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Athens Journal of Law

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

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

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The current issue is the third 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



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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.
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Important Dates

- Abstract Submission: **DEADLINE CLOSED**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **DEADLINE CLOSED**

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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€
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Athens Institute for Education and Research

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- **Dr. Gregory T. Papanikos**, President, ATINER.
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An Essay about Privacy

By Ronald C. Griffin*

Jessye Norman was an American opera singer. She died on October 1, 2019. On October 2, 2019, my wife got a grim diagnosis that put me in a stupor and reminded me, now more than ever, that my generation (that did so much good in the world) stands in line waiting for the Grim Reaper's call. In a seventy-years (that have gone by too fast) I have watched my peers run from the realms of privacy, spaces where people implemented life plans uninterrupted by neighbours that were discernible, palpable, and real to everybody, to a realm where there is none. Why? This paper takes a stab at answering that question and, in so doing, reclaiming bits of what we have lost with workable ideas, a Michigan statute, the Restatement of Torts, stories, and case law. The undertaking collects things with catch phrases and, with a trove in hand, assembles and weaves together a narrative that will help us. There are guides for the reader to follow to help him through the essay: new beginning, ploughing the ground, tree stumps and stone obstacles, furrowed fields, and so on. It ends with a deep conviction that "we've relinquished too much of ourselves to claim anything as private." Everybody knows something about everybody. Who you are and what you are and where you have been are in the hands of others.

Keywords: Privacy, Surveillance, and Constitutional Law

Introduction

Privacy is a realm bustling with activity.¹ It is a noun in the English language that accommodates cities where people think and feel anonymous. It is in bustling small towns and villages where everybody knows something about everybody. It is in digital spaces where people do embarrassing things to themselves. It is in self-propelled, highly motivated, individuals excavating their minds and bodies for talents out of the gaze of other people.

Invasions of privacy are disruptive events. They come down to unwelcomed visitations by others. Some victims accede to visitations because there is nothing they can do about them. Some welcome visitations because it is the only way to get credit to do business. Some resist visitations, with all their might because what they are doing to themselves is nobody's business but their own.²

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¹I am eighty years old and I have watched change tear down everything I know. Freedom (the option to go hither and yon in my country unmolested by others) and privacy (with all its facets) are legacies American civilisation gave to everybody. See Marcuse (1968). Sadly, people have given them away for electronic conveniences, and see Etsebeth (2011).

²*Griswold v. Connecticut*.

There is a metaphorical-lyrical account for this. Think about it this way! We are bit players in the town circus. Everybody has a performance under the big top. What players do after their performance is a mystery. First off, it is nobody's business. Second, it is private time for the performer away from everybody, and everything, and what's gnawing on them. Third, it is a domain or domains within a larger realm where performers retreat. It accommodates a craving for peace, quiet, solitude, self-isolation, and the right to be left alone.

Folks are terrified by myths about the outside world: that it is cruel; that reason is impotent; that reality (what's serendipity in our lives) comes out of chaos. The truth is that some things associated with the myths are true. We live in physical and virtual realities. Everybody is everybody's friendly enemy. People are nosy and pushy. Competition and anxiety fuel what people do. Violence is a part of everyday life and, lastly, a ruling class tells us what to do.³

Story, Questions, and Answer

Let me flesh out these claims with a story. I am in Kansas City. Jesse Norman (a Metropolitan Opera singer and a celebrity of note) died yesterday. The next day, October 2, 2019, my wife got a grim diagnosis that put me in a stupor and reminded me of the fact that my generation, that did so much good in the world, stands in line waiting for the Grim Reaper's call.

In seventy plus years, that have gone by too fast, I have watched my peers run from the realm of privacy - a space where people made and implemented life plans uninterrupted by neighbours - to a realm where there is no privacy. Why is this so? Is privacy a relic from the past? Is it being alone with one's thoughts and personal decisions that we have lost? Is it being anonymous in the marketplace that we have lost? Is it the deals we cut with somebody to conceal matters from others? Is it freedom from government surveillance that we fight to keep? This paper takes stabs at answering these questions and, in so doing, reclaiming bits of what we have lost with workable ideas, statutes, and case law. The undertaking collects new ideas with catchy phrases, and with a trove of material in hand, knits principles and legal narratives together that will help us.

Chimera

There is a preliminary problem to solve before embarking upon a longer journey about privacy. A reader of this paper told me the paper was like a cubist painting. He could see the privacy images being painted by me. But when the painting's pieces were parsed and viewed in isolation, the parts, he said, were too blurry and too illusive to grasp. He intimated that it was like wrestling with a

³Patricians, who provided historic memory and generational leadership, have given way to a small cadre of corporate elites who crave money, power, and control of everything. See Baltzell (1987) at 7-8, 144-145. See Ramirez (2012) at 48, 133; Galbrath (1973) at 81-82. See also Bouton (2007) at 69-70.

chimera on paper. You could wrestle with him, but you could not put him down on the mat for the count. Let us solve this problem, now, with a shorter and blunter narrative about privacy.⁴

Privacy is a familiar and enigmatic idea. First off, it is a noun in the English language. Second it is a craving. Third, it takes different forms in different contexts in different places in different people, in different people's lives. In some cases, it is a domain within a realm (the public square) where people bury what they have done to themselves. It is a personal diary in one's home, in a lock box, that one needs a key to open. It is a craving for physical and mental space to be alone and safe in one's person that crops up from abusive master-and-slave, master-and-servant, principle-and-agent, parent-and-child, employer-and-employee, government employer-and- government employee relationships.

Thematically speaking, privacy is the same craving in everybody everywhere. Britaney Spears' Los Angeles conservatorship case is an example.⁵ In a parent-and-child relationship, she wanted her father to leave her alone; to stay out of her mind; to let her manage her own money; to give her physical space; to give her an emotional break; and last, but not least, time and space to work-out what was important in her life without outside interference. Ms. Spears is a modern-day American woman, living in a 246-year-old country, trying to figure out what is important to her as an individual. She wanted and eventually reclaimed a domain within the realm of privacy.

Primitive Notion

Let us begin with a primitive notion about privacy. It is apocryphal to say this, but it should be said anyway. America is a country of foreigners. Nobody belongs here. We are a raucous, unruly, acquisitive, heterogeneous, mongrelised people. We are colonisers living in man-made fortresses that are camped on somebody else's land.⁶ Everybody's erected walls around themselves to get privacy. Government uses what passes for bad speech (what the ruling class finds

⁴Like a piece of metal on a blacksmith's anvil out west, I have pounded out privacy, over and over again, to push out the concept in all its forms so we can apply them to facts.

⁵Day, Stark, & Coscarelli (2021) at A1. See also Coscarelli & Jacobs (2021) at A1.

⁶Men and women with guns built the United States on the dead bodies of Native Americans and the purloined labour of West Africans. See, e.g., "Act to provide for the armed occupation and settlement of the unsettled parts of the peninsula of east Florida," in Stat. at Large at 502, 4 Aug., 1842. See Williams (1994) at 9; Zinn (2015) at 129; Frymer (2014) at 124-25.

unpalatable in public discourse),⁷ reasonable suspicion,⁸ national security,⁹ and probable cause¹⁰ to breach the walls.

Individuals furnish the public with ways to peer over the walls: Being weird, odd, and cantankerous in public; allowing church folks to misuse organised religion and religious precepts to spy on a congregation in their homes; snitching to clerics about what folks do. Bursting on the scene (taking center stage) in different science, art, or entertainment cloaks (Carl Sagan and David Chappelle); a person assuming folk, entertainment, and celebrity status¹¹ like Michael Jackson did in America culture, and, in so doing, making what one does public.¹² Using the internet to buy goods that allows others to mine data about us. Shoppers using Amazon,¹³ Google,¹⁴ Microsoft Edge, and Yahoo to look up stuff merchants use to make avatars of us; and last, but not least, private sector employers monitoring an employee's use of company computers to get company work done and their work done too.¹⁵

Today, we blithely go about our days unaware of what we have given up: (1) the exquisite feeling of being alone (the option to use time, space, and presence of mine to be introspective);¹⁶ (2) the loss of and the erosion of historic memory (important family encounters in our lives; our experiences with relatives that matter to us; the option to rummage through parents' and grandparents' things to find personas to present to the world), and (3) sanctuaries we erect from the rough and tumble and hustle and bustle of daily life.¹⁷

In our haste to reclaim things that are worthwhile, in our lives, we have reclaimed nothing. We are like fish in a fishbowl. Everybody sees us.¹⁸ There is little or no self- reflection. There is too little introspection. It is all about Meta, Instagram, Twitter, FOX sports spectacles, like SEC football games on weekend TV, and celebrities from Division I football teams selling college athletic images

⁷*Ashcroft v. American Civil Liberties Union* (Breyer, J. dissenting); *Pope v. Illinois*; *Miller v. California*. See Hudson (2009).

⁸*Terry v. Ohio*.

⁹When one uses an electronic medium to converse with somebody about everything, the user's right to privacy evaporates. See *Smith v. Maryland*; *In re FBI*. Cf. *Klayman v. Obama*. Trolling the nation's electronic communications (metadata) without a warrant to find folks likely to commit domestic acts of terror for a foreign entity is a troubling. See Atkins (2014) at 51, 56-57.

¹⁰Probable cause is a conviction that is one step up from suspicion that a crime has been or is being committed. *State v. Wilson*. See *Brinegar v. United States*, at 175-176. See also *Telzer v. Borough of Englewood Cliffs*.

¹¹Carl Edward Sagan was a celebrity, an American astronomer, planetary scientist, cosmologist, astrophysicist, famous author, and scientific communicator. Kragh (2022). See Achenbach (2014).

¹²A celebrity's image is camped on turf beyond the scope of privacy. Policing its use by the press for profit, be it for the target's good or ill, is problematic. *Comedy III Production, Inc. v. Gary Sanderup, Inc.*, at 134-135 (2001). See Dreyman (2017) at 677-678.

¹³Grynberg (2019) at 226 fn.131.

¹⁴Carr (2011) at 156.

¹⁵Levinson (2009) at 933-934.

¹⁶Carr (2011) at 167.

¹⁷Carr (2011) at 64-65.

¹⁸April Falcon Doss, *Cyber Privacy: Who has your data and why should you care*, Loc. 151,160, and 169 (2020). (Kindle E-book).

(there is a recent Supreme Court case on this)¹⁹ to make money. Surreptitiously, data miners go about the business of collecting info about us every day; storing their trove; and selling it to others. Nobody (the individual) knows anything about himself, indeed, anybody anymore. It is smoke and mirrors - day-in and day-out.

Commercial Zombies

What are we? Are we commercial Zombies? Maybe. Are we scavengers? The answer is yes. Are we avatars? Again, the answer is yes. Are we murderous scallywags? The answer is sometimes and yes. Everybody breaks moral codes for a reason to get something valuable and something done. Who are we really? Are we flawed human beings? The answer is yes. Are we commodities to be bought and sold by other beings? Again, the answer is yes. Everybody capitalises upon the works of others.

Let's get something straight. We live on the earth's crust like ants. We mine the planet for minerals, harvest surface plants for food, waste stuff we need, set up camps in mountains, valleys, meadows, semi-arid places, and open plains dotted with villages, towns, cities, computer stations, large computer storage facilities (in Utah),²⁰ and cyberspace networks to make a living.

Settlers draw circles around their neighbours' aspirations; doing their best to stay on their side of their neighbours' lines. Everybody is a friendly enemy. Competition animates what folks do. Everybody is preoccupied with their projects: assembling them; launching them; and seeing them through to fruition. So what! Is it a big deal? Is this a bad thing per se? The answer is no. Is there a dystopian side to us in this world?²¹ The answer to that question is yes.

We are fractious, flawed, and competitive beings. We embrace the doctrine of sameness to cope with unruliness in American life. We think everybody is equal. What we do by ourselves is destructive, selfish, theatrical and, when you look at the big pictures in life, irrelevant. We treat everybody the same (of course, we do not do that all the time); judge folks by their deeds; arresting impulses in

¹⁹NCAA v. Alston. See also Do & Weaver (2021).

²⁰Uta Data Center (2023).

²¹It is 2022. Devolution (a fancy word for States Rights) is in vogue. Dismantling the federal administrative state by somebody and rugged individualism "run-a-muck" enchants us. See Marcuse (1991) at 276 & 282. Modern day Americans behave like cowboys lived out West, 125 years ago, when life was short, crude, and uncertain; when death was a certainty and violence, and violent people were everywhere. See *District of Columbia v. Heller* (Therein the Supreme Court said Americans could store guns in their homes to protect the hearth); *New York State Rifle & Pistol Association v. Bruen* (Therein the Supreme Court said Americans could pack guns in public to ward off violence). Folks use guns to settle far too many disputes in the United States. Stoked fears and violence established peoples' boundaries. A person's reputation for acting violent, their neighbours' wariness, and his perceptions of him, determine the scope of privacy. Privacy comes down to private pacts between individuals (I will leave you alone Mr. X and Mrs. Y if you will leave me alone.) In its most granular form, it is a circle around an individual that is impermeable to a stranger's claims and prying eyes. It is the "non-disclosure of personal facts" and "non-interference with the right to decide what's good for oneself." See, Outing Arthur Ash in the Press, in Cohen (1992). This article was about a tennis player's personal battle with AID'S.

ourselves, where we can, to deal with others based on pigmentation, religion, language, sex, or dress. Principles of Law like Contracts, Property, Torts and Ethical Precepts (justice, equality, and fairness) capture, weigh, measure, and objectify what we do.

Dystopia

There is a dystopian side to us that is frightening.²² We are bound together by two bears. One giant is gentle, kind, and altruistic. The other is mean, selfish, and violent. In the end, the one we feed determines who we become. Like the great dinosaurs, from the Earth's past, we are spectacles on this planet. We are territorial beings with needy children. We perceive that we are under threat by our neighbours and, labouring under this delusion, we will do anything and everything to stave off death (pushing rivals to the margins of life, servitude, and extinction). Given all the foreigners who occupy physical space in the United States; that is, the countless non-native American invaders (by and large European coloniser) occupying Indian land: immediate gratification trumps long range planning and generational gratification. We dwell in our parents' reality - good and bad.

This is a quaint, oh so gothic, and old-worldish-picture of ourselves. It is 2023 now. The world is in turmoil and people are anxious and upset about everything. The only constant is time. It moves on no matter what we do to stop it or slow it down. Our surroundings (the earth's landscapes, seascapes, national boundaries) keep changing and, rightly or wrongly, America is changing too. The world wide web blankets the Earth. Generation X is at the nation's helm. Citizens are making accommodations with their new surroundings. Privacy as we know it is under siege. Older adults are bewildered by their surroundings. Access to countless website and a flood of data make things worse.

Like mother nature and what little we know about outer space, cyberspace is indifferent to the shenanigans, cheap claims, puny achievements, and the antics of man. But cyber technology - a man-made achievement in the wrong hands - is a fearsome, intrusive, corrosive, destructive, upsetting, and worrisome thing. Business computers prowl company turf to compile data about company employees. Government uses machines to spy on people to trap lawbreakers.

When you think about it, cyberspace is like the old growth forests that blanketed North America in the old days. Good guys (frontier path finders in a new world) and bad guys (cyber ruffians) and sheriffs (government marshals) dart in and out to plot things, solve problems, catch criminals, steal information, trap, and gather what they want, to trade with others.

Today, rummaging through personal computers is suspect.²³ Using a computer to steal information from another computer is wrongdoing.²⁴ Using a website to bully somebody is wrongdoing.²⁵ Using a computer to goad somebody into

²² Albright (2019) at 230-233 and 238.

²³ *Shamrock Food Co. v. Gast*.

²⁴ *Multiven v. Cisco Systems, Inc.*

²⁵ Chaffin (2008) at 773, 774, 817-818.

committing suicide is a crime.²⁶ Taking another person's on-line identity is wicked.²⁷ Using a computer to collect proprietary information is suspect. Selling the trove to private entities²⁸ and foreign governments is a crime.²⁹

Depravity

There is something craven about human beings these days. A significant number wallow in depravity because depravity is profitable. The wallowers use crowds, houses, family homes, and bungalows they own, or rent, to hide their identity, movement, and foul deeds. These folk are empty vessels---beautiful people to look at but monstrous down deep.

They look at the world with a jaundice eye. They treat civil society with contempt. They are users, grifters, predators, and profiteers: bored with their surroundings; incapable of love and desire; indifferent to ugliness and beauty; hiding, as best they can, their foul attitudes from everybody. They are things, sleek tool and menacing visages. A more apt description of them is hollowed out human beings and free lancers - property-for-hire, criminals, assassins, prostitutes, props, pimps, and actors - capable of doing awful things.

In today's world, the pressures of everyday life beat people down. They want to be left alone. Does privacy crop up when individuals use crowds to hide their identity and what they have done to other people? Does it crop up when they use houses and warehouses to hide their identity and what they are doing? Does it crop up when they use crowds, houses, and warehouses to hide their movements?

When a person is not detained, restrained, or arrested by authorities: is his privacy (the emotional barricade that bars officials from rummaging through a person's life) intact? Is his body a fortress against officialdom?³⁰ When one gives into an entreaty to converse with a policeman: does the individual's right to privacy evaporate? Can government rummage through a person's cell phone history without invading his privacy?³¹ What about GPS monitoring of a person's movements for 28 days?³² Is that an invasion of privacy?

When a congenial and convivial man, walking his dog in a gated community and, notably, unconnected with any wrongdoing, gets stopped and frisked by a policeman: is that an invasion of privacy? Can a policeman use an arrest to harvest

²⁶*United States v. Drew*.

²⁷*Sloan v. Equifax Info. Services Inc.* at 498.

²⁸*United States v. Aleynikov* at 187-188.

²⁹*Idem* at 176-179.

³⁰Alderman & Kennedy (1997) at 71-80. Messing with people's bodies, poking around to look for stuff is a matter of propriety (what is proper under the circumstances), common sense, and degree of intrusion. A beat-cop is like an ordinary pedestrian when he exchanges pleasantries with folks in a mall and on the street. Privacy does not come into play under those circumstances. Now, when something vile and upsetting happens to somebody somewhere; that is, when officialdom stoops to using breath, urine, and blood tests, cavity searches, figure scrapings, and surgery to collect information about somebody, the Fourth Amendment constrains what officialdom can do. *Idem* at 80. Somebody must do something wrong to generate that kind of official activity.

³¹*Carpenter v. United States* at 2216-2217.

³²*United States v. Jones*.

data in his cell phone? If the cell phone is seized by a policeman after a person's arrest; if the data stored in the cell phone cannot be used as a weapon to hurt the officer or effectuate the arrestee's escape: is harvesting the data from the phone an invasion of privacy? Are these unwelcomed intrusions? The answer is a resounding yes.

A Man's Castle

In America, a man's home is his castle. People crave peace, quiet, and solitude at home. Are door-to-door salesmen, telemarketers, text messaging sales schemes, and robot-calls disruptive? Assume a person's workday has come to an end. If the worker is ensconced in her home and spending quality time with her spouse and children: Is a telemarketing call an invasion of privacy?

If the call is made after 9 p.m.: is the call an invasion of privacy?³³ If a telemarketer makes calls after he has been told not to call a person's home: is that an invasion of privacy?³⁴ If a telemarketer uses a mailing to a person's home to get him or her to make a 1-800 call about something: does privacy evaporate when the person makes the call?

Are robot calls alright? If the telemarketer is using equipment that has a gizmo in it that produces random or sequential phone data: is the use of that equipment an invasion of privacy? Are children prey to invaders in their home? Do they have a right to privacy? Can merchants use computers, computer game promotionals, and apps for computers, to harvest personal information?

A Brewing Storm

There is a political and social storm brewing in the United States.³⁵ Clerics, congressmen, senators, and judges, giving into forbidden desires, have stooped to using laws and technology to hurt people because of their sympathies, associations, and beliefs. Over time, and after ceaseless pounding, the victims (beaten up inside) forget what they believe and what they were born to do.

When we are left with a stormy place like this, and an anxiety wrack public space where people cannot find relief; that is, a space when fear of communism and its modern-day equivalents (Islam, Mexican and South American migrants, China, Russia and domestic terrorism) grip everybody; privacy crops up when folks stand mute to hide what they think about everything and everybody.

³³Telemarketing Sales Rules, 16 C.F.R. 310 (4) (c). See Telemarketing and Consumer Fraud and Abuse and Prevention Act, 15 U.S.C. 6102 (b)(c) (1994).

³⁴Telemarketing Sales Rules, 16 C.F.R. 310.4 (b) (iii) (A). See Greenfield, *Consumer Transactions* (5th ed. 2009).

³⁵Partisan politics (a blood sport these days) has displaced organised religion (what priests and preachers tell us) as the nation's recipe for resolving social disputes. It is a gamy enterprise. It is an emotionally charged, imperial brew of bad stuff, flavoured with violence and zealots, willing to use sticks, stones, spears, guns, intimidation and violence to get their way. Albright (2019) at loc. 3213, 3221, 3228, 3324, and 3332.

Speaking out on issues and acting out at demonstrations costs something - e.g., a person's social station in life, a sought-after job, and associational status. Calumny (touting a lie) eviscerates privacy (the craving to be left alone). If one is a teacher in a public school, a panhandler, a hobo, a vagrant,³⁶ or a member of a dreaded organisation, public officials can pry into what you are doing.

In the 1950's, Congress used unwelcomed-but-legal visitations, the cudgels of fear and publicity, to force people to prostrate themselves before authorities to keep their jobs. Victims wanted to: (1) rescue their social station in society, (2) keep their jobs, and (3) preserve their opportunities to work in the United States. In *Watkins v. United States*,³⁷ the Supreme Court stopped that practice. In 1957, the Alabama legislature passed a law sanctifying government surveillance and visitation of organisations to: (1) circumscribe a particular group's political activities and (2) an individual's choice to join them. The Supreme Court stopped that in *NAACP v. Alabama*.³⁸

It was a cruel and barbaric time in the United States.³⁹ The New Hampshire legislature went out of its way to erect a statute giving the New Hampshire Attorney General the power to delve into a university professor's past (a lecture he delivered to university students)⁴⁰ and, in so doing, make his private life public. Giving the Attorney General the power to determine whether a university professor was suitable to mingle with other New Hampshire residents was declared unconstitutional by the Supreme Court.⁴¹

Spiked by fear, surrounded by troubled adults, angry men, cackling women, unruly mobs, and disaffected intimidators (e.g., the FBI, national pundits, clerics, industrial manufacturers, Conservative activists, and advertisers), the national press caved to social pressure and decided to censor what their journalists published.⁴² Reporters wrote safe stories about world events that tracked with the prevailing narratives about American life,⁴³ America's foes, American foreign policy,⁴⁴ and American lifestyles---e.g., folks doing domestic and international travel, cabined tranquillity, consumerism, competitive individualism, the sanctity of the family, patriarchy, free enterprise, commercial liberalism, Christianity, and conditional equality.

Nothing is changed from yesteryear. Our foes remain the same - non-intellectuals bound by ridged principles and goons determined to enforce them. We (as a people) clung and, cling to, our tin-pan-like myths about America and American life. The Fourth Amendment (the words)⁴⁵ highlight what is private and

³⁶Wolf (2022). Morales (2022).

³⁷*Watkins v. United States* at 182, 185-187, 198-199.

³⁸*NAACP v. Alabama* at 462.

³⁹*Sweezy v. New Hampshire*.

⁴⁰*Idem* at 245.

⁴¹*Idem* at 244-245, 249-251.

⁴²Whitefield (1996) at 3025, 3033, 3042, 3049, 3057 & 3065.

⁴³*Idem* at Loc. 2933.

⁴⁴*Idem* at Loc 2917.

⁴⁵Amendment 4, United States Constitution. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

what is protected.⁴⁶ The Government's questionable activities borrough into the squishy perimeter around the Fourth Amendment⁴⁷ while ordinary citizens, snared by a system that makes proof of innocence nye-on impossible, succumb to government surveillance, searches, and seizures.

Absent a legitimate government search and seizure order a victim's protestations; his profession that "he knowns about his rights to privacy"; his profession that he has a "general awareness of his rights"; a perception by government officials that what the government has done to a person is wrong, gets quashed by qualified immunity (a novel legal concept) that excuses what government does to somebody.⁴⁸ Government is at liberty to use probable cause "for computer-based crimes" to snare other computers and their owners caught up in a crime. If a search warrant is "cabined" by a statement limiting the search to a particular person and evidence for a particular criminal episode, that is enough for government to go after other people and their stuff. Victims of an abnormal searches and seizures cannot use the right to privacy or a lack of a warrant's specificity to thwart what the government wants to do.

Public Square

What about the non-criminal side of American life? That is, the public square where people are not branded criminals? Is privacy a thatched house built with brittle sticks? Is there a "close"? Is it a yard around the structure? Is it a haven for some? Can householders use the thatched dwelling to fend off unwelcomed intrusions? When there is wrongdoing by the householder, does the house get swept away? The answer to these questions is yes. Privacy is a thatched house built with brittle sticks. It has a "close" around it. It is a haven folks use to fend off unwelcomed visitors but, sadly, it can get swept away by need, emergencies, and other events at any time.

What about privacy in business settings? When employees use an employer's email system to converse with fellow employees: do the messages and the messages' contents land on turf beyond the realm of privacy? When a government agency (the employer) gives phone pagers to employees; when the employees misuse the pagers (mixing work related and non-work related messages); when the employer warns all its employees that they will be audited when there are too many "page characters" being used by an employee per month; when the employees know this; when the agency gets wind that something's wrong with a

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things."

⁴⁶See *Katz v. United states* at 361 (Harlan, J., concurring); *Kyllo v. United States*. When an individual manifests an expectation of privacy, by his conduct, that tracks with what society is willing to recognise as reasonable, there is privacy. Thermal imaging of a person's home compromises the homeowner's privacy.

⁴⁷*Rakas v. Illinois* at 148-149. (Mr. Justices White, Brennan, Marshall, and Stevens joined in dissent. Ibid at 156-160).

⁴⁸Schweikert (2020).

pager's use: does the agency have the right, indeed, an obligation to find out what the employee is doing? The short answer is yes.⁴⁹

The Fourth Amendment (a U.S. Constitutional provision that highlights what is private) won't constrain what government employers are doing. If an undertaking is launched for an administrative reason and the audit itself is limited in scope, that is alright. Stumbling over embarrassing personal information about a government employee's doings while doing an audit changes nothing.

Suppose an employee of a private concern establishes a website; decides who is a suitable user; excludes all management; and posts a gatekeeper to vet visitors: can management use the username and the password of "suitable users" to peruse, monitor, and harvest website conversations?⁵⁰ Is that proscribed by the Stored Communications Act?⁵¹ Can management use the information to sow union discontent and steer collective bargaining negotiations their way to get a favourable collective bargaining result?⁵² Can it launch a lawsuit against the website developer? Is that proscribed by the Railway Labor Act?⁵³ Are these federal statutes the so-called "thatched houses" in which government employees can converse in secret? Are intrusions invasions of privacy?

What about privacy in a non-business setting? Is a person's brain a domain within the realm of privacy? Is it a healthy mental state (a condition we all crave) that we are trying to promote and defend? Is it a mental health status, writ large for everybody, that is a long sought-after mental condition free of noxious materials that we crave? Is it a claim against rueful people and gnarly things in society that hurt us? Is it marked by people's sharp outbursts hurled at others when they are threatened? Is it a person's outcry to "leave me alone"? Is it derived from a person's innate power to exclude others from his or her life (other men and women who want to tell someone where to live; what to do outside of work; where to travel; what activities are suitable; what one can and cannot do at home; who to marry; who to claim as one's friends and associates; what to say to strangers)? Is it a man's veto power over a person's decision to procreate; a man's veto power over a woman's decision to terminate a pregnancy, and would-be-charlatans and moralists, older men by-and-large and women long pass procreation possibilities, telling a woman what to do with her body?

Dobbs Decision

The battles fought over privacy are never-ending. Dobbs is the latest iteration of this fight.⁵⁴ Prior to the moment in time when a fetus is viable (on or before the 24th week of gestation), nobody can tell a woman what to do about her pregnancy.⁵⁵

⁴⁹*City of Ontario v. Quon* at 764-765.

⁵⁰*Konop v. Hawaiian Airlines*.

⁵¹*Ibid* at 880.

⁵²*Ibid* at 885.

⁵³*Ibid* at 883.

⁵⁴*Jackson Women's Health Organization v. Dobbs*.

⁵⁵*Idem* at 282, Ho, J. concurring.

But some folks in Mississippi want to replace “viability” with scientific evidence about “when a physician can detect a foetus’s heartbeat” and “when a fetus can feel pain”⁵⁶ (unique moments in time that are demonstrably less time than the 24th week) to curb what a woman can do on her own.

They (largely white men from the South and Southwest) want “fresh science” and legislatures to drive the law on this issue. They want to use the discovery rules at the trial level, as they were used by civil rights lawyers in *Brown v. Board of Education of Topeka*, to get evidence into the record to, in effect, develop a full record for the Supreme Court to rule on this claim and what is salvageable, or should be salvageable, under the banner of personal privacy.⁵⁷

The pro-lifers claim that there is nothing in the Constitution about abortion;⁵⁸ that the Supreme Court has made countless pronouncements about abortion; that Supreme Court pronouncements like other precedents are subject to being overturned by the Supreme Court for good reasons; and that there are good reasons for overturning this one.

What are the points being made by the pro-life litigants in the Supreme Court? That we should establish a full record about abortion piled high with scientific evidence to overturn *Roe v. Wade*? That human life begins at conception; that life is something that must be rescued and cultivated above all else? That a child in the womb is as valuable as a child outside of the womb? That “feeling a fetus’s heartbeat” in a woman and “a foetus’s ability to feel pain” are suitable substitutes for “viability” in abortion cases? That women, in the final analysis, have no right to privacy when it comes to new life in the United States?⁵⁹

What does world history tell us about peoples’ social attitudes about privacy, new life, life in the womb, and abortion? What did the German state do to women who underwent abortions and the abortionist doctors in the 1930’s and 1940’s?⁶⁰ What position did Ireland and the Irish Catholic Church take on abortion in the 1940’s, 1950’s, and later?⁶¹ Was abortion a crime then?

⁵⁶Idem at 280-82.

⁵⁷Idem at 282.

⁵⁸Idem at 277.

⁵⁹The Supreme Court put aside all the judges’ deliberations, deliberation time, and fretting about a woman’s privacy, freedom, liberty, and abortion rights. On July 24, 2022, it wiped out all these things, saying, it was a part of our past. Six Justices burned down everything. From the moment of fertilisation, the state can constrain what women do with their bodies. *Dobbs v. Jackson Women’s Health Organization*, at *8. See Cf. *Hodes & Nauser v. Smidt*. Nobody, including the state, can fiddle with another person’s human dignity---recognition of oneself, recognition of one’s worth, and self-determination. Idem 497-98. Under Section 1 of the Kansas Constitution Bill of Rights, men and women are endowed with the same right to make decisions about their bodies, their health, their family formation, and their family life. Idem at 484, 491-492.

⁶⁰Hereditarily healthy German women of Aryan descent were denied the right to abortion. Women deemed inferior based on race or health were allowed or forced to terminate their pregnancies. See German Historical Institute (1993).

⁶¹Cole (1993) at 115-33. Ireland outlawed abortion. In 2018, a referendum measure amending the Irish Constitution legalised abortion up to 12 weeks after a woman’s fertilisation. Ely (2022). See *Open Door and Dublin Well Woman v. Ireland; Society for the Protection of Unborn Children (S.P.U.C.) (Ireland) Ltd v. Grogan; Att’y Gen. v. X and Others*, rev’d (Ir. S. C. 1992) reprinted in attorney general v. x and others: judgement of the high court and supreme court with submissions made by counsel to the supreme court (Suniva McDonagh ed., 1992).

Do we want state legislators using unruly crowds, vigilantes, and mobs on ideological jags about what it means to be a human, and, lastly, ill-considered state laws telling all women what to do with their bodies? Do we want to restrict the time, or worst, eliminate the time women need to make good decisions for themselves? Is the state an unwelcomed visage, an interloper, a disrupter, in a realm where women make decisions for themselves? Do we want religion, religious figures, and would-be moralists telling women what to do?

A Summing Up

Individual liberty of which privacy is a part, and the demands of organised society clash all the time.⁶² When there is a clash; when the fate of liberty, privacy, autonomy, and gender equality (fundamental rights) hang in the balance: should fundamental rights carry the day? Yes.⁶³

Context fixes the meaning for privacy. So far, privacy comes down to cities and towns where people feel anonymous, thatched houses (federal statutes) where people move about and converse in secret; virtual file cabinets in cyberspace surrounded by guards and gatekeepers to keep unwelcomed visitors out;⁶⁴ people's brains; the human body, a woman's reproductive parts; and last, but not least, claims against society (that is, the raw powers given to individuals to exclude others from their lives).

Is personal privacy in commerce a myth in society, a commodity, or a different kind of thing altogether? Is it about the creation and the maintenance of a good reputation in the marketplace to get credit? Is it something an individual creates with his personal power? Is it about others doing whatever to maintain and protect it? Is it about holding others accountable for doing too little to prevent others from tarnishing it?

Commerce Writ Large

In commerce, creditors and credit bureaus are conservators, guardians, and gatekeepers of personal privacy? When a person shares personal information with others, his privacy evaporates. Recipients of divulged information (vendors of various sorts, creditors, and credit bureaus) must identify themselves; highlight how they will use personal information; promise to keep the information confidential, safe, secure, and accurate; list others who will use the information;

⁶²MacCormick (2005) at 112-114.

⁶³Ibid. It is using social values like folks using bright line-colored pencils in some other contexts, to draw bold lines beyond which society should not go. Abortion cases are about human life (the fetus) and human lives (the women). In *Dobbs*, women lost the right to privacy when it came to new life. *Roe's* calculation about life were quite different. If men and women are human beings and human beings are equal: Women, like men, should be afforded the time, indeed, equal time and emotional space to make good decisions about their future and fate?

⁶⁴*Koch Industries, Inc. v. John Does*, at *8.

and, last, provide the person sharing his personal information with remedies for a user's wrongdoing.

There are industry codes, statutes, and cases memorializing all these obligations. The Fair Credit Reporting Act is one of them.⁶⁵ It polices creditors, credit bureaus, and faulty consumer reports that may or could damage peoples' reputations. If a consumer report contains a half-truth that creates inferences that cannot be corroborated with n facts; if corrections are cheap and doable for a credit bureau; if the credit bureau does nothing; that is wrongdoing.⁶⁶ If a person files an application for credit with a brick-and-mortar-store; if the credit bureau issues a report about a person not seeking credit from that store; if the report is negative in tone; if it is about the credit applicant's spouse; that is wrongdoing.⁶⁷

What about a report that contains false statements? That is wrongdoing. If it contains a statement that is a literal truth, that might be alright. What about a report containing a clerk's mischaracterisation of a public record? Is dissemination of that report a wrongdoing? What about a report containing a bureau investigator's mischaracterisation of a public record? Is dissemination of that report wrongdoing? If a person, seeking a correction of his record, asks a credit bureau to correct its record; if the correct information about the person is in a public record (e.g., a judicial declaration about him); if the information is in bold print; if it costs nothing to correct the record; if nothing is done to fix this: is the ongoing dissemination of that report a wrongdoing?⁶⁸

What is a credit bureau report? What is in a public record? Here are the short answers. Both are official narratives about peoples' doings in commerce. The former is larger and contains the latter. It (1) highlights identifying information about somebody (an individual's full name, social security number, home address, telephone number, a spouse's name); (2) financial status and employment information (a person's income, a spouse's income, the person's workplace, his position, and tenure of employment); (3) credit history (the types of credit previously obtained, names of previous credit guarantors, extent of previous credit, and complete payment histories); (4) information about existing lines of credit (payment habits and outstanding obligations); (5) public record information (pertinent newspaper accounts about a person, arrests and conviction records, bankruptcies, tax liens, and lawsuits); and (6) a list of bureau subscribers that have asked for credit reports on an individual.⁶⁹

Let us put the credit report in context. If a person gets wind of a mischaracterisation of himself in a bureau's credit report; if he asks the bureau to correct the mischaracterisation; if the bureau asks the source of the mischaracterisation (the individual creditor-vendor) to investigate the questioned characterisation for its truth or falsity; if the creditor's obliged to do a detailed and systematic

⁶⁵ 15 U.S.C. 1681-1681x (1970). See Commentary on the Fair Credit Reporting Act, 16 C.F.R. Part 600 Appendix.

⁶⁶ *Austin v. Bank of America Service Corp.* Cf. *McPhee v. Chilton Corporation*.

⁶⁷ *Koropoulos v Credit Bureau Inc.*

⁶⁷ *Koropoulos v Credit Bureau Inc.*

⁶⁸ *Dennis v BEH-1* [hereinafter *Dennis*].

⁶⁹ Greenfield (2009) at 228-230 citing Privacy Protection Study Commission, Personal Privacy in an Information Society 47-51 (1977).

investigation of the characterisation to find the truth; if the creditor does a cursory investigation: that is wrongdoing.⁷⁰

Here is the skinny on all of this. In commerce, privacy presupposes the creation, control, and use of one's reputation to get credit. When an individual divulges personal information to another person, personal privacy evaporates. The holders of divulged information are both conservators and, figuratively speaking, Pretorian guards of privacy. What they disclose to others is confidential. What they do is policed by private codes, public policy, and statutes. Sadly, these policies, codes, and statutes are too vacuous, open ended, ambiguous, toothless, mind bending, and costly, in terms of time and effort and money spent on them, to get anything done.

Children and Privacy

What about children? Do they have a domain called privacy? Their inside world---the family bubble shielding them from the whims and vicissitudes of mercenary adults--- remains the same. But their outside world has undergone change in the 21st Century. Do they have a mental space, a species of privacy, unto themselves? Do they have a right to privacy? Is it palpable, tangible, viewable, emotional, and, lastly, a thing unto itself for them? Is privacy for children a legal conundrum in our world? Is it negotiable? Is its outer boundary determined by a parent's admonition (telling his or her child and children) not to rifle thru a sibling's diaries? Is it a domain in a larger realm established by government that is manned by sophisticated bureaucrats (government guardians and private gatekeepers) screening out unwelcomed adults? Does it crop up from deals in commerce---what children seek from their parents at a particular time, place; or a subject, an object, or activity that pops up in their house, where they are left alone?

Congress has drawn a line beyond which predators, amoral, and greedy merchants cannot go. The Children's Online Privacy Protection Act (COPPA) is such a line.⁷¹ Merchants cannot use the media to fish for impressionable youngsters. When they use media to send messages to children; when their motive is to collect personal information about the children's parents; when they use a youngster's appetite for different on-line amusements, to collect for the merchants what they need for themselves;⁷² when the entire undertaking is without parental consent, that is wrongdoing.⁷³

When they collect, use, and disclose personal information with computer programs, the programs' collectors should tell the parents what they are doing. Merchants should post a privacy policy on their websites, and online services, highlighting what they are collecting; put parents on notice that they are doing this; procure parental consent; give parents veto power over what is collected; and last, but not least, establish a scheme that does the following: (1) stamps out

⁷⁰*Dennis v BEH-I*.

⁷¹15 U.S. Code Sec.6501-6506 (1998).

⁷²In The Matter of GeoCities, Docket No. C-3850, 127 F.T.C. 94 1999 WL 339112980.

⁷³15 U.S. Code Sec. 6502(b)(1)(A)-(D) (1998).

corruption of the information, (2) preserves confidentiality, and (3) keeps unwelcomed users out.⁷⁴

If youngsters are urged to download computer programs and, in the downloading process, they divulge personal information (name, street address, email address, age, and personal interests), without parental inputs, that is wrongdoing under COPPA. If a child is urged to enter an online contest, without a scheme to verify parental ratification of the child's participation, that is wrongdoing. If a merchant uses an educational program to spy on school age children, that is suspect. If it is done without parental consent, that is wrongdoing.

New Mexico officials caught Google doing that in 2020. The firm without parental input used teachers in different school-settings; school children doing their homework; and children shouldering other school related educational undertakings, because adults asked them to do something to: first, hook youngsters to Google's other services and, second, track them. The New Mexico Attorney General brought an action in United States District Court to stop this.

There are other cases about these shenanigans. Their likely outcomes are settlements. The point being made here is this. To date government actions under COPPA are laudable. But, under COPPA, not providing a youngster's parents with a private remedy is a major shortcoming. Thomas Hobbs, and all his oracles and acolytes, that is, those folks who have a dark view about human beings,⁷⁵ have seeped into American commerce on this score. Children are the victims (the vulnerable little fish at sea, swimming in schools near home, feeding on the fringes of commercial society). Merchants trawl for them. The trawlers (commercial competitors) and their captives (the little fish) have no friends. They are friendly enemies. Competition and profit are everything in this world. It is the parents the trawlers want more than anybody else. It is "dog-eat-dog fight" among competitors, when they are trawling for children and, in their fishing expeditions, it is survival of the fittest.

Adults and Praxis

Turning back to intemperate adults in a much larger world: It is an animal kingdom out there. There is human wreckage everywhere. When people are not fusing, fuming, quarrelling, pestering, postering, and fighting with each other, about everything, many seek and eventually workout timeouts among themselves. They want to be inaccessible to others; to minimise unwelcomed attention, visitations, and noxious disruptions of their lives.

What about the mentally ill? What about mental illness itself? In the privacy realm: can mentally ill patients minimise the unwelcomed attention of strangers? Do they have a right to privacy? If a person has violent propensities; if his or her

⁷⁴F.T.C. v. Toysmart.com

⁷⁵Larry McMurtry (an American novelist) said it best. Life is what we do with it. Humans are puny beings occupying small spaces on the Earth's surface. Individuals, he wrote, must be as wild as wild beasts in the wild to survive. McMurtry (1995) at 400-401. See Finn (2008). <https://iep.utm.edu/hometh/>

physician knows this: does she have a duty to warn others? Should she blab to the public about all she knows? If a person is a paedophile; if her craving for children is acute; if her physician knows this: does she have a duty to warn?⁷⁶ If a patient is violent; if she has a target for her ire; if her physician knows this: does she have a duty to warn him? To whom should she disclose patient information? Should she tell the patient's would-be victims, hospital custodians, employers, and police? If the societal benefit coming out of disclosure of this information dwarfs a patient's discomfort, is disclosure alright?

Nothing is intrinsically private these days. For many people privacy is a situational thing. It comes down to an individual's control over the amount and type of disclosure offered to others. The right word for this disclosure is *confidentiality*. If a person is a paranoid schizophrenic, if he is a alcoholic, if he is a war veteran (having participated in vicious combat in Southeast Asia at some point in his life), if heavy drinking nowadays triggers violent outbursts in public, if his physicians know all this: should they warn those who host him in their homes?⁷⁷

What do we know now about privacy at this moment? In the real world, there is something called privacy praxis. Personal information about somebody is precious cargo in the commercial world and everybody wants it. If one's "frame of reference" about himself, that is, what he thinks of himself as a person and what he thinks of his place in the world, is something he wants to protect; if that information is in sync with his neighbour's frame of reference about him, there is bit of privacy. Colleagues, acquaintances, neighbours, physicians, and strangers, in the know, should not disclose a person's physical condition, mental state, and financial situation; or blab to everybody about what they know; or put it on parade for all to see. Physicians, for example, should warn folks who are the object of a dangerous patient's fantasies. In all other cases, they should shut up. They should leave people alone.

Let us sum up what we have gleaned, so far, from this essay about privacy? It is domains in a realm that accommodates peace and quiet, solitude and self-isolation and so on. It is thatched houses (federal statutes) where people converse in secret. It is what comes out of privacy praxis. It is a women's procreative parts, the human body writ large, cyber cabinets harbouring personal information with guards and gate keepers posted around them to keep unwelcomed visitors out. It is places where one is inaccessible to others. It is houses and bungalows with "closes" where homeowners and renters keep unwelcomed people out.

Privacy has its own iconography, relics, and artifacts (the brain, the human body, human body parts, people's images of other people, long running marriages and their secrets, procreation decisions, contraception decisions, made by young people at home, family relationships, childrearing practices, childrearing, and education in general). Privacy crops up from norms (social routines about a private life acceded to by the ruling class and followed by everybody else). It comes from

⁷⁶*Tarasoff v. Regents of University of California*, at 342-344.

⁷⁷*Leonard v. Latrobe Area Hosp.* at 1231-1232. In Pennsylvania, a physician needs to know a specific person whose life or health is threatened by a patient before notice of his illness is disclose to others.

customs, traditions, Supreme Court cases, private pacts, codes, statutes, and regulations.

Confidentiality is one step removed from privacy. It highlights a person's obligation to keep another's personal information secret. The right to privacy is a constitutional right embedded in the First and Fourth Amendments. It is a right recognised in torts.⁷⁸ Confidentiality comes from private pacts. It is both a sword and a shield that offended people use against offending folks to preserve and restore their reputations.

The Media

Let us look at the media. The news producers are big corporations. The news they produce for us is a commodity. It captures facts and events that are spectacular, unsettling to many, emotionally disturbing, and negative. American media traffics in this stuff to make money and, in the process, turns ordinary folk into celebrities that are gawked at by the public, e.g., West Virginia Senator Joe Manchin gutting President Biden's Build Back Better Act in Congress, and Kyrie Erving (a National Basketball Association New York Nets basketball player) telling the media that he would not take the Covid-19 vaccine and, by implication, would not play professional basketball for the New York Nets this season.

Intrusion - the invasion of a domain where a celebrity wants to keep something secret - is an issue. The American press is a busy body in our lives. It is an intruder and an irritant. It publishes accounts about our environment, e.g., awful oil spills off the Monterey, California and Alaskan coasts, sports figures and their peccadillos, poverty and destitution, slums and peoples' foibles, gun violence and other events. It camps around us like the Covid-19 virus, in America, waiting for opportunities to make us their host. The press is driven by (1) a need to survive as an industry, (2) what is prurient in our lives, (3) a smattering of malice, and (4) profiteering.

When private facts are put on parade for all to see (e.g., a victim of a child abandonment who doesn't want her personal story and family history perused by anybody); when the account's newsworthiness (the newspaper publisher's decision to bring dark traits in human beings to light) is overshadowed by the thrill and excitement the newspaper's readers feel after reading the account; when the newspaper's editor runs the account over-and-over again; when the motives are (a) moneymaking only and (b) getting people to gawk at somebody, or (c) something or somebody passing by us in the community, or an event that turns a person into a spectacle; that's wrong. We should turn the newspaper's act into a tort.⁷⁹

⁷⁸*Rumbauska v. Cantor* at 856-858; *Villanova v. Innovative Investigations, Inc.*, 21 A.3d 650, 654 (N.J. 2011); *ACS Systems, Inc. v. St. Paul Fire & Marine Ins. Co.* at 793-795.

⁷⁹*Hall v. Post* at 825-827. The North Carolina judiciary revisited this question a year later. When a person is a noteworthy figure; when the press publishes a true story about her; when the story draws a large reading audience, that is alright. *Hall v. Post* at 714. The public's right to know negates the family pain kindled by the story. See Alderman & Kennedy (1997) at 406-408

If there are two narratives about a newspaper's account of something it has done to a victim; if one is the intentional infliction of emotional distress; if the other is invasion of privacy, in North Carolina, at least, the first narrative governs everything.⁸⁰ If a sliver of wisdom fuelling what's been done, that is, not giving in to the temptation to repeat a reported disasters, from the past, for the sake of reporting them; if important human insights about something are the real issue; if it comes down to a jury second guessing what the newspapers' editors have done; the newspapers always win.

If a newspaper takes a picture of a fourteen-year-old girl; if she is a murder victim and, without her parents' consent, the newspaper publishes her image; if the newspaper reproduces the image from a negative photo, displays, and sells it to others; if the paper sells the image to keep the story going: that is wrongdoing.⁸¹ If what the newspaper purveys is the truth; if it is plucked from public records, and adds authenticity to a newspaper's story about somebody, or something odd; or a tragic event in human affairs; if, in the final analysis, the newspaper's output makes the story real, that's alright.⁸²

Should an intrusion (that is, somebody bogarting their way) into another's private domain and rifling stuff be confined the photographed victim? If the victim is dead should the invasion of privacy tort die with her? Should tort law pardon TV and print media, that is, give reporters a pass for the emotional damage a publication of an article with pictures,⁸³ or the TV broadcast of horrific images of a person, does to the victim's families?⁸⁴ What about the ritualistic lynching of young Negroes in the form of newspaper pictures, in the South, in the early 1900's and the 1930's? What about the 1950's image of Emmett Till, in his casket, after his brutal murder in Mississippi?

When a reporter takes a person's picture and puts it in a national magazine to make a parody; when he writes a narrative accompanying the photo that is false: is that an invasion of privacy? When a woman is doing wholesome work in her community; when her photograph is put in a pornographic magazine; when it is done by the reporter without her consent; when it creates a false impression of her with a segment of the reading public; when the false impression causes her mental distress: is that an invasion of privacy?⁸⁵ In California, and elsewhere, media cannot go into a person's home, willy nilly, and film who lives there without the

⁸⁰*Hall v. Post* at 716.

⁸¹In *Waters v. Fleetwood*, the newspaper got away with it. Gruesome pictures of a murder victim were milked for money. A judge took a whack at media spectacles in *Toffoloni v. FSP Publishing Group, LLC*. A person's likeness belongs to himself. Appropriation for profit is an invasion of privacy. The privacy right, that is, the right to publicity survives an owner's death. It is inheritable and divisible (*idem* at 1205-1206). A short newspaper type narrative pinned to a nude photograph of a dead celebrity is an invasion of privacy. The celebrity's demise changes nothing (*idem* at 1210-1211).

⁸²*Waters v. Fleetwood*.

⁸³*Idem* at 348. If images of a person's death attract newspaper audiences; if they hold their attention; if the images are part of a murder investigation, that is alright. Family grief kindled by a newspaper's display of death of a person in photographs, and sale of the gruesome pictures, changes nothing.

⁸⁴*Armstrong v. H&C Communications* at 282-283.

⁸⁵*Braun v. Flynt* at 250-258.

owner's consent. If they are overly aggressive while they are doing their newspaper job, that is an invasion of privacy.

Media Redux

Alas. This world may not be fit for chivalrous men in 2023. Don Quixote is dead. Strangers camp around us waiting for chances to make us their hosts. Surveillance is a minor annoyance. Intrusion is a major headache. The media has turned our backstage peccadilloes (the things we want to keep secret) into stage performances. The social etiquettes of the past (the non-publication of the private life of General Dwight David Eisenhower, in the UK, during the Second World War, and President John F. Kennedy) have given way to "telling it like it is" (newspaper reporters writing articles about Colorado Senator Gary Hart's extra marital activities) when he ran for President of the United States.⁸⁶

Put bluntly: we live in a media hungry, media crazed, and media adjusted society. Our human cravings, debts, deeds, peccadilloes, needs, habits, appetites, and vices command more value than us. People are comfortable with facades and avatars of us. They (the media) is all about the images of our corpus. People can make money off of them.

These days, there is no privacy in the media and cyberspace. Everybody knows about everybody else's business. What should we do about this? As a society, folks should use: (1) autonomy (doing what we can for ourselves to protect what's precious to us), (2) liberty (fighting for and preserving the option to roam about society without government surveillance and government interference), (3) bargains with folks to fence out others; (4) all state and federal legislation establishing havens for privacy; (5) personal vigilance to keep interlopers out of our lives; (6) circumspection in public places and last, but not least, (7) man made solitude to protect ourselves. Is that enough? It is something to do but, sadly, it is not enough.

The media has adjusted us. Its enablers (news conglomerates, news corporation executives, and their news reporting policies to make money), their toadies (the beat reporters, their scandal sheets (New York Post), popular cable pundits, respected journalist, computers, and sundry machines) have spread information broadly; levelled what the recipients get; democratised ideas (allowing truth to emerge from falsehoods and conflict). Disparate, desperate, emotionally needy, ethically challenged, hustling cub reporters and, last, but not least, would-be journalists, high and the low, have altered the way we process information about the outside world. Our words, in the English language, have given way to pictures and, lamentably, long accounts of peoples' deeds have given way to chopped up ones.

Media tools (newspapers, national magazines, digital replicas) have shaped our culture; they have changed discussions around the office water cooler and break rooms; they have changed discussions around the family dinner table about

⁸⁶Waxman (2018).

everything; and altered peoples' consciousness. Having said all that: what about the everyday beat reporters who produce local news? Can they shroud (encrypt) their sources and their raw information under the law? Can government pry it out of them? Are reporters accorded some privacy?⁸⁷

At times, reporters are pimps, scavengers, pickpockets, bottom feeders, and thieves. They use feelings, hunches, rumours, personal reconnaissance, stealth, peoples' tips, hushed up sessions with interviewees (their sources) away from prying eyes, phony gestures of friendship with interviewees, social contrivances to foster trust, paper-and-pens, yellow pads, audio and video tapes, I-pads, and cellphones to steal a subject's pearls of wisdom.

They jumble up what they collect from folks, mix and re-mix, and reconfigure their trove of stuff, to produce narratives that differs from the interviewees and the subjects upon which they report (making unflattering likenesses of them, distortions of some events, distortions of the reported subject's location in a narrative, and, lastly, misrepresentations of a person's view).

What about the scrivener's emotional state of mind while she is writing, editing, and typing up her news reports? What about her attitude, her mental state of mind, and the material discarded before she publishes her article? Can the reporter shroud all that material? If a reporter promises to write a life story about somebody; if she promises the interviewee that the story will comport with what she is told by the interviewee; if the story clashes with what she is told by the interviewee: can the victim of her narrative parade the reporter's black hearted work, her dark inner workings, and discarded materials? Is the reporter's conduct a tort? Can the interviewee recover damages for defamation?

In *MacDonald v. McGuinness*,⁸⁸ a celebrity brought an action against a reporter and he paid a price in damages.⁸⁹ The plaintiff used a civil suit with legal depositions, interrogatories, documentary evidence, and the testimony of the defendant-reporter, under oath, to establish his malice, fraud, defamation of the plaintiff, moral failing, and breach of contract.

Janet Malcolm wrote about this in her famous book.⁹⁰ She quoted Joseph Campbell. Campbell wrote the following about reporters:

'The look that one directs at things, both outward and inward, as a [reporter], is not the same as that with which one would regard the same as a man.... [It's] at once colder and more passionate. As a man, you might be well-disposed, patient, loving, positive, and have a wholly uncritical inclination to look upon everything as all right, but as a [reporter], your demon constrains you to observe, to take notes, lighting fast upon, and with hurtful malice, [capture] every detail that in the literary sense would be characteristic, distinctive, significant, opening insight, typifying the race, the social, or the psychological mode..[:] recording all, as

⁸⁷Taylor (2021).

⁸⁸Malcolm (1990) at 36-44.

⁸⁹Malcolm (1990) at 100-101. Jeffery MacDonald sued Joseph McGuinness on a false friend claim. He sought 15 million dollars. The parties settled the case for three hundred and twenty-five thousand dollars. See *Fatal Vision Lawsuit Settled*, N.Y. TIMES, November 24, 1987, at A21.

⁹⁰Malcolm (1990) at 60. An Interviewee's encounters with seasoned reporters has a regressive affect. Wariness of the breed gives way to childish trust and impetuosity, at Malcolm (1990) at 82.

mercilessly, as though you had no human relationship to the observed object whatsoever'.⁹¹

That, Mr. Campbell said, is a newspaper reporter. He is an observant narrator that reports the facts; that is, makes written statements that are empirically verifiable and accurate. He is someone who is separate, apart from, and independent of the person, organisation, or event that is reported upon.

As regards their inner workings (what she collects as a reporter for her newspaper and all her discarded materials): can she shroud the stuff from authorities in a criminal case? Can he say to legal authorities that "it's my stuff, that is, what I collected that inspired the news account" and "I alone can use it" and "it's my property" and "leave me alone"? Can a reporter claim some form of privacy? If the existence of an item (a reporter's background materials) enhances the accuracy of a statement in a criminal case; if it is exacting; if it is unobtainable in some other way: must the reporter cough it up for authorities? The answer is yes.

African American's Plight

Let's ponder what we've put on paper thus far and think anew about privacy. What about the plight of Africans in America? If we rummage thru their tortured history in the new world (the old cotton, sugar, rice, and tobacco plantation lifestyles and black slavery in the South):⁹² can we get a bead on their privacy? From their first step as a people on the continent, to this today, African Americans have fought for rights that white American from Europe take for granted. They pine for freedom (the option to go hither and yon unmolested by neighbours), liberty (the option to go hither and yon unmolested by government), and privacy (the right to be left alone). These foundational principles were then, much like now, bound together by the notion of sovereignty over oneself.

This was, in the beginning of African American history, like now, the profound and, sadly, pined for, masked and unresolved issue in *Dred Scott v. Sandford*. If a slave resided in a non-slave state or territory for a notable amount of time, the question was: whether he or she could use "emancipation" to secure his or her freedom and privacy? In *Rachel v. Walker*, the Missouri Supreme Court said yes.⁹³ Slaves got emancipated when they were taken to and resided in a non-slave territory or state by their masters for a notable period of time.⁹⁴ If a master was military officer; if he was required by military orders to go to a non-slave state or territory to complete a tour of duty, i.e., in Missouri, for example, the petitioning slave had to be set free.⁹⁵

⁹¹Malcolm (1990) at 61.

⁹²See Baptiste (2016) at Loc. 5310, 5318 & 5322.

⁹³*Rachel v. Walker (Text)*, Washington University of St. Louis digital library, <http://repository.wustl.edu/concern/texts/t722h9873>. See Ashcroft (2023).

⁹⁴Ibid.

⁹⁵Ibid.

In 1850, the Scotts secured freedom in Missouri. They could go about their business unmolested by white people. Justice Tawney rendered a different opinion, when *Dred Scott v. Sandford* reached the United States Supreme Court.⁹⁶ Tawney preached white supremacy. If people coming from Europe were a part of American society (the folks baked into the national pie), if people from other continents on Earth were excluded from American society, people coming from excluded continental locations on Earth, like Africa, had no rights that Americans (white Europeans) had to respect.

President Lincoln's Emancipation Proclamation (a military measure that lost its force and effect after the Civil War), the 13th Amendment to the US Constitution, and complementary federal legislative and Constitutional law pronouncements, overthrowing *Dred Scott v. Sandford*, kindled white anger and rage in the South, white anxieties acute among former plantation owners, Black Codes,⁹⁷ the Klu Klux Klan organisation, white terrorism, vagrancy and vigilante laws, legal segregation, and restrictive covenants in contracts,⁹⁸ that chipped away an African American's sovereignty over himself.

From this brief excursion thru American history, it is clear to me, now, that privacy means different things to different folks at different times in history. For African Americans it means "don't sully my life with your foolishness" or "trash my domain." It means "leave me alone" and "let me plot my own way of life." It means do not constrain what I do behind closed doors with my spouse. It means do not "single me out for disparate treatment." As a person, let me bounce around the country, as I wish, using public transportation, public roadways, public accommodations, public amusement parks, state universities to get an education for myself and my children and, lastly, public hospitals to get well like everybody else. It means do not let others turn my life inside out; make my life a side show; make unwelcomed intrusions into my life a norm; putting what I do in private on public display for others to ridicule and last, but not least, denigrate my sovereignty over myself.

Second Summation

Senator Joseph McCarthy and Roy Cohen did that very thing to Annie Lee Moss.⁹⁹ The woman migrated from South Carolina to North Carolina to Washington, D.C. to build a better life for herself. She was a government employee, a union member, and a community activist doing her best to make life better for herself and the people around her. She bumped into and had casual contacts with Communists and people who sympathised with communism.¹⁰⁰

⁹⁶*Scott v. Sandford*..

⁹⁷Dubois (1997) at 149-152.

⁹⁸*Corrigan v. Buckley* at 330. Pacts between individuals constraining what Negroes do with real property was alright. That notion got overturned in *Shelly v. Kraemer*.

⁹⁹Wills (2021).

¹⁰⁰*Ibid*.

Government spies in her community got wind of her encounters; put her on a watch list; and gave documents to the government about her.

She was hauled before a federal loyalty board in D.C. and Senator Joseph McCarthy's Senate Subcommittee investigating communist infiltrations in government. The Chairman wanted to establish two things. First, Ms. Moss was a security risk. Second, black folks embraced the status quo erected by white men that temporised and rationalised what was "right thinking" in a segregated society ruled by white men and white women.

Let us sum up some things in the essay about privacy. It is a domain where people get peace, quiet, solitude, self-isolation and the right to be left alone. If you own yourself (all Europeans self-evidently owned themselves); if you own other folk suffused with your personality or birth stain (mulatto men, women, and children one hundred and eighty years ago; some emancipated-but-subservient Negroes; house keepers and tenant farmers): messing with them was a deprivation of personal property, a messy trespass, and an invasion of the owner's privacy.

Oscar Wilde's Take

Oscar Wilde (a noted 19th Century Irish playwright) is an inspiration for what comes next. In the Picture of Dorian Gray, he intimated that man was a two-faced creature. One face (accommodating man's foibles, vices, ugliness, sins, and antics) was everchanging. The other (e.g., the facial makeups, each day's get-ups, masks, daily dramas, theatre, and spectacles) was unchanging. Most of us live on and, sadly, too many spend large amount of time acting out on what is unchanging.

In this unchanging world, everything is bought and sold. Everybody owns somebody. Everybody steals, uses, and wastes somebody else's mind, body, and talents. Everybody is attractive, beautiful, pretty, and petty. Television pitch men and women, social celebrities holding different ranks in society, FOX and MSNBC cable broadcasters, network T.V. program characters, T.V. programmers and producers, television ads and ads makers, pop culture heroes, pop culture characters, known actors and actresses, comic book figures in film, and last, but not least, the internet companies themselves, e.g., Comcast and Spectrum Inc., facilitate the sale and trade of everything.

In this world, where people use the internet, the user forfeits privacy. With the virtual world changing from one moment to the next; with the physical world giving way to the virtual world at every turn in a person's life; common laws must change to (1) reflect societal changes in our daily lives; (2) normalise what is taken place around us; (3) get people into the changes; and (4) promote, through updated laws, legal order, certainty, continuity, and predictability in our lives.

With some exceptions, people should do what they can to control information about themselves. Publicity about oneself should be limited to legitimate matters of public concern. It comes down to sovereignty over oneself, sovereignty over one's personal information, and the relinquishment of some sovereignty to others, and free will.

New Questions

Does surrender of sovereignty come from bargains? Does the giver consent to a traffic in personal information for everything? Does it come down to a tussle between folk about a legal subpoena? Is the information traffic about a person authorised by statute? When does one's claim to privacy (that wooden stake a person drives into society's mud, with big red flags, bearing the words "no further") weigh-up to a basket of wooden sticks with red flags that amount to privacy? Does the basket help people to flourish as a group?

Here is our tally for privacy thus far. Privacy is a realm. It is a "place name" for domains given to everybody.¹⁰¹ Its virtual cabinets surrounded by guards, gatekeepers, and written pronouncements to keep unwelcomed visitors out. It is thatched houses (statutes) where people can converse in secret. It is a reporter's work product (a domain unto itself shrouded (encrypted) from another's gaze). It is people's medical records veiled from others. It is a bunch of sticks with red flags bearing the words "no further".

Deeds that compromise a person's autonomy and stunt his or her personal growth; deeds that sully a person's reputation and degrade his or her domains; deeds that cause personal and family heartache; spies and gossips who besmirch a person's reputation; eavesdroppers eavesdropping on people at unguarded moments,¹⁰² and laws constraining what people do behind closed doors *are* invasions of privacy. The question is: how do we cope with all these invasions? Property law, case law, constitutional law, and statutes provide some answers.

A Thought

Let me digress for a moment, take deep breaths, as I occasionally do, pause and think anew about this topic, to get at an answer for the privacy question. There is a slave narrative and his or her progenies' perspective after slavery about privacy. Here is their up-to-date narrative about his or her day-to-day surroundings in the new world. When one crawls into an African American's skin; when one rummages through his or her family's history; when he or she (the rummaging child) recounts his or her parents' stories and narratives about their social life when they were young, and the social life of his or her ancestors in Virginia, when they were slaves; when he or she knows that history down deep in their bones because of his or her schooling and university training:¹⁰³ he and she can see things in history. She can see her family's troubled rubble strewn pathways down thru history towards freedom basic schooling up to the seventh grade for one's grandmother, the good teachers and the bad teachers, the public scolding children got from broken adults, the social snubs and social protests, the campaigns

¹⁰¹It is a space that is impregnable to strangers' claims; a space that accommodates peace, quiet, solitude, self-isolation, and the right to be left alone; and a larger space where an individual shares personal information with somebody who is bound to keep the trove from strangers.

¹⁰²See Madigan & Somalya (2016).

¹⁰³National Advisory Commission on Civil Disorders (2016) AT 211-238.

launched by educated black folks for a better way of life, the social unrest, the costs (loss of jobs and damaged reputations) and the triumphs to establish sovereignty over oneself.

In the United States, a coloniser's property claims to bewildered, confused, and imprisoned east coast Indians, imported West Africans, and indentured servants, brought to America to work; the unlucky groups' labour value (what have you done for me lately claims), along with farm animals, was then, like now, a reality. Privacy was and is, to this day, intertwined with property claims. If one owned a slave suffused with an owner's personality, branded, and biologically stained, the object was property. If one made an object that was coveted by others (a new life to be nurtured by somebody for example), the object was property. If one used a contract to purchase somebody, the object (a Black man from West Africa) was property. If somebody owned another's body and, literally, controlled that person's life, heart, mind, and spirit: all of that was property.

If the body's subtle movements, brain power, and prized skills were constrained by somebody else: the body's movements, brain power, and skills were property. If one coveted a slave's athletic physique and his prowess in a sport like boxing, horse-racing, sprinting, football, and long-distance running; if somebody with money bought those things: the athlete's body in sport amounted to property.

Holders of this property then, like now, were endowed with autonomy (the option to make decisions that sated their appetite), and freedom (the power to implement personal decisions about their property's use, sale, and fate, unimpeded by others), and privacy (the option to sweepout, include, or exclude others in their lives vis-a-vie the property).

If a white man from Europe used his mind, body, and spirit to break new ground somewhere in the newly minted United States; if he established, cultivated and collected slaves and other people who coveted what the trailblazer owned and developed, that was property. If he built banks, cultivated bank owners, neighbours, business acquaintances, business partners, associates, colleagues, peers, investors, friends, and formed other economic relationships that were valuable to him: he could call all these things his property and, by implication, brand what he had said about all of them as private.

If, by chance, one was a reporter for a news outlet somewhere; if the reporter used his skill, brain power, and physical body to establish a rapport with a stranger to write a story about him that edified the public (like Andrew Jackson and the cruelty of slavery and mistreatment of Native Americans attributable to him); or the skinny on the Bill Cosby's professional career in entertainment, his sex capades, and sexual harassment case in Pennsylvania): the source and his source materials were the reporter's property, and, lastly, what the sources told the reporter was private too.

Old Man's Reflections

Let me pause one more time and refit my pen with ink and start anew. I am running out of time. This is my last rodeo as an academic and I want to write something that takes a long time for people to erase. I have wrestled with privacy as if it were a wild animal (a mustang bronc out West) and gone at the animal with spurs, hammers, and tong. It is January 12, 2022, in Orlando, Florida. It was a hard day for me to write about personal privacy. Before I got underway a physician told me, in his office, that “I was sick” and “I’d succumb to a disease.” His pronouncements made me numb inside; threw me off my essay writing schedule; and put my time on Earth (thankfully, I have a lot left), my friendships, family, loved ones, kindnesses, and debates with others about privacy in sharper relief.

Going forward with this privacy project, today, I am stirring this essay (my privacy soup) with a frenzy to get things just right; mobilizing bits of the English language that I find colourful enough to add flavour to the brew; sprinkling *nostalgia* into what I have before me to give the broth a kick, to dispatch the stuff into battle as a refreshment for new gladiators to nourish them for a noble cause (getting the public to see that I’m fighting for the individual’s sovereignty over himself to the end.)

Years ago, Hubert Pair was my mentor. He was the Deputy Corporation Counsel for the District of Columbia; a member of the Board of Bar Examiners for the District of Columbia; and, later, a Court of Appeals Judge for the District of Columbia Court of Appeals.

If I were writing for him in chambers, today, I would say the following about privacy. We are in the midst of a rebuild of privacy and the boundaries we should ascribe to peoples’ private lives. Privacy is a reclamation project in the United States. It is an aspirational thing for many people. It is a good idea (there is no doubt about that) and lots of folks want it. Sadly, people have glommed demands and complexities onto it to make an undertaking about the “new privacy” (turning people’s aspirations into rewarding realities) more difficult. We need to clarify the realm’s boundaries and the personal domains accommodated in the realm.

Privacy is a visage. It is a social value. It is a hazy and colourful picture of something grand in our lives. We should hold fast to this picture (with the all haze and the fog and all that) because: (1) it makes life better; (2) it is a way to ration *our common’s* wealth (claims against organised society given to everybody about freedoms, liberty, equality, property, and bits of alone time); (3) it is a way to give everybody their share of the above to make them comfortable with their fate, their allotments, and their surroundings; and (4), when bits of the above stuff are left over, and unused by folks, its way for hungry people, craving something, to compete and bargain for to stabilise the privacy project.

Privacy should not be a glossy state trophy won in an all-out-contest with others over a right, hammered out in state legislatures, or made the subject of half-baked once-and-for all bargains about a person’s refuge against the cold and the cruel world. Michigan’s adopted a modest privacy statute to cope with invasions

of privacy. The statute may help us see our way thru on this project. The statute is paraphrased below for your review.¹⁰⁴

(1)The Michigan statute covers people who can do and suffer (Individuals) and organisations (partnerships, cooperatives, associations, public and private corporations, personal representatives, receivers, trustees, assignees, and other legal entities with sufficient contacts with the state of Michigan to satisfy the Due Process Clause of the United States Constitution), transactions (occurrences cropping up in commerce), and third parties (individuals and organisations not directly involve with a transaction between an Individual and an organisation), and personally identifiable information (data that specifically identifies an individual or could reasonably be believed to identify a specific individual).

(2)It is unlawful, in Michigan, for an organization to get personally identifiable information beyond that which is necessary to complete a transaction. It is unlawful for an organisation to disclose personally identifiable information to third parties without the express or implied consent of the individual that submitted the personally identifiable information to the organisation as part of a transaction. The absence of individual consent (either expressed or implied) makes the organisations actions unlawful.

(3)If an organisation violates the statute, individuals can bring an action for a temporary or permanent injunction or a civil action to recover actual damages or damages in an amount of \$5000 per violation. The Attorney General is invested with the power to pursue a temporary or permanent injunction; accept an assurance of a discontinuance in a manner provided by the statute; he is given subpoena power and the option to bring class actions to produce a result.

(4)Information needed to promote the health, safety, and welfare of the public; information to help law enforcement; information that promotes and enhances the welfare of an individual; information needed to enforce contract rights are beyond the scope of the statute. Lastly, information by journalists, artists, literate, and historians are stacked up on ground outside of the statute's boundaries.

Let me close with a few psychological remarks about privacy. Human beings have big egos. There is something going on in our brain every moment of the day. The brain's boundaries are determined by pleasure and pain. The Id and the Super-Ego are its tenants. The former grabs everything that is pleasurable. The latter constrains what the Id wants to grab. Memories about our appetite clutter the brain like trash. They are the vile, the brutish, the uplifting, and the clownish encounters with the outside world. It is all the good, all the bad, all the pleasure, and all the pain showering us, inflicted upon us, and chewing up all human beings.

The spaces in the brain and what people try to pry open and un-package about others (our informational cargo) are the crudest objects of privacy. This is a nativist way to proclaim things about us. It is the unvarnished animal impulses, in us all, to grab everything outside of ourselves for pleasure. It presupposes the use of autonomy, freedom, liberty, and our secret desire to pry open another person's life versus a person's sovereignty over himself.

¹⁰⁴Keck (2002) at 118-121.

American slaves never got these powers or got them by trick, compacts, hard work, sleight of hand, and chance during slavery. European emigres (the early ones), the pathfinders, the white pioneers, and settlers had them when they landed in America. We, as a people, have spent over 100 years gridding down and refining this trove of legal and psychological stuff to make use of a felt need, a craving in all of us, to insulate ourselves from others in our lives. In 1896, we gave the work-product a façade. In a law review article, we called it privacy.¹⁰⁵

Old Man's Reflection

It is the 21st century now and my time on earth to do good and useful things as an elder is short, treacherous, hazardous to one's health, emotionally draining at times, climate altering, and cruel. Some people want *us* (the people who think about people as individuals and their privacy) to die off so they can get on with their lives and the business of making money. As commercial individualists, mercenaries of a sort (capitalists), they stand apart from their dying neighbours; doing their best to stay aloof from reality's social distractions, people's foibles, pain, and civilisation's shortcomings, to minimise the pain inflicted upon them as individuals and a group. They seek objects to love (cars and trucks) and objects that love them (cats and dogs) to cope with reality. Some take intoxicants to dull reality. Others accept death and give into its will to find ultimate privacy. All are obsessed with money.

Let me put a finer point on these observations. Privacy is a realm established in our public square. It is a refuge from the coarseness of the outside world. It is a structure. It has physical wing and psychological wing in our lives. Invasions of privacy, by contrast, are unwelcomed intrusions into a person's life that upset a person's plans, planned activities, and equilibrium. It is spying on a woman's doings and ratting her out to authorities. It is holding her up for ridicule. It is making a person's private affairs grub for public consumption. It is defamations of a person's character. It is putting people in a false light. It is opting to cause another's mental anguish; it is making a conscious decision to do something awful that causes mental anguish and bodily harm. It is making caricatures out of people to cause disquiet in them. It is unearthing awful things people bury about themselves that is grub, or becomes grub, for other's consumption. It is using inaccurate, false, misleading, and deceptive consumer reports to sully a person's reputation. It is turning university lectures by a professor into grub for consumption by government officials.

Now, while one is alive and kicking, like me, there are tools we can use to help ourselves. They are: (1) use frames of reference about our body and body parts to keep un-welcomed visitors out; (2) use negligence per se under privacy statutes to punish those who publish what one wants to keep secret; (3) use the defamation tort to defend the walls of privacy; (4) use virtual cabinets with guards and gatekeepers to keep un-welcomed visitors out; (5) use the First, Fourth,

¹⁰⁵Warren & Brandies (1890) at 195.

Fourteenth Amendment, and Supreme Court cases to minimise the harm government can do with official power; and (7), where possible, use state legislatures to get rid of vagrancy and vigilante statutes that circumscribe and criminalise what people do in public.

Let me close with these remarks. I wanted to write an essay about privacy and technologies that breach the walls of privacy. What I believed when I started this project a year ago and what I believe now are different. Between human beings there are secrets (knowledge about what will become of one's body in the near term; the love or contempt one has for one's spouse; the pain that comes from the discovery that you're not an attractive object to your spouse; that a spouse prefers companionship with others and not you; that your marriage to someone is based upon a lie; that a spouse's grudges and deceit fracture a marriage; that a spouse's anxieties, insecurities, and cravings for money determine a lot in one's life).

When technology takes over folks' lives; when people use technology daily as a substitute for a person-to-person conversations about everything; confidentiality replaces privacy. When all is said and done, given the social trash piled high around us that most of us have not or cannot swept away or bury beneath us (the stuff paraded in the previous paragraphs), death becomes the ultimate form of privacy.

The Mouth of Babes

Let me end the essay with an uplifting story. It is the Thanksgiving Holidays in Florida. I went to the movies with my grandson. We saw the Eternals on 29 November 2021, and, after the movie, we had a discussion in my car on the way home. Out of the mouths of babes (It was Griffin Roy Simons who spoke to me) came wisdom. Here is the synthesis of our twenty-minute conversation. There is a wheel that turns all the other wheels. That is life. How it starts is a mystery. Life on earth is a given, obvious, plain, raw, and unadorned. Animals eat animals to live. Man is an animal. He has the option to eat animals to live. That is free will.

Earth men are curious beings. They have a public face (it is adorned with stuff), a private face, and zones of privacy. The public face is used in play, social, and business discourse. The private face harbours desires, concerns, drives, fears, secrets, ambition, anxieties, and loathing. The space between the two is the zone of privacy. It is a chamber or lots of chambers where one hides what's humbling, dark, embarrassing, and humiliating about oneself.

Modern man lives in a man-made fortress (21st Century privacy domains) on plots of land that belonged to somebody else. The fortresses have guards and a gatekeeper (bureaucrats with statutes) to keep unwelcomed visitors out. There are fences around the fortress to accommodate the fortress holders' peace and quiet, freedoms and liberties. Vandal camp around the fences waiting for a chance to poach what is valuable to them. Is this a good image of privacy? Maybe, I told Griffin. Is poaching an invasion of privacy? Maybe. Stay tune. We will see.

To Griffin I said: we must get out of our old and the dusty books about our checker past in history, to see what is going on around us. American devolutionists

(the states' rights politicians) [...] I used different words with Griffin [...] are in control. Deregulation,¹⁰⁶ individualism run-a-muck,¹⁰⁷ and mob violence (a recurrent feature in American life) have carried the day. People behave like cowboys and Indians lived a century or so ago. Today, privacy is a glossy veneer people use to hide what they have done in the past. One's reputation, and his or her neighbour's perception of him or her,¹⁰⁸ their wives' and loved ones' perceptions, determine the scope of privacy. *We are reflections of the people who made us. We want to be left alone, in the worst way, to preserve our best selves; we want to deny folks an opportunity to appropriate our names, likeness, and image for money; and, lastly, take away another person's chance to put us in a false light.*

Conclusion

Chew on this. We are a memory and a hope. We live in a haze. Too many of us have relinquished too much of ourselves to claim anything as private. Everybody knows something about everybody. "Who you are" and "What you are" and "Where you've been" are in the hands of others. We have to claw back things for ourselves and make somebody pay for the misuse of our information.

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¹⁰⁶*West Virginia v. EPA*. See Wallach (2022).

¹⁰⁷*New York State Rifle & Pistol Association v. Bruen* (Packing guns in public is alright under the Second Amendment); *District of Columbia v. Heller* (The Second Amendment to the United States Constitution accommodates the storage guns at home).

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Japan's Contribution to International Peace: Restrictions and Advantages

By Katsumi Ishizuka*

Japan is said to be a peace-loving country. In fact, the State's history indicates that Japan and its politicians have surely sought positive ways to dispatch Japan's SDF personnel to UN or international operations for the pursuit of UN-centred policy, despite the State's constitutional constraints. For example, Japan created or amended several laws including the PKO Law in 1992 as well as the JDR Law in 1987 and the Anti-Terrorism Law in 2001. Therefore, one can identify the evolving process of Japan's contribution to international peace. However, at the time of writing, Japan's contribution to UN peacekeeping is token. This article points out several restrictions and advantages for Japan to dispatch forces to overseas operations. The restrictions include legal, diplomatic, and situational ones. The advantages include ones due to the State's record in the UN, due to the state's diverse and comprehensive approaches to international peace, and those due to the current situation of international peace and security. Japan should take advantage of its middle-power status for its contribution to international peace.

Keywords: Japan; International peace; The UN; Middle power

Introduction

It is well-known that Japan is called a peace-loving country. This is partly because Japan is the only state that suffered from atomic bombs, partly because the State's Constitution prohibited the possession of official military forces and, therefore, partly because the Japanese citizens strongly desire international peace and order. The Japanese Government has long supported the "UN-centred policy" in the State's diplomacy.

So, what are the criteria for states that persistently hold peace and security dear? What kind of facts and figures prove the states' adopting the UN-centred policy? In the field of international peace and security, one such criteria would be the contribution to UN peacekeeping operations. Therefore, the frequency of the dispatch of troops or civilians to UN peacekeeping, or the number of personnel dispatched to the entire UN peacekeeping operations during a fixed period would be good indicators. As far as Japan is concerned, the current number of the Japanese Self Defence Forces (SDF) deployed in UN peacekeeping operations is merely four, almost the bottom of the international ranking. Essentially, joining the UN operations, which are neutral and non-coercive, should be ideal for Japan.

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How can one explain the contradiction between the status of a peace-loving country and the token participation in UN-led operations? In explaining the contradiction, this article will discuss the weaknesses (or restrictions) and strengths (or advantages) of Japan in pursuing its contribution to international peace through UN operations.

After the brief description of the history of Japan's contribution to international peace, this article will discuss restrictions and advantages of Japan's contribution to international peace from the viewpoints of its history, domestic laws, governmental policy, and current security situation of international affairs. In conclusion, this article will advocate some suggestions to revive Japan's performance in contributing to international peace by minimising the restrictions and maximising the advantages.

History of Japan's Contribution to International Peace

It is to be noted that even before Japan's membership in the UN, the Japanese Government indicated its commitment to the international organisation by dispatching its SDF abroad. In 1952, Foreign Minister Katsuo Okazaki officially stated that Japan would fill all the obligations of a UN member by all means at its disposal. In 1954, however, the House of Councillors passed the resolution which would not allow the SDF to be dispatched abroad despite the fact that some legal scholars advocated the participation of the SDF in UN missions. Japan joined the UN in 1956 and then became a non-permanent member of the UN Security Council in 1965. In February 1966, the Ministry of Foreign Affairs drafted a UN Resolution Cooperation Bill, which mentioned the SDF personnel as part of Japan's contribution to UN missions.¹

In 1982, the Japanese Government submitted a resolution to the UN General Assembly that advocated strengthening the role and effectiveness of the UN. The UN then requested that Member States submit concrete proposals to strengthen the UN. In meeting the request, the Japanese Government formed an advisory panel chaired by a former UN Ambassador. The group's final report encouraged Japan's participation in UN peacekeeping operations.

In 1988, Prime Minister Noboru Takeshita proposed the International Cooperation Initiative and identified five areas including UN peace operations in which Japan could play a role on the world stage.² In 1989, the Director General of the Japan Defence Agency, Juro Matsumoto, stated in the Diet that he was considering authorising the use of troops for anti-terrorist operations and international peacekeeping activities.³

In the Gulf Crisis and the following War in 1990 and 1991, Japan made a substantial financial contribution to the US-led Multi-National Forces, amounting to \$13 billion, although this financial contribution was criticised as "being too little

¹Kozai (1991).

²Ibid, at 18

³Leitenberg (1996) at 12.

too late”⁴ or “chequebook diplomacy”.⁵ The Secretary-General of the ruling Liberal Democratic party (LDP) Ichiro Ozawa insisted that the SDF’s dispatching abroad was possible by the current law. The Foreign Ministry White Paper of 1991 stated that a contribution of troops was indispensable. Even Prime Minister Miyazawa stated: “Japan’s international contribution should include some sweating or dispatch of personnel to assist UN peacekeeping operations”.⁶ Finally, after much deliberation, the International Peace Cooperation Law (the PKO Law) was approved in the Diet which became the legal basis for SDF participation in all UN peacekeeping operations.

Since then, the SDF has been dispatched to the countries and areas including Angola, Cambodia, Mozambique, El Salvador, the Golan Heights, East Timor, Nepal, Sudan, Haiti, and South Sudan for UN peacekeeping operations. Their missions include engineering units, transportation units, elections observation, military observation, liaison coordination, and headquarters personnel etc. Engineering and transportation units are so-called “logistics missions.” The other missions are individual ones. For example, in Cambodia, the SDF conducted their engineering missions in UNTAC, focusing on the repair of main supply roads and bridges in Takeo in 1992-1993. In El Salvador, the Japanese personnel observed implementation of the election of the president and members of the parliament as a member of ONUSAL in March and April 1994. In the Golan Heights, Israel, as a UNDOF mission, the SDF dispatched transportation units whose missions were the transportation of foodstuffs etc., safekeeping of goods in supply warehouses, and repairing roads. The SDF was stationed in the Golan Heights in relatively long periods, from February 1996 to January 2013. In Haiti, after the 2010 earthquake, the engineering units of the SDF conducted debris removal, levelling the ground, repairing roads, and constructing simple facilities. In East Timor, the Japanese Government dispatched both the SDF as engineering units for construction works and civilian police for counselling the local police administration in UNMISSET in the 2000s. In the South Sudan, since 2011 the Japanese headquarters personnel has implemented the arrangement of the overall supply base in the military division of UNMISS, and the engineering units had conducted activities including infrastructure like road improvement.⁷

In general, engineering units require large forces of battalion. For example, Japan dispatched the maximum of 600 forces in Cambodia, 680 forces in East Timor, 346 forces in Haiti, and 402 forces in South Sudan. The Japanese transportation units consisted of about 40 forces in the Golan Heights. The Japanese personnel number of other missions was the maximum of ten.⁸ Therefore, when the Japanese engineering units were deployed in UN peacekeeping operations, the total ranking of Japan in the number of personnel dispatched to UN peacekeeping operations was relatively high. For example, in June 2002, when the Japanese engineer units of the SDF was deployed in East Timor, the total number

⁴Ito (1995) at 285.

⁵*The Daily Yomiuri*, 12 February 1992

⁶*Mainichi Daily News*, 20 October 1991

⁷Fujishige, Uesugi, & Honda (2022) at 189-196.

⁸*Ibid.*

of Japanese personnel dispatched to UN peacekeeping was 679, which was the 20th place in the entire UN Member States.⁹

However, disappointingly, since the Japanese engineering unit withdrew from South Sudan in UNMISS in March 2017, Japan's contribution to UN peacekeeping operations has become token. The total number of the Japanese participants in UN peacekeeping in February, 2023, is just four (staff officers in UNMISS).

There are both positive and negative aspects for Japan to promote or discourage the State's peacekeeping policy. Negative aspects mean the restrictions of Japan's role as a contributor to international peace, which has been inherent to its history and tradition. Positive aspects mean the advantages Japan achieves by contributing to international peace. The following sections are restrictions and advantages of Japan's contribution to international peace.

Restrictions of Japan's Contribution to International Peace

Legal Restriction: Japan's "Peaceful" Constitution and the PKO Law

It is well-known that Japan does not have official military forces due to its history of World War II, which is also specified in the Article 9 of the Constitution.¹⁰ While the Japanese Constitution is, therefore, called the "Peaceful Constitution" in the peace-loving country, this Constitution makes restrictions to the missions of the SDF in UN peace operations. The restrictions are reflected by the PKO Law which was created in June 1992. The PKO Law included the so-called "Five Principles" for the participation of Japanese contingents in peacekeeping operations:

1. Agreement on the ceasefire shall have been reached among the parties to the conflicts.
2. The parties to the conflict, including the territorial states, shall have given their consent to deployment of the peacekeeping force and Japan's participation in the force.
3. The peacekeeping force shall maintain strict impartiality, not favouring any party to the conflict.
4. Should any of the above guideline requirements cease to satisfy the Government of Japan, it may withdraw the contingent.
5. Use of weaponry shall be limited to the minimum necessary to protect the lives of personnel.¹¹

In reality, several practical problems were identified as a result of the SDF's

⁹UN Peacekeeping Operations, the UN HP.

¹⁰Article 9. (1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. (2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be sustained. The right of belligerency of the state will not be recognized.

¹¹Defence Agency, *Defence of Japan: The White Paper of the Defence Agency*.

involvement in UN peace operations, mainly due to operational constraints caused by the PKO Law. For example, when the SDF was deployed in UNTAC in Cambodia in 1992-1993, the Five Principles were broken when the Khmer Rouge refused to disarm and ignored the ceasefire. Nevertheless, the Japanese Government did not consider withdrawing the SDF. The decision of the Government to stay was criticised by some opposition parties.¹²

Another constraint of the Five Principles occurred in UNAMIR, Rwanda, in 1995. In fact, the SDF was deployed not in Rwanda but in its neighbouring countries, Zaire and Tanzania, because the deployment in Rwanda, where the ceasefire had not been agreed, would have been regarded as a breach of the Five Principles. In UNMAIR, the SDF was criticised by other contributing states when, because of Japan's PKO Law, it refused a request to look for missing staff from UN headquarters.¹³ This was because the PKO Law requires strict impartiality, and prohibits any belligerence by the SDF.

Furthermore, one of the most serious issues due to the constraint of the Five Principles occurred in the so-called "daily report affair" in UNMISS, South Sudan, in 2016. According to Kazuto Suzuki, the daily report affair was multifaceted. One aspect was that whenever the word "combat" was used in the daily reports written by the SDF staff to describe the security situation in South Sudan, the Ministry of Defence would replace with the phrase "armed conflict" in the summaries of their reports. Simply put, "combat" meant the breach of ceasefire which would require the withdrawal of the SDF from South Sudan according to the Five Principles. Another aspect was that it had become clear that, although the government claimed that the daily reports had been destroyed, they were actually being kept in storage. Reasonably, this raised questions about whether the Japanese government was concealing the truth about whether the SDF had witnessed or even been involved in combat.¹⁴

Diplomatic Restriction: Criticism from Neighbouring Countries

Rosalie Arcala Hall researched Japanese SDF's participation in the Disaster Relief Operations in Aceh, Indonesia in 2004-2005. Her research was highly critical of the deteriorating civil-military cooperation between the civilian Japan Disaster Relief (JDR) and the SDF. In fact, the article of her research was published in the journal of defence studies in South Korea. She criticised several aspects of the issues. One of the aspects was the argument about whether and in what circumstances Japan's military (SDF) may be brought in to respond to a disaster relief situation. This should require the overall debate on the meaning of Article 9 of Japan's Constitution. In acutality, it warned that the decision of the Japanese Government to deploy troops for international disaster relief operations was problematic as opposed to deploying civilian operations. It even implied that the investment of the SDF to develop additional capacity of disaster relief operations was strengthening the argument for the Japanese Government to pursue

¹²Ishizuka (2005) at 63.

¹³Ibid, at 64.

¹⁴Suzuki (2017) at 59.

remilitarisation. The Article also expressed a serious concern about a democratic civilian-control system in Japan. It recalled that the controversial dispatches of the SDF to the Indian Ocean and Iraq had occurred despite strong public opposition. Therefore, the deployment decision by certain politicians in the Government arguably strengthens executive control of the SDF, vis-à-vis the Diet, for example.¹⁵

Two questions can be pointed out in this article: One question is “Will Japan be remilitarised due to the SDF’s deployment in disaster relief operations even for humanitarian purpose? The other question is “Have the Korean Journal and the South Korean Government genuinely supported the above arguments?” Diplomatic restriction from a neighbouring state regarding the SDF’s deployment even for humanitarian operations becomes clear.

Meanwhile, China is also apprehensive about the debate on the constitutional amendment, which would legalise Japan to exercise the right to collective self-defence. In July 2014, Japan’s Abe Government introduced new legislation that reinterpreted Article 9 of the Constitution, which permitted Japan to use military force to come to the aid of an ally or a country when it is under armed attack. Chinese media criticised the changes as a “brutal violation” of the spirit of Japan’s pacifist Constitution. The Chinese Foreign Ministry also stated that constitutional reinterpretations raised doubt about Japan’s commitment to peaceful development. Chinese officials and academics censured the Abe Government for ignoring the majority of the Japanese public that opposes the changes to national security policy. On the one hand, the Constitution has been reinterpreted by the Japanese Government mainly in order to allow Japan to develop the SDF and to participate in international peacekeeping. The Japanese Constitution held that the militarily constrained State was abnormal power, prohibiting the use of force in operational areas. On the other hand, the constitutional interpretation in Japan had been condemned by the Chinese Government for fear that such interpretation would undermine the post-World War II international order by allowing Japan to take military steps to counter the rise of China.¹⁶ Likewise, a Chinese scholar also claimed that the average Chinese citizen still has deeply rooted apprehensions about Japan repeating its “militarist mistakes.”¹⁷

Thus, the above two cases indicate that both South Korea and China still regard the SDF as a sign of Japan’s re-militarisation. They therefore claim that the Japanese Constitution should not be amended, and that the SDF should not be deployed even in UN peacekeeping or even humanitarian missions. The diplomatic restrictions from the above two states would be the negative factors impacting on Japan pursuing its peacekeeping policy.

Situational Restriction: “No Peace to Keep” And Japan’s Excessive Pacifism

Currently, UN peacekeeping has been deployed in extremely difficult circumstance where there is “no peace to keep,” and missions are mandated to engage in robust and combat activities as well as in stabilisation activities. These

¹⁵ Arcala Hall (2008) at 394.

¹⁶ King (2014).

¹⁷ Yongtao (2017).

activities require the use of force in order to protect civilians under imminent threat of physical attack.

Historically, the UN missions that include the use of force have been called “peace enforcement forces” at a strategic level, and also called “robust peacekeeping” at a tactical level. The UN has also accepted such missions in the operational areas. In 1993 Kofi Annan, then UN Under Secretary General for Peacekeeping Operations asserted that there were increasing demands on the UN to enforce peace.¹⁸ In 1996, Annan reinforced his own stance, stating “the old dictum of consent of the parties will be neither right or wrong; it will be, quite simply, irrelevant.”¹⁹ Meanwhile, robust peacekeeping reached an apex in the mandate of the Force Intervention Brigade in MONUSCO in the Democratic Republic of the Congo (DRC).

Accordingly, the number of fatalities in UN peacekeeping operations has been increasing. As of 31 January 2023, the total number of the fatalities of UN peacekeeping since its establishment in 1948 is 4,280. This number consists of 1,385 accidents, 1,472 illness, 1,111 malicious acts and 321 others. The majority of UN fatalities has been from the UN missions from the Middle East and Africa, including Lebanon (UNIFIL 329), Mali (MINUSMA 298), Darfur, Sudan (UNAMID 295), DRC (MONUSCO 257), Liberia (UNMIL 204) Central Africa (MINUSCA 175) etc.²⁰

Many democratic countries, including Japan, are risk-averse, and reluctant to send their soldiers into the line of fire complying with such robust mandates. The trend toward peace enforcement and robust peacekeeping is viewed with concern by the Japanese Government which has strong attachment to the main principles of traditional peacekeeping operations; having local consent, being in an impartial position, and limiting the use of minimum force to self-defence. The total number of Japanese fatalities in UN peacekeeping is only six.²¹ It is a relatively small number among troop-contributing states.

The risk-averse tendency has been applicable to the Japanese public as well as the Government. This is illustrated in the results of opinion polls conducted before and after the occurrence of large-scale fighting in 2013 and 2016 in South Sudan, when the Japanese SDFs were deployed as an engineering unit in UNMISS. In the 2013-armed clashes, thousands of South Sudanese people escaped to the UN base in Tongping where the Japanese SDF was deployed. Widespread violence recurred in July 2016 when anti-government forces shot the UN Tongping Base again. At that time, the Bangladeshi engineering unit fired back.²² Experiencing the above incidents, the Japanese public has adopted a more cautious view towards UN peacekeeping. In accordance with the opinion polls conducted by the Cabinet Office, the Japanese public became less enthusiastic

¹⁸Annan (1993) at 4.

¹⁹Annan (1996).

²⁰Fatalities | United Nations Peacekeeping, <http://peacekeeping.un.org/en/fatalities>.

²¹The six fatalities consist of one from UNTAG (Namibia), two from UNTAC (Cambodia), one from UNMOT (Tajikistan), one from UNMIT (Timor-Leste) and one from MINUSCA (Central African Republic) Fatalities | United Nations Peacekeeping.

<http://peacekeeping.un.org/en/fatalities>.

²²Fujishige, Uesugi, & Honda (2022) at 153-154.

about SDF participation in UN peacekeeping after the violence involving the SDF in UNMISS in 2013 and 2016. For example, in terms of the question of expectation for SDF activities in the opinion poll, 48.8% of the respondents answered “International Peace Cooperation (IPC)” in 2012. This figure dropped to 34.8% in 2018. Likewise, in terms of asking for IPC activities as a mission of SDF, 28.1% of the respondents answered “Should work on it more actively than ever”. However, this figure dropped to 20.6% in 2018.²³ Furthermore, the non-action of the Japanese SDF against anti-government forces in 2016 resulted in serious criticism even among Japanese academia of UN studies:

In the midst of this confusion [in the 2016 incident] , the JEG locked themselves in the camp. Fortunately, there were no fatalities among the Bangladeshi and Japanese engineers after this incident, but it left a serious concern for the Japanese side: should the JEG be allowed to just hide themselves while their fellow engineers actively fight to defend their common base?²⁴

In short, the currently volatile international situation, where peace operations have inevitably made a shift to the more coercive type of operation has resulted in the decreasing demand for Japanese SDF which expects to be deployed in more secure operations. It is not only due to the State's Constitution, but to the risk-averse policy of the Japanese Government. This stance has also been supported by the Japanese public.

Advantages of Japan's Contribution to International Peace

Advantage by the Record in the International Organisation and the UN

After World War II, Japan accomplished significant economic recovery termed “economic miracle”. Accordingly, Japan started joining international economic groupings such as IMF in 1952, GATT in 1955, OECD in 1966, and G7 in 1975.

Japan joined the UN as the 80th member state in 1956 with enthusiastic public support from the Japanese public. Japan's membership in the UN was supported by the State itself for many political reasons such as the State policy of pacifism hoping for a peaceful world order; unarmed neutrality guaranteed by the State's Constitution; and the expectation of diluting the State's almost total dependence on the US for its security.

One of Japan's remarkable records in the UN is, for example, illustrated by Japan's having been elected for non-permanent membership of the UN Security Council twelve times, the most frequently elected member. As early as 1973, the Japanese Government officially stated that Japan should be given a permanent seat on the UN Security Council, which was also supported by the US. In 2005, Japan again launched a strong campaign of UNSC reform with Germany, India and Brazil, who also strived to gain a permanent seat on the Council. At the time of

²³Ibid, at 217-220.

²⁴Ibid, at 154.

writing, Japan is serving as non-permanent member of the Security Council in 2023-24. Japan's diplomatic ability has been highly respected there at a time when the Security Council is not functioning properly over the war between Russia, the permanent member, and Ukraine. Takahiro Shinyo, a former ambassador of Japan's permanent mission to the UN, said that Japan's ability to help stop "high-handedness" by Russia and China will be put to the test after becoming a non-permanent council member.²⁵ In the Security Council, Japan has been a strong supporter of the principles of multilateralism, democracy and the rule of law valuing the UN Charter. For example, at the UN Security Council Open Debate on 12 January 2023, the Japanese Foreign Minister Yoshimasa Hayashi stated that "Uniting for the rule of law" must be the keyword in the current Security Council, saying "I believe that it is only through multilateralism that we can uphold the rule of law globally. [...] And, I believe that the Security Council should be the guardian of multilateralism."²⁶

Japan's strong position for multilateralism based on democratic international order was demonstrated in the General Assembly as well. At the 77th Session of the UN General Assembly in September 2022, Prime Minister Fumio Kishida delivered a general debate in which he condemned Russian aggression on Ukraine and repeatedly emphasised respect for the rule of law. Indeed, he referred to the world of "rule of law" ten times in his brief speech there. He also mentioned the value of "human security" four times. The term "human security" was also linked with Japan's unique historic position as the only nation to have suffered atomic bombs during WWII. In addition to the promotion of the rule of law and human security, triggered by Russian aggression, Prime Minister Kishida strongly advocated the reform of the UN including the Security Council. Without concrete ideas and solutions on this agenda for nearly 30 years, Kishida stated that what is truly needed is not a discussion for the sake of discussion, but action towards reform. Therefore, he concluded that the time has come to start "text-based" negotiations to reform the Security Council.²⁷ In his speech, the Prime Minister has been determined that Japan would make "realistic" efforts by taking "concrete" action through the UN.

Meanwhile, Japan's strong commitment to the UN has also been illustrated by its enormous financial contribution to the international organisation.

²⁵*The Japan Times*, 2 January 2023

²⁶Hayashi (2023).

²⁷Kishida (2022).

UN Regular Budget Allocation Percentages from Major States (%)

Ranking	Country	2016-2018	2019-2021
1	U.S.	22	22
2	China	7.921	12.005
3	Japan	9.68	8.564
4	Germany	6.389	6.09
5	U.K.	4.463	4.567
6	France	4.859	4.427
7	Italy	3.748	3.307
8	Brazil	3.823	2.948
9	Canada	2.921	2.734
10	Russia	3.088	2.405

The Scale of Assessments for the UN Peacekeeping Budget by Major Member States (%)

Ranking	Country	2019	2020-21
1	U.S.	27.8912	27.8908
2	China	15.2197	15.2195
3	Japan	8.564	
4	Germany	6.09	
5	U.K.	5.79	5.7899
6	France	5.6125	5.6124
7	Italy	3.307	
8	Russia	3.049	
9	Canada	2.734	
10	South Korea	2.267	

Sources: MOFA, Diplomatic Bluebook 2020

In terms of the regular budget of the UN, Japan contributed approximately USD 238.8 million to the UN for 2019, ranking after the US and China. Japan's contribution to peacekeeping operations for 2019 was approximately USD 814.3 million, ranking again after the US and China.²⁸ On the one hand, Japan's anti-militarism and the subsequent "cheque-book diplomacy" was severely criticised during the 1990-1991 Gulf Crisis. Even Japan's decision by Prime Minister Yukio

²⁸MOFA, Chapter 3: Japan's Foreign Policy to Promote National and Global Interests, *Diplomatic Bluebook 2020*.

Hatoyama in January 2010 to withdraw the Japanese Maritime SDF in support of the US-led Coalition of the Willing was also criticised in the academic journal as a return to “cheque-book diplomacy”.²⁹ On the other hand, historically, UN Secretary Generals have remarked that Japan’s support to the UN was concerned with more than just funding:

*Japan’s wide-ranging support for UN activities has substantially improved the Organization’s ability to address chronic challenges of social and economic development. Its contributions in humanitarian relief are legendary, along with its longstanding efforts to promote global nuclear disarmament, its valiant efforts against global warming, and its strong support for UN peacekeeping efforts.*³⁰

Advantage by the State’s Diverse and Comprehensive Approach to International Peace: Humanitarian Assistance and Disaster Relief Operations, Counter-piracy Operations, and “All Japan Approach”

The role of the Japanese SDF as peace-providers is not limited to UN peacekeeping operations. In other words, the SDF has been making diverse international contributions in addition to peacekeeping operations. One of them is humanitarian assistance and disaster relief (HADR) operations by the SDF. Asia is the disaster-prone region in the world. With a growing concern about the environmental issues such as climate change and the subsequent natural disasters, there is an increasing demand for the Japanese SDF in HADR operations. There, the SDF rescues victims and provides critical medical support, supplies and equipment.

In March 1982, the Japanese Government established the Japan Medical Team for Disaster Relief (JMTDR) for the purpose of the rapid response of medical relief operations to overseas disasters. Following JMTDR’s missions in Ethiopia in 1984 and in Colombia in 1985, the Japanese Diet passed the Japan Disaster Relief (JDR) Law on 26 August 1987. Subsequently, the JDR was dispatched to 15 countries and 21 operations from 1987 to 2020.³¹

There are several rationales behind Japan’s pursuit of HADR operations. The first rationale is normative. HADR activities are based on humanitarianism, altruism, and liberalism. Likewise, Japan’s policy on providing disaster relief is based on the expectation of a “give-and-take” effect. Japan, a country vulnerable to natural disasters such as typhoons, earthquakes, and tsunamis, expects to receive similar support and assistance from foreign countries when in need. Another rationale is related to security. Countries hit by natural disasters are sometimes vulnerable to occupation by belligerent and terrorist groups. HADR operations can play a role as a preventive measure.³²

Weston Konishi at John Hopkins University has also pointed out several

²⁹Hynek (2012).

³⁰UN News (2006).

³¹15 countries consist of Honduras, Turkey, India, Iran, Thailand, Indonesia, Pakistan, Haiti, New Zealand, the Philippines, Malaysia, Ghana, Nepal, Djibouti, and Australia. Fujishige, Uesugi & Honda (2022) at 203-210.

³²Ishizuka (2013) at 217-218.

merits for the Japanese SDF to join HADR operations. First, the deployment of the SDF to HADR operations does not need the approval from the Diet (parliament). Accordingly, the SDF can swiftly respond to the disasters without time-consuming debate over the issues of constitutionality or rules of engagement which would be conducted in dispatching to peacekeeping operations. Second, the participation in HADR activities would enhance joint defense cooperation with the US military and other like-minded nations. Third, and the most important, HADR missions would build goodwill and reinforce Japan's image as a responsible player in the international community. Japan, as one of the most developed countries, has a good combination of technological, financial, and human resources, which would contribute to HADR operations, and by so doing, Japan would build its soft-power assets in the region.³³

Another diverse operation conducted by the SDF is counter-piracy operations. Ships passing through the Gulf of Aden in transit to the Suez Canal have been facing serious security challenges caused by piracies. Meanwhile, the average amount of ransom paid for Somali pirates was \$5.4 million/case in 2010.³⁴ Responding to the demand from the international community, in March 2009, with the approval of the Japanese Minister for Maritime Security-Building Operations, two destroyers of the Maritime SDF started the mission to escort Japanese vessels to prevent pirates off the coast of Somalia and in the Gulf of Aden. In June 2009, the Anti-Piracy Law was enacted to legalise the mission. Since then, the SDF and the Japan Coast Guard (JCG) have implemented the operations in the Republic of Djibouti. The SDF also conducts warning and surveillance activities in Somalia and in the Gulf of Eden with P-3C patrol aircraft. The flight activities included a total of 2,653 in flight missions and 19,610 in flying hours as of December 31, 2020, from June 2009. The aircraft have identified about 222, 600 vessels, engaging in counter-piracy operations on around 15,155 occasions.

In 2020, no piracy incident was reported.³⁵ There are several reasons for continuous deployment of the SDF as counter-piracy operations in the area. The first reason is deterrence. A senior SDF official said, "The second we leave, the pirates will have everything their way." The SDF's counter-piracy operation observes an important transportation route for Japan, especially for petroleum shipping. Also, twenty percent of the vehicles exported from Japan pass through the area.³⁶ Second, from the international viewpoint, the area in Somalia was where the UNPKO mission, namely, UNOSOM and the US-led coalition of Unified Task Force (UNITAF) were deployed for humanitarian purposes in the midst of civil wars in the 1990s, which failed to implement their mandates and withdrew from the ground. Due to the failure, former Somali fishermen appeared as pirates off the coast of Somalia. Therefore, the role of SDF in the counter-piracy operations is highly related to the UN operations on the ground.

Another advantage of Japan's contribution to international peace is the State's adopt comprehensive approach to solving international security. One of the typical

³³Konishi (2016).

³⁴Sakurai & Kawashima (2013) at 8.

³⁵Cabinet Secretariat, The Government of Japan (2021).

³⁶*The Asahi Shimbun*, 26 January 2023.

cases is called the “All-Japan Approach.” As mentioned before, the diversity of operations, including humanitarian assistance and disaster relief operations, counter-piracy operations as well as UN peacekeeping operations which Japan has engaged in, needs a more comprehensive approach requiring the diversity of actors for various operations. Such actors are not only the SDFs but also the Japan International Cooperation Agency (JICA) and NGOs that are actors operating directly in conflict and disaster areas. These players also include the Japanese Government including the Ministry of Foreign Affairs, the Ministry of Defence, and the Secretariat of the International Peace Cooperation Headquarters in the Cabinet Office, who are all considered policymakers. For example, in the UN peacekeeping operations in Timor-Leste, or UNMISET, the Japanese SDFs or Engineer Group (JEG) cooperated on civil engineering work for the “Recovery, Employment and Stability Programme for Ex-Combatants and Communities in Timor-Leste” (RESPECT). The Japanese Government funded the project to support disarmament and demobilisation. RESPECT aimed to assist the integration of former Timorese soldiers into the local society by providing job training and employment opportunities, such as roadbuilding or forestation.³⁷ The “All Japan Approach” was also identified in UN peacekeeping in Haiti or MINUSTAH in the late 2010s. When the Japanese SDFs conducted construction work in the Sigueneau tuberculosis sanatorium as a part of MINUSTAH missions, for example, the Japanese embassy provided ODA funds as Cultural Grant Assistance to build a well and to donate an X-ray machine.³⁸

Advantage in the Current Situation of International Peace and Security: Instability in Asia, War in Ukraine and the necessity of the Role of Middle Powers including Japan as a Contributor to Peace

Currently, one can witness the increasing instability in international security, especially, in the Asia-Pacific region. For example, in Myanmar, the humanitarian crisis by the violence in Myanmar’s Rakhine state in August 2017 resulted in more than 90,000 Rohingya refugees in Bangladesh. In the same state, a military coup occurred in February 2021, and the leader in the current democratic regime, Aung San Suu Kyi, has been imprisoned. While the US administration has been ready to impose sanctions against the military regime in Myanmar from a human-rights perspective, no Security Council resolution has been approved on the issue. Japan, the politically middle power in Asia, is the only developed nation that can engage in dialogue with the Myanmar military.³⁹

Meanwhile, the withdrawal of the US military from Afghanistan in August 2021 evidently made way for the Taliban regime to gain momentum. In several days after the US withdrawal, the Taliban occupied the whole territory of Afghanistan. The US administration sent the message that “it’s time to end America’s longest war” at the time of its 20th anniversary of the “9.11 terrorist attack”= of 2001. However, China and Russia made diplomatic approaches to the

³⁷Fujishige, Uesugi & Honda (2022) at 111-112

³⁸Ibid, at 132.

³⁹*The Japan News*, 20 February 2021.

Taliban. At a meeting of foreign ministers in mid-July 2021, the Shanghai Cooperation Organisation of China, Russia and Central Asian countries stressed the importance of Afghan-led dialogue, expressing their status to remove US involvement.⁴⁰

On the maritime issues in Asia, China has long claimed the territorial right of the South China Sea inside the Nine-Dash Line. In 2011, Indonesia and the Philippines officially objected to China's claim. In 2013, the Philippines instituted arbitral proceedings against China under Annex VII to the United Nations Convention on the Law of the Sea (UNCLOS). In 2016, the South China Sea Arbitration fully approved the Philippines' claim and offer and dismissed China's claim on the legitimacy of the Nine-Dash Line, its continental shelf, and its Exclusive Economic Zone (EEZ). The Arbitration insisted that the maritime territory which China claimed in the South China Sea was beyond 200 nautical miles from China. The Arbitration did not approve the historical right which China claimed, either. However, China claimed that the judgement of the Arbitration was invalid.⁴¹ In February 2021, Beijing enforced a law allowing the Chinese Coast Guard to use weapons in the Sea and, reportedly, intimidation measures by Chinese vessels in the Sea occurred repeatedly.⁴²

Above all, Russia's military operations against Ukraine since 2020 has significantly tarnished Russia's status as a permanent member of the UN Security Council. Russia's determination to prevent Ukraine's membership of NATO and the State's joining the Western sphere of influence resulted in brutal operations by the Russian troops which are a breach of international law. Moreover, at the time of writing, there is no sign of peaceful solutions or ceasefire agreement between the two states.

Considering the above cases, it is obvious that several permanent members of the UN Security Council have not played their leadership role in the UN for the purpose of maintaining international peace and security. In other words, the super- and the great- powers have virtually abandoned the duties of their commitment to creating global security. Therefore, if so, who should replace such great powers as peacemakers or peacekeepers? The answer would be "the middle powers." The middle powers are ideal peacekeepers and peacemakers. On the one hand, in a peacekeeping role that mainly focuses on mediation and arbitration, the coercive nature of the great powers and their colonial histories will make host states apprehensive. On the other hand, peacekeeping is a para-military role which requires appropriate military equipment, mission skills, disciplined soldiers, and high morale amongst troops. Middle powers can also provide logistical support capability, which is another important factor in peacekeeping missions. Therefore, peacekeeping gives the middle powers a chance to have a leading role in international security issues, which can restrict the superpowers' dominance. This intention has been that of most middle power contributions.⁴³ In fact, when the

⁴⁰*The Yomiuri Shimbun*, 3 August 2021.

⁴¹Hoshino (2017).

⁴²*The Japan News*, 9 April 2021.

⁴³Grant (1973).

first UN peacekeeping force, namely the United Nations Emergency Force (UNEF I) was established in the aftermath of the Suez Crisis and the Second Middle East War in 1956 when the great powers were in stalemate, most of the contributing states to the UN operations were the middle powers. Since then, the middle powers have been in demand as troop-contributing states to UN peacekeeping, especially, during the Cold-War period.

In the post-Cold War period, Japan had remarkable records as UN peacekeepers in Asia. As stated before, Japan dispatched about 600 forces of engineering units to UNTAC in Cambodia from 1992 to 1993. Likewise, the state sent about 400 to 680 forces of engineering units to UNTAET and UNMISET in East Timor.

Conclusion

This article argued Japan's policy and practice for the State to contribute to international peace through the UN. In terms of its history, Japan and its politicians have certainly sought positive ways to dispatch the SDF personnel to the UN or to international operations for the pursuit of UN-centred policy, despite the State's constitutional constraints. In order to do so, Japan created or amended several laws including the PKO Law in 1992 for UN peacekeeping operations, as well as the JDR Law in 1987 for humanitarian assistance and disaster relief operations and the Anti-Terrorism Law in 2001 for counter-terrorism operations. Therefore, one can identify the evolving process of Japan's contribution to international process. In fact, Japan has a remarkable record for the deployment of the SDF in several UN peacekeeping operations. Meanwhile, currently Japan's contribution to UN peacekeeping is, regrettably, token. This article pointed out several restrictions and advantages for Japan to dispatch to overseas operations. As a result, this article will provide the following suggestions:

First, Japan's identity as a peace-loving country should not be confused with that of an excessively pacifist one. Therefore, discussion of the constitutional amendment should commence at once.

Second, Japan should improve diplomatic relations with its neighbouring states in order to promote its UN-centred policy.

Third, Japan should continue dispatching its personnel to diverse operations with the State's comprehensive approaches.

Fourth, Japan should take advantage of its middle-power status with its like-minded states, replacing great powers, as a new leader of promoting international peace.

Finally, what should Japan do now as a middle power to contribute to peace in the international events mentioned above? For example, on the issue of political instability and humanitarian crisis in Myanmar, Japan can dispatch humanitarian monitoring missions with its SDF to observe the possible violations of human rights in Myanmar and in refugee areas. On the maritime dispute involving China in the South China Sea, Japan's SDF can conduct maritime peacekeeping missions just as they have done in counter-piracy operations in Somalia. In the case of the

undemocratic situation in Afghanistan, Japan can dispatch political missions.

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Abbreviations

- DRC: Democratic Republic of Congo
- EEZ: Exclusive Economic Zone
- HADR: humanitarian Assistance and Disaster Relief
- IMF: International Monetary Fund
- IPC: International Peace Cooperation
- JCG: Japan Coast Guard
- JDR: Japan Disaster Relief
- JEG: Japan Engineering Groups
- JICA: Japan International Cooperation Agency
- JMTDR: Japan Medical Team for Disaster Relief
- G7: Group of Seven
- GATT: General Agreement on Tariffs and Trade
- LDP: Liberal Democratic Party
- MINUSCA: United Nations Multidimensional Integrated Stabilisation Mission in Central African Republic
- MINUSMA: United Nations Multidimensional Integrated Stabilisation Mission in Mali
- MINUSTAH: United Nations Stabilisation Mission in Haiti
- MOFA: Ministry of Foreign Affairs
- MONUSCO: United Nations Organisation Stabilisation Mission in DR Congo
- NATO: North Atlantic Treaty Organisation
- ODA: Official Development Assistance
- OECD: Organisation for Economic Co-operation and Development
- ONUSAL: United Nations Observer Mission in El Salvador
- RESPECT: Recovery, Employment and Stability Programme for Ex-Combatants and Communities in Timor-Leste
- SDF: Self Defence Force
- UN: United Nations
- UNAMID: United Nations Hybrid Operation in Darfur
- UNAMIR: United Nations Assistance Mission for Rwanda

UNCLOS: United Nations Convention on the Law of the Sea
UNDOF: United Nations Disengagement Observer Force
UNEF: United Nations Emergency Force
UNIFIL: United Nations Interim Force in Lebanon
UNITAF: United Task Force
UNMIL: United Nations Mission in Liberia
UNMISSET: United Nations Mission of Support in East Timor
UNMISS: United Nations Mission in South Sudan
UNMIT: United Nations Mission in Timor-Leste
UNMOT: United Nations Mission of Observers in Tajikistan
UNOSOM: United Nations Operation in Somalia
UNSC: United Nations Security Council
UNTAC: United Nations Transitional Authority in Cambodia
UNTAG: United Nations Transition Assistance Group
WWII: World War II

Low Emission Areas vs. Urban Congestion Taxes

By José Manuel Castillo López*

In most European cities, urban transport is responsible for the majority of energy consumption, the emission of pollutants into the air, traffic congestion and noise, and in the last century we have faced an increase in urban mobility and a growing tendency to use private, as opposed to public transport, and an increase in the number of vehicles. The strictly private economic rationality of citizens explains this trend and the market will regulate it, albeit with largely avoidable social costs of congestion. Supply policies, that is, more and more extensive routes, are those that have been carried out almost exclusively traditionally, but these have been insufficient and, paradoxically, have even caused effects contrary to those intended, in the light of the state of empirical experiences, not to mention the waste of public resources that may be destined for more socially profitable alternative uses. As a consequence, where there is the greatest room for manoeuvre for urban transport policy is found in demand, that is, in the use of available means of urban transport. In recent decades, a good number of partial demand measures have been tried in European cities, such as subsidies for buses and subways, ecological fuels, car-sharing, smart cards, road-pricing, park-pricing, one day without a car, distribution of departure times at the end of the working day, etc. This paper focuses on Road Pricing, pointing out the experiences of the cities in which it has been put into practice but, mainly, examining its economic foundation and the design that should inspire collaboration in terms of achieving a more efficient and socially equitable urban mobility model.

Keywords: Taxes; Automobiles; Highways; Payments; Urban congestion; Polluters.

Introduction: Automobiles, Pollution and Urban Congestion

It is generally known that the growing urban traffic of people and goods generates congestion, accidents and other problems relating to environmental quality in cities and that, however, most trips are made in private cars. In contrast, public transport represents a very small proportion of urban traffic and is, consequently, bares little responsibility for this state of affairs¹.

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¹No studies currently exist with a proven methodology on the possible effects of developments in electronic communications on traffic in the coming years. In any case, some of the national projections that have appeared that ensure a significant reduction in urban automobile traffic lack empirical support. The use of electronic communications that compete with the physical movement of people is today limited to a small number of professionals in the area of services; furthermore, however, it seems that the driving effect that electronic communications have on physical movements is greater than the substitute. In reality, the increase in leisure time that some people

The main reason for the preference shown by city dwellers for private vehicles, to the detriment of public transport, is mainly related to the time cost of each system, without completely ignoring other factors such as privacy, comfort, autonomy and freedom of movement and even in some cases the manifestation of high social status, etc. although of seemingly less importance.

Indeed, in the absence of congestion and segregation of roads, the private vehicle is faster than public transport, both from the perspective of speed reached when traveling and in the waiting times necessary for use, with such advantages apparently far outweighing the higher private cost involved in car use in view of the choice made by a very significant proportion of citizens.

These advantages associated with the private vehicle over public transport have increased among citizens of southern European countries. In recent decades there has been a suburbanisation or emigration from the centre cities to the outskirts and nearby rural areas, emulating the Anglo-Saxon model and opting for the private car as the main form of transportation.

The period of time dedicated to journeys, generally from the home to other locations such as place of work, study, leisure, etc. has traditionally been a decisive argument in favour of the use of individual and private vehicles to the detriment of collective and public transport. For citizens, journeys are considered a waste of free time and, in the case of business owners, as an increase in production costs. However, some technological innovations, such as mobile phones, which can be used during journeys on public collective transport, but not in private vehicles, produce changes in social behaviours, lifestyles and ways of relating with other people, such as walking, cycling on roads and pedestrian areas... and can contribute to the existence of friendlier cities that do not inevitably require very high speeds in the movements of citizens.

On the other hand, erratic infrastructure construction policies, almost the only formula for improving citizen mobility, have actually worsened the situation of urban traffic on many occasions, since they have been revealed as offers that create their own demand. In other words, citizens who, in the absence of a certain infrastructure, had a preference for collective and public transport, now paradoxically opt for the private vehicle due to the transitory advantages provided by this infrastructure. In addition, the increasing construction of extensive roads, in addition to the high public and environmental cost they demand, has a regressive effect, as in the case of Spain, for example, they are funded with broad-based taxes such as Value Added Tax (VAT) or personal income tax, as well as the reduction in spending of a distributive nature on elements such as basic education, healthcare and other social policies.

But the comparison of the results obtained from the application of the cost-benefit analysis in social terms to both modes of urban transport yields different conclusions. To the strictly private costs generated by the private vehicle, mainly related to purchase, maintenance and general use, we must add the incremental private and social costs generated with respect to the alternative of collective transport.

enjoy due to electronic communications is used for the development of various activities that require urban mobility.

Thus, the private car causes costs associated with the construction and maintenance of necessary infrastructures to increase. It also entails additional costs of congestion and other types of urban pollution; that is, private transport occupies more space within cities than public transport and, furthermore, complicates traffic for both private vehicles and public transport, causing loss of time (congestion), greater fuel consumption and, consequently, more urban pollution. For example, an average bus occupies approximately three times more effective space (five times more theoretical space) and uses three times more fuel than the private car, but carries forty times more passengers. Finally, traffic accidents are the leading cause of unnatural death in Spain, as well as handicaps and disabilities in the population. Urban accidents represent 17% of the total and, of these, 73% were suffered by people who were users of private vehicles (18% pedestrians and 9% users of collective and/or freight transport).

The conclusion for the purposes of municipal management is clear and immediate: there would be much less congestion on urban roads, less fuel consumption², less air pollution and deterioration of the health of citizens³, fewer deaths and disabilities caused by traffic accidents etc.; in general, there would be fewer environmental quality problems (collective social welfare) if the use of public and collective transport, such as the bus, the surface tramway, the underground railway, etc., were increased⁴ to the detriment of private vehicle use.

The origins of these approaches in economic science can be found in Ronald Coase, Nobel Prize in Economics, especially in his article "The Problem of Social Cost"⁵ although also in other equally relevant ones such as "The Nature of the firm".⁶

Nevertheless, the pioneering work is "The Economics of Welfare" by Athur Pigou, published in 1920, in which he argues that the existence of negative externalities justifies government intervention by introducing a tax that internalises the social costs generated by the producer.

A marginal analysis of this situation would show that the private cost borne by the driver of a private vehicle using urban roads is less than the marginal social

²From a more strictly economic perspective, saving fuel acquires special relevance for the effects of social welfare in urban life, since it must be taken into account that 99% of this energy is imported, and 40% consumed in urban areas.

³Paradoxically, some of the least studied consequences of urban pollution are those that directly affect the health of city dwellers. A report prepared by the Barcelona Public Health Agency (ASPB) "Assessment of air quality in the city of Barcelona", reveals that in 2018 there were 350 premature deaths in the city attributable to urban air pollution.

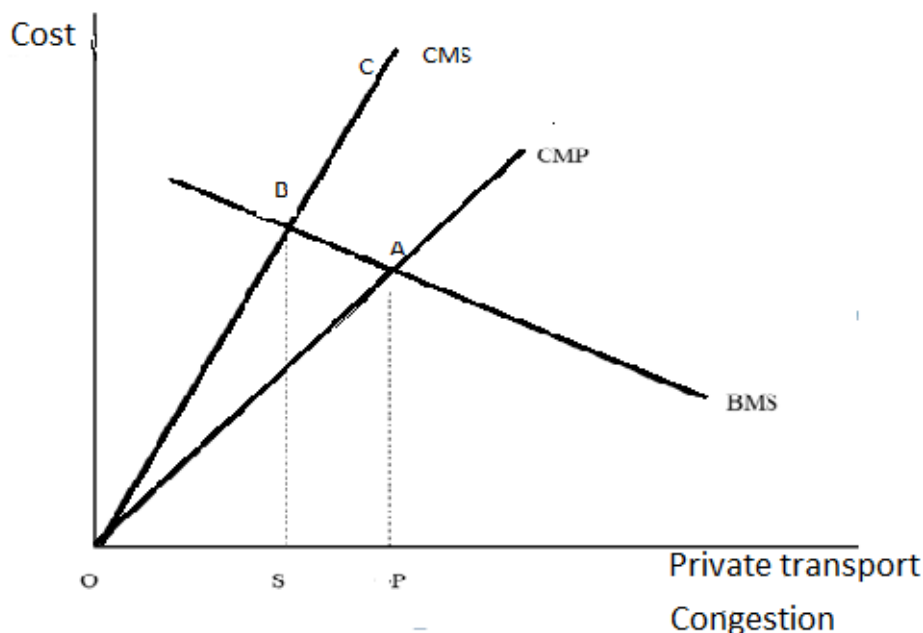
⁴In the London experience the results were: a 35% reduction in average vehicle-kilometre (veh - km) as a measure of traffic flow, determined by multiplying the number of vehicles circulating or remaining in a given area by the average duration of its permanence measured in kilometres, reduction of congestion, on average 30%, improvement of the speed of the urban bus service, reduction of the victims of accidents of traffic between 40-70 per year, reduction of polluting gas emissions in the city by 13% NOx and 16% PM10. See Santos (2008) and Santos & Caranzo (2022).

⁵Coase (1960).

⁶Coase (1937).

cost of using them. This is the main reason why many people prefer private transport to collective and public transport⁷

Graphic 1. *Excess Traffic and Loss of Social Welfare*



Source: Own creation.

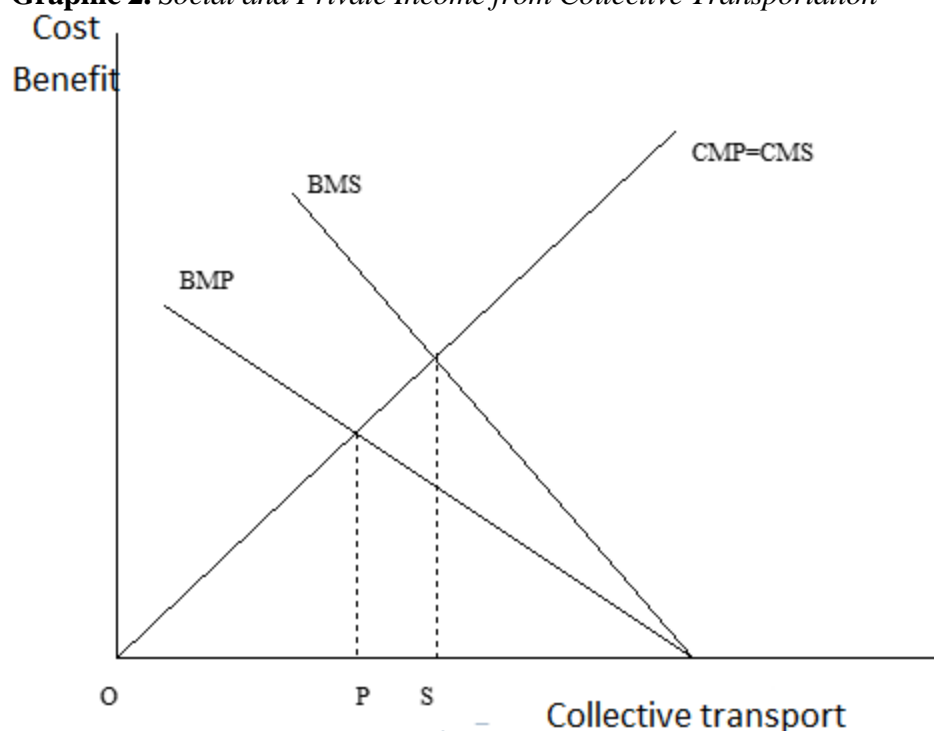
An analysis of the private marginal costs (PMC), social marginal costs (SMC) and the demand for urban transport serve to illustrate the preference shown by many people for the private vehicle to the detriment of collective transport.

The effective level of urban traffic and, with it, of congestion would be lower private vehicle users considered all the costs generated by their choice (OS), instead of considering only the private costs (OP).

If area S-P is excess traffic, the level of traffic P is higher than the socially desirable level and would therefore generate a loss of social welfare delimited by the triangle ABC.

However, when choosing the mode of urban transport, it is necessary to consider all the income generated by collective transport.

⁷The fundamentals and a broad discussion on the negative externalities caused by private vehicles and positive ones coming from urban public transport can be seen in Castillo Lopez, J.M. (1999), particularly p 68-80 and 214-227)

Graphic 2. *Social and Private Income from Collective Transportation*

Source: Own creation.

The marginal social benefit (MSB) of collective transport is greater than the private marginal benefit (BMP) generated for the users of this mode, insofar as it also has benefits for private transport users in terms of less congestion, time displacement, number of accidents, atmospheric congestion, fuel imports, etc.

The most intransigent neoliberal positions, in the framework of the reaction, shows above all what the intervention of the State means in defence of public interests, it being argued that the congestion of urban roads constitutes the most powerful instrument for self-regulation of urban mobility.

It is evident that traffic congestion generally leads to a decrease in demand for urban mobility and, consequently, in private car use, which strongly influences decisions related to mode of transport. However, the existence of urban congestion is a clear manifestation of social inefficiency, which ultimately has a pernicious effect on the quality of life of city dwellers.

Urban transport policy must be able to face the challenge of reconciling the development of economic activities and, in general, the rights of citizens to mobility with respect for the quality of life of all urban centre inhabitants, in the knowledge that this model entails higher private costs than the prevailing conventional model, particularly in the short term.

One of the results of the conventional model of urban mobility is a continual decrease in private car traffic speed in large cities. In other words, the achievement of very *important* technological innovations applied to modern cars, such as the turbo, 16 valves, power steering, four-wheel drive, speeds of 280 km/h, etc., have converted the car not into a means of transportation, but an end in itself, an

indicator of the social status of its owners. Paradoxically, the *old clunkers* from the beginning of the 20th century reached higher speeds through city streets.

With the conventional model of urban transport, traffic congestion is inevitable in cities. The war against traffic jams using only urban measures (bypasses, widening or connecting streets, etc.) is lost before it has even begun. The wider the roads that are built, the more the use of private cars will be encouraged.

The urban transport system is a clear example of supply that creates its own demand. In other words, as the transport system becomes cheaper or better in real terms (faster, safer and more comfortable roads, increase in the real income of citizens, etc.), the number and length of journeys demanded by citizens will increase.

However, in addition, the particular case of large roads built on the outskirts of cities has an influence on the fluidity of urban traffic that is less positive than that attributed by official propaganda. In reality, with greater weighting than desired, these constructions are motivated more by the prospect of certain politicians appearing in the inauguration photo than by the real improvement they will bring about in urban traffic.

As in fluid dynamics, speed is limited by the narrowest section of the tubes through which it runs. In the case of vehicles, their real speed will be conditioned by the most conflictive intersection, by the most congested street, etc., through which they are obliged to pass.

That is, the destination of the traffic is the centre of cities and the current inadequacy of their streets for the simultaneous circulation of a large number of vehicles (narrowness, intersections, double parking, etc.) are the main causes of urban congestion.

But, on the other hand, it would be tremendously difficult to reform our current cities and articulate our urban mobility model around streets that serve both for pedestrians to walk or for children to play that have a pleasant appearance, etc, and, in addition, that facilitate fast road traffic.

In conclusion, at present the only socially viable way of having a significant effect on reducing congestion caused by vehicular traffic is to encourage (positively and/or negatively) citizens to use fewer private cars when travelling in the centre of cities. In other words, a sustainable transport policy in the urban environment requires initiatives aimed at changing social habits, transferring users from private vehicles to collective transport, by penalising the use of private vehicles and, in addition, supporting the means of more energetically and socially efficient collective transport.

‘Road Pricing’

Along with solutions based on direct regulations, above all, the prohibition of unauthorised private vehicle traffic in certain areas or the mandatory use of catalytic converters, silencers, etc., measures have also been suggested that encourage changes in certain social habits, in particular the staggered entry and exit times of company employees, shared cars, location of activities, etc. In the

same way, a good number of economic-financial instruments have been proposed, which discourage the use of the private automobile.

In 1992, the European Commissioner for the Environment promoted the beginning of an intense debate about the problems caused by urban vehicle traffic and, consequently, to seek solutions to them. *The Network of Car-Free Cities* is framed in this context

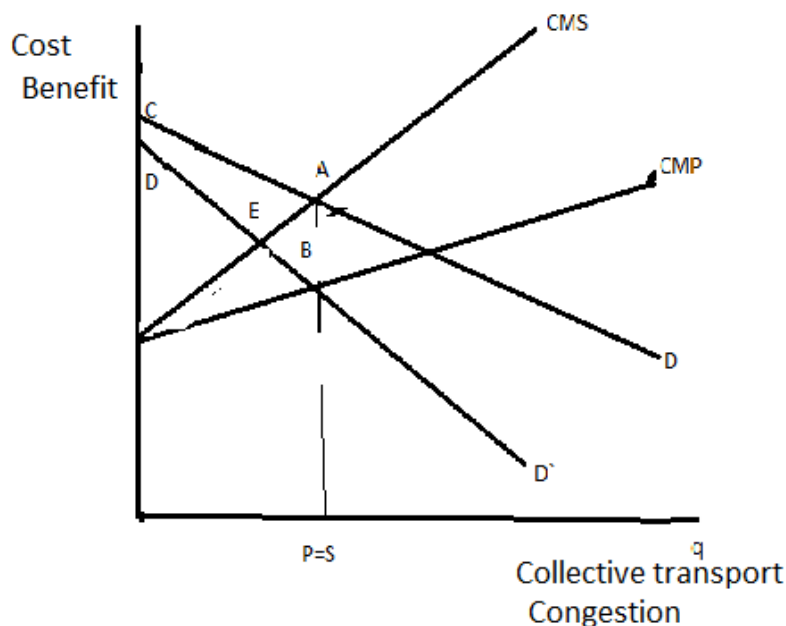
The first Car-Free Cities Conference was held in Amsterdam in 1994 and the second in Granada in 1995.

In these and other European cities, innumerable practical projects are being carried out aimed at promoting sustainable mobility in an ecological context favoured by a reduction in individual and private car use.

At present, many large cities are testing instruments and numerous other projects including cycle lanes, bus subsidies, ecological fuels, pedestrian zones, *car - sharing*, *smart cards*, *road-pricing*, *park-pricing*, *bus-taxi lane*, *a day without a car*, environmental suitability inspection, surcharge and/or rebates on fuels, catalytic converters and mufflers, incentives for the use of electric cars, distribution of departure times at the end of the working day, and information panels on the traffic situation, centralised control of traffic light regulations, and not only by periods of time, reservation of lanes and other incentives for the use of shared cars, alternatively managing car access to city centres depending on the even or odd nature of the license plate, including an absolute prohibition on circulation in certain areas, information panels on the traffic situation, laptop installations in vehicles that could indicate the route less congested to carry out a certain journey at each moment, etc..

Traffic restriction measures in certain areas, for example, through the lowering of emissions by reducing the number of vehicles that can access daily, or the prohibition of those that are more polluting, suffer in the short term from economic inefficiency because they fail to consider differences in evaluating the access needs of different groups of drivers, but also in the medium term as license plate restrictions are circumvented by purchasing other vehicles that, being even older, are more polluting. Low emission zones also lose efficiency in terms of spatial traffic congestion, although they gain in terms of reducing atmospheric pollution. On the other hand, they provide a dose of regression to the system because only the wealthiest people have the economic capacity to replace traditional vehicles with less polluting ones.

The alternatives in terms of the use of economic-financial instruments are based on the fact that although quality of service is a very significant variable in the modal distribution of transport, the monetary costs perceived by private vehicle users (fuel, tolls, parking fees, etc.) can also contribute to modifying the demand for the different types of urban transport available.

Graphic 3. *The Alternative of the Contraction of the Demand*

Source: Own creation

A demand restriction policy could achieve socially optimum vehicle circulation by eliminating excess traffic ($P=S$), as can occur with the use of Road Pricing, which is shown in Graphic no. 2. This option eliminates the loss of social welfare caused by Road Pricing (ABE area) but generates another loss of welfare measured by the area (AEDC area) caused by the different assessment that drivers have of access to the restricted area. Therefore, the pricing system is more efficient than that of access or demand restrictions.

The possibility of discouraging private vehicle use has been suggested, above all, through higher fuel prices, with which some drivers would probably change their means of transport. But the convenience of rationally managing scarce resources is evident, including of course, the precious time of citizens. But more specifically, the marginal social cost of the automobile in terms of air pollution and, above all, congestion, is variable throughout the day and it would be tremendously difficult, and it is indeed currently impossible, to carry out a parallel graduation of the price of fuel used at every moment.

There are simple fare systems such as payment for the mere ownership of a resident vehicle in a population modulated according to its characteristics, the single payment for registration, the purchase of cards or badges that permit driving and parking in a certain area, etc. which all have a collection effect but a negligible influence on congestion and air pollution, since these payments do not depend on the length of time the vehicle remains in the area or the distances travelled.

In Spain, the use of articulated standardised environmental charges, for example, in relation to what are generically referred to as use bonuses or annual single payments, such as our current Tax on Mechanical Traction Vehicles (based on the capacity and power of the vehicle), or the Tax on Certain Means of

Transport (former registration tax), is insufficient for drivers to internalise the full social cost generated, that is, where, when and how the vehicle was used.

Other urban toll systems, such as those established in London, Stockholm and Oslo, mandate fixed rates so that cars can access certain areas of the cities, and cameras are used to link vehicle registration plates with their corresponding owners, who are fined where they fail to pay the corresponding rate, do not discourage private vehicle use either.

These drawbacks can be avoided, at least in part, with an economic-financial instrument that is extraordinarily flexible, selective, in short, efficient and suggested some time ago, but only the recent developments of *ad hoc telematic systems* are making its application possible. It consists, in general, in the use of a tariff system that penalises the use of the automobile in proportion to the social damage it causes.

Together with type of car, driving mode, etc., the social damage caused by urban road traffic congestion is a case of possible congestion, that is, the external cost is practically zero when urban roads are quiet, but when they are congested the negative externalities are manifest.

With circulation in very clear streets we are in the presence of a pure public good. There are no externalities and, therefore, charging prices for driving on the streets would be inefficient. But once congestion occurs, if there are negative externalities for the vehicles that join traffic it would be socially efficient to charge drivers who circulate in that period of time, that is, during rush hours.

The price mechanism can encourage drivers of private vehicles to behave more ecologically, by rationalising use, taking into account the existing levels of congestion in each place and period, redistributing the demand for public space in the different areas, cities and over time, through due payment for the negative externalities they produce, that is, for the additional congestion they cause.

Road Pricing management requires the installation in private cars of transmitting devices, along with receivers strategically placed throughout the urban network. Receiving devices could show where and for how long each car drove. Periodic checking of these devices would allow motorists to be charged the exact price for the social cost incurred at each time the car was used.

The three types of technology tested for electronic tolls have been microwave and infrared in some cities of Andalusia and the United Kingdom, GSM (Global System for Mobile Communication) and GSP (Global Positioning System, tested in Switzerland).

There has also been the proposal, without knowing its empirical evidence, of a fixed emission calculator installed in the vehicle, that will also estimate emissions caused depending on model, driving mode and time.

Recent technological innovations substantially facilitate the relatively easy establishment of new urban toll systems, in particular, through satellite positioning coupled with the development of C-V2X1 communications.

C-V2X1 (Cellular-Vehicle-to-Everything) is a communications system capable of connecting vehicles to each other and institutions in their environment. This technology, accompanied by the development of the 5G network supported by satellite positioning, will allow direct communication in real time between

connected. In this way, vehicles and public institutions will have the ability to send and receive information instantly, including the identification of vehicles, their location and due and corresponding payments.

Although it is already technologically possible and economically efficient to establish *Road-Pricing* in the urban area, numerous issues, such as the system of exemptions, bonuses, treatment of vehicles belonging to citizens who do not live in a certain city and, even more so, in the case of foreigners, the presumed double taxation generated by inventories of other figures that tax use by automobiles of urban roads, etc., must be resolved before proceeding to the demand with the rigor that its indisputable legitimacy and social justification requires.

In some countries, such as Spain, there are taxes that are levied on mere ownership of the car or the act of its registration, which is why some people allege possible double taxation. No. Road Pricing does not record these taxable facts, but ranks the damage caused by the use of the car through its characteristics.

In order for Road Pricing to be efficient, the rate structure must consist of at least two sections:

One fixed for each car, which depends on:

- a) Type of energy used.
- b) Physical characteristics of vehicle (age, size, power, etc.)
- c) Adequate maintenance and technological adaptations that reduce the different manifestations of pollution (catalysts, silencers, etc.).

Another variable that affects the effective use of the car, depending on:

- a) Busy urban areas.
- b) Hours of the day.
- c) Distances travelled and parking time.

A system of this type allows citizens to rationalise the use of the private car by internalising the social costs generated by its use and, with it, a reduction in the global social cost caused by air pollution and congestion on urban roads.

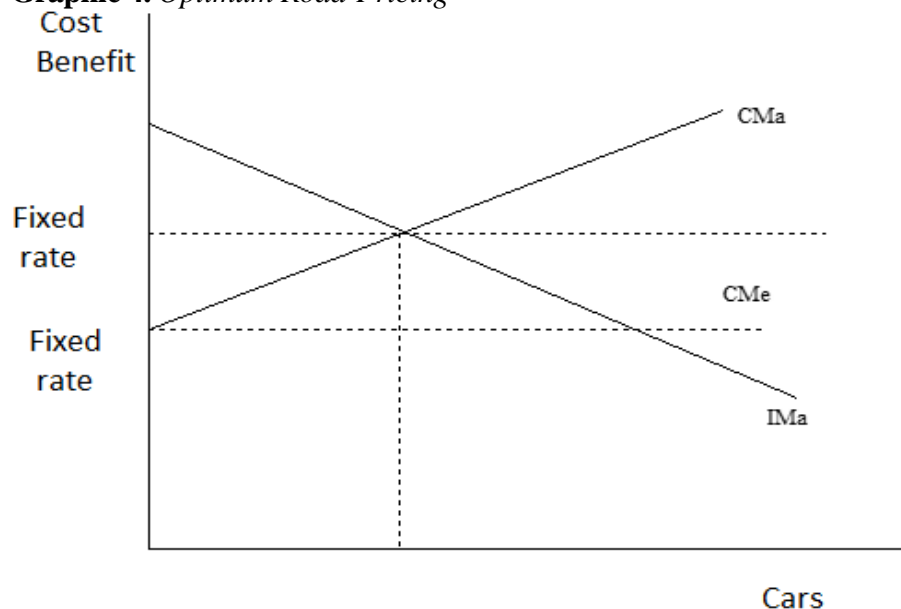
The double rate structure of Road-Pricing proposal will allow users of private cars in urban areas to be charged the total social cost caused by this type of traffic; that is, both the cost of infrastructure, maintenance and operation and the cost of congestion and pollution.

The fixed rate, variable depending on vehicle characteristics, will be calculated as an average of the total monetary cost indicated divided by the number of users (standardised units).

Given that infrastructure costs and, to a lesser extent, maintenance and operational costs do not depend on degree of use, it may be that a marginal cost pricing system, although contributing to efficiency in its use, is insufficient to fully cover them. For this reason, in this case, the fixed rate per type of vehicle calculated at average cost guarantees financial sufficiency.

The variable section of the rate must serve to compensate for the excess of the marginal cost over the average cost, that is, that which corresponds to the marginal social costs caused by congestion and pollution.

Graphic 4. Optimum Road-Pricing



Source: Own creation

As congestion and contamination of a certain capacity and/or infrastructure can cause very significant oscillations in both time and space, changes in the average level of the rate do not guarantee the achievement of the objectives pursued and, can even cause inefficiency and distortions in the yields obtained from the different modes of transport and/or types of private vehicles. Therefore, an efficient and effective tariff requires adequate temporal and spatial modulation.

There are some who uphold that the application of Road Pricing in urban areas can cause regressive distributional effects⁸. More often than not, the *polluter pays* principle becomes *whoever pays has the right to pollute*.

The result of Road Pricing is clearly regressive for drivers of private vehicles, but the effect on all road users is not predetermined, since it will favour users of collective public transport. Therefore, in order to obtain a correct evaluation of this public action, it is necessary to examine it case by case and type by type and, in addition, also analyse the distributive effect of the public expenditure that is financed, where appropriate, with the collection obtained by the establishment of this levy without forgetting, of course, the effects on former car users who will be transferred to collective public transport.

⁸The fairness of establishing traffic tolls in the urban environment has been investigated by many authors, including Richardson (1974); Izquierdo & Vassallo (2001); Villegas (2001); Ferrari (2005); Franklin (2007); Schweitzer & Taylor (2008); Zhicai, Qingyu, Zhongning & Hongfei (2008); Lauridsen (2011); Ortega Hortelano (2014); Muñoz Miguel & Anguita Rodríguez (2019); Santos & Caranzo (2022).

In fact, there will be a segregation of traffic by quality levels: a payment network, with less vehicle traffic and its consequences, among which the shorter time needed to move from one point to another in the delimited area particularly stands out. On the other hand, there is the a free secondary network with lower effective circulation speed and longer journey time to go from one point to another of this delimitation.

But the indisputable negative consequences on equity caused by the implementation of this type of economic-financial instrument should not serve as the only pretext to disqualify its probable implementation. This presumed detrimental effect should only alert us to the necessity of accompanying its implementation with complementary measures (greater public subsidies for collective transport, greater housing subsidies for people with low level incomes, subsidies for the installation of measures to surround homes located in certain areas, etc.). In summary, with the collection obtained through Road-Pricing, the competent Public Administration can obtain extraordinary financing with which to attempt to mitigate the pernicious effects the circulation of vehicles on urban roads causes to citizens, including those produced on the drivers themselves.

Complementary Measures to Road Pricing

In summary, the aforementioned institutional possibility as well as, by its very nature, the frequent mobility between municipalities of private vehicles, advise the creation of a new regional or local tax, subject to the appropriate agreements for the management thereof and, above all, the necessary compensation in order that municipalities do not see their sources of financing diminished.

The repeatedly manifested growth of social awareness of city dwellers as regards urban ecological problems and, consequently, the willingness to voluntarily accept individual sacrifices and some immediate inconveniences for the sake of the quality of collective life and a sustainable urban development model should not serve as a stimulus or justification to public managers for the adoption of unconnected or fragmented, and therefore ineffective, measures, which would in reality only serve to undermine the invaluable capital afforded to urban policy by existing social awareness and predisposition.

For example, the mandatory use of cleaner energies, catalytic converters, other installations and/or devices in automobiles, etc., may lead to substantial improvements in the state of air pollution, but would not mean any progress in other aspects of urban pollution such as noise, visual obstacles to the movements of citizens, accidents, in short, in the invasion of vital space.

Likewise, for example, the entry into operation of urban buses that are comfortable, modern, clean, fast, etc will have a very limited effect if measures are not simultaneously adopted on private transport that prevent it from hindering the development of this collective transport.

The delimitation of public pedestrian or residential areas without cars, in order for them to continue fulfilling their traditional functions, in particular, places of rest, meeting and market, however, must be complemented with the urban

design of access roads to those that are equally necessary, such as a system of dissuasive car parks, properly managed and located on the outskirts, with public transport shuttle lines, etc.

International Experiences

Tax Figures Established in the World

Although the theoretical background and first attempts of primary figures of urban tolls on the circulation of private vehicles are older, the first experience of the establishment of a measure similar to Road Pricing took place in Singapore in 1975.

It consisted of the payment of a congestion charge for those vehicles that wanted to access the city centre between 7:30 and 9:30 in the morning.

Similar figures have also subsequently been established:

In Hong Kong between 1983-1985. Electronically controlled road pricing, Cancelled.

In 1986 in Norway the "Toll ring" of Bergen. Manual system for circulation in a delimited area between 9 and 10 in the morning.

In 1989 in the Italian city of Rome.

In 1990 in the Swedish city of Oslo, entrance toll, and in 1992 in Trondheim, toll at peak hours.

In 1994 in Stuttgart.

In 1997 in Leon toll for driving in certain areas, variable at peak hours.

In 1997 in Norway in the city of Kristiansand.

In 1999 in Santiago de Chile.

In 2000 in New Jersey. Electronic system with variable rate in the hours of the day.

In 2001 in New York, Variable loads in bridges and tunnels.

In 2001 in Stavanger, a city in Norway.

In 2002 in the city of Durham, in the United Kingdom.

In 2003 in London. Daily payments for access to certain zones.

In 2006 in Stockholm, through a referendum.

In 2007 in La Vellella (Malta).

In 2008 in Milan (Italy). Payments for access to a certain zone.

In 2009 in Mexico City.

In 2013 in Gothenburg (Sweden).

In 2019 in New York.

In 2020 in San Francisco (USA).

Most of the evidence examined shows that the objectives achieved by urban congestion tolls and Road Pricing in particular have been and currently are the reduction of circulatory congestion and the environmental problems associated

therewith and, finally, the improvement of collective, mainly public, transport services and the frequency of their use by citizens.⁹

Thus, the available empirical evidence globally shows an initial resistance to the establishment of Road Pricing by some business groups and residents, but in the medium and long term this decreases substantially, given the obvious environmental improvements and reduction in congestion it entails. This resistance is more persistent over time in those groups that have their usual origins, destinations or transits in the area, without the possibility of altering them. On the other hand, its social acceptance increases substantially if the collection of public funds provided by road-pricing is finalist in nature and used to improve the public transport system, which must inevitably be in deficit from a financial point of view.

Public acceptance towards its implementation is not easy, but experience shows that, in the medium and long term, it is achieved thanks to the environmental and congestion improvements generated. In any case, for said acceptance it is essential that the income generated by the urban toll be dedicated expressly and with the appropriate public information to the improvement of the collective and public transport system.

In some of the experiences examined, cars are charged based on the time they spend within the delimited area and in others a fixed rate is even paid independently of that period of time, which favours and simplifies management but substantially reduces its positive effects on congestion and associated environmental problems.

This simple system can improve its efficiency if the rate for time spent is modulated according to the exact hours of the day and also by establishing different rates depending on the day of the week.

The Institutional Framework in Europe

The first reference on the need to implement urban toll systems, as a decisive management instrument to address the problem of congestion and poor environmental quality in large cities around the European Union (EU) is clearly stated through the White Paper of the Commission of the European Community: "European transport policy for 2010. The moment of truth 2001", p. 94.

Later, through the EC Green Book of 2007 "Towards a new culture of urban mobility", there was a development of the urban toll system through the study of available technologies for its application, methodologies for calculating rates that internalise the external costs caused by vehicles, levels and clauses for social acceptance, effectiveness of these instruments, etc. which materialised through a set of European projects financed by the European Community that sought to explore technical, financial, political and social aspects related to the execution and implementation of this type of system, some examples being: Europrice, Progress, Cupid and Curacao.

⁹Rotaris, Daniel, Marcucci & Massiani (2010); OCDE (2022).

One such policy aimed at reducing the volume of emissions caused by vehicle traffic and currently implemented in more than 220 European cities in 14 countries is the delimitation of low emission zones (LEZs), which generally consist of prohibiting the movement in certain urban areas of vehicles that do not meet technical characteristics that guarantee that a maximum level of emissions is not reached as a whole¹⁰.

In summary, the procedure of the proposal consists in the fact that in order to drive through a low emission zone, vehicles are obliged to display a "green" badge, otherwise drivers will be penalised.

To date, low emission zones have been established in 60 European cities in Spain, Germany, Belgium, France, Italy, the United Kingdom, Denmark, Finland, the Netherlands, Norway, Portugal, Sweden, Latvia, Hungary, Romania, Bulgaria and Ireland.

For the establishment of Road Pricing, it is essential to previously delimit the low emission zones, which would technologically justify them and also serve as a spatial framework for their application.

Experiences in Spain: Low Emission Zones and Urban Tolls for Private Vehicles

In Spain, low emission zones have been established in Barcelona and Madrid.

A) Barcelona

The Rondas de Barcelona low emission zone encompasses the municipalities of Barcelona (except for the Industrial Free Zone and the Vallvidrera, Tibidabo i les Planes neighbourhood), l'Hospitalet de Llobregat, Sant Adrià del Besòs i parts d'Esplugues de Llobregat and Cornellà de Llobregat.

As of January 1, 2020, the movement of vehicles that do not display a green badge provided by the General Direction of Traffic (DGT) is prohibited, from Monday to Friday and from 7 a.m. to 10 p.m.

However, the most polluting vehicles can request daily circulation authorisations and others that require longer periods can do the same, such as those for people with reduced mobility, public services (firefighters, police, refuse collection, etc.),

The Metropolitan Registry is a service of the Barcelona Metropolitan Area (AMB) that allows the registration of the most polluting vehicles to request daily circulation authorisations, as well as enjoying other exceptions and authorisations. Registered vehicles will be able to circulate in any low emission zone in the metropolis of Barcelona with a simple procedure

The Metropolitan Council of the Metropolitan Area of Barcelona definitively approved the modification of the Fiscal Ordinance regulating the Fee for the metropolitan management of Low Emission Zones and its entry into force on January 1, 2022, in accordance with the provisions of article 17.3 and 17.4 of

¹⁰Croci (2016).

Royal Legislative Decree 2/2004, of March 5, which approves the consolidated text of the Law Regulating Local Treasuries,

A significant number of citizen and environmental organisations have presented a proposal for an urban toll for Barcelona this month. The suggestion is very specific: four euros to be able to circulate (with exceptions) and a period of two years to initiate it.

The project has been promoted by several business, citizen and environmental institutions of Barcelona, among others, by the Platform for Air Quality, Transport Promotion Pública, Ecologistes en Acció, Eixample Respira, the Bicicleta Club de Catalunya, the Xarxa per la Justícia Climate and the Prevention Association d'Accidents de Trànsit, and the Polytechnic University of Catalonia (UPC) has been entrusted to carry out the cost and benefit calculation models.

The Barcelona 2022 urban toll project for the city of the same name, in summary, is a proposal that contemplates a daily rate of 4 euros to drive through low emission areas from 7 a.m. to 10 p.m., Monday to Sunday, with the exception of those vehicles that circulate with 3 or more occupants. It is not controlled through the installation of entry and exit barriers in the low emission zones but through cameras, and collection is destined towards improving public transport and healthcare.

This rate would apply to both residents and non-resident drivers in Barcelona.

According to the study by the Polytechnic University, the application of this toll would reduce traffic in Barcelona by 25.1. In addition, it would translate into 370 million euros of net income that should be used, according to the proposal, to "improve collective public transport and the public health system."

The results of a survey carried out by the Office of Social Studies and Public Opinion (GESOP) at the request of environmental entities, show that 51% of the citizens of the metropolitan area would be in favour of applying the urban toll.

In summary, this project is a hybrid system between direct regulation supported by the determination of low emission zones with prohibitions and entry control and taxes. In general, the regulations on circulation permits and prohibitions are effective because they are simple to apply, but once the established amount has been paid, it does not encourage less use of vehicles as taxes, that is, the payment based on the actual car use in a certain area constitutes a constant incentive, since the amount to be paid will be lower the less the vehicle circulates.

B) Madrid

Madrid ZBE is a Low Emissions Zone that seeks the progressive restriction of access and circulation to all vehicles with an A environmental classification, according to their polluting potential (which cannot obtain an environmental badge), throughout the municipal area.

The sustainable mobility ordinance that regulates Madrid ZBE was approved on September 22, 2021 with a transitional regime, by which it is applied progressively from January 1, 2022 to December 31, 2024. The Agents of the authority monitor and penalise improper access to the interior of the M30 motorway and circulation through Madrid ZBE from January 1, 2022. The photo-

network devices located on roads inside the M-30 will denounce improper access to Madrid ZBE from January 1. May 2022. Madrid City Council plans to install a camera system on the access roads to the part of the city located inside the M-30.

Unauthorised access to the Madrid Low Emission Zone (ZBE) constitutes a traffic offense that is penalised with a fine of between 90 and 200 euros.

The New Institutional Framework for the Establishment of Road Pricing in Spain

The publication of The Law on climate change and energy transition and the draft of the Sustainable Mobility Law represent a new institutional framework for the establishment of low emission zones and taxes on urban traffic congestion.

Law on Climate Change and Energy Transition and the Draft of the Sustainable Mobility Law

Law 7/2021, of May 20, on climate change and energy transition, in its article 14, Promotion of Mobility without Emissions, establishes, among other points, that municipalities with more than 50,000 inhabitants and island territories will before 2023 implement sustainable urban mobility plans through the introduction of mitigation measures, that is, preventive actions that reduce the emissions caused by vehicles, which include low emission zones.

The Law understands low emission zone as the area delimited by a public administration, within its territory and within the scope of its powers, the establishment of restrictions on access, circulation and parking of vehicles in order to reduce greenhouse gas emissions, and thereby improve air quality.

This Programme is financed in part by the European Union, Next Generation EU EDN within the framework of the Recovery, Transformation and Resilience Plan, approved by the European Commission on June 16, 2021 and by the Spanish Government on July 13, 2021.

In Spain there are 149 municipalities with over 50,000 inhabitants, and as of October 31, 2022, only a few of which have their ZBE regulated and active, and according to the Spanish Federation of Municipalities (FEM) forecasts, fewer than 20 population centres will have their ZBE active by January 1, 2023.

In fact, together with the cited cases of Madrid and Barcelona, only Valencia, Bilbao, Seville and Valladolid have their ZBE active.

For the first time, the draft of the Sustainable Mobility Law enables municipalities of towns with more than 50,000 inhabitants to “introduce a fee for the circulation of private vehicles in low emission zones.

Although the norm will be state-wide, within its powers, it allows municipalities to delimit tax elements, such as bonuses, tax rates, exemptions, etc.

On the other hand, with the avowed purpose of reducing the emissions produced by motor vehicles, Additional Provision 7 creates the rate for Special Use of Low Emission Zones, and Final Provision 2 modifies Royal Legislative

Decree 2/2004, of March 5, which approves the Consolidated Text of the Local Treasury Law.

The Question of the Tax on Mechanically Drawn Vehicles and the Tax on Certain Means of Transportation (ivtm)

The taxes configured by the state law of compulsory levy must necessarily be required. However, local entities have the capacity to modulate the volume of tax resources by regulating specific aspects of local taxes, both voluntary levy and mandatory levy, under the terms and conditions established by state law. Thus, they may set the type of tax or establish some tax benefits, within the limits of the law.

The Tax on Certain Means of Transportation

The Special Tax on Certain Means of Transportation is a state tax of an indirect nature, regulated in Title II of Law 38/1992, of December 28, on Special Taxes (hereinafter LIE).

Since its creation, the IEDMT (Tax on Certain Media of Transport) has undergone a series of modifications. But the regulatory regulations of the IEDMT have been undergoing transformations in such a way that this Tax currently no longer only records the economic capacity of the holders, but also attends to environmental considerations, depending on potential CO₂ emissions, based on vehicle characteristics.

Among the modifications are the so-called *Renove* and *Prever* plans that have constituted tax incentives for the purchase of new vehicles and the scrapping of old ones, by reducing the fee for this tax, for which they have had a favourable impact on the environment.

The Tax on Mechanically Drawn Vehicles

The Tax on the Value of Mechanical Traction Vehicles (IVTM) is a local tax, which with its current name was created by Law 39/1988, of December 28, Regulating Local Treasuries, and began to be required from 1990, substituting the old Municipal Tax of Circulation of Vehicles. It is a direct tax that taxes the ownership of vehicles of this nature, suitable for driving on public roads, whatever their class and category.

Regarding the allegations of possible incompatibilities or double taxation with the Mechanical Traction Vehicle Tax, obviously it does not occur while the taxable event of this tax is constituted by the mere ownership of mechanical traction vehicles suitable for circulation on public roads, whatever their class and category.

The Commission of Experts appointed by Agreement of the Spanish government of July 5, 2013 for the reform of the tax system carried out a comprehensive analysis of said system. Regarding the IEDMT and the IVTM, it advised reform according to the following criteria: explore the future introduction of a tax on the use of vehicles that can replace most of the taxes, and that takes into

account the distance travelled and discriminates by type of vehicle, place and time of use.

In other words, replacement of the IEDMT and IVTM taxes by a tax with two sections, a fixed variety, depending on the characteristics of the type of vehicle (power, size, fuel, etc.) and another variable depending on the pollution caused, measured by the time of circulation and parking of the vehicle through the Low Emission Zones (ZBE), hours of the day and day of the week, that is, with the general characteristics of Road Pricing mentioned above.

Conclusions

The problem of quality of life due to the urban traffic system is multifaceted (social). Therefore, the policy on the mobility of citizens in this area, if it is to be effective, must combine: urban design measures that put the health of citizens first; the adoption and installation of the advances that new technologies can bring to urban traffic management; actions aimed at improving knowledge and the consequent social awareness of the consequences of the deterioration of the quality of urban life; positive incentives (tax relief, forgiveness of municipal pecuniary obligations) and negative incentives (fines, taxes, etc.) in order to take advantage of the economic rationality of the inhabitants of the cities, and, finally, in those cases in which the effects could be extraordinarily harmful, irreversible or whose solution would require very expensive investments, mandatory regulations (catalysts, cleaner energies, etc.), zones and hours prohibited to traffic, etc., of course, with an adequate control and sanctioning apparatus thereon.

It is foreseeable that Road Pricing, such as that set out above, will presumably contribute to a reduction in traffic, an increase in the speed of circulation, with the consequent reductions in spatial occupation, accidents and both acoustic and atmospheric pollution; in short, it will contribute a higher degree of social efficiency to urban mobility.

In addition, this tax will also provide the urban mobility system with a dose of equity since collection, if it is configured as final, can be used to finance collective transport that has still been financially deficient, if it is intended that it be ecological, fast, safe, with convenient periodicity, etc.

These forecasts have been confirmed, at least, in those places where they have been put into practice, including Singapore¹¹, Stockholm¹², Gothenburg¹³, London¹⁴ and Milan, and even the forecasts produced by the mathematical models elaborated on the hypothesis of their establishment for the Madrid case¹⁵.

In short, they involve urban design measures that facilitate the transition from favourable attitudes to positive actions. In this process, the coordination of the greater efficiency presented by economic-financial instruments and the advantages

¹¹Christainsen (2006).

¹²Eliasson, Hultkrantz, Nerhagen & Rosqvist (2006).

¹³Börjesson & Kristoffersson (2015).

¹⁴Buckingham, Doherty, Hawke & Vitouladiti (2010) and Santos (2008).

¹⁵Muñoz Miguel (2012).

in the control function offered by the city would play a prominent role in terms of direct regulation, especially in extreme situations.

The only intention behind partial measures is to justify and exhibit an extremely recent self-assigned environmentalist vocation of some Administrations, but which, in reality, will only serve to undermine and waste the capital that the current and positive social attitude in this regard supposes.

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News and Perspectives of Public Law

*By Elena Emilia Ștefan**

Since the earliest classic division of law into public law and private law, envisioned by the 3rd century Roman legal expert Ulpian, interdisciplinarity as a fundamental feature of the law has currently become noteworthy. The recent exceptional pandemic situation that we have faced, which can easily be regarded as “crisis,” has revealed once more that reference to society can only be made by resorting not only to law but also to ethics and morals. Public authorities have often found themselves in the position of making administrative decisions for the population, objected by the great majority, as fundamental rights have been restricted for short periods of time. This paper addresses a current topic of interest, namely Considering interdisciplinarity, can we speak nowadays of a new public law? If so, what should we do with the old law? Should we discard it or rebuild it? These questions are answered herein by using research methods specific to law, in order to emphasise the conclusions according to which the measures for good administration carried out by public authorities must express both the letter of the law and the spirit of the law, taking the general interests of society into account.

Keywords: *Public law; Public Interest; European Ombudsman; Maladministration; The Venice Commission.*

Introduction

Humanity is going through a period of full changes that are unique due to their unpredictability. At the same time, however, such changes are wonderful because they challenge us to relate to the environment not as a “given” (le donné), but as a “construct” (le construit) - by means of the contribution of each and everyone. Moreover, it is necessary for decision-makers, national public authorities or institutions or even any official body of the European Union to offer citizens the required and necessary guarantees that their rights be preserved. In this respect, we believe that two of the rights regulated by the Charter of Fundamental Rights of the European Union: art. 41 - *Right to good administration* and art. 47 – *Right to an effective remedy and to a fair trial* are intertwined with the responsibility of ensuring a high level of environmental protection and quality improvement, as per art. 37 – *Environmental protection*.

Furthermore, for theorists and practitioners of law, the appeal of the period we are going through reveals a shade of the law noted by distinguishing the phenomenon of imminent dangers for individual persons as well as for species. This period is appealing because it obliges us *simple* individuals or representatives of the people or of the planet to resort to that state of individual conscience we

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possess to help by contributing to build a state of responsible collective conscience. The state of danger, the possibility of losing health or even life can generate a leap of faith to find solutions for coexistence, even in these perilous conditions. Similarly, of mention is the opinion of the doctrine according to which:

'before being a normative reality, law is a state of conscience, in the sense that the changing needs of society [...] are not transposed tale quale into the language and content of the law; they pass through the conscience of the legislator (or of the people if it is a habit), followed by a process of evaluation, valorisation and final exploitation by means of the legal norms¹'.

Considering the general background described above, this paper intends to reach a broad scope to answer specifically the following question:

Is there any change of validation for the theory of the classical division of law perceived by Ulpian, according to which law is divided into public law and private law, given that at the time interdisciplinarity is increasingly taking shape?

The structure of this paper concerns the emphasis on the practical applicability of certain concepts, such as administrative acts, maladministration, administrative liability and more. Furthermore, the paper is drawn up in a personal manner and structured so as to combine information of the national doctrine with that of comparative law along with an interdisciplinary nature. Among the scientific research methods used, the computer, comparative or deductive logical methods stand out. These are necessary in the sections where case studies from French law or from the European Ombudsman's case studies were presented, precisely from the perspective of formulating the conclusions reached in this study, following documentation carried out on the topic.

General Matters – Reassertion of Common Values

The hypothesis from which we start in this analysis is based on the idea that, on the one hand, we cannot currently speak of national law without taking into account international public law and, on the other hand, national law in general cannot exist outside the *acquis communautaire*. In support of this idea, we mention, for example, that there are international legal instruments for the defence of the rights and freedoms of citizens, such as conventions, agreements, treaties, etc. There are forms of associations between states. There are common values and principles. But there also exist supranational mechanisms to verify compliance with the rule of law². Especially current in this context is the opinion expressed in the doctrine according to which:

¹See Popa (2020) at 58.

²We do not detail in this paper for example, Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

*‘one of the most difficult problems standing in the way of the fulfilment of the rule of law: to find the most effective procedural ways to make state bodies which, directly or indirectly, have the power of coercion in order to make citizens to comply with the law, to find themselves in the situation of being bound to comply with them’.*³

Perhaps more than ever, humanity faces this reality: the obligation to identify legislative solutions for the time being as well as for future generations along the fine lines between law, ethics and morality. This is why the drafters of international legal instruments, which will subsequently be reflected in national legislation must show great wisdom in proposing those measures that safeguard the present as well as the future on the one hand and, on the other hand, that guarantee the existence of the rule of law.

The values the European Union is founded upon are provided in art. 2 of the Treaty on the European Union -T.U.E.:

‘the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’

Therefore, these values have already entered the collective mind and we cannot fail to emphasise that, in addition to law, the recent exceptional pandemic situation has also emphasised the reassertion of fundamental ethical values such as respect, integrity, liability or responsibility.

In recent years, there has been a development in some areas of society that call for urgency and maturity in administrative⁴ decisions that cannot exist in the absence of a common political power at the supranational level. For example, the health crisis generated by the COVID-19 virus has overlapped with other events, such as the humanitarian crisis generated by the outbreak of a war on the borders of Europe and, at the same time, with the environmental crisis generated by irreversible climate change. All these have a wide spectrum of action, emerging from such current realities, because they have consequences for all people who make up the population of the planet on all continents.

Therefore, with good reason any normative action plan can only be developed under the observance of the fundamental rights, as provided by the Charter of Fundamental Rights of the European Union. In this vein, the theory according to which a specific feature of the public law is the priority of general interests⁵ as opposed to private ones, while ever underlining the principle that every right

³See Drăganu (1992) at 12.

⁴For more about public administration, see Popescu (2017) at 528-532.

⁵We do not develop more on this occasion the issue of legality-opportunity in case of administrative acts, but we mention that art. 7 named: “Absence of abuse of power” of the European Code of Good Administrative Behaviour outlines the idea supported by us: “Powers shall be exercised solely for the purposes for which they have been conferred by the relevant provisions. The official shall in particular avoid using those powers for purposes which have no basis in the law or which are not motivated by any public interest”, <https://www.ombudsman.europa.eu/en/publication/ro/3510>

always corresponds to a correlative obligation, whether for the citizen or the state, as was confirmed during the pandemic of 2020.

The European Commission for Democracy through Law, better known as the Venice Commission, is the Council of Europe's advisory body on constitutional matters and currently consists of 61 Member States⁶. In March 2016, the Venice Commission published the rule of law checklist⁷ which consists of the following:

'legality; legal certainty; prevention of abuse (misuse) of powers; equality before the law and non-discrimination; access to justice'.

As noted, legality⁸ is the first principle used in this enumeration. Understandably, in the opinion of the Venice Commission, legality is the first basic pillar of any rule of law and it is natural it be so, since it is a social imperative that must be observed.

In relation to the last criterion listed – *the access to justice* – it is unavoidably noticeable that recently, two countries, Poland and Hungary challenged the Court of Justice of the European Union Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020, on a general regime of conditionality for the protection of the EU budget, and the action for annulment was dismissed on 16 February 2022⁹. Therefore, it is easy to note that access to justice works not only at the national level, but also at the EU level. In a different vein, we consider that another reality of the legal framework is illustrated through this case, namely the increase these days of the importance of financial aspects, as the States' no longer have the ability to face the new global social challenges on their won.

The Rule of the Law and the Increase of the Number of Administrative Acts issued during the Pandemic

It is already well-known after three years that the legal basis on the national level of the measures taken at the beginning of the pandemic of March 2020 were the Constitution, the law and then the normative administrative acts. Therefore, there were, in general, many administrative measures taken by the senior officers of all countries worldwide, in a period characterised by such an unprecedented unpredictability. From this vantage point, the Venice Commission sought know if a state of emergency had been declared, by which authority, and for how long. Therefore, a briefing document on this matter has been

⁶See in this respect the public source at https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN

⁷CDL-AD (2016)007-rev Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice 11-13 Mars 2016).

⁸For more about legality, see Ștefan (2017).

⁹See in this respect public information at <https://curia.europa.eu/juris/document/document.jsf?text=&docid=254061&pageIndex=0&doclang=ro&mode=req&dir=&occ=first&part=1>

released¹⁰. This document is a summary of the measures taken by various countries starting from the spring of 2020, in order to institutionally respond to an unprecedented aggression with impact on life, namely a killer virus.

From the few examples briefly reproduced in the following, and even in the absence of official statistics, the unmistakable conclusion is that the large number of administrative acts issued in such a short time by governments around the world in response to an exceptional situation, cannot be compared with any other period in the constitutional-administrative history of any country that would claim a common battlefield generating similar administrative acts.

For example, in France, according to the official information of the Venice Commission, the first measures on the COVID-19 crisis were taken by the Ministry of Health based on the Public Health Code which prohibited public access to a great number of public gatherings, by means of a Ministerial Decree adopted on 14 March 2020¹¹. Subsequently, the Organic Law Draft regarding the state of emergency was adopted in March 2020 to face the COVID-19 epidemic¹². The Constitutional Council decided to endorse this law declaring a state of health emergency.¹³ Albeit, there was a great number of non-conformity objections¹⁴ on the text of this normative act.

In Romania, the state of emergency was declared by means of Decree of the President no. 195 of 16 March 2020 enforced on the territory of Romania.¹⁵ It was further prolonged by Decree of the President no. 240 of 14 April 2020.¹⁶ In Austria, the state of emergency was not declared, according to the aforementioned public document, but the Ministry of Health prohibited gatherings of more than 500 participants, and ordered the closure of universities and schools by means of the decree of 11 March 2020¹⁷.

In Peru, the state of emergency was declared by means of a decree issued by the President of the country on 16 March 2020, while in the United States of America, the federal government and the 50 states issued state of emergency declarations in response to the COVID-19 pandemic¹⁸. For example, according to the aforementioned document, at the federal level the President of the United States of America published Proclamation 9994 declaring a national emergency concerning the novel coronavirus disease (COVID-19) outbreak on 13 March 2020.

¹⁰Public source at <https://www.venice.coe.int/files/EmergencyPowersObservatory//T06-F.htm>

¹¹*Ibid.*

¹²Loi organique n°2020-365 du 30 mars 2020 d'urgence pour faire face à l'épidémie de covid-19.

¹³The state of emergency was declared by a decree issued by the Council of Ministers.

¹⁴We refer to Decision 2020 - 800 DC du Conseil du 11 mai 2020.

¹⁵Published in Official Journal no.212 of 16 March 2020.

¹⁶Published in Official Journal no. 311 of 14 April 2020.

¹⁷Public source at <https://www.venice.coe.int/files/EmergencyPowersObservatory//T06-F.htm>

¹⁸*Ibid.*

The Right to Good Administration and the Motivation of the Public Interest in the Decisions of the European Ombudsman

To reach a conclusion in relation to the subject matter of this study, it is interesting to see whether, at the European level, there have been cases of maladministration in public health services concerning the pandemic. In this respect, one of the levers created by the European documents is the possibility of citizens to file complaints before the European Ombudsman authority especially created in this context. Relatedly, there is another affirmation made on another occasion: “Each government body or rather each State is bound to ensure the provision of public goods or services for the fulfilment of the obligations incumbent on it.”¹⁹

From the documentation carried out on the public source of information²⁰, it appears that despite being in the exceptional situation of the COVID-19 pandemic, the European Ombudsman was active during this period at publicly reporting cases of maladministration derived from the lack of transparency on public access to documents. Alternatively, they concluded the inquiry by assessing that there was no maladministration. For example, two different case studies from COVID-19 pandemic are herewith cited, both based on the lack of transparency, while also substantiated in the public interest.

Case study no. 1 - Decision on how the European Commission handled a request for public access to documents concerning the quality of medical masks distributed during the COVID-19 pandemic (case 79020121/MIG).²¹

In short, as evident in the public briefing of the situation, the case concerned a request for public access to documents concerning 1.5 million medical masks the Commission had purchased at an early stage in the COVID-19 pandemic. The masks did not meet the required quality standard and the Commission refused to give access to some of the requested documents, relying on the need to protect the commercial interests of the manufacturer in question.

‘The Ombudsman therefore took the view that the Commission’s refusal of public access in this case constituted maladministration, recommended that the Commission should reconsider its position with a view to granting significantly increased access to the documents at issue, from two reasons:

- *The Ombudsman found that the information at issue could not reasonably be considered to be commercially sensitive;*
- *Even if one were to accept that the Commission could reasonably invoke the relevant exemption, there is a strong public interest in disclosure.*

In conclusion, the Commission has reacted positively to the Ombudsman’s recommendation by giving wider public access to the documents at issue. However, the Commission has still not given access to the three remaining documents in their entirety²².

¹⁹See Lazăr (2016) at 26.

²⁰Public source at www.ombudsman.eu

²¹Public source at <https://www.ombudsman.europa.eu/en/decision/en/156438>

²²*Ibid.*

Case study no. 2 - Decision on the European Medicines Agency (EMA)'s refusal of public access to documents relating to the manufacturing of mRNA vaccines against COVID-19 (case 1458/2021/MIG)²³.

In short, the case concerned a request for public access to parts of an application for marketing authorization for an mRNA vaccine against COVID-19. The request contained detailed explanations regarding how the vaccine is manufactured. EMA refused to grant access to the documents because it considered their disclosure undermining to the manufacturer's commercial interests and because there was no overriding public interest in disclosing the documents.

The Ombudsman closed the inquiry finding no maladministration for the following reasons:

'The information of the requested documents is commercially sensitive under the law of the European Union, as the disclosure is likely to be useful to competitors²⁴. Regarding whether there is an overriding public interest in disclosing documents, even if there are reasons why information related to the safety and efficacy of a drug should always be disclosed (for example, clinical trial results), the same is not applicable in the case of the information related to the manufacturing method used for a drug.

In conclusion, the Ombudsman recognises the sentiment of the complainant in this case of the interests of the wider public. However, it feels these are largely political questions which need be addressed by those politically responsible.'²⁵

The Contribution of the Current Case Law in Defining the Legal Regime of the Administrative Liability

In order to determine the interdisciplinary nature of some concepts that are identified in the area of public law in general and administrative law in particular, a new type of liability arises while analysing legal liability: patrimonial administrative liability of the State for ecological damage. A recent case law regarding ecological damage, which emerged in France from two case studies and was settled by the Administrative Court and the Conseil d'Etat illustrates the evolution of the administrative liability as it stands today. The above-mentioned case studies illustrate that "in France, administrative justice was born from a contest of historical circumstances and lasted only for practical reasons."²⁶ This surely confirms the great role of French case law in the creation of the law. Furthermore, we also note that, in 2020, a complaint was filed with the European Court of Human Rights against 33 countries for failing to take sufficient action on climate change.

Case study no. 1 – "The Case of the Century" (*L'Affaire du Siecle*).

²³Public source at <https://www.ombudsman.europa.eu/en/decision/en/149025>

²⁴For further details on European regulations in the field of competition, see Lazăr (2013) at 2 et seq.

²⁵Public source at <https://www.ombudsman.europa.eu/en/decision/en/149025>

²⁶Rivero & Waline (1998) at 137, and Leş (2021) at 59.

In this case, France was found guilty by the Administrative Court of Paris for ecological damage regarding climate changes, the respective judgment consisting of 38 pages.²⁷ The press release of 3 February 2021 notes the following:

'In March 2019 4 non-governmental organizations filed four appeals with the Paris Administrative Court in order to have the French State's failure to act in the fight against climate change recognised, to obtain its condemnation to redress not only their moral but also their ecological damage and to put an end to the State's failure to fulfil its obligations.

*The court held that the French state should be held liable for part of this damage if it had failed to meet its obligations to curb greenhouse gas emissions. [...] The court estimated that the existence of such damage, which was not contested by the State, was reflected in particular in the constant increase in the Earth's average global temperature, which was responsible for a change in the atmosphere and its ecological functions'*²⁸.

*The judges 'then examined whether there was a causal link between this ecological damage and the alleged failures of the French state in the fight against climate change. They held that the French state should be held liable for part of this damage if it had failed to meet its obligations to curb greenhouse gas emissions. [...] The court held that the applicants were entitled to claim compensation in kind for the ecological damage caused by France's failure to meet its greenhouse gas emission reduction goals [...]]. In the end, the court held that the French state's failing to honour its obligations to combat global warming was detrimental to the collective interests defended by each of the applicant associations'*²⁹.

In conclusion,

*'The Court of Paris sentenced the State to pay each of the Associations a symbolic sum of one euro as compensation for the moral prejudice it had caused them'*³⁰.

Case study no. 2 – Commune de Grande - Synthe and several associations³¹.

In this case, the French Conseil d'Etat cancelled the refusal of the Government to take additional measures and required it to take such measures before 31 March 2022, being a case built on the Government's inaction.

The following information emerges from the press release of the French Conseil d'Etat: 'Commune Grande - Synthe and several associations (four non-governmental organizations) requested the French Conseil d'Etat to cancel the refusal of the Government to take additional measures to reach the target of reducing greenhouse gas emissions totalling 40% by the year 2030. To achieve the reduction targets set out in the Paris Agreement, meaning a 40% reduction in emissions as compared to 1990 levels, the Government had previously adopted a reduction plan covering four time periods (2015-2018, 2019-2023, 2024-2028 and 2029-2033), each with its own reduction targets'.

²⁷Public information at <http://paris.tribunal-administratif.fr/content/download/179360/1759761/version/1/file/1904967190496819049721904976.pdf>

²⁸For further details, see Ştefan (2021) at 17.

²⁹*Ibid.* at 18.

³⁰*Ibid.*

³¹Decision du Conseil d'Etat n°427301 du 19 Novembre 2020.

The French Conseil d'Etat admitted the petition of the plaintiffs, noting on the one hand that the decrease in emissions in 2019 was low and that in 2020 was insignificant because economic activity has been reduced by the health crisis. On the other hand, by observing the trajectory, which particularly provides a 12% reduction in emissions for the period 2024-2028, it does not seem to be achievable if new measures are not quickly adopted.

In conclusion, the French Conseil d'Etat requested that the Government take additional measures until 31 March 2022 in order to reach the target of reducing greenhouse gas emissions totalling 40% by the year 2030³².

Leaving the national plan and looking towards the European one, there is a noticeable precedent consisting of filing complaints before the European Court of Human Rights against certain States, in order to establish their legal liability of a new type, concerning the environment. We refer here to the case *Claudia Duarte Agostinho and Others v Portugal* and 32³³ Other States³⁴ filed on 7 September 2020. The case concerns greenhouse gas emissions from 33 Contracting States which is said to 'contribute to global warming [...] and are affecting the applicants' living conditions and health'³⁵.

As the doctrine notes: 'the applicants are young Portuguese aged between 8 and 12 who filed allegations against 33 European countries for failing to comply with their commitments in order to limit climate change'³⁶.

Conclusions

Following the documentation carried out on the proposed topic, both from national law and from comparative law, the research objective of this study is fulfilled: providing information on the status and perspective of public law in general.

The following can be concluded:

First, nowadays law cannot be imagined without denying its classical division into public law and private law, as described by the Roman legal adviser Ulpian. Notwithstanding, a potential answer to the questions that make up the scope of this paper, is that it is impossible to say that there is a new public law that is autonomous, even if it benefits from interdisciplinarity. From this point of view, certainly the destruction of old public law and its replacement with a new public law is out of question. The solution can be the

³²Public information at <https://www.conseil-etat.fr/actualites/emissions-de-gaz-a-effet-de-serre-le-conseil-d-etat-enjoint-au-gouvernement-de-prendre-des-mesures-supplementaires-avant-le-31-mars-2022>

³³The 33 defendant countries are: Austria, Belgium, Bulgaria, Switzerland, Cyprus, Czech Republic, Germany, Denmark, Spain, Estonia, Finland, France, United Kingdom, Greece, Croatia, Hungary, Ireland, Italy, Lithuania, Luxemburg, Latvia, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Sweden, Tukey, Ukraine.

³⁴Public information at https://www.nhri.no/wp-content/uploads/2020/11/DUARTE-AGOSTINHO-and-others-vs-PORTUGAL-and-32-others-unofficial-translation-fr.en_.pdf

³⁵*Ibid.*

³⁶This case is discussed in detail in Duțu (2021) at 238-243.

following: to keep its form, but adjust its content to new social, economic, ethical and moral realities, all of these observing its tendencies.

Another conclusion is that the exceptional situation, experienced since March 2020 to the present, calls for exceptional measures of State authorities, that should be supported on the letter and spirit of the law. Furthermore, the idea of solidarity between States and joint action against a killer virus while leaving aside their own political, national ideologies has become one of the most important. Never and nowhere in the world in such a short period of time have States been united in generating a firm institutional response to create the legal framework to combat the unknown state of danger to people's lives. And this is not on a declarative but practical level. Conclusions are based on the report drawn up by the Venice Commission. Therefore with this in mind, public authorities, in declaring exceptional measures, applied the principles of the regime of public power, a regime in which public interest has priority over private interest.

Furthermore, another conclusion that emerges from this analysis is that the executive public authorities have adopted many measures substantiated by administrative acts: decrees, orders, etc., more or less objected to by the citizens due to the fact that over a relatively short period of time, their rights and freedoms were restricted. Therefore, the philosophy of the measures taken by public authorities was based on public interest, in protecting the public health of citizens. From this point of view, public health services stood out remarkably during the pandemic, compared to other public services, as mentioned above re complaints addressed to the European Ombudsman. On this topic, two recent complaints addressed to the European Ombudsman were presented above.

In the end, this study has brought additional information to outline the interdisciplinary nature of certain branches of law that traditionally have belonged to the branch of public law. In addition, it has shed light and analysed administrative liability within administrative law, by revealing a new type of liability i.e. patrimonial administrative liability of the state for ecological damage.

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Competition Law, Ethics and Corporate Social Responsibility

By Ioan Lazăr*

The importance of corporate social responsibility (CSR) activities has increased in recent years. More undertakings active on different markets are becoming aware of the importance of improving labour policies, investing in safety training of employees, environmental protection, local community-related projects, volunteering, and charitable activities. At issue is whether higher degrees of competition associated with periods of economic crisis will affect the degree of competition on the market in a favourable or a non-favourable manner. Based on statistical data currently available, this paper will analyse whether higher levels of competition will increase investments in CSR activities to create trustworthy firms that will survive even in economically harsh periods, or will otherwise reduce the aforementioned types of investments and thereby facilitate the flourishing of anticompetitive practices on the market. This paper will first start with a short presentation of the concept, importance and meaning of corporate social responsibility, followed by considerations related to the importance of ethics in competition law. Finally, the author will analyse the impact of competition on CSR-related activities and the ways in which the pressure of competition can impact on CSR investments.

Keywords: Corporate social responsibility; Competition; Anticompetitive practices; CSR activities; CSR investments

Introduction

Nowadays, companies are operating in an open and globalised economic environment where consumers are highly informed, having access to important information allowing them to choose the right products that best fit their needs.

Development over recent years has sustained the tendency of consumers, investors, and employees to conduct business in a way that also contributes to the greater good of society. In this context, care for the environment, the improvement of labour conditions, engagement in corporate social responsibility activities, contribution to the well-being of local communities has become an integral part of the company's efforts.

Today's companies are operating in a business environment in which undertakings are operating on the market with a clear deeming purpose. Besides their economic goals, they are contributing to the attainment of socially important

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goals (e.g., poverty reduction, recycling, care for local producers, promotion of low toxicity products, etc.).

Also, another reality of the actual business conditions is the presence on the market of well-informed consumers, who demonstrate no tolerance towards unethical companies. The proliferation of the use of social networks permits consumers to show collective resistance to companies consciously engaged in business practices detrimental to the consumer.

Corporate social responsibility related activities are increasing the value which consumers, employees, clients, and commercial partners are attributing to businesses, especially in the pandemic context, bringing to the forefront issues related to food insecurity, poverty, social problems, local communities' cohesion, wage disparities, healthcare system capacity.

The current state of research in this domain indicates that companies increasingly focus on corporate social responsibility and related activities in times of crisis because the companies' long-term profits are dependent on embracing the needs of customers, employees and suppliers.

Recent studies¹ indicate that companies investing in their employees, providing safe products to consumers, dealing fairly and ethically with suppliers, and protecting the environment are more appreciated in the eyes of consumers.

The intensification of competition in times of crisis was considered to have determined firms to differentiate their products, and CSR activities represent one strategy to obtain that differentiation on the one hand and the loyalty and trust of stakeholders in general, on the other hand².

The second current opinion on the topic in the specialised literature considers that the intensification of competition for markets and consumers, which is specific during economic crisis, will determine companies to pay attention to market competition strategies more focused on short-term survival, based on cost reduction. In this latter view, CSR related costs are considered avoidable and usually cut from the list of the companies' costs³.

On the other hand, economic crisis can represent a period in which anticompetitive behaviours (especially in the form of illegal state aids, anticompetitive agreements, abuse of dominance) and unethical behaviours (e.g., exclusion of competitors, exploitation behaviour of dominant companies, environment pollution, worker abuse to reduce costs etc.) of companies can flourish⁴.

Another important aspect that has been analysed in the specialised literature regards the way in which companies are reacting to economic crisis, depending on the size of their market shares⁵. It can be observed that firms with bigger market shares tend to invest more in CSR related activities in times of economic crisis,

¹See for example, Lins, Servaes & Tamayo (2017); Servaes & Tamayo (2017); Asemah-Ibrahim, Nwaoboli & Asemah (2022); Souto (2009); Simionescu & Dumitrescu (2014); Bhattacharya, Good & Sardashti (2020).

²International Monetary Fund (2022); Dobre (2013); Notta & Vlachvei (2015).

³See for example, Kee-Hong, El Ghoul, Gong & Guedhami, (2021); Havlinova & Kukacka (2023).

⁴See for more details on the subject at Gurria, Jenny, Ferrandi, Szilágyi, Lueckenhausen, Jaspers, Harrop & Russell (2020); Da Silva & Núñez Reyes (2021); Lowe (2009).

⁵Buchanan, Cao & Chen (2018); Ogachi & Zeman (2020).

when the expected benefit of investments in these kinds of activities allegedly higher. On the other hand, companies with small market shares are focused on reducing the costs in crisis periods as part of the general tendency to reduce costs in the context of financial constraints.

The Concept and Typology of Corporate Social Responsibility

From a conceptual point of view, corporate social responsibility can be defined as the sum of the business initiatives of commercial companies related to ethics and sustainability and which present a social impact, contributing to the achievement of the respective company's mission in the world and which influence the way the company is perceived in society.⁶

Today's businesses are organisations whose missions go beyond the mere objective of profit maximisation, and are also part of the social construct of the communities in which they operate. According to the OECD Corporate Governance Principles, social responsibility is associated with the concept of good corporate governance that positively influences consumers' behaviour, as they have a positive perception of businesses that engage in such practices.⁷

The objective of enterprises is, after all, to find a balance between making a profit at the enterprise level, creating economic value for shareholders, while at the social level, contributing to the increase of social well-being by reducing unemployment and increasing the gross national product.

The corporate social responsibility activities are considered more important in periods of financial crisis when the implications of such undertakings contribute to the improvement of the company's social image and increases the consumers' confidence in the quality of services offered by the company. However, financial crises negatively influence the investment of companies in social projects, in the context of the general tendency of companies to reduce costs related to economic activity.

Corporate social responsibility actions are considered especially important in times of financial crisis when the enterprises' involvement in such activities contributes to generate a better social company image and increases the confidence of consumers in services/products offered.

Regarding the typology of social responsibility activities, the specialised literature distinguishes⁸ between: environmental social responsibility, social responsibility related to the protection of fundamental rights and aspects related to ethics in business, philanthropic social responsibility and economic responsibility.

*Environmental social responsibility of companies*⁹ takes into consideration the commitment of a company to sustainability, as well as to an environment-friendly business conduct by taking measures to reduce greenhouse gas emissions,

⁶Idowu, Capaldi, Fifka, Zu & Schmidpeter (2015) at 25.

⁷OECD (2021).

⁸See for more details at Hansen & Sierestad (2017) at 51 et seq.

⁹For more details related to the concept of environmental corporate governance see Dathe, Dathe. Dathe & Helmold (2022) at 115.

opting for the use of environment-friendly raw materials, avoiding the use of single-use plastics and in general, and by keeping the care for the environment at the centre of all operations. At the same time, care for the environment cannot exist without the commitment of the company and its employees to the idea of sustainable business development as part of the general mission of the company.

Ethical responsibility of companies involves their commitment to ethical business strategies that respect the principles of fair business practices as well as the fundamental rights of the actors involved.¹⁰ Ethical responsibility, therefore, aims at avoiding any form of discrimination at the workplace related to race, nationality, sex, age, religion, political opinion, etc., guaranteeing a fair minimum wage and avoiding forms of labour exploitation.

The philanthropic responsibility of companies concerns the orientation of the company's actions towards the public well-being in general, by involving the company in charitable actions that serve the good of the local community in which the company operates, or which are related to the well-being of society in general, thus increasing social trust in the company's actions.¹¹

Finally, the *economic responsibility* of the company refers to the adoption of financial decisions that serve the public good, such as investments in renewable energy sources, reducing production costs, investments in educational programs and charitable actions.

Besides the types of social responsibility mentioned above, companies can engage themselves in social activities promoting the ideas of good corporate governance by investing in the physical well-being and mental health of employees, by engaging in volunteer activities, by prioritising environmentally friendly supply chains, etc.

The way a company involves itself in different types of CSR activities (environmental, social, economic etc.) has a direct influence on customers' attitudes related to the product and to the satisfaction they show towards a certain brand of service and product. This, in turn, directly influences the reputation of the company (*Figure 1*).

¹⁰See for more details at Boubaker & Nguyen (2019) at p. VI.

¹¹See also at Hopkins (2007) at 113.

Figure 1. *How the Reputation of the Company is formed*

Source: [Corporate social responsibility and reputation \(reputationx.com\)](https://reputationx.com)

Ethics in Business and its Importance

In a business environment characterised by fierce competition, the value of ethics in business can be in danger. Promotion of standards of excellence, high quality products and services, equity, teamwork, responsibility, and care for the consumers have direct impact on corporate behaviour and their employers and can represent an asset of the company in its competition to attract more clients.

The concept of fair competition implies the obligation of economic agents to exercise their business activity in good-faith and according to honest commercial customs. Thus, fair competition expresses a concept of affirmation in business, through generally accepted and honest commercial strategies.

Unfair competition is defined¹² as the sum of commercial acts contrary to honest customs in industrial and commercial matters, such as: comparative advertising; offering advantageous terms in commercial contracts if the client also attracts other buyers; false advertising regarding the characteristics of products or services, the nature or content of services, omission of essential information; dissemination of false or misleading information regarding competitors; the discrediting of competitors, aggressive advertising practices, etc.

Legislators worldwide are sanctioning unfair commercial practices by applying civil, criminal, and administrative sanctions in order to protect the interests of consumers and to facilitate small and medium-sized companies to penetrate markets.

¹²For details see de Very (2006) at 8.

At the European level, *Directive no. 2005/29/EC*¹³ regulates unfair commercial practices in order to realise relatively uniform rules at the level of Member States regarding unfair business-to-consumer commercial practices, materialised in any act or omission directly related to the promotion, sale or supply of a product or service by a trader to consumers. The objective of the directive is to realise the protection of consumers interests before, during and after commercial transactions, irrespective of the place of purchase or sale in the EU.

The Directive mentioned above defines unfair commercial practices¹⁴ as those contrary to the requirements of professional diligence and those which are likely to distort the purchasing behaviour of the average consumers by forcing them to make purchasing decisions that they otherwise would not make in the absence of such unfair commercial practice. The provisions of the directive differentiate between misleading commercial practice (made by action or omission) and aggressive commercial practices. They also contain an exemplificative list of commercial practices prohibited in all circumstances.

In the first category of *misleading commercial practices*¹⁵, they mention the category of misleading actions, such as the company offering false or deceptive information regarding the existence, nature or characteristics (benefits, risks, composition, origin etc.) of the product, the extent of commitment of the trader, eventual price advantages, and service of repair related information.

Further, in the second category of misleading commercial practices, the directive refers to *misleading omission*¹⁶, manifested by information offered in an unclear, unintelligible, ambiguous or untimely manner which can cause an unspecific purchasing decision.

In the light of the above-mentioned directive, *aggressive commercial practices*¹⁷ are considered those practices which significantly impair the freedom of choice of average consumers, by making them take purchasing decisions that otherwise they would not have taken, due to aggressive or unfair coercion, harassment, or undue influence. The aggressive nature of commercial practices is determined by taking into consideration the nature, location and duration of practices, the use of abusive language or behaviour, the existence of specific health circumstances that impair the consumers' judgement or that influence their decisions regarding the product.

The directive contains a list¹⁸ of 35 unfair commercial practices which should be prohibited by Member States, such as: the publication of fake consumer reviews; hidden advertising in search results and the resale of tickets that the trader has acquired using automated means; displaying a trust mark, quality mark or equivalent, without having obtained the necessary authorisation; stating the false information that the product can be legally sold; false statement related to the

¹³Directive no. 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning, at 22–39.

¹⁴Directive no. 2005/29/EC, Art. 5.

¹⁵Directive no. 2005/29/EC, Art. 6.

¹⁶Directive no. 2005/29/EC, Art 7.

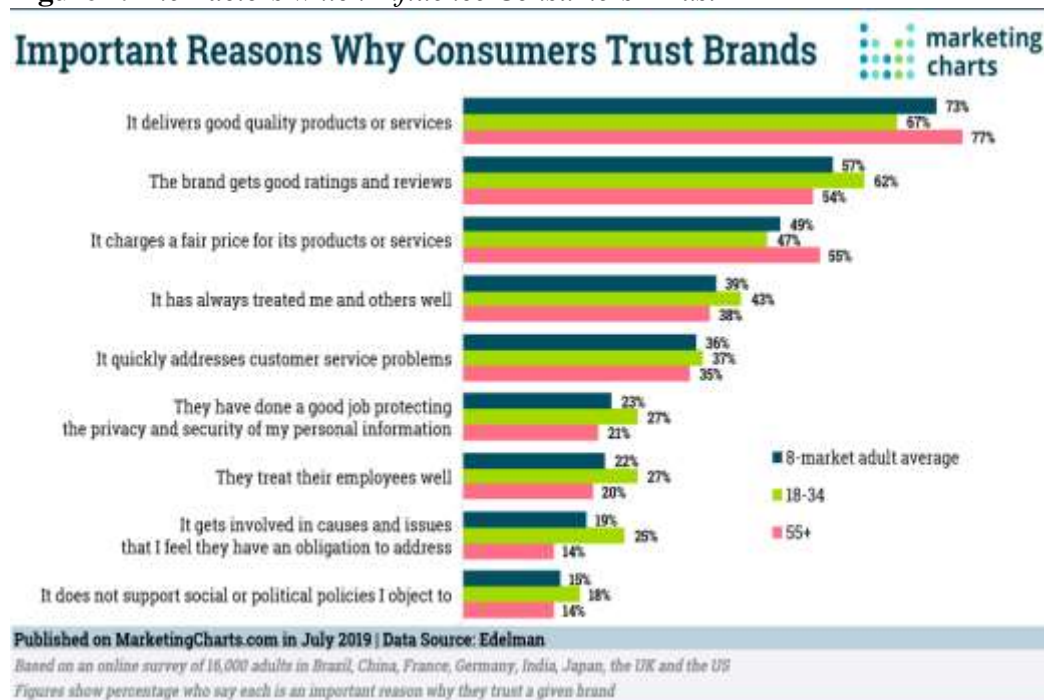
¹⁷Directive no. 2005/29/EC, Arts 8-9.

¹⁸Directive no. 2005/29/EC at Annex no. 1.

limited nature of the products or services; falsely describing a product as sold for free, making persistent and unwanted solicitations by telephone, mail or other means etc.

Regarding sanctioning the unfair commercial practices Directive no. 2019/2161/EU¹⁹, which was amended to Directive no. 2005/29/EU, refers to specific solutions that the affected consumers can obtain, for example in the form of compensation or price reduction. The penalties Member States will sustain for such practices should be effective, proportionate, and dissuasive and they should amount to at least 4% of the trader's turnover and above 2 mil. Euro in major cross-border infringement cases²⁰.

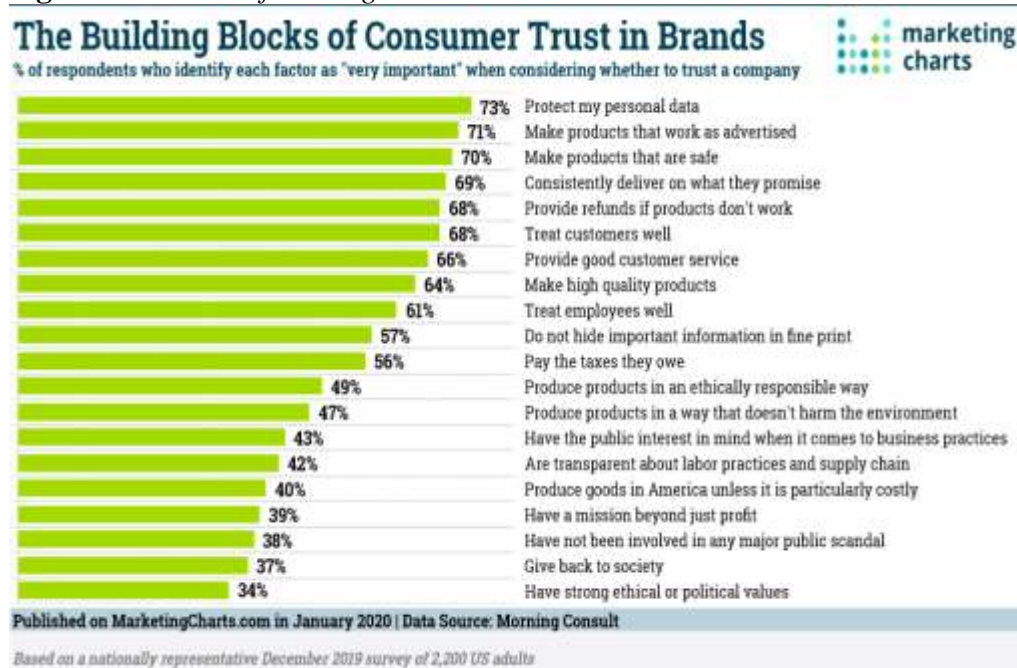
Figure 2. *The Factors which Influence Consumers' Trust*



Source: [Brand Trust Is Becoming More Important: Here Are Some Key Stats And Themes - Marketing Charts \(www.marketcharts.com\)](https://www.marketcharts.com) – 2019)

¹⁹Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 at 7–28.

²⁰Directive no. 2019/2161/EU, Art. 1.

Figure 3. *Factors Influencing Consumers Trust in the US*

Source: The Building Blocks of Consumer Trust in Brands - Marketing Charts (www.marketingcharts.com – 2020)

Statistical data offered recently to publicity (*Figure 2*) shows, that, besides the good quality of products and services offered by an undertaking on the market, consumers – irrespective of their age – trust brands for perceiving a fair price for the offered product and services, for the fair treatment accorded to their consumers and to their employees, as well as for their implementation in solving the problems of communities where they are activating.

Similarly, a market study carried out on US consumers (*Figure 3*) has revealed relatively similar results showing that consumers appreciate fair advertising, fair treatment of consumers and employees even above product quality. Ethical production, strong ethical values, care for the environment, production in accordance with public interest, transparency, mission beyond profit and the fact that they are offering back to consumers are also important factors when it comes to consumers' decisions to buy certain products.

Ethics in business as a component of the companies' socially responsible behaviour prevents malpractices, increases consumer and client confidence, protects consumer rights, contributes to a good image of the company in society, protects employees and other stakeholders from abusive behaviour, contributes to consumer satisfaction. Ethics in business is one of the necessary assets for the success of companies.

In times of economic crisis, keeping the values of ethics in business is even more important in the context of companies' struggle to gain the trust of the major

stakeholders (clients and consumers).²¹ Therefore, the companies exploiting the crisis are likely to suffer reputational damage.

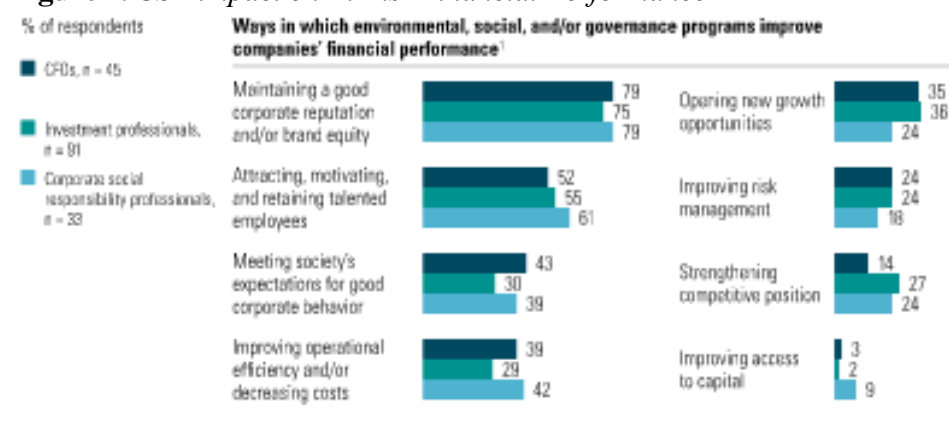
Corporate Social Responsibility of Companies in the context of Economic Crisis, a Strategy to cope with the Effects of the Crisis?

According to specialised literature²², the company's involvement in social responsibility actions in times of economic recession is associated with a better image of the given company in the business environment, as well as with a high degree of consumer confidence in the products and services offered by the company in question.

Economic recession has been defined as a significant decrease in economic activity at the level of the entire economy, a decrease that is also reflected in the levels of the gross national product.²³ At the company level, periods of economic crisis are characterised by reduced incomes and liquidities, generally followed by reduced costs related to research and development, or marketing activities as well as by reduced amounts of investments in social responsibility.

Although the common strategy of businesses is to reduce investments in social responsibility actions and marketing related costs, they contribute to increasing the value of established businesses in the eyes of consumers in times of crisis. This draws the conclusion that corporate investment in social responsibility actions could represent one of the strategies through which companies could meet the negative effects of economic crisis.

Figure 4. CSR impact on Firms' Financial Performance



¹Excludes any changes stemming from current economic crisis.

Source: https://www.mckinsey.com/~media/mckinsey/business%20functions/strategy%20and%20corporate%20finance/our%20insights/valuing%20corporate%20social%20responsibility%20mckinsey%20global%20survey%20results/svgz_srvy_esg_ex2.svgz?cq=50&cpy=Center

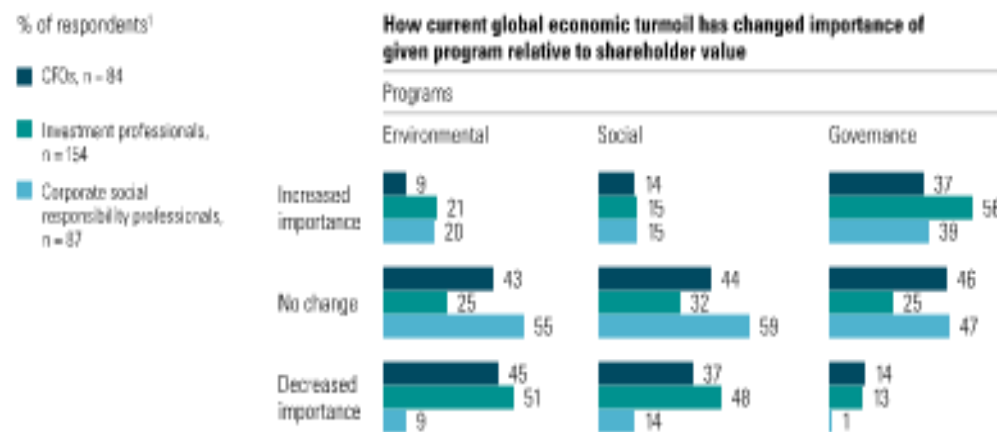
²¹See for more details at Cowton, Dempsey & Sorell (2019).

²²Horrigan (2010) at 13.

²³Obstfeld, Cho & Mason (2012) at 235.

Indeed, investment in social responsibility actions represents means of differentiating the company and its brands on the market, being an important element in building brand loyalty and significantly influencing consumer purchasing decisions. Therefore, investing in CSR activities significantly contributes in creating a good reputation for the company, in attracting and motivating employees, in opening growth opportunities, and even in improving access to capital and strengthening the competitive position of the company (*Figure 4*).

Figure 5. *Economic Crisis Impact of CSR Importance*



¹ Respondents who answered "don't know" are not shown.

Source: https://www.mckinsey.com/~media/mckinsey/business%20functions/strategy%20and%20corporate%20finance/our%20insights/valuing%20corporate%20social%20responsibility%20mckinsey%20global%20survey%20results/svgz_srvy_esg_ex4.svgz?cq=50&cpy=Center

Regarding the effects of economic crisis on the importance of different CSR activities, the importance of social or philanthropic corporate social responsibility has understandably increased significantly, along with the general idea of good corporate governance. Meanwhile, however, the importance of environmental CSR activities has not changed significantly (*Figure no.5*).

Thus, although economic crises have a generally negative impact, they can also hide development opportunities for companies that manage to exploit the economic potential of the context.²⁴

It has been demonstrated that in times of crisis, consumers look for predictability, stability, a reduction in the risks assumed through purchases, basing their choices on trusted brands over trying new ones. They invest in products that offer a lower cost/use and an increased confidence in the durability of the product, thus allocating more time to choose a reliable product²⁵.

On the other hand, the major criticism of investments made in corporate social responsibility activities regards the fact that the major purpose of organisations is to provide products and services that bring profit to businesses and

²⁴For details see Galloway (2020).

²⁵Bhattacharya, Good & Sardashti (2020) at 2055 et seq.

not to invest in actions that lead to a decrease in incomes, the main purpose of enterprises being that of profit maximisation²⁶. In relation to this argument, we note that, although the short-term investments in social actions involve an expense at the company level, it represents a possible source of maximising profits in the long term.

Thus, economic studies carried out at the level of the European Commission in a pandemic context revealed that 42% of respondents reported an impairment of the company's economic position as a result of the economic impact of the pandemic. Concurrently, 28% of respondents reported increases in the value of products and the services offered by their companies, the latter being the businesses that have identified growth opportunities for their companies by adapting their business strategies to the social and economic context²⁷ (through digitalisation, investing in social projects, adapting products and services to new consumer needs, the creation of business partnerships, adaptations in supply chains, changes at the logistics level, the creation of innovative products – e.g. telemedicine, online fitness subscriptions, etc.).

Conclusions

The economic crisis generated by the COVID-19-pandemic has given rise to unprecedented challenges for companies in terms of their adaptation to the new realities of markets where they carry out their activities. In this context, companies need to take important decisions about their CSR activities and related costs, respectively if they need to be reduced or, contrarily, if the level of CSR related costs should be maintained or even increased.

The study has shown that the evidence currently available reveals that the character of today's market economies typified by the presence of highly informed consumers and the widespread use of social networks, the companies' commitment for the well-being of local communities, for social projects of local communities and towards environmental protection, will constitute an asset for the company and will increase consumer confidence and brand trust, in general.

The results of recent market statistics clearly indicate that the ethical market behaviour of companies is even more important in times characterised by economic instability, accompanied by social vulnerability of consumers, food insecurity, poverty, and increased needs for cohesion in society.

²⁶Karaibrahimoglu (2010) at 382.

²⁷For more details regarding the mentioned possibilities consult *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Competition Policy fit for New Challenges*, Bruxelles, 18.11.2021.

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Religion and Belief Discrimination at Work: Legal Challenges in the UK

By Graeme Lockwood*, Vandana Nath* & Stephanie Caplan♦

The UK continues to be more ethnically and religiously diverse. The inclusion of religion and belief within the UK Equality Law framework however has been controversial since its inception in 2003. The aim of this paper is to examine the practical and legal complexities associated with religion or belief discrimination in the UK. Drawing on an analysis of religion and belief claims from 2003 onwards and using illustrative case law, the study highlights several thematic areas of litigation relevant to employers, potential claimants and legal advisors. The paper offers insights into the underdeveloped legal debates and variations in how tribunals and the courts have interpreted and applied the law.

Keywords: Religion and Belief; Discrimination; Equality Law; Labour Law

Introduction

The inclusion of religion and belief within the UK Equality Law framework has been a contentious issue since its inception. Several problems have been highlighted relating to the definitions of religion and belief as constructs within the law, and indeed, with its application in the courts. Sandberg¹ observes that religious pluralism and diversity renders the definition of religion as more difficult and important in terms of deciding when the law affords legal protection to individuals and groups. Pitt² similarly notes that the protected characteristic of religion or belief is problematic due to its expansiveness and the difficulties of assigning relative worth to different belief systems. The legal regulations pertaining to religion and belief discrimination also vary between nations. In the USA and Canada, the law imposes a requirement on employers to accommodate the religious practices of employees as long as this does not cause undue hardship to the organisation. The UK law, however, does not explicitly place such an obligation on employers.

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¹Sandberg (2018).

²Pitt (2011).

Several authors have observed difficulties in providing evidence for and proving religion or belief discrimination³. More critically, Bruce, Glendinning, Paterson & Rosie⁴ state that both individual and shared *perceptions* of religious discrimination might show a considerable divergence from the *actual* experience of religion-based discrimination. Such concerns additionally speak to the occasional complications inherent in delineating religion or belief discrimination from other protected characteristics such as race or ethnicity⁵. It is noteworthy that prior to 2003, religious groups could advance a claim under the Race Relations Act 1976 only if their religion coincided with a racial group by its 'ethnic origins'. Therefore, the Jewish community is recognised as both a racial group and religion and would have protection, but not Rastafarians⁶ who are recognised as a religious but not a racial group.

Ashcroft and Bevir⁷ have observed that since the second world war, the demographic profile of the UK has shifted from one that was White, ethnically British, and Christian, to one that includes diverse cultures, creeds and communities from all over the world. Specifically in terms of religion, in England and Wales, ONS⁸ data in 2011 revealed that 63.1 percent of the population identified as being Christian, 4.8 percent as Muslim, 1.5 percent as Hindu, while the Buddhist, Jewish and Sikh groups each accounted for less than 1 percent. Those claiming no religion amounted to 27.9 percent of the population. Looking ahead on a global scale, it is projected that by the year 2050, Islam will be the only major religion to increase faster than the world's population rate⁹. In terms of *religious conversion* modelling, which accounts for natural demographic increases (births minus deaths), the biggest increase is expected in the 'unaffiliated' identity group, and the religious category predicted to lead the growth are the Muslims, with the greatest decline anticipated in the Christian faith groups (with some countries likelier to have higher conversion rates than others¹⁰). These forecasts associated with switching in and out of religious categories suggests the legal difficulties associated with an expanded the notion of ethnicity to accommodate religious affiliations and simultaneously gives credence to the idea that religion and belief might be exercised as a choice for *some* individuals. Indeed, certain commentators oppose legal protection being offered to a characteristic which is essentially *opted for* by a person¹¹. On the other hand, authors such as Vickers¹² contend that as the majority of people display adherence to the religious group they were born into, religion might not be experienced by these individuals as having been freely

³E.g. Weller (2011); Woodhead & Catto (2009).

⁴Bruce, Glendinning, Paterson & Rosie (2005).

⁵Ball & Hague (2003); *Bouzir v Country Style Foods Ltd.* (2010); Pitt (2011).

⁶*Crown Supplies v Dawkins* (1993).

⁷Ashcroft & Bevir (2018)

⁸ONS (2011).

⁹Pew Research (2017).

¹⁰See also Barro, Hwang & McCleary (2010).

¹¹E.g. Lester & Uccellari (2008) at 570.

¹²Vickers (2011).

chosen. Vickers¹³ also notes that in certain religions, faith is understood to be communal and closely aligned with cultural identity (e.g. Judaism).

Similar arguments about the matter of ‘choice’ appear in the demonstration of one’s religious identity at work. Research has suggested that the visibility of religion can be received by others in both a positive (e.g. enhancing esteem) or a negative manner (e.g. stigmatising)¹⁴. Moreover, the expression of certain religious opinions might be seen as political expressions or a purposeful disassociation from the norm¹⁵. In this regard, some critics such as the National Secular Society, believe that employers have the right to regard the workplace as secular and therefore refrain from pandering to religion and faith-based accommodations¹⁶. There is associated scepticism about whether the duty to make reasonable adjustments (as applicable to disability) should be extended to religion or belief¹⁷. It is argued that doing so could imply privileging religion or belief over other protected characteristics, such as sexual orientation.

These viewpoints, however, do not consider that irrespective of organisational attempts to make religion ‘invisible’ in the public sphere, one’s faith and belief systems underpin how work tasks are interpreted and completed, and how individuals interact with one another¹⁸. It has been argued that ethnic penalties might be furthered in certain communities if reasonable accommodation is not considered at work¹⁹. Hunter-Henin²⁰ additionally contends that as courts unilaterally assess the validity of religious observances, the methods in place inevitably penalise minority practices. Indeed, a number of challenges with respect to employers offering religious accommodation have been identified by both lay and faith-based sources in the UK²¹. Complications might arise, for example, in accommodating particular types of dress or appearance, permitting leave from work for prayers or religious days, catering to specific food requirements, and resolving objections that religious minorities might have in providing goods or services that conflict with their religious beliefs.²²

Following on from this argument, there is a conjecture in legislation that the various equality strands share common interests and agendas as a result of ‘common experiences of exclusion and discrimination’.²³ The veracity of such assumptions is challenged by observing how various constituents of the Equality Law might conflict with each other. For example, ideological and practical tensions can surface between distinct protected characteristics (e.g. disability and religion; sexual orientation and religion) and among different groups within a single equality strand (e.g. religious Christians and atheists). Illustrating such

¹³Vickers (2011).

¹⁴Atar & Shapira (2016); Nath, Bach & Lockwood (2016); Squelch (2011).

¹⁵Sayed & Pio (2010).

¹⁶Hambler (2014).

¹⁷Pitt (2013).

¹⁸Cadge & Konieczny (2014).

¹⁹e.g. Ghumman & Ryan (2013);

²⁰Hunter-Henin (2021).

²¹Shah (2013).

²²Hambler (2016).

²³Valentine & Waite (2012).

potentially competing rights, a Muslim taxi driver who declined to offer transportation to a blind man with a guide dog (because taking the dog in the car was against his religion) was fined for breaching the Disability Discrimination Act²⁴. Wald²⁵ relatedly problematises the issue of ‘accommodation’ by critically questioning the extent to which certain religious traditions, or forms of those traditions, might instead be able to adapt to the culture and values of the law in a particular society.

With the UK evidently becoming more ethnically and religiously diverse, and given the deleterious outcomes associated with harassment and discrimination due to religion or belief²⁶, this paper explores the content of religion or belief discrimination claims brought to tribunals and higher courts since 2003. The first part of the article describes the incorporation of religion and belief in UK Equality Law and alludes to the definitions adopted to guide legal advisors, policy makers and the courts. Drawing on a random sample of cases from Employment Tribunals and the Employment Appeals Tribunal (EAT) from 2003 onwards, with purposeful sampling used for further elaboration, the second part presents several thematic areas relevant to litigation in religion or belief claims. The cases illuminate some of the complications, contradictions and outcomes that relate to accommodating individual religion or belief concerns within the workplace. Despite the controversial nature of managing the manifestations of religion and belief in the workplace, the third part of the paper summarises the implications for potential claimants and employers in the UK.

The Legal Context

European law has been influential in developing the UK equality law in many areas, including religion or belief discrimination. The Framework Directive for Equal Treatment in Employment and Occupation (2000/78) requires Member States to implement legislation prohibiting discrimination on grounds of religion. The UK introduced the law to comply with its EU obligations in the form of the Employment Equality (Religion or Belief) Regulations 2003. The current provisions are contained in the Equality Act 2010 which largely replicates the regulations. Since the EU (Withdrawal) Act 2018, UK courts and tribunals are no longer bound by decisions of the European Court of Justice, but might have regard to them where relevant.

The protected characteristic of religion or belief is provided for in section 10 of the Equality Act 2010. The definition reflects Article 9 of the European Convention on Human Rights (ECHR) [freedom of thought, conscience and religion]. Religion is defined in the Act as including all religions, and any religious or philosophical belief, including atheism and agnosticism. Denominations or sects of religions like Baptists or Sephardic Jews are also protected. While the definition includes religions that are not mainstream, a religion must however have

²⁴BBC (2017).

²⁵Wald (2009).

²⁶Weller (2011).

a clearly defined belief system and structure. The EAT in *Greater Manchester Police Authority v Power* (2010) recognised that spiritualism was a religious belief, pointing out that the Spiritualist Church was the eighth largest worshipping group in Britain.

Belief covers both religious and non-religious belief, and it does not have to involve faith or worship, but must fulfil certain broad criteria. In *Grainger Plc and others v. Nicholson* (2010), it was found that the claimant suffered discrimination at work because of his belief in climate change. In this case, Burton J. helpfully described belief as comprising the following:

- (i) It must be genuinely held;
- (ii) It must not simply be an opinion or viewpoint;
- (iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour;
- (iv) It must attain a certain level of cogency, seriousness, cohesion and importance; and
- (v) It must be worthy of respect in a democratic society and not be incompatible with human dignity and not conflict with the fundamental rights of others.

In *Gray v Mulberry Company (Design) Ltd.* (2019), Choudhury P. expressed the view that the proper approach to the application of the Grainger criteria was:

“to ensure that the bar [was] not set too high, and that too much [was] not demanded, in terms of threshold requirements, of those professing to have philosophical beliefs”.

Forms of Discrimination

Discrimination, in employment or otherwise, can be direct and overt or indirect and inferential. Prohibited conduct, which is unlawful under the Equality Act 2010, includes direct and indirect discrimination, harassment and victimisation. Direct discrimination (s13) arises when a person (A) discriminates against another (B) if because of a protected characteristic, A treats B less favourably than A treats, or would treat, others. The definition includes discrimination by association (treating one person unfavourably because of their association with another person who does have a protected characteristic) or perception (treating someone unfavourably because of an incorrect and maybe stereotypical belief about their attributes, abilities or beliefs related to a protected characteristic). There is no defence to direct discrimination except on the grounds of occupational requirements.

Indirect discrimination (sec. 19) arises if A applies to B a provision, criterion or practice (PCP), which is discriminatory in relation to a relevant protected characteristic of B. The defence of justification applies when the employer can show that the practice is a proportional response to a legitimate aim in the particular circumstances [sec.19(2)(d)].

Harassment (sec. 26) includes three different categories:

1. Characteristic-related harassment involves unwanted conduct, which is related to a relevant characteristic and which has the intention or effect of violating one's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment.
2. Unwanted conduct of a sexual nature that has the same intention or effect as in (i) above.
3. Treating someone less favourably because that person has either submitted to or rejected sexual harassment or harassment related to sex or gender reassignment.

Victimisation (sec. 27) includes the undesirable treatment of someone who has asserted their right under the Equality Act 2010 (e.g. made a complaint) or someone supporting them.

The European Convention on Human Rights (ECHR) and the Human Rights Act (HRA)

The European Convention on Human Rights (ECHR) came into operation in 1953. It requires signatories to abide by a number of fundamental civil rights, including the rights to liberty and security (Article 5), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), and freedom of assembly and association (Article 11). The rights to life (Article 2), a fair trial (Article 6) and privacy and family life (Article 8) are also included. Prior to the introduction of the HRA 1998, the convention was not directly enforceable in the UK courts. Claimants had to take cases alleging breaches by government to the European Courts of Human Rights at Strasbourg. With respect to the HRA, section 3(1) provides, so far as it is possible to do so, that primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the ECHR drafted in 1950²⁷.

Religion and Belief Discrimination Claims

Overall, to succeed in the courts, a religion or belief discrimination claim would need to provide evidence that a belief is 'protected', that the issue complained about constitutes discrimination and that it cannot be justified. An inductive analysis of religion or belief case law reveals several thematic areas relevant to litigation that employers, potential claimants, and legal advisors might consider. The following subsections exemplify these aspects of decision-making in the law. It should be noted that in numerous case illustrations, the thematic issues overlap and might be read simultaneously, but have been presented separately herein for clarity.

²⁷ Adams, Caplan & Lockwood (2020).

(a) Establishing whether a belief meets the Legal Criteria

To qualify under the Equality Act, religion might constitute both larger organised religions such as Christianity and Islam and smaller religions, for instance Rastafarianism, which have a clear structure and belief system. With respect to cases of philosophical belief, it is crucial to satisfy the Grainger criteria. A key factor in determining success or failure in these cases is whether the specified belief is considered by the tribunal as a weighty and substantial aspect of human life and behaviour and has cogency and cohesion. Another important consideration is whether the *manifestation* of the belief is compatible with human dignity and whether it conflicts with the fundamental rights of others. It is evident from the analysis of cases that claims on the grounds of philosophical belief can be difficult to maintain and raises complex issues for employment tribunals. For example, in *Dunn v University of Lincoln* (2017), the claimant sought to rely on “*a belief that challenges the tendency to favour what is palatable in social policy discussion over the truth, in colloquial terms the tendency known as ‘political correctness’*”. The employment tribunal held that the claimant’s belief was not entitled to protection under the Equality Act 2010. Interestingly, and somewhat surprisingly, the court observed that the issue was unfamiliar territory that made it difficult for the tribunal to reach a decision. The tribunal concluded that the belief was not protected on the following grounds: (i) it was more of an opinion than a belief; (ii) whilst the tribunal accepted that the belief was a weighty and substantial aspect of social policy study, it was not a weighty and substantial aspect of human life and behaviour; and (iii) it lacked cogency and cohesion.

The difficulty in predicting the outcome of meeting the legal criteria for a philosophical belief is also illustrated in the following cases. In *Maistry v BBC* (2011), a tribunal held that a belief that public service broadcasting has the higher purpose of promoting cultural interchanges and social cohesion, qualified as a philosophical belief. It might be contended that this was a surprising decision with Maistry’s belief being more akin to a viewpoint or opinion rather than a philosophical belief. The tribunal were influenced by the fact that there had been comment from academics and the then Director General of the BBC on the importance of public sector broadcasting. Therefore expert opinion had played a role in shaping the employment tribunal’s decision-making. Equally in *Farrell v. South Yorkshire Police Authority* (2011), it was held that an employee’s beliefs that the 9/11 and 7/7 attacks were “false flag operations” authorised by the US and UK governments and that the media is controlled by a global elite seeking a new world order, were not philosophical beliefs. While the tribunal accepted that the belief was genuinely held and that whilst the views were not incompatible with human dignity, the claimant’s beliefs did not have the necessary cogency, seriousness and coherence to constitute a philosophical belief. Considering ‘widely accepted’ public knowledge, the beliefs were deemed absurd. In *Lisk v. Shield Guardian Co Ltd.* (2011), it was held that the belief that a poppy should be worn as a mark of respect for military war dead was too limited to be a protected belief.

On the other hand, in *Hashman v Milton Park (Dorset) Ltd.* (trading as Orchard Park) [2011], an employment tribunal held that the claimant's belief in the sanctity of life and that foxhunting should consequently be banned met the Grainger criteria and qualified as a protected belief. In *Costa v League of Cruel Sports* (2018), the claimant had been dismissed from his employment after raising concerns that the pension fund operated by his employer was investing in businesses involved with animal testing which was against his belief of ethical veganism. The claimant sent several emails to work colleagues informing them of the situation and was subject to disciplinary action and dismissed from his employment. Mr Costa argued that he had done nothing wrong and that his actions were motivated by his belief in ethical veganism. In order for a claimant to succeed in a philosophical belief claim, as stated previously, a tribunal or court needs to be convinced that the specified belief is capable of constituting a philosophical belief and that the claimant adhered to that belief. The claimant became a vegan in 2000 and also disposed of any clothing containing animal products. Ethical veganism was deemed as rooted in the way persons led their life, what they wore, what personal care products they used, their hobbies, the work they undertook and how they travelled to work. The employment tribunal concluded that ethical veganism was capable of being a philosophical belief and was therefore a protected characteristic under the Equality Act 2010.

The dilemmas facing employment tribunals indicate a thin dividing line between success and failure in this domain. With difficulties involved in defining both religious and non-religious beliefs, the application and interpretation of the law might be considered subjective and uncertain. The view expressed by the tribunal in *Dunn v University of Lincoln* (2017) that such cases required them to engage in '*unfamiliar territory that made it difficult for the tribunal to reach a decision*' indicates an unmet need for more specialist training of employment tribunals in relation to this aspect of equality law²⁸. Indeed, as Sandberg asserts, '*with the exception of beliefs that are deliberately insincere and / or harmful to others, it is possible to argue that most beliefs would meet the (Grainger) criterion*'.²⁹

(b) Establishing Rationale within the Context

Whilst a claimant might genuinely believe that the comments or conduct that they were subjected to were offensive on the grounds of religion or belief, employment tribunals and courts often take the view that mere comments and conduct do not constitute discrimination. In this context, the cases often fail because the claimant cannot meet the legal threshold for establishing discrimination or harassment. In *Quershi v The Commissioners of Her Majesty's Revenue and Customs* (2019), the claimant did not shake hands with female colleagues because of his firmly held religious beliefs. He alleged that as a result of this he was subject to harassment at work. The tribunal concluded that his employer's conduct did not have the purpose of violating the claimant's dignity or creating an intimidating,

²⁸TUC Report (2007) at 11.

²⁹Sandberg (2013).

hostile, degrading, humiliating or offensive environment. In this case the claimant could not establish facts and in the absence of any other explanation, an act of harassment on the grounds of the claimant's race or religion could not be established. The burden of proof did not shift to the respondent. If it had so shifted, the tribunal was satisfied that the employer had shown that their conduct was entirely appropriate and did not amount to harassment.

In *Heathfield v Times Newspaper* (2012), the claimant who was a Roman Catholic was a sub-editor with the respondent. An editor, who was chasing a story about the Pope shouted across to the senior production executives, "*can anyone tell what's happening to the f***ing Pope?*". The claimant raised an internal complaint which he did not think was adequately dealt with, and brought claims of harassment and victimisation to the employment tribunal. The employment tribunal dismissed both claims, saying in relation to harassment that the colleague had indeed engaged in 'unwanted conduct' but neither did the conduct have the purpose or effect of violating the claimant's dignity or creating an adverse environment for him nor was the conduct on the grounds of the claimant's religion. The claimant appealed against the ruling in respect of harassment, but this was dismissed by the appeals tribunal. In relation to the motive of the conduct, the employment appeal concluded that there was no anti-Catholic purpose in what the colleague had said, and that bad language was used because of irritation and work pressure. In terms of the effect of the conduct, the tribunal found that to the extent that the claimant felt that his dignity had been violated or that an adverse environment had been created, it was not a reasonable reaction in the circumstances and rejected the claimant's appeal.

(c) Establishing the Degree of Harm caused by the Conduct

The failure of a claimant to complain or challenge particular conduct, or to inform the alleged perpetrator that the conduct is unwelcome, damages the claimant's likelihood of success. For example, in *Ullah v B&Q Plc* (2019), the claimant alleged race and religious discrimination. In a meeting concerning Mr Ullah's work performance and promotion, the following exchange took place between the parties (recorded by the claimant): The manager said: "*There are times when you seem very engaged and very up for it and there's other times you have almost been verging on being, I hate to say it because it's such an inappropriate word, but being a terrorist. And do you know that is an old B&Q word don't you?*". Mr Ullah said: "*Yeah*" and is heard laughing on the recording which he made of the interview. The claimant's manager continues: "*That is not me saying another kind of terrorist, I am not saying that*". Mr Ullah responds: "*You're calling a Muslim guy a terrorist*". Again, he is heard laughing on the recording. The manager then says: "*No, no, no, no, I know that's why it sounds so ridiculous I'm not saying anything*". Mr Ullah responds: "*OK*". He subsequently claimed that the exchange amounted to the manager calling him a terrorist and argued that this denoted discrimination because of race and religion.

The tribunal observed that the 'terrorist' comment was made almost halfway through a lengthy interview and that at no point during the meeting did the

claimant suggest that he was upset or exhibit signs of distress due to the comment. The court concluded that the claimant had only raised his grievance because he was disappointed at not being selected for promotion. The tribunal found that the use of the word 'terrorist' did not amount to race or religious discrimination and fell significantly short of amounting to harassment within the meaning of the Equality Act 2010. However, it could be contended that the claimant's laughter in the recording was a reasonable way for him to respond in dealing with an uncomfortable situation. The tribunal took the view that 'feeling uncomfortable' is not the same as being subject to race and religious discrimination or harassment. It is evident that in order to succeed in religious discrimination cases of this nature, the claimant will need to provide tangible supporting evidence about specific comments, to list any specific detriments suffered, and be able to discuss these in detail while giving evidence.

(d) Establishing the Credibility of Parties

Tribunal and court decisions in discrimination cases often turn on the key issue of witness credibility which can be derived from the strength of the evidence and the responses of the litigating parties. There is an appraisal of whether reactions are evasive or exaggerated, if explanations provided are unclear or contradictory, and whether the allegations are supported by contextual circumstances. In a significant number of religious discrimination cases where the tribunals are faced with an allegation of offensive behaviour by a work colleague or manager, there is often a straight denial from the alleged perpetrator, constituting two conflicting versions of the events (rarely witnessed by others in the workplace). The hearing is then essentially a 'credibility contest'³⁰. The outcome of the claim will be determined by whose evidence the employment tribunal prefers.

By way of example, in *Roderick v Chief Constable of South Wales Police* (2018), a claim by a police officer of religion and belief discrimination was held not to be well founded and was dismissed. The claimant alleged that he was called 'Father Ted' by one colleague and that another colleague commented that 'Jesus did not exist and the Bible is a pile of nonsense'. The employment tribunal did not regard the claimant as a credible witness and noted that he regularly raised religion as a conversation topic and initiated discussions about it by inviting questions about his faith and the Bible. The tribunal took the view that the comments made to the claimant were not presented in an argumentative or derogatory manner, and arose in a more general conversation about religion and the Bible (paragraphs 20-22).

(e) Establishing the Sufficiency of Proof

Offering specific evidence of discriminatory conduct is essential and would bolster the likelihood of success in litigation. Making a claim with a paucity of evidence reflects a lack of knowledge and understanding about the legal process

³⁰Samuels (2004); Lockwood, Rosenthal & Budjanovcanin (2011).

and what is required to establish religious discrimination to the satisfaction of an employment tribunal or court. A claim should also be brought within three months of an act that is deemed discriminatory on the grounds of religion or belief. The burden of proof in discrimination cases initially falls on the claimant to adduce facts from which the tribunal could infer that unlawful discrimination has occurred. The burden then shifts from the claimant to the employer in order to show there is a non-discriminatory reason for the conduct, behaviour or comment. In many cases that fail or are struck out by the employment tribunals, there is insufficient direct evidence of an act of discrimination and therefore the tribunal concludes that there is no reasonable prospect of success³¹.

In a number of claims, the allegation of religion or belief discrimination is considered speculative in nature and not supported by the contextual circumstances. This might suggest that too many petty and spurious claims are being made. For example, in *Dunhulow v Imperial College Healthcare* (2019), whilst it was evident that the claimant had many unresolved grievances relating to her workplace, she attempted to shoehorn these individual grievances into allegations of discrimination on account of age discrimination and religion, often in a somewhat haphazard manner. Whilst the claimant genuinely believed in the discrimination, there were no grounds for the employment tribunal to infer from the evidence that the issues were in any way related to her age or religion and belief. In another example³², a claimant alleged that when his area manager visited the shop in which he worked, the manager made comments about his skin colour, race and religion. The tribunal viewed the allegations about skin colour, race and religion as vague with a lack of specific examples, and therefore concluded that the incidents had not occurred.

(f) Establishing the Degree of Threat to Organisational Image, Culture and Reputation

There is increasing evidence of employees wanting to manifest their beliefs at work by wearing religious clothing or symbols and expressing their philosophical views³³. However, an organisation's ethos might be challenged by an employee's dress, behaviour or conduct in the workplace, demonstrating one area of conflicting rights [see also section (g)]. The difficulty for employers is how best to accommodate individual employee authenticity with the organisation's brand vision and reputation. In *Noah v Sara Desrosiers* (trading as Wedge) (2007), the claimant was Muslim and applied for the position of stylist at the salon. She wore a headscarf, which she considered essential to her religion. The respondent did not hire the claimant as the wearing of a headscarf was considered unsuitable for the post. The owner made it clear that if an employee at her salon wore any type of head covering, she would ask them to remove it as it would not be consistent with the promotion of the business. Here the claimant complained of direct and indirect discrimination. While the claim of direct discrimination was rejected, the complaint of indirect discrimination was well-founded. The tribunal accepted that

³¹*Sidhu v Hovis Ltd.* (2019).

³²*Said v PCC Abbey Ltd.* (2018).

³³Aquelch (2013).

the respondent had a legitimate aim and was objectively entitled to view hair coverings as a risk to business. However, a combination of factors, including the discriminatory impact, the fact that the PCP did not go to the core requirement of the job function, and a critical assessment of the available evidence as to the degree of risk and adverse impact to the respondent's business had the claimant been employed and covered her hair at all times, meant that the respondent could not show that the PCP was a proportionate means of achieving a legitimate aim (para 160).

Similarly, in *Farrah v Global Luggage* (2012) it was held that an employer who required a Muslim employee to resign because she wore a headscarf on the grounds that the business wanted to maintain a 'trendy image' was liable for constructive unfair dismissal. By way of further example, in *Sethi v Elements Personal Services* (2019), the claimant - a Sikh man, was refused employment because he had a beard. The employer had a 'no beards policy' for appearance (and not hygiene-related) reasons. The tribunal held that this placed Sikhs generally, and the claimant, at a particular disadvantage because the beard is a tenet of the Sikh faith. The tribunal viewed the 'no beards' rule to be a disproportionate requirement for the maintenance of high standards of appearance – an alternative requirement to keep the beard tidy in this instance would have been reasonable.

An employee's behaviour or conduct, both in their public and private life, that is associated with religion or belief might also need careful consideration and proportionate action by an employer. In *Gen Menachem Hendon Ltd. v De Groen* (2019), a teacher at a religious Jewish nursery was dismissed after disclosing to pupils' parents that she lived with her boyfriend, which was contrary to the ultra-orthodox religious principles of the school. The nursery was concerned that such an admission to parents would taint its image, have a detrimental effect on the school's credibility and result in financial loss. The claimant subsequently refused the respondent's request to lie and state that she was not living with her boyfriend, so that the nursery could communicate that information to relevant persons. However, the teacher's claim for religious discrimination failed because she had not been dismissed because of *her* lack of belief, but because of the *organisation's own religious belief* forbidding cohabitation of non-married couples. Here, the claimant could not satisfy the comparator requirement in direct discrimination, since the employer would have dismissed any other person cohabiting outside of marriage irrespective of their religion. However, it could be argued that as a consequence of this application of the law, the school's beliefs on cohabitation was being prioritised over the less favourable treatment experienced by the teacher because of her belief system. As appraised by O'Dempsey³⁴, the "over focus (on the concept of religion) tends to mask the fact that *belief* as a characteristic operates in a completely different way and requires more detailed consideration". This illustration highlights how the law will have to tread a difficult path where the claimant and defendant might be of the same religion, but have different interpretations about certain aspects of their belief systems.

³⁴O'Dempsey (2019).

(g) Establishing the Degree of Threat to others and balancing Conflicting Rights

Ideological and practical tensions can surface between distinct protected characteristics (e.g. disability and religion; sexual orientation and religion) and among different groups within a single equality strand (e.g. religious Christians and atheists). In such instances, a notion of ‘competing rights’ emerges which shores up questions about how incongruent individual equality-related rights are to be assessed, and indeed, whether one set of rights could trump another. The issue of balancing conflicting rights is raised in a range of cases. Exemplifying circumstances of religious tensions between the same equality strand, in *Ali v Heathrow Express Operating* (2020), a Muslim employee claimed discrimination because his Sikh colleagues objected to him wearing a Kara, which is intrinsically associated with the Sikh religion. The work colleagues emphasised that the claimant’s religion (Islam) was the reason for them objecting to him wearing a Kara. However, as they also made inflammatory remarks about incidents of sexual abuse by Muslims who specifically wore the Kara, the tribunal had no hesitation in finding that this was discrimination against the claimant on the basis of his religion.

In *Ladele v The London Borough of Islington* (2010), the claimant (a registrar) lost her religious discrimination claim when she was disciplined for refusing to conduct same-sex civil partnership ceremonies on the grounds of her strict Christian religious belief. Here, the Borough was deemed as authorised to use its ‘Dignity for All’ policy to oblige all its registrars to perform civil partnerships and marriages. The court’s decision has been criticised for not acceding on the point that the employer could have reasonably accommodated Ladele’s conscience objection (additionally given her experienced distress) when other councils had found ways to do so in such circumstances³⁵. Similarly, in *McFarlane v Relate Avon Ltd.* (2010), the claimant lost his claim of religious discrimination when he was dismissed for refusing to carry out certain same-sex counselling sessions because of his Christian belief that same-sex activity was sinful. The narrow dividing line between success and failure in some cases might, however, be exemplified by the employment tribunal decision in *Mbuyi v Newpark Child Care* (2015), where it was held that a Christian nursery assistant had been subject to direct religious discrimination when she was dismissed for expressing her belief to a lesbian colleague that God did not approve of same-sex relationships. This decision was highly context specific— in that the claimant was *replying to a question asked by the colleague*, and not promulgating her views in the workplace.

In *Mackreth v Department for Work and Pensions* (DWP)] [2018], the applicant who was a Christian claimed several religious and/or philosophical beliefs, including his belief in the truth of the Bible and a lack of belief in, and conscience objection to, transgenderism. The claimant asserted that his religious beliefs meant he could not refer to individuals undergoing, or who had undergone, gender reassignment with the pronoun of that person’s choice (as required by the DWP). The tribunal accepted that lack of belief in transgenderism and conscience

³⁵Vickers (2010).

objection to transgenderism are genuinely held and that the lack of belief in transgenderism are beliefs that relate to a weighty and substantial aspect of human life and behaviour and attain a certain level of cogency, seriousness, cohesion and importance. However, the court held that such beliefs were incompatible with human dignity and conflict with the fundamental rights of others, specifically here, transgender individuals.

The ambiguity/confused state of the current framing, application and interpretation of the law is also demonstrated in *Forstater v CGD Europe* (2021). The claimant held the belief that sex was immutable and not to be conflated with gender identity. She made comments on social media which some of her colleagues found offensive to transgender people. At the conclusion of an investigation, the claimant's working relationship with the respondent was terminated. At first instance, the employment tribunal held that whilst the claimant's belief satisfied the first four criteria in *Grainger*, it did not satisfy the fifth criterion – her belief was deemed as incompatible with human dignity and in conflict with the fundamental rights of others. However, on appeal, the EAT overturned the decision on the grounds that the employment tribunal had incorrectly applied the *Grainger* criteria. The employment tribunal had interpreted the law too narrowly and that a philosophical belief should only be excluded for failing to satisfy the *Grainger* criteria if the belief was *extreme* in nature, such as a belief in terrorism, Nazism or totalitarianism (and therefore in contravention of Articles 9 and 10 of the ECHR). Whilst the claimant's views were controversial, objectionable and offensive they did not fall into the category of 'extreme' that would exclude it from legal protection. This wider interpretation of the law has been welcomed by commentators, however, given the uncertain state of the law in this domain, the Policy Exchange has called for Section 10 of the Equality Act 2010 to be amended to explicitly state that only '*extreme beliefs*' should be excluded from protection and not mere controversial or offensive views³⁶.

(h) Establishing the Degree of Threat to Job Performance and Health and Safety

In certain contexts, the employer and claimant will need to balance job-performance or health and safety issues with respect to religious expression. In *Azmi v Kirklees Metropolitan Borough Council* (2007), Mrs Azmi was employed at a junior school as a bilingual support worker. The claimant asked whether she could wear a veil whilst teaching in the presence of male colleagues. Mrs Azmi was informed that she could wear a veil while working around the school, but that she must remove it whilst teaching because obscuring the face and mouth reduced the nonverbal signals required between the instructor and pupil. Essentially, it was determined that she performed her work more effectively when not wearing a veil. The claimant complained of indirect discrimination and the court found that the local authority had applied a provision, criterion, or practice that put persons of Mrs Azmi's religion at a disadvantage when compared with others. Here there was

³⁶Yowell (2021) at 36.

a potential case of indirect discrimination, however, in this context the PCP was a proportionate means of achieving a legitimate aim. There was objective evidence that when the claimant was wearing the veil, children did not engage with her as effectually as when she was unveiled.

In another instance, a claimant (an observant Muslim) was offered employment at a nursery. Her religious beliefs required her to wear a *jilbab* - a garment that reached from her neck to her ankles³⁷. She claimed that she was at a disadvantage by reason of the manifestation of her religious belief because she had been told that she would not be permitted to wear a *jilbab* (contrary to her religious beliefs) and was therefore unable to accept the post. It was held by the EAT that the claimant had not been instructed by the hiring organisation that she could not wear a *jilbab*, but was asked if she could wear a shorter one. The employer was concerned about staff wearing any garment that might constitute a tripping hazard to themselves or the children in their care; the provision, practice, or criterion was not indirectly discriminatory to Muslim women. The PCP was applied equally to staff of all religions and if it did put some Muslim women at a particular disadvantage, any indirect or direct discrimination was justified as being a proportionate means of achieving a legitimate aim; namely protecting the health and safety of staff and children.

In *Onuoha v Croydon Health Services NHS Trust* (2021), the employment tribunal held that a Catholic nurse was subject to direct discrimination for wearing a cross necklace. The trust had argued that the wearing of the cross posed an infection risk. The tribunal found that the infection risk was very low and that the organisation's dress code was applied in an arbitrary manner and in a way that was not proportionate. There was no cogent explanation as to why rings, neckties, kalava bracelets, hijabs and turbans were permitted, but a cross necklace was not (paras 270- 271). This decision contrasts with *Chaplin v Royal Devon and Exeter Hospital NHS Foundation Trust* (2010), where the claimant, a nurse in a hospital, was prevented from wearing a cross at work on the grounds of health and safety because management were concerned about the associated risks (e.g. a patient seizing and tugging on the cross thereby causing injury or the item coming into contact with an open wound). Here however, the hospital had engaged in extensive consultation with Ms Chaplin to accommodate the wearing of a cross or brooch, however, a compromise could not be reached.

Dress codes and uniform policies can also be contentious in other public service contexts. For example, in *Singh v Greater Manchester Police* (2018)³⁸, a Sikh officer was asked not to wear a turban during riot training and was told to wear a Force regulation helmet during training exercises; this requirement was held to be indirect discrimination on grounds of both race and religion. Here the tribunal noted that "it is appropriate to recommend that Greater Manchester Police should amend its uniform and equipment policy to take into account the race and religious requirements of Sikh officers". While the Force stated that they thought they were acting in the officer's best interests in terms of job performance and health and safety, they were obliged to eventually accommodate the request. It is

³⁷ *Begum v Pedagogy Aurus UK Ltd.* (2015).

³⁸ *Guardian* (2009).

noteworthy that under the Employment Act 1989, Sikhs who wear a turban have exemption from the requirement of wearing head protection on construction sites, or indeed more recently, at any other workplace (The Deregulation Act 2015). These cases demonstrate inconsistencies in the application of law in the area of religion and health and safety. In some cases, there might be calls for empirical evidence to ascertain the degree of threat posed by non-adherence to a PCP, whereas in others, exemptions are automatically granted with few exceptions.

(i) Establishing the Fairness of Procedural Issues

The manner in which employer policies, practices and procedures are applied have been a relevant issue in litigation. In *Noufel v Royal Mail* (2018), the claimant alleged direct and indirect religion or belief discrimination based on the way his request for leave was handled. In August 2017, the claimant first informed his employer that he wanted to carry forward a week's leave from 2017 to 2018 in order to request time off for *Hajj* (religious pilgrimage). His leave form was initially returned to him without consent because it was a period which was oversubscribed, and he had been granted a similar period of leave the year before. The employment tribunal found that the claimant was not treated less favourably than anyone else would have been treated under the employer's absence policy. In fact, the tribunal concluded that the claimant was treated *more* favourably than others in that his request for leave to go on *Hajj* was previously approved as an exception subject to his putting it in writing. It was determined that the employer's system for dealing with absence requests was a proportionate means of achieving the legitimate aim of securing the required service level at peak holiday seasons. Mujtaba and Cavico³⁹ observe tensions can arise among employees when a particular individual's religious practices are seen to impinge on another employee's work life. Here, it is conceivable that permitting a special absence for certain workers could result in a disproportionate workload allocation for others, which would need careful management.

Conclusion

Our analysis highlights some of the major thematic areas relevant to litigation in religion or belief claims. While employment tribunal decisions do not create binding precedent, they reveal the nature, complexities and the scope of such litigation claims. The current legal framework pertaining to religion or belief is highly complex and employment tribunals and higher courts appear to be unilaterally vested with the task of adjudicating religion or belief claims and setting the limits of the law⁴⁰. Sandberg⁴¹ observes that tribunals and the courts have interpreted the law in different ways, reaching inconsistent and arbitrary decisions. Case law further demonstrates that the protection proffered by the

³⁹Mujtaba & Cavico (2012).

⁴⁰Hunter-Henin (2021).

⁴¹Sandberg (2018).

Equality Act 2010 to philosophical belief is potentially wide in scope and the boundaries/limits of the law are not always clear. As acknowledged by Pitt⁴², “the inclusion of all religions and all beliefs within the rubric of a protected characteristic leads to a real danger of trivialising the equality principle”. The legal regulations pertaining to religion or belief therefore continue to present significant challenges for both employers and employees in terms of predicting how the law will be interpreted and applied by tribunals or courts. Whilst the review of legal claims demonstrates areas of ambiguity and subjectivity, it nevertheless points to certain implications for both employers and employees.

To summarise, employees should be aware that if they are contemplating making a religious discrimination claim, there is a requirement for sufficient and direct evidence of the act of discrimination, listing any specific detriments suffered and discussing these in detail while giving evidence. Workers should note that the failure to complain or challenge conduct, or to inform the alleged perpetrator that the conduct is unwelcome, harms the likelihood of success⁴³. As Pearson observed,⁴⁴ the outcome of an employee’s claim is likely to depend on how offensive the conduct was; whether it took place in work time; whether it arose in the context of a general discussion about religious issues or if it was unwanted and unwarranted behaviour.

Demonstrating the existence of religious discrimination can be problematic due to the subtle means by which religious discrimination might manifest itself. The importance of legal advice for employees when taking a claim is particularly pertinent to ensure that speculative and unworthy claims are not brought to court and that an employee has cogent evidence to support the claim. If an employee is taking a philosophical belief claim against an employer, the belief must meet the *Grainger* criteria. A belief might potentially be protected, but in the context of a particular case, the employee might not gain protection of the law if the manner in which the person manifested the belief is deemed incompatible with human dignity and the fundamental rights of others⁴⁵.

With respect to employers, whilst organisations might wish to preserve their brand and reputation, managers must be sensitive to the right of employees to express their beliefs and religious identity. Complexities in this arena commonly arise on grounds of dress requirements⁴⁶ which might amount to unfavourable treatment by preventing a person from manifesting their religion. However, indirect discrimination might be seen by the courts as justifiable if the employer can show that its regulations are proportionate and necessary to fulfil a legitimate aim. Indeed, it has been observed that employment tribunals and higher courts have been reluctant to treat religious discrimination claims as direct discrimination,

⁴²Pitt (2011) at 403.

⁴³*Ullah v B&Q Plc* (2019)

⁴⁴Pearson (2016) at 42.

⁴⁵*Mackreth v. Department for Work and Pensions* [2018]; *Forstater v CGD Europe* (2021).

⁴⁶*Middlemiss* (2018); *Nath, Bach & Lockwood* (2016).

preferring instead to classify issues as indirect discrimination, thereby providing an employer with an opportunity to objectively justify the treatment⁴⁷.

While the right to express religious freedom might increase the morale of individuals in the workforce, it presents challenges to organisations if other groups of workers view religious expression negatively as a means of promulgating faith against their wishes. Therefore, a claimant who manifests their religion in a way that is inappropriate and which upsets other members of staff could be dismissed for a permissible reason, and they would not be considered to have been subject to less favourable treatment in such a situation⁴⁸. In the event of a conflict, an employer must balance this right of an employee against the rights and freedoms of others.

An employer will also need to balance health and safety issues with respect to religious expression, considering where the employees religious freedoms cease, and health and safety issues commence. The key question is whether the employer can justify the PCP on health and safety grounds⁴⁹. They should ensure policies, practices and procedures are explicit, applied reasonably and even-handedly, and do not discriminate on the grounds of religion or belief⁵⁰. It is also important that management should not act in haste relating to disciplinary action and dismissal⁵¹. As Mujtaba and Cavico observe⁵², management might avoid religion or belief litigation by taking positive measures to educate and train staff in the areas of culture, religion and diversity and implement policies prohibiting discrimination on the grounds of religion or belief. To avoid the likelihood of legal action, employers could consider adopting the US and Canadian approach of reasonable accommodation (see Vickers⁵³ for an alternative viewpoint). Overall, it would be prudent for organisations to gather feedback and review their policies, practices and procedures that could raise issues concerning belief and religious observance at work.

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⁴⁷Pearson (2016); Hatzis (2011); TUC Report (2007); *Azmi v Kirklees Metropolitan Borough Council* (2007).

⁴⁸*Chondol v Liverpool CC* (2009); *Grace v Places for Children* (2013).

⁴⁹*Begum v Pedagogy Aurus UK Ltd.* (2015).

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The Sin of Unreasonable Doubt in the Age of Unfair Trial: Comparative Perspectives

By Rocco Neri*

In order to best understand judicial decisions following evidentiary findings supported by testimony, it is necessary to start with two questions: In the case of an acquittal verdict, why was the defendant acquitted? In the case of a guilty verdict, how should the defendant be punished? The first prejudice lies in this. The witness, who is aware that his or her word may affect these two outcomes, is in turn judged without bias by the assessors. The second prejudice stems from the function of punishment: to educate by punishing, or by infringing the rights of all does not conform to the canons of social reintegration of the possible convict. This contribution, therefore, aims to find the scientific degree of moral certainty that is based on the use of rational methods of research and evaluation of evidence, oriented towards the discovery of the truthfulness of the incisive facts of the case.

Keywords: Civil law and common law; Epistemology and reasonableness; Evidence; Logic; Legal certainty; Fair trial

Introduction

The judicial process can be interpreted as a dynamic context in which different narratives are presented by various actors with different positions and different functions. The fundamental problem is to establish which statements are true and which are not. A factual hypothesis supported by adequate evidence does not satisfy the judge's certainty as to its truth, since such a conviction still has a subjective connotation that differentiates it from the rational and objective assessment of the evidence¹. In particular, the problem arises as to the judge's narratives, since the final decision is based on them. Human perceptions of agents and their actions are informed by motivational conditioning concerning what types of actions are ethically required in different types of situations. A strongly inquisitorial system places the onus on the defence, so that if there is no evidence to acquit, one convicts, or if the evidentiary picture is contradictory, one acquits for insufficient evidence, with permanent negativity on the defendant². In contrast, in the accusatory system, which is based on the presumption of innocence, the prosecution bears the burden of proof so that, on the one hand, insufficient or contradictory evidence leads to acquittal, also regarding justification. Furthermore, conviction must be pronounced when responsibility has been established beyond

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¹Nobili (1974); Gaito (1975) at 517.

²Dinacci (1984) at 73; Pasta (2016) at 200.

reasonable doubt³. However, it is necessary to emphasise how it is often stated in the operative part of the judgment that the decision was taken pursuant to Article 530(2) of the Code of Criminal Procedure (with consequent opacity as to the position of the acquitted). Likewise, in civil proceedings, the (deficient or contradictory) evidentiary results in the liability judgment are invoked⁴. The judge's need to know the facts to determine and motivate his/her decisions obligates him/her to indicate the assessment criteria to which he has referred in the grounds of the judgment, (excluding assessment parameters based on scientific data or long-established opinions, and the maxims of experience and laws of logic)⁵. The correct treatment of the facts is an indispensable condition for an adequate and fair legal response.

The Difficult Coexistence of Orality and Adversarialism

This fact brings out a further profile of the trial philosophy about the issue of evidence: the relationship between orality and cross-examination. This relationship replaces 'strict legality' with an eminently discretionary datum, verifiable and controllable only through the assessment of the reasonableness of the motivation⁶. Here, the problem is not only the issues of applicative uncertainty that characterise free conviction, reasonable doubt, and the rules of judgment; But the moment the evidentiary fact is invoked, as a constituent element of the case, rather than legal proof it becomes privileged proof⁷. In this way, however, an undue evidentiary shortcut is in fact introduced; and it is achieved not by violating the rules of procedure but by taking advantage of an ascertainment to be conducted on a hypothesis of a substantive criminal case⁸. Moreover, in the Italian system, there is a threat to constitutional guarantees. In fact, the burden of proof originates from the presumption of innocence provided for in Article 27, paragraph 2, of the Italian Constitution. At the time of assessment, Italy assigns the function of an epistemological rule to the burden of proof, where it is pointed out that qualifying the defendant as innocent implies both that the sanction must follow the sentence of conviction, and that the defendant's guilt must be proved in the manner prescribed by law⁹. Hence, the recognition of the principle that evidentiary uncertainty must be resolved in favour of the defendant simply because the demonstrative object of the trial is conviction and not acquittal¹⁰. In fact, in order to arrive at a formal declaration of guilt, it is necessary to await the outcome of the last trial. The object of the ascertainment can only be the guilt of the defendant with repercussions at the level of the burden of proof¹¹. Also in the

³De Caro (2016) ; Stella (2003) at 195; Marzaduri (2010) at 326.

⁴Di Bernardo (2016) at 64; Di Bernardo (2010) at 466.

⁵Ferrajoli (2016) at 172-175.

⁶Nobili (1995) at 650; Padovani (1999).

⁷Taruffo (2018) at 1307.

⁸Sgubbi (1990) .

⁹Cordero (1967); Capograssi (1959).

¹⁰Di Donato (2008).

¹¹Ho (2008) at 212; Tuzet (2013) at 27.

European context, with specific reference to the trial ascertainment, it is emphasised that the presumption of innocence implies a precise rule of evidence and judgment: the guilt of the defendant must be proved beyond all reasonable doubt; and the burden of providing such proof rests exclusively on the prosecution¹². Moreover, on the subject of rules of evidence, the European Court of Justice has made it clear that the presumption of innocence requires that, in carrying out their duties, the members of the judging body do not start from the preconceived notion that the defendant has committed the offense for which he/she is being prosecuted; the burden of proof rests on the prosecution and the doubt is for the benefit of the accused. Furthermore, the prosecution has a duty to indicate to the person concerned what charges are being brought¹³.

Unpredictability and associated Problems

The formulated observations highlight a situation of serious unpredictability as to the consequences of conduct. Unpredictability, which in addition to finding its origin in the descriptive vagueness of a criminal offense, also transmigrates into the content of the decision. This, moreover, is the inevitable result when moments of discretionary assessment of the historical facts are introduced among the 'types' of offense, further filtered by attitudes elusive of the onus probandi of an orthodox probative method¹⁴. We are, therefore, in the presence of an unpredictability that is not limited to the descriptive deficiency of the offense, but extends to the "treatment" that such a situation entails at the trial level, producing the following general problems:

- a. Witness sensitivity sees inductive rationality as the fundamental source of justification for the hearing officer's response, which we find to be the most attractive component in the inferential model. Prejudice often manifests itself through stereotypes¹⁵. In fact, a prejudicial stereotype is a stereotype that is the product of a motivated maladaptation to the evidence¹⁶. Stereotypes may take the form of an implicit generalisation¹⁷; Alternatively, it may take the generic form in which there need not be a statistically significant number of cases, but only a simple association expressing the salient features of some characteristic¹⁸.
- b. In the Anglo-Saxon trial, the judge is the guarantor of the regular course of the confrontation between the parties, extraneous to the decisive moment that is assigned to the jury, which, however, lacks evidentiary powers. The codified system, typically of civil law, gives the judge investigative and

¹²ECtHR *Mangano v Italy*, on the grounds about the admission of the appeal, at 4-6.

¹³ECtHR *Salabiaku v France*.

¹⁴Pagliari (2005) at 1042.

¹⁵Ainis (2010).

¹⁶Twining (2006) at 310-334.

¹⁷["all/most/most X are F"], Marconi (2007) at 49.

¹⁸["X is F"] Greene & Ellis (2007) at 183-200.

decisional powers that inevitably culminate in favouring incursions into the field of evidence, aimed at his/her greater cognition necessary to motivate the judgment. This is relevant, considering that the judgment will be subject to possible appeals, i.e. censure by the public and the parties¹⁹. This element has an impact on the manner in which the judgment is conducted, characterised by the failure to comply with the stipulated deadlines, such as in the matter of cross-examination, with very frequent and profound incursions made by the judge. This datum is favoured by the lack of sanctioning profiles when the rules, laid down by the legislator in the matter of evidence, are violated.

- c. The trial also ultimately suffers from the overlap of the so-called media trial that takes place parallel in the press. This carries repercussions regarding the information detached by the media, fabricated during the investigation phase, prior to the procedures of the hearings, clearly violating the terms of trial document publication²⁰. These are moments behind which different interests operate also in relation to different situations: reinforcement of the accusatory hypothesis; defensive strategies of the defence and of the offended persons; political and economic interests; the certainty of conjecture. This is often completely unmotivated and lacking any rational justification²¹. Not infrequently, if someone is asked why they are certain of something, the answer has no rational justification, but rather psychological or fideistic explanations²².
- d. The conduct of the cross-examination before the jury in the Anglo-American system and in the Assize Court (in the Italian judicial system), also manifests numerous critical aspects, prefiguring an evidentiary development not lacking aspects such as emotionality, suggestion, tension, aggressiveness. These profiles are not present in the development of the taking of declarative evidence before a professional judge, who is called upon to conduct a vast number of trials, often on the same issues. The problem lurks, above all, in criminal trials in the civil law system because cross-examination is dissociated from orality, since the assignment of validity may result from the evidence obtained during cross-examination of the parties, even before another judge²³. Indeed, on this point, the wording of Article 111 of the Constitution does not appear to be exhaustive. To the extent that it emphasises the adversarial aspect, it essentially puts the profile of orality in the background. This encourages the circulation of evidence even between different proceedings, the so-called regime of evidence in special cases (Art. 190 bis Code of Criminal Procedure), the circulation of evidence from other proceedings to assess facts contained in irrevocable judgments (Art. 238 bis Code of Criminal

¹⁹["*aspettiamo di leggere le motivazioni della sentenza*" - "We are waiting to read the grounds for the judgment"] Eusebi (2016) at 1668.

²⁰Dinacci (2008).

²¹Donini (2016) at 14.

²²Betti (1958).

²³Aliseda (2006).

Procedure). This element undermines the principle of immediacy, (whereby the decision must be taken by the same judges who took part in the trial) by affecting a different regime of orality or a regime of readings, even though the trial formation of the evidentiary material must be observed in both situations²⁴.

Epistemology of Testimony between Certainty and Uncertainty

The dissociation between orality and cross-examination is confirmed at the constitutional level, providing that evidence must be formed in cross-examination. That evidence also may not be formed in cross-examination by consent, by proven unlawful conduct, as well as by impossibility of an objective nature. The guilt of the accused cannot be founded on the statements of those who have always voluntarily evaded questioning (Art. 111 Const.). In essence, certainty does not presuppose the use of any method of checking the rational or cognitive basis of what is certain²⁵. On the other hand, the use of expressions such as moral certainty is falling into disuse in common law doctrine and jurisprudence, although the reference to certainty remains widespread in the everyday language of jurists. This is especially the case in the field of criminal law, where it is believed that a conviction is justified only if the judge is certain of the defendant's guilt. However, the idea that in general the judicial decision must be based on a 'certain' conviction concerning the facts to be decided is recurrent²⁶. Not infrequently, this idea is expressed in strengthened terms, with the addition of adjectives such as moral or absolute, to indicate that the certainty must not be based on a superficial opinion but must derive from a particularly deep conviction. Thus, allegedly, if the judge achieves moral, or absolute certainty, he/she is in a position to decide properly²⁷. This type of certainty is based on a truthful conviction, i.e. a claim to truth: if I say that I am certain that X implies that I am certain that X is true, certainty as to the facts could be understood as synonymous with the truth of the facts. This occurs especially when this certainty is stated as absolute, moral certainty as to the facts of the case and can only be attained on condition that the judge researches all the facts that can identify the truth, acquiring all the evidence and information necessary for this purpose²⁸. Moreover, moral certainty is identified in the condition in which the judge, rationally assessing the elements of judgment available to him/her, reaches a conclusion based on the facts that allow him/her to exclude any 'reasonable doubt' and thus determine a 'maximum probability'²⁹. Some uncertainties, however, concern the method on which it is based. On the one hand, it deals exclusively with how the members of the jury reason in common law systems above all. Even assuming, for the sake of argument, that it reliably

²⁴Pardo & Allen (2008) at 223.

²⁵Tversky & Kahneman (1980).

²⁶Vidmar (2011) at 58-62.

²⁷Klein & Mitchell (2010); Koehler & Meixner (2015) at 749-774.

²⁸Tversky & Kahneman (1974) at 1124-1131.

²⁹Tversky & Kahneman (1983) at 293-315; Zenker (2013).

describes what goes on in the minds of jurors, one can justifiably doubt that it can automatically apply to the reasoning of a professional judge, skilled in the critical evaluation of evidence and the application of law³⁰. Similarly, the risks of overstating evidence that involve the cognitive consistency approach for jurors do not arise, or arise in different terms, for the judge³¹. On the other hand, what if the evidence is taken into account by the trier of fact for the purpose of ascertaining whether the statements concerning the facts of the case (taken individually or taken as a whole) are or are not true? One is thus concerned with how the jurors construct their narratives, but not with the issue of whether and to what extent these narratives correspond to the reality of the facts they relate³². Thus, the focus is exclusively on the coherence of the narratives the jurors construct, and not on their truthfulness. Here too, it should be noted that there can be perfectly coherent narratives and completely false ones, which is of no interest in the context of a trial.

Reasonable Unfair Testimony

Reasonable testimony is the assurance of truth that the speaker gives to the listener. It is the non-evidential characteristic of their interpersonal relationship that gives value to testimonial beliefs, the exact connection between a speaker giving a listener the assurance of the truth of his/her utterance, or inviting a listener to trust him/her, and the truth itself³³. In other words: What is the scientific value of such interpersonal characteristics? For the speaker, by presenting an utterance as an assertion, by the power of saying something to the listener, presents him/herself as responsible for the truth of what he/she says and, in so doing, offers a kind of guarantee for this truth³⁴. But even if a speaker explicitly offers his listeners a guarantee of the truth of his assertion, what does this have to do with truth itself? Trust is only a source of epistemic assurance when it is epistemically reasonable³⁵. Trust is scientifically reasonable when the thing trusted is trustworthy, provided there is no evidence to show that it is not trustworthy. Witness injustice, on the other hand, occurs when prejudice drastically reduces the credibility

³⁰Guthrie, Rachlinski & Wistrich (2007); Posner (2010); Scholars who have dealt with legal reasoning have traditionally focused on the decisions made by juries and individual jurors, which play a central role in systems of the Anglo-Saxon tradition, particularly the English and American systems. The result is that, from the point of view of empirical studies on the subject, 'the behaviour of judges remains something of a mystery'; and, from a theoretical point of view, none of the many models of judicial reasoning in the field is satisfactory. And it is precisely the latter presided over by the principle of legality, to which the notion of the case is correlated, that limits the operation of judicial reasoning. "Judges too are human": like other experimental subjects and ordinary people, they rely more or less consciously on heuristics and reasoning shortcuts that can lead them to draw wrong conclusions or make irrational decisions.

³¹Weinshall-Margel & Shapard (2011).

³²Wistrich, Guthrie & Rachlinski (2005) at 1277-1293.

³³Zenker, Dahlman & Sarwar (2016) at 173-196.

³⁴Viscusi (1999) at 26-62.

³⁵Fricker (2016a) at 144-159.

attributed to someone's word³⁶. This means finding fault regardless of whether one benefits from the fault³⁷. Indeed, it means justifiably believing the word of a speaker, but being culpably negligent with the evidence³⁸. The listener ends up with a false belief, but the history of epistemic guilt is such that the responsibility is discharged and we regard the error as being solely the fault of the original speaker: After all, it is 'X' who was negligent with the evidence, whereas the listener made no error of reasoning in believing 'X'. The evaluator is a faultless (and therefore blameless) conduit for bias³⁹. If the reception of 'X's' word is negatively influenced by prejudice (testimonial injustice), then it cannot be challenged; or if 'X's' account is rejected because it has to recount a form of social experience for which there are insufficient shared concepts due to interpretive marginalisation (hermeneutic injustice), then it still cannot be challenged⁴⁰. When the level of credibility attributed to a speaker's word is reduced by the bias operating in the listener's judgment, the speaker suffers testimonial injustice⁴¹. The bias that drives every case of testimonial injustice may or may not be a conviction, operating specifically in the listener's credibility judgment. Judgment may be unreflective and spontaneous, a matter of ingrained habit, or testimonial sensitivity⁴². Witness injustice not only blocks the flow of knowledge, it also blocks the flow of evidence, doubt, critical ideas and other epistemic inputs that are conducive to knowledge⁴³. If a speaker knows something that the listener does not (and if the level of credibility deficit is such that the listener does not accept what he or she is told), the listener's ignorance is preserved⁴⁴. Alternatively, if the speaker offers evidence that has a bearing (positive or negative) on something the listener already believes but does not know, then the listener loses his/his ignorance⁴⁵. Thus, the listener loses reasons that (if positive) may make his belief knowledgeable or at least give it greater justificatory weight; or that (if negative) may dissuade a false belief, or at least turn out to be less solid than it seemed. In both cases, an opportunity for scientific improvement is lost and ignorance prevails. The plausibility and credibility of a narrative depends on the extent to which it corresponds to criteria of 'normality' or 'familiarity' of what is being narrated with respect to the way of thinking of those reading the narrative, but not on whether the narrative is or is not true⁴⁶. This implies that the narrator (the judge) or the user of the narrative, may take as true facts that have not been proven, as long as they are normal or familiar. This would, in the name of narrative coherence, fill in the gaps that may have arisen in the evidentiary verification of factual statements: that is, one would take as true what one actually knows nothing

³⁶Fricker (2007).

³⁷Fricker (2013b) at 49-53.

³⁸Fricker (2013a) at 1317-1332.

³⁹Holroyd (2012) at 274-306.

⁴⁰Medina (2012).

⁴¹Fricker (2015b).

⁴²Ibid.

⁴³Fricker (2016b) at 33-50.

⁴⁴Ibid.

⁴⁵Ibid.

⁴⁶Lackey (2020) at 43-68.

about⁴⁷. This, however, assumes that the judge can base the decision on unproven facts, and thus excludes that the judicial decision must be based only on the facts that have been proven at trial, even when this leads the judge to construct a narratively inconsistent or incomplete version of the facts⁴⁸.

The Judge against Prejudice: The Intervention of Logic

The judge and all the other subjects of the process stop to rethink what has already been, to return to the present with intelligence, with the feeling of having had a moment in the past. But they merely make present what is not present. And so the process is always proceeding through signs which signify but are not the thing signified⁴⁹. This occurs when the judge, instead of 'discovering' the meaning of the norm, tends to 'construct' it⁵⁰. In essence, the interpretation of facts and, in particular, of legal facts is not a mere 'evaluative approach', all the more so in a system, in which the semantics of legal language is multi-interpretive. Hence the recourse to criteria of discretion which, although admissible in the legal system, must nevertheless be kept quite distinct from arbitrariness insofar as it is bounded by the control of a rational justification in which the judge is always in a position to scrutinise within the limits of the contested charge⁵¹. In essence, every argumentative passage of the judge, leading from the evidentiary fact to the fact to be proved, must be supported by a logical apparatus⁵². Judges rely heavily on intuitive reasoning to evaluate legal disputes. They systematically use "simple mental shortcuts as a guide to reasoning about legal materials" and for this reason, while occasionally employing more deliberative forms of reasoning, "remain exposed to errors of judgment".⁵³ Examples of this are the distortions introduced by procedural constraints, bureaucracy, and the legal environment, as well as the emotions and other psychological factors that influence judges' decisions⁵⁴.

The risk posed by the crisis of the law results in some correspondence to the facts in the dispositive power of creating new law on the part of the judging authority. This is due to a corresponding weakening of the law in its role of limiting arbitrariness, played by the principle of legality, now characterised by an indeterminate language.

This reality is flanked by a normative production generated for the solution of specific cases and, therefore, necessarily lacking the requirements of generality and abstractness⁵⁵. Hence the crisis of the law's regulatory capacity, which distorts

⁴⁷Nagel (2014) at 219-241.

⁴⁸Medina (2012) at 201-220.

⁴⁹Schauer (2009).

⁵⁰Teichman & Zamir (2014).

⁵¹Canale (2013).

⁵²Gigerenzer (2014); Selten (2001).

⁵³Sunstein, Kahneman, Ritov & Schkade (2002)..

⁵⁴Frederik (2005) at 25-42.

⁵⁵It thus emerges how the expansion of judicial law also originates from the dysfunctions of legislative law. whereas 'generality' means the reference of the normative provision to a series of persons who are not individually determined, the requirement of abstractness is characterised by the

the cognitive role of jurisdiction. The reference to evidentiary relevance that guarantees the right of defence, implies the right to evidence and the right to cross-examination even through a limitation of ascertainment⁵⁶. It thus emerges how the 'fixing' of a subject of investigation does not merely fulfil bureaucratic functions of 'procedural order', but instead constitutes an expression of fundamental values of the criminal process⁵⁷. In any event, this aside, it is essential to point out how the insufficient clarity of the normative perimeter of the evidentiary theme leads to the effect of evidence tending to replace its object in the sense that the element in which it consists becomes significant at the same time on the real level (as an element of the *notitia criminis*, as *corpus delicti*). This happens as on the symptomatic level (as an element that presumptively refers to a broader and more significant context), with an interchange such that the procedural factors through their symptomatic-probative relevance replace the relative elements lacking in identification and determination⁵⁸. Having overcome the opposing orientations that considered it sufficient to resort to a probabilistic scientific law, there has been a move towards a logical probability supported by a high degree of rational credibility. Even if the scientific law has low probability, and those that required a high probability law close to certainty, this move also occurs even in the wake of North American jurisprudence⁵⁹. The data must emerge from the cross-examination of the experts so as to allow the judge to determine the validity of the evidence and the applied scientific method. In essence, the degree of decidability of a pronouncement of legal truth is directly proportional to the degree of taxability of the rule applied by it and inversely proportional to the space required for interpretive argumentation⁶⁰.

Is Logic Sufficient?

In civil law systems, the method of interpretation is deductive based on the Aristotelian syllogism: a) all men are mortal (major premise); b) Socrates is a man (minor premise); c) Socrates is mortal (conclusion). The above conclusion is based on the deductive method; it is free of logical flaws; it is in line with our civil law system (rule - fact - effect i.e. judgment). Unlike common law where it is predominantly inductive: a) Socrates is mortal (conclusion); b) Socrates is a man (minor premise); c) all men are mortal (major premise). The inductive method has at least one logical flaw because it generalises (major premise) from a

indeterminability of the subjects who may find themselves in the situation described by the norm. In essence, the rule, in its physiology, must be configured as a will to will, a preliminary will directed to give rise to a concrete will when the conditions provided for therein occur, since this follows from the need to ensure, in addition to the greatest possible legal certainty, equality of treatment for all those who find themselves in the same situation. Danziger, Levav & Avnaim-Pesoa (2011) at 6889-6892; Dhimi,(2003) at 175-180; Diamond, Rose, Murphy & Meixner (2011) at 148-178.

⁵⁶Tuzet (2010); Engel (2012); Englich, Mussweiler & Strack (2006) at 188-200.

⁵⁷Ferrajoli (2011) at 36.

⁵⁸Tuzet, (2006); Josephson (2002) at 287

⁵⁹Simon (1997); Fenton, Neil & Berger (2016) at 51-77; Festa (1996); Garbolino (2014).

⁶⁰Kahneman, Slovic & Tversky (1982) at 84-98.

conclusion. In fact, that Socrates is mortal and is a man does not necessarily imply that all men are mortal. However, it is in line with the common law system (effect i.e. judgment - fact i.e. rule). In essence, the judge's reasoning should lead him to determine which are the possible reconstructions of the facts of the case on the basis of the available evidence, and to choose the narrative that is 'better' than the others for the final decision. However, the hypothesis taken into consideration by the judge would not in itself be evaluated, but would only be evaluated in comparison with the other hypotheses. The result of the evidence would be the determination of which is the 'best' narrative, through the comparison between this narrative and the other possible hypotheses, aimed at establishing which hypothesis is to be preferred to the others⁶¹. The judge must first assess the degree of corroboration obtained by each of the hypotheses in play, considered in isolation and not in comparison with the other hypotheses. Accordingly, then, the judge must discard those hypotheses that do not have a sufficient evidentiary foundation to be considered. The inference to the best explanation is not, when considered on its own, an acceptable criterion for the final choice of the version of the facts to be used as the basis for the decision. One conception of the decision states that the judge should choose the version of the facts that is relatively plausible: The choice of hypothesis must be based on the relationship between the best resultant hypothesis and the degree of evidentiary corroboration relating to the facts on which the hypothesis is based⁶². One can certainly agree that the conditional explanation must correspond to the facts, but one can observe that this calls into question, and essentially abandons, the entire construction of the other criteria indicated for the choice of the best explanation. For if it is said that the explanation, having considering all the available evidence, turns out to correspond to the facts that must be chosen, this constitutes an autonomous and sufficient criterion for identifying the best explanation. Then the consistency of the explanation ends up being a secondary, if not entirely irrelevant criterion: Consequently, one ends up saying that the explanation is best if it is true. The bulwark of the predictability of the decision should preserve (not replace) legislative legality. Thus, the (albeit important) perspective of jurisprudential stabilisation cannot be enforced outside the connection to prior legislation. Understanding legal reasoning and its peculiar characteristics thus serves both to shed light on human reasoning in general and to test various 'theories of rationality' in relation to the systematic and predictable deviations of human thought from the rules of correct reasoning theory (logic and probability theory in particular)⁶³. In this regard, an alternative between two possible hypotheses seems to emerge: a) only the coherence of the narrative is taken into account, believing it to be the most important factor, or the only factor on the basis of which the narrative is to be taken as the basis for the decision, thus eliminating any reference to the truth of the narrative itself; b) the narrative is held to be true because it is coherent, thus understanding coherence as a synonym or demonstration of the truthfulness of the narrative. Both of these hypotheses are,

⁶¹Gigerenzer (2008); Howson, & Urbach (1993).

⁶²Posner (2010); Rachlinski, Wistrich & Guthrie (2013) at 1586-1618.

⁶³Crupi, Dell'Utri & Rainone (2016) at 81-98; Taroni, Biedermann, Bozza, Garbolino & Aitken (2014).

however, highly problematic. The first hypothesis can only be accepted on condition that it is assumed that the trial is not aimed at establishing the truth of the facts on which the decision is based, but only at having the judge choose a narrative of those facts⁶⁴. The second possibility must also be excluded for several reasons. On the one hand, to say that a description of a factual matter is true because it is consistent implies the premise that one considers the reality being described to be consistent (in whatever meaning of the term)⁶⁵. This presupposes ontological, or even metaphysical assumptions. There is, therefore, no necessary correspondence between the narrative coherence of a description and its truthfulness. As a rule, it is consistency, not completeness of information, that leads one to accept a story as true, even if it is not. On the other hand, it is not true that the most coherent stories are the most probable ones, and 'the uninformed easily confuse the concepts of coherence, plausibility and probability'⁶⁶. It is no coincidence that inductive logic is used to explain the structure of evidentiary inferences, and special attention is paid to the rules of evidence and the criteria that must guide a rational evaluation of evidence in general, and witness statements in particular⁶⁷. We are confronted with a perspective hinged on the values of rationality, the logical validity of the judge's reasoning, and the analytical and intersubjectively verifiable evaluation of evidence; an evaluation that must be oriented essentially towards ascertaining the truth of the facts⁶⁸.

Conclusion

The smooth functioning of a country's legal and juridical system depends, to a significant extent, on the quality of the decisions and choices of its protagonists: judges, prosecutors, jurors, lawyers, experts, witnesses, investigators, etc. Moreover, to the extent that legislation is the product of choices and deliberations, individual and collective, of legal professionals, these also determine the quality of the very system of norms and laws that regulates actions and interactions. For this reason, the study of legal reasoning is the set of Judges, jurors, investigators and prosecutors who must assess daily the relative probabilities of different events based on clues, testimonies, reports, and ambiguous information, under conditions of high uncertainty and scarcity of time and resources (including cognitive). These are the ideal conditions that favour a 'fast', intuitive and heuristic-based thinking style, to the detriment of 'slow' and deliberative thinking. Judges are undoubtedly expert reasoners, careful to avoid traps and hasty conclusions and explicitly instructed to carefully consider the different aspects of each decision problem. A judge might assess the defendant's guilt as highly probable even if the available

⁶⁴Gilovich, Griffin & Kahneman (2002).

⁶⁵Guthrie, Rachlinski & Wistrich (2002).

⁶⁶Rachlinski, Wistrich & Guthrie (2011) at 72–98.

⁶⁷Kerstholt & Jackson (1998) at 445–454; Kaye (1979).

⁶⁸Guthrie, Rachlinski & Wistrich (2001); Guthrie, Rachlinski & Wistrich (2007); Guthrie, Rachlinski & Wistrich (2009).

statistical data do not justify this conclusion, but the precautionary principle that it is better to acquit a guilty person than to convict an innocent one always remains.

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Indigenous Peoples' Rights in Brazil: A Conceptual Framework on Indigenous Constitutional Law

By Thiago Burckhart*

The recognition of indigenous peoples as subjects of rights by the 1988 Brazilian constitutional as well as the development of International Law opened the way for establishing, at least in a theoretical perspective, an “essential core of rights” of indigenous peoples, surpassing the historical integrationism. However, these norms vary significantly with a reality marked by the permanence of integrationist practices, asserted by the state, as is the case of “timeframe thesis”. Therefore, the aim of this paper is to critically analyse, landed on the fields of constitutional theory and legal sociology, the essential core of indigenous peoples' rights in Brazil, pointing to the current issues that hinder or hamper its enforcement.

Keywords: *Indigenous peoples' rights; Brazil; Indigenous Constitutional Law; Human rights.*

Introduction

The second half of the 20th century, as stated by the Italian jurist Norberto Bobbio, can be labelled as the “*age of rights*”. The gradual and recent undertaking of political openness towards *new rights* and *new subjects of rights* – boosted by this new sociopolitical context – enables to theoretically conceive the birth of a “paradigm of diversity”, or even an “era of diversity”. Indigenous peoples of different nationalities are at the heart of this broad process. As integral parts of a certain “national communion”, but which seeks to assert its own sociocultural heterogeneity, indigenous peoples have politically mobilised themselves in order to legally trigger their claims towards multiculturalism and interculturality.

The recent acquisitive evolutions of contemporary constitutionalism in Latin America, as well as in International Human Rights Law – both being fruitful contributions to the “common heritage of democratic constitutionalism” – impose, at least formally, a new legal reality for indigenous peoples, marked by *multiculturalism* and *interculturality*, which implies the formal overcoming of the historical integrationism engraved in legal and political practices in all the

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Americas. The recognition of indigenous rights by the 1988 Constitution, international treaties and conventions brings about the structuring of an “*essential core of indigenous rights*”, conceived as a block of constitutionality and conventionality, and is based on the urgencies and sociocultural needs of these peoples.

This reality, however, coexists with several contradictions and paradoxes from the point of view of its enforcement. This is because the affirmation of indigenous rights in Brazil inexorably pervades the “indigenous question”, that is, the indigenous’ claim for the right to land. Indeed, the judicial thesis of “*marco temporal*” [timeframe thesis], created by the Federal Supreme Court in the *Raposa/Serra do Sol* case in 2009, which, briefly, prevents the guarantee of the right to land of indigenous peoples who were not living there on the date of the 1988 Constitution enactment, came to be instrumentalised both by the Judicial Branch, as well as by other branches to prevent the enforcement of the constitutional right to land of indigenous peoples. Ever since, the thesis is one of the “hot topics” involving indigenous peoples rights in the country.

In this regard, this article aims to analyse the rights of indigenous peoples in Brazil, focusing on the theoretical construction of the “essential core of rights” in the paradigm of diversity, and the legal-political practices that subvert this normative order and represent, in practical terms, the remaining of *historical integrationism* – the case of “*marco temporal*” thesis. The analysis is grounded on the fields of constitutional theory and legal sociology, in a structural-functional perspective, bringing together elements of political theory. Therefore, the article is divided into three parts:

- I. The essential core of rights;
- II. The paradigm of diversity and the formal overcoming of historical integrationism;
- III. The “*marco temporal*” thesis and the integrationist remnant.

The Essential Core of Rights

The 1970s and 1980s witnessed the gradual process of political and cultural engagement of indigenous peoples, within the framework of political “empowerment”¹ in Latin America. This is the result of the broader process or “politicisation of culture”², as it has greatly triggered this topic within political arena and legal norms³. By redefining the concepts of “culture”⁴, “ethnicity”, and “indigenism”, indigenous peoples have considered themselves as political subjects

¹For an analysis of the process of “political empowerment” of indigenous peoples in Brazil, see Sousa Filho (2003).

²Benhabib (2006).

³Bhabha (2013).

⁴Cunha (2009).

and subjects of fundamental rights, in order to found a “new indigenism”⁵. This was deemed as the “rebirth of indigenous peoples towards law”, whether from a domestic law point of view – in several Latin American countries –, or even from an international law point of view – especially within International Human Rights Law.

Indeed, the 1988 Constitution, as a catalysis for the large and detailed process of indigenous rights constitutionalisation in Brazil, has coined these rights in a new grammar of legal reading, linked to other constitutional principles and fundamental rights, along with the opening clause that provides for the dialogue with International Human Rights Law. The document made room for surpassing, at least theoretically, the historical integrationist approach in force since the beginning of the 20th century – with the creation of the National Indian Protection Service, current “FUNAI” – based on the recognition of its cultural and specific cosmovisions. The legal provisions of the indigenous issues within the scope of this new approach – in a new “legal form” – concerns the need for the state and institutional policy to respond to demands for recognition⁶, especially when it comes to cultural diversity within the nation-state⁷.

In this context, the 1988 Constitution has become a sort of “symbol” for the indigenist movement and indigenous peoples. It was the outcome of political engagement by both indigenous peoples and indigenous institutions during the National Constituent Assembly (1987-1988). The military dictatorship, the preceding period (1964-1985), was responsible for systematic violations of fundamental rights and indigenous peoples’ rights in Brazil, including the commitment of state crimes – such as the genocide of the Waimiri-Atroari people, in Amazonas⁸, the genocide of the Avá-Canoeiro in Araguaia and the successive massacres of the Cinta Larga in Mato Grosso⁹, the bombing of tribes by the Armed Forces using Napalm¹⁰, in addition to enslavement, the creation of clandestine prisons, the prohibition of speaking their own language (one of the elements of ethnocide), the establishment of arbitrary criteria for “indigeneity”, attempts at “emancipation” of indigenous peoples, negative certificates of the existence of these peoples for the illegal licensing of economic activities on their lands¹¹. In this length, the possibility of redrawing the legal and political order mobilised the interests and political will of these peoples and the institutions that politically support them.

At the international landscape, the political moment was also favourable for the recognition of cultural diversity and indigenous peoples’ rights, especially within the scope of the UN Commission on Human Rights, which created the

⁵To understand the concept of *indigenism* and its political repercussions, see: Ramos (1998); Niezen (2003).

⁶On the concept of recognition, see: Honneth (1996).

⁷If until then diversity was a problem that was beyond the nation-state, in the sense of the different peoples that configure the political dynamics of other countries, from then on diversity becomes an internal problem. See Laraia (2001).

⁸Comitê Estadual da Verdade do Amazonas (2012) at 158.

⁹Brasil (2014) at 201.

¹⁰São Paulo (2015) at 3233.

¹¹Fernandes (2015) at 145-146.

Working Group on Indigenous Populations in 1982. This engagement, fostered by indigenous leaders themselves, resulted in the revision of international legally-binding documents, such as the International Labour Organisation (ILO) *Convention on the Rights of Indigenous and Tribal Peoples n. 107* (1957), a document with an integrationist nature and bias¹². In 1989, the works of the mentioned Group provided the enactment of ILO Convention n. 169, which revised the legal approach towards indigenous peoples' rights, whereby new rights were enshrined – as is the case of the *right to prior consultation*¹³. This has reinvented International Law for indigenous peoples, dimensioned in a new legal grammar¹⁴.

The normative evolutions regarding indigenous peoples' rights are landed on what Norberto Bobbio¹⁵ called as the “era of rights”, and evinces the flourishing of their renaissance towards law¹⁶, triggering the basis for indigenous policies in Brazil. In theoretical terms, an attuned analysis of this normativity enables to construct an “*essential core of rights*”, which steers as a set of constitutional and international rights that conform one rigid block on the control of constitutionality and conventionality, and refer to the main urgencies and sociocultural need of these peoples in their daily lives. The nucleus consists of current specific and general rights recognised by the Brazilian state, and as it is delimited to the constitutional and international scope, it is composed of fundamental and human rights. Therefore, it asserts the degree of fundamentality¹⁷ of these rights, based on the normative finding that fundamental rights are not only provided for in the article 5 of the Constitution¹⁸ – as stated for in the Article 5, 2.

The core is made up of three pillars. The first one relates to the *territorial and environmental rights*, and it confirms a unit insofar as land and environmental protection as intimately related for indigenous peoples, being land the basis for sustainable development of their own communities. Secondly, the *right to self-determination* – or, as Rodolfo Stavenhagen states, *ethnodevelopment*¹⁹ – which infers on the capacity for self-management and self-government of their peoples and communities. The third one, the *cultural rights*, that enshrines the cultural autonomy, epistemologies, cultural heritage and establish the legal protection for their cultural assets.

Territorial rights were historically at the heart of the “indigenous question”, and still is an open wound regarding indigenous peoples claims. From a constitutional point of view, the right to land, and the right to an ecologically balanced environment, are both provided respectively in Articles 231, § 1 and 225

¹²Anaya (2010) at 118.

¹³“Article 6º, 1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly”.

¹⁴Stavenhagen (2010).

¹⁵Bobbio (2004).

¹⁶Souza Filho (1998).

¹⁷For further analysis see Ferrajolli (2011).

¹⁸Canotilho (2012).

¹⁹Stavenhagen (1985).

of its text²⁰. The Article 231 stresses that indigenous traditionally occupied lands are the ones permanently inhabited, as well as those used for their productive activities, those essential for the preservation of environmental resources – which demonstrates their intrinsic relationship with the *right to environment* –, and those lands used for their physical and cultural reproduction. In this length, the article 225 points out that “everyone” has the right to an ecologically balanced environment, deemed as a common good for the people, by which it is part of the dynamics of intergenerational protection. From the outlook of International Law²¹, *ILO Convention 169* coins several references to the right to land. It states the need for governments to adopt measures in cooperation with indigenous peoples to protect and preserve the environment and indigenous territories (art. 7, 4), along with establishing a specific section of the Convention only to address on “indigenous lands”, pointing out that this concept should be broadly understood as “territory”, which encompasses the entirety of the habitat occupied by indigenous peoples, that they use in some way. Among other points, it recognises the *right of possession* and *property*²² for indigenous peoples (art. 14, 1), determines the protection of natural resources existing in their lands (art. 15, 1), in addition to preventing indigenous peoples from being transferred of the lands they occupy – the latter can only be carried out with the express consent of the communities (16, 1). Still in International Law, the *2007 International Declaration on the Rights of Indigenous Peoples* also highlights that indigenous peoples have the right to lands, territories and resources that they traditionally own and occupy or that they have used and acquired (26,1), as well as the control of their lands, territories and resources (26,2), the need for the State to ensure this right through demarcation (26, 3), and points out that indigenous peoples will not be forcibly removed from their lands (article 10); additionally, it also recognises that indigenous peoples have the right to conservation and protection of the environment and the productive capacity of their lands, territories and resources (art. 29, 1). The recent *American Declaration on the Rights of Indigenous Peoples*, enacted in 2016, also emphasises the protection of territorial rights related to the right to a balanced environment in several articles²³. Territorial and environmental rights are also related to the right to food, water, among others, that guarantee the lives of these peoples in their respective territories.

The *right to self-determination* of indigenous peoples is not expressly provided for in the chapter dealing with indigenous rights in the Federal Constitution. However, one of the fundamental principles of the country’s international relations (Article 4, item III) is “self-determination of peoples”, which, in an extensive interpretation, can be conceived as a device that also concerns indigenous peoples²⁴. International treaties are more vehement regarding

²⁰For a better understanding of the legal dogmatics on the right to land of indigenous peoples, see Barbosa (2001).

²¹For a further understanding of indigenous peoples’ land rights at the international level, see Gilbert (2013).

²²In Brazilian legislation, however, only the right to possession is recognised.

²³Emphasis on these matters is given in articles VI, XIX 2 and 3, and article XXV.

²⁴For details see Barbosa (2011).

the provision of this right and also its content. The *International Declaration on the Rights of Indigenous Peoples* points out in Article 3 that indigenous peoples have the right to self-determination, which is embodied in the ability to freely determine their political condition and freely pursue their economic, social and cultural development. Article 4 outlines that the exercise of the right to self-determination includes *autonomy* or *self-government* in matters related to its internal and local affairs, as well as the way to dispose of the means to finance its autonomous functions. According to the declaration, the right to self-determination also includes the ability to maintain and strengthen one's own political, legal, economic, social and cultural institutions, while retaining the right to fully participate in political, economic and social life (art. 5). The declaration also proposes a guarantee of access to means of communication (art. 16); political and social participation (art. 18); political cooperation (art. 19), and recognition of their political strategies development (art. 23). *ILO Convention 169*, despite not expressly recognizing the right to self-determination, make reference to two essential aspects interwoven: the right to prior consultation, recognised by article 6, 1, "a", and the respect to the customary right of indigenous peoples, recognised in art. 8, 1 of this instrument. Likewise, the *American Declaration on the Rights of Indigenous Peoples* also provides for the right to self-determination and the pursuit of indigenous free development (art. III and XXIV). All these normative aspects comprise this pillar related to the self-determination of indigenous peoples.

The *cultural rights* of indigenous peoples are recognised in the Constitution in several articles. The article 231 employs the recognition of indigenous social organisation, customs, languages, beliefs and traditions. Therefore, the Constitution ensures bilingual education for indigenous communities (art. 210, § 2), and determines that the State must protect the manifestations of indigenous cultures (art. 215, § 1). At the international level, there are several normative instruments that guarantee the right to diversity (*1972 Convention for the Protection of the World Cultural and Natural Heritage*; *2001 Universal Declaration on Cultural Diversity*; *2003 Convention on the Safeguarding of the Intangible Cultural Heritage*; and *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 2005). *ILO Convention 169* recognises in several articles the cultural rights of indigenous peoples. The articles 5, "a" and "b" are the ones that most eloquently emphasises it, by determining that social, cultural, and religious values and practices must be recognised and protected, as well as the integrity of indigenous values, practices and institutions. The *International Declaration on the Rights of Indigenous Peoples* is more emphatic in this regard and provides for the right to identity (Article 33), the protection of cultural heritage (Article 31), respect for traditions and customs, and the prohibition of discrimination (article 9, 11 and 12). The *American Declaration on the Rights of Indigenous Peoples* also recognises in a specific article (art. XXVIII) the protection of cultural heritage and intellectual property.

The pillars, as noted, are synergically interwoven as there is an evident interdependence between them, in which the violation of one right implies, in many cases, the violation of others. This is basically the idea that surrounds the conception of indigenous peoples "core of rights" – of an "*essential core*" – which

raises from the relation of reciprocal interdependence between these rights and lead up to the need to conceive them in an integrated way. In this regard, there is a need to conceive these rights in a *complex* way and to build intersectoral and intersectional constitutional policies that operate in the sense of giving meaning and value to these rights that make up this notion.

The Paradigm of Diversity and the Formal Overcoming of Historical Intergrationism

James Tully²⁵ leads off his book “*Strange multiplicity: constitutionalism in the age of diversity*” posing one central question, in epistemological and political terms: “[...] can a modern Constitution recognise and accommodate cultural diversity?”. This was a central issue for constitutionalism since the mid-1970s, in which cultural movements came into sight, giving rise to the “age of diversity” – based on a new paradigm, the “cultural paradigm”, as Alain Touraine²⁶ states. According to James Tully, the “age of cultural diversity” is marked by new of demands for *interculturality*, which transforms the way in which constitutionalism, human and fundamental rights are effectively conceived. In fact, space was opened for the recognition of new subjects of rights and new rights, which converge for increasing the sense of legality and constitutionality towards collective and individual freedom.

Tully’s question must be answered in the affirmative sense, taking into consideration the state of the art of contemporary constitutionalism. Indeed, the contemporary political moment is characterised by the rebirth of identity and cultural movements – Ghai Yash²⁷ calls it “the rise of ethnic consciousness” – that were triggered withing political and legal territories, and the demands for the recognition of *diversity*²⁸ were integrated into the “common heritage of democratic constitutionalism”²⁹. As Tully and Yash rightly point out, this process give rise to several causes and questions about the limits of the modern nation-state, which can be read – at least from the point of view of political pluralism – as the basis of a series of ethnic injustices and epistemicide. Following Boaventura de Sousa Santos’ thought, the process of building modernity downgraded the “epistemologies of the south” – the ways of knowing and being in the world that did not agree with the ideals of a western modern national society³⁰. This is why Tully³¹ specify that “a just form of constitution must begin with the full mutual recognition of the different cultures of its citizens”.

In the same light, Andrew Arato and Jean Cohen suggest that the modern consensus on “cultural unification” lost its meaning with the birth of cultural

²⁵Tully (1995) at 5.

²⁶Touraine (2005).

²⁷Yash (2008).

²⁸Tully (1995) at 8; Polanco (2006).

²⁹Onida (2008).

³⁰For details see Santos & Meneses (2010).

³¹Tully (1995) at 8.

movements at the end of the 20th century. The authors underline that this process is endorsed by the failures of the nation-state to cope with “pluralism”, and the self-determination of ethnic minorities within each state. It demonstrates several problems and challenges for state sovereignty, as it also redesigns the political and legal models shaped throughout modernity. Economic, cultural, political and legal globalisation, allied to intensive cultural interchanges and new political arrangements – such as the new and “brand new” social movements – carry out the restructuring of modern state and nation, in favor of the democratisation, recognition of cultural and ethnic pluralism within each state and society, including the promotion of cultural diversity through constitutional policies in order to expand – and not limit – freedom and equality in democratic constitutionalism³².

This has fostered the redraw of modern constitutionalism foundations. Modern constitutionalism was born in the 18th century, right after the French and American revolutions, as a new ideal and essentially normative political form, which represents a specific form of “legalisation of political rule”³³, triggering the separation of powers and liberal rights³⁴. The epistemological and political basis of constitutionalism have been updated at first shortly after the Industrial Revolution, paving the way for the recognition of “social rights”. Secondly, soon after the Second World War, the assertion of International Human Rights systems and the emergence of welfare state in Europe, stirred up the internationalisation of constitutionalism as a universal ideal³⁵, specifying new principles of coexistence, respect and dialogue among different peoples. As outlined by the French jurist Dominique Rousseau³⁶, a forgotten dimension of constitutional theory and constitutionalism has been inflated ever since, that is, the *utopian* dimension. For Rousseau, utopia is a constitutive impetus of modern constitutionalism – as well as the mentioned separation of powers and guarantee of rights –, being it the catalysis element that allows to dimension the recognition of new rights.

In this context, the “paradigm of diversity” is moulded. This new paradigm emerged in the mid-1970s onwards, changing social, political and legal dynamics since then. In what concerns indigenous peoples, this phenomenon enabled the assertion of their demands into legal grammar. As several authors point out – perhaps Stuart Hall³⁷ is the most emphatic – the recognition of new identities did not occur consensually in all society. Indeed, several groups have also disproved it, claiming a static and “pure” perspective of cultural identity and religiosity, subverting the logics of the diversity paradigm³⁸.

However, this new paradigm has widely brought about innovative political and legal measures regarding indigenous peoples, especially in what it comes to indigenous rights. The 1988 Constitution, insofar as it is a result of this process,

³² Arato, Cohen & Busekist (2018).

³³ Grimm (2016) at 4.

³⁴ Canotilho (2012).

³⁵ Ackerman (1997).

³⁶ Rousseau (2014).

³⁷ Hall (2010).

³⁸ In Brazil, perhaps the most emblematic case is the recent rise of “evangelicals” in Brazilian institutional politics. This is a group that, allied with the “ruralists” in the National Congress and other instances of power, operates in the sense of belittling and delegitimizing indigenous agendas.

was responsible for overcoming the historical integrationism that marked indigenous policies in Brazil, and all over the Americas. Integrationism, in indigenous policies, can be conceived as a governmental action that seeks to integrate indigenous peoples into the “national community” – into que way of life mostly shares by one state population –, which, in Brazil, reflects the dynamics of a non-indigenous society – and largely deny their very cultural and political autonomy. As Raquel Fajardo underlines, integrationist policies differ from assimilationist policies. According to her, assimilationism, carried out in several parts of the American continent during the first decades of post-colonisation, consist in assimilate indigenous peoples into “national community” values, without, however, taking into consideration their own cultural expressions. While integrationism give leave to the reproduction of their culture and cosmovisions, but without directly hindering the dynamics of dominant relations of national culture³⁹.

Integrationism has marked indigenist policy since the creation of the *Indigenous Protection Service* in 1910. Influenced by positivism and evolutionist bias – social evolutionism – prevailing at that time, the integrationist policy aimed to gradually integrate indigenous peoples into national society. This “will to integrate” was consistent with a broad interest – still alive – landed on political and economic aspects, that sought to make indigenous peoples to lose interest in remaining in their lands – which would open the space for selling them or even use it to agro-industrial purposes⁴⁰. The Statute of Indigenous People (Law n. 6,001, enacted in 1973), states in its first article that “this law regulates the legal status of indigenous communities, with the purpose of preserving their culture and progressively and harmoniously integrate them into the national communion”. For several jurists, constitutionalists and environmentalists, the mentioned article has been revoked by the promulgation of the 1988 Constitution, as the latter recognises cultural pluralism within the scope of a new perspective for its governance.

Since integrationism is profoundly related to “liberal” multiculturalism, whereby different cultures coexist under the fragile sign of “tolerance”, it then roughly prevents the development of intercultural dialogue between cultures and mutual learning, as well as the hybridisation of culture⁴¹. The 1988 Constitution, in the other hand, despite being the result of a multicultural cycle of new constitutions in Latin America – as stated by Raquel Fajardo – makes room for a sort of multiculturalism that is not merely “liberal”. Actually, it paves the way for interculturality and fruitful intercultural dialogues – although not expressively provided in the Constitution – as it happens in the most recent constitutions of Ecuador (2008) and Bolivia (2009).

It becomes evident, therefore, that from a theoretical point of view, the historical integrationism has been surpassed, particularly in the field of indigenous policies in Brazil. This surpassing is upheld by the 1988 Constitution and the other legislative directives that emerged from it. In this regard, the trackway to the possibility of harmonious coexistence of different peoples and different nations in

³⁹Fajardo (2009).

⁴⁰Cunha (2012).

⁴¹For an analysis of criticisms of multiculturalism see Dulce (2014); Zizek (2008).

Brazil, which implies dialogue as a strategic mechanism to solve conflicts and avoid violence, and claim peaceful, dialogic and productive coexistence between different epistemologies.

The Timeframe Thesis and the Remaining Integrationist Practices

Despite the formal surpassing of the historical integrationism, driven by the 1988 Constitution, it is certain, however, that numerous integrationist practices still mark indigenous policies in the country. One of these practices is the “timeframe thesis” [*tese do marco legal*], put into practice by the Supreme Court during the judgement of the leading case “Raposa/Serra do Sol”. This case springs from a popular action filed in 2005 by former Senator Augusto Afonso Botelho Neto (PT/RR) against the Union – in the aftermath of the administrative recognition of the indigenous land “Raposa/Serra do Sol”, by the President Luís Inácio Lula da Silva, in 2009 – with the aim of declaring its nullity and unconstitutionality. This judicial action spread the political and legal discussions around the demarcation of indigenous lands within judicial arena.

The trial process initiated in 27.08.2008. The case Rapporteur, Judge Carlos Britto, cast his vote, dismissing the popular action, making the Raposa/Serra do Sol land as indigenous in its entirety, and on a continuous basis. In his vote, Britto innovated by establishing a regulatory framework related to demarcation process, namely: 1) “timeframe thesis”; 2) landmark of the occupation’s traditionality; 3) landmark of the concrete land coverage and the practical purpose of the traditional occupation; and, 4) landmark of the land-wide concept of the so-called “principle of proportionality”⁴².

Shortly after the rapporteur’s vote, the judge Carlos Alberto Menezes Direito asked for views of the process. The trial was resumed in December 2008, with the offering of a partially dissenting opinion by Minister Menezes Direito. In the words of Erica Magami Yamada and Luis Fernando Villares, “aware that a vote against the continued demarcation of the Indigenous Land would not be well received by the majority of the Plenary, which would put him in an uncomfortable position, this minister established 19 conditions – or caveats – to demarcations”⁴³. These 19 caveats were added to the four milestones established in the rapporteur’s vote as a set of measures to be observed during the demarcation process as for the characterisation of a land as “indigenous land”. Among these, the most controversial and which generated the greatest political and legal repercussions was the “timeframe thesis”. According to this criterion, *indigenous peoples would not have the right to their lands if they were not living there on the date of promulgation of the 1988 Constitution*. This parameter is not based on any constitutional provision or even on international instruments for the protection of human rights, being it, therefore, an *extrajudicial* and *extralegal* criterion, created in in order to set up a *restrictive interpretation* of indigenous peoples’ rights⁴⁴.

⁴²Supremo Tribunal Federal (2009) at 295-308.

⁴³Yamada & Villares (2010) at 145. [my translation from the Portuguese].

⁴⁴Cunha & Barbosa (2018).

In the aftermath, the judge Justice Menezes Dias voted in favor of the constitutionality of indigenous land demarcation. The judges Carmen Lúcia, Ricardo Lewandowski, Eros Grau, Joaquim Barbosa and Cezar Pelluso also voted in favour of the constitutionality of indigenous land demarcation, with a new request for views made by the judge Justice Marco Aurélio de Mello. The judgment returned on 18.04.2009, in which the judge Justice Marco Aurélio de Mello addressed his dissenting opinion, for the unconstitutionality of the demarcation of the land. On the same date, the judge Cesar de Mello cast his vote in favor of the demarcation, and due to the interruption of the session, the judge Gilmar Mendes, the former President of the Federal Supreme Court, cast his vote accompanying the rapporteur, with the reservation additions made by the judges Carlos Britto and Menezes Direito.

The action was, therefore, judged partially valid, and the judges Joaquim Barbosa and Marco Aurélio were defeated, the first for deeming it totally unfounded – including the reservations and the timeframe thesis –, and the second for judging it totally proceeding⁴⁵. The constitutionality of the continuous demarcation of the Raposa/Serra do Sol indigenous land was then declared and the constitutionality of the administrative-demarcation procedure was affirmed. The mentioned *safeguarding measures*⁴⁶ and regulatory marks were justified on the decision for the “superlative historical-cultural importance of the cause”.

⁴⁵Supremo Tribunal Federal (2009) at 241.

⁴⁶Safeguarding measures: “(I) the usufruct of the riches of the soil, rivers and lakes existing in indigenous lands (art. 231, § 2, of the Federal Constitution) can be relativised whenever there is, as provided in art. 231, § 6, of the Constitution, relevant public interest of the Union, in the form of a supplementary law; (II) the usufruct by the indigenous peoples does not cover the use of water resources and energy potential, which will always depend on authorisation from the National Congress; (III) the usufruct by the indigenous peoples does not cover the research and mining of mineral wealth, which will always depend on authorisation from the National Congress, assuring them the participation in the results of the mining, in the form of the law; (IV) the usufruct by the indigenous peoples does not cover prospecting or sparking, and, if applicable, permission must be obtained for prospecting; (V) the usufruct by the indigenous peoples does not supersede the interest of the national defense policy; the installation of bases, units and military posts and other military interventions, the strategic expansion of the road network, the exploration of energy alternatives of a strategic nature and the safeguarding of riches of a strategic nature, at the discretion of the competent bodies (Ministry of Defence and Council of National Defence), will be implemented regardless of consultation with the indigenous communities involved or with FUNAI; (VI) the performance of the Armed Forces and the Federal Police in indigenous areas, within the scope of their attributions, is assured and will take place regardless of consultation with the indigenous communities involved or with FUNAI; (VII) the usufruct of the Indians does not prevent the installation, by the Federal Union, of public equipment, communication networks, roads and transport routes, in addition to the constructions necessary for the provision of public services by the Union, especially those of health and education; (VIII) the usufruct of the Indians in the area affected by conservation units is under the responsibility of the Chico Mendes Institute for Biodiversity Conservation; (IX) the Chico Mendes Institute for Biodiversity Conservation will be responsible for managing the area of the conservation unit also affected by the indigenous land with the participation of the indigenous communities, which must be heard, taking into account the uses, traditions and customs of the indigenous people, being able to count on FUNAI consultancy; (X) the transit of non-indigenous visitors and researchers must be allowed in the area affected by the conservation unit at the times and conditions stipulated by the Chico Mendes Institute for Biodiversity Conservation; (XI) the entry, transit and permanence of non-indigenous people in the

In this regard, despite the Supreme Court has ruled the case by granting the constitutionality of the indigenous land demarcation, it has also established another issue at stake, which is related to the timeframe thesis and the mentioned safeguarding measures. Hence, the decision fostered legal and political discussions concerning the constitutionality of these judicial innovations, insofar as they are not covered by current law. For several specialists – jurists and anthropologists – and indigenous institutions, there are several unconstitutionality in some provisions, which boost legal uncertainty for a large part of indigenous peoples who still claim for the demarcation procedure – or even those still under analysis.

According to Luis Fernando Villares and Erica Magami Yamada, the safeguard measures can be described as follows: “some are interpretations or repetitions of the constitutional and legal text (numbers 1, 2, 3, 4, 14, 15, 16, 18), others, contrary commands to those already established in convention 169 of the International Labour Organisation (ILO), (5, 6, 7)”, and additionally, there is “the creation of normative statements by exceptions 11, 12, 13, 17, and 19”⁴⁷.

In the aftermath, a motion was filled by the Federal Public Ministry, aiming at clarifying the content of the decision. In response, the Supreme Court determined that the effects of this decision would be restricted to the case *Raposa/Serra do Sol*. However, the Supreme Court itself has already issued the timeframe thesis in at least other two cases⁴⁸, and the judicial discussion about the

rest of the area of the indigenous land must be admitted, subject to the conditions established by FUNAI; (XII) the entry, transit and stay of non-indigenous people cannot be subject to the collection of any tariffs or amounts of any nature by the indigenous communities; (XIII) the charging of tariffs or amounts of any nature may not apply or be required in exchange for the use of roads, public equipment, energy transmission lines or any other equipment and facilities placed at the service of the public, which have been excluded expressly of approval, or not; (XIV) indigenous lands cannot be leased or subject to any act or legal transaction that restricts the full exercise of usufruct and direct possession by the indigenous community or by the Indians (art. 231, paragraph 2, Federal Constitution, c/c article 18, caput, Law nº 6.001/1973); (XV) it is forbidden, in indigenous lands, for any person outside the tribal groups or indigenous communities, to practice hunting, fishing or fruit gathering, as well as agricultural or extractive activities (art. 231, § 2, Federal Constitution, c/c article 18, § 1, Law nº 6.001/1973); (XVI) lands under occupation and possession of indigenous groups and communities, the exclusive use of natural wealth and existing utilities in occupied lands, subject to the provisions of arts. 49, XVI, and 231, paragraph 3, of CR/88, as well as indigenous income (art. 43 of Law No. 6.001/1973), enjoy full tax immunity, not charging any taxes, fees or contributions on one or the other; (XVII) the expansion of the already demarcated indigenous land is prohibited; (XVIII) the rights of the Indians related to their lands are imprescriptible and these are inalienable and unavailable (art. 231, § 4, CR/88); and (XIX) the participation of federal entities in the administrative procedure for the demarcation of indigenous lands, embedded in their territories, is ensured, observing the stage in which the procedure is found (Supremo Tribunal Federal (2009) at 416-418). [My translation from the original in Portuguese].

⁴⁷Yamada & Villares (2010) at 147), my translation from the original in portuguese. For a critique of the safeguard measures, see: Miras (2009) and, Kayser (2010).

⁴⁸“It [the timeframe thesis] justified the annulment of the recognition ordinances of the Limão Verde Indigenous Lands, of the Poro Terena Guyaroké, of the Guarani-Kaiowá people, both in Mato Grosso do Sul, and Porquinhos do Povo Canela Apanyekrá, in Maranhão, for the Second Panel of the Federal Supreme Court in 2014 and 2015”, Fernandes (2018) at 140 [my translation from the original in Portuguese].

possibility to issue this thesis continues on the Supreme Court's agenda⁴⁹.

Additionally, the decision also paves the way for the application of the safeguarding measures, and the timeframe thesis, by federal and state judges in cases involving the demarcation of indigenous lands all over the national territory. Three "legal opinions" issued by the Attorney General's Office also restate the "obligation" of the Federal Public Administration to "effectively comply, in all processes of demarcation of indigenous lands, with the conditions established in the decision of the Federal Supreme Court in PET 3.388/RR". The last Opinion, still in force – but with its effects suspended due to a lawsuit of the Federal Public Ministry⁵⁰ –, dated July 19, 2017, justifies the measure with the argument that the safeguards "have been reaffirmed in several other judgments of the Federal Supreme Court itself, making the undoubted consolidation and normative stabilisation of institutional safeguards"⁵¹. This opinion, by obliging Federal Public Administration bodies to enforce the timeframe and institutional safeguards, appears to be an even more harmful manoeuvre against indigenous peoples' lands. This is because the Federal Public Administration is in charge of demarcating indigenous lands.

Within the scope of Legislative branch, there are several bills proposing to turn into "legally binding" the timeframe thesis, such as: PL 490/2007; PL 1.216/2015; PL 1.218/2015; and PL 7.813/2017. The PL 490/2007, *inter alia*, does not even accept the exception of dispossession⁵² – as occurred during the military dictatorship. These proposals are controversial given that the National Parliament has several benches – and in this scenario the most preeminent one is the "ox bench" [*bancada do boi*], which gathers the country's landowners and agrobusiness owners – who are openly opposed to any demarcation of indigenous lands.

The consequences of the Supreme Court's decision, thus, is added to the already conflicting relations between state and indigenous peoples – something that marks Brazilian history. In strictly legal terms, there is a wider conflict regarding the meaning of "constitution", when it comes to the historical meaning attributed to the devices that manage indigenous peoples' rights, which is attested in the Federal Supreme Court *par excellence* – particularly in the seat of the constitutional review.

It is remarkable, therefore, that the use of the timeframe thesis turns it difficult to assert the rights of indigenous peoples to their lands based on a restrictive interpretation. First, because there is no legal basis for sustaining that thesis. Second, due to the fact that the thesis does not take into account the dispossession that occurred and intensified during the military dictatorship – through the "march to the west". In this length, the symbolic and empirical violation of the indigenous right to land, out turned by the application of this thesis, even as the safeguarding measures, represent a violation not only of the

⁴⁹This is the case of the "*Recurso Extraordinário (RE) n. 1.017.315*", filed by the "Instituto do Meio Ambiente de Santa Catarina" against FUNAI.

⁵⁰As it is the case of the "*Ação Civil Pública n. 1002351-95.2018.4.01.3600*", filed by the Federal Public Ministry against the Union and FUNAI.

⁵¹Advocacia Geral da União (2017).

⁵²Cunha (2018).

right to land, but to the “essential core of rights”, as explained above. This is because the pillars that conform the essential core of indigenous core of rights should not be interpreted in a separate watertight way, since the enjoyment of a specific right directly or indirectly imply on the enjoyment of others.

In this context, the timeframe thesis can be conceived as the continuity – through alternative means – of the historical integrationism. This is a political will that, by denying the right to land of indigenous peoples, incites their integration into the “national community” as the only alternative way, other than effectively recognizing their lands and territories, cultural practices and self-determination. When the state, whether by the means of Executive, Legislative or Judiciary, denies the original right to indigenous lands – controversy provided by the Constitution – via a hermeneutic strategy that restricts indigenous rights, it perpetuates illegitimate relations of domination, exclusion and oppression towards indigenous peoples, giving floor to a systematic violation of indigenous territorial, cultural, political and environmental rights⁵³. This can also be described and analysed as the permanence of a *symbolic violent relation*, as well defined by Pierre Bourdieu⁵⁴, inscribed in a pragmatics of violence.

However, there is no reason to carry out a restrictive interpretation of indigenous peoples’ rights other than a political will – disguised with supposedly legal elements – to retain them under an integrationist paradigm. It is evident that the rise of the diversity paradigm in Brazil is not easily assimilated by institutions, that continue to pose threats to the enforcement of indigenous rights and ways of living. The “essential core of rights” is, thus, carved in this dismantling context, marked by the use of new methodologies, which demonstrate the still in curse need to categorically affirm the rights of indigenous peoples and their emancipatory dimension.

Conclusions

The essential core of rights, granted in recent decades, represent an immensurable achievement for indigenous peoples in Brazil. This represents the possibility, at least theoretically, of coexistence in harmony between these peoples, whether with the cultural aspects that mark their identity, or with the other aspects that are directly related to their existence – land, environment, political self-organisation, and culture. This conquest also represents, at a symbolic level, the possibility of emancipating indigenous peoples from the yoke of integrationism, which has historically not taken seriously their cultural specificities, and did not consider their culture as a constitutive element of Brazilian cultural identity.

The timeframe thesis, however, stands as a concrete impediment to the construction of an intercultural state in Brazil, and to the steadiness of diversity paradigm, since it is a restrictive interpretation of the indigenous territorial rights, and violates not only the right to land – the access to indigenous traditionally

⁵³For further details on a critical view of the time frame, consult the following collection: Cunha & Barbosa (2018).

⁵⁴Bourdieu (1989).

occupied lands –, but the whole “essential core of rights”, which have a great connection. It also demonstrates that agrarian conflicts remain in force in the country, as well as a distorted view towards indigenous culture and the role of land in the cosmovision of indigenous peoples. Likewise, it indicates that the mechanisms of violence filed by the state against indigenous peoples have changed outfit, but still last – having adopted a “judicial discourse”.

Despite the fact that Federal Supreme Court has signalled a turning point in the interpretation of the timeframe thesis, by taking a contrary standpoint in ADI 3239 and ACO 304, both judged in 2017, there still remain several uncertainties over its application and repercussions it could cause – especially on the part of the Federal and State Courts – as well as the instrumentalisation by Federal Executive power, and its “legislation” by the Legislative branch.

The Brazilian political cartography that was designed with the timeframe thesis represent a threat to the essential core of rights, as well as to the construction of an intercultural or multicultural state, that respects the rights of ethnic minorities, under the prism of cultural diversity protection and promotion. By way of a possible conclusion, it should be pointed out that the essential core of rights – due to the fact that they constitute fundamental rights in Brazilian constitutional system – must be enforced by all constitutional institutions and Brazilian citizens. The enforcement of these rights is nor, therefore, the mere and exclusive interest of indigenous peoples, but it is an issue that pertains to all Brazilian, an issue that pertains to environmental protection, an issue pertaining humanity.

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Legislative Mechanisms of the European Union and of Transposition into the Romanian Legislation Concerning the Problem of Work-Life Balance for Parents and Caregivers - Sociological Aspects

By Iulia Boghirnea*

In this study, we want to analyse the legal framework of the European Union regarding family leaves and flexible work formulas, measures that the Member States must take by transposing the Directive 2019/1158 of the European Parliament and the Council of Europe on work-life balance for parents and caregivers. A novelty in the Union legislation is the fact that this Directive replaces the notion of “reconciliation” with that of “balance”, and the notion of “family life” with that of “private life of parents and caregivers”. Also, the Directive, which had to be transposed by all EU Member States by August 22, 2022, aims to promote and facilitate the reintegration of mothers into the labour market after the period of maternity leave and parental leave, but, in particular: fathers’ right to paternity leave, parental leave, caregiver’s leave and not least, flexible working arrangements for workers who are parents or caregivers. As for fathers’ right to paternity leave, the EU legislator provides that it can be requested around the child’s birth date, before or after birth and should be granted regardless of the marital or family status, as will be defined in the internal law of each state. The parental leave granted to fathers can be extended by one or two months, a period of time that cannot be transferred to the other parent. The right to this leave will be guaranteed, by law, to all workers who have parental responsibilities. Finally, we will analyse how Romania transposed this Directive into the internal legislation.

Keywords: European Union, private life of parents and caregivers; Parental leave; Flexible working; Transposing the Directive (EU) 2019/1158 into the internal legislation

Introduction

In the sphere of the family, in contemporary society, countless changes have taken place as a result of some economic and social mutations at the level of human communities.

The purpose of this study is to identify the reasoning of the European Union legislator called to regulate unitarily, at the level of the European Union, through the new Directive no. 2019/1158, ensuring the balance between the professional and private life of parents and caregivers¹, in order to reduce or even eliminate

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¹Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and caregivers and repealing Council Directive 2010/18/EU.

those effects that negatively affect the insertion and maintenance of parents or caregivers in the labour market, people involved in raising children and/or care relatives in need.

As specific objectives that we propose in this study, we list:

- the doctrinal, legal or jurisprudential definition, as the case may be, of some basic concepts with which the legal phenomenon under investigation operates (“family”, “family life”, “work-family balance” or “balance between professional and personal life” etc.);
- arguing the need to ensure the balance between the professional and private life of parents through sociological studies to verify the theoretical aspects;
- description of the Union normative framework in the matter adopted by the European Union;
- research and identification of new elements brought by Directive no. 1158/2019;
- analysis of the transposition of the Directive into national legislation, in order to ensure the legal bases.

Therefore, the degree of novelty of the topic is very high, the field under investigation being a topical one that is at the center of attention of the Union and national legislator, as evidenced by the recently adopted normative acts in the matter that we will analyse in this study.

Definition of Concepts from a Doctrinal, Legislative and Jurisprudential Perspective

Foreign legal doctrine² states that “the family, the vital cell of society, is an irreplaceable way of anchoring the person in the group, a unique refuge when everything is destroyed”.

Gerard Cornu in “Vocabulaire juridique” defines the family as “the restricted group of father, mother and their minor children who live with them (conjugal, nuclear family)”³.

In the sociological meaning⁴, the family represents “the group of people united by marriage, filiation or kinship, which is characterised by the community of life, interests or help [...]”, being thus defined relative to the human community. In the same sense, there can be family relationships, but without being regulated by legal norms, such as the situation of cohabitation (free union)⁵, of which the doctrine says it is “outside the law”.

²Terre & Fenouillet (2011) at 1.

³Cornu (2014) at 448.

⁴Pricopi (1998) at 13.

⁵Avram (2016) at 9.

In the legal sense⁶, the family represents “the essential social form that brings together persons between whom there are legal relations of marriage, kinship (natural or civil) or other relations assimilated to family”, thus defined, the family being a legal reality through its regulation by the legal norms.

In domestic legislation, Art. 48 Para. 1 of the Romanian Constitution, revised and republished, states the concept of “family” as being “based on free-conscientious marriage between spouses, on their equality and on the right and duty of parents to ensure the growth, education and training of children” and the new Romanian Civil Code provides in Art. 258 that “The family is based on the freely-consented marriage between the spouses [...]” and in Art. 309 states that “Spouses owe each other respect, fidelity and moral support”.

In European legislation, the right to respect for family life has its material seat in Art. 8 Para. 1 of the European Convention on Human Rights, according to which “Every person has the right to respect for his private and family life, his home and his correspondence”. In the spirit of the jurisprudence of the European Court of Human Rights, the notion of “family life” includes relationships with a social, moral, cultural feature and material interests, implying “the existence of interpersonal and effective ties, capable of generating it, regardless of their source”⁷, the state having the positive obligation, among other things, to ensure the equality of spouses in terms of the exercise of parental duties⁸ and to ensure the development of the bond between parents and children⁹.

Thus, the family is characterised by the community of life and continuous help between the family members.

The Need to Ensure Balance between Professional and Private Life

However, in the context of the development of industry and services and the massive training of women in production by detaching them from the “shell of the family”, the immediate effect was a decrease in the birth rate and a change in the optics relative to the size of the family¹⁰. Thus, at the beginning of the 90s, 86% of women working outside the family had only one child and 75% of them had two children¹¹.

In the last 20 years, our country, as well as the other Member States of the European Union, are facing a massive demographic decline due to the decrease in the birth rate, implicitly decreasing the active population, a fact that creates pressure on the long-term sustainability of the social and pension systems¹².

The need to integrate and keep women in the workforce is more current than ever, coming in conflict with a pressing problem that most families face in relation

⁶Lupaşcu & Crăciunescu (2021) at 37.

⁷Bârsan & Pivniceru (2008) at 88.

⁸ECHR, *Hoffmann v Austria*.

⁹ECHR, *Olsson v Sweden*; ECHR, *Gnahoré v France*.

¹⁰Voinea (2005) at 13.

¹¹Segalen (2011) at 313.

¹²See also the “National Strategy for Employment 2021-2027”, p. 4 Annex 1 of the GD no. 558/19 May 2021, published in the Official Gazette of Romania, Part 1, no. 559/31 May 2021.

to adequately satisfying the two roles of women, the traditional role in the family, educating children and caring for the elderly, as well as that of the labour market¹³.

In the Romanian specialised literature¹⁴, the concept of “balance between professional and personal life” is defined as “that situation characterised by satisfaction, minimum role conflict and optimal functioning of the employee both in the tasks and roles at the workplace, and in personal/family life”.

In the foreign doctrine¹⁵, work-life balance represents the extent to which a person is equally involved and satisfied with both the professional and the personal role.

Following a sociological study¹⁶, relative to this issue, it emerged that approximately half of the respondents support the equality of women’s gender roles both in the family and on the labour market, the traditional view of women only in the family core being in a rate of more than half of the respondents. The professional achievement of the woman is tolerated, however, as this ensures both her own independence and the economic well-being of the family.

According to Eurofound 2017¹⁷ the challenges of ensuring the work-life balance also come from changes occurring outside of working life due to the increase in needs and responsibilities regarding the care of children and the elderly.

In the European Union, the responsibilities of caring for children and the elderly, who have various ailments, take up a significant number of hours per week to carry out activities. Women are twice as likely as men to care for their own children and relatives in difficulty.

Thus, according to Eurofound (2017), 35% of respondents without children and 43% of respondents with a child were too tired, at least several times a month, after work to do household chores. However, the people who had the greatest difficulties in finding time to fulfil their family duties were parents with three or more children (67%).

The same study¹⁸ shows that 77% of parents with children under 18, declared that they “take care of or educate their children every day”, of which 88% are mothers and 67% are fathers. Men are involved in this activity, on average, 21 hours per week, compared to 39 hours per week for women.

Comparing the stress indicators regarding the work-life balance 2007-2016, from this research it appears that this balance has deteriorated a lot, starting from 2011, especially for young women and women who fall into the category of age 35-49 years.

Most people with caring responsibilities are employees, therefore legislative measures were needed to be able to ensure the balance between paid work and unpaid work, for the fulfilment of household chores.

¹³Popescu (2010).

¹⁴Ispas (2018).

¹⁵Greenhaus, Karen & Janson (2003) at 240.

¹⁶A sociological study with the topic “*Viața de familie*” [*Family Life*] (2008), conducted by the “Public Opinion Barometer” Program (Source: Soros Foundation). The barometer is a sociological research program of the Soros Foundation that constantly provides, from 1994 to the present, quantitative data on the opinions of citizens on various topics.

¹⁷Eurofound (2017).

¹⁸Ibid.

Some authors¹⁹ point out that the responsibility of ensuring work-family balance should not remain solely with individuals, as there are a wide range of social and structural factors that prevent this balance from being achieved.

The factors that have an influence on the work-family balance are related to the personal characteristics and priorities of the individual, the organisation, social status as well as the support of those around him.

A key factor in ensuring the balance between professional and family life is the support that the state offers in the form of methods of reconciling work with the family through parental leaves²⁰ (paternity leave and parental leave), through caregiver leaves (in the case of caring for a seriously ill relative) as well as flexible forms of work for workers who are parents or caregivers.

The Research Method

In the following sections, using the methods of legal scientific research (logical method, systematic method, comparative method and sociological method) for data collection, we will proceed to enumerate the Union legislation in force in the matter, focusing on the research of the provisions of the new Directive no. 2019/1158 relative to ensuring the balance between professional life and family life of parents and caregivers, we will investigate how this was recently transposed into domestic legislation by the legislator in order to draw the final conclusions of this study.

We will approach the inter and multidisciplinary research of the topic under investigation in order to be able to reach the desired results and to achieve our proposed goal, meaning in which we exemplify: legal sociology, general theory of law, labour law, social security law, family law, European Union law.

De Lege Lata Regulations of the European Union Regarding the Insurance of the Life-work Balance

At the level of the European Union, the employment rate among women has a strong positive impact on the economy²¹. However, many women face obstacles if they want to enter or stay on the labour market and improving work-life balance is one of the policies that can be applied to eliminate gender disparities on the labour market²².

¹⁹Gryzwacz, Carlson & Zivnuska (2009) at 455-471 in Leovardis & Cărcu (2018) at 104.

²⁰Leovardis & Cărcu (2018) at 105.

²¹In 2021, women with children aged 25-54 who were employed in the EU had an employment rate of 72%, slightly lower than women aged 25-54 without children which forms a percentage of 77%, being a higher rate than ever. See https://ec.europa.eu/eurostat/en/web/products-eurostat-news/w/e dn-20230302-2?utm_campaign=later-linkinbio-eu_eurostat&utm_content=later-33429783&utm_medium=social&utm_source=linkin.bio.

²²Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region. Gender equality is one of the goals of current feminism, see Kaka (2017).

The European Parliament and the Council of Europe have adopted a series of directives on ensuring the balance between professional and family life, of which we mention the most important: Council Directive 79/7/EC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding; Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

August 2, 2022 was the deadline for the transposition by the EU Member States of the Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and caregivers and repealing Council Directive 2010/18/EU that we will further analyse in the present study, as it was transposed into the internal legislation of our state.

Novelties brought in the Matter of Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on Work-life Balance for Parents and Caregivers

The adoption of the Directive (EU) 2019/1158 on work-life balance for parents and caregivers²³ contributes to the fulfilment of the objectives of the European Union that are outlined in the Treaty of the European Union, namely respect for human dignity, human rights and equality, as values common to the EU Member States, on which the European Union is founded and which it promotes (Art. 2 of the TEU) as well as the provisions of the Treaty on the Functioning of the European Union regarding equality between men and women in terms of equal opportunities on the labour market and equal treatment at the workplace (Art. 153 Para. 1 Let. i of TFEU).

The general objective of the Directive (EU) 2019/1158 is to apply and ensure the principle of equal treatment in terms of opportunities on the labour market between women and men as well as their equal treatment in the workplace.

²³Directive (EU) 2019/1158 had to be transposed by August 2, 2022 in all Member States and by August 2, 2024 it must be transposed with regard to the payment of the amount related to the last two weeks of the period of minimum 2 months of parental leave. For a current situation regarding the transposition of this Directive at the level of the Member States. See <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX%3A32019L1158>.

In a subsidiary way, the aforementioned Directive pursues specific objectives such as: increasing the degree of participation in the labour field of parents and employees who care for relatives or other people in the household, by regulating family leave and flexible work formulas, legislation provisions that ensures, at the same time, the improvement of women's access on the labour market, the father's assumption of childcare responsibilities and, implicitly, the equality of spouses in terms of the exercise of parental duties and the development of the bond between parents and children.

We note that the Union legislator replaced, through this Directive, the notion of "conciliation" with that of "balance", and the notion of "family life" with that of "private life of parents and caregivers".

In this context, the adoption of Directive (EU) 2019/1158 brings new elements regarding the reduction of gender disparities relative to employment, the Union legislator wanting the member states to establish individual rights and minimum standards, regarding:

- a) Fathers' right to paternity leave of 10 working days, which can be requested on the occasion of the birth of the worker's child. The EU Member States can establish unilaterally when it can be granted, for example, before or after the birth, or if this leave will be carried out in flexible formulas, not conditional on marital status or family status or length of service.
- b) Parental leave of four months is guaranteed to all workers with parental responsibilities, each parent being able to exercise their right to parental leave effectively and under equal conditions, in flexible formulas. But, in this case, the Directive allows the states to condition the right to this leave on a maximum of one year's work experience. The Directive provides for non-transferable rights to parental leave.
- c) Caregiver's leave of five working days per year – this leave is defined by the Union legislator as "a leave for workers in order to provide care or personal support to a relative or a person who lives in the same household as the worker and who needs significant care or support as a result of a serious medical problem as defined by each Member State" [Art. 3 Para. 1 Let. d) of the Directive (EU) 2019/1158], the Member State being able to provide in the legislation for the granting of this leave on the basis of "adequate evidence in accordance with domestic law or national practices".

Here, the Union legislator introduces, through this Directive, a new concept, that of "caregiver leave".

The notion of "caregiver" means, within the meaning of the Directive, the worker who provides care or personal support to a relative (son, daughter, mother, father or husband/wife) or "to a person who lives in the same household as the worker and who needs of significant care or support as a result of a serious medical problem" [Art. 2 Para. 1 Let. d) from the Directive (EU) 2019/1158].

- d) the right to be absent from the workplace for each worker due to force majeure in situations of family emergency, in case of illness or accident that

makes the immediate presence of the worker indispensable [Art. 5 from the Directive (EU) 2019/1158].

The right to be absent in cases of force majeure represents another new element of the Directive, which although it was not enshrined in law until now, in practice there were companies that provided a day of paid leave for emergency or medical situations.

- e) flexible working formulas, for a limited time, for care purposes, for workers who are parents with children aged at least 8 years old as well as for caregivers, request which can be conditioned by a requirement of at least six months of service [Art. 9 of the Directive (EU) 2019/1158].

The EU legislator defines the concept of “flexible working arrangements” as the possibility for workers to adapt their working schedule, including the use of remote working arrangements, flexible working arrangements or short time working hours [Art. 2 Para. 1 Let. f) of the Directive (EU) 2019/1158].

Also, the Directive provides for flexible working time arrangements, for both women and men, employers being encouraged to implement policies favourable to the balance between professional life and family life by adopting new (tele)work²⁴ arrangements that have been triggered to be able to participate actively in the field of work under the conditions of the Covid19 pandemic.

- f) the Directive states that workers, who are parents or caregivers, must not be treated discriminatory at the workplace [Art. 11] or unfavourable [Art. 14] on the grounds that they have requested/taken a paternity leave, paternal leave or caregiver’s leave, provided for in Art. 4-6 of the Directive.

In conclusion, the Directive provides for the promotion and equitable sharing of care responsibilities between parents and the facilitation of mothers’ reintegration into the labour market after a period of maternity leave and parental leave through regulations that ensure the balance between professional and private life.

Transposing the Directive (EU) 2019/1158 in the Romanian Legislation

Therefore, in the context of demographic aging in Romania, the full participation of the available labour force has become an economic necessity, imposing measures to support parents and caregivers to enter the labour market, by supporting their ties with children or relatives in a state of need due to serious illnesses, allowing parents and people with caring responsibilities to reconcile professional life with family life.

In our country, women continue to be the main ones responsible for family and household care activities, given that the social services dedicated to the care of

²⁴Telework, relative to the topic under investigation, offers opportunities to contribute to gender equality with regard to increased flexibility in the organisation of working time, the possibility for both parents who work at home to more equitably share the responsibilities of caring for children or family members in difficulty and greater flexibility in harmonizing unpaid care responsibilities with paid work, which can improve labour market participation (Recommendation 1.3 of the Opinion of the European Economic and Social Committee on “Teleworking and gender equality — conditions so that teleworking does not exacerbate the unequal distribution of unpaid care and domestic work between women and men and for it to be an engine for promoting gender equality”).

children and dependent people are not sufficient to meet the needs²⁵, in terms of achieving a balance between professional and family life.

With the entry into force of this directive, the Romanian legislator managed to modify and complete more than 14 normative acts in order to harmonise the internal legislation with that proposed by the Directive to the Member States, for the harmonisation of the legislation relative to ensuring the work-life balance for parents and caregivers.

On September 14, 2022, the European Commission sent a letter of delay to Romania and to 18 other EU Member States by which it announced that it had initiated the infringement procedure because they had not notified whether it had transposed the Directive (EU) 2019/1158 on work-life balance for parents and caregivers until the deadline of August 2, 2022.

We will analyse the important points of the Directive's regulations to see if and how these provisions have been transposed into our legislation.

As for fathers' right to paternity leave, it was already regulated in the domestic legislation by Law no. 210/December 31, 1999 regarding paternity leave, but after the entry into force of Directive (EU) 2019/1158, the aforementioned law was amended by GEO no. 117/26 August 2022 and it is stipulated that the father of the newborn child, who is a worker, has the right to a paid leave of 10 working days [Art. 2 Para. 1 of the Law no. 210/1999, consolidated form], as the Directive also provides, 5 days more than the law provided in its original form, with the amendment that the Romanian legislator ordered that they can be requested only in the first 8 weeks from the birth of the child, based on the child's birth certificate, from which the petitioner's paternity results [Art. 2 Para. 2 of the Law no. 210/1999, consolidated form].

The employer has the obligation to grant this leave to the father of the newborn child, the law does not condition its granting on the length of service of the employee or the period of activity performed [Art. 153² Para. 1-2 of the Labour Code, consolidated form]. The employer's failure to grant paternity leave to employees who meet the conditions required by law is sanctioned with a fine between 4000-8000 lei [Art. 260 Para. 1 Let. u) of the Labour Code, consolidated form].

This paternity leave aims to ensure the effective participation of the father in the care of the newborn child and to facilitate the reconciliation of the professional life with the family life of the workers who are parents.

Regarding parental leave, although the Directive establishes a term of 4 months, the Romanian legislator has stated much more favourably through GEO no. 111/2010 on leave and monthly allowance for raising children, by granting a leave for raising a child aged up to 24 months, respectively 36 months, in the case of a child with a disability, for people who, in the last 2 years prior to the after the

²⁵In 2018, approximately 12% of women were inactive due to family responsibilities. See, "Reducing the gender disparity in employment", Action Direction no. 4 of the "National strategy for employment 2021-2027", Annex 1 of GD no. No. 558/19 May 2021, published in the Official Gazette, Part I, no. 559/31 May 2021.

birth of the child, they have earned for at least 12 months income from wages or similar as wages²⁶.

Through the changes made to the GEO no. 111/2010 is fully transposed into the national legislation Directive (EU) 2019/1158 and the non-transferable period for raising the child is extended in the case of the parent who did not initially request this right, from one month as it was regulated to 2 months of the total leave period, if both parents meet the legal requirements, as mentioned by the Directive.

“Caregiver's leave”²⁷ is a new concept transposed from the Directive in Art. 152¹ of the Romanian Labour Code by Law no. 283/2022 for the amendment and completion of Law no. 53/2003 on the Labour Code, as well as the GEO no. 57/2019 regarding the Administrative Code, taking over the same definition given by the Union legislator with the mention that the word “worker” was replaced by that of “employee”, maintaining the duration of the caregiver’s leave of 5 working days in a calendar year which can be granted to employees and specifying that this term may have a longer duration established by special laws or by the collective labour agreement [Art. 152¹ Para. 2 of the Labour Code, consolidated form].

Through the notion of “relative”, Art. 153¹ Para. 4 of the Romanian Labour Code stipulates that it means “the son, daughter, mother, father or husband/wife of an employee”.

In order to prove the quality of a relative of the employee or of a person who lives in the same household as the employee, to whom the latter provided care during the period in which he had a serious medical problem, he must, within 30 days of the request for leave the caregiver to submit the following documents: the identity document of the person requiring care, which shows the same domicile or residence as the employee, the document by which the person was taken into the space, the certificate from the owner/tenant association or the employee’s self-responsible declaration which results in the fact that the person to whom the employee provided care or support lives in the same household with him at least during the period of care leave [Art. 3 Para. 2 of the Order of the Minister of Labour and Social Solidarity no. 2172/3829/2022, hereinafter MMSS Order].

Also, Art. 152¹ Para. 5 of the Romanian Labour Code ordered the definition of the concept of “serious medical problems, as well as the establishment of the conditions for granting caregiver leave by joint order of the Minister of Labour and Social Solidarity and the Minister of Health. Thus, by MMSS Order no.

²⁶Such as: income from independent activities, income from intellectual property rights, income from agricultural activities, forestry and fish farming, subject to income tax according to the provisions of the Law no. 227/2015 on the Fiscal Code, with subsequent amendments and additions, called by the legislator “taxable income”.

²⁷In the Romanian legislation, there is also regulated “medical leave for the care of a sick child” which can be obtained by parents for a maximum duration of 45 calendar days, which can be extended up to 90 days for serious cases, for the child up to the age of 8 years, respectively 18 years for the child with disabilities [This leave is stated by the GEO 158/2005 published in the Official Gazette of Romania, Part I, no. 1074/29 November 2005]. However, this leave, which is a medical leave, should not be confused with the caregiver’s leave which is a leave granted for family reasons, the legislator in this situation increasing the spectrum of people who “need care or support” for which the leave can be requested, i.e. both the child and also a relative or other person who lives in the same home as the employee.

2172/3829/2022 regarding the granting of caregiver's leave provides that by serious medical problems is meant "conditions or their complications that affect the patient's functional status for certain periods or permanently, respectively significantly limit the possibility of performing basic activities and daily instrumental activities, reaching the impossibility of performing them, requiring the support of another person".

Regarding the concept of "serious medical problems"²⁸ of the relative or of a person with whom the employee lives in the same household and who is in need, as ordered by the Directive, it is a condition sine qua non, which must be proven, in order to certify the existence of a serious medical problem, with medical documents such as: the hospital discharge ticket or, as the case may be, the medical certificate issued by the attending physician or the family doctor of the person with serious medical problems [Art. 3 Para. 3 of MMSS Order no. 2172/3829/2022].

For the granting of caregiver's leave, it was established by Annex 1 of the MMSS Order no. 2172/3829/2022 regarding the granting of caregiver's leave, the list of serious illnesses²⁹ for which the caregiver's leave can be granted for employees.

It should be mentioned that the provisions of the Labour Code have included norms derogating from the provisions of Art. 244 Para. 2 of the Law no. 95/2006 regarding the reform in the field of health, republished with subsequent modifications and amendments, by which it was ordered that employees who request the caregiver's leave will be insured, during this period, without paying the contribution, in the social health insurance system [Art. 152¹ Para. 4 of the Labour Code, consolidated form].

Failure by the employer to grant the caregiver's leave to employees who meet the conditions required by law is sanctioned with a fine between 4000-8000 lei [Art. 260 Para. 1 Let. t) of the Labour Code, consolidated form].

New regulations were brought by amending the Labour Code using the Law no. 283/17 October 2022 and regarding the right to be absent from work for each employee in unforeseen family emergencies [Art. 1522 Para. 1-3 of the Labour Code, consolidated form].

The Romanian legislator has stated this legal institution in a specific way, in compliance with the norms of the Directive, in the sense that it imposes two conditions on the employee who is absent from the workplace for unforeseen family emergencies, caused by illness or accident, namely: the prior information of the employer and the recovery of the absent period until the full coverage of the normal duration of the employee's work schedule³⁰. The period of time that can be absent cannot last longer than 10 working days per calendar year, and the way to

²⁸These must be proven with medical documents provided in Art. 3 Para. 2 of the Order of the Minister of Labour and Social Solidarity no. 2172/3829/2022.

²⁹<https://legislatie.just.ro/Public/DetaliiDocument/263025>

³⁰The Romanian Labour Code provides in Art. 111 Para. 2 that by "work schedule is meant the way of organizing the activity, which establishes the hours and days when the work starts and ends".

recover this period will be established by mutual agreement between the employee and the employer.

However, the Labour Code does not use the term “force majeure”, as provided by Directive (EU) 2019/1158, but the concept of “unforeseen situations”, however, the phrase “force majeure” is defined, according to the provisions of Art. 1351 of the Romanian Civil Code, as “any external, unpredictable, absolutely invincible and inevitable event”, i.e., an unforeseeable and ineradicable/insurmountable *lato sensu* fact, which objectively annihilates the execution of a contractual obligation³¹.

As for flexible working formulas, for a limited duration, for care purposes for parents and caregivers provided by Art. 9 of the Directive (EU) 2019/1158, this provision was transposed into Art. 118 of the Labour Code.

In the spirit of the Romanian Labour Code, “flexible way of organizing work” means “the possibility for employees to adapt their work schedule, including through the use of remote work formulas, flexible work schedules, individualised work schedules or some work with reduced working time” [Art. 118 Para. 1-3 of the Labour Code, consolidated form].

These provisions allow the employer to establish individualised work schedules, at the request of employees, including those who benefit from caregiver's leave, schedules that may have a limited duration, the employer's refusal having to be reasoned, in writing, within 5 working days from the receipt of the employee's request.

In the case of establishing a time-limited schedule, the employee has the right to return to the original work schedule at the end of the established period or if the circumstances that led to the establishment of the personalised schedule, he can return to the initial schedule and before the completion of the individualised work schedule [Art. 118 Para. 7 of the Labour Code, consolidated form], as also provided by Directive (EU) 2019/1158.

Therefore, with the new regulations, Romanian employers will be obliged to grant, at the employee's request, flexible working formulas and to motivate any refusal to grant them.

Even after the 1980s, employers saw benefits from implementing these work-life balance policies, with organisations beginning to adopt flexible schedules, such as family-friendly workplace policies, for employees to balance their work responsibilities with their family and personal responsibilities.

Regarding the discriminatory or unfavourable treatment at the workplace of employees, parents or caregivers, on the grounds that they have requested/taken a paternity leave, parental leave or caregiver's leave, provided for in Art. 4-6 of the Directive it was prohibited by the internal legislation of our state. Thus, by amending and supplementing Law no. 202/2002 regarding equal opportunities and treatment between women and men by Government Ordinance no. 57/28 April 2022, the Romanian legislator also transposes Art. 14 of the Directive (EU) 2019/1158 and provides in Art. 10 Para. 3 of the Law no. 202/2002 that “any less favourable treatment applied to a woman or a man on the grounds that he requested

³¹Sardare (2019).

or took leave to raise children, paternity leave, caregiver's leave or that he exercised his right to request flexible working arrangements, represents discrimination", the employee at the end of these leaves having the right to return to the last job or an equivalent job, with equivalent working conditions, and to benefit from any improvement in working conditions to which he would have been entitled to during his absence [Art. 10 Para. 8 of the Law no. 202/2002].

At the national level, there is already the National Commission in the field of equal opportunities between men and women, which operates under the authority of the National Agency for Equal Opportunities between Men and Women, which in turn is under the authority of the Ministry of Family, Youth and Equal Opportunities [regulated in Chapter V of the Law no. 202/2002 consolidated form].

Also, in each county and in the capital of the country, there is a county commission in the area of equal opportunities between men and women (COJES).

These public authorities have a legal obligation to monitor and ensure equality of opportunity and treatment between women and men.

Findings/Results

We find that the Romanian legislator has transposed Directive (EU) 2019/1158 into the internal legislation of our state, with the mention that in some cases the internal rules state provisions more favourable to the employee, as we found to be the case of granting the parental leave that the Romanian state grants up to 24 months, while the rules of the Directive provide for a period of minimum 4 months.

Eurofound (2015) showed through statistical data that "the prevalence of health problems and absenteeism is the highest and the work-life balance is difficult to achieve", being issues "under pressure" for the European Union.

The sociological research (Eurofound 2023)³² that started this year will investigate, through statistical data analysis, what changes have taken place as a result of the effects of the legislation newly entered into force as a result of the transposition of the Directive (EU) 2019/1158 on work-life balance, as well as on the health and well-being of employees.

We will analyse in a future study whether these legislative levers, with the involvement of state institutions and the employer, will create a climate that ensures equality between men and women in terms of equal opportunities on the labour market and equal non-discriminatory treatment at the workplace, the insertion and maintenance of parents or caregivers on the labour market.

Conclusions

The importance of the work-life balance of workers is recognised not only by employers, who directly note the difficulties faced by employees who are parents or caregivers, but also by the authorities of the European Union and the authorities of the Member States, who draw up and apply specific policies and strategies to ensure this work-family balance.

³²During the Covid 19 pandemic, these sociological studies were no longer carried out.

Maternity may come as an impediment regarding the women's access on the labour market.

This study showed that recent legislative measures allow and encourage the assumption of childcare responsibilities by the father, who can participate equally with the mother in the exercise of parental duties. It was a necessary legislative framework, in the institution where both the family and the children as well as the workplace represent the parents' priority.

These policies for granting leave for family reasons (parental leave, paternity leave, caregiver's leave), granting the employee the right to be absent from work for reasons of force majeure in family emergency situations, as well as the flexibility of time of work, will bring, in our opinion, benefits such as: insertion, maintenance and protection against discrimination of employees, parents and caregivers on the labour market, reduction of absenteeism, increase of productivity, avoidance of staff reductions, reduction of space requirements, loyalty employees etc.

However, we believe that the flexibility of work programs will be one of the important levers through which employers will adapt to the changes in the labour market that took place during the Covid19 pandemic, offering formulas for individualised work programs³³ and options regarding the place from which the employee works³⁴.

The results of the most recent sociological studies as well as the adoption of new legislative acts in the matter show that the policy of ensuring a balance between the professional life and the private life of employees will be an important characteristic of workplaces in the future.

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³³Moreover, from a series of sociological research in the field (face to face), from 2015 it emerged that 31% of workers are faced with a "last minute" change in their work schedule, a situation that complicates the work-life balance of workers and may lead to health or safety problems for them. See Eurofund (2015), https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1634en.pdf. 43.850 workers from the 28 EU Member States, the five EU candidate countries (Albania, the former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey) and Switzerland and Norway participated in this study, for a total of 35 European countries.

³⁴Ocerernîi (2019) at 266.

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Romanian Legislation

Constitution of Romania

Civil Code of Romania

Labour Code of Romania

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The Study on the Effectiveness of Arbitration Clauses in International Commercial Arbitration – From the Perspective of Contract Non-Formation

By Yunbo Zhang^{*}

This study belongs to a more specific project, aiming at exploring the issue of the validity of arbitration clauses in international commercial arbitration when the main contract is not established, and addressing the issue of determining the validity of arbitration clauses in transnational commercial disputes to provide commercial operators, arbitrators or judges with guidelines and references for their ideas. This study is based on the classical jurisprudence of private international law, common law, and international commercial arbitration. Furthermore, based on the customs of international commercial transactions and the contents of the cases, it conducts legal doctrinal analysis, comparative analysis, and case analysis. From different perspectives, these legal norms and issues reflect that the arbitration clause has considerable independence and can typically be established independently of the main contract. The validity of an arbitration clause is based on sufficient formal and substantive elements. The study points out that the determination of the validity of the arbitration clause has its logic of the decision, and it should also apply the process of conclusion of the contract, which includes the conditions of the voluntary agreement of the parties, the process of invitation and negotiation, and the true intention of the parties.

Keywords: *Autonomy of Will, Independence, Arbitration Clause, Contract*

Introduction

The arbitration agreement has been widely discussed, such as the form of the arbitration agreement, the invocation of the arbitration clause, the confirmation of the law applicable to the arbitration agreement, the expansion of the effect of the arbitration agreement, the impact of an arbitration clause in PPP agreement, the rules of interpretation of arbitration agreement, the incorporation of the arbitration clause of lease into the bill of lading, the arbitration agreement in non-liner transportation mode, and the introduction of an arbitration clause in the articles of association of listed companies. Regarding the independence of arbitration agreements, some commentators have argued that the agreement needs to be established without a final and valid signature of one of the parties to the main contract¹. In contrast, some commentators have argued that if the central arrangement is not shown due to the lack of the final and valid signature of one of

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¹Selvig (2022).

the parties, it should not be mechanically concluded that the arbitration clause therein needs to be established². Establishing an arbitration agreement should be judged from formal and substantive criteria.

Some scholars have also commented on the validity of arbitration agreements. Some scholars have studied the legal autonomy of arbitration agreements and pointed out that the rule neglects the dominance of the law of the place of arbitration over the validity of international commercial arbitration agreements. There is a great deal of uncertainty about its future development into a rule of universal significance³.

Regarding the procedure for court confirmation of the validity of arbitration agreements, some commentators have argued that, given the nature of non-litigation cases, and the public law contractual nature of arbitration agreements, it is essential for the courts to determine the validity of arbitration agreements⁴. Some commentators believe that the application for court confirmation of an arbitration agreement should be made in light of the nature of non-litigation cases and the public law contractual nature of arbitration agreements. Given the efficiency of arbitration procedures, and the need to save judicial resources, it is more appropriate to characterise the application for court confirmation of the validity of arbitration agreements as non-litigation cases⁵. Therefore, this procedure cannot be "litigated." However, due to the unique nature of such cases, it is necessary to give the parties more flexibility in the system's design.

Method

The study is based on the general principles and case studies of international commercial interactions. Modern researchers of international commercial arbitration generally believe that arbitration clauses have their independence, and this independence contains a sufficient jurisprudential basis behind it, such as the *Principle of procedural freedom* and the *Theory of autonomy of meaning*. The author adopts a case study approach. The case study method has become essential in management and social science research. With many scholars paying attention to the case study method, many excellent case study papers have emerged, and the technique has been improved. Case researchers can enhance the validity of their research by collecting data systematically, examining and interpreting it carefully, analysing it rigorously, and matching the research design and process to the extent and reliability of the research questions. This paper explores the path of finding arbitration clauses and supports the reasonableness of the conclusions by extracting critical jurisprudence from international commercial interactions. International commercial arbitration refers primarily to global economic and trade arbitration, but its broader scope includes arbitration arising from various commercial relationships. In addition to international economic and trade

²Alqudah (2016).

³Philip (1997) at 130.

⁴Schwartz (2014).

⁵Mann (1986).

arbitration, specialised arbitration such as transportation and maritime arbitration also falls within the scope of international commercial arbitration. A case study of Western countries with a more developed global retail arbitration industry shows that the independence of arbitration clauses has been recognised in the world's major developed countries, and their effectiveness has been judged separately in different situations.

Misconceptions about the Independence of Arbitration Clauses

The independence of the arbitration clause means that, as a clause of the main contract, the arbitration clause, although dependent on the main contract, can still exist independently by being separate from the other clauses of the main contract, i.e. the arbitration clause is not invalidated by the invalidity of the main contract, nor is it invalidated by the avoidance of the main contract. Many internationally renowned arbitration institutions have confirmed the arbitration clause's independence principle and are widely recognised in arbitration rules. The UNCITRAL Model Law on International Commercial Arbitration also clearly states: '*An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*'⁶ A growing number of countries have clarified their position by making the independence of arbitration clauses part of their arbitration laws. But in practice, the autonomy of the arbitration clause is often seen as simply being valid even if the main contract is not formed or invalid. There need to be more separate judgments for the process of clause formation.⁷

Absence of Determination of the Validity of an Arbitration Clause when a Contract is not established

The fact that the basis of arbitration is contractual is not in dispute, and *the power of the arbitrator to resolve the dispute rests on the common intention of the parties to the dispute*. Arbitration clauses are often considered *relatively independent* or *severable* from the parties' main contract. Regardless of the wording, simply put, all of this language focuses on the fact that "*the arbitration clause in a contract is considered to be independent of the main agreement of which it is a part*" and, therefore, remains in effect after termination of the contract. Suppose the parties claim the warranty and arbitration clauses are invalid. In that case, the meaning and purpose of each arbitration agreement are at risk of being unenforceable. The principle of independence has been reflected in most international documents, such as the UNCITRAL Arbitration Rules⁸ and the

⁶Article 16(1) of the Model Law.

⁷Wheeler (1969).

⁸Article 23 (1) of UNCITRAL Arbitration Rules: an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract.

UNCITRAL Model Law.⁹ The problem, however, is that the autonomy of the arbitration clause mainly refers to the invalidity, termination, or avoidance of the main contract. There needs to be more discussion of the freedom of the arbitration clause when the main contract is not formed.

The Theories and Practice of the Independence of Arbitration Clauses

The Meaning of Independence of the Arbitration Clause

The arbitration agreement is independent in terms of its characteristics, and the arbitration clause, which forms part of the contract, should be regarded as an agreement separate from the other contractual provisions so that the manner of commitment of the arbitration agreement is different from that of the general contractual obligation and is also independent. The terms "*arbitration agreement*" and "*arbitration clause*" must be analysed in their own words. In the Chinese context, an arbitration clause is the same as an arbitration agreement. According to the International Commercial Court of the Supreme Court in China, both types of arbitration clauses in contracts and stand-alone arbitration agreements are considered arbitration agreements, and the two are juxtaposed, as there are almost no parties who have both an arbitration clause in the main contract and a separate arbitration agreement. Therefore, the arbitration clause in Chinese law can be regarded as an arbitration agreement, and the legal provisions on arbitration agreements apply to the establishment and validity of the arbitration clause. In common law, whether an arbitration agreement is independent arises only if the arbitration clause is contained in a contract.¹⁰ Suppose the parties' agreement to arbitrate is contained in a separate agreement. In that case, this is often an agreement between the parties to resolve the dispute after it has arisen, in which case the arbitration agreement is independent. Hence, this article focuses on the situation where the arbitration clause is in the main contract.

Principle of Procedural Independence

Many modern scholars of procedural law advocate procedural independence, arguing that procedures have value and can stand alone without depending on the entity's existence. This doctrine has been recognised in the practice of domestic procedural law in most countries, where domestic law is mainly manifested in respecting the fundamental procedural rights of the parties to block the implementation of substantive law or to create new substantive law through litigation procedures. The arbitration clause's independence principle is also generally recognised and applied in international commercial activities. The primary purpose of the arbitration clause is to establish a straightforward

⁹Part Two of Model Law(Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006): Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract.

¹⁰Domke (1959).

procedure for settling disputes, which is entirely different from the provisions of the main contract regarding the content of substantive rights and obligations, and damages. Therefore, the separation of the arbitration clause does not violate the doctrine of the unity of the contract.¹¹

Theory of Autonomy of Meaning

Since an arbitration clause can also be considered a separate contract, the formation of the clause also requires the parties' agreement regarding arbitration. The fact that the primary contract may not be formed due to the parties' lack of understanding or may be voidable due to fraud or duress does not ipso facto affect the validity of the arbitration clause.¹² Because the arbitration clause merely expresses the parties' intent to resolve the dispute, the factors involved in this expression of intention are relatively simple. Only the place of arbitration, the institution, and the governing law need to be considered. Therefore, if the arbitration clause, which can be regarded as a separate contract, is the parties' true intention, its validity can be judged independently of the main contract.

Maintaining Order in Transactions

The purpose of establishing an independent and effective arbitration clause is to ensure that the parties, when entering into a contract, can agree to submit future disputes to the jurisdiction of an international, neutral arbitral tribunal, thereby excluding the improper intervention of a biased court in a domestic country. Parties to international commercial arbitration are generally commercial entities from different countries or regions. In the event of a dispute, it is often necessary to agree in advance on a straightforward method of dispute resolution in the contract. This ensures that the outcome of the debate is not influenced by the parties' attempts to find the most profitable way of dispute resolution and to ensure that the product is fair and unbiased. This is why most of the selected arbitration venues are arbitration institutions in London, New York, and Hong Kong, precisely based on the importance that common law regions attach to the order of transactions and the good faith of arbitration institutions in these regions. Therefore, establishing the principle of independence in the arbitration agreement is necessary to avoid excessive disputes over dispute resolution.

Developments in the Practice of Independence of Arbitration Agreements

Establishing the principle of independence of arbitration clauses in the international community has taken some time. The traditional view is that even if an arbitration agreement is considered to be independent, it is by its very nature a contract, which requires the familiar elements of contract formation. Likewise, an arbitration clause contained in the main agreement is not effective in the absence of a final commitment by one of the parties if the main contract has not been

¹¹Ranjbar & Dehshiri (2017).

¹²Ha (2019).

formed from the outset and neither is the arbitration agreement that was part of the contract that did not exist. In 1942, the English Court of Appeal judges in *Heyman v Darwins Ltd* held that if the contract never existed, neither did the arbitration agreement, which was part of the contract.¹³ Another view, autonomy, is that the independence of the arbitration agreement leads to a distinction between the elements of the formation of the arbitration agreement itself and the general contract and that the absence of the final formal commitment of the main contract does not affect the validity of the arbitration agreement if it can be shown that the parties have agreed to arbitrate. This view is now supported by most developed countries, except for the degree of independence of the arbitration clause.¹⁴

The conventional view is that, in principle, the invalidity of the main contract means that the arbitration agreement is invalid.¹⁵ However, in a considerable number of cases, German and Swiss courts have taken the lead in establishing that an arbitration agreement can be "independent" or, in common German terminology, "self-existent" and therefore, it can grant the arbitrator the right to decide on the validity of the main contract. The exclusivity of whether an arbitration agreement is "separable" (or independent) should be a matter of interpretation of the terms of the entire transaction, taking into account all circumstances that may indicate the "consent of the parties. The wording of the agreement itself does not matter. Most deals in court are couched in the following language: The arbitrator shall decide all disputes relating to or arising out of this contract. In one case, the arbitrator was expressly granted the power to determine the contract's validity. Still, on this point, while holding the agreement invalid on other grounds, the court denied the arbitrator jurisdiction in the case of a fraudulent discharge, apparently influenced by a lack of confidence in the prospective arbitrator." In the case of another equally broad arbitration clause, the arbitrator's jurisdiction over the fraud defence was recognised. However, the court only incidentally referred to the express provision extending arbitration to the validity of the main contract. Taken as a whole, the trend in German and Swiss courts is definitely toward the doctrine of independence. The courts have held that defences to fraud and error while determining the validity of the main contract should be delegated to the arbitrator. A similar result arises even when the defendant asserts that the operative part of the contract is impossible and that the object of the dispute is not within the parties' power of compromise and, therefore, unsuitable for arbitration. Where the conflict between the parties to a contract involves whether the main contract has been performed, courts have also held that the arbitrator's jurisdiction can cover the dispute.

Article 23.1 of the UNCITRAL Arbitration Rules provides that the arbitral tribunal has the power to rule on its jurisdiction, including any challenge relating to the existence or validity of the arbitration agreement. For this purpose, an arbitration clause forming part of a contract shall be deemed an agreement independent of the other provisions of the contract. A decision by the arbitral tribunal that the contract is invalid shall not automatically render the arbitration

¹³See *Heyman v Darwins Ltd*.

¹⁴Ware (2007).

¹⁵Nussbaum (1940).

clause invalid. The UN Model Law on International Commercial Arbitration makes a similar provision. Its article 16(1) provides that the arbitral tribunal may rule on its jurisdiction, including any objection to the existence or validity of the arbitration agreement.¹⁶ For this purpose, an arbitration clause forming part of a contract shall be considered an agreement independent of other contractual provisions. A decision by the arbitral tribunal that the warranty is void shall not legally invalidate the arbitration clause.

This principle is also generally established in the domestic laws of a significant number of developed Western countries. For example, Article 7 of the UK Arbitration Act 1996 provides that "*unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid or did not come into existence or has become ineffective, and it shall for that purpose be treated as a separate agreement.*" For this purpose, the arbitration agreement shall be deemed separate. Section 3 of the Swedish Arbitration Act 1999 provides that where the validity of an arbitration agreement constituting another agreement must be determined with the determination of the arbitrators' jurisdiction, the arbitration agreement shall be deemed a separate agreement.¹⁷ Section 104 of the German Code of Civil Procedure 1998 provides in paragraph (1) that "*the arbitral tribunal may determine its jurisdiction and at the same time decide on the existence and validity of the arbitration agreement*". Therefore, an arbitration clause forming part of a contract shall be regarded as an agreement independent of the other provisions of the contract. The LCIA Arbitration Rules express the same meaning.¹⁸

The arbitration clause's independence principle has been established in China through a process. Currently, China adopts the principle of full autonomy, i.e., in line with the views of arbitration institutions in countries such as the United Kingdom, the United States, and the International Chamber of Commerce, which accept the principle of the independence of a dispute resolution clause entirely and recognise the validity of the dispute resolution clause if the main contract is void ab initio or does not exist.¹⁹ This principle is also established in the rules of some well-known Chinese arbitration institutions, such as Article 5(d) of the CIETAC

¹⁶Article 16(1) of UNCITRAL Model Law: The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause

¹⁷Section 3 of The Swedish Arbitration Act (SFS 1999:116): Where the validity of an arbitration agreement which constitutes part of another agreement must be determined in conjunction with a determination of the jurisdiction of the arbitrators, the arbitration agreement shall be deemed to constitute a separate agreement.

¹⁸Article 23.1 of LCIA Arbitration Rules (2014): For that purpose, an arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement. A decision by the Arbitral Tribunal that such other agreement is non-existent, invalid or ineffective shall not entail (of itself) the non-existence, invalidity or ineffectiveness of the arbitration clause.

¹⁹Philip (2006) at 247.

Arbitration Rules, *"The arbitration clause in the contract shall be regarded as a clause separate and independent from the other provisions of the contract, and the arbitration agreement attached to the contract shall also be regarded as a part separate and independent from the other provisions of the contract; the contract, the alteration, dissolution, termination, assignment, expiration, invalidity, non-effectiveness, revocation and establishment of the contract shall not affect the validity of the arbitration clause or arbitration agreement."* Article V of the Beijing Arbitration Commission Arbitration Rules provides that *"the arbitration agreement exists independently and its validity shall be judged separately; whether the contract is formed, changed, dissolved, terminated, invalidated, lapsed, not in force, or revoked, it shall not affect the validity of the arbitration agreement."* Article 5(5) of the Shanghai International Economic and Trade Arbitration Commission provides that *"the arbitration clause in the contract shall be deemed to exist separately and independently from the other provisions of the contract, and the arbitration agreement attached to the contract shall also be deemed to exist separately and independently from the other provisions of the contract; the alteration, dissolution, termination, assignment, invalidation, invalidity, non-validity, revocation and establishment of the contract shall not affect the validity of the arbitration agreement. Or the establishment of the arbitration agreement shall not affect the validity of the arbitration clause or the arbitration agreement."*

Case Study on the Independence of Arbitration Clause

The most famous example of the principle of independence is the *Sojuznefteexport* case.²⁰ One of the subject matters discussed in that case was the arbitration clause's autonomy (i.e. separability). The contract was signed in Paris on November 17, 1976, between *"Sojuznefteexport"* and *Joc Oil Ltd* (hereinafter - *Joc Oil*). The contract has an arbitration clause. In case of any dispute, the arbitration proceedings will be conducted before the Foreign Trade Arbitration Committee of the Moscow Soviet Chamber of Commerce and Industry (FTAC) by FTAC's procedural rules. *Sojuznefteexport* caused the dispute due to a delay in delivery. *Joc Oil* objected to FTAC's jurisdiction because the contract did not meet the requirements of the Decree of the Central Executive Committee and the Council of People's Commissars of the USSR of December 26, 1935, which states that *"in cases where the said (foreign trade) organisation must conclude foreign trade transactions [...] outside Moscow (whether in the USSR or abroad), such a transaction [...] must be signed by two persons who have received a power of attorney signed by the President of the Association."* However, these requirements are not necessary for reaching an arbitration agreement. Therefore, the arbitration clause signed on the side of the contract by V.E. Merkulow and John Deuss, association president *"Sojuznefteexport"* in the name of the company *"JOC Oil"*, was valid. In addition, *JOC Oil* challenged the applicability of the arbitration clause's autonomy principle, which was not explicitly reflected in the Soviet arbitration principles.

²⁰See *Sojuznefteexport (SNE) (USSR) v. Joc Oil Ltd*.

Upon review of the interpretation and position of the Court of Appeals in the 1989 case, Judge Alistair Blair-Kerr held that *‘the AFT rules make no direct reference to the fact that an arbitration agreement (arbitration clause) is autonomous vis-à-vis the contract . [...] An analysis of the FTAC charter and its rules, which define the authority of the Commission, and the Commission's practice, permits the conclusion that the independence of the arbitration clause is not in doubt. Thus, the arbitration agreement was considered a procedural contract and not an element (condition) of a substantive legal contract in the decision of the FTAC of January 29, 1974, in a dispute between the Soviet Union and an Indian organisation’*. The FTAC Commission acted within its competence. Through the analysis of the above case, it can be said that this principle was successfully applied and led to the hearing of the case by the FTAC.

Another landmark decision occurred on October 17, 2007, when the Fiona Trust Court of the House of Lords ruled favouring the doctrine. The SCOTUS unanimously upheld the Court of Appeal's decision on the scope and effect of the arbitration clause. They noted two main issues: (1) The House of Lords emphasised the idea of the principle of independence and insisted that arbitration clauses should be "liberally construed without making subtle semantic distinctions between the relevant disputes. (2) The "arbitration clause" as defined by the House of Lords should be regarded as a "different agreement" from the main agreement and relevant to the arbitration clause itself only if the 14th award is invalid, " *even if the contract was entered into through fraud, misrepresentation or bribery, only the arbitral tribunal has jurisdiction to consider the validity of the contract*". The Fiona Trust decision is a further important affirmation that an arbitration clause is a separate contract that survives the termination of the main contract.

In a critical English decision, *Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Company*²¹, Lord Diplock discussed the nature of an arbitration clause, stating that "*an arbitration clause constitutes a self-contained contractual collateral or an adjunct to the (underlying) contract itself*". Lord Diplock's statement was approved by two other members of the House of Lords. In France, in the classic Gosset decision, the French Court of Cassation held that the arbitration agreement has complete autonomy over the substantive contract in international arbitration.²²

Criteria for Determining the Establishment of an Arbitration Clause

The essence of an arbitration clause is a contract between the parties to settle a dispute, and must meet the necessary formation elements to have a legal effect between the parties. Typically, the features of an arbitration clause include formal and substantive aspects.

²¹See *Bremer Vulkan v South India Shipping*.

²²Mann (1986).

Formal Elements

In general, the basic principle is the written form of the contract, but with the development of science and technology, the validity of non-written agreements in the form of data messages has been recognised worldwide. After all, the essence of the truth of the contract is the truthfulness of the intention of the parties. Article 2(1) and (2) of the 1958 New York Convention provides that "*The parties agree in writing to submit to each other all or any disputes which have arisen or may arise between them if The Contracting States shall recognise such agreement when it relates to the determination of legal relations, whether contractual or not, which are capable of being settled by arbitration. The term 'written agreement' means a contractual arbitration clause or agreement entered into by the parties or contained in an exchange of letters and telegrams.*" As can be seen, the New York Convention provides for two forms of the arbitration agreement in writing: an arbitration clause or arbitration agreement signed by the parties, and a contractual arbitration clause or arbitration agreement set out in an exchange of letters between the parties. Paragraph (2) of Variant I provides that "*the arbitration agreement shall be in writing*" and paragraph (3) provides that "*the content of an arbitration agreement is in writing if it is recorded in any form, whether the arbitration agreement or contract is concluded orally, by conduct or otherwise.*" It can be seen that the Model Law while allowing for a variety of written forms for arbitration agreements, places greater emphasis on recognising the agreement to arbitrate²³. As time passes, arbitration agreements will become more and more diverse, including information that can be generated and stored by various electronic, magnetised, and optical means, which will require flexibility in practice.

The offer is the starting condition for the conclusion of a contract and is necessary for the formation of a contract. The core of a proposal is the clarity of the offeror's intention, whether it has been sent to the other party, and whether the other party has received it. In the case of arbitration clauses, which are contractual in nature, the above-mentioned primary conditions for an offer must also be met²⁴.

An offeree makes a representation that it has no objection to the content of the arbitration. There are several possible scenarios in which the offeree makes a non-objection to the scope of the arbitration. The arbitration agreement is uncontested when the offeree gives express written consent to the arbitration offer. The second is a cross offer. A cross offer is an offer by the parties to a contract to enter into a contract for the same content using a non-direct dialogue. Since both parties have the same intention, the law can presume that they must have the result of mutual commitment to establish the contract. If A sends a contract text to B, which includes an arbitration clause, and B sends a text with the same contract content to A simultaneously, then the contract can be deemed established because both parties have the same intention. Thirdly, the offeree makes a written counter-offer that does not object to the content of the arbitration. In this case, there is a dispute about whether the arbitration agreement has the necessary formal elements. In the author's view, if the offeree makes a written counter-offer that

²³Gulerci (2008).

²⁴Ware (2007).

does not modify the content of the arbitration and the parties do not change, amend or object to the scope of the arbitration before the dispute arises, the formal requirements for an arbitration agreement should be deemed to have been fulfilled. Based on the above analysis of the independence of the arbitration clause and the content of the main contract in the same contract, a counter-offer containing arbitration and other substantive rights and obligations made by the offeree to the offeror comprises two separate elements, one being a counter-offer of arbitration. The other is a counter-offer of substantive rights and responsibilities. In the case of a counter-offer of arbitration, if its content is identical to that of the offer, it is considered that the parties have written expression of intent to agree on arbitration, which is the necessary formal condition for forming an arbitration agreement. In other words, such a manifestation of the same intention is required to establish an arbitration agreement. For example, suppose one party provides a model contract or form clause containing an arbitration clause, and the other party does not make any representations about that clause or makes a counter-offer containing the same but does not expressly object to it. In that case, the formal requirements for forming an arbitration agreement cannot be considered met. At the same time, it is essential to emphasise that even if a counter-offer is made by one party with the same arbitration clause, as the arbitration clause is still like a counter-offer, a valid undertaking by the other party is still required to constitute a good arbitration agreement²⁵. Such an undertaking may, of course, be an act of fact other than a signature or a signature, such as the failure of one party to object to the jurisdiction of the arbitration or the validity of the arbitration agreement within the time limit prescribed by law after the other party has requested arbitration.²⁶

Substantive Elements

The substantive element for establishing an arbitration clause is that the expressions of intent are consistent and genuine. Substantive aspects refer to the substance of the arbitration agreement and the standard legal features that must be present.²⁷ Although international conventions and national legislation vary, the substantive elements of an arbitration agreement generally require an expression of intent to submit the dispute to arbitration and the matters to be submitted to arbitration. For example, the Model Law provides that 'arbitration agreement' means an agreement by the parties to submit to arbitration a defined contractual or non-contractual legal relationship between them. The Model Law provides that 'arbitration agreement' means an agreement by the parties to submit to arbitration all or some of the disputes that have arisen or may arise in a defined contractual or non-contractual legal relationship between them"; section 6 of the English Arbitration Act 1996 defines an arbitration agreement as "an agreement (whether contractual or not) to submit to arbitration a dispute which exists or which is to arise." French National Articles 1442, 1447 and 1448 of the Code of Civil Procedure and the arbitration laws of the Netherlands, Spain and Belgium are

²⁵Janicijevic (2007).

²⁶Shanghai Law Society (2022).

²⁷Gulerci (2008).

similar. The arbitration laws of the Netherlands, Spain and Belgium also contain similar provisions. As to whether the declaration of intent is accurate, it can be combined with the process by which the parties entered into the contract and judged comprehensively from the following two aspects:

First, there needs to be a consultation process. Consultation when entering into a contract is a critical process to judge the true meaning of the parties to the agreement; the two parties to consult on a matter, indicating that the two parties to the contract are equal and have sufficient opportunity to express their intention, rather than one party imposed on the other.

The second is the attitude of the parties to the arbitration clause. In the course of the conclusion of the contract, the party's opinions and statements on the arbitration clause are also essential criteria for determining the true meaning. Suppose both parties are aware of each other's views on arbitration before the eventual dispute arises, and neither party raises any objection.²⁸ In that case, a judgment should be made that the parties have reached a consensual agreement. If, on the other hand, the parties' offer and counter-offer consistently differ in their views on whether to arbitrate or on the content of the arbitration, then no agreement has been reached, and the arbitration agreement has yet to be formed.²⁹ In other words, it is essential to determine whether there is continuity and consistency in the parties' attitude to the content of the arbitration.

Results

An Arbitration Agreement in force should have the Consent of the Parties

The study's findings indicate that, in practice, national courts have established the independence of arbitration clauses in invalid contracts, fraudulent contracts, and illegal contracts, and there is less jurisprudence in cases where the agreement does not exist.³⁰ However, a jurisprudence study shows that the arbitration procedure should be applied as long as the parties have agreed to arbitrate and there is no objection to the arbitration clause. For example, in 1967, the U.S. Supreme Court held in *First Paint Co. v. Vlad & Conklin Manufacturing Co.*³¹ that if the issue in dispute concerned the validity of the main contract, the debate should be referred to arbitration and that the federal courts had jurisdiction only if the validity of the arbitration clause itself was at issue. Justice Schwebel summarised it as, "*When a contract is entered into which contains an arbitration clause, they enter into not one but two contracts, and the arbitration clause may still retain its validity.*"³² In the case of *Harbour Insurance Co. v. Kansa General International Insurance Co.*³³, the principle that an arbitration clause or agreement

²⁸ Aaron (1990).

²⁹ Zarubina & Katukova (2018).

³⁰ Rogers & Launders (1994).

³¹ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*

³² Domke (1959).

³³ See *Harbour Assurance Co. (UK), Ltd. v Kansa General International Assurance Co., Ltd.*

to arbitrate in a contract may exist in English law independently of the contract provided that the arbitration clause itself is not subject to direct allegations. The contract that is void ab initio can also be resolved through arbitration, provided the arbitration clause is not directly alleged to be void ab initio. Suppose it is a contract that has not been formed, judged by the principle of independence of the arbitration clause. In that case, the main contract and the arbitration clause can be considered two separate contracts, and the agreement remains valid. However, if there was fraud in the conclusion of the arbitration clause, or if the parties did not agree on the arbitration clause as a contract, then the arbitration agreement shall be void at that point. In other words, if it is considered that the arbitration clause cannot be applied, the validity of the arbitration agreement shall be denied if it is stated, *mutatis mutandis*, that there was no agreement or other invalid circumstances in the formation of the arbitration agreement.

The Route to Identifying Arbitration Clauses where a Contract is not formed

An arbitration clause, a dependent contract, should first be identified as to whether it is formed. The identification of the formation of an arbitration clause applies to the general elements of contract formation.

Generally speaking, the following elements are required to form a contract: (1) The existence of two or more contracting parties. The contracting party is the person who enters into the contract, either as a party to the contract or as an agent of the contracting party. (2) Consent to the main terms. The establishment of the contract is usually based on the consent of the parties, the consent that the parties to the contract mutually agreed to express their intentions. Consent is, in principle, the agreement of the parties to describe the contract's content and the objective deal on the terms of the contract. A contract is formed by the parties' agreement, and only in the case of a contract of service (e.g., custody) does the agreement require, in addition to the agreement, the delivery of goods or the completion of other payments. Suppose the agreement's content is inconsistent with the meaning of the inner effect. In that case, it is not a question of whether the contract is formed but whether it can affect its validity and be dealt with under a system such as material misunderstanding. If the parties to a contract do not agree on the content of the contract (disagreement), it is a "non-consent" contract. The contract is not formed because the parties need to reach a consensus.³⁴ Therefore, if there is no subject to the contract (which does not exist in practice) or the parties do not agree on the meaning of the contract, the contract is not formed. In common law, there are many cases of the contract not being included or not taking effect, such as no intention to create a contract; no consideration (lack of consideration); common error (a common mistake); completely uncertain contract (uncertainty); illegal contract (illegality), illegal duress (unlawful duress), etc., all of which can lead to the contract deemed as not formed or invalid from the onset.

As far as the general requirements for the formation of a contract are concerned, they are satisfied by the existence of a contracting party and the

³⁴Ali & Almanasrah (2019).

agreement on the main terms. For some special arrangements, other elements may be required for the contract to be formed. For example, in the case of contracts regarding pharmacological products, there must be the delivery of the goods in addition to the agreement; in the case of a contract in form, in addition to the agreement, there should be a specific manner, such as the use of the contract form. In addition, the traditional theory of the civil law system also considers the elements of contract formation to include the subject matter of the contract, and some scholars in China believe that the issue of the contract's subject matter belongs to the contract's validity³⁵. If the agreement is not established, the warranty has no contracting party, or the contracting parties disagree on the meaning between them. The contract that needs to be installed means that the parties have yet to reach an agreement on the main terms of the contract, such as the failure to make a commitment or the failure to reach a written agreement on a contract that is legally required to be in writing³⁶. If no agreement is reached during the conclusion of the arbitration clause, for example, if one of the parties does not sign the central contract or does not expressly appear to do so, or if it agrees with the main contract but objects to the dispute resolution, then this arbitration clause shall be deemed to be not formed and shall have no effect.

The General Elements of the Validity of a Contract with an Arbitration Clause

A contract as a legal, valid act means that it occurred entirely with the legal consequences expressed by the intention. The main elements are: (1) the parties have the corresponding contracting capacity when contracting. As a natural person should have the total ability, limited capability should be represented by the person's legal representative. (2) Truthfulness of the expression of intent. The main point is that the videographer's expression should reflect their inner meaning. The expression of intent contains the two elements of the effect of the meaning, and the act of expression is established but must be confirmed to be valid. (3) Not to violate public order and morals. In China's law, the primary meaning is that it does not violate the mandatory provisions of laws and administrative regulations and does not harm the state or public interest, while in international commercial acts, the meaning should be that it does not violate the prevailing practices and good customs in global commercial interactions³⁷. In general, the conclusion of an arbitration clause does not violate the two aspects of contracting subjects and public order and morals. The primary situation is that the arbitration clause does not take effect if the parties to the contract do not agree or are not free to express their intention.

³⁵Han (2022) at 35-41.

³⁶Darami Zadeh & Farhangpur (2018).

³⁷Jene (2017).

Conclusion

The present study's findings highlight the importance of the logic of independent determination of arbitration clauses. In international commercial disputes, establishing the principle of the independence of the arbitration clause helps to maintain the stability of the order of transactions, reflects the inherent value of the procedure, and avoids the disinterest of one of the contracting parties in the outcome of the adjudication by subjecting the dispute resolution to the adjudication of a third country's judicial body. The legal consequences of the contract are the same in the cases of non-formation, formation without effect, and revocation, i.e., they are all not materially adequate. Arbitration clauses are all relatively independent, and the contract's invalidity does not necessarily lead to the invalidity of the arbitration clause. The agreement of the contract subject to the arbitration clause should be regarded as an independent contract, and the validity of the arbitration clause should be judged from the general constituent elements of the truth of the agreement.

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