Athens Journal of Law

Quarterly Academic Periodical,
Volume 9, Issue 1, January 2023
URL: https://www.athensjournals.gr/ajl
Email: journals@atiner.gr
e-ISSN: 2407-9685 DOI: 10.30958/ajl

Front Pages

Athens Journal of Law

Published by the Athens Institute for Education and Research (ATINER)

****

***

ATINER is an Athens-based World Association of Academics and Researchers based in Athens. ATINER is an independent and non-profit Association with a Mission to become a forum where Academics and Researchers from all over the world can meet in Athens, exchange ideas on their research and discuss future developments in their disciplines, as well as engage with professionals from other fields. Athens was chosen because of its long history of academic gatherings, which go back thousands of years to Plato's Academy and Aristotle's Lyceum. Both these historic places are within walking distance from ATINER's downtown offices. Since antiquity, Athens was an open city. In the words of Pericles, Athens"…is open to the world, we never expel a foreigner from learning or seeing". ("Pericles' Funeral Oration", in Thucydides, The History of the Peloponnesian War). It is ATINER's mission to revive the glory of Ancient Athens by inviting the World Academic Community to the city, to learn from each other in an environment of freedom and respect for other people's opinions and beliefs. After all, the free expression of one's opinion formed the basis for the development of democracy, and Athens was its cradle. As it turned out, the Golden Age of Athens was in fact, the Golden Age of the Western Civilization. Education and (Re)searching for the 'truth' are the pillars of any free (democratic) society. This is the reason why Education and Research are the two core words in ATINER's name.

****

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.

The Athens Journal of Law
ISSN NUMBER: 2407-9685 - DOI: 10.30958/ajl
Volume 9, Issue 1, January 2023
Download the entire issue (PDF)

Athens Journal of Law
Editorial and Reviewers' Board

President's Message

All ATINER's publications including its e-journals are open access without any costs (submission, processing, publishing, open access paid by authors, open access paid by readers etc.) and is independent of presentations at any of the many small events (conferences, symposiums, forums, colloquiums, courses, roundtable discussions) organized by ATINER throughout the year and entail significant costs of participating. The intellectual property rights of the submitting papers remain with the author. Before you submit, please make sure your paper meets the basic academic standards, which includes proper English. Some articles will be selected from the numerous papers that have been presented at the various annual international academic conferences organized by the different divisions and units of the Athens Institute for Education and Research. The plethora of papers presented every year will enable the editorial board of each journal to select the best, and in so doing produce a top-quality academic journal. In addition to papers presented, ATINER will encourage the independent submission of papers to be evaluated for publication.

The current issue is the first of the ninth 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

20th Annual International Conference on Law
10-13 July 2023, Athens, Greece

The Law Unit of ATINER, will hold its **20th Annual International Conference on Law, 10-13 July 2023, 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/2023/FORM-LAW.doc).

Academic Members Responsible for the Conference

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

Important Dates

- Abstract Submission: **12 April 2023**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **12 June 2023**

Social and Educational Program

The Social Program Emphasizes the Educational Aspect of the Academic Meetings of Atiner.

- Greek Night Entertainment (This is the official dinner of the conference)
- Athens Sightseeing: Old and New-An Educational Urban Walk
- Social Dinner
- Mycenae Visit
- Exploration of the Aegean Islands
- Delphi Visit
- Ancient Corinth and Cape Sounion
    - More information can be found here: https://www.atiner.gr/social-program

Conference Fees

Conference fees vary from 400€ to 2000€
Details can be found at: https://www.atiner.gr/fees

Athens Institute for Education and Research

A World Association of Academics and Researchers

10th Annual International Conference on Business, Law & Economics
1-4 May 2022, Athens, Greece

The Business, Economics and Law Division (BLRD) of ATINER is organizing its **10th Annual International Conference on Business, Law & Economics, 1-4 May 2023, Athens, Greece,** sponsored by the Athens Journal of Business & Economics and the Athens Journal of Law. In the past, the six units of BLRD have organized more than 50 annual international conferences on accounting, finance, management, marketing, law and economics. This annual international conference offers an opportunity for cross disciplinary presentations on all aspects of business, law and economics. This annual international conference offers an opportunity for cross disciplinary presentations on all aspects of business, law and economics. Please submit an abstract (email only) to: atiner@atiner.gr, using the abstract submission form (https://www.atiner.gr/2023/FORM-BLE.doc)

Important Dates

- Abstract Submission: **31 January 2023**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **3 April 2023**

Academic Member Responsible for the Conference

- **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.

Social and Educational Program

The Social Program Emphasizes the Educational Aspect of the Academic Meetings of Atiner.

- Greek Night Entertainment (This is the official dinner of the conference)
- Athens Sightseeing: Old and New-An Educational Urban Walk
- Social Dinner
- Mycenae Visit
- Exploration of the Aegean Islands
- Delphi Visit
- Ancient Corinth and Cape Sounion

More information can be found here: https://www.atiner.gr/social-program

Conference Fees

Conference fees vary from 400€ to 2000€
Details can be found at: https://www.atiner.gr/fees

Athens Journal of Law - Volume 9, Issue 1, January 2023 – Pages 9-32

The Impact of COVID-19 on Brazilian Judiciary: Reflections on a Justice 4.0 and a 100% Digital Judgment in the Post-pandemic Context[1]

By Paulo Cezar Dias[±] & Heitor Moreira de Oliveira[*]

This paper aims to examine the impact that the advent of the COVID-19 pandemic had on the organisation and routine of the Judiciary in Brazil, especially with regard to the expansion of the use of technology in judicial activities. It is not forgotten that the start of the Brazilian Judiciary virtualisation dates to the beginning of the 1990s and, even since 2006, there is a law that deals with the electronic judicial process. However, the pandemic period generated intense investment by the judicial Public Administration in the digital fulfilment of electronic procedural acts, such as videoconference hearings, an alternative found as a way to guarantee the continuity of judicial provision during the period of suspension of face-to-face activities (physical). Like that, the article will approach some of the important innovations that the Brazilian Judiciary suffered during the pandemic, with emphasis on the Justice 4.0 and 100% Digital Judgment. The research was developed under theoretical and hypothetical-deductive methods, based on a broad systematic review of the literature, including books and scientific articles, in addition to consultation of normative acts and legislation. In the end, it is concluded that the pandemic left an unquestionable positive legacy for the Judiciary virtualisation in Brazil in a future post-pandemic context.

Keywords: *Brazilian judiciary; COVID-19 pandemic; Electronic justice; Justice 4.0; 100% Digital Judgment.*

Introduction

At the end of 2019, in the Wuhan city, Hubei Province, China, an epidemiological infection with SARS-CoV-2 was detected. On 30 January, 2020, the World Health Organisation (WHO) declared that the outbreak of the disease caused by the new coronavirus constituted a public health emergency of international importance. Faced with the accelerated spread of the disease, the WHO, on 11 March, 2020, declared that the disease COVID-19 was characterised as a pandemic[2].

[±]PhD, Full Professor, UNIVEM (Centro Universitario Euripedes de Marilia), Marília, Brazil.
Email: paulo.dias@univem.edu.br
[*]LLM., Judge, Court of Justice of the State of São Paulo, Brazil.
Email: heitor.ufg@gmail.com
[1]The authors thank Mrs. Erika Fernandes for her valuable help and advice in the translation of this paper.
[2]Joint WHO-China Study (2021).

In Brazil, Law No. 13,979 of 6 February, 2020, which established measures to face the public health emergency of international importance arising from the coronavirus, responsible for the 2019 outbreak. Subsequently, the National Congress approved Legislative Decree No. 6, of 20 March, 2020, which recognised, notably for exempting the government from achieving fiscal responsibility goals, the occurrence of the state of public calamity.

To prevent the spread of COVID-19, health authorities, worldwide and in Brazil, indicated the need to avoid crowding and social distancing. As a result, most activities, both in the private sector and in the public sector, had their face-to-face (physical) execution suspended, including the closing of many stores, departments and buildings.

In general, everyone was affected by the consequences of the pandemic. Simple activities, like shopping at the supermarket, going to a restaurant or watching a play, had to be reinvented. It was not different with the Brazilian Public Administration. After all, with the suspension of face-to-face services, the Government needed to invest in the use of new information and communication technologies (ICTs) to enable the provision of services remotely, from access to the worldwide web[3].

The Brazilian Judiciary also suffered the consequences triggered by the COVID-19 pandemic. In March 2020, the buildings of the Brazilian courts were closed and all physical activity was reduced to the minimum. Thence fore, judges, civil servants and collaborators began to work remotely, directly from their respective homes[4]. Initially, court hearings were suspended and gradually resumed, but, under the virtual modality, through the entry of participants to the digital platforms offered by the courts[5].

Certainly, technology was the great asset that made it possible for judicial activity, of an essential nature, to not be interrupted during the pandemic.

Between moments of increase and decrease in the number of infected, Brazil, a country that has already surpassed more than 600 thousand deaths due to the new coronavirus[6], lived with extremes that ranged from periods of explosion and peaks of cases, including the decree from local lockdowns, to contagion control times, with the flexibility that allowed the release of face masks[7]. Although, even between difficulties, in a context of such uncertainty, the Brazilian Judiciary did not fail to provide justice to its citizens.

In fact, led by the National Justice Council[8], the Brazilian Judiciary issued a series of normative acts that established the criteria for the use of technology as a measure that made it possible to preserve judicial services. Throughout this work, we will approach the solutions adopted, such as virtual appointments between judges and lawyers, public service through a digital platform, virtualisation of physical processes, telework of judges and servers, videoconference hearings,

[3]Reck & Hübner (2021).
[4]Fogaça & Machado (2021).
[5]Almeida & Pinto (2020).
[6]Brazil, Ministry of Health (2022).
[7]Acioli (2020).
[8]In Portuguese, Conselho Nacional de Justiça, hereinafter referred to by the original acronym CNJ.

which allowed access to participants directly from their respective homes or place of work, etc. In addition, two CNJ initiatives will be highlighted that illustrate how technologies have qualified the Judiciary Power's performance, making it more accessible and efficient: Justice 4.0 and 100% Digital Judgment.

The main objective of this article is to examine to what extent all the innovations arising from the COVID-19 pandemic tend to perpetuate with the Brazilian Judiciary, effectively inserting themselves into the judicial routine even in a post-pandemic scenario.

This research is justified by the fact that the pandemic has dramatically increased the use of technology by the Judiciary in Brazil. From a timid and lengthy insertion, during the pandemic, there was a real boom in the application of digital functionalities to essential support of judicial activity.

In this context, utilities, facilities, systems and tools were developed that made the judiciary faster, more effective, more economical and less bureaucratic, as can be seen from the positive results of Brazilian procedural statistics[9]. Therefore, it is relevant to examine which legacy of the pandemic should be maintained even after the state of calamity ends. It is opportune, then, to highlight a new and irreversible Brazilian Electronic Justice, whose solid foundations were laid during the pandemic.

The methodology adopted in this research is a broad systematic review of the literature, including books and scientific articles, Brazilian and foreign, besides to consulting normative acts and legislation. Theoretical and hypothetical-deductive methods were used.

The Changes in the Brazilian Judiciary during the Pandemic

On 17 March, 2020, the CNJ issued Recommendation No. 62, which advised Courts and magistrates to adopt preventive measures to avoid the spread of infection by the new coronavirus within the scope of the Brazilian criminal justice and socio-educational systems. Among the recommended measures, the one contained in article 7 of the normative act has to be observed: the reassignment of hearings in cases in which the defendant is released and its realisation by videoconference in cases in which the person is deprived of liberty.

Days later, on 19 March, 2020, the CNJ approved Resolution No. 313, which established the Extraordinary Duty regime within the Brazilian Judiciary, to standardise the functioning of judicial services, with the objective of, at the same time, preventing the COVID-19 contagion and guarantee access to justice during the abnormality period.

The aforementioned regime resulted in the suspension of the face-to-face work of magistrates, civil servants, interns and employees in the judicial units, who began to perform their duties remotely, from their respective homes, in a telework regime, as well as ensured the maintenance of services considered essential, giving priority to emergency procedures. In addition, the face-to-face

[9]National Justice Council (2021).

service, lawyers and interested parts was suspended and started to be carried out remotely. Procedural deadlines were also suspended.

On 31 March, 2020, the CNJ, by Ordinance No. 61, instituted the Emergency Videoconferencing Platform for holding hearings and trial sessions in the Judiciary, in the period of social isolation caused by the COVID-19 pandemic.

Afterwards, on 20 April, 2020, the CNJ approved Resolution No. 314, which extended the regime established by Resolution No. 313, but determined the resumption of deadlines for processes that are processed in electronic media, maintaining the suspension only of physical processes. In fact, § 4 of article 6 authorised the full digitalisation of physical processes, so that they can be processed in electronic form.

The resumption of in-person jurisdictional services within the scope of the Judiciary in Brazil was only authorised on 1 June, 2020, pursuant to CNJ Resolution No. 322, which recommended compliance with biosecurity rules and measures to prevent the spread of COVID-19. Article 3, I, admitted the full resumption of procedural deadlines in electronic and physical processes. The resolution allowed for the exceptional holding of face-to-face hearings, in the courtrooms, but stated that the hearings and acts will be held, whenever possible, preferably by videoconference, also authorising the act to be carried out in a hybrid way, with the presence of some people in the courtroom and the virtual participation of others who are able to.

Clearly, the COVID-19 pandemic has given rise to a scenario of many challenges and notorious transformations for the Judiciary in Brazil[10], in which the adoption of new routines and procedures in a remote (online) regime has gained prominence[11].

Thus, the changes undergone by the Brazilian Judiciary during the pandemic are so relevant that there will hardly be a return to the *status quo ante*. The main innovations bequeathed by the pandemic period will be discussed in more detail below, fulfilling, since now, to point out that many of them are not unprecedented creations. However, the pandemic undoubtedly acted as a factor for accelerating and consolidating many tools that, although already existing, were not yet fully inserted into the Brazilian judicial routine[12].

Hearings by Videconference

The first virtual hearing held in Brazil took place on 26 April, 1996, in São Paulo[13]. However, it was not a routine, so that, as a rule, the hearings took place in person, in the courtrooms. In fact, there were many criticisms against videoconferencing, which came to be characterised as a status-degradation ceremony[14]. For example, there are people who understand that in the distance hearing the judge cannot access important non-verbal elements, such as the voice

[10]Dutra & Melo (2021).
[11]Siqueira, Lara & Lima (2020).
[12]Guimarães & Parchen (2020).
[13]Nunes (1996).
[14]Dotti (1997).

intonation, the body posture and the emotion in the eyes[15], which can impair the judgment.

Finally, Law No. 11,690 of 9 June, 2008, and then Law No. 11,900 of 8 January, 2009, expressly authorised the holding of videoconference interviews in Brazilian criminal proceedings, but only authorised in exceptional situations[16]. The rule continued to be face-to-face hearings, which is why the number of virtual hearings actually held until 2020 is not significant.

Likewise, in civil proceedings, videoconference hearings were also not a daily reality before the beginning of the pandemic. Not even the validity of the new Civil Procedure Code[17], in 2015, which contains a set of devices that authorise the videoconferencing use[18], was enough for the virtual hearings' generalisation in Brazil. Thus, in practical terms, both in criminal proceedings and in civil proceedings, the expressive majority of hearings held in Brazil followed the traditional model, that is, with the physical presence of the parts in the courtroom, on the court's premises.

With the advent of the COVID-19 pandemic, because of the need to observe the recommendations of the health authorities for social distance and due to the suspension of face-to-face activities in order to avoid the agglomeration, there was no other alternative for the Brazilian Judiciary than to bet on virtual hearings as a viable alternative to ensure the continuity of judicial activity[19].

After a few months and the pandemic dragged on, remote hearings became increasingly common. It is important to say, the number of videoconference hearings showed a notable growth, since now they were no held as an exception, but as a rule or "semi rule" or, at least, a "temporary rule"[20].

With the contagion partial control and the decrease in the number of infected, at the time of the restriction measures flexibility, the Brazilian forensic reality started to include three types of hearings, depending on the way in which the participation of the parts in the procedural act is made possible (Judge, Public Ministry, defendant, lawyer, Public Defender, parts, victim, witnesses, expert s and auxiliary justice departments): in *virtual hearings*, all of them, in full, enter the videoconference act, directly from their respective places (residence or work); in the *face-to-face hearing*, all participants physically meet at the courthouse; and in the *hybrid hearing*, part of the procedural participants is physically present in the courtroom and other ones participates in the act by videoconference[21].

CNJ Resolution No. 329, of 30 July, 2020, established criteria for holding virtual hearings in criminal proceedings during the state of public calamity resulting from the COVID-19 pandemic. The act provides that the videoconference hearings must observe the maximum equivalence with those carried out face to face[22].

[15]Oliveira (1996).
[16]Mascarenhas, Alves & Mascarenhas (2013).
[17]Law No. 13,105 of 16 March, 2015.
[18]Article 236, § 3 (procedural acts in general); article 385, § 3 (personal testimony); article 453, § 1 (inquiry of the witness); article 461, § 2 (confrontation); article 937, § 4 (oral support of the lawyer).
[19]Guimarães & Parchen (2020).
[20]Martins (2020).
[21]Malan & Saad (2022) at 364-365.
[22]Resolution No. 329 of 30 July, 2020, article 4, § 1.

In turn, CNJ Resolution No. 330 of 26 August, 2020, established criteria for holding virtual hearings in processes aimed at investigating infractions committed by adolescents and the subsequent application of socio-educational measures to young offenders, during the state of public calamity.

Due to the polemic surrounding the generalisation of hearings by videoconference[23], there was special controversy regarding the holding of certain specific types of hearing in digital media. The most emblematic example is the custody hearing. It is the act that gives the newly arrested person the opportunity to denounce possible episodes of mistreatment, torture and/or degrading treatment. Thus, there are many criticisms regarding the spontaneity of the act carried out directly from the penitentiary unit (which may have served as a stage for possible atrocities committed against the prisoner)[24].

Therefore, CNJ Resolution No. 329 of 2020 initially prohibited the holding of a custody hearing by videoconference.

However, with the enactment of CNJ Resolution No. 357 of 26 November, 2020, the act became accepted, provided that there is the concomitant use of more than one camera in the environment or 360-degree cameras, in order to allow viewing space during the act, in addition to the use of an external camera to monitor the prisoner's entry into the room and its door[25].

CNJ Resolution No. 354 of 19 November, 2020, provided for the digital compliance with procedural act and court order. In addition, it regulated the holding of hearings and trial sessions by videoconference and telepresence. The act clarifies that the authorisation for virtual participation depends on technical feasibility and is subject to the judge's convenience[26].

CNJ Resolution No. 358 of 2 December, 2020, created technological solutions for the handling of conflicts by the Judiciary through conciliation and mediation, authorising sessions to be held through the videoconferencing system. Therefore, the parts will be able to opt for any digital means available and suitable for everyone involved.

CNJ Resolution No. 465 of 22 June, 2022, established guidelines for holding videoconferences within the Brazilian Judiciary, with the purpose of improving judicial provision in a digital way.

After more than two years of the pandemic, the number of remote hearings held in Brazil is quite significant. For example, in São Paulo state, the most populous unit of the Federation, the headlines of edition No. 3318, of 14 July, 2021, reported that the Court of Justice had held 466 thousand hearings during the pandemic, between March 2020 and June2021, with 238.9 thousand in the first half of 2021[27].

In view of the notable gains in productivity and efficiency, as well as the advantages of practicality and convenience for participants, it is credible to

[23]Forster, Schäfer, Previdelli & Buralde (2020).
[24]Ocampos (2022).
[25]Resolution No. 329 of 30 July, 2020, article 19, with the wording given by the Resolution No. 357 of 26 November, 2020.
[26]Resolution No. 354 of 19 November, 2020, article 4, § 2.
[27]São Paulo (2021).

consider that even after the pandemic is over, videoconferencing audiences will continue to be adopted on a large scale[28].

Teleworking for Magistrates and Officials

Law No. 13,467 of 13 July, 2017, amended the Labour Laws in Brazil Consolidation, an old diploma dating from 1943, to include regulations on teleworking or remote work, defined by article 75-B as one in which services are provided outside the employer's premises, predominantly or not, with the use of information and communication technologies (ICTs).

Within the scope of the Brazilian Judiciary, CNJ Resolution No. 227 of 15 June, 2016, authorises that the servers' activities of the Judiciary departments, may be carried out remotely, under the name of teleworking, optional adherence. It adds that teleworking aims, among others, to increase the productivity and quality of employee's work, to save time and reduce the cost of commuting employees to the workplace and to promote a results-oriented culture, with focus on increasing the efficiency of services provided to society.

However, it was after the outbreak of the COVID-19 pandemic that telework reached an undeniable projection[29]. This is because with the closing of court buildings and the suspension of face-to-face work, practically all Brazilian judges and clerks began to work remotely, directly from their respective homes.

The unprecedented generalisation of teleworking has brought up a series of new issues, such as the right to disconnect from work and organise the routine, separating personal life and professional tasks[30], as well as attention to workers' mental health, in a context of abnormality, in which there was a weakening of face-to-face social interaction[31].

Without prejudice, the positive results from telework implemented as an emergency during the pandemic, signal the remote work appreciation even in a post-pandemic.

In this sense, for example, considering the experience obtained and the results achieved with carrying out remote work during social isolation due to the Covid-19 pandemic and in view of the significant expenses reduction, observed with the provisional implementation of teleworking during the pandemic, in São Paulo state, Resolution No. 850, of 14 April, 2021, was edited, which regulated teleworking within the scope of the state Judiciary power.

In the same sense, given the new reality experienced from the new coronavirus pandemic, which demonstrated that judicial activity can be provided remotely with the same efficiency, quality and effectiveness, the CNJ held a public hearing on 13 October, 2021 to discuss the topic and obtain subsidies to prepare a draft resolution on the remote work regime for judges, aiming at increasing productivity, improving the organisational climate and expanding access to justice.

[28]Forster, Schäfer, Previdelli & Buralde (2020) at 236.
[29]Fogaça & Machado (2021).
[30]Nascimento & Creado (2020).
[31]Santos & Padilha (2021).

The permission for the judge to exercise jurisdiction away from the judicial courts is in line with the answer that Richard Susskind gives to his question: "Is court a service or a place? When people and organisations are in dispute and call upon the state to settle their differences, must they congregate in physical courtrooms?"[32]. Definitely, the court is a service and not a place. After all, regardless of where he is, now, especially from all the innovations and transformations that came with the COVID-19 pandemic, the judge will be able to provide the essential judicial service. In other words, Justice can be accessed and enforced from anywhere.

The Electronic Judicial Process

Since 2006, Brazil has a national law that allows the use of electronic means in legal proceedings, acts communication and procedural documents transmission. This is Law No. 11,419 of 19 December, 2006, which provides for the judicial process virtualisation. Article 8 of the law authorises the Judiciary departments to develop electronic systems for processing lawsuits through digital records, preferably using the worldwide web[33].

The electronic process adoption, replacing the old process in physical records, has brought countless benefits to the Brazilian Judiciary, mainly in terms of efficiency and economy.

Thus, the electronic process extinguished a series of activities that became unnecessary (e.g. joining of petitions), speeded up the appraisal of requests, allowed the services optimisation, enabled the appraisal of repetitive demands in series, reduced the financial cost of the processes, freed judges and clerks to dedicate themselves to core activities, reduced the time spent on their activities and allowed the incorporation of new functionalities that lead to the judicial activity improvement[34].

In short, the electronic process implementation meant a true revolution in the way the Judiciary works in Brazil and imposed a review of traditional routines and practices[35].

It happens that, in a country like Brazil, with continental dimensions and 27 federative units, 91 courts and hundreds of Judicial Districts and Sections, the process of Justice automation developed in a decentralised way, since the courts began the simultaneous creation of judicial computerisation different systems, it developed in a local, individual and isolated way, without any standardisation and uniformity criteria[36].

As an example, the Courts of Justice of São Paulo, Santa Catarina and Mato Grosso do Sul states adopted the SAJ automation system. In turn, the Courts of Justice of Paraná, Bahia and Goiás states use the PROJUDI system. The Tocantins

[32]Susskind (2019) at 95.
[33]Law No. 11,419 of 19 December, 2006, article 8.
[34]Dantas Neto (2015).
[35]Gabriel, Abreu & Porto (2021) at 16.
[36]Gabriel, Abreu & Porto (2021) at 19.

state, the Federal Regional Courts of the 2nd and 4th region and the Superior Military Court use the e-Proc system.

Plus, it should be mentioned that the Courts of Justice of Minas Gerais, Mato Grosso, Maranhão, Pernambuco, Paraíba, Rio Grande do Sul, Rio Grande do Norte and Roraima states implemented the PJe system. Still, there are other systems adopted in Brazil. As can be seen, there is a big difference between the various Brazilian courts, each using a system, without interconnection and connectivity with each other.

Consequently, several obstacles and practical barriers were perceived. Imagine, for example, the hypothesis of the lawyer who performs his activities in Tocantins, Goiás and São Paulo states and needs to migrate between different systems (e-Proc, PROJUDI and SAJ), with different functionalities, tools, in short, with different languages and procedures.

Considering the heterogeneous reality that has been consolidated in Brazil, around the innovations implemented at the time of the pandemic, the CNJ spearheaded the creation of the Judiciary Digital Platform (PDPJ-Br).

The measure aims to improve the judicial service, ease of access, greater information availability and risks and costs reduction, through the adoption of a single, standardised and free solution for procedural processing throughout the Brazilian Judiciary, which avoids redundant, overlapping, duplicated and conflicting actions and provides the interoperability of informational objects, records and online resources[37].

In fact, driven by these objectives, the CNJ published Resolution No. 335 of 29 September 2020, which aims to modernise the Electronic Judicial Process platform and transform it into a multiservice system, with the possibility of being adapted according to the specific needs and demands of each court, provide the unification of the procedural process in Brazil.

The Judiciary's Digital Platform promotes collaborative development between Brazilian courts, encouraging each court to create its features, which will be available to other courts, in a kind of marketplace based on a community concept of mutual benefit[38].

In addition, the Digital Platform, as it is hosted in the cloud, does not present availability and accessibility problems.

CNJ Resolution No. 455 of 27 April, 2022, established the Judiciary Portal of Services (PSPJ), as a solution to be developed on the Judiciary Digital Platform (PDPJ-Br), destined to external users to allow, among other functionalities, the unified consultation of all electronic processes in progress in the procedural systems connected to the PDPJ-Br.

[37]Santos & Torres (2020).
[38]Gabriel, Abreu & Porto (2021).

The Use of Artificial Intelligence (AI)

The term "Artificial Intelligence" appeared for the first time in 1955, in the title of a proposed project by John McCarthy, with the Dartmouth College, at the University of New Hampshire, in the United States of America, in allusion to science and to the engineering of making intelligent machines[39].

Nowadays, the artificial intelligence concept has the purpose of, through software, accomplishing something that the human being could do, however, in a faster way. Thus, through it algorithms, heuristics and methodologies are developed that are based on the way the human brain solves problems, to enable the computer, in an approximation movement of human intelligence, to acquire and preserve knowledge that enable it to respond to new situations[40].

In recent years, with the increasing adoption of the Brazilian Courts of Justice to the electronic judicial process model, associated with the increasing virtualisation of legal practice, several initiatives have emerged aimed at technological innovation in the Brazilian Judiciary, largely involving some type of Intelligence model. Artificial Intelligence (AI), with the aim of providing greater efficiency and effectiveness to the processing and judgment of lawsuits[41].

In fact, there are currently numerous examples of the use of AI in the Judiciary departments' routine in Brazil. In this sense, a survey carried out by Fundação Getúlio Vargas identified important artificial intelligence systems used by the Brazilian Justice, with emphasis on[42]: VICTOR, an auxiliary tool used by the Federal Supreme Court in the rapid and automated filtering of repetitive judicial precedents[43]; ATHOS, used by the Superior Court of Justice to index jurisprudence; SÓCRATES, also adopted by the Superior Court of Justice for the monitoring and grouping of cases and for the identification of judicial precedents; BEM-TE-VI, used by the Superior Labour Court to facilitate the management of cases that enter the offices of the Court's Ministers; SINARA, used by the Federal Court of the 3th Region to support the identification of legal texts, such as laws, articles and paragraphs, and also to enable the search for subjects to facilitate the work in the offices; e JULIA (Laboured Jurisprudence with Artificial Intelligence), created by the Federal Court of the 5th Region, to assist in jurisprudential research.

However, despite the numerous advantages that the adoption of AI tools can provide, it cannot be ignored that its use arouses controversies.

In fact, there are many controversies surrounding the topic, such as the risk of dehumanising judicial decisions, the activities that can serve the use of AI, the control of predictive (and potentially discriminatory) in decisions and the protection of data privacy, in addition to ethical elements involved in the decision-making process that may be unattainable for machines[44].

[39]Carvalho (2022) at 21.
[40]Schorr & Nedel (2020) at 4.
[41]Nascimento, Coelho, Miranda & Mello (2022).
[42]Salomão (2021).
[43]Magalhães & Vieira (2020).
[44]Hijmans & Raab (2021).

In this regard, it is important to bear in mind that:

> *'The use of artificial intelligence should provide for the expansion of autonomy, and not its restriction. In the event of a prescriptive approach, the user needs to be informed, in a clear and understandable way, explaining the link and the options available, including the possibility of legal advice. A court decision that has used artificial intelligence must inform the data that was used for training the model, the algorithm technique, if there is a bias in the training data and the interpretability of the model.'*[45]

In this line of reasoning, considering the increase in the availability of AI and the expansion of its use during the pandemic, the CNJ published Resolution No. 332 of 21 August, 2020, which talks about ethics, transparency and governance in production and the use of AI within the Judiciary. According to the normative act, AI is applied to the Judiciary with the objective of promoting the well-being of the jurisdictions and the equitable provision of the jurisdiction[46]. In addition, it is foreseen that court decisions supported by AI tools must preserve the values of equality, non-discrimination, plurality and solidarity, so that they can effectively assist in achieving fair trials[47].

Soon after, on 4 December, 2020, Ordinance No. 271, which regulates research, project development, use, inter-institutional coordination in the field of artificial intelligence within the Judiciary, was edited. It says that the use of AI by the Judiciary will take place on a common platform, accessible by everyone[48].

Artificial intelligence had its use potentiated during the course of the pandemic[49]. Although, we must consider that the correct insertion of AI as a factor of collaboration in the decision-making process requires human values, such as sensitivity.

The "100% Digital Judgment"

The use of technology in favour of the Judiciary in Brazil did not come from the pandemic. It is a much older reality. As seen, virtual hearings, for example, have been held since the mid-90s. Furthermore, since 2006 Brazil has a law that regulates the electronic judicial process. On the other hand, it is undeniable that the COVID-19 pandemic acted as a factor in accelerating the Brazilian Judiciary virtualisation process[50].

All the innovations and digital transformations that were boosted during the pandemic and the new features and tools that emerged in the pandemic, from March 2020, paved fertile ground for the CNJ to lay the foundations for a bold and unprecedented project in the Brazilian Judiciary: the "100% Digital Judgment".

[45]Salomão. (2021) at 20.
[46]Resolution No. 332 of 21 August, 2020, article 2.
[47]Resolution No. 332 of 21 August, 2020, article 7.
[48]Ordinance No. 271 of 4 December, 2020, article 4.
[49]Barros & Cota (2021).
[50]Siqueira, Lara & Lima (2020).

CNJ Resolution No. 345 of 9 October, 2020, approved during the pandemic, authorised the adoption, by Brazilian courts, of the necessary measures to implement the "100% Digital Judgment" in the Judiciary.

Within the scope of the "100% Digital Judgment", all procedural acts will be performed exclusively electronically and remotely through the Worldwide Web[51].

In other words, the "100% Digital Judgment" allows all procedural acts, such as notifications, hearings and trial sessions, to be carried out exclusively by electronic means. In this way, it will not be necessary for the parts and other procedural subjects to be physically in a court building, saving time and money.

Membership is optional. Therefore, it is up to the parts and the lawyers, by mutual agreement, to choose, optionally, the "100% Digital Judgment". The option for the tool can be made at any moment of the process, as long as it is before the sentence is pronounced.

Within the "100% Digital Judgment" scope, the Judiciary will have disposal all the entire IT and telecommunication infrastructure so that the public service can be done remotely, through chat, telephone, email or video call.

By the way, under the sole paragraph of article 4 terms of CNJ Resolution No. 345 of 9 October, 2020, the "Virtual Counter" may serve users. It is a videoconferencing platform that allows immediate contact between the external user and the service sector of each judicial unit, popularly known as 'counter', during public service hours, whose creation was regulated by CNJ Resolution No. 372 of 12 February, 2021.

The "100% Digital Judgment" can be applied to processes in any Judiciary area, whether labour, civil, family or childhood and youth. Despite this, there are some people who understand that the "100% Digital Judgment" should be avoided in all criminal cases involving children and adolescents who are victims or violence witnesses[52].

The "100% Digital Judgment" may also be used for the proper and consensual treatment of disputes, through virtual conciliation or mediation hearings that provide for the preservation or restoration of bonds between the parts in conflict[53]. In fact, Law No. 13,994 of 24 April, 2020, made it possible to hold a virtual conciliation hearing within the scope of Small Claims Courts, by the use of available technological resources for the transmission of sounds and images in real time.

In short, by the "100% Digital Judgment" not only the processes will be virtual, but all procedural acts, including public service, hearings and trial sessions and communication acts, all will be carried out by electronic and remote means.

From this perspective, it can only be concluded that the "100% Digital Judgment", considering the effective transformation in the Brazilian judicial routine, represents a disruptive innovation for the Brazilian Judiciary. After all, the new system caused a rupture with the standards, models and technologies already

[51]Resolution No. 345, of 9 October, 2020, article 1, § 1.
[52]Ribeiro & Veronese (2022) at 33.
[53]Wolff & Silveira (2022).

established in the traditional forensic procedure of action and dynamically changed the way of the judicial environment working and communicating[54].

In this sense, CNJ Resolution 345 of 9 October, 2020, signals a true revolution in the Brazilian judicial process way of working, because it contributes to changing a traditional culture, which is still rooted in the Brazilian justice system, which considers the court physical space as an essential jurisdictional activities locus.

The "100% Digital Judgment" a traditional way of judgment, with physical headquarters and staff with a work schedule, but which includes videoconference hearings in its routine. Not. It is a Court whose performance is possible by means of technological devices that allow the judicial provision to occur at a distance.

In this way, we can say that the innovative project led by the CNJ symbolises that Justice is much more a service than merely a place and, in this sense, it is the first step that Brazilian Justice takes towards online courts. Like Richard Susskind words, about online courts:

> 'It involves and requires radical change. It represents a much greater leap than the swing from physical to virtual hearings. Although virtual hearings give rise to great consternation, they belong in the same broad paradigm as traditional courtrooms. Online courts are a different idea altogether. Even in the first generation, where human judges are deciding the cases, online judging takes away much that many people hold dear – the public hearing, the day in court, the direct interaction with other human beings. On the other hand, it is likely to make court service much more accessible and affordable, and will chime with those who cannot recall a pre-internet world.'[55]

The "100% Digital Judgment" follows what Susskind says: under its procedure, there are no more physical hearings in the courtrooms, there is no more day-to-day in the courtroom and there is no direct face-to-face interaction between the parts and others procedural participants. Unlike, everyone intervenes remotely, by internet access.

Just like online courts, the "100% Digital Judgment" does not entail the mere change from physical courtrooms to virtual ones, but rather encompasses a complete meaning transformation and proposal of judicial system action, with the consequent change in Judiciary culture. Through it, the courts can become more accessible, more understandable, simpler, cheaper and more effective, providing better quality services.

In fact, the "100% Digital Judgment" is just beginning, the first step towards a progressive, scalable of Brazilian Justice Virtualisation progress. In other words, the project lays the foundations that could lead, in the near future, to the improvement of an advanced system of online courts, in which the user himself, without the need to assistance from a lawyer, can make even low-complexity requests electronically[56]. Soon virtual courts may be an irrefutable reality in Brazil.

[54]Magalhães & Vieira (2020).
[55]Susskind (2019) at 60-61.
[56]Schiller (2021).

Finally, the "100% digital judgment" represents a new management and work model, which uses all the potential that technology can provide to the Judiciary, with a significant cost and time reduction, both for the State and for the parts themselves, and that leads to a significant increase in efficiency, culminating in the promotion of an effective access to justice[57].

By the way, among the advantages, it is possible to highlight the increase in speed by the use of technology, as delays arising from the need to practice physical acts or that require the presence of the parts in the court buildings are avoided.

Consequently, there is also a significant reduction in ordinary expenses with fuel, transportation, food, etc. In addition, there will be no sudden interruption of the litigants' parts routine, who will not need to be absent from work for the whole day, because the trip to the court will be waived.

The "100% Digital Judgment", in the specific Judiciary scope, is aligned with the entire Brazilian Public Administration virtualisation broader movement, including in the Executive and Legislative Powers domain, as well as of municipalities and public companies.

In fact, the pandemic also encouraged a considerable increase in public sector investment in the use of new information and communication technologies (ICTs)[58].

It is not by chance that it was during the pandemic that this Law, of 29 March, 2021 was published, providing principles, rules and instruments for Digital Government in Brazil, in order to increase the Public Administration efficiency, especially through the bureaucracy reduction, modernisation, innovation, digital transformation, social and citizen participation by electronic means, including mobile devices, as well as the relationship strengthening and simplification between public authorities and society.

Digital Government allows the user to access public services by digital means, without the need for in person request, and uses technology as a means to optimise the services by the Public Administration provision (e-Public Services), focusing on universal access and technological development and innovation promotion in the public sector.

In this way, the Digital Government corresponds to the ICTs use so that technological innovation promotes provision of public services improvement to all citizens, without any discrimination[59].

According to the law, the Digital Government will use digital solutions to provide greater speed and efficiency to the electronic administrative processes[60]. In addition, Law No. 14,129 of 29 March, 2021 adds that the digital provision of public services access will be carried out, preferably, by self-service[61].

[57]Gabriel, Abreu & Porto (2021).
[58]Nóbrega & Heinen (2021).
[59]Cristóvam, Saikali & Sousa (2020).
[60]Law No. 14,129 of 29 March, 2021, article 5.
[61]Law No. 14,129 of 29 March, 2021, article 14.

Thus, it is possible to conclude that the "100% Digital Judgment" and the Digital Government are coming together and results of the same movement, the public power virtualisation in Brazil.

In addition, both contribute to a disruptive transformation through the Brazilian culture radical abandonment, which still insists that the existence of people working in a certain physical space is essential for the services provision.

As stated above, the "100% Digital Judgment" has countless advantages, among which we can highlight: it provides greater speed through technology, avoiding delays and procrastinations in the process progress; it rationalises the budgetary resources use by the Judiciary organs, contributing to the expenses reduction; the improvement in processes and demands management; it generates an increase in the judicial provision efficiency; it expands the access to justice guarantee.

Notwithstanding these benefits, it cannot be ignored that there is a consistent obstacle to the "100% Digital Judgment" universalisation: the significant digital divide that still exists in Brazil.

After all, through the "100% Digital Judgment" special rite, (reminding that is an optional choice), the parts will appear in court entirely remotely, that is, electronically, by the digital platforms access, available by the Justice. Now, for this to be possible, it is a factual assumption that the parts have (in some way) internet accessibility.

It turns out that internet access is not a reality for all Brazilian people.

> 'Even though the mediation of the functioning of state figures comes to rely on technological tools, the reality of many individuals has a degree of socioeconomic asymmetry so marked that it prevents them from following the State of the art of 21st-century technologies. Internet and smartphone are entirely unaware of the reality of a considerable portion of the population.'[62]

In this sense, the Continuous National Household Sample Survey - Continuous PNAD 2018, carried out by the Brazilian Institute of Geography and Statistics, showed that about a quarter (25%) of the Brazilian population over 10 years old (approximately 47 million people) did not use the internet in the fourth quarter of 2018. The reasons stated by the sample interviewed to justify the lack of internet use were: they did not know how to use the internet (41.6%); lack of interest in accessing the internet (34.6%); internet access service was expensive (11.8%); the electronic equipment needed to make the service viable was expensive (5.7%); unavailability internet access in the places they used to go (4.5%). Furthermore, the study showed that the accessing the internet difficulty varies according to age and schooling indicators, as 57.5% of people over 60 years old said they did not know how to use the internet and 67.9% of uneducated people said they did not access the internet[63].

According to CNJ Recommendation No. 101, of 12 July, 2021, parts who do not have internet and other digital media access or do not have the ability or

[62]Reyna, Gabardo & Santos (2020) at 32.
[63]Brazilian Institute of Geography and Statistics (2020).

knowledge to use them are digital excluded[64]. The act recommends that Brazilian courts adopt specific measures to guarantee access to justice for them.

Faced with the millions of Brazilians reality who are deprived of the internet access and ICTs, now, the mandatory imposition of a Justice that takes place exclusively in electronic media could mean, in practical terms, the prohibition or obstruction of justice access for a large number of vulnerable people.

Precisely for this reason, the "100% Digital Judgment", as previously stated, it is an option, which must be exercised by the plaintiff at the time of the action distribution, and the defendant may oppose this choice until the moment of submitting your objection[65].

By the way, adapting to the Brazilian reality in which digital inclusion still does not reach all people, which makes it difficult, for example, to interview certain witnesses by videoconference, when they do not have a smartphone or computer, CNJ Resolution No. 378 of 9 March, 2021, amended the previous CNJ Resolution No. 345 of 9 October, 2020. It began to provide that the "100% Digital Judgment" may also use services provided in person by other court departments, such as those of adequate resolution conflicts, compliance with warrants, calculation centres, and others, provided that the procedural acts can be converted into electronic[66].

The new wording of CNJ Resolution No. 345 of 9 October, 2020 also authorises that, if the evidence production or other procedural acts in a virtual way remains unfeasible, its performance in person will not prevent the process progress within "100% Digital Judgment" scope[67].

In order to enable the fulfilment of certain procedural acts in person, for example by a hybrid hearing, the courts may adopt measures to maximise access to justice for the digitally excluded, such as providing rooms for the testimonies collection in hearings by videoconference, as authorised by CNJ Resolution No 341 of 7 October, 2020.

Alternatively, the Digital Inclusion Points implementation that allow, in an adequate way, the performance of procedural acts, mainly parts, witnesses and other justice collaborators depositions, by videoconference, as well as providing assistance by the Virtual Counter, as provided for in Recommendation No. 130 of 22 June, 2022.

It should also be noted that Law No. 14,129 of 2021 establishes that the Digital Government does not prevent the public service provision of a face-to-face nature when indispensable[68] and ensures the citizen's right to this service[69].

In fact, the "100% Digital Judgment" is still a project just beginning its execution in Brazil, and it is to be expected that its regulation will need some adjustments.

[64]Recommendation No. 101 of 12 July, 2021, article 1, item I.
[65]Resolution No. 345 of 9 October, 2020, article 3.
[66]Resolution No. 345 of 9 October, 2020, article 1, § 3.
[67]Resolution No. 345 of 9 October, 2020, article 1, § 2.
[68]Law No. 14,129 of 29 March, 2021, article 3, item II.
[69]Law No. 14,129 of 29 March, 2021, article 3, item XVI and article 14.

However, without prejudice to the norm improvement, it is an irrefutable reality that is in place and that tends to consolidate over the years.

In the São Paulo State, for example, Joint Provision No. 32 of 2020 provides for the "100% Digital Judgment" procedure implementation, initially as a pilot program in the Family and Succession, Civil and Special Courts of the Regional Court. XV - Butantã, of the Court of Justice of São Paulo State. Given the success of the project, Joint Provision No. 17 of 2021 expanded the procedure to the Counties of Atibaia and Porto Feliz.

Brazilian Justice 4.0

Klaus Schwab used the expression "fourth industrial revolution" to refer to the movement of expanding the technologies use linked to the internet for the industrial production improvement and transformation that had its epicentre from the 2010s.

Also called Industry 4.0, it is about of a paradigm shift that leads to a new way of producing, consuming and relating to goods, products and services, which is in the process of emergence due to the convergence of digital, physical and biological technologies, resulting in significant changes in interpersonal dynamics.

Thus, it is a "technological revolution that will fundamentally alter the way we live, work, and report to one another. In its scale, scope, and complexity, the transformation will be unlike anything humankind has experienced before"[70].

Inevitably, the fourth industrial revolution effects spilled over into every field of civil society, altering the way we shop, study, or even meet and engage with new people. In the same way, Industry 4.0 also influenced the judicial environment, stimulating a new way of thinking about Justice, which culminated in the emergence of the expression Justice 4.0.

In general, Justice 4.0 is the one developed in the fourth industrial revolution context, with the Judiciary theory and practice modification, where secular notions of what was understood by conflict resolution forms were traditionally applied, with the emergency of a jurisdiction new notion, increasingly virtual and within everyone's reach, with uninterrupted availability, provided at an unimaginable speed, from the integration between the forensic routine and the new information and communication technologies (ICTs)[71].

In Brazil, the Justice 4.0 consolidation was led by the CNJ through the "Justice 4.0 Program – Innovation and Effectiveness in the Realisation of Justice for All", developed in partnership with the United Nations Development Program (UNDP). Through actions and projects whose execution is accompanied by teams from both the UNDP and the CNJ, the program aims to promote access to justice, based on the collaborative use of products that employ new ICTs and artificial intelligence.

[70]Schwab (2016).
[71]Santana, Teixeira & Moura Junior (2020).

To this extent, Justice 4.0 aims to increase the governance, transparency, efficiency and speed of the Judiciary, with the consequent public expenses reduction, making the Brazilian Justice closer to the citizen.

In short, "The Justice 4.0 Program fosters the development and the use of new technologies and artificial intelligence to make the Brazilian justice system more efficient and effective"[72].

Among the main actions and projects that integrate Justice 4.0 are: the implementation of the "100% Digital Judgment" implementation; the Digital Platform of the Judiciary standardisation (PDPJ-Br), with the degree expansion of the electronic judicial process automation and the incentive to the Artificial Intelligence (AI) use in the judicial activity; the Codex system improvement, a platform for transforming and extracting procedural information that makes it possible to feed statistical data for management and can also be used as an input for an AI model; and the development of an asset search and recovery tool (Sniper).

In addition, CNJ Resolution No. 385 of 6 April, 2021, authorises Brazilian courts to institute "Justice 4.0 Council" specialised in the same matter and with competence over the entire area located within the limits of its jurisdiction. Each "Justice 4.0 Council" must have a judge, who will coordinate it, and at least two other judges[73], who will only process cases that, comply with the "100% Digital Judgment"[74].

In São Paulo state, Joint Ordinance No. 10,135 of 2022 implements, as of 8 August, 2022, the "1st Justice 4.0 Specialised Council" of the Court of Justice of São Paulo State, with competence to prosecute and judge actions referring to traffic demands.

Justice 4.0 is an innovative management model that is intended to be consolidated in Brazil as an important technological advancement towards a more efficient, faster and closer to the citizen Judiciary, replacing the old slow, bureaucratic and ineffective Justice[75].

Conclusions

The COVID-19 pandemic has significantly affected all countries on the globe, including Brazil. In addition, its consequences reached practically all areas of social life, reaching everyone. With the Judiciary, it was not different. In a context of abnormality, in which preventive health measures determined social distancing and the suspension of face-to-face services, the Brazilian Justice needed to reinvent itself and, with creativity, bet on massive investment in technology to develop tools that allowed the continuity of provision uninterruptedly.

The Brazilian Judiciary was already leading technological modernisation actions. In fact, the electronic judicial process was already a usual reality.

[72]National Justice Council (2022).
[73]Resolution No. 385 of 6 April, 2021, article 1, § 3.
[74]Resolution No. 385 of 6 April, 2021, article 1, § 2.
[75]Gabriel, Abreu & Porto (2021).

However, the new coronavirus pandemic served as an unquestionable factor in accelerating Brazilian Justice Virtualisation.

In the pandemic, tools, methodologies and platforms were developed that contributed to making access to justice in Brazil more efficient, faster and less costly, in addition to bringing the Judiciary closer to the citizen. Many innovations and transformations applied in this period have already been inserted in the Brazilian Judiciary services routine, such as virtual hearings and distance service. It is credible to think that such measures, which proved to be quite successful and promising, will remain even after the end of the state of calamity.

The pandemic positive legacy for the Brazilian Justice virtualisation, increasingly electronic, can be symbolised by two projects proposed by the CNJ that translate a new, disruptive vision of jurisdiction: the "100% Digital Judgment" and Justice 4.0, which, together, introduced important changes in the existing interpersonal relationships in the judiciary.

The "100% Digital Judgment" authorised new or old processes to be performed remotely, including virtual or hybrid hearings. The Justice 4.0 Program, in turn, enables remote participation in procedural acts at the judge discretion and without the need for physical presence at the courthouse. In this sense, they are in full compliance with the Sustainable Development Goals (SDGs) goals and indicators – Agenda 2030, of the United Nations (UN), notably with SDG No. 16 – Peace, Justice and Effective Institutions.

The expectation is that the process fostered at the time of the pandemic will not stop, unlikely, and will advance on a large scale. In this sense, the CNJ heads many programs still in progress. For example, the following are planned for the year 2022: the Unified Services Portal implementation, the deliveries of the National Asset Management System and new version of the National Bank of Penal Measures and Prisons, the new functionalities incorporation in the National Adoption and Reception System and the National Bank of Precedents creation.

The present and future of Brazilian justice is digital.

References

Acioli, J.M. (2020). 'Uma análise retrospectiva dos impactos da COVID-19 no Brasil – como o país percebeu e lidou com a pandemia' [*A retrospective analysis of the impact of COVID-19 in Brazil - how the country perceived and dealt with the pandemic* (in Portuguese)] in *Revista dos Tribunais* 109(1022):327-340.

Almeida, M.P. de & .M. da F. Pinto (2020). 'Os impactos da pandemia de COVID 19 no Sistema de Justiça – algumas reflexões e hipóteses' [*The impacts of the COVID 19 pandemic on the Justice System – some reflections and hypotheses* (in Portuguese)] in *Revista Juris Poiesis*, vol. 23, No. 31. http://periodicos.estacio.br/index.php/jurispoiesis/article/view/8160

Barros, S.R.A. de F. & A.L.S. Cota (2021). 'Inteligência Artificial na pandemia da COVID-19: dilemas éticos a partir da fórmula da soma' [*Artificial Intelligence in the COVID-19 pandemic: ethical dilemmas from the summation formula* (in Portuguese)] in *Revista Thema* 20, 201-214 special edition. https://doi.org/10.15536/thema.V20.Especial.2021.201-214.1879

Brazil, Ministry of Health (2022). *Covid-19 in Brazil*. Data until 07/08/2022. https://info ms.saude.gov.br/extensions/covid-19_html/covid-19_html.html

Brazilian Institute of Geography and Statistics (2020). 'Pesquisa Nacional por Amostra de Domicílios Contínua - PNAD Contínua 2018' [*National Continuous Household Sample Survey – PNAD Continuous 2018* (in Portuguese)]. https://biblioteca.Ib ge.gov.br/index.php/bibliotecacatalogo?view=detalhes&id=2101705

Carvalho, A.C.P.L.F. de (2022). *Principais conceitos de Inteligência Artificial e computacional* [*Main concepts of Artificial and Computational Intelligence* (in Portuguese)] in *Inteligência Artificial*, 2ª ed. Rio de Janeiro: Fundação Getúlio Vargas (FGV). https://ciapj.fgv.br/sites/ciapj.fgv.br/files/relatorio_ia_2fase.pdf

Cristóvam, J.S. da S., Saikali, L.B. & T.P. de Sousa (2020). 'Governo digital na implementação de serviços públicos para a concretização de direitos sociais no Brasil' [*Digital government in the implementation of public services for the realisation of social rights in Brazil* (in Portuguese)] in *Seqüência*, 41:84. https://doi. org/10.5007/ 2177-7055.2020v43n84p209

Dantas Neto, R. de M. (2015). 'Sobre Processo Eletrônico e mudança no paradigma processual: ou não existe ou tudo é paradigma' in *Revista de Processo* [*On Electronic Process and change in the procedural paradigm: either it does not exist or everything is paradigm* (in Portuguese)] in *Revista de Processo*, vol. 240. São Paulo. https:// hdl.handle.net/20.500.12178/113343

Dotti, R.A. (1997). 'O interrogatório a distância. Um novo tipo de cerimônia degradante' [*The Remote interrogation: A new kind of degrading ceremony* (in Potuguese)**]** in *Revista de Informação Legislativa* 34(134):269-273. https://www2.senado.leg.br/bds f/bitstream/handle/id/244/r134-23.PDF?sequence=4&isAllowed=y

Dutra, R. Q. & L.S.C. de Melo (2021). 'Desafios do acesso à Justiça no contexto pandêmico e o *jus postulandi* nos Juizados Especiais Estaduais da Bahia' [*Challenges of access to Justice in the pandemic context and jus postulandi in the Special State Courts of Bahia State* (in Portuguese)] in *Revista da Defensoria Pública da União*16:133-148. https://doi.org/10.46901/revistadadpu.i16.p133-148

Fogaça, V.H.B. & M.V. Machado (2021). 'O teletrabalho como regime laboral impositivo durante a pandemia de COVID-19: Primeiras impressões sobre o caso brasileiro' [*Telework as an imposing labour regime during the COVID-19 pandemic: First impressions on the Brazilian case* (in Portuguese)] in *Revista dos Tribunais*, 47(216): 273-300.

Forster, J.P.K., Schäfer, G., Previdelli, J.E.A. & C.M. Buralde (2020). 'O direito humano à audiência no processo: novo paradigma em tempos de pandemia' [*The human right to hearing in the process: new paradigm in the pandemic period* (in Portuguese)] In *Revista Direito Público* 17(96). https://www.portaldeperiodicos.idp.edu.br/direito publico/article/view/4559.

Gabriel, A. de P., Abreu, A.L. de & F.R. Porto (2021). 'Plataforma Digital do Poder Judiciário Brasileiro: a ponte para Justiça 4.0" [*Digital Platform of the Brazilian Judiciary: the bridge to Justice 4.0* (in Portuguese)] in *Revista Eletrônica do CNJ* 5(1):12-30. https://doi.org/10.54829/revistacnj.v5i1.196.

Guimarães, R.R.C. & A.G.D.L. Parchen (2020). 'Videoconferência na Inquirição de Testemunhas em Tempos de Covid-19: Prós e Contras na Percepção dos Atores Processuais Penais' [Videoconference in the Inquiry of Witnesses in the Covid-19 Period: Pros and Cons in the Perception of Criminal Procedural Actors (in Portuguese)] in *Revista Direito Público* 17 (94). https://www.portaldeperiodicos.idp.edu.br/direito publico/article/view/4394.

Hijmans, H. & C. Raab (2021). 'Ethical Dimensions of the GDPR, AI Regulation, and Beyond' In *Revista Direito Público*, 18(100):56-80. https://www.portaldeperiodicos.idp.edu.br/direitopublico/article/view/6197/pdf

Joint WHO-China Study (2021). 'WHO-convened Global Study of Origins of SARS-CoV-2: China Part'. Joint Report. https://www.who.int/docs/default-source/coronaviruse/final-joint-report_origins-studies-6-april-201.pdf?sfvrsn=4f5e5196_1&download=true

Lopes, G.E. (2020). 'Intimação por telefone e WhatsApp. Tecnologia a serviço da celeridade processual – uso de mídias sociais' [*Subpoena by phone and WhatsApp. Technology at the service of procedural celerity – use of social media* (in Portuguese)] in *Revista do Curso de Direito Centro Universitário Brazcubas*. https://revistas.Brazcubas.br/index.php/revdubc/article/download/901/891

Magalhães, D. de C.S. & A.L. Vieira (2020). 'Direito, tecnologia e disrupção' [Law, technology and disruption **(**in Portuguese)] in *Revista Eletrônica do CNJ* 4(1). https://doi.org/10.54829/revistacnj.v4i1.126

Malan, D.R. & M.C.C. Saad (2022). 'Devido Processo Legal e Virtualização de Audiências Criminais' [Due Process of Law and Virtualisation of Criminal Hearings (in Portuguese)] in Dezem, G.M., Badaró, G.H.R.I. & R.S.M. Cruz (eds.) *Código de Processo Penal: estudos comemorativos aos 80 anos de vigência* [*Criminal Procedure Code: studies commemorating its 80th anniversary* (in Portuguese)] Vol. 2. São Paulo: RT.

Martins, F. de R. (2020). 'Audiência por videoconferência: o 'novo normal' ou o 'velho normal' agora valorizado?' [*Hearing by videoconference: the 'new normal' or the 'old normal' now valued?* (in Portuguese)] inn *Blog Gran Cursos Online*. https://blog.grancursosonline.com.br/audiencia-por-videoconferencia-o-novo-normal-ou-o-velho-normal-agora-valorizado

Mascarenhas, F.A., Alves, T. de A.P. & M.A. Mascarenhas (2013). 'El uso de la videoconferencia en los procedimientos penales: dos lados de una misma moneda' [*The use of videoconferencing in criminal proceedings: two sides of the coin* (in Portuguese)] in *Memorias del XV Congreso Iberoamericano de Derecho e Informática* [Proceedings of the xv Ibero-American Congress of Computer Law Buenos Aires – October 3 to 8, 2011 (volume iii)].

Nascimento, A., Coelho, J.L., Miranda, P. & R.F. Mello. 'Aplicação da Inteligência Computacional no Judiciário' [*Application of Computational Intelligence in the Judiciary* (in Portuguese)] in *Inteligência Artificial*, 2nd ed. Rio de Janeiro: Fundação Getúlio Vargas (FGV). https://ciapj.fgv.br/sites/ciapj.fgv.br/files/relatorio_ia_2fa se.pdf

Nascimento, G.A.F. & R.S.R. Creado (2020). 'O direito à desconexão no período de *home office*: análise dos impactos da quarentena pelo COVID-19 na saúde do trabalhado' [*The right to disconnection in the home office period: analysis of the impacts of quarantine by COVID-19 on worker health* (in Portuguese)] in *Revista do Programa de Pós-Graduação em Direito UFMS* 6(1). https://periodicos.ufms.br/index.php/revdir/article/view/10040/7987.

National Justice Council (2021). 'Justiça em números 2021'. [*Justice in Numbers 2021* (in Portuguese)] https://www.cnj.jus.br/wp-content/uploads/2021/09/relatorio-justica-em-numeros2021-12.pdf.

National Justice Council (2022). 'Solutions for Access to Justice to guarantee human rights. https://www.cnj.jus.br/wp-content/uploads/2021/12/folder-fj-j40-ing-0212.pdf.

Nóbrega, M. & J. Heinen (2021). 'As forças que mudarão a Administração Pública pós-COVID: transparência 2.0, blockchain e smart contracts' [*The forces that will change Public Administration post-COVID: transparency 2.0; blockchain and smart contracts*

(in Portuguese)] in *A&C – Revista de Direito Administrativo & Constitucional* 21(85). http://dx.doi.org/10.21056/aec.v21i85.1405

Nunes, E. (1996). 'SP faz 1º interrogatório de preso por computador' [*SP interrogates first inmate by computer* (in Portuguese)] In *Folha de S. Paulo*. https://www1.folha uol. com.br/fsp/1996/4/27/cotidiano/3.html

Ocampos, L.A. (2022). *Audiência de custódia: a presença como direito fundamental* [*Custody hearing: presence as a fundamental right* (in Portuguese)]. Belo Horizonte: D'Plácido

Oliveira, A.S.S. de (1996). 'Interrogatório on-line' [*Online Interrogation* (in Portuguese)] in *Boletim IBCCRIM*, No. 42.

Reck, J.R. & B.H. Hübner (2021). 'A transformação digital do estado: digitalização do governo e dos serviços públicos no Brasil' [*The digital transformation of the state: digitalisation of government and public services in Brazil* (in Portuguese)] in *Revista Eletrônica Direito e Política* 16(3):1075–1096. https://doi.org/10.14210/rdp.v16n3. p1075-1096

Reyna, J., Gabardo, E. & F. De Santos (2020). 'Electronic Government, Digital Invisibility and Fundamental Social Rights' in *Seqüência* 41(85). http://doi.org/10.5007/2177-7055.2020v41n85p30

Ribeiro, J. & J.R.P. Veronese (2022). 'Direito Digital e o acesso à Justiça da criança e do adolescente: o que a fraternidade tem a dizer' [*Digital law and access to justice for children and adolescents: what has the fraternity to say* (in Portuguese)] in Veronese, J.R.P. & R.S. da Fonseca (eds.) *Sociedade Digital: desafios para a fraternidade* [*Digital Society: challenges for fraternity* (in Portuguese)]. Vol. 1. Caruaru: Asces.

Salomão, L.F. (ed.). (2021). *Artificial Intelligence: Technology Applied to Conflict Resolution in the Brazilian Judiciary*. Rio de Janeiro: Fundação Getúlio Vargas (FGV). https://ciapj.fgv.br/sites/ciapj.fgv.br/files/report_ai_ciapj.pdf

Santana, A.G., Teixeira, C.N. & J.V. de Moura Junior (2020). 'O uso da jurisdição 4.0 para diagnóstico e direcionamento de políticas públicas' [*The use of jurisdiction 4.0 for diagnosis and targetic public policies* (in Portuguese)] in *Revista Em Tempo* 19(1): 118-134. https://revista.univem.edu.br/emtempo/article/view/3121

Santos, L.P. dos & R.P. Torres (2020). 'A Interoperabilidade entre os Sistemas de Gestão Arquivística de Documentos Digitais do Conselho Nacional de Justiça e o Futuro do Judiciário na Era da Informação Digital' [*The Interoperability between the National Council of Justice's Digital Document Archival Management Systems and the Future of the Judiciary in the Digital Information Age* (in Portuguese)] in *Revista Eletrônica do CNJ* 4(2):233-248. https://www.cnj.jus.br/ojs/index.php/revista-cnj/article/view/ 99/83

Santos, P.R. dos & N.S. Padilha (2021). 'O *home* que virou *office*: saúde mental no meio ambiente do trabalho e o direito à desconexão no contexto de pandemia' [*The home that became office: mental health in the work environment and the right to disconnect in the pandemic context* (in Portuguese)] in *Revista da Academia Brasileira de Direito Constitucional.* 13(25):291-311. http://www.abdconstojs.com. br/index.php/revista/ article/view/397/274

São Paulo (2021). 'TJSP realiza 466 mil audiências durante a pandemia' [*TJSP holds 466,000 hearings during pandemic* (in Portuguese)] in *Diário da Justiça Eletrônico.* July 15.

Schiller, C.O.S.B. (2021). 'Tribunais virtuais e tecnologias disruptivas como meios de ampliação do acesso à Justiça' [*Virtual Courts and Disruptive Technologies as means of expanding access to justice* (in Portuguese)] in *Revista de Direito e as Novas Tecnologias* vol. 13. https://dspace.almg.gov.br/handle/11037/42705

Schorr, J.S. & N.K. Nedel (2020). 'A Inteligência Artificial e a seara jurídica: ponderações, observações e questionamentos' [*Artificial Intelligence and the legal field: considerations, observations and questions* (in Portuguese)] in *RBIAD Revista Brasileira de Inteligência Artificial e Direito* 1(2):1–12. https://rbiad.com.br/index.php/rbiad/article/view/13/16

Schwab, K. (2016). *The Fourth Industrial Revolution: what it means, how to respond*. Cologny/Geneva: World Economic Forum.
https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/

Siqueira, D.P., Lara, F.C.P. & H.F.C.A.F. Lima (2020). 'Acesso à Justiça em tempos de pandemia e os reflexos nos direitos da personalidade' [*Access to Justice in the pandemic and the reflexes on personality rights* (In Portuguese)] in *Revista da Faculdade de Direito UERJ* 21(3):1265-1277
DOI: https://doi.org/10.12957/rfd.2020.51382

Susskind, R. (2019). *Online courts and the future of justice*. Oxford: Oxford University Press.

Wolff, R.P. & M. Silveira (2022). 'O 'Juízo 100% Digital' e os desafios para a prática da mediação' [*The '100% Digital Judgment' and the challenges for mediation practice* (in Portuguese)] in Veronese, J.R.P. & R.S. da Fonseca (eds.) *Sociedade Digital: desafios para a fraternidade* [*Digital Society: challenges for fraternity* (in Portuguese)], Vol. 1. Caruaru: Asces.

Legislation

Laws -
Law No. 11,419 of 19 December, 2006
Law No. 11,690 of 8 January, 2008
Law No. 13,105 of 16 March, 2015
Law No. 13,467 of 13 July, 2017
Law No. 13,979 of 6 February, 2020
Law No. 13,994 of 24 April, 2020
Law No. 14,129 of 29 March, 2021

Ordinances -
Ordinance No. 61 of 31 March, 2020
Ordinance No. 271 of 4 December, 2020

Recommendations -
Recommendation No. 62 of 17 March, 2020
Recommendation No. 101 of 12 July, 2021
Recommendation No. 130 of 22 June, 2022

Resolutions -
Resolution No. 227 of 15 June, 2016
Resolution No. 313 of 19 March, 2020
Resolution No. 314 of 20 April, 2020
Resolution No. 322 of 1 June, 2020
Resolution No. 329 of 30 July, 2020
Resolution No. 330 of 26 August, 2020

Resolution No. 332 of 21 August, 2020
Resolution No. 335 of 29 September, 2020
Resolution No. 341 of 7 October, 2020
Resolution No. 345 of 9 October, 2020
Resolution No. 354 of 19 November, 2020.
Resolution No. 357 of 26 November, 2020
Resolution No. 358 of 2 December, 2020
Resolution No. 372 of 12 February, 2021
Resolution No. 378 of 9 March, 2021
Resolution No. 385 of 6 April, 2021
Resolution No. 455 of 27 April, 2022
Resolution No. 465 of 27 June, 2022

Athens Journal of Law - Volume 9, Issue 1, January 2023 – Pages 33-58

Digital Markets Act (DMA) and Digital Services Act (DSA): New Rules for the EU Digital Environment

*By Maria Luisa Chiarella**

The Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (known as DMA – "Digital Market Act") sets clear rules for large online platforms. It aims to ensure that no large online platform that is in a "gatekeeper" position - to many users - abuses that position to the detriment of businesses wishing to access those users. The most innovative elements are the introduction of the legal figure of the "gatekeeper" and the provision of specific duties imposed on the same. The Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (known as DSA "Digital Services Act") introduces a common set of rules on intermediaries' obligations and accountability across the single market, aiming to ensure a high level of protection to all users. This paper aims to analyse the new provisions introduced by the Digital Service Package in the framework of market regulation policies.

Keywords: *Digital markets; Intermediary service; Online platforms; Online search engines; Market regulation; EU policies Ombudsman; Constitutional Institution; Unwillingness of Bureaucrats*

Introduction

Since the adoption of Directive 2000/31/EC (the "e-Commerce Directive"), epochal changes have occurred that have transformed society and the market, giving rise to a "digital revolution"[1]. New and innovative digital services have emerged, changing our daily lives, shaping how we communicate, connect, consume goods, and do business[2]. This transformation is defined as the new digital revolution, which is as fundamental as that caused by the industrial revolution. At the same time, the use of digital services has also become the source of new risks and challenges, both for society as a whole and for individuals. This situation has been exacerbated by the pandemic emergency which has dramatically increased the use of online bargaining and the use of digital services. In the meantime, digitalisation has become one of the pillars of post-pandemic

*Associate Professor of Private Law, Magna Græcia University, Catanzaro, Italy.
Email: mlchiarella@unicz.it
[1]Dąbrowski & Suska (2022).
[2]Quarta & Smorto (2020) at XI et seq.

transformation of the EU. For this reason, given the immense importance of online platforms and digital services, European Institutions feel the need to introduce specific rules for the sector to improve online access to goods and services for consumers, to prohibit the dissemination of illegal content and products, as well as to facilitate innovation, competition and growth of the European digital ecosystem[3].

The goal of the European Union is to create a digital single market and to govern the digital transition underway. As part of the digital single market strategy, the European Commission has recently developed "*the Digital Service Act Package*", consisting of the Digital Service Act (DSA) and the Digital Market Act (DMA). It sets out a first comprehensive rulebook for the online platforms with the specific purpose of creating a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses[4].

These acts were preceded by a series of Communications of the European Commission, the first of which is *A Digital Single Market Strategy for Europe*, published in 2015, which sets out the strategy for a digital single market. The strategy sets out several targeted actions based on these three pillars: (i) better access for consumers to digital goods and services across Europe; (ii) creating the right conditions and a level playing field for digital networks and innovative services to flourish; (iii) maximising the growth potential of the digital economy.

In 2016, the Commission approved the Communication *Online Platforms and the Digital Single Market Opportunities and Challenges for Europe*[5], which underlines the impact of the role of online platforms for the digital single market, highlighting the need for the presence of competitive platforms in the EU[6]. When elaborating on responses to issues related to online platforms, the Commission considers the following principles: a level playing field for comparable digital services; responsible behaviour of online platforms to protect core values; transparency and fairness for maintaining user trust and safeguarding innovation; open and non-discriminatory markets in a data-driven economy.

Subsequently, in 2020 the Commission approved the Communication *Shaping Europe's Digital Future*[7] which indicated the three main pillars for European growth: (i) technology that works for the people; (ii) a fair and competitive digital economy; (iii) an open, democratic, and sustainable society. In this Communication, the Commission committed to updating the horizontal rules that define the

[3]In argument, see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, 6 May 2015, COM (2015) 192 final.

[4]See, among others, Laux, Wachter & Mittelstadt (2021). See further references below in the paper.

[5]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Online Platforms and the Digital Single Market, Opportunities and Challenges for Europe*, 25 May 2016, COM (2016) 288 final.

[6]Palmieri (2019) at 43.

[7]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Shaping Europe's digital future*, 19 February 2020, COM (2020) 67 final.

responsibilities and obligations of providers of digital services, and of online platforms in particular.

That Communication proposed that –

> "*Based on the single market logic, additional rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry, as well as public interests that go beyond competition or economic considerations*. It also announced that the Commission *'will further explore,[…], ex ante rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants*".

Moreover, on March 9, 2021, the Commission approved the Communication *2030 Digital Compass: the European way for the Digital Decade*[8]. The *Digital Compass* is part of the EU's 2030 Policy Programme "*Path to the Digital Decade*" which sets out a 10-year roadmap for Europe's digital transition. It specifies and narrows down the objectives outlined in the Communication *Shaping Europe's Digital Future* of 2020.

Furthermore, on January 26, 2022, the Commission drew up a proposal for a declaration on digital rights and principles for a human-centred digital transformation, with the aim of raising awareness and creating an overall framework to govern this process[9].

The *Digital Service Package*

The European Commission proposed two legislative initiatives concerning digital services in the EU in December 2020 and on 25 March 2022 a political agreement was reached on the *Digital Market Act* and on 23 April 2022 on the *Digital Services Act*. Following the adoption of the *Digital Services Package* by the European Parliament and by the Council of the European Union, both texts have been published in the Official Journal of the European Union and put into force 20 days after publication[10].

Both the regulations are concerned with the size of digital platforms and aim at creating a safer and more open digital space in which the fundamental rights of all users of digital services are protected and also to establish a level playing field to foster innovation, growth and competitiveness[11].

These regulatory interventions aim to put an end to the legislative fragmentation existing in Europe, giving rise to a greater law harmonisation of

[8]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *2030 Digital Compass: the European way for the Digital Decade*, 9 March 2021, COM (2021) 118 final.
[9]*European Declaration on Digital Rights and Principles for the Digital Decade*, 26 January 2022, COM (2022) 28 final.
[10]See the timeline described by ten Thije (2022).
[11]Laux, Wachter & Mittelstadt (2021).

online activities[12]. Legal harmonisation makes the fight against illegal activities and the protection of citizens' fundamental rights more effective while normative fragmentation makes it easy to distort competition to the detriment of the evolution of new innovative services in the internal market.

In this perspective, see the *Explanatory Memorandum* of the DSA Proposal (par. 3), which reads:

> *"The legal fragmentation with the resulting patchwork of national measures will not just fail to effectively tackle illegal activities and protect citizens' fundamental rights throughout the EU, it will also hinder new, innovative services from scaling up in the internal market, cementing the position of the few players who can afford the additional compliance costs. This leaves the rule setting and enforcement mostly to very large private companies, with ever-growing information asymmetry between online services, their users and public authorities*".

The Impact Assessment accompanying the DSA proposal identifies an added value of legal harmonisation in a possible increase of cross-border digital trade of 1 to 1.8%, i.e. the equivalent of an increase in turnover generated cross-border of EUR 8.6 billion and up to EUR 15.5 billion.

For that we have to read the *Explanatory Memorandum* of the DSA Proposal (par. 3) which also says:

> "*With regard to added value in the enforcement of measures, the initiative creates important efficiency gains in the cooperation across Member States and mutualising some resources for technical assistance at EU level, for inspecting and auditing content moderation systems, recommender systems and online advertising on very large online platforms. This, in turn, leads to an increased effectiveness of enforcement and supervision measures, whereas the current system relies to a large extent on the limited capability for supervision in a small number of Member States*".

In that perspective, an important option is represented by the format for the new legislation: regulation instead of directive. The presence of two regulations is not by chance, since regulations are (pursuant to art. 288 TFEU) general in scope, compulsory and directly applicable in each of the Member States. The direct applicability of the regulations is expected to help overcome the divergences between the national legislations.

These two new pieces of legislation aim to regulate different profiles of online platforms. The DSA is about harmful and illegal goods, services and content online and will replace the e-Commerce directive (without repealing it). In contrast, the DMA is concerned with access to the digital market and will enrich the range of existing measures for investigating and correcting market practices by creating *ex ante* rules that prohibit specified behaviours.

The key values inspiring the regulatory interventions are the protection of fundamental rights, of free market and of competition. However, in terms of competition outcomes from reduced network effect and more trust in the digital system, the impact and benefits of the EU DMA and DSA will depend on the

[12]Marchiafava (2021) at 246.

digital endowments, the economic structure of the Member States and on the interplay with other regulatory tools.[13].

The "*Digital Market Act" (DMA)*

On 18 July 2022, the Council of Europe definitively approved the Digital Market Act (DMA), thanks to the previous presentation of the proposal for new rules on contestable and fair markets in the digital sector on 15 December 2020[14].

The DMA ensures a level playing field in the digital market, establishes clear rights and rules for large online platforms ("gatekeepers") and ensures that none of them abuse their position[15]. The regulation's purpose is to create a fair and competitive digital environment, enabling businesses and consumers to benefit from digital opportunities balancing between the respective freedoms of business providers of core platform services and their business users (Article 16 of the Charter of Fundamental Rights of the European Union)[16]. With this in mind, the regulation intends "to foster the emergence of alternative platforms, which could deliver high-quality, innovative products and services at affordable prices. Fairer and more equitable conditions for all players in the digital sector would allow them to take greater advantage of the growth potential of the platform economy"[17].

The adoption of a regulation, as it is directly applicable in Member States, arises from the national regulatory initiatives that cannot fully address the same effects, without norms at the EU level, the Internal Market is fragmented. There is a fragmentation of the Internal Market[18]. A regulation establishes the same level of rights and obligations for private parties and enables the coherent and effective application of rules in the online cross-border platform economy. Regulation is most suited to addressing the problems of fairness and contestability and to preventing fragmentation of the Single Market for core platform services provided or offered by a gatekeeper[19]. Without European harmonisation, the dissimilarities existing in national legislation have the power to lead to increased regulatory uncertainty of the platform space which is of an intrinsic cross-border nature[20].

Therefore, since legal harmonisation at EU level is necessary, the legal basis for the DMA is found in Article 114 of the Treaty on the Functioning of the European Union[21].

[13]Erixon, Guinea, der Marel & Sisto (2022) at 2, 6-7.
[14]Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15 December 2020, COM (2020) 842 final 2020/0374(COD). For a comment, see, among the others: Manganelli (2021) at 473 et seq.; Polo & Sassano (2021) at 501 et seq.; Manzini (2021) at 435 et seq, and Falce & Faraone (2022) at 5 et seq.
[15]About the role of gatekeepers in digital platforms, see Palmieri (2019) at 27 et seq.
[16]Proposal, *Explanatory memorandum*, 11. See, in argument, also Recital 107 of the DMA.
[17]Proposal, *Explanatory memorandum*, 10.
[18]Proposal, *Explanatory memorandum*, 1, 4. See, in argument, also Recital 107.
[19]Proposal, *Explanatory memorandum*, 6.
[20]Proposal, *Explanatory memorandum*, 4.
[21]Proposal, *Explanatory memorandum*, 4.

The EU law is in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union; and in accordance with the principle of proportionality. As set out in that Article, the DMA does not go beyond what is necessary to achieve its objective[22].

The DMA builds on the existing P2B Regulation[23] and is aligned with other EU instruments, including the EU Charter of Fundamental Rights, the European Convention of Human Rights, the General Data Protection Regulation[24], EU competition rules and the EU's consumer law acquis.

It is also coherent with the *Digital Service Act*, which we will discuss later in this paper. The proposal is also coherent with other EU vertical regulations, including the rules applicable to electronic communication services or short-selling, as well as with existing initiatives targeting harmful trading practices in the offline world[25].

The purpose of the DMA is to ensure the proper functioning of the market through effective competition in digital markets, and to solve the critical issues of the market to facilitate innovation and consumer protection by combating unfair and anti-competitive behaviour[26]. It aims to allow platforms to unlock their full potential by facing the most critical issues at the EU level, so "as to allow end users and business users alike to reap the full benefits of the platform economy and the digital economy at large, in a contestable and fair environment"[27].

As pointed out in the *Explanatory Memorandum* of the Proposal, a small number of large online platforms have captured the lion's share of the overall value generated. Large platforms are the protagonists of today's digital economy, intermediating most transactions between business users and end users. These platforms act as "gateways"[28] or "gatekeepers"[29] between business users and end users. Their economic power is embedded in their own platform's ecosystem. As such, they have substantial control over the access to digital markets, leading to a significant number of business users becoming dependent on them, which thus correlates to unfair behaviour. This situation produces negative effects on the contestability of the core platform services involved affected[30]. On the other hand, a very significant network effect characterises the functioning of digital platforms: it implies that the number of users, in itself, fosters the increase of those users: in this regard, it must be considered that since a service becomes more attractive on one side of the market, the more the users will go to the other side. Therefore, a

[22]Recital 107.
[23]Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.
[24]Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).
[25]See, for example, Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.
[26]Marchiafava (2021) at 260.
[27]Proposal, *Explanatory memorandum*, 3.
[28]Recital 6.
[29]Recital 3.
[30]Manzini (2021) at 440.

rival platform company not only has to offer a better quality and/or cheaper service, but also to convince a very high number of users to switch *en masse* from the service of the incumbent platform to its own (*incumbency advantage*). If (or as long as) such a migration does not take place, its service will still be less attractive to consumers»[31].

The DMA tackles such problems because they lead to inefficient outcomes in the digital sector in terms of higher prices, lower quality, as well as less choice and innovation to the detriment of European consumers.

As Article 1, par. 1, points out, the purpose of the DMA is «to contribute to the proper functioning of the internal market by laying down harmonised rules ensuring for all businesses, contestable and fair markets in the digital sector across the Union, where gatekeepers are present, to the benefit of business users and end users». It applies «to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service» (par. 2).

"Core platform services" are the most widely used services by business users and end users; these services are only those «where there is strong evidence of (i) high concentration, where usually one or very few large online platforms set the commercial conditions with considerable autonomy from their (potential) challengers, customers or consumers; (ii) dependence on a few large online platforms acting as gateways for business users to reach and have interactions with their customers; and (iii) the power by core platform service providers often being misused by means of unfair behaviour vis-à-vis economically dependent business users and customers"[32].

The definition of "core platform service" is given by Article 2, par. 2: it includes any online intermediation service, online search engine, online social network service, video-sharing platform service, number-independent interpersonal communication service, operating system, web browsers, virtual assistants, cloud computing service and online advertising service (including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by the undertaking that provides any of the core platform services listed before).

The DMA does not apply to markets related to electronic communications networks as defined in point 1 of Article 1 of Directive (EU) 2018/1972 of 11 December 2018 establishing the European Electronic Communications Code.

The *DMA:* Notion and Duties of Gatekeepers

Analysing the structure, the DMA consists of six Chapters and one hundred and nine Recitals. Chapter I is devoted to *Subject matter, scope and definitions.* The DMA is binding only for those providers that meet clearly defined criteria for being

[31]Manzini (2021) at 442.
[32]Proposal, *Explanatory memorandum*, 6.

considered "gatekeepers"[33]. Before the adoption of the DMA, the identification of "gatekeepers" and the related problems were currently not (or not effectively) addressed by existing EU legislation or national laws of Member States.

As pointed out in the *Explanatory Memorandum* of the Proposal, "[p]roviders of core platform services can be deemed to be gatekeepers if they: (i) have a significant impact on the internal market, (ii) operate one or more important gateways to customers and (iii) enjoy or are expected to enjoy an entrenched and durable position in their operations"[34].

Gatekeeper status is described in Chapter II of the DMA. It can be determined either with reference to quantitative metrics, which can serve as rebuttable presumptions, to determine the status of specific providers as a gatekeeper or based on a case-by-case qualitative assessment by means of a market investigation[35].

Furthermore, the DMA also establishes conditions under which a designation of a gatekeeper may be reconsidered and contains an obligation to regularly review such a designation[36].

Chapter III of the DMA is about *Practices of gatekeepers that limit contestability or are unfair*. It lays down self-executing obligations[37]; obligations that are susceptible to specification that the designated gatekeepers should comply with in respect to each of their core platform services listed in the relevant designation decision; and obligations for gatekeepers on the interoperability of number-independent interpersonal communications services[38].

Moreover, the Chapter contains the provisions concerning compliance with obligations of gatekeepers[39], by providing a framework for a possible dialogue between the designated gatekeeper and the Commission, relating to measures that the gatekeeper implements or intends to implement in order to comply with the obligations set out by DMA[40].

The obligations for an individual core platform service may be suspended in exceptional circumstances[41]; exemption can be granted also on grounds of public interest[42]. Additional provisions in this Chapter concern the reporting[43]; updating

[33]For a comparison with the undertaking in a dominant position, see Manzini (2021) at 443.
[34]Proposal, *Explanatory memorandum*, 2.
[35]Article 3. As it is pointed out in Recital 73 of the DMA, a provider of core platform services not meeting the quantitative thresholds laid down in the Regulation can be designated as a gatekeeper in case of systematic non-compliance and whether the list of obligations addressing unfair practices by gatekeepers should be reviewed and additional practices that are similarly unfair and limiting the contestability of digital markets can be identified. Such assessment should be based on clear procedures and deadlines, in order to support the ex-ante effect of DMA on contestability and fairness in the digital sector, and to provide the requisite degree of legal certainty
[36]Article 4. See also Recitals 30 and 31.
[37]Article 5. See Appendix - note 2.
[38]Article 7 introduces specific rules requiring a designated gatekeeper providing number-independent interpersonal communication services to provide interoperability for the benefit of other providers of such services. Different types of sub-services will progressively fall under the interoperability obligation at different points in time.
[39]Article 8.
[40]See also Recital 58/60.
[41]Article 9.
[42]Article 10.
[43]Article 11.

of the list of obligation[44]; a clarification about anti-circumvention[45]; an obligation to inform about concentrations[46]; and an obligation of an audit[47].

The power to supervise the fulfilment of the obligations and related implementation measures is given to the European Commission in the perspective of a centralised enforcement model. The Commission shall be assisted by the Digital Markets Advisory Committee composed of representative of Member States[48].

The DMA provides rules about market investigations (Chapter IV), notably the assumptions for the opening of a market investigation[49] and for different types of market investigations: (i) designation of a gatekeeper[50], (ii) investigation of systematic non-compliance[51] and (iii) market investigation of new services and practices[52].

The DMA contains provisions also concerning the opening of proceedings[53], the power of the Commission to request information[54], to carry out interviews and take statements[55], to conduct inspections[56] and to adopt interim measures[57]. The Commission is allowed to make voluntary measures binding on the gatekeepers[58] and to monitor compliance with the Regulation[59]. Third parties may inform the competent national authority about any practice or behaviour by gatekeepers contrary to the scope of the DMA[60]. A compliance function for gatekeepers is also introduced in the same Chapter: it is independent from the operational functions of the gatekeepers and composed of one or more compliance officers, including the head of the compliance function[61]. Its task is to organise, monitor, and supervise compliance with the DMA.

[44]Article 10.
[45]Article 13.
[46]Article 14.
[47]Article 15. As it is explained in the *Explanatory memorandum* of the Proposal (4), transparency obligations on deep consumer profiling will help General Data Protection Regulation ('GDPR') enforcement, whereas mandatory opt-in for data combination across core platform services supplements the existing level of protection under the GDPR (Article 5, a). About profiling and transparency obligation, see also Recital 72. Gatekeepers must ensure that compliance with the obligations laid down in the DMA should be done in full compliance with other EU law, such as protection of personal data and consumer protection.
[48]Article 50.
[49]Article 16.
[50]Article 17.
[51]Article 18.
[52]Article 19.
[53]Article 20.
[54]Article 21.
[55]Article 22.
[56]Article 23.
[57]Article 24.
[58]Article 25.
[59]Article 26. See, in argument, Recital 68 et seq.
[60]Article 27.
[61]Article 28.

The DMA provides rules for non-compliance: the Commission can adopt non-compliance decisions[62], as well as impose fines[63]. Fines cannot exceed 10% of total gatekeeper turnover in the preceding financial year if the non-compliance is intentional or negligent; fines to undertakings and associations of undertakings are not to exceed 1% of the total turnover in the preceding financial year. Periodic penalty payments are provided by the DMA: they are not to exceed 5 % of the average daily turnover in the preceding financial year, calculated from the date set by that decision[64].

Before adopting a decision, the Commission shall give the gatekeeper, undertaking or association of undertakings concerned the opportunity to be heard and to access the file[65].

Annual reporting on the implementation of the DMA by Commission to the European Parliament and to the Council is also regulated by a specific provision[66].

The DMA framework considers and protects fundamental rights: the Commission's investigation powers would be subject to the full scope of fair process rights, such as the right to be heard, the right to a reasoned decision and access to judicial review, including the possibility to challenge enforcement and sanctioning measures[67]. Another procedural guarantee concerns professional secrecy[68].

The regulation also governs cooperation with national authorities, cooperation and coordination with national authorities enforcing competition rules, cooperation with national courts and "the high-level group" for the Digital Markets Act[69].

The DMA foresees the possibility for three or more Member States to request that the Commission open a market investigation pursuant to Article 15[70], while Articles 42 and 43 are about representative actions and reporting of breaches, as well as the protection of reporting persons.

The last provisions of the DMA are contained in Chapter VI and are general: an obligation to publish an identified set of individual decisions adopted under the Regulation[71], a clarification about the jurisdiction of the Court of Justice of the European Union in respect of fines and penalty payments[72] and the possibility to adopt implementing[73], guidelines[74], standardisation[75] and delegated acts[76].

[62]Article 29.
[63]Articles 30.
[64]Article 31. The DMA contains also a limitation period for the imposition of penalties and for their enforcement: the powers conferred on the Commission for the imposition of penalties shall be subject to a three-year prescription; the limitation period for the enforcement of penalties is of five years (Articles 32 and 33).
[65]Article 34.
[66]Article 35.
[67]Proposal, *Explanatory memorandum*, 11.
[68]Article 36.
[69]Articles 37/40.
[70]Article 41.
[71]Article 44.
[72]Article 45.
[73]Article 46.
[74]Article 47.

Finally, the remaining provisions are about the committee procedure[77], the amendment of the Directive 2019/1937[78], amendment of the Directive 2020/1828[79], the review clause[80] and the specification of the entry into force and dates of application of the Regulation[81].

In short, the regulatory framework of the DMA is constituted by (a) a closed list of core platform services; (b) a definition of gatekeepers status given by quantitative and qualitative indices; (c) directly binding and applicable obligations, together with a regulatory dialogue to facilitate their enforcement; and (d) a possibility for the Commission to update the regulatory framework following a market investigation as regards the obligations on the gatekeeper and to amend the list of core platform services[82].

The "*Digital Services Act*" *(DSA)*

On 5 July of 2022 the European Parliament approved the *Digital Services Act*, presented by the Commission in December 2020[83] and on which a political agreement had already been reached on 23 April 2022. The *Digital Services Act* is a regulation that replaces and innovates the previous liability regime for information society service providers, constituted by the e-Commerce Directive (Dir. CE 2000/31)[84].

As well as the DMA, the *Digital Service Act* is a horizontal initiative which lays down harmonised rules on the provision of intermediary services in the internal market. The rules of regulation purport to ensure effective harmonisation across Europe and prevent legal fragmentation, ensuring the proper functioning of the internal market, in relation to the provision of cross-border digital services[85].

In line with this objective, the DSA aims to ensure legal harmonisation by addressing and preventing the emergence of obstacles to innovative cross-border services resulting from differences in the national laws. At the same time, it provides for the appropriate supervision of digital services and cooperation between authorities at the EU level, thereby supporting trust, innovation and growth in the internal market[86].

While the DMA is concerned with economic imbalances, unfair business practices by gatekeepers and their negative consequences, such as weakened

[75]Article 48.
[76]Article 49. See, in argument, also Recital 66.
[77]Article 50.
[78]Article 51.
[79]Article 52.
[80]Article 53.
[81]Article 54.
[82]See Proposal, *Explanatory memorandum*, 9.
[83]Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Service Act) and amending Directive 2000/31/EC, 15.12.2020, COM (2020), 825 final, 2020/0361 (COD).
[84]Among the others, see Stanzione (2022) at 9 et seq.
[85]See Proposal, *Explanatory memorandum*, 7 and *Recital* 2, 4.
[86]See Proposal, *Explanatory memorandum*, 5-6.

contestability of platform markets, the DSA focuses on issues such as liability of online intermediaries for third party content, safety of users online or asymmetric due diligence obligations for different providers of information society services, depending on the nature of the societal risks such services represent[87].

As well as the DMA, the DSA is in accordance with the principles of subsidiarity and proportionality[88].

As was pointed out in the *Explanatory Memorandum* of the Proposal, the DSA complements existing sector-specific legislation (e.g., information society services, consumer and privacy law) and does not affect the application of existing EU laws regulating certain aspects of the provision of information society services, which apply as *lex specialis*[89]. It also introduces a horizontal framework for all categories of content, products, services and activities on intermediary services. The illegal nature of such content, products or services is not defined in the DSA, but instead results from Union law or from national law in accordance with Union law[90].

The legal basis for the DSA is found in Article 114 of the Treaty on the Functioning of the European Union, which provides for the establishment of measures to ensure the functioning of the Internal Market[91].

Analysing the normative framework, we can see that the DSA consists of five Chapters and one hundred and seven Recitals.

Chapter I sets out general provisions, including the subject matter and scope[92] and the definitions of key terms used in the Regulation[93]. The DSA establishes: (a) a framework for the conditional exemption from liability of providers of intermediary services; (b) rules on specific due diligence obligations tailored to certain specific categories of providers of intermediary services; (c) rules on the implementation and enforcement of the Regulation, including the cooperation and coordination between the competent authorities[94]. The DSA applies to intermediary services provided to recipients of the service that have their place of establishment or residence in the Union, irrespective of the place of establishment of the providers of those services[95].

Chapter II contains provisions on liability of providers of intermediary services. More specifically, it includes the conditions under which providers of mere conduit[96], caching[97] and hosting services[98] are exempt from liability for the third-party information they transmit and store, without affecting the possibility

[87]See Proposal, *Explanatory memorandum*, 1 et seq.
[88]See Proposal, *Explanatory memorandum*, 6.
[89]See Proposal, *Explanatory memorandum*, 4.
[90]See Proposal, *Explanatory memorandum*, 4.
[91]See Proposal, *Explanatory memorandum*, 5.
[92]Article 1-1a.
[93]Article 2.
[94]Article 1, par. 2.
[95]Article 1a, par. 1.
[96]Article 3.
[97]Article 4.
[98]Article 5.

for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

A novelty can be found in Article 8 which governs *orders to act against illegal content*: providers of intermediary services, after receiving an order to act against one or more specific items of illegal content, issued by the relevant national judicial or administrative authorities, on the basis of the applicable Union or national law, in compliance with Union law, have to inform the authority issuing the order or any other authority specified in the order of the effect given to the orders, without undue delay, specifying if and when the order was applied[99]. In force to par. 2 of Article 8, the orders must contain specific elements. According to Art. 9, providers of intermediary services can receive orders (provided with reasons and information on remedies available to the provider and to the recipients of the service in question) to provide information.

Chapter III sets out the *Due diligence obligations for a transparent and safe online environment* in five different Sections. First of all, providers of intermediary services shall establish a single point of contact for direct communication, by electronic means, with Member States' authorities, the Commission and the European Board for Digital Services[100]. Moreover, providers of intermediary services also have to designate points of contact for recipients of services[101]. Furthermore, providers of intermediary services, which do not have an establishment in the Union, but which offer services in the Union, shall designate, in writing, a legal or natural person as their legal representative in one of the Member States where the provider offers its services[102].

Providers of intermediary services must include information in their terms and conditions on any restrictions that they impose in relation to the use of their service in respect of information provided by the recipients of the service.[103] The providers also have to publish clear, easily comprehensible and detailed reports at least once a year, on any content moderation they engaged in during the relevant period[104].

Additional provisions are applicable to providers of hosting services, including providers of online platforms[105]: providers of hosting services are obligated to introduce mechanisms able to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be of illegal content. Those mechanisms shall be easy to access, user-friendly, and allow for the submission of notices exclusively by electronic means[106].

In the meanwhile, providers of hosting services have to provide a clear and specific statement of reasons to any affected recipients of the service for any

[99]Article 8, par. 1.
[100]Article 10, par. 1.
[101]Article 10a.
[102]Article 11, par. 1.
[103]Article 12, par. 1.
[104]Article 14, par. 1.
[105]Article 14 et seq.
[106]Article 14, par. 1

restriction imposed[107]. Notification of suspicions of criminal offences is regulated by Article 15a.

Additional provisions are applicable to providers of online platforms[108], except online platforms that qualify as micro or small enterprises as defined by the Annex to Recommendation 2003/361/EC[109]. All online platforms are required to furnish an *internal complaint-handling system* which enables the complaints to be lodged electronically and free of charge against the decisions taken by the online platform about illegal content or that which is contrary to terms and conditions[110]. Providers of online platforms are obliged to inform complainants without undue delay of decisions (which are not taken solely by automated means) taken regarding the information to which the complaint relates. The providers also have to inform complainants of the possibility to settle disputes out-of-court and of other available redress possibilities as provided for in Article 18[111].

Out-of-court dispute settlement is regulated by Art. 18. It does not prejudice the right of the recipient of the service to redress against the decision before a court in accordance with the applicable law (par. 1). Recipients of the service are permitted to select the out-of-court dispute settlement body from any out-of-court dispute service certified by the Digital Services Coordinator of the Member State, where the out-of-court dispute settlement body is established: Settlement bodies are certified if they meet all the conditions indicated by paragraph 2 of Art. 18 (impartiality, expertise, remuneration not linked to the outcome of the procedure, accessibility, effectiveness and the condition that the dispute settlement take place in accordance with clear and fair rules of procedure).

To further tackle illegal content, Trusted flaggers, acknowledged by the Digital Services Coordinators, are bodies whose notices are processed and decided upon urgently and expediently. After ruling on the figure and the role of *Trusted flaggers*[112], the DSA sets down the measures that online platforms are to adopt against the misuse by service recipients who frequently provide manifestly illegal content or by individuals or entities (or complainants) that frequently submit notices or complaints that are manifestly unfounded[113]. Such measures include issuing a warning of and the suspension, for a reasonable period, of the provision of the service.

In case of suspicion that a serious criminal offence involving a threat to the life or safety of persons has taken place, is taking place or is likely to take place, online platforms must inform the law enforcement or judicial authorities of the

[107] Art. 15, par. 1. The restrictions indicated by the paragraph are: a) *any restrictions of the visibility of specific items of information provided by the recipient of the service, including removal of content, disabling access to content, or demoting content; b) suspension, termination or other restriction of monetary payments (monetisation); c) suspension or termination of the provision of the service in whole or in part; d) suspension or termination of the recipient's accounts.*
[108] Article 16 et seq.
[109] Article 16.
[110] Article 17.
[111] Article 17, par. 4 – 5.
[112] Article 19. See also Recital 46.
[113] Article 20.

Member State or Member States concerned of such suspicion and provide all relevant information available[114].

The DSA also obliges online platforms to receive, store, and reasonably assess the reliability of and publish specific information on the traders using their services where those online platforms allow consumers to conclude distance contracts with those traders[115]. Those online platforms are also obliged to organise their interface in a way that enables traders to respect Union information duties and product safety law[116]. Online platforms are also obliged to publish reports on their activities relating to the removal and the disabling of information considered to be illegal content or contrary to their terms and conditions[117]. The DSA also foresees transparency obligations for advertising on online platforms[118]; it regulates the recommender system of transparency[119] and online protection for minors[120].

Section 3a of Chapter III contains provisions applicable to providers of online platforms allowing consumers to conclude distance contracts with traders: traceability of traders[121], compliance by design[122], right to information[123].

The *DSA: Very Large Online Platforms (VLOP) And Very large online search engines (VLOSEs)*

A novelty introduced by the DSA is the definition and regulation of very large online platforms (VLOP) and very large online search engines (VLOSEs). The first are defined as "online platforms which reach a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, and which are designated as very large online platforms pursuant to paragraph 4"[124]. In turn, very large online search engines are described as those engines "which reach a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, and which are designated as very large online search engines in accordance with Article 25"[125].

According to Recital 53, "(...) it is necessary to impose specific obligations on the providers of those platforms, in addition to the obligations applicable to all online platforms. Due to their critical role in locating and making information retrievable online, it is also necessary to impose those obligations, to the extent they are applicable, on the providers of very large online search engines. Those additional obligations on providers of very large online platforms and of very large

[114]Article 21.
[115]Article 22.
[116]Article 22, par. 7.
[117]Article 23.
[118]Article 24.
[119]Article 24a.
[120]Article 24b. In argument, see Montinaro (2021) at 219 et seq.
[121]Article 24c.
[122]Article 24d.
[123]Article 24e.
[124]Article 25, par. 1. See Appendix Note 3.
[125]Article 33a, par. 1.

online search engines are necessary to address those public policy concerns, there being no alternative and less restrictive measures that would effectively achieve the same result." Furthermore, Recital 54 foresees: "[v]ery large online platforms and very large online search engines may cause societal risks, different in scope and impact from those caused by smaller platforms. Providers of such very large online platforms and very large online search engines should therefore bear the highest standard of due diligence obligations, proportionate to their societal impact. Once the number of active recipients of an online platform or a search engine, calculated as an average over a period of six months, reaches a significant share of the Union population, the systemic risks the online platform or the online search engine poses may have a disproportionate impact in the Union (…) "[126].

Section 4 of Chapter III of the DSA lays down obligations, additional to the obligations laid down in Sections 1 to 3, for very large online platforms and for very large online search engines to manage systemic risks. Very large online platforms are compelled to conduct risk assessments on the systemic risks related to their services[127] and to take reasonable and effective measures aimed at mitigating those risks[128]. A crisis response mechanism is also contemplated, and it is related to an event in which «extraordinary circumstances lead to a serious threat to public security or public health in the Union or in significant parts thereof»[129]. Providers of VLOP are also obliged to submit themselves to external and independent audits[130].

Section 4 of Chapter III, devoted to VLOP and VLOSE, also includes a specific obligation in case of very large online platforms using recommender systems[131] or displaying online advertising on their online interface[132].

Furthermore, Section 4 of the DSA establishes how providers of very large online platforms have to allow access to data to the Digital Services Coordinator of establishment or to the Commission and vetted researchers (i.e. academics with specific expertise in the DSA field)[133] and sets out the obligation to appoint one or more compliance officers responsible for monitoring compliance with the obligations set forth in the Regulation[134] and specific, additional transparency obligations such as the publication of any content moderation reports (referred to in Article 13) every six months[135].

Section 5 of Chapter III of the DSA contains specific provisions concerning due diligence obligations, namely the processes for which the Commission will support and promote the development and implementation of harmonised

[126]See also Recitals 55 et seq.
[127]Article 26.
[128]Article 27.
[129]Article 27a.
[130]Article 28.
[131]Article 29.
[132]Article 30.
[133]Article 31.
[134]Article 32.
[135]Article 33.

European standards[136]; the procedure for the adoption of codes of conduct[137] and of specific codes of conduct for online advertising[138] and for accessibility[139].

Crisis protocols for addressing extraordinary circumstances affecting public security or public health are regulated by a specific provision which involves the Commission, Member States' authorities, Union bodies, offices and agencies, and encourages stakeholders to participate in the drawing up, testing and application of these protocols[140].

The *DSA*: Implementation and Enforcement

Chapter IV of the DSA contains the provisions concerning its implementation and enforcement. In this context we find the competent authorities and the national Digital Services Coordinators, regulated by Section 1. They are both the primary national authorities designated by the Member States for the consistent application and enforcement of the DSA[141]. The Digital Services Coordinators and the other designated competent authorities are independent authorities required to perform their tasks impartially, transparently and in a timely manner[142]. They comprise the European Board for Digital Services, an independent authority which advises and provides guidance on issues falling within the scope of the regulation and which also works in joint investigations and in the supervision of systemic platforms. The new authority is regulated by Section 2 and its structure and tasks are regulated by Articles 48 and 49.

Member States where the main establishment of the provider is located have jurisdiction to enforce the DSA[143].

The Digital Services Coordinators are granted specific powers of investigation and enforcement towards the providers of intermediary services. In the case of noncompliance with the requirements of the DSA, if the infringement persists and causes serious harm or entails a serious criminal offence involving a threat to the life or safety of persons, Digital Services Coordinators can request the competent judicial authority of that Member State to order the temporary restriction of access of recipients of the service concerned by the infringement or, only where that is not technically feasible, to the online interface of the provider of intermediary services on which the infringement takes place[144]. Furthermore, Member States

[136]Article 34.
[137]Article 35.
[138]Article 36.
[139]Article 36a.
[140]Article 37.
[141]Article 38. In argument, for the Digital service coordinator, see Recital 73 et seq.
[142]Article 39.
[143]Article 40.
[144]Article 41. The DSA provides for a system of limits and guarantees in conformity with the national laws, the Charter and the general principles of Union law: Member States shall ensure that any exercise of the powers pursuant to paragraphs 1,2 and 3 of Article 41 is subject to adequate safeguards; "in particular, those measures shall only be taken in accordance with the right to respect for private life and the rights of defense, including the rights to be heard and of access to the file, and subject to the right to an effective judicial remedy of all affected parties" (Art. 41, par. 6).

have to lay down rules on penalties applicable to breaches of the obligations by providers of intermediary services under the DSA together with the extent of the penalty[145].

Digital Services Coordinators can receive complaints against providers of intermediary services for breaches of the obligations laid down in the DSA[146]; they are required to publish annual reports on their activities[147] and to cooperate with Digital Services Coordinators of other Member States[148]. They can also participate in joint investigations regarding matters covered by the DSA[149]. There is a prescription about compensation[150]: recipients of the service have the right to seek it from providers of intermediary services against any damage or loss suffered due to the conduct by those providers contrary to the DSA.

A specific system of supervision, investigation, enforcement and monitoring in respect of providers of VLOP and of VLOSEs is regulated in Section 3 (Articles 49a-66) of the DSA.

Some common provisions on enforcement are introduced in Section 4 which first lays down rules on professional secrecy[151] and on an information-sharing system supporting communications between Digital Services Coordinators, the Commission, and the Board[152] and includes the right of recipients of intermediary services to mandate a body, organisation or association to exercise their rights on their behalf[153].

Section 5 is about the adoption of delegated acts by Commission, in accordance with Article 290 of the Treaty on the Functioning of the European Union[154], and about the Digital Service Committee called in to assist the Commission[155].

Finally, Chapter V contains the last provisions of the DSA: the deletion of Articles 12 to 15 of the e-Commerce Directive[156], amendments to Directive 2020/ 1828/EC[157], evaluation of the Regulation[158] and its entry into force and application[159].

In short, the DSA establishes rules on 1) liability rules and exemption from liability of providers of intermediary services; 2) targeted asymmetrical due diligence obligations for a more transparent and safer online environment; 3) rules for implementation and enforcement which include the cooperation between authorities[160].

---

[145]Article 42.
[146]Article 43.
[147]Article 44.
[148]Article 45.
[149]Article 46.
[150]Article 43a.
[151]Article 66a.
[152]Article 67. In argument, see also Recital 88 et seq.
[153]Article 68.
[154]Article 69.
[155]Article 70.
[156]Article 71.
[157]Article 72.
[158]Article 73.
[159]Article 74.
[160]Buri, Van Hoboken (2021) at 7-8.

Some Conclusions

The EU's policy in the field of digital technologies is characterised by an evolution over the last thirty years[161]. A paradigm shift has occurred, offering pointers for legal experts to explain the birth of the "European digital constitutionalism"[162].

The issues of the digital ecosystem are not limited to the field of private or competition law, but are also inherent to a public law perspective[163], considering that "modern constitutionalism aims to protect fundamental rights and limit the emergence of powers outside any control."[164] Digital constitutionalism, in fact, consists of creating limits on exercising power in a network society, and is rising as a shield against the abuse of power in the digital environment[165].

That said, European policy has shifted from a liberal, economic perspective to a constitutional approach aimed at protecting fundamental rights and democratic values[166]. While at the beginning of this century, a liberal approach characterised EU's policy aimed at promoting the development of the internal market[167], this approach has ended up infringing upon fundamental rights and freedoms by allowing strong undertakings to consolidate their powers and by empowering transnational corporations operating in the digital environment[168].

Given these challenges, the EU has introduced provisions to limit online abuse and illicit conducts, leading to regulatory solutions to protect fundamental rights, the smooth functioning of the internal market and democratic values[169]. This scenario is seen as the end of the liberal approach and a potential basis for promoting a democratic digital environment in the EU[170].

Within this framework, the importance of the DMA is evidenced by its ability to address unfair practices by gatekeepers that either fall outside the existing EU competition rules or cannot be effectively governed by these

[161]Palmieri (2019) at 1 et seq.
[162]De Gregorio (2021) at 66.
[163]Civil, social and political rights are intertwined in this debate [see Stanzione (2019) at 1 et seq.].
[164]De Gregorio (2021) at 42.
[165]*Ibidem*.
[166]Stanzione (2019), at 2; Polo & Sassano (2021) at 502.
[167]We may consider as emblematic in this sense the Directive 95/46/EC ("Data Protection Directive") and Directive 2000/31/EC ("e-Commerce Directive"). The adoption of a paternalistic approach was considered able to frustrate the development of new digital services and, for this reason, EU was more concerned about economic freedoms and innovation rather than on the protection of individuals' rights and freedoms. While new technologies were supposed to innovate the entire society, a rigid approach to the online environment would have damaged the growth of the internal market. At the beginning of the Internet era, the EU approach was comprehensively far from "digital constitutionalism" because new digital technologies were considered as an opportunity to grow and prosper. Thus, new private powers challenging the protection of fundamental rights and competing with States' powers were not object of fear by EU Institutions. In argument see De Gregorio (2021) at 44, 45.
[168]De Gregorio (2021) at 66.
[169]For an economic analysis of this change of policy, see Polo, Sassano (2021) at 501 et seq.
[170]De Gregorio (2021) at 67.

rules[171], since antitrust enforcement concerns the situation of specific markets - and thus intervenes after the restrictive or abusive conduct has occurred - and involves lasting procedures to ascertain the infringement. However, the DMA and competition policies are complementary: the DMA minimises the detrimental structural effects of unfair practices ex ante[172], without limiting the ability to intervene ex post under EU and national competition rules[173].

Therefore, this intervention is linked to antitrust and consumer legislation with the aim of encouraging innovation in the digital ecosystem, improving efficiency and reducing transaction costs for businesses and end users.

Noticeably, within platform business, problems arise for commercial users who cannot control the success factors of the company in the platform and SMEs who cannot do business profitably. Big players (e.g. the so-called GAFAM: Google, Amazon, Facebook, Apple and Microsoft) determine the rules of the system, generating contestability problems. For this reason, the *Digital Service Act Package* purports to prevent the digital system from continuing to reinforce advantages and strengths of big economies and big firms, in favor of developing tools to support smaller enterprises.

The characteristic of the DMA is to counteract the imbalances of power and the abuse of power by platforms that hold negative repercussions for commercial users and consumers.

In turn, the DSA's purpose is to produce a higher level of accountability for online platforms and intermediaries by introducing rules of transparency, due diligence requirements and third-party content liability, and by covering a wide range of policy, from online marketplace requirements to the protection of minors. The DSA establishes the passage in the configuration of the platforms, from de facto authority to legal authority, attempting to reduce the risk of abuse of contractual power[174]. According to the DSA, the online marketplace must ensure safety for end users, strengthening the obligations of business users. One of the most significant elements of the DSA is its requirement for algorithmic transparency: Platforms will have to explain how their "recommendation system" works and produce their results to improve information for users and any choices they make[175]; While, on the user experience side, the DSA prohibits misleading interfaces or "dark patterns" which are designed to manipulate users into making certain choices[176].

Both the regulations are novel: they take an approach that has not been tried-and-tested before.

The DMA and the DSA obligations are like circles in a Venn diagram, since not all very large platforms and all very large search engines are necessarily also gatekeepers, though many will likely fall in that category as well[177].

---

[171]See, among the others, Laux, Wachter & Mittelstadt (2021) at 4.
[172]Recital 73.
[173]Polo & Sassano (2021) at 509 et seq.
[174]Stanzione (2022), at 13.
[175]Montinaro (2021) at 219 et seq.
[176] See Recital 68 of DSA.
[177]Laux, Wachter & Mittelstadt (2021) at 4.

In a civil law perspective, the Italian regulatory tool to counter the harmful consequences of the illegal conduct of the platforms is given by article 9 of Law n. 192 of 1998, because there is a network model which is vertically integrated with hierarchical relationships and cooperation needs, like those of economic dependence abuse. The abuse of economic dependence in the Italian system is governed by a rule of civil law that applies to vertical relationships between companies and which provides protection for the weak contractor, such as the nullification of the contractual clause that incorporates the abuse and compensatory remedies to counter the bargaining power of the strong contractor.

The prerequisite for the application of this institute is the economic dependence of one of the two parties of a negotiation relationship with another. Article 9, par. 1 of Law n. 192/98 defines economic dependence a situation in which a company may determine commercial relations with another company as an excessive imbalance of rights and obligations, taking into account the concrete possibilities for the party who suffers the abuse to find satisfactory alternatives in the market.

The recent Law n. 118 of 5 August 2022 aimed at amending the rules against the abuse of economic dependence deals with digital platforms[178]. The law explicitly introduces the reference to digital platforms in paragraph 1 of Article 9 of Law n. 192 of 1998[179] and, furthermore, it introduces an exemplary list of abusive practices in the text of paragraph 2 of the same article. Among these, there are those, made by digital platforms, that may "also consist in providing insufficient information or data regarding the scope or quality of the service provided and in requesting undue unilateral services not justified by the nature or content of the activity carried out, or in adopting practices that inhibit or hinder the use of different suppliers for the same service, also through the application of unilateral conditions or additional costs not provided for in the contractual agreements or existing licences". [180]

It will be necessary to combine this new legislation with the novelties of the *Digital Service Package* with specific reference to the extra-national scope of the platform business and digital regulations.

[178]Bellomo (2022) at 1 et seq.
[179]See Appendix note 4.
[180]See Appendix note 5.

References

Bellomo, G. (2022). 'Piattaforme digitali: le novità introdotte dalla legge concorrenza e mercato 2021', in *Quotidiano giuridico* (7 September).

Dąbrowski, Ł.D. & M. Suska (eds.). (2022). *The European Union Digital Single Market. Europe's digital Transformation.* London and New York: Routledge.

De Gregorio, G. (2021). 'The rise of digital constitutionalism in European Union', in *International Journal of Constitutional Law* 19(1):41-70.

Erikson, F., Guinea, O., der Marel, E. & E. Sisto (2022). *After the DMA, the DSA and the New AI regulation: Mapping the Economic Consequences of and Responses to New Digital Regulations in Europe* in *Ecipe Occasional Paper* March 2022:1-80.

Buri, I. & J. Van Hoboken (2021). 'The Digital Service Act (DSA) proposal: a critical overview'. Discussion paper in *DSA Observatory by Ivrt Amsterdam.* 1-43.

Falce, V. & N.M. Faraone (2022). 'Mercati digitali e DMA: note minime in tema di enforcement', in *Diritto industriale* 1:5-15.

Laux, J., Wachter, S. & B. Mittelstadt (2021). 'Taming the few. Platform regulation, independet audits, and the risks of capture created by the DMA and DSA', in *Computer Law & Security Review* 43:1-12.

Manganelli, A. (2021). 'Il regolamento EU per i mercati digitali: ratio, criticità e prospettive di evoluzione' [*The Eu Regulation for Digital Markets: Ratio, Pitfalls, and Possible Evolution*], in *Mercato Concorrenza Regole* 3:473-500.

Manzini, P. (2021). La proposta di legge sui mercati digitali: una prima mappatura' [*'Unraveling the proposal of Digital Market Act*], in *Orizzonti del Diritto Commerciale* 1:435-462.

Marchiafava, S. (2021). 'La disciplina europea del settore digitale in itinere: le proposte', in A. Contaldo (ed.), *Le piattaforme digitali. Profili giuridici e tecnologici nel nuovo ecosistema*, pp. 239-271. Pisa: Pacini giuridica.

Montinaro, R. (2021). 'Online markeplaces and consumer law', in *Nuovo diritto civile* 3: 219 – 257.

Palmieri, A. (2019). *Profili giuridici delle piattaforme digitali. La tutela degli utenti commerciali e dei titolari di siti web aziendali*. Torino: Giappichelli.

Polo, M. & A. Sassano (2021). 'DMA: Digital Markets Act or Digital Markets Armistice?', in *Mercato Concorrenza Regole* 3:501-532.

Quarta, A. & G. Smorto (2020). *Diritto privato dei mercati digitali*. Florence: Le Monnier.

Stanzione, P. (2022). *I poteri privati delle piattaforme e le nuove frontiere della privacy.* Torino: Giappichelli.

ten Thije, P. (2022). 'The Digital Service Act: Adoption, Entry into Force and Application Dates', in *DSA Observatory* (12 September).

Appendix

Note 1:

Unless the end user has been presented with the specific choice and has given consent, gatekeepers are not allowed: to process, for advertising purposes, personal data of end users using services of third parties that make use of core platform services of gatekeeper (par. 2, let. a); to do data combining (let. b); to do cross-use of personal data (let. c); to sign in end users to other services of the gatekeeper in order to combine personal data (let. d). The gatekeeper shall not prevent business users from offering, outside of its online intermediation service, the same products or services to end users at different prices or conditions than on its platform (par. 3). The gatekeeper shall allow business users to promote their offers, receive payments and conclude contracts with end users outside the gatekeeper's core platform service (par. 4). The gatekeeper shall allow end users to access and use, through its core platform service, content, subscriptions, features or other items by using the software application of a business user, including where these items have been acquired by the end users from the business user without using the gatekeeper's core platform service (par. 5). The gatekeeper shall not prevent or restrict business users or end users from raising any issue of non-compliance with relevant EU or national law by the gatekeeper with relevant public authorities, including national courts (par. 6). The gatekeeper shall not require business users or end users of a core platform service to use, offer, or interoperate with a gatekeeper's identification service, web browser engine or payment service in the context of services offered by a gatekeeper's business user through the gatekeeper's core platform service (par. 7). The gatekeeper shall not require business users or end users of a core platform service to also use another core platform service that has been listed in the designation decision or that meets the user number thresholds of the quantitative presumption expressed in Article 3(2)(b) (par. 8). The gatekeeper shall provide, free of charge and on a daily basis, advertisers (or their authorised third parties) who are customers of its online advertising services with a range of detailed information on, broadly speaking, the use of its advertising services and payments from publishers and advertisers (par. 9). The gatekeeper shall provide, free of charge and on a daily basis, publishers (or their authorised third parties) who are customers of its online advertising services with a range of detailed information on, broadly speaking, the use of its advertising services and payments from publishers and advertisers (par. 10).

Note 2:

Article 6: the gatekeeper shall not use in competition with business users any data not publicly available which is generated or provided by those business users in the context of their use of the relevant core platform service, including data generated or provided by the business users' end customers (par. 2); the gatekeeper shall allow and technically enable end users to easily un-install software applications on the operating system of the gatekeeper and allow end users to easily change default settings on the operating system (par. 3); the gatekeeper shall allow and technically enable the installation and effective use of third-party software applications or software application stores on its operating system (par. 4); the gatekeeper shall not treat more favourably in ranking and related indexing and crawling, its own services and products compared to similar services or products offered by third parties on its platform, and shall apply transparent, fair and non-discriminatory conditions to such rankings (par. 5); the gatekeeper shall not restrict the ability of end users to switch between, or subscribe to, different software applications and services to be accessed using the gatekeeper's core platform service (par. 6); the gatekeeper shall allow

providers of services and hardware, free of charge, effective interoperability with hardware and software features accessed or controlled via its operating system or virtual assistant (par. 7); the gatekeeper shall provide advertisers and publishers, and third parties authorised by them, upon their request and free of charge, with access to performance measuring tools of the gatekeepers and sufficient data for advertisers and publishers to carry out their own verification of the ad inventory (par. 8); the gatekeeper shall provide end users and third parties authorised by them, upon their request and free of charge, with effective portability of data provided by the end user or generated through the end user's activity on the core platform service, including by the provision of continuous and real-time access to such data (par. 9); the gatekeeper shall provide business users and third parties authorised by them, upon their request, free of charge with effective, high-quality, continuous and real-time access and use of data that is provided for or generated in the context of the use of the relevant core platform service (or related services) by those business users and their end users (par. 10); the gatekeeper shall provide, on fair, reasonable and non-discriminatory terms, competing online search engines with access to ranking, query, click and view data in relation to searches generated by end users on its online search engine (par. 11); the gatekeeper shall apply fair, reasonable and non-discriminatory general conditions for business users' access to software application stores, online search engines and online social networking services listed in the designation decision (par. 12) and the gatekeeper shall not use disproportionate general conditions for terminating a core platform service and not to make their exercise unduly difficult (par. 13).

The introduction of the possibility of tailored applications ensures that there is no over-regulation and, at the same time, allows to avoid a lack of intervention in relation to similar practices by the same gatekeepers, where practices may evolve over time (see the *Explanatory memorandum* of the Proposal, 6). Manzini (2021) at 439 et seq. considers weak this side of DMA since the obligations imposed on gatekeepers are seen as belonging to the general categories of antitrust law.

Note 3:

The text of par. 4 in Article 25 is as follows:

"The Commission shall, after having consulted the Member State of establishment or after taking into account the information provided by Digital Services.

Coordinator of establishment pursuant to Article 23(3a), adopt a decision designating as a very large online platform for the purposes of this Regulation the online platform which has a number of average monthly active recipients of the service equal to or higher than the number referred to in paragraph 1 of this Article. The Commission shall take its decision on the basis of data reported by the provider of the online platform pursuant to Article 23(2), or information requested pursuant to Article 23(3) or any other information available to the Commission. The failure by the provider of the online platform to comply with Article 23(2) or to comply with the request by the Digital Services Coordinator of establishment or by the Commission pursuant to Article 23(3) shall not prevent the Commission from designating that provider as a provider of very large online platform pursuant to this paragraph".

Note 4:

È vietato l'abuso da parte di una o più imprese dello stato di dipendenza economica nel quale si trova, nei suoi o nei loro riguardi, una impresa cliente o fornitrice. Si considera dipendenza economica la situazione in cui un'impresa sia in grado di determinare, nei rapporti commerciali con un'altra impresa, un eccessivo squilibrio di diritti e di obblighi.

La dipendenza economica è valutata tenendo conto anche della reale possibilità per la parte che abbia subito l'abuso di reperire sul mercato alternative soddisfacenti. Salvo prova contraria, si presume la dipendenza economica nel caso in cui un'impresa utilizzi i servizi di intermediazione forniti da una piattaforma digitale che ha un ruolo determinante per raggiungere utenti finali o fornitori, anche in termini di effetti di rete o di disponibilità dei dati.

Note 5:

Italian text: "Le pratiche abusive realizzate dalle piattaforme digitali di cui al *comma 1 possono consistere anche nel fornire informazioni o dati insufficienti* in merito all'ambito o alla qualità del servizio erogato e nel richiedere indebite prestazioni unilaterali non giustificate dalla natura o dal contenuto dell'attività svolta, ovvero nell'adottare pratiche che inibiscono od ostacolano l'utilizzo di diverso fornitore per il medesimo servizio, anche attraverso l'applicazione di condizioni unilaterali o costi aggiuntivi non previsti dagli accordi contrattuali o dalle licenze in essere".

Athens Journal of Law - Volume 9, Issue 1, January 2023 – Pages 59-88

Proactive Intelligence-Led Policing Shading the Boundaries of Entrapment: An Assessment of How Common Law Jurisdictions have Responded

*By Ger Coffey**[1]

Law enforcement agencies have adapted their detection and investigative strategies in accordance with proactive intelligence-led policing of suspected offenders that include surreptitious undercover methods. While such measures are necessary and proportionate to safeguard society from harm caused by offenders, some forms of proactive policing methods could be regarded as entrapment. Allegations of entrapment are typically raised in circumstances where undercover law enforcement officers have actively participated in the creation of a crime, have tested the virtue of people instead of directing their detection and investigative strategies on persons against whom there are reasonable grounds for suspicion, or have gone beyond merely creating the circumstances and effectively induced the suspect to commit an offence. Criminal justice systems have typically responded to allegations of entrapment with judicial discretion to grant a stay of the prosecution for an abuse of the courts process, relying on judicial integrity and the imperative of constitutional principles and international human rights standards being adhered to by courts of justice. Undercover methods bordering entrapment might require the exercise of judicial discretion to either exclude impugned evidence or as a mitigating factor reducing the sentence imposed on convicted offenders. This article evaluates the judicial responses to successful pleas of entrapment in foremost common law jurisdictions underpinned by constitutional principles of due process and international human rights standards in accordance with the rule of law.

Keywords: *Abuse of process; Agent provocateur; Defence; Entrapment; Exclusion of evidence; Judicial discretion; Stay of criminal proceedings*

Introduction

The essence of entrapment is causing someone to commit a criminal offence they would have been unlikely to commit of their own volition, either directly through law enforcement officers or persons acting under their direction and control (*agent provocateurs*). A stratagem (encouragement, incitement, coercion, persuasion) is employed as a temptation to lure suspects into committing an

[*]BA (UL), LLB (NUI), MA (NUI), PhD (NUI), Lecturer in Law and Course Director LLM/MA in Human Rights in Criminal Justice, Centre for Crime, Justice & Victim Studies, School of Law, University of Limerick, Limerick, Ireland.
Email: ger.coffey@ul.ie

[1]This article is a revised and expanded version of a PAPER presented at the ATINER 19th Annual International Conference on Law, Athens 11-14 July 2022.

offence which the suspect otherwise would probably not have committed.[2] In most common law jurisdictions entrapment is raised as a procedural defence and the accused bear the burden and onus of proof on the balance of probabilities to establish they was incited, coerced or persuaded into committing the substantive offence. The burden then shifts to the prosecution to prove beyond a reasonable doubt that the accused was predisposed to commit the offence notwithstanding the purported influence of law enforcement officers (provided the allegations are not wholly improbable). The accused's previous criminal record and reputation for the type offending behaviour targeted by the undercover methods are relevant to the determining the issue of weather law enforcement had reasonable suspicion. Merely creating the circumstances to facilitate the accused to form the intention to commit the offence would not constitute entrapment. If the accused committed an offence they would otherwise not have committed this will probably equate with state created crime if law enforcement officers have actively participated in the commission of the substantive offences by the accused.[3] Successfully pleading entrapment requires the accused to establish that the idea, or impetus, for committing the offence was instigated by a law enforcement officer, or *agent provocateur*, and the accused was not already willing or predisposed to commit the offence. The establishment of predisposition to commit such offences however militates against successful pleas of entrapment.[4]

The discernible increase in crime rates has resulted in a change in law enforcement policies from reactive to proactive detection and investigative methods with the exponential use of intelligence-led methods including undercover operations and the increasing use of police informers. Surreptitious deceptive strategies are used to investigate offences that have been committed and more recently the increasing use of such operations is to determine whether a suspect who has been provided with the opportunity, where law enforcement offices have created the circumstances, would go on to commit the substantive offence. Such dissimulation strategies typically include sting operations, use of decoys, test purchases, controlled deliveries and so-called virtue testing of fidelity to legal values.[5] Categories of serious criminal offences targeted by undercover investigations by law enforcement officers invariably comprise terrorism, human trafficking and sexual grooming of children on the internet.[6]

The superior courts in foremost common law jurisdictions have grappled with the nature and scope of undercover policing strategies to determine whether the proactive methods are lawful and permissible or alternatively whether such methods are unlawful and therefore constitute entrapment.

This article evaluates the responses to entrapment in foremost common law jurisdictions with a focus on evidential and procedural safeguards regarding successful pleas of entrapment. An assessment of human rights safeguards adumbrated through ECtHR jurisprudence reveals international best practice in a

[2]Ashworth (1978).
[3]Ho (2011).
[4]Field (2019).
[5]Ashworth (2000).
[6]Allen, Luttrell & Kreeger (1999).

European context ensuring undercover methods do not violate due process and fair trial safeguards of accused persons.

Consensual Offences

Issues regarding allegations of entrapment invariably arise with respect to consensual criminal offences, so-called offences without a victim. Society through the law-making process has deemed proscribed conduct as offences that are enforced. Unless victims and witnesses come forward to report offences, such offences are detected ad investigated by law enforcement to rigorously enforce the legislative mandate of enforcing the criminal law. Surreptitious policing methods shade the boundaries of participating in the commission of a substantive offence with the intention of obtaining proof of the commission of the substantive offence and evidence against the accused.

Ostensible victimless crimes include circumstances where there is no apparent victim (e.g. corruption, money laundering, drug offence), proscribed conduct constituting an offence despite the consent of the victim (e.g. certain categories of sexual offences), where both parties engage in proscribed conduct to their mutual benefit (e.g. selling goods or providing services to underage consumers, selling counterfeit goods), and engaging in proscribed conduct that has not yet reached the stage of impinging on potential victims directly (e.g. conspiracy). Law enforcement agencies typically adapt their proactive intelligence-led detection and investigative strategies as conventional methods are inadequate.

Definitional Elements

Entrapment is not a legal term of art and the boundaries encircling the nature and scope of the doctrine remain controversial and somewhat illusive. The term ‘entrapment’ is a derivative of the verb ‘to entrap’ and seemingly used for the first time by the Colorado Court of Appeals in *People v Braisted*.[7] The term is now widely used in common law jurisdictions to refer to unlawful undercover methods by law enforcement officers.

Entrapment occurs when law enforcement officers, or controlled informers, effectively cause a suspect to commit a substantive offence with the intention of prosecuting the suspect for that offence.[8] This entails active intervention by law enforcement officers encouraging the commission of an offence as opposed to passive investigation of suspects. There is a rebuttable presumption the substantive offence has not been committed before the involvement of undercover law enforcement officers.

Identifying characteristics of the entrapment doctrine encompasses impermissible conduct by law enforcement agents before or when the substantive

[7](1899) 13 Colo App 532.
[8]Hill, McLeod, & Tanyi (2018).

offence is committed. Judicial oversight functions in determining allegations of entrapment were neatly encapsulated in *R v Bellingham*[9] where Smyth, J. opined:

> "*The court should look at the nature of the offence, the reason for the police operation, the presence or absence of malice, and the nature and extent of the police participation in the crime. The greater the inducement held out by the police is, and the more forceful or persistent the police overtures are, the more readily may a court conclude that the police overstepped the mark. It will not, however, normally be regarded as objectionable for the police to be behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant. If having considered all these matters, the court adjudges that this amounts to 'State created' crime then the prosecution will be stayed or, less frequently, the evidence excluded…. On the other hand, where it is not such an affront the matter goes to mitigation of sentence if that is a relevant consideration*."

This circular and somewhat formulistic description as to the parameters of proscribed conduct that encircle the boundaries of entrapment does not sufficiently clarify the issue. Judicial formulations of the doctrine and legislative intervention clarifying the nature and scope of the plea may be necessary in accordance with the rule of law. Devising a working definition of entrapment is a challenging concept mainly due to the surreptitious nature of undercover investigative strategies. Nonetheless, the courts and legislatures will be required to construct the defining parameters of entrapment from the perspective of the conduct by law enforcement officers and the conduct of suspects. Balancing constitutional and statutory obligations on law enforcement officers (as emanations of the state) in protecting society through effective detection and investigative strategies with the panoply of fundamental rights of (especially vulnerable) suspected persons will necessitate a proportionate response in terms of the objective to be achieved by surreptitious undercover operations. In this context, Lord Bingham of Cornhill CJ in *Nottingham City Council v Amin*[10] opined:

> "*On the one hand it has been recognised as deeply offensive to ordinary notions of fairness if a defendant were to be convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded, pressurised or wheedled into committing it by a law enforcement officer. On the other hand, it has been recognised that law enforcement agencies have a general duty to the public to enforce the law and it has been regarded as unobjectionable if a law enforcement officer gives a defendant an opportunity to break the law, of which the defendant freely takes advantage, in circumstances where it appears that the defendant would have behaved in the same way if the opportunity had been offered by anyone else*."

The same principles would equally apply whether the impugned undercover methods were undertaken by law enforcement officers or by informants operating under the direction and control of law enforcement (*agent provocateur*).

[9][2003] NICC 2, para 19.
[10][2000] 1 WLR 1071 at 1076.

Merely creating an opportunity or circumstances through passive intervention for suspects reasonably believed to be engaged in criminal behaviour to commit offences would not constitute entrapment. Unlike creating an opportunity through passive intervention, entrapment might be raised as a procedural defence where the law enforcement agent has incited or caused the commission of an offence with the intention that the suspect would be prosecuted. Creating an opportunity such as pretending to be a criminal, engaged in criminal behaviour oneself or alerting the suspect to an opportunity to commit an offence will not suffice. To successfully raise the procedural defence of entrapment, the accused must prove that law enforcement officers effectively incited or encouraged the accused to commit an offence. Thus, although incitement is an inchoate offence it can be raised in answer to a criminal prosecution by an accused alleging entrapment.

Judicial Recognition of the Entrapment Doctrine

The superior courts exercise judicial discretion modifying aspects of law and procedure interstitially by addressing lacunas, which is a modest form of judicial extension, not constituting judicial activism, to avoid injustice and to adapt the common law to contemporary social changes.[11]

An embryonic form of the modern entrapment doctrine was considered in nineteenth century England, which seems to have been the first intimation of the procedural defence in the common law.[12] This is evidenced in *R v Titley*,[13] where an abortionist that had been solicited by a plainclothes undercover officer did not have a defence notwithstanding the presence of misrepresentation and strong inducement. The court focused on the intent of the accused and the effectiveness of his methods as opposed to the surreptitious investigative method employed by the undercover officer. Such hostile attitudes evidence by members of the judiciary was largely due to the belief that there was no legal justification for upholding a plea of entrapment.[14] Scottish courts took a more liberal view of the embryonic entrapment plea in *Blaikie v Linton*,[15] where an undercover officer induced the accused to sell her some whisky, for which sale he had no permit. A plea of entrapment was raised and the court acquitted the accused without elaborating on the reasons for the decision. Although the officer had induced the offence that would not have been committed but for his solicitation, there were also procedural issues in the case that may also have influenced the decision.

In mid twentieth century England, judicial disapproval of encouraging and persuading another person to commit an offence was evident, albeit there was no indication the courts were prepared to declare a defence or plea in bar. In *Brannan v Peak*,[16] Lord Goddard CJ vehemently disapproved of police methods of

[11]Smith (1984); Friedman (1966); Friedmann (1961).
[12]Marcus (1986); Shafer & Sheridan (1970); DeFeo (1967).
[13](1880)14 Cox Crim Cas 502.
[14]Williams (1961) at 785.
[15](1880) 18 Scot Law Rep 583.
[16][1948] 1 KB 68.

committing offences to detect purported criminals. In *Sneddon v Stevenson,*[17] an undercover officer stopped his car near the suspect, who opened the car door, and the office accepted her offer of prostitution. In the opinion of the court, the officer had not been a party to the offence and did not actively participate by providing the suspect with an opportunity to commit the suspected offence.

One of the earliest cases where the plea in bar was raised in a criminal prosecution is *Grimm v United States,*[18] which involved sending obscene mails. On the facts of the case the Supreme Court found that the methods employed by the officer did not constitute an inducement to commit the offence, and the conviction was upheld. The negative recognition of the plea is evident in the judgment of Brandeis J (dissenting) in *Casey v United States.*[19]

In *Sorrels v United States,*[20] the plea was recognised in federal criminal law.[21] Surprisingly, the Court did not base the plea on the due process guarantee but rather on the constitutional basis that Congress would not have intended the enactment of offence to be applicable to suspects entrapped by unlawful police investigative strategies.[22] This decision suggests a constitutional basis for the plea as opposed to being an element of due process albeit with the development and expansion of the plea in the contemporary criminal justice process would equally be founded on due process of law. Roberts J concurring suggested the basis for the plea should be on the inherent supervisory jurisdiction of the courts to prevent an abuse of process.[23] Unfortunately the Court did not proceed to elaborate on the nature and scope of the plea suggesting the entrapment of suspects was inherently unlawful and implicitly not requiring further explanation.

Sorrells adumbrated the objective and subjective nature of the plea, where suspects have been induced or encouraged by law enforcement agents to engage in proscribed conduct. The application of the subjective test requires the court to consider whether the suspect was predisposed to engaging in the proscribed conduct when approached by the law enforcement agent, whereas the objective element considers the extent of the law enforcement agent's encouragement of inducement and whether this was within acceptable limits of detection and investigative strategies. Although the majority decision in *Sorrells* advanced the subjective test both tests appear to feature in judicial assessments of the plea across common law jurisdictions.

From its inception in the United States as a substantive defence, the entrapment doctrine has migrated to other foremost common law jurisdictions albeit based on evidential and procedural judicial discretionary remedies.[24]

Procedural Defence

[17][1967] 1 WLR 1051.
[18](1895) 156 US 604.
[19](1928) 276 US 423 at 421.
[20](1932) 287 US 435 at 448.
[21]Orfield (1967); Mikell (1942).
[22](1932) 287 US 435 at 448.
[23](1932) 287 US 435 at 457.
[24]Roth (2014); Bronitt (2004).

The range of defences provided by the criminal law may be classified into two broad categories, excuses and justifications.[25] A justification refers to something that the accused was entitled to do, for example, where the accused acted in self-defence. Most defences, however, are classified as excuses, whereby the accused was not entitled to do what he did, but the law may nevertheless excuse (either wholly or partially) the offender. These excuses are recognised as being 'concessions to human frailty' where, for example, the accused does a prohibited act in certain circumstances such as acting under duress, suffering from mental instability, which the law may recognise as being an excusing factor.

The outer limits of the criminal law give rise to pleas in bar of a criminal prosecution, or plea in mitigation of sentence, as a concession to human frailty such as provocation, duress and self-defence. People can be induced to engage in proscribed conduct, whether it be an act or omission, which constitutes a criminal offence especially when the temptation of potential benefit outweighs potential harm (hedonistic calculi). Entrapment may be raised as a procedural defence in a criminal prosecution on the grounds that the accused only committed the offence because of some inducement by a law enforcement officers or someone acting on their behalf, which had, in effect, caused the commission of the offence.

Evidence obtained by entrapment (by law enforcement officers acting as *agent provocateur* acting on law enforcement instructions) to be used against the accused in criminal proceedings may warrant judicial intervention to exclude evidence obtained in breach of the accused's fair trial and due process rights or judicial stay on the proceedings against the accused. The remedy for entrapment is a judicial stay on the criminal proceedings or exclusion of the unlawfully obtained evidence gathered through the undercover operation. It is possible for a criminal trial to proceed notwithstanding the presence of unlawfully obtained evidence, which can be excluded, if there is other compelling evidence of guilt.

Criminal justice systems inevitably differ in their response to successful pleas of entrapment, which include granting an order to stay a prosecution, exclusion of evidence that was procured by the entrapment, substantive defence to criminal liability, a mitigating factor reducing the sentence imposed on conviction for the substantive defence, and to a lesser extent a complete defence. Judicial discretion in the trial and sentencing processes will inevitably vary within and across jurisdictions as to the appropriate response.

General principles in the construction of criminal liability will militate against the availability of a complete defence given that the *actus reus* and *mens rea* elements of criminal offences will not be negatived by entrapment. It follows that entrapment cannot be a complete defence underpinned by legal principles unless the basis of an entrapment defence is on grounds of public policy against criminal justice agencies enabling an abuse of process.[26] Notwithstanding the illogical dilemmas caused by the presence of *actus reus* and *mens rea* elements of offences in cases of alleged entrapment, the United States Supreme Court has nonetheless

[25]Smith (1989).
[26]Choo (2008); Rogers (2008); Jacob (1970).

recognised a substantive defence of entrapment.[27]

United States

Entrapment was first recognised as a substantive defence, which is unique to the Unites States, in federal criminal law by the Supreme Court in *Sorrells v United States*.[28] In *Sherman v United States*,[29] the Supreme Court differentiated undercover investigative methods creating the circumstances for the suspected person to engage in proscribed conduct from active participation where law enforcement officers effectively create crime. Warren CJ opined:

> *"[….]stealth and strategy become as objectionable police methods as the coerced confession and the unlawful search. Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations. However, the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity' of law-enforcement officials."*

In cases where the substantive defence of entrapment is raised by the accused in criminal proceedings a jury will determine the issue. In *Jacobson v United States*,[30] the Supreme Court held that in cases where the evidence suggests the suspected person was predisposed towards committing the type of offence charged, notwithstanding active incitement by undercover law enforcement, this will not per se ground a defence of entrapment. However, if the evidence suggests the suspect was not predisposed to committing the type of offence charged then the plea of entrapment may succeed as a full defence, exculpating the accused from criminal liability.

Canada

The doctrine of entrapment has been judicially developed by the Supreme Court of Canada in a succession of decisions including *R v Amato*[31] and *R v Barnes*.[32] In *R v Mack*,[33] the Supreme Court held that influence exerted by law enforcement officers may be acceptable in circumstances where there is objective evidence of reasonable suspicion the accused participated in the alleged criminal activity. The subject nature of reasonable suspicion was considered in *R v*

[27]Heydon (1973); Sagarin & Macnamara (1972).
[28](1932) 287 US 435.
[29](1957) 356 US 369 at 372.
[30](1992) 503 US 540.
[31][1982] 2 SCR 418
[32][1991] 1 SCR 449
[33][1988] 2 SCR 903.

Ahmad,[34] where the Supreme Court ruled that police cannot rely solely on a tip from an unverified source to establish reasonable suspicion.

Notwithstanding this general approach, the Court in *Shirose and Campbell v R*[35] held a remedy by way of judicial stay of a prosecution as an abuse of process where the accused successfully raises the issue of entrapment on grounds of active participation by law enforcement offices in the commission of the offence may be granted in the appropriate circumstances.

Australia

Covert detection and investigative methods have been part of law enforcement methods in Australia since the nineteenth century.[36] The High Court of Australia has formulated a rule that a judicial stay of criminal proceedings is inappropriate on the basis that entrapment is not a substantive defence to a criminal charge. Nonetheless, in *Nicholas v R*[37] the Court held that trial judges may exercise judicial discretion to exclude evidence of the commission of an offence in circumstances where the commission of the offence was produced by unlawful conduct by law enforcement.

Ridgeway v The Queen[38] is one of the leading cases regarding entrapment as a procedural defence. The accused was charged with the importation of heroin because of a controlled operation between the Australian Federal Police and Malaysian Federal Police. The accused sought a judicial stay on the grounds that the criminal prosecution were an abuse of process, which the High Court held was inappropriate based on the facts of the case. However, in cases where evidence of the involuntary elements of the offence is excluded the proceedings would fail as to proceed would be oppressive, vexatious and unfair. While the Court did not recognise a defence of entrapment, the Court did stipulate that as a matter of public policy, courts of justice should exercise judicial discretion to exclude any evidence against the accused of an offence that was brought about by unlawful conduct of law enforcement officers. It is notable thar purposes for exercising judicial discretion to exclude such evidence is to discourage such unlawful conduct by law enforcement officers and to preserve the integrity of the administration of criminal justice. The right to due process and fair trial seems to be either subsumed into this discretion or subservient to the preservation of the integrity of the criminal justice process.

The judicial explanation of the entrapment concept in *Ridgeway* suggests that it may be feasible to formulate a general rule to encompass cases of alleged entrapment where the accused petitions the court seeks to grant a stay of criminal proceedings on the ground that the offence was either induced or otherwise was the result of active participation by law enforcement officers. Preserving the

[34](2020) SCC 11.
[35](1999) 133 CCC (3d) 257.
[36]Murphy (2021).
[37](1998) 193 CLR 173.
[38](1995) 184 CLR 19.

integrity of the criminal justice process necessitates a judicial stay on criminal prosecutions in cases where the offence was effectively artificially created by the unlawful conduct of law enforcement officers. McHugh J neatly encapsulated the criteria to guide trial judges when determining the issue:

> "*(1) Whether conduct of the law enforcement authorities induced the offence.*
> *(2) Whether, in proffering the inducement, the authorities had reasonable grounds for suspecting that the accused was likely to commit the particular offence or one that was similar to that offence or were acting in the course of a bona fide investigation of offences of a kind similar to that with which the accused has been charged.*
> *(3) Whether, prior to the inducement, the accused had the intention of committing the offence or a similar offence if an opportunity arose.*
> *(4) Whether the offence was induced as the result of persistent importunity, threats, deceit, offers of rewards or other inducements that would not ordinarily be associated with the commission of the offence or a similar offence*."[39]

In the circumstances of the case, the appellant was not entitled to a stay of the proceedings. This judgment clearly negatives any assumption that entrapment is a substantive defence, but rather that successful pleas of entrapment preserve the integrity of the administration of criminal justice. Courts of justice shall not condone illegal and improper conduct by law enforcement officers and the exercise of judicial discretion may deem evidence of entrapment inadmissible. Courts will generally decline to grant a judicial stay of criminal proceedings on the basis that entrapment is not a substantive defence to a criminal charge.

Notwithstanding the absence of a substantive defence of entrapment in Australia, jurisprudence on the issue that in circumstances where an accused would normally not have committed an offence, but for the active participation of law enforcement officers, the sentence imposed on conviction may be reduced by the exercise of judicial discretion. Evidence of entrapment may be considered as a mitigating factor in sentencing, subject to judicial discretion in this regard.

New Zealand

A similar approach to developments in Australia has been formulated by the superior courts in New Zealand whereby unfairly obtained evidence can be excluded on the grounds of entrapment. In a series of decisions including *Fox v Attorney General*,[40] *R v Katipa*,[41] *Police v Lavalle*[42] and *R v Pethig*,[43] the New Zealand superior courts recognise the existence of judicial discretion to exclude obtained evidence that would include the products of entrapment. Trial judges may exercise the courts inherent jurisdiction to exclude evidence of the

[39](1995) 184 CLR 19, para 3.
[40][2002] 3 NZLR 62.
[41][1986] 2 NZLR 121.
[42][1979] 1 NZLR 45.
[43][1977] 1 NZLR 448.

commission of the offence produced by unlawful undercover practices to prevent an abuse of process of the courts by the avoidance of unfairness.

Unfairly obtained evidence not constituting entrapment may be admitted into evidence. This principle is illustrated in *R v Cameron,*[44] where a accused made a statement to an undercover police officer regarding previous offending. The High Court held that because accused had made the statement voluntarily to a person who happened to be a police officer it was not unfair to use it as evidence. Such cases are indicative of the penumbra of the entrapment doctrine and the exercise of judicial discretion in determining whether to exclude evidence that has been unfairly obtained and whether this is evidence of entrapment.

England and Wales

While evidence of entrapment does not constitute a substantive defence, jurisprudence has nonetheless incrementally developed a procedural defence encompassing the exercise of judicial discretion to grant a judicial stay on a prosecution, or the exclusion of evidence that would have an adverse effect on the fairness of criminal proceedings under section 78 of the Police and Criminal Evidence Act 1984.

In *R v Sang*,[45] the House of Lords held that it would be illogical and contra to principles of criminal liability to allow an accused to please a substantive defence of entrapment in circumstances where the accused effectively admits committing the *actus reus* with the required *mens rea* elements of the offence for the purposes of asserting that a law enforcement officer had induced the accused to commit the. Nonetheless, the exercise of judicial discretion in sentencing might consider evidence of entrapment as a mitigating factor in determining the sentence to be imposed. Their Lordships overruled previous decisions that found a judicial discretion to exclude evidence in such circumstances based on the premise that as there was no substantive defence of entrapment there could be no judicial discretion to exclude evidence of an offence allegedly induced by an *agent provocateur* as this would, in the words of Lord Salmon "amount to giving the judge the power of changing or disregarding the law." Their Lordships considered that evidence of entrapment as a mitigating factor in the sentencing process would be sufficient in such cases. Their Lordships did not proceed to consider the possibility of a substantive defence of entrapment nor indeed judicial discretion to exclude evidence obtained because of entrapment.[46] The House of Lords per lord Diplock obstinately considered the law in this reads as being as undisputable that evidence of entrapment does not operate as a substantive defence in the criminal law.[47] The potential criminal liability of law enforcement officers who counsel or procure the commission of the substantive offence is noteworthy in the judgment and is illustrated by the decision of the High Court of Ireland in *Dental Board v*

[44]Unreported, High Court, Gisborne, Venning J, 10 August 2007.
[45][1980] AC 402.
[46]Allen (1982); Allen (1980).
[47][1980] AC 402 at 432.

O'Callaghan.[48]

The analysis of entrapment by the House of Lords in *Sang* did not encompass a consideration of the authority of trial judges to grant a judicial stay of criminal proceedings for abuse of process when law enforcement officers have acted unlawfully. It had been suggested that their Lordships implicitly rejected the availability of this judicial remedy in entrapment cases. Strenuous arguments have been made against adopting this approach limiting the scope of judicial discretion in cases of unfairly obtained evidence undermining the plea of entrapment.[49]

In *R v Looseley*,[50] the House of Lords overturned the intransigent approach of Lord Diplock in *Sang*.[51] The judgment provides a comprehensive analysis of the doctrine concluding that entrapment could be raised as a procedural defence (mitigating factor) by way of judicial discretion to grant a stay on a prosecution or to exclude unlawfully gathered evidence. Their Lordships held that a plea of entrapment would not be sustained provided that the undercover law enforcement officer, or informant under the control and direction of law enforcement, merely provided an 'unexceptional opportunity' to commit the offence to a suspect whom the law enforcement officers had formed reasonable suspicion of being involved in the criminal activity. In circumstances where the investigative method constituted luring or enticing a person to commit an offence, a criminal courts of justice should not proceed with a prosecution for the offence.

It is noteworthy that the abuse of process doctrine had not been fully developed when *Sang* was decided. The House of Lords has since been resolute that this doctrine is the appropriate remedy for a successful plea of entrapment. Their Lordships reasoned this approach preserving the integrity of the courts process, which is directly contra to the much-criticised view of Lord Diplock in *Sang*.[52]

Looseley established the test for trial judges to consider in cases alleging entrapment. The court should consider whether the participation of law enforcement officers has brought the administration of justice into disrepute. It seems therefore that preservation of the integrity of the criminal justice will be considered by the court before any assessment of the fair trial rights of the accused in determining whether a judicial stay on criminal proceedings for an abuse of process, or exclusion of evidence, would be appropriate in any given case.

Lord Hoffmann analysed the legal principles under various themes (causing and providing an opportunity; suspicion and supervision; nature of the criminal offence; predisposition; whether the investigation was active or passive) which may guide trial courts judges in their assessment of whether the conduct of law enforcement officers was so gravely serious as to bring the administration of justice into disrepute. Safeguarding the integrity of the criminal justice process is therefore a key consideration in cases of alleged entrapment. Lord Nicholls stated it would be an abuse of the process of the courts' process for law enforcement

[48][1969] IR 181. See text accompanying fn 58-59.
[49]Orchard (1980).
[50][2001] 1 WLR 2060.
[51]Ashworth (2002a); Ashworth (2002b).
[52]Bronnitt (2002).

agencies, as emanations of the state, to lure suspects into committing offences followed by a prosecution for those offences. The inherent jurisdiction of the courts is to ensure the state, through law enforcement agencies, is not permitted to take this course of action by granting a stay on such purported prosecutions. In sum, their Lordships stipulated that in cases where there is insufficient grounds to grant a stagy of prosecution, judicial discretion may nonetheless be exercised to excluded impugned evidence. It is noteworthy that preventing an abuse of the courts process is regarded as the primary remedy in entrapment cases.

In *R v Syed (Haroon)*,[53] the Court of Appeal approved *Looseley* and further held that there was no material difference between the common law on the doctrine of entrapment and the jurisprudence of the European Court of Human Rights (hereinafter ECtHR). This is significant for the development of the doctrine in criminal justice process and whether the right to a fair trial under Article 6.1 of the European Convention on Human Rights (hereinafter ECHR) will be treated as materially different to the common law on entrapment. The Court found there was no arguable case of entrapment and no arguable case that there was any material difference between English common law and ECtHR jurisprudence such as to cast any doubt on *Looseley* complying with Article 6.1. However, the Court recognised that the burden of proof which the common law places on the accused may be incompatible with Article 6.1.

Superior courts in England and Wales seem to have adopted a balancing test, in the interest of justice, in assessing whether a prosecution should be stayed, or evidence excluded commensurate with the withholding of intelligence from the suspect.[54]

Scotland

The leading judicial authorities in Scotland, a hybrid jurisdiction combining elements of common law tradition and civil law tradition, indicate the remedies available correspond with those in England and are either a plea in bar of trial or a challenge to the admissibility of evidence obtained through entrapment. In *Brown v Her Majesty's Advocate*[55] the High Court of Justiciary stated that entrapment will occur when law enforcement officials cause an offense to be committed which would not have occurred had it not been for their involvement. This line of reasoning was followed in *Calum, Jones and Doyle v Her Majesty's Advocate*[56] where the same court stressed the importance of not over-elaborating or indulging in excessive philosophical analysis stating the courts assessment "is simply whether an unfair trick was played upon the accused whereby he was deceived, pressured, encouraged or induced into committing an offence which he would never otherwise have committed. That is essentially the only test. No doubt resolution will depend on the facts and circumstances of the individual case." This

[53][2019] 1 WLR 2459.
[54]Choo (1999).
[55][2002] SLT 809.
[56][2010] JC 255, para 88.

judicial formulation clearly favoured the avoidance of a theoretical approach to the detriment of a practical approach considering the practicalities and inherent complexities associated with surreptitious undercover investigations.

Ireland

Like most common law jurisdictions, the doctrine of entrapment operates to stay a criminal prosecution for abuse of process or exclusion of evidence obtained because of unlawful undercover operation.[57] The justification for judicial stay of a prosecution for an abuse of process is the obligation on the courts not to allow the integrity of the criminal justice process to be compromised, which might occur if law enforcement agencies were permitted to prosecute an accused for an offence whom they had caused to commit that offence. Accordingly, the accused could avoid prosecution even through technically s/he committed the offence charged.

In the absence of a legislative framework or regulatory guidelines, the nature and scope of the doctrine has been distilled from previous case law. A judicial stay might be ordered to prevent an abuse of the courts process or to protect the due process rights (Constitution of Ireland, Article 38.1) and fair trial rights (ECHR Article 6.1) of the accused. The courts have an inherent jurisdiction to protect the integrity of the criminal justice process and invoke preventative remedies including judicial stays of proceedings.

In *Dental Board v O'Callaghan*,[58] the Irish Dental Board had reason to believe a dental technician was practicing as a dentist without a licence to practice, that is, was providing a service unlawfully. An investigator, posed as a customer, requested the technician to repair a set of dentures, which he duly did. The technician was prosecuted for performing a service that only a licensed dentist was lawfully permitted to do. The District Court believed the law enforcement officer (inspector) was effectively an accomplice to the commission of the offence and because of some uncertainty regarding the admissibility and reliability of accomplice evidence, stated a case to the High Court. Butler J. reviewed English authorities which held that the actions of undercover law enforcement officers in gathering evidence differed from accomplices, the latter having the intention to commit the offence.[59] The Court stated that while undercover investigative techniques of this nature should be used sparingly the necessity to employ such tactics is permissible. It is unclear from the judgment whether this was an endorsement of the doctrine of entrapment, which at the time of this case was not an issue that was raised in criminal proceedings. The Court did allude to the perils of undercover law enforcement officers in circumstances where undercover operations were done in the absence of clear and adequate oversight procedures. In the absence of proper authorisation, undercover law enforcement officers could be exposed to potential criminal liability (accomplice or secondary participant) or

[57]Coffey (2019); Orange (2011); Spencer and Veale-Martin (2005).
[58][1969] IR 181.
[59][1969] IR 181 at 185-187.

disciplinary action if the undercover operation is deemed to have been conducted in breach of the accused's fundamental rights.

The explosion of illicit drugs into Ireland from the 1980's resulted in the widespread use of undercover operations to detect and investigate these offences, particularly undercover police officers posing as customers for illicit drugs. *DPP v Van Onzen and Loopmans*[60] involved the seizure of illegal drugs with a valuation over IR £19 million. The Gardaí (Ireland's National Police and Security Service) came into possession of a mobile phone and a senior officer had reason to believe a vessel offshore would make contact to bring drugs into the country. The undercover officer continued with the drug deal and the appellants were led to believe the undercover officer was their pre-arranged contact person in Ireland. The vessel was boarded by the Irish Navy and detained once it moved into Irish territorial waters. The appellants were arrested and charged for drug trafficking offences to which they raised the issue of entrapment claiming they had been lured into bringing the drugs into the state. The Court of Criminal Appeal *per* O'Flaherty J. dismissed the claim of entrapment.[61] The undercover officers had not done anything outside of the normal acts of purchasing drugs and there was no evidence of luring or entrapment, and the Court of Criminal Appeal affirmed the convictions.

In *People (DPP) v Mbeme*,[62] the Gardaí intercepted a package containing illegal drugs and undercover officers in the guise of postal workers delivered the package to the accused (controlled delivery), who was subsequently intercepted when he attempted to make his departure by car with the package. The Court pf Criminal Appeal cited the House of Lords judgment *Looseley* with approval and Hardiman J. framed the test for entrapment in terms of whether the accused would have behaved in the same manner "offered the opportunity by anybody else or at least anyone he didn't believe to be a policeman."

In *Syon v Hewitt and McTiernan*,[63] the High Court reaffirmed the practice of random test purchases is permissible and necessary in detection of sales of products and services to underage persons and public policy required that children be protected against the dangers of such activities. Murphy J. held there was no substantive defence of entrapment where an underage person is used to make test purchase. Trial judges are confined to the application of the rules of evidence in determining whether evidence obtained be means of a test purchase should be excluded. It is uncertain whether this ruling was confined to the facts of the case dealing with random test purchases or whether the ruling was applicable more generally. This is indicative of the dearth of Irish authority on the parameters of entrapment.

In the *People (DPP) v Mills*,[64] the central issue had been whether the trial judge had erred in allowing evidence to be given by several law enforcement officers who had been engaged in undercover operations involving the purchase of

[60][1996] 2 ILRM 387.
[61][1996] 2 ILRM 387 at 400.
[62]Unreported, Court of Criminal Appeal, 22 February 2008, Hardiman J.
[63][2008] 1 IR 168.
[64][2015] IECA 305.

controlled drugs. In upholding the conviction, the Court of Appeal held that the accused had been provided with no more than an 'unexceptional opportunity' to commit an offence, and he had freely taken advantage of this opportunity in circumstances where it appeared that he would have behaved in the same way if the same opportunity had been offered by anyone else. The law enforcement officers had confined themselves to investigating the suspected criminal activity in an essentially passive manner. The Court of Appeal found that while there was no formal written protocol in place, there were adequate safeguards in that the operation was conducted under the supervision of a detective sergeant. The Court also found that the law enforcement officers had provided the appellant with no more than an 'unexceptional opportunity' to commit an offence, and the accused freely, not being under duress or compulsion, took advantage of the opportunity to commit the offence charged.[65] The accused was not "was not incited, instigated, persuaded, pressured or wheedled into committing a crime."[66] It is noteworthy the Court held that, notwithstanding the criticism of the lack of procedures in respect of undercover purchasing of drugs, there was no infringement of the appellant's fundamental rights protections.[67] A further appeal was dismissed by the Supreme Court.[68] Mr Justice Mahon opined that while the practice of test purchasing drugs had been in existence in Ireland for many years, there was little Irish case law on the issue. A subsequent application to the ECtHR was unanimously deemed inadmissible however, it is noteworthy that the ECtHR reiterated the Court of Criminal Appeal's finding of no formal legislative or regulatory basis for the use of undercover operations.[69] A crucial aspect of undercover investigations was raised by the ECtHR in *Mills*, which suggests the need for a clear and appropriate protocols governing the authorisation and supervision of undercover investigations.

Non-State Actors

Allegations of entrapment are confined to official state involvement and at present does not arise through the intervention by a private individual or organisation such as media/journalist investigations.[70] This lacuna has implications for due process rights of accused persons and will require, at the very least, judicial formulation on the extent of the doctrine or legislative intervention. This is necessitated in accordance with the rule of law and principle of legality in the criminal justice process. Whether the plea should extend to inducement or encouragement by a private person, as opposed to law enforcement agents as emanations of the state, remains uncertain and this ambiguity further adds to the controversial nature and scope of the plea.

In *Council for the Regulation of Health Care Professionals v. General*

[65] White (2017).
[66] [2015] IECA 305, para 66.
[67] [2015] IECA 305, para 65.
[68] *DPP v Mills* [2016] IESC 45.
[69] *Mills v Ireland* App No 50468/16.
[70] Leggett (2018); Dyer (2015).

Medical Council,[71] an undercover journalist attended a doctor's surgery posing as a patient and had asked to be provided with a sickness certificate in circumstances where she wanted to take time off work for leisure activities. The doctor indicated that he would provide a sickness certificate for a fee notwithstanding that the person was in good health. The journalist had surreptitiously recorded the conversation however, the audio was unclear. In subsequent disciplinary proceedings the Fitness to Practise Panel of the General Medical Council decided to grant a stay on the proceedings as an abuse of process based on entrapment. The Panel relied on case law in relation to criminal proceedings. On appeal, the High Court overturned the order staying the proceedings on the basis that the Panel erred in law in not distinguishing civil proceedings from criminal proceedings, entrapment only being applicable to the latter.

A similar line of reasoning was followed by the High Court of Ireland in *McElvaney v Standards in Public Office Commission*.[72] Allegations of the impermissible exercise of entrapment by an undercover reporter was rejected. The Court held that the reporter had not promoted or instigated the commission of an offence and/or the commission of alleged contraventions of planning laws in circumstances where no such offence or contravention would otherwise have taken place.

Public Policy Considerations

At the core of proactive intelligence-led policing is a necessary and proportionate response by criminal justice agencies on public policy grounds to protect society and safeguard against the criminal activities targeted by undercover detection and investigative strategies. However, the difficulties for law enforcement agencies and the courts is in circumstances where such undercover operations occur at the penumbra of crime investigations and more likely to give rise to allegations of entrapment for improperly obtained evidence.

The court should be mindful of the type of criminal activity targeted by undercover investigations; the rationale for the undercover operation and whether there was a clear and sufficient legislative framework or regulatory guidelines for undercover operations; whether the law enforcement involvement was merely a passive investigation gathering evidence or conversely whether there was an inducement or incitement to commit an offence relating to the type of criminal activity targeted; the bona fides of targeting certain individuals or places will also be relevant in the assessment of surrounding circumstances leading to the allegation of entrapment.

The use of entrapment techniques by law enforcement officers involves a practice whereby a law enforcement agent or agent of the State (such as an informer) induces, incites or entices a suspect to commit an offence in circumstances where the person suspected would otherwise have been unlikely or unwilling. Undercover investigative techniques that involve law enforcement agents

[71][2007] 1 WLR 3094.
[72][2019] IEHC 633.

engaging in deceptive practices to detect offenders precipitate concerns about possible entrapment.[73]

Entrapment practices are unlawful as they involve the creation of crime by law enforcement agencies for the purpose of detection and prosecution in circumstances where the commission of the offence would otherwise not have been committed. There is a clear distinction between law enforcement agencies merely providing the opportunity through passive intervention for a suspect to commit an offence and active intervention causing the commission of an offence. Providing an opportunity through passive intervention is permissible whereas actively inciting the commission of an offence is unlawful.

The perceived unfairness of prosecuting and punishing offenders in cases of entrapment may be considered from two complementary perspectives, concerning the culpability of the entrapped accused and concerning the legitimacy of the state through law enforcement agencies to entrap and prosecute offenders that the state has effectively created.[74] Distinguishing between these two perspectives of entrapment offers some clarity on the moral issues in the balance and resolve perceived uncertainty in judicial determinations and legal analyses of the entrapment doctrine.[75]

The extent of proactive intelligence undercover policing detection and investigative methods should be limited to creating the circumstances in which suspect might form the intent to commit an offence where law enforcement officers have reasonable suspicion that such individuals are already engaged or intending to engage in proscribed conduct of a similar nature.[76]

The exclusionary rule of evidence balances competing interests in the criminal justice process. Only lawfully obtained evidence should be admissible to prosecute and punish offenders. Concomitantly the admissibility of evidence obtained unlawfully would constitute an abuse of the courts process and undermine the integrity of the criminal justice process. This balancing exercise requires the court to consider the extent of participation by undercover law enforcement officers, whether the officers merely created the circumstances for the offender to freely commit the offence and whether the accused was predisposed into committing an offence

Evidence obtained though unlawful or improper conduct should be excluded on grounds of public policy however, the criminal trial may still proceed based on other admissible evidence to prove the accused is guilty of the offences charged.

Public policy considerations militate against the use of unlawfully obtained evidence as the basis of conviction and punishment, consummating a miscarriage of justice. Moreover, judicial oversite of propriety by law enforcement officers and surreptitious undercover methods safeguards individual rights and freedoms from the purported oppressive use of the criminal law. Such public policy considerations are reflected in most common law jurisdictions by judicial discretion to exclude evidence rather than by the complexities of a substantive defence of entrapment

[73]Ashworth (1998).
[74]Kauzlarich, Matthews & Miller (2001).
[75]Kim (2020).
[76]Dworkin (1985).

adjudicated on by a jury as is the case in the United States. The general approach employed by the courts in most jurisdictions is to make a determination as to whether unlawfully or unconstitutionally obtained evidence could be admissible based on extraordinary excusing circumstances, the seriousness and prevalence of the offences being investigated are factors to be considered when deciding whether impugned evidence should be excluded.

Judicial discretion may be invoked to exclude impugned evidence where the ostensible probative value is clearly outweighed by the prejudicial effect of such evidence. Judicial discretion to exclude admissible evidence on the basis that such evidence was obtained by improper or unfair means seems less clear. Willingness, or otherwise, to exercise judicial discretion is very much dependant on the personality of the judge, whether influenced by due process or crime control ideologies, and this process inevitably results in a degree of uncertainty of approach and outcome of decisions.[77] It is apposite that members of the judiciary presiding over cases, and lawyers for prosecution and defence will invariably need guidance on the nature and scope of such discretionary remedies where the issue of excluding impugned evidence is raised. More specific guidance is needed in accordance with the rule of law however, each case is considered on its own merits therefore precise guidelines for every conceivable case is unwarranted.

Human Rights Standards

In criminal proceedings the onus rests with the prosecution to establish the guilt of the accused beyond reasonable doubt. It is imperative that in cases where entrapment is raised that judicial discretion, whether to grant a stay on criminal proceedings, exclude evidence, or consider entrapment evidence as a mitigating factor in the sentencing process, complies with national bills of rights. Article 6.1 ECHR enshrines the right to a fair trial, reveals international best practice in a regional context. The right to a fair trial guaranteed by Article 6.1 could be infringed in circumstances where law enforcement authorities had gone beyond a passive investigation of the suspect's criminal activities and had effectively incited or caused the commission of an offence that would not have otherwise been committed by the suspect. The ECtHR has elaborated on the general principles of the entrapment doctrine in a series of judgments including *Matanović v Croatia*,[78] *Furcht v Germany*,[79] and *Vanyan v Russia*.[80] The ECtHR has underscored the importance of authorisation and supervision of performance, and criticised states for their lack of formal guidelines with regards to undercover operations. The ECtHR identified principal factors to be considered as to whether entrapment had occurred. Factors such as whether law enforcement officers were passive or incited criminal activity, whether there was a reasonable suspicion against the suspects, and whether appropriate safeguards, procedures and judicial oversight were in place.

[77]Frank (2017); Quinn (2002).
[78]App No 2742/12.
[79]App No 54648/09.
[80]App No 53203/99.

In *Ramanauskas v Lithuania (No 2),*[81] the ECtHR acknowledged the difficulties for law enforcement in searching for and gathering evidence for the purpose of detecting and investigating criminal offences with the increasing use of undercover agents, informers and covert practices for serious criminal offences. The phrase concerning law enforcement officers confining themselves to investigating criminal activity 'in an essentially passive manner', is part of a sentence in which the contrast drawn is with behaviour which 'exert[s] such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed.' In *Bannikova v Russia,*[82] the phrase was used in contrast with any conduct that may be interpreted as pressure being put on the applicant to commit the offence, such as taking the initiative in contacting the applicant, renewing the offer despite his initial refusal, insistent prompting, raising the price beyond average or appealing to the applicant's compassion by mentioning withdrawal symptoms. However, on account of the risk of police incitement entailed by such techniques, their use must be kept within clear limits. The use of undercover detection and investigative cannot infringe the right to a fair trial. Moreover, in *Khudobin v Russia,*[83] the ECtHR held that in cases where an accused claims that he was incited to commit an offence, the courts must carefully examine the evidence because for criminal trials to be fair within the meaning of Article 6.1 all evidence obtained because of active participation by law enforcement officers must be excluded. This is especially true where the undercover operation took place without a sufficient legal framework or adequate fundamental rights safeguards.

In jurisdictions where there is judicial discretion to exclude evidence of entrapment but there is a criminal prosecution, the accused person may nonetheless be convicted by indirect means, such as circumstantial evidence, rather than by direct reliance on the impugned evidence of entrapment.

Undercover policing methods by their very nature can be nebulous in terms of allegations of entrapment. In less contentious cases the accused is already involved in the criminal activity when the law enforcement officer infiltrates passively. In *Lüdi v Switzerland,*[84] law enforcement offices had formed reasonable suspicion the accused had been involved in procuring and selling illicit drugs. This was a typical case of predisposition by the accused when the undercover officer purchased the illicit drugs.

The test formulated in *Teixeira de Castro v Portugal*[85] is whether law enforcement officers had "exercised an influence such as to incite the commission of the offence." The ECtHR will carefully examine the extent of the influence exercised on the suspect. Two undercover law enforcement officers had been introduced to accused, who did not have a criminal record and was not suspected by them of dealing illicit drugs. The officers asked the accused, who was himself a drug user but not a supplier if he could procure a quantity of heroin. Following a subsequent request by the officers, the accused purchased the drugs from a

[81]App No 55146/14, paras 49-61.
[82]App No 18757/06.
[83]App No 59696/00, paras 133-135.
[84]App No 12433/86.
[85]App No 25829/94 para 38.

supplier and then in turn sold the drugs to the undercover officers. At the second request he bought drugs from another man and sold them to the undercover officers for a profit. A noteworthy aspect of this case is the absence of evidence the accused had previously been involved in dealing illicit drugs. The undercover officers had effectively incited the accused on several occasions to commit the offence and the accused ultimately yielded to the enticement. The ECtHR held that because the accused was not a known or suspected offender before the undercover officers approached him on several occasions with a proposition to procure illicit drugs, this surreptitious method violated the right to a fair trial guaranteed by Article 6.1 for having been entrapped into committing the offence. The inducement by the undercover officers of a suspect who was not predisposed to committing the type of offence resulted in the depravation of a fair trial as the evidence suggested the accused would not have committed the offence but for the unlawful inducement by the officers.

ECtHR jurisprudence clearly stipulate that the exercise of judicial discretion to exclude evidence would be an insufficient safeguard against the entrapment of suspects where the evidence suggests they are not predisposed to committing such offences. Courts of justice are therefore mandated to determine whether the undercover law enforcement officers had reasonable grounds for suspecting the accused had committed similar type offences before a determination is made whether the methods employed by the officers was permissible. It follows that in cases where judicial discretion to exclude evidence is an insufficient response to safeguard the right to a fair trial then judicial discretion to mitigate sentence is also inadequate. Courts of justice are constitutionally bound to perform their judicial functions in a manner that is compatible with ECHR fundamental rights, with the result that legislative intervention and incremental developments of the inherent common law right of the courts to prevent an abuse of process undermining fair trial rights of accused persons have been underpinned by judicial reasoning in entrapment cases.

ECtHR jurisprudence has developed criteria to enable the court to distinguish cases of entrapment from permissible conduct by law enforcement officers in the use of legitimate undercover investigative techniques in criminal investigations. A more structured and coherent scheme to regulate the authorisation and conduct of undercover operations and remedies for abuses of entrapment.[86] A legislative framework or formal guidelines governing the use of undercover operations is required such as in *Syon* where the High Court of Ireland found that a non-statutory protocol that had been adopted by a statutory body was sufficient in this regard.

In *Tchokhonelidze v Georgia*,[87] the ECtHR has formulated substantive and procedural tests to distinguish between entrapment and legitimate undercover operations.[88] The substantive test considers whether the offence would have been committed without the influence exerted by law enforcement officers, that is, whether the investigation was essentially passive. In determining whether the

[86]Ormerod and Roberts (2002).
[87]App No 31536/07.
[88]Gray (2018).

undercover investigation was passive the ECtHR will be mindful of the reasons for the undercover operation, whether the law enforcement officers had reasonable suspicions the accused might be engaged in or was predisposed to criminal activities until the law enforcement officer approached him. Applying the procedural test, the ECtHR will consider procedures employed by domestic courts to deal with the accused's assertion that law enforcement officers incited the commission of the offence and therefore the officers operated as *agent provocateurs* instead of passive investigators. In particular, the capacity of the domestic courts to deal with the accused's complaint in a manner compatible with a fair hearing is key. The Court will consider whether the complaint of incitement constituting entrapment is a substantive defence, or grounds for excluding evidence obtained unlawfully, have similar consequences in terms of the remedy in cases of entrapment. The procedure must be adversarial, thorough, comprehensive and conclusive on the issue of entrapment raise by the accused.

In *Mills v Ireland*,[89] the ECtHR noted that "Ireland was the only country in a comparative survey covering 22 Contracting Parties to the Convention that lacked a formal legislative or regulatory basis for the use of undercover [operations]." The ECtHR reiterated the Court of Criminal Appeal of Ireland finding of inadequate safeguards owing to the absence of a formal system regulating undercover operations. This is a salutary pronouncement for Contracting States to have appropriate stipulations and oversight ensuring undercover surreptitious methods are in accordance with the rule of law. It is notable that a similar line of reasoning had been followed in *Veselov and Others v Russia*.[90] These decisions underscore the necessity of a legislative framework or formal regulations governing undercover operations by law enforcement agencies.

Analysis

In jurisdictions where the perceived pre-disposition of suspects is not the principal criterion by which the acceptability of conduct by law enforcement officers is to be determined, it follows that the suspect's previous criminal record would be of limited value. Criminal justice values will be determinative of whether judicial considerations of entrapment allegations should focus on the impugned methods employed by undercover officers conduct rather than the susceptibility of the accused. In this context, it is notable that the judicial formulation in *Texeira v Portugal* was whether undercover officers had "exercised an influence such as to incite the commission of the offence," whereas in *R v Loosely*, is whether in the circumstances of the case the conduct of undercover law enforcement officers is improper to the extent that the administration of justice is brought into disrepute. In the exercise of judicial discretion, courts of justice must strike a necessary and proportionate balancing between the public interest in the proper investigation, prosecution and punishment of offenders and the individual interest of ensuring courts will not adopt an approach that the end will justify the means.

[89]App No 50468/16, para 12.
[90]App No 23200/10, 24009/07, 556/10, para 51.

Unethical methods employed by law enforcement agencies undermine due process safeguards and the integrity of the criminal justice process.[91] The general approach that conduct amounting to entrapment is ethically unacceptable because intentional temptation engages the suspect in the entrapment has been questioned.[92]

There is a rebuttable presumption in the construction of criminal liability that individuals are autonomous with the capacity to make rational decisions and consequently should be held responsible for their acts or omissions constituting a criminal offence. A corollary of this general principle of liability is that there is unlikely to be a significant difference in terms of criminal liability between the suspect who pleads entrapment and the person who encouraged the commission (omission) of the offence. Attributing culpability may be compounded in circumstances where the person who encouraged the commission (omission) of the offence is not a law enforcement officer but rather was acting under their direction and control.

While the criminal justice response to allegations of entrapment invariably differs across jurisdictions there seems to be commonality in terms of the basis for the 'defence' that seems to be more concerned with the level of active participation by the law enforcement official or person acting under their direction and control effectively creating the offence (state crime) as opposed to reducing the accused persons level of culpability. Preserving the integrity of the criminal justice process through judicial discretion to exclude evidence, grant a stay on the prosecution, or giving due consideration to a successful plea of entrapment in the sentencing process thus seems to be the primary rationale for entrapment whether it be a substantive defence or exercised through judicial discretion. The rule of law in the criminal justice process stipulates that conviction and punishment should not be permitted in circumstances were the offence was effectively committed by the state. It follows that if the law enforcement officer's conduct has compromised the integrity of the criminal justice process, then a judicial stay on a prosecution would seem appropriate.[93] If a successful plea of entrapment is raised, the appropriate remedy would be a judicial stay on the prosecution as opposed to excluding the evidence or in mitigation of sentence. Entrapment effectively creates offences that might not have been committed but for the active participation by law enforcement officers therefore the issue for the courts is not simply one of evidence but the very commission of the offence.

A successful plea of entrapment necessitates an appropriate response by the criminal justice system. At the very least, the law enforcement officer would (presumably) not have complied with internal policies of the criminal justice agency and may have committed a criminal offence under the principles of criminal liability, either an inchoate offences (attempt, conspiracy, incitement) or secondary participation (aid, abet, counsel or procure) the commission of an offence. In most cases of alleged entrapment, the law enforcement officer may be liable for the inchoate offence of incitement, or indeed an accomplice to the commission of the

[91]Dworkin (1987).
[92]Hill, McLeod & Tanyi (2022).
[93]Birch (1994).

substantive criminal offence as having counselled or procured the commission of the substantive offence by the person targeted by the undercover operation.

It is conceivable that jurisdictions will, in due course, enact specific offences proscribing conduct that may constitute entrapment of suspects in circumstances where law enforcement officers incited the commission (or omission) of a criminal offence regardless of whether the completion of the offence (whether by commission or omission) would have been prevented or nullified. The responsibility of national legislatures to ensure undercover investigative strategies are fully compliant with the rule of law (principles of legality, legal certainty and access to justice) will possibly be underscored by future challenges against prosecutions by suspected offenders before national superior courts and regional human rights courts.

It is evident from a series of decisions in Canada, including *Campbell and Shirose v The Queen,*[94] *Barnes v The Queen*[95] and *Mack v The Queen*[96] that the Supreme Court had adopted the approach of the House of Lords in *Looseley*. On the other hand, the High Court of Australia in decisions such as *Nicholas v The Queen*[97] and *Ridgeway v The Queen*[98] have not followed *Looseley* instead placing emphasis judicial discretion to exclude evidence of entrapment.

Comparative jurisprudence on the concept of entrapment reveal a significant divergence of approaches revealing an important divergence that has emerge in mitigating sentence as a judicial response to successful pleas of entrapment. The issue falls between reconciling the rationale of the entrapment doctrine with the rationales of judicial discretion to apply the various remedies available by virtue of the inherent jurisdiction of the courts. The underlying distinction is that between a fair trial, which might in some cases be possible, and the fairness of trying the accused at all because of entrapment.

In Canada and Australia, the exercise of judicial discretion may exclude evidence or grant a judicial stay on the prosecution in circumstances where the accused was induced into committing an offence to commit a crim that he would not have contemplated but for the active participation by undercover law enforcement officers. Moreover, in Australia courts of justice may also exercise judicial discretion to reduce the sentence imposed based on entrapment as a mitigating factor in cases where conduct by law enforcement officers has fallen short of entrapment but nevertheless either contributed to or escalated the commission of an offence by the accused. In contrast, such judicial discretion as pertains in Australia does not pertain in Canada regardless of whether the impugned conduct of law enforcement officers suggests doubt over the culpability of the accused.[99]

Judicial discretion to preserve the integrity of the criminal justice process is a possible legal basis for resolving allegations of entrapment. It is noteworthy that in

[94](1999) 171 DLR (4th) 193.
[95][1991] 1 SCR 149.
[96][1988] 2 SCR 903.
[97](1998) 193 CLR 173.
[98](1995) 184 CLR 19.
[99]Murphy & Anderson (2014).

Amato v R[100] the Supreme Court of Canada opined that the criminal justice process should demand obeyance of the law by law enforcement officers who enforce the law.[101] Active participation in the detection and investigation of suspects would undermine the integrity of the process especially of criminal courts of justice admitted tainted tendered by the prosecution. It is imperative that the criminal justice process continues to be underpinned by moral authority and legitimacy in accordance with the rule of law.

Codes of practice governing the authorisation and supervision of undercover operations pertain in many common law accusatorial jurisdictions while in some European civil law inquisitorial jurisdictions provision is made for the judicial authorisation of such operations.

Conclusion

Consensual crime is not easily identified as it is unlikely that participants would report the offence to law enforcement authorities. The entrapment doctrine not only requires an assessment of whether the conduct of law enforcement was impermissible, unlawful but also whether the response by the criminal justice process is appropriate. The nature and scope of the plea has developed incrementally, and the courts have not definitely delineated the contours of the plea in accordance with the rule of law and in particular the principles of legal certainty and access to justice. Apart from the United States, the approach to dealing with allegations entrapment in most common law jurisdictions essentially limited to evidential and procedural judicial discretionary remedies may not adequately safeguard the fundamental right to due process and a fair criminal trial.

Law enforcement officers necessarily employ undercover investigative practices. The role of the courts in reviewing allegations of entrapment is to balance competing interests. The public interest in the detection, investigation and prevention of crime sometimes yields to the practicalities of the means necessarily employed during undercover operations, which must be balanced with fundamental constitutional due process and ECHR fair trial rights. There must be clear, adequate and formal oversight mechanisms delimiting undercover operations to safeguard the integrity of the criminal justice process and the rule of law. It is a truism that ends do not justify the means employed in the investigation of crime and apprehension of suspects. Moreover, the complexities associated with the investigation of consensual crimes can has the potential to blur the line between creating the opportunity (legitimate infiltration) and causing (incitement) the commission of an offence.

An identifiable Code of Practice regulating the authorisation and conduct of undercover detection and investigative methods in full compliance with the rule of law is essential to safeguarding the due process and fair trial rights of suspects. Balancing the public interest in the investigation and prosecution of offenders

[100](1982) 69 CCC (2d) 31.
[101]Joh (2009).

must be squarely balanced with the individual due process and fair trial rights of accused persons.

References

Allen, D. (1980). 'Entrapment and exclusion of evidence' in *Modern Law Review* 43:450-456.

Allen, M. (1982). 'Judicial discretion and the exclusion of evidence in entrapment situations in light of the House of Lords decision in *R v Sang*' in *Northern Ireland Legal Quarterly* 33:105-131.

Allen, R.J., Luttrell, M. & A. Kreeger (1999). 'Clarifying entrapment' in *Journal of Criminal Law and Criminology* 89:407-443.

Ashworth, A. (1978). 'Entrapment' in *Criminal Law Review* 2002:137-140.

Ashworth, A. (1998). 'Should the police be allowed to use deceptive practices?' in *Law Quarterly Review* 114:108-140.

Ashworth, A. (2000). 'Testing fidelity to legal values: official involvement and criminal justice' in *Modern Law Review* 63:633-659.

Ashworth, A. (2002a). 'Entrapment and criminal justice' in *Oxford University Commonwealth Law Journal* 2:125-132.

Ashworth, A. (2002b). 'Re-drawing the boundaries of entrapment' in *Criminal Law Review* 2002:161-179.

Birch, D.J. (1994). 'Excluding evidence from entrapment: what is a fair cop?' in *Current Legal Problems* 47:73-99.

Bronitt, S. (2002). 'Sang is dead, looseley speaking' in *Singapore Journal of Legal Studies* 2002(1):374-387.

Bronitt, S. (2004). 'The law in undercover policing: a comparative study of entrapment and covert interviewing in Australia, Canada and Europe' in *Common Law World Review* 33:35-80.

Choo, A.L.T. (2008). *Abuse of Process and Judicial Stays of Criminal Proceedings*. 2nd ed. Oxford: Oxford University Press.

Choo, A.L.T. (1999). 'The legal aspects of undercover police operations in England and Wales' in *International Journal of Police Science & Management* 2:144-155.

Coffey, G. (2019). 'Entrapment in the criminal law: reassessing the contours of the procedural defence' in *Irish Criminal Law Journal* 29:68-82.

DeFeo, M.A. (1967). 'Entrapment as defense to criminal responsibility: its
history, theory and application' in *University of San Francisco Law Review* 1:243-276

Dworkin, G. (1985). 'The serpent beguiled me and I did eat: entrapment and the creation of crime' in *Law and Philosophy* 4:17-39.

Dworkin, G. (1987). 'Ethics and entrapment' in *Journal of Social Issues* 43: 57-59.

Dyer, A. (2015). 'The problem of media entrapment' in *Criminal Law Review* 2015:311-331.

Field, A. (2019). 'Ethics and entrapment: understanding counterterrorism stings' in *Terrorism and Political Violence* 31:260-276.

Frank, J. (2017). 'The judging process and the judge's personality' in *Law and the Modern Mind* London: Routledge.

Friedmann, W. (1961). 'Legal philosophy and judicial lawmaking' in *Columbia Law Review* 61:821-845.

Friedmann, W. (1966). 'Limits of judicial lawmaking and prospective overruling' in *Modern Law Review* 29: 593-607.

Gray, C. (2018). 'Police entrapment and undercover work' in *European Human Rights Law Review* 5:529-532.
Heydon, J.D. (1973). 'The problems of entrapment' in *Cambridge Law Journal* 32:268-286.
Hill, D.J., McLeod, S.K. & A. Tanyi (2018). 'The concept of entrapment' in *Criminal Law and Philosophy* 12:539-554.
Hill, D.J., McLeod, S.K. & Tanyi, A. (2022). 'Entrapment, temptation and virtue testing' in *Philosophical Studies* 179:2429-2447.
Ho, H. (2011). 'State entrapment' in *Legal Studies* 31:71-95.
Jacob, I.H. (1970). 'The inherent jurisdiction of the court' in *Current Legal Problems* 23:23-52.
Joh, E.E. (2009). 'Breaking the law to enforce it: undercover police participation in crime' in *Stanford Law Review* 62:155-198.
Kauzlarich, D., Matthews, R.A. & W.J. Miller (2001). 'Toward a victimology of state crime' in *Critical Criminology* 10:173-194.
Leggett, Z. (2018). 'When will the conduct of non-state actors give rise to entrapment?' in *Journal of Criminal Law* 82:434-437.
Marcus, P. (1986). 'The development of entrapment law' in *Wayne Law Review* 33:5-37.
Mikell, W.E. (1942). 'The doctrine of entrapment in the federal courts' in *University of Pennsylvania Law Review and American Law Register* 90:245-265.
Murphy, B. (2021). *Regulating Undercover Law Enforcement: The Australian Experience*. Singapore: Springer.
Murphy, B. & J. Anderson (2014). 'After the serpent beguiled me: entrapment and sentencing in Australia and Canada' in *Queen's Law Journal*, 39:621-654.
Orchard, G.F. (1980). 'Unfairly obtained evidence and entrapment' in *New Zealand Law Journal* 1980:203-208.
Orange, G. (2011). 'Deception and entrapment' in *Bar Review* 16:120-123.
Orfield, L.B. (1967). 'The defense of entrapment in the federal courts' in *Duke Law Journal* 39:39-71.
Ormerod, D. & A. Roberts (2002). 'The trouble with Teixeira: developing principled approach to entrapment' in *International Journal of Evidence & Proof* 6:38-61.
Quinn, G. (2002). 'The judging process and the personality of the judge: the contribution of Jerome Frank' in *Judicial Studies Institute Journal* 2:141-162.
Rogers, J. (2008). 'The boundaries of abuse of process in criminal trials' in *Current Legal Probems* 61:289-323.
Roth, J.A. (2014). 'The anomaly of entrapment' in *Washington University Law Review* 91:979-1034.
Sagarin A. & D. Donal Macnamara (1972). 'The problem of entrapment' in *Crime Law and Justice Annual* 1:358-380.
Shafer J. & W.J. Sheridan (1970). 'The defence of entrapment' in *Osgoode Hall Law Journal* 8:277-299.
Smith, A.T.H. (1984). 'Judicial lawmaking in the criminal law' in *Law Quarterly Review* 100:46-76.
Smith, J.C. (1989). *Justification and Excuse in the Criminal Law*. London: Stevens.
Spencer, K. & Ó. Veale-Martin (2005). 'Fashioning an Irish entrapment doctrine based on international experience' in *Irish Criminal Law Journal* 15:2-8.
White, T. (2017). 'Director of Public Prosecutions v Robert Mills' in *Irish Criminal Law Journal* 27:31-32.
Williams, G. (1961). *Criminal Law: The General Part*. 2nd ed. London: Stevens.

Cases

Australia

Nicholas v R (1998) 193 CLR 173
Ridgeway v The Queen (1995) 184 CLR 19

Canada

R v Ahmad (2020) SCC 11
R v Amato [1982] 2 SCR 418
R v Barnes [1991] 1 SCR 449
R v Mack [1988] 2 SCR 903
Shirose and Campbell v R (1999) 133 CCC (3d) 257

Ireland

Dental Board v O'Callaghan [1969] IR 181
DPP v Van Onzen and Loopmans [1996] 2 ILRM 387
McElvaney v Standards in Public Office Commission [2019] IEHC 633
People (DPP) v Mills [2015] IECA 305
People (DPP) v Mbeme, Court of Criminal Appeal, 22 February 2008, Hardiman, J. (unreported)
Syon v Hewitt and McTiernan [2008] 1 IR 168

New Zealand

Fox v Attorney General [2002] 3 NZLR 62
Police v Lavalle [1979] 1 NZLR 45
R v Katipa [1986] 2 NZLR 121
R v Pethig [1977] 1 NZLR 448

United Kingdom

England and Wales

Brannan v Peak [1948] 1 KB 68
Council for the Regulation of Health Care Professionals v General Medical Council [2007] 1 WLR 3094
Nottingham City Council v Amin [2000] 1 WLR 1071
R v Looseley [2001] 1 WLR 2060
R v Sang [1980] AC 402
R v Syed (Haroon) [2019] 1 WLR 2459
R v Titley (1880) 14 Cox Crim. Cas. 502
Sneddon v Stevenson [1967] 1 WLR 1051

Northern Ireland

R v Bellingham [2003] NICC 2

Scotland

Blaikie v Linton (1880) 18 Scot Law Rep 583
Brown v Her Majesty's Advocate [2002] SLT 809
Jones and Doyle v Her Majesty's Advocate [2010] JC 255

United States

Casey v. United States (1928) 276 US 423
Grimm v. United States (1895) 156 US 604
Jacobson v. United States (1992) 503 US 540
People v. Braisted (1899) 13 Colo App 532
Sherman v. United States (1957) 356 US 369
Sorrels v. United States (1932) 287 US 435

European Court of Human Rights

Bannikova v Russia App No 18757/06 (4 November 2010).
Furcht v Germany App No 54648/09 (23 October 2014).
Khudobin v Russia App No 59696/00 (26 October 2006).
Lüdi v Switzerland App No 12433/86 (15 June 1992).
Matanović v Croatia App No 2742/12 (04 April 2017).
Mills v Ireland App No 50468/16 (10 October 2017).
Ramanauskas v Lithuania (No 2) App No 55146/14 (20 February 2018).

Tchokhonelidze v Georgia App No 31536/07 (28 June 2018).
Teixeira de Castro v Portugal App No 25829/94 (09 June 1998).
Vanyan v Russia App No 53203/99 (15 December 2005).
Veselov and Others v Russia App Nos 23200/10, 24009/07, 556/10 (02 October 2012).

Athens Journal of Law - Volume 9, Issue 1, January 2023 – Pages 89-102

The Importance and Reality of having an Ombudsman in Bangladesh

*By Mohammad Abdul Hannan**

The fundamental aim of a country like Bangladeshis to realise through the democratic process a socialist society, free from exploitation- society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social will be secured for all citizens. The Office of an Ombudsman is not a basic institution of a democratic government; but it is very important to keep democracy intact and effective. Article 77 of the Constitution of Bangladesh is inserted therein in conformity with this statement of the Preamble to attain the same purpose.

Keywords: *Reality; Ombudsman; Constitutional Institution; Unwillingness of Bureaucrats*

Introduction

A good system of administration, in the ultimate analysis, has to be responsible and responsive to the people. But history demonstrates that more frequently, the impersonal bureaucratic system advertently or inadvertently tries to overwhelm the 'little man'. The proliferation of administrative faults touches the rights of a person and personal property. This research has generated the concept of 'Ombudsman' which in terms of utility means a 'watchdog of the administration' or 'the protector of the little man'.[1] As stated in the Preamble of the Constitution of the People's Republic of Bangladesh[2] the fundamental aim of the state is to realise through the democratic process a socialist society, free from exploitation- society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social will be secured for all citizens. The Office of an Ombudsman is not a basic institution of a democratic government; but it is very important to keep democracy intact and effective. Article 77 of the Constitution is inserted therein in conformity with this statement of the Preamble to attain the same purpose. The concepts of Anti-corruption Commission, the office of an ombudsman etc. are the results of a study by political scientists and scholars.

*LL.B.(Hons.), LL.M, Ph.D. Professor, Department of Law, University of Rajshahi, Rajshahi, Bangladesh. Email: mahannan.law@ru.ac.bd

[1]Massey (1999) at 458.

[2]Hereinafter referred to as *The Constitution*

Concept of Ombudsman

The figure of ombudsman, with its current characteristics, owes its origin from Sweden; however, its roots may be found '13 ancient history. For instance, during the Abbasid era, complaint management organisations known as "Diwan Al Mazalim" were founded inside the Islamic judicial system. These organisations are believed to have been run by a senior judge. A comparable role was fulfilled by the "Judge of Judges," or "Quadi al Quadat," when Turkey was in power. In fact, it has been said that the Swedish King Charles XII had the notion to create an ombudsman while he was staying with the Sultan of Turkey for a number of years in the early 1700s after being defeated by the Russian army in Poltava.[3]

The Swedish term "ombuds" is the source of the word "ombudsman". In Swedish language it commonly denotes a person who acts as a spokesmen or representative of another person or persons.[4] In short, the characteristics of the institution of Ombudsman are that it is a public office, separate from Parliament and the Courts, which is responsible for monitoring the actions of public authorities and dealing with complaints and problems encountered by the citizens of the country in their contact with, and treatment by those authorities.[5]

The International Bar Association's Ombudsman Committee has proposed the statement that

> *"An ombudsman is an office provided for by the Constitution or by the action of the Legislature or Parliament and headed by an independent, high level public official who is responsible to the legislature or Parliament, who receives complaints from aggrieved person against governmental agencies, officials, and employees or who acts on his own motion and who has the power to investigate, recommend, corrective action and issue reports".*[6]

An Ombudsman's effective derives entirely from his power to focus public and parliamentary attention upon citizens, grievances and concerns. But publicity based on impartial inquiry is a powerful lever.[7] The review of the Ombudsman Institution in most of the countries in which it operates successfully reveals that it has, in general, the following features:

Independence

Independence from the executive should be guaranteed in the Ombudsman system whether it is appointed by the legislator or the executive.

Power of Investigation

[3]Sultana (2007).
[4]Saxena (1987) at 41.
[5]Barnes (1998) at 107.
[6]Frank (1975) at 55.
[7]Wade & Forsyth (1994) at 81.

Ombudsman should be empowered to have access to the required information, evidence and documents to reach a decision. It should be given the power to examine both the official bills and documents for investigation.

Power of Recommendation

In general, the Ombudsman lacks enforcement powers and can only offer suggestions to the offending authority in order to correct injustices. However, it is recognised that recommendations based on a thorough investigation of all facts, meticulous evaluation of all factors, and detailed assessments of all concerns may give the organisation with perfect moral strength.

Annual Report

The procedure to lodge complaint with the Ombudsman office must be simple and easy. Moreover, the complaint procedure should be less time consuming to make it a credible institution.

Flexibility

The Ombudsman's office needs to be adaptable so that it can do a variety of tasks. Investigating corruption and administrative irregularities should take advantage of the much-needed administrative degradation.

Personnel

A man of integrity and outstanding merit should be appointed as an Ombudsman. He should be able to confront social injustice, wide political and bureaucratic corruption, and irregularities in public sectors.

Adequate Resource

It should have adequate funding, sufficient staffing and required facilities for its smooth functioning.

Jurisdiction

Another necessary requirement is that the Ombudsman's jurisdiction be clearly defined in order to prevent effort duplication. The basic purpose of this system is to protect the human rights of the citizens. The ombudsman offers the citizen a knowledgeable and unbiased person who responds swiftly and without the need for legal advice and suggests corrective action. Thus, ombudsman is known as 'Citizen's defender', 'Complaint Commissioner' or as an 'independent critic of the administration'.

According to Gerad E Laiden, the device is "the institutional public conscience, the essence, of what government ought to do".[8]

Importance of the Office of an Ombudsman

Government officials' misuse of authority, poor management, nepotism, and corruption have all risen along with the complexity of governance. Every contemporary democratic state offers the standard constitutional and legal frameworks necessary to combat these ills. These include the judicial system, the legislative branch, different government-established inquiry panels, etc:

A. The administration can also be sued in ordinary courts for damages in respect of acts, omissions or acts committed by it. They are also empowered to challenge administrative decisions in certain circumstances. But it is becoming more apparent that –

(1) The court remedy is expensive, intricate, time-consuming, and difficult for regular people to access, and

(2) There are also certain aspects of maladministration and illegal practices which are out of reach of the courts.[9]

B. Legislation is the forum for investigating the grievances of citizens and the evils of modern public administration. Parliament can also exercise control over various departments of the government through committees. But, the control by parliament frequently proves illusory in many countries, particularly where cabinet forms of government prevail. Party interests frequently work to undermine impartiality, which is the most crucial component in every investigation, as a result of the cabinet frequently regulating and being governed by the members of its own party in parliament.[10]

C. Every modern state government appoints various types of commissions of enquiry 'flies'. These commissions often hold enquiries into executive excesses, negligence on the part of public functionaries and government departments. The chief complaints against them are that their reports are not made public and are consigned to cold storage. Considering the drawbacks of the conventional methods of investigation into various acts and omissions of

[8]Kabir (1998) at 98.
[9]Law Commission (2000).
[10]Ibid.

public functionaries an institution called the Ombudsman has therefore been brought into existence in a number of countries.[11]

The following characteristics of the Ombudsman system stand out based on literature research and actual experiences in different nations:

The Ombudsman is an independent and non-partisan institution established usually by the Parliament. It may also be established by the president, or an institutional authority (e.g., Board of Directors/Trustees if it is private or non-government organisation). The Ombudsman receives complaints from aggrieved persons against concerned institutions, departments, officials and employees. The presence of an effective and resourceful Ombudsman has a moral and psychological value for all parties. The citizens are confident as there is a watchdog that serves as deterrent to misuse of power by the bureaucracy. The officials, on the other hand, are assured that trivial and frivolous complains without proper evidence will be dropped and no undue harassment of legal and administrative procedures will be applicable.[12]

In the present scheme of Bangladesh government, the Ministers play the most vital role in shaping administrative policies and in implementing those policies. They are also ultimately responsible to the Parliament for al actions of their respective ministries and departments. As such, their actions, decisions etc. should also be subject to investigation by the Ombudsman. It has already been observed that one of the main maladies of public administration—corruption in public life-has been kept out of scrutiny by the Ombudsman in the Act.[13]

In Bangladesh, the Anti-Corruption Commission (ACC) is not an alternative to the ombudsman since only abuse of power for financial or other material gain comes under the jurisdiction of ACC. Jurisdiction of different guardian institutions needs to be distinctly identified to avoid overlapping and complementary role between the Ombudsman and other pillars of national integrity system should be explored further.

Constitutional Provisions of Ombudsman

Article 77: Ombudsman

(1) Parliament May, by Law, Provide for the Establishment of the Office of Ombudsman

With the word ‘may’ it is the discretionary power of the Parliament of Bangladesh (House of the Nation) to establish the office of the Ombudsman. This is an enabling provision that empowers the Parliament to do so and at the same time debars any other State organ to create such an office even for a very limited purpose. Clause (1) of Article 77 makes it clear that only an Act of Parliament may establish the office of the Ombudsman. Here, the word ‘law’ means only an

[11]Ibid.
[12]Iftekharuzzaman (2007).
[13]Law Commission (2000).

Act of Parliament. The word 'law' does not mean ordinance, order, rule regulation, bye law, notification or another legal instilment as defined in Article 152 but an Act stated therein. Reading the word 'law' with reference of the word 'Parliament' makes it crystal.

(2) The Ombudsman will exercise whatever authority and carry out whatever duties the Parliament may, by law, specify, including the authority to look into any action made by a Ministry, a public official, or a statutory public authority

Clause (2) of Article 77 of the Constitution embodies the fundamental law regarding the powers and functions of the person appointed to the office established according to complying with the provision of clause(l) of this Article. The Ombudsman so appointed can exercise such powers and has to perform such functions the Parliament determines. How the Parliament will determine that? The Parliament will communicate the same by way of an Act of parliament. The Parliament is given discretion as to what powers and functions are to be fixed for the Ombudsman. The word 'may' used in this clause again indicates the discretion of the authority. But by adding "including the power to investigate any action taken..." means that though the Parliament has discretion in granting powers to the Ombudsman it should give him the power to make investigation, because it is the principal task of an Ombudsman. Without the power to investigate the very purpose of the establishment of the office of an Ombudsman can never be attained.

(3) An annual report detailing how the ombudsman carried out his duties must be prepared and presented to Parliament

Clause (3) of Article 77 of the Constitution of the People's Republic of Bangladesh imposes two types of duty on the Ombudsman. The report will be considered by the legislature of Bangladesh and basing on the consideration so made the legislature will make further determination. Annual reports are of considerable importance because they help publicise the operations of the office to policy makers, legislator and the public. Here, the accountability of the Ombudsman is also ensured. But if the Ombudsman is appointed on political consideration (as existing law provides such an opportunity) than this mechanism of his accountability will not work properly.

Analysing and Evaluating the Provisions of the Ombudsman Act, 1980

Appointment, Qualifications and Tenure of Office of the Ombudsman

Section 3(1) of the Ombudsman Act, 1980 provides for the establishment of the Ombudsman where it is stated that there shall be an Ombudsman who shall be appointed by the president on the recommendation of parliament So it seems to me that what was an discretion of the Parliament to provide for the provision of an

office of an Ombudsman, by this time of 1980 becomes an obligation on the parliament in the sense that provision for the establishment of that office is made and section 3(1) of the Ombudsman Act makes it must that an Ombudsman must be in existent. But the 'shall' used in section 3(2) of the same Act maybe of two interpretations. First, parliament has to recommend for appointment as Ombudsman. Second, the parliament will have to recommend a person who has to be of known legal or administrative ability and conspicuous integrity. To me to mean the second interpretation the provision of section 3(2) could be as hereunder.

There are two possible interpretations, one of which is that the Parliament decides who should be appointed and the other is that they must be of known legal or administrative ability and conspicuous integrity. And as this condition must be shall be fulfilled the provision of section 3(1) of the Ombudsman Act shall be obliged. So, the obligation section 3(1) depends upon the section 3(2) is upon the fulfilment of the duty of Parliament. So, the interpretation of section 3(2) is very much sweet to the provision of section 3(1).

While making an analysis and evaluation of this provision considering the political reality of Bangladesh my sense considers some amendments in the appointment precedes of an Ombudsman for Bangladesh. The appointment of an Ombudsman by the president on the recommendation of the Parliament seems to be logical and rational. But the rising political intolerance between the parties and growing tendency of political appointment in the administration makes me think that even in the office the Ombudsman a person will be appointed according to the will of the party in power .It is very much possible for the political party in power to unilaterally appoint the Ombudsman. As a result, the very purpose of the establishment of this office will be destroyed as other tools for ensuring accountability in the public administration. To avoid this consequence, the appointment should be made by a parliament committee including members of both the treasury bench and the opposition group. The Ombudsman must have legal as well as administration expertise and experience. The word 'or' in section 3(2) should be replaced by the word 'and'.[14]

According to sub-section (1) of section 4 of the Ombudsman Act, 1980 the tenure of office of an Ombudsman is three years. Bangladesh Parliament passed the Ombudsman Act in 2002, but an earlier decision of making the Act updated was ignored. Till date the office of the ombudsman has not come into being. Bangladesh has established a nationwide, sector-specific Tax Ombudsman office in response to developing needs and the success of other nations. In Bangladesh there is also ombudsman in the private sector: BRAC and Diabetic Association of Bangladesh are examples.[15]

Immunities

According to section 16 of the ombudsman Act. 1980, no suit, prosecution shall lie against the ombudsman of any member of his Staff in respect of anything

[14]Kabir (1998) at 104.
[15]Sultana (2007).

which is done or intended to be done in good faith. The only condition is that the act is intended to be done to done to exercise any power or to perform an)' functions under this Act. And the decision of the ombudsman shall be final. In no court shall any process, decision, or report of the Ombudsman be contested, examined, reversed, or questioned. So, he will not be sued nor will his acts be challenged. Here, if we consider again about the immunities of the Ombudsman and his, officials independent of the present provision, we will have to decide these following two questions foreseeing the consequences. First, (1) Should any suit, prosecution or other legal proceeding lie against an Ombudsman Of any member of his staff in respect of anything done by them? And (2) Should there be any provision to challenge any proceeding, decision or report of the Ombudsman? If we decide the first question in affirmative then because of the wicked bureaucrats, and their *malafide* objections and obstacles the office of the Ombudsman will be unable to work. If we decide in negative staff of the Ombudsman will be so immune that just using the term 'good faith' they will be able to do many unexpected things, then we are bound toy one more time that if human beings are wicked superb laws will not protect rights of any beings. As it is expected that an Ombudsman should be of conspicuous integrity, but to dream such a dream the appointment procedure will have to be reconsidered. In answering the next question similar type considerations will come forward.

Functions

Investigation on a Complaint. Information

The ombudsman may investigate any action taken by a ministry, statutory public authority, or a public officer on a complaint made to him by any person: The Ombudsman may also proceed *suo moto*, on information about such action, received by him from any person of source. An Ombudsman is empowered to investigate any action of any public officer. The presiding officers of courts are the exception to this general principle. There is a pre-requisite of conducting investigation - that is forwarding a copy of the complaint, or a statement setting out the grounds as the case may, to the Ministry, statuary public authority or the public officer concerned.

Preparation of the Report

The Ombudsman will make a recommendation to the competent authority concerned that the unfairness be corrected. The report may include a time limit as well as the way or strategy of fixing the problem. The Ombudsman has full discretion to recommend such legal, departmental and disciplinary action as he deems fit (section 9). So, the functions of the Ombudsman seem to be right enough to fulfil the purpose of the Act. But the functional jurisdiction of the Ombudsman is not wide enough to cover the acts of local authority or some other

similar institutions[16] As stated in section 8 sub-section (5) of the Act, no person is authorised to furnish any such information to answer any such question or to produce so much of any document as might prejudice the security or defence or international relations of Bangladesh, or the investigation or detection of any crime. No one can be forced to answer any such question, or produce any such document under the terms of this Act. For the purpose stated here, a certificate issued by a Secretary to the Government, certifying that any information, answer, or portion of a document is of such a nature, shall be conclusive and binding[17].

The Secretary to the Government should not be the final authority on the matter of secrecy of information to be given to the Ombudsman. Terms like 'security of the state' etc. should be precisely defined so that no one can take advantage of such vagueness. Such inconsistent provision of the Ombudsman act, 1920 must be repealed before establishing the office of the Ombudsman.

Powers of an Ombudsman

In order to hold an investigation, the Ombudsman can require any public officer or any other person to furnish information or produce any document or to answer any document. It is already stated. And for the purposes of any such investigation, he shall have all the powers of a Civil Court while trying a case in accordance with the Code of Civil Procedure, 1908, in respect to the following matters, namely:

(a) summoning and enforcing the attendance of any person and questioning him under oath;
(b) mandating the search for and production of any document;
(c) requires affidavit-based evidence;
(d) requesting a copy of any public record from a court or office;
(e) appointing commissions to look over documents or witnesses;
(f) such additional items as may be required.[18]

Sub-section 3 of section 8 has been a good provision in the sense that it will deter misleading the Ombudsman by any servant of the republic or any other person by providing false documents, information and answers. This provision says that any proceeding before the Ombudsman shall be deemed to be a judicial proceeding within the meaning of section 193 of the penal code (XLV of 1860). So, for providing false evidence the Ombudsman has been empowered to punish the offender with imprisonment of either description which may extent to seven years and to fine him indefinitely.[19]

For the purpose of investigation, the Ombudsman has discretionary power to enter upon and inspect any premises and search and seize such books or documents

[16]Kabir (1998) at 102.
[17]Ibid, at 103.
[18]The Ombudsman Act, 1980, section 8.
[19]The Penal Code, 1860, section 193.

as he deems necessary, the provisions of sections 102 and 103 of the Code of Criminal Procedure, 1898 shall, so far as may be, apply to regulate it.

According any person being in charge of any such place is bound to allow him free ingress and to afford all reasonable facilities for a search therein.[20] If the Ombudsman does not have free ingress, he has got the power to break open any outer or inner door or window of any house or place. And he has got the power to search subject to the conditions stated in section 103 of the Code of Criminal Procedure of 1898. The Ombudsman has got another provision to under section 13 of the Ombudsman Act to convict any person who obstructs him in the performance of his functions without lawful excuse. To clean the path of the Ombudsman so that he may work without disturbance this provision has been included.

Staff of Ombudsman

Officers and other employees are to be appointed by the Ombudsman himself The Ombudsman can define the categories of the officers and employers. With the consent of the Government the Ombudsman many utilise the service of any officer, employee or agency of the Government.

Jurisdiction

Under this act the Ombudsman many investigate any action of a ministry, a statutory public authority or a public officer. Here, the provision is good enough to be understood by expert's jurisdiction of the Ombudsman but for the understanding of the general public specific schedule is needed which will include the list of agencies or departments over which the Ombudsman will have jurisdiction to investigate.

Empirical Study

A Questionnaire Survey on Knowledge of Professionals on Legal Standpoint of the Office of an Ombudsman and Mental Urgency to Have an Ombudsman for Bangladesh

This Questionnaire Survey I conducted was designed to recollect the knowledge of our country's highly educated class on the current legal status of the office of an ombudsman, to determine whether they have very common information in their knowledge, and to comprehend their urgency in having an ombudsman for Bangladesh. The investigation was carried out using field research and the questionnaire survey method. The following section presents the findings. It may be emphasised that the presentation here is based entirely on interviews with the respondents (100 respondents) in the sample and does not question the correctness of their views.

[20]The Code of Criminal Code, 1898, section 102.

Satisfaction with The Present State Of Transparency And Accountability Of The Ministry, Public officers and all other Statutory Public Authorities

The respondents' level of satisfaction with the present state of transparency and accountability of the Ministry, public officers and all other statutory public authorities is tested and findings are given below:

Respondents who express satisfaction: 21%
Respondents who express dissatisfaction: 79%

Knowledge about the Existence of Constitutional Provision regarding the Establishment of the Office of an Ombudsman

The respondents' knowledge about the existence of constitutional provision regarding the establishment of the office of an Ombudsman is tested and findings are given below:

Respondents, aware of the provision: 100%
Respondents not aware of the provision: 0%

Knowledge about the Existence Binding Law Upon the State to Appoint an Ombudsman

Respondents' knowledge about the existence binding law upon the State to appoint an Ombudsman has been tested asking them that whether they know the Ombudsman Act, 1980 makes it binding for the President to appoint an Ombudsman for Bangladesh. The findings are shown hereunder:

Respondents, aware of the imperative provision: 43%
Respondents, not aware of the Imperative provision: 57%

Knowledge that until Today the Office of Ombudsman has not been established

Inquiry on how many of the respondents know that till today there has been no Ombudsman for Bangladesh. The results are as below:

Respondents, aware of not having an Ombudsman: 100%
Respondents, not aware of not having an Ombudsman: O%

Inquiry on whether the Government should take Immediate Step to Appoint an Ombudsman

Inquiry on whether the Government should take immediate step to appoint an Ombudsman has led me to the result stated hereunder:

Respondents, willing to have an Ombudsman immediately: 79%

Respondents, not willing to have an Ombudsman immediately: 21%

Opinion on Reasons that denied the Appointment of an Ombudsman in Bangladesh for long Thirty-eight Years

Some of the respondents opine that one factor is there for the denial of the appointment of an Ombudsman in Bangladesh for long thirty-eight years, while some votes two or three reasons. Some of the respondents debarred themselves from making any opinion in this regard. However, the results are:

Respondents, having opinion that political party in power have lack of intention: 77%
Respondents, having opinion that Government officer have strong opposition in this regard: 43%
Respondents, having opinion that civil society does not create enough pressure on Government: 17%
Respondents, having opinion that we do not need an Ombudsman: 23%

Opinion on whether the Establishment of the Office of an Ombudsman will Ensure Accountability and Transparency in Public Administration

We know that there is some dissenting opinion regarding the establishment of the office of an ombudsman All does not support that the establishment of the office of an ombudsman will ensure accountability and transparency in public administration The opinions resulted into the following findings:

Respondents, in favour of effectiveness: 38%
Respondents, not in favour of effectiveness: 62%

An Interesting Finding

While comparing opinions and answer of the respondents I find it very interesting that 100% of the non-government professionals opine in favour of immediate establishment of the office of an Ombudsman while only 58% of the government professionals votes in favour of the same. And 46% of the government officers are of the view that we do not need the office of an Ombudsman while 86% non-government professionals are of the view that because the unwillingness of the bureaucrats till today there is no Ombudsman for Bangladesh. Considering all these findings it is come to a conclusion that in spite of having lacuna and irrationalities in the existing laws, unwillingness of the bureaucrats and political parties in power are the main factors of non-presence of an Ombudsman.

Concluding Remarks

The Ombudsman Act was passed by a Presidential form of Government. Subsequently, the Presidential form of Government was replaced by a Westminster type of Parliamentary form of Government. As such, it appears to us that the effectiveness of the Act should be judged in the present context. One crucial point is that the Ombudsman should be independent and separate from government. One more time it is to be remembered that all through my research I tried to evaluate the laws existing in Bangladesh regarding the office of an Ombudsman by way of analysing the provisions therein. In doing so I tried to cultivate the existing law in the field present socio- political situation of Bangladesh and tried to suggest al the alteration to adapt the condition prevails so that this mechanism of accountability does not dishearten the people like some others. In short, it can be said that the appointment procedure of an Ombudsman, Qualifications to be appointed as an Ombudsman, the term of office of an Ombudsman, Jurisdictions etc. are to be reconsidered. The survey conducted also express that we, the nation is in an eager wait for an Ombudsman. We have kept our hope alive and have to run to the end.

References

Barnes, M. (1998). 'The Institution of Ombudsman' in *British-Bangla Law Week*, 29 Nov.-5 Dec.

Frank, B. (1975). 'The ombudsman revisited'' in *Int. Bar J*. 6:48-60.

Iftekharuzzaman (2007). 'Ombudsman for Good Governance in Bangladesh: Why Now, and How?' Presented at the Seminar organized jointly by *Manusher Jonno Foundation* and Transparency International Bangladesh, Dhaka, 15 May, 2007.

Kabir, A.H.M. (1998). 'Ombudsman for Bangladesh in quest for good governance' *British-Bangla Law Week*, 29 Nov.-5 Dec.

Law Commission (2000). Report on The Ombudsman Act; 1980 (Act XV of 1980), DHAKA-l000. E:\Projects\LawComin\DOCs\ reports\Ombudsman & Forfeiture.doc

Massey, I.P. (1999). *Administrative Law*. 6th ed. Lucknow, India: Eastern Book Co.

Saxena, D.R. (1987). *Ombudsman (Iokpal) Readdress of citizen's Grievances in India*. New Delhi, India: Deep & Deep Publications.

Sultana, R. (2007). 'The Ombudsman question' in *The Daily Star,* Vol. 5 num. 1105.

Wade, H.W.R. & C.F. Forsyth (1994). *Administrative law*. 11th ed. Oxford: Oxford University Press.

Legislation

The Constitution of the People's Republic of Bangladesh
The Code of Civil Procedure,1898
The Penal Code,1860
The Ombudsman Act, 1980

Athens Journal of Law - Volume 9, Issue 1, January 2023 – Pages 103-116

Self-Defence and Domestic Violence: An Analysis of Turkish Criminal Law Practice

*By Selin Türkoğlu**

How to assess the criminal liability of the abused woman who kills her abuser while in his sleep or in a state of unconsciousness has become a salient topic of debate in recent years. Although there is a tendency to consider these acts within the context of self-defence with the impact of "the battered woman syndrome" theory and the movement to battle against domestic violence, the debate still persists. Despite some opinions that such acts should be considered self-defence in the Turkish doctrine, the Turkish Courts, for the most part, tend to evaluate them as provocation. According to the Turkish Penal Code, only acts that are a response to occurring attacks or those that are certain to ensue are considered "self-defence." Domestic violence is not accepted as itself as an attack if it does not meet these conditions. In this study, we will examine how such cases are treated in Turkish law practice in light of three decisions of The Court of Cassation. Prior to the explanations about self-defence and domestic violence, we will provide an overview of how this practice should be interpreted in the context of domestic violence according to the Turkish penal doctrine (I). It is argued that the conditions of self-defence are gender-neutral provisions, indicating they do not take into consideration "the battered woman syndrome" or female victims of domestic violence. This study will also focus on the conditions of self-defence in the Turkish Penal Code and will analyse it in the context of domestic violence (II).

Keywords: *Violence against women; domestic violence; battered woman syndrome; self-defence; provocation.*

Introduction

Violence against women is a critical issue in Turkey, as it is worldwide. Every day, countless women are abused by their former or current spouse or family member and are subjected to various forms of violence. In domestic violence cases, the violence commonly continues for days, months or even years. Although in many countries there are specific criminal and civil law remedies to combat domestic violence, they are apparently not sufficient to protect the victims[1]. Furthermore, even when legislation is sufficient, almost every country has shortcomings in its law practice[2]. For example, let us imagine a female victim who suffers from domestic violence. She cannot forfend the violence despite having filed several complaints, even with the existence of restraining orders.

*Research Asst., Faculty of Law, Galatasaray University, Istanbul, Turkey.
Email: sturkoglu@gsu.edu.tr
[1]Euronews. (2022).
[2]Erbaş (2021) at 1.

Conceivably out of fear, she is unable to appeal to any authority and is therefore compelled to withdraw her complaint. Unfortunately, we can encounter this kind of story in any newspaper in Turkey almost daily. What is worse, we observe that such stories mostly result in femicide[3].

In some cases, the story may have a different conclusion: Victims, especially when violence has been continuing for many years, can respond with violence toward their abusers[4]. Studies show that when a woman has been convicted of murder or any violent crime, that crime has almost certainly arisen as the response to domestic violence[5]. Although men have different motives from women when they commit crimes, the same legal procedures and provisions are applied to both[6]. Therefore, gender-neutral legislation can cause discrimination against women, so that self-defence may fall into this type of gender discrimination[7].

Imagine a woman who has killed her abuser. The first thing that comes to mind is that the woman did it to defend herself. If this act has occurred in the face of a present attack, we can undoubtedly classify it as "self-defence." However, the self-defence classification cannot be so clear-cut if the abuser is sleeping or unconscious. Debates about how such acts should be evaluated under criminal law have been ongoing in Turkey and other countries such as the United States and France[8]. One of the purposes of this study is to show how Turkish law practice responds in such cases. For this reason, firstly, we will try to explain the facts and the court's reasoning in sample cases. In the Turkish Penal Code (TPC), there are some articles that can be applied to these acts: self-defence, excessive self-defence, provocation, and error[9]. Therefore, it is necessary to clarify what these articles mean according to the TPC. Additionally, in recent years "battered women syndrome" (hereinafter BWS) has started to be used in self-defence context, but BWS has not been mentioned in any judgments in Turkish law at this time of writing. On the other hand, the Turkish doctrine touches on this topic, and various suggestions have been made about how this phenomenon can be considered. Therefore, in this study, we will try to explain "BWS" from the point of view of Turkish criminal law. Moreover, we will try to evaluate the self-defence provisions of the TPC in light of domestic violence facts.

The Cases

We have chosen three key cases to demonstrate the Turkish law practice on the matter. As our main aim is to understand the practice of non-confrontational self-defence, the homicides we examine were carried out while the abusers were

[3]DW/BÖ, HS.
[4]Cornia (1997) at 100.
[5]Linklaters LLP for Penal Reform International, (2016) at 4; Penal Reform International (2012) at 1.
[6]Crocker (1985) at 121.
[7]European Human Rights Advocacy Centre (EHRAC) (2021) at 8.
[8]Faigman (1986) at 619; Fitz-Gibbon & Vannier (2017) at 319.
[9]Küçüktaşdemir (2015) at 556.

sleeping or unconscious. Excepting the first case, the Turkish Court of Cassation has classified the other two homicides under provocation, rather than self-defence.

In the first case[10], the woman was abused by her own father for many years. She underwent almost every kind of violence, such as sexual assault and physical injury. When she was married, the abuser threatened, harassed, and injured his son-in-law and was prosecuted for all these crimes. He threatened his daughter by saying, "*even if you have ten children, I will make you break up with this person, and I will never give you up to anybody*." Because of these threats, the perpetrator divorced her husband and she returned to her family home, where she lived with her parents and younger sister. The father sexually harassed his other 22-year-old daughter, even in the presence of other family members, by holding her in his arms and touching her hips and chest during the six months preceding the date of the incident. The perpetrator was sharing the same room with her sister, and while the sister was asleep, her father sexually assaulted his wife while holding a gun to her head. As a result of these sexual assaults, the perpetrator became pregnant and terminated the pregnancy at a clinic. One day, the perpetrator, her sister and mother were kicked out of the house by the father on the grounds that the perpetrator had come home late. For this reason, the women had to stay in the restaurant they managed together. One night, when the father was sleeping, the woman killed him with three gun shots. The Court decided that self-defence was established, noting that the perpetrator had behaved with the belief that the abuser's attacks would continue, and that the abuser would never give up. Therefore, it was concluded that the temporal limit was exceeded as a result of excusable anticipation, fear or anxiety.

In the other case[11], the perpetrator and the deceased had been married since 1985 and had two children from this marriage. The deceased often consumed alcohol and while drunk, he was violent towards his wife and children. Previously, the deceased had been sentenced to imprisonment for threatening his wife and intentionally injuring his daughter, son, and the perpetrator's wife, but the verdict was deferred. Although the couple was living together, there was an ongoing divorce case. The perpetrator had argued that before the incident, the deceased had attempted to sexually assault her, upon which a fight broke out between her and her husband. As he was continuously beating her, in order to defend herself, she had to strangle her husband with her scarf. The Court decided that there was no attack directed at the perpetrator when the murder occurred, in light of the evidence in the file. The existence of self-defence was discussed among the court members, and several judges had the dissenting opinion that the conditions of self-defence were met. However, the majority upheld the sentence of voluntary manslaughter with the existence of provocation. In this case, it was concluded that "just *as there was not an occurring attack, there was no imminent attack.*" The Court concluded "there was no attack" by evaluating the medical report of the perpetrator. It was noted that although the perpetrator had minor redness, there was no other scar on her body.

[10]The Court of Cassation, 1st Criminal Chamber, 2011/ 1267 E. 2011/4491 K., 13.07.2011.
[11]The Court of Cassation, General Assembly of Criminal Chambers, 2015/1-424 E., 2018/399 K., 18.09.18.

In the third case[12] there is no debate about self-defence but the straight acceptance of provocation. The victim had abused the perpetrator physically, for which she had left home. Also, it mentioned that the husband occasionally used other means of violence against the perpetrator. Two days before the incident, the deceased had recourse to violence again. The perpetrator killed him with a gun while her husband was asleep. The Court of Cassation did not even discuss self-defence and stated that, on the grounds that the deceased was sleeping, this was an aggravated homicide.

The Defences Which May Be Applied Excluding Except Self-Defence under Turkish Penal Code

Provocation According to the Turkish Penal Code

As we can observe in the above-mentioned cases, in Turkish law practice, these homicides have been assessed in the context of provocation. Provocation is one of the motives which affects culpability under Turkish criminal law. According to TPC article 29 "*Any person who commits an offense in a state of anger or severe distress caused by an unjust act shall be sentenced to a penalty of imprisonment for a term of eighteen to twenty-four years where the offense committed requires a penalty of aggravated life imprisonment up to a penalty of imprisonment for a term of twelve to eighteen years, where the offense committed requires a penalty of life imprisonment. Otherwise, the penalty to be imposed shall be reduced by one-quarter to three quarters.*" The conditions of provocation comprise the existence of an unfair act, the perpetrator being under impact of anger or passion, and the crime being committed because of this anger or passion[13]. In the case of provocation, the sentence will be reduced. It is not possible to determine a criterion about how long the passion caused by an unfair act should continue. Therefore, the judge should decide according to the distinctive characteristics of the case[14]. Nonetheless, an element of "imminence" between the unfair act and the reaction is not required as rigidly as in self-defence; therefore, in domestic violence cases, former violence that the perpetrator suffered is considered provocation.

There is no doubt that the domestic violence is an unfair act. And this violence can cause "anger" and "severe distress" in the domestic violence victim. However, in self-defence cases, the perpetrator's state of mind while committing homicide differs from that of a female "provoked" person, because the self-defending perpetrator's survival instincts are what primarily motivate her[15]. In other words, the most significant difference between self-defence and provocation is that the perpetrator aims to ward off the attack in the case of self-defence[16],

[12]The Court of Cassation, 1st Criminal Chamber, 2020/693 E. 2021/4491 K., 15.09.2021.
[13]Demirbaş (2021) at 478.
[14]Ibid, at. 483.
[15]Eroğlu & Özeroğlu (2020) at 1414.
[16]Özgenç (2021) at 507.

whereas the provocation perpetrator does not. The perpetrator may act with anger, but specifically because there is a time gap between violence and the criminal act, it should not automatically mean provocation exists in every case.

Mistake of Law

Although not discussed in the above-mentioned cases, article 30 of the TPC, which regulates "mistake"[17], argues that this provision can be applied in such situations as above. The mistake may be related to facts or to law[18]. In the latter scenario, the mistake of the perpetrator is not about facts. Instead, it is about her perception of law: she actually thinks that the law permits her acts[19]. According to TPC 30/4 "*Any person who makes an inevitable mistake about whether his act was unjust or not shall not be subject to penalty.*" However, the mistake of the perpetrator should be inevitable so that she can use article 30/4 in her defence[20]. To decide whether the mistake was inevitable or not, the subjective circumstance of the perpetrator is considered, such as her educational background, the social and cultural environment in which she lives[21]. In case of mistake/error of her concept of law, the perpetrator will be considered not culpable[22].

In the Turkish doctrine, *Ergüne* and *Demirel* have argued that if there is no attack at the time of act, it is not possible to implement the self-defence provisions, but that the act can be considered as a "mistake of law"[23]. If the perpetrator acts believing that they are acting in self-defence as a measure against the attacks which will occur in the future, their case may be evaluated within the context of "mistake"[24]. The perpetrators have been subjected to violence, and in efforts to hide this from society, they may have remained silent against these acts while they were occurring, putting mounting pressure on them. For these reasons, their criminal act can be considered inevitable[25]. As a result, the perpetrator will not be considered culpable, and according to TPC 223, the verdict will be "no need to impose punishment."[26]

---

[17]*(1) Any person who, while conducting an act, is unaware of matters which constitute the actus reus of an offence, is not considered to have acted intentionally. Culpability with respect to recklessness shall be preserved in relation to such mistake.*
(2) Any person who is mistaken about matters which constitute an element of a qualified version of an offence, which requires an aggravated or mitigated sentence, shall benefit from such mistake.
(3) Any person who is inevitably mistaken about the conditions which, when satisfied, reduce, or negate culpability shall benefit from such mistake.
(4) (Paragraph Added on 29 June 2005 - By Article 4 of the Law no. 5377). Any person who makes an inevitable mistake about whether his act was unjust or not shall not be subject to penalty.
[18]Koca & Üzülmez (2021) at 253.
[19]Dülger, Özkan & Bakdur (2021) at 253; Göktürk (2016) at 126.
[20]Özgenç (2021) at 535; Dülger, Özkan & Bakdur (2021) at 254.
[21]Koca & Üzülmez (2021) at 370.
[22]Demirbaş (2021) at 451.
[23]Ergüne & Demirel (2020) at 175; The authors have examined two cases of The Court of Cassation in this study and one of them is The Court of Cassation, 1st Criminal Chamber, 2011/1267 E. 2011/4491 K., 13.07.2011. In both cases, the perpetrators were victims of sexual assault.
[24]Ibid, at 176.
[25]Ibid, at 177.
[26]Ibid.

Self-Defence According to the Turkish Penal Code

Self-defence is a person's response to deflect an unjust attack against himself/ herself or a third party[27]. Under the TPC, self-defence is a justifying reason that renders an act, which should constitute a crime, lawfully subject to the existence of certain circumstances[28]. The Turkish doctrine, Article 223 of the Turkish Penal Procedure Code is used to demonstrate that self-defence is a justifying reason because, according to this Article, when self-defence is acknowledged , the tribunal decides upon acquittal[29]. The act becomes lawful and is accepted as correct[30]. Because there is a theoretical divergence between justifiable act and excusable act[31], there is a need to evaluate these acts in the context of self-defence or justification instead of within the concept of excuse[32]. In short, the perpetrator demands that her acts be accepted as lawful instead of being considered excusable[33]. Moreover, according to TPC, provocation provides a reduced sentence, but in the existence of self-defence, the verdict is acquittal.

Self-defence is one of the essential legal arguments used to defend a perpetrator who is the victim of domestic violence in Turkey in such cases. It is argued that the perpetrator has been in a constant state of self-defence, and with her criminal act, she has protected her own life and/or also the lives of her children from a future attack[34]. If she had not killed her abuser, one day the abuser would have killed her[35]. However, is it possible to accept such acts as self-defence in terms of the TPC? In order to answer this question, it is necessary to refer to the conditions of self-defence regulated in Article 25 of the TPC.

According to Article 25/1 "*No punishment is given to an offender who acts with immediate necessity, according to the prevailing conditions, to repulse or eliminate an unjust assault against his or another person's rights, of which the recurrence is highly expected."*[36] The Turkish doctrine generally analyses elements of self-defence in two subgroups, related to 'aggression' and 'defence'[37]. The elements of aggression are: there should be an aggression, this aggression should be unlawful and be directed towards a right, the aggression and the defence should occur at the same time[38]. The elements of defence are: the defence should be necessary, and proportionate to the aggression[39].

---

[27]Dönmezer & Erman (1997) at 97: Özgenç (2021) at 357.
[28]Özgenç (2021) at 357; Sınar (2016) at 30.
[29]Sınar (2016) at 34; Özgenç (2021) at 357.
[30]Robinson (1975) at 274.
[31]Dressler, (2006) at 13 - The excusable conduct is still unjustified, but we cannot blame the perpetrator for her actions in this case.
[32]Crocker (1985) at 130.
[33]Dressler (2006) at 7.
[34]Walker (1992) at 321.
[35]Dressler (2006) at 11.
[36]European Commission for Democracy Through Law (Venice Commission), Penal Code of Turkey.
[37]Dönmezer & Erman (1997) at 105.
[38]Ibid.
[39]Ibid.

For the matter at hand, the first problem is to decide whether it is possible to acknowledge the existence of an attack. The Turkish legislator accepts self-defence in two cases: One of them is "present attack," which means both aggression and defence happen simultaneously. In other words, the attack is ongoing.[40] Acts committed after the attack is completed are not considered self-defence, but they may be evaluated under the terms of provocation[41]. The acts perpetrated to prevent future aggressions will not be considered as self-defence, either[42] because in such situations, it is accepted that it is possible to avoid future attack without resorting to an incriminating act, for instance, applying to public authorities[43]. If we can say that an attack is **certain** to occur or repeat, *i.e.,* if there is an imminent attack, the acts will come under the scope of self-defence according to the TPC. As "certainty" is neither a legal term nor a word that exists as defined in the TPC, what counts as "certain should be established."[44] "Certain" means "leaving no room for doubt and hesitation"[45]. In the Turkish doctrine, it is argued that this should not be strictly interpreted[46]. Someone approaching you with a pointed gun while threatening to kill you, is a classic example to explain certainty[47]. Considering this example, much as it is argued that this concept should not be interpreted strictly, we can say traditional criminal law does not allow for commenting broadly. Also, Turkish courts tend to follow this interpretation. Even if there is no direct reference to a time gap, the Court of Cassation has not accepted violence that occurred two days before the act as "aggression[48]." Therefore, it is largely not possible to accept self-defence in such cases. Some Turkish scholars share the same opinion, and they criticise the first case for this reason[49]. Although there are various opinions within the Turkish Doctrine, it is generally accepted that if this element is not established, it cannot be possible to discuss the others[50].

Hypothetically, let us assume that this element was established; the second problem we are faced with in such cases is to determine whether the defence was necessary or not. To meet this criterion, it must be impossible to save yourself from the attack in any other way[51]. During the proceedings, the perpetrators are always confronted with the same questions. For example, why did she not break up with her abuser or did not choose another option?[52] The third problem is whether this defence is "proportionate" or not. Considering the perpetrator used deadly force against a person who was asleep, it can be said that the defence limit was exceeded because using more force than necessary to repulse aggression

[40]Ibid. at 113.
[41]Demirbaş (2021) at 311.
[42]Ibid, at 310.
[43]Dönmezer & Erman (1997) at 113.
[44]Kaufman (2007) at 344.
[45]Büyük Türkçe Sözlük
[46]Apaydın (2020) at 78.
[47]Demirbaş (2021) at 310.
[48]The Court of Cassation, 1st Criminal Chamber, 2020/693 E. 2021/4491 K., 15.09.2021.
[49]Ergüne & Demirel (2020) at 172.
[50]Byrd (1991) at 173.
[51]Dönmezer & Erman (1997) at. 115.
[52]Burke (2002) at.13.

indicates that the defence is disproportionate[53].The responses to these questions should be examined within the context of domestic violence.

Self-Defence and Domestic Violence

All evaluations will change when we examine the above-mentioned self-defence from a gender or battered woman syndrome perspective. It has been suggested that gender-neutral provisions that do not consider women's social and economic positions may cause discrimination against women[54]. The self-defence provisions are interpreted as this type of discrimination because they have been created with the notion that men who confront to are aggressive.[55] Why the self-defence provisions can cause discrimination is explained as follows: The woman's act can be a reaction to continuing violence rather than to a single attack that can be pinpointed[56]. When we consider all the violence that the woman has been subjected to, the attacks the abuser committed before the defensive act may not be life-threatening[57]. Because of the disparity in power between the abuser and the woman, the immediate response by domestic violence victims may be impossible[58]. In domestic violence cases, whether the existence of aggression is met or not should be examined with gender perspective.

In the United States, "The Battered Woman Syndrome"[59] started to be used as a legal defence by lawyers of women who kill their abusers when their abusers were in an unconscious state, in other words, when there is no imminent attack[60]. BWS was first mentioned by Lenore Walker[61]. It is a term used to explain the mental state of women who were repeatedly subjected to violence[62]. Although this syndrome has not been accepted by all legal experts, it has found many supporters[63]. BWS is a mechanism which is based on two theories: Circle of violence and learned helplessness[64]. The domestic violence victim comprehends a danger of attack even if there is no violence, therefore she acts with the instinct of self-defence[65]. This syndrome is used for explaining why a woman behaves violently in non-confrontational situations and why their perception about imminent attack is

[53]Erden Tütüncü (2019) at 474.
[54]Choudhry (2018) at 6; EHRAC (2021) at 8.
[55]EHRAC (2021) at 9; Cornia (1997) at 104.
[56]Committee of Experts of The MESECVI (2018) at 4; EHRAC (2021) at 9.
[57]Committee of Experts of The MESECVI (2018) at.4; EHRAC (2021) at 9.
[58]Penal Reform International (2012) at 4; EHRAC (2021) at 9.
[59]Even if it is called "battered woman syndrome" it can be used for the same-sex relationships or for the men who are abused by female partners. Champaign (2010). For detailed explanations see Polat Akgün (2022).
[60]Crocker (1985) at 101.
[61]Dressler (2006) at 6; Walker (1977) at 1.
[62]Küçüktaşdemir (2015) at 327; *This syndrome is considered a sub-category of the generic Post Traumatic Stress Disorder.*
[63]Burke (2002) at 12; Faigman (1986) at 620.
[64]Doğan (2015) at 179.
[65]Polat Akgün (2022) at 156.

different from that of men[66]. This approach aims to consider the acts of women as "justifiable" rather than "excusable"[67].

According to "BWS", the cycle of violence is divided into three phases[68]. The first phase is called "tension-building", in which there are not too many grave violent incidents, but where the tension has begun to rise[69]. The second phase is called "acute battering" where the violence is intense[70]. And the third phase is "non-violent phase" wherein the man feels remorse and to get forgiveness for himself[71]. This continuing cycle is used as an argument as to why the women constantly feel in danger[72]. This cycle also causes "learned helplessness", which means the woman starts to think she will never break free from this violence"[73]. Thus, we can explain why the woman does not try to escape by divorce. In the Turkish doctrine *Erden Tütüncü* has argued that in the case of BWS, even though there has been a current attack, it is also possible to evaluate the existence of an imminent attack[74]. *Eroğlu* and *Özeroğlu* share a similar view[75].

There are many critics as well as supporters of this argument in the doctrine. BWS should not been used to justify murders in self-defence in which the "imminence" element is not lacking[76]. Firstly, there is no scientific evidence about "cycle of violence." Each relationship may follow different patterns which need to be distinguished[77]. This way, we create a category which the women must fit into to be considered to be acting in self-defence[78]. Even though violence against women is a human rights violation, the abusers' right to life cannot be denied[79]. *Dressler* alleged that if there is self-defence, the act is "justifiable"[80]. The person's psychology and mental state, or in a broader sense, her subjective peculiarities are not about justification[81]. In order to justify this act, it is unacceptable to say that if the perpetrator had not killed him, the abuser would kill her one day[82]. On the other hand, *Taşkın* accepts that the self-defence conditions are not met in such cases, because if we accept self-defence, we would be excessively broadening its scope[83]. Also, for *Küçüktaşdemir*, there is a possibility of attack, but it is not certain[84].

[66]Cornia (1997) at 104.
[67]Dressler (2006) at 7.
[68]Walker (1977) at 53.
[69]Walker (1977) at 53; Taşkın (2013) at 107.
[70]Taşkın (2013 at 107.
[71]Walker (1977) at 54;, Taşkın (2013) at 107.
[72]Burke (2002) at 22.
[73]Walker (1992) at 330; Burke (2002) at 22; Eroğlu & Özeroğlu (2020) at 1409.
[74]Erden Tütüncü (2019) at 478.
[75]Eroğlu & Özeroğlu (2020) at 1423.
[76]Dressler (2006) at 7.
[77]Faigman (1986) at 638.
[78]Wallace (2004) at 1756.
[79]Dressler (2006) at 10.
[80]Ibid, at 5.
[81]Burke (2002) at 38; Dressler (2006) at 7.
[82]Dressler (2006) at 11.
[83]Taşkın (2013) at 117.
[84]Küçüktaşdemir (2015) at 567.

We should examine the violence during the relationship closely. All proof about the abuse should be taken into consideration within the trial. Our goal is not in creating an automatic justifying reason, but without acknowledging the reality of domestic violence or, in other words, "the battered woman syndrome", we may end up with unfair judgments. Even if the imminent attack is accepted as existing, whether the other conditions are met or not still need to be examined. One of them is the obligatory character of the defence, which means that the only way of thwarting the attack is the act constituting defence[85]. It can be argued that while the abuser is asleep, the woman can appeal to any authority or just could leave the abuser. But while evaluating these conditions, we must consider all of the motives behind the behaviour of the woman and why she did not act in any other way. In respect to BWS, the notion of "learned helplessness" can help explain things. Indeed, in this day and age, women try to get out of this type of relationship, but we can observe that the legal remedies available to them are not sufficient to help[86]. In both possibilities, women experience desperation, and they cannot see any release from this situation[87]. The best solution is to evaluate every case while considering its own characteristics, and not to interpret self-defence in a very strict sense. In gender-based violence, we can assume the existence of imminent attack in every domestic violence case at first sight. The abusers can resort to violence at any time. Therefore, it is not hard to say that when the abuser wakes up, he will resume the violence[88]. But what matters the most is what happens before the homicide. For example, if there had been a dispute between the couple and he had physically assaulted the perpetrator, existence of an imminent attack may be more easily accepted.

Excessive Self-Defence

Two aspects of excessive self-defence can be discussed in such cases: Disproportionate defence/tool or excessive temporal limit[89]. In the Turkish doctrine, there are two views: According to one, exceeding the temporal limit in self-defence is not possible, and according to the other, it is possible[90]. *Erden Tütüncü* and *Küçüktaşdemir* are of the opinion that it is possible to exceed temporal limit in self-defence and battered women, with the pressure of their situation, defend themselves without a present attack[91]. Excessive self-defence regulates under TPC article 27/2. *"No punishment is given to the offender if the limit during self-defence is exceeded as a result of excusable excitement, fear or anxiety."*

Even if we consider this act within the concept of self-defence, it becomes possible to debate excessive self-defence in respect of the other condition. One of

[85]Sınar (2016) at 43.
[86]Küçüktaşdemir (2015) at 554.
[87]Ibid.
[88]Dressler (2006) at 10.
[89]Demirbaş (2021) at 358.
[90]Demirbaş (2021) at 359; Erden Tütüncü (2019) at 476.
[91]Erden Tütüncü (2019) at 478, Küçüktaşdemir (2015) at 578.

the conditions of self-defence is that the defence should be proportionate, i.e. the defence should be in proportion to the resistance of the attack[92]. It has been argued that this defence is proportionate when we consider all the violence that was imposed on the woman during the relationship[93].

Concluding Remarks

In Turkey, domestic violence still poses a vital problem and regardless of whether their situation is formally accepted as a syndrome or not, battered women who are abused by men, as well as these women's predicaments, should not ignored by courts. Effects of being subjected to violence over a long period of time, and the hardship in daring to escape this cycle of violence should be understood by the legal authorities. Moreover, victims of domestic violence should not be portrayed as insane, mentally ill or irrational. It seems difficult to accept the existence of self-defence in crimes perpetrated by victims of BWS in Turkish law, because when the abuser is asleep or unconscious, there seems to be no present or imminent danger or attack in the sense of the TPC, which precludes application of self-defence provisions. Nevertheless, domestic violence can be accepted as a form of continuing attack even if in the absence of aggression in the traditional sense. In order not to cause abuses with this interpretation, the courts should carefully examine the evidence which proves the domestic violence the perpetrator underwent.

References

Apaydın, C. (2020). *Meşru Savunma [Self Defence]*. İstanbul: Seçkin.

Burke, A.S. (2002). 'Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Women' in *North Carolina Law Review* 81(1):211-316.

Byrd, B.S. (1991). 'Till Death Part Do Us Part: A Comparative Law Approach to Justifying Self-Defense By Battered Women' in *Duke Journal of Comparative & International Law* 1:169-212.

Champaign, L. (2010) 'The Battered Woman Syndrome' in *The Georgetown Journal of Gender and The Law* 11(1):59-76

Cornia, R.D. (1997). 'Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes about Woman' in *Ucla Women's Law Journal* 8(1):99-123.

Crocker, P.L. (1985). 'The Meaning of Equality for Battered Women Who Kill Men in Self-Defence' in *Harvard Women's Law Journal* 8:121-153

Demirbaş, T. (2021). *Ceza Hukuku Genel Hükümler [Criminal Law General Provisions*] 16th Edition, İstanbul: Seçkin.

Doğan, R. (2015) "Hukuki Bir Kavram Olarak Şiddet Mağduru Kadınlarda Öğrenilmiş Çaresizlik Sendromu ve İngiliz Haksız Tahrik Hukuku Üzerindeki Etkileri," [Learned Helplessness Syndrome in Women Victims of Violence as a Legal Concept

[92]Özgenç (2021) at 312.

[93]Küçüktaşdemir (2015) at 579.

and Its Effects on British Unjust Provocation Law] in *Ankara Barosu Dergisi* 2:179-194.

Dönmezer, S. & Erman, B. (1997) *Nazari ve Tatbiki Ceza Hukuku [Theoretical and Practical Criminal Law]*,II, 12. İstanbul: Beta.

Dülger, V. & Özkan, O. & M. Bakdur (2021). 'Ceza Hukukunda Hata ve Hataya Bağlanan Sonuçlar.'[Error in Criminal Law and Consequences Related to Error] in *Türkiye Adalet Akademisi Dergisi* 45:227-264.

Dressler, J. (2006) 'Battered Women and Sleeping Abusers: Some Reflections.' *Ohio State journal of Criminal Law* 3:457-471.

Erbaş, R. (2021) 'Effective Criminal Investigation for Women Victims of Domestic Violence: The Approach of The ECtHR' in *Women's Studies International Forum* 86:1-12. doi.org/10.1016/j.wsif.2021.102468

Erden Tütüncü, E. (2019). 'Örselenmiş Kadın Sendromu" Argümanının Türk Hukukunda Meşru Savunma Kapsamında Uygulanabilirliği Üzerine Düşünceler.' in *Fasikül,* 11 (111): 469-482.

Ergüne, E. & M. Demirel, M. (2020). 'Müteaddit Defa Cinsel Saldırı Suçunun Mağduru Olan Kadının "Muhtemel Cinsel Saldırıya" Binaen Faili Öldürmesine İlişkin "Birbiriyle Çelişen" İki Yargıtay Kararının Değerlendirilmesi' [Evaluation of Two "Contradictory" Court of Cassation Decisions Regarding the Killing of the Perpetrator Based on the "Possible Sexual Assault" by the Woman Who Was the Victim of the Repeated Sexual Assault Crime'] in *Prof. Dr. Türkan Rado'nun Anısına Armağan* İstanbul: On İki Levha.

Eroğlu, F. & A. Özeroğlu (2020). '"Kötü Muameleye Kalmış Kadın Sendromu"nun Meşru Savunma Açısından Değerlendirilmesi' in *ÇÜHFD,* 5(1) 1405-1431.

Faigman, D.L. (1986). 'The Battered Syndrome and Self-Defence: A Legal and Empirical Dissent' in *Virginia Law Review* 72(3):619-647.

Fitz-Gibbon K. & M. Vannier (2017). 'Domestic Violence and the Gendered Law of Self-Defence in France: The Case of Jacqueline Sauvage' in *Feminist Legal Studies* 25(2):313-335.

Göktürk, N. (2016). *Haksızlık Yanılgısının Ceza Sorumluluğuna Etkisi [The Effect of Mistake of Law on Criminal Liability]*. İstanbul: Seçkin,

Kaufmann Whitley R.P. (2007). 'Self-Defence, Imminence, and the Battered Woman' *New Criminal Law Review: An International and Interdisciplinary Journal* 10(3): 342-369. https://doi.org/10.1525/nclr.2007.10.3.342.

Koca, M. & I. Üzülmez (2021). *Türk Ceza Hukuku Genel Hükümler [Turkish Criminal Law General Provisions]* 14th Edition, İstanbul: Seçkin.

Küçüktaşdemir, Ö. (2015) 'Ceza Hukukunda Örselenmiş Kadın Sendromu.' [Battered Woman Syndrome in Criminal Law] in *Başkent Üniversitesi Hukuk Fakültesi Dergisi* 1(1):547-586.

Özgenç, İ. (2021). *Türk Ceza Hukuku Genel Hükümler* [Turkish Criminal Law] General Provisions 17. İstanbul: Seçkin.

Polat Akgün, D. (2022). 'Adil Yargılanma Hakkı ve Hukuk Devleti Işığında' in *Şiddete Uğramış Kadın Sendromu* Üzerine Bir İnceleme' [The Review on the Battered Woman Syndrome in the Light of the Right to a Fair Trial and the Rule of Law] in *Akdeniz Üniversitesi Hukuk Fakültesi Dergisi* 12(1):145-175.

Robinson, P.H. (1975) 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' in *UCLA Law Review* 23:266-292.

Sınar, H. (2016) 'Self-Defence As A Justification Reason In Turkish Criminal Law' in *CHD* 11(30):29-62.

Taşkın, O.E. (2012). 'Kötü Muameleye Maruz Kalmış Kadın Reaksiyonu: Meşru Savunma mı Mazeret Nedeni Mi?' [The Reaction of Battered Women: Self Defence or Excuse?] in CHD 7(20):43-58.

Wallace, S. (2004) 'Beyond Imminence: Evolving International Law and Battered Women's Right to Self-Defence' in 71 *The University of Chicago Law Review* 71(2):1749-1781.

Walker, L. E. A. (1977). 'Who are the Battered Women?.' *Frontiers: A Journal of Women Studies*, 2(1):52-57.

Walker, L.E.A. (1992). "Battered Women Syndrome and Self Defence," *6 Notre Dame J.L. Ethics & Pub. Policy* 6:321-334.

Court Cases

The Court of Cassation, 1st Criminal Chamber, 2011/ 1267 E. 2011/4491 K., 13.07.2011. http://www.kazanci.com.tr

The Court of Cassation, General Assembly of Criminal Chambers, 2015/1-424 E., 2018/399 K., 18.09.18. http://www.kazanci.com.tr

The Court of Cassation, 1st Criminal Chamber, 2020/693 E. 2021/4491 K., 15.09.2021

Reports and other sources

Büyük Türkçe Sözlük [Turkish Dictionary]. https://sozluk.gov.tr

Coudhry, S. (2018). 'Women's Access to Justice: A Guide for Legal Practitioners' (drawn from the Dubain, E. & I Radačić (2017) *Training Manual for Judges and Prosecutors on Ensuring Women's Access to Justice*, Council of Europe. https://rm.coe.int/fact sheet-womens-access-to-justice/16808ff44e

Committee of Experts of the MESECVI (2018). *General Recommendation N. 1 of the Committee of Experts of the MESECVI on Self-Defence and Gender-Based Violence according to Article 2 of the Belém do Pará Convention.* https://www.oas.org/en/ mesecvi/docs/MESECVI-CEVI-doc.249-EN.pdf

DW/BÖ, HS. 'Türkiye'de 2021'de 280 Kadın Öldürüldü.' [280 women were killed in Turkey in 2021]. https://www.dw.com/tr/türkiyede-2021de-280-kadın-öldürüldü/a-60328427

Euronews (2022). 'Erkeklerden fiziksel veya cinsel şiddet gören kadınların oranı:Avrupa ve OECD'nin Lideri Türkiye.' [The rate of women who have experienced physical or sexual violence by men: the leader of the OECD and Europe in Turkey]. https://tr.euro news.com/2022/03/31/erkeklerden-fiziksel-veya-cinsel-siddet-goren-kad-nlar-n-oran-avrupa-ve-oecd-nin-lideri-tu.

European Commission for Democracy Through Law (Venice Commission), Penal Code of Turkey. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)011-e

European Human Rights Advocacy Centre (EHRAC) (2021). EHRAC *Guide to Litigating Self-defence in the Contexts of Domestic Violence Against Women*. London, UK https://ehrac.org.uk/wp-content/uploads/2021/12/Self-defence-guide-ENG.pdf

Linklaters LLP for Penal Reform International (2016). *Women Who Kill in Response to Domestic Violence: How Do Criminal Justice Systems Respond?* Follow-Up Mechanısm OEA/Ser.L/II.7.10 Conventıon of Belém do PARÁ (MESECVI) MESECVI/CEVI/ doc.249/18, 15th Meeting of the Committee of Experts (CEVI), 2018 Washington,

D.C. Original: Spanish. https://cdn.penalreform.org/wp-content/uploads/2016/04/Women_who_kill_in_response_to_domestic_violence_Full_report.pdf

Penal Reform International (2012). *Briefing Access to Justice: Discrimination of Women in Criminal Justice System.* https://www.penalreform.org/resource/access-justice-discrimination-women-criminal-justice-systems/

Athens Journal of Law - Volume 9, Issue 1, January 2023 – Pages 117-138

Fake News Legislation in Hong Kong: The Limitations of Current Laws to Counter the Fake News Wildfire

By Bryan Tzu Wei Luk[±] & Derek Chun Pong Cheung[*]

Hong Kong government is planning to legislate a new law that can fight against digital wildfire fake news. Hong Kong has faced two waves of fake news digital wildfires in the past few years: The 2019 social unrests in Hong Kong and the 2020 COVID-19 pandemic. The city has witnessed how fake news can undermine social trust and social cohesion, causing large-scale damage to both societies and governments. Fake news brings substantial damage to society due to the erosion of the credibility of governments, rule of law, and the democratic system's human security. The government's announcement of legislation has received criticisms and objections. One of the main objections is that the current laws are sufficient to combat against fake news, hence new legislation is not necessary. Yet, our study shows the contrary. We studied laws that have been used by the prosecution to deal with publication and speech related public-order crimes, which are within the Hong Kong National Security Law, the old common law offence Outraging Public Decency, and Crime Ordinance. The study results show that those laws are either outdated or applicable to deal with current fake news problem. Therefore, we argue that a contemporary fake news legislation is indeed needed, but the government should study thoroughly about how the new law can strike an equilibrium between civilian's freedom and public safety.

Keywords: *Fake news; Public-order crimes; Criminal liability; False information; Freedom of speech.*

Introduction

Technological advancement has transformed our way of living and relationships. Especially since the emergence of smartphones and social media in 21st century, ordinary people have become empowered with privatisation of public communication for distributing information and messages instantly and boundlessly. Smartphone combined with social media enable people to build extensive social networks and enhance their mobilisation ability in a cost-effective manner. Obviously, this changes the mediascape and has many advantages, allowing people to share news, messages and information much faster with others. Yet, it has become deemed as a double-edged sword. It also heightens people's

[±]Senior Research Fellow, Basic Law Foundation, Hong Kong SAR. Corresponding author. Email: bryanluktw@gmail.com
[*]Research Fellow, Basic Law Foundation, Hong Kong SAR.
Email: derekcheungcp@gmail.com

sense of outrage, expediates arguments and creates a path for inaccurate and unchecked information bombardment against persons or organisations.

In 2013, the World Economic Forum issued Global Risks 2013 Eighth Edition, warning that fake news acts as 'digital wildfires' in a hyperconnected world. It warned the global community that the wildfire of fake news could bring large-scale damage to both societies and governments, bringing substantial threats to human security due to the erosion of the credibility of governments, rule of law, and democratic system. It urged regional or national governments to start preparing together for a global wildfire that was seemingly beyond their control or influence.

After nearly a decade, the 2013 warning has been proved valid, and even far more beyond our expectation. An unaccountable quantity of fake news that is disseminated over the internet has posed a significant challenge to societies. Remarkably, the events of the 2016 United Kingdom European Union membership referendum, the 2016 United States presidential election and the 2017 French presidential election all suffered from a painful experience regarding the fake news wildfire. The world witnessed how fake news could disintegrate the social solidarity of well-developed democratic societies.

Statistically, fake news could be deemed as one of the greatest threats against human security. As defined by Wardle & Derakhshan[1], fake news consists of three types: Mis-information, dis-information and mal-information. Fake news can be satire or parody, misleading content, manipulated content, false connection, false context, imposter content and fabricated content[2]. Various surveys and research studies reflected that people from around the world are facing the same problem. For example: the Centre for International Governance Innovation's survey named *2019 CIGI-IPSOS Global Survey Internet Security & Trust*[3] (from 21st December 2018 to 10th February 2019) received around 25,000 respondents from 25 economic regions showing that over 86% of the respondents admitted to having fallen victim; the Flash Eurobarometer survey (with around 26,000 respondents from 28 European Union member states) indicated 37% of the respondents suffered from fake news every day, but only 15% of them have sufficient ability to distinguish them confidently[4]. Moreover, nearly 85% of respondents believe that fake news will harm democratic society. Breakstone et al.[5] also conducted a national students' civic online study (with 3,446 participants) to test the students' ability to differentiate between 'true' and 'fake' information. Not surprisingly, over 75% of participants failed to identify advertisement content and true news.

Recently, the Government of Hong Kong Special Administrative Region (hereinafter HKSAR) declared that the administration is planning to legislate an anti-fake news law in the name of promoting social, internet and national

[1]Wardle & Derakhshan (2017). According to their study, misinformation are false connection and misleading content; dis-information are false content, imposter content, manipulated content and fabricated content; mal-information are information leaks, harassment and hate speech.
[2]Wardle (2017).
[3]Simpson (2019).
[4]Directorate-General for Communications Networks of European Commission (2018).
[5]Breakstone et al. (2021).

security[6]. Similar to other economically developed regions/countries that have promulgated the relevant anti-fake news law (such as Singapore, Germany, France), the Hong Kong announcement received a wide range of dissent, criticisms and concerns from the civic society[7]. Most of them argue the necessity of the legislation and express their apprehensions about potentially weakening the freedom of expression and press, their main argument being that the current laws are sufficient to protect the public from fake news threats, a new law thus is unnecessary[8]. However, their argument may not be true. On the contrary, Hong Kong does not have a fake news law and the current legislations and common law offence are not effective against fake news.

Purpose and Methodology

There are two purposes in this article: To explain why it is necessary to legislate fake news law, and to study why the current legislations are not sufficient or effective to counter against fake news. In order to achieve these purposes, this article unfolds mainly in two parts: First, the article conducts a literature review to overview the fake news problem in Hong Kong, and explains how the fake news problem has damaged Hong Kong society in the past few years in detail. Then, the article explains why current laws are ineffective by explaining their characteristics and legal applications.

The research is based on the documentary research concept. It will specifically focus on analysing the laws of Hong Kong, and the judicial ruling that impacted the application of the law against a person's speech-related misbehaviour. Therefore, the primary sources are respectively the ordinances, court judgments, legislative papers, and records as well as other relevant official government responses.

Background of Legislation against Fake News in Hong Kong

The background of the proposed legislation was rooted in a societal political saga and public health insecurities. Hong Kong, known as one of the busiest international cosmopolitans with a solid cultural fusion of East-meets-West business activities, is one of the most digitally connected regions with active social media usage in the globe for both recreation and leisure, business, and tourism purposes.

According to the latest report of *Digital 2022: Hong Kong*, social media penetration and usage recorded a historical high. As of January 2022, 88% of the people in Hong Kong use social media (approximately 6.68 million users), and the top social media platforms used by Generation Z & Millennials (18 - 40 years old) were Instagram (86.1%), WhatsApp (85.5%), YouTube (77%), Facebook/Meta

[6]The Government of HKSAR (2022b).
[7]Kihara (2021); International Federation of Journalists (2021); Cheung et al. (2022).
[8]Cheung et al. (2022).

(58%) and WeChat (40%)[9]. They use those platforms mainly for entertainment, social and news access. Due to the high penetration rate, the internet platform is the primary source of news access the local population with 76% in 2020, which doubled in number compared to the statistic in 2010. The *Reuters institute digital news report 2019* found that 41% of the total population used WhatsApp as their primary source for receiving daily news[10].

Because of the highly digitalised and hyper-connected living environment, Hong Kong is no exception and is vulnerable to this wildfire. According to the *2019 CIGI-IPSOSs Global Survey Internet Security and Trust*, around 64% of surveyed respondents from Hong Kong reported that they had accessed fake news on the internet, in which half of them trust and rely on those fake news[11]. Notably, this survey was conducted in the period between December 21, 2018 and February 10, 2019. At that time, during the period of 2019 Hong Kong Social Unrest and the 2020 Covid-19 Pandemic the fake news threat soared.

First-wave of Fake News Wildfire - The 2019 Social Unrests in Hong Kong

The first wave of the fake news wildfire was the 2019 Hong Kong Social Unrest. It involved many causes and reasons, but the common understanding is that it was mainly triggered by the introduction of the Fugitive Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019 proposed by the Government of HKSAR[12]. The bill was introduced by the Government of HKSAR to establish a fugitive transfer to other parts of China (including Mainland China, Taiwan, and Macau), which are currently excluded in accordance with the existing clause. Although the government's intention was to remove the legal loophole, it was highly controversial. The bill's introduction did not gain sufficient public support and received strong criticism and objections from both the domestic and international communities, and subsequently became the greatest socio-political crisis after the 1997 Handover of Hong Kong[13].

It was a dire situation marked as catastrophic, leaderless, violent-oriented social unrest with extremely widespread and severely radicalised crimes[14]. It resulted in a sharp rise in crime figures and delinquencies, socio-psychological damages that were comparable to regions experiencing terrorist attacks and large-scale human and natural disasters, the erosion of political legitimacy and government authority, and mass political violent radicalisation[15].

A number of studies showed that the crisis had been fuelled by fake news and hate speech, where both sides (pro-and-anti-government) *weaponised* fake news as political propaganda to gain advantages in this psychological warfare. For example: Lee, based on his observations and preliminary research findings,

[9]Kemp (2022).
[10]Chan, Lee & Chen (2019).
[11]IPSOS (2019).
[12]Author (2021); Shek (2020); Luk (2020).
[13]Purbrick (2019); Luk (2021).
[14]Purbrick (2019); Panel of Security of the Legislative Council of HKSAR (2020).
[15]Luk (2021).

explained how the politics of fake news and rumours helped the pro-establishment to delegitimise the social unrest and how the protest camp, in contrast, pressurised their political power to sustain itself[16]; The Hong Kong Youth Association conducted an *ad hoc* fake news survey with the Chinese University of Hong Kong to study how citizens perceived the relationship between fake news and social unrest[17]. The results showed nearly 80% of the interviewees reported that more fake news was circulating during the social unrest, and 74% of those surveyed felt that fake news dominated social media platforms; The author explained in detail how the characteristics of Hong Kong environment and social media created a channel for messages (including mis-and-disinformation) to amplify the pro-and-anti-government camps' organising capabilities and political propaganda[18].

While the international city was suffering an ongoing socio-political crisis with unprecedented social division, distrust and hostility and still struggling to restore society back to normal, the COVID-19 pandemic suddenly struck Hong Kong hard in January 2020; When it rains, it pours. In fact, Hong Kong was one of the earliest places to get hit by the virus since the outbreak in Wuhan City located in Mainland China in mid-January 2020 due to its high volume of international travellers and transportation. The first confirmed case in Hong Kong was recorded on 23 January 2020.

Second-wave of Fake News Wildfire - The 2020 COVID-19 Pandemic

Fortunately, notwithstanding public trust and political legitimacy at the historic lowest level, society still had the community capacity to mobilise its resources to face the upcoming novel public health crisis, based on the previous SAR pandemic experiences. The crisis response was deemed unexpectedly efficient, effective as well as comprehensive against all odds[19]. The public had implemented non-pharmaceutical measures (mainly by wearing protective facemasks) much earlier than the government's intrusive anti-pandemic policies to mitigate the transmission of COVID-19. Therefore, the COVID-19-related infection and death rate in Hong Kong was relatively low compared to other cities and areas throughout 2020 - 2021[20].

However, the success story was no longer sustainable after early 2022. While the public was enjoying a certain relatively high degree of safety from the Alpha and Delta pandemic variants due to the implementation of comprehensive strict pandemic control measures, the growth of the vaccination rate was unexpectedly slow and limited. Therefore, when Hong Kong was hit by the fifth wave of the pandemic starting from mid-December 2021 (where the virus had evolved to a more transmittable variant - SARS-CoV-2 Omicron B.1.1.529 variant), the government documentation showed that the vaccination rate of the first dose only reached to around 71% with around 4,780,000 people at that time, which was

[16]Lee (2020).
[17]Cheung et al. (2020).
[18]Author (2021).
[19]Hartley & Jarvis (2020).
[20]Kwok et al. (2020); Ngai, Singh &Yao (2022).

much lower than comparable cities like Singapore and Shanghai. More importantly, the rate for the elderly aged 80 or above was only 19%[21].

After the highly contagious Omicron variant broke out into Hong Kong's strict containment measures, the spread of the virus inside the world's most populated city was rapid and uncontrollable. It had dragged Hong Kong society out of the illusion of being free from viruses, hence unvaccinated populations flocked to vaccination in the hope of self-protection. There was a rapid increase in the vaccination rate from 3,900 doses of a 7-day moving average (as of 15th December 2021) to 34,000 (as of 15th February 2022)[22]. Yet the race against the virus was deemed to be unsuccessful. The elderly population's fully effective vaccination rate remained low; it resulted in a large number of hospitalised cases and deaths (around 7000 cases), among them (mainly elderlies and chronic patients who were unvaccinated and not fully or effectively vaccinated elderly)[23].

One of the main reasons behind the low and slow vaccination rate among vulnerable groups was largely related to online mis-and-disinformation. Recent emerging epidemiological studies from both eastern and western societies reflected a similar situation, where people's exposure to vaccine-related misinformation reduced their intention to be vaccinated[24]. Most of the misinformation could be divided into three categories: (1) safety concerns - vaccination might cause sudden death or serious illness, (2) conspiracy theories (government's control against human rights) and (3) efficacy concerns (little or no difference between unvaccinated and vaccinated persons). The more exposure to this kind of false and inaccurate information, the stronger vaccine hesitancy was.

Hong Kong is no exception – COVID-19 vaccine misinformation played a large part in affecting citizens' motivation to get vaccinated[25]. The Hong Kong Baptist University[26] analysed the characteristics of misinformation and fake news during the pandemic in Hong Kong by gathering the data from four local public fact-checking organisations. The results showed that only 4 out of 120 pieces of online suspicious information related to COVID-19 pandemic and vaccines were rated as 'true'. Others were rated as false or partially false. Those false and inaccurate messages about COVID-19 vaccines included inaccurate descriptions of the side effects, risks in the administration process, and conspiracy beliefs about the vaccines. All in all, citizens' confusion, distress and mistrust against the safety of vaccines and their distrust of the government vaccination policy had significantly hindered their motivation to get vaccinated.

To summarise, fake news and misinformation have already brought tremendous damage to Hong Kong society. From 2019 until the present, fake news continues to confuse the public with many inaccurate and untruthful messages and information. Regarding the 2019 political saga, fake news itself did not create

[21]The Government of HKSAR (2022a).
[22]The Government of HKSAR (2021).
[23]Cheung, Chan & Jin (2022).
[24]For example: Loomba et al. (2021); Carrieri, Madio & Principe (2019); Lockyer et al. (2021); Kanzoia & Arya (2021).
[25]Ngai, Singh & Yao (2022); Zhang (2022); Sun (2022).
[26]Hong Kong Baptist University (2021).

Hong Kong's 2019 protests, yet created intangible politically-oriented power that energised capabilities of sustaining and empowering both pro-and-anti movements.

During the 2020 COVID-19 pandemic, society was able to contain the virus during the early stage, yet fake news and misinformation regarding the pandemic and vaccination, so widespread on the internet realm and on social media, caused a situation where the growth of vaccination rate was low for a long period of time. Once the Omicron variant broke ,through Hong Kong's pandemic measures, our society suffered heavy casualties among the elderly population due to the low, fully effective vaccination rate.

There is no doubt that fake news divides society, incites hatred, provokes discontent, compromises public order and safety, and damages public trust. Especially, the false news in Hong Kong's environment in those years facilitated political and public health crises, both of which are still ongoing. Therefore, it is necessary to address this problem seriously and squarely.

The Government of HKSAR has implemented a soft and hard strategy to combat the spread of fake news[27]. For the soft approach, they will actively find any erroneous information circulating widely on social media and the internet, then will try to stop the spread of those rumours and fake news with clarification through both traditional and non-traditional channels such as press conferences, press releases, statements on social media etc. For the hard approach, the government is planning to take stringent legal enforcement against any person making inappropriate speech online that may involve criminal elements.

Existing Legislations and their Limitations to Counter Digital Fake News

As mentioned earlier, after the government's announcement of legislating anti-fake news law, community stakeholders from different backgrounds raised a dissenting voice against it. One of their main arguments was that the laws of Hong Kong were currently sufficient to combat the spread of fake news and disinformation[28]. In that case, this article will study whether this argument is valid or not.

Before the fake news wildfire, Hong Kong had different ordinary laws to regulate and outlaw any mis-and-disinformation, similar to the UK's common law system. For example - the Caption 210 Theft Ordinance outlawed dishonest acts where the offender uses deceit, including reliance on false and misleading information, to cause harm to the victim or to the benefit of a third party[29]. This Ordinance is aimed at two specific groups of people - *perpetrators* who perform dishonest acts for a personal gain, and third-party gain against the *victims*. Caption 362 Trade Descriptions Ordinance outlaws false and deceptive information and descriptions for goods (section 7) and services (section 7A)[30]. Under this law, merchants must provide accurate information on the goods and services they sell

[27]The Government of HKSAR (2022b).
[28]Cheung et al. (2022).
[29]*Caption 210 Theft Ordinance*.
[30]*Caption 362 Trade Descriptions Ordinance*.

or offer, including origin, product composition, and related information. The Ordinance is aimed at two specific groups of people - *merchants* who supply goods and services and *consumers* who purchase them. Merchants that violate this law generally aim at enhancing private gains, such as promoting the sale of products.

In summary, these ordinary laws are designated to regulate specific targets, circumstances, and elements. When the government legislates a corresponding law in various fields to protect life and property of Hong Kong citizens, provisions for prohibiting false information will inevitably be included in those corresponding laws accordingly. Furthermore, the most prominent element of those existing legislations is that there must be clear subjects and victims of each case, and that the transfer of interests is also involved. However, in the case of dissemination of fake news, the relationship between perpetrators and victims and the causal relationship between the victims' *loss* and perpetrators' *gain* is generally ambiguous and hard to establish. Therefore, it will be extremely difficult to fulfil the general principles for prosecution[31].

On that account, laws against public-order crimes (which are defined as deviant behaviours that contradict society's shared norms, values and customs and interfere with the operations of society and the ability of people to function efficiently) would be our article's focus. We identify that (1) Hong Kong National Security Law, (2) Crime Ordinance[32] and (3) common law offence Outraging Public Decency are the laws that restrain freedom of speech and publication by criminalizing certain speeches and publications' deviant acts that are harmful to public order.

While studying whether those laws are effective in combating fake news, a number of court cases are cited for study. It is because the Hong Kong legal system follows the UK's common law system practice that adopts a strong legal doctrine of *stare decisis* and *ratio decidendi* that would deeply affect how the scope of laws and how those laws are being applied nowadays.

The Hong Kong National Security Law

Hong Kong National Security Law[33] (hereinafter Security Law) is a piece of national law that is directly enacted and passed by the Standing Committee of the National People's Congress of the People's Republic of China on 30 June 2020, and is listed under Annex III[34] of the Hong Kong Basic Law[35]. It is later on

[31]This situation also occurred in other places like France and the United Kingdom. For example, Couzigou (2022), Department for Digital, Culture, Media & Sport et al. (2022).
[32]*Caption 200 Crime Ordinance*.
[33]*The Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region*.
[34]Basic Law's Annex III: "*The following national laws shall be applied locally with effect from 1 July 1997 by way of promulgation or legislation by the Hong Kong Special Administrative Region*". It includes 13 pieces of Chinese national laws relating to diplomatic, defence and the foreign affairs relating to the HKSAR, such as laws of Declaration on the Territorial Sea, Nationality Law, Diplomatic Privileges and Immunities, Consular Privileges and Immunities, Law of the People's

promulgated and enforced by the Hong Kong government pursuant to article 18(2)[36] and (3)[37] of the Basic Law, bypassing the city's legislature.

The Security Law enjoyed a higher legal status by overruling local laws in cases of conflict (article 62)[38]. It lists four crimes against public interest in a national security perspective, which are respectively (1) secession (article 20), (2) subversion (article 22), (3) terrorist activities (article 24) and (4) collusion with a foreign country or with external elements to endanger national security (article 29). Those crimes are punishable by a maximum sentence of life imprisonment. Normally, relevant cases are tried in the Hong Kong judiciary; yet when Hong Kong government is unable to enforce the law, or when the case is effectively due to complex involvement of foreign countries or external elements which makes the Government of HKSAR difficult to exercise jurisdiction over the case, it could be enforced by the Supreme People's Procuratorate and tried in the Supreme People's Court (article 55).

The Security Law is a relatively new law that still requires a lot of legal clarifications. It therefore faced a lot of tests and judicial reviews after its implementation[39], for example: *Tong Ying Kit v HKSAR*[40] where Tong asked for *habeas corpus* application by challenging the Security Law's article 42(2)[41]; *Tong Ying Kit v Secretary for Justice*[42] where Tong challenges the Department of Justice's decision to issue certificate directing the criminal case be tried without jury pursuant to Security Law's article 46[43]. Among cases related to the Security

---

Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region and etc.

[35]An organic law and constitution of Hong Kong SAR and special national law of People's Republic of China.

[36]Article 18(2): "*National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.*"

[37]Article 18(3): "*The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.*"

[38]Article 62: "*This Law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law.*"

[39]Kong (2021).

[40]HCAL 1601/2020; [2020] HKCFI 2133.

[41]Article 42: "*When applying the laws in force in the Hong Kong Special Administrative Region concerning matters such as the detention and time limit for trial, the law enforcement and judicial authorities of the Region shall ensure that cases concerning offence endangering national security are handled in a fair and timely manner so as to effectively prevent, suppress and impose punishment for such offence. No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security.*"

[42]CACV 2923/2021; [2021] HKCA 912.

[43]Article 46: "*In criminal proceedings in the Court of First Instance of the High Court concerning offences endangering national security, the Secretary for Justice may issue a certificate directing that the case shall be tried without a jury on the grounds of, among others, the protection of State secrets, involvement of foreign factors in the case, and the protection of personal safety of jurors*

Law, one of the most vital precedents of the Security Law is the case *HKSAR v Tong Ying Kit*[44], where Tong was also the first person to be tried under this law.

A brief introduction of the background to Tong's case is needed. Tong rode his motorcycle through the streets of Hong Kong with a black banner stating "*Liberate Hong Kong. Revolution of our Times*" (this slogan was widely used by the protesters during the 2019 Hong Kong Social Unrest). He refused to follow the police order multiple times to stop before the police defence line, hence crashing into the defence line at high speeds and injuring three officers. He was immediately arrested. He was subsequently charged with the incitement to secession under article 20[45] and terrorist activities under article 24[46].

The High Court of First Instance analysed the elements of these two offences respectively. In this landmark case, the court had to decide whether Tong's actions were the actus reus of secession and terrorism, especially whether his act of carrying the slogan "*Liberate Hong Kong. Revolution of our Times*" could be an element of secessionist activity. Both sides had summoned academic scholars to argue the etymology of the slogan and the actual political message brought by the slogan at that time[47].

As noted by the verdict, all judges said their focal point was simply whether the message of secession (separate Hong Kong from China) was a natural and reasonable effect of displaying the slogan on the black flag[48]. The prosecutors, with the testimonial support of a Chinese history professor, insisted the catchphrase that Tong was advocating at that time and during that particular political environment was literally intended to deliver a political message that was regarding Hong Kong independence and the rejection of the sovereignty of the

---

and their family members. Where the Secretary for Justice has issued the certificate, the case shall be tried in the Court of First Instance without a jury by a panel of three judges."

[44]HCCC 280/2020; [2021] HKCFI 2200.

[45]Article 20: "*A person who organises, plans, commits or participates in any of the following acts, whether or not by force or threat of force, with a view to committing secession or undermining national unification shall be guilty of an offence: (1) separating the Hong Kong Special Administrative Region or any other part of the People's Republic of China from the People's Republic of China; (2) altering by unlawful means the legal status of the Hong Kong Special Administrative Region or of any other part of the People's Republic of China; or (3) surrendering the Hong Kong Special Administrative Region or any other part of the People's Republic of China to a foreign country.*"

[46]Article 24: "*A person who organises, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intended to cause grave harm to the society with a view to coercing the Central People's Government, the Government of the Hong Kong Special Administrative Region or an international organisation or intimidating the public in order to pursue political agenda shall be guilty of an offence: (1) serious violence against a person or persons; (2) explosion, arson, or dissemination of poisonous or radioactive substances, pathogens of infectious diseases or other substances; (3) sabotage of means of transport, transport facilities, electric power or gas facilities, or other combustible or explosible facilities; (4) serious interruption or sabotage of electronic control systems for providing and managing public services such as water, electric power, gas, transport, telecommunications and the internet; or (5) other dangerous activities which seriously jeopardise public health, safety or security.*"

[47]Wong (2021).

[48]HCCC 280/2020; [2021] HKCFI 2200, para. 40.

Chinese central government[49]. In contrast, the defendant proposed a counterargument that it could have an alternative meaning, quoting two academic social scientists who contended its de facto message was unclear. But, during the cross-examination, the defendant had not challenged and did not dissent the prosecution's point that the slogan could carry a secessionist meaning[50]. It became a critical point that affected the result of the case, as the court was being convinced that the slogan carried a profound pro-independence political message, meant to incite secessional action by those who read it (which is *liberate Hong Kong from Chinese authority*)[51].

Furthermore, with regard to the terrorist act, the court had to decide whether Tong's dangerous actions on that day involved serious violence against persons that could jeopardise public safety for the sake of pursuing his political agenda was an act of terrorism which is defined by the Security Law. As stated by the Security Law's Article 24 - "*A person who organises, plans, commits, participates in or threatens to commit any of the following terrorist activities causing or intended to cause grave harm to the society with a view to coercing the Central People's Government, the Government of the Hong Kong Special Administrative Region or an international organisation or intimidating the public in order to pursue political agenda shall be guilty of an offence": it includes (1) serious violence against a person or persons; and (5) other dangerous activities which seriously jeopardise public health, safety or security*". The Court stated that the element of *pursuing a political agenda* and *causing*[52] *or intended to cause grave harm to the society*[53] are satisfied.

It further explained that, in view of the fact that his act of dangerous driving, which was not challenged by the defence, was an act of serious violence against a person, it had obviously fallen into the scope of a terrorist act defined by the Security Law. Considering those facts, criminal elements and the socio-political context (which are the dangerous and violent manner as he rode his motorcycle, his state of mind and intention at the time of the offence and displaying the banner with that catchphrase, and his repeated aggressive challenge to the police order), judges ruled out that Tong was found guilty of secession and terrorism in Hong Kong's first security law trial.

The ruling had a far-reaching impact on the implication and application of the Security Law, as it became a legally binding precedent, influencing other relevant cases in the future. In accordance with this case, there is no doubt that the case has somehow directly restrained the freedom of expression and speech by banning the use of the slogan "*Liberate Hong Kong Revolution of our Times*" for political purposes and banning any acts (including spreading and promoting a secessionist political message and information verbally or physically) that can be deemed as a successive activity (where the context of circumstantial evidence also supports

[49]Ibid, para. 103-116.
[50]Ibid, para. 126.
[51]Ibid, para. 141.
[52]Ibid, para 149 & 163.
[53]Ibid, para. 133.

such claim), but this Security Law could not be used as a law against fake news spreading.

In the Tong case, the court's judgment had repeatedly emphasised that the context of circumstantial evidence and the political atmosphere at that period (politically-oriented and anti-government social unrest) was much more vital than other factors. In other words, if the case did not involve any element of threatening national security and if the circumstantial evidence is not sufficient, then the Security law is not applicable to the case simply about spreading or creating fake news against society.

Outraging Public Decency - An Old Common Law Offence

Another law that the law enforcement agencies had used for criminalising speech related public-order crime is the Outraging Public Decency Order. It is an offence of common law for a person to do an act or acts which outrage public decency, and punishable under section 101I of the Caption 221 Criminal Procedure Ordinance. The order is intended to prevent the corruption of the mind and the destruction or erosion of values of decency, morality and good order[54]. In general, it applies to all grossly disgraceful behaviour or behaviour that is openly and outrageous indecent or is offensive and disgusting, or is injurious to public morals by intending to corrupt them. However, the court has ruled out that this offence does not apply to online misbehaviour after the ruling of a remarkable appeal case *HKSAR v. Chan Yau Hei*[55].

In 2010, a netizen named Chan Yau Hei posted allegedly "inflammatory" messages on a popular online discussion forum named HKGolden. He published a message on the forum stating that "*we have to learn from the Jewish people and bomb the Liaison Office of the Central People's Government* [English translation]" in June 2010. The message was sent from his computer at his home. After a Police investigation, he was arrested that same month, and he admitted that he was the one who had participated in the discussion and posted the message. He defends his act by claiming that his act was "for fun only" with "no intention to commit any offence". Law enforcement agencies decided to charge him with "committing an act outraging public decency."

The defendant, at first, had pleaded guilty before a magistrate, and then changed to a plea of not guilty, after seeking alternative counsel advice. It was contended by the defendant that the act was not conducted in *public* as it was conducted on the *internet forum* where it was not possible for two or more people to see. The Magistrate rejected this contention, confirmed the conviction and sentenced the defendant to twelve months of probation. The defendant appealed to the Court of First Instance in November 2011, but his appeal was dismissed. Finally, he appealed to the Court of Final Appeal (Criminal).

First of all, in order to satisfy the law's requirements, the court took the case *R v Hamilton* [56] as a guideline to set two elements of the law, which were the

[54]Community Legal Information Centre (2021); Legal Aid Department (n.d.).
[55]FACC 3/2013.
[56](2008) QB 224.

indecency requirement (nature of the act done); and the publicity requirement (being known as the public element of the offence). In Chan's case, the Court of Final Appeal relied on a broad interpretation of 'indecency' and 'obscenity' in which it can be both sexual and non-sexual. Therefore, there was no controversy regarding the indecency requirement. However, the case's focal point was whether this old common law offence could be committed by posting a message on an *internet discussion forum*[57].

In order to satisfy this element, the prosecutor must prove that an offence was committed in public space which is defined as the "*public has access or in a place where what is done is capable of public view*."[58] According to the "two-person" rule, the public nature of this offence "*can only be satisfied if the act is capable of being seen by two or more persons who are actually present, even if they do not actually see it.*"[59] Since previous relevant precedents showed that the offence's public element only includes "*actual or physical, tangible place*"; in this regard the Court was not convinced that the internet can be a *public place*, hence ruled out that the internet website *de pure* did not fall within the meaning of a physical, tangible place, but a *de facto virtual* place[60]. Furthermore, the defendant posted the message at his home, not a place of publication. It also means the place that the defendant posted the message did not satisfy the publicity element. The prosecution must prove the indecent acts were committed in *public*, in circumstances where there is a real possibility of public members capable of witnessing the act.

Despite the Court agreeing that the inflammatory message posted by the appellant on the internet discussion forum was profoundly indecent[61], the public element of the offence was not satisfied in this case[62]. The Lordships further explained that the internet is regarded as a medium and not a place under the scope of this offence[63]. The Court of Final Appeal, therefore, allowed the appellant's appeal, and quashed the appellant's conviction for the offence of outraging public decency[64].

In essence, this case becomes the precedent, banning the use of an old common law offence Outraging Public Decency to broadly control indecent online speech and message that does not fall into the public element. It can only be applied when the indecent and outrageous online message on a mobile internet device was displayed in a physical, tangible realm where the members of the public have actual access or is capable of public view.

Caption 200 Crimes Ordinance - Section 161 Access to Computer with Criminal or Dishonest intent

[57]FACC 3/2013, para. 4.
[58]Ibid, para. 22.
[59]Ibid, para. 23 & 26.
[60]Ibid, para 50.
[61]Ibid, para. 87.
[62]Ibid, para. 90.
[63]Ibid, para. 63.
[64]Ibid, para. 93.

Another law that was often used by the prosecution to ban the use of computer-committed offence is subsection 161 access to computer with criminal or dishonest intent under the Caption 200 Crimes Ordinance. Notably, the ruling of the High Court case *Secretary for Justice v. Wong Ka Yip Ken*[65] had extended the scope of the law, stating mobile phones fall under the definition of *computer* in subsection 161. The Department of Justice previously used this law as a catch-all charge to prosecute a wide range of computer and smartphone-related crimes and offences. Before a landmark ruling by the Court of Final Appeal in 2019 (which will be explained later), prosecutors had extended and utilised the use of this law to charge any offences that can be linked to the dishonest use of computers and mobile phones, including - but not limited to - online fraud, illegal intrusion, clandestine photo-taking using smartphones in non-public places, urging or inciting others to engage in illegal activities, online publication, false or misleading message and information on the internet[66]. One of the most important but controversial extensions is the control of online speech. Cases showed that it had been used to prosecute people based on their online provocative or hate speech, and offenders who used computers to send mis-and-disinformation through email[67]. This law thus is known as a one-size-fits-all charge. Yet, the scope and application of the law was being challenged in 2019 with the case *Secretary for Justice v Cheng Ka Yee & Others*[68], where the Court had set a new legally binding guideline in the final appeal case about its application.

The case arose in 2016, where four teachers were accused of leaking the questions of the school entrance examination through their own smartphones. They took photos of the exam paper and subsequently distributed them without authorisation. They had been charged under this subsection 161(1)(c). The section 161 concerning access to computer with criminal or dishonest intent reads as follows:

(1) Any person who obtains access to a computer -
(a)with intent to commit an offence;
(b)with a dishonest intent to deceive;
(c)with a view to dishonest gain for himself or another; or
(d)with a dishonest intent to cause loss to another, whether on the same occasion as he obtains such access or on any future occasion,

[65][2013] 4 HKLRD 604. In 2013, a defendant Mr. Wong used his smartphone to secretly record a video in the ladies' washroom of his office. The phone was discovered; and he admitted that he had an intention to film a female colleague secretly with it. The prosecution cited section 161 of the Crime Ordinance against his criminal and dishonest act. The central question of this law was whether a mobile phone could be legally identified as a "computer", since the term of computer was undefined by the Legislative Council while drafting the provision in 1992. The lower court held in its findings, did not agree that a mobile phone was a computer. The Secretary for Justice appealed against the acquittal. The judge of the High Court, after considering the expert's professional opinion, ruled that mobile phones could be defined as "computers". He also further emphasized that this was in line with judgments in other jurisdictions as well.
[66]Cheung (2017); the Government of HKSAR, 2014.
[67]HKSAR v Yip Kim Po and others [CACC 353/2010].
[68][2019] HKCFA 9.

> *commits an offence and is liable on conviction upon indictment to imprisonment for 5 years.*
>
> *(2) For the purposes of subsection (1) gain and loss are to be construed as extending not only to gain or loss in money or other property, but as extending to any such gain or loss whether temporary or permanent; and*
> *(a)gain includes a gain by keeping what one has, as well as a gain by getting what one has not; and*
> *(b)loss includes a loss by not getting what one might get, as well as a loss by parting with what one has.*

The case was first heard in the magistrates' court. The magistrate ruled that the prosecutor failed to prove the objective limb of the Ghosh test on *honesty* beyond a reasonable doubt[69]. As a result, the defendants were acquitted. The prosecution then appealed to the Court of First Instance, the Judge pointed out that the use of a person's own mobile smartphones, or use of computer which is not authorised, to leak questions did not amount to "*obtaining access to computer*"[70]. The Judge therefore rejected the appeal. Prosecution was not satisfied with the decision and appealed. The case was heard by the Court of Final Appeal[71].

The Judges of Court of Final Appeal raised the major concern in this case. It was about whether the terminology and phrase *obtain access to a computer* should be interpreted as *gaining access* to a computer belonging to someone else, or simply *using* any computer. The fact that four defendants used their own smartphone and computer to commit the misconduct, such acts *prima facie* was conflicted against the provision's meaning.

The Judges first applied the literal rule to interpret the *de facto* meaning of the provision. They pointed out, inter alia, as a matter of semantics, the word *obtain* basically referred to "*come into the possession or enjoyment of; secure or gain as the result of request or effort, acquire, get"* according to the Oxford Dictionary. Therefore, they stated that "[it] *is not a word which sits easily with the use by a person of their own device. Nor is the word "access" which, used as a noun, ordinarily means "admittance (to the presence or use of)"*[72]. As a verb, it includes in its usage *gain access to* something[73]. The Judges further explained that, as a matter of language, one always *obtains* access to something to which *one did not have access before*[74]. Other than the literal meaning approach, the Judges also reviewed the legislative history. They found out that the "*interpretive provision 'a person obtains access to a computer if (and only if) he causes a computer to perform any function'* was deleted"[75]. *The words '(obtaining access) with or without authority' did not appear in the bill either*"[76]. The judges construed the

[69]HKSAR v Cheng Ka Yee & others KCCC 2932/2015.
[70][2018] HKCFI 2418.
[71][2019] HKCFA 9.
[72]Ibid, para. 38–39.
[73]Ibid.
[74]Ibid.
[75]Ibid, para. 40.
[76]Ibid.

provision based on their interpretation of the text and purpose, and ruled that "*the use of one's own computer to set up a phishing website*" does not fit the provision's *actus reus*. Despite this, the appellant urges the Court to adopt a construction that advances the policy of combating related crime due to the technological advancement in recent years. But the judges rejected the appellant's request, by stating that it was not the function and responsibility of the Court in statutory construction.[77] As a result, the judges rejected the final appeal, and set a new guideline that has in effect narrowed the scope and application of this law after a legal clarification.

There is no doubt that the Offence has been criticised for its excessive usage, but it could be statutory to fight against the perpetrator who intentionally creates and spreads fake news. After the Court of Final Appeal's judgement in 2019, the laws had lost their previous function. If the perpetrator spreads fake news and mal-information by using his own computer device, then it was not criminal behaviour under section 161.

Discussion and Conclusion

Freedom of expression, speech and publication are an individual basic right. The popularisation of new social technologies that can facilitate rapid, instant yet unverified information sharing and large-scale information cascades enabling the spread of fake information. As mentioned, Hong Kong has experienced two waves of fake news wildfires: first wave of 2019 social unrest and the second wave of COVID-19. Both waves have significantly damaged social trust and solidarity.

The value of this article could be as a pioneer study to analyse in-depth the limitations of current legislation against fake news in Hong Kong, and to counter the argument raised by the groups who stand against the fake news legislation. The objectors argue that current laws are sufficient to fight against fake news, but our study reflects a different story. The law enforcement agencies of Hong Kong have tried different laws to serve that purpose, yet they were to a certain extent ineffective because of their scope and the limit of their legal application. In other words, there is no profound legal basis that can be used by the government to stop the spread of fake news and deter potential preparators from creating them. In fact, the judiciary had expressed their opinions, suggesting that the government shall introduce statutory provisions to criminalise the posting on the internet of certain outraging and extremely improper materials for the sake of closing the legal loophole[78].

[77]ibid, para. 47.

[78]In the case of HKSAR v Chan Yau Hei - Mr Justice Fok PJ stated in his judgement that "*For a number of reasons, there would seem to be a strong case for introducing statutory provisions to criminalise the posting on the internet of certain material like that [hate speech] in the present case*". In the case of Secretary for Justice v Cheng Ka Yee and others: Mr Justice Robert French NPJ explained that "*Those forms of offending, it was submitted, could not have been foreseen at the time of the enactment of the Computer Crimes Ordinance 1993. […] the second submission appears to offer a desirable public policy and urges the Court to adopt a construction that advances that policy. But that is not the function of the Court in statutory construction. The Court seeks to*

We argue that anti-fake news legislation helps to promote better public trust since the legislation would allow the government to have the legal basis to specifically target those fake news that may cause profound harm to public safety and persons who maliciously spread fake news with criminal intentions; secondly, it could improve the online environment and curtail the speed of news spreading by coercively increasing social media platform's legal liabilities and responsibilities; and thirdly, it will help to promote anti-fake news public education and deter potential offenders.

There is no doubt that the legislation will inevitably capture the public's attention (especially from the civic organisations) and trigger international consciousness. However, it does not necessarily mean the government and public should choose to ignore its presenting threats and potentially further damage. Referencing the global trend, according to the latest summary report conducted by Poynter[79], nearly 53 countries or regions have implemented different kinds of tangible and intangible policies to fight against fake news to a certain extent - which respectively, but are not limited to, setting up a government and parliamentary task force, formulating non-legally binding regulations with private sectors, anti-fake news law legislation, organizing community campaign and education to fight against the issue.

In fact, countries like France, Germany, Singapore, and the United Kingdom face similar socio-political pressures from domestic and international communities while legislating relevant laws[80]. Even though they suffer from heavy bombardments of public criticism and scepticism, the government still takes responsibility enacting relevant laws to protect society from fake news wildfire.

It will be the same in the Hong Kong case. It is expected that the Government of HKSAR will face a lot of local and international pressure, especially since the current socio-political environment is highly intense. Therefore, our suggestion is that the Government should take an active role in consulting the civic communities from both local and international sectors. This should help to enhance the new law's legitimacy and its effectiveness in targeting fake news, and to strike an equilibrium between civilians' freedom and public safety.

In a nutshell, we should bear in mind that the worst is yet to come. Indeed, there are an increasing amount of evidence and scholarly articles showing that AI technological development will worsen the fake news problem, such as deep fake technology, bots, etc. Netizens will face increasing disadvantages in spotting and exposure to high-quality fake content. Recalling the old English adage, "time and tide wait for no man," curtailing the spread of fake news is similar to the control of wildfire, which must be conducted in a timely manner. Therefore, Hong Kong should take vital precautionary steps to equip itself against the future fake news wildfire.

---

ascertain the purpose of the statute to inform its construction. It does not identify a purpose which it thinks would be beneficial and then construe the statute to fit it." Para. 45-47.

[79]Funke & Flamini (2022).

[80]For example: Teo (2021); Claussen (2018); Carson & Fallon (2021).

References

Author, A. (2021). 'Hong Kong Unraveled: Social Media and the 2019 Protest Movement' in *Global Storytelling: Journal of Digital and Moving Images* 1(1). https://doi.org/10.3998/gs.830

Breakstone, J., Smith, M., Wineburg, S., Rapaport, A., Carle, J., Garland, M. & A. Saavedra (2021). 'Students' Civic Online Reasoning: A National Portrait' in *Educational Researcher* 50(8):505-515. https://doi.org/10.3102/0013189X211017495

Carrieri, V., Madio, L. & F. Principe (2019). 'Vaccine hesitancy and (fake) news: Quasi-experimental evidence from Italy' in *Health economics* 28(11):1377-1382. https://doi.org/10.1002/hec.3937

Carson, A. & L. Fallon (2021). *Fighting Fake News A Study Of Online Misinformation Regulation in the Asia Pacific*. Melbourne, Australia: La Trobe University.

Chan, M., Lee, F. & H. Chen (2019). "Hong Kong" in *Digital News Report 2019*. Published by Reuters Institute for the Study of Journalism and University of Oxford.

Cheung, C., Chan, S., Yuen, A., Cheung, S. & I. Har (2022). *A Study of the Rise of Fake News*. Published by The Hong Kong Federation of Youth Groups. [Chinese only].

Cheung, K. (2017). 'Dishonesty and computers: how a loosely drafted offence is abused by prosecutors' in *Hong Kong Free Press*, 17 December 2020. https://hongkongfp.com/2017/12/17/free-speech-selective-enforcement-opacity-problems-dishonest-use-computer-offence/

Cheung, P.H., Chan, C.P. & D.Y. Jin (2022). 'Lessons learned from the fifth wave of COVID-19 in Hong Kong in early 2022' in *Emerging microbes & infections*, 11(1): 1072–1078. https://doi.org/10.1080/22221751.2022.2060137

Claussen, V. (2018).' Fighting hate speech and fake news. The Network Enforcement Act (NetzDG) in Germany in the context of European legislation' in *Fake news, pluralismo informativo e responsabilità in rete*:110-136.

Community Legal Information Centre (2021). B. *Acts Outraging Public Decency*. The University of Hong Kong. https**://**www.clic.org.hk/en/topics/sexual_offences/III_Sexual_offences_to_protect_public_morality/B_Acts_Outraging_Public_Decency

Couzigou, I. (2021). 'The French Legislation Against Digital Information Manipulation in Electoral Campaigns: A Scope Limited by Freedom of Expression' in *Election Law Journal: Rules, Politics, and Policy* 20(1):98-115. https://doi.org/10.1089/elj.2021.0001

Department for Digital, Culture, Media & Sport, Home Office, Dorries, N. and Patel, P. (2022). Online safety law to be strengthened to stamp out illegal content. Press Release. Published by the Government of the United Kingdoms.

Directorate-General for Communications Networks of European Commission (2018). 'Fake News and Disinformation online Report' in *Flash Eurobarometer 464*. 2018.2391. Published by European Union.

Funke, D. & D. Flamini (2022). 'A guide to anti-misinformation actions around the world' in *Poynter*. https://www.poynter.org/ifcn/anti-misinformation-actions/

Hartley, K. & D.S.L. Jarvis (2020). 'Policymaking in a low-trust state: legitimacy, state capacity, and responses to COVID-19 in Hong Kong' in *Policy and Society* 39(3):403-423. https://doi.org/10.1080/14494035.2020.1783791

Hong Kong Baptist University (2021). 'COVID-19, Vaccines and Related "Fake News" An Overview of Misinformation Debunked by Hong Kong Fact-checking Organisations' in *The Overcoming Vaccine Hesitancy in Hong Kong Project Report Series No. 9*. Hong Kong.

International Federation of Journalists (2021). 'Hong Kong: New poll shows widespread concern over possible introduction of "fake news" law'. *News and Press Release*, 9

November 2021. https://www.ifj.org/media-centre/news/detail/category/press-releases/article/hong-kong-new-poll-shows-widespread-concern-over-possible-introduction-of-fake-news-law.html

IPSOS (2019). CIGI-IPSOS Global Survey Internet Security & Trust 2019 – Part 3: social media, fake news & algorithms. Published by Centre for International Governance Innovation.

Kanozia, R. and A. Arya (2021). "'Fake news", religion, and COVID-19 vaccine hesitancy in India, Pakistan, and Bangladesh' in *Media Asia*. https://doi.org/10.1080/01296612.2021.1921963

Kemp, S. (2022). *Digital 2022: Hong Kong*. *Datareportal*. https://datareportal.com/reports?author=5576cd58e4b0ba7a870b77fc

Kihara, T. (2021). 'Hong Kong's call for 'fake news' law raises media crackdown fears' in *NikkeiAsia*, 15 August 2021. https://asia.nikkei.com/Politics/Hong-Kong-s-call-for-fake-news-law-raises-media-crackdown-fears

Kong, Y. (2021). Recent case law relating to the National Security Law – Hong Kong. *Thomas Reuters*. https://support.thomsonreuters.com.hk/product/westlaw-asia-new/updates-alerts/recent-case-law-relating-national-security-law-hong-kong

Kwok, K.O., Li, K.K., Chan, H., Yi, Y.Y., Tang, A., Wei, W. I. & S. Wong (2020). 'Community Responses during Early Phase of COVID-19 Epidemic, Hong Kong' in *Emerging infectious diseases*, 26(7):1575–1579. https://doi.org/10.3201/eid2607.200500

Lee, F.L.F. (2020). 'Social media and the spread of fake news during a social movement: The 2019 Anti-ELAB protests in Hong Kong' in *Communication and the Public* 5(3–4):122–125. https://doi.org/10.1177/2057047320969437

Legal Aid Department (n.d.). Chapter 3 Case of Public Interest or Concern. https://www.lad.gov.hk/documents/annual_rpt_2014/eng/case.html#:~:text=The%20offence%20of%20%E2%80%9COutraging%20Public,lewd%2C%20obscene%20or%20disgusting%E2%80%9D.

Lockyer, B., Islam S., Rahman, A., Dickerson, J., Pickett, K., Sheldon, T., Wright, J., McEachan, R., Sheard, L. and Bradford Institute for Health Research Covid-19 Scientific Advisory Group (2021). Understanding COVID-19 misinformation and vaccine hesitancy in context: Findings from a qualitative study involving citizens in Bradford, UK, in *Health expectations : an international journal of public participation in health care and health policy* 24(4):1158–1167. https://doi.org/10.1111/hex.13240

Loomba S, de Figueiredo A, Piatek S. J., de Graaf & H.J. Larson (2021). Measuring the impact of COVID-19 vaccine misinformation on vaccination intent in the UK and USA. Nature Human Behaviour 5: 337–348. https://doi.org/10.1038/s41562-021-01088-7

Luk, T.W. (2020). 'The 2019 Social Unrest: Revisiting the Pathway of Radicalization in Hong Kong from 2008 to 2012-an Explorative Approach with General Strain Theory' in *Contemporary Chinese Political Economy and Strategic Relations* 6(3):'1163-1206.

Luk, T.W. (2021). Human security and threats associated with the impacts of 2019 Hong Kong social unrest' in *International Journal of Peace and Development Studies* 12(1):1-10. https://doi.org/10.5897/IJPDS2020.0388

Ngai, C., Singh, R.G. & L. Yao (2022). 'Impact of COVID-19 Vaccine Misinformation on Social Media Virality: Content Analysis of Message Themes and Writing Strategies' in *Journal of medical Internet research*, *24*(7), e37806. https://doi.org/10.2196/37806

Panel of Security of the Legislative Council of HKSAR (2020). *Administration's Paper on Brief Report on Hong Kong's Law and Order Situation in 2019*. LC Paper No.CB(2) 644/19-20(03). Hong Kong SAR: Legislative Council of HKSAR.

Purbrick, M. (2019). 'A Report of the 2019 Hong Kong Protests' in *Asian Affairs* 50(4):465-487. https://doi.org/10.1080/03068374.2019.1672397

Shek, D.T.L. (2020). 'Protests in Hong Kong (2019–2020): a Perspective Based on Quality of Life and Well-Being' in *Applied Research Quality Life* 15: 619–635. https://doi.org/ 10.1007/s11482-020-09825-2

Simpson, S. (2019). 2019 CIGI-Ipsos Global Survey on Internet Security and Trust. Published by Centre for International Governance Innovation. https://www.ipsos.com/en/2019-cigi-ipsos-global-survey-internet-security-and-trust

Sun, F. (2022). 'Coronavirus Hong Kong: why are elderly not getting vaccinated? Families, doctors and government not doing enough to tackle irrational fears and practical obstacles, say social workers' in South China Morning Post. https://www.scmp.com/news/hong-kong/health-environment/article/3166840/coronavirus-hong-kong-alone-afraid-and

Teo, K.X. (2021).' Civil Society Responses to Singapore's Online "Fake News" Law' in *International Journal of Communication* 15(2021):4795-4815.

The Government of HKSAR (2022a). Hong Kong Vaccination Dashboard (as at 22 August 2022). https://www.covidvaccine.gov.hk/en/dashboard/totalFirstDose

The Government of HKSAR (2022b). LCQ1: Combating false information. Press Release. https://www.info.gov.hk/gia/general/202205/11/P2022051100450.htm?fontSize=1

The Government of HKSAR (2021). Update on monitoring COVID-19 vaccination. Press Release. https://www.info.gov.hk/gia/general/202112/08/P2021120800577.htm?fontSize=1

The Government of HKSAR (2014). LCQ4: Access to computer with criminal or dishonest intent. Press Releases. https://www.info.gov.hk/gia/general/201411/05/P201411050605.htm

Wardle, C. & H. Derakhshan (2017). *Information Disorder: Toward an Interdisciplinary framework for research and policy making*. Council of Europe Report DGI (2017)09. Published by the Council of Europe.

Wardle, C. (2017). Fake News. It's complicated. First Draft. https://medium.com/1st-draft/fake-news-its-complicated-d0f773766c79

Wong, B. (2021). 'National security law: protest slogan 'Liberate Hong Kong' can have multiple meanings, but is it ultimately a call for secession? in *South China Morning Post*, 28 July 2021. https://www.scmp.com/news/hong-kong/law-and-crime/article/3142767/national-security-law-protest-slogan-liberate-hong

Zhang, X. (2022). 'Report Series NO.1: Examining COVID-19 Vaccination Misinformation and Clarification by the Public Sector in Hong Kong' in *Combating COVID-19 in Hong Kong Project.* Hong Kong Baptist University.

Cases

Hong Kong

HKSAR v Cheng Ka Yee & others KCCC 2932/2015
HKSAR v Tong Ying Kit HCCC 280/2020; [2021] HKCFI 2200
HKSAR v Chan Yau Hei FACC 3/2013
HKSAR v Yip Kim Po and others [CACC 353/2010]
Secretary for Justice v Cheng Ka Yee & Others [2019] HKCFA 9
Secretary for Justice v Cheng Ka Yee & Others [2018] HKCFI 2418
Tong Ying Kit v HKSAR HCAL 1601/2020; [2020] HKCFI 2133

Tong Ying Kit v Secretary for Justice CACV 2923/2021; [2021] HKCA 912

UK
R v Hamilton [2008] QB 224

Athens Journal of Law - Volume 9, Issue 1, January 2023 – Pages 139-172

Kashmir's Right to Self Determination: UNSC Resolutions, Human Rights Violations and Culpability under International Law

*By Zia Akhtar**

The United Nations has voted for the Kashmir dispute to be settled by a referendum in the territory since the inception of both India and Pakistan as independent states in 1947. The Security Council resolutions have mandatory effect since their passage and a plebiscite was overdue when India decided to annex the state in August 2019. In refusing to let the people decide their future the Indian government went against the cardinal principle of self-determination. By revoking its constitutional status as a state within the Indian Union the government revoked the Article 370 without consulting any other interested party including the political representatives of the Kashmiri people. The consequence was the declaration of Martial law in the Valley enforced by an unprecedented security operation whereby the special powers allotted to the military and the auxiliary Border Security forces and Central Reserve Police force have been used to assault the human rights of the people. The Indian government has not only refused to implement the mandate of the UNSC but also breached the International Convention of Civil and Political Rights and the Universal Declaration of Human Rights. The actions of the Indian forces have been under the spotlight of the UN Human Rights Council whose reports in 2018 and 2019 implicate the military of gross human rights abuses in Kashmir. The argument of this paper is that there should be rigorous application of international humanitarian law and war crimes tribunals invested to prosecute the Indian officials for breaches of the rules in Non-International Conflicts (NIC).

Keywords: *Instrument of Accession; Article 370; cultural genocide; Uti possidetis; UN Chapter VI; International Covenant on Civil and Political Rights; AFSPA Public Safety; ct, OHCHR Report 2018; International Humanitarian Law (IHC); Non International Conflict (NIC)*

Introduction

The Kashmir dispute relates to the land and its long suffering people who have experienced "human rights violations through militarised control"" from the Indian occupation.[1] The inhabitants of Kashmir have been denied a referendum under the UN Security Council auspices and their resentment has led to suppression by the Indian military authority acting with complete immunity under

*LL.B. (Lon), LL.M. (Lon), Barrister, member of the honourable society of Gray's Inn, University of Bolton, United Kingdom.
Email: plawsgrad@gmail.com
[1]Sharma (2022).

its special powers.[2] This has escalated since the Indian government revoked Article 370 on 8 August 2019, which protected Kashmir's status as a state within India's constitution, and imposed direct rule from New Delhi. The security operation that has followed includes human rights violations, including collective punishments, curfews, extra judicial killings and disappearances at the hands of Indian security forces. It requires an examination of the legal background, the issues involved, and the deprivation of human rights in this asymmetrical conflict that needs international attention as a Non international Conflict (NIC) governed by humanitarian law.

The origins of the dispute are in partition of the Indian sub-continent when Britain relinquished sovereignty over the Indian subcontinent by enacting the Indian Independence Act (IIA) 1947. The Last Viceroy of British India, Lord Mountbatten allowed dispensation to the 562 Princely States to accede to any one of the two dominions of India or Pakistan.[3] However, the British government's representative formulated two pre-conditions that had to be met which were, firstly, the requirement that the State to be contiguous, and, secondly, the general aspirations of the people had to be accounted for. [4]

The overwhelming Muslim population of Jammu and Kashmir (J&K)had wished to be aligned with Pakistan but the princely ruler wanted to accede to India and he dismissed his Prime Minister Ranchandra Kak, on 11 August 1947 who had wanted a referendum.[5]The Maharaja then signed the Instrument of Accession with India upon which the Indian government provided the military guarantee for the unilateral declaration by the Maharaja when its armed forces landed on 24 October 1947 in the capital of Srinagar. It was ostensibly to prevent the Pakistani forces who had infiltrated to lay claim to the state which had been transferred to them under the boundary commission. The Indian government invoked Section 10(1) of the IIA for its incorporation which states "*the provisions of this Act keeping in force provisions of the Government of India Act, 1935, shall not continue in force the provisions of that Act relating to appointments to the civil services of, and civil posts under, the Crown in India by the Secretary of State, or the provisions of that Act relating to the reservation of posts*".[6]

The intervention by Pakistan's sympathisers secured a rump state of Pakistani (Azad) Kashmir and this is an autonomous region within the nation state of Pakistan. The UN Security Council adopted a resolution after the ceasefire for a plebiscite to be conducted in the whole territory for the Kashmir's people to self-determine their future status. [7] The division of Kashmir has remained and it includes 66 % of its designated area in India and the rest is in Pakistan with a border which is divided by a line of control (LOC).

---

[2]The population of Jammu and Kashmir was 14.5 million before its annexation. It was 68% Muslim. Indian Population 2019. //indiapopulation2019.com/population-of-jammu-kashmir-2019.html

[3]*Brown (1984).*

[4]Ibid.

[5]Ankit (2010). See also Abdullah & Chinar (2016).

[6]Lone (2018).

[7]UN Security Council, *Security Council resolution 47 (1948)*

In 2019 the Indian government annexed Kashmir and imposed a lockdown and closed all communication with the outside world. It arrested the political leaders, disbanding the local parties and dissolved its national assembly. This form of censorship and news blackout continued for over one year and has only been partially lifted.[8] The policy of the Indian government under Prime Minister Narendra Modi, a fervent nationalist of the Bharatiya Janata Party (BNP), has been to implement extra constitutional measures that has usurped the status of Kashmir and led to two variables. Firstly, it is against the letter and spirit of the UN Security Council Resolutions for a plebiscite to determine its permanent status. Secondly, it has broken the Simla Agreement which was the first bilateral accord between the two countries on Kashmir by annexing the state without consultation with Pakistan. It states in Article 4(ii) "*In Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice to the recognized position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations*".[9]

However, the human rights dimension of the conflict has caused the most concern because of the immunity with which the Indian forces have carried out their operations. The Armed Forces (Special Powers) Act (AFSPA) 1958 provides the umbrella of immunity to military personnel in Kashmir and has been effective for the longest period than on any other state. This has led to the commission of atrocities and the first Human Rights Council report in 2018 was very damning of the Indian government's actions in Kashmir and stated that the "allegations of human rights violations include torture and custodial deaths, rape, enforced disappearances and extrajudicial executions".[10] The subsequent report also mentioned the "extrajudicial, summary or arbitrary executions especially since the 2016 unrest began".[11] Despite this the Indian government revoked Kashmir's autonomous status and incorporated it within the Indian union after further sub dividing the state into two territories.[12] There was no acknowledgment of its alleged actions in the territory and it has refused UN Secretary General Antonio Gutteras's offer of mediation.[13]

The breach of human rights is not only related to the measures the armed forces and the security services have taken against the civilian population but now also concerns the suppression of grassroots representation of the Kashmir people. The Indian Parliament (Lok Sabha has passed the law by providing land grants which have removed all obstacles to non-Kashmiris purchasing land in Kashmir.

[8]Gupta (2019).
[9]Ministry of External Affairs, Government of India , Simla Agreement.
[10]OHCHR (2018).
[11]OHCHR (2019).
[12]The Jammu and Kashmir Reorganisation Act, 2019 abolished Kashmir's autonomy and created two union territories, Jammu and Kashmir (J & K) and Ladakh. The J &K will have its own legislative assembly while Ladakh will be governed by a Lieutenant General appointed by New Delhi. Both territories have been annexed under Article 229 of the Indian Constitution that was framed for new territories beginning with Pondicherry, the former French colony.
[13]UN Chief officer.

[14]The Indian government has enacted legislation that threatens to permanently change the demographic balance of the population. The Jammu and Kashmir Property Rights to Slum Dwellers Act 2012, as amended in 2020, deletes references to "permanent residents", facilitating the process for this category of migrants to attain property rights, which would allow them to apply for residency. This would lead to marginalisation of the original inhabitants who have resided since time immemorial on this territory, and along with the defunct status of Kashmir's political parties makes it a unique crises.

The violations of human rights extend to the cultural genocide of the indigenous Muslim population.[15] The BJP party has taken control of the Jammu and Kashmir Waqf Board which was a charitable trust exercising control over properties across the region which extends to the control of shrines. [16] These in Kashmir were an ancient repository of piety and assertion of Muslim identity which have been transferred to a party committed to Hindutva. The lingua franca of the Kashmiri people Urdu is being eroded with transplantation of Hindi, and Dogri being made official languages and with transfer of the native Kashmiri language from Nastaliq to the Devanagriscript.[17] The children in state schools are being made to "sing Hindu hymn Raghupati Raghav Raja Ram in classes as part of the preparation for the festival of Gandhi Jayanti" in the process of indoctrination.[18]

The imposition of the BJP ideology on the Kashmir population is alongside the repression that has been in motion since India annexed Kashmir. The majoritarian state's policy framework in India "dissipates the possibility of resolving the Kashmir question" and its ideological underpinning "eschews its responsibility of administering Kashmir through democratic engagement and of seeking negotiated settlement" under the present dispensation. [19] The oppression of the inhabitants and their Sankritisation is reminiscent of a "colonial agenda imposed by settler states on Indigenous peoples". The violation of international law by India in granting its forces immunity needs the chain of command to be indicted for crimes in a NIAC.[20]

---

[14]The Jammu and Kashmir Grant of Domicile Certificate (Procedure) Rules (2020) enables residency and property rights for various categories of non-residents, who can now also apply for government jobs.

[15]Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) define genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group".

[16]Sharma (2022).

[17]Jammu and Kashmir Official Languages Act 2022 was introduced in Lok Sabha on September 22, 2020. The legislation declares Kashmiri, Dogri, Urdu, Hindi and English as the official languages to be used for the official purposes of the union territory, from such date as the Administrator of the union territory may notify.

[18]Muslim Students being forced to sing Hindu hymns draws ire in Kashmir. The Hindu.

[19]Rai (2019).

[20]Korbell (2021).

This paper has 4 parts which can be navigated as follows. In Section A the issue of the legality of the Instrument of Accession to India of Kashmir in 1947 and the mandatory effect of the Security Council resolutions is extrapolated that have called for a referendum in the territory; Section B examines the application of and the right of self-determination under the international conventions and UN Declarations; Section C evaluates the human rights violations that are the consequence of immunity from prosecution of the armed forces and refers to the Human Rights Council reports and Non-Governmental Organisations (NGO)s; and Section D charts India's refusal to be bound by Additional Protocol (AP) I and II of the Geneva Convention that bind it to observe international humanitarian law in the Non-International Conflict (NIC) and prosecution for war crimes. The article draws a nexus between the international law principles, legal precedence and the liability of the state that has breached human rights.

Legal Origins of the Dispute

Device of Incorporation

The status of Jammu and Kashmir (J&K) under the British rule was to provide it with special autonomy throughout the duration of the Raj. The land and title were purchased by Gulab Singh from the East India Company in 1846 and he became the Maharaja under the auspices of the British Government (East India Company) under the Treaty of Amritsar. This is accepted as the 'Kashmir Sale Deed' signed on 16 March 1846 [21]which conveyed the title in succession to the Maharaja, Sir Hari Singh, who inherited the seat as part of the House of Dogra when he ascended to power on August 15, 1947.[22]

The contentious issue in this dispute is the execution of the Instrument of Accession in favour of India that was the dispensation that the Last Viceroy of British India, Lord Mountbatten gave to the Princely States. This was after the Indian Independence Act (IIA) 1947 was promulgated by the UK Parliament that relinquished British sovereignty over the Indian subcontinent. Article 1 of the IIA partitioned British India into the two states of India and Pakistan, and Article 7 made provision for the devolution of 'His Majesty' powers over the 562 Indian Princely States and conveyed them to the new states on 15 August 1947. Subsequently, all treaties and agreements that were enforced before the enactment of this Act between rulers of the States and His Majesty's government lapsed.

The British gave the Princely States the choice to accede to any one of the two dominions of India or Pakistan.[23] However, there were two pre-conditions which were, firstly, the requirement of the contiguity of the State to the new nation states and, secondly, the aspirations of the people.[24] The overwhelming Muslim population of J&K wanted to be aligned with Pakistan and the act of its royal

[21]Lone (2009).
[22]Gull (2015).
[23]Teng, Bhatt & Kaul (2006).
[24]Ibid.

potentate to dismiss his Prime Minister, Ranchandra Kak, on 11 August 1947, who favoured Kashmir's accession to Pakistan is an indication that the Maharaja wanted to align with India.[25]

The Instrument of Accession that declared Kashmir as a state within the Indian union was executed when the Maharaja signed the proclamation on 27 October 1947. The title deeds were not registered in the UN Secretariat which is required under the law of treaties and furthermore they were not deposited at the UN headquarters in New York. [26]The Instrument protects against the illegal incorporation into another state and its terms affirm the sovereignty of Kashmir as a State. [27] Article 7 states: "Nothing in this instrument shall be deemed to commit me (Maharaja) in any way to acceptance of any future constitution of India […]" Article 8 states: "Nothing in this Instrument affects the continuation of sovereignty in and over this state[…]."[28]

The Indian government granted Kashmir autonomy under Article 370 of its Constitution which permitted a state constitution that derogated powers of defence and foreign affairs to the central government in New Delhi. While this arrangement was meant to be a temporary provision the Article 370 become entrenched in the Indian constitutional framework.[29] This was complimented by Article 35A which excluded Indian citizens from becoming the *state subjects* or citizens of Kashmir and also prohibited them from acquiring property in J&K.[30]

Uti Possidetis

The territory of Kashmir has separated the people who share ethnicity, religion and language and are divided by a Line of Control (LOC) which is heavily militarised. The argument that Britain as a colonial power governed an undivided India that gives the right to ownership in secession of Kashmir is not sustainable. The concept of *Uti possidetis* is for the continuation of previous colonial boundaries and is against the disintegration of former colonised territories. It has been declared by the ICJ that the" essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than

[25]Ankit & Kak (2010) at 36-39. See also Abdullah & Chinar (2016) at 291-292.
[26]Arts.2 (1) (b) and 15, Vienna Convention on the Law of Treaties 1969
[27]Kapur & Narang (2001).
[28]Instrument of Accession 1947. *jklaw.nic.in/instrument_of_accession_of_jammu_and_kashmir_state.pdf*
[29]Part XXI of the constitution of India deals with the "Temporary, Transitional and Special Provisions." It describes Article 370 as a temporary provision and addresses three key points. First, it notifies that Article 238, dealing with the administration of states is not applicable to the state of Jammu and Kashmir. Second, the power of the parliament to make laws for the state is limited. Third, concurrence and consultation with the state is necessary on matters specified in the Instrument of Accession (Constitution of India, part XXI).
[30]Article 35 A was enacted under Article 370 (1) (d) in 1954 and gives the Jammu & Kashmir legislature full power to decide who is a "permanent resident" of the state. The Article gives "permanent residents" privileges regarding employment in the state, acquisition of immovable property and settlement, the right to scholarships and other forms of aid that the state government provides.

delimitations between different administrative divisions or colonies all subject to the same sovereign".[31]

The application of *Uti possidetis* provides that as far as international law is concerned the independence of a former colonial territory freezes the colonial borders and is binding on a sovereign state after independence.[32]This is because the principle originated when the process of de colonialisation began and the UN anticipated that when former colonies which were not ethnically homogenous became independent they were to include all the inhabitants of the colony unless they were separated by a barrier of 'salt water'. The border governed by *Uti possidetis* can potentially be any type of internal territorial demarcation that has been established in domestic law prior to secession into an international one once secession has succeeded. [33]In the dispute over Kashmir two new states had come into existence with each claiming a right over the territory. The solution to the dispute has been un ambiguously stated by the United Nations Security Council (UNSC) that there should be a plebiscite to allow the inhabitants to determine their future according to their own aspirations.

- However, the Indian government made no effort to organise the plebiscite that was mandated by the UNSC. It had predetermined that if such a referendum was held that the people of Kashmir would either vote for independence or for alignment with Pakistan with whom the people share cultural and family ties. This information has been corroborated by UN officials who were working on the project of de militarisation and for conducting a referendum in the two parts of the disputed territory.

The United Nations Representative for India and Pakistan (UNRIP) Owen Dixon reported to the Security Council as follows:

> "*In the end, I became persuaded that India's agreement would never be obtained to demilitarization in any such form, or to provisions governing the period of plebiscite, conducted in conditions sufficiently guarding against intimidation, and other form of abuse by which the freedom and fairness of the plebiscite might be endangered*".[34]

The Indian government proceeded to align the state with India by promulgating Article 370 in the Indian constitution of 1951 which created the scope for a political party system that accepted the status quo in Kashmir. The Presidential order of 1950, officially The Constitution (Application to Jammu and Kashmir) Order, 1950, came into force on 26 January 1950 contemporaneously with the Constitution of India. It specified the subjects and articles of the Indian Constitution that corresponded to the Instrument of Accession as required by the clause b(i) of the Article 370. The largest party that emerged was the Jammu and Kashmir National Conference (JKNC) that accepted the patronage of India and deferred to the union government in matters of defence and foreign affairs. On 27 October

[31]Frontier Dispute (Burkina Faso/Republic of Mali), ICJ 1986, p 554. Para 23
[32]Rossi (2017) at 106.
[33]Walter, von Ungern-Sternberg & Abushov (2014)
[34]Report of Sir Owen Dixon.

1950, the General Council of the National Conference adopted a resolution recommending the convening of a Constituent Assembly for the purpose of determining the 'future shape and affiliations of the State of Jammu and Kashmir.' The Constituent Assembly consisting of 75 members was elected in 1950 by a universal adult franchise and the constitution that was adopted declared the State of Jammu and Kashmir to be 'an integral part of India.' It may, however, be noted that all the nominations filed by the opposition in the election were rejected. [35]

Article 35 A preserved the territorial integrity by restricting the right of alienation of land to people who were not born or had residential status in Kashmir. This did not dissipate the issue of the aspirations of its population and their future inclination within the purview of international law. The UN Security Council considered this as usurping the will of the people by disparaging the Constituent Assembly where the JKNC "*might attempt to determine the future shape and affiliation of the entire state or any part thereof that would not constitute a disposition of the state in accordance with the above principle*".[36]

However, the Indian government refused to conduct a plebiscite and empowered the constituent assembly to establish a legislative assembly by forming a mechanism for an electoral process.[37] The result was that the Indian-controlled part of Kashmir had a government which was restricted by the powers granted under the Indian constitution. The Instrument of Accession led to the Indian sovereignty over most of Kashmir and it was a conveyance of land that transferred title to India by overriding the principle of *Uti possidetis*. The process of annexation of a non-contiguous territory was accomplished by the use of judicial fiat rather than by conducting a plebiscite to determine its future status.

Binding Effect of Resolutions

Security Council Seised of Matter

The UN bodies had called for a ceasefire after the Indian - Pakistani skirmish post-independence over Kashmir and the Security Council proposed a referendum in the territory to decide its future status. There has been a total of 6 UNSC resolutions calling for a plebiscite beginning in 5 January 1949(S11196) and ending on 24 January 1957 (S13779) ; and 21 February 1957 (S3793). The lack of implementation by the Indian government may be a breach of international law as it falls under the UN Charter that specifically mandates the areas over which the issue arose when the decisions are made to pass a resolution.

Under Chapter 1 'Purposes and Principles the member states of the UN are bound under Section 2 (1) to respect the "sovereign equality of all its Members";

[35]Ghosh (2007).
[36]UN Security Council, *Security Council resolution 91 (1951)*
[37]The government of India expressed the view that as the democratic process followed for the election of the legislative assembly of the state proved that the people had accepted to remain within the Union of India the UN resolutions on plebiscite 'had become obsolete and were no longer binding on India.' Report of the Security Council, 16 July 1963-15 July 1964, at 88.

2(3) "All Members shall settle their disputes by peaceful means in such a manner that international peace and security, and justice are not endangered" and 2 (5) "All Members shall give the UN every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action".

- *The framework of the UN has three important instruments the first of which is the Chapter V, on the 'Functions of the Security Council. Article 25 states: "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". Chapter VI is on the 'Pacific Settlement of Disputes' and Chapter VII is on the 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'. Article 39 states*
- *"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".*[38]

The accession of Kashmir to India was raised in the UN after the de militarisation of the Indian and Pakistani forces when the UNSC called on both sides to conduct a plebiscite to allow Kashmir's people decide its future status. Resolution 48 reaffirmed the first resolution that had called for an armistice between the two countries and it stated as follows:

> "*Noting with satisfaction that both India and Pakistan desire that the question of the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite, considering that the continuation of the dispute is likely to endanger international peace and security, Reaffirms its resolution 38 (1948) of 17 January 1948*".[39]

There was no protocol to state whether it was adopted under Chapter V or Chapter VI by the Security Council. However, during the period of the UNSC resolutions on Kashmir (1947-57) it was not the practice to

> "*mention the title of the chapter, whereas the majority of resolutions that were acted upon by the member states did not mention any reference to a chapter of the UN Charter*". Instead, "*it was the content and the substance of the resolution that would determine the nature of implementation. If one looks at the UNSC's practice in its first decade of existence, only a handful of resolutions mention the title of the chapter, whereas the majority of resolutions that were acted upon by the member states did not mention any reference to a chapter of the UN Charter*". It is apparent

[38]Chapter VII emphasis ' :Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression Articles 39-51; and Chapter VIII: Regional Arrangements under Articles 52-54.
[39]Resolution 47 (1948) On the India-Pakistan question submitted jointly by the Representatives for Belgium, Canada, China, Colombia, the United Kingdom and United States of America and adopted by the Security Council at its 286th meeting held on 21 April, 1948. (Document No. 5/726, dated the 21st April, 1948).

that" *there is no reference to either Chapter VI or Chapter VII in any of the 17 resolutions*".[40]

The International Court of Justice (ICJ) has established the basis to ascertain whether the Security Council intended the resolution to have legal effect. These factors are:

> *"the language used in the resolution; prior reference establishing the importance of the subject matter through discussions, resolutions, or documents; and the binding charter provisions in the resolution". There is also the additional requirement of "international law, which includes reference to, or reliance of the resolution on, treaties, jus cogens norms, customary law, and other sources of international law".*[41]

The impact depends upon whether those resolutions can be interpreted as 'decisions' or those that are 'recommendations' and while the former are expressed in specific terms as giving rise to a remedy the latter has a persuasive effect only. The decisions are considered as binding by the ICJ. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), 'the Namibia case"*[42] the Court had to respond to the question by the Security Council of the United Nations, "What are the legal consequences for States of the continued presence! Of South Africa in Namibia notwithstanding Security Council resolution 276 (1970)?". The Court offered its advisory opinion that "there was a UNSC Resolution 276 that sought to terminate the mandate of South Africa in South West Africa (Namibia)".

The Court held that

> "'*[a] binding determination made by a competent organ of the United Nations to the effect that a situation is illegal cannot remain without consequence [...] there is an obligation, especially upon Members of the United Nations, to bring that situation to an end*'.[43]

The determination was that South Africa's actions were illegal and that the Security Council resolutions were obligatory and that in taking this into consideration the following factors were relevant:

> "*It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to "the decisions of the Security Council" adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII,*

[40]Soofi (2019).
[41]Öberg (2005) at 885.
[42]Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) [1971] (hereinafter Namibia Case) ICJ Rep 16, para. 105. Request for Advisory Opinion (including the dossier of documents transmitted to the Court pursuant to article 65, paragraph 2 of the Statute)
[43]Namibia case, Para. 113.

> *but immediately after Article 24 in that part of the Charter, which deals with the functions and powers of the Security Council*".[44]

However, the Court was at pains to point out that all UNSC resolutions have a mandatory effect and that Member States are bound to accept them to uphold the principles of international law.

> *"The decisions made by the Security Council […] were adopted in conformity with the purposes and principles of the Charter and in accordance with its articles 24 and 25. The decisions are consequently binding on all [Member States] of the United Nations which are thus under obligation to accept and carry them out. Accordingly, Article 25 mayapply to resolutions passed under Chapters VI, VII, VIII, and XII".*

The commentary on the case states that the "*Court offered no explanation, the legal determination was presumably binding because it was included in a decision contained in SC Resolution 276. The causative effect is binding upon the states that apply the norm*".[45]It can be summed up that the binding or non-binding nature of a resolution (decision or recommendation) also covers determinations made therein; "*a determination made in a recommendation is not binding, whereas a determination made in a decision is of mandatory effect*".[46]

This ruling was confirmed in the *Legal Consequences of the Construction of a Wall in the Palestinian Territory,*[47]in which the General Assembly requested an Advisory Opinion on the construction of the Israeli wall based on the UNSC Resolutions 452, 465 and 446 on the following question:

> "*What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the Report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions*?"

The ICJ held that the resolutions had "binding effect and the actions of Israel had no legal validity in the process of constructing the wall".[48] These Resolutions were adopted under Chapter VI which made them non enforceable because it is concerned with 'Pacific Settlement of Disputes' and not adopted under Chapter VII of the UN Charter which invites 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'.

However, a former Chief judge of the ICJ has stated that "resolutions under Chapter VI are not necessarily non-binding and resolutions passed under the

[44]Ibid, Para. 117.
[45]Öberg (2005) at 891.
[46]Ibid.
[47]Legal Consequences of the Construction of a Wall in the Palestinian Territory, Advisory Opinion ICJ Reports 2004, p 136
[48]Para. 120.

auspices of Chapter VII are not always binding".[49]This implies that the resolutions on Kashmir that have been passed under Chapter VI can still be binding and are enforceable despite the fact that they do not have mandatory implications such as action under Section 2 of the UN Charter.

> In *USA v Nicaragua*[50]the ICJ ruled that in order to determine the relevant facts '*in its quest for the truth, it may also take note of ... the resolutions adopted or discussed by [international] organizations, in so far as factually relevant'. This goes to the evidential value of the cases that should be interpreted to imply that factual basis of GA and SC resolutions and the decisions are not by themselves exhaustive for the Court*". [51]

The Court takes an objective approach and Chapter V, Article 24 grants the Security Council permission to act on behalf of UN member states to maintain international peace and security through the powers available under Chapters VI, VII, VIII and XII.[52]The contextually based approach in interpreting the Article 25 in the background of Article 24 demonstrates that Security Council resolutions can also be binding under Chapter VI decisions. The Security Council] decision[s] may bind all UN Member States, including 'those members of the Security Council which voted against it and those Members of the United Nations who are not members of the Council".[53] It has been observed by the ICJ as dependent on the "clarity of the determinations" made and not on whether they were issued under any Chapter of the UN framework.[54]

The final UNSC resolution on Kashmir no 122 adopted on 24 January 24, 1957 declared the outcome in J&K had to be in accordance with the will of the people expressed through a free and impartial plebiscite and that the

> "*convening of a Constituent Assembly as recommended by the General Council of the 'All Jammu and Kashmir National Conference' and any action that assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the Assembly, would not constitute a disposition of the State in accordance with the above principle; 2. Decide to continue its consideration of the dispute.*"

This states expressly that the assembly proposed by the Jammu and Kashmir National Conference could not constitute a solution to the problem as defined in United Nations Security Council Resolution 91 which had been adopted almost six years earlier. The resolution was also not presaged under any specific Chapter of the UN either the Chapter VI or VI and could suffice to validate and reaffirm

[49]Higgins (1972) at 282.
[50]Militarv and Puramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (hereinafter the Nicaragua case). Merits, Judgment. I.C.J. Reports 1986, p. 14 at 44.
[51]Para. 72.
[52]United Nations Chapter 5 the Security Council Functions and Powers Article 24 https://www.un.Org/en/sections/un-charter/chapter-v/index.html
[53]Öberg (2005) at 885.
[54]In Case Concerning Legality of Use of Force (Serbia and Montenegro v Belgium) [2004] ICJ Rep, p. 279 General list no 105 at 27–29, paras 64–70.

the principles that were adopted in the first resolution in 1948. Therefore, the procedure under which it was adopted was not relevant but the substance of the resolution was significant.

Legal Impact of Resolutions

The impact of a resolution does invite enforcement under Chapter VI and if ostensibly of persuasive effect does not preclude it from mandatory application. The UNSC Resolution 1325 on Women, Peace, and Security (Resolution 1325) passed unanimously on October 31, 2000[55] states in its preamble the disproportionate impact of armed conflict on gender in vulnerable circumstances. It affirms the need for "effective institutional arrangements to guarantee their protection and full participation in the peace process [which] can significantly contribute to the maintenance and promotion of international peace and security".[56]

This was passed under Chapter VI which calls for a pacific solutions in resolving conflicts. However, it orders to determine the intent of a UNSC there are several factors that need to be assessed. Kwadwo Appiagyei-Atua contends that in order to determine the intent of the Security Council

> "*the language used in the resolution, the discussions leading to it, and the Charter provisions invoked. Article 25 includes a fourth factor by addressing the international laws, including the application of treaties, customary law and jus cogens norms*".[57]

The analogy can be extended to the UNSC resolutions on Kashmir which transcend the principles of both Chapter IV and Chapter VII in enforcing the mechanisms for a plebiscite. There is also the text because under Chapter VI the term 'resolution' is not used and UN practice emphasises a generic meaning of the word whether conveying a decision or a recommendation. [58]

Appiagyei-Atua, argues that this Resolution 1325 imposes mandatory obligations on states in the international domain in an effort to promote and protect the rights and dignity of women and children during conflict. This he argues should have binding effect because it is objectively based on the three principles which are, firstly, the Resolution seeks to

> "*ensure greater representation, participation, and involvement of women in peace-making processes, and to include a gender perspective in peacekeeping operations. Secondly, the Resolution calls for respect for humanitarian law with a special emphasis on ensuring better protection of women and girls, such as excluding impunity clauses, in order to better promote justice for female victims of conflict. The state must also take affirmative action to prevent third parties from abusing the rights of women and girls during armed conflict. Thirdly, it calls for the promotion of the rights of women and girls and their special needs during the process of repatriation,*

[55]SC.Res.1325,UNDocS/Res/1325 (Oct. 31, 2000)
[56]Ibid.
[57]Ibid.
[58]Appiagyei-Atua (2011).

> *resettlement, reintegration, and reconstruction.7 further, states have the duty not to interfere or act in any way that would compromise women and girls' enjoyment of fundamental rights*".[59]

Sir Michael Wood, a member of the International Law Commission accepts that in order to determine the binding or non-binding effect of a UNSC resolution there needs to be "*an evaluation of its intent by reference to its travaux préparatoires, which does not diverge from a contextual, or an object and purposeful approach to interpretation*".[60] The travaux préparatoires are found in the previous deliberations made in connection with the resolution prior to its formulation and passage. Its impact is that "*a decision or a recommendation can change depending on context. Therefore, a rigid application of these distinctions leads to confusion, as some decisions are non-binding and some recommendations have the force of law*".[61]

This analysis finds support in Professor Stefan Talmon's observation that UNSC practice and the common understanding of the UN membership in essence establishes "*that 'threat to the peace' is a constantly evolving concept and from the 1990s, the understanding of what constitutes a 'threat to the peace' has broadened considerably from the narrow concept of absence of the use of armed force, to the wider concept of situations that may lead to the use of armed force*".[62] This implies that the separation between Chapters VI and VII is not arbitrary and enables a broad based interpretation of Article 25 of the UN Charter as applied to resolutions created under non-enforcement measures.

There is also another basis for the application of UNSC resolutions passed notionally under Chapter VI, such as the Kashmir dispute, which is that they conform to a rule of international customary law and reflect the *opinio juris* of the General Assembly. There is a debate between those who recognise UN resolutions as constitutive of state practice or *opinio juris*, [63]and the ICJ has settled this issue in favour of the latter.[64] The GA Res 2625 (XXV) in the Nicaragua case was adopted unanimously.[65] The General Assembly resolutions even if they are not binding may sometimes have normative value and they can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. The evidence can be found in the ICJ rulings that have identified the General Assembly resolutions to be a step in the development of international law or encapsulating the rules of international law without specifying the content of these rules. [66]

This principle can also be applied to Security Council resolutions adopted under Chapter VI that are considered to be non-binding. In the *Nuclear Weapons*

---

[59]Ibid.
[60]Wood (1998). See also Orakhelashvili (2007).
[61]Ibid.
[62]Talmon (2005).
[63]Cahin, Ranjeva & Simon (2001) at 95. See also Akehurst (1975) at 11.
[64]Nicaragua case, para 188.
[65]Ibid, at para 191
[66]Schwebel (1979) at 303. See also Schwebel (1994) at 503.

Case[67] the ICJ held that that the relevant resolutions "*fall short of establishing the existence of an opinio juris', because 'several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions*".[68] There might still be an emerging "*customary rule specifically prohibiting the use of nuclear weapons*", based on factors such as "*the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI)*".[69]

The Court noted that "a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."[70] It emphasises the importance of the adoption "each year by the General Assembly resolutions calling for the use of nuclear weapons to be prohibited".[71] The significance of a series of resolutions is to create an *opinio juris* because of their persuasive affect that emanates from being adopted with greater frequency.[72] The ICJ has found repetition to be important because the voting and passing of resolutions could be interpreted as state practice.[73]

The UNSC resolutions on Kashmir meet the test of regularity and each one of them have affirmed the principle in Security Council resolution 47 (1948) [The India-Pakistan Question]. They all invoke the clause that calls for an administration of a plebiscite that would determine the aspirations of the Kashmiri people and their future status. The UNSC Resolutions on Kashmir do not preclude their binding effect because the adoption of a resolution does not distinguish between the effect of a decision and a recommendation but is based on a 'determination' which even if made in a decision is of mandatory effect. The resolution that is to promote peace and which is to achieve a solution to end the conflict by a referendum is a determination and is therefore compulsory, and India which is a party to the dispute has breached international law by not establishing a mechanism for a plebiscite.

[67]Legality of the Threat or Use of nuclear weapons, Advisory Opinion, 1. C.J. Reports 1996, at 226.
[68]Para. 71.
[69]Para. 73.
[70]Para. 255
[71]Ibid.
[72]re Namibia case, dissenting opinion of Judge Tanaka, at 292; Barcelona Traction, Light And Power Company, Limited (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3, Separate Opinion of Judge Ammoun, at 303.
[73]GA Res 2625 (XXV) (Nicaragua, at 101, para. 191).was adopted unanimously

Right to Self-determination under International Law

De Colonialisation and Inalienable Rights

Prior to the examination of the specific breaches of international human rights and humanitarian law by India in Kashmir it is necessary to consider the right of self-determination recognised in the UN Charter. This principle is embodied in Article I of the Charter of the United Nations which states: "**All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".**[74]

There are two UN declarations, in addition to the UN Charter itself which have dealt with the issue of decolonialisation and self -determination and these are the Declaration on the Granting of Independence to Colonial Countries 1960 and Friendly Relations Declaration 1970.[75] The underlying principles of both these declarations is that self-determination leading to severance from the state is the final option and exercisable only within the decolonisation context. The qualification for meeting the conditions for such a right is based on the notion that colonised peoples were living under imperial subservience and the colonial governments had exercised their dominion over centuries.[76] While these declarations emphasised the principle of territorial integrity of existing states they were the precursor to the movements for the self-determination where there was a transfer of power to a state that was prima facie decolonised.

The concept of self-determination originates in de colonisation and is supported by the United Nations General Assembly Resolution 1514 that states

> "*All peoples have the right to self-determination; by virtue of that right they may freely determine their political status and freely pursue their economic, social and cultural development*". [77]

The Instrument of Accession stemmed from a colonial dispensation and the Indian union became the new sovereign over the Princely state of Kashmir and

---

[74]Article 55 of the Charter reinforces this principle by affirming that "conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

[75]Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (Dec. 14, 1960); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (Oct. 24, 1970)..

[76]Ibid, para. 6 (declaring "[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country" as incompatible with the purposes and principles of the United Nations' Charter); Friendly Relations Declaration, *supra* note 7 ("[n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States[. . .] ").

[77]United Nations General Assembly Resolution 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples (United Nations General Assembly [UNGA]), 14th December 1960 (UN Doc A/RES/1514(XV)

exercised its power to incorporate it into the union by invoking Article 70. While there is no universal definition of statehood in international law[78] this can be inferred by various means, such as international commissions of inquiry, and facts, such as the actual manifestation of a people to assert their identity; [79] and (iii) while self-determination may take various forms, including continued association with an existing state, a strong preference is placed on the grant of statehood on the people in question.[80]

The Indian union's possession of J&K has to be contextualised as a process of colonialism because when the State enacted its new Constitution in 1956 it affirmed its inclusion within the Indian Union (article 3). The object clause of this Constitution states the "pursuance of the accession of this State [J&K] to India […], to further define the existing relationship of the State with the Union of India as an integral part thereof". This implies that J&K was considered territorially apart of India, even if its legal integration on the other hand is still in pending. The essence of this clause is that the inclusion of Kashmir in the Indian union was by conveyance of the *Instrument of Accession*, and finally incorporation into the Indian Constitutional framework.

The international law principles can designate the minority groups as "peoples" who have the right to self-determination to provide the ability to freely determine their political fate and form their own representative government. Michael P. Scharf argues that

> "*Although no international treaty defines the term "people" for the purposes of self-determination, it is generally accepted that this classification entails a subjective element, such as a common belief by members of the group that they share the same characteristics and beliefs and thus form a common unit, as well as an objective element, such as common racial background, culture, ethnicity, religion, language, and history*".[81] Els Bogaerts argues that "*like many globally embracing terms, such as imperialism and post colonialism de colonialisation was seldom restricted in application to a particular political activity or a neatly defined era. Moreover, as a binary activity decolonialisation was interpreted to be both a calculated process of military engagement and diplomatic negotiation between the two contending parties colonial and non-colonial*".[82]

The application of the right to self-determination does not only apply to the former colonial countries but is also relevant to states that are heterogeneous and may have emanated from post colonialism. Wilson observes that the UN Charter does not refer to the right of self-determination and "does not clarify 'who is self'

[78]Western Sahara, Advisory Opinion, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975), 16th October 1975, United Nations [UN]; International Court of Justice [ICJ], 43-44

[79]The International Court of Justice has recognised the validity of a flexible approach in determining the "freely expressed wishes of the territory's peoples", holding that an actual consultation with the population may not always be necessary": Ibid at 33.

[80]General Assembly Resolution 1541 provided for three legitimate methods of decolonisation consistent with the principle of self-determination, independence, free association, and integration with an existing state. GA Res 1541, 15 UN GAOR Supp (no 16) at 29, UN Doc A/4684 (1960).

[81]Scharf (2003).

[82]Bogaerts & Remco (2012) at 23-39.

which is a principle" that it seeks to protect. However, while its development into "a rule of law in international public law is indisputable" and the "foreign domination and alien form of governance" and oppression that "initially referred to colonialism" has now evolved to apply to contemporary forms of "alien governance and subjugation" which has been conveyed to present forms of "alien governance".

The consequence is that the manner in which the UN Charter "creates the right of self-determination" does not form a binding norm but is an "expression of political principle".[83]The analogy applies to India because of the power of eminent domain that it used to annex Kashmir on 5 August 2019, and the fact that it has revoked Articles 370 and 35A which were the device used to give legal effect to the accession. This process annulled the territorial integrity of Kashmir and denied the aspirations of its people by not conducting a referendum. The demographic changes are likely to follow leading to an encroachment of non-Kashmiri people on its soil. Section 3A of the Jammu and Kashmir Reorganisation-Adaptation of State Laws Order 2020 enables Indian government to enact laws to reconfigure the demographic balance. Under this ordinance the J&K Civil Services (Decentralisation and Recruitment) Act 2020 has been enacted to settle non-Kashmiri on Kashmir.[84]

Sections 59 and 60 of Jammu and Kashmir Reorganisation Act 2019 has led to the redrawing of gerrymander of electoral constituencies under Section 3 of the Delimitation Act 2002. The Delimitation Commission (DC) that has powers under the Act has increased assembly and parliamentary constituencies to give Jammu greater representation to reduce Muslim representation and shift the political balance to Hindus in the region. In May 2022 the Commission awarded Jammu six more seats in the 90-member J&K Assembly while Kashmir is to be given one more which will take Jammu's total seats to 43 leaving Kashmir with 47.[85] The most astonishing aspect of the DC report is that it has extended its jurisdiction to Pakistani Kashmir (Azad Kashmir) by including the districts over the border (LOC) in its remit. The J&K state assembly has 114 seats for its union territory, of which 24 are reserved for Pakistan-administered Kashmir, until such time it becomes part of India.[86] This is a clear demonstration that India has no plans to hold a referendum and let the people self-determine their future and instead has designs on incorporating it by force in a future war with that country.[87]

---

[83]Wilson (1988) at 38-59.

[84]Section 5(a) defines a domiciled person as the one who has resided for a period of 15 years in the union territory of Jammu and Kashmir or has studied for a period of seven years and appeared in class 10 or 12 examination in an educational institution located in the territory.

[85]Delimitation Commission Report 2022, Summary, 6 May 2022. ttps://pdffile.co.in/delimitation-commission-jk-report-2022/

[86]*Section14(4) Notwithstanding anything contained in sub-Section (3), until the area of the Union territory of Jammu and Kashmir under the occupation of Pakistan ceases to be so occupied and the people residing in that area elect their representatives— (a) twenty four seats in the Legislative Assembly of Union territory of Jammu and Kashmir shall remain vacant and shall not be taken into account for reckoning the total membership of the Assembly; and (b) the said area and seats shall be excluded in delimiting the territorial constituencies as provided under PART V of this Act }*

1. [87]This can be confirmed by Indian Defence Minister Rajnath Singh's speech that the Azad Kashmir is part of India. 'Rajnath vows to reach Gilgit-Baltistan: where is this place that is illegally occupied by Pakistan?' Indian Express, 30 October '22. https://indianexpress.com/article/explained/rajnath-singh-gilgit-baltistan-history-explained-8234674/

International Covenants and Right of Secession

The principle of territorial integrity applies to an already sovereign state and it is of continuing effect even after it has gained independence from a colonial power. This is because of the guiding principle that a state must not disintegrate after it has attained independence from a colonial power. The International Covenant of Civil and Political Rights (ICCPR) 1966 and the International Covenant of Social, Economic and Cultural Rights 1966 have both stipulated the rights that can be construed as leading to self-determination. The Covenants share an identical Article 1 that states as follows:

> "*All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, cultural and social development".*

The issue is whether these covenants prescribe a legal right that overrides the territorial integrity of a state and if they grant a human right that can be interpreted as the exercise of self-determination. It is documented that in the process of formulating the above Covenants some delegates opposed to the common Article 1 and argued that the "UN Charter referred to the principle of self-determination but that was not to a right". The advocates of the right to self-determination argued that "the right was essential for the enjoyment of human rights and should appear in the forefront of covenants".[88]

The Covenants were adopted by inclusion of the right to self-determination. This was the most significant development which evolved from a political principle to a legal norm and it is associated with human rights. Self-determination is the key right in ICCPR/ICESCR and the adoption provides it with an elevated place in the hierarchy of legal norms. The state of J&K has not been granted self-determination and Kashmir remained a de facto part of India prior to annexation in 2019.

In *State Bank of India vs Santosh Gupta And Anr. Etc*[89]the Supreme Court of India ruled that the state of Jammu and Kashmir had no "absolute sovereign power" on account of Article 370. The Supreme Court held that it has "no vestige" of sovereignty outside the Constitution of India and its own Constitution is subordinate to the Indian Constitution. The Court upheld the applicability of the union Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act **(**SARFAESI) Act Sections 13 (1) and (4) to Jammu and Kashmir as it was under the Union list of subjects for which the Indian Parliament is empowered to enact laws for the whole of India, including Jammu and Kashmir.[90]

Joshua Costellino traces the development of principles enshrined in the Resolution 1514 which connects "self determination to better standards of life and larger freedom". He points to the resolution's concept of self-determination stating that "one of the important results of decolonisation is that it is a fundamental

[88]Twining (1991) at 85.
[89](2017) 2 SCC 538
[90]Para. 10.

human right bringing it within the scope of the United Nations Declaration of Human Rights 1948".[91] The adoption of the ICCPR/ICESCR meant that this was a culmination of self-determination emerging as a human right and underpinned the principle in the multi-lateral treaties by extending to not just "civil and political rights but facilitating passage to the economic, social and cultural rights".[92]

There is another important aspect of these covenants which is that they do not restrict the right of self-determination to colonial or oppressed peoples but includes all peoples.[93] It is apparent that the Article 1 has a uniform approach by its emphasis on the free determination of "political status" and "economic and social and cultural development" of states and that should lead to them being able to "freely dispose of their national wealth".[94] The ratification by countries of these covenants can be with exclusions and reservations which implies a more restricted application. This is also the approach of India which upon endorsing entered a reservation to Article 1 in the following terms:

> "*The right to self-determination appearing in those articles apply only to the peoples under the foreign domination and that these words do not apply to sovereign independent states* ".[95]

This caveat provides India with a waiver and discharges any responsibility it may have to offer self-determination from its annexation of the state of J&K, and its inclusion within the Indian union.[96] The fact that it defeats the objective of the ICCPR/ICESCR and the United Nations General Assembly Resolution 1514 (1960) which established the right of self-determination that applied to the decolonialisation process and created a multi-lateral framework to which India became a signatory. The development of legal norms by the process of these covenants, political principle of self-determination and its fusion within human right is consistent with the respect for international law and its framework.[97]

International Human Rights and armed Forces Immunity

Atrocities committed under Special Powers

There are fundamental human rights such as the right to life, right to be free from torture, right not be imprisoned without due process; right to a fair trial; right to privacy etc. These are non derogable and apply in all circumstances in the

[91]Castellino (2000) at 22-23.
[92]Ibid, at p 31
[93]Jennings (1956) at 56. See also Moore (1998) at 1-13.
[94]Catellino (2000) at 93.
[95]Centre for Human Rights (1987).
[96]In a subsequent appearance before the Human Rights Committee, India stated more explicitly that the UN Charter applies " the right of self-determination in the international context only to disputed territories and peoples". Statement of the representative of India to the Human Rights Committee, UN Doc. CCFR/C/Sr 498 (1984) at 3.
[97]Hurst (1996) at 41-42.

treatment of persons under the jurisdiction of the state or its agencies. There is also an international dimension that transfers liability to the state based on the International Declaration of Human Rights[98] and the covenants that include binding human rights provisions.

It is necessary to understand that as an occupying force the Indian military operates in a legal vacuum in the Valley of Kashmir and their armed operations are governed by the Armed Forces Special Protection Act (AFSPA) 1958. The AFSPA 1958 was first introduced in states in the north-east region of India, including Assam and Manipur, in response to armed political activity arising from demands for self-determination. A version of the Act was implemented in the state of Punjab in 1983, but later repealed in 1997. This was promulgated in 1990in J&K and is still effective. There are two sections of this act that provide draconian powers to members of the armed forces and complete immunity which are as follows:

> "*Section 4. Special powers of the armed forces.—Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,— (a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;*
> *Section 6. Protection to persons acting under Act.—No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act*".

The AFPSA provides extra ordinary powers that have been used extensively in the J&K to commit human rights abuses by Indian troops. The violence and its impact began before the arrival of Prime Minister Modi into power. According to one estimate in the period leading upto 2011 “over 60,000 people had been killed, thousands have gone missing and hundreds had been brutally tortured, and a staggering 50,000 or more have been orphaned”.[99] This has continued after Modi's ascent to power in 2013 and in its current phase reached critical mass after the security forces killed a popular leader of an armed group, Burhan Wani, on 8 July , 2016, in southern Kashmir.[100] The killing led to a renewed uprising, which continued for the next six months and the Indian occupational forces launched "Operation All-Out" in 2017.[101] This has heralded the relaunch of the Cordon and Search Operations (CASO) which are conducted on regular basis and in the "first

[98]International Declaration of Human Rights, 1948.
[99]Dobhal 2011) at 10.
[100]Kashmir violence:
[101]Andrabi (2021).

six months of 2020 there were 107 of them in the Valley" causing a shutdown by the armed forces of areas designated for intervention.[102]

The Indian Interior Ministry has stated that there was a 167% increase in civilian killings in 2017 compared to 2015 and a 6.21% jump in the number of violent incidents compared to 2016. The number of insurgents killed went up by 42%. There was an increase by 166% rise in Civilian casualties in 2017-18.[103] The Jammu Kashmir Coalition of Civil Society (JKCCS), a local rights group, has estimated "that more than 586 people were killed in 2018, including militants, Indian security forces, and 160 civilians".[104]

The powers granted under AFPSA are supplemented by the Jammu and Kashmir Public Safety Act 1978 (PSA) which empowers security personnel to detain people and suspend the writ of habeas corpus. **The powers exercisable under the PSA have been defined as opaque and arbitrary.**[105] Action 13 (2) allows the detention of a person without giving them the reasons and can keep them in confinement indefinitely. Section 13 does not require the detaining authority to set out the reasons for detention and non-disclosure for the grounds of detention means the detainees cannot challenge the grounds for their incarceration. Section 16(5) prohibits a counsel of choice for the suspect. This is a breach of international law as the UN Human Rights Committee has clarified that to reserve the right "to arbitrarily arrest and detain persons" would be incompatible with the object and purpose of the ICCPR.[106] In 2008, the UN Working Group on Arbitrary Detention concluded that

> "*10 individuals detained under the PSA in J&K had been detained in violation of articles 7, 9, 10 and 11(1) of the Universal Declaration of arbitrarily Human Rights and Articles 9 and 14 of the ICCPR*".[107]

The Amnesty International report has stated that the PSA violates the international human rights law because "According to article 9(1) of the ICCPR [n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". In its view the

> "*PSA does not define 'security of the state', and provides a vague and over-broad understanding of what 'public order' is. Thus the PSA violates the principle of legality, and seriously compromises the ability of detained persons to contest their detentions*".[108]

The report also raised the issue that "under international law, India's reservations to the ICCPR, including its reservation to article 9, must not be

[102]Six monthly Review of Human Rights situation in Indian administered Jammu and Kashmir (January to June 2020) Jammu and Kashmir Coalition of Civil Society. p 10 https://jkccs.net/wp-content/uploads/2020/07/Bi-Annual-HR-Report-2020-JKCCSAPDP.pdf
[103]Home Ministry report. 18/3/18. https://economictimes.indiatimes.com/news/politics-and-nation/jk-saw-166-rise-in-civilian-sasualties-in-2017-home-ministry-report/articleshow/63823735.cms
[104]Connolly (2019).
[105]'Humiliated'.
[106]Human Rights Committee, General Comment No. 24.
[107]Opinion no. 45/2008 (India).
[108]Still a Lawless Law.

"incompatible with the object and purpose of the treaty."[109] and "it is incompatible with the object and purpose of the ICCPR as it denies key article 9 protections from persons in administrative detention".[110]

It has been argued that the "*origins of the PSA can be traced in the Defence of India Act which was passed under Colonial Rule in 1915. The purpose of the Act was to stifle political dissent. The PSA, likewise, permits the state government to take a person into preventive detention without trial for up to two years*". [111] The PSA allows imposing of curfews, internet blackouts, and banning of political parties with grassroots support in Kashmir. This was enforced on 5 August **2019, after the military forces sealed off the territory and the Indian Government revoked the autonomous status of J&K under Article 370 of the Indian Constitution. There were 389 people detained under the PSA including former Chief Ministers of the State, Mehbooba Mufti and Omar Abdullah and many other political leaders under the PSA.**

There is a raft of legislation that has been employed in Kashmir to quash dissent and the International Crises Group has reported that

> "*Beyond political actors, the government has stifled dissent among civil society, including by arresting civilians for expressing opinions on social media platforms. Security forces have also harassed, beaten and arrested journalists, including under the Unlawful Activities Prevention Act 1967, a draconian anti-terror law*".[112]

This Act is aimed at both individuals and associations and can also be used against the print media.

There have been two successive reports by the Human Rights Council (OHCHR)in Geneva that have catalogued the Indian forces disregard for human rights and their immunity from prosecution under the AFPSA. The first report of the OHCHR in 2018 consisted of 49pages which was the first ever issued by the UN on the human rights situation in the Indian-Administered and the (Azad) Pakistan-Administered Kashmir.[113] It details abuses on the Indian side of the border and while acknowledging the rise of a "variety of armed groups" conveys the "widespread and serious human rights violations" perpetrated by the Indian forces on the suspected guerrilla fighters and civilian population in the Kashmir region.[114] The report also states that Pakistan provided access to the investigators in Azad Kashmir but India refused to grant the UN any right to collect evidence. The report states that within the timeframe of the report in Pakistan "the human rights violations in this area are of a different calibre or magnitude and of a more structural nature".[115]

[109]Vienna Convention on the Law of Treaties, A/CONF.39/27 (1969), adopted 22 May 1969, entered into force 23 May 1980, para. 19(c).
[110]Still a Lawless Law, at 14.
[111]Kumar (2020).
[112]Raising the Stakes in Jammu and Kashmir.
[113]OHCHR (2018).
[114]Executive Summary at 4.
[115]Executive Summary at 5.

The report states that the "Indian security forces used excessive force that led to unlawful killings and a very high number of injuries" citing civil society estimates that approximately "145 civilians were killed by the security forces between mid-July 2016 and the end of March 2018, with up to 20 other civilians killed by armed groups in the same period".[116] The report also confirms that the "Impunity for human rights violations and lack of access to justice are key human rights challenges in the state of Jammu and Kashmir" and the "*AFSPA and the Jammu and Kashmir Public Safety Act 1978 (PSA) have created structures that obstruct the normal course of law, impede accountability and jeopardize the right to remedy for victims of human rights violations.*"[117]

The HRC report states that the powers granted under AFSPA

> "*contravenes several international standards on the use of force and related principles of proportionality and necessity including the UN Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, which requires law enforcement officials to use firearms only as a last resort, and to use them with lethal intent only when 'strictly unavoidable in order to protect life'*".[118] The follow -up OHCHR report issued a year later catalogues the use of pellet shot guns "used against protesters in 2016 – and which is still being employed by security forces". The official statistics provided showed "*17 people were killed by shotgun pellets between July 2016 and August 2017, and 6,221 people were injured by the metal pellets between 2016 and March 2017. Civil society organizations believe that many of them have been partially or completely blinded*".[119]

The debilitating injuries caused by shooting of pellet guns into unarmed demonstrators has led to many of them being permanently blinded. The UNHCR Guidance on the use of non-lethal weapons, such "as tear gas shells should not be used indiscriminately or put innocent bystanders or peaceful members of an assembly at risk".[120] However, if law enforcement agencies resort to "*any use of violent means to police or disperse an assembly, such use must be promptly and transparently recorded to enable an ex post facto review of the proportionality, necessity and impact of the usage*".[121]

Characterisation of the Conflict as NIC

The disputed status of Kashmir involves the population of Kashmir and the armed forces of India employed in overwhelming numbers. The Indian State is one of the High Contracting Parties to the 1949 Geneva Convention and its actions have to be evaluated under the principles of the international humanitarian law (IHL). The Indian state party has ratified all four Geneva Conventions and has also

[116]Ibid, at 7.
[117]Ibid, at 11.
[118]Page 6.
[119]OHCHR (2019).
[120]Guidance on the use of less lethal weapons in law enforcement.
[121]General Comment No.37, Human Rights Committee.

adopted the Geneva Convention Act 1960 into its domestic legislation. The state parties under Common Article 1 of the Geneva Convention are obliged to "respect and to ensure respect in all circumstances" toward the convention and obliges "*a duty on the part of all States to use all available means to ensure respect for all provisions of the Conventions by all other States during all armed conflicts, even those to which the State in question is not a party*".[122]

The Geneva Conventions, together with the laws of the Hague Convention form the basis of contemporary IHL which comes into effect during an armed conflict. The IHL aims to regulate the conduct of belligerents; all combatants and to those no longer taking part in hostilities, including POWS. The application of IHL is based on the framework of the Geneva Conventions for the protection of civilian persons in times of war. The International Committee of the Red Cross (ICRC) is the main international agency that oversees its implementation whose "basic principle underlying that law -humanity, impartiality, and neutrality that are as valid as ever and of utmost relevance" in its work.[123]

- The Indian government had signed a Memorandum of Understanding (MoU) in 1995 which permitted the ICRC to visit persons arrested, detained and imprisoned in relation to the situation in J&K. [124]However, it has been gradually withdrawing this support since 2016 when initially it "only stopped ICRC officials from visiting jails and working for inmates, which was the Geneva-based organisation's key mission".[125] After the revocation of Article 370 the ICRC has not "*been able to work in India-held Kashmir since it was stripped of its political autonomy on August 5, foreign aid workers are not being issued visas and Kashmiris are being left without support*". This has led to the ICRC stopping "*its humanitarian works in the erstwhile state of Jammu and Kashmir" and the Indian government "enforced a security and communications clampdown that continues to this day in some form or other*".[126]

The Indian government has an obligation under the Common Article 3 that is generic to all four Geneva Conventions and which states "(1) Persons taking no active part in the hostilities, ---shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria;" and '(2) An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict". The Common Article 3 is based on a negative description: it is applicable in the case of armed conflicts 'not of an international character'. Armed conflicts 'not of an international character' are armed conflicts where at least one Party is not a State.[127]

This provision has application to Non International Conflicts (NIC) and the Kashmir dispute must now be assigned as an NIC and the compliance by the

[122]de Chazournes & Condorelli (2000).
[123]Sandoz (1998).
[124]Jammu and Kashmir: The government of India grants the ICRC access to detainees. 22-6-95 ICRC.https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/57jm96.htm
[125]Kashmiris suffer further as ICRC stops humanitarian work. 15/1/20 TRT World. TRT World. com/magazine/Kashmiris-suffer-further-as-ICRC-stops-humanitarian-work-32965
[126]Ibid
[127]Commentary of 2016.

Indian government of its obligations need examination. The Indian government has implemented counterinsurgency measures in the Kashmir Valley with its 1 million-strong occupation forces that have used "excessive force" against the lightly armed rebel forces.[128] Under customary international law the "use of lethal force must respect the legal principles of military necessity, distinction, (and) proportionality."[129] In executing a proactive, offensive and retributive doctrine the Indian forces have breached the rules not to cause "indiscriminate and disproportionate attacks"[130] and to "observe a series of precautionary rules in attack, aimed at avoiding or minimizing incidental harm to civilians and civilian objects."[131]

The breach of IHL is a structural problem with the Indian state because the government has not signed the two additional protocols that been added to the Geneva Conventions in 1977 which cover armed conflict which is a Non International Conflict (NIC). These are the Additional Protocol (AP) I and II and while the former defines armed movements involving the "right to self-determination of colonised people as international armed conflicts, bringing, in some respects, guerrilla warfare and state responses to it within the protection ambit of IHL".[132] The latter was "specifically adopted to cover situations of NIC, thereby bringing a situation of armed conflict occurring on the territory of a country within the framework of international humanitarian law".[133]

Part IV of the AP II on Civilian populations and General Protections of the Civilian Population states in Article 13 as follows:

1. *The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to the protection, the following rules shall be observed in all circumstances,*
2. *The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts ot threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.*
3. *Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.*[134]

By not signing the AP 1/II India has excluded any responsibility for the atrocities that are being committed in Kashmir and which have been attested by the OHCHR in its reports. The reasons have been speculated upon by Srinivas Burra, Assistant Professor at the Faculty of Legal Studies at the South Asia University, New Delhi who argues that it

[128]OHCHR (2018) at 17.
[129]Henckaerts & Doswald-Beck (2005) at rules 1-24.
[130]Ibid, at rules 11-24.
[131]Ibid, at rules 15-24.
[132]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
[133]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non International Armed Conflicts (Protocol I), 8 June 1977
[134]Protocol Additional II to the Geneva Conventions of 12 August 1949.

"*could be mainly because these protocols have expanded the scope of international humanitarian law as provided in the four Geneva Conventions, which may have certain implications at the domestic level. Such a hesitation – mainly in the form of domestic political contingencies*".[135]

There may be another concern which is that when the AP1/11 were effective

"*India was not in favour of accepting the category of non-international armed conflict itself. This position no longer remains valid as India has become a party to other international treaties which govern non-international armed conflict situations. An example of this is the Convention on Certain Conventional Weapons of 1980*".[136]

The Indian state has no valid reason to not ratify the APs and the only grounds for noncompliance is that it wants to give its armed forces absolute immunity from prosecution. The sequence of the India actions in Kashmir prior to 2019 was to operate under the martial law and upon the annexation it imposed a lockdown on the civilian population. The breach of the Geneva Conventions' Common Article 3 and the AP II which is crucial to the protection of civilians in a NIC does expose India to allegation of war crimes and from departing from a norms of IHL and it can be accused of crimes against humanity.

The collective punishments imposed on the people resident in J&K is a breach of IHL and the principles of culpability were defined in *Prosecutor v. Tadic,*[137] where an international tribunal was constituted to determine the crimes committed by former Yugoslavian military personnel. The decision states:

"*Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [. . .] the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: . . .] "* [138] *"In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations"*.[139]

There is a need for armed forces to respect the principle of proportionality in conflict in the conduct of any military action in order to uphold IHL. This determines the legality or illegality of the act in terms of its duration and intensity and these principles were formulated in the *Request for Advisory Opinion on the Legality of the Threat of nuclear weapons*[140] where the ICJ held that the

[135]Burra (2017).
[136]Ibid.
[137]Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)
[138]At 111,127 At 111, 127 (citing U.N. General Assembly Resolution 2675).
[139]Ibid.
[140]ICJ 1994 General list no 95

"*entitlement to resort to self-defence under Article 51 is subject to the conditions of necessity and proportionality*".[141]

The Court stated in *Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America*)[142] "*there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law*".[143]

The ICJ held the purpose of IHL was "*aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets*".[144] The Court also expounded on an essential ingredient in armed conflict which was the " *the principle of neutrality, whatever its content, which is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used*".[145] It was comparable to other humanitarian laws, where the laws of the conduct of war mandate its use within certain limits to restraint unnecessary suffering and destruction.

It seems that the Indian state by its abuse of human rights as documented by the OHCHR reports has been responsible for the breach of international human rights law. There is also infringements of international humanitarian law which makes it liable for the crimes committed by the enforcement of AFSPA against the people of Kashmir. The operations carried out by its armed forces, such as extra judicial killings has caused the infliction of harm to the civilian population. The standards that the actions of the armed forces will be judged are of NIC which governs conflict between state and the non-state actors and the fact that India has not signed the API/II militates heavily in the direction of being guilty of the offences.

Conclusion

The annexation of Kashmir by India in August 2019 was the final act of its strategy of creating a Greater India. The first stage was accomplished by the Instrument of Accession that served as a legal device for the state of Kashmir to be incorporated into the Indian union as a state with a constitutional mandate under Article 370. The UN did not recognise this and set out a mechanism for a referendum and the people of Kashmir did not accept this whose affiliations were with Pakistan as it was contiguous to the population. The Indian government have mapped out the policy of colonising the territory by opening it to migration, land alienation and gerrymandering to increase its vote bank.

[141]Paras. 37-50
[142]I.C.J. Reports 1986, p. 94, para. 176
[143]Ibid.
[144]Paras 74-87.
[145]Paras.88 and 89.

The Indian decision to revoke Kashmir's status by annulling Article 370 of its constitution denies political representation to its populace. The process of cultural assimilation will continue apace with the changes in the school curriculum, appropriation of language and control of trusts that previously catered for the charities that preserved the Mosques and shrines. This is a policy that breaches the human rights of its people who will increasingly be denied their freedom of speech and expression.

The human rights abuses that have been carried out by the Indian forces are a consequence of denying the inhabitants a right to self-determination. The UNSC Resolutions invited a referendum under the Chapter VI procedures which are mandatory in application and the inalienable right of the people of Kashmir has not been respected. The imposition of military rule in the form of a Lieutenant-Governor from the New Delhi is a form of direct rule which implies that Kashmir is now occupied territory. By granting immunity to its armed forces the inhabitants are at their mercy and searches and destroy missions inevitably impacts on the civilian population. The gross human rights in the form casualties from both lethal and non-lethal weapons in the suppression of local dissent are a vivid testimony to the breaches of international human rights law.

The Indian government has not allowed International Committee of the Red Cross the ability to function in the territory as stipulated by the Geneva Conventions. It has also not signed the Additional Protocols I/II that is necessary to accept Common Article 3 as a high contracting party to this treaty. The abuses its forces have committed have not been the subject of redress in any war crimes tribunal. It is now pertinent that its officials are tried in international courts for war crimes in a conflict that is a NIC as it can now be defined after India's annexation of Kashmir.

References

Abdullah, S.M. & B. Chinar (2016) A Critical Review VII (a), translated from Urdu by Mohammad Amin; Gulshan books.

Akehurst, M. (1975). 'Custom as a Source of International Law' in *British Yearbook of International Law*, Volume 47, Issue 1, 1–53.

Andrabi, M. (2021). 'Human Rights Crises in Kashmir: An Overview' in *Legal Services* April 16. http://www.legalserviceindia.com/legal/author-11334-mehak-19.html

Ankit, R. & R.C. Kak (2010). 'Forgotten Premier of Kashmir' in *Epilogue* JK Magazine, Volume 4(4):36-39.

Ankit, R. (2010). 'Pandit Ramchandra Kak: The Forgotten Premier of Kashmir' in *Epilogue, Epilogue -Jammu Kashmir*, 4(4):36-39.

Appiagyei-Atua, K. (2011). 'United Nations Security Council Resolution 1325 on Women, Peace, and Security — Is it Binding?' in *Human Rights Brief* 18(3):2-6.
are Binding Under Article 25 of the Charter?, 21

Bogaerts, E. & R. Remco (eds.) (2012). *Beyond Empire and Nation: Decolonialization of African and Asian societies 1930-1970s*, Leidem: KITLV Press.

Brown, J.M. (1984). 'The Mountbatten Viceroyalty. Announcement and Reception of the 3 June Plan, 31 May-7 July 1947' in The English Historical Review 99 (392):667–668.

Burra, S. (2017). 'Why India should consider signing the Additional Protocols of Geneva Conventions' (June 8) in *The Wire*. https://thewire.in/diplomacy/india-humanitarian-law-additional-protocols

Cahin, G., Ranjeva, R. & D. Simon (2001). *La coutume internationale et les organisations internationales: l'incidence de la dimension institutionnelle sur le processus coutumier*. Paris: Pédone.

Castellino, J. (2000). *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial National Identity.* Martinus Nijhoff, The Hague.

Connolly, A. (2019). 'Kashmir's decade: A high death toll is warning sign. The New Humanitarian'. June 11. https://www.thenewhumanitarian.org/news/2019/06/11/kashmir-s-decade-high-death-toll-warning-sign

Dobhal, H. (2011). *Writings on Human Rights, Law, and Society in India: A Combat Law Anthology: Selections from Combat law, 2002-2010*. Socio legal Information Centre (New Delhi).

- Ghosh, P.S. (2007). Identity, Ideology, and Conflict, Aspects of India's International Relations, 1700 to 2000: South Asia and the world, ed. by JK Ray, Vol X, Part 6.

Gull, R.S. (2015).'The Man who Purchased Kashmir' in *Kashmir Life*, https://kashmirlife.net/the-man-who-purchased-kashmir-issue-15-vol-07-81400/

Gupta**,** S. (2019). 'Kashmir remains paralyzed by lockdown as resentment simmers' in CNN**,** August 16. https://edition.cnn.com/2019/08/16/asia/kashmir-11-days-of-lockdown-intl/index.html

Henckaerts, J.-M. & L. Doswals-Beck (2005). *Customary International Humanitarian Law, Volume I: Rules. Cambridge: Cambridge University Press*. Ruiles 1-24 pp. 3-76.

Higgins, R. (1972). The Advisory Opinion on Namibia: Which UN Resolutions are Binding Under Article 25 of the Charter?' in Int'l & Com l.Q. 21:270, 275. (1972).

- 'Humiliated' : Top Kashmiri leaders charged under 'draconian' law (2020). *AlJazeera Human Rights* February 7. https://www.aljazeera.com/news/2020/2/7/humiliated-top-kashmir-leaders-charged-under-draconian-law

Hurst, H. (1996). *Anatomy Sovereignty and Self Determination. The Accumulation of Conflicting Rights*. Philadelphia: University of Pennsylvania Press.

International Declaration of Human Rights https://www.jus.uio.no/lm/en/pdf/un.universal.declaration.of.human.rights.1948.portrait.letter.pdf

Iqbal, N. (2022). 'Rajnath Singh: We are walking north, have to reach Gilgit, Baltistan' in *Indian Express*, October 30. https://indianexpress.com/article/explained/rajnath-singh-gilgit-baltistan-history-explained-8234674/

Jennings, I. (1956). *The Approach to Self- Government*. Cambridge University Press.

Kapur, V. & V. Narang (2001). *A Fate of Kashmir: International Law or Lawlessness?* In *Stanford Journal of International Relations* 3(1). http://www.stanford.edu/group/sjir/3.1.06_kapur-narrang.html

- 'Kashmir violence: 16 die after key militant killed' (2016). *BBC news* July 10. https://www.bbc.co.uk/news/world-asia-36758319

Korbell, J. (2021). 'From Domicile to Dominion: India's Settler Colonial Agenda in Kashmir' in *Harvard Law Review* 134:2530-2551.

Kumar, A.V.P. (2020). 'wammu and Kashmir Public Safety Act, 1978: India's Use of Preventive Detention Violates Human Rightsw (OxHRH Blog, March 2020), http://ohrh.law.ox.ac.uk/jammu-and-kashmir-public-safety-act-1978-indias-use-of-preventive-detention-violates-human-rights/

Lone, F.N. (2009), 'For Sale to Accession Deed' –Scanning the Historigraphy of Kashmir, 1846-1947. Lone, History Compass 7/6: 1496 History Compass 7/6 (2009):1496–1508. doi: 10.1111/j.1478-0542.2009.00652.x

Lone, F.N. (2018). 'Incorporation of Kashmir into the Indian Union: An International Assessment on Human Rights and Democratic Government' in *Historical Title, Self-Determination and the Kashmir Question*. Brills Asian Law

Ministry of External Affairs, Government of India, Simla Agreement, July 2, 1972. https://www.mea.gov.in/bilateral-documents.htm?dtl/5541/Simla+Agreement

Mir, H. (2020). 'Kashmiris suffer further as ICRC stops humanitarian work' in *TRT World*. com/magazine/Kashmiris-suffer-further-as-ICRC-stops-humanitarian-work-32965

Moore, M. (ed.) (1998). *National Self-discrimination and Succession*. Oxford University Press.

- Muslim Students being forced to sing Hindu hymns draws ire in Kashmir in *The Hindu* Sept/ 20, 2022. https://www.thehindu.com/news/national/other-states/muslim-students-being-forced-to-sing-hindu-hymns-draws-ire-in-kashmir/article65910773.ece

Öberg, M.D. (2005). 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' in *Eur. J. Int'l L.* 16(5)879-906.

Orakhelashvili, A. (2007). 'The Acts of the Security Council: Meaning and Standards of Review' in 11 *Max Planck Yearbook of United Nations Law* 143.

Rai, *M. (2019). 'Kashmiris in the Hindu Rashtra'* in Chatterji, A.P., Hansen, T.B. & Jaffrelot. C. (eds.) *Majoritarian State: How Hindu Nationalism is Changing India*. Oxford University Press at 259-280. DOI: 10.1093/oso/9780190078171.003.0015

Rossi, Ch.R. (2017). *Sovereignty and Territorial Temptation.* Cambridge University Press.

Scharf, M.P. (2003). 'Earned Sovereignty: Judicial Underpinnings' in Denv. J. Int'l L. & Pol'y 31:373-385.

Schwebel, S.M. (1979) 'The Effect of Resolutions of the U.N. General Assembly on Customary International Law', in 73 *Proceedings of the Annual meeting (ASIL)* 301.

Schwebel, S.M. (1994). 'The Legal Effect of Resolutions and Codes of Conduct of the United Nations', in *Justice in International Law – Selected Writings of Stephen M. Schwebel*. Cambridge University Press.

Sharma, A. (2022). 'J&K: In a first, BJP leader elected new chairperson of Waqf Board' in Indian Express, March 22. https://indianexpress.com/article/cities/jammu/jk-in-a-first-bjp-leader-elected-new-chairperson-of-waqf-board-7825174/

Sharma, S. (2022). 'Epistemes of human rights in Kashmir: Paradoxes of universality and particularity' in *Journal of Human Rights* 21(2):158-173.

Soofi, A.B. (2019). 'Binding Resolutions', September 14. Dawn.com/news/1505094

Talmon, S. (2005). 'The Security Council as World Legislature' in *Am. J. Int'l L.* 99(1): 175-193.

Teng, M.K., Bhatt, R.K. & S. Kaul (2006). *Kashmir, Constitutional History and Documents*. 2nd ed. New Delhi: Light & Life Publishers.

Twining, W. (1991). *Issues of Self-determination.* Aberdeen: Aberdeen University Press.

UN Chief officer offers mediation in Kashmir dispute (2020). 'Deeply concerned' in *Al Jazeera*, Februarty 17. https://www.aljazeera.com/news/2020/02/concerned-chief-offers-mediation-kashmir-dispute-200217073630129.html

UN Security Council, *Security Council resolution 47 (1948) [The India-Pakistan Question]*, 21 April 1948, S/RES/47 (1948). https://www.refworld.org/docid/3b00f2 3d10.html

UN Security Council, *Security Council resolution 91 (1951) [The India-Pakistan Question]*, 30 March 1951, S/RES/91 (1951). https://www.refworld.org/docid/3b00f1f338.html

Walter, Ch., von Ungern-Sternberg, A. & K. Abushov (2014). *Self-Determination and Secession in International Law* , Oxford Scholarship Online. DOI:10.1093/acprof: oso/9780198702375.001.0001

Wilson, H.A. (1988). *International Law and the Use of Force by National Liberation Movements*. Oxford: Clarendon Press.

Wood, M. (1998). 'The Interpretation of UN Security Council Resolutions' in *2 Max Planck Yearbook of United Nations Law* 73.

Reports

Centre for Human Rights, Status of International Instruments (New York: UN 1987), UN Sales No, E 87. XIV 2, at 9.

Commentary of 2016. Article 3,: Conflicts of Non International Character. ISRC. iht-database.icrc.org/ihl/full/GLI-Commentary/aRT3

General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/ 37, at: https://documents-dds-ny.un.org/doc/UNDOC/ GEN/G20/232/15/PDF/G202 3215.pdf?OpenElement

Guidance on the use of less lethal weapons in law enforcement, United Nations Human rights, 2020, https://www.ohchr.org/Documents/ HRBodies/CCPR/LLW_Guidance. pdf. Also see: General Comment No.37, Human Rights Committee, September 17 2020, CCPR/C/GC/37: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/2 32/15/PDF/ G2023215.pdf?OpenElement

Home Ministry report. 18/3/18. https://economictimes.indiatimes.com/news/politics-and-nation/jk-saw-166-rise-in-civilian-sasualties-in-2017-home-ministry-report/articles how/63823735.cms

Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, 4 November 1994, para 8.

Jammu and Kashmir: The government of India grants the ICRC access to detainees. https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/ 57jm96.htm

de Chazournes, L.B. & L. Condorelli (2000). 'Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests' in International Review of the Red Cross (IRRC) vol. 82 (837):67-87.

OHCHR (2018). 'Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan', 14 June 2018, p11. https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKash mirJune2016ToApril2018.pdf.

OHCHR (2019). 'Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019', p 13 file:///C:/Users/pc1/Desktop/KashmirUpdateReport_8July2019.pdf

Opinion no. 45/2008 (India) adopted on 26 November 2008, Opinions adopted by the Working Group on Arbitrary Detention, Human Rights Council Thirteenth Session, 2 March 2010, UN Doc. A/HRC/13/30/Add.1. www2.ohchr.org/English/bodies/hrc ouncil/docs/13session/A-HRC-13-30- Add1.pdf (UN WGAD 2010), para 51.

Protocol Additional II to the Geneva Conventions of 12 August 1949, p. 94. ICRC https://www.icrc.org/en/doc/assets/files/other/icrc_002_0467.pdf

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Raising the Stakes in Jammu and Kashmir, International Crises Group, Report no 310/ Asia, 5/8/20 https://www.crisisgroup.org/asia/south-asia/kashmir/310-raising-stakes-jammu-and-kashmir

Report of Sir Owen Dixon, United Nations Representative for India and Pakistan to the Security Council: annex UN Security Council, S/1791, 15/9/50, digitallibrary.un.org/record/486273?In=en

Report of the Security Council, 16 July 1963-15 July 1964. G.A.O.R.: XIX Session, Supplement No. 2 (A/5802), p. 88.

Six monthly Review of Human Rights situation in Indian administered Jammu and Kashmir (January to June 2020) Jammu and Kashmir Coalition of Civil Society. p 10 https://jkccs.net/wp-content/uploads/2020/07/Bi-Annual-HR-Report-2020-JKCCS APDP.pdf

Statement of the representative of India to the Human Rights Committee, UN Doc. CCFR/C/Sr 498 (1984) at 3

Still a Lawless Law: Detention under the J&K Public Safety Act, 1978, Amnesty International, (2012) p 12-13 https://www.amnesty.org/en/documents/asa20/035/2012/en/

Sandoz, Y. (1998). The International Committee of the Red Cross as guardians of International Humanitarian Law, 31-12-98. icc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm

Cases of International Court of Justice

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) [1971]

Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3, Separate Opinion of Judge Ammoun.

Burkina Faso/Mali, ICJ 1986.

Case Concerning Legality of Use of Force (Serbia and Montenegro v Belgium) [2004]

Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

Legal Consequences of the Construction of a Wall in the Palestinian Territory, Advisory Opinion ICJ Reports 2004, p 136.

Militarv and Puramilitary Activities in and against Nicaragua (Nicaragua v. United States of America).

State Bank of India vs Santosh Gupta and another (2017) 2 SCC 538.

Western Sahara, Advisory Opinion, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975), 16th October 1975, United Nations [UN]; International Court of Justice [ICJ], 43-44.