteenth century double jeopardy was settled as a common law principle.

Conclusion

The injustice of repeated ordeals of trials and inhumane punishments necessitated the incremental development and implementation of the procedural defence as a bar on the authority of the state.

Interpretations of the double jeopardy principle should consider the historical context wherein the procedural defence originated. The basis of double jeopardy jurisprudence may be traced to the formative periods in the development of the common law and the policies it espouses have progressively evolved through the decisions of the common law courts in response to the adverse standing of the accused in the medieval criminal justice system. It is arguable that the rationale for the development of the common law principle against double jeopardy was influenced by the continental civil law which may have been transposed through the cannon law of the Church. It is unlikely that the principle was native to the common law of England particularly in consideration of the former Anglo-Saxon rudimentary legal system and the absence of reported decisions of the common law courts during the formative periods in the development of the common law legal system. Nevertheless, the exact basis for the gradual emergence of the common law principle against retrials cannot be demonstrated with a sufficient degree of certainty.

The precise origins of the recognition of the injustice of retrials and multiple punishments for the same offence remains speculative. Further research into the historical evolution of the principle is necessitated to shed light on the underlying driving forces that stimulated the incremental development of the principle into its modern form in criminal justice systems concerned with universal law of reason, justice, and induvial liberties.

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Speedy Dispensation of Justice: Lagos Multi-Door Court House (LMDC)

By Chinwe Egbunike-Umegbolu[1]*

The Lagos Multi-Door Courthouse (LMDC) scheme is currently incorporated into the justice system. Since it was enacted into law, its relevance has developed due to its unique way of linking cases to appropriate forums for appropriate settlements. Hence, considerable literature has grown around its establishment; one such piece was on the scheme's effectiveness, which was carried out in 2012. In hindsight, the work will evaluate the philosophy behind the birth of the Lagos Multi-Door Courthouse (LMDC) in Nigeria and the underlying elements of the LMDC Law. What is the story so far? Has the courthouse contributed to or reduced the pitfalls associated with litigation in Lagos state? The work employs a socio-legal and comparative approach. It concludes on how effective the LMDC has been from its inception to date, the differences or contributions they have brought in terms of speedy dispensation of justice.

Keywords: *Alternative Dispute Resolution, Multi-Door Courthouse, Access to Justice, United States, United Kingdom; Nigeria.*

Introduction

The consequences or aftermath of colonisation by the English left an ineradicable mark upon the Nigerian Judicial System.[2] Taking a closer look at the Nigerian Law or Legal System would reveal that it is patterned after the English Common Laws.[3] Wisdom Anyim reinforced this viewpoint when he stated that the Nigerian legal system is carved out of the English common law legal tradition by reason of colonisation and the attendant incidence of reception of English law through the process of legal transplant.[4]

Bob Osamor corroborates with the overhead view; he opines that 'it was the enormous impact or influence of the English law, which characterises the Nigeria Legal System.'[5]

[*]PhD; SCDTP Post-Doctoral Fellow, Part-Time Lecturer in Law, Society and Ethics, The University of Brighton, Brighton, UK. ADR Blogger; Host and Producer of Expert Views on ADR.
Email: c.s.umegbolu@brighton.ac.uk

[1]The authoress thanks Prof. Emilia Onyema, Professor of Law - SOAS London, Dr. wwAdaeze Okoye, Principal Lecturer, Research Group Lead-Law, Justice and Society - University of Brighton, School of Business and Law School and Dr Claire-Michelle Symth, Principal Lecturer - University of Brighton, School of Business and Law

[2]Nwosu (2004) at 91.
[3]Anyim (2019) at 3.
[4]Ibid.
[5]Osamor (2004) at xiv.

Before proceeding to how the English common law is applicable in Nigeria's legal system or law, as evidenced above. It is pertinent to point out that Section 32 (1) of the Interpretation Act chapter 192 (1990) reads as thus:

> Subject to the provisions of this section and except in so far as other provision is made by any Federal law, the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st day of January 1900, shall, in so far as they relate to any matter within the legislative competence of the Federal legislature, be in force in Nigeria.[6]

The 1999 constitution under its provision section 7, which is under the second schedule to this Constitution (Part II-Powers of the Federal Republic of Nigeria), states:

> That the House of Assembly of a state shall have the power to make laws for the peace, order and good government of the state or any part thereof concerning the following matters.[7]

Against this backdrop, they grew a natural urge amid the commercial sector for what may be called an antidote- a remedy other than litigation that can hasten or resolve commercial disputes rapidly while preserving business relationships. Given this, the Nigerian government, in the bid to curb the problem associated with the justice system, amended the constitution of the Federal Republic of Nigeria and Section 36 was believed to be the antidote.[8]

Conversely, Section 36 of the Constitution of the Federal Republic of Nigeria 1999[9] guarantees a fair hearing within a reasonable time by a court or other tribunal established law and constituted in such manner as to secure its independence and impartiality.[10] Furthermore, in recent years, the Supreme Court of Nigeria has accorded recognition to the right of disputants to take steps to narrow down issues between them. This was well illustrated in the case of *Ogunleye v Oni*, where the court stated that:

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[6]Laws of the Federation of Nigeria the Interpretation Act, Chapter 192

[7]Constitution of the Federal Republic of Nigeria 1999 cited in Anyim at 6 - "Received English law" comprises the common law, the doctrines of equity, statutes of general application in force in England on January 1, 1900, Statutes and subsidiary legislation on specified matters and English law (statutes) made before October 1, 1960, and extending to Nigeria, which is not yet repealed. Laws made by the local colonial legislature are treated as part of Nigerian legislation. The failure to review most of these laws, especially in the field of criminal law has occasioned the existence of what may be described as impracticable laws, which are, honoured more in the breach than in the observance.

[8]Osamor (2004) at xiv.

[9]Ibid.

[10]Ibid.

Parties to action can settle their matters to save the court's time by agreeing on those facts, not in the contest and leaving the court to decide, from received evidence based on those facts in pleading contested, the justice of the case.[11]

It is submitted that this leads to a cultural shift where a delay is equated with adequate justice, and speed is viewed with suspicion. Undoubtedly parties want to be fully listened to.[12] The points above emphasise the clogs experienced with litigation which has brought to light more awareness of the advantages of ADR mechanisms amongst users (i.e., business associates, stakeholders, and legal practitioners). Consequently, most contracts drafted by parties started inserting provisions to resolve disputes by way of ADR mechanism, e.g., mediation, arbitration, or hybrid process (med-arb). ADR is cost-effective as the time frame for meetings and hearings is scheduled by the parties and tribunal.[13] As seen in the courts, ADR is not plagued by unnecessary adjournments and delays.[14]

Subsequently, it follows that the shorter proceedings and flexible procedure prevents escalating costs and save time.[15] The courts now refer parties from magistrate court, high court and court of appeal through the Multi-Door Courthouse (MDC), which is attached to the High Court to explore settlement of their dispute through one of the ADR mechanisms.[16] The Arbitration and Conciliation Act (of the Laws of the Federation of Nigeria 1990)[17] is being adopted and modified by many states of the Federation of Nigeria. There has been tremendous growth in institutional and ad-hoc arbitration and all phases of arbitration and an increase in the activities of institutional arbitration centres in Nigeria and other parts of Africa.[18] Undoubtedly, Nigeria is equipping itself to grapple with the escalating commercial disputes resulting from the growth in business activities and an increase in international trade and investment.

An Overview of the Nigerian Courts System as it relates to ADR

It is imperative to discuss the court structure in Nigeria. This will provide more clarity to the paper and make it easier to understand the position and impact of the Lagos Multi-door Court House (LMDC) on the Nigerian legal system. The court system in Nigeria is as follows:

> First is the Supreme Court (S.C) of Nigeria; section 230 (1) of the 1999 Constitution establishes the Supreme Court (S.C) of Nigeria.[19] This is the apex court, and its

1.1.1 [11]Joshua Ogunleye v Babatayo Oni (SC 193 of 1987) [1962] NGSC 1 (27 April 1962) cited in Anyim (2019) at 93.

[12]Interview with the Director 2 of the LMDC on 3rd October 2020

[13]The Association of Multi-Door Courthouse of Nigeria (2013) at 15.

[14]Onyema (2013) at 5

[15]The Association of Multi-Door Courthouse of Nigeria (2013) at 17.

[16]Ibid

[17]The Arbitration and Conciliation Act 1990

[18]Ibid.

[19]Sokefun & Njoku, (2016) at 5.

decisions are usually final and binding.[20] It is essential to point out that the Chief Justice of Nigeria heads S.C. The Chief Justice of the Federation or his nominee would sit as the head of each matter brought before it.[21]
Next, in the order of precedence, is the Court of Appeal.[22]

Thirdly is the High Court (H.C); however, they are two categories of the High Court (H.C)- the Federal High Court and[23] the State High Court.[24] It is pertinent to point out that the lowest is the court's magistrate.[25] Apart from the regular court's structure, each state has enabling legislation to set up subordinate or complementary courts in the administration of justice within their states.[26]

Each state has its own internal para-legal adjudication institutions or its own internal Para-legal adjudication institutions or offices; in Lagos, the government has taken the bold step to initiate the Lagos Multi-Door Courthouse (LMDC), Office of the Public Defender (OPD)[27] and Citizens Mediation Centre (CMC).[28] The LMDC is connected to the Judiciary. These institutions, as earlier stated, constitute a soft interface[29] between the first and second levels of courts in Lagos.

[20]Oniekoro (2011) at 12.
[21]Constitution of the Federal Republic of Nigeria 1999.
[22]Sokefun & Njoku (2016) at 12
[23]Other federal courts at the level of the federal high courts, apart from the Federal High Court, there are other special courts constitutionally established by Federal Government strictly for special topics. There are two courts called tribunals, which comprise of Election Petition Tribunal and the Code of Conduct Tribunal. Just as the names appear, the election petition tribunal handles election petitions while the code of conduct tribunal handles cases of breach of the code of conduct for government workers. There is also the National Industrial Court, courts, otherwise called Sharia Courts. Sharia Courts handle breaches of Islamic codes in states that practice sharia. *Cited in* Sokefun & Njoku (2016) at 22.
[24]Oniekoro (2011) at 12.
[25]The State High Courts exist in each state in Nigeria, such (as Sharia Court, Customary Court and Area Courts etc.) including Abuja, the federal capital territory. Each state has its own state high court. It usually has divisions or branches, in some other parts of the states for geographical convenience. Just like the Federal High Court, the same rules of court control the various divisions. The number of divisions it may have depends on how big the state is and the volume of cases the state has. In Lagos, the Lagos High Court has five branches or divisions, but the same court. *Cited in* Sokefun & Njoku (2016) at 22.
[26]The Association of Multi-Door Courthouse of Nigeria (2013) at 21.
[27]On the other hand, in 1999 when the new democracy began and it was discovered that there was a gap between the rich and the poor, particularly in access to justice. The then administration of Senator Bola Ahmed Adekunle Tinubu through the present VP-Prof Osinbajo thought they could be an agency that could take care of the less privileged so that was what brought about the Office of the Public Defender (OPD) in Lagos State. Though it was established initially as a unit within the dept. of the ministry of Justice called directorate for citizens' rights but through the proactiveness of the office of the public defender and the yearnings of people it was carved out and it now stood as an agency on its own supported by law. Thus, the OPD was created in 2000 and it initially had its first law in 2003 and this was further amended in 2015. -Director 2- an Interview carried out by the writer.
[28]Finally, the CMC was established by the Lagos State government in 1999 due to the lack of fairness, cost and lack of privacy of the judicial system *cited in* Kasumu & Onyeonoru (2016) at 202.
[29]The Association of Multi-Door Courthouse of Nigeria (2013) at 60.

They support both the high court, the magistrate courts in Lagos State, and the court of appeal in recent years.[30]

The focal point here is that; Nigeria has two levels of courts.[31] The highest is the H.C and the National Industrial Court, a court with coordinate jurisdiction with the High court. Below that is the Magistrate Court, which deals exclusively with criminal matters.[32] However, appeals from the magistrate Court go to the H.C.[33] Hence, the high courts are at the (first) 1st level Court in the hierarchy of courts in Nigeria. Appeals from Magistrate Court goes to the state high court of the relevant state in Nigeria.[34] The Court at level 3 is the Court of Appeal (C.A), and[35] the Court at level four (4) is the Supreme Court[36] (S.C). Courts at levels 3 and 4 traditionally do not entertain originating summons, as they are appellate courts by nature.[37] On level 2 is the high court; apart from the federal high courts, other federal courts merely entertain restricted topics and other matters such as (sharia, tribunal and national industrial court known as labour court).[38]

Even the Federal high court itself has a narrow scope of jurisdiction as it is substantively for matters that are Federal in nature.[39] This, therefore, means that only the High Court (H.C) and other courts below it are available to handle the day-to-day needs of the common masses in a state. As a result of this, there was pressure on the H.C and in the magistrate court to meet up with the volume of cases oozing out or coming out daily within the Lagos State.

Odoh Uruchi agrees, stating: These tailback Rules have not allowed the Magistrates' Courts to act as a court of summary jurisdiction.[40]

On the other hand, an analysis of the cause list of the state judiciary in June 2010 revealed that 2,000 cases are being handled weekly by the Lagos state high courts.[41] Conversely, in Lagos State, the massive volume of cases that the Magistrate court, High court, and Court of appeal takes into its list on daily basis causes a lot of congestion in the courtrooms and has precipitated the emergence or the creation of the aforementioned Para-legal institutions. However, amongst the three named Para-legal institutions, the LMDC stands out of them all because of its distinctive features.

[30]Sokefun & Njoku (2016) at 5.
[31]Oniekoro (2011) at 12
[32]Ibid.
[33]The Magistrate court is one in each state, including Lagos, but has many branches or divisions across the state. These various branches are grouped into what are called magisterial districts. In Lagos, there are seven magisterial districts. Each is headed by a chief magistrate. Each district comprises many magistrate courts. Cited in Sokefun & Njoku (2016)
[34]Oniekoro (2011) at 23
[35]Ibid at 12.
[36]Ibid at 23.
[37]Ibid.
[38]Sokefun & Njoku (2016) at 22
[39]Merife & Igwe (2016) at 17.
[40]Uruchi (2015) at 98.
[41]Adedimeji (2010) at 13.

The Birth and Development of the MDC in Nigeria

'Having spent most of my early practice years in courtrooms, it became crystal clear to me that the justice system was in desperate need of an overhaul.'[42] - Kehinde Aina.

In his quest for an effective legal system to keep up with the surge of disputes that overwhelmed the courts, Kehinde Aina founded the Negotiation and Conflict Management Group (NCMG) in 1995, a non-profit private organisation.[43] The NCMG embarked on a campaign to establish collaboration with the Lagos State government in 2002, then adapted the Alternative Dispute Resolution (ADR), notably the Multi-Door Courthouse (MDC), as an institutional repository of ADR mechanisms[44] to encourage the resolution of the dispute in an atmosphere free of acrimony and contestations.

The LMDC Act was enacted in 2007 with the Lagos Multi-Door Courthouse (LMDC) situated within Igbosere High Court in the mainland of Lagos State.[45] The LMDC was created in a bid to help settle conflicts or disputes amongst business partners or people in business, tenant and landlord, land disputes, and matrimonial cases; in an effort to bring about speedy and efficient administration of justice.[46] Several states in Nigeria have emulated the LMDC by replicating their model because of its effectiveness in delivering speedy dispensation of justice to the citizenry.[47]

Consequently, the acceptance of ADR in the Lagos landscape indicates one thing 'the wind of change-which is opposed to the adversarial relationship -the win-lose.[48] Hitherto the acceptance of ADR means turning an adversarial pursuit into a problem-solving partnership, which connotes a win-win[49] for all the parties involved. Evidence supporting this position can be found in Kehinde Aina's statement, where he pointed out that 'the new face of justice is also assuming a human countenance.'[50] This means that both the disputants or litigants and the providers will have the autonomy to be the co-creators of an expeditiously and effective process of settling a dispute in a private dispute setting on the courts' premises.[51] Judges and the Magistrates get to refer their cases. Even with the Walk-in cases that are not referred by the Judge, when the parties sign the Terms of Settlement (TOS), it is sent to the ADR Judges,[52] and they will enter it and endorse it as a Consent Judgement in court.[53] The above-stated submission is the

[42]The Lagos Multi-Door Courthouse (2016) at 12
[43]Ipaye (2021) at 4.
[44]Umegbolu (2020b at 1.
[45]Stone plaque at the LMDC
[46]The Lagos Multi-Door Courthouse (2016) at 13.
[47]Umegbolu (2019) at 1.
[48]Marks (2000) at 17.
[49]Ibid.
[50]The Lagos Multi-Door Courthouse (2016) at 82.
[51]Aina (2008) at 18.
[52]ADR Judge- Is a High Court Judge that the Chief Judge of a state has appointed to oversee all matters sent to the MDC.
[53]Umegbolu (2020a)

reason why the LMDC is referred to as a Court-Connected ADR[54] or 'one-stop dispute resolution services' otherwise known as 'one-stop shop' as Professor Feldman termed it.[55]

This simply means assimilation of ADR with the court system, where parties have the power to select other ADR methods that would be appropriate to their case;[56] this method gives room for screening and referral[57] and places cases and disputants to the right track that suits their disputes.[58]

According to Moore, all knowledge claims are socially constructed and represent particular situated perspectives.[59]

This statement aligns or is in alignment with what Aina described as the frustration[60] he faced with the Nigerian courts at five (5) years old in legal practice and a partner in the law firm of Aina Blankson & Co. as head of litigation.[61]

Aina stated: Those short, glorious years were, for the most part, spent in courtrooms, a place of passion and great delight but very little satisfaction. It was my view then (and still is) that access to Justice means much more than access to the courtroom; access to justice means providing an opportunity for a 'just and timely result.' Not only did I not experience that just and timely result in those five years, none of those I represented did.[62]

The above statement signifies that Aina was motivated by his 'situatedness' at that point, which was with the ineffectiveness of the court system in Lagos. Hence, he decided to seek a solution and was stimulated by Professor Frank Sander's speech-is the founder Multi-Door Courthouse in America.[63] Sander first introduced this concept in a speech at the National Conference on the causes of popular dissatisfaction with the administration of justice in St Paul, Minnesota. In this very place, Roscoe Pound brought to the fore the causes of popular dissatisfaction of the administration of justice.[64] The MDC has been tested in domestic jurisdiction in the United Kingdom and has been implemented in parts of the United States, Australia, Canada, New Zealand, Singapore and other parts of the Commonwealth Countries.[65]

Professor Sander emphasised the five criteria[66] for determining how best disputes can be resolved, and this criterion contributes to the effectiveness of the MDC process, which are as follows:

[54]Ibid.
[55]Feldman (2020) at 2.
[56]Ezike,(2011-2012) at 248.
[57]Practice Direction on Mediation Procedure (2008) at 3.
[58]Goh (2007) at 8.
[59]Moore (2021) at 82.
[60]Aina (2008) at 4.
[61]Aina (2007) at 7.
[62]Levin & Russell (1979) at 19
[63]Ibid.
[64]Ibid.
[65]Goh (2007) at 7.
[66]Levin & Wheeler (1979) at 13.

- The Nature of Disputes
- The Relationship between Disputants
- The Amount in Dispute
- Cost and Time
- Speed

It has been observed that the LMDC emulates these five (5) criteria; however, for this work, it will be relevant to focus on the first criterion- The nature of Disputes, to form some relevant issues for determination.

Whether the parties have a likelihood of maintaining long relationships? E.g., family disputes and business disputes.[67]

a) Is the process fair and justifies the type of dispute or conflict in question?
b) Whether the dispute is amenable to Mediation or ADR? For instance, in a matrimonial cause, only the courts have the power to make a decree nisi or absolute. A party cannot submit divorce to Mediation. However, a party can submit matters on maintenance-alimony and custody of children to Mediation.[68]
c) Whether the LMDC will need to determine if the proper parties listed are before the court. When they are, the dispute will be readily sent to the MDC.[69]
d) Finally, whether the parties voluntarily or willing want to settle in ADR?[70]

However, Haitham stated that the applicability and importance of the criteria above would differ depending on the type of ADR in question.[71] For example, fair process requirements would be more stringent in arbitration, which is entirely a creature of the arbitration agreement as opposed to the not so evident of fair process in mediation- the neutral third-party work in a more informal environment with the parties to facilitate an acceptable settlement.[72]

Lending credence to the above statement is Carrie Menkel-Meadow clearly stating that:

> Third, process pluralism is good idea: different kinds of parties and particular types of disputes might best be handled in different ways. In other words, "one size will not fit all." ADR has always been about "tailoring" - both tailoring the process to fit the dispute.

On the contrary, Justice Oke stated:

[67]Ibid.
[68]The Lagos Multi-Door Courthouse (2016) at 13.
[69]Section 3 (6) Lagos State Multi-Door Court Law 2015/
[70]Menkel-Meadow (2009) at 27
[71]Haitham (2003) at 119.
[72]Ibid.

> Some people have bicycle-sized problems and choose to go through Cadillac-sized procedures to resolve them.[73]

Flowing from the above, the above statement reinforces the simple procedure in ADR.[74] Nevertheless, before one can decide on whether or not the LMDC is an effective option or not, the nature of the dispute and its examples are prerequisite factors that determine or should be taken into cognise on whether the LMDC practices will/can be effective or whether he LMDC practice is set on the path of effectiveness.

The Challenges Instrumental to the Creation of the LMDC

As earlier stated, due to the concerns over the challenges posed by overcrowded dockets, exorbitant cost, lack of judicial bodies, lack of infrastructure and delay, public policy demands that laws should be for support of virtues and condemnation of vices and not vice versa.[75] Therefore, every law has a jurisprudential philosophy or mischief for which it aims to correct or address in society.

Against this backdrop, the developing economies of the world are now exploring this medium of dispute resolution and seeking to advance it further.[76] This development underpins the fact that dispute has, become an endemic part of human existence through the years. The thrust is not how to eradicate conflict/ dispute but how to manage it.

Consequently, Lagos State Judiciary and the Ministry of Justice imbued with the experiences and sentiments of both stakeholders and the common man in the hands of justice -through the Lagos House of Assembly, enacted the LMDC Act in a bid to reduce the challenges mentioned above that are associated to the court system and therefore, promote a faster case flow management system in Lagos State.[77] Thus, the LMDC was established in 2002. Its law was enacted in 2007 and reviewed in 2015,[78] with the theoretical lens view of achieving its overriding objective as initially stipulated in Section 2 of the LMDC Act 2015. Accordingly, the LMDC was created to:

a) Enhance access to justice by providing alternative mechanisms to supplement litigation in resolving disputes.
b) Minimize citizen frustration and delays in justice delivery by providing a standard legal framework for the fair and efficient settlement of disputes through Alternative Dispute Resolution (ADR)

[73]Kio-Lawson (2012) .
[74]ADR provides its users with autonomous control over the way their dispute is determined, unlike the conventional courts where they do not have such autonomy.
[75]Umegbolu at 146.
[76]Fiadjoe (2004) at 4.
[77]Aina (2008) at 82.
[78]Lagos State Multi-Door Court Law 2015.

c) Serve as the focal point for promoting Alternative Dispute Resolution in Lagos rule.
d) Promote the growth and effective functioning of the justice system through Alternative Dispute Resolution methods.

The broader landscape of the justice system in Nigeria was identified as an area for further research, which prompted the section mentioned above of this law. It is important to point out that on a good day, people tend to think that the opposite of poverty is wealth, but it has been stated otherwise, giving new insight into the fact that the opposite of poverty is injustice. Then there is no other place where that rings through other than a place like Nigeria where the access to justice or the justice administration is before gone by or limited, invariably placing a lot of challenges on the actual delay and the length of time it takes for cases to be resolved.[79]

The challenges of cost, infrastructure, and other numerous challenges make it difficult for the average litigants to be excited about being in the courtroom, so it begs the question as to whether justice is what the litigants get out from the courts? Is there a challenge in that regard? To the extent that there is a challenge in the length of time it takes. To the extent that there is a challenge to the cost of it? The very essence of why litigants are in the courts is not being met.

What then is the answer? This paper argues that the solution does not lie in increasing the number of judges; nor does it lie in increasing the number of courtrooms in Nigeria alone; the answer lies in some level of de-structuring, a strategic overhaul of the Justice Administration System in a manner that inculcates and accommodates the alternative mechanisms, as new avenues that can supplement the court system. In other words- avenues that can supplement the 'mono-door of litigation,'[80] which is what the average courthouse is all about in Nigeria to a large extent.

Thus, it is for this reason that the Multi-Door Courthouse (MDC) was founded in 2002, sixteen (16) years now with another four (4) years that will make it twenty (20) years. Indeed, it is more than that; it was also established because the essence of litigation in itself is entirely 'foreign' to the African culture.[81] Elisabetta Grande corroborated with the above view by stating that 'what is in 'tune' with the African culture is a very 'harmonious' (harmonically) dispute resolution process that can make things a lot better. Thus, businesses will also thrive better in the grand scheme of things, and that is what it was meant to do and that was what it was meant to achieve.

On the other hand, Aina admitted that the MDC, as a response to the aforesaid justice challenge, has largely contributed to reducing civil cases in the Lagos State Judiciary.[82] On the contrary, Onyema underlined that the LMDC is not getting any

[79]Discussion with Director 2 on the 20th of November 2020
[80]Aina (2007) at 5.
[81]Moscati (2020) at 519.
[82]Aina (2008) at 4.

substantial amount of these disputes.[83] She evidenced this statement with statistics provided by the Lagos State Judiciary, which revealed that for the period between 2008 and 2010, 16,072 civil cases were filed before the Magistrate courts while 25,807 civil cases were assigned to the High court.[84] On the other hand, the Citizens Mediation Centre (CMC) settled 77,954 civil cases while the LMDC dispensed with 888 civil cases.[85] However, one question that needs to be asked is whether the study demonstrates that civil matters are refered or filed at the LMDC. How about criminal matters?

The issue of delay is not only associated with or restricted to Nigeria alone or the developing economies. A study carried out by the World Bank in 2006 has revealed 'that the average duration of cases in certain developed countries manifested unusual delay like 421 days in Canada and 320 in the check collection compared to 40 days in Swaziland and 60 days in Belize.'[86] Since these are developed countries, it can be said that delay is not only associated with developing nations but rather with every country at large.

Consequently, these challenges required a global solution because the use of only litigation to settle disputes has manifestly hindered access to justice. The above-stated statistics have illustrated the enormous volume of conflicts or disputes before the Lagos State Courts. Therefore, the LMDC was birthed to rectify these challenges that had contributed to the hindrance of access to justice in Nigeria.[87]

The High Court Rules in 'Nudging' Parties to Alternative Dispute Resolution

Just like the saying goes that 'the only constant thing in life is change,' in the words of Professor Yakubu:

The dynamic nature of law necessitates its constant change… It must reflect the ethos and values of the people. Law does not emphasise the ethos and values of bygone days but considers the utility, relevant and acceptability of a rule of conduct at a point in time.[88]

These above-stated sentiments resonate with the writer, and this philosophy is embraced by reemphasising the change that occurred from the pre-colonial era (when the traditional system was dominant and was the only door) up to the colonial era (the introduction of litigation into the Nigerian clime) and finally the post-colonial era (where the traditional system was repackaged as the new ADR and then Litigation was infused with ADR). This link to the eras is crucial because Yakubu mentioned that 'law changes with time,'[89] a proof that the law as we know it is never static. Thus, if a law is no longer serving its purpose or if it does not meet the purpose it was created for, it is either overhauled or amended to

[83]Onyema (2013) at 9.
[84]Ibid at 8.
[85]Ibid.
[86]Dam (2006) at 10.
[87]Ibid, at 3
[88]Nwosu (2004) at 341.
[89]Ibid, ibid.

conform with the required standards to sufficiently tackle the challenges in the law.[90]

Perhaps the most dramatic evidence is that because litigation could not solve the problem of congestion of the system[91], it became necessary that an independent, party reliant, and speedy process that could generate effective results was sought; hence the birth of the LMDC. The focal point here is that, as earlier mentioned, when the westerners left Nigeria, the Nigerian law was changed, various rules of law and enactments were put in place to reflect the needs of the 'commercial village' in this context, present-day Nigeria[92] and the Lagos state took appropriate steps to 'nudge' the stakeholders –judges, (to enforce adherence to ADR clause in commercial agreements), Senior Advocates of Nigeria (SAN), Magistrates, Lawyers and the citizens to embrace ADR and LMDC.[93]

Lending credence to the above is the High Court of Lagos State (Civil Procedure) Rules, Order 3 Rule 11 2019, which states thus:

> all originating processes filed in the Registry shall be screened to determine the suitability for Alternative Dispute Resolution (ADR) mechanisms and may be referred to the Lagos Multi-Door Court House or any appropriate ADR institution.[94]

Subsequently, the 2012 rules were amended in 2019, and the provisions mentioned above were inserted accordingly. Apart from encouraging the screening for suitability of ADR, which is continuity from the old rules,[95] a new provision of its own came in, which is -the Expeditious Disposal of Civil Cases Practice Direction No. 1 of 2019,[96] whose primary focus is the timely disposal of backlog cases before litigation commences in the Lagos State Judiciary.[97]

The 2019 rule amended the 2012 rules and introduced some of the above-stated provisions. However, both Acts placed a colossal control on the court to decide on matters as it deems fit about expeditious justice delivery in the State and though still in the early stages of the process.[98] It has also restored a sense of timely justice and equal footing to the common man so that the people can have closure to long-standing disputes. It is pertinent to point out that the English Court can only 'encourage' and does not mandate or compel parties to engage in ADR, including mediation; however, they do not hold back when sanctioning parties that have wasted the time of the Court, especially when the parties refuse to settle in ADR[99] but instead want to continue with the tactics that will result in undue delays

[90]Ibid.
[91]Ibid, at 37
[92]Faturoti (2014) at 16.
[93]The Lagos Multi-Door Courthouse (2016) at 12.
[94]High Court of Lagos State Rules Civil Procedure Rules, 2019
[95]Ibid.
[96]Expeditious Disposal of Civil Cases Practice Direction: Pre-Action Protocol Lagos State Judiciary 2019.
[97]The Association of Multi-Door Courthouse of Nigeria (2013) at 15.
[98]Ibid, at 16.
[99]Constable & Vilar (2020) at 1.

of the matter in the course of litigation. Lending credence to the above claim is the recent case of *DSN v Blackpool Football Club Ltd.*[100]

However, Master McCloud's directions in the case highlighted that:

> At all stages, the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging […] must serve a witness statement giving reasons.[101]

After extensive examination of the above directions by Justice Griffiths, he admitted that BFC's reasons for failing and refusing to engage in any settlement discussions were inadequate.[102] Though losing the claim does not validate an award for indemnity costs, in this case, Mr Justice Griffiths was of the opinion that 'based' on their conduct that they deserved it.[103] This judgement was inescapable as it is clear the English courts can wholly sanction parties that refuse to settle under ADR and, in some cases, award indemnity costs.[104] The reason behind this is to provide an effective justice system so future claims can follow this rule and parties will desist from wasting the court's time, which in turn affects the dockets of the court. Hence, in this case, the ruling brings out a peculiar feature that other jurisdictions like Nigeria, with particular reference to Lagos State, can use as case precedent. Just like Sir Anthony Clarke MR, pointed out that without an:

Effective civil justice system, substantive civil laws are no more than words and the rule of law becomes an 'aspiration' rather than a reality.[105]

This is in line with the recent case of *Nweke v. FRN*, where the victim of this case is still waiting for justice. Hitherto, his case has been at the trial Court for eight years (8) now and is yet to commence. However, it has gone from one court to another.[106] This new rule has provided an effective justice mechanism that can tackle such cases, which is a step in the right direction for such cases exemplified above; the judge, in his discretion, can unburden the courts and achieve swift justice either through litigation or through Alternative Dispute Resolution through the LMDC or any other ADR Centre, in this new rule. However, the issue of 'referring parties'[107] is argued that it comes across as ambiguous or vague. It could also connote a different meaning, 'forcing or controlling parties' to use ADR.

Is the LMDC the Right antidote for Access to Justice?

One of the reasons that this new method of settling disputes became an instant hit in Nigeria or, as Nigerians would say, a 'hot akara'[108] was validated by this

[100]DSN v Blackpool Football Club Ltd (2020) EWHC 670QB.
[101]Ibid.
[102]Ibid.
[103]Ibid.
[104]Ibid.
[105]Genn (2010) at 18.
[106]Nweke v FRN (2019) LCN/4810 (SC)
[107]Order 2 (1) of the 2019 Constitution of the Federal Republic of Nigeria 1999.
[108]Akara means fried hot bean cake, but it is used as slang that something is working well or a hit.

recent case between two famous Nigerian musicians, the case borders on copyright infringement. The case started as far back as 2004 when Innocent Ujah Idibia, aka 2face or 2baba, a member of the Plantashun Boiz, left the band to pursue a solo career as an artist. He later released a hit track known as 'African Queen', and his former bandmate Blackface began to make a ceaseless accusation against 2face, claiming he wrote the song and that 2face stole his songs and sang as his own.[109]

Additionally, he accused 2baba of taking the credit for writing the song. Thus, no royalties were paid to him. This case has been ongoing approximately for fifteen (15) years and was later settled via out of Court at the LMDC within two (2) days, precisely on the 27th of Nov 2019.[110]

However, these two friends turned foes were not on speaking terms when they stepped in for their mediation session, but after the Terms of Settlement (TOS) were reached (the parties turned from foes to friends once again, laughing and cracking jokes). They appended their signatures on the TOS, and they both went outside and took pictures and uploaded them on their various social media platforms. Additionally, one of the mediators stated:

> Litigation destroys people; you need to see them when they walked into this room; both parties refused to speak to each other, including their managers, but when the mediation session was mid-way, they were both laughing and speaking pigeon (broken) English.[111] They both apologised to each other while, reminiscing about the good old days. You can see the relief on their faces when the mediation session ended, and they hugged. They both cancelled their engagement for the following day and scheduled a time (on the second day) just to come in and conclude the Terms of Agreement (TOA) and sign it off.[112]

Against this backdrop, the above statement indicates another significant impact of the LMDC towards preserving the parties' relationship from the onset; unlike litigation where the battle line is drawn, the parties and their respective businesses, social and other various relationships are ruptured.[113] However, there is credible, intense competition for business retent and securing more clients in this age of globalisation rather than losing out. The LMDC has done well in resolving disputes and reconciling parties.[114] Thus they desire great fulfilment from seeing either two or more estranged parties now coming to an agreement, shake hands and continue with their business relationship. That is what litigation cannot give. Even more so, when the parties resolve their respective disputes via litigation, often, the relationship might not be as cordial as it was before.[115]

Additionally, a landmark case involving the first elected vice president of Nigeria, Dr Alex Ekwueme, is another example of its effectiveness. This case was

[109]The writer witnessed the settlement of the case at the LMDC *cited in Umegbolu (2019).*
[110]Ibid.
[111]Broken English – When Used-Mostly signifies 'closeness' or 'familiarity.'
[112]Due to the ethics of mediation, this part of speaking with their mediator would be classified as mediator 4.
[113]Umegbolu (2019) at 67
[114]The Association of Multi-Door Courthouse of Nigeria (2013) at 19.
[115]DSN v Blackpool Football Club Ltd (2020) EWHC 670QB at 19

in contention for seventeen (17) years because of a sale of land. And the former vice president would fly into Lagos from Enugu to attend Court proceedings.[116] The matter was referred to the LMDC for mediation after much money had been spent in litigation. As soon as the parties signed the 'Terms of the Settlement' (TOS), the matter was resolved within 10:00 am - 8:30 pm same day.[117] Indicating that timeliness is one of the main benefits of using the LMDC.

Furthermore, cost-effectiveness can be gleaned as another benefit of the LMDC. For example, during the 2017 Lagos Settlement Week, a banking case in Court for about twenty-six (26) years, was settled at two (2) mediation sittings. Then a banking case with a claim of over 1.6-billion-naira equivalent to 3,067.66 Pounds Sterling was settled in two (2) mediation sittings.[118]

Conversely, a case for dissolution of marriage was taken, and both parties withdrew their Petitions and Reliefs. In the same 2017 settlement week, about 4.5-billion-naira equivalent to 8,637.82 Pounds Sterling monetary claims were recovered, representing about 14% of resolved matters.

However, in the 2018 Settlement Week Programme, about 24.3-billion-naira equivalent to 46,698,354.90 Pounds Sterling in monetary claims were recovered.[119] Also, a case on the Administration of Estate has been in Court for nearly twenty-nine (29) years. It was settled in two (2) mediation sittings. Additionally, a banking case with a claim of over 1.8-billion-naira equivalent to 3, 457,910.70 Pound Sterling was settled.[120]

Following through, in 2016 and 2017 Settlement Week, 31.3-billion-naira equivalent to 60,060,577.79 pounds sterling was recovered in claims and the LMDC effectiveness and impact can be gleaned from saving some legal fees. Management time for corporate litigants, court time, counsel time, the resources of the court, things like contingent reliability risk, reputational risk, other sheer inconveniences associated with serving litigation in financial terms, which have been computed with the colossal amount of savings made for the litigants in counsel and judicial system.[121]

It is pertinent to point out that Lagos Settlement Week (LSW) is free and it's scheduled three times a year, [122] it was set aside by the Chief Judge of Lagos State for specific courts to settle as many cases as possible in a bid to decongest the court.[123] The cases stated above demonstrates the eagerness of the Lagos State Judiciary or legal system to refer these cases to the LMDC in a bid to reduce the dockets of the courts and also provide a particular example of the impact and the effectiveness of using ADR through the LMDC.

[116]Dawson (2013) at 1.
[117]The Association of Multi-Door Courthouse of Nigeria (2013) at 21.
[118]Umegbolu (2019) at 67
[119]Constable & Vilar (2020) at 23
[120]Ibid.
[121]Ibid.
[122]Annexed -The Lagos Multi-Door Courthouse: Lagos Settlement Week -Frequently Asked Questions (FAQS).
[123]Umegbolu (2021) at 67

The founder of the LMDC[124] Kehinde Aina, agrees with the above–mentioned assertion and during the opening ceremony of the LMDC stated:

> I envisioned a comprehensive justice centre where both the consumers and provider will be collaborators and co-creators of a streamlined and agile process. I dreamt of a faster case flow management system where parties are not left impoverished and embittered. I fantasised about a legal regime where an apology would be seen as a useful tool rather than an admission of guilt, a system where disputants could problem-solve and search for common ground within the backdrop of integrity, understanding and human decency. My dream was to create a nexus for peace, fair and an effective administration of justice in our dear country Nigeria.[125]

As demonstrated from the statement by the founder of the Lagos Multi-Door Courthouse (LMDC), who had a first-hand experience on how frustrating the court system can be in Nigeria, albeit he had a vision, but he did not stop at that, he went on to actualise that dream by bringing it into reality the Lagos Multi-Door Courthouse. He believed that justice system could be rescued by integrating ADR into the mainstream of the civil justice system with a managerial approach to dispute resolution.

Consequently, disputes would be resolved in 'multiple doors' within the established courts in Lagos, which the researcher calls the 'revolving door mechanism.' Therefore, the disputants or litigants do not need the rigorous process associated with litigation when they can amicably settle differences and have closure in one or two days.[126] Despite this, its effectiveness and impact has so far motivated some states like Enugu State. They opened its doors in 2018 to start up the Enugu State Multi-Door Courthouse (ESMDC) this indicates that the LMDC has made some profound changes by including minor criminal offences to its list. So far the LMDC has raised the bar a notch higher by providing an all-inclusive justice system for settlement of disputes not only in civil but now in criminal law, thus section 2(a)-(d) LMDC 2015 explored and proffered the idea of an inclusive justice system however, and in recent years, that dream has been actualised into a reality and now an effective alternative through the LMDC is pretty much attainable- the writer is of the opinion that this has moved from 'law on paper' to 'law in action.'

For these reasons, LMDC has enabled the economy in Lagos State to thrive by providing an effective alternative to litigants who have been clamouring for an improved system- access to justice for many years.[127]

[124]The Lagos Multi-Door Courthouse (2016) at 11.
[125]Ibid.
[126]The Association of Multi-Door Courthouse of Nigeria (2013) at 23.
[127]Ibid. (2009) at 5.

Limitations that Might Hinder the Growth of LMDC

The above-mentioned rule has provided an effective justice mechanism that can tackle such cases which is a step in the right direction- providing more leeway for the judges. Thus the judge in his discretion can unburden the courts and achieve swift justice either through litigation or through ADR through the LMDC or any other ADR center.[128] However, the issue of 'referring parties' to use ADR has been deemed as mandating parties to mediate hence perceived as unjust.[129] Furthermore divergent debate has been raised on 'people not having access to the law courts.'[130] On the contrary, some ADR critics see the mandatory requirement,[131] as an attempt to limit the people's unfettered right to access to court[132] and which will also strip off party autonomy in ADR.[133] The above - viewpoints resonates with the writer.

Against this backdrop, laws are modified to suit the culture of the people. For instance, a study conducted in 2013 indicated that Turkey is not yet ready for a flexible and voluntary alternative dispute resolution due to its culture and public awareness.[134]

In the same manner, in the Nigerian -home, which is classified as the 'informal setting,' most parents tell their children what to do using 'force,' for example a parent would or an elderly person will tell the young ones, do not ask questions, do as I say.'[135] This is what the writer refers to as 'the do as I say mentality' and woe betides one,' who dares question them, he will be flogged mercilessly, unlike in the 'western culture' to be more specific United Kingdom, where children ask, 'why' and their parents explain why they should adhere to this rule or the other etc. As such, this pattern of encouraging parties to ADR as depicted in *Dunnett v Rail track*[136] and *Halsey v Milton Keynes*[137] may be counterproductive in Nigeria as 'directing or mandating people or forcing people' is in line with the African culture.'[138] In essence, African culture is such that they are forced to do things, so once there is no force; most of them flaunt the rules.[139]

Likewise, the same goes in the 'formal setting', which is the office or organization.[140] However, Franz Boas asserts that no culture is good or bad or better put that people basically view the cosmos through the perception of their own culture and judge it according to their own acquired cultural orientation.[141]

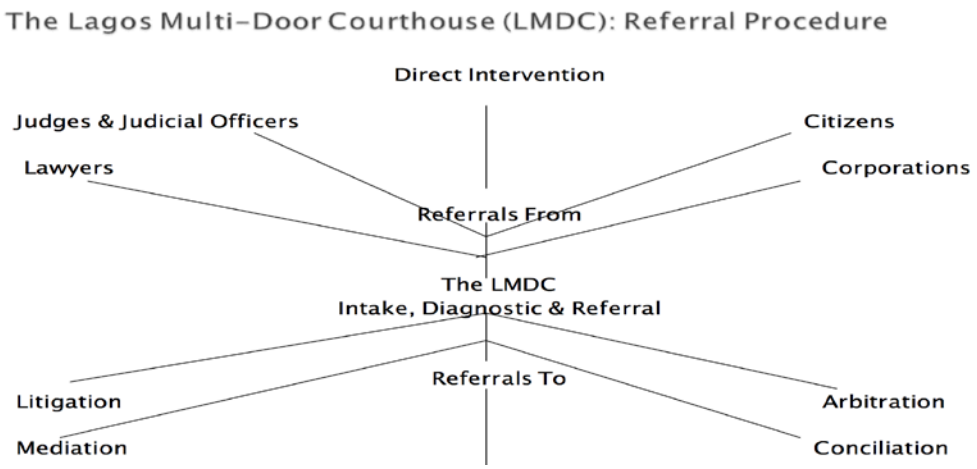
[128]Constable & Vilar(2020) at 1.
[129]Ibid, at 1.
[130]Order 3 Rule 11 High Courts (Civil Procedure Rules) 2004.
[131]The Nation, Catching the ADR bug in Lagos at 30.
[132]Constable & Vilar (2020) at 1.
[133]The Nation, Catching the ADR bug in Lagos at 30.
[134]Napley (2014) at 3.
[135]Egbunike (2012) at 71.
[136]Dunnett v Rail track EWCA Civ 302
[137]Halsey v Milton Keynes EWCA Civ 576
[138]Most of the stakeholders and users affirmed the above assertion.
[139]Egbunike (2012) at 71. Also, most of the stakeholders hold the same view as Egbunike.
[140]Ibid, at 72.
[141]Sydel (2004) at 18. Silverman (2004) at 18.

The Features and Procedural Framework of the LMDC

In Nigeria, the Arbitration and Conciliation Decree provides for the right to settle disputes by Conciliation. Part II of the Decree, sections 37-42 and 55 made adequate provisions for conciliation.[142]However, in recent years mediation in Nigeria has developed into a more well thought out process and within a legislative framework.[143] Hence, the LMDC panel of neutrals is made up of accredited mediators, arbitrators and neutral evaluators from every field; the Lagos Multi-Door Courthouse, the Chief Judge of Lagos State is in charge of approving the panel stated above on the direct recommendation by the Neutrals' Screening Committee.[144] Thus the operation of the LMDC is to supplement litigation as the available resource for justice by the provision of enhanced, timely, cost-effective and user-friendly access to justice.

Aina stated that the 'doors' available to the MDC are mediation, arbitration, and neutral evaluation.[145] However, in recent years the LMDC included a hybrid process.[146] It has been observed that due to the COVID-19 Pandemic, which held the world at standstill, the LMDC used this as an opportunity to include another 'door,' which is the Online Dispute Resolution (ODR).[147] It is essential to point out that the LMDC panel of neutrals is made up of the Chief Judge of Lagos State, ADR Judges, Accredited Mediators, Arbitrators and Neutral Evaluators from every field.

The figure below illustrates the features or workings of the LMDC[148]:



[142]Orojo & Ajono (1999) at 10.
[143]Rhodes-Vivour (2008) at 1
[144]The Lagos Multi-Door Courthouse (2016) at 10.
[145]Aina (2008) at 9.
[146]The Lagos Multi-Door Courthouse, A Guide, Justice delivery through the Alternative Dispute Resolution at 1.
[147]LMDC Twitter page *cited in Umegbolu (2019)*
[148]The LMDC made the Diagram above available to me.

An essential feature of the Lagos Multi-Door Courthouse (LMDC) is that it is an independent and a non-profit making body. Thus, they are more efficient and not biased.[149] Thus, that is part of the reason the LMDC is cheap or free as they are not there to make profit and to a large extent has contributed to the effectiveness of its service delivery model which is primarily focused on enhancing and advancing access to Justice.[150] Consequently, Article 2 of the LMDC Practice Direction[151] stipulates: That at LMDC, a matter may be initiated at the LMDC in any of the three ways:[152]

A) Walk-Ins

- Any party can decide to Walk-In to the LMDC or write to its director to initiate a dispute either through mediation, Arbitration, Early Neutral Evaluation and Conciliation. It is essential to point out that other ADR Para-legal institutions like the Citizens Mediation Centre (CMC) and Office of the Public Defender (OPD) may file matters at the LMDC for settlement.
- The party from now on known as the claimant or his counsel walks into the Multi-Door Courthouse to lodge his or her complaint with the Registrar.
- The claimant pays an administrative fee of 14,000-naira equivalent to 29.12566 GBP
- A set of forms is given to be filled or completed by the claimant.
- The opponent from now on is known as the respondents[153] and is notified about the complaint.
- A set of forms is despatched to those above along with the notification of the "referral"- a referral is used in the MDC instead of a suit.
- The respondent returns his or her filled forms and response; then, the hearing date is fixed for the first meeting.

B) By Court Referral:

The presiding judges in the on-going matter; might decide to refer a case to Mediation; if he believes it is an appropriate way of resolving the dispute.

- Referrals from the Courts can either be made by the judge independently or at the demand of the party if his lawyer requests a stay of proceedings in the court which will enable him (the party) try settling amicably in the MDC.
- Finally, if the parties reach a settlement, the court pronounces it as a consent judgement of the court making it final and binding on the parties. Both parties appointed mediator and the LMDC would jointly sign the

[149]The Lagos Multi-Door Courthouse (2016) at 19.
[150]Onyema (2013) at 10
[151]Article 2 of the LMDC Practice Direction 2007
[152]Ibid.
[153]The Lagos Multi-Door Courthouse, A Guide, Justice delivery through the Alternative Dispute Resolution at 20

LMDC decision, with all parties strictly adhering to the confidentiality rules of LMDC process.[154]

C) Direct Intervention

The LMDC in circumstances of public interest or by demand by the parties through the director may approach the parties by extending an invitation to them.[155]

A. Preparatory Session -Mediation

Aina pointed out that it is essential for parties to attend the sessions to utilise the effectiveness of the process they must have 'full authority,'[156] which must be in writing to settle (if it is a court-referral) the dispute for the ADR session to proceed. The researcher believes that this will be applicable depending if it is a court-referral, or if it is a direct Intervention by the LMDC and not applicable through the walk-In route. Thus, to ensure that the aforementioned are achieved- once a mediator is appointed, he makes contact with the parties or their lawyers to discuss some process arrangements and to clarify some key aspects. Some parties and mediators may request a pre-mediation meeting.[157] In most cases, it is not ideal to hire lawyers, just because they are grounded with knowledge of the law does not make them an excellent candidate to settle disputes or conflict as the case maybe. It is irrefutable that they can resolve a conflict or dispute, but the chances are unusually low.[158] Hence, the purpose of the preparatory stage is to ensure that the parties understand the process and that parties are well prepared for the mediation. Matters to be discussed at this stage will include asking some pertinent questions necessary to ascertain the direction of the process.[159]

At this stage during the mediation session, communication is key because the most important gift a mediator should or can possess is how to effectively communicate.[160] Disputes can be quite complex at times and the need to hire a mediator who can actively listen- get vital information and insight on the nature of the disputes, i.e. the intention of the parties which might lead to the settlement, is essential.[161] Also, the mediator must be able to communicate, inform the parties as to how they may formalise the agreement and the likelihoods for enforcing the

[154]Ibid.
[155]Ibid.
[156]Aina (2007) at 4
[157]Ibid, at 20
[158]Blake, Browne & Sime (2012) at 257
[159]Some of the likely questions may include the following: Whether the parties have agreed to mediation? Whether their lawyers or advisers will accompany the parties? Whether legal proceedings are already underway or would be stayed during mediation? Or whether there are other time constraints.
[160] Ibid.
[161] Beer & Stief (1997) at 22.

agreement.[162] To achieve the aforementioned a mediator should be calm and ask open-ended questions that will enable the parties to reach an agreement.[163] Thus resolving disputes in mediation will not be possible without active listening and communication from the mediator.

An integral part of mediation is the relationship between the mediator and the party building rapport. For example, during the opening speech introductions are made, he / she becomes familiar with how parties wish to be addressed. This is important because in the private meeting the party will have to be comfortable enough to open up to the mediator. Prior to that, the mediator will open up the private session by reminding the parties the ground rules to help guide the conduct of the parties.[164] Also, the parties are reminded that everything discussed in the private session is confidential and will not be revealed except with their permission or compelled by law.[165] Also, the mediator clarifies each party's positions, underlying interests, explores alternatives solutions and seeks possible concessions.[166] A mediator who does not connect with the party lacks empathy; this would make the party feel uncomfortable. And the issue of trusting the mediator becomes a problem, which might affect, the relationship with the party and will not yield to the fruition or end of the process.[167] As soon as there is semblance of common ground, a joint session is convened. The mediator or neutral narrows the difference, highlights the progress made and formalises offers to gain an agreement,[168] then the terms of settlement (TOS) reached are reduced in writing and signatures are appended by the parties.

B. The Arbitration Session

Each ADR mechanism has its benefits and limitations, but despite these limitations, the introduction of ADR in the resolution of commercial disputes have opened doors to more investments for business stakeholders and indeed restored confidence in negotiation of commercial agreements in various jurisdictions, with reference to Nigeria. However, not all the ADR mechanism are widely used in Nigeria, the two most used ADR mechanisms are arbitration[169] and mediation, one

[162]Ibid, at 22
[163]Hyman (2005) at 19.
[164]Hyman (2005) at 36
[165]European Code of Conduct for Mediators para 4
[166]Ibid.
[166]Hyman (2005) at 36.
[167]Hyman (2005) at 23.
[168]Hyman (2005) at 37.
[169]Arbitration was first promulgated as the Arbitration Ordinance in 1914, which applied to all parts of the country. As early stated in this chapter that Nigerian Law was modelled after the English law, it follows through- for the Arbitration Ordinance, which was modelled after the English Arbitration Act of 1889 *cited in Adekoya & Iwu (2017) at 13*. However, in recent years, the legislation that governs arbitration is the Arbitration and Conciliation Act 1988 (Laws of the Federation of Nigeria 2004 Cap A18) (ACA), which is the federal statute. It is imperative to point out that some jurisdictions in Nigeria have enacted their own arbitration laws; an example of such jurisdiction is Lagos. The ACA was modelled on the UNCITRAL Model Law on International Commercial

of the limitations being the ready acceptance and practice of arbitration as opposed to mediation.

Generally, under the International Commercial Arbitration (ICA) Process, parties have the procedural freedom to organise their proceedings as they like and may choose an adversarial or inquisitorial procedure or mixture of both.[170] First, the claimant must submit a notice of arbitration, to which the respondent's answers.

Subsequently, the tribunal itself can be appointed by the parties or by an appointing authority, and then a meeting will follow to discuss how the arbitration will proceed.[171] At the hearing there may be short opening statements, followed by oral testimony, submission of documentary evidence, if requested by the parties.[172] Then, at the end of the hearing there may be short closing statements, and the arbitrators may require post-hearing submissions. After the arbitrators review the post-hearing submissions, they deliberate and render a decision in the form of a final judgement. It is evident that the proceedings in arbitration are quite simple unlike the Court system that is rigid and far more expensive. For example, the arbitrators are selected at the discretion of the parties, however, in litigation; they make use of extensive attorneys, amongst others.[173]

Today, most arbitration is usually conducted under specified rules or procedures, which is similar to court rules.[174] For example, under the LMDC parties can commence an arbitration in two ways through walk-ins and court-referred, although the court-referred under arbitration will not be classified as court-referred because it still boils down to the written agreement of the parties because parties must have an arbitration clause in the contractual agreement before the court can even refer it.[175]

On the other hand, the Procedure for Initiating and Administering Arbitration Proceedings at the Lagos Multi-Door Courthouse (LMDC) is as follows:

- First, the Notice of Arbitration is forwarded to the Respondent by the Claimant indicating an intention to refer the matter to the Lagos Multi-Door Courthouse (LMDC)
- Appropriately completed LMDC Form 1 and 2, a copy of the Notice of Arbitration duly acknowledged by the Respondent and the Claimant for

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Arbitration 1985 (UNCITRAL Model Law) and came into force on 14th March 1988. Up till now, Nigeria has not made any modifications to the ACA at the federal level, although a bill is currently before parliament to replace the 1988 legislation with the UNCITRAL Model Law incorporating the 2006 amendments. The Lagos State Arbitration Law 2009 (LSAL) applies to all arbitrations that arise in Lagos State, except where parties have stipulated another law. This law is an enactment of the UNCITRAL Model Law and incorporates the 2006 amendments. *Cited in Adekoya & Iwu* (2017) at 13

[170]Umegbolu (2019) at 23.

[171]Ibid.

[172]Adekoya & Iwu (2017) at 12.

[173]Moses (2012) at 157

[174]The Lagos Multi-Door Courthouse (2016) at 24.

[175]Ibid, at 17.

screening submits four (4) copies of the Claimant's Statement of Claim is submitted to the LMDC Registry.

- Upon being screened and found suitable, the Claimant would be required to present a deposit slip evidencing payment of the sum of One Hundred Thousand Naira (100, 000.00), which is equivalent to £207.12. Non-Refundable Administrative Deposit into the Lagos Multi-Door Courthouse (LMDC) account.[176]
- Upon receipt of the Claimant's process, a letter inviting both parties to attend a Pre-Session Meeting (PSM) at the LMDC is sent. At the PSM, parties would be: Intimated of the Administrative/Arbitration Fee deposit. This is calculated based on Parties' Claims and Counterclaim contained in the LMDC Fee Schedule. Furnished with the profiles of three Arbitrators from which parties would list their preferred Arbitrators in Order of Preference.
- This is calculated based on 'Parties Claims and Counterclaim contained in the LMDC Fee Schedule. Upon submission of parties' separate list of Arbitrators in Order of Preference, the Arbitrator whose name is common to both parties are appointed as a Sole Arbitrator.
- Where it is impracticable to choose an Arbitrator that is most common to parties from the Parties' list of Arbitrators, the LMDC shall appoint a Sole Arbitrator. In the alternative, parties would be intimated of the appointment of a Sole Arbitrator where required.
- Where the appointment involves a three (3) man panel of arbitrators, the parties shall each appoint an arbitrator from the LMDC list of arbitrators while the LMDC appoints the Chairman of the Arbitral Panel from the same list required to suggest three tentative dates for a Preliminary Meeting with the appointed Arbitrator. Upon payment of the Administrative and Arbitration Session fees by parties, the Arbitral Tribunal would be contacted. The Tribunal would hold a preliminary meeting with the parties and subsequent sessions thereafter until the final award.[177]

C. The Neutral Evaluation Session (NE)

A retired judge, lawyer, or an expert in a particular field usually conducts the NE process, which is mainly initiated to guide the parties towards resolution. The process is mostly adopted to or in the course of a mediation session with an outlook to assisting the parties in their negotiation.[178] However, this process or proceeding is hardly used at the LMDC.

[176]Ibid.
[177]Ibid.
[178]Ibid.

D. Hybrid Sessions

The hybrid processes consists of (Med-Arb) or (Arb-Med), if parties fail to reach a settlement of any or all of the matters in a mediation proceeding, they may decide to submit such issues, to advisory arbitration, binding arbitration or any other ADR process considered suitable.[179]

E. Online Dispute Resolution (ODR) Session

ODR was used more during the Covid-19 Pandemic at the LMDC in 2019. It entails parties that has entered a valid contract or purchased a product that was fraudulently misrepresented or did not get the goods delivered within the agreed date. Then parties can indicate interest in using the ODR service to commence their sessions. As the name implies, parties can subscribe to the online sessions that allows for the use of technology to have virtual meetings in a bid to settle dispute between disputants, as it has become practically impossible to have face-to-face resolution of disputes because of the Covid-19 Pandemic.[180]

Conclusion Phase for ADR Processes:

1) When case managers conclude matters, the Registrar receives the closed case files.
2) Check files for completing Terms of settlement, Mediator's Closure Report, Case Manager's Report, Full payment of Fees, Feedback forms, Etc.
3) The Registry receives TOS and forwards it to the courts for adoption as Consent Judgment of the Court or other reports.[181]

The Underlying Elements of the LMDC Law - Whether the LMDC Law is Stringent or Lenient?

As indicated above, the LMDC legislation or Act came to solve a problem, there was a mischief it was enacted to address, that is prior to the enactment of LMDC -there used to be a lot of congestion in the courts and some of this cases are frivolous cases that at the end of the day there is no substance in them so the act came to clear the air, to remove the chaffs and settle disputes is the whole idea of the LMDC. It did not come to blow away litigation entirely rather it came to supplement it [182] by paving way for the speedy dispensation of justice so that

[179]Ibid, at 37.
[180]Twitter Page LMDC cited in Umegbolu (2020a)
[181]The Lagos Multi-Door Courthouse (2016) at 8.
[182]Umegbolu (2021) at 13.

litigation can now focus on core issues that are not resolvable amicably by parties while this focuses on all other issues that can be resolved before the LMDC. Therefore, the mischief rule came to address is actually to decongest the courtroom or the court system and actually it has succeeded in that. Thus, going into the act of interpreting the laws of LMDC is a tricky one in the sense that the procedure is not where lawyers or mediators come and cite sections or cases, rather the LMDC rules are meant to provide useful guidance.

In regards, to the above-mentioned question, as to whether if the LMDC law is stringent or lenient. This is the first time a writer will undertake the task of demystifying the LMDC law to ascertain whether the LMDC law is strict or lenient?

First, it is prominent to have a look at the Lagos State High Court Rules because the court screens and refers to the LMDC in most cases. Thus, it was drafted for one to go into mediation voluntarily which is evidenced in the civil procedure rules of Lagos 2004,[183] but subsequently this law was amended in 2019 thereby mandating mediation unlike in some other jurisdiction. For example, in Italy, the statute by which it implemented the directive in 2008/52/EC of the European Parliament made out of court conciliation scheme compulsory, it stipulated that parties must mediate before they file action in court, in less than four (4) years precisely in 2012,[184] an undisclosed ruling overturned the 2008 rule of mandating parties to mediate but[185] subsequently reintroduced in 2013.[186] Accordingly under the court-referred mediation, which is instituted by the High Court, it is strict.

On the other hand, the LMDC law is not strict, because under the functions and powers of the LMDC section 3(2) (6*)* of the both rules (old and new, same section)[187] and under Article 2 the practice direction on mediation procedure encourages parties to mediate through walk-in-that is parties voluntarily coming to mediate their matters without the court referring them.[188] Furthermore they also encourage parties whose matters were screened for ADR and referred by the court, to appear before the LMDC for the resolution of their dispute.[189]

Consequently, looking at it from this angle, it is very liberal; moreover was drafted for one to go into mediation unlike in some other jurisdiction like Italy[190] where it is compulsory that parties must mediate before they file action though their state foot mediation bills.[191] On the other hand, the LMDC Law 2007/ 2015 is designed to encourage parties to resort to mediation as much as possible that is why they hardly have any cohesive professions there and any offences created - it is a liberal law designed to encourage mediation.[192]

[183]High Court of Lagos State (Civil Procedures) Rules 2004
[184]Van Rhee & Yullin (2014) at 249
[185]Ibid.
[186]Matteucci (2015) at 19.
[187]Lagos State Multi-Door Court Law 2015.
[188]Practice Direction on Mediation Procedure 2008.
[189]Ibid .
[190]Ibid at 191.
[191]Matteucci (2015) at 250.
[192]The Lagos Multi-Door Courthouse (2016) at 23.

It is argued that the essence of the LMDC is basically the resolution of dispute and requiring the attendance of parties and then their consent and their valuation. Now in regard to interpreting the law vis-à-vis court referred matters. The court-referred matters are still viewed strictly because some recalcitrant parties consider that they are sent to LMDC to mediate against their will. Thus, in drafting the TOS the parties will put that they do not want penalties written in the terms because they have in mind that they will end up defaulting.

In other words, they do not view it as compulsory because they have plans to take the case back to the court. It is essential to point out that parties are part of the court's jurisdiction; in respite to court-connected matters, the Laws are interpreted strictly neither to bow down to the old legal rules on a technicality. Although some stakeholders have argued that ADR through the LMDC can only be an effective method if parties voluntarily submit to the process, (through the walk-in) while some think otherwise.

For the reasons stated above, the court-refereed is stringent; however, when it comes to walk-in the rules are relaxed, thus, making it a more lenient approach. Basically, in considering whether the LMDC Law is strict or lenient, it will depend on the mode of approach to the LMDC; that is if the matter is a court-connected matter or a walk-in. Since the aim is the resolution of justice, of which there are evidence that the application of the law embodies as much as possible an approach that gives the law a lenient face.

In the final analysis, the issue of enforcement of the Terms of Settlements (TOS)- once terms of settlements is reached, it takes the law of contract between the parties and when one breaches it the other one can sue for breach of contract. Additionally, there are also the elements of making the (TOS) as much as possible to conform to the rudiments of judgements of courts so that enforcement can be easily done.

However, while the LMDC rules themselves are couched in lenient terms, they are still hunted by the shadows of legalism just like the English quote:

> Although the old forms of action are there, nevertheless they are spirits and they are ghosts, which still haunt the modern day of doing things.[193]

Consequently, when it comes to enforcement and Court Referral, the ghost of legalism still hunts the LMDC Law, although it does not create substantive rights rather it creates procedural rights.

Conclusions

The work has explored the details of the LMDC and in furtherance to the above, it has shown that although in most cases litigation can be said to be an ineffective means of dispute resolution in comparison to the ADR.

[193]Note on Books and Periodicals (1905) at 402.

It has also explored some of the preliminary background issues relating to Lagos state's court structure and why it was necessary to introduce LMDC and other ancillary bodies or Para-legal institutions to help decongest the courts and speed up the administration of justice within Lagos State the country's economic capital. Also, this work has also depicted that to a large extent that the Lagos state government in conjunction with NCMG kept up with the tempo of the growth of systems and laws; and has enacted rules and revised a lot of this old rules and processes that are well streamlined in context within the modern-day dispute resolution; to offer a framework for fast-track procedures through ADR. This work critically analyses the indispensable elements of the LMDC process towards making an effective method of dispute resolution.

It is vital not to shy away from the most fundamental advantages of the LMDC; hence the TOS are final and further the decisions can be enforced. Thus, it is apparent that all this contributes to the effectiveness of the ADR processes and distinguishes ADR through LMDC from litigation. However, in some ways a recalcitrant party may decide to hinder the process by using the above-mentioned elements stated to his advantage against the other party and in some cases the benefits or pros of the LMDC becomes its challenge. Though it cannot outweigh the challenges posed by litigation in terms of parties not being at liberty to select judges or procedures of their choice. Thus, its advantages bring more value to the table of justice than litigation.

On the contrary, the drawback can be avoided if the LMDC law could be reviewed alongside High Court Civil-Procedure Rules (H.C.P.R) as LMDC will not be having its rules that it is contradictory with the H.C civil procedure rules because after mediation, parties will apply to the court for adoption, and they will have to follow the H.C civil procedure rules.

Thus, the need for these two (LMDC and Court Process) to work together is vital because the rule of the LMDC encourages party autonomy, and parties are at liberty to draft their contracts themselves. However, when it goes to court for enforcement, the court adopts the Terms of Agreement (TOA) wholly. Hitherto it becomes a problem if parties' default or cannot follow through with their TOA. The case now falls back to the court; thereby, in the long run, ADR might not achieve its overriding objective, one of them being the Settling matters quickly and efficiently.

Although litigation gives teeth to the enforcement of the agreement of the ADR processes through the LMDC, the writer argues that some cases through the LMDC might be a preferable alternative. Due to its less complicated nature, its simple proceedings will continue to have more relevance, development, and input in modern-day Dispute Resolution.

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Use and Abuse of Social Media in Myanmar between 2010 and 2022

By Robert Smith & Nucharee Smith±*

Myanmar, or Burma as it was previously known, has been under almost most continuous military rule since 1962 except for a brief period from 2016 until 1 February 2021. The military started the transfer of power to a civilian government in 2010 until the military staged a coup on 1 February 2021. The country has essentially been in a state of various civil wars since its independence in 1948. The period from 2010 saw the opening up of the telecommunications sector and a rapid uptake in social media. The spread of smartphones has opened up communication to the masses and provided them with access to information; the Myanmar Military has also used it to spread disinformation. These campaigns are used to uphold the state, people and religion. To the military, this essentially means the Burman (Bamar) majority, the Buddhist religion and the unitary state (with the military as its guardian). In many of these endeavours, they have been supported by non-state actors such as militant Buddhist monks. Since the military takeover in 2021, the resistance has also used social media, particularly young people and the many ethnic armed groups.

Keywords: *Social-media, disinformation, human rights, military rule, cyber security legislation*

Introduction

Myanmar, or Burma as it was formerly called, has had a troubled history, particularly since its independence from Britain in 1948.[1] There were four elections between 1947 and 1960, followed by a military coup in 1962.[2] Then followed the institutionalisation of military rule from 1962 to 1989, although, in 1972, it morphed into a civilian one-party state under a draft Constitution.[3] Myanmar consists of more than 130 different ethnic groups.[4] The majority are the Buddhist Bamars, who also make up most of the elite, and "experts say the army sees itself as the elite of this elite".[5]

There was a pro-democracy uprising in 1988, and multi-party elections were held in 1990, which the National League for Democracy (NLD) won with an

[*]PhD (Civil Engineering), M.Phil in law, Postgraduate Student in Law, University of New England, Armidale, New South Wales, Australia.
Email: r.b.smith@unswalumni.com or robert@aecconsultants.asia
[±]PhD (International Trade Law), Assistant Professor, Kasetsart University, Chalermphrakiat Sakon Nakhon Province Campus, Thailand. Corresponding author.
E-mail: pulom88@hotmail.com
[1]Kipgen (2022).
[2]Ibid, at 34-36.
[3]Ibid, at 38-39.
[4]BBC News (2022).
[5]Ibid.

overwhelming majority.[6] The outcome was not that desired by the State Law and Order Restoration Council (SLORC), so democracy was stifled again.

In 2008 a new Constitution was approved by referendum, and a multi-party election was held in 2010. However, Aung San Suu Kyi boycotted the election won by the military aligned Union Solidarity and Development Party (USDP).[7]

> "The pace and breadth of reforms that were initiated between 2011 and 2013 were among the most ambitious in a generation [. . .] [b]y 2013, most of the earlier scepticism in the international community had diminished, though some viewed continuing ethnic and communal violence as an indicator of whether the new administration would be able to sustain these reforms."[8]

By the time of the 2015 General Election, the NLD fully participated. It won most seats even though 25% were reserved for the military.[9] Aung San Suu Kyi was denied the post of President under the Constitution of 2008 but was made State Counsellor, making her de facto leader, and took on the roles of foreign minister, education minister, energy minister and minister of the President's office.[10]

In the middle of the COVID-19 pandemic, a general election was held in November 2020.[11] The NLD was once again the landslide victor.[12] On 1 February 2021, the military detained leaders, declared a state of emergency and handed over power to the commander-in-chief.[13] They claimed that the reason for the takeover was election fraud, and their response was in accordance with the provisions of the Constitution.[14] Civil disobedience commenced immediately[15] and continues to this day.[16] "Ousted NLD lawmakers, protest leaders, and activists from several minority groups established a parallel government known as the National Unity Government (NUG)".[17]

Kipgen observes that political activism by students has occurred in different capacities throughout the history of Myanmar:

> "Student unions have played an important role as civil society actors at different points of time. Generally, students have a tendency to believe that there is a historical legacy that they will have to fulfil in the larger interest of the country. The freedom from family responsibilities and the general preference of parents for their children to

[6]Aung-Thwin & Aung-Thwin (2013) at 276-279.
[7]Kipgen (2022) at 123.
[8]Aung-Thwin & Aung-Thwin (2013) at 291-292.
[9]Kipgen (2022) at 151,
[10]Ibid.
[11]Ibid, at 164.
[12]Ibid, at 165.
[13]Ibid, at 166.
[14]Ibid.
[15]BBC News (2021).
[16]May 2022.
[17]Maizland (2022).

> engage in student activism rather than getting involved in active politics encouraged students to play the role of civil society actors".[18]

The period from 2010 saw the opening up of the telecommunications sector and a rapid uptake in social media.[19] Regulation was under the Telecommunications Law (2013), which provided imprisonment for "extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening any person using a telecommunications network".[20] The Act has been used and misused. The military released an even more draconian Act for comment in early 2022.[21] The spread of smartphones has opened up communication to the masses and provided them with access to information. It has also been used over several years by the Myanmar Military (the Tatmadaw) to spread disinformation.[22] These campaigns are used to uphold the state, people and religion.

As social media has become ubiquitous in Myanmar, it has become a significant source of information for many.[23] "Many stories start as social media reports and then subsequently reported in the print media," meaning that "hatred "is stirred up online reported in the print media".[24]

Since the military takeover, social media has also been used by the resistance, particularly young people[25] and the many ethnic armed groups, officially called "ethnic armed organisations" (EAOs) by the government of Myanmar, to coordinate activities.[26] Unfortunately, many of the young activities appear not to be aware of the surveillance of social media by the Tatmadaw or the perils of posting even from the Thai side of the Myanmar border.[27] The proposed replacement Cybersecurity Law is draconian, and for Myanmar citizens, it has extraterritorial application.[28] Its definitions are so broad that any activity that criticises the Tatmadaw, the political situation, and even the people's current social deprivation can be considered a criminal offence,[29] as is having a Virtual Private Network (VPN) on your mobile device.[30]

The paper will also provide a detailed analysis of the Telecommunication Law and its proposed replacement, the Cybersecurity Law, identify deficiencies and how they violate human rights norms. It will also provide verified examples of misuse of social media by state and non-state actors and the response by social media platforms such as Facebook.

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[18]Kipgen (2022).
[19]KrASIA Writers. (2021).
[20]Telecommunications Law 2013 s 66(d).
[21]Cyber Security Law Draft.
[22]See, for instance, Gleicher (2018) and Gleicher (2020).
[23]Ibrahim (2018) at 83.
[24]Ibid.
[25]Deejay & Wella (2021, 20 April 2022).
[26]Tønnesson, Min Zaw Oo & Ne Lynn Aung (2021).
[27]Fishbein & Nu Nu Lusan. (2021)..
[28]Cyber Security Law Draft (anonymous unofficial translation received by Free Expression Myanmar) (2022) s. 2; Telecommunications Law 2013 s 1.
[29]Cyber Security Law Draft (anonymous unofficial translation received by Free Expression Myanmar) (2022) Sec. 91-92.
[30] Ibid, at S. 90.

Methodology

This research is based on the documentary research concept. It analyses the current and proposed legislation governing social media. Finally, it analyses the available contemporary reputable sources to provide details of the use and abuse of social media over the period 2010 to 2022.

Legal Analysis

In October 2013, Myanmar enacted the Telecommunications Law.[31] The Law opened the telecommunications sector:

> "to bring out Telecommunications Services that will be able to provide high quality and worthy services to the users by allowing fair and transparent competitions from domestic and abroad in the telecommunications sector which is developing;"[32]

As a result, the government created four new telecommunications licences.[33] Finally, in June 2013, Telenor (Norway) and Ooredoo (Qatar) were awarded licences.[34] In July/August, when SIM cards became available, activists from the 969 Buddhist organisation asked people not to buy SIM cards from a Muslim country.[35] The bidding process was considered to be well conducted and transparent resulting in mobile coverage across most of the country "at an affordable rate, in competition with the existing government-run network".[36]

At the same time, the Law introduced some somewhat draconian provisions that impact the users of the telecommunication services. The most controversial clauses are:

> "66. Whoever commits any of the following acts shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine or to both:[37]
> (a) Accessing and disturbing a Telecommunications Network, altering or destroying the determination of technical standards or the original form without the permission of the owner administrative right.
> (b) […]
> (c) […].
> (d) Extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening to any person by using any Telecommunications Network.
> […]
> 68. Whoever commits any of the following acts shall, on conviction, be liable to imprisonment for a term not exceeding one year or to a fine or both.

[31]Telecommunications Law 2013.
[32]Ibid, at art. 4(d).
[33]Lall (2016) at 140.
[34]Ibid.
[35]Ibid.
[36]Cockett (2015) at 234.
[37]Telecommunications Law 2013, art. 66

(a) communications, reception, transmission, distribution or conveyance of incorrect information with dishonesty or participation;" [38]

In March 2017, *Article 19* undertook a legal analysis of the Law to ascertain its "compliance with international standards on the right to freedom of expression".[39] They were critical of the offence of criminal defamation[40] because they are vulnerable to exploitation "where left to government authorities to enforce".[41] The provisions of Article 66(d) and Article 68(a) were considered to be too broad and do "not meet the requirements of legal certainty".[42] They argue that Article 40 gives sweeping investigatory powers and, as drafted, to conduct a search and seize any information, data, paper and documents provided it is from a place where telecommunication services are provided.[43] Similarly, Article 76 has similar national defence provisions, national security, and public interest.[44] Finally, they argue that Article 77 allows the Ministry "to suspend services, intercept communications, and to temporarily control services" during an emergency should be stricken, and service restrictions should be narrowly defined, require prior judicial approval and only occur in exceptional circumstances.[45]

In the light of the *Article 19* analysis and an independent review of the Law by the authors, it is concluded that the law has broad provisions, which are often poorly defined or even undefined, offences are broad, and search and seizure can occur without cause. The only condition is that it be in a facility where telecommunications are provided. In other words, search and seizure can take place anywhere there is a mobile device, which in these interconnected times is almost anywhere. As will be seen later in this paper, the Law was an effective tool used by the Tatmadaw following the coup d'état of February 2021. Even then, they decided to make it even more draconian. Nine days after the coup, the ruling State Administrative Council sent a draft of a revised telecommunications bill, now called a cyber security law, to telecommunications operators for comment.[46]

The Myanmar Centre for Responsible Business obtained a copy dated 6 February 2021. It was translated, and a legal analysis was sought.[47] The draft, if implemented, would have severe impacts on the usage of social media.[48] Section 29 states:

[38]Ibid, art 68
[39]Article 19. (2017). *Myanmar: Telecommunications Law, 2013.*
[40]Telecommunications Law 2013, art 66(d).
[41]Article 19. (2017) at 12.
[42]Ibid.
[43]Ibid, at 13.
[44]Ibid, at15.
[45]Ibid.
[46]Human Rights Watch (2021).
[47]Myanmar Centre for Responsible Business. (2021).
[48]The review of the draft, and it impacts on social media, is based on the translated sections included in the analysis published by the Centre and not on the analysis and conclusion of their legal advisor. The authors have been unable to obtain a translation of the complete draft.

> "When the Department informs that Online Service Provider causes any of the following events in the Cyberspace within the Union of Myanmar, they shall be prevented, removed, destroyed and terminated in line with the stipulations:
> a) Speech, texts, images, videos, audio, files, signs or other means of expression that lead to hatred and destroy unity and peace;
> b) Fake news and rumours;
> c) Sexually oriented pictures, audio files, videos, phrases, signs or any other illustrations that are not in line with the community's culture;
> d) Child pornography, pictures, phrases, signs or any other illustrations; and
> e) Written statements, speeches or descriptions that infringe any existing laws."[49]

As has been found in the laws of other jurisdictions in Southeast Asia,[50] the draft law does not define terms such as "destroying unity and peace", "fake news and rumours", and the "community's culture". Moreover, it leaves the Department the power to determine what is acceptable and what is not, hence restricting freedom of speech. Further, Section 49 allows for the interception to prevent harm to the "sovereignty and territorial integrity of the State";[51] performing acts "for the defence and security of the State";[52] ensuring "the rule of law and public order";[53] criminal investigations;[54] investigating crimes; activities "approved under any existing laws";[55] and "safeguarding and protecting public life, property and public welfare".[56] Again, the draft includes activities that can be undertaken by the authorities that are ill-defined at best or are potentially undefined.

Online service providers may be requested "to provide written records if it is necessary for the country's protection and security purposes and public interest".[57]

Offences under the draft law include:

> a. "creating misinformation and disinformation with the intent of causing public panic, loss of trust or social division on a cyberspace";[58]
> b. "creating a fake account, website and web portal with the intent of **causing public panic, loss of trust or social division on a cyberspace";[59]**
> c. "Anyone - with the intention of infringing state sovereignty, security, stability, rule of law, unity among ethnic groups - prevent others not to be able to use cyber resources, make the use of cyber resources difficult, attempt to penetrate the cyber network without permission, use more than allowed, put in the malware into computer with the intention of harming someone, shall be prosecuted under the Counter-Terrorism Law."[60]

[49]Myanmar Centre for Responsible Business (2021) at 5-6.
[50]See for instance: Smith & Perry (2020); Smith, & Perry (2022); Smith, Perry & Smith (2021).
[51]Draft Cyber Security law,. s. 49(a)
[52]Ibid, s. 49(b).
[53]Ibid, s. 49(c).
[54]Ibid, s.49(d).
[55]Ibid, s. 49(e).
[56]Ibid, s. 49(f).
[57]Ibid, s. 50.
[58]Ibid, s. 64.
[59]Ibid, s. 65.
[60]Ibid, s. 70.

If enacted, the authorities would have absolute control over social media and would have the ability to be entirely arbitrary in applying administrative or criminal sanctions.

The 2021 draft was subsequently abandoned,[61] and a new draft was released in January 2022.[62] The terms that were not defined in the 2021 draft remain undefined in the 2022 draft.

Section 29 of the 2021 draft was replaced by Section 35 in the 2022 draft:

> "35. Prevention, removal, destruction and cessation shall be made accordingly in a timely manner, following the provision of information by the department that a digital platform service provider in Myanmar causes any of the following on cyberspace;
> (a) Speech, texts, images, video, audio files, signs or other ways of expression causing hate, disrupting unity, stabilisation and peace;
> (b) Misinformation and disinformation;
> (c) Sexually explicit material that is not culturally appropriate for Myanmar society to see; Photos, Audio files, Videos, Texts, Signs, Symbols and other expressions;
> d) Child pornography; Photo, Video, Texts, Symbols and other expressions;
> (e) Written and verbal statement breaching any existing law;
> (f) A legitimate complaint of the expression, writing, sending, distribution of speech, text, images, video, sound, symbols and other expressions that damage an individual's social standing and livelihood."

It could be argued that replacing "fake news and rumour" in the 2021 draft with "misinformation and disinformation" in the 2022 draft is a positive action. That the terms remain undefined is a significant defect.[63] It appears that s 35(f) implies an act of online defamation where the item is removed if its contents "damage an individual's social standing and livelihood," regardless of whether the content is true.

Section 49 of the 2021 draft remains unchanged as s 59 of the new draft.

The use of Virtual Private Networks (VPNs) and similar tools require permission from the Ministry "to set up, access and use networks that are licensed under the Telecom Law".[64]

A new offence has been created in the 2022 draft:

> "90. No one shall have access to a network using Virtual Private Network (VPN) technology or similar technology on a network licensed under the Telecommunications Law without the permission of the Ministry.[65]

The illegal use of a VPN will result in a prison term of one to three years and a fine. In the current circumstances, this would effectively criminalise access to Facebook, which the military has blocked since 4 February 2021. As "most people

[61]Free Expression Myanmar (2022).
[62]Cyber Security Law Draft (anonymous unofficial translation received by Free Expression Myanmar) (2022).
[63]For further discussion on these terms see, for instance: Smith (2021); Smith & Perry (2021); Wardle (2017).
[64]S. 62 of the 2022 draft.
[65]S. 90 of the new draft.

in Myanmar use VPNs to access Facebook, […] any individual or business that posted on Facebook could in effect be creating evidence of a crime".[66] Even encouraging the use of VPNs could result in imprisonment of up to three years or a fine.[67]

A penalty of from one to three years or a fine applies to "[a]ny person who is convicted of creating misinformation and disinformation with the intent of causing public panic, loss of trust or social division on cyberspace".[68] In 2021 the prison term was up to three years with no minimum set.[69]

At the time of writing (in May 2022), the status of the current draft was unknown.

This section has provided the legal framework in which social media operates if the current 2013 Telecommunications Law was policed and how the Tatmadaw intends to change the law to counter dissent. The following section will look at the social media landscape from the country's opening up in 2010 to 2022, the second year of the current military rule.

a.

Social Media Landscape in Myanmar

Facebook is the social media platform of choice for most of Myanmar's population, "about 90 percent of whom use mobile phones to get news and other information".[70]

Country in transition – 2010 to 2014

Extremist Buddhist monks in Myanmar have coalesced around the 969 Movement and the Ma Ba Tha.[71] Both organisations seek to preserve the primacy of Buddhism in Myanmar and revile Muslims. Their best-known leader is Ashin U Wirathu, a monk from Mandalay who is well known for his extremist views.[72] A particular target of the movements is the Rohingyas, whom they claim are Bengalis and not citizens of Myanmar, although they may have lived in Myanmar for generations.[73]

The year 2012 saw significant violence break out in Rakhine state against the Rohingya.[74] Violence appeared to be a "consequence of the deliberate actions and planning of the extremist monks and political parties such as the RNDP [Rakhine

[66]Free Expression Myanmar (2022).
[67]S. 89(c) of the new draft.
[68]S. 91 of the new draft
[69]Myanmar Centre for Responsible Business (2021) at 10.
[70]Radio Free Asia. (2020).
[71]Ibrahim (2018) at 67-70.
[72]Ibid, at 67.
[73]For a detail discussion of this issue see Ibrahim (2018) and Wade (2017).
[74]Ibrahim (2018) at 79-86 and Wade (2017) at 98-122.

Nationals Development Party]".[75] Social media had a significant role in stoking the violence:

> "The force of the propaganda, and its unremitting circulation – not just in its leaflets and statements, but in domestic media of all stripes state-owned and private – left little mental space within the Buddhist communities of Rakhine State to consider the Rohingya as anything but menacing. That image had become a staple of the Rakhine imagination and, it soon became evident, the Buddhist population of Myanmar more broadly".[76]

In March 2012, Buddhist monks led attacks on Muslims in Meiktila near Mandalay, resulting in over 14,000 people being displaced.[77] Attacks were preceded by Facebook posts describing the local Muslim population as preparing for jihad and urging the government must deal with the Islamic extremists and raid auspicious houses and mosques.[78]

Government Response

Ibrahim argues that:

> "the Myanmar regime remains convinced that the Rohingyas are deliberately, and successfully, manipulating international opinion, and has tried to cut off communication links between the Rohingyas and the outside world […] [D]ue to social media and sympathetic external connections this has only been partially successful. In addition, there has been a concerted pattern of excluding aid agencies from the country […]. The regime has come to see any critical mention of the conditions endured by the regime as an attack on the state, and will eagerly revoke access to NGOs if they speak out […].. A number of aid agencies are prepared to comply with government restrictions in order to carry out other work in the region."[79]

National League for Democracy (NLD) Government – 2015 to 2020

Whilst 30 million people were Facebook users, media literacy and critical consumption of information in the country remained low.[80] The depth of Facebook usage and the general naivety of the users provided optimal conditions for disinformation to thrive.[81] The most extreme example was the Rohingya crisis of 2017, where disinformation on social media fanned conflicts between the Buddhists and the Rohingya, resulting in around 860,000 Rohingyas fleeing to Bangladesh.[82] Most remain in refugee camps at the time of writing with no prospect of return in the near future.

[75]Ibrahim (2018) at 83.
[76]Wade (2017) at 118.
[77]Ibrahim (2018) at 86.
[78]Ibid.
[79]Ibid, at 86-87.
[80]Bestle & Lehmann-Jacobsen (2021, 22 April 2022).
[81]Ibid.
[82]Ibid.

In March 2020, Myanmar authorities ordered the mobile phone operators to block access to 221 sites under Article 77 of the Telecommunications Law. [83] Article 77 allows the blocking of sites in an "emergency situation". In this case, it was claimed to be about COVID-19.[84] Whilst no list was provided, several major news outlets were blocked, as were ethnic minority-focused news sites.[85] At the same time, five journalists were facing terrorism charges for interviewing the Arakan Army ethnic armed group that the government had declared a terrorist organisation.[86] In addition, the Tatmadaw practised online manipulation whilst "the government coerced telecommunications companies to impose internet shutdowns and disruption of services in Rakhine and Chin states".[87]

In 2019, six artists who live-streamed a Facebook "political satire that mocked and criticised the military" were imprisoned for violating Section 505(a) of the Penal Code. Four later received further imprisonment for violating the 'online defamation' clause (Section 66(d)) of the Telecommunications Law.[88]

In the middle of 2019, the government imposed an internet blackout in conflict-ridden parts of Rakhine and Chin states.[89] The blackout was announced by the service providers and not by the government. Jha notes that "[t]he move to suspend internet access, in turn limiting freedom of expression and information comes at a time when Myanmar's citizens are already under attack for voicing their opinions".[90] The blackout lasted for almost a year and "raised serious concerns that many citizens had been left in the dark about the global COVID-19 pandemic".[91]

Social Media and the Tatmadaw

A New York Times investigation in 2018 found that Myanmar military personnel used Facebook as a tool for ethnic cleansing targeting the Rohingya.[92] They flooded Facebook with their hatred by posing as pop stars and national heroes. They claimed that Islam was a threat to Buddhism and even shared a fake story about the rape of a Buddhist woman by a Muslim man.[93] This story seems to be a common theme in a number of attacks on Muslims.

Military officers secretly monitored popular accounts and criticised posts unfavourable to the military.[94]

In June 2018, a new company, MyTel, entered the mobile phone market.[95] It is owned by Viettel, a Vietnamese enterprise wholly owned and operated by the

[83]Reporters Without Borders (2020).
[84]Ibid.
[85]Ibid.
[86]Ibid.
[87]Asia Centre (2021) at 5.
[88]Ibid, at 5.
[89]Jha (2019, 24 August 2014).
[90]Ibid.
[91]Preece & Beny (2021).
[92]Mozur (2018).
[93]Ibid.
[94]Ibid.
[95]Thurein Hla Htway (2018).

defence ministry with 49%.[96] A further 28% are held by a conglomerate belonging to Myanmar's military.[97] The remaining shares are held by a Myanmar consortium of 11 local companies.[98]

On 28 August and 18 December 2018, Facebook removed Facebook pages, Facebook groups, Facebook accounts, and Instagram accounts for coordinated inauthentic behaviour on Facebook.[99] The sites were "seemingly independent news, entertainment, beauty and lifestyle pages".[100] The pages were traced back to the Tatmadaw. Gleicher pointed out that:

> "[t]his kind of behaviour is not allowed on Facebook under our misrepresentation policy because we don't want people or organisations creating networks of accounts to mislead others about who they are, or what they're doing […] . Our decision to remove these Pages was based on the behaviour of these actors rather than on the type of content they were posting.[101]

The *Tatmadaw True News Information Team* Facebook page was set up in June 2020 "to provide 'accurate news' ahead of the November election".[102] In hindsight, the Tatmadaw was setting the scene for the military "to allege voter fraud as a pretext for the coup".[103]

Social Media and Non-State Actors

Since 2009 the armed ethnic group the Arakan Army used sophisticated posts and videos on social media to promote its aim for "greater rights and autonomy for the Rakhine Buddhist community".[104] It also used the platform for soliciting donations and recruiting new members.[105] Mobile internet and social media were also used for command and control and gathering intelligence. Facebook has had limited success in removing the sites as the Arakan Army obviously has highly skilled social media operatives.

Reuters searched the internet and "found more than 1,000 examples of posts, comments and pornographic images attacking the Rohingya and other Muslims on Facebook".[106] Almost all of the posts were in Burmese. Some of the material had been "on Facebook for as long as six years".[107]

In 2019 a copy of Radio Free Asia called Radio Free Myanmar (RFM) appeared.[108] Its role was to spread disinformation, usually about the NLD and the Rohingya Muslims. Frontier Myanmar also found that RFM operated "a network

[96]Ibid.
[97]Ibid.
[98]Ibid.
[99]Gleicher (2018).
[100]Ibid.
[101]Ibid.
[102]Domino (2021, 20 April 2022).
[103]Ibid.
[104]International Crisis Group. (2021).
[105]Ibid.
[106]Stecklow (2018).
[107]Ibid.
[108]Banyan Kyaw, Phone Htet Naung, Beatson & Nachemson (2020).

of linked Facebook accounts and pages that are being used to spread RFM misinformation through the social media platform".[109] It appeared that RFM was being operated by supporters of the Union Solidarity and Development Party, which was military-aligned.

Independent International Fact-Finding Mission on Myanmar

In September 2018, the United Nations Human Rights Council issued its *Independent International Fact-finding Mission report on Myanmar*.[110]

> "In accordance with its mandate, the mission focused on the situation in Kachin, Rakhine and Shan States since 2011. It also examined the infringement of fundamental freedoms, including the rights to freedom of expression, assembly and peaceful association, and the question of hate speech."[111]

Despite written requests, the Government did not cooperate with the mission.[112] There was limited informal contact with government representatives, but there were no written responses to any of its requests for information or to access in-country access.[113] The report was shared with the Government before release, but again there was no response.[114] The findings and recommendations of the committee to the Government concerning its governance of social media were:[115]

a. unequivocally condemn and end intolerant, divisive and discriminatory rhetoric based on ethnic, racial or religious grounds, both from State actors and non-State actors […];[116]
b. enact the domestic legislation necessary to punish the crimes of genocide, conspiracy to commit genocide, direct and public […];[117]
c. act swiftly to end all intolerant, divisive or discriminatory public commentary that reinforces hate speech and false narratives […];[118]
d. dismiss and otherwise hold accountable public officials, whether serving in the Government or military, found to be spreading hate speech or false narratives […];[119]
e. repeal or amend provisions in laws unduly restricting the interrelated rights to freedom of opinion and expression, association, and peaceful assembly, including sections 143-147, 499-502 and 505(b) of the Penal Code, the

[109]Ibid.
[110]United Nations Human Rights Council (2018).
[111]Ibid, at 1.
[112]Ibid, para 2.
[113]Ibid.
[114]Ibid..
[115]United Nations Human Rights Council. (2019a).
[116]Ibid, para 11.
[117]Ibid, para 24.
[118]Ibid, para 30(a).
[119]Ibid, para 30(c).

Official Secrets Act, sections 66(d) and 77 of the Telecommunications Act, and section 17(1) of the Unlawful Associations Act;[120]

f. pending legislative amendments to end criminal defamation, stop government officials from making criminal defamation complaints, including under section 66(d) of the Telecommunications Act.[121]

To Facebook and other social media, its findings and recommendations included:

b. all social media platforms […] should apply international human rights law as basis for content moderation on their platforms. In doing so, they should respect the rights of their users to freedom of expression and to privacy;[122]
c. support the existing research of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression on online content moderation;[123]
d. allow for independent and thorough examination of the use of their platform to spread messages inciting to violence and discrimination in Myanmar;[124]
e. open themselves up to public accountability and transparency. They should actively track the use of their platform in Myanmar for the spread and promotion of threats and the incitement to violence, hostility and discrimination. They should be transparent about their policies and practices to identify and remove objectionable content;[125]
f. enhance their capacity to combat the use of their platforms for the spread and promotion of threats and the incitement to violence, hostility and discrimination. This includes hiring sufficient content moderators who are familiar with the context, background and nuances of Myanmar language and the issue of hate speech in the country, and providing them with training on human rights standards;[126]
g. retain indefinitely copies of material removed for use by judicial bodies and other credible accountability mechanisms addressing serious human rights violations committed in Myanmar in line with international human rights norms and standards, including where such violations amounted to crimes under international law;[127]
h. establish early warning systems for emergency escalation, involving all relevant stakeholders;[128]
i. actively assist efforts to promote tolerance, peace and the human rights of all the Myanmar people;[129]

[120]Ibid, para 32(a).
[121]Ibid, para 32(b).
[122]Ibid, para 137.
[123]Ibid, para 138.
[124]Ibid, para 139.
[125]Ibid, para 140.
[126]Ibid, para 141.
[127]Ibid, para 142.
[128]Ibid, para 143.

j. before entering any new market, particularly those with volatile ethnic, religious or other social tensions, Facebook and other social media platforms, including messenger systems, should conduct in-depth human rights impact assessments for their products, policies and operations, based on the national context and take mitigating measures to reduce risks as much as possible;[130]

COVID-19 Pandemic

At the outset of the pandemic, misinformation and fake news proliferated on Facebook.[131] Despite official pleas to check information, the general public and businesspeople continued to upload photographs and post misleading information and advice concerning COVID-19.[132]

Also, in 2020, journalists were charged for spreading fake news on social media.[133] The authorities disputed their report of the number of COVID-19 patients and deaths.

Military Rule 2021-2022

Demonstrations followed the coup d'état of 1 February 2021.[134] In order to stop people from mobilising for protests, the military rulers blocked access to Facebook, Twitter and Instagram.[135]

Technology companies are developing tools to provide better protection to users from reprisals.[136] However, using these tools requires a level of knowledge and security awareness.

> "Although digital security habits have improved significantly since 1 February, including through the uptake of VPNs and encrypted messaging applications such as Signal, it is largely younger and better educated users who have tightened up their practices. There is still a significant knowledge deficit in some demographics, which is particularly concerning given the array of tools the Tatmadaw has to target users."[137]

As western businesses withdrew from Myanmar following the coup, Norwegian telecommunications operator Telenor sold its Myanmar business to a Lebanese investment company which, in turn, was allowed to sell a stake to a

[129]Ibid, para 144.
[130]Ibid, para 145.
[131]Radio Free Asia. (2020).
[132]Ibid.
[133]Asia Centre (2021) at 5.
[134]BBC News (2021).
[135]Ibid.
[136]International Crisis Group (2021).
[137]Ibid.

company with close links to the military.[138] The sale raised concerns that the personal data of its 18 million users in Myanmar would become available to the Tatmadaw.[139] The reason for concern was that in 2021, Telenor was pressured to install eavesdropping equipment for monitoring communications on its network.[140] Apparently, Telenor had complied with data requests from the beginning of the coup, and by February 2022, the Ministry of Transport and Communications had made at least 200 requests for sensitive information.[141]

Social Media and the Tatmadaw

Soon after the coup, Facebook banned the Tatmadaw's official Facebook page, the *Tatmadaw True News Information Team* and that of its military spokesman.[142]

Reuters reviewed thousands of social media posts in 2021 and "found that about 200 military personnel, using their personal accounts on platforms including Facebook, YouTube, TikTok, Twitter and Telegram, regularly posted messages or videos alleging fraud at the election and denouncing anti-coup protesters as traitors".[143]

In December 2021, Facebook banned all Myanmar-military controlled businesses from its platforms.[144] The action was based on "extensive documentation by the international community and civil society of these businesses' direct role in funding the Tatmadaw".[145] Around the same time, Rohingya refugees commenced proceedings in a California court against Facebook for $150bn "over claims the social network is failing to stem hate speech on its platform, exacerbating violence against the vulnerable Myanmar minority".[146] Their complaint argued that Facebook's algorithms "promote disinformation and extreme thought that translates into real-world violence".[147]

Covid-19 Pandemic Pandemic and Issues

Prohibitions on access to the use of the internet and social media impacted access to critical information and guidance on COVID-19 prevention measures.[148] It was also likely to "further exacerbate gender-based violence risks for women and their access to life-saving services".

Prior to the third COVID-19 wave in mid-2021, "there was strong stigma against COVID-19 vaccinations as people swore on Facebook to refuse vaccines until Aung San Suu Kyi was freed and democracy restored".[149]

[138]The Irrawaddy (2022).
[139]Ibid.
[140]Ibid.
[141]Access Now (2022).
[142]Domino (2021, 20 April 2022).
[143]Potkin & Lone (2021).
[144]Al Jazeera (2021a). .
[145]Ibid.
[146]Al Jazeera (2021b).
[147]Ibid.
[148]Sharma, Phyu Phyu Oo, Hollaender & Scott (2021).
[149]Naw Theresa (pseudonym) (2022).

Discussion

As discussed above, after nearly fifty years of military rule and isolationism, the Constitution of 2008 signalled the country's opening up to the outside world.[150] The period from 2010 to 2015 showed promise as the power was transferred from the military to a civilian government. This period resulted in the internationalisation of the telecommunications sector and the rapid take-up of social media, essentially Facebook. There was continuity under the government of Aung San Suu Kyi until the coup of 2021 when the military returned to run the country and imposed a brutal regime. During this period, there was one constant – the various administrations did little to limit hate speech, particularly when it related to Muslims, particularly the Rohingya. At the same time, they persecuted and prosecuted those who were critical of the regime. The reasons for this lack of respect for human dignity and human rights are complex.

During the period of the National League for Democracy government:

> "the generals have made no major concessions to the NLD. All they have done—all they have had to do—has been to stick to their constitutionally guaranteed rights and privileges. The Tatmadaw remains Burma's strongest political institution. The generals have given up nothing that matters to them.
> [. . .]
> The hard realities of Burmese politics are these: There has been no significant transfer of political power from the generals to elected civilians, and there will be no such transfer unless and until the Tatmadaw wants it to happen. In all respects that truly matter, the generals are still in charge. If they are to cede any influence or control, it will have to be voluntary. The only authority that can limit the military's power is the military itself. At present, it is hard to see any compelling reason why the generals would want to reduce their own political clout."[151]

The violence against the Rohingya was, and remains, a major humanitarian crisis, with violence fuelled by fake news on social media. In her role as State Counsellor, Aung San Suu Kyi who is de facto leader of Myanmar, showed little interest in resolving the issue. Fake news and hate speech continued to be posted on social media, as was reported by the United Nations Human Rights Council.[152] One of the reasons for this could be a feeling of ethnic superiority. Many of the Buddhist Bamar majority view the Muslim Rohingya as outsiders who do not deserve to live in the country.[153] It is even argued that during the NLD government, press freedom regressed and seemed more restrictive than that during the transition period of the Thein Sein government.[154]

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[150]See for instance, Maizland (2022).
[151]Barany (2018) at 6.
[152]United Nations Human Rights Council. (2019b).
[153]Kurlantzick. (2017a). This was apparent when the first author was undertaking a development project in Myanmar in 2015. One of his female staff was a Buddhist engineer from Rakhine State. Her demeanour was quiet and friendly. If the name "Rohingya" was mentioned she would become quite agitated and make clear her opinion that they did not belong in Myanmar.
[154]Kurlantzick (2017b, 2 March 2019).

As Facebook was the primary source of information during the NLD government and remains so to those who still have access via a VPN, it deserves the scathing criticism for not addressing the proliferation of fake news and hate speech that fuelled the ethnic violence against the Rohingya in particular and Muslims in general. International action is required to provide oversight of social media platforms to ensure that the platforms adequately monitor posts to minimise the spreading of fake news and hate speech. If the platforms cannot self-monitor their platforms, consideration should be given to remove current safe harbour protections and legislate to have them declared publishers of their online content. Such legislation would expose them to the same sanctions that apply to print or online mainstream media companies.

Another issue that has arisen and is challenging to overcome is that of social media becoming an echo chamber. This has been a pressing issue in Myanmar, especially where Facebook became the major source of news and communication because of its early introduction.[155] There needs to be education at all levels to cross-check information sources. There is also an urgent need for social media users to be aware of privacy issues associated with open social media platforms.

Conclusion

Myanmar is an extreme example of the use and abuse of social media. It shows what can happen if there are no strong governance structures. If there are not, the rule of law can break down, and widespread abuses of human rights can occur and, at times, encouraged. Governments need to regulate state and non-state actors in this regard. At the same time the use of social media to oppose the government is a relatively new and powerful phenomenon. It is not only used locally but also sells its message to the world.

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[155]The first author has personal experience of this. A colleague, her sister and 11-year-old niece had to be smuggled out of Myanmar to Mae Sot in Thailand because of their support for the demonstrators during the early days of the coup. She continued to use social media even during her exile in Thailand until she closed it down following several entreaties from her colleagues. She was openly reposting material from various sources to her friends and contacts. In fact, she was putting her freedom at risk because she was just acting as an echo chamber to her circle. Her actions were even more serious as the posts would have violated Thailand's cybercrime legislation. She seemed to be oblivious to the fact that authorities in both Myanmar and Thailand would be monitoring social media posts, particularly from refugees at the Thai border. It has not been unheard of the Myanmar military crossing the border or the Thai authorities pushing refugees back across the border into the hands of the Myanmar authorities.

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'The Right to Remain and Produce in your Homeland' in Light of Article 8 of the European Convention on Human Rights, The European Court of Human Rights Case Law and the Italian Constitution

*By Ivan Allegranti**

The multi-level protection offered to the right to property is an element of the current Italian and European legal system. Reading Article 8 (respect to private and family life) and Article 1, paragraph 1 (property protection) of the European Convention on Human Rights (hereinafter ECHR) it is possible to state that the protection of someone's property has gone beyond the physical object. This interpretation, which derives from an approach which underlines the social function of property, has been strengthened by the ECHR that, during the last 20 years, has extended the concept of property. Thanks to it, it is possible to affirm the existence of a right to remain in one's own land before, during and after an emergency, caused by a natural, health or man-made disaster. Also, trough the reading of Articles 41, 42 and 44 of the Italian Constitution it is possible to affirm the existence of this right within the Italian Fundamental Charter. In light of the above evolutions of the jurisprudence and of the interpretation of the concept of property within the Italian Constitution, this article analyses how this principle may apply also to people affected by natural hazards.

Keywords: *Property right; Right to remain in your homeland; Italian constitution; Natural disasters; European Court of Human Rights; Court of Justice of the European Union; European Convention Human Rights*

Introduction

A house is much more than a physical shelter that repairs from the elements[1]. In fact, a home meets the basic need of the human being, like those psychological and social, and offers security, stability and identity to its inhabitants who live there[2] defining who one is[3]. To be deprived of it, for any circumstance, during and after an emergency - caused by a natural, health or man-made disaster[4]- can have negative effects on both physical health and mental health of the people involved[5].

*Research Fellow and PhD Candidate in Civil Law at the University of Camerino, Italy.
Email: ivan.allegranti@unicam.it
[1]Fick & Vols (2016) at 40.
[2]Relph (1978).
[3]Samanani & Lenhard (2019) at 1.
[4]Cutter, Barnes, Berry, Burton, Evans, Tate & Webb (2008).
[5]Nettleton (2001).

The thesis proposed in this paper then moves from the observation that the protection offered to the right of property in the contemporary European legal system is multilevel[6].

Over time, in fact, the notion of property has changed so that from the meaning of property with a singular meaning [7] we now intended 'property' on a pluralistic level, eliminating in its definition the physicality of the *res*[8].

The Cases of *Nonna Peppina* and *Enzo Rendina*

In this perspective, the stories of Nonna Peppina (Giuseppina Fattori) and Enzo Rendina are emblematic as they 'fought' to remain to live in their respective land of origin.

The story of «Nonna Peppina» (Giuseppina Fattori)[9] is linked to the earthquake, resistance and attachment to her homeland. Born and raised in Fiastra 98 years ago (now Giuseppina Fattori has died), after the earthquake that 2016 devasted four regions in Italy[10], the first home of Nonna Peppina, was heavily damaged. So, in order not to leave her territory, together with her family, she built a wooden house very close to the old and destroyed house. After an anonymous report, however, the building process risked to be interrupted due to two shortcomings: the building permit and the presence of a landscape constraint. The house was built but Peppina was evicted as a result of the seizure of the building occurred under the order of the Criminal Judge of Macerata. Only a specific law, the so-called 'Salva Peppina law'[11] allowed Giuseppina Fattori to win the civil procedure case and return to the small house in San Martino di Fiastra. The criminal proceeding ended in 2019. The judge Vittoria Lupi of the court of Macerata acquitted Giuseppina Fattori who was accused at first instance of building abuse with a fine of almost one thousand euros paid to the Municipality.

The other story is the one of Enzo Rendina, a farmer born in Pescara del Tronto who has always lived there[12]. When the earthquake of 2016 occurred, he remained in Pescara del Tronto, in front of his house destroyed by the seismic events, for 5 months using as a temporary house only a tent given to him by the Protezione Civile (Civil Protection)[13], in which he had settled in the red zone of the country[14]. Throughout 2016, Rendina did not abandon the tent in the red zone

[6]Viglianisi Ferraro (2020).
[7]Perlingieri (2011) at 6.
[8]Tenella Sillani (2013) at 1060.
[9]Il Fatto Quotidiano (2021).
[10]In September and October 2016 and in January 2017, three seismic events destroyed the regions of Abruzzo, Lazio, Marche and Umbria in Italy.
[11]Article 2 bis, paragraph 6 of the *decreto legislativo* of 16 October 2017 n. 148.
[12]Il Sole 24 Ore (2017).
[13]The Civil Protection was the first State organisation that provided the evacuees of the earthquake with a temporary house (a tent).
[14]After the earthquake, the all the cities hit by the events were divided into zones given by the intensity of the damages they faced. The most dangerous zone was the 'zona rossa' (red zone) as there the risk of building collapse was more possible.

of Pescara del Tronto until it was the Carabinieri who arrested him and made him leave his house, after the seizure order provided to him by the mayor of Arquata del Tronto, Aleandro Petrucci, who invited Rendina to move to the hotel room, far from Pescara, and prepared for him and the other people who have lost their home during the 2016-17 seismic events[15]. On January 30, 2017, Enzo Rendina was forced to leave his homeland and his house and tried unsuccessfully - in order to avoid the transfer to the hotel- to resist to the officers who had the duty to proceed to the enforcement of the order. However, he was imprisoned for two days in the prison of Marino del Tronto. Subsequently, Rendina underwent a first-degree trial until February 2021. The Court of Ascoli Piceno sentence has decreed an imprisonment of five months for resistance to public officers (article 337 of the Criminal Law Code) and interruption of public service (article 340 of the Criminal Law Code).

Methodology

It is therefore considered necessary to promote the ongoing investigation, whose scope is to highlight the existence of a 'right to remain in your homeland', due to a systematic analysis of Articles 16 and 17 of the Charter of Fundamental Rights of the European Union (hereinafter CFREU) and Article 8 and Article 1, Protocol 1, of the ECHR[16]. The importance of the two Treaties now mentioned is indisputable as they lay the foundations for a modern reflection on the right to property even[17] within the Italian borders[18].

On the one hand, Article 16 of the CFREU recognises the freedom to conduct a business in accordance with EU law, national laws and practices. On the other hand, Article 17 of the CFREU protects the right to property by ensuring protection for every individual to own, use, dispose and bequeath legally acquired property. Article 8 of the ECHR, then, protects the private and family life, the domicile and correspondence of each individual, while Article 1, Protocol 1, ECHR establishes, as a fundamental right (of an individual or a legal person), the ownership and peaceful enjoyment of a property. It is worth to say that, in light of the Explanation on the CFREU made by the Presidium of the ECHR, the scope and meaning of what is enshrined in Article 17 of the Charter of Nice is identical to the one enclosed in Article 1, Protocol 1, ECHR[19]. The two articles set out three distinct rules: the first one relates to the peaceful enjoyment of the property[20]; the second one concerns the necessary conditions that must exist in order to deprive an

[15]As State aids for the people involved in the earthquake, the evacuees could either live in temporary house build for them (SAE), receive a monthly allowance if they had found on their own a house (CAS) or the free stay at a hotel on the seaside of the Marche region until their house had been rebuild.
[16]Perlingieri (2005).
[17]Betti (1971) at 167.
[18]La Pergola (1961) at 262.
[19]Council of Europe (1978) at 863.
[20]See Article 17, para. 1, sentence 1 of CFREU together with Article 1, para. 1, sentence 1, Protocol 1, ECtHR.

individual of his property[21] and the third one recognises the possibility for states to regulate the matter in accordance with the general interest[22]. Each of these three rules are interconnected each other in accordance with the general principle of the right of enjoyment of property[23]. In order to implement the concrete and correct balance of the protected values with respect to the public interests adopted as their respective counter-limits, in the jurisprudential context it has been adopted the doctrine of the margin of appreciation[24]. By applying this method, the Court of Strasbourg demands to the national authorities the discretion on the legislation necessary to meet the needs of the community but the court will assess their proportionality in relation to case they are dealing with[25].

In this regard, the current investigation will proceed into focusing on how the court cases of the European Court of Human Rights (hereinafter ECtHR) have impacted into providing a new definition of property pursuant Article 8 and Article 1, Protocol 1, ECHR.

Article 8 of the European Convention on Human Rights (ECHR) and its new boundaries

For instance, it is thanks to a personalistic interpretation of Article 8 of the ECHR, that today it is possible to affirm the existence not only of 'a right to remain in one's homeland' but also of 'a right to be able to produce in one's homeland'[26]. In fact, Article 8 of the ECHR, in putting on the same level the protection of the right to private and family life, the right of domicile and the right to correspondence, does not define them[27]. However, the copious jurisprudence of the Court of Strasbourg makes it possible to trace the boundaries of these rights, starting from the concept of domicile.

The Durini ECtHR Case

For this analysis it is useful to take into consideration the *Durini v. Italia case*[28]. The story concerned the right to succeed and to remain to live in the castle of the Durini family claimed by the heirs Paolina, Adriana and Diamanda due to the link established between them and this place. The story begins in 1918 when

[21] See Article 17 para. 1, sentence 2 of CFREU together with Article 1, para. 1, sentence 2, Protocol 1, ECtHR.
[22] See Article 17 para. 1, sentence 3 of CFREU together with Article 1, para. 2, sentence 3, Protocol 1, ECtHR.
[23] *Cacciato* v. *Italy*, para. 21; *Sporrong & Lönnroth v. Sweden*, para. 61; *James et al. v. United Kingdom*, para. 37; *Beyler v. Italy*, para. 98.
[24] Artaria (2012) at 282.
[25] *James et al. v. United Kingdom*, para. 36.
[26] Perlingieri (1972).
[27] It should be noted that both the English and French text of the Convention adopt the coordinating conjunction «and» and «et», putting the rights and values guaranteed there on the same level.
[28] *Durini v. Italy*.

Mr. Antonio Durini left his entire assets to a foundation, of which his cousin, Paolina Durini, was president. Antonio's will stated that only male descendants could become presidents of the foundation, which also implied the right to live in the family castle. Because of this testamentary disposition, the right to live in the castle passed to Gian Giacomo Durini, husband of Paola and father of Adriana and Diamanda. Since Gian Giacomo had no sons, after his death on January 7, 1980, Teobaldo Durini succeeded to the right to live in the castle. After the use of all the national judicial remedies, Paola (wife), Adriana and Diamanda (daughters) Durini appealed to the ECtHR complaining, among others, a violation of Article 8 of the Convention and Article 1, Protocol 1, ECHR. The Judges, in considering the appeal inadmissible for procedural reasons and because there was no ground for discrimination in the will of Mr. Antonio Durini, stated that 'even supposing it possible to derive from the Convention Provisions relied on by the applicants the existence of a positive Obligation on the part of the State to intervene in this area, the applicants' Complaints are manifestly ill-founded.'

Moreover, the right to live in the castle (which dates back to the foundation) did not fall within the concept of 'possession' of Article 1, Protocol 1, of the Convention, so that this provision was not applicable to the case. Second, the Court observed that Antonio Durini reserved this right for the older male descendant. Consequently, even assuming that forcing the applicants to leave the castle after the death of Paola's husband and Adriana's and Diamanda's father was an interference with their right to respect for their home under Article 8, paragraph 1, ECHR, such interference would have been justified pursuant Article 8, paragraph 2, ECHR as necessary for the protection of the rights and freedoms of others (of the foundation and of Teobaldo Durini). Therefore, the complaint concerning the infringement of Article 8 of the Convention was also manifestly ill-founded.

It is worth investigating how, in the years following the analysed case, the court has interpreted Article 8 of the ECHR.

The New Boundaries of Article 8 ECHR

In recent years, after the Durini case, the interpretation offered by the ECtHR to the right to 'domicile' pursuant to Article 8 has changed. In fact, today, all the personal and professional relationships of the individual are included in the sphere of protection of the article[29]. The wide scope of the article means that the domicile is not intended exclusively for traditional homes, but also caravans, other mobile homes[30] and also the places where a certain person carries out his professional or working activity[31]. In practice, the concept of domicile is expanded in order to include any place, regardless of the title, in which a certain person carries out

[29]*Winterstein et al. c. France*, para. 141; *Prokopovich v. Russia*, para. 36.
[30]On the relationship between professional activity and Article 8 see *Chappell v. United Kingdom*, para. 26; *Société Colas Est et al v. France*, para. 41; *Buck v. Germany*, para. 31; *Saint- Paul Luxembourg S.A. v. Luxembourg*; *Popovi v. Bulgaria*, para. 103.
[31]*Buckley v. United Kingdom*, para. 52; *Chapman v. United Kingdom*, para. 71; *Yordanova et al. v. Bulgaria*, para. 103.

activities that can be included in his private and family life[32]. The link between the domicile and the person complaining of the violation must be lasting and this person is obliged to prove the continuous relationship both material and affective with the good, not being sufficient the *ius hereditarium* to create this bond[33].

However, it is thanks to the concept of 'private life', linked to that of domicile, that Article 8 of ECHR provides full protection to those who complain a violation. 'Private (and family) life' within the meaning of Article 8 of the ECHR means a broad concept for which it does not seem possible to give an exhaustive or even unambiguous definition. The definition of 'private and family life' includes in its notion both the physical and the psychological integrity of a person[34], the right to establish and develop relations with other human beings[35] and other aspects concerning a person's physical and social identity[36] as well as his or her right to personal fulfilment or his or her right to self-determination[37]. Above all, as far as this paper is concerned, the concept of private life encompasses the emotional ties of a person[38] but also the professional ones[39].

In *Fernanda Martinez v. Spain*[40], the Court ruled that '*restrictions on an individual's professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. In addition, professional life is often intricately linked to private life, especially if factors relating to private life, in the strict sense of the term, are regarded as qualifying criteria for a given profession. Professional life is therefore part of the zone of interaction between a person and others which, even in a public context, may fall within the scope of 'private life'.*'

In consideration of what has emerged so far, it is possible to see how the concept of property has evolved thanks to the ECtHR cases history. Therefore today, a violation of the right to property as for Article 8 of the ECHR and Article 1, Protocol 1, ECHR includes not only an actual damage or violation of the right in the direct relationship between the individual and the property but also in the emotional, personal and professional relationship between the *res* and the individual.

[32]The limits to this extensive interpretation of Article 8 are stated in *Loizidou v. Turkey*, para. 66, for which Article 8 does not apply if it is an uninhabitated property or an empty or under construction building.
[33]*Demopoulos et al. v. Turkey*, para 137; *Khadija Ismayilova v. Azerbaijan*, para 107.
[34]*X e Y v. The Netherlands*, para. 22.
[35]*Niemietz v. Germany*, para. 29.
[36]*Mikulić v. Croatia*, para. 53.
[37]*Pretty v. United Kingdom*, para. 61.
[38]*Paradiso-Campanelli v. Italy*, para. 159.
[39]*Jankauskas v. Lithuania*, para 56; Bărbulescu v. Romania, para 71.
[40]*Fernández Martínez v. Spain*, para 109.

Article 8 of the ECHR and Natural Disasters

Returning to analyse the case *Durini v. Italy*, in which precisely had not been recognised the 'right to remain' to live in the castle because the interference of the right under Article 8, paragraph 2, ECHR had taken place, avoiding so that the right of others (that of Teobaldo Durini) was undermined, in the case of people affected by an earthquake or any emergency, the situation changes.

Article 8, paragraph 2, ECHR in fact allows the interference of a public authority in the exercise of property if it is in accordance with the law and it is need, in a democratic society, both in the interest of national and public security or for the economic welfare of the country, for the prevention of disorder or crime, for the protection of health or morals, or, finally, for the protection of the rights and freedoms of others.

Following a natural disaster, it is undisputed that the State authority intervenes in order to rebuild the affected territories, with the consequence of compressing the property rights of the victims of the events[41]. However, the tardiness in the process of reconstruction, does not allow the right, once compressed, to return to be fully enjoyed, in fact being able to be a useless intervention and limiting in the meantime the right to disposition and enjoyment of the property[42].

In addition, unlike the *Durini* case - in which the heirs Paola, Adriana and Diamanda did not have a title to continue living in the family castle - the people involved in a seismic emergency, have both a title in living in the property destroyed by the hazard (as they are the legitimate owners) as well as an affective and lasting bond with it[43]. Also, in light of the evolution of the court cases of the ECtHR, it emerges how, apart from the direct and affective link with the property, the right under Article 8 of the ECHR by virtue of the social function of private property is referred both in the right to remain in someone's place as well as in the right to exercise of an economic activity[44]. In fact, only trough allowing some to produce and work in his homeland, it is possible to guarantee his right to remain there[45].

The Italian Constitution and the right to remain in your homeland

The above-mentioned principle can also be found within the Italian Constitution. In order to demonstrate this, it is necessary to relate Articles 41, 42 and 44 of the Italian Constitution. Reading the three aforementioned articles, contained in the so called 'economic Constitution'[46] of the Italian Fundamental

[41]Montecchiari (2020) at 1140.
[42]Spuntarelli (2019) at 91.
[43]See the stories of *Nonna Peppina* and *Enzo Rendina*.
[44]*CJEU*: *Hrtmann Schräder HS Kraftfutter GmbH & Co. KG* v. *Hauptzollamt Gronau*, c-265/87, para. 15; *Georg von Deetzen* v. *Hauptzollant Oldenburg*, c-44/89, para. 28.
[45]European Charter for Rural Areas (2016) at 1.
[46]Müller-Graff (2019).

Charter, it emerges that the Constitution recognises, for each individual, the following rights:

First of all, Article 41 of the Constitution guarantees for an individual the right to exercise an own economic activity[47]. Article 42, paragraph 2, of the Constitution, recognises the exercise of an individual of his property rights, within the limits established by law[48]. These two are linked by a common thread which is the social function[49] of both private property - intended to promote the person in compliance with her specific peculiarities - and the economic/productive property - as a place in which an individual realises and satisfies his needs in society as well as his personal interests capable of an economic evaluation- in conjunction with Article 2 of the Constitution[50].

But it is by reading Article 44 of the Constitution that is possible to affirm the existence of 'a right to remain and produce someone's homeland'[51] within the Italian Fundamental Charter. The article now examined in fact states that it is the law to establish 'the reconstruction of production units' (paragraph 1) and that, always the law, 'provides for measures in favour of mountain areas' (paragraph 2). These two paragraphs, in a unified vision of the socio-economic development of the territory, have an enormous scope as regards to the places affected by a seismic emergency[52].

The first paragraph of the article now examined might be interpreted in the sense that the Constitution needs 'in order to achieve the rational exploitation of the land and to establish fair social relations [...] to impose obligations for the reconstruction of productive activities.' This means that it is the State's duty in light also of Article 3 of the Constitution 'to remove the economic and social obstacles which, by restricting citizens' freedom and equality, impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country'. Therefore, it is of utmost importance, in order to allow the full implementation of the principles of solidarity and equality within the Italian State, that the Government adopts appropriate legislation able to rebuild production units that have become unproductive, thus allowing every person to exercise the rights constitutionally guaranteed pursuant Article 41 of the Fundamental Charter[53].

Finally, of particular interest for the present article is the second paragraph of Article 44 of the Italian Fundamental Charter. This paragraph states that law 'provides for measures in favour of mountain areas.' This means that, in order to guarantee the economic and social rights protected by the Constitution and in order to remove the obstacles referred to in Article 3 of the Constitution, it is the State's duty to promote a regulatory system able to protect that part of the population

[47]Irti (1965).
[48]Rodotà (1981).
[49]Perlingieri (2011) at 23.
[50]Carapezza Figlia (2011) at 1071.
[51]Angeletti (2006).
[52]Gaspari (2015) at 129.
[53]Guadagnolo (2015) at 366.

living in the mountains[54]. Not only that, in order to avoid inequalities within the State, the Constitution, invites the legislator to 'forge' laws able to ensuring that those who live in mountain areas are put in the same position to those living in the city, thus being able not only to continue to live in their own places but also to be able to produce and create wealth in those territories[55].

Conclusions

As so far stated, it is possible to deduct that from a reading focused on the person and his values of the Article 8 of the ECHR, there is an inalienable right not only to remain in one's land but also to produce in it. It is therefore common ground that the European legal framework recognises not only a right to remain in one's homeland and thus to be able to pursue private and family life in a particular place of one's election. Therefore, it also exists, thanks to an interpretation focused on the person and social function of the property of Article 8, Article 1, Protocol 1, ECHR and Article 16 and 17 of the CFREU, a right to be able to produce and create wealth in one's homeland, thus avoiding the depopulation of areas affected by a natural disaster.

At the same time, analysing Article 41, 42 and 44 of the Italian Constitution, it is possible to state that also within the Italian Fundamental Charter it is recognised and guaranteed a right to remain and produce in someone's homeland. In fact, by interpreting Article 41 and 42 of the Constitution in light of the social function covered by both the private and economic property, it is peaceful to affirm the existence of a right to property that promotes the person in compliance with his specific peculiarities, his needs in the society and his personal interests capable of an economic evaluation. But it is thanks to the analysis of Article 44 of the Italian Fundamental Chart, in which is prescribed a duty for the State of providing the 'reconstruction of production units' and to 'provide for measures in favour of mountain areas' that the right to remain and produce in someone's homeland is stated. In fact, the abovementioned obligations, if read together with Article 3 of the Italian Constitution, oblige the State both to rebuild the industrial units that are unproductive but also to eliminate the inequalities between people living in metropolitan areas and people living in mountain areas. By adopting this systematic analysis is possible to state that also within the Italian Fundamental Chart exists a right to remain and produce in one's own homeland.

The principle thus stated has the purpose to protect - from the point of view of opening our international legal system to the new values and to the new fundamental rights of society- the new needs of the people, which require a positive consideration by our contemporary legal system.

[54]Esposito (1954).
[55]Marchetti (2019).

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