Athens Journal of Law

Quarterly Academic Periodical,
Volume 10, Issue 1, January 2024
URL: https://www.athensjournals.gr/ajl
Email: journals@atiner.gr
e-ISSN: 2407-9685 DOI: 10.30958/ajl

Front Pages

Athens Journal of Law

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

Editors-in-chief

- Dr. David A. Frenkel, Head, Law Unit, ATINER and Emeritus Professor, Law Area, Guilford Glazer Faculty of Business and Management, Ben-Gurion University of the Negev, Beer-Sheva, Israel.

Editor

- Dr. Michael P. Malloy, Director, Business, Economics and Law Division, ATINER & Distinguished Professor & Scholar, University of the Pacific, USA.

Editorial & Reviewers' Board

https://www.athensjournals.gr/ajl/eb

Administration of the Journal

1.Vice President of Publications: Dr Zoe Boutsioli
2.General Managing Editor of all ATINER's Publications: Ms. Afrodete Papanikou
3.ICT Managing Editor of all ATINER's Publications: Mr. Kostas Spyropoulos
4.Managing Editor of this Journal: Ms. Eirini Lentzou

****

***

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

****

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

The Athens Journal of Law
ISSN NUMBER: 2407-9685 - DOI: 10.30958/ajl
Volume 10, Issue 1, January 2024
Download the entire issue (PDF)

Athens Journal of Law
Editorial and Reviewers' Board

Editors

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

Editorial Board

- Dr. Viviane de Beaufort, Professor, ESSEC Business School, France.
- Dr. Dane Ally, Professor, Department of Law, Tshwane University of Technology, South Africa.
- Dr. Jagdeep Bhandari, Professor, Law department, Florida Coastal School of Law, USA.
- Dr. Mpfari Budeli, Professor, University of South Africa, South Africa.
- Dr. J. Kirkland Grant, Distinguished Visiting Professor of Law, Charleston School of Law, USA.
- Dr. Ronald Griffin, Academic Member, ATINER & Professor, Washburn University, USA.
- Dr. Guofu Liu, Professor of Migration Law, Beijing Institute of Technology, China.
- Dr. Rafael de Oliveira Costa, Public Prosecutor, Researcher & Professor, Ministério Público do Estado de São Paulo Institution, Brazil.
- Dr. Damian Ortiz, Prosecutor & Professor, the John Marshall Law School, USA.
- Dr. Dwarakanath Sripathi, Professor of Law, Osmania University, India.
- Dr. Robert W. McGee, Associate Professor of Accounting, Fayetteville State University, USA.
- Dr. Nataša Tomić-Petrović, Associate Professor at Faculty of Transport and Traffic Engineering, University of Belgrade, Serbia.
- Dr. Emre Bayamlioğlu, Assistant Professor, Koç Universty, Faculty of Law, Turkey.
- Dr. Thomas Philip Corbin Jr., Assistant Professor, Department of Law, Prince Mohammad Bin Fahd University, Saudi Arabia.
- Dr. Mahfuz, Academic Member, ATINER & Assistant Professor- Head, Department of Law, East West University, Bangladesh.
- Dr. Taslima Yasmin, Assistant Professor, Department of Law, University of Dhaka, UK.
- Dr. Margaret Carran, Senior Lecturer, City University London, UK.
- Dr. Maria Luisa Chiarella, Academic Member, ATINER & Senior Lecturer, Magna Graecia University of Catanzaro, Italy.
- Dr. Anna Chronopoulou, Academic Member, ATINER & Senior Lecturer, European College of Law, UK.
- Dr. Antoinette Marais, Senior Lecturer, Tshwane University of Technology, South Africa.
- Dr. Elfriede Sangkuhl, Senior Lecturer, University of Western Sydney, Australia.
- Dr. Demetra Arsalidou, Lecturer, Cardiff University, UK.
- Dr. Nicolette Butler, Lecturer in Law, University of Manchester, UK.
- Dr. Jurgita Malinauskaite, Lecturer in Law, Brunel University London & Director of Research Degrees, Arts and Social Sciences Department of Politics-History and Law, College of Business, UK.
- Dr. Paulius Miliauskas, Lecturer, Private Law Department, Vilnius University, Lithuania.
- Dr. Jorge Emilio Núñez, Lecturer in Law, Manchester Law School, Manchester Metropolitan University, UK.
- Dr. Ibrahim Sule, Lecturer, University of Birmingham, UK.
- Dr. Isaac Igwe, Researcher, London University, UK.
- Regina M. Paulose, J.D, LLM International Crime and Justice.

- **General Managing Editor of all ATINER's Publications:** Ms. Afrodete Papanikou
- **ICT Managing Editor of all ATINER's Publications:** Mr. Kostas Spyropoulos
- **Managing Editor of this Journal:** Ms. Eirini Lentzou (bio)

Reviewers' Board
Click Here

President's Message

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

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

Gregory T. Papanikos
President
ATINER

Athens Institute for Education and Research

A World Association of Academics and Researchers

21st Annual International Conference on Law
15-18 July 2024, Athens, Greece

The Law Unit of ATINER, will hold its **21st Annual International Conference on Law, 15-18 July 2024, 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/2024/FORM-LAW.doc).

Academic Members Responsible for the Conference

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

Important Dates

- Abstract Submission: **26 March 2024**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **17 June 2024**

Social and Educational Program

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

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

Conference Fees

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

11th Annual International Conference on Business, Law & Economics
6-9 May 2024, Athens, Greece

The Business, Economics and Law Division (BLRD) of ATINER is organizing its **11th Annual International Conference on Business, Law & Economics, 6-9 May 2024, Athens, Greece,** sponsored by the Athens Journal of Business & Economics and the Athens Journal of Law. In the past, the six units of BLRD have organized more than 50 annual international conferences on accounting, finance, management, marketing, law and economics. This annual international conference offers an opportunity for cross disciplinary presentations on all aspects of business, law and economics. This annual international conference offers an opportunity for cross disciplinary presentations on all aspects of business, law and economics. Please submit an abstract (email only) to: atiner@atiner.gr, using the abstract submission form (https://www.atiner.gr/2024/FORM-BLE.doc)

Important Dates

- Abstract Submission: **15 December 2023**
- Acceptance of Abstract: 4 Weeks after Submission
- Submission of Paper: **3 April 2023**

Academic Member Responsible for the Conference

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

Social and Educational Program

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

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

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

Conference Fees

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

Athens Journal of Law - Volume 10, Issue 1, January 2024 – Pages 9-28

Network Analysis and Control System in Mega Projects: The Case of PICASP Erasmus Project

By Massimo Bianchi[*]

Network Analysis achieved some significant results in recent years thanks to advances in technology and in the approach to organisational networks. Less exciting were the results obtained with Mega Projects. These projects show high risk with regards to results, to the compliance of the budget and to the realization of the entire project. So far, the response of Mega Projects contracting authorities is to ask those presenting the project proposals to increase the number of controls and connected indexes without obtaining, almost until now, an increase in project performance. This paper examines the proposal to transfer some results of network analysis to the performance monitoring of Mega Projects. Starting from the case of Erasmus PICASP Project for the creation of Pilot courses and new didactics for teachers training in cultural tourism for the development of Caspian Area, the paper proposes an evolutionary model of cycles of simplification and complexification of the networks control systems. The approach of Practice Enterprise which allows the members of the project networks to acquire the practice of teamwork right from the early stages of planning, and, once the project starts case risks or emergencies arise, will be applied within his model.

Keywords: *Network Analysis, Practice Enterprise, MOOCs, Mega Projects, Erasmus Projects*

Introduction

Network Analysis in organisations achieved some significant results in recent years thanks due to advances in technology and in the approach to organisational networks. Less exciting were the results obtained with Mega Projects with a budget of 1,000,000 euros and more. These projects show high risk with regards to results, to the compliance of the budget and, sometimes, to the realisation of the entire project. So far, the response of Mega Projects contracting authorities is to ask those presenting the project proposals for a higher level of details and to increase the number of controls and connected indexes without obtaining, almost until now, an increase in project performance.

This paper examines the proposal to transfer some results of network analysis to the performance monitoring of Mega Projects. Starting from the case of Erasmus PICASP Project for the creation of Pilot courses and new didactics for

[*]Professor, Alma Mater Studiorum University of Bologna, Full Professor (retired) in Management, University of Bologna, Italy.
Email: massimo.bianchi@unibo.it

teachers training in cultural tourism for the development of Caspian Area[1] paper proposes a transdisciplinary approach to interpret the differences and the evolution of the types of networks through cycles of simplification and complexification of the control systems and try to connect these results to the control strategy of the projects considering the high risk of failure which appears to affect a significant proportion of these projects.

Particularly, as results are connected to the adequacy of control tools, is relevant to consider managerial concepts like the span of control defined as the number of subordinates of a hierarchical position, and the connected capability of networks to maintain the control in complex procedures, particularly when the system is wide and highly interconnected.

To this purpose, the proposal is to apply, in the project preparation phase, the Practice Enterprise approach which allows project network members to acquire teamwork practice from the early design phases and by doing this practice to work together, immediately available, once the project has been approved, financed and started, in case of risks or emergencies.

Literature Review

This paper involves the Literature concerning three main subjects: the Network Analysis, the Project PICASP, and the innovative didactical approach of learning by doing named Practice Enterprise applied to Tempus Erasmus Projects.

The Network Analysis

The research on networks started with the interest on links or ties connecting objects and produced the structuralist approach[2]. The appliance to social of Network Analysis, codified in the acronym SNA arrived at the study of organizational networks after twenty years[3] of researches concerning various aspects but only in last times researchers use the dynamic analysis of links among organizations to examine the development and change of organizational structures over time[4] .

At the beginning this trend of research cnsider the organisational evolution from the point of view of the the state of organisation development by examining big data from the social media platform[5]. This last contribution recognises that the organizational development is an authonomous field of research using the trans disciplinarity to introduce studies on the complexity of networks facing the need to

[1]EAC-A02-2019-CBHE, Erasmus+ Capacity Building in higher education, Cooperation for innovation and the exchange of good practices, Joint Projects
[2]Freeman (2004).
[3]Knoke & Yang (2019).
[4]Toivonen, Kovanen, Kivelä, Onnela, Saramäki & Kaski (2009).
[5]Ogle, Tenkasi & Brock (2020).

explain in a coherent process, the evolution of these multidimensional aggregates of ties[6].

Treur has developed this line of research through the application of network analysis, enhancing its factual aspect and paving the way for an extension of the processes of complexification and simplification to a general and unified model of interpretation[7].

The PICASP Project

The PICASP Project was considered in publishing within the action institutionally forecasted for the project dissemination with some connections with previous projects[8].

The appliance of Network Analysis to Project Teams was realised on Research Projects involving more Partners and Researchers[9] and was mainly focused on number of components, diameter, density, and transitivity of the co-author networks with the aim to analyse the contribution of network to the consolidation of a research community.

Anticipatory research on the relevance of link activation in the evolution of networks has posed the problem of the tools to implement in practice a management of uncertainties and emergencies already posed in the study of risks[10].

The Practice Enterprise

Concerning Practice Enterprise its initial definition was expressed as Practice or Experimental Economy[11] and only in last years was defined as Practice Enterprise[12]. As a learning by doing it was considering an innovative didactical tool but to be distinguished from business games and a simple practical exercise for classrooms of business economics[13].

Practice Enterprise received a strong institutional boost in 1993 as European project funded by the European Social Fund and the German Federal State of North Rhine-Westphalia to connect the different networks around the world in an international non-profit association named EUROPEN. Since 2021, the international association has become PEN Worldwide.

In last years its growing diffusion in universities has represented a significant result compared to the previous, prevalent dissemination in higher institutes[14].

[6]Bianchi (2022).
[7]Treur (2018).
[8]Antonini, Bianchi, Favaretto, Kaklauskas & Pretelli (2022).
[9]Hicks, Coil, Stahmer & Eisen (2019).
[10]Hurlbert, Haines & Beggs (2000).
[11]Greenblat (1988).
[12]PEN Worldwide (2020a).
[13]Gorman, Hanlon & King (1997).
[14]PEN Worldwide (2020b).

Furthermore, Practice Enterprise could be proposed as a tool to apply the transdisciplinary approach as a bridge between science and action, to highlight the problems and pitfalls associated with its employment[15].

To be mentioned that, in analysing recent trends of megaprojects, the personnel training is not a major research problem[16].

The Method

On the one hand, both project management theory and practice had to take note of the high risk that mega-projects fail to achieve their intended goals or cost much more than expected[17].

As far as project clients are concerned, this growing risk over time, also due to the increase in the number of mega-projects to be evaluated and organised, has translated into the request for a more stringent and analytical control strategy in order to prevent catastrophic deviations from objectives and budgets[18].

All this happened by complicating somewhat the project descriptions and the indexes to propose in the submission of projects to the commitment (as happened, for example, for the European projects Tempus, then Erasmus) and by increasing the number of parameters and indexes required in the submission phase.

To analyse the question, the use of indexes for project control should be seen not as a reference to the current moment in which the control of project performance, given the disappointing results, is proposed as an increase in indexing, but as a phase in the development of the network organisation within recurring cycles of simplification/complexification.

Two questions arise: a) from a theoretical point of view, the question is whether this ongoing evolution has reached its maximum to turn towards simplification in perspective, and b) from a practical point of view, the problem derives from the increasing performance expected from the surge of controls applied to improve the performance of the project without, with this, burdening the control structure and, consequently, the execution of the project itself[19].

We will try to answer the first question by tracing an evolutionary model that explains the evolution of networks through cycles of complexification/ simplification using that transdisciplinary approach recently proposed for mega projects[20].

As it concerns the second topic, we will describe the proposal to apply a different way of carrying out project management using a preparation of the project teams through learning by doing with Practice Enterprise and applying a

[15]Renn (2021).
[16]Chen, Xiang, Jia & Guo (2020).
[17]öderlund, Sankaran & Biesenthal (2018).
[18] Virtuani, Barabaschi & Cantoni (2022).
[19]*Barabaschi, Cantoni & Virtuani (2020).*
[20]Cantoni & Favari (2019).

combination of MOOCs for the preparation of Teachers, with Practice Enterprise for the simulation of Project Management structures[21].

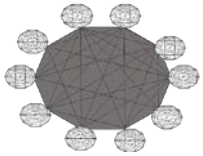
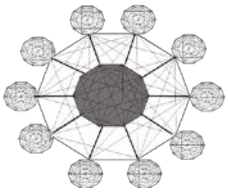
One of the target of this approach is to reduce and to prevent the failures or difficulties in the realisation of the project that often led to an increase in costs and to a reduction in results.

The Project Networks

The partners of a project, generally grouped in a consortium, correspond to a network of reciprocal relationships that can be analysed through dedicated software such as those applied by Social Networks Analysis (SNA) and namely: NetMiner II, MultiNet, StOCNET, GRADAP, JUNG, KliqFinder, MatMan, Pajek, PermNet, PREPSTAR, SNA, SNAP, SNOWBALL, STRUCTURE[22] with the result of highlighting structures characterized by great complexity, however smaller in size than those typical of social or technological-computer systems which can be characterized by millions of component elements.

To this purpose we can reduce the variety of Networks to four basic typologies (Fig.1).

Figure 1. *The Basic Typologies of Network*

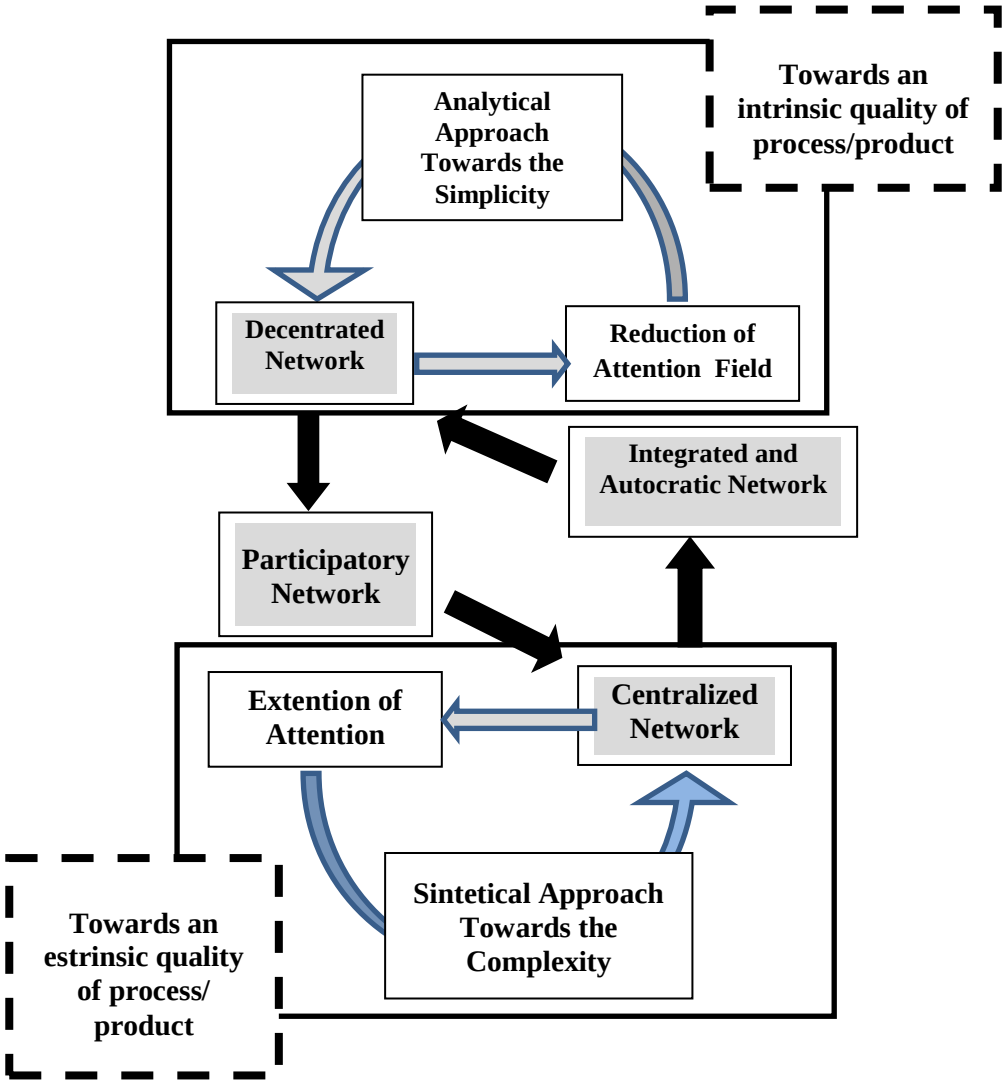
Structure Typology	Integrated and Autocratic Network	Decentrated Network	Participatory Network	Centralized Network
Macro Structure				
Main Features	Large Dimensions with Integrated Internal Functions	Small, middle and large dimension with specialization induced by the externalization of leader organizations	Small and midddle dimensione organized in network without a leader organization	Prevailing leader organization distributing specializations owing its developmental strategies

These typologies includes the Integrated and Autocratic Network in which internal functions are realised with an extreme specialisation. This network could evolve into a decentrated one in which some functions are externalised to independent units dedicated to the sub supply. These units, over time, may evolve into independent entities not necessarily linked to the mother company and establishing a Participatory Network. Within this network a unit can assume a leadership acquiring a dominant position and possibly a larger dimension which,

[21]Bianchi (2020).
[22]Parise (2007).

over the time, absorb the other units with a structure of Centralised Network, bringing the evolutionary cycle back to the original typology of integrated unit of the various functions. This kind of analysis, applied recently to personal networks, would be extended to networks of organisations without increasing the parameters used in the analysis[23].

Figure 2. *Cycles of Simplification/complexification in the Evolution of Networks*



Considering these typologies, we can hypotise also an evolutionary process based on cycles of symplification/complessification (Fig. 2) in which the core of the model composed by examined typologies evolves continuously according with exigencies to ensure the quality of product/services requested by the market and social development[24].

[23]Bidart, Degenne & Grossetti.(2018).
[24]Serrat (2017).

In the core of the model we have the four typologies which are hypothesised to evolve according to two different self-feeding processes. A complexification process aimed at extending the attention paid to the product/service and to the context in which the network operates Towards the Complexity.

At the other side we have a simplification cycle in which the attention is concentrated on the intrinsic qualities of the product/service and in which the network operates inside the organisation, towards the Simplicity.

This implies that the Decentrated Network and the Centralised One are stable configurations while the Integrated and Autocratic Network is less stable together with the Participatory One, both considered transition states.

This enforces the hypothesis that simplification and complexification cycles, as also observed in the evolution of supply chains, is only a phase of network management. To this purpose, an implicit assumption of researches on current supply chain integration is that the results obtained from product supply chains can be directly extrapolated to service supply chains and this equivalence makes the transition from internal to external integration compatible with the idea that both configuration are structural but contingent[25].

Figure 3. *The Examined Cases of Project Management in Tempus/Erasmus*

Project Acronym	Project Subject	Project Grant Holder	Countries involved	Period	N° of Partners	Distance Learning
BECK	ERASMUS - BECK Integrating Education with Consumer Behavior Relevant to Energy Efficiency and Climate	Vilnius Gedeminias Technical University Vilnius (LT)	Bangladesh, Italy, Lithuania, Russia, Sri Lanka, United Kingdom.	2019-2022	14	Simulimpresa/Practice Enterprise - Moocs
HEIPNET	ERASMUS + Inclusion of Innovative Work-Based-Learning and Business Partnerships in HEI Curricula Development	University of Pavia (IT)	Austria, Germany, Italy, Lithuania	2020-2022	5	Simulimpresa/Practice Enterprise - Moocs
PICASP	Pilot Courses and new didactics for teachers training in cultural tourism for the development of Caspian Area	University of Chieti (IT)	Azerbaijan, Italy, Kazakhstan, Lithuania, Poland, Russia	2021-2023	11	Simulimpresa/Practice Enterprise - Moocs

Considering the Networks involved into the process of Project Management we can try to apply this evolution to the project processes, examining the trend of

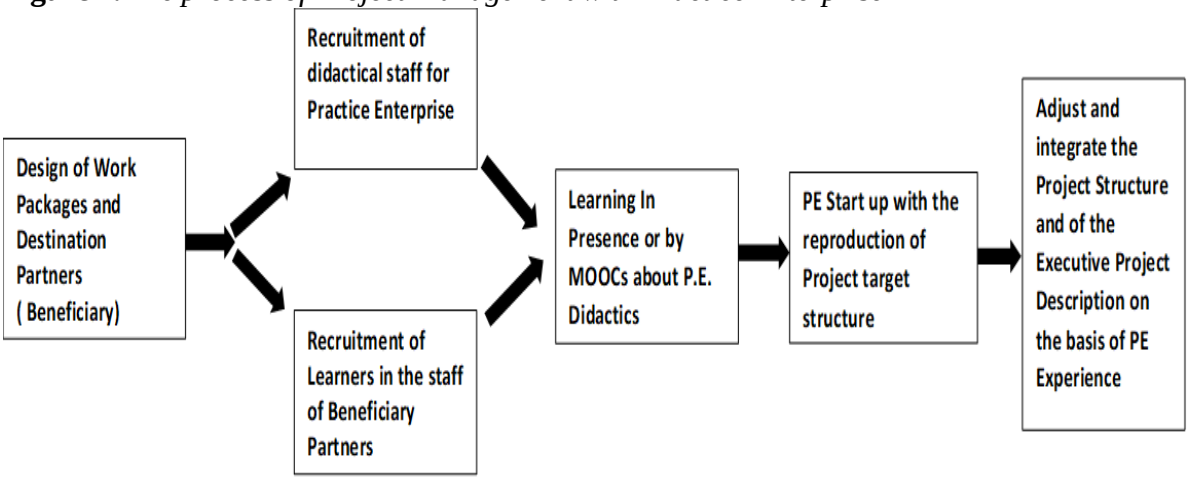
[25] Yuen & and Thai (2017).

complexification individuated in the present of Project Management, and some hypothesis to support the perspective of simplification of controls according to the exigencies of more adequacy of the project management applied to some projects in progress.

The PICASP Project and the Tempus/Erasmus Program

Last experiences in Tempus/Erasmus Projects with the use of Practice Enterprise and MOOCs involves many Consortium Networks on different subjects (Fig.3).
In recent Erasmus calls, the integration of MOOCs and PE was practically proposed in three Projects involving the partners from the very beginning of the planning which took place according to the process shown in Fig. 4.

Figure 4. *The process of Project Management with Practice Enterprise*



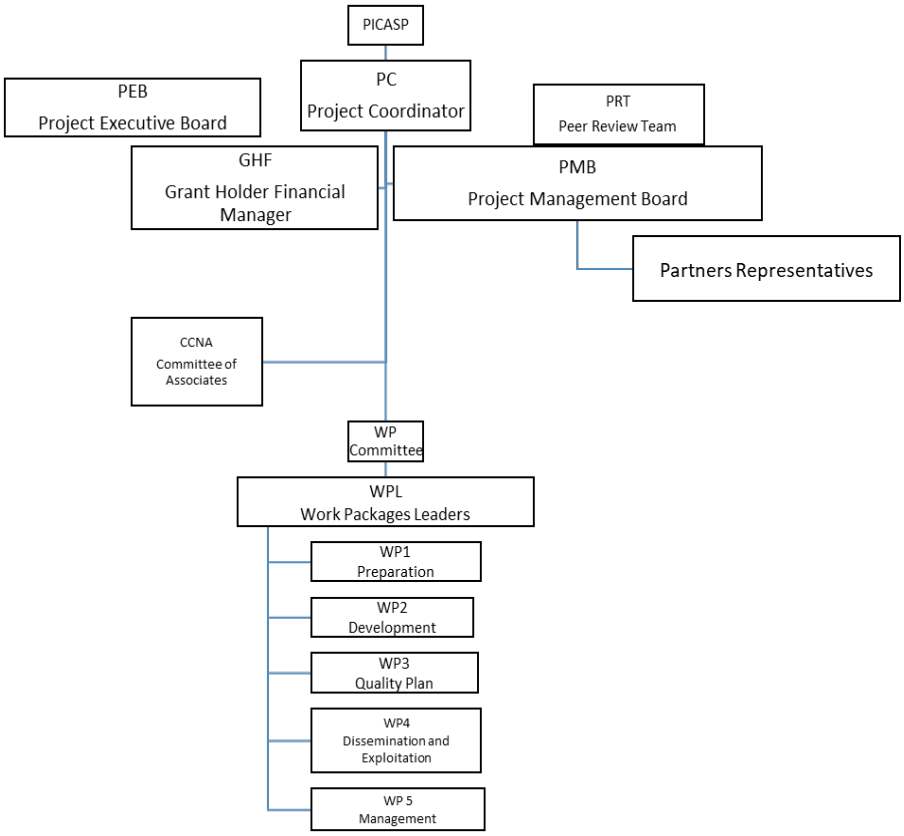
Particularly in PICASP Project the main objectives were mainly connected to the development of new teaching methodologies as Practice Enterprise applied to the Developing courses in Entrepreneurship and SME Management and to the enhancing of the exchange of best practices with EU partners through mobility of academic and technical staff; Other purposes were the enforcing of stakeholders' involvement in curriculum development and graduates placement together with the stablishing of standards and providing quality assurance in didactics with a sustainable maintaining of results after the project end. The main sector chosen was the entrepreneurship relate to the cultural heritage.

The network of universities for the implementation of these Pilot Courses had the purpose to verify the possibilities for its dissemination in other partner countries. As it concerns the PICASP Project, still in progress, this will be positive not only in the field of Economic Activities but more generally among the partners how to design higher education, according to UE Standards. Furthermore, it will have a positive impact in the perspectives, for the Caspian Area, trigged by policies to implement Sustainable Development related to the Silky Road. Of note,

with the position of Grant Holder represented by the University of Chieti-Pescara, the contribution of Europen-Pen, manager of the international network of practice companies, registered in the project as an Associate Partner with the ICA, Italian Central Institute of Archaeology. The role of the Associate Partner, not having assigned budgets, is to collaborate with their own professional and institutional resources in the implementation of the planned activities, in particular as regards the dissemination and sustainability of the project activities, after its conclusion.

In this way the need to verify the collaboration among partners has two topics, the one is concerning the establishment of the Project Structure with its different positions (Fig. 5)

Figure 5. *PICASP Project Organisational Chart*



The other topic is concerning the realisation, in single beneficiary partners, of a structure having the purpose to start Modules, Courses and Mini Masters with the appliance new didactics represented by MOOCs and Practice Enterprises. Like the ones programmed in PICASP (Fig.6). Particularly Courses having Practice Enterprise as method were undertaken in Kazakhstan by the University of International Business of Almaty and by the Caspian State University of Technology and Engineering in Aktau.

This approach was the subject of a previous applicative research concerning the introduction of an Agency on Volga River, as a structure similar to AIPO, The

Agency for Po River in charge to the coordination of interventions on river basin[26], next proposed in a project originated from the 7th Framework Project on European Big Rivers of 2013[27] .

Figure 6. *Courses with Practice Enterprise programmed in PICASP Project*[28]

Country Area	PC	Short Courses	Curricular Courses 1st, 2nd Level	Teachers	Tutors	Mentors	Students
AZ	ATMU	2	1	3	6	3	50
	KHAZAR	2	1	3	6	3	50
RU	ASU	2	1	3	6	3	50
	VSTU	2	1	3	6	3	50
KZ	CSUTE	2	1	3	6	3	100
	UIB	10	5	15	30	15	300

The Didactics with Practice Enterprise and Moocs

The Practice Enterprise was introduced, with the name of Simulimpresa, in 2001 by the University of Bologna as first experience in Italy of these advanced didactics in university courses.

In October 2001, with the creation of the simulated company Perting srl, the activity of the Laboratory of Practice Enterprise conducted by Daniele Gualdi was launched on an experimental basis, within the Business Organization course (Massimo Bianchi). and with the support of the Cassa dei Risparmi di Forlì Foundation.

Perting srl, operating in the field of organisational and network consultancy and in the sale of ICT products, was the first certified Business Simulation Unit, set up at an Italian University.

Also in 2004, the Forlì Business Simulation Laboratory participates, as a remote support centre for business initiatives, in its first international project of "Training and technical assistance for the development of SMEs in the port district of Durres" financed by the Ministry of Foreign Affairs - General Directorate for Economic Cooperation. During the project, the first Simulation Unit abroad is created: KK Personal Robe by Shkoder.

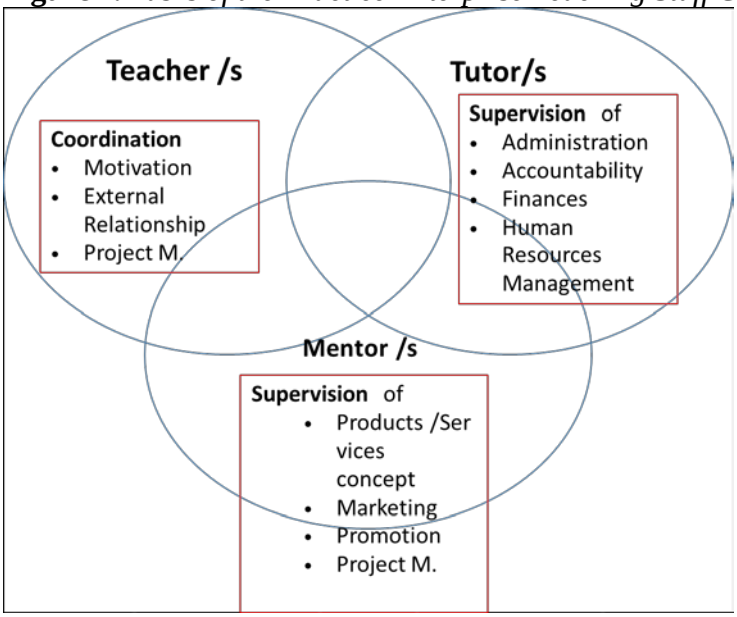
In the following years this activity continued with refinements of the approach and through the simulated company Perting SrL.

[26]Bianchi (2011).
[27]Bianchi & Tampieri (2012).
[28]ATMU Azerbaijan Tourism Management University; KHAZAR Khazar University; CSUTE Caspian State University of Technologies and Engineering; UIB University of International Business. (ASU: Astrakan University; VSTU Volgograd State Technical University; Partners excluded in 2022 by EACEA from PICASP Project, owing the Ukrainian War).

Preparatory to these activities was the education of Teachers, Tutors and Mentors (as showed at Fig. 7), these last ones coming from the entrepreneurial and managerial sector, to the applying of new didactical technologies like Practice Enterprise. Until today, MOOCs were used for the preparation of teaching staff in condition to promote and manage courses oriented to the start up of SMEs and to the modernisation of the existing ones.

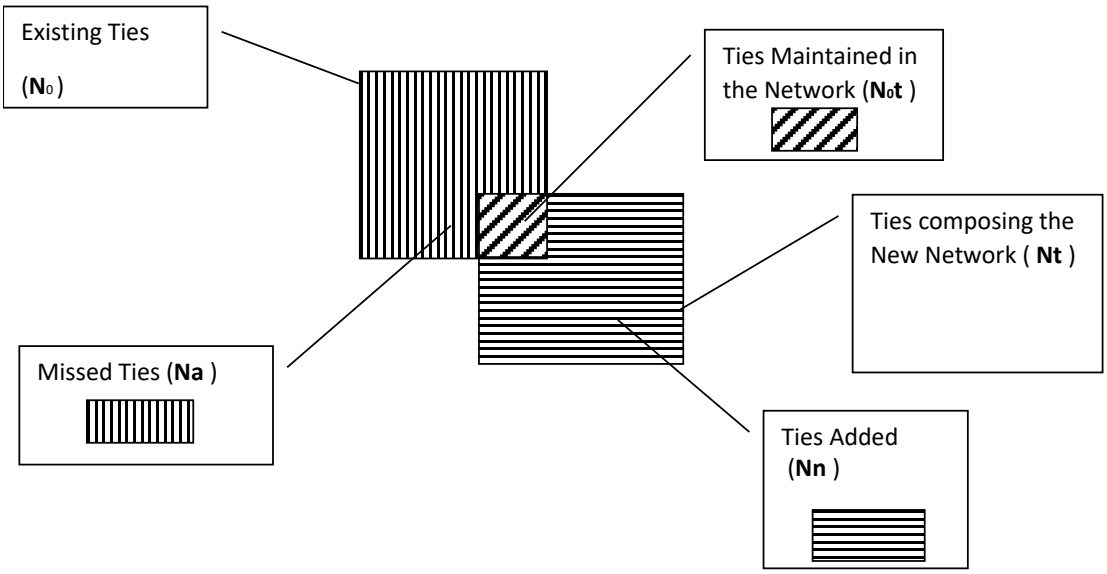
Also in this case was essential, for the fulfillment of the project, the preparation of the Teaching Staff (Teachers, Tutors and Menthors) with a particular attention for the coaching activity having the purpose of creating a real team and an adequate network among the staff, an attitude that was replied in the project management applied in PE Courses.

Figure 7. *Tasks of the Practice Enterprise Teaching Staff Components*



To be mentioned that, among difficulties that the appliance of Practice Enterprise to the Project Management wants to prevent and reduce, is the observation of many project manager with a traditional approach to Mega Projects. In these projects, in most cases, the Chief Project Manager or its organisation, centralises the project management as the sole position having the acquaintance and he is in touch with the most partners. It means that most of the partners, during the preparation of the project and its presentation, are not used to work together. Even more, once the project has been approved, they do not have a common group experience in dealing with unexpected events and emergencies.

Figure 8. *The Model of Ties Renewal*



The appliance of Practice Enterprise contributes to overcome these shortcomings which subsequently translates into significant difficulties when the realization of the project does not go as planned.

The Renewal Process in the evolution of business ties

As it concerns the Renewal Process and the evolution of business ties the model which expresses main parameters involved is represented at Fig.8.

The same model can be represented by the formula of Renewal System:

[1] $Co_n = Ct_0 + e - u$

in which :

Ct_0 = Initial consistency
Ct_n = Final Consistency
e = Input
u = Output

and with the connected basic Indexes:

Time Turnover Variation Index

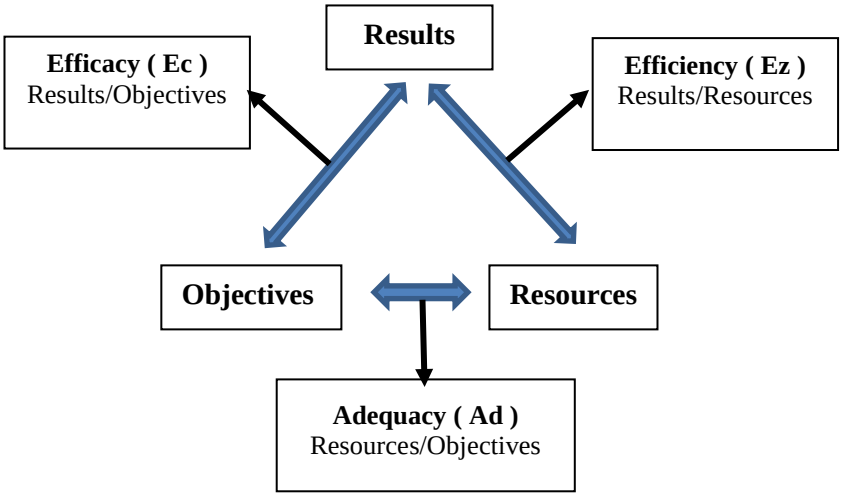
[2] $T = (Ct_0) / u$ [3] $V = e / Ct_0$ [4] $E = (Ct_n - Ct_0) / Ct_0$

at their turn connected with the relationship:

[5] T= 1/ (V – E)

It is clear that this model relating to the dynamic behaviour of networks is connected to the performance that network organisations produce and, having the objective of evaluating the relevance of the indices applied for this purpose from a methodological point of view, it is necessary to think about the formal aspects of the performance with particular regard to the measurement of Objectives, Resources and Results.

Figure 9. *Main Typologies of Basic Performance Indexes*



The Performance of Networks

As it concerns the performance of the process that transforms Objectives and Resources in Results, we can distinguish three typologies of basic indexes (Fig. 9).

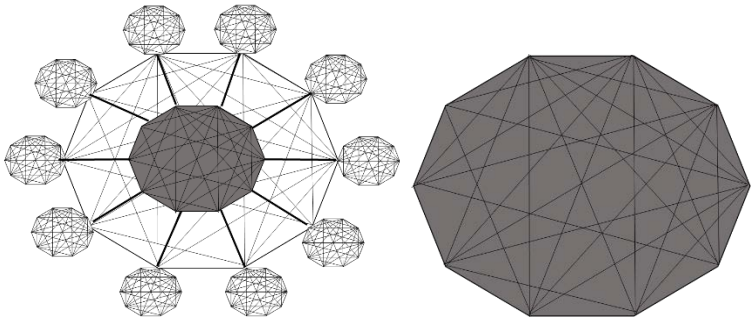
$$[6]\text{Adequacy} = \frac{\text{Resources}}{\text{Objectives}} = [7]\ \frac{\text{Efficacy}}{\text{Efficiency}} = \frac{\frac{\cancel{\text{Results}}}{\text{Objectives}}}{\frac{\cancel{\text{Results}}}{\text{Resources}}}$$

The representation of Fig. 9 can be also considered as the one of a system of indexes each of them with its own characteristics but, at the same time, related with reciprocal interdependencies that produce the following:

If we unify the formulas [5] and [7] in a single transform, by setting Ec = 1, i.e. on the condition that the Results coincide with the Objectives, we can obtain:

[8] Adequacy = Efficacy / Efficiency = 1/(V-E) = T

Figure 10. *Project Management Structures*



Traditional Project Management Structure
by Practice Enterprise Simulation

Project Management Structure
Fully Interrelated

In this considering that, when the Efficacy is supposed as 1, the Efficiency corresponds to the difference (V – E) between Turnover and Variation Index, and the Adequacy is exclusively related to the Time of fulfilment of Results.

This can be a very restricted condition but, examining problems connected to most of projects, Time is the most diffused critical condition. This transform connects the calculation of Network Performance with its dynamics represented by the numerical evolution of links.

Particularly, if we consider the traditional structure of the project management in a consortium of participants, focused normally, as the practice told us, on the project manager or on the partner in charge to the project management, and compare it with a network deriving from the appliance of Practice Enterprise as demonstrated in empirical studies[29] the dynamics of the links differ greatly.

Table 1. *Comparing the potential evolution of Project Management Networks*

n° of Partners	n° of Links with centralized Project Management	n° of Links with the fully Project Management
5	4	120
6	5	720
7	6	5040
8	7	40320
9	8	362880
10	9	3628800
11	10	39916800
12	11	479001600
13	12	6227020800
14	13	87178291200
15	14	1,30767E+12

[29]Tampieri (2013).

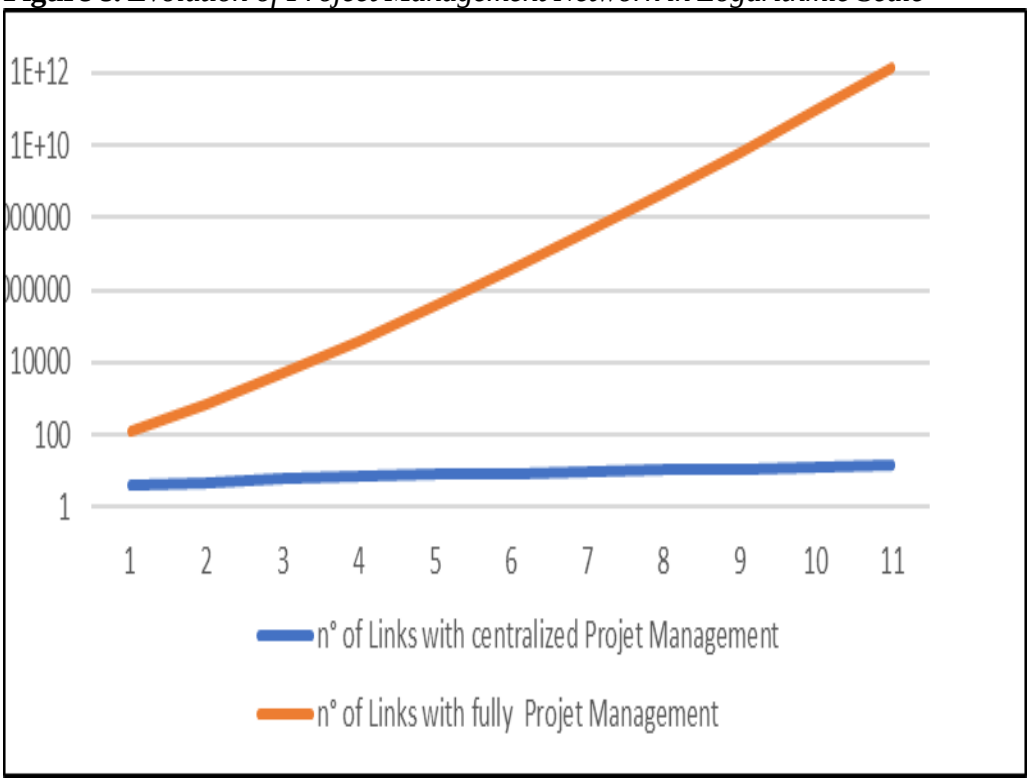
Moving from centralised Project Management to the fully exchange of the planning trough Practice Enterprise applied to project partners (Fig.10), the results of the performance indicators change significantly. Starting from a minimum of five partners we can simulate the evolution of Network Links in the two different structures as compared at Table 1.

Both typologies of Network allow us to highlight the intrinsic limits regarding coordination. The traditional ones have the limit concerning the classic Span of Control defined by Graiciunas[30]. According the Span of Control principle, a manager couldn't coordinate more than 7-8 partners, although this limit can be raised to 15-20, if the coordination position is represented by an organisation with several project managers[31].

The fully networked project management within 5-7 number of components assumes soon, after a few steps, a number of possible connections out of control, entering in the domain of hyperlinks.

Obviously not all links will be activated, during the planning of a project, but the design carried on by a project network in which different subjects are involved from a managerial, administrative and technical point of view requires an interfunctional and interpersonal dynamics that cannot be taught without practical application like the one experienced by Practice Enterprise as fully project management team.

Figure 8. *Evolution of Project Management Network in Logarithmic Scale*

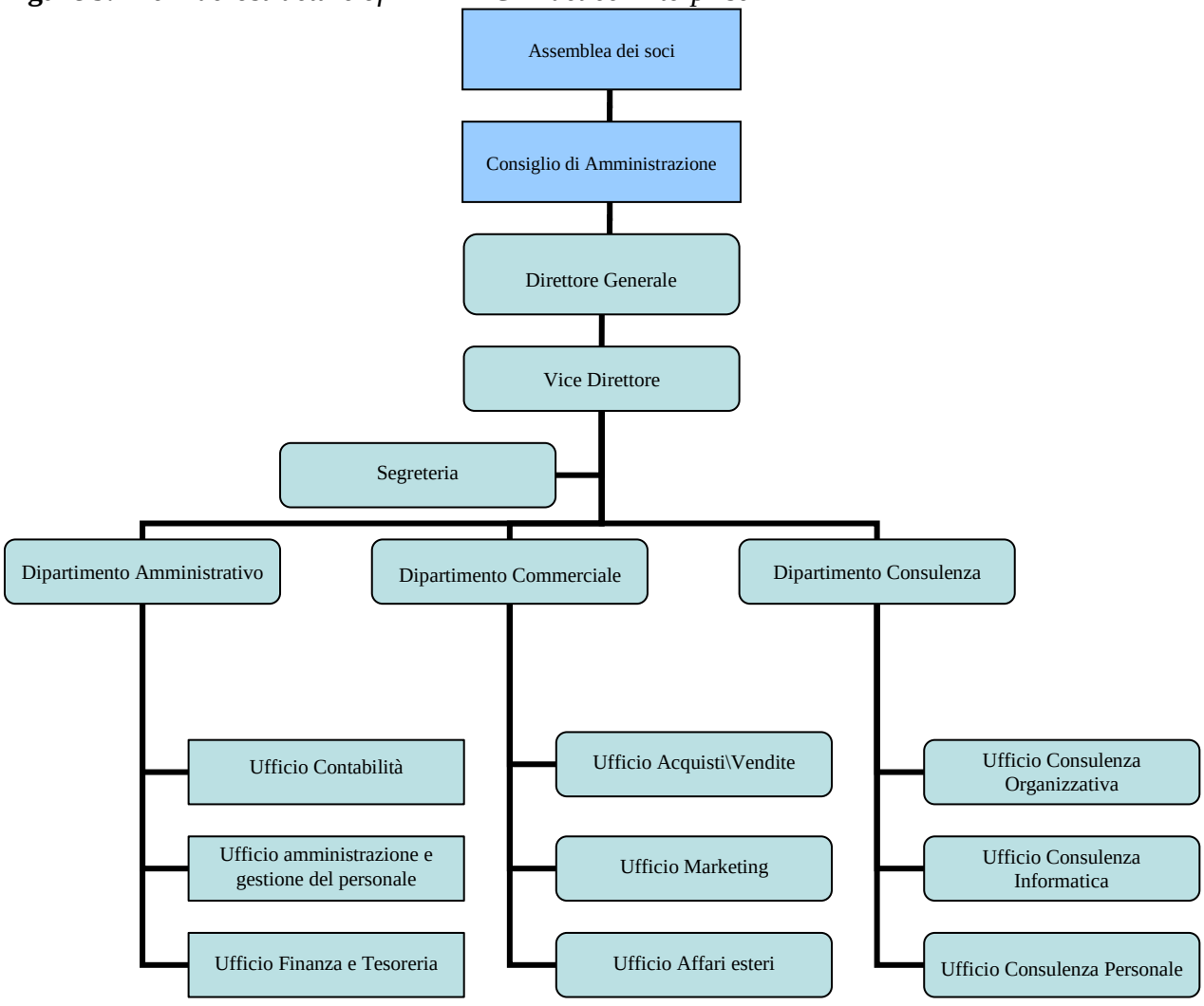


[30]Graiciunas (1937).
[31]Bianchi (2020).

According to this condition for a convenient Adequacy of the project performance, the recommended maximum number of learners or participants to each initiative of Practice Enterprise is around 10th-15th and to this purpose the basic organisational structure normally applied is the one at Fig. 9. This structure represents the Organisational Map of Perting, the Practice Enterprise created in 2002 by the University of Bologna, Campus of Forlì[32].

Conclusions

Figure 9. *The Macrostructure of PERTING Practice Enterprise*



Studies on project performances with the application of Practice Enterprise are at the beginning[3334].

[32]AAVV. (2012).
[33]Bianchi, Fernandez-Lara & Gualdi (2015).
[34]Bae, Qian, Miao & Fiet (2014).

The problem is to transform the organisations business model by making choices that yielded three rigid consequences: entrepreneurship participants' high sense of ownership, feelings of accomplishment, and trust. The choices implicit in the teaching model have to eliminate the hierarchy, decentralising decision making, focusing on teams to get work done, and having participants own the assets.

Also, in project management the mission is to break down barriers among network partners introducing initiative like Practice Enterprise to prepare people to work together before the project starts, from the first steps of the project design. This allows to face adequately eventual distances of results and costs from the ones programmed and enforce the collaboration to maintain the project organisational structure of governance once the project starts.

References

AAVV. (2012) *The Forlì Business Simulation Laboratory and the Activities of Perting SrL Simulated Business 2003-2008 [Il Laboratorio di Simulazione d'Impresa di Forlì e l'Attività di Perting SrL Impresa Simulata 2003-2008]*. Official Handouts Campus of Forlì, University of Bologna.

Antonini E., Bianchi M., Favaretto G., Kaklauskas A. & M. Pretelli (2022). 'The combination of different knowledge within the BECK project: between architectural disciplines and economic sciences' in *Journal of the Italian Society for Architectural Restoration*, Intrecci .n. 1, 2022 https://sira-restauroarchitettonico.it/intrecci/numeri/anno-i-2022-n-1/

Bae, T.J., Qian, S., Miao, C. & J.O. Fiet (2014). 'The Relationship between Entrepreneurship Education and Entrepreneurial Intentions: A Meta–Analytic Review' in *Entrepreneurship Theory and Practice* 38(2):217–254.

Barabaschi, B., Cantoni, F. & R. Virtuani (2020). *'Rethinking leadership in megaprojects. Results from a preliminary investigation' in Cantoni, F., Favari, E. (ed.), Megaprojects.* Multidisciplinarity as the key to successful management, pp. 97-104. Torino: Giappichelli Editore.

Bianchi, M. (2000). Inter-company relationships in the survey and assessment of organizational boundaries, in *Proceedings of the XXIII Convegno Italian Academy of Business Economy* (pp. 211-212). McGraw-Hill.

Bianchi, M. (2011). 'Increasing performance of network building throughout virtual reality and organizational simulation. The case of the Interregional Agencies for Po and Volga River' in *Value, Innovation and Partnership XV IRSPM Conference*, 11th-13th April. Dublino.

Bianchi, M. (2020). 'The E-Learning of entrepreneurial skills through Practice Management and MOOCs. Projects, Perceptions and Perspectives in Impresa Progetto' in *Electronic Journal of Management*, n. 2, pp. 1. www.impresapro getto.it, ISSN 1824-3576

Bianchi, M. (2022). 'Practice Enterprise and MOOCs in the design and implementation of megaprojects. Some lessons from European Projects in *Proceedings of MERIT 2022* Milano 9-10 Nov. Springer book series

Bianchi, M., Fernandez-Lara, A.B. & D. Gualdi (2015). 'The contribution of virtual enterprises to competence-based learning: an assessment from the students'

perspective: Case study' in *Journal Technology Innovation Education*, ISSN 2197-9855), Springer, 1:4, pp. 1- 16.

Bianchi, M. & L. Tampieri (2012). 'Simulated Management in the start up of new Public Organizations. The case of AIVO, Agency for the Governance of the Volga River' in *Transforming Governance, Enhancing Innovation, IRSPM Conference* Roskilde (DK) October 29-31.

- Bidart, C., Degenne, A. & M. Grossetti (2018). *'Personal networks typologies: A structural approach'* in Social Networks 54:1-11.
- Cantoni, F. & E. Favari (2019). *'Introduction - A multidisciplinary approach to embrace complexity and sustainability' in Cantoni, F. & Edoardo Favari, E. (eds.)* A multidisciplinary approach to embrace complexity and sustainability - Megaprojects Research Interdisciplinary Team Workshop. *Giappichelli Editore, Torino VI- VII , http://hdl.handle.net/10807/159648*

Chen, D., Xiang, P., Jia F. & J. Guo (2020). 'A systematic review of current status and trends of mega-infrastructure projects' *in Ain Shams Engineering Journal* 13(6). https://doi.org/10.1016/j.asej.2022.101773

Freeman, L.C.(2004). *The development of social network analysis a study in the sociology of science*. North Chaleston, South Carolina: BookSurge.

Gorman, G., Hanlon, D. & W. King (1997). 'Some research perspectives on entrepreneurship education, enterprise education and education for small business management: a ten-year literature review' in *International Small Business Journal* 15(3):56–77.

Graiciunas, V. (1937). 'Relationship in Organization' in Urwick, L. & Gulick, L. (Eds.) *Papers on the science of administration*. Institute of Public Administration.

Greenblat, C.S. (1988). *Designing games and simulations: An illustrated handbook*. Newbury Park, CA: Sage.

Hicks, D.J., Coil, D.A., Stahmer, C.G. & J.A. Eisen (2019) 'Network analysis to evaluate the impact of research funding on research community consolidation' PLoS ONE 14(6): e0218273. https://doi.org/10.1371/journal.pone.0218273

Hurlbert, J.S., Haines, V.A. & J.J. Beggs (2000). 'Core Networks and Tie Activation: What Kinds of Routine Networks Allocate Resources in Nonroutine Situations**?**' in *American Sociological Review* 65(4): 598-618.

Knoke, D. & S. Yang (2019). *Social Network Analysis* 3rd Ed. SAGE Publications.

Ogle, D.L., Tenkasi R.V. & W. Brock (2020). **'**The Social Media Presence of Organization Development: A Social Network Analysis Using Big Data' in *Research in Organizational Change and Development* ISBN: 978-1-83909-084-4, ISBN: 978-1-83909-083-7, 31 July**.**

Parise, S. (2007). 'Knowledge Management and Human Resource Development: An Application in Social Network Analysis Methods' in *Advances in Developing Human Resources* 9(3):359-383.

PEN Worldwide (2020a). *About us*. https://www.penworldwide.org/about-us/concept (30.03.2021).

PEN Worldwide (2020b). *The Association*. https://www.penworldwide.org/get-to-know-our-association (30.03.2021).

- Renn, O. (2021), 'Transdisciplinarity: Synthesis towards a modular approach', *Futures***,** Elsevier, Volume 130. https://doi.org/10.1016/j.futures.2021.102744

Serrat, O. (2017). Social Network Analysis. In: Knowledge Solutions. Springer, Singapore. https://doi.org/10.1007/978-981-10-0983-9_9

Söderlund, J., Sankaran S. & C. Biesenthal (2018). 'The Past and Present of Mega Projects' in *Project Management Journal* 46(6):5-16.

Tampieri, L. (2013). La valutazione delle performance nel project management. Alcune ricerche sui progetti di cooperazione internazionale Broché [Performance Evaluationin Project Management]. CEDAM, Wolters Kluwer, ISBN 978-88-13-32913-6, pp. 151-192

- Toivonen, R., Kovanen, L., Kivelä, M., Onnela, J.P., Saramäki, J. & K, Kaski (2009). *'A comparative study of social network models: Network evolution models and nodal attribute models'* in Social Networks 31(4):240-254.

Treur, J. (2018). 'Network reification as a unified approach to represent network adaptation principles within a network' in Martín-Vide, C., Vega-Rodríguez, M.A., Fagan, D. & M. O'Neill (Eds.) *Theory and Practice of Natural Computing: 7th International Conference, TPNC 2018, Proceedings*, pp. 344-358. (Lecture Notes in Computer Science (including subseries Lecture Notes in Artificial Intelligence and Lecture Notes in Bioinformatics); Vol. 11324 LNCS). Springer - Verlag. https://doi.org/10.1007/978-3-030-04070-3_27

Virtuani, R., Barabaschi, B. & F. Cantoni (2022). 'The Human Side of Megaprojects: Leadership Style and Traits to Face Growing Levels of Complexity and Uncertainty' in F. Cantoni & E. Favari (Eds*) Sustainability and Megaproject Development.* London: Routledge.

- Yuen, K.F. & V.V. Thai (2017). 'The influence of supply chain integration on operational performance: A comparison between product and service supply chains' in *The International Journal of Logistics Management* 28(2):444-463.

Athens Journal of Law - Volume 10, Issue 1, January 2024 – Pages 29-46

Dispositivity in Russian Business Law

By Vladimir Orlov[*]

The principle of dispositivity is developed based on the concept of party autonomy that is characteristic of civil law regulation that covers business activities and is realised through the application of, in addition to directly applicable imperative norms, dispositive norms that imply the freedom of the parties to perform (to acquire, realise and dispose of) their rights on their own discretion. Particularly in respect of the civil law relations the law provides the parties with large possibilities to determine their relations in accordance with their autonomy of will and in default of such determination offers the applicable rules. Essentially important in realisation of the principle of dispositivity in the civil law are also initiative norms through the application of which the civil law relations emerge, change and cease. Related particularly to the contract and corporate law regulation in Russia, the traditional totality of the legislative law has been challenged in the pragmatic approach supported by the Russian highest judicial body. According to the Ruling of the Plenum of the Supreme Arbitrazh Court of 2014, the norm that determines the rights and obligations of contractual parties but does not include the expressed provision of its dispositivity or imperativity, ought to be recognised as dispositive or imperative in accordance with the interpretation of its aims, and this indicates of favourable attitude towards business activities as well as of reasonable implementation of the pragmatic attitude that is characteristic to common law to Russian law. In particular, the favouring of the principle of dispositivity in respect to business law regulation, by the concentration of the valuation of the dispositivity of a legal norm in the sphere of successive control, instead of previous control, actually promotes the real freedom of business activities, and makes the regulation flexible. This is particularly important for small and family enterprises that are very common in Russia.

Keywords: *Dispositive Norm; Initiative Norm; Contract Law; Corporate Law; Pragmatic Approach*

Introduction

The subject of the article is related to the civil law regulation of business activities in Russia that is performed to a considerable degree by dispositive norms, the application of which is dependent on the will of the parties in accordance with the principle of dispositivity (dispositiveness) that are the main subject of the presentation.

[*]Dr. of Legal Sciences; Professor, Herzen State Pedagogical University of Russia, Saint Petersburg, Russia. Kauppakartanonkatu 22 G 58, 00930 Helsinki, Finland.
+358443236249
Email: vladimir.orlov@saunalahti.fi

Business activities are, for the most part, regulated in Russia by the Civil Code that is the main civil law source, containing imperative (compulsory) and dispositive legal rules. In addition to the Civil Code, civil law norms are contained in other civil laws. In certain cases, international law is also applied, particularly to entrepreneurship relations. Civil (business) law rules can be included into other normative acts (substatutory acts). Customs are recognised as legal sources, while the use of standard contract conditions and analogy application are also known in Russian civil law. Furthermore, judicial practice is not totally excluded from sources of Russian law, and the decrees of supreme judicial bodies are recognised as having precedent value in Russia. In Russia, civil law regulation is also realised on nonnormative level, for instance, by single law-application acts and usage, course of dealing and course of performance. Furthermore, since Russian civil law is codified to such an extent that the norms of Russian civil code contain actual legal principles, objective interpretation is the main rule in Russian law. In principle, officially only the Constitutional Court is empowered to deviate from the text-bound interpretation of the legal norms. Also, according to the rules on interpretation of contract, the starting point of interpretation is the literal meaning of the words and expressions contained in the contract.[1]

Related to civil law the principle of dispositivity is implied in freedom of contract grounded on the freedom of the parties' will. In the Russian international private law, the principle of autonomy of will is expressed in the basic rule regarding the law applicable to the issues belonging to the contract statute. The principle of party autonomy covers also procedural law issues.

The article starts with some personal background notes related to the presentation and its starting points, including my value orientation to the subject, that is, a positive attitude to business activities and civil law regulation of them.[2] The actual part of the presentation begins with the genesis and traditional concepts of dispositivity, handles the genesis and role of legal dogmatics as well as present understanding or traditional concepts of dispositivity, and then is devoted to their

[1]For more on the subject *see* Orlov (2019) at 117–136.

[2]Among the factors that have influenced my empathy towards entrepreneurship that I regard as being a means to general social welfare was successful post-war small entrepreneurship before its total statisation, as well as good neighbourhood shared with the Georgian retailer and the Caucasian Jewish family in the time of my living in the Soviet Union. Also, the necessity of reforms of the Soviet command economy and changes in the general linear thinking seemed obvious to me. Furthermore, the entrepreneur family background of my wife has supported my positive attitude to entrepreneurship. Due to all these factors, I see the participation in socially beneficial activities as the purpose of my life, and the input to the solution of economic and business issues I regard particularly significant. Among the important stages of my CV are working as a lawyer in different enterprises, and then research and teaching as well as consulting on the issues related to the business law in Russia and Finland. Notable is that I miss the experience of serving in the law enforcement bodies. Thus, since I have not been particularly burdened with problems of public law regulation, I dare to be bold in posing challenging questions about the real necessity of the total power of the law in regulating (entrepreneurial) commercial and production activities of enterprises. Furthermore, I believe personally that the professional mentality of the lawyer and the entrepreneur are not reconcilable. However, lawyers who are sophisticated in the peculiarities of business activities as well as entrepreneurs that can arrange their routine of activities to correspond to the legal requirements are not exceptional for me.

problematisation and end up with some proposals on conceptual renewal of dispositivity in the civil law regulation of business activities.

The starting point of my paper, related to the civil law regulation of business, is a realistic understanding of law[3], according to which it exists in the concepts that are textually presented in the applicable legal norms containing legislative and judicial acts, resulted from the application of legal norms. Such an understanding of law includes my support for its practical orientation that implies in securing favourable conditions for normal routine business activities with adequate means to solve possible problems. It concerns particularly cases burdened with the issues related to the regulatory difficulties, due, for instance, to the uncertainty and unpredictability of circumstances, that are ordinarily outside of the legislator's concern[4].

And even though such regulation mainly consists of simple easily applicable norms, it is not to be understood only as a static collection of basic, albeit unavoidably necessary abstract constructs. Moreover, in the legal decision-making, the applicable norms are not necessarily to be handled mechanistically[5] without their positivisation or judiciary concretisation, and, if necessary, revision under the criteria of their practical reasonableness. It is, for instance, characteristic for civil law regulation that a concrete case requires the clarification and consideration of the applicability of more than one rule to it, and, also, it is often necessary to consider that the result of the decision of the case ought also to correspond to legal principles. Furthermore, the presence of dispositive elements is characteristic for civil law regulation, in accordance with which the content of the legal relation is determined by *the parties' will.* There are also applicability difficulties related to the subject of regulation, to its unpredictability, because of dynamic and risky character of business activities, characteristic for which are relative spontaneity and unpredictability.[6]

The other starting point of my presentation, related to the previous one, is critical attitude to that the social reality is traditionally, particularly, in Russian law regarded as causally determined[7] truly existing world that is reflected in the jurisprudence (legal dogmatics). Following this, the Russian legal norms are still often presumed to be followed as such (in fact as officially established/recognised truths), and truth believers you can meet among the legal scientists[8]. I shall present

[3]Meaning acts and actions that are understandable within borders of the realistic approach as law, or legal acts consisting of legislative and judicial acts.

[4]Real business law problems seem to be ignored also by legal doctrine but not by judiciary as the activities of the Russian Supreme Court show it. *See*, for instance, Orlov (2022) at 479.

[5]Linear explanations are, however, necessary elements of the scientific cognition usually playing the intermediary role in the building of adequate knowledge. Otherwise, it is only artistic (emotional) displaying reality that have the capability of the directly adequate perception of it.

[6]For more critique on the Russian legal doctrine *see* Razuvaev (2019) at 6–8.

[7]On the problem *see*, for instance, Zolo (1986) at 115–117.

[8]In respect of crimes, for instance, it is still ordinary in Russia to use the term "truth" ("verity") that is established by the investigator and confirmed by the prosecutor is to form the basis of the crime imputed by the court. In respect of crimes, for instance, it is still ordinary in Russia to use the term "truth" ("verity") that is established by the investigator and confirmed by the prosecutor is to form the basis of the crime imputed by the court. Concretely, however, the task of the investigator is to establish the facts and other requirements for the investigation of the crime, whereas the task of the

further below my critique concerning the adequacy of traditional truth-based legal dogmatics to the business regulation.

Genesis

In general, business rules have had practical roots, representing genuine dispositivity that gradually had become institutionalised in customs and later took a legislative shape. The civil law regulation began its shaping and civil law dogmas started to develop in ancient Rome, when the ideas of ancient *ius naturale* became incorporated into Roman law with its developed skills to produce and handle legal items[9], and the abstract norms of *ius naturale* became positivised (realised in the concrete rules) of Roman law, and the doctrinal development began with the conceptualisation and typification of jural material.[10] In addition to the ownership claims, also obligation claims became legally protected, meaning that voluntarily agreed *ex contractu* obligations became subjected to remedies. The recognised *ex contractu* actions included initially only the enlisted ones and later were extended to concern any agreement.

The civil law regulation began its shaping in ancient Rome factually with the situations, where public power provided remedies against the breach of a private obligation upon the application of the injured party; and it means the emergence of initiative dispositivity that has become immanent to the private law regulation. In Middle Ages, the judiciary have started recognizing the situations where public protection and intervention was necessary by applying the principles of Roman law, discovered and further developed in European universities. Furthermore, in *the Medieval period*, when Roman law and canon law formed the European *ius commune*, the principle *pacta sunt servanda*, according to which any agreement is binding, was legally enforced[11]. As such, it has served as a kind of platform for development of freedom of contract, a total embodiment of dispositivity. The *Corpus Juris Civilis*, as the basic source of the European law, was respected by the founders and followers of the dogmatic doctrine obviously as "holly" true document, and it has factually preserved its axiomatic nature until now.

Important for the development of modern civil law, particularly, related to the regulation of business activities, was the emergence and institutionalisation of customary law in western Europe. In fact, the reception of Roman law as the

---

prosecutor is to establish the requirements for the prosecution of the crime, and the task of the court is to establish the requirements for the condemnation of the crime. In fact, truth believers are civilised (progressive) followers of the Enlightenment, characteristic for which has been the Cartesian (René Descartes) believe in Reason identified with truth. The Enlightenment, aimed at conquering the wild world, ought to be regarded as representing a soft form of the European civilization of the world started with the crusades at the 11th century. The real merit of the Enlightenment ideas is, among others, in the law codifications in Europe.

[9]In the preclassical period of the history of the Roman law, the tasks of the person who could be called a (*iurisprudent*) lawyer contained drafting lawsuits and transactions (*cavere*), dealing with cases in court (*agere*) and advising citizens on legal issues (*respondere*).

[10]*See*, for instance, Strogov (2022); Tumeneva (2019); and Razuvaev (2019) at 12–14.

[11]For more on the subject *see* for instance Zimmerman (1996) at 576–582 and Giaro (2021).

essence of European *ius commune* occurred without prejudice to the continuation of the use of (local) customs by judges at the royal courts, who had been educated in (universal) Roman law and canon law. Moreover, the emergence of customary law occurred along with the process of centralisation of the state and unification of the law and expansion of its regulatory role, where the legal doctrine has begun to play the constitutive function emerging the rule of law. In the process of judicialisation of custom, judges at the royal courts created new legal rules that became the basis of the national civil law shaped in the civil codes—where *ius commune* became positivised in national legislation—, as for instance, the French *Code Civil.* Furthermore, the judicialisation of custom meant that custom was gradually removed from the sphere of individual (*in casu*) behaviour to the sphere of collective mass regulation[12], without, however, reducing the significance of dispositivity in business relations. The French *Code Civil* adopted the subjective theory of contract or the will theory, in which the freedom of contract has become shaped; it has emphasised the party´s intentions or will, meaning the dispositivity, in the formation of the contract[13].

The French codification included *Code civil* (1804) that had followed the traditional Roman civil law structure, and *Code de commerce* (1807) that contained the supplementary provisions to the *Code civil* as regards issues of commercial law, was followed by the German, based on the academically developed pandect codification, realised in the *Burgerliche Gesetzbuch* (Civil Code) and the *Handelsgesetzbuch* (Commercial Code) provided to regulate primarily the legal relations of merchants[14]. In general, the modern civil law in continental Europe is codified and is still characterised by legislatively fixed distinction of cases of dispositive (as well as imperative) nature. Also, the dominance of legal positivism favouring mechanistic concepts of law, related to linear reasoning, and the expansion of societally oriented (mainly imperative) legislation is characteristic of the modern law.

The specificity of the civil law that in Russia regulates business relations is related to the fact, that the modern Russian law had roots[15] in the Byzantine law[16] and the czarist Russian[17] society was not much familiar with the market economy

[12]*See*, for instance, Seong-Hak Kim (2019) at 186-211.

[13]The concurrent objective theory of contract, in U.S. law, has required that the existence of a contract is determined by the legal significance of the external acts of a party to purported agreement, rather than by the actual intent of the parties or then unexpressed intentions.

[14]In addition to dispositive norms the *Handelsgesetzbuch* contains administrative prescriptions.

[15]The historical background of Russian law was formed by old customs, Byzantine canon law heritage, and influences of' western law that has been generally respected as an ideal to be striven for. *See*, for instance, Orlov (2021) at 476.

[16]The joining of Russia to the Byzantine church and law occurred after the adoption of Christianity in the 10th century, when the Byzantine Empire was one of the most powerful militarilly and culturally developed states. However, the canonical and legal realities as well as the cultural and socio-political realities of Byzantium and Rus were significantly different, wherefore the use of the imperial laws and canons in the territories of newly enlightened people with their own language did not seem possible. But in any case, the Russian legal tradition is primarily based on the influences from the Byzantine Empire with its law that was essentially a continuation of Roman law with increased Christian influence**.** *See*, for instance, Orlov (2021) at 467-469.

[17]Czar (Imperial) Russia existed from 1721 to 1917.

tradition. Strong enterprises, independent from the state power were absent in Russia, and business activities were mainly subject to public law regulation that was aimed to secure, in the first instance, public interests.[18] Particularly in the 19th Century the capitalistic development in Russia met with obstacles which were connected to the dominant social structure, particularly the autocracy and serfdom. Thus, the conditions for organic capitalist market economy development were insufficient, and the state made efforts to promote business activities by legal means, and the promotion of industry and trade became prioritised in the Government's policy particularly since the 19th century.[19] Thus, the modern Russian law have been developed under the influence of continental, particularly, German law[20]. Contrary to that western business law rules have had practical roots as being originated in the institutionalised customs and later legislatively shaped, Russian business law, including dispositive regulation[21], still almost totally consists of the dogmatic transplants of the western business law norms and practices, directly represented in the civil legislative norms. The Russian legal norms are presumed to be followed as such (in fact as officially established/ recognised truths).

The doctrinal exploration of civil law in Russia started with the establishing the legal education in the Russian universities[22]. In particular, the legal societies organised at the universities with law faculties played a vital role in promoting academic legal studies. As a result, in the 19th Century, many traditions and institutions of Western European civil law were adopted in Russia. Moreover, the Russian traditional dogmatic thought was reinforced by German as well as French legal dogmatics. The *Corpus Juris Civilis* was respected by the founders and followers of the dogmatic doctrine obviously as "holly" true document, and it has factually preserved its axiomatic nature until now. After the legal reforms of 1860-1870 years, aimed at the modernisation of the Russian law, the doctrinal development of civil law in Russia was intensified and brought the necessity of Russian positive law studies[23]. German historical school played a significant role in the development of Russian civil law.

---

[18]For more on the subject *see*, for instance, Orlov (1999) at 363 and the material cited therein.

[19]In the years between 1861 and 1874, Czar Alexander II decreed his reforms that concerned Russia's social, judicial, educational, financial, administrative, and military systems. The reforms liberated roughly 40 percent of the population from serfdom, created an independent judicial system, introduced self-governing councils in towns and rural areas, eased censorship, transformed military service, strengthened banking, and granted more autonomy to universities; furthermore, in the 19th Century, many traditions and institutions of Western European civil law were adopted, and law became the main source, while customs were placed second. However, the modernisation of the imperial (absolute) Russia and its capitalist future was ended up with the Russian Revolution of 1917.

[20]*See*, for instance, Orlov (2021) at 466–477; Poldnikov (2017) at 697. Also, the US business law concepts have been largely adopted in the Russian legislation.

[21]Czar Russian legal scholars were acquainted with the concept of dispositivity that has, however, no particular significance in the country, where private law regime was unknown, and where, the civil law regulation of business activities has not been practiced.

[22]At Moscow State University, lectures on western law were given in 1756 by the German professor Philip Dilthey. But systematic lectures on law (given by guest German professors) began in the 1764, and since 1767, law lectures were given also in Russian. For more on the subject *See*, for instance, Nechaev (1895).

[23]*See*, for instance, Poldnikov (2017) at 708.

German teachings had become adopted doctrinally since the mid-nineteenth century, but the shaping of the legislative basis started in the Soviet period of the Russian history. The adopted German doctrine got expression in the codified legislation since 1923; later, under the influence of the historical school, the dominance of the characteristic for Russia (state-established) statutory law ended with the recognition of custom as a legal source in the present Russian civil law.
Business activities in the Soviet Union were subject to the economic law regulation standing for civil law provisions strengthened by compulsory norms that concerned the formation of contract and its content as well as settlement of disputes.[24] In the Soviet economic law relations it was even prohibited for the socialist enterprises to disobey the plan tasks submitted (yearly) by the state. However, apart from the economic law relations, the Russian civil law regulated other property relations following the continental law patterns, where applicable were dispositive as well as imperative rules; in general, the dispositive norms have been regarded as being permitted by the state. The attitude to the dispositive regulation has radically changed (at least declaratively) in the post-soviet Russia, where freedom of economic relations is regarded as the constitutional basis of the country.

Role of Legal Dogmatics

The specificity of the civil law that regulate business relations is mainly grounded on the role that legal dogmatics has played in its development. And, traditionally, the main purport of legal dogmatics is to secure the process where a legal rule prescribed in the established procedure in the legislative act is to be realised in the concrete legal court decision or judicial act through the jurisprudential procedure that is grounded on legal dogmatics or jurisprudential act[25].

The modern European law has inherited the essential features of the religious law that are particularly presented in the legal dogmatics. In general, social relations has been subject to religious and legal regulation. In accordance with the *ius naturale*, historically mainly dominated in Europe concept of law, any law is of divine nature. This has been concerned Roman law, particularly started from the *Codex Juris Civilis*, the natural law element of which had originated in a divine lawgiver[26] and continued by the pandect law, and, consequently, the basics of

[24]*See*, for instance, Orlov (2021) at 476.
[25]It is a rule prescribed in the established procedure to be realised through the established procedure in the concrete legal decision. Compare with Varga (2008) at 254 where he cited Wróblewski (1948) at 184. Varga introduces correspondingly the law (to legislative act), the application of law (to judicial act) and the jurisprudence (jurisprudential act). Compare also with Razuvaev (2019) at 5, where he states that implementation of regulatory functions is carried out by doctrine in three ways, namely, through legislation, jurisprudence and law enforcement practitioners. We have the law in books, the stuff of desiderata with normativity derived from its valid, and we have also the *law in action* composed of series of deductions based on the former in form of actual positivisation decisions to convert positive rules into practical reality, within the social understanding of the law's final ordering force in society.
[26]For more on this subject *see*, for instance, Tyler, Jr. (2014).

Roman law were shaped dogmatically—the general principles as the statements used as major premises were presumed true. And such an apodictic[27] statement, as being *universally (absolutely) true, contained* the ability to produce true statements through deductive reasoning, meaning the application of a general rule to a concrete case, that has emerged the juridical conceptualism and pandect systematisation in the continental law doctrine. The natural law element strongly linked to religion ended up with the German historical school resulted in *Burgerliche Gesetzbuch*, *BGB*, according to which the law is grounded in a form of popular consciousness called the *Volksgeist*; law develops with society and dies with society[28].[29]

German legal dogmatics became perfect in the conceptual jurisprudence. In general, *Begriffsjurisprudenz* or conceptual legal dogmatics ordinarily stands for a conceptual and mathematical orientation in jurisprudence. It is constructed on three postulates:

(1)that the given law contains no gaps,
(2)that the given law can be traced back to a logically organised system of concepts ("pyramid of concepts"),
(3)that new law can be logically deduced from superordinate legal concepts, which themselves are found inductively ("method of inversion")[30].

The conceptual legal dogmatics was aimed at containing proper answers to any legal question supported with the idea of the only one right (true) decision. The teachings of *Begriffsjurisprudenz* or pandect law served as conceptual fundament for the German Civil Code (*Bürgerliche Gesetzbuch*, *BGB*). At present, however, the conceptual jurisprudence that reflects the idea of the only one right decision has no scientific value, but as legal dogmatics—using scientific tools in the jurisprudence—it is practically important in establishing the content of the applicable law. Furthermore, it provides to the legal system the conceptual instruments necessary for the maintenance of the logical (formal dogmatic) consistency in law and the substantial coherency of the legal provisions, meaning their being bind with the value system of the legal order.[31]

Russian civil law jurisprudence, as stated above, began to take shape under the decisive influence of the German Historical School and the Pandectists. The borrowed (axiomatically accepted) dogmatic constructs became legislatively supported and as recognised scientific (jurisprudential) tools, have been dogmatically followed as such without any real problematisation in Russia[32]. The

[27]Apodicticity or apodixis is a *logical* term, applied to judgments which are demonstrably, necessarily or self-evidently true, for instance, as of mathematical conclusions.
[28]For more on this subject *see*, for instance, Reimann (1990) and Mihailov (2023) at 220–418; as well as https://indianlawportal.co.in/friederich-karl-von-savigny
[29]Thus, civil law has become nationalised and secularised in Germany.
[30]Haferkamp (2011).
[31]For more on this subject *see*, for instance, Reimann (1990) and Mihailov (2018).
[32]Russian lawyers and scholars usually obtain legal knowledge from study books and translations of foreign legal literature. It ought to be mentioned that in general legal German is not easy for foreigners, wherefor translations are popular. A similar situation concerns also other foreign languages.

heritage of the unity of the religious and secular law concepts became axiomatised in the legal dogmatics through the believe in the scientific truth in Russia. In any case, in the Soviet (socialist) and post-Soviet science legal dogmatics has had very strong position[33].

Present Understanding

In Russia, the legal regulation has been traditionally identified with the application of imperative or compulsory rules that mainly represent the public law; the meaning of the imperative norms is that, the prohibitions they contain, are to be unexceptionally obeyed. In turn, the dispositive norms as a means of flexible regulation have been usually regarded as exceptions in Russian law, mainly related to contract regulation. The concepts of imperative and dispositive norms are well-established in Russian law, and they are used in the Civil Code. According to the rules enforcing the principle of freedom of contract, in the events when a term of contract is provided by a norm which is to be applied as long as the parties have not reached an agreement to the contrary (a dispositive norm), the parties may by their agreement exclude its application or establish a term different from that provided in it, and in the absence of such an agreement the term of the contract is to be determined by the dispositive norm (Art. 421.4). In turn, the rules on imperative norms are included in the norm of the Civil Code concerning relation between contract and law, according to which a contract must comply with rules obligatory for the parties established by a law and other legal acts (imperative norms), which are in effect at the time of its conclusion. The dispositiveness of a legal norm is determined in Russian law in a traditional way, which means that the norm itself expresses the application of it, unless otherwise provided by a contract. Such a provision could also cover a number of rules. In Russian law imperativeness rather than dispositiveness still continues to be presumed.[34]

In the Russian civil procedure literature of the late 19th - early 20th centuries the dispositive rules were purported like in Germany to be applied as rules to determine the procedural means of protection[35]. Later in the 20th century, the juridical construction of dispositivity, as the legally based freedom of the parties to

[33]*It is significant that* Orthodox Christianity was adopted in Russia at the time when the period of its dogmatic pursuits in Byzantine had ended. Therefore, the Russian religious consciousness has understood the Christian doctrine as being complete and not subject to analysis. Thus, openness to the problematisation of fundamental religious questions had not rooted in Russia. Non-critical attitude to the a priori knowledge has also been (and still is) characteristic for the Russian traditional societal, particularly social scientific, thought that has been oriented towards the exploration and elaboration of the (in the first instance universal) truth composing the system of linearly accumulated knowledge. *See*, for instance, Orlov (2021) at 468 and the literature mentioned therein. For more on this subject *see*, for instance, Mihailov (2018).

[34]For more on this subject *see*, for instance, Demieva (2016) and Kozhevnikov (2017).

[35]Related to a civil law dispute, characterised as dispositive, the significance of the dispositivity is still generally implied in that an unpresented or unproven statement as well as a statement recognised by the court in its procedure as rejected, in default of the further procedural activities of the parties, is to be outside of the scope of law, or such a statement ought to be considered legally non-existent, regardless how trustworthy in reality it is.

perform (to acquire, realise and dispose of) their rights on their own discretion, has become shaped in the different branches of law. As related to Russian civil law, the principle of dispositivity is reflected in that the main parts of the civil law norms (contained in the Civil Code of 1994-2006) are dispositive. Their application is dependent on the will of the parties. The application of a dispositive legal norm may be excluded, or it may be deviated by them. Civil law regulation is performed in Russia also by facultative norms. These mean norms, the application of which requires that parties have agreed on their application, and such an agreement must be expressed in a positive way. Furthermore, also reference norms are known in Russian civil law. By using them generally in contract regulation, the rule regulating certain legal relation (contract) is to be applied to the other, usually similar ones.

The principle of dispositivity is developed based on the concept of party autonomy that belongs to the fictitious postulates of civil law related to the Kantian metaphysical word. The principle of dispositivity is characteristic of civil law regulation that covers business activities and is realised through the application of dispositive norms. Particularly in respect of the civil law relations the law provides the parties with large possibilities to determine their relations in accordance with their autonomy of will, and in default of such determination offers the applicable rules. Related to civil law the principle of dispositivity is implied in freedom of contract grounded on the freedom of the parties' will. The principle generally connotes the liberty of the parties to the contract to define the content of their agreement at their discretion and determine the courts before which and the law according to which any disputes should be governed. In turn, in the Russian international private law, the principle of autonomy of will is expressed in the basic rule regarding the law applicable to the issues belonging to the contract statute. According to Article 1210 of the Civil Code on the choice-of-law-clause, the contracting parties may, at the conclusion of the contract (of international character) or thereafter, choose by agreement the law that will govern their rights and duties under the contract. The principle of party autonomy has also been recognised in Russian law of arbitration – where parties may similarly choose the law according to which their arbitration agreement and its procedure (curial law) should be governed.

Essentially important in realisation of the principle of dispositivity in the civil law are also initiative norms through the application of which the civil law relations emerge, change and cease.[36] A great part of civil regulation in Russia consists of initiatively dispositive norms, the application of which requires introductive acts, for instance, the application of contractual remedies is possible, only after entering a contract. As to the international private law regulation, its switching on requires an initiation of the international private law dispute. The presence of initiative norms by applying of which the subjects of law perform their interests to acquire, realise and dispose of their rights is characteristic particularly for the private law regulation and often even for the public law regulation.

[36]The presence of initiative norms by applying of which the subjects of law perform their interests to acquire, realise and dispose of their rights is characteristic particularly for the private law regulation and often even for the public law regulation.

In general, the dispositivity stands for legally fixed capacity of the subject of law to realise his subjective rights at his discretion and implies in dispositive norms, in accordance with which the parties may agree on their rights and obligations, and, in default of this, the law provides the rule of the law obligatory for them. However, the purport of the dispositivity is not necessarily only in filling the gaps in the expressions of will but also in granting freedom of expression to the parties to some extent.

Among the civil law dispositivity norms, absolutely and relatively dispositive norms are known in Russian law. Absolutely dispositive norms stand for the situation where there are no obligatory standards of behaviour that are set by the law, and the law subjects granted with the discretionary freedom. In turn, in relatively dispositive norms the discretionary freedom of the participants is legally limited, and such limitations often mean setting of several variants of decision with the right of choice or requirements for the proper decision. The variants of decision may be alternative, where several variants are due but the application of one is sufficient, or facultative, where in addition to the basic rule there is its additional (compensatory) variant.

Furthermore, the dispositivity may be divided differently between the parties of the legal relation. In the event of a unilaterally dispositive norm, the dispositivity is granted only to one party, and this often means that the active party enjoys the full freedom of action (as it is) in the absolute. In turn, bilaterally dispositive norm stands for the situation when both parties enjoy the dispositive power to the same extent.

The generally applicable, particularly in respect of contracts, principle of civil law dispositivity means that everything which is not forbidden is allowed; usually this refers to the prohibitions provided by the *ordre public*. In turn, the public law dispositivity is generally ruled by the opposite to the civil law dispositivity principle proclaiming that everything which is not allowed is forbidden. It is characteristic for public law regulation where the interests of the society and state are prioritised and means that an action can only be taken if it is specifically allowed.

However, the distinction between the civil law and public law dispositivity has been sometimes blurred by the generalisation of the allowness to cover the civil dispositivity cases presented sometimes in the sentences that "allowance and permissibility are to characterise the Russian civil law" and that it is generally “the permissive type of legal regulation”.[37]

In fact, such a generalisation is diminishing the significance of dispositivity, particularly, related to business law regulation, where freedom of business activities is among the economic rights and freedoms that are recognised, guaranteed and directly effective in Russia as existing *apriori* and not as established and granted by the state (sovereign or legislator). Consequently, the realisation of those rights and freedoms does not require any high allowance or permission. In fact, such an

[37]The Soviet legal science was based, as being positivist and etatist oriented, on the idea that the state allows the possibility for the parties to choose the most proper behaviour pattern for them provided it is formally legal; and this was later corrected by applying the requirements of fairness and non-abuse of rights as well as the concept of human rights. *See* Demin (2016).

allowance, could mean the existence of the publicly established prohibition that may be subject to its exclusion.

Related to a contract the dispositivity provides the contracting parties with the possibility to establish the contract relation by expressing their wills. According to the rules enforcing the principle of freedom of contract of the Civil Code[38], in the events when a term of contract is provided by a norm which is to be applied as long as the parties have not reached an agreement to the contrary (a dispositive norm), the parties may by their agreement exclude its application or establish a term different from that provided in it, and in the absence of such an agreement the term of the contract is to be determined by the dispositive norm, and in the absence of this, by the customs, applicable to the relationships between the parties. It is still specific for the Russian contract law that dispositive norm has priority over business custom in Russia with some exceptions.[39]

Freedom of contract determined in accordance with the principle of dispositivity also provides the possibilities to change or even rescind it and it may be occurred automatically that requires the dynamic feature of contract and consequently means the impossibility of the final definition of its conditions. Thus, it is principally impossible to clearly distinguish the character of legal norms and accordingly finally fix the conditions of a contract because, for instance, also of the subjective factor. So, any contract condition could be declared in the negotiations by the party as essential, the agreement on which is necessary for the contract to be formed.

A contract concluded with a foreign person may be subject to the application of international private law or choice of law rules. According to these rules applicable may be the law chosen by the parties except for directly applicable norms and *ordre public* rules. According to the interpretation of the Russian Supreme Court of 2019 of Article 1210(5) of the Civil Code, the parties to a contract attributed with a foreign element may choose in their choice of law agreement also the law of a country that has no relation to the contract or its parties (choice of neutral law). The parties may also choose soft law documents containing the rules recommended for participants of the turnover by international

[38]In respect of contracts, the provisions of the Civil Code that is the main civil law source, containing imperative (compulsory) and dispositive legal rules may be generally hierarchised, in accordance with the Civil Code, as follows: the first are imperative norms of the law, and the second are the terms of the contract agreed upon by the contracting parties. The third in contract regulation are dispositive norms which shall be applied in default of the contractual terms, and the fourth are customs (business customs) that are applicable in default of both contractual terms and dispositive norms. In the event a commercial custom or dispositive norm is included in the terms of the contract, it is regarded as a condition of this.

[39]There is an exception to the general rule prioritizing a dispositive norm in relation to commercial custom. It is contained in the rules of the Civil Code concerning the performance of obligations (Art. 311 and 312) there is an exception to the general rule prioritizing a dispositive norm in relation to commercial custom: commercial custom takes priority in those rules. The Russian contract law rules contain also the exclusion to the general rules on the hierarchy of contract conditions concerning imperative norms. In accordance with the Article 422.2 of the Civil Code, the terms of contract could take priority over the imperative norms, if these are enacted after the conclusion of the contract. And it is only the law (not any other normative act) which may include a provision which supersedes the term of contract.

organisations or state unions[40]; such rules are applicable only in case of explicit agreement of the parties.[41] Thus, the principle of the free will or *lex voluntatis* is enforced in the Russian international private law.[42]

The corporate law regulation is usually related to the civil law regulation, characteristic for which is the presence of the dispositive law element that is essentially important for securing adequate base for business activities in corporate form. Corporate law regulation is also based on the application of imperative norms, many of which are necessary for securing the public interests, as well as the rights of the participants and creditors of the corporation.

The dispositive basis of the corporate law stands for initiative dispositivity that is characteristic of it. The foundation of a corporation requires the initiatives or the expressions of will of its founders or founding documents ought to be executed properly in the form of registered documents that determine the legal relationship. In the absence of the expression(s) of will the legal relation is not to be emerged; the will expression(s) or initiated acts are also necessary for changing or terminating the legal relation, and they are to be registered. The rules of Russian international private law contained in the Civil Code that regulate incorporation and membership agreements allow the choice of law by the parties. They may not, however, exclude the application of the imperative norms of the country in which the juristic person has been founded.

Traditional dogmatically conceptualised civil law regulation of business activities deserves critique, since it does not adequately correspond to the modern business realities, though it pretends to be scientific. Particularly the *claims of the scientificity* of law in Russia, where the social reality is regarded as causally determined[43], truly existing world, are inconsistent with modern understanding of law, since for instance, it is ignored that social scientific world does not operate by following causal determination patterns, wherefore attempts of the scientific handling of legal phenomena are usually meaningless. Axiomatic (true) propositions are not to be regarded as scientifically valid even related to exact sciences, not to mention behavioural sciences that represent, if not explanatory interpretations of behavioural acts, then speculative notions about them, due to the absence of

[40]For instance, UNIDROIT Principles of International Commercial Contracts, Principles of European Contract Law, Model Rules of European Private Law.

[41]Issues that are not to be resolved in accordance with such documents, as well as with the universal principles on which they are based, ought to be resolved in accordance with the national law determined in accordance with the agreement of the parties or by conflict of laws rules. *See* para 31 of the ruling of the plenum of the Russian Supreme court no 24 of 9 July 2019 on application of the international private law norms by the Russian courts (Ruling 24).

[42]It comprehends, firstly, that the contracting parties may define the content of their contract at their discretion and determine the law applicable to it by the choice of law clause. *See* Russian Civil Code, art. 1210.1.

[43]In the raw reality (left scientifically unconquered), any explanatory proposition of a causal nature implies infinite references back in innumerable different directions, and every effect it preceded by an infinite number of causes, as every cause is followed by infinite number of effects. Furthermore, any claim to explain a social phenomenon causally on the basis of its effects implies belief in a deterministic ontological-metaphysical conception of the social order. Such an order is hardly to be found from the Kantian metaphysical speculations. For more on the subject *see* Luhmann (1991) at 9-30 and Zolo (1986) at 116-117.

adequate measure instruments for social phenomena for establishing and verifying social phenomena.[44]

Thus, the present (secular) law may not exist as providing the only one (scientifically) proper or true legal solution. In general, the law is a rule prescribed in the established procedure[45] to be realised through the established procedure[46] in the concrete legal decision[47]. The regulation mechanisms related to these procedures have however become so sophistically differentiated, and in the absence of the exclusive authority that divines a solution or determines what is true[48], it seems obvious that there are no means to secure any predictable legal solution, particularly, if the law application stage as a process may not be exactly defined.

Towards Positivisation

Traditional dogmatic use of the concepts of civil law, including dispositivity, has been otherwise problematic in Russia due to the ignorance of the practical reality. It seems important to understand that the business law regulation, although this mainly consists of simple easily applicable norms, is not a static collection of separate abstract constructs. It is obvious that the applicable norms are, though unavoidably necessary in the legal decision-making, are not necessarily to be handled linearly, for instance, following causal determination patterns. It means directly understanding law as a living phenomenon, as well as, that the judiciary application of law or its positivisation—its actualisation by the legally proper decision aimed at concretisation of the legislated norm, when it became the real legal norm—is to be considered as a part of the process aimed at legal solution of a concrete problem. Moreover, it is, for instance, characteristic for civil law regulation that a concrete case requires the clarification and consideration of the applicability of more than one rule to it, and, also, it is often necessary to consider that the result of the decision of the case ought also to correspond to legal principles. This also makes the use of traditional dogmatics in business law difficult.

[44]In a concrete comparative study of the different legal systems, it is obviously hard to quickly find cognition that national legal systems are principally different, which is hardly to be explained through classical, rationalist and empiricist conceptions of cognition and scientific knowledge oriented towards searching for truth and objective laws and representing linear thinking. As embodied in meaningless metaphors like truth (verity) and objective laws of nature and development, such conceptions are inadequate to modern knowledge on cognitive processes and science. Universal criterion of truth (verity) is impossible, and, consequently, the idea of scientific (objective) laws is unproductive, particularly in relation to artefactual phenomena. This concerns especially the domains where concrete and personal realization of knowledge is essential, which is characteristic for law.

[45]meaning a legislative act,

[46]legal dogmatics,

[47]a jurisprudential act.

[48]Historically, scientific knowledge has religious roots, and the religious ground has been reflected in the legal science in the form of its absolutisation through the absolute authorities and dogmas, usually presented as being true (*veritas*); they are still used often as unavoidable metaphors of perfectness and eternity. For more on this subject *see*, for instance, Sigalov (2008).

The necessity of the legal (more exactly, judiciary) positivisation is particularly obvious in the event of the application of dispositivity rules to a contract and a corporate law relation. Such a relation is directly dependent on the parties' will that additionally is subject to changes, and it, consequently, means that there is the absence of the possibility and even necessity to predetermine legislatively or doctrinally the concrete content of the final judicial decision. Moreover, the unpredictability of a law application act may be directly related to the application of the civil law provisions restricting the use of dispositive power and its negative consequences (*ordre public*, directly applicable norms, the limits of exercising the civil rights)[49]. There are also difficulties to predetermine the concrete content of the final judicial decision that related to the subject of business law regulation, meaning its unpredictability because of dynamic and risky character of business activities.

Related particularly to the contract and corporate law regulation in Russia, the traditional totality of the legislative law has been challenged in the pragmatic approach supported by the Russian highest judicial body that is to be regarded as a remarkable step in the positivisation of the Russian business law regulation. According to the Ruling of the Plenum of the Supreme *Arbitrazh* Court[50] no 16 of 14. March 2014 on freedom of contract (Ruling 16), the norm that determines the rights and obligations of contractual parties but does not include the expressed provision of its dispositivity or imperativity, ought to be recognised as dispositive or imperative in accordance with the interpretation of its aims[51], and this indicates of favourable attitude towards business activities as well as of reasonable implementation of the pragmatic attitude, characteristic to common law, to Russian law. In particular, the favouring of the principle of dispositivity in respect to business law regulation, by the concentration of the valuation of the dispositivity of a legal norm in the sphere of successive control, instead of previous control, actually promotes the real freedom of business activities, and makes the regulation flexible. This is particularly important for small and family enterprises that are very common in Russia.

Equally important for the development of adequate system of regulation for business activities as the Ruling 16 of 2014 are the interpretive instructions of the Russian Supreme court that are contained to the ruling of its plenum no 24 of 9. July 2019 on application of the international private law norms by the Russian courts (Ruling 24). The instructive interpretations of the Supreme Court confirmed the answers to important questions raised in Russian judicial practice and considered

[49]For instance, according to the position of the Supreme Court, If the party has abused his right that follows from the contract conditions being different to the applicable dispositive norm or excluding the application of this, the court may evade the protection of his rights. *See* https://www.consultant.ru/law/podborki/imperativnye i_dispozitivnye_normy/

[50]The Supreme Court of the Russian Federation is the highest judicial body in the resolution of economic disputes and in civil, criminal, administrative and other matters that are within the jurisdiction of lower courts established in accordance with federal constitutional law. It exercises judicial review of the activities of the courts and provides explanations on matters of judicial practice. The plenums of the Supreme Court in Russia are competent to give not only decisions in concrete appeal cases, but also generalise the judicial practice and pass interpretative rules or guiding explanations on the applicable legal norms obligatory for the lower general courts.

[51]as an exception to the objective interpretation that is the main rule in Russian law.

in doctrine[52]. They are obviously to serve the jurisprudential needs aimed mainly at solution of social collisions. Practically they are definite and final positions of the highest judicial authority and as being even above the legislative text could not be legally overruled.

Both Rulings (16 and 24) indicate the shift of the Russian legal system towards practical solutions of actual legal problems through the adequate interpretations of legislative norms—positivising or transforming them into real legal (law-in-action) norms. Moreover, the Rulings obviously shows the aims of the Supreme Court to promote the further positivisation of the Russian civil law regulating business relations by enlarging the judicial discretion at the cost of favouring the litigation culture.

The present renovation of the Russian legal system obviously means shaping of the sophisticated legal system, where (jurisprudent) advocates and (jurisprudent) judges supported by the (jurisprudent) scholars, representing the emerging Russian legal society, are capable to secure functioning of the effective jurisprudential system that *provides justice* for society, including, more than simply mechanistically applying laws, assistance in favouring societally healthy business activities.

Conclusion

As concluded in this paper, and following the Ruling of 2014, it is important to mention that the legislator is not obliged or even competent to predetermine if the norm in question is imperative or dispositive, and if the parties have not determined the character of the norm, then the court is to decide if the norm in question is imperative or dispositive.

In the case the court is obliged to decide if the applicable norm is imperative or dispositive, then

1. in the event the norm does not contain the direct prescription on its obligatory application, there are no other prescription or ground for the public intervention *ex officio*, and none of the parties has applied for the application of the norm (in his claim or objections), there is no need to clarify the character of the norm in question; then
2. if there are the requirements for direct application of the norm in accordance with the prescription of the law, the demand of the party, or some other ground, the positivist (direct application) decision is to be taken;
3. the final (positivist) decision ought to be evaluated against the aims of the law (teleological aspect) as well as the acceptability of its application results (consequential aspect).

References

Demieva, A.G. (2016). ‘Соотношение императивного и диспозитивного начал в правовом регулировании отношений с участием предпринимателей’

[52]See Kolobov (2019).

[*Correlation between the Mandatory and Non-Mandatory Principles in the Legal Regulation of the Relations with Participation of Entrepreneurs*] in *Ученые записки Казанского Университета. Серия гуманитарные наук* [Proceedings of Kazan University: Humanities Series] 58(2):391–398.

Demin, A.W. (2016). 'Диспозитивность как общеправовой концепт' [*Dispositivity as a general legal concept*] in *Право и государство* [*Law and State*] 3(72):94–100.

Giaro, T. (2021). 'Medieval Canon Lawyers and European Legal Tradition' in *Review of European and Comparative Law* 47(4):157–187.

Haferkamp, H.-P. (2011). 'Begriffsjurisprudenz' (Jurisprudence of Concepts) in *Enzyklopädie zur Rechtsphilosophie.* https://enzyklopaedie-rechtsphilosophie.net/inhaltsverzeichnis/19-beitraege/105-)

Kolobov, R.Y. (2019) 'Новейшие тенденции развития международного частного права России (к принятию Постановления Пленума Верховного суда РФ от 9 июля 2019 г. № 24) [*Recent trends in the development of Russian private international law (to the adoption of the Supreme Court`s plenary decision of 9 July 2019 no 24*)] in *Сибирский юридический вестник* [Siberian Juridical Journal] 4(87):104–113.

Kozhevnikov, V.V. (2017). 'К проблеме диспозитивных норм частного и публичного права современной России' [*On Problem of Discretionary Rules of Private and Public Law of Modern Russia*] in *Журнал российского права* [Journal of Russian Law] 8:16–28.

Luhmann, N. (1991). Soziologische Aufklärung [Sociological Enlightenment] 1. Westdeutscher Verl.

Mihailov, A.M. (2018). 'Юридическая догма и формально-юридический (догматический) метод в постсоветском правоведении' [*Legal dogma and formal–legal (dogmatic) method in post-Soviet jurisprudence*] in *Проблемы постсоветской теории и философии права* [Problems of the post-Soviet theory and philosophy of law]:149–199.

Mihailov, A.M. (2023). *Сравнительное правоведение: догма романо-германского права*. [Comparative law study. Dogma of Romano-Germanic law]. Moscow.

Nechaev, V. (1895) 'Конструкция юридическая. Наука гражданского и римского права в России [Juridical Construction. Civil law and Roman law science in Russia]' in *Энциклопедический словарь Брокгауза и Ефрона* [*Brockhaus and Efron Encyclopedic Dictionary*]. XVI: 88–89.

Orlov, V. (1999). *Entrepreneurship in Russia*. Helsinki: Finnish Lawyers' Publishing.

Orlov, V. (2016). 'Особенности общественно-научного и юридического познания [Peculiarities of societal scientific and legal cognition]' in *Российский юридический журнал* [*Russian Juridical Journal*] 3:9–23 and 231.

Orlov, V. (2019). 'Legal Sources and Interpretation in Russian Civil Law' in *Athens Journal of Law* 5(2):117–135.

Orlov, V. (2021). 'Russian Legal Discourse' in *Athens Journal of Law* 7(4):463–484.

Poldnikov, D. (2017). 'Why Generalize Contract Law? The Russian Perspective on the Benefits of the Western European Legal Style during the Long 19th Century' in *European Journal of Legal History* 14:695–710.

Razuvaev, N.V. (2019). 'Юридическая доктрина как средство конструирования правовой реальности' [Legal Doctrine as a Means of Constructing Legal Reality] in *Теоретическая и прикладная юриспруденция* [*Theoretical and Practical Jurisprudence*]1:5–32.

Reimann, M. (1990). 'Nineteenth Century German Legal Science' in *Boston College Law Review* 31(4):842–895.

Seong-Hak Kim, M. (2019). 'Custom as a Source of Law in European and East Asian History' in Modeer, K.A., Masferrer, A. & O. Moreteau (Eds.). *Comparative Legal History Handbook*, pp. 186-211, Cheltenham: Edward Elgar Publishing.

Sigalov, K.E. (2008). 'Религиозное бытие права' [*Religious* existence of law] in *Juridical World* 7 (139):71–74.

Strogov, N.D. (2022). 'Природа ius resistendi в свете правовых школ и теорий' [Nature of *Ius Resistendi* in the Context of Legal Schools and Theories] in *Право* [Law] 22(3):339–345.

Sulikowski, A. (2019) '*Law After the Death of God. Jurisprudence and Some Assertions of the Contemporary Philosophy'* in Bator A., Pulka Z. (Eds.) *A post-analytical approach to philosophy and theory of law*, pp. 181-194. Peter Lang.

Tumeneva, N.V. (2019). 'Jus naturale и римское право: вопросы соотношения' [Jus Naturale and Roman Law: Issues of Correlation] in *Право* [*Law*] 19(3): 316–323.

Tyler, Jr. J.O. (2014). 'Justinian's *Corpus Juris Civilis*. Legal Validity' in *The Internet Encyclopedia of Philosophy*, ISSN 2161-0002. https://iep.utm.edu/legal-va

Varga, Cs. (2008). 'Law and its Doctrinal Study *(On Legal Dogmatics)'* in *Acta Juridica Hungarica* 49(3):253–274.

Wróblewski, H.B. (1948). *Jezyk prawny i prawniczy*. [Legal and Legal language]. Kraków, 1948.

Zimmerman, R. (1996). *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Oxford University Press.

Zolo, D. (1986). 'Function, Meaning, Complexity: The Epistemological Premisses of Niklas Luhmann's 'Sociological Enlightenment' in *Philosophy of the Social Sciences* 16:115–117.

Courts' Rulings

Ruling of the Plenum of the Supreme Court of the Russian Federation no. 24 of 9 July 2019 on Application of Private International Law Norms by Courts of the Russian Federation [Постановление Пленума Верховного Суда РФ от 09.07.2019 № 24 «О применении норм международного частного права судами Российской Федерации»] in *Российская газета* [*Russian Gazette*] 2019.154. (Ruling 24).

Ruling of the Plenum of the Supreme *Arbitrazh* Court of the Russian Federation no 16 of 14 March 2014 on Freedom of the Contract and its Limits [Постановление Пленума Высшего Арбитражного Суда Российской Федерации от 14.03.2014 *№* 16 «О свободе договора и ее пределах»] in *Вестник Высшего Арбитражного Суда Российской Федерации* [*Herald of the Supreme Arbitrazh Court of the Russian Federation*] 2014, 5. www.arbitr.ru 03.04.2014. (Ruling 16).

Athens Journal of Law - Volume 10, Issue 1, January 2024 – Pages 47-62

Data Act:
New Rules about Fair Access to and use of Data

By Maria Luisa Chiarella[*] and Manuela Borgese[±]

Data-driven technologies are becoming more and more relevant every day. The constant increase in products connected to the Internet corresponds to an increase in the volume of data generated, the content of which represents a fundamental resource both for technological and economic evolution and with a high impact for businesses, citizens, and the public sector on the whole. This is the underlying motivation behind the approval of the Data Act, the new EU Regulation adopted on 27 November 2023 which aims to create a European regulatory framework based on clear rules on data sharing, a fair and guided data economy in the European Union.

Keywords: *Data economy; Market regulation; EU policies; Data Protection; Data Circulation; Access; Sharing; Interoperability.*

Introduction

This paper deals with the concept of data as a legal asset within the recent European legislation. Since the last century, Information and Communication Technologies (ICTs) have taken on a fundamental role in the lives of individuals and organisations. Contemporary society is generally now defined as an information society, since data is a central element and a precious resource both for technological and economic evolution with a high impact on businesses, citizens, and the public sector on the whole.[1] Further explained below in the investigation, data-based technologies and data access take on a more concrete relevance every day. The constant increase in Internet products corresponds to an increase in the volume of data generated, the content of which represents a fundamental development factor for technological evolution and with a high potential for businesses, citizens and for sustainable economic growth and recovery[2]. In general, it is related to the benefit of digitalisation in terms of security, geopolitical

[*]Ph.D., Associate Professor of Private Law, Magna Græcia University of Catanzaro, Catanzaro, Italy; authoress of paragraphs 1, 2 and 5.
Email: mlchiarella@unicz.it
[±]Ph.D., Professor by contract at postgraduate courses, Magna Græcia University of Catanzaro, Catanzaro, Italy; authoress of paragraphs 3 and 4.
Email: manuela.borgese@unicz.it

[1]See, among others, Stanzione (2022) at 1 et seq.; Ricciuto (2022) at 105 et seq.; Zeno Zencovich (2023) at 415 et seq.; Versaci (2020) at 27 et seq.; De Franceschi (2017) at 9 et seq.; Quarta & Smorto (2020) at XI et seq.; Dąbrowski & Suska (2022) at 1 et seq.

[2]See the European Parliament Resolution *European strategy for data* of 31.03.2021, in https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021IP0098&from=EN.

resilience, and strategic autonomy of the Union[3]. At present, the advantages offered by the digital age are also balanced by the risks of the invasiveness of new technologies. In particular, those based on artificial intelligence have automated decisions with the added risk of significantly impacting the rights and freedoms of individuals.

The topic under investigation ranks highly among European policies in the digital world. In this field, Art. 8 of the European Charter of fundamental rights states that every individual is entitled to have their personal information protected (par. 1); this personal data must be treated in a fair and legal way for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law; these data are made available to individuals requesting copies, to be rectified if erroneous (par. 2); an independent authority is responsible for monitoring compliance with data protection rules (par. 3).

The protection of natural persons in relation to the processing of personal data concerning them is also protected in Article 16 of the Treaty on the Functioning of the European Union, which constitutes a specific legal basis for the adoption of legislative acts relating to data protection. Before the introduction of the European Charter, Art. 8 of ECHR protected the right to respect for family and private life. This right was further protected by the Council of Europe Strasbourg *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* of 1981 which was the first binding international document protecting the individual against possible abuses of collecting and processing personal data, processing of individuals' "sensitive" data in absence of proper legal safeguards. The Preamble of this Convention recalls "the right to the respect for privacy, taking account of the increasing flow across frontiers of personal data undergoing automatic processing." Art. 2 defines "personal data" as any information relating to "an identified or identifiable individual (data subject)." The Convention also preserved the individual's right to know that information on him or her is stored and, if necessary, to have it corrected. The Convention also admitted restriction on the rights in presence of overriding interests (e.g., State security, defence, etc.) and it imposed some restrictions on transborder flows of personal data to States in case of no equivalent protection. The European Court of Human Rights has brought the protection of personal data back to the protection of confidentiality by leveraging the Strasbourg Convention n. 108 of 1981[4].

In principle, the collection, storage, and any processing of "personal data" is an interference with "privacy" and the right to protection of "personal data" under both ECHR and EU law.

Nowadays, among European documents, there is another steppingstone to bear in mind: the *Declaration on European digital rights and principles*, approved in January 2023, which lays down a set of principles for the digital transition according to European values. The Declaration illustrates the EU's commitment to

[3]*Ibid.*.

[4]See ***Copland v United Kingdom*** [2007] ECHR *62617/00* (*3 April 2007*): "[…] the Court considers that the collection and storage of personal information relating to the applicant's telephone, as well as to her e-mail and internet usage, without her knowledge, amounted to an interference with her right to respect for her private life and correspondence within the meaning of Article 8" (par. 44).

a safe, secure, and sustainable digital transformation that puts people and human rights at the centre, in line with EU values and fundamental rights. The approval of this Declaration reflects the political commitment of the EU and its Member States to promote and implement these fundamental principles in all areas of digital environment and to achieve the objectives of the Digital Compass 2030. This Declaration aims to be a guide for the Digital Decade 2030 Strategic Agenda. Its political program establishes an annual cooperation cycle to achieve common objectives and targets, based on an annual cooperation mechanism involving the Commission and the Member States.

Returning to secondary European law, in the context of this research, it is useful to retrace the main stages in terms of data protection.

In the context of protecting individual rights, during the last decade of the 20th century the "Mother Directive" in data protection (n. 95/46/EC) had the merit of breaking down borders to guarantee a free flow of data for the first time in history, granting protection to natural persons in the balance between personal protection and free movement of data within the EU, in view of protecting innovation and the fundamental right of the individual to control information concerning him[5].

In 2002, we had the E-privacy Directive which pointed out more specific privacy rights in the field of electronic communications[6], including rules of any personal and non-personal data storing and access from terminal equipment. But it was not until 2018 that this made a determining turning point when, in fact, the GDPR (*General Data Protection Regulation* – Reg. UE 679/2016) came into effect: a strategic tool for the digital single market in Europe with the aim of regulating the right to protection of personal data considering its social function. The regulation entered into force on 24 May 2016 and has been applied since 25 May 2018. It repealed the "Mother Directive," deemed appropriate to better harmonise the regulation of personal data protection in the EU through a regulation (characterised by direct applicability throughout the EU territory without the need for transposition acts) rather than through a directive.

These EU acts provide the basis for sustainable and responsible data processing, combining in some cases personal and non-personal data.

In Italy, the adaptation of internal legislation to the GDPR took place with the Legislative Decree n. 101/2018 which modified the Privacy Code (Legislative Decree n. 196/2003) conforming it to the principles of the GDPR.

Directive (EU) 2016/680 on the protection of natural persons regarding processing of personal data connected with criminal offences or the execution of criminal penalties, and on the free movement of such data is another important text in this field[7]. Furthermore, the EUDPR (*Data Protection Regulation for the European Union institutions, bodies, offices and agencies* - Reg. UE 1725/2018) provided the rules applicable to the processing of personal data by EU institutions,

[5]Rodotà (1995) at 19 et seq.

[6]Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

[7]The directive entered into force on 5 May 2016 and EU countries had to transpose it into their national law by 6 May 2018.

bodies, offices and agencies in line with the high standards of data protection prescribed by the GDPR. It has been applied since 11 December 2018, when it repealed and replaced its predecessor, Reg. (EC) 45/2001[8]. Moreover, in 2018 the Regulation on free flow of data aims to ensure that electronic data, apart from personal data, can be processed freely throughout the EU[9].

Thanks to all these instruments, we have a European legislation and public enforcement for the protection of personal data and a European Data Protection Board (EDPB) responsible for ensuring the application of European rules (Artt. 63 to 76 and Recitals 135 to 140 of GDPR). The EDPB ensures that data protection law is applied consistently across the EU and it works to ensure effective cooperation amongst Data Protection Authorities. The Board adopts guidelines on the application of the GDPR and it also issues binding decisions on disputes regarding cross-border processing, thereby ensuring a uniform application of EU rules.

All this considered, we must bear in mind that, in the contemporary data driven economy, EU policies place their emphasis on data circulation, rather than focusing attention exclusively on data protection and data subjects' fundamental right to control. Precisely by virtue of recent political trends, in the European Union the attention to data regulation in the digital economy has undergone a decisive change. Recent regulatory interventions, fundamental pieces of the European data strategy[10], introduced by the Open Data Directive[11], aim to increase trust in data sharing, strengthen mechanisms to increase data availability and overcome technical obstacles to data reuse, with the aim of creating a single market for the exchange and reuse of data both in public and private areas[12]. Emphasis is placed on the circulation, sharing, interoperability (and not only portability) of data as the new challenges and pillars of the European data strategy. Once considered that the goal is "A Europe fit for the digital age"[13], new rules are always required for the benefit of the EU digital environment[14]. Thus, the focus is changed: the emphasis becomes more marked on data circulation and above all the model of reuse and sharing is defined, both in a public and private perspective.

[8]Regulation (EC) n. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

[9]Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union.

[10]In argument, see Cerrina Feroni (2022).

[11]Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast).

[12]Irti (2021) at 39; Poletti (2023) at 367 et seq.

[13]In argument, see https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en.

[14]We must remember also, in a different perspective, the important role played by the Digital Market Act, the Digital Service Act and the Data Governance Act. The Proposal for a Regulation on artificial intelligence is also headed to integrate with this legal framework. In argument, among the others, see Resta (2023) at 605 et seq. and, if you wish, Chiarella (2023), at 33 et seq.

European Data Strategy

Keeping this in mind, it is useful to point out that personal and non-personal (such as industrial or commercial) data represents a key element for the digital economy; it is an increasingly valued resource for the market and a tool to ensure green and digital transition, although most remain unused or accessible only to a small number of large companies. Economic growth and a competitive, multi-player and fair market economy need rules of interoperability and access to data for actors of all sizes, to contrast the market imbalances.

Accordingly, the European Commission Communication "*A European strategy for data*" (February 2020)[15] aims to establish the EU as a leader in the data-driven society. The Commission Work Programme 2020 sets out several strategic objectives, including the European strategy for data, adopted in February 2020. That strategy aims at building a genuine single market for data promoting transparency, security, non-discrimination, accountability, interoperability, sharing, access, and portability of data[16].

The protection of internal market, free competition and circulation are clearly the main goals of the Commission's action which works in different aspects: networks and services (with the Digital Services Act); platforms and competition (with the Digital Market Act); the sharing of personal and non-personal data between the public and private sectors (with the Digital Governance Act); and accessibility to the value represented by that data (finally, with the Data Act)[17].

In the Resolution of 31 March 2021 *European strategy for data*[18] the European Parliament welcomes the Commission strategy for data while believing "that the strategy will be a prerequisite for the viability of European businesses and their global competitiveness and for the progress of universities, research centres and nascent AI, and marks a crucial step towards building a data society rooted in rights and EU values, defining the conditions for and establishing of the Union's leading role in the data economy. This leads to better services, sustainable growth and quality jobs; considers that ensuring trust in digital services and in safe smart products is fundamental for the digital single market to grow and thrive, and should be at the core of both public policy and business models." The Resolution also notes that "the Commission should ensure competitive markets through

[15]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A European strategy for data* (Bruxelles, 19.2.2020): "The aim is to create a single European data space – a genuine single market for data, open to data from across the world – where personal as well as non-personal data, including sensitive business data, are secure and businesses also have easy access to an almost infinite amount of high-quality industrial data, boosting growth and creating value, while minimising the human carbon and environmental footprint. It should be a space where EU law can be enforced effectively, and where all data-driven products and services comply with the relevant norms of the EU's single market. To this end, the EU should combine fit-for-purpose legislation and governance to ensure availability of data, with investments in standards, tools and infrastructures as well as competences for handling data. This favourable context, promoting incentives and choice, will lead to more data being stored and processed in the EU".

[16]Cerrina Feroni (2022).

[17]*Ibid.*

[18]https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021IP0098&from=EN.

interoperability, portability and open infrastructures, and remain vigilant about any potential abuses of market power by dominant actors." Digital markets are in fact characterised by high entry barriers relating to access to and ownership of data. Regulating the sharing of data and unlocking data markets may represent one possible way to correct these shortcomings[19].

All this is considered in the European data strategy. A single market where data flows freely within the EU and across all sectors is seen as a benefit for businesses, researchers, and public administrations and this is the final goal of the model proposed by the EU. Data is assumed as a key building block of the digital economy and an essential tool to ensure green and digital transitions. Our society is more interconnected every day, with an incremental increase in devices and data produced by citizens and businesses. However, most of this data remains largely unused or accessible only to a small number of large companies, with a significant detriment to the potential value that would be derives from full use.

For these reasons, data is considered "the new oil" - as we also read in a widely referenced article by *The Economist*[20]. While the volume of data continues to rise and it is owned only by the large digital firms, the issue is how to manage data in a way that ensures adequate competition.

Bearing this in mind, the European strategy is aimed at creating a single market for data, to create a space where data is available for use in the economy and society, while maintaining the control of businesses and individuals generating the data and contributing to social improvement in important fields such as health care, sustainability, and energy efficiency.

Regulating data access and use is considered a fundamental step toward seizing the opportunities of the data driven society. In this context, the Data Act, the new EU Regulation adopted November 27, 2023 is a key pillar and the second major initiative in the data strategy (after the Data Governance Act). It contributes to the creation of a cross-sectoral governance framework for data access and use, by legislating on matters that affect relations between data economy actors, to build a horizontal data sharing system. The new regulation aims to create a European regulatory framework based on clear rules aimed at allowing the conditions for a fair and guided economy from data in the European Union.

Data Act: Premises and Objectives

Over the last decade, there has been a significant increase in connected devices and greater human-machine interaction, which has corresponded to a proportional increase in data generated. This is a trend destined to grow. In fact, according to forecast estimates from the European Commission, by 2025 the global volume of data will increase by 530%, with an economic value of 829 million euros.

Beyond strictly numerical indices, there is no doubt that data represents an element of essential strategic value in the digital economy, by virtue of its high

[19]Szczepański (2020).
[20]Humby (2017). In a critical perspective, see Martinez (2019).

potential in the context of the digital and ecological transition. For example, it has been observed that companies that base their innovation plans on data record a 5% - 10% faster growth in productivity than others.

In a context of undoubted opportunities, however, we observe that this potential is not fully exploited, due to various reasons.

First, the management of large data sources requires substantial investments for the maintenance of technological infrastructures for which proportional economic investments are also necessary. This limit is further hindered by the lack of specific incentives and ease of access to them, which represents a structural block for the acquisition of concrete tools.

Secondly, to take full advantage of data analysis, it is essential to have adequate skills, especially digital ones.

Further categories of causes are also of a regulatory nature, due to the lack of specific provisions regulating the standards and fundamental aspects underlying the interoperability of data and between data and services, as well as the concentrations of the same within the circle of large companies, even when due to contractual abuse. This last circumstance is partly due to the abuse of dominant positions or contractual positions unbalanced in the use and sharing of the data produced.

Despite the copious regulatory production, which will also be partially examined, the reviewed framework highlights the persistence of strong needs for intervention to implement the European strategies already examined. This need is therefore the basis of the new Data Act, as a key pillar of the European data strategy.

The distinctive element of the Data Act is to make available a greater quantity of data, personal and non-personal, relating to connected products or related services, making them accessible to users and usable through a clear system of rules, in all sectors/economies of the Union. The desired effect is therefore to expand the data market, including manufacturers of connected products and providers of related services. In addition to this commercial line, this legislation aims to promote a greater balance in the use of data, regulating a uniform distribution free of barriers or anomalous concentrations, respecting the rights of the parties involved, mainly data subjects and small and medium- sized enterprises[21].

These assumptions are the basis of the creation of a circular context, in which data are freer to circulate in interconnected and interoperable environments, according to certain, effective rules, all to create a reliable system that can generate confidence in the use of such systems.

This is a regulation developed following a complex process, starting with a legislative proposal formally presented by the Commission in 2022[22], following a specific public consultation phase[23], which has now finally been approved by

[21]Poletti (2023).

[22]https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2022/0068/COM_COM(2022)0068_EN.pdf.

[23]https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13045-Data-Act-amended-rules-on-the-legal-protection-of-databases /F_en.

Council of European Union and has reached the final approval phase[24]. After publication in the EU's official journal, it shall apply from 20 months from the date of its entry into force. However, the requirements for simplified access to data for new products (article 3, paragraph 1), shall apply to connected products and the services related to them placed on the market after 32 months from the date of entry into force of the regulation.

Access and Transparency at the Crossroads between user and Company Protections

Among the main objectives pursued is that of facilitating, for businesses and consumers, access to data obtained or generated by the use of a connected product or related service[25], with the possibility to use or transfer them to third parties indicated by the user.

For this purpose, the legislation sets up a system based on transparency and accessibility to information, dictating specific requirements starting from the design of the same, up to the transfer, in the cases provided for by the legislation.

In particular, it is established[26], by default, that connected product and related services are designed, manufactured and delivered in such a way that the product data and related service data, including relevant metadata necessary to interpret and use such data, are easily accessible in a secure, free manner, in a complete, structured, commonly used and machine-readable format and directly accessible to users.

However, the legislation intervenes in a very incisive manner in the information, pre-contractual and contractual context, in the cases of sale, rental or leasing of a connected product and with respect to the supply of connected services.

The emerging framework presents a strengthening of transparency requirements, not only with respect to the form but also with regard to the list of specific technical and informational details.

With regard to pre-contractual obligations in relation to the purchase, rent or sale of a connected product, information relating to the characteristics, volume and methods of creation, saving, access and management of the data produced must be indicated. In this category, the fundamental request to make

[24]https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-data-act https://www.consilium.europa.eu/en/press/press-releases/2023/11/27/data-act-council-adopts-new-law-on-fair-access-to-and-use-of-data/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Data+Act%3a+Council+adopts+new+law+on+fair+access+to+and+use+of+data.

[25]On regulatory definitions, see the provisions of the Data Act (Art. 2): "product data" refers to data generated by the use of a connected product that the manufacturer has designed to be recoverable from the connected product by a user, a data owner or a third party, including, if relevant, the manufacturer; "related service data" refers to data that also represents the digitisation of user actions or events related to the connected product generated during the provision of a related service by the provider. Data generated by the use of a connected product or related service should be understood as intentionally recorded data or data that results indirectly from user action, such as data about the environment or interactions of the connected product.

[26]Art. 3, par. 1 Data Act.

known to the user the forms of access, the conditions of use and the quality of the service is highlighted[27].

The same provisions are envisaged for related services, in relation to which all data produced by the digitalisation of user actions or events relating to the connected product, generated during the supply of the same, are placed. In addition to what has already been examined with regard to the nature and volume of the data, specific indications are imposed regarding the identity of the prospective data holder and the means of communications with which it is possible and easy to contact him, the methods with which the user can request that the data are shared with a third party and where applicable, end the data sharing.

With respect to this last aspect, also following the strong debates that took place during the negotiations, it was specified that it must be made known whether the prospective data holder is also the holder of the trade secret contained in the data that is accessible from the connected product or generated during the provision of a related service or otherwise the actual trade secret holder[28].

The legislation then provides a clear system of rules regarding the sharing of data obtained or generated by the use of related products or services, especially with regard to access and usage rights, providing for a mandatory obligation to make such data available. This access must take place in a simple manner, complete with all the elements necessary to interpret the data, to the same extent as those held by the data holder, without unjustified delay and upon simple request[29]. Any limitations must be contractually foreseen between the parties, except in cases specifically provided for by the law such as compromising the safety of the device or service itself[30].

Due to the strong margin of access rights, the need to protect trade secrets emerged already during the negotiations. The problem that emerged during the discussion was linked to the fact that blocking access on this point could have resulted in defeating the purpose underlying the entire legislation. On the other hand, allowing unconditional access would have compromised the business integrity of the companies involved. Therefore, the solution adopted is placed on a median level, generally providing that commercial secrets must be preserved and disclosed only if data holders and users adopt all necessary measures to preserve its confidentiality, especially with respect to third parties[31].

In the absence of such guarantees or if the user does not take the agreed measures, the law authorises the data holder not to communicate the requested information. However, given the extremely delicate nature of the matter in question, the legislator has admitted that the data holders can refuse the access request if they can demonstrate that it is highly probable that serious economic damage could result from the disclosure, despite the measures adopted.

[27]Art. 3, par. 2 Data Act.
[28]Art. 3, par. 3, lett. h. Data Act.
[29]Articles 4-5. Data Act.
[30]Art. 4, par. 2 Data Act.
[31]Art. 4, par. 6 et seq. Data Act.

This provision acquires an even more interesting connotation when one considers its dynamics in the case of a user's request to share data with third parties. The emerging risk is that of exposing potential trade secrets to other entities in a potential competitive position. In balancing this situation with the right to request transfer by the user, the law recognises a specific provision of protection, especially due to the possible obvious exposure of the contents of the trade secret to potential competitor companies. With respect to this need, a specific protection is in fact specifically provided for[32], where disclosure is limited only to cases in which it is necessary to fulfil the purpose agreed upon between the user and the third party. If so, the data holder or the trade secret holder shall identify the data which are protected as trade secrets and provide appropriate measures for the transfer. Even in these cases the exceptions already observed with regard to the opposition apply, in cases where the disclosure could lead to serious economic damage for the company or suspension, if the third party does not implement the identified measures or undermines the confidentiality of the trade secrets.

The Protection Needs of Smaller Companies in the Context of Access to Data

On the basis of a real and fair sharing context, it is essential that there are no prevarications or imbalances that jeopardise the rights of contractually weaker counterparties. In particular, in order to rebalance the negotiating power in contracts between professionals, especially to protect microenterprises, small and medium-sized enterprises[33], often compromised by contractual imbalances in data sharing contracts, the Data Act imposes a margin of protection against unfair contractual clauses imposed by a stronger contractual counterparty[34].

In relations between companies, the legislation unequivocally clarifies its position as a guarantee towards an exchange of data based on equity and correctness, imposing fair, reasonable, non-discriminatory, and formulated terms and conditions in a transparent manner. Furthermore, to avoid abusive contractual conditions[35] with respect to access or use of data or the limitation of liability and recovery and protection tools, it must be considered non-binding or non-applicable, where contrary to a right of the user.

Especially with regard to the regulation of contractual relationships between companies, the legislation contains a specific provision of those cases in which a contractual clause must be considered, respectively, abusive or presumably abusive[36].

To safeguard this framework of guarantees, the right to reasonable compensation for companies for making data available is also specified, which

[32]Art. 5, par. 9.
[33]The European Commission defines micro, small and medium-sized enterprises (SMEs) in the EU Recommendation 2003/361.
[34]Scientific debate on this issue is very wide; see, among the others, Roppo (2010) at 19 et seq.; Di Raimo (2003) at 159 et seq.; Chiarella (2016) at 45 et seq.
[35]Art. 8 Data Act.
[36]Art. 13 Data Act.

must be fair and non-discriminatory, as well as providing for adequate dispute resolution mechanisms[37].

A further aspect concerns the obligations to share and use the data held by companies, by public bodies and institutions, agencies or bodies of the Union. This provision certainly includes all those in which circumstances arise that justify an exceptional need for data. However, they can also refer to all those hypotheses in which the mandatory sharing of data between companies and public administrations is justified in order to support public policies and services based on concrete, effective, efficient and results-oriented data. This is another area heavily discussed in the dialogue phase, since on the one hand greater openness towards this type of sharing brings undoubted advantages but can, at the same time, be unsustainable for data holders. Therefore, to safeguard these conflicting needs, the most correct choice is to precisely limit the categories[38] of cases of access to such data and impose specific obligations of justification in the request for access by authorised public entities[39].

Interactions with other European vertical regulations

The rich framework of facilitations for access to data provided by the Data Act involves the inevitable interaction with many vertical regulations, including the Data Governance Act[40], the Data Base Directive[41], the Regulation on free flow of data[42] and the GDPR, most of which we already mentioned before, and on which we will focus more carefully.

Before proceeding with this analysis, we can only start from the consideration that the Data Act is part of an enormous European regulatory context, part of the European data strategy[43], within which it must be examined and considered.

First, we can consider the innovative force dictated by the Data Governance Act ("DGA"), which has the merit of creating the processes and structures to facilitate the sharing of data by companies, citizens and public enterprises. Among these, it is interesting to observe, for example, the rules relating to the so-called "data altruism"[44], the reuse of data held by public bodies,

[37]Art. 9 Data Act.
[38]Art. 15 Data Act.
[39]Art. 17 Data Act.
[40]Regulation (EU) 2022/868 of the European Parliament and of the Council of 30 May 2022 on European data governance and amending Regulation (EU) 2018/1724.
[41]Directive 96/ 9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[42]See Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information (recast).
[43]See the European Parliament Resolution *European strategy for data* of 31.03.2021, in https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021IP0098&from=EN.
[44]"Data altruism" is referred to in art. 3 of the DGA. We can also consider the mechanism for voluntary data sharing based on the consent granted by the interested parties to the processing of personal data concerning them, or on the authorisations of other data owners aimed at allowing the use of their non-personal data, without requesting or receiving compensation that goes beyond

intermediation services and one-stop shops for data. The DGA has therefore created the basis on which the collection flow set by the Data Act is based, with its rules aimed at making an even greater number of data available and usable, in particular that generated by the use of connected products and related services, identifying the categories of subjects authorised to access, use and dispose of such information.

With regard, however, to some specific regulations of more immediate convergence, the Data Act directly provides for specific provisions, aimed at identifying the relationships of possible interaction, for a more harmonious regulatory application.

In this sense, we can consider all the cases in which the provisions of the Data Act prevent any prejudice to aspects already regulated by further regulations, including those on the protection of intellectual property rights[45], on the use and access of data for statistical purposes[46].

However, the hypothesis of Directive 96/9/ EC, relating to the legal protection of databases, established the so-called *sui generis right*[47], which protects the contents of databases.. This right in particular has been declared inapplicable in eliminating the risk that owners of data may claim the sui generis right.

Although apparently pervasive, it should be highlighted that the exercise of this right could in fact represent an obstacle to the exercise of the rights recognised by the Data Act, thus nullifying its innovative significance. However, recital 112 specifies that this right continues to operate outside the scope of application of the Data Act, provided however that this does not result in a violation of protection within the scope guaranteed by the law.

Another regulation that deserves a comparative analysis with the Data Act is the regulation on the free circulation of non-personal data[48], a regulatory act of great importance in the European data economy.

Among the most important elements, it is highlighted that this Regulation, through specific provisions aimed at digital service providers, has imposed the commitment to develop and implement self-regulatory codes of conduct to facilitate the change of providers of services and the porting of date.

Despite the excellent premises, the conditions envisaged by this Regulation have not brought the desired results, as there has been neither a high rate of adoption of these self-regulatory tools nor an increase in open standards and interfaces; hence, the central importance of the Data Act in providing for minimum regulatory obligations directed at suppliers of data processing services, aimed at eliminating those barriers, of a technical or contractual

---

compensation for the costs incurred in making their data available, for objectives of general interest, established in national law, where applicable, such as healthcare, the fight against climate change, improving mobility, facilitating the processing, production and dissemination of official statistics, improving the provision of public services, the development of public policies or scientific research in the general interest.

[45]Recital 13 of the Data Act.

[46]Regulation (EC) 23/2009.

[47]Art. 7 Directive 96/9/EC.

[48]The Regulation (EU) 2018/1807.

nature, which limit or hinder the transfer of user data and the switching from one processing service to another. The Data Act, therefore, complements the regulatory approach envisaged by the General Data Protection Regulation[49], adding generally applicable obligations on the transition to the cloud.

The Data Act and Relations with the Regulations on the processing of Personal Data

Due to the common object that unites them, the processing of data for data subjects, the Data Act is intimately linked to the current legislation on the processing of personal data and the protection of privacy in the electronic communications sector, referred to in the Regulation 2016/679 and Directive 2002/58/EC. In fact, the use of a connected product or a related service, in case of personal data referable to a natural identified or identifiable person[50], make the privacy legislation applicable. Already in the first recitals of the Data Act, the relationship with this legislation is examined, addressed as the first methodological premise underlying the entire legislation.

The absolute absence of any prejudice with respect to the regulations on the protection of personal data, privacy and confidentiality of communications and integrity of terminal equipment is therefore preliminarily established[51], especially with regard to the areas of competence of the supervisory authorities and the rights recognised to data subjects.

Since at the basis of the proposed Regulation of the Data Act, the expansion of the data produced is associated with a rigid regulation of access systems, it is precisely on the rights of the interested parties, specifically those of access and portability[52], that these two regulations must intertwine more often.

In fact, given the multiple provisions contained in the Data Act, sometimes even restrictive to protect the interests of the parties involved, as in the case of contexts in which trade secrets are present, the need to frame the interested party's power of control over his/her own personal data emerges[53]. For this reason, the Data Act provides that when users are also data subjects, therefore recipients of the rights provided for by articles 15 and 20, in the event of conflict with the provisions of the Data Act the provisions of the GDPR will instead prevail[54].

A further, very significant clarification, highlighting the supremacy of the current privacy legislation, is the explicit provision that the Data Act cannot be considered a legal basis pursuant to art. 6 of Regulation (EU) 2016/679 for the collection and creation of data by data holders[55]. Therefore, the initial

[49]Art. 1, par. 7 Data Act.
[50]See Art. 4 GDPR and art. 2, lett. a Directive 2002/58/EC.
[51]See the express referring, in Art. 1, par. 5, of Data Act, to regulations (EU) 2016/679 and (EU) 2018/1725 and Directive 2002/58/EC.
[52]Articles 15 and 22 GDPR respectively.
[53]Poletti (2023).
[54]See Recital 7 Data Act.
[55]See rec. 7, 34, 35 and art. 4.12, 5.7.

requirement to be satisfied is always that of compliance with the processing of personal data, precisely the principle of lawfulness of the processing[56] which therefore represents the prerequisite on which the structure envisaged by the Data Act is based. On the basis of this premise, we also understand the reference to the necessary application of minimisation in the context of the application of the principle of *privacy by design and privacy by default*[57], as a tool to safeguard the protection of the data being processed.

The framework reviewed therefore represents the governance context of this new category of data, both with regard to their qualitative and quantitative structure and with regard to the rights recognised to data subjects. The aim is to fill the information gap of the interested party, now faced with a new category of data and to make him/her a conscious and active part of the application of the rights that are recognised by the GDPR and which the Data Act Proposal does not intend in any way to compromise. The circulation of such data, however, in which the personal component is largely combined with a prevalent amount of non-personal data, is also a direct fulfilment of the data holders and data recipients, i.e. those actors in the commercial circulation segment, called to correctly manage the most relevant phase, that of production and use, in the context of their exploitation and valorisation.

Conclusion

The goal of the European Data Strategy is the construction of a Digital Single Market that puts the person at the centre of digital transformation and makes the European digital space safe and competitive. Accordingly, the European Declaration on digital rights and principles for the digital decade is a suitable tool for enhancing and defending democratic and personalistic values online as well as offline (art. 1).

Following the Data Governance Act, Data Act regulation is a tool to consolidate the role of the EU and to compete on a global scale with world economic giants. In particular, the removal of barriers that currently limit the interoperability of data represents a fundamental development factor for the internal digital market, to the advantage of competitiveness, innovation, and sustainable economic growth. To create such a framework, EU politics opts for legal harmonisation – through the introduction of an EU regulation – bypassing the fragmentations of national legislations, with clear rules regarding the identification of who has the right to use the data collected, obtained or otherwise generated by connected products or digital services. The huge scope of this new legislation already highlights the first undisputed advantage in favour of SMEs, today in fact limited by the benefits deriving from access to such data both due to the lack of digital skills to collect, analyse and use them and due to the non-existent information interoperability with the operators who

[56]Art. 5 GDPR.

[57]On the principles of minimisation and privacy by design and by default, compare art. 5 and 25 GDPR.

hold them. The EU recently adopted its position on this issue, providing for more measures to allow users to access the data they generate and increasing the guarantees of data sharing agreements between companies. In conclusion, the EU Data Act appears suitable to rebalance the negotiating power to protect weaker companies, identifying greater protection with respect to possible contractual imbalances with companies in a dominant position. The regulatory process still provides for several steps. However, we can already speak of a framework based on clear rules that lay the foundations for concrete growth with real advantages for citizens, businesses and the public administration[58].

References

Cerrina Feroni, G. (2022), 'Luci e ombre della Data Strategy europea', in *Agendadigitale.eu*, 12 May 2022.

Chiarella, M.L. (2016). *Contrattazione asimmetrica. Segmenti normativi e costruzione unitaria.* Rome: Giuffrè.

Chiarella, M.L. (2023). 'Digital Market Act (DMA) and Digital Service Act (DSA): New Rules for the EU Digital Environment', in *Athens Journal of Law*, 9(1): 33-58, and in Frenkel, D.A. (ed.) (2023), *A Current Anthology of Law*, pp.33-57. Athens, Greece: Atiner.

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

De Franceschi, A. (2017). *La circolazione dei dati personali tra* privacy *e contratto.* Naples: Edizioni Scientifiche Italiane.

Di Raimo, R. (2003). *Autonomia privata e dinamiche del consenso*. Naples: Edizioni Scientifiche Italiane.

Irti, C. (2021). *Consenso negoziato e circolazione dei dati personali*. Turin: Giappichelli.

Humby, C. (2017). 'The world's most valuable resource is no longer oil, but data', in *The Economist*, 6th of May.

Kerber, W. (2023), 'Governance of IoT Data: Why the EU Data Act Will not Fulfill Its Objectives', in *GRUR International* 72(2):120-135.

Martinez, A.G. (2019). *'No, Data Is Not the New Oil',* in *Wired*, February 26th 2019.

Poletti, D. (2023). 'Il controllo dell'interessato e la strategia europea sui dati' in *Osservatorio sulle fonti*, 2:367-378.

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

Resta, G. (2023), 'Pubblico, privato, collettivo nel sistema europeo di governo dei dati' in G. Resta & V. Zeno Zencovich (eds.), *Governance of /trough Big Data*, II, Rome: RomaTre Press.

Ricciuto, V. (2022). *L'equivoco della privacy. Persona* vs *dato personale*. Naples: Edizioni Scientifiche Italiane.

Rodotà, S. (1995). *Tecnologie e diritti*. Bologna: il Mulino.

Roppo, V. (2010). 'Regolazione del mercato e interessi di riferimento: dalla protezione del consumatore alla protezione del cliente' in *Rivista di diritto privato* 1:19-35.

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

[58]In a critical perspective, about a negative assessment of Data Act, see Kerber (2023) at 120 et seq.

Szczepański, M. (2020). ʿIs data the new oil? Competition issues in the digital economyʾ, European Parliament Research Service: January 2020.

Versaci, G. (2020). *La contrattualizzazione dei dati personali dei consumatori.* Naples: Edizioni Scientifiche Italiane.

Zeno Zencovich, V. (2023). *ʿDo "data markets" exist?ʾ*, in G. Resta & V. Zeno Zencovich (eds.), *Governance of /trough Big Data*, I, Rome: RomaTre Press.

Athens Journal of Law - Volume 10, Issue 1, January 2024 – Pages 63-86

An Examination of Proactive Intelligence-Led Policing through the Lens of Covert Surveillance in Serious Crime Investigation in Ireland

By Ger Coffey[*1]

This article examines the powers and functions conferred by the Criminal Justice (Surveillance) 2009 Act to bolster the resources of the Garda Síochána (Ireland's National Police and Security Service) to detect, investigate and apprehend suspects. The analysis will encompass the management and use of covert surveillance operations, procedural requirements for external 'authorisation' to carry out surveillance with judicial oversight, internal 'approval' to carry out surveillance without judicial oversight, and the use of tracking devices as less intrusive measures. The assessment will consider whether there are sufficient procedural safeguards provided in the 2009 Act to protect fundamental rights of suspects, and whether covert surveillance practices as a tool of effecting crime control policies is proportionate and necessary commensurate with fundamental rights of suspects in the criminal justice process. While the focus of analysis is on police covert surveillance operations in Ireland, reference to international best practice and human rights standards emanating from the Irish superior courts and ECtHR jurisprudence will broaden the scope of analysis that is intended to be of interest to a wider readership.

Keywords: *Criminal Justice (Surveillance) Act 2009 (Ireland); Covert surveillance; Authorisation for surveillance; Approval for surveillance; Garda Síochána (Ireland's National Police and Security Service); Serious crime investigation*

Introduction

The Criminal Justice (Surveillance) Act 2009 (Ireland) (hereinafter *2009 Act*) consolidates the ability of criminal justice agencies to detect, investigate, and prevent the commission of serious criminal offences. Members of the Garda Síochána (Ireland's National Police and Security Service), officials of the Revenue Commissioners, Defence Forces and Garda Síochána Ombudsman Commission (independent policing oversight body) may covertly enter a 'place' and conceal audio recording surveillance devices for the purpose of gathering information and

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

[1]This article is a revised and expanded version of a presentation at the Athens Institute for Education and Research (ATINER) 20th Annual International Conference on Law, Athens 10-13 July 2023.

intelligence concerning serious criminal offences. This policing method is predicated on reasonable grounds suggesting that information and intelligence garnered by covert surveillance operations may prevent the commission of serious (inchoate) criminal offences, or whereby evidence for the pursuit of serious crime investigation may be identified and gathered to be admitted in evidence in criminal proceedings.

This article examines the powers and functions conferred by the 2009 Act to bolster the resources of criminal justice agencies with a focus on police operations to detect, investigate and apprehend suspects, the management and use of covert intelligence operations, and compliance with fundamental rights in the criminal justice process. The analysis will encompass procedural requirements for external 'authorisation' to carry out surveillance with judicial oversight, internal 'approval' to carry out surveillance without judicial oversight, the use of tracking devices as a less intrusive measure, and whether substantive and procedural safeguards are adequate to protect fundamental rights of suspects and third parties targeted by covert surveillance operations. This assessment of the scope of 'surveillance' as a covert policing resource will consider whether there are sufficient procedural safeguards and whether covert surveillance methods as a tool of effecting 'crime control' policies is proportionate and necessary in compliance with fundamental rights of suspects. Policy considerations underpinning the necessity for the legislative framework and police covert operations in serious crime investigation will inform the analysis.

Serious Crime Investigation

Section 2(1) of the 2009 Act provides that the legislative framework applies to surveillance carried out by members of the Garda Síochána (National Police and Security Service), designate officers of the Ombudsman Commission (independent policing oversight body), members of the Defence Forces and officers of the Revenue Commissioners. The provisions of the 2009 Act are applicable to 'arrestable offences' as defined by section 2 of the Criminal Law Act 1997 (as amended by section 8 of the Criminal Justice Act 2006) as offences carrying a minimum term of imprisonment for five years and includes an attempt to commit any such offence. Serious crime is categorised as a serious offence and is defined in section 1 of the Bail Act 1997 as an offence specified in the Schedule to the Bail Act 1997 (including murder, manslaughter, assault occasioning actual bodily harm, kidnapping, false imprisonment, rape) for which the minimum term of imprisonment is five years. The multifarious contexts within which serious criminal offences are committed encompasses unique features that necessitate proportionate responses for the effective detection and investigation of such offences. While detection and investigative policing strategies have evolved in compliance with fundamental rights in the criminal justice process, the unique nature of various forms of serious crime and ongoing technological advancements necessitate appropriate policing strategies commensurate with the context and severity of suspected criminal activities under investigation.

Proactive Intelligence-Led Policing

Covert surveillance operations are frequently employed as a necessary and proportionate method for policing serious crime, especially with the ongoing technological advances and the continuing availability of more specialised surveillance devices. Proactive intelligence-led policing methods are indispensable for the detection, investigation, and prevention of serious criminal offences. Undercover officers effectively blend into their surroundings covertly observing and recording suspects activities, communications and conversations by encroaching on the right to privacy and incidental rights of suspected offenders.[2] The capacity to covertly monitor and audio record suspects has been greatly enhanced with the ongoing development of new technological resources.

Key dimensions of evidence-based practice in policing strategies are pivotal to the implementation and evaluation of policing methods.[3] The very nature of intelligence-led policing encompasses proactive detection and investigation methods that informs policing strategies to make evidence-based decisions concerning the prioritisation of police operations. Strategic assessment reports are prepared with the aim of identifying medium to long-term threats and risk assessments within the area of operation. Policing strategies underpinning these priorities of prevention, detection, investigation and intelligence gathering ensures that by understanding and prioritising policing strategies, the level of criminal activities presenting the highest levels of actual or potential threat, risk and harm to others can be targeted and significantly reduced.[4]

The core objectives of proactive intelligence-led policing are to increase operational efficiency and efficacy of undercover police operations through analyses of criminal activities. Evidence-based objective decisions concerning targeted and specialised covert surveillance operations and policing strategic priorities are underpinned by intelligence gathering. Undercover policing methods inevitably raise issues of concern around the practicalities of covert surveillance with potential confrontational lines between intelligence gathering, prevention, detection and investigation of serious crime.[5]

There are shortcomings in covert policing methods where proper training, resources and supervision are lacking, with concomitant lack of proper understanding of intelligence analysis amongst investigators. This can be compounded by a lack of understanding of undercover policing strategies amongst intelligence analysts that might unduly influence the effectiveness of intelligence analysis for operational undercover policing methods.[6] Reliable analysis of inteligence is undoubtedly beneficial for covert policing operations.[7] Evidence based analyses of intelligence-led policing methods provides an enhanced understanding of the practical realities of investigative and criminal intelligence

[2]Loftus & Goold (2012).
[3]Fielding, Bullock & Holdaway (2019); Ratcliffe (2022).
[4]Ratcliffe (2016).
[5]Fyfe, Gundhus & Rønn (2019).
[6]Cope (2004).
[7]Kirby & Keay (2021).

environments, and proactive intelligence-led policing is reflective of policing methods and policies.[8]

The employment of covert surveillance policing strategies raises legitimate concerns regarding safeguarding fundamental rights and the democratic nature of states commensurate with policies and regulations governing the extraordinary policing operations and how these should be controlled and implemented in the context of serious crime investigation. The potential for omnipresent covert surveillance operations with appropriate judicial and regulatory oversight will inevitably increase in importance. The absence of efficient oversight presents challenges in controlling the discretionary nature of undercover policing methods. Common law accusatorial and civil law inquisitorial criminal justice systems inevitably vary between legitimate concerns about undercover surveillance as a crime control policy, commensurate with due process safeguards.[9] The willingness of national law enforcement to employ covert surveillance strategies must be proportionate and necessary commensurate with the nature and level of perceived threats originating from serious crime (including cybercrime, espionage, human trafficking, organised crime, terrorism, national security, drug trafficking) in addition to ordinary forms of criminality constituting an 'arrestable offence.' The necessity and proportionality justification for the deployment of covert surveillance strategies and the intrusion by criminal justice agencies authorised by the state is an accepted limitation on certain fundamental rights, with particular emphasis on the right to privacy. The oscillation between crime control, due process and victims rights criminal justice policies adopted by democratic states inevitably produces disparate conceptions of the challenges posed by covert surveillance investigations, the purpose of state infiltration, and the mechanisms by which undercover surveillance strategies should be legitimated, supervised and controlled through external judicial oversight. There is an inevitable variance between regulatory compromises on fundamental rights based on varying degrees of legitimacy to the necessity justification of undercover covert operations.[10]

The frequent deployment of covert surveillance policing methods is generally accepted in policing strategies and operations as being standardised practice for serious crime investigation. Covert surveillance policing methods are employed extensively for serious crime investigations and continually feature as core policing strategies through expansionism policies justifying covert surveillance operations in preference to traditional overt policing. Covert surveillance policing strategies are inevitably inconspicuous to deal with serious crime and avoid the conflicts that accompany overt policing strategies.[11] Nonetheless, while many of the attitudes and working practices of covert surveillance officers parallel those of traditional policing methods there are significant differences with a propensity for occupational culture of undercover officers.[12] Moreover, there is a propensity for outdated surveillance governance mechanisms to be misaligned with ongoing

[8]James (2013).
[9]*Cf.* Spencer (2016).
[10]Ross (2007).
[11]Loftus (2019).
[12]Loftus, Goold & Mac Giollabhui (2016).

advancements brought by contemporary surveillance technologies and whether covert policing methods are conducted with proper training, resources and oversight.[13]

Constitutional Framework

The Preamble of the Constitution of Ireland (1937) inter alia stipulates the ethos of the Constitution as "seeking to promote the common good […] so that the dignity and freedom of the individual may be assured, true social order attained […]", which correlates with the expectation of proactive intelligence-led policing methods. The public interest in the detection and investigation of crime is grounded in Article 30.3 of the Constitution which provides the constitutional basis for the public prosecution model of criminal justice. In *Kane v Governor of Mountjoy Prison*,[14] the Supreme Court alluded to the legitimate public interest and rights to prevent, detect and investigate serious crime affecting public interests and the common good.[15]

Prohibited conduct (positive acts or omissions) by offenders not only constitutes a criminal offence, but also violates the personal rights of the person. Article 40.3 (Personal Rights) inter alia provides that:

1. *The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.*
2. *The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.*

This provision stipulates the constitutional mandate on the state to protect people from harm (potential victims of crime), which is achieved through the criminal justice process that enforces the substantial criminal law of the state through proactive intelligence-led policing. In the case of actual victims of crime, this is achieved through the proper and efficient detection and investigation of the offences with the prosecution and punishment of convicted offenders.

The prosecution of offences in accordance with the constitutional due process guarantee is provided by Article 38.1 stipulating that "***No person shall be tried on any criminal charge save in due course of law.***" The superior courts have identified numerous unenumerated rights under this provision including the presumption of innocence, and the inadmissibility of unconstitutionally obtained evidence in criminal proceedings against the accused. However, in a recent Supreme Court judgment, the *People (DPP) v JC*,[16] the majority judgment was delivered by Mr Justice Clarke, who stated "***from now on, evidence obtained unconstitutionally will be admissible if the prosecution can show the breach was***

[13]Fussey & Sandhu (2022).
[14][1988] IR 757.
[15]See Delaney & Carolan (2008) at 62 ff. for jurisprudential analysis.
[16][2015] IESC 31.

due to inadvertence," which confers a measure of judicial discretion whether to admit evidence in criminal proceedings against the accused. In a strong dissenting judgment, Mr Justice Adrian Hardiman stated that the majority decision has effectively given the Garda (police) "***immunity from judicial oversight***" by rewriting a key rule on evidence in criminal proceedings. The majority judgment is significant as it correlates with section 14 of the 2009 Act (discussed below) which is a legislative provision also conferring judicial discretion on trial court judges to admit evidence of covert surveillance that may have been gathered in technical breach of the suspect's fundamental rights.

The qualified right to the inviolability of the dwelling (with implications for the right to privacy) is provided by Article 40.5 of the Constitution which stipulates that "***The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law***." The definition of a 'place' in the 2009 Act that may be subject to surreptitiously placing audio visual recording covert surveillance devices encompasses a dwelling which seems to comply with the qualification "save in accordance with law." In *Ryan v O'Callaghan*,[17] the High Court per Barr J confirmed that the phrase "in accordance with law" should be interpreted to mean that any interference with this constitutional right must not breach the fundamental norms of the Constitution.

While the Constitution does not explicitly provide for the right to privacy, such right has been recognised by the superior courts as an unenumerated personal right guaranteed by Article 40.3.1 of the Constitution.[18] It is well established by superior court jurisprudence that the right to privacy does not extend to participation in criminal activity wherein the expectation of privacy significantly diminishes,[19] which has been cogently described as an "unremarkable proposition."[20] In the *Idah v DPP*,[21] where the product of Garda surveillance was contested, MacMenamin J. for the Court of Criminal Appeal observed that:

> *There can be no doubt that the State may make incursions into the right of privacy in accordance with law. This is particularly the case in circumstances where the State is seeking to provide in relation to 'the investigation of arrestable offences, the prevention of suspected arrestable offences and the safeguarding of the State against subversive and terrorist threats.' Nevertheless that law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which public authorities are entitled to resort to such covert measures and it must provide necessary safeguards for the rights of individuals potentially affected.*

The accessing of private communications by criminal justice agencies authorised by the state through interception or surveillance directly engages the

[17][1987] IEHC 61.
[18]*Idah v DPP* [2014] IECCA 3; *People v Dillon* [2003] 1 ILRM 531; *Kennedy and Arnold v Attorney General* [1987] IR 587; *McGee v Attorney General* [1974] IR 284.
[19]*People (DPP) v Kearney* [2015] IECA 64; *Idah v DPP* [2014] IECCA 3; *EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd* [2010] 4 IR 349.
[20]Hogan, Whyte, Kenny & Walsh (2018) at 1722.
[21][2014] IECCA 3, para 37.

qualified constitutional right to privacy. In *Kennedy v Ireland*,[22] the High Court per Hamilton P. noted this constitutional right is underscored by the commitment in the Preamble of the Constitution to the protection of the "dignity and freedom of the individual" and the guarantee of a democratic society stipulated in Article 5 of the Constitution. The general right of privacy was acknowledged by the Supreme Court in *Kane v Governor of Mountjoy Prison*,[23] albeit the Court rejected the claim by the applicant that his constitutional rights had been unlawfully interfered with by overt police surveillance of his movements. Whereas the Court did not circumscribe the circumstances wherein the right to privacy might be qualified, an assessment of the circumstances of each case under consideration will need to be scrutinised. However, in the context of covert surveillance, this issue will be *ex post facto* and conditional upon evidence of covert surveillance infringing on the right to privacy in criminal proceedings against the accused.

Legislative Framework

With the advent of covert surveillance policing methods and proactive intelligence-led policing there would also appear to be a constitutional mandate on the state to protect the interests of potential victims of crime in accordance with personal rights enshrined in Article 40.3 of the Constitution. Section 7(1) of the Garda Síochána Act 2005 provides that the functions of the Garda are to provide policing and security services for the State with the objective of –

(a)preserving peace and public order,
(b)protecting life and property,
(c)vindicating the human rights of each individual,
(d)protecting the security of the State,
(e)preventing crime,
(f) bringing criminals to justice, including by detecting and investigating crime, and
(g)regulating and controlling road traffic and improving road safety.

Notably, section 9(1) of the Policing, Security and Community Safety Bill 2023 (to repeal and replace the Garda Síochána Act 2005) that is currently being debated by the Oireachtas (Parliament) provides that the function of the Garda Síochána will be to provide policing services and security services for the State with the objective of –

(a) preserving peace and public order,
(b) protecting life and property,
(c) protecting and vindicating the human rights of each individual,
(d) protecting the security of the State,

[22][1987] IR 587.
[23][1988] IR 757.

(e) preventing crime,
(f) preventing harm to individuals, in particular individuals, who are vulnerable or at risk,
(g) bringing criminals to justice, including by detecting and investigating crime,
(h) protecting and supporting victims of crime, and
(i) regulating and controlling road traffic and improving road safety.

The addition of 'protecting' in (c), that was not included in the equivalent provision of the 2005 Act, suggests the proposed new statutory provision governing the functions of the national policing and security service incorporates proactive intelligence-led policing practices. This is significant as 'protecting' correlates with the constitutional mandate to safeguard personal rights underpinned by Article 40.3 of the Constitution.

Prior to the enactment of the 2009 Act there had been a lacuna in the regulation of surveillance and in particular the use of covert surveillance as an effective investigation technique invoked by the Garda Síochána, and other state agencies because of the lack of legislation regulating covert surveillance practices. Previously, due to the lack of statutory controls, information and intelligence gathered in this way, such as transcripts of conversations, could have been used for intelligence purposes but would have been inadmissible in criminal proceedings as having been obtained in breach of the suspect's constitutional rights. The Law Reform Commission published a Consultation Paper on Privacy (1996)[24] followed by a Report on Privacy (1998)[25] that highlighted the need for legislation to legitimise covert surveillance practices however, the status quo with no regulatory oversight continued until the enactment of the 2009 Act. The reactionary nature of legislative response to organised/gangland crime that had prevailed for decades but reached a high point in 2009 resulted in the so-called '2009 anti-gangland crime package.'[26] The crime control measures included the 2009 Act are designed to strengthen the work of specified criminal justice agencies for the purposes of preventing, detecting or investigating offences, or apprehending or prosecuting serious offenders and in safeguarding the security of the State against subversion and terrorism. This was an effective measure to thwart serious criminal activities.

Section 1 (Interpretation) of the 2009 Act provides a broad definition of a 'place' wherein covert surveillance of suspects may occur, and includes a dwelling or other building, a vehicle whether mechanically propelled or not, a vessel whether sea-going or not, an aircraft whether capable of operation or not, and a hovercraft (which is not classified as a vessel or aircraft). Audio-visual covert surveillance recording devices and GPS location devices can be surreptitiously installed for intelligence gathering or monitoring the location of suspects or

[24]Law Reform Commission, Consultation Paper on Privacy: Surveillance and the Interpretation of Communications (1996).
[25]Law Reform Commission, Report on Privacy: Surveillance and the Interpretation of Communications (LRC 57–1998).
[26]Conway & Mulqueen (2009).

contraband. In the *People (DPP) v Hawthorn,*[27] a controlled delivery of inert explosives was recorded by a member of the National Surveillance Unit who took a series of photographs some of which were tendered in evidence. One of the grounds of appeal from the Special Criminal Court of the offence of membership of an unlawful organisation was that admitting the photographs was an error as the photographing of events on the balcony outside the dwelling was regulated by the 2009 Act. The Court of Appeal rejected this ground of appeal. The suspects had been photographed on a balcony of a flat complex at a time they were in a 'place' to which the public has access.

Section 1 of the 2009 Act defines 'surveillance' as monitoring, observing, listening to or making a recording of a particular person or group of persons or their movements, activities and communications by or with the assistance of surveillance devices. A 'surveillance device' means an apparatus designed or adapted for use in surveillance, but does not include an apparatus designed to enhance visual acuity or night vision, to the extent to which it is not used to make a recording of any person who, or any place or thing that, is being monitored or observed, a CCTV within the meaning of section 38 of the Garda Síochána Act 2005, a camera to the extent to which it is used to take photographs of any person who, or anything that, is in a place to which the public have access. A 'tracking device' means a surveillance device that is used only for the purpose of providing information regarding the location of a person, vehicle or thing, which is a less intrusive means of surveillance.

Section 3 of the 2009 Act provides that the designated criminal justice agencies may only carry out surveillance in accordance with a valid 'authorisation' or 'approval'. A 'superior officer' (Garda Superintendent; Defence Forces Colonel; Revenue Commissioners Principal Officer; Garda Síochána Ombudsman Commission Member) of the relevant criminal justice agency may apply to a judge assigned to any District Court for an 'authorisation' for the carrying out of surveillance. Section 4 of the 2009 Act stipulates that a superior officer when making an application for authorisation must satisfy the court that this is the least intrusive (in terms of infringing on the fundamental rights of suspects) means of investigation and proportionate in terms of the objectives to be achieved and the impact on the rights of any person, and duration of covert surveillance that will be required to achieve the stated objectives. The intelligence gathered may be admitted in subsequent criminal proceedings against the accused. The application is made *ex parte* and heard by the judge otherwise than in public and may be granted for a maximum period of 3 months (section 5), subject to being varied or renewed on the same or different conditions for a further period of 3 months. (section 6). The periods of surveillance permissible might be deemed necessary and proportionate to applications depending on the complex nature of the investigation.

An authorisation issued by a judge of the District Court under section 5 of the 2009 Act does not bestow complete authority upon state agencies empowered under the legislation. In the *People (DPP) v R McC,*[28] the Court of Appeal

[27][2020] IECA 107.
[28][2017] IECA 84.

underscored the procedural safeguard in that the circumstances wherein surveillance devices may be utilised are strictly delineated by the conditions of the authorisation (and presumably an approval) and the provisions of the 2009 Act governing surveillance operations.

Section 7 of the 2009 Act provides that an approval for the carrying out of surveillance in cases of urgent necessity may be issued by a Superintendent of the Garda Síochána, a Colonel of the Defence Forces, or a Principal Officer of the Revenue Commissioners. Section 7 provides that an internal 'approval' for surveillance may be granted in cases of urgency (likelihood the suspect would abscond the jurisdiction; information or evidence would be destroyed; security of the State would be compromised) for a maximum period of 72 hours from the time at which the approval is granted. The superior officer who approves the carrying out of surveillance under section 7 shall make a report as soon as possible and, in any case, not later than 7 days after the surveillance concerned has been completed, specifying the grounds on which the approval was granted, and including a copy of the written record of approval and a summary of the results of the surveillance. There is, however, no requirement to see *ex post facto* 'authorisation' by a judge of the District Court, and the lack of judicial oversight in that regard might need to be revisited in due course. In *Idah v DPP*,[29] undercover Gardaí had obtained a surveillance 'authorisation' from a judge of the District Court to conduct surveillance from the 14 to 18 September 2010. However, the relevant communications concerning the suspect had not taken place over those dates. A superior officer of the Garda Síochána granted an internal 'approval' to continue using the surveillance device on 19 September 2010. On appeal from conviction, the Court of Appeal held that the approval could only have been granted if the superior officer had been satisfied that at least one of the circumstances of urgency provided for under section 7(2) of the 2009 Act applied. However, as there was no note as to which of the conditions of urgency applied and there had been no evidence of this nature given by Gardaí during the criminal prosecution, the Court held that the surveillance approval under which the evidence had been obtained was invalid and quashed the conviction with an order for retrial.

Idah v DPP[30] is significant as it was the first judgment concerning the application of the 2009 Act that considered the admissibility of recorded conversations between the appellant and members of the Garda Síochána during a covert operation. The prosecution sought to tender into evidence a transcript of an audio recording of a face-to-face conversation between members of the Garda Síochána and the accused in circumstances where the undercover investigators were equipped with covert audio recording devices. Since the evidence was procured using a surveillance device as defined by the 2009 Act the legislation was applicable. Having obtained an authorisation from a judge of the District Court for two days of surveillance an internal approval was granted for a third date of surveillance without seeking judicial approval to continue the surveillance. Without the use of a surveillance device, recordings made of the exchanges in

[29][2014] IECCA 3.
[30][2014] IECCA 3.

question would not have been possible and these recordings were later transcribed, and the transcripts were tendered in evidence in criminal proceedings against the accused. The trial judge ruled that what had taken place were face-to-face meetings and, therefore, did not come within the definition of 'surveillance.' The Court of Appeal concluded there was insufficient justification of urgency to warrant the extension by the Superintendent of the period previously authorised by the judge of the District Court. MacMenamin J opined:

> *The express terms of the 2009 Act seek to confine surveillance to specified activities carried out 'by or with the assistance of surveillance devices.' If such devices are not used, then the Act does not apply. It, therefore, has no application to other investigative techniques.*[31]

MacMenamin J stressed that state agencies were not free to choose whether to apply for an authorisation with judicial oversight or internal approval. The Court of Appeal ordered a retrial, and the undercover members could then give viva voce evidence that was not tainted by the approval that was deemed invalid. One of the key factors in determining whether there ought to be a retrial was the fact that neither of the undercover members gave viva voce evidence during the original trial, but instead relied solely on the transcripts in question. The recordings of face-to-face meetings between the appellant and undercover members were deemed inadmissible where such recordings had not been authorised in accordance with the 2009 Act and where there was no element of urgency to justify the failure to seek an authorisation. A provision that would require judicial oversight retrospectively at the earliest opportunity in circumstances where surveillance had been internally approved by a superior officer in cases of urgent necessity would effectively constitute judicial oversight of the surveillance operation.

The *Idah* judgment raised significant legal issues regarding the use of 2009 Act. The investigating members of the Garda were clearly dealing with the exercise of extensive powers under the provision of the new legislation and were evidently adhering to what they believed was the correct procedure in the context of the investigation. The case accentuates the necessity for adequate training, resources and supervisory oversight through the interpretation and implementation of the extensive powers conferred by the 2009 Act, which must be exercised in a fair, proportionate and a transparent manner in all contexts. The judgment sent out a clear message to investigators concerning the interpretation of the legislation and compliance with procedural safeguards. Nonetheless, the judicial interpretation in *Idah* is beneficial to investigators and ensuing superior court judgments have identified best practices and procedures for investigators in the planning and execution of covert surveillance operations and related policing strategies.

In the *People (DPP) v Maguire*,[32] the Court of Appeal endorsed the opinion expressed by the Court in *Idah* that the provisions of the 2009 Act, to the extent as approval or authorisation is required, do not apply to visual observation type

[31][2014] IECCA 3, para 42.
[32][2021] IECA 223.

evidence. Such evidence may be deemed admissible subject to the rules of evidence and constitutional imperatives safeguarding due process guarantees.

Section 7 of the 2009 Act was considered by the Supreme Court in *Damache v DPP*[33] with other statutory provisions by which members of the Garda Síochána may exercise powers to issue search warrants. Section 29(1) of the Offences against the State Act 1939 (as amended) was deemed unconstitutional, and the search warrant granted invalid. The impugned provision had permitted members of the Garda Síochána not below the rank of superintendent, to issue a search warrant in certain specified circumstances but did not specify that such warrants should only be issued by members of appropriate rank who were independent of the relevant investigation. The Court held that the issuing of search warrants is an administrative function that must be exercised judicially and independently of the investigation. It is conceivable that a similar legal challenge could arise in the context of the 2009 Act in circumstances where internal approvals are granted by a superior officer who is directly involved in the investigation.

Section 8 of the 2009 Act provides for the internal approval for the use of 'tracking devices' for a maximum period of 4 months, or shorter period as the relevant Minister may prescribe by regulations. The superior officer who approves the use of a tracking device shall not later than 8 hours after the use has been approved, prepare a written record of approval of the use of the tracking device, and shall make a report not later than 7 days after its use has ended, specifying the grounds on which the approval was granted, and including a copy of the written record of approval and a summary of the results of the monitoring. There is no requirement for external judicial oversight of surveillance pursuant to the granting of an approval.

Section 9 provides for the retention of materials relating to applications and reports for 3 years after the day on which the authorisation ceases to be in force, or the day on which they are no longer required for any prosecution or appeal to which they are relevant. Presumably, materials gathered pursuant to an authorisation or approval will be destroyed in compliance to personal data protection and retention legislative requirements.

Section 10 provides for restriction of disclosure of the existence of authorisations and other documents. The relevant Minister shall ensure that information and documents are stored securely and that only persons who the Minister authorises for that purpose shall have access to them. This stipulation is significant to ensure compliance with personal data protection and processing of personal data.

Retention of materials relating to applications and reports (section 9), restriction of disclosure of existence of authorisations and other documents (section 10) and confidentiality of information (section 13) were under consideration in the *People (DPP) v Hannaway (et al).*[34] The trial court and Court of Appeal ruled evidence inadmissible because the exclusionary rule was inapplicable to irregularities that may have occurred after the evidence had been gathered. The Supreme Court disagreed because this was an incorrect interpretation of section 10

[33][2012] IESC 11.
[34][2021] IESC 31.

as it purported to empower the Minister for Justice and Equality with a role in the investigation and prosecution of criminal offences that was clearly not intended by the legislature and would in any event have constitutional implications. The Court reached this conclusion following an examination of the statutory scheme and provisions for disclosures to persons whose authority to receive it derives from other provisions of the 2009 Act governed by the overarching constitutional due process safeguard. The Court found no infringement of section 10 as this provision is not relevant to the processes of investigation and trial of criminal offences.

Section 11 provides a complaints procedure whereby a person who believes he or she might have been the subject of an authorisation or an approval to apply to Referee for an investigation into the matter. The Referee shall investigate whether an authorisation was issued or an approval was granted as alleged by the person concerned, and whether there has been a relevant contravention. Unless the application is frivolous or vexatious the Referee may direct the quashing of the authorisation or reversal of the approval, destruction of the written record of approval concerned, and recommend for the payment of compensation not exceeding €5,000 to the person who was the subject of the authorisation or approval.

While proactive intelligence led policing strategies are clearly necessary and proportionate to combat serious crime, covert surveillance operations must be properly regulated and produce admissible evidence. Internal transparency accompanied by external judicial oversight is mandated to ensure that practice and legislative interpretation is compliant with constitutional and human rights in the criminal justice process. Section 12 provides for the review of operation of the 2009 Act by designated judge of the High Court, while serving as such as judge, to keep under review sections 4 to 8 of the 2009 Act, and report to the Taoiseach (Prime Minister) once every 12 months. The Taoiseach ensures that a copy of the annual report is laid before each House of the Oireachtas (Parliament) not later than 6 months after the report is made. The designated judge of the High Court may refer a matter to the Referee for an investigation under section 11. It is notable that annual reviews on operation of the 2009 Act by a designated judge of the High Court provide an insight into the high levels of compliance by the respective state agencies.

Section 13 stipulates for the confidentiality of information unless disclosure is to an ‘authorised person’ and is for the purposes of the prevention, investigation or detection of crime; for the prosecution of offences; in the interests of the security of the State; or required under any other enactment. An ‘authorised person’ includes the Minister for Defence, Minister for Finance, a person the disclosure to whom is authorised by the Commissioner of the Garda Síochána, the chairperson of the Garda Síochána Ombudsman Commission, the Chief of Staff of the Defence Forces or a Revenue Commissioner, or otherwise authorised by law. The possibility of disclosing information as ‘required under any other enactment’ facilitates a broad discretion by the relevant Minister to disclose relevant information, which potentially might include disclosing information under the Criminal Justice (Joint Investigation Teams) Act 2004 regarding criminal investigations with a cross border dimension.

Section 14 provides for the admissibility of evidence in criminal proceedings because of surveillance carried out under an authorisation or under an approval. There is a (rebuttable) presumption that a surveillance device or tracking device is a device capable of producing accurate information or material without the necessity of proving that the surveillance device or tracking device was in good working order. Information or documents obtained because of surveillance carried out under an authorisation or under an approval may be admitted as evidence in criminal proceedings notwithstanding any error or omission on the face of the authorisation or written record of approval concerned. Judicial discretion to admit such evidence considers whether the error or omission concerned was inadvertent, whether the information or document ought to be admitted in the interests of justice, whether the error or omission concerned was serious or merely technical in nature, the nature of any right infringed; whether there were circumstances of urgency; possible prejudicial effect of the information or document, and the probative value of the information or document. These criterion proved a wide measure of judicial discretion in criminal proceedings. In the *People (DPP) v Dowdall,*[35] the accused was the subject of audio surveillance based an authorisation having issued pursuant to the 2009 Act to place an audio recording device in his vehicle, and a tracking device on the same vehicle. Significantly, the portion of the intelligence that was pivotal to the conviction was recorded outside the jurisdiction, having taking place in Northern Ireland. However, the Court of Appeal ruled that the evidence should have been admitted in the interests of justice based on the judicial discretion conferred by section 14 of the 2009 Act.

Statements made by suspects against interest, admissions or plans for the commission of serious (inchoate) criminal offences may be admissible in evidence as exceptions to the rule against hearsay. This is significant in the context of proactive intelligence led policing strategies to tackle the consequence of serious criminal offences, organised crime, and terrorist activities. Section 14 of the 2009 Act provides that evidence obtained as a product of surveillance carried out under an authorisation or under an approval may be admitted as evidence in criminal proceedings notwithstanding errors or omissions in the authorisation. In the *People (DPP) v Mallon,*[36] the Court of Criminal Appeal underscored the significance of this provision.

Section 15 concerns the disclosure of information. Unless authorised by the court, the existence or non-existence of the following shall not be disclosed by way of discovery or otherwise during any proceedings: an authorisation, an approval, surveillance carried out under an authorisation or under an approval, use of a tracking device, documentary or other information or evidence. The court shall not authorise the disclosure if it is satisfied that to do so is likely to create a material risk to the security of the State, ability of the State to protect persons from terrorist activity, terrorist-linked activity, organised crime and other serious crime, maintenance of the integrity, effectiveness and security of the operations of the Garda Síochána, the Defence Forces or the Revenue Commissioners, and the ability of the State to protect witnesses, including their identities.

[35][2023] IECA 182.
[36][2011] IECCA 29, para 52.

Section 13 of the Garda Síochána (Amendment) Act 2015 amends certain provisions of the 2009 Act to enable the Garda Síochána Ombudsman Commission (GSOC, an independent statutory body to provide efficient, fair and independent oversight of policing in Ireland) to carry out surveillance in circumstances where this is necessary in connection with criminal investigations concerning arrestable offences. This places GSOC in the same position as the Garda Síochána for the purposes of conducting criminal investigations..

Human Rights Standards

The legislative basis for surveillance and concomitant detection and investigative methods adopted by national policing service must be human rights compliant. Covert surveillance measures must be proportionate and necessary to the objectives to be achieved and a less intrusive measure should be considered in the first instance. Fundamental rights that typically pertain in the criminal justice process encompass article 2, article 3, article 5, and article 6. The ECtHR has held that the right to a fair trial enshrined in Article 6 does not confer a substantive right on victims to secure the prosecution, conviction and punishment of convicted offenders,[37] nor indeed to seek private revenge,[38] albeit the right of private prosecution exists in many jurisdictions including Ireland.[39] Moreover, there is no absolute obligation for all prosecutions to result in conviction nor indeed impose a particular sentence (sentence would be reflected in the offence charged e.g. conspiracy offences based on surveillance).[40]

Article 6 guarantees the right to a fair trial. Non-compliance with the principles outlined in *Klass* (discussed below) does not lead to automatic exclusion of evidence. In *Schenk v Switzerland*,[41] there was no breach of article 6 when an illegally obtained tape recording was admitted into evidence in circumstances where the defendant had the opportunity to challenge the use and authenticity of the tape and there was other evidence supporting the conviction. The ECtHR stipulated that judicial oversight of criminal proceedings should consider the fairness of the proceedings.

Article 8 enshrines the qualified right to respect for private and family life:

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or*

[37]*Perez v France* App No 47287/99, para 70,
[38]*Öneryıldız v Turkey* App No 48939/99, para 147.
[39]*Kelly v District Judge Ryan* [2015] IESC 69; [2013] IEHC 321.
[40]*Tanlı v Turkey* App No 26129/95, para 111.
[41](1988) Series A 140.

> *crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Since article 8 is a qualified right and not an absolute one, states can interfere with this right in limited circumstances, the ability to do this is contained in article 8(2). For example, a police officer opening a letter or placing a listening device in a suspect's home does contravene a person's right to respect of correspondence and respect to his/her home. There are four elements which must be satisfied to do so: legality; pursuance of a legitimate aim; necessity; proportionality. Each of the four elements must be present before a restriction on tis right may be justified. Evidence of this can be seen in *Malone v United Kingdom*[42] which regarded a telephone tap which had been authorised without a statutory power. The applicant challenged the legality of same and the ECtHR held that the activity was almost certainly in pursuance of a legitimate aim and was both necessary and proportionate but there was no legal basis for the activity.

The detection and investigation of serious criminal offences followed by criminal proceedings with the prospects of conviction and punishment inevitably has adverse consequences for the qualified right to privacy of the accused. In this regard, the ECtHR concluded in *Jankauskas v Lithuania (No 2)*[43] that the criminal justice process is compliant with article 8 ECHR provided that such measures do not exceed the normal and inevitable consequences for the accused of surveillance policing methods.

The expectation of a right to privacy diminishes with involvement in criminal activities and commission of criminal offences. The qualified right in article 8 ECHR does not pertain where the accused complains of reputational damage which the ECtHR concluded in *Sidabras and Džiautas v Lithuania*,[44] and *Pişkin v Turkey*,[45] is a reasonably foreseeable consequence of prohibited conduct. In *Falzarano v Italy*,[46] the ECtHR articulated in the surveillance context requirements in the law must be sufficiently clear in its terms to give citizens an adequate indication of the conditions and circumstances in which the authorities are empowered to resort to any measures of secret surveillance and collection of data.[47] In *Vukota-Bojić v Switzerland*[48] the Court found a violation of article 8 due to the lack of clarity and precision in the domestic legal provisions that had served as the legal basis of the applicant's surveillance by her insurance company after an accident.

The right to privacy is not absolute and may be qualified by states who may depart in defined circumstances in accordance with article 8(2) which provides that states may derogate from "respect for the right to a private life": in the interests of national security or to prevent disorder or crime. In *Klass v Germany*,[49]

[42]App No 8691/79.
[43]App No 50446/09, para 76.
[44]App Nos 55480/00 and 59330/00, para 49.
[45]App No 33399/18, paras 180-183.
[46]App No 73357/14, paras 27-29.
[47]*Shimovolos v Russia* App No 30194/09, para 68.
[48]App No 61838/10.
[49](1978) 2 EHRR 214.

the ECtHR acknowledged the significance of the technical advances made in surveillance as well as the development of terrorism, and recognised that states must be entitled to counter terrorism with secret surveillance of mail, post and telecommunications. Such measures must be taken in exceptional circumstances and states do not have the right to adopt whatever measures it thinks appropriate in the name of counteracting espionage, terrorism or serious crime. The ECtHR has recognised that, although surveillance can be justified to counter threats from espionage, terrorism or serious crime, stringent safeguards must be in place. The ECtHR provided the following guidance as to the application of article 8 to national legislation authorising surveillance:

- legislation must be designed to ensure that surveillance is not ordered haphazardly, irregularly or without due and proper care
- surveillance must be reviewed and must be accompanied by procedures which guarantee individual rights
- it is in principle desirable to entrust the supervisory control to a judge in accordance with the rule of law, but other safeguards might suffice if they are independent and vested with sufficient powers to exercise an effective and continuous control
- if the surveillance is justified under article 8(2) the failure to inform the individual under surveillance of this fact afterwards is, in principle, justified

In *Huvig v France*,[50] and *Kruslin v France*,[51] telephone tapping carried out on the instructions and under the supervision of investigating judges in France violated article 8 because there were inadequate safeguards against various possible abuses. The ECtHR identified the following deficiencies:

- there had been no definition for the categories of people liable to have their telephones tapped nor the nature of the offence which might give rise to such order
- the investigating judge had not been under an obligation to set a limit on the duration of the tapping
- the procedure for drawing up the summary reports of the intercepted conversations was unspecified
- the precautions to be taken with regards to the communication of the recordings intact and in their entirety for possible inspection by the judge and by the defence were unspecified
- the destruction of the recordings, particularly where the accused had been discharged or acquitted, was unspecified

The provisions of the 2009 Act would seem to accord with this criteria.

Article 13 ECHR enshrines the rights to an effective remedy in the following terms:

[50](1990) 12 EHRR 528.
[51](1990) 12 EHRR 547.

> *Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.*

The obligation on states to provide remedial action applies equally to victims of crime and suspected offenders, a process that requires a proportionate balancing exercise by legislative and judicial authorities. From the perspective of suspected offenders subject to surveillance, the effectiveness of a remedy may be restricted in respect of qualified rights such as the qualified right to privacy.[52] The efficacy of an effective remedy in the context of surveillance and article 13 was considered in *İrfan Güzel v Turkey*,[53] wherein the ECtHR concluded that what is required is "a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in any system of secret surveillance."

Analysis

Members of the Garda Síochána, officials of the Revenue Commissioners, Defence Forces and Garda Síochána Ombudsman Commission representatives may, in accordance with legislative authority conferred by the provisions of the Criminal Justice (Surveillance) Act 2009, covertly enter a place and surreptitiously conceal surveillance devices. Such operational strategies is predicated on reasonable grounds suggesting that information and intelligence garnered by covert surveillance devices may prevent the commission of serious criminal offences or whereby evidence for the pursuit of serious crime investigation may be identified and garnered to be tendered in evidence.

The expectation on criminal justice agencies to engage in more intelligence-led proactive investigations and detections clearly necessitates covert surveillance practices. However, in Ireland, the Garda Inspectorate has reported that the Garda Síochána has not fully operate an intelligence-led policing process, which has been identified as a significant organisational weakness.[54] Presumably, this deficiency is because of inadequate human resources, and financial resources, training and equipment that will be required for effective operations. Invoking the provisions of the 2009 Act to bolster covert surveillance operations under the conditions imposed on (external) judicial authorisations or internal approvals sanctioning covert surveillance operations, training and supervision will not per se infringe due process rights or fair trial of the accused.

Covert surveillance of suspected offenders has been a feature of policing methods for many decades however, there was no legislative basis for intruding on the right to privacy and incidental fundamental rights (subject to the proviso save in due course of law), until the enactment of the 2009 Act. While technical covert

[52]*Cf. Hasan and Chaush v Bulgaria* App No 30985/96, paras 98-99 in the context of freedom of religion.
[53]App No 35285/08, para 99.
[54]Report of the Garda Síochána Inspectorate (2018) at 7.

surveillance operations for the detection and investigation of serious criminal offences had been conducted prior to the enactment of the 2009 Act the product of the evidence could not be used in criminal trials. The 2009 Act is innovative in that it established a formal process for the use of covert surveillance technical devices, including lawful authority entering a 'place' including a dwelling to surreptitiously place such audiovisual recording devices. This enables law enforcement agencies to collect surveillance evidence for use in evidence in criminal proceedings. Prior to the enactment of the 2009 Act the product of covert surveillance could not be used in criminal proceedings against the accused as the intelligence evidence would have been obtained in violation of the accused's rights. Notably, the Law Reform Commission of Ireland had recommended a legislative framework to legitimise detection and investigation practices in a Consultation Paper (1996) followed by a Report (1998) into privacy, however there was no legislative response until 2009, and this was a reactionary legislative response based largely on the murder of innocent persons by members of organised crime. In 2009, several pieces of legislation were enacted that colloquially became known as the '2009 anti-gangland crime package.' The 2009 Act was enacted a part of the anti-gangland legislation enacted in that year as a reactionary response to public outrage because of significant increase in violent deaths and serious criminal offences committed by members of organised criminal organisations. The issue with such reactionary measures is whether the intrusive provisions are fundamental rights compliant. The extensive powers conferred on law enforcement agencies were heavily criticised by the Irish Human Rights and Equality Commission as well as civil liberty and legal groups which called for more safeguards in the legislation to be fully human rights compliant.

The 2009 Act consolidated the ability of specified criminal justice agencies to detect, investigate, and prevent the commission of serious criminal offences and clearly contemplates the harvesting and retention of relevant information for ongoing intelligence purposes. The national police and security service have a duty to seek out, obtain and preserve all relevant evidence, whether patent or latent,[55] which extends to the disclosure of evidence to the defence.[56] This obligation does not diminish the duty of investigators to perform their statutory duties proportionately in terms of the objectives to be achieved in gathering information and intelligence albeit given the nature and complexity of covert surveillance practices there must be a degree of latitude and inevitably extraneous material may be gathered, processed and retained during such investigations.

The lacuna that existed concerning the regulation and legislation for covert surveillance practices was filled with the enactment of the 2009 Act. However, there are deficiencies such as the procedure for granting internal approvals to engage in surveillance are too lax and there should be a requirement to seek retrospective judicial approval in such cases. The complaints procedure is also quite lax; if effective covert surveillance is put in place how can a person ever know if they are subject to same. Perhaps there should be a requirement in place that persons are notified *ex post facto* that they had been subject to surveillance.

[55]*Braddish v DPP* [2001] 3 IR 127.
[56]McDermott (2005).

Also, GPS tracking devices can be placed on vehicles for up to 4 months without external judicial approval or oversight, which might not proportionate and necessary to an investigation. While the provisions of the 2009 Act seem to comply with article 8 and article 6 ECHR, the legislation has remained relatively unchallenged apart from the Court of Appeal rulings in *Idah v DPP*[57] and *People (DPP) v Dowdall*.[58] Presumably, with the increased use of covert surveillance practices and the use of information and intelligence in criminal proceedings, the will be concomitant appeals against conviction and the Court of Appeal will be tasked with performing judicial scrutiny of the legislation in the cold light of day and *ex post facto* of surveillance operations. If the decision in *Idah* is indicative of how the appellate courts will interpret the legislation in the light of covert surveillance practices based on internal approvals it may be that the court will be concerned to ensure the fundamental rights of suspects, especially the right to privacy and due process in criminal proceedings, are protected and vindicated. But equally so, the rights of actual and potential victims of crime would also need to be counterbalanced with the rights of suspects, particularly in cases of surveillance of persons who are suspected of having committed, or are suspected of planning serious offences against the person. In that regard, crime control policies seem to have influenced the judgment by the Court of Appeal in *Dowdall* based on judicial discretion to admit unlawfully, and presumably unconstitutionally, obtained evidence once this is deemed to be in the interests of justice. Appeals against conviction in due course will determine whether the provisions of the 2009 Act have (or have the potential) to infringe on the fundamental rights of suspects (notably the qualified rights to privacy, inviolability of the dwelling and due process in criminal proceedings) that might necessitate legislative amendment ensuring that the practices and procedures under the provisions of the 2009 Act are compliant with the Constitution, ECHR and associated jurisprudence.

The most important safeguard of the 2009 Act is the judicial oversight concerning the overall operation of the legislation. A judge of the High Court is responsible for reviewing the system and is required to present annual reports on the operation of the legislation to the Taoiseach (Prime Minister). The granting of surveillance must be proportionate to the rights of the third parties and be the least invasive form of surveillance required. Presumably, judges of the District Judge would refuse applications for authorisations where information may be privileged. There is also a complaints procedure available, where a person who believes they were unlawfully subject to surveillance can apply to a Referee for an investigation. The Referee has the power to quash an approval or authorisation for surveillance. There is also the question that a person will probably not know they had been subject to covert surveillance. Also, a person will only be told that an approval or authorisation was made if it turns out that there was a contravention and the Referee believes it does not contravene the public interest to inform the person. The Referee's decision is also final as there is no appeals process under the 2009 Act.

[57][2014] IECCA 3.
[58][2023] IECA 182.

There seems to be a deficiency with the 2009 Act in that the legislation does not include offences for unlawful counter-surveillance carried out by organised crime gangs. It is reasonable to assume there is widespread use of counter-surveillance by serious criminals who become more aware of covert surveillance policing and inevitably will employ highly sophisticated counter surveillance methods. The 2009 Act may require legislative intervention not only to protect the integrity of lawful covert surveillance operations but also to safeguard members of the Garda Síochána in the performance of their statutory duties.

Conclusion

The use of covert surveillance operations as a tool of effecting crime control policies is proportionate and necessary commensurate with the Constitution, ECHR and associated jurisprudence. The advantages of covert surveillance practices are obvious in accordance with the constitutional mandate for the prevention, detection and investigation of serious criminal offences. However, provisions for the granting of internal approvals for surveillance without external judicial oversight might endanger the rights of suspects including other persons (third parties associated with the primary suspects) who are subject to covert surveillance. An assessment of policy considerations by appellate jurisprudence, underpinned by the interests of justice criterion, will in due course determine whether there are sufficient procedural safeguards in the legislative framework governing covert surveillance..

References

Conway, V. & M. Mulqueen (2009). 'The 2009 anti-gangland package: Ireland's new security blanket?' in *Irish Criminal Law Journal* 19(4):106-113.

Cope, N. (2004). 'Intelligence led policing or policing led intelligence?': integrating volume crime analysis into policing' in *British Journal of Criminology* 44(2):188-203.

Delaney, H. & Carolan, E. & C. Murphy (2008). *The Right to Privacy: A Doctrinal and Comparative Analysis*. Round Hall.

Fielding, N., Bullock, K. & S. Holdaway (Eds.) (2019). *Critical Reflections on Evidence-Based Policing*. Routledge.

Fussey, P. & A. Sandhu (2022). 'Surveillance arbitration in the era of digital policing' in *Theoretical Criminology* 26(1):3-22.

Fyfe, N., Gundhus, H. & K. Rønn (2019). *Moral Issues in Intelligence-led Policing*. Routledge.

Hogan, G., Whyte, G., Kenny, D. & R. Walsh (2018). *Kelly: The Irish Constitution*. 5th ed. Bloomsbury Professional.

James, A. (2013). *Examining Intelligence-Led Policing: Developments in Research, Policy and Practice*. Palgrave Macmillan.

Kennedy, D.S. (2013). 'Has Packer's "crime control model" become the dominant force in Irish criminal justice?' in *Irish Criminal Law Journal* 23(3):76-82.

Kilcommins, S. (2016). 'Crime control, the security state and constitutional justice in Ireland: discounting liberal legalism and deontological principles' in *International Journal of Evidence and Proof* 20:326-342.
Kirby, S. & S. Keay (2021). *Improving Intelligence Analysis in Policing*. Routledge.
Law Reform Commission (1996). Consultation Paper on Privacy: Surveillance and the Interpretation of Communications (1996).
Law Reform Commission (1998). Report on Privacy: Surveillance and the Interpretation of Communications (LRC 57-1998).
Loftus, B. & B. Goold (2012). 'Covert surveillance and the invisibilities of policing' in *Criminology & Criminal Justice* 12(3):275-288.
Loftus, B. (2019). 'Normalizing covert surveillance: the subterranean world of policing' in *British Journal of Sociology* 70(5):2070-2091.
Loftus, B., Goold, B. & S. Mac Giollabhui (2016). 'From a visible spectacle to an invisible presence: the working culture of covert policing' in *British Journal of Criminology* 56(4):629-645.
McDermott, P.A. (2005). 'The duty to seek out, preserve and disclose evidence to the defence' in *Judicial Studies Institute Journal* 5:80-98.
Ratcliffe, J.H. (2016). *Intelligence-Led Policing*. Routledge.
Ratcliffe, J.H. (2022). *Evidence-Based Policing: The Basics*. Routledge.
Report of the Garda Síochána Inspectorate (2018). *Policing with Local Communities*. https://www.gsinsp.ie/policing-with-local-communities-4/
Ross, J.E. (2007). 'The place of covert surveillance in democratic societies: a comparative study of the United States and Germany' in *American Journal of Comparative Law* 55:493-579.
Spencer, J.R. (2016). 'Adversarial vs inquisitorial systems: is there still such a difference?' in *International Journal of Human Rights* 20:601-616.

Cases

Ireland

Braddish v DPP [2001] 3 IR 127
Damache v DPP [2012] IESC 11
EMI Records (Ireland) Ltd v UPC Communications Ireland Ltd [2010] 4 IR 349
Kane v Governor of Mountjoy Prison [1988] 1 IR 757
Kelly v District Judge Ryan [2015] IESC 69*;* [2013]IEHC 321
Kennedy and Arnold v Attorney General [1987] IR 587
McGee v Attorney General [1974] IR 284
*Idah v DPP [*2014] IECCA 3
People v Dillon [2003] 1 ILRM 531
People (DPP) v Dowdall [2023] IECA 182
People (DPP) v Hawthorn [2020] IECA 107
People (DPP) v Hannaway (et al) [2021] IESC 31
People (DPP) v JC [2015] IESC 31
People (DPP) v Kearney [2015] IECA 64
People (DPP) v Maguire [2021] IECA 223
People (DPP) v Mallon [2011] IECCA 29
People (DPP) v R McC [2017] IECA 84
Ryan v O'Callaghan [1987*]* IEHC 61

European Court of Human Rights (ECtHR)

Amann v Switzerland App No 27798/95
Antović and Mirković v Montenegro App No 70838/13
Bărbulescu v Romania App No 61496/08
Bykov v Russia App No 4378/02
Centrum för Rättvisa v Sweden App No 35252/08
Falzarano v Italy App No 73357/14
Halford v United Kingdom App No 20605/92
Hasan and Chaush v Bulgaria App No 30985/96
Huvig v France (1990) 12 EHRR 528
İrfan Güzel v Turkey App No 35285/08
Jankauskas v Lithuania (No 2) App No 50446/09
Kennedy v United Kingdom App No 26839/05
Klass and Others v Germany App No 5029/71
Köpke v Germany App No 420/07
Kruslin v France (1990) 12 EHRR 547
Leander v Sweden App No 9248/81
López Ribalda and Others v Spain App Nos 1874/13 and 8567/13
Lüdi v Switzerland App No 12433/86
Malone v United Kingdom App No 8691/79
MD and Others v Spain App No 36584/17
Oleynik v Russia App No 23559/07
Öneryıldız v Turkey App No 48939/99
Perez v France App No 47287/99
Pişkin v Turkey App No 33399/18
Roman Zakharov v Russia App No 47143/06
Rotaru v Romania App No 28341/95
Schenk v Switzerland (1988) Series A 140
Segerstedt-Wiberg and Others v Sweden App No 62332/00
Shimovolos v Russia App No 30194/09
Sidabras and Džiautas v Lithuania App Nos 55480/00 and 59330/00
Szabó and Vissy v Hungary App No 37138/14
Tanlı v Turkey App No 26129/95
Telegraaf Media Nederland Landelijke Media BV and Others v The Netherlands App No 39315/06
Uzun v Germany App No 35623/05
Vukota-Bojić v Switzerland App No 61838/10
Weber and Saravia v Germany App No 54934/00
Zoltán Varga v Slovakia App No 58361/12

Legislation

Constitution of Ireland (1937)
Bail Act 1997
Criminal Justice (Surveillance) Act 2009
Criminal Law Act 1997 (as amended the Criminal Justice Act 2006)
Garda Síochána Act 2005
Garda Síochána (Amendment) Act 2015
Offences against the State Act 1939

Athens Journal of Law - Volume 10, Issue 1, January 2024 – Pages 87-118

The Ethics of Law: How US/UK Intervention in Iraq and Russia's Invasion of Ukraine Breach the Principle of Virtue and International Law

By Emmanuel K Nartey[*]

The war in Iraq and the recent war in Ukraine symbolise the importance of resolving the crisis of international law and laws of war. In addition, the problematic aspect of these wars stems from the misconception of aggression or the composition of aggression. This falsity consists solely of the concept of aggression under international law, which has been abused, fragmented and confused. Therefore, this false idea of the concept of aggression under international law contributes to the development of modern conflicts. In an attempt to rationalise some of the fundamental failures in international law and the United Nations Security Council (hereinafter UNSC), this article seeks to examine whether the inclusion of ethics in the mechanism by which international law is implemented will be relatively useful. It explores whether ethical code can be incorporated into the mechanism by which international law is implemented, and if so, how can ethics enhance the existing rules and states' conduct? What role can ethics play in the justification of the use of force by the states, and what conclusion can be drawn from UNSC and states' practice? The article is divided into four sections. The first tries to explain the fundamental principles of ethics, while the second views international law in the conception of subject matter application and practice. The third section looks at Russia's invasion of Ukraine and the UK/US invasion of Iraq. And the final part presents a philosophical conclusion on the subject matter.

Keywords: *Laws of War; Russia, Ukraine, Iraq and Ethics*; *International Law;*

Introduction

Over the last decades, there has been much focus on applying international law and the laws of war to contemporary conflict. Laws, such as humanitarian rules, have also been subjected to much debate and diplomacy, as well as how these rules affect wars and military occupation, such as Afghanistan, Iraq, and Libya.[1] However, the issue is not the attention nor discourse; it is the demystification of international law and laws of war in the intersection of conflict or illegal wars. Likewise, over the years, international law and laws of war have become the law of the jungle, where the fittest survive. In terms of regulating wars, this animalist approach has led to an unequal implementation of

[*]Ph.D., Senior Lecturer and LL.M. Course Leader, Bath Spa University, Bath, & Academic Lead for Employability OU, Walton Hall, Milton Keynes, United Kingdom.
Email: maninartey@gmail.com
[1]Rogers (2016).

international law and laws of war.[2] Therefore the application of international law and laws of war can neither be nor be conceived as effective without the idea of the triangular concept. The triangular concept means effective implementation, prosecution and enforcement. This idea of triangular concept can neither be nor conceived unless all nations are held to the same standard. In this understanding, the effectiveness of international law and laws of war may be said to belong to the essence of the idea of the triangle, and there is nothing to be conceived from that. However, it may also be assumed that the precept of effective implementation of international law and laws of war may rest on the principle of ethics in the intersection of states' conduct. Henceforth, international law and laws of war in their current form may be a legal rule but just an ideological rule if the practical and equity issues are not addressed.

Furthermore, the fundamental principles of international law and national law are violated without effective legal justification. Terrible atrocities include the First Gulf War[3], Yugoslavia since 1991, Rwanda in 1994, Iraq in 2003 and Libya in 2010.[4] Fundamentally, Yugoslavia in 1991 and Rwanda in 1994 compelled the UNSC[5] to create an international tribunal to adjudicate the application of international law and restore the principle of international law. I will argue that this effort is nothing less or important than a flood flowing back into the ocean. This is partly because the equity issue in international law is neither addressed nor thought of through the lens of fairness and the good principle of virtue. Therefore, the effort of the United Nations (UN) and its related organisation is something that can be recognised but should not be commended for its failure to hold powerful states accountable to the same standard.[6] In this sense, implementation, enforcement, prosecution and accountability for the violations of international law and laws of war are one and the same. Therefore, the equity of international law and the principle of ethics are nothing beyond the implementation, enforcement, prosecution and accountability. The principle of international law and the specific doctrine of ethics are one and the same; therefore, international law and laws of war should be examined through the lens of equity and ethics. By approaching the argument of implementation, enforcement, prosecution and accountability this way, we thus removed the cause which is commonly assigned to the error of state practice. This also means our understanding of international law and laws of war cannot be explained by the doctrine of international law alone but must be examined according to the doctrine of virtue and moral conduct of the UNSC.

In an attempt to rationalise some of the fundamental failures in international law and the UNSC, this article seeks to examine:

1. Whether the inclusion of ethics in the mechanism by which international law is implemented will be relatively useful.

[2]Roberts (1995).
[3]Lowry (2008).
[4]Engelbrekt, Mohlin & Wagnsson (2013).
[5]Lowe, Roberts, Welsh. & Zaum (2010).
[6]McKinney (2012).

2. What ethical code can be incorporated into the mechanism by which international law is implemented?
3. How can ethics enhance the existing rules and states' conduct?
4. What role can ethics play in the justification of the use of force by the states?
5. What conclusion can be drawn from UNSC and states practice.
6. Can implementing a code of ethics be pursued as an underlying principle of international law and the UNSC principle of governance?

These questions are worth consideration because over the years competing needs and ideologies of states' conduct have created friction and conflict. Therefore, the issue of ethics and substantive code is needed to prevent serious violations of international law and war from occurring in the future.[7] For example, the war in Iraq and the recent war in Ukraine symbolise the importance of resolving the crisis of international law and laws of war. In addition, the problematic aspect of these wars stems from the misconception of aggression or the composition of aggression. This falsity consists solely of the concept of aggression under international law, which has been abused, fragmented and confused. Therefore, this false idea of the concept of aggression under international law contributes to the development of modern conflicts.[8]

For instance, the crime of aggression is one of the four foundations of international crime under the remit of the ICC, which encompasses individual responsibility for an illegal war.[9] Even though the Nuremberg Tribunal expressed aggression as 'the supreme international crime differing only from other war crimes in that, it contains within itself the accumulated evil of the whole',[10] there is a lack of agreement on the actual meaning of the constitution of the crime of aggression.[11] Even though the amendments of aggression came into force after 1 January 2017, the definition was hailed as a substantive development in international crime law. Nonetheless, the substantive issues do not pertain to the definition itself but state attitudes and the international community's ability to enforce international law and maintain peace. Therefore, the relevance of the definition of aggression for contemporary armed conflict is redundant in this sense. From this point of view, it should be assumed that the effectiveness of international law and laws of war should focus on state behaviour, individuals, and state officials with enough authority but not a simple connotation of words.

When we say the effectiveness of international law, we may assume that it acquiesces in what is deemed enforceable or acquiesces in what is the true reflection of international law in as much as there is no reason or justification for states or individuals to violate the law. Thus, although the definition of aggression may be assumed to be acquiescence in its interpretation, we can never say that it is effective. By effectiveness, we mean something positive, a positive obligation to

[7]Boas (2013).
[8]Tucker (1951).
[9]Weisbord (2009).
[10]Bachmann & Kemp (2012).
[11]Zuppi (2007).

act according to the principle of ethics. Therefore, the issue of Iraq, Libya and Russia's invasion of Ukraine raises legal, ethical and moral questions. In this understanding, the accurate distinction between the definition of aggression or the conceptual parameter of war and effective implementation, enforcement, prosecution and accountability under international law must be imagined through the lens of ethics. Thus, it is further necessary to distinguish between the connotation of words and legal principles that signify the deficiencies in states and human conduct.

Furthermore, Clausewitz believes that war is 'a mere continuation of state politics'.[12] If this opinion is to hold true value, then we may say war reflects the personality and characteristics of state leaders. Therefore, till one is guided by the internal principle of conduct (ethics), it is impossible to foresee the absolute end of wars in contemporary society. It is also obvious from this statement that war is conceived as a state's inherited right, which is problematic and gives rise to more wars.[13] War should not be conceived as an inherited right of a state; this is partly because war, in its fundamental history, is associated with the violation of human dignity and the destruction of the common peace. Therefore, assuming that war is necessary for a state right is premature. However, it is also important to note that the Peace Treaty of Versailles of 1919, which condemned aggressive war as 'a supreme offence against international morality and sanctity of treaties,' changed the inherited narrative of the state's right to conflict.[14] Whether this change is transposed into modern conduct remains to be seen in light of the recent conflict in the last decades.

Additionally, the Kellogg-Briand Pact of 1928 expands on this point by 'condemn[ing] recourse to war for the solution of international controversies, and renouncing] it, as an instrument of national policy in their relations with one another'.[15] Furthermore, the London Charter that established the Nuremberg Tribunal after World War II (WWII) made an offence to wage a war of aggression by including the 'crime against peace'.[16] The United Nations General Assembly (UNGA) acknowledge the Nuremberg Principles as international law. Likewise, the Nuremberg Principles were used as a model for the Tokyo judgement.[17] Though the development and implementation of the Nuremberg Principles may be questioned on ethics and moral grounds, there is no doubt that acknowledging the London Charter as international law, the UNGA is of the view that aggressive war is no longer seen as an inherent right of states. Therefore, this act could be recognised as an international crime under certain conditions.[18] While this approach and acknowledgement is something to celebrate, the current Ukraine conflict questions the London Charter's core validity. It also undermines the principal recognition of it as an international law. Therefore, the fundamental

[12]Clausewitz (2007).
[13]Bachmann & Kemp (2012).
[14]Desai & Desai (2020).
[15]Kellogg-Briand Pact at Art. 1.
[16] Kreß & Von Holtzendorff (2010).
[17]Lawrence (1988).
[18]United Nations General Assembly Resolution 3314 (XXIX).

question here relates to states and individual attitudes toward international law. It may be assumed that state and individual attitude toward international law by, many scholars is either entirely confused or not distinguished with sufficient accuracy of perception. Hence, states are generally ignorant of the role ethics could play in observing and respecting international law. As well as how absolutely necessary the knowledge of ethics in the doctrine of international law is, both for legal philosophy and for the ordering of international relations.

This confusion and gullible construction and deconstruction of international law and legal order may be found in scholars' analysis of both Russia's invasion of Ukraine and the US/UK invasion of Iraq. For instance, Brunk and Hakimi pointed out that Russia's invasion of Ukraine challenges the international legal order. They further claim that Russia's invasion of Ukraine has been a significant shift under international law since WW II. They seem to base this analysis on a rejection of 'the foundational principle of the post-World War II order', 'meaning that international boundaries may not be changed with force alone'.[19] They suggest that Russia's invasion of Ukraine lacks 'baked within it, a limiting condition to explain why the use of force might be justifiable here but not in other locations where people continue to harbour historical grievances about the internationally recognised borders that they have inherited'.[20] In terms of Putin's refusal to recognise Ukraine as an Independent state, they believed that this goes against international norms of the post-World War II international legal order. Their claim is biased and obscure and does not address the substantive issue of instances where Western nations have used force or invaded other countries, such as the United States (US) and the United Kingdom's (UK) invasion of Iraq in 2003 or the Iraq invasion of Kuwait in 1990.

To illustrate my point, Brunk and Haimi pointed out that military intervention is not geared toward changing international boundaries by force. Referring to Iraq's invasion of Kuwait in 1990.[21] This statement also correlates with the UNSC's condemnation of Iraq's invasion of Kuwait.[22] As the facts point out, the UNSC statement does not change anything significantly but rather affirms that Iraq's conduct is in 'material breach' of its duties under international law. Furthermore, Brunk and Hakimi's argument seems to endorse the US-led coalition's use of force under the 'limiting principle built into it'. This element can also be connected to the other controversial use of force, such as the North Atlantic Treaty Organisation (NATO) bombing of Serbia during the crisis in Kosovo (to stop the humanitarian crisis) and the US's airstrikes in Syria (which was justified on the use of chemical weapons by Syria forces). In reviewing these multiple so-called military operations, it is possible to assume they are in accordance with 'the core norm against forcible annexations of foreign territory'.[23]

On the contrary, Kotova and Tzouvala are of the view that Russia's invasion of Ukraine is observed by Western powers as illegible in accordance with their

[19]Brunk & Hakimi (2022).
[20]*Ibid.*
[21]Greenwood (1992).
[22]Resolution 1441 (2002).
[23]Brunk & Hakimi (2022).

interpretation of the use of force.[24] This is partly because there is no significant difference between the Western power's use of force and Russia's invasion of Ukraine. Therefore, the fact that Western powers failed to recognise the connection between their action and interpretation of the use of force in accordance with Russia's invasion of Ukraine may stem from two argument points:

1. The general perception is that Russia's justification for invading Ukraine is to win support at home rather than to please an international audience. In this line of reason, it can be assumed that Russia's invasion of Ukraine is not substantively framed within the so-called international legal principles and doctrinal framework.
2. Western powers seem to frame the principle of international law to suit their idea of rules of law and political preference. In this understanding, it may be assumed that Russia's invasion of Ukraine is indifferent to the Western power's use of force during the 1990s and 2000s.

However, Western states failed to acknowledge this similarity because Russia's invasion of Ukraine undermined their imperial ideology. Therefore, whether we conceive Russian and Western power's conduct as contrary to international law, they both breach society's fundamental principles of ethics and morality. The endeavour to invade a country in the name of any other reason is a violation of ethics and morality. Hence, revengeful war in the quest to repay an injury done to someone should not be a legitimate course of action under international law. Based on the difference outlined here, this article seeks to underline the important roles ethics could play in interpreting the use of force in Iraq and Ukraine. It suggests using the principle of ethics as an important measure to guide against state conduct and the abuse of the use of force. The article is divided into four sections. The first tries to explain the fundamental principles of ethics, while the second one views international law in the conception of subject matter application and practice. The third section looks at Russia's invasion of Ukraine and US/UK invasion of Iraq. And the final part presents a philosophical conclusion on the subject matter.

Fundamental Principles of Ethics

The principle of ethics can be traced back to the ancient Greek 'ethos'.[25] The original meaning of the word is associated with a place of living, but also it encompasses habits, customs and conventions. Cicero translated the Greek term into the Latin 'mores', meaning ethos and customs. Through this, modern thoughts of morality came into existence.[26] Modern philosophers such as Kant categorised ethics as a principle to deal with the question 'What I should do'?[27] In the

[24]Kotova & Tzouvala (2022).
[25]Sattler (1947).
[26]Galloway (2021).
[27]Walsh & Fuller (2007).

contemporary world, most people think of ethics in the form of normative ethics. For instance, they may contemplate it in the form of moral principles in psychology, an experiment involving human behaviour, or even ethnology. However, whether normative ethics is divided into its particles or forms, the basic objective of ethics has been the same ever since the term was first coined in the Greek 'ethos'.

In line with the Greek concept of ethics, their philosophy focused on virtue as a way of life. By approaching the philosophy of ethics this way, they were able to explain patterns of behaviour or attribute dispositions to certain conducts as they emerged, whether right or wrong. In this way, the Greeks saw virtue as rightful conduct; therefore, a man who lived by virtue was deemed fair and just. The transformation of the Greek 'virtue' to the principle of ethics in the modern world is one that requires careful attention.[28] Other authors have tried to deconstruct ethics into a form of utilitarianism or into the technicalities of metaethics.[29] However, none has arrived at a tangible conclusion. All facts point to the foundation of the Greek theories, and only by referring to these classical theories, we are able to offer a better understanding of ethics in its ancient and contemporary meanings.

Observing the Greek approach to ethics, three distinctive points emerge. The first is that Greek philosophers were concerned with living the virtue, and what it is meant to be a good person. This is what they referred to as *eudaimonia* (a state of the mind), as opposed to what was right or wrong in its narrow sense. The second is broader in scope and covers the issue of motives for morality or the fundamental reasons behind a person's quest to do good. This question proved problematic for Kantians and the utilitarians to solve. It is problematic in the sense that observing people's behaviours is different from actions that are based on conduct or other characteristics. One cannot try to understand someone's action, even though one can speculate as to why this course of action occurred.[30] Similarly, one cannot examine these actions without paying attention to the motives of the person. Therefore, one could draw a conclusion by saying the motive was connected with the person's character more than the theoretical proves in modern society. In these distinctive characteristics, ethics could only be beneficial if seen as an independent element of morality. Perhaps this is the point Aristotle was trying to make in his discourse on this topic.

According to the Greeks then, there were three kinds of disposition in a person, and two of them complemented each other. The first two became what they called 'excess' and 'deficiency', and the last was what they referred to as 'virtue'.[31] The Greeks saw all these dispositions as a compound element of the whole, but they all opposed each other at the same time. The upper state contradicted the middle, and in the end, they all conflicted with each other. What does this mean in the modern term? All dispositions are equal to one, and at the same time, they are relatively less to the greater parts. So, when we take the

[28]Striker (1987).
[29]Brandt (1992).
[30]Miller (2014).
[31]Ross (1956).

middle part as excessive relative to the deficiency, the deficiency will be relative to the action, and both may become a passion and an action. For example, for a brave person who acts in a cowardly manner, their cowardice will be relative to their passion and actions. This disposition formulates the cause-and-effect approach in our understanding of ethics in ancient Greece and the modern world.

Moving on, for contemporary thinkers and scholars to conceptualise this idea requires closer attention to the development of the Greek concept of ethics. In essence, the assessment of the ancient Greek theories on ethics goes beyond the classic views of Plato and Aristotle. Moving past Plato and Aristotle will help to demystify how the principle of ethics informs the conduct of ancient Greece and modern society. It will also help us to draw a clear distinction between what needs to be understood or learned to advance legal knowledge in the modern world.[32] For the modern scholar, it is vital to understand the way ancient Greeks viewed ethics as fundamental to their process of constructing laws as a guiding rule for all persons. It will lead them to the inevitable question of moral justification or the basis of all moral rules in society.

Therefore, asking the philosophical question of international law and laws of war should be the starting point for all thinkers and scholars who seek an explanation for the obedience of the law from different perspectives. They must resort to the question, what is virtue? What does it mean to live a good life or what is a life of the good? While asking this question might not necessarily lead to the ultimate answers, it is a starting point. It will help them to complete the puzzle or to understand where the central problem of international law and the laws of war is. The contention here is that one should pay close attention to the examination of the objectivity or the relativity of morality and compliance in the international community. In relation to the points I have made thus far, when we observe the concept of ethics, there is a clear correlation between the modern approach to ethics and the classical approach to good life. However, complexities exist in the development and historical understanding of what ethics means in the law and compliance. Therefore, trying to bridge this complication in the historical development of ethics might help build a good connection between ethics and the concept of the law and compliance in modern civilisation.

The language in the Greek ethical discourse focuses on the concept of life, such as at the beginning of Socrates' discussion in Gorgias (472C-D).[33] Socrates' discourse is about happiness, and how can we live happily? This discourse ignited the good life concept in ancient Greece. Every Greek philosopher who came after Socrates became of the view that happiness was a state of living, which was the object desire of every person. This view can be arbitrary in its theory and practice. Partly this is because it is difficult to predict the happiness of every person, let alone determine the contentment of their life. This means the person does not wish for another life except the one which has been granted to them by their environment. However, these great thinkers saw happiness as the ultimate goal of action for every person. Therefore, everything else became insignificant in this sense.

[32]Vasiliou (2008).
[33]Hardy & Rudebusch (2014).

I will concur with the Greek philosophers that happiness could be the main goal of every person, but what happiness could mean to everyone may differ. This might explain the main reason why modern writers have struggled to contemplate the Greek concept of ethics in modern writing. Life for the modern person encompasses a variety of things, not just living to satisfy happiness. The modern person might live with a desire to achieve their goals or a desire to be successful. So, in these simplistic terms, happiness in a modern person could be explained by a quest to achieve consistent desire in all adventures. Without contemplating the object of desire, how can one be morally or ethically sound in this adventure? This is a tragedy for the modern thinker and scholar. I shall in this endeavour say that it is difficult to conceptualise the Greek concept of happiness as the ultimate goal of every person. It is difficult to see how the actions of a person in ancient Greece could affect their life and how they should live meaningfully as the Stoics advocated.[34]

One cannot contemplate everything for the sake of happiness. However, if this should be the case, then is like telling every single person on this planet to become whatever they want. This is the same as saying if you want to be happy, you should be happy. Now, this is hardly a point that I can reconcile in this article. However, what I can say is that if happiness is the ultimate goal according to the Greeks, then it must encompass all things. This means happiness must be a pattern of life or must be seen as a life to live. Perhaps this might be the reason why the Greeks saw happiness as the good life and happiness as the attainment of the good. Therefore, when it is said that happiness is the main objective of all conduct, what is essentially being said is that happiness is: '(a) that there is a general answer to the question 'What sort of life can count as a good life for humans?' (b) that every human desires to live a good life, and (c) that we do or should plan all our actions in such a way that they lead or contribute to such a life.'[35]

If we can conceptualise this, we can say ethics could be the desire of every person in society. Hence, a good life becomes the desire of everyone. In this interpretation, we could assume that everyone should be taught and should know what is meant by the good life. If this knowledge is attributed to the average person, then we can say everyone knows what is a good life, thus, this good life becomes the ultimate defining purpose of his or her conduct in society. For the ancient Greeks, this knowledge element is important. Its significance can be observed as the ultimate aim of ethics, the defining rule of society.[36] Will this hold water, though? The answer to this question requires careful observation. For instance, it is possible that the average person in society does not desire the good life. Let' us also look at people who engage in a stream forms of other practices. These people may not desire what the ordinary person may want or even they may not contemplate the good life. If we attempt to answer this question in the orthodox path of this theory, we could say such a person is deluded, and may have wrong desires or ideas of what is acceptable in society. How can this be true

[34]White (1979).
[35]Striker (1987).
[36]Rist (2002).

though, when perhaps these individuals' ethics is not an important aspect of their life.

To be specific, Socrates, Epicurus, and the Stoics saw the good life as the ultimate goal and achievement in human conduct.[37] Therefore, whether this is in the contemplation of the person or not, it is important to know this principle so that the person can understand the composition of happiness or the consequence of living an unhappy life. In this sense, the observation of the good life rests on the distinction between right and wrong perception. According to these philosophers, if a person lives a life contrary to the good life, the person suffers a disposition. Perhaps the underlying thoughts of Socrates, Epicurus, and the Stoics may pose a difficult question for the modern philosopher to comprehend. However, if this is the case, then they may have to engage themselves in Greek philosophy on the path of Aristotle. Following this path allow them to adopt the restricted interpretation of the good life, as suggested by Aristotle.[38] Regardless of whichever way we aim to balance this argument, there is a reputable presumption that there is an end to every desire and conduct.[39] This means there is an end to what is called happiness or the good life. If the end call for everything to be neutral and none exists, then the biggest task for ethics is to find what this end is and what happiness encompasses and how we reach this path in terms of law and the application of policy.

Therefore, the point I strongly wish to emphasise here is that the good life gave birth to virtue, and virtue and morality gave birth to ethics. In this conception, ethics should be originally understood in Greek methodology, partly because it explains the various aspects of our contemporary thoughts on ethics and even the continued developments and explanations of the many aspects of our moral principles in the present day. This could be observed as the truth of the matter, and I could add that understanding and correlating ethics to present-day conduct will enable society to be conscious of their conduct and the modes of expressing the action in the face of legal rules and obligations. Therefore, to light the expression of ethics in the contemporary world to dogma is to misunderstand the principal methods and procedures of humans' thoughts and obedience to international law and laws of war.[40]

International Law in the Conception of Subject Matter Application and Practice

Apart from the philosophies of virtue and politics, we also have other forms of philosophy, one of which is the philosophy of law. Though these forms of philosophy can be said to be interconnected and interdependent, the only distinction here is that the philosophy of law is said to belong to the realm of practical reason. Therefore, practical reason has been an important element of

[37]Long (2006).
[38]Sellars (2018).
[39]Nartey (2023a).
[40]Nartey (2023b).

many natural law theories for the past centuries because it helps deduce an adequate explanation of the concept of law. Aquinas wrote of 'an ordinance of reason for the common good, promulgated by him who has the care of the community.'[41] While Cicero observed: 'the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. This reason when firmly fixed and fully developed in the human mind is Law.'[42] Hooker was of the view that 'a law therefore generally taken, is a directive rule unto goodness of operation. The rule of voluntary agents on earth is the sentence that reason giveth concerning the goodness of those things which they are to do.'[43] Vico, on the other hand, was of the view that natural law was based on the concept of human reason as 'human jurisprudence, which looks to the facts themselves and benignly bends the law to all the requirements of the equity of the cause.'[44] Finnis, a modern theorist of natural law, observed in his work, Natural Law and Natural Rights (1982), that the real meaning of the law was 'reflectively constructed by tracing the implications of certain requirements of practical reason, given certain basic values and certain empirical features and persons and their communities.'[45] Perhaps what all these authors have in common is where natural law and practical reason meet as one; for where we are yet to know the effect and the course that produced an outcome in society, a practical methodology must be adopted. Natural law may be commanded by the process of practical reason; this is partly because that which is contemplated in practice acts as the cause in the operation rules.

Consequently, for us to understand the true patterns of practical reason in the indication above, we must first examine the cognitive level of activity in a person. This cognitive structuring of action is what we may call practical reasoning. In this sense, the concept of natural law is closely connected to practical reasoning.[46] In this observation, it is legitimate to point out that Finnis' work seems to be taking a contrary position to natural law theories. This approach or contention creates difficulties as well as opportunities to rethink the concept of practical reasoning as the foundation of natural law.[47] However, it is also reasonable to assume that practical reason becomes the philosophy of practical reasoning. The main idea behind this conceptual statement is that the practical reason is concerned with the demystification of problems in their full universality. Therefore, when practical reason is used to deduce the characteristics of phenomena, the method is composed of a reasonable dialogue and decision-making by the person.[48] However, this dialogue and decision-making are shaped by the person's free will or freedom to take a particular course of action, which shapes their views and commitment to society.

Nevertheless, approaching the philosophy of law as a sole method in its own nature is liable to abstraction and gives only a little substance to the reality of

[41]Luizzi (1982).
[42]*Ibid.*
[43]*Ibid.*
[44]Vico (2015).
[45]Finnis (2011).
[46]Fitzgerald (1982).
[47]Crowe (2011).
[48]Raz (2009).

things which must observe the law. I will observe that to resolve the nature of the practical reason into a universal purpose of the philosophy of law is to go further into the nature and purpose of the law.[49] In this sense, the concept of practical reason becomes less important. This is partly because of the universal purpose of the philosophy of law, as the form and substance become the object of attention. This approach might help us to conceptualise and change concepts, and deduce simple actions to methodological terms. When we move practical reason to the law of dynamics or the law of movement, forms and substances are the figments of the philosophy of law unless we agree practical reason is the sole methodological explanation of the universality of the philosophy of law. This agreement in itself is problematic because in order for this to hold true we must first find out the most important elements of practical reason, which can effectively provide an explanation for the closeness of substance to the reality of things which must observe the law.

Let us take a close re-examination of Finnis' point. According to his observation, there are some basic elements of good in human nature.[50] Therefore, it is possible to assume from Finnis' point of view that the basic elements of good in human nature bring forth the basic principles set in natural law, and both the elements of good and the principles can be noted in practical reason. A point of caution to be noted here is that the basic elements of good in human nature, according to Finnis, are problematic. The reason is the absoluteness of his point on the basic elements of good in human nature in practical reason is ambiguous, and it does not explain exactly how these elements are either achieved or inform the processes of practical reasoning.[51] What is fundamentally important for Finnis to have noted is that there are and can only be two ways of searching into and discovering the true nature of the philosophy of law. This is derived from the nature of a person's mental conduct and the particularities that lead to general decision-making. The mental conduct and general decision-making are also informed by the elements of good in human nature, the ethics by which it abides by, and the social dynamics which influence personal judgement and the ability to discover the true nature of laws or legal principles in societies. In this way, we can say the philosophy of law is fashionable. If this fashionability is deduced, we can say the philosophy of law derives practical reasoning from ethics and the substance of the law, rising gradually and unbroken through the generations. Therefore, we may arrive at the absoluteness of all theories of law. That is the true understanding of the relationship between law and conduct.

Therefore, instead of seeking to explain international law and laws of war in some abstract language, it needs to be studied and understood from a historical, ethical and integrity perspective rather than through the lens of liberal political discourse.[52] From this point of view, the modern discourse and approach to international law and laws of war theory have not resolved the fundamental issues concerning powerful individuals, state relations and multinational corporations'

[49]DCL & George (2013).
[50]Bix (2010).
[51]Finnis (2007).
[52]Johnston (1996).

operations in the international arena. Likewise, liberal political theory has failed to explain how autonomous and independent entities can come together to support the common good of humanity, in other words, to ensure the respect of international law and human rights in all spectrums of life.[53]

Furthermore, the question is not autonomous and independent of the state; it is rather the collective responsibility to realise the common goal of peace and security.[54] It may be assumed that international law and laws of war can be realised through collective responsibility and the realisation of the universality of human dignity by all nations. It is the lack of collective responsibility that the nature of international law and laws of war fails because the parties to its principles are deficient in its rational nature. The state is naturally the principle of its conduct and actions, its obligation and will. This means the full realisation of international law and laws of wars must also be seen through this metaphor. International law and laws of war cannot be abstract from its application because the definition depends on the whole. When observing international law and laws of war, the whole (which includes moral principles and states) consists of components that make the realisation of international law possible. Such components include ethics and social structures, without which the realisation of international law and laws of war becomes difficult. Thus, it is conceivable that patterns of change in international law and laws of war, belong to two concepts. The first is what is causing the changes, and the second is what is changed by it. In this view, we may assume international law and laws of war itself is one thing that is abstracted from different perspectives, whereas states' actions and behaviours may differ because they include different considerations and motivations.

Grotius, based his theory on a system of positive law, rather than universal moral principles or natural law principles.[55] From this point of view, he argued that his approach to the system of law was justified by its universal application. Regardless of God's precept as the Divine existence, his system of law holds. He put forward this argument in *De Jure Belli ac Pacis* (1625: para. XI). This argument is not plausible in its conception, as law cannot exist without effective application. This means that the intersection of all laws rests on the Natural Order of all things, which is the natural state of all laws. Therefore, knowledge of law does not only concern the social structures and human conduct; thus, nothing can be known, save what is in natural law. For all law is inspired by Divine Order, because it teaches society how to live, it corrects conduct, and it instructs justice.

Now, if the law is Divinely inspired, then international law is part of natural law, which is also built from human reasoning. In this conceptual understanding, it is useful to assume that besides the so-called positive law, there should be another element of the law of which we should be aware. This is what I shall call Divinely inspired law, in other words, the principles of ethics and integrity through the lens of natural law. It, therefore, is premature for Grotius to have assumed or contemplated the exclusion of natural principles in law. This exclusion means his theory has overlooked ethics as components of international law and laws of war.

[53]Carty (1991).
[54]Thakur (2016).
[55]Ortiz & Medina (2022).

This is also premature because ethics define the relations of law or the human relations between law and conduct. This is partly because human behaviours and conduct, as good or bad in the absolute sense, are defined by the principles of ethics and morality. In this conception, international law and laws of war must distinguish from a relative or an abstract theoretical concept and the sense of that which is good and that which is not good. As space cannot exist without solid matter, so the law cannot exist without ethics. Likewise, as light cannot exist without darkness, so can be said for the relationship between international law and ethics and states.

On second thought, Grotius's theory created the universal concept of international law, which is separate from Christian beliefs, thus, making his theory more inclusive.[56] As a result of his theory, many leading scholars were able to make contributions to the doctrine of international law, including Pufendorf,[57] Kant,[58] Hegel,[59] and Bentham.[60] The two leading scholars in the 20th century, Kelsen[61] and Hart[62], dedicated much of their attention to studying international law, as did Bernstorff.[63] Nonetheless, it is possible to assume that the study of international law over the years has been overlooked by Anglophone legal and political scholars and the crucial study of international law philosophers who might be able to make an important contribution to the philosophical discourse has also been limited. In addition, the rapid expansion of globalisation has led to a search for a new system of governance that might have the ability to oversee states' activities and conducts over a diverse spectrum of governmental matters. Globalisation and the diverse spectrum of governance matters led to the development of treaties and conventions on the issue of states' relationship with each other and human rights issues.[64]

In essence, it is possible to assume that from this development international law has been extended to cover new subject matter, including states' relationships with each other, individuals and the states, multinational corporations, migration, human rights, environment, climate change and sustainability, and economic and workers' rights, etc. Therefore, we can reach the conclusion that the new international legal order may be conceived as an 'international rule-based order'. However, this 'international rule-based order' has also given rise to the transposition and the imposition of powerful states' ideas onto the Global South. Nonetheless, this action should not be encouraged or elevated as a principle that must be accepted as a rising norm. An assumption may be reached that the populist forces in Western Society are hostile to international law, specifically when it comes to the totality of international law and the universality of human

[56]Nussbaum (2019).
[57]Von Pufendorf (1991).
[58]Teson (2018).
[59]Kadelbach et al (2017).
[60]Janis (1984).
[61]Kelsen (2003).
[62]Hart & Green (2012).
[63]Von Bernstorff (2010).
[64]Berman (2004).

rights in all states.[65] Also, the expansion of international law may be seen by others as a threat to the liberal foundation of national sovereignty. I am of the view that international law as a Divine order, driven by natural law and informed by ethics, is neither threat nor hostile to the sovereign rights of the people. What are a threat and hostile is the transposition and imposition of an abstract view on law and the governance of nations. Law as Divine or natural is never diluted or compensated, meaning the law serves the people and serves its purpose.

For the true purpose of the law, one must observe its naturalness and its universality without discrimination as to what is fit and what interests. That this means the realisation of international law must not be subject to the interpretation of powers states but should be subject to the confirmative of Divine principles. Therefore, anything that is contrary to the naturalness of international law is not founded on the absolute or the universality of ethics. I will conceive that international law has twofold nature: ethics and integrity. Since, it is through the operation and the manifestation of this that states accomplish or attain good conduct. Hence, it is possible to assume that in the present day (21st century) more states are inclined to follow international law than those that follow it because international law in its form lacks ethics and integrity. Resulting in discrimination and unequal treatment of the inferior state. Therefore, whatever the deficit in international law, it is unnatural for populist forces in Western society to seek to redesign an international legal order that fits their agenda. To resolve this issue, international law needs to be compared to the order of human reasoning and human dignity, as the parameter for interpretation of the philosophy of international law in ethics and integrity.

Having said that, the current study of international law seeks to address some of the vast and difficult questions. These questions can be respectively grouped into categories of two, but the conceptual boundaries between them are not big. The first theoretical question is whether international is an aspect of the law, in other words, if it is indeed law and, if it is, how is it connected with national law and individual states; there is also the theoretical question of the discourse of international law and how key ideological principles are implemented in the international spectrum, whether this ideological principle is general, for example, the principle sovereignty of state or legitimacy of international law or theory of international legal doctrines and sources such as customary international law, *jus cogens*, and the principle of human dignity. The second question relates to the aims and objectives of international law or the conceptual parameters of international human rights law,[66] international environmental law,[67] and international criminal law.[68] Should these laws be advanced and realised or is there an effective mechanism to realise these laws? The other aspect relates to the legitimacy of international law, how is it accessed, and whether is it equally applied and observed by all states. However, the underlining issue of both questions is to what extent the principle of ethics and integrity is fashioned to

[65]Alston (2017).
[66]De Schutter (2019).
[67]Shelton (2021).
[68]Cryer, Robinson & Vasiliev (2019).

examine national law and politics, for instance, the doctrine of democracy, the rule of law and how legitimacy is applied to international law.[69] Nonetheless, the philosophy of international has neglected the role that ethics play in its nature and forming. By neglecting the role of ethics and integrity in the philosophy of international law, we are rejecting the exact norm that instructs or tells states' conscience what good conduct is, and which is not good conduct. Regardless, international law is not just about a concept that expresses the doctrine of ethics, for example, a principle that encompasses the question of the absolute doctrine of moral duty. So, ethics are also specific to the question of transparency and equality in international law. Therefore, from this point of view, international law is that of command because what is absolute about it is first of all its possibility to be effective or to oblige states to act in a certain way.

To further complicate matters, scholars and thinkers have observed two key characteristics of international law that create a fundamental gap in its application, the first is the lack of a centralised system of enforcement and the second is the consent of the state in the formation of rules of international law.[70] However, some scholars seem to acknowledge that despite this fundamental gap, international law has features and characteristics of law, therefore, all disputes understand that international law follows a genuine legal principle and order.[71] I am of the view that regardless of the centralisation of the system of international law and the consent of the state in the formation of rules of international law, if the issue of ethics is not addressed, regardless of the answers to these questions international law may not serve its fundamental purpose. To put it very concisely, ethics illustrates our knowledge of the natural order of international law as created or form by the universal good of humanity. Therefore, the formal object is what makes the natural order of international law absolutely relevant with respect to the universal good of humanity. I used the word absolute relevant with respect to the principle of virtue as the latter formed ethics. With respect to ethics and integrity, every element of international law is important in an absolute sense, however, it is also more or less important in regard to the hierarchical order of its observation and implementation. In essence, it is clear that the modern approach to international law so far is yet sufficient. This is partly because we do not have the fundamental principles to ensure its effectiveness or the perfect autonomy, so that its realisation can be known by all states. In this understanding, we may assume that scholars and thinkers are still observing international law from an extrinsic point of view.

This can also be true about politics at the international level. For politics at the international level to serve its purpose, it too must originate from the recognition of ethics. Ethics may underline the unique encounter of states' relationship with each other. It derives from a primordial and original consent that has its composition in the constitutive and developmental aspect of virtues, which the universal value of international law and its authority depend on. In the modern world, the primordial consent of international law may be given by specific kinds of constitutional agreement that may be derived from customs, norms and the

[69]Buchanan (2008).
[70]Nartey (2021).
[71]Hart & Green (2012).

universal good of humanity. As the outcome of individual human dignity and rights that approved them. This conception of customs, norms and the universal good of humanity itself too are unique and individual from the start of our understanding of international law and cannot be understood outside the context that depends on them and gives the law its truthful meaning. From this point of view, the understanding of ethics concerning international law is certainly an important point to consider in the contemporary world. Therefore, as a matter of fact, the true meaning of international law remains inseparable from the ethics that produced them.

International law is the composition of doctrines, rules and customs that can regulate the conduct of States and international organisations in their relationship with each other in the international spectrum. Therefore, the principal objective of international law may be seen as the doctrine of governance, meaning a system of rules that regulate conduct between all groups, private individuals and multinational corporations.[72] However, the contemporary study of international law views it as a system of rules that regulate certain particularities, and historical events that have happened across a vast spectrum of time, such as the First World War and the Second World War.[73] In essence, this point of view may seem to illustrate that international law is the result of the transposition of basic political ideas and theory into hard and soft law. While there is an element of truth in this conception, it is not adequate to claim that international law is the emergence of political ideas or theories, as the modern study of international law claims.[74] Perhaps, this view from modern legal scholars might be accepted if we seek to steer the discourse of international law into the field of international relations. However, if this is not the case, then international law remains the composition of fundamental rules and principles of society, and that means going back to examine the rules and principles prior to the compound nature of modern dialectical theory between positivism and the natural conception of international law.[75] In this understanding, it must be noted, if the study of the law according to its precept does not encompass effective application and retribution, it is not competent for us to expound on its usefulness, and that which is not useful to society is neither effective in implementation nor enforcement. Therefore, for international law to hold its value, states must not have the power to dispense with the laws. In essence, it seems to me that international law must obtain the absolute force of law and should abolish conducts that are contrary to cooperation and human dignity.

Therefore, just as international law is not distinct from political theory, and political theory is not distinct from international law, ethics is not distinct from international law and political theory. Notably, there is a causation between international law, political theory, ethics and integrity. This is partly because it can be assumed that all these concepts may have their natural characteristics in the principle of virtue. The concept of international law has this characteristic in its nature, in as much as it flows from the first principle, which is morality or virtue.

[72]Wallace & Martin-Ortega (2020).
[73]Lesaffer (2004).
[74]Carty (1991).
[75]Carty (2017).

Although international law in itself, has yet to direct all conduct in the international arena, it has the capacity to rule by the first precept (virtue), thus its force is contained under ethics. In this conceptual understanding, the question is whether general customary law has the primary force to impose obligatory consensus among states, or does the states have the ability to circumvent their obligation under international law.[76] This is a puzzling question that is yet to be addressed by many, and what I mean by many is that the practicality of international law is slowly diminishing in the contemporary world. This is partly because globalisation has set the quest for economic maximisation and exploitation, which have led to incoherent and fragmentation of the governing principle of the new world order. In addition, the gradual loss of the dominance of world powerful nations has created insecurity and competition, which is leading toward proxy wars and dismissing of international law. However, the custom of international law cannot be changed either in its nature or in its natural form, as a composition of natural law. Similarly, compositions of bad action or conduct do not make one good. However, the person who initially violate the law broke the law. Hence, by trebling such conduct, nothing good comes out of it. It may be assumed that international law is something good since it is a rule of state conduct. Therefore, the custom of international law cannot be changed or abolished by states, so the custom of international must obtain the force of law.

Russia's Invasion of Ukraine

Those, who throw contempt on the customs of a people, disobey the international law or rules governing international relations. For illustrative purposes, the behaviour of some Western countries, such as with the invasion of Iraq[77] and Russia's invasion of Ukraine may be contempt of international law and laws of war.[78] According to the late Kofi Annan, the Iraq invasion 'was not in conformity with the UN Charter. From our point of view and from the Charter point of view, it was illegal.'[79] In regard to this statement, observing the legal position of Kofi Annan's statement concerning the Iraq invasion. There remains the legal question of whether the invasion of Iraq and the stationing of the foreign troops in Iraq was lawful, as well as questions on the violations of international humanitarian law by both Iraqi and foreign forces.[80] This can also be said about the 2022 Russia's invasion of Ukraine.

To put it another way, Kotova and Tzouvala[81] believe that both Russia's evasion of Ukraine and Western country's application of the use of force constitute an 'imperialist logic', according to Chehtman.[82] If we adopt a comparative

[76]Tunkin (1993).
[77]Yoo (2003).
[78]Cecire (2014).
[79]MacAskill & Borger (2004).
[80]Patel (2004).
[81]Kotova & Tzouvala (2022).
[82]Chehtman (2023).

analysis here, it may be assumed that this claim correlates with Russia's evasion of Ukraine and Western application of the use of force. In this sense, we can conclude that the authors believed that 'the international legal order will have to be anti-imperialist, or it will not be at all'.[83] This argument is not plausible and does not adequately examine the comparative factors underlining Russia's and Western application of the use of force. It is also flawed because even though Russia's invasion of Ukraine and the US/UK invasion of Iraq may constitute a violation of international laws, both conducts should be examined from a different perspective. Therefore, the idea of imperialism may not suffice, but what should be fundamentally examined is the cause and effect of both wars. From a legal point of view, this will mean the extent and the gravity of the harm and the result of the suffering as the result of wrongful conduct. This is not to say imperialist doctrine and conduct may not cause harm to humanity; its harm may be derived from the extensive use of force and the extent of the application of the force to achieve one's aim. Therefore, in order to arrive at the conclusion of discourse on Russia and Western use of force, there is a need to consider the different spectrums and the interplay of wrongful conduct.

To demonstrate one's point, the principle of ethics, which concerns the compound nature of a person's conduct without exceptions. Ethics in the compound nature of a person's conduct is significant to their decision-making and choices (action or inaction). It can also be assumed that ethics in this instance affect the person's behaviour, shaping their conduct and the world.[84] Kotova and Tzouvala[85] assume the state of affairs without absorbing the true nature of the application of force by Russia and Western nations. It does not consider the issue nor confront each problem precisely in so far as the conduct of both nations are concerned.

To address this query, it is important to answer the question of whether military intervention in Iraq was legal. This requires one to go back to the Charter of the United Nations (UN), to study the general prohibition of the use of force in international disputes or relations in Article 2 (4).[86] Likewise, the Nuremberg War Crimes Tribunal established in 1946, stated categorically that '[a]ggression is the supreme international crime'.[87] In addition, the spirit of the UN Charter stress solving the dispute in a peaceful and cooperative means.[88] Specifically, the preamble of the UN Charter also stated that there is a need to 'save succeeding generations from the scourge of war'.[89] Furthermore, there are also other norms outside the UN Charter in customary international that prohibit intervention and

[83]Brunk & Hakimi (2022).
[84]Gössling (2003).
[85]Kotova & Tzouvala (2022).
[86]Article 2(4) states that '[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State'.
[87]International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, vol 1, 186.
[88]UN Charter Arts 2(3), 33.
[89]*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US (Merits)* [1986] ICJ Rep 14.

the use of unauthorised force in the dispute.[90] However, not only the UN Charter or other norms prohibit intervention and the use of authorised force in dispute resolution, the International Court of Justice in its decision on *Nicaragua* also affirmed this position,[91] as well as years of state practice.[92]

In this point of view, it is possible to conceptualise that international law proceeds from reason and customs of society, of which ethics inform its obedience. Ethics and integrity drive international law, and this regulates state compliance and conduct. Now just as ethics, in practical conception, may manifest in obedience to the law, they may also be known and recognised through state conduct. Since the state's conduct is driven by its ability to choose between good and bad conduct, in this understanding, the US, UK and Russia's conduct does not proceed from customs or international law; they failed the test of its principles. However, the same reason remains, in which the law is useful; if this is the case, then it is not the custom that prevails against the conduct, but it is the law that overcomes the custom unless perhaps the only reason is for the international law to seemingly be redundant. Therefore, it seems to me that the US, UK and Russia cannot dispense from international law or customs. This is because international law is established for the common good. In this sense, the common good cannot be set aside for individual objectives or private gain.

In regard to Russia's invasion of Ukraine, the fundamental question that most scholars have failed to answer is the nature of the rule breached, for instance, the acquisition of another country by force. This same question may be applied to the US/UK invasion of Iraq.[93] In comparison, it may be argued that the breaches of both wars are the same, but the substantive output may differ at the intention level. However, it is also vital to point out that, as the law demands, substantive limitation is not ingrained in justifying the use of force. This failure is one of the substantive factors that give rise to the use of force by the states. Therefore, it may also give rise to unjustified use of force by the state in the future. It may be pointed out that an ethics code is required for the use of force by states. This ethical code

[90]*Legality of Use of Force (Yugoslavia v Belgium) (Provisional Measures)* [1999] ICJ Rep 124; *(Yugoslavia v Canada) (Provisional Measures)* [1999] ICJ Rep 259; *(Yugoslavia v France) (Provisional Measures)* [1999] ICJ Rep 363; *(Yugoslavia v Germany)(Provisional Measures)* [1999] ICJ Rep 422; *(Yugoslavia v Italy) (Provisional Measures)* [1999] ICJ Rep 481*; (Yugoslavia v Netherlands) (Provisional Measures)* [1999] ICJ Rep 542; *(Yugoslavia v Portugal) (Provisional Measures)* [1999] ICJ Rep 656; *(Yugoslavia v Spain) (Provisional Measures)* [1999] ICJ Rep 761; (*Yugoslavia v UK*) (Provisional Measures) [1999] ICJ Rep 826; (Yugoslavia v US (Provisional Measures) [1999] ICJ Rep 91.

[91]*Ibid.*

[92]Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA Res 2131, UN GAOR, 1st Comm, 20th sess, 1408th plen mtg, UN Doc A/RES/2131 (21 December 1965); Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res 2625, UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (24 October 1970); Resolution on the Definition of Aggression, GA Res 3314, UN GAOR, 6th Comm, 29th sess, 2319th plen mtg, UN Doc A/RES/3314 (14 December 1974); International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, as contained in Report of the International Law Commission on the Work of its 48th Session, 6 May – 26 July 1996, UN Doc A/51/10 (1996).

[93]Tuathail (2003).

may give effective meaning and virtue to the use of force by states. For instance, could the issue with the forcible annexation of Crimea[94], Libya and Iraq intervention be justified under ethical code? Perhaps this is an argument that requires further consideration.

However, in regard to the forcible annexation of Crimea, there are two possible implications in relation to the focal point of international legal order. The least credible justification is the rule regarding the rights of states to protect their territorial borders. Nonetheless, this may not suffice in Russia or the US/UK case. However, if we examine the states right to protect its borders, deficiencies become apparent. This is partly because states' justification is based on unethical and illogical values and historical processes, which may involve colonialist, discrimination projects and imperialist propaganda. In this sense, it is possible to assume that the rights of states to protect their territorial borders is not the most important justification for these wars but an interest that is derived from the values, rights and ambition of their leaders. This is an illogical and illegal utilisation of the use of force. Thus, the appropriate justification is a decision that is derived from the fundamental rights of humanity and the universal interest of the citizens. From this perspective, it is possible to argue that the precept of international law does not allow illogical and illegal justification for the use of force as a defence for existing international borders for the sake of US, UK or Russia.

Having said that, there are also two or three possible exceptions to the general rule of using force in dispute resolution. The first is that states can use force in self-defence, the second force can be used when the UNSC authorises it, and the third is about the use of force to protect vulnerable foreign populations from systematic and gross human rights violations, which may be justified on humanitarian ground, such as humanitarian intervention in the case of Rwanda and Kosovo.[95] However, it is important also to point out that humanitarian intervention without authorisation from the UNSC may amount to an unlawful use of force. Nonetheless, a plausible argument arises regarding the legitimacy of this authorisation, and the basis of the UNSC decision-making should be questioned in fact and law.

In effect, the disparities in the UNSC authorisation of the use of force or the disregard of the fundamental principle of international law by the world's powerful nations may unleash additional conflict in future. Therefore, we should be concerned about states' justification for using force, legally or illegally; war due to territorial disputes should not be tolerated under international law. While the effect of Russia's invasion of Ukraine is yet to be realised, it may be assumed that this act, in conjunction with the US/UK breach of the *jus ad bellum* in Iraq, may lead to further wars in future if the current approaches and states attitude toward the use of force is not reviewed. Therefore, if the international community is serious about preventing wars, international law should have equal application and condemnation. In particular, the US/UK invasion of Iraq received insufficient condemnation in contrast to the substantial sanctions and isolation that Russia received. Russia's

[94]Saluschev (2014).
[95]Simpson (2005).

invasion of Ukraine is similar to the US/UK invasion of Iraq,[96] therefore, both should be strongly condemned in law and ethics.

It is also obvious that the US/UK invasion of Iraq has played a significant role in state abuse of the use of force, which may have paved the way for the invasion of Ukraine.[97] Therefore, it is possible to assume that the lack of criticism and coordinated response to the US/UK invasion of Iraq may have weakened the foundation of *jus contra bellum* norm in a similar manner compared to Russia's absurd, banal and illegitimate justification of the use of force against Ukraine. This is a rather unfortunate, disgraceful and disrespectful way of using international law or customs to fulfil one absurd, banal and illegitimate aim. Therefore, none of the exceptions or the arguments put forward to justify the war on Iraq and Ukraine is valid or merits consideration. It also violates legal norms established by international doctrines and customs over the years.

Likewise, the UK Attorney General declined to support the argument put forward by the US as the basis for military intervention in Iraq, which is basically a statement that creates a foundation for pre-emptive self-defence.[98] This is also absurd, banal and illegitimate justification of the use of force against the Iraqi people. In this understanding, international law, as it contains general precepts, may not fail, hence, does not allow dispensations. In other conceptions, however, we may draw a conclusion of the general precepts, meaning a dispensation may something be granted, for instance, in self-defence or something similar. Nonetheless, in international law, each state stands as a private person to the public law to which they are subject. Therefore, just as no one can dispense from public law, except the principles from whom the law derives its authority, so in the precepts, international law is absolute, and no state can be dispensed.

In this observation, it seems to me that international law in its current form is not common law for all nations. This is partly because it will seem that not every conduct of states is derived from international law. At the outset, this may be because states, for various reasons, may intentionally violate international law or unintentionally breach the general principle of international law, either for political or economic reasons. Therefore, international law may only be called common law for all nations if the legal justification for state action is that which fundamentally is a matter of indifference. Thus, the conduct that arises from state action should not be a matter of indifference to international law. Therefore, states' conduct and action should be derived from international law and customs. That is to say, the conduct and actions that flow as the conclusion from the general principles of international law belong to obedience to the law, thus, encompassing ethics. Hence, that which is established by international law or customs must be respected by all states, in order to give it meaning. In this understanding, any argument for military intervention must be a mode of derivation found in international law, customs and doctrine. Therefore, that which should be derived from the first instance should contain the totality of international law and customs not emanating

[96]Kramer & Michalowski (2005).
[97]Krisch (2022).
[98]UK, Parliamentary Debates, House of Lords, 21 April 2004, vol 660, pt 70, columns 369–76 (Lord Goldsmith, Attorney-General).

from the exclusive power of some so-called world superpower and must also have the force of international law. However, the conduct and action which are derived in the secondary matter, have no other force than the principle of ethics. On this observation, I will argue that the Iraq invasion was illegal and there was no legal basis for such a decision in law. I will also observe that the decision violates the common principle of ethics and, therefore, lacks virtue.

The 2022 Russia's invasion of Ukraine breaches Article 2(4) of the UN Charter, which 'prohibits the threat or use of force and calls on all Members to respect the sovereignty, territorial integrity and political independence of other States.'[99] Likewise, Russia's Permanent Representative to the UN advised the UN Secretary-General that the military action taken against Ukraine is 'taken in accordance with Article 51 of the UN Charter in the exercise of the right of self-defence.'[100] In justification of Russia's action, he explains Putin's speech to the Russian population before the invasion.[101] After the speech, he transferred the notification to the UNSC (UN Doc. S/2022/154), which led to an 11-1 vote to condemn Russia, with China, India, and the Arab Emirates abstaining. Russia notifying the UNSC complies with the requirement of reporting action under the principle of self-defence. Thus, the fundamental issue here is whether Russia's military action is a lawful exercise of self-defence under the principle of customary international law.

To establish the lawfulness of Russia's action, two key criteria need to be satisfied; the first, the necessary condition that gives rise to the conduct of self-defence is an 'armed attack'. The second is the use of force in response to the armed attack, which could be individual or collective. The latter could be exercised in collaboration with the injured state or on behalf of the entire state. Furthermore, international law recognises that states need not suffer an attack before taking lawful action to defend themselves against forces that pose an imminent danger of attack. Legal scholars and international jurists also believe that a visible mobilisation of armies, navies, and air force preparation to attack may trigger self-defence. In critical observation of these points of view, it is clear that Russia's action does not satisfy any of these requirements.

Therefore, the claim by President Vladimir Putin and other Russian officials that military intervention in Ukraine is justified under Article 51 of the UN Charter has no tooth or support in fact or law.[102] It also demonstrates an obscured, banal and cagey approach to the interpretation of Article 51 of the UN Charter and the justification of military intervention in the 21st century. The general principle of international law cannot and must not be used as a justification for bloodshed, regardless of how states may or may not feel about each other's conduct and action.[103] War has no virtue, nor morality and human dignity cannot be observed under military intervention. Consequently, I may argue that if we are to truly observe international law, we may reach the conclusion that the general principles

[99]Article 2(4).
[100]Schmitt (2022).
[101]Putin (2022).
[102]Chachko & Linos (2022).
[103]Kelsen (2003).

of international may not permit war or acts that may lead to the destruction of social structures and human dignity. It may only be possible if ethics no longer become the substance of international law. Even in this conception, we may, thus, say international law has lost its validity, as it cannot obtain its true value without ethics.

In this conceptual understanding, the general principle of international (in this instance, I am referring to the UN Charter) law cannot be applied to all military interventions or wars in the same way on account of the great varieties of state military operations. Simply, because war violates human dignity, it breaches the principle of ethics. Hence, international law must not be a tool for war except in some exemptional circumstances where there is a risk of gross human suffering or an imminent attack on a state or civilians. This is because it serves to preserve the relationship between states and maintain the respect of human dignity. International law is to be understood as rules that determine the extent of cooperation and respect of human dignity, on which determination must be judged against ethics and integrity, which is based on moral principles. It thus, seems to me that international law should be a frame not for a justification for military action, but rather for cooperation and protection of human dignity. Based on this understanding, I will argue that both wars were wrong and violated the basic principles of international law.

Furthermore, Article 51 provides 'nothing in the present charter shall impair the inherent right of individual or collective self-defence, if an armed attack occurs against a member of the United Nations.'[104] In relation to Article 51 and Russia's invasion, under no circumstance may we conceive Ukraine committing or threatening the security of the Russian state or, as a matter of fact, any of the other UN member states. Therefore, Russia's claim of self-defence is an illusion and false interpretation of Article 51.[105] Likewise, it is possible to assume that Article 51 is framed as a rule or measure of state conduct. Hence, the only conclusion one may draw from Russia's action is due to its interior behaviour or disposition, since the same thing is not possible for a person who has no virtue or has not had a virtuous habit, as this is possible for another person to have it. So, it can also be said about the US and UK invasion of Iraq on 10th March 2003.[106] Therefore, international law aims to lead the state to collective responsibility and virtue, not suddenly but gradually. While international law does not lay upon the majority of states the burden of those who are already virtuous, it definitively seeks nations to abstain from unvirtuous conduct. Otherwise, less powerful states may not be able to bear the precepts, and they in turn, may break out into greater conducts that are contrary to the good or the spirit of the Rule of Law. Thus, the law which is framed for nations must be allowed and must not leave unpunished all conducts that are punishable under international law and customs. In this understanding, if the general principle of international law does not attempt to address the issue of cooperation and respect for human dignity, then this is the reason why it should be

[104]Article 51 of the UN Charter.
[105]Grossman (2022).
[106]Lowe (2003).

blamed for what it does not do.[107] For the true form and substance of international law, must prohibit and forbid everything that violates the principle of cooperation and human dignity, without the endorsement of military intervention.

Additionally, even if Russia could demonstrate that Ukraine had violated international law or planned to attack the Ukrainian regions of Donetsk and Luhansk, Article 51 may not cover such action in the principle of collective self-defence. Likewise, Putin's claim that Ukraine has committed genocide against Russians in Donetsk and Luhansk will not suffice under the Genocide Convention.[108] Again this illusion and misinterpretation of international law, therefore, a possible conclusion here is that Russia seeks to justify its invasion of Ukraine by using the word "genocide" as a means of violating international law. However, even though the approach used by Russia may differ, the fundamental principle is similar to the US and UK justification for military action in Iraq in 2003. Both are legally and morally wrong. International law in these circumstances does not prescribe acts that violate cooperation and human dignity. However, states do not prohibit conduct that violates the principle of cooperation and human dignity. Therefore, neither states prescribe all conduct that a deem compatible with the principles of cooperation and human dignity. In this conceptual understanding, it seems to me that international law in its present state and form does not bind states in conscience. For inferior states has no jurisdiction in a state of a higher power. However, the higher power state, which frames international law is not beneath the principle of the Rule of Law, ethics and integrity. therefore, powerful states cannot impose their precept on international law.

By way of illustration, Convention on the Prevention and Punishment of the Crime of Genocide states under Article II that

> 'G*enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
>
> *a. Killing members of the group;*
> *b. Causing serious bodily or mental harm to members of the group;*
> *c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
> *d. Imposing measures intended to prevent births within the group;*
> *e. Forcibly transferring children of the group to another group.'*[109]

Examining Article II against Russia's claim shows there is no evidence that Ukraine has engaged in such conduct or crimes defined under the Convention. Likewise, there is no evidence to show Ukraine intended to destroy the entirety, or any part, of Eastern Ukraine, as alluded to by Putin. However, if the government of Ukraine had committed human rights violations against the Russian people in

[107]Degan (1997).
[108]Quigley (2016).
[109]Article II Convention on the Prevention and Punishment of the Crime of Genocide.

Eastern Ukraine, these human rights abuses may not amount to a crime as defined by the Convention or the violation of UN Charter, which may permit member state to take military action to remedy the genocide or serious breaches of human rights if the UNSC authorises it. Therefore, Russia's intervention violates the principle of ethics in international law, but so can be said about the US and UK's intervention in Iraq. This argument is true for conducts that are contrary to the general principle of international law, which goes beyond the power of states. Hence, in such a matter, international law should be respected and obeyed. This argument is also true for the conduct that inflicts unjust harm on its subjects. Likewise, the 21st-century approach to international law may help one to assume that not all states are subject to the principle of the Rule of Law. Therefore, international law has created bias or partiality, whereby only a few are subject to the law for whom the law is made. However, I will argue that the law is not made for only the smaller states, but made for all in its totality. It is therefore evident that, as regards the general principle of international law, whether speculative or of practical reasoning, truth or virtue, it is the same for all, and it is equally known and applied by all.[110]

Now, this is not true for the majority of cases in the contemporary world, when it comes to the respect of international law and human rights. Consequently, we must assume that international law as a general principle is flawed and requires improvement. However, as to the issue of respect and application, we can say the general principle of international law is the same for a majority of cases. However, international law may fail to exhibit itself due to the nature and manner in which it is constructed. Therefore, where the law indeed is absolute, it can be said the law is fair and just as it is applied without exceptions. Without a doubt, it is possible to assume that international law is good. For just as its precept has been demonstrated to be good by the fact that it accords with the right reason, likewise, customs are also in accord with reason. Consequently, it is evident that it is a good law. However, it must also be noted that good has various degrees, thus, there is a concept of perfect good and the notion of imperfect good. In essence, things that are said to be perfect goodness in their end mean it has attained perfect goodness when such a thing is sufficient in itself to produce a good end.

Whiles, we may contemplate imperfect goodness to be things that help to achieve some objective means but are not sufficient for the realisation of the totality of the thing. For instance medicine for an illness is perfectly good, if it helps a sick person to be healthy, but it is imperfect if it helps in curing the sick person, without helping him/her get back to where he/she was before the illness. This is the spirit of international law and customs; the end is different from national law. The end of international law is cooperation, harmony and respect for fundamental human rights, which effect by directing external actions, as regards disturbing peace and security. Consequently, that which suffice for the perfection of international law prohibits conduct that violates the enjoyment of peace and security. Therefore, it is the requisite of international law to make sure that all state

[110]Bassiouni (1989).

action and conduct fit the everlasting peace and security of all or the common good.

Conclusion

From this point of view then, it would seem that the current approach, implementation and enforcement of international law precepts are not suitable in regards to the relationship between powerful individuals, states and multinational organisations. This is partly because it is impossible to realise total peace among powerful individuals, states and multinational organisations, if one powerful individual, state or multinational corporation can take what belongs to another. However, the doctrine of international law seems to indirectly approve this by justifying self-defence under the use of force. Therefore, in this conception, international law did not make suitable provisions for the totality of peace in the world.

Hence, the US, UK and Russia and its allies are able to invade other countries. In addition, one of the fundamental threats to peace and security in the world is states' ability to violate the territorial integrity belonging to one another. This principle makes it unsuitable for the international community to protect the welfare of all people. To resolve this difference, a distinction needs to be drawn between application and practice. By this means, the characteristic of international law must be focused on practice and enforcement, rather than as a means to some other activity. This distinction should be the practical aims and objectives of international law. The practical aims and objectives imply the understanding of international relations and conduct and a better understanding of states' actions. Therefore, since the subject matter must match its aims and objectives, the subject matter of application and practice of international law has to encompass things we can do to improve international law, which involves questioning the foundation of international law. Therefore, the subject matter of international law has to do with things affecting its application and practice. This should be the new branch for studying international law and states' obligations.

In conclusion, the purpose of this article is to highlight modern problems with international law and laws of war. It may also highlighten the importance of protecting human dignity and respect for international law in relation to the use of force. It has explored the inadequacy of international law and argues for including ethical principles in the use of force doctrine. It is thus recommended that the international community develop a new code of ethics for the use of force and future military intervention, new guidelines for the use of force in contemporary war and an independent tribunal to adjudicate the use of force.

References

Alston, P. (2017). 'The Populist Challenge to Human Rights' in *Journal Of Human Rights Practice* 9(1):1-15.

Bachmann, S.D. & G. Kemp (2012). 'Aggression as Organized Hypocrisy-How the War on Terrorism and Hybrid Threats Challenge the Nuremberg Legacy' in *Windsor YB Access to Justice 30(1):* 233. DOI:10.22329/wyaj.v30i1.4365

Bassiouni, M.C. (1989). 'A Functional Approach to General Principles of International Law' in *Mich. J. Int'l L.* 11:768-818.

Berman, P.S. (2004). 'From International Law to Law and Globalization' in *Colum. J. Transnat'l L.* 43:485-556.

Bix, B. (2010). 'Natural law theory' in D. M. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 2nd ed. Oxford: Wiley-Blackwell (2010), at pp. 209-227.

Boas, A.T. (2013). *The Definition of The Crime of Aggression and Its Relevance for Contemporary Armed Conflict*. International Crimes Database.

Brunk, I.W. & M. Hakimi (2022). 'Russia, Ukraine, and the future world order' in *American Journal of International Law* 116(4):687-697.

Buchanan, A. (2008). 'Human rights and the legitimacy of the international order' in *Legal Theory* 14(1):39-70.

Carty, A. (1991). 'Critical International Law: Recent Trends in The Theory of International Law' in *Eur. J. Int'l L.* 2:66-96.

Carty, A. (2017). *Philosophy of international law*. 2nd ed. Edinburgh University Press.

Cecire, M. (2014). The Russian Invasion of Ukraine. *Foreign Policy Research Institute E-Notes*.

Chachko, E. & K. Linos (2022). 'International Law After Ukraine: Introduction to the Symposium' in *American Journal of International Law* 116:124-129.

Chehtman, A. (2023). 'Unpacking the comparison between Ukraine and Iraq'. https://cil.nus.edu.sg/blogs/unpacking-the-comparison-between-ukraine-and-iraq

von Clausewitz, C. (2007). *On War*. [Translated by M. Howard & P. Paret]. Oxford University Press

Crowe, J. (2011). 'Natural Law Beyond Finnis' in *Jurisprudence* 2(2):293-308.

Cryer, R., Robinson, D. & S. Vasiliev (2019). *An Introduction to International Criminal Law and Procedure*. Cambridge University Press.

Keown, J. & R.P. George (Eds.) (2013). *Reason, morality, and law: The philosophy of John Finnis*. Oxford University Press.

De Schutter, O. (2019). *International Human Rights Law*. 3rd Ed. Cambridge University Press.

Degan, V.Đ. (1997). *Sources Of International Law* (Vol. 27). Martinus Nijhoff Publishers.

Desai, B.H. & J.B. Desai (2020). 'On the Century of Peacemaking at the 1919 Treaty of Versailles: Looking Back to Look Ahead' in *International Studies* 57(3):201-222.

Engelbrekt, K., Mohlin, M. & C. Wagnsson (2013). *The NATO Intervention in Libya*. New York: Routledge,.

Finnis, J. (2007). "Natural Law Theories" in *The Stanford Encyclopedia of Philosophy* (Summer 2020 Edition), Edward N. Zalta (ed.),

Finnis, J. (2011). *Natural Law and Natural Rights*. 2nd ed. Oxford University Press.

Fitzgerald, P.J. (1982). 'John Finnis, Natural Law and Natural Rights' in *Philosophy in Review* 2(4):164-167.

Gössling, T. (2003). 'The Price of Morality. An Analysis of Personality, Moral Behaviour, and Social Rules in Economic terms' in *Journal Of Business Ethics* 45:121-131.

Greenwood, C. (1992). 'New World Order or Old-The Invasion of Kuwait and the Rule of Law' in *Mod. L. Rev.* 55(2):153-178.

Grossman, C. (2022). 'The Invasion of Ukraine: A Gross Violation of International Law' in *Human Rights Brief* 25(2):74-81.

Hart, H.L.A. & L. Green (2012). *The Concept of Law*. 3rd ed. Oxford University Press.

Janis, M.W. (1984). 'Jeremy Bentham and the Fashioning of "International Law"' in *The American Journal of International Law* 78(2):405-418.

Johnston, D. (1996). *The idea of a liberal theory: A critique and reconstruction*. Princeton University Press.

Kadelbach, S., Kleinlein, T. & D. Roth-Isigkeit (Eds.). (2017). *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*. Oxford University Press.

Kelsen, H. (2003). *Principles Of International Law*. New Jersey: The Lawbook Exchange Ltd.

Kotova, A. & N. Tzouvala (2022). "Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law" in *American Journal of International Law* 116(4):710-719

Kramer, R. C. & R.J. Michalowski (2005). 'War, Aggression and State Crime: A Criminological Analysis of the Invasion and Occupation of Iraq' in *British Journal of Criminology* 45(4):446-469.

Kreß, C. & L. Von Holtzendorff (2010). 'The Kampala Compromise on The Crime of Aggression' in *Journal of International Criminal Justice* 8(5): 1179-1217.

Krisch, N. (2022). 'After Hegemony: The Law on the Use of Force and the Ukraine Crisis' in *European Journal of International Law; Blog: Talk.*

Lawrence, F. (1988). 'The Nuremberg Principles: A Defense for Political Protesters' in *Hastings Law Journal* 40(2):397-436.

Lesaffer, R.C.H. (Ed.). (2004). *Peace treaties and international law in European history: from the late Middle Ages to World War One*. Cambridge University Press.

Lowe, V. (2003). 'The Iraq Crisis: What Now?' in *International & Comparative Law Quarterly* 52(4):859-871.

Lowe, V., Roberts, A., Welsh, J. & D. Zaum (Eds.). (2010). *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945*. Oxford: Oxford University Press.

Lowry, R.S. (2008). *The Gulf War Chronicles: A Military History of the First War with Iraq*. iUniverse.

Luizzi, V.L. (1982). 'Practical Reasoning in Natural Law Theories' in *Vera Lex* 3(2):1, 19-20.

MacAskill, E. & J. Borger (2004). 'Iraq war was illegal and breached UN charter, says Annan' in *The Guardian* 16 Sept. 2004.

McKinney, C. (2012). *The Illegal War on Libya*. Clarity Press, Inc.

Nartey, E. (2023a). *Ethics and Integrity in the Rule of Law and International Law*. Cambridge Scholarly Press.

Nartey, E.K. (2021). *Accountability and Corporate Human Rights Violations in Tort and International Law*. Cambridge Scholars Publishing.

Nartey, E.K. (2023b). 'Neurological Aspect of Ethics and Integrity: A Fundamental Compound Element of Law and Tax Compliance' in *Athens Journal of Law* 9(2):245-274.

Nussbaum, M.C. (2019). *The cosmopolitan tradition: A noble but flawed ideal*. Harvard University Press.

Ortiz, S.S., Torres, I.H. & R.A. Medina (2023). 'The Russia-Ukraine conflict: analysis of the international responsibility of The States, the principles of non-intervention, and prohibited use of force under the international court of justice jurisprudence' in *Revista Ruptura*. https://doi.org/10.26807/rr.v414.111

Patel, M. (2004). 'The Legal Status of Coalition Forces in Iraq after the June 30 Handover' in *American Society of International Law Insights* 8(5):24 March.

Putin, V. (2022). 'Putin's declaration of war on Ukraine' in *The Spectator* 24 February 2022.

Quigley, J. (2006). *The Genocide Convention: An International Law Analysis*. London: Routledge.

Raz, J. (2009). *Between authority and interpretation: On the theory of law and practical reason*. Oxford University Press.

Roberts, A. (1995). 'The Laws of War: Problems of Implementation in Contemporary Conflicts' in *Duke Journal of Comparative & International Law* 6:11-78.

Rogers, P. (2016). *Irregular War: The New Threat from the Margins*. Bloomsbury Publishing.

Saluschev, S. (2014). 'Annexation Of Crimea: Causes, Analysis and Global Implications' in *Global Societies Journal* 2:37-46.

Schmitt, M.N. (2022). 'Russia's "Special Military Operation" And The (Claimed) Right of Self-Defense'. *Articles Of War*. https://lieber.westpoint.edu/russia-special-military-operation-claimed-right-self-defense

Shelton, D. (2021). *International Environmental Law, Vol. 4*. Brill.

Simpson, G. (2005). 'The war in Iraq and international law' in *Melbourne Journal of International Law* 6(1):167-188.

Teson, F. (2018). *A Philosophy of International Law*. Routledge.

Thakur, R. (2016). *The United Nations, peace and security: from collective security to the responsibility to protect*. Cambridge University Press.

Tuathail, G.Ó. (2003). '"Just Out Looking for a Fight": American Affect And The Invasion Of Iraq' in *Antipode* 35(5):856-870.

Tucker, R.W. (1951). 'The Interpretation of War Under Present International Law' in *The International Law Quarterly* 4(1):11-38.

Tunkin, G. (1993). 'Is General International Law Customary Law Only?' in *European Journal of International Law* 4(4):534-541.

Vico, G. (2015). *The New Science of Giambattista Vico*. Vico, G. (2015). *The New Science of Giambattista Vico*. (Translated by Th.G. Bergin & M.H. Fisch). Cornell University Press..

Von Bernstorff, J. (2010). *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Vol. 68). Cambridge University Press.

Von Pufendorf, S.F. (1991). *Pufendorf: On the Duty of Man and Citizen According to Natural Law*. Cambridge University Press.

Wallace, R.M. & O. Martin-Ortega (2020). *International Law*. Sweet and Maxwell.

Weisbord, N. (2009). 'Conceptualizing Aggression' in *Duke Journal of Comparative & International Law* 20:1-68.

Yoo, J. (2003). 'International law and the war in Iraq' in *American Journal of International Law* 97(3):563-576.

Zuppi, A.L. (2007). 'Aggression as International Crime: Unattainable Crusade or Finally Conquering the Evil' in *Penn State International Law Review* 26(1):2-36.

Cases

Nicaragua v US (Merits) [1986] ICJ Rep 14.
Yugoslavia v Belgium (Provisional Measures) [1999] ICJ Rep 124.
Yugoslavia v Canada (Provisional Measures) [1999] ICJ Rep 259.
Yugoslavia v France (Provisional Measures) [1999] ICJ Rep 363.
Yugoslavia v Germany (Provisional Measures) [1999] ICJ Rep 422.
Yugoslavia v Italy (Provisional Measures) [1999] ICJ Rep 481.
Yugoslavia v Netherlands (Provisional Measures) [1999] ICJ Rep 542.
Yugoslavia v Portugal (Provisional Measures) [1999] ICJ Rep 656.
Yugoslavia v Spain (Provisional Measures) [1999] ICJ Rep 761.
Yugoslavia v UK (Provisional Measures) [1999] ICJ Rep 826.

Yugoslavia v US (Provisional Measures) [1999] ICJ Rep 91.

Legal Instruments

Convention On the Prevention and Punishment of the Crime of Genocide - Approved and proposed for signature and ratification or accession by General Assembly resolution 260 A (III) of 9 December 1948 Entry into force: 12 January 1951, in accordance with article XIII

Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA Res 2131, UN GAOR, 1st Comm, 20th sess, 1408th plen mtg, UN Doc A/RES/2131 (21 December 1965).

Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res 2625, UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (24 October 1970).

International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, as contained in Report of the International Law Commission on the Work of its 48th Session, 6 May – 26 July 1996, UN Doc A/51/10 (1996).

International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946 (1947) vol 1, 186.

Kellogg-Briand Pact, signed 27 August 1928 (entered into force 24 July 1929).

Resolution 1441 adopted by the UNSC at its 4644th meeting, on 8 November 2002.

UK, Parliamentary Debates, House of Lords, 21 April 2004, vol 660, pt 70, columns 369–76 (Lord Goldsmith, Attorney-General).

United Nations Charter. https://www.un.org/en/about-us/un-charter/full-text

United Nations General Assembly Resolution 3314 (XXIX). Definition of Aggression ['Resolution 3314'], adopted on 14 December 1974.

Athens Journal of Law - Volume 10, Issue 1, January 2024 – Pages 119-130

The Ethical Dilemma with Open AI ChatGPT: Is it Right or Wrong to prohibit it?

By Marzia A. Coltri[*]

Digitalisation and innovation in learning and research are rapidly becoming crucial drivers of society's sustainable and progressive growth. AI's technological advancements and landscapes have significant strengths, and their diversity and quality have grown in recent years. This has facilitated the impressive development of AI apps and software, such as ChatGPT, which has become popular around the world. ChatGPT is an OpenAI access to users in education to generate essays, song lyrics and stories. It is an AI language model that can understand and generate human-like responses to text inputs, making it a valuable tool for various economic and cultural applications. This study examines the ethical dilemma of banning ChatGPT. Using a range of argumentative examples, I address the concept of moral obligations to OpenAI access but also its limitations. Some possible ethical issues that may arise in the use of AI-powered chatbots include concerns about data privacy, algorithmic bias, and the potential for chatbots to replace human interaction and support. Can OpenAI's cutting-edge technology and tools truly help corporate operations and institutions, and improve decision-making? Can it also give students and researchers significant resources to help them develop their knowledge, critical thinking skills and understanding in a variety of fields? Allowing ChatGPT to operate freely could lead to unintended consequences, but it could also promote innovation in the field of AI. Ultimately, finding a balance between regulation and innovation is key to maximising the benefits of ChatGPT while minimising its potential harms. AI software has the potential to degrade and debase our ethics, which are fundamentally different from our critical thinking. Chomsky, Roberts & Watumull[1] *concern is that AI software lacks the ability to understand and apply ethical principles in the same way that humans do, which could lead to unintended consequences and ethical dilemmas.*

Keywords: *Critical Thinking; Ethical dilemma; Right or Wrong; ChatGPT*

Introduction

The development of Open AI ChatGPT (Generative Pre-trained Transformer) and GPT-4 has brought about significant advancements in the field of natural language processing, business, educational and research settings. ChatGPT can generate human-like text, making it one of the most remarkable AI tools in recent years. However, with this new change in digitalisation some ethical concerns need

[*]Ph.D., Lecturer, Institute of Foundation Studies, Faculty of Business, Arden University, Coventry, UK.
Email: mcoltri@arden.ac.uk
[1]Chomsky, Roberts & Watumull (2023).

to be addressed. This paper will explore the ethical dilemmas with GPT and how we might face them today. I will also investigate a variety of philosophical arguments for and against GPT. The Socratic Method will be primarily explored as part of a critical thinking consideration in this AI ChatGPT debate. Conversing with people in a forum, asking them questions, and supporting them in discovering solutions are part of our analytical skills. This dialectical approach is an effective way to challenge assumptions and promote critical thinking by asking thought-provoking questions. We may increase our awareness of the subject and participate in a meaningful debate by using this Socratic method in the AI GPT debate. This innovation encourages us to reflect critically and carefully on GPT and its influence on both current and future generations. This is not an important step in "super intelligent" AI. We will not be replaced by robots. However, it is crucial to understand the potential consequences and ethical implications of AI technology. As we continue to develop and integrate AI into our daily lives, it is necessary to approach the subject with caution and consideration for its impact on education, the economy and social integrity.

How significant is ChatGPT as a moral guide in a clear and open argument, and how can we rely upon it? Is it appropriate for the government sector and higher education to consider banning the use of AI, including in teaching, learning and research? This can be considered as a pause for reflection for a wide community that invests time in making sure AI's effects on the educational sector are positive and that its risks are controllable. While it may be tempting to stop using AI in these fields, it is important to understand that it has the potential to significantly advance both research and education. Instead, we should be focused on creating ethical AI policies or guidelines and making sure that AI's potential benefits are maximised while its risks are minimised.

Think Critically

It is crucial to think about the possibility of living honestly and acting appropriately when considering whether to ban ChatGPT. If GPT is in line with human nature and the ethical path, we can then decide which choices and actions are in tune with our morality and sense of responsibility. This implies that GPT cannot make decisions, that its activities or human-like words are determined by our decisions rather than its own, and that they are consequently ethically good or bad/right or wrong. Therefore, the decision to ban or not ban GPT should be based on whether its use aligns with our moral values, and whether it can be used responsibly without causing harm to individuals or society as a whole. Ultimately, it is up to us as humans to make the right choices and take responsibility for our actions, including those involving technology such as ChatGPT. One of the analogies that came up in recent Higher Education UK Quality Assurance Agency (QAA) webinars conducted by academics and practitioners was that AI is "the fast food or machine vendor"[2] without a soul or emotional intelligence.

[2]Quality Assurance Agency – QAA (2023).

This metaphor emphasises the danger of AI tools depersonalising academic achievement and diminishing the role of human connection[3] in the learning process, resulting in a lack of empathy and understanding of individual needs. The analogy suggests that ChatGPT implementation should be carefully and critically considered, to avoid negative impacts on the quality of creative practice, critical analysis and intellectual growth.

Those who support AI, on the other hand, argue that it can improve the learning experience by providing personalised support and input, allowing educators and students, such as non-native speakers with special needs, to focus on higher-level tasks. There are several enthusiastic educators who welcome this rapid digital change. They believe that technology can enhance the learning experience and provide students with new opportunities to engage with course material. These educators see technology as a valuable tool that can help prepare students for the demands of the modern workforce.

Reflecting critically on my own experience and in my foundation classes[4] with a wide student demographic, I was able to explore that ChatGPT can be used to improve students' learning approaches, and give them more confidence in their assignments, and English language for non-native speakers. Embedding ChatGPT in my lessons for students with special needs has increased student engagement, teamwork, digital literacy, and cultural diversity approaches. This has enabled me to redesign assessments and gain a better understanding of ethical policies "in the presence of generative AI tools".[5] In line with the UN Sustainable Development Goals[6] there are new schools of thought that see LLM models as a counter-narrative for the intersectionality of various forms of oppression and exclusion. Professors and instructors all over the world are discovering how AI ChatGPT can improve their sense of belonging and create a more inclusive and equitable learning environment. However, there is a downside to this AI access, which cannot be made available to everyone for free when most Latinos, Black communities, and Eastern Europeans are financially disadvantaged.[7] As a result, governments and educational institutions must address these inequalities and ensure that access to AI technology is not negatively impacted by financial limitations. It is also necessary to provide educators with the training and resources they need to effectively integrate AI technology into their teaching.

ChatGPT provides personalised and immediate feedback to students, allowing them to address their weaknesses and improve their skills.[8] However,

[3]Arendt (1998) at 7-17.

[4]Arden University in 2023. The Institute of Foundation Studies. I teach blended learning classes to a wide range of students from different backgrounds and with learning and language barriers. It is important for me as an educator to establish a welcoming, inclusive classroom setting that meets each student's specific needs. To ensure that all students have an equal opportunity to succeed, I work to incorporate a variety of teaching strategies and digital support.

[5]D'Agostino (2023).

[6]United Nations (2015) – SDGs 10 and 16.

[7]D'Agostino (2023).

[8]Bozkurt, Xiao, Lambert, Pazurek, Crompton, Koseoglu, Farrow, Bond, Nerantzi, Honeychurch, Bali, Dron, Mir, Stewart, Costello, Mason, Stracke, Romero-Hall, Koutropoulos, Toquero, Singh,

there are some vulnerabilities and fallibilities. The nature of critical thinking is not to be judgemental and opinionated, but to examine what is going on with an open mind and without bias or prejudice. Critical thinking is a skill we learned from Socrates in the *forum* of Athens, that allows us to evaluate information objectively and not rely on a single opinion. Thinking is always related to who we are, to what we experience and feel. But when we think, we become aware of our beliefs, alongside other ideas and knowledge, to help us understand claims and the way things actually are.

1. What are the issues with using ChatGPT in a variety of fields, including research and education? Why should I trust it?
2. What are the most common judgments or assumptions about it?
3. Have you ever tried it?
4. What do you enjoy and why?
5. What are the disadvantages of ChatGPT? What are the positive aspects?
6. What unconscious biases are there?
7. Is there any human that can be misled and replaced by ChatGPT?

In a heuristic approach, given the following information about banning ChatGPT, people may choose between two options, A (for) or B (against) due to news, emotions, something that conforms to us and external influences. Several considerations are now examined before determining whether OpenAI may be classified as ethical. In evaluating whether ChatGPT is ethical, two perspectives emerge. The first is characterised by the utilitarian approach, which states that an action is ethical if the benefit is probably greater than the damage. The deontological viewpoint emphasises the importance of moral behaviour. From this standpoint, information suppression or user manipulation can never be viewed as ethical.[9]

By citing Singer's book Expanding the Circle, computer scientist Dan Hendryck argues that all humans have evolved to expand their knowledge, and empirical senses, in other forms of learning, and places, and thus they progress as the same AI evolves to create new science and technology frameworks and new moral values like humans. This AI evolution may have certain ethical utilitarian, deontological and virtue ethics implications. How can we build new relationships with AI if AI technology produces, writes, and creates images, articles, protein synthesis, and games that surpass us? Are they becoming self-sufficient and replacing humans? Are they benevolent or malevolent conscious agents? [10]

Tlili, Lee, Nichols, Ossiannilsson, Brown, Irvine, Raffaghelli, Santos-Hermosa, Farrell, Adam, Thong, Sani-Bozkurt, Sharma, Hrastinski & Jandrić (2023).

[9]Aguinis & Henle (2002) at 34–56.

[10]Hendrycks (2023) at 19.

Maieutic Art of Socrates: "What if Socrates couldn't write but GPT could?"

Socrates was a philosopher who emphasised the value of critical thinking and the acquisition of information via debate and questioning. He thought that human interaction and the exchange of ideas were important components of an open society – democracy.

Socrates did not write any books or texts himself, but his ideas and teachings were preserved and disseminated through the writings of his students and followers, such as Plato and Xenophon. In this sense, the written word played an important role in the propagation and preservation of Socrates' ideas.

In modern times, Socrates, as a challenging thinker, could have the potential to create new pathways for youths. He could have engaged in debates and arguments to uncover the truth about the digital era and AI information in the *agora* of Athens and the realm of critical thinking. His teaching style involved asking thought-provoking questions to stimulate critical thinking and self-reflection, which helped his students develop their own philosophical perspectives and ideas. Socrates believed that the pursuit of knowledge and wisdom was essential for personal growth and societal progress.[11]

Had Socrates been alive today, he might have recognised the value of technology including the pros and cons of OpenAI platforms as a tool for "the unexamined life". So, it is possible that he would have applied in the *forum* a maieutic dialogue regarding AI software and generator language machine. The ChatGPT could be the potential tool to generate complex questions and stimulate critical thinking in our audience, interlocutors, and students. Indeed, Socrates advocated for the use of new techniques to know what is still uncertain and unexplored through the "method of elenchus" to challenge and enhance his listeners and investigate what is right or wrong. In this sense, Socrates could be interested in ChatGPT as a tool that can generate complex questions and stimulate curiosity in future generations. It can be argued that from the perspective of the Socratic "maieutic" dialogue, our human development and potential[12] through communication and knowledge seek their position on OpenAI platforms. In Greek, the word maieutic means "to process," which is literally translated as "helper at birth and delivery." The term was famously used by Socrates to describe his method of questioning, which he believed helped people "give birth" to their own ideas and understanding. The Socratic philosophical tradition, which consists of questions, answers, reflections, and recognition in turn, has its roots in exploratory dialogue. The maieutic of Socrates is the way by which the philosopher or the critical thinker has assisted individuals in seeking answers to the questions "What is knowledge?" and "What is the reality around us?" through an open dialogue. Using this strategy, it is possible to find a path to the light of truth and critical skills. It does, however, need regular practice and a willingness to challenge one's own beliefs and biases. This Socratic mode of inquiry consists of the concept "I know I do not know". Individuals can gain a better understanding of the world around them and make more informed decisions as a result.

[11]Offor (2012).
[12]Stober & Grant (2006).

In the Platonic dialogue of Theaetetus, Socrates says:

> "My maieutic art is similar to that of midwives, but it differs in that it assists in the birth of men rather than women, and it provides for the generation of souls rather than bodies. [...] This is what I share with midwives: I am also sterile, sterile in wisdom" (Plato, pp. 151d-186e).[13]

This passage also highlights the famous Socratic "I know I don't know." That is the Socratic technique of challenging the certainty, often erroneous/fallacious, of one's participants and proclaiming one's ignorance of the subject matter.

As a result of the philosopher's questions and answers, a creative debate proceeds, with open rebuttals of the initial premises. In the case of OpenAI platforms' benefits and drawbacks, we could say that they can provide learning materials, but they can also provide inappropriate and inaccurate information to a wide range of participants. The value of human connection and conversation needs to be safeguarded in an open process where human relationships provide the *agora* through creativity, cultural exchange, critical thinking, empathy, and values that technology cannot replace.

Ethical Dilemmas in Data Protection since Italy has banned ChatGPT

The problem of privacy is a crucial consideration for ChatGPT. Gathering highly personal information about participants may jeopardise their privacy and lead to identification.

On 1 April 2023, ChatGPT was banned in Italy[14] due to ethical concerns. The Italian data protection authority's ban could be a significant step towards ensuring the safety and privacy of users, particularly children.

The main concerns were how the data collected by OpenAI ChatGPT could be presented to and inspected by users, as well as the answers and conclusions reached. OpenAI's data collection methods were also scrutinised to ensure that they were ethical and did not infringe on users' privacy. Additionally, the company had to address concerns about the potential biases in their data sets and algorithms. The fact that the Italian government has temporarily stopped ChatGPT raises questions about the inappropriate response to minors and the lack of safeguards. While it is vital to protect personal information, the prohibition of a platform that allows people to discuss mental health difficulties can be a cause for concern. On 5 April 2023, the Italian Data Protection representatives and the OpenAI conducted a video meeting to comply with European privacy standards, and establish a collaborative approach to resolving data protection issues. Germany, France and the Republic of Ireland are considering following Italy. The UK Taskforce, the US Center for AI and Digital Policy (CAIDP),[15] UNESCO's AI regulations, the EU's AI Act, and the African Union are all working to establish a data policy and

[13]Plato (360 BCE) and Chappell (Summer 2022).
[14]GPDP (2023).
[15]CAIDP (2023).

ethical standards framework. Finally, China has been taking significant steps in data protection. These initiatives reflect the global recognition of the importance of data governance and ethical standards in AI development.

What is wrong with ChatGPT, and how can we ensure that it is put right? What can we expect from ChatGPT in terms of quality, integrity, inclusiveness, diversity and gender equality? The goal is to create a code of ethics for OpenAI businesses.

The ethical dilemma and consequent governmental intervention with ChatGPT are to guarantee the privacy and security of user data, as well as to prevent the spread of disinformation or harmful content. This entails creating strong data security and management guidelines, as well as promoting transparency and responsibility in how user information is used and shared.

The data set for GPT models is derived from a variety of sources, including books, journals, and internet sources. Biases, stereotypes, and discriminatory elements in this information may be repeated in the generated writing. To address this problem, researchers and developers should ensure that the training data is varied and inclusive and that GPT models are inspected for bias regularly. Including ethical concerns throughout the development process can also aid in mitigating the possible harm caused by prejudiced text created by GPT.[16] Furthermore, it is important to involve diverse groups of people in the development and testing of GPT models to ensure that the technology is inclusive and respectful of all individuals. By doing so, we can work towards creating more ethical and responsible AI systems that are sustainable for all societies. For example, if the learning algorithm used for GPT models contains homophobic, racist, or sexist content.

Another issue is that GPT algorithms are often used in applications such as chatbots, customer service, and content creation, where the generated hallucinations and falsification of reality with “fabricated news/made-up articles” have a direct impact on readers, followers, and people's behaviour.[17] Any unconscious biases or prejudice in the generated text, from a utilitarian viewpoint, might cause individuals to inflict harm, spread negative beliefs, and encourage discrimination.

Introducing new data sets is an alternative to the ethical debate of data security, hallucinations, factual distortions, fake news and discrimination in GPT-generated text. By using more diverse data sources and codes of ethics, GPT systems can better represent society's diversity and eliminate discrimination and bias. Therefore, it is important to continue improving GPT systems to ensure that they are ethical and inclusive. A further option is to improve transparency and accountability in the application of GPT models. This could include providing clear guidelines on the ethical use of GPT models and ensuring that users are aware of the technology's potential biases and limitations. In addition, collaborations between experts in AI and ethicists could lead to the development of more responsible GPT models. This would involve incorporating ethical considerations into the design and development process of GPT models.

[16]Federal Office for Information Security (2023).
[17]Moran (2023).

Disadvantages and Advantages of Employing ChatGPT in the Educational and Research Sectors

A reason for concern is the possibility of GPT replacing teaching staff, thereby reducing human communication and teamwork in education and research. Understanding ways to prevent deceptive, Machiavellian, and other unethical behaviour in AIs, with an emphasis on huge language models, is vital to future generations. This can also help with the creation of more ethical and trustworthy AI systems for the benefit of society. Furthermore, it is crucial to assess the potential implications of immoral AI activity, such as privacy violations and prejudice, and work to reduce these risks.

Despite the ethical concerns associated with the use of ChatGPT in education, this technology has several benefits. As previously stated, one such advantage is the ability to create focused and personalised learning materials for students and researchers. This can help to improve student engagement and learning outcomes while also reducing teacher workload and increasing the variety of research topics.

According to a recent online survey conducted by *Varsity*, 47.3% of Cambridge students have used ChatGPT or other AI chatbots to finish their university work, with more than a fifth saying they do so "frequently" or "always". Students in the STEM fields were more likely to use ChatGPT than students in the humanities, with a rate of 53% versus 43%, respectively.[18] The survey also revealed that time savings and increased productivity were the most frequent justifications for using AI chatbots. However, some students voiced doubts about the dependability and accuracy of the data this AI-generated chat box provides. During his interview with Varsity, the pro-vice chancellor cited a *Guardian* article[19] in which John Naughton claimed that text generators like ChatGPT would become "as mundane as Excel."[20]

These AI systems could significantly decrease response delay and enhance accessibility for students who may not have instant access to academic experts or personal tutors. Another significant benefit is the opportunity to give free online digital access to people who would not normally have it. GPT may be used to develop educational materials in several languages and is adaptable to individuals with diverse learning requirements, including those from underprivileged backgrounds, making it accessible, equitable, and inclusive.[21]

A Critical View from Chomsky on AI Technologies

Noam Chomsky, the prominent linguist, philosopher and political commentator, has expressed critical views on AI and its potential impact on society. In his view, AI is often used as a tool to serve the interests of powerful

[18]Hennessey (2023).
[19]Naughton. (2023).
[20]Olsson (2023).
[21]United Nations – SDGs (2015).

institutions, such as corporations and governments, rather than to serve the broader public good.

Chomsky has argued that OpenAI ChatGPT, Google's Bard and Microsoft's Sydney use of AI in education and other areas of society should be approached with caution, as it can lead to the commodification of knowledge and the devaluation of critical thinking skills. He wrote, "This machine learning will degrade our science and debase our ethics by incorporating into our technology a fundamentally flawed conception of language and knowledge.[22]

Chomsky has claimed that our human mind is not like a machine, but rather more elegant and creative, and that using grammar and language and engaging with events and experiences around us is part of human and child development. Similarly, in Arendt's view, there are no better human relationships than the presence of other humans. We are linked to one another, and all human actions take place because we live together.[23] A machine's activity cannot be imagined without the ability to communicate with humans. The learning machine is a process that always requires the presence of beings. The Aristotelian theory of *zōon politikon*, derived from Aquinas, explains how a man is a political animal: "*homo est naturaliter politicus, id est, socialis*" [by nature man is political and therefore social].[24] As Arendt described it, "that affects the existence of all, since without such provisions, communal life would be impossible".[25]

Moreover, Chomsky discusses the potential for AI to be used for monitoring and control. He has stated that the advancement of AI technology, particularly when used for face recognition and other types of monitoring, endangers civil liberties and individual privacy.

In general, Chomsky analyses the benefits and drawbacks of developing AI technology in human communication and relationships. It is critical that companies establish standards and guidelines that are ethically accountable to the greatest number of people rather than the interests of organisations.

Conclusion

The AI-powered ChatGPT is reinventing our lifestyle, workload and workplace. With its versatility and potential, ChatGPT is revolutionising the way we interact with technology and enhancing our daily lives in various ways. It has already facilitated professional writing and has passed Bar and MBA exams.[26] It is being used to make up bedtime stories, plan family vacations, make grocery lists and plan meals. The chatbot is also being used to assist in mental health therapy sessions and provide emotional support to individuals. The ethical dilemma of bias and discrimination in OpenAI's ChatGPT-generated text requires a multifaceted approach. To address this, it is important to increase the diversity of training data,

[22]Chomsky, Roberts & Watumull (2023).
[23]Arendt (1998) at 23.
[24]Arendt (1998) at 23 and Owens (2012) at 553.
[25]Arendt (2005) at 115 and Owens (2012) at 552.
[26]Cray (2023).

develop algorithms to identify misinformation or fallacies and involve individuals from diverse backgrounds in the development and testing of AI platforms. Additionally, strict regulations and guidelines for the use of AI-ChatGPT can help diminish potential ethical issues.

From a philosophical perspective, the use of GPT can be seen as part of the broader tendency of human progression, but it is essential to maintain a balance between technological advancements, human interaction, and creative or critical information.

References

Aguinis, H. & C.A. Henle (2002). 'Ethics in research' in S.G. Rogelberg (Ed.) *Handbook of research methods in industrial and organizational psychology*, pp. 34–56. Blackwell Publishing.

Arendt, H. (1998). *The Human Condition*. 2nd ed. The University of Chicago Press.

Arendt, H. (2005). *Promise of Politics*. New York: Schocken Books.

Bozkurt, A., Xiao, J., Lambert, S., Pazurek, A., Crompton, H., Koseoglu, S., Farrow, R., Bond, M., Nerantzi, C., Honeychurch, S., Bali, M., Dron, J., Mir, K., Stewart, B., Costello, E., Mason, J., Stracke, C.M., Romero-Hall, E., Koutropoulos, A., Toquero, C.M., Singh, L., Tlili, A., Lee, K., Nichols, M., Ossiannilsson, E., Brown, M., Irvine, V., Raffaghelli, J.E., Santos-Hermosa, G., Farrell, O., Adam, T., Thong, Y.L., Sani-Bozkurt, S., Sharma, R.C., Hrastinski, S. & P. Jandrić (2023). 'Speculative futures on ChatGPT and generative artificial intelligence (AI): A collective reflection from the educational landscape' in *Asian Journal of Distance Education* 18(1):53–130.

CAIDP. Center for AI and Digital Policy (2023). *CAIDP Update 5.14 – 5.20*. Retrieved April and May, from https://www.caidp.org

Chappell, S-G. (Summer 2022 Edition). Plato on Knowledge in the Theaetetus. *The Stanford Encyclopedia of Philosophy*. Edward N. Zalta (ed.). https://plato.stanford.edu/archives/sum2022/entries/plato-theaetetus

Chomsky, N., Roberts, I. & J. Watumull (2023). Opinion | Noam Chomsky: The False Promise of ChatGPT. *The New York Times (23 March).* https://www.nytimes.com/2023/03/08/opinion/noam-chomsky-chatgpt-ai.html

Cray, K. (2023). *Chatgpt will change housework*. https://www.theatlantic.com/family/archive/2023/04/chatgpt-ai-use-domestic-labor-housework/673735/

D'Agostino, S. (2023). How AI Tools Both Help and Hinder Equity. *Inside Higher Ed*. https://www.insidehighered.com/news/tech-innovation/artificial-intelligence/2023/06/05/how-ai-tools-both-help-and-hinder-equity.

Federal Office for Information Security. (2023). Large-scale AI language models - opportunities and risks for industry and public authorities. https://www.bsi.bund.de/SharedDocs/Downloads/DE/BSI/KI/Grosse_KI_Sprachmodelle.html

Génova, G. & M.R. González, (2016). 'Teaching ethics to engineers: A Socratic experience' in *Science and Engineering Ethics* 22(2):567-580.

Good, I.J. (1966). 'Speculations Concerning the First Ultraintelligent Machine' in *Advances in Computers* 6:31–88.

GPDP. Garante Per La Protezione dei Dati Personali (March 30, 2023). *Intelligenza artificiale: il Garante blocca ChatGPT. Raccolta illecita di dati personali. Assenza di sistemi per la verifica dell'età dei minori. Artificial intelligence: stop ChatGPT by the Italian SA Personal data is collected unlawfully, and no age verification system is*

in place for children. https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9870847. See also https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9881490

Hassan, R., & T. Sutherland (2016). *Philosophy of media: A short history of ideas and innovations from Socrates to social media*. London & New York: Routledge..

Hennessey, M. (2023). 'Exclusive: Almost half of Cambridge students have used ChatGPT to complete university work' in *Varsity*. https://www.varsity.co.uk/news/25463

Moran, C. (2023). ChatGPT is making up fake Guardian articles. Here's how we're responding in *The Guardian* (6 April). https://www.theguardian.com/commentisfree/2023/apr/06/ai-chatgpt-guardian-technology-risks-fake-article.

Naughton, J. (2023). The ChatGPT bot is causing panic now – but it'll soon be as mundane a tool as Excel. *The Guardian* (6 February). https://www.theguardian.com/commentisfree/2023/jan/07/chatgpt-bot-excel-ai-chatbot-tech.

Plato (360 BCE). *Theaetetus*, in F.M. Cornford (Trans.) *Platos' Theory of Knowledge, the Theaetetus and the Sophist*. New York: Liberal Arts Press. .

Offor, F. (2012). 'Socrates, Science and Technology' in *Canadian Social Science* 8(4):101-107.

Olsson, E. (2023). We have to recognise ChatGPT – not ban it, says Cambridge pro-VC. *Varsity*. https://www.varsity.co.uk/news/24892.

Owens, P. (2012). 'Human security and the rise of the social' in *Review of International Studies* 38(3):547–567. http://www.jstor.org/stable/41681478

Quality Assurance Agency (QAA). (2023). 'ChatGPT: How do I use it as a force for good?' In *QAA ChatGPT and Artificial Intelligence*. https://www.qaa.ac.uk/membership/membership-areas-of-work/academic-integrity/chatgpt-and-artificial-intelligence.

Singer, P. (1981). *The Expanding Circle: Ethics and Sociobiology*. Farrar, Straus and Giroux.

Stober, D.R. & A.M. Grant (2006). *Evidence-based coaching handbook: Putting best practices to work for your clients*. Hoboken, NJ: John Wiley & Sons.

United Nations. (2015). *Transforming our world: The 2030 agenda for sustainable development*. United Nations. https://sdgs.un.org/2030agenda

Athens Journal of Law - Volume 10, Issue 1, January 2024 – Pages 131-154

ADR and Workplace Conflict - A Podcast Analysis Nigeria, Britain and the US

By Chinwe Egbunike-Umegbolu[*1]

The decline of union representation and the introduction of legal incentives for workers to resolve individual employment disputes without resorting to the courts has unequivocally made Alternative Dispute Resolution (ADR) increasingly prominent in the British industrial relations landscape. The conciliation service offered by the Advisory Conciliation and Arbitration Service (ACAS) has been the most important sign and driver of this change. Although ADR has been encouraged in Western jurisdictions, particularly in the United Kingdom (UK) and in the United States (US), as a means to reduce time and litigation costs in relation to employment tribunal claims, the scarcity of scholarly publications, particularly on the benefits of utilising mediation or conciliation to settle workplace disputes is frankly unacceptable. On the other hand, Nigerian workers or employees are not encouraged or have little or no awareness of resolving workplace disputes or conflicts via ADR due to a lack of sensitisation in most organisations and a dearth of scholarly research on ADR to settle conflicts or workplace disputes in Nigeria, particularly with Mediation and Conciliation. This lack of awareness is a grave oversight compared to the UK. While British workers are encouraged to lodge their disputes with the Advisory, Conciliation and Arbitration Services (ACAS) before proceeding to an employment tribunal claim, Nigerian counterparts settle via the National Industrial Court (NIC) ADR, which is not always adequate. However, some sectors in Nigeria, like the Trade Unions, are quite complex, particularly disputes emanating from the Maritime Industry, which are hardly settled via ADR, unlike their UK counterparts. Hence, the jurisdictions mentioned above have different patterns and modus operandi for resolving workplace conflicts or disputes, and these will be meticulously examined in this paper. Additionally, the paper scrutinises the reason why the minister of labour and employment has so much power accorded or bequest to him to apprehend and refer a disputed award to the National Industrial Court (NIC) ADR. The paper employs a comparative and, for the first time, podcast analysis of workplace disputes in Nigeria and Britain, focusing on the different patterns of settling Workplace Conflicts such as discrimination, bullying and harassment. The paper concludes

[*]Ph.D. ESRC Funded Post-Doctoral Fellow at the School of Business and Law, University of Brighton, UK. Fellow of the American Bar Association, Section of Dispute Resolution (Mediation Committee).
Email: c.s.umegbolu@brighton.ac.uk.
[1]The authoress acknowledges and appreciates the unwavering support and invaluable guidance provided by her research mentor, Dr. Anne Daguerre (Reader in Social Justice) at the School of Business and Law, University of Brighton, without which her research journey would have been significantly more challenging. The author firmly acknowledges and appreciates the invaluable contributions of the experts who graced the EVA Show, particularly those mentioned in the article, as well as the ESRC-UKRI and the American Bar Association (ABA) Section of Dispute Resolution.

by unequivocally highlighting the benefits of mediation and its relevance to various entities involved in Workplace conflicts or disputes.

Keywords: *Alternative Dispute Resolution, Workplace Conflict, Access to Labour Justice, Employment Relations, Human Resource Management, Podcast, Awareness.*

Introduction

The invention of new technologies such as podcasts has made the world a global village, with people from different parts of the world being able to connect with each other more easily.[2] Despite the advancements in technology that have brought people closer together, there are still unique differences and similarities between different jurisdictions such as Nigeria, the US and the UK.[3] As such, the comparative analysis of legal systems can provide valuable insight into foreign cultures.[4] Comparative legal analysis involves systematically comparing two or more legal systems. This definition is consistent with John Reitz's view that the comparative method involves an explicit comparison of different elements of legal systems.[5]

Furthermore, a comparative study can enhance understanding of different legal systems and create awareness of the position of one's own legal system in an international legal order.[6] Research podcasts have been found to be a credible method of data gathering, as guests invited are experts in their respective fields. In furtherance, ongoing research by the writer indicates that podcast reaches more geographic location or audience faster than any form of data-gathering tool- it was employed as instructional material.[7]

Scholars tend to reveal thoroughly researched views on podcasts because they know or are aware that whatever they say would be distributed all over platforms like Amazon, Spotify, and Apple, amongst others, in turn, reaches thousands of people all over the world, which makes podcasts the most authentic form of data gathering and research dissemination. Thus, the writer shall adopt this pattern to achieve a more in-depth understanding of critical insight into what new knowledge is likely to emerge from comparing the United Kingdom, in some cases the US, of settling workplace conflicts or disputes with that of Nigeria.

[2]Eberle (2009) at 451-452.
[3]The Association of Multi-Door Courthouses of Nigeria, (2019).
[4]Hantrais (1995) at 3.
[5] Reitz (1998) at 619.
[6]Platsas (2015).
[7]Egbunike & Umegbolu (2021).

The Need to Manage Conflict via ADR

Recent research has shown that conflict in the workplace leads to poor performance, creates an unconducive environment, and impacts mental well-being.[8] Hence, the need to manage conflict via ADR, precisely mediation and conciliation, has proved to be a relatively cheap, fast, and successful way of resolving most disputes without further escalation, particularly when compared to litigation.[9]

Currie et al. postulated that in the heyday of collective industrial relations, conflict at work was commonly viewed as something like the arrival of bad weather, not particularly welcomed but inevitable, nonetheless.[10]

According to her, both trade union representatives and personal managers in the UK held a stoic attitude towards workplace conflict.[11]

The stoic attitude towards workplace conflict held by both trade union representatives and personal managers in the UK is not a sustainable approach. It is unacceptable that some view occasional industrial disputes as therapeutic for cleansing bad feelings between management and the workforce. Fortunately, the introduction of the Advisory Conciliation and Arbitration Service (hereinafter ACAS), which uses ADR to settle disputes such as mediation and conciliation, has brought about significant changes to the UK dispute resolution system. Michael Gibbons's review in 2007 initiated these changes, leading to the introduction of the new ACAS pre-claim conciliation service. Through this service, parties can avoid resorting to an employment tribunal (ET) to resolve a dispute, which has delivered significant savings to businesses.[12]

The establishment of the National Industrial Court of Nigeria (NICN) in 1976 marked a significant milestone in resolving labour disputes in Nigeria through the Trade Disputes Decree.[13] The NICN ADR Centre Instrument & Rules 2015 provides a vital legal framework that serves as the foundation for establishing and operating the ADR Center. The NICN ADR is deeply rooted in the combined provisions of Ss.1 (2) (a) and 20 of the NICA 2006, which empower the President of the Court to administer the court, promote and apply ADR in the court.[14]

With far-reaching jurisdiction and powers under the Constitution and statute, the court has a clear responsibility to provide justice between parties without the need for strict evidentiary rules and technicalities, consistent with national laws, international standards, and best practices.[15] Conflicts or disputes relating to labour are bound to occur in the workplace, and workers have the responsibility to solve problems via ADR instead of litigation, which may accentuate the fragmentation and isolation of the employment relationship, a potential issue that needs to be addressed.

[8]Orifowomo & Ashiru (2015).
[9]Blake, Browne & Sime (2021) at 37.
[10]Currie, Gormley, Roche & Teague (2016).
[11]*Ibid.*
[12]Resolving workplace disputes: A Consultation (2011) Department for Business Innovation and Skills (Tribunal Service).
[13]Orifowomo & Ashiru (2015) at 152.
[14]Ogbuanya,(2015).
[15]Orifowomo & Ashiru (2015).

In Nigeria, it is uncommon for employees to utilise alternative dispute resolution (ADR) methods when attempting to resolve issues with their employers. This is due to a variety of factors, including cultural norms and corruption.[16] Unfortunately, labour disputes are viewed unfavourably in Nigeria due to the lengthy and complex adjudication process, as well as regulations that govern the employment relationship.[17] Additionally, the Trade Act requires disputing parties to consult with the Minister of Trade and Industry prior to bringing their grievances before an arbitral body.[18] As a result of these challenges, new approaches to workplace dispute resolution are necessary. Mr Kehinde Aina, the founder of the Multi-Door Courthouse in Nigeria, recognises that while employees are aware of their options for resolving workplace conflicts, their knowledge is not as widespread as it should be.[19]'

He went on to reveal 'that the National Industry Court (NIC), which is solely responsible for employment disputes, has incorporated an ADR Center based on the Multi-Door Courthouse (MDC) model. This move has improved awareness among employers and employees on the concepts of mediation and ADR. However, there is still more work to be done in raising awareness within the labour community. The Lagos Multi-Door Courthouse (LMDC) resolved its first case involving a staff member laid off by a Trade Association and Bank, showcasing the efficacy of mediation in resolving disputes. The inability of the federal government and the Academic Staff Union of Universities (ASUU) to find common ground brings to light the potential limitations of mediation or ADR in resolving cases. While ADR or mediation may not be the mainstream approach in dealing with Trade union cases, trade unions still have a role to play in mediation. South Africa has made significant strides in addressing Trade union disputes through mediation.'[20]

Conversely, Dr Eugene Nweke, Trade Union Consultant, has made it clear that the Maritime Industry in Nigeria needs to take a more professional approach to resolving conflicts. He believes that the Trade Union Congress (TUC) represents the interests of workers in Nigeria but is outspoken about the corruption plaguing the settling of cases in Nigeria,[21] where one or two people are paid off, and the case remains unsolved. However, he is adamant that ADR still has an important role to play in the Maritime Industry.

He points out that the Nigerian Shippers Council has a mediation desk that has successfully mediated between parties involved in freight forwarding. Dr Nweke firmly believes that mediation has played a vital role in resolving conflicts, but further sensitisation is needed on the use of ADR in the maritime industry.

To bolster the points made above, it dawns on the writer that the nature of industrial relations and labour or employment-related conflicts or disputes tends to

[16]Resolving workplace disputes: A Consultation (2011) Department for Business Innovation and Skills (Tribunal Service).
[17]Orifowomo & Ashiru (2015).
[18]Okpara (2022) at 85..
[19]Expert Views on ADR (EVA) Show, Episode 39.
[20]*Ibid*.
[21]Corruption in Nigeria is also known as 'man know man.'

favour the adoption of ADR without going through the rigorous process associated with litigation. While ADR is gaining acceptance in other sectors, such as property, commercial, family, and even criminal matters, it still has a long way to go in industrial relations,[22] but in industrial relations, it still has a long way to go. However, more emphasis must be placed on training Senior management teams to handle workplace conflicts or disputes via ADR processes.

Disputes and conflicts are a natural part of any workplace, and in some cases, legal action may be necessary to resolve them. According to Section 54 (1) of the National Industrial Court Act (NICA), a trade dispute refers to any disagreement between employers and employees,[23] as well as between their respective organisations and federations, related to employment or non-employment of any person, terms of employment and physical conditions of work of any person, the conclusion or variation of a collective agreement, and an alleged dispute.[24]

In recent years, there has been an increased emphasis on utilising workplace mediation to settle labour disputes2.[25] Despite claims of its efficacy, there is a lack of evidence to support the notion that alternative dispute resolution (ADR) is successfully resolving workplace conflicts.[26] While there is limited academic research into workplace mediation in Nigeria,[27] there is a growing body of evidence that suggests its potential benefits[28] are too significant to ignore.

Workplace mediation is an idea whose time has come; over the past two decades, mediation services have been set up in both developed and developing countries to deal with a range of disputes, including commercial, property, criminal[29], and family disputes.[30] The Woolf Report, released in 1996,[31] made suggestions to the legal system for the expansion of mediation into various areas of the law, such as civil disputes and legal disputes with local authorities.[32]

Against this backdrop, Blake et al. pointed out Alternative Dispute Resolution (ADR) has a long and respected history in England and Wales.[33] Several government reports and consultation papers have been disseminated to establish how mediation can be utilised, and legislation has been passed to introduce ADR procedures into employment law.[34] The first formalised approaches to mediation in the workplace were developed in 1996 in Lewisham Council's Housing Department and the Department of Health.[35]

A 2015 Chartered Institute of Personnel and Development (CIPD) survey of their members testified that in-house mediation was used in 24% of organisations

[22]Umegbolu (2021) at 54.
[23]Orifowomo & Ashiru (2015) at 152.
[24]*Ibid.*
[25]Efbunike-Umegbolu (2022b).
[26]Umegbolu (2021) at 56.
[27]*Ibid*.
[28]Osabiya (2015).
[29]Umegbolu (2021) at 54.
[30]Levin & Wheeler (1979) at 51.
[31]In a bid to decongest the court system in England.
[32]Liebmann (2000) at 167.
[33]Blake, Brown & Sime (2021).
[34]Liebmann (2000) at 166.
[35]*Ibid*.

and external mediation in 9%.[36] Moreover, the use of in-house and external mediation increased by 24% and 32%, respectively.[37] At the same time, almost four in ten organisations had expanded their development and use of mediation skills.[38] However, Litigation is still preferred over mediation due to the attraction of financial rewards.[39] This is a mistake, and it is time for people to recognise the benefits of mediation.

The case of Shell v. Farah is a prime example of why people need to start taking mediation seriously. In this case, the lawyers received roughly 2,500,000 Naira (equivalent to 4,934.9) or 54% of the total compensation payment, leaving the plaintiffs with only 46% of the compensation.[40] It is essential to understand what mediation is. According to Acas and the CIPD, mediation is defined as 'where an impartial third party, the mediator, helps two or more people in dispute to attempt to reach an agreement.'[41]

The court system has faced numerous challenges, including high costs,[42] congestion,[43] and delays,[44] leading to significant changes.[45] Litigants and stakeholders alike have sought effective solutions to address these issues.[46] Litigants have expressed concern about their cases taking years to resolve due to the expensive nature of litigation,[47] including lawyers' fees and court filing fees.[48] Furthermore, corruption has only served to reinforce a lack of trust in the judiciary.[49] Meanwhile, stakeholders have been proactive in encouraging litigants to consider ADR as a viable alternative to litigation. [50] It is important to note that these challenges are not exclusive to Nigeria and are present in other jurisdictions[51] as well, highlighting the need for all stakeholders to take decisive action to tackle them.

Following the above, ADR has established a well-deserved reputation as a reliable, efficient, and cost-effective method of resolving commercial disputes.[52] This is particularly evident in countries like the USA, Australia, the UK, Singapore, Canada, and numerous other nations worldwide. With litigation being commonplace, ADR has become the preferred choice for dispute resolution and is gaining popularity among businesses worldwide.[53]

---

[36]*Ibid*.
[37]Saundry, & Wibberley (2015) at 1.
[38]*Ibid*.
[39]Frynas (2001).
[40]*Ibid.*
[41]Saundry & Wibberley (2015).
[42]Nwosu (2004) at 9.
[43]Onyema (2013) at 4.
[44]I*bid*.
[45]Levin & Wheeler (1979) at 51.
[46]Onyema (2013) at 6.
[47]Dawson (2013).
[48]*Ibid.*
[49]Oduntan (2017) at 36.
[50]Akerdolu (2013).
[51]Ahmed (2015) at 72.
[52]*Ibid.*
[53]Ntuly (2018) at 38.

Given the above, it is a fact that in the last two decades, Alternative Dispute Resolution (ADR) has grown to the extent of challenging litigation as the principal means of dispute resolution in the West.[54] Nevertheless, a brief insight into what the term ADR refers to is necessary - it simply refers to Mediation, Arbitration, Conciliation and Negotiation, which are out-of-court mechanisms for settling disputes.[55] This work does not seek to engage with all aspects of ADR but will deal mainly with Mediation and Conciliation.

Considering the changes that are sweeping across the globe in terms of dispute resolution, it is disheartening to note that the progress of ADR as a method of dispute resolution in developing countries is hardly keeping pace with the more developed countries like the UK and the USA;[56] particularly in workplace conflicts or trade disputes. It is concerning that many employees in Nigeria are aware of neo-patrimonial characteristics such as corruption and bullying; such traits are only further reinforced in the workplace. Additionally, recent research conducted illustrated that Nigerians are yet to embrace ADR.[57]

The Relevance of using the United Kingdom and Nigeria as Case Studies

The common law, also known as the Anglo-American Law, was the body of customary law based upon judicial decisions and represented in decided cases that the common-law courts of England have administered since the Middle Ages.[58] From it has evolved the type of legal system now also found in most of the member states of the Commonwealth and in the United States.[59] With the advent of colonial rule, Nigeria embraced common law and Customary Jurisprudence.[60] In the aftermath of colonial rule, virtually all new ideas of law or development in Nigeria that have been introduced are patterned after Western law, precisely the United Kingdom.[61] For example, the Arbitration Act, the first legislation on Arbitration in Nigeria, was inspired by the then-English Arbitration Act of 1889, which extensively dealt with domestic arbitration.[62] Subsequently, in 1988, Nigeria became the first African country to adopt the UNCITRAL Model law with the promulgation of the Arbitration and Conciliation Decree of 1988.[63]

To reiterate, the work will focus on the United Kingdom, Nigeria, and the US; however, it will predominately concentrate on Britain and Nigeria in the comparative analysis of this paper. Lagos was the federal capital territory of Nigeria from 1914-1991 and is one of the biggest commercial cities in Africa.[64]

[54]Fiadjoe (2004) at 19.
[55]Derri (2016) at 2.
[56]Fiadjoe (2004) at 37.
[57]Umegbolu (2021) at 53.
[58]The Common Law and Civil Law Traditions.
[59]*Ibid*.
[60]Idornigie (2007).
[61]Burns (1978) at 18.
[62]Derri (2016).
[63]*Ibid* .
[64]Fiadjoe (2004) at 18.

Lagos is widely known in Nigeria as the 'Centre for Excellence.' Population-wise, as of 2019, Lagos has over Twenty-five (25) million inhabitants with over Two hundred and fifty (250) ethnic groups represented in Lagos as residents with a reasonable number of international or foreign citizens resident for various economic purposes. [65] Lagos boasts of both huge water and land resources, thus making it inevitably the economic capital of Nigeria and Africa due to the location of its seaport. Hence, the attraction of various international companies like the six (6) major foreign oil companies which dominate the Nigerian oil industry today (Shell, Exxon Mobil, Chevron, Elf, Agip and Texaco), were already present in Lagos- Nigeria, to set up their businesses in Lagos by the early 1960s.[66]

On the other hand, in the United Kingdom, the rule of law is the longest-established common law dating to the Magna Carta of 1215, particularly jurisprudence.[67] In the same vein, in 1998, the encouragement of the use of ADR was built into the Civil Procedure Rules in the United Kingdom.[68]

Access to Labour Justice

The concept of "access to justice" embodies two fundamental approaches. Firstly, the justice system must be approachable without hindrance or obstacles, meaning that it must be unequivocally open and accessible to everyone, leading to socially just results.[69] Additionally, access to labour justice is grounded in the rules or methods established by the courts for their citizenry, guaranteeing just legal proceedings and outcomes.[70] Disputes and conflicts arising from employees' complaints continue to grow across different spheres of the world. Labour courts play a vital role in contributing to equity in industrial relations and ensuring access to justice. Access to labour justice should not only be understood as "formal access to labour courts and rights," but rather, it should enable real conditions of equality before the judiciary.[71]

Paz-Fuchs et al. have reflected on two aspects of access to justice: the procedural element of "access" and the substantive element of "justice.[72]" By combining the two, access to justice is undoubtedly hinged on its accessibility to all, and the denial of access to justice by any means, whether by a failure of the system to make alternative provisions or any form of bullying, discrimination, or harassment, is unacceptable.[73]

The case of *R (on the application of UNISON) v Lord Chancellor* underscores the constitutional right of access to justice and the rule of law. UNISON pursued a judicial review on the Fees Order, which illicitly restricted access to justice, and the Supreme Court collectively allowed its appeal, declaring the Fees Order

[65]Aina (2000) at 18.
[66]Frynas (1999) at 19.
[67]Blake, Browne & Sime (2021) at 5.
[68]*Ibid.*
[69]Access to Labour Justice (2021).
[70]*Ibid.*
[71]*Ibid.*
[72]Welsh (2022) at 6.
[73]*Ibid* .

unlawful and must be quashed.[74] The 1999 Constitution, Section 36 (1), explicitly guarantees the fundamental right of every citizen of Nigeria to a fair hearing, such that the common man is entitled to be treated justly and receive appropriate remedies from the court, which is within the ambit of the law and his constitutional right as a citizen of Nigeria.[75]

In Nigeria, several factors contribute to the impediment or hindrances to access to justice, some of which are deep-rooted in the political and economic scheme of the country, while others are procedural or substantive.[76] A report published by Afro Barometer reveals that one out of eight (8) Africans deliberately avoided taking cases to court in the past eight years.[77] The reasons for their avoidance include spiralling high costs of litigation,[78] unfair treatment,[79] alleged corruption[80] in the judiciary, and a lack of confidence and trust in the justice system. These hindrances pave the way for introducing ADR in all parts of the country to ensure access to justice.[81]

The Workings of Workplace Conflicts or Disputes in Nigeria

Generally, conflicts or disputes arising between employers and employees, employers and employees in organisations, are bound to occur in every organisation.[82] In Nigeria, the relationship between employers and employees is that of master and servant roles, making it difficult for employees to open up or even report a conflict between them and their employers for fear of losing their jobs.[83] In contrast to their UK counterparts, they are encouraged to open up or report any conflicts or disputes arising between them and their employers informally.[84]

The Nigerian Labour Law is the primary legislation that deals with the relationship between employers and employees.[85] In other words, in Nigeria, disputes or conflicts in the workplace entail or involve all employment disputes.[86] However, the act gave a vague definition of workers -excluding persons exercising administrative, executive, technical or professional functions as public officers or otherwise.[87]

The usage of the term 'workers' in the Labour Act has led to debates about its applicability to all classes of employees in Nigeria.[88] In retrospect, the above

[74]*R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51.
[75]Constitution of the Federal Republic of Nigeria, 1999.
[76]Okoguble (2015).
[77]Chukwurah (2017).
[78]Okogbule (2005) at 101.
[79]Oduntan (2017) at 37.
[80]*Ibid.* at 38.
[81]*Ibid.*
[82]Egbunike-Umegbolu (2022a). .
[83]*Ibid*.
[84]Acas working for everyone.
[85]9 Things every Nigerian should know about the Labour Act.
[86]Essien (2014) at 464.
[87]*Ibid*.
[88]*Ibid*.

definition begs the question, who is an employee? The definition of an employee in Section 230 (1) of the Employments Act, 1996 (ERA) in the UK defines an employee as an individual who has entered or works under contract employment[89] is different from that in the Nigerian Labour Act.[90]

However, both definitions share a common factor, which is that an employee works under a contract of employment. Moving on, labour disputes refer to any disagreements that occur among parties involved in establishing, implementing, or terminating labour relations.[91] These disputes can also arise from relations directly related to labour relations or disputes among workers' representative organisations. Such disputes are commonly referred to as trade disputes.[92] The Oxford Law Dictionary defines trade disputes as disagreements between an employer and employees (or their trade union), usually concerning wages or working conditions.[93] Nevertheless, Obi-Ochiabutor argued that the Trade Dispute (Amendment) Decree 1992 interpreted the meaning of trade disputes inversely. This means that the National Industrial Court (NIC) has exclusive jurisdiction over trade dispute cases, including inter or intra-union disputes.[94]

On the contrary, Section 47 of the Trade Dispute Act 2004 and Section 54 (1) of the National Industrial Court Act (NICA) 2006 provide clear definitions of trade disputes as any disagreement between employers and workers or between workers and workers related to employment or non-employment, terms of employment, physical conditions of work, or collective agreements.[95] It is important to note that not every labour dispute qualifies as a trade dispute.

Subsequently, Section 54 (1) of the National Industrial Court Act (NICA) 2006 defines trade dispute to mean-

Any dispute between employer and employees, including a dispute between their respective organisations and federations, which is connected with the employment or non-employment of any person, terms of employment and physical conditions of work of any person, or the conclusion or variation of a collective agreement, and an alleged dispute.[96]

The above definition depicts that the Labour Dispute is based on the premise of a relative balance of power between different parties, such as wrongs like exploitation, for instance, an exploiter and an exploited victim.[97] Nevertheless, it is not every labour dispute that qualifies as the latter.

For example, the court stated the core elements of a trade dispute in the case of NURTW v. Ogbodo (1998),[98] which are as follows:

---

[89]Russell (2021).
[90]9 Things every Nigerian should know about the Labour Act.
[91]*Ibid*.
[92]Advocaat Law Practice.
[93]*Ibid*.
[94]Obi-Ochiabutor (2002-2010).
[95]Essien (2014
[96]National Industrial Court Act (NICA) 2004
[97]Bogg (2017).
[98]NURTW v. Ogbodo (1998). 2 N.W.L.R (Pt. 537) at 189 *Cited* in Advocaat Law Practice, An Appraisal of Trade Dispute Resolution Mechanisms in Nigeria 2006, 1.

a) There must be a dispute.
b) The dispute must involve a trade, and it must be between employers & workers or workers and workers.
c) the dispute must relate to the employment or non-employment or terms of employment or physical condition of work of any person.[99]

From the preceding, the National Industrial Court of Nigeria (NICN) was established to handle labour, employment matters, and industrial relations matters. Any issues that have to do with labour matters are exclusively for the National Industrial Court.[100] In the 1999 constitution of Nigeria, there is a provision that says that the court may establish an ADR centre to deal with matters where the court has jurisdictions, which are labour employment and industrial matters. The Labour Conflict Act is designed to resolve any related labour matters in a cost-effective, user-friendly, and time-efficient manner, restoring relationships, maintaining confidentiality, and ensuring that the aggrieved parties receive satisfaction.[101]

A Trade Dispute Resolution Mechanisms in Nigeria

In regard to labour disputes, it is important to note that any party involved in such a dispute, including employees, employers, trade union representatives, or the Minister of Labour, can contact the Mediation Services provided by the National Industrial Court of Nigeria (NICN).[102]

This course of action is guided by the relevant laws, including the National Industrial Courts Law, the 1999 Constitution, and the Trade Dispute Acts 2004, which the NICN adheres to in its dispute resolution process. The trade unions are also empowered to initiate a process to settle disputes through mediation, conciliation, arbitration, or court intervention.[103] The Minister of Labor may also initiate the dispute resolution process if they become aware of a dispute. It is worth noting that the labour minister can begin settling labour disputes[104] outside of these methods as well.

Given the context mentioned above, it is crucial to compare the modus operandi of trade dispute mechanisms in Nigeria to that of the United Kingdom's mode of operation. This analysis will help to identify any similarities or differences between the two approaches.

[99] *Ibid*.
[100] 1999 Constitution of the Federal Republic of Nigeria
[101] Expert Views on ADR (EVA) Show, ADR and workplace conflicts: National Industrial Court of Nigeria (NICN) with Mr Odunayo Bamodu.
[102] *Ibid*.
[103] *Ibid*.
[104] *Ibid* .

Internal Settlement Mechanism

Under the Trade Dispute Act of Nigeria, parties to a conflict or dispute are mandated to settle their disputes themselves through internal settlement mechanisms before approaching any alternative means.[105] These internal means are also known as Collective Bargaining.[106]

What this means is that it allows or mandates parties to a conflict or dispute a leeway to settle their disputes themselves before approaching any alternative means. These Internal means are also known as Collective Bargaining. Section 91 (1) of the Labour Act defined Collective bargaining as a process of arriving or attempting to arrive at a collective agreement.[107]

Conversely, Section 3 of the same act indicates that collective agreements freely entered by the parties may have the effect of law after being submitted to the Minister of Labour and Employment, who has the discretion to make an order specifying the terms and portions of the agreement that shall be binding on the employers and workers.[108]

The above statement raises the prevalent question of why the minister of labour and employment has so much power conferred on him. It has been argued that this power is necessary in Nigeria, especially the fact that 'Nigerian culture' is one of the factors for this rule in the sense that most Nigerians understand the 'hard way'. For instance, the way most people were brought up with a whipping or beating and a 'do as I say mentality' without being allowed to question why they are being punished by their parents or elders, in contrast to the UK, where children ask 'why they are being shouted on. Hitherto, in Nigeria, if a rule is soft, people tend to flout it because they are accustomed to rigid rules/the 'hard way.'

Mediation/Conciliation

Mediation or conciliation is a process where a neutral third party, called a mediator or a conciliator, is appointed by parties in dispute to facilitate or assist them in reaching an amicable settlement.[109] The main objective of using mediation to settle workplace conflicts or disputes is to restore good employment relations through an efficient and fair resolution of conflicts. Unlike litigation, where parties are not directly involved, mediation promotes good employment relationships as it is party-driven. Another advantage of mediation is the preservation of the existing relationship between the parties, which tends to be lost in adversarial system.[110] Moreover, mediation saves time and avoids dealing with overloaded courts and inherent delays in the adversarial system, which is the primary motivation for the federal and state governments to encourage ADR in industrial relations in Nigeria.

[105]Advocaat Law Practice.
[106]Chaman Law Firm.
[107]International Labour Organisation 2021.
[108]*Ibid*.
[109]According to Professor Paul Idornigie, Mediation and Conciliation are both the same and thus can be used interchangeably. *Cited* in Egbunike-Umegbolu (2022a).
[110] *Ibid.*

According to Section 4 (2) of the Act, the mode of settling trade disputes via the mediation route is stipulated. If an attempt to settle the dispute through the internal settlement mechanism fails, or no such means of settlement exists, the disputing parties are required to meet within seven (7) days to resolve the dispute by the presidency of a mediator mutually agreed upon by the parties.[111] If the mediation fails, the matter will then be referred to the Minister within three (3) days of the expiration of the period for resolving the dispute by mediation.[112] This will be done in a written report containing the details of the disagreement and attempts made to resolve it by the Minister.[113] However, where this fails, it is within the remit of the Minister's power to direct the parties to take further steps to resolve the conflict where he/she is not satisfied that the parties have engaged in the procedures in good faith. If the parties, for any reason, are not able to resolve amicably, then the Minister refers the matter for mediation or conciliation to the Industrial Arbitration Panel (IAP).[114]

The Industrial Arbitration Panel (IAP)

The Industrial Arbitration Panel (IAP) offers Arbitration to disputants who were not able to settle disputes via the Mediation/Conciliation route. Professor Emilia Onyema defined 'Arbitration as a process wherein a third (3rd) party decides or makes a decision for the parties, unlike Mediation or Conciliation, where the third (3rd) party supports the parties or the disputants to decide for themselves.'[115]

One of the significant characteristics of the Trade Disputes Act is that the Minister has the authority to refer disputes to the IAP, and any award granted by the panel will not be legally binding on the parties up until the Minister of Labour approves or confirms it.[116] In simple terms, the IAP does have a procedure – it would only deal with matters referred by the Minister.

Given the foregoing, IAP is 'responsible for arbitrating the industrial disputes between employers and employees inter and intra-union disputes upon referral by the Minister of Labour and Productivity under section 9 (1) of the Trade Dispute Act 7.'[117] The Objective of the Industrial Arbitration Panel is to preserve harmony between workers and employers from the public and private sectors in industrial relations. Additionally, to enrich workers' and employers' political and socio-economic development in various working environments in the Nation.[118]

[111]Advocaat Law Practice.
[112]Advocaat Law Practice.
[113]This written report is required in accordance with the Act to be submitted by the parties to a dispute.
[114]Obi-Ochiabutor (2002-2010).
[115]Egbunike-Umegbolu (2021).
[116]Okpara (2022).
[117]IAP was conceived under the Trade Dispute Decree No. 7 of 1976 Cap 438, and the Minister of Labour and Productivity is the supervising body to the Panel *Cited* in Essien (2014).
[118]*Ibid.*

Hearing

According to Obi-Ochiabutor, 'the hearing consists of the Panel of Arbitrators listening to the disputing parties.'[119] The panel comprises the Chairman, the Vice Chairman, and at least Ten (10) other members appearing to the minister to represent the workers' interests. Generally, the Arbitration Tribunal (AT) consists of a sole Arbitrator supported by assessors and one or more arbitrators nominated by the representatives of employers and workers.[120]

Award

Subsequently, the IAP is expected to make its award within Twenty-one (21) days or more extended period at the discretion of the Minister.[121] Once a copy of the award is sent to the minister, he then sends copies to the parties and publishes the same.

Enforcement

This automatically validates the award parties shall be bound by the decision reached by the award.[122] It is pertinent to point out that a breach of the award will render the guilty parties (y) legally responsible. Nevertheless, if a notice of objection to the award is given within the stipulated time to the minister, then the minister shall refer the dispute to the National Industrial Court.[123]

Settlement by the National Industrial Court of Nigeria (NICN)

To reiterate, the Minister has the absolute power to apprehend[124] and refer a disputed award to the National Industrial Court (NIC). It is argued that the minister is the final arbiter in such circumstances.[125] This raises a prevalent question of whether the absolute power vested in the minister by the Trade Act creates a ripple effect on the part of the party, [126]who might not ordinarily have faith in the ADR procedure- to exercise his fundamental right by approaching the traditional court of Justice.

On the other hand, once the matter reaches the NICN, it ceases to be arbitration; as this is the apex court for the settlement of trade disputes, it becomes a Judicial hearing- which is final and binding.[127] However, there is an exception to

[119]Obi-Ochiabutor (2002-2010) at 78.
[120]*bid.*
[121]*Ibid*.
[122]*Ibid*.
[123]Essien (2014) at 467.
[124]Okpara (2022).
[125]Obi-Ochiabutor (2002-2010) at 82.
[126]Okpara (2022).
[127]Obi-Ochiabutor (2002) at 83.

this rule if a party alleges a breach of his/her fundamental rights automatically; this creates a leeway for an appeal.[128]

By and large, Section 5 of the Trade Dispute Act has empowered the Minister of Labour and Productivity to apprehend a dispute even before the parties report it.[129] What the Minister does, in this case, is to inform the disputants in writing of his apprehension of their case and propose to them steps that can be taken to resolve the dispute. The writer believes that state intervention in labour-related matters is targeted towards promoting democracy and safeguarding economic and international responsibilities. The power of the Minister of Labour and Productivity is not without its limitations, as the parties can refer the case to the National Industrial Court if they are not satisfied with the award at the end of the arbitration.

Therefore, in Nigeria, going by the Trade Disputes Act, as enumerated above, parties are mandated by the act to approach all these steps or processes -mediation, conciliation, and arbitration before they may choose the services of a lawyer, which is contrary to the modus operandi of ACAS in Britain-the powers of the Minister in Nigeria have no equivalent in the UK where the Conciliation/ Arbitration process is almost entirely privatised and in theory depoliticised.

The Workings of Workplace Disputes or Conflicts in Britain

The Advisory Conciliation and Arbitration Service (Acas)

ACAS is the Advisory, Conciliation and Arbitration Service. It is an independent body funded by the UK Government;[130] thus, it is not under the influence of any minister to exercise its functions, unlike its Nigerian Counterpart.

Trevor Colling postulated that:

> The Advisory Conciliation and Arbitration Service (ACAS), the public body with statutory responsibilities for individual and collective employment dispute resolution, can facilitate conciliated settlements in most cases prior to a tribunal hearing. Most parties express satisfaction with the service they receive, and targets for bringing remaining cases to a hearing within a reasonable time frame are substantially met.[131]

The focal point is that ACAS has been at the hub of dispute resolution in Britain, complementing the Employment tribunal system. It has provided a substantial number of services with a strong initial focus on collective disputes while adapting to more individual claims.[132] ACAS services align with the Employment Act 2002, which provides procedural reforms to the tribunal system to force dispute resolution back into the workplace.[133] The main objectives of

[128]Chapter IV of The Constitution of the Federal Republic of Nigeria Cited in Okpara (2022).
[129]The Trade Disputes Act 2004
[130]Curtis & Wright (2001).
[131]Colling (2004) at 560.
[132]*Ibid* .
[133]*Ibid*.

ACAS are to promote the improvement of industrial relations and resolve disputes more quickly and effectively.

However, the Advisory Conciliation and Arbitration Services (ACAS) modus operandi is thus:

> Before approaching the employment tribunal, parties are advised to try to settle their dispute by themselves, i.e., telling their manager. If they cannot resolve it, they approach ACAS to raise a formal grievance. Nevertheless, it is optional for parties to do so before they approach an employment tribunal to make claims;[134] however, it could help parties resolve disputes informally. Not trying this may affect how much compensation would be awarded. If they eventually make an employment tribunal claim. It is pertinent to point out that if a party raises the problem with his employer first, the time limits to make an employment tribunal claim do not change.[135]

Notification to Acas

'Parties must notify Acas before claiming an employment tribunal about a workplace conflict or dispute'[136]:

1. Once the party has notified 'Acas that they want to make a claim to an employment tribunal, they are 'the claimant.'
2. 'The other party who will respond to the claim, for example, your employer, is the respondent,'
3. Once the parties have notified Acas 'that they want to make a claim, they will offer early conciliation; this is when they talk to both parties, hereinafter known as 'the claimant and the respondent.' In most cases, it allows them to reach an agreement without going to the tribunal. It is pertinent to state that Acas is not part of the tribunal service and will not discuss any matter with the tribunal.'

Following the above, the ACAS mode of operation is quite lenient and free from any interference, unlike in Nigeria, where the parties are under pressure to settle due to the Minister's interference in labour dispute resolution. This is seen in the trade dispute resolution process as provided by the Trade Disputes Act. Due to the extensive control given to the Minister of Labour over the Industrial Arbitration Panel in the Trade Disputes Act, there is no real liberty for the Panel to demonstrate their impartiality towards the disputing parties.

[134]Acas working for everyone.
[135]*Ibid.*
[136]*Ibid.*

The Different Patterns of Settling Workplace Conflicts: Discrimination, Bullying and Harassment

In relation to Discrimination, bullying, and harassment are common practices in most organisations. It is pertinent to point out that the culprits are often above the employee or at some level of authority in which they believe they can exercise certain treatment with immunity.[137] However, in the US, if an employee is being treated poorly, it can be frowned upon but not illegal.[138] While most companies do not regard bullying as harassment, by utter definition and the result of the behaviour, it is. When it relates to an employee's diverse background, it is considered discrimination, which is illegal.[139]

According to Herschenia A. Brown, in the U.S. the bullying activities are not yet recognised as illegal, and some companies do not understand subtle forms of discrimination based on someone being a member of a legally protected class of people, thereby resulting in a potential hostile work environment claim. So, for many employees, there is not a trusting resource available within the company to help them resolve these conflicts, so they suffer in silence.[140]

However, David Hoffman, a past chair of the American Bar Association Dispute Resolution and a Harvard Law Lecturer, pointed out that there is a 'well-established system of Adjudication for discrimination cases in the United States and other parts of the world. In the US, both the national federal agency and the state anti-discriminatory agency have mediation programmes, and the cases are filed if it is found to have enough merits in the allegations to warrant processing the claim.'[141]

Hitherto, in the US, the participants are offered the option of mediation, and occasionally, they are ordered to at least try mediation. The principle of mediation is voluntariness; however, if people are required to stay in mediation until they have an agreement- then it removes the voluntariness of the mediation process. Interestingly, many of the US courts and anti-discriminatory agencies have a procedure requiring parties to try mediation at least. It raises an interesting policy question, which is -if mediation is confidential, then how did these agencies and courts, for that matter, enforce the obligations to try mediation in good faith because they are not allowed to enquire about what happened in the mediation process? Thus, there is an unresolved tension between confidentiality and policies that want to encourage the use of ADR in the US.[142]

On the contrary, in Nigeria, disputes concerning bullying, discrimination and harassment are not amenable to the use of ADR. Bullying and harassment are issues that ought to be resolved in most cases via disciplinary actions; in some cases, they may bother on crime, and if the crime is established, they will be dealt with accordingly. Thus, discrimination can arise in many ways, either due to

[137]Herschenia (2022).
[138]*Ibid.*
[139]Herschenia (2022).
[140]*Ibid.*
[141]Egbunike-Umegbolu, C. (2022c).
[142]*Ibid*.

disability, race, sex, age, national or state of origin or religion. Such complaints should be adequately addressed and should be handled at the managerial level.[143]

However, there is minimal encouragement for employees to use ADR to settle discrimination, bullying and harassment in the workplace in Nigeria. Unlike the way an ADR clause is inputted in commercial agreements between organisations, many employers do not have the inclusion of explicit ADR provisions in their organisation's handbooks, unlike in the UK and the US. Nevertheless, in Nigeria, employees are aware of ADR options regarding disputes or conflicts that might arise at the workplace- this is because of the third alteration to the Constitution of 2010. The issue of ADR is not only constitutionally but also statutory.[144] This is because they now have an ADR sector at the National Industrial Court (NIC).

Secondly, the Trade Disputes Act of 1976 and the NIC Act of 2006 expressly provide for ADR in the Industrial and Labour sectors. However, Professor Paul Idornigie pointed out that there needs to be statistics to demonstrate the awareness of ADR options regarding disputes or conflicts that might arise. Still, when drafting contracts, most organisations prefer clauses on Mediation over Arbitration.[145]

Conversely, in the UK, employees are aware of utilising ADR to settle disputes. It is definitely spreading now; ADR and mediation, particularly, are struggling to get a few holds in many different jurisdictions initially. That has been the case in the UK to some degree and certainly also in the workplace and employment disputes, but things are changing quite a lot, and there is a lot of awareness that is going on. People are aware of mediation, and many people have experiences with that in different contexts.[146]

Professor Bryan Clark pointed out that in the UK, large organisations have their in-house dispute resolution, particularly mediation thus if there is some sort of dispute or a conflict between employees, they can be referred to an in-house mediation service that is either offered by the trained and independent staff of the organisations or by an external third-party organisation bringing in mediators.[147] For instance, New Castle University has an in-house mediation scheme for staff disputes.[148]

But equally, in the United Kingdom, they have other external mediation providers offering workplace employment mediation. As a result, the civil mediation council has a list of accredited workplace mediators, and that space or area of activity is growing, and equally, people/ organisations are beginning to interact with the employment tribunals services. For example, if there is a real legal dispute, as it were, he/she may be offered mediation service by an employment tribunal judge.[149]

---

[143]Egbunike-Umegbolu (2022a).
[144]*Ibid*.
[145]*Ibid*.
[146]*Ibid*.
[147]Egbunike-Umegbolu (2022b).
[148]*Ibid.*
[149]*Ibid*.

Professor Bryan Clark pointed out that 'after they have assessed your dispute for the suitability, they may offer you that service though parties do not have to accept it, they can go down that route. If they like, one of the judges will mediate if the case is not successful, and then another judge will deal with the claim thereafter. However, that has grown quite a lot since it was brought in early 2006 and equally the other way- ADR in the employment tribunal services; it's called Advisory, Conciliation and Arbitration Service (ACAS).'[150]

On the Contrary, David Hoffman indicated 'that there is a fairly low level of awareness in the US except in a couple of situations. Yet, a portion of the US workforce is unionised, and a fairly high percentage of the employees realise that if they have a dispute with their employer, there is a procedure in the collective bargaining agreement- processing grievances and ultimately going to Arbitration if the grievances are not resolved. Nevertheless, this is less than Ten (10) per cent of the US workplace; unfortunately, it could have been much better if there was a high level of unionisation. Laws in the United States have been interpreted in ways that make unionisation efforts hard to succeed.

Against this backdrop, it is crucial to note that a significant portion of the US workforce is not represented by unions or subject to collective bargaining. However, in cases where employees sign written employment agreements, these agreements often include provisions for mandatory mediation in case of a dispute. If mediation fails to resolve the issue, the next step is private arbitration.[151] It is imperative that employees have a comprehensive understanding of the differences between mediation and arbitration and what the process entails, especially for those who have signed employment agreements with these provisions. Furthermore, it is essential to note that for workers in the US who do not have such agreements in place, there is a lack of awareness that they can suggest mediation as an option for resolving disputes with their employer.[152]

Conclusion and Recommendations

The paper presents a compelling and convincing historical account of employment relations in Nigeria and Britain, highlighting the significant differences in their respective ADR mechanisms - ACAS and NIC ADR. It unequivocally points out that the Minister's imperious influence has been hobbling Nigeria's NIC ADR, while Britain's ACAS is free and fair.

However, ADR, especially the straightforward and efficient Mediation process, is undoubtedly a clear winner over litigation, offering a cost-effective, party-driven, timely, and effective mode of conflict resolution. Mediation aims to restore healthy employment relationships and preserve the relationship between the parties. The adoption of ADR mechanisms has resulted in decongesting courts and better access to labour justice.

[150]*Ibid.*
[151]*Ibid.*
[152]*Ibid.*

Nonetheless, a comparison of Nigeria's NICN ADR and Britain's ACAS lays bare the significant disparities in their respective functioning. ACAS is an independent impartial advice to employers, employees, and their representatives on employment public body that receives government funding and offers free and rights, best practices, and policies. In contrast, NICN ADR's limited jurisdiction, lack of independence, and strict adherence to formal court procedures make it a far cry from ACAS.

Therefore, the writer strongly recommends that the Nigerian government continues its efforts to provide ADR at no cost and encourages citizens, particularly Trade Unions, precisely maritime and the Nigerian Union of Teachers, to maximise ADR to its fullest.

The writer also insists on the modification or review of the Trade Disputes Act to remove the Minister's undue influence or interference in labour dispute resolution, thus ensuring that settlements are impartial and free from corruption. The ACAS model must be used as a guide or replicated, as it is independent and devoid of corruption.

Additionally, the writer asserts that a review of the NICN ADR Centre Instrument & Rules 2015 is necessary to include walk-ins by employees and employers, reinforcing that the NICN ADR is a Court-Connected ADR centre where parties have the autonomy to opt for dispute resolution of their choice. This is one of the main features or benefits associated with ADR/court-connected ADR.

Finally, the writer insists that heightened sensitisation programmes concerning the benefits of ADR in settling disputes or conflicts in the workplace must be provided. Every organisation, especially private organisations that do not adhere to government rules, must be mandated to do so, as it would benefit both the organisation and society at large. The management of private organisations should include the ADR mechanism in their employee manual.

References

Ahmed, M. (2015). 'Bridging the gap between alternative dispute resolution and robust adverse costs orders' in *Northern Ireland Legal Quarterly* 66(1):71-92.

Aina, K. (2000). 'ADR 2000 - Resolving Corporate Disputes In the 21st Century'. Institute of Directors (IOD) Members Evening.

Akeredolu, A. (2013). A Comparative Appraisal of the Practice and Procedure of Court Connected Alternative Dispute Resolution in Nigeria, Unites States, and United Kingdom. A Thesis in the Department of Public and International Law Submitted to the Faculty of Law in partial fulfilment of the requirements for the degree of PhD of the University of Ibadan.

Blake, S., Brown, J. & S. Sime (2012). *A Practical Approach to Alternative Dispute Resolution.* 2nd ed. Oxford University Press.

Blake, S., Brown, J. & S. Sime (2021). *The Jackson ADR Handbook.* 3rd ed. Oxford University Press with the support of the Civil Mediation Council.

Bogg, A. (2017). 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' in *International Journal of Comparative Labour Law and Industrial Relations* 33(1):7-37.

Bradney, A. (1998). 'Law as a Parasitic Discipline' in Journal of Law and Society 25(1):71-84.

Burns, A. (1978). *History of Nigeria*. 8th ed. George Allen & Unwin Ltd.

Bush, R.A.B. (2021). 'Handling Workplace Conflict: Why Transformative Mediation?' in *Hofstra Labor & Employment Law Journal* 18(2):367- 373.

Cahillane, L. & J. Schweppe (eds.) (2016). *Legal Research Methods: Principles and Practicalities.* Clarus Press.

Cahilllae, L. & J. Schweppe (eds.) (2016). *Legal Research Methods: Principles and Practicalities*. Clarus Press.

Chukwurah, F. (2017).'Why Africans get a raw deal in the justice system' https://edition.cnn.com/2017/05/05/africa/access-justice-africa-view/index.html

Colling, T. (2004). 'No Claim, No Pain? The Privatization of Dispute Resolution in Britain' in *Economic and Industrial Democracy* 25(4):555-579

Cowley-Cunningham, M.B. (2014). Quantitative Methods in Socio-Legal Studies: A Methodology Clinic Workbook - CSLS, University of Oxford. SSRN Electronic Journal. 10.2139/ssrn.2407141.

Creutzfeldt, N., Mason, M. & K. McConnachie (eds.) (2020). *Routledge Handbook of Socio-Legal Theory and Methods.* Routledge Taylor & Francis Group.

Currie, D., Gormley, T., Roche, B. & P. Teague (2016). 'The management of workplace conflict: Contrasting pathways in the HRM literature' at *International Journal of Management Reviews.* https://doi.org/10.1111/ijmr.12107

Curtis, S. & D. Wright (2001). 'The Role of ACAS' in *Management Research News* 24(1/2):50-54.

Dada R. (2022). 'Conflict Resolution in The Workplace' at https://www.mondaq.com/nigeria/human-resource-management-/1216666/conflict-resolution-in-the-workplace

Dawson, S. (2013). 'Alternative Courthouse in Lagos speeds delivery of Justice' (Thomas Reuters Foundation) at http://cms.trust.org/item/20130522080353-sa1vp

Derri, D.K. (2016). *Alternative Dispute Resolution in Nigeria – A Functional Approach.* Malthouse Press Limited.

Eberle, E. (2009). 'The Method and Role of Comparative Law' in *Washington University Global Studies Law Review* 8(3):451-486.

Egbunike-Umegbolu, C. (2021). Careers in ADR with Professor Emilia Onyema. https://blogs.brighton.ac.uk/chinwe/2021/03/13/episode-15-careers-in-adr-with-professor-emilia-onyema

Egbunike-Umegbolu, C. (2022a). ADR and workplace conflicts: a Nigerian Perspective with Professor Paul Idornigie, SAN, C.Arb (UK) https://blogs.brighton.ac.uk/chinwe/2022/12/18/adr-and-workplace-conflicts-a-nigerian-perspective-with-professor-paul-idornigie-san-c-arb-uk/

Egbunike-Umegbolu, C. (2022b). Alternative Dispute Resolution and Workplace Conflict: A British Perspective with Prof Bryan Clark. https://blogs.brighton.ac.uk/chinwe/2022/08/29/adr-and-workplace-conflict-a-british-perspective-with-professor-bryan-clark

Egbunike-Umegbolu, C. (2022c). ADR and Workplace Conflict: A US Perspective with David Hoffman. https://blogs.brighton.ac.uk/chinwe/2022/11/20/adr-and-workplace-conflict-a-us-perspective-with-david-a-hoffman

Egbunike-Umegbolu, C. ADR and workplace conflicts: National Industrial Court of Nigeria (NICN) with Mr Odunayo Bamodu. https://spotifyanchor-web.app.link/e/Eit4z3Kkhxb

Egbunike, N.A. & Ch. S. Umegbolu (2021). Adopting podcasts as a pedagogical tool by Nigerian university teachers- yea or nay? Paper presented at University of Brighton

Education and Student Experience. https://unibrightonac.sharepoint.com/teams/clt/esec/SitePages/Home.aspx

Essien, K.B. (2014). 'Re-Shaping Institutions for Industrial Dispute Settlement in Nigeria: Perspectives on the Status of the Industrial Arbitration Panel' in *International Journal of Research* (IJR) 1(6):463-476

Euwema, M.C., Medina, F.J., García, A.B. & E.R. Pender (eds.) (2019). *Mediation in Collective Labor Conflicts.* Springer.

Feeley, M.M. (2001). 'Three Voices of Socio-Legal Studies' in *Israel Law Review* 35(2-3):175-204.

Feeney, A. & E. Heit (eds.) (2007). *Inductive Reasoning Experimental, Development and Computational Approaches*. Cambridge University Press.

Fiadjoe, A. (2004). *Alternative Dispute Resolution: A Developing World Perspective.* Cavendish Publishing Limited.

Frynas, J.G. (1999). 'Litigation in the Nigerian oil industry: a socio-legal analysis of the legal disputes between oil companies and village communities' A Thesis Submitted for the Degree of PhD at the University of St Andrews.

Frynas, J.G. (2001). 'Problems of Access to Courts in Nigeria: Results of a Survey of Legal Practitioners' in *Social & Legal Studies* 10(3):397-419.

Galligan, D.J. (2006). *Law in Modern Society*. Oxford: Clarendon Press.

Hantrais, L. (1995). 'Comparative Research Methods' Social Research 'Update 13. http://sru.soc.surrey.ac.uk/SRU13.html

Herschenia A.B. (2022). How Bullying and Discrimination Intersect in the orkplace – And Why ADR is a Solution (ABA, Section of Dispute Resolution 2022) https://www.americanbar.org/groups/dispute_resolution/publications/JustResolutions/october-2022/how-bullying-and-discrimination-intersect-in-the-workplace/

Idornigie, P.O. (2007). 'Overview of ADR in Nigeria' in *Arbitration: The International Journal of Arbitration, Mediation and Dispute Management* 73(1):73-76.

Kratt, E. (2015). 'To What Extent Is Neopatrimonialism the Unchanging Way in Which 'Africa Works'?' E-International Relations, ISSN 2053-8626 Pp. 7/7.

Levin, L. & R.R. Wheeler (eds.) (1979). *The Pound Conference: Perspectives on Justice in the Future Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*. St. Paul, Minnesota: West Publishing Co.

Liebmann, M. (ed). (2000). *Mediation in Context*. London and Philadelphia: Jessica Kingsley Publishers.

Moscati, M.F., Palmer, M. & M. Roberts (eds.) (2020). *Comparative Dispute Resolution*. Edward Elgar Publishing.

Mulcahy, L. & R. Cahill-O'callaghan (2021). 'Introduction: socio-legal methodologies' in *Journal of Law and Society* 48 (s1), S1-S9. https://doi.org/10.1111/jols.12336

Ntuly, N. (2018). 'Africa: Alternative Dispute Resolution in a Comparative Perspective' in *Conflict Studies Quarterly* 22:36-61.

Nwosu, K.N. (ed.) (2004). Legal Practice Skills & Ethics in Nigeria: In Honour of Chief Babatunde Abiodun Ibironke, SAN; CONconulting.

Obi-Ochiabutor, C.C. (2002-2010). 'Trade Disputes Resolution under Nigerian Labour Law' in *Nig.J.R.* 9:1-87

Oduntan, G. (2017). 'Prescriptive Strategics to Combat Corruption within of Justice Sector in Nigerian' in *Journal of Money Laundering Control* 20(1):33-51.

Ogbuanya, N. (2015). Overview of National Industrial Court's ADR Centre Instrument and Rules. The Guardian. https://guardian.ng/features/law/overview-of-national-industrial-courts-adr-centre-instrument-and-rules-2015

Okogbule, N.S. (2005). 'Access to Justice and Human Rights Protection in Nigeria: Problems and Prospects' in *Sur - Revista Internacional de Direitos Humanos* 3(2): 95-113.

Okonache Ogar, 'International Commercial Arbitration: The Principal Issues and Conflicts of Laws Challenges in Dispute Resolution', University of Bradford 2013-Unpublished)

Okpara, H.O. (2022). 'The Use of Alternative Disputes Resolution (ADR) Mechanisms in Resolving Labour Disputes In Nigeria' in *International Journal of Innovative Legal & Political Studies* 10 (1) at https://seahipaj.org/journals-ci/mar-2022/IJILPS/full/IJILPS-M-9-2022.pdf

Onyema, E. (2013). The Multi-door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC. https://api.semanticscholar.org/CorpusID:153833569

Orifowomo, O.A. & M.O.A. Ashiru (2015). 'Settlement of Trade Disputes: Nigeria's Labour Court in Perspectives' in *Journal of Policy & Globalization* 37:150-164

Osabiya, B.J. (2015). 'Conflict Management and Resolution in Nigeria Public Sector' in *Review of Public Administration and Management* 4(8):107-120.

Platsas, A. (2015). 'A Cosmopolitan Ethos for Our Future Lawyers (in English) in *Law Journal of the Higher School of Economics* [Право Журнал Высшей Школы Экономики 150-168]. https://ssrn.com/abstract=2597577

Platsas, A.E. (2009). 'A cosmopolitan ethos within a global law curriculum: comparative law as its promoter' in *Global Studies Journal* 2(4): 57-72.

Reitz, J.C. (1998). 'How to Do Comparative Law' in The American Journal of Comparative Law 46(4):617-636.

Russell, R. (2021). *Concentrate Q & A Employment Law*. 2nd ed. Oxford University Press.

Saundry, R. & G. Wibberley (2015). 'Workplace Mediation – Transforming the Culture of Conflict Management? in CIPD Conference paper.

Saundry, R. & G. Wibberley (2015). Workplace Mediation – Transforming the Culture of Conflict Management? CIPD Conference paper.

Schiff, D.N. (1976). 'Socio-Legal Theory: Social Structure and Law' in *The Modern Law Review* 39(3):287-310

Sinclair, Jr., K. (1971). 'Legal Reasoning: In Search of an Adequate Theory of Argument' (comment), in *California Law Review* 59(3) A Tribute to Hans Kelsen):821-858.

Sonnentag, S., Unger, D. & I.J. Nägel (2013). 'Workplace conflict and employee well-being; The moderating role of detachment from work during off-job time' in *International Journal of Conflict Management* 24(2):166-183.

Umegbolu, Ch. (2021). Dispensation of Justice: Lagos Multi-Door Courthouse (LMDC) as a Case Study in Nigeria. PhD Thesis submitted at the University of Brighton.

Watkins, D. & M. Burton (eds.) (2018). *Research Methods in Law* (2nd ed.). Routledge.

Welsh, L. (2022). *Access to Justice in Magistrates' Courts - A Study of Defendant Marginalisation*. Bloomsbury Publishing.

Websites

Acas working for everyone. https://www.acas.org.uk/early-conciliation

Access to Labour Justice: Judicial institutions and procedures in selected South American countries: Overview of procedural elements for access to labour justice dispute in judicial dispute resolution institutions (Labour Law and Reform Unit 2021)

Advocaat Law Practice, An Appraisal of Trade Dispute Resolution Mechanisms in Nigeria 2006. https://advocaat-law.com/wp-content/uploads/2021/11/c6068a396a29b5cd5f694c003e7f61e0.pdf

Chaman Law Firm, How to Settle Trade Disputes in Nigeria https://www.chamanlawfirm.com/how-to-settle-trade-disputes-in-nigeria->

Expert Views on ADR (EVA) Show, ADR and workplace conflicts: National Industrial Court of Nigeria (NICN) with Mr Odunayo Bamodu. https://podcasts.apple.com/us/podcast/episode-32-adr-and-workplace-conflicts-national/id1538506713? i=1000591269758

Expert Views on ADR (EVA) Show, Episode 41: Trade Unions/Maritime - ADR and Workplace Conflicts: A Nigerian Perspective with Dr Eugene Nweke https://podcasts.apple.com/us/podcast/episode-44-adr-and-workplace-conflict-a/id1538506713?i=1000604785492

Resolving workplace disputes: A Consultation (2011) Department for Business Innovation and Skills (Tribunal Service) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31435/11-511-resolving-workplace-disputes-consultation.pdf

The Association of Multi-Door Courthouses of Nigeria, *A Compendium of Articles on Alternative Dispute Resolution (ADR)* 2019. https://blogs.brighton.ac.uk/chinwe/2019/08/13/5/

The Common Law and Civil Law Traditions. https://www.law.berkeley.edu/wpcontent/uploads/2017/11/CommonLawCivilLawTraditions.pdf

Things every Nigerian should know about the Labour Act https://lawpadi.com/9-things-every-nigerian-know-labour-act

Legislation

Constitution of the Federal Republic of Nigeria 1999
National Industrial Court Act (NICA) 2004
The Trade Disputes Act 2004

Cases

Nigeria

NURTW v. Ogbodo (1998) 2 N.W.L.R

United Kingdom

R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51

Athens Journal of Law - Volume 10, Issue 1, January 2024 – Pages 155-162

The Ethical Riddle of Executive Remuneration

By Clément Labi[*]

Excessive executive remuneration causes public unease, debate, and very often legislative initiative. There could be actually good reasons for that: from times immemorial, betray the trust of a fellow and to take a decision as a judge in one's own cause, have been considered despicable. Those ethical concerns are so "etched in legal nature" that the principles of sanctioning corporate mismanagement and conflicted decision-making have been considered parts of natural law. Such is not the case of the current (but not novel) concern with compensation "levels" irrespective of the merits of their earners, for which an ethical foundation is elusive.

Keywords: *Business Ethics; Ethics; Executive Remuneration; Fiduciary Duty; Economic Inequality.*

Introduction

Universally, shareholders appoint their company's directors, who are sometimes paid for the exercise of their mandate. Such remunerations however tend to be very modest compared to those of executives, especially at the C-level. Chief Executives Officers of S&P 500 firms earned on average USD 16.7 million in 2022[1], and among those same companies, *Fortune* found twenty Chief Financial Officers (CFOs) earning at least USD 50% more than their CEOs[2]. Tales of individual instances of extraordinary compensation packages occasionally hit the news cycle and provoke a *moral* outrage. Why is this exactly?

The Abhorrence of "Extracted" Remuneration

The Roman lawyer Ulpian has stated that the basic principles of law are three: a) to live honourably, b) not to harm any other and c) to render each other his own – *juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*[3] Although not in that particular order, the result of this research is that the ethical malaise surrounding "excessive" executive remuneration can be best approached along those three categories. Maybe the simplest idea to

[*]Ph.D. Candidate, Faculty of Law, Economics and Finance, University of Luxembourg, Esch-sur-Alzette, Luxembourg.
Email: clementlabi@gmail.com.
[1]Kerber (2023).
[2]Estrada (2023).
[3]Watson (1985).

comprehend does correspond to the second item in Ulpian's enumeration and to the thesis of Lucian Arye Bebchuk.[4]

Bebchuk's starting point is the agency problem: shareholders, to the extent that they could be considered as a class, have utility curves and return-to-risk profiles that are typically very different from the board and the executives. Bebchuk posits three features for an optimal arrangement to align the interests of those two classes: it must attract and retain high-quality executives, provide said executives with enough incentive to make sufficient effort and serve the shareholders' interests, and minimise overall costs (agency costs). As minimal conditions, the board should act at arm's length and spontaneously determines the optimal remunerations, market forces should prevent incorrect remuneration and company law should enable shareholders to veto unsatisfactory agreements on remuneration.

Through political manoeuvring ("collegiality, team spirit, a natural desire to avoid conflict within the board, friendship and loyalty"[5]), and thanks to the weakness of shareholders, however, executives are in such a commanding position that they are able to "tunnel" the firm's resources for their personal profit[6]. In other words, through their "managerial power", the higher-ups mismanaging the firm often succeeded in obtaining unearned income without creating any wealth, or, in public choice theory parlance, they "extract rent". The argument that there is some persistence to the issue alludes to what is known in public choice theory as Tullock's paradox: the advantages of "extracting rent" vastly surpass the costs of obtaining such extraction[7], which should be impossible or at least unsustainable if the conditions under which the efficient market theory would be applicable. It is notable that Bebchuk emphasises how it is the poor quality of the information communicated to the company's shareholders that allows the extraction to occur, as, if they were better informed of the details of the higher-ups' remuneration, they could challenge it either by dismissing the company managers, initiating legal action, or simply selling their stake in the company and re-invest in another. Similarly, many arguments against letting remunerations be spontaneously set, without specific legal regulation, are, explicitly or not, arguments against the ideas that markets are in reality, efficient.

It is not difficult to see how the defrauding of investors by the firm's powers-that-be is ethically repulsive. In fact, presuming that natural law does indeed exist, two of its most incontestable elements are that there should be a strict punishment of the abusers of others' trust, especially when it comes to the management of another person's wealth - hence the money invested by the shareholders should be managed with "the punctilio of an honor the most sensitive" according to then-Chief Judge of the New York Court of Appeals Benjamin Cardozo[8] - and that no one could be a judge in his or her own cause, from where it follows that management should, at least, consider the question of

[4]Bebchuk & Fried (2005).
[5]*ibid*.
[6]Johnson, La Porta, Lopez-de-Silanes & Shleifer (2000).
[7]Tullock (1980).
[8]*Meinhard v. Salmon*, 164 N.E. 545.

their remuneration not as their own cause, but rather a question of allocation of assets from the perspective of the firm.

For his defence of Sextus Roscius of Ameria, a man accused of murdering his own father, Cicero found that the real culprit was Lucius Cornelius Chrysogonus, a recent ally to the dictatorship. During his speech, Cicero remarkably emphasised, as a way of establishing his deplorable character, that Chrysogonus had mismanaged the resources put under his trust, while "*[i]n private business, if any one carried out a trust, I do not say fraudulently for his own interest and profit, but even without proper care, our ancestors deemed that he had been guilty of a most dishonourable act*"[9]. From this Cicero concluded that Chrysogonus was a worthless person, as "it betokens an utterly worthless character to break the ties of friendship, and at the same time to deceive a man who could not have been wronged had he not had confidence in his friend"[10].

It is therefore not a hyperbole to state, as Tamar Frankel does, that the question of "how to trust, or at least reliably depend upon, others who undertake to act on behalf of our interests" is "etched in legal nature"[11], at least in that common law jurisdiction under the concept of fiduciary duty.

In the case of *Pepper v. Litton*[12], Litton, the controlling shareholder of the Dixie Splint Coal Company, had $33,468.89 in "back salaries paid to him just before putting the company in bankruptcy. Justice William O. Douglas was very explicit about grounding the Supreme Court's opinion on jusnaturalist and ethical bases:

> "*A sufficient consideration may be simply the violation of rules of fair play and good conscience by the claimant; a breach of the fiduciary standards of conduct which he owes the corporation, its stockholders and creditors. He who is in such a fiduciary position cannot serve himself first and his cestuis second. He cannot manipulate the affairs of his corporation to their detriment and in disregard of the standards of common decency and honesty. He cannot by the intervention of a corporate entity violate the ancient precept against serving two masters. He cannot by the use of the corporate device avail himself of privileges normally permitted outsiders in a race of creditors. He cannot utilise his inside information and his strategic position for his own preferment. He cannot violate rules of fair play by doing indirectly through the corporation what he could not do directly. He cannot use his power for his personal advantage and to the detriment of the stockholders and creditors no matter how absolute in terms that power may be and no matter how meticulous he is to satisfy technical requirements. For that power is at all times subject to the equitable limitation that it may not be exercised for the aggrandisement, preference, or advantage of the fiduciary to the exclusion or detriment of the cestuis. Where there is a violation of those principles, equity will undo the wrong or intervene to prevent its consummation*".

[9]Dyck (2010).
[10]*Ibid.*
[11]Frankel (2011).
[12]*Pepper v. Litton*, 308 U.S. 295.

As for the "etching" of that principle, Justice Douglas noted the resemblance in spirit of the Court's decision with English Fraudulent Conveyance Act 1541, promulgated under Queen Elizabeth I[13].

When Natural Law and Positive Law Meet

The critical importance of the legal fiduciary principle, mirroring the ethical abhorrence for abuses of trust but also by other names in many if not all legal systems. Celsus' *Digest* already made the depositary care for the deposited good as he would do for his own[14] and Gaius wrote eloquently about the standard of responsibility for the *socius*[15]. Commenting on the Talmud's position that "all robbers must reimburse the value of the item at the time of the theft"[16], Maimonides states that, in the context of a deposit the same principle applies to "a person who without the owner's consent takes an object entrusted to him for safekeeping to use for his private purposes in a way that will diminish it, or to take as his own"[17], although Jewish law's position is somewhat weaker in the particular case of partnership[18]. While it has been proposed that the *concept* of fiduciary principle has been imported from English and American laws to France or Germany in the late twentieth century, the same (or similar) emphasis is placed on the duties of the depositary as early as 1745 by French jurisconsult Jean Domat, himself referring to Celsus[19]. Even better, the classic English law decision that equates the duties of a company director to that of a trustee, *The Charitable Corporation v Sutton*[20]. even mentions Domat as support of their findings.

The second jusnaturalist concept upon which an executive compensation could be challenged as excessive is also one which is strongly grounded in ethics, namely that according to which no man can be a judge of his own cause, which the Justinian Code phrased as "*Ne quis in sua causa iudicet vel sibi ius dicat*"[21]. Evidently, when a company director votes on his own compensation, or when an executive influences the board as to approve a package in his or her favour, one of the issues is that his action is likely to be biased.

Thomas Hobbes wrote in *Leviathan* that "[*f]or the same reason no man in any cause ought to be received for arbitrator to whom greater profit, or honour,*

[13]13 Eliz 1, c 5.
[14]Celsus, 11 dig., D. 16,3,32: *quod Nerva diceret latiorem culpam dolum esse, Proculo displicebat, mihi verissimum videtur. Nam et si quis non ad eum modum quem hominum natura desiderat diligens est, nisi tamen ad suum modum curam in deposito praestat, fraude non caret: nec enim salva fide minorem is quam suis rebus diligentiam praestabit.*
[15]Gaius, 2 cott. rer., D. 17,2,72*: socius socio etiam culpae nomine tenetur, id est desidiae atque neglegentiae. Culpa autem non ad exactissimam diligentiam dirigenda est: sufficit etenim talem diligentiam communibus rebus adhibere, qualem suis rebus adhibere solet, quia qui parum diligentem sibi socium adquirit, de se queri debet.*
[16]Talmud, Baba Kamma, p.66a.
[17]Maimonides (1180).
[18]Saiman (2019).
[19]Domat (1745).
[20](1742) 26 ER 642 ; 2 Atk 4.
[21]Codex Iustiniani 3.5.

or pleasure apparently ariseth out of the victory of one party than of the other: for he hath taken, though an unavoidable bribe, yet a bribe; and no man can be obliged to trust him. And thus also the controversy and the condition of war remaineth, ***contrary to the law of nature***".

Similarly, in the case of *Thomas Bonham v College of Physicians*[22], Lord Justice Coke found that the College of Physician Act 1553 was not legally empowered to authorise anyone to practice and to sit as a court of delegation of prerogative powers from King Henry VIII, because that would be a violation of the *nemo iudex* rule. The ruling is worded in unmistakably jusnaturalist language*: "One cannot be Judge and attorney for any of the parties[...] And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void;* ***for when an act of Parliament is against common right and reason, or repugnant****, or impossible to be performed, the common law will control it, and adjudge such an Act to be void; and, therefore in [...[Thomas Tregor's case*[23]*[...]/ Herle saith, some statutes* ***are made against law and right,*** *which those who made them perceiving would not put them in execution*".

That being said, it is also obvious that those who harm others by defrauding them of their money are *ipso facto* preventing the allocation to each of their own, and also tantamount to living dishonourably, thus violating all three of Ulpian's precepts.

Hence a confusion arises: regardless of whether the remuneration was earned or usurped, independently of whether the gain for the company was at least equal (or, if possible, greater) that managers' reward, with no consideration of the stock prices, benchmarks, incentives, is too much *morally* to much?

The work of the concept of "inequity aversion", defined in a landmark article by Fehr and Schmidt[24] as meaning that "means that people resist inequitable outcomes; i.e., they are willing to give up some material payoff to move in the direction of more equitable outcome" [25]. For example, in the "ultimatum game", the proposer offers to the responder a certain fraction of a surplus with a fixed size. If the responder accepts the offer, then he or she acquires the proposed fraction, if not, both proposer and responder get nothing. Although it would be rational for the responders to accept any offer superior to zero, experiments have evidenced that they certainly do not[26]. The feeling according to which company executives should not earn more than a certain multiple of the pay granted to other workers seems to be widespread, although to various extents[27]. This is expressed by Kiatpongsan and Norton in words such as "universal desire" and "ideal pay gaps"[28]. In Switzerland, however, a 2013 federal popular initiative sought to cap the amount of the highest *salary* (defined as "the sum of compensations in cash and in kind

[22]*Thomas Bonham v College of Physicians* (1610) 8 Co. Rep. 107, 77 Eng. Rep. 638.
[23]*Thomas Tregor's case* (1324) Y.B. Pasch. 8 Edw. III, 26, 30a-31a.
[24]Fehr & Schmidt (1999).
[25]*Ibid*.
[26]*Ibid*.
[27]Gavett (2014).
[28]Kiatpongsan & Norton (2014).

[…] paid in relation to a profit-seeking activity") in a given business to twelve times that of the lowest salary[29]. However the initiative was handily defeated by referendum[30]. The idea has been popular with certain left-wing parties even in developed economies: in France, Jean-Luc Mélenchon's 2017 presidential campaign aimed at a multiple of twenty[31]. The Labour manifesto for the 2019 general elections in the United Kingdom promised to "require one-third of boards to be reserved for elected worker-directors and give them more control over executive pay"[32], implicitly to restrain executive compensation not by setting maximum amounts but by subjecting it to employees' consent. Ultimately, the Conservatives won that election and the idea has not come to fruition.

Conclusion

Is there an ethical issue at stake in censoring remunerations above a certain amount? Words are important: regardless of the scientific merits of their position, Fehr and Schmidt were careful to use the word "*inequity*" instead of "*inequality*": implicitly in the ultimatum game or the dictatorship game is the idea that the proposer has substantially no greater claim on the surplus than the responder. There is no ethical case to forbid compensation above a certain amount *unless* one ascertains that one's work cannot be *worth* more than the cap amount, which is never certain. Although not an executive, basketball player Stephen Curry is scheduled to earn USD 51.9 million for playing point guard for the Golden State Warriors[33], which is *considerably* higher than the average CEO pay figure cited above. However, his team is valued USD 7 billion[34], to which he certainly contributed a lot, as since joining the Warriors in the 2009 season, he alone accounted for 128[35] of his team's 656 wins[36]. Would it be fairness to limit Curry's pay to a maximum twenty times that of his teammate Gary Payton II, who only played 7 games during the 2022-2023 season and scored a total of forty points[37]?

[29]Initiative populaire fédérale 1:12 - Pour des salaires équitables'. https://www.bk.admin.ch/ch/f/pore/vi/vis375t.html
[30]FF 2014 1693, Arrêté du Conseil fédéral constatant le résultat de la votation populaire du 24 novembre 2013 (Initiative populaire «1:12 – Pour des salaires équitables»; initiative populaire «Initiative pour les familles: déductions fiscales aussi pour les parents qui gardent eux-mêmes leurs enfants»; modification de la loi fédérale concernant la redevance pour l'utilisation des routes nationales [Loi sur la vignette autoroutière, LVA]. https://www.fedlex.admin.ch/eli/fga/2014/303/fr
[31]Delmas (2017).
[32]Labour Party (2019).
[33]Knight (2023).
[34]Sim (2023).
[35]Basketball Reference, Stephen Curry. https://www.basketball-reference.com/players/c/currys t01.html
[36]Basketball Reference, Golden State Warriors.https://www.basketball-reference.com/teams/GSW/
[37]Basketball Reference, Gary Payton II. https://www.basketball-reference.com/players/p/paytoga02.html

As per Ulpian, who stated that the principle *suum cuique tribuere* (*to render each other his own)* as one of the three principles of law, it would not be fair if an employee or anybody else who brings or makes a lot of profit for a business was to be paid "equally" to an underperformer, and it would be certainly unequitable.

References

Bebchuk L. & J.M. Fried (2006). 'Pay Without Performance: Overview of the Issues', in *Academy of Management Perspectives* 20(1):5-24.

Delmas, I. (2017). 'Une mesure à la loupe – Comment Mélenchon veut instaurer un salaire maximum des patrons' *Libération*, March 17. https://www.liberation.fr/politiques/2017/03/17/comment-melenchon-veut-instaurer-un-salaire-maximum-des-patrons_1556122/

Domat, J., (1745). *Les lois civiles dans leur ordre naturel, Le Droit Public et Legum Delectus*, Paris: Michel Brunet.

Dyck, A.R. (2010). *Cicero: Pro Sexto Roscio*. Cambridge: Cambridge University Press.

Estrada, S. (2023). 'At 20 S&P 500 companies, the CFO earned 50% or more of what the CEO was paid in 2022.' *Fortune*, August 14. https://fortune.com/2023/08/14/comparing-cfo-and-ceo-compensations.

Fehr, E. & K.M. Schmidt (1999). 'A Theory of Fairness, Competition, and Cooperation' in *Quarterly Journal of Economics* 114:817-868.

Frankel, T.T. (2011). *Fiduciary law*. Oxford: Oxford University Press.

Gavett, G. (2014). 'CEOs Get Paid Too Much, According to Pretty Much Everyone in the World' *Harvard Business Review*, September 23. https://hbr.org/2014/09/ceos-get-paid-too-much-according-to-pretty-much-everyone-in-the-world.

Johnson, S., La Porta R., Lopez-de-Silanes R. & A. Shleifer (2000). 'Tunneling', in *American Economic Law Review* 90:22-27.

Justinian, Digest 1.1.10. In Watson, A. (ed.) (1985). *The Digest of Justinian*. Philadelphia: University of Pennsylvania Press.

Kerber, R. (2023). 'CEO pay averaged $16.7 million last year at S&P 500 companies, a decline.' *Reuters*, August 3. https://www.reuters.com/business/ceo-pay-averaged-167-million-last-year-sp-500-companies-decline-2023-08-03

Kiatpongsan, S. & M.I. Norton (2014). 'How Much (More) Should CEOs Make? A Universal Desire for More Equal Pay', in *Perspectives on Psychological Science*, 9:587-593.

Knight, B. (2023). 'The NBA's Highest-Paid Players 2023', *Forbes*, October 20, https://www.forbes.com/sites/brettknight/2023/10/20/the-nbas-highest-paid-players-2023/

Labour Party (2019). *It's time for real change – for the many not the few*, at https://labour.org.uk/wp-content/uploads/2019/11/Real-Change-Labour-Manifesto-2019.pdf

Maimonides, M. (1180). *Mishnei Torah*. Touger T. New York: Moznaim.

Saiman, C. (2019). Fiduciary Duties in Classical Jewish Law', in Criddle E.J., Miller P.B. & Sitkoff R.H. (eds.), *Oxford Handbook of Fiduciary Law*. Oxford: Oxford University Press.

Sim, J. (2023). 'Report: Golden State Warriors valued at 'US$7bn' as minority shareholders put stake up for sale', *SportsPro Media*, September 25. https://www.sportspromedia.com/news/golden-state-warriors-minority-stake-sale-valuation-investment.

Tullock, G. (1980). 'Efficient rent-seeking', in Buchanan, J., Tollison, R, and G. Tullock (ed.). *Toward a theory of the rent-seeking society*, 97–112. College Station: Texas A&M Press.

Cases

England

The Charitable Corp v Sutton (1742) 26 ER 642 ; 2 Atk 4
Thomas Bonham v College of Physicians (1610) 8 Co. Rep. 107; 77 Eng. Rep. 638
Thomas Tregor's case (1324) Y.B. Pasch. 8 Edw. III, 26, 30a-31a

USA

Meinhard v. Salmon, 164 N.E. 545.
Pepper v. Litton, 308 U.S. 295.

Athens Journal of Law - Volume 10, Issue 1, January 2024 – Pages 163-174

The Full Enforcement of Socio-economic Rights in Africa: A Dream or a Reality?

By Katlego Arnold Mashego[*]

The adoption of the African Charter on Human and Peoples' Rights (African Charter) on 27 June 1981 in Nairobi, Kenya was recorded as historic step towards the protection of human rights in Africa. However, to date, Africans' socio-economic rights are not fully or at all enforced. The author argues that Africa must take a new approach, a strategic one towards economic development in Africa and consequently the enforcement of socio-economic rights. He submits that several strategic approaches, such as development of new laws on the natural resources, producing quality products and services, image related strategies which involve great marketing of Africa, its products, and services. The author is of opinion that there is a link between economic development and the enforcement of socio-economic rights. It is further argued that intra-African trade will enhance sustainable development and economic growth and it is important. It is submitted that African countries must focus more on intra-African trade, which will accelerate sustainable economic development and consequently the enforcement of socio-economic rights, which will in turn reduce poverty and better the lives of millions of Africans who are in dire need of socio-economic rights to be enforced due to the living conditions they are in.

Keywords: *Africa; socio-economic rights; natural resources, strategic economic development.*

Introduction

The adoption of the African Charter on Human and Peoples' Rights (hereinafter referred to as the African Charter) on 27 June 1981 in Nairobi, Kenya, was recorded as historic step towards the protection of human rights in Africa. However, to date, Africans' socio-economic rights are not fully or at all enforced.

Dr. Kwame Nkrumah in his 1963 speech in Addis Ababa, Ethiopia, '*We must unite now or perish'* passionately and hopefully said, '[*Africa] must unite now or perish'* he continued to state that *'[b]ut just as we understood that the shaping of our national destinies required of each of us […] so we must recognise that our economic independence resides in our African union […] The unity of our continent […] economic development of Africa will come only within the political kingdom, not the other way round.'* [1]

He further said *'[t]he resources are there. It is for us to marshal them in the active service of our people […] [o]ur continent certainly exceeds all the others in*

[*]Lecturer, Tshwane University of Technology, Pretoria, South Africa.
Email: kat.vsp@gmail.com

[1]Nkurmah (1963).

potential hydro-electric power, which some experts assess as 42% of the world's total'. What need is there for us to remain hewers of wood and drawers of water for the industrialised areas of the world? It is said, of course, that we have no capital, no industrial skill, no communications, and no internal markets, and that we cannot even agree among ourselves how best to utilise our resources for our own social needs […]'.[2]

It has been many years since Africa became independent, however, Africa is still struggling economically. This poor economic situation is affecting many Africans, since their socio-economic rights cannot be enforced due to (as some states put it) lack of 'resources'. The lack of resources argument is actually puzzling as Africa has substantial resources that can lead to socio-economic rights of every African being enforced.

As suggested by the title of this paper, this paper investigated strategic economic development and consequently the enforcement of socio-economic rights in Africa. Further, the paper will show that it is possible for Africa to have a strong economy as long as it takes strategic approach towards economic development, such economic development will consequently lead to enforcement of socio-economic rights.

Strategic Approach to Economic Development

A lot has been said about economic development in Africa,[3] however, this paper is on the strategic economic development, which will consequently lead to the enforcement of socio-economic rights. The strategies argued in this research are good quality products/service and world class marketing for African products/ services. Stating differently, the strategies put forward are Africa producing good quality products/services, great marketing of such products/services. Also, capturing of its natural and other resources towards economic development and redirecting of wealth of natural and other resources to its rightful owner, Africa.

As a result of no clear quality products/services, number of people prefer buying products/services of other countries outside of Africa, if Africa can have good quality products/services and market these, such people can buy local products/services and would eventually change their mentality about African products/services. Consequently, even the people outside of Africa will support the African products/services. This cannot happen overnight and obviously the African Union (hereinafter referred to as the AU) and/or individual states cannot impose laws to force people to buy local brands, but the quality and marketing will progressively change the mindset of people against the 'low-quality'/'bad-quality' African products/services, as perceived by many.

The other facet of the strategies brought forward is the harnessing of Africa's natural resources and enacting laws that would lead to Africa's minerals being

[2]Nkurmah (1963).
[3]Mashego (2020).

processed in Africa and the manufacturing of the end products being done in Africa. It is hopeful to see that there is a development on this strategy.[4]

In the words of Ralph Waldo Emerson, 'if a man can write a better book, preach a better sermon or make a better mouse trap than his neighbours, though he builds his house in the woods, the world will make a beaten path to his door.'[5] Les Brown, a motivational speaker goes on to say 'if you know marketing people will sleep outside your door, looking for a telephone they never touched or seen'.[6] This can indeed apply to Africa, good quality and good marketing can eventually lead to African products/services doing well.

It is the argument of this paper that Africa have a potential, this can be demonstrated with many African products/services, for instance Mxit, a chat app which 'fell victim to the rise of intense competition from international offerings such as WhatsApp and Facebook.'[7] Mxit had around 7.4 million monthly users, not only in South Africa (where it was created) but internationally, such as in Malaysia, India, Indonesia, the UK, the US, Nigeria, Brazil, France, Germany, Italy and Portugal.[8] There was a big potential in this app and at the time of its existence, WhatsApp (most popular currently) was not even popular,[9] it is the researcher's argument that the failure of this app was as a result of lack of innovation and less or poor marketing of the app.

It is a known fact that many African countries are doing badly economically,[10] and they use that as an excuse for not enforcing socio-economic rights.[11] The research concede that indeed poor economic development leads to failure to enforce socio-economic rights, and that this is a major problem for Africa.

It has been demonstrated that intra-African trade as facilitated by the African Continental Free Trade Area (hereinafter referred to as the AfCFTA) will yield good results in terms of trade which on the other hand would lead to economic development in Africa.[12] It is the argument of this paper that the intra-African trade will not yield substantial results as anticipated if there is no treaty (leading to also national policies) with the objectives of enhancing the African products/ services to being of great quality, i.e. good quality products/services. Borders can be opened but if African products/services are of less quality they will not be preferred by the consumers in other African countries.

Economic Development and Socio-Economic Rights: The Link

The African Union is made up of all African countries and consists of 55 Member States, which represent all the countries on the African continent. In

[4]News24 (2023).
[5]Quote Investigator (2015).
[6]Brown.
[7]Business Tech (2016).
[8]News24 (2020).
[9]News24 (2020).
[10]Arieff (2015).
[11]Agbakwa (2002) at 186.
[12]The AfCFTA website.

Africa, both civil and political rights and socio-economic rights are protected, in addition to that, group rights are as well protected, all these rights can be found in the African Charter.[13] The 'minimalist' approach which is all about considering the young states from number of obligations has led to the African Charter covering only limited number of socio-economic rights,[14] however, many important rights are covered in the African Charter.

For as much as the African Charter explicitly only covers limited number of rights, it should be brought to light that other rights, in particular socio-economic rights are covered implicitly.[15] It has been submitted that the vagueness of the African Charter is to allow those who apply the law and the interpreters some sort of flexibility.[16] Also, it must be borne in mind that 'promote and protect human and peoples' rights and freedoms',[17] being the objectives of the African Charter must be realised. Sadly however, despite the African Charter strongly protecting socio-economic rights, realisation of these rights is poor.[18]

The African Charter, in its preamble states that:

> '[*E]njoyment of rights and freedoms also implies the performance of duties on the part of everyone […] it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'*.[19]

In terms of the protection of socio-economic rights, constitutions of the African countries' reveal three broad constitutional models,[20] which are the direct constitutional protection model, the second model does not include the protection of socio-economic rights in a bill of rights, and third and last the hybrid model, whereby some socio-economic rights are recognised in the bill of rights, while others are under directive principles of state policy. One of arguments laid down by Viljoen is that Africa is a rich continent, his reference to this was in terms of natural resources and he indicated that Africa is capable of enforcing socio-economic rights.[21]

It is argued that there is a link between economic development and the enforcement of socio-economic rights. It is further argued that intra-African trade will enhance sustainable development and economic growth and it is important. It is submitted that African countries must focus more on intra-African trade, which will accelerate sustainable economic development and consequently the

[13]Chirwa & Chenwi (2016a) at 6.
[14]Rapporteur's Report on the Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/Draft Raot.Rpt.(II) Rev.4, para 13.
[15]Ssenyonjo (2016) at 94.
[16]Rapporteur's Report on the Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/Draft Raot.Rpt.(II) Rev.4, para 13.
[17]African Charter on Human and Peoples' Rights Preamble.
[18]Ssenyonjo (2016) at 92.
[19]African Charter on Human and Peoples' Rights Preamble.
[20]Chirwa & Chenwi (2016a) at 8.
[21]Viljoen (2012) at 544.

enforcement of socio-economic rights, which will in turn reduce poverty and better the lives of millions of Africans who are in dire need of socio-economic rights to be enforced due to the living conditions they are in.

Central to the argument of this paper, Ewing stated that the British officials who coined the phrase 'Made in Germany' intended it as an insult to Germany, since Germany was at a time known for low quality. Ewing further states that in 1887 while alarmed by an influx of low-priced German products, the British government ruled that goods imported from Germany must have 'Made in Germany' label.'[22] However, many years later, the label 'Made in Germany' is known for good quality.[23] Africa can learn from Germany.

During the briefing by A GIZ-AU the paper presented a case on the labour market effect of the AfCFTA. The paper submits that the AfCFTA will have the potential to significantly impact the livelihoods of African people by increasing inter-African trade and consequential employment opportunities in the integrated African labour market.[24] This submission unfortunately only emphasised on the one side analysis of labour market. Mbah *et al.* on the importance of economic development submit that economic development is the most powerful instrument for reducing poverty and improving the quality of life, particularly in developing countries, such as Africa.[25]

Signe and Johnson submit that the key advantage of manufacturing is that it absorbs large number of workers and places them into productive and decent paying jobs. They further submit that throughout history, countries such as the United States, United Kingdom, France, Japan, and Germany were transformed into some of the world's wealthiest countries by manufacturing. Further they looked into the most recently transformation, which is China, a new age of industrialisation has helped elevate China into one of the world's fastest growing economies at the moment. Concluding on the above, they submit that the above are examples of how industrialisation can generate rapid structural change, drive development, and alleviate poverty and unemployment.[26] This supplement the argument of this paper that one of the strategic economic development be ceasing or reduction of export of raw minerals to countries out of Africa.

Further, Signe and Johnson put it forward that the limited industrial development in Africa represents a missed opportunity for economic transformation and quality employment generation that reduce poverty.[27] They also submit that recently leaders all over Africa are realising that manufacturing is a major factor in helping Africa achieve their goals of successfully reaching the next stage of economic development.[28] There are lot of favourable factors in terms of economic development for Africa, for instance, the availability of low-cost labour and a plenty of natural resources and raw materials,[29] this simply means that Africa has

[22]Ewing (2014).
[23]Ewing (2014) at 159.
[24]Lungu (2019) at 1-3.
[25]Mbah & Ojo (2018) at 22.
[26]Signe & Johnson (2018).
[27]Signe & Johnson (2018).
[28]Signe & Johnson (2018).
[29]Signe & Johnson (2018) at 7.

a potential to develop economically, what is lacking is the strategic way towards that economic development.

Sun argues that Africa is 'the world's next great manufacturing center'.[30] Focusing attention at the macroeconomic terms, a strong manufacturing sector is argued to improve a country's external account balance, this is done by decreasing imports and diversifying exports, this thereby increase resilience to external shocks as compared to reliance on primary commodities.[31] Mbah *et al* submit that they rebuke the delayed state of economic growth and development in Africa looking at the immense natural resources the continent is having.[32] This inability of Africa to accelerate economic development using its wealth of natural resources have led to scholars identifying this dilemma as the 'resource curse'.[33] Panford submits that the dismal failure and strategies of economic development by African leaders have engendered numerous write-ups, study, and disquisition.[34]

Sender and Cramer argue that Africa will need to allocate resources so as to ensure a dramatic increase in the growth rate of their export earnings.[35] They further argue that raising agricultural productivity acts as a foundation for broader sustained economic development and should therefore be a priority for Africa's policy makers. Also, they argue that higher productivity in the output of food crops bought and consumed by African wage workers is a key part of a non-inflationary strategy to sustain profitability, investment, and growth.[36]

On the other facet of this research is socio-economic rights, Shebu argues that socio-economic rights have short history in Africa as initially the focus was on civil and political rights, the so-called first-generation rights, reason behind this being because enforcement of socio-economic rights depends on the state of the economy, and the effective and efficient of management of the economic resources.[37]

Economic Development and Socio-Economic Rights: Strategic Approach

It is submitted that one cannot speak of the problems of Africa, especially economic challenges and divorce that from colonialism which affected Africa abominably, colonialism has seen the colonisers deriving out of Africa socio-economic benefits for the colonial powers at the expense of the livelihoods of the colonised people, the Africans.[38] As a result of this colonisers became rich due to the resources of Africa and Africa remaining poor.[39] It cannot be argued otherwise

[30]Sun (2017).
[31]Hauge (2016).
[32]Mbah & Ojo (2018) at 22.
[33]Venables (2016) at 161.
[34]Panford (2017).
[35]Cramer, Sender & Oqubay (2020) at 111. .
[36]Cramer, Sender & Ocubay (2020) at 11.
[37]Shehu (2013).
[38]Chirwa & Chenwi (2016a) at 4.
[39]Chirwa & Chenwi (2016a) at 4.

that Africa is rich in terms of resources,[40] however, poverty in Africa affect close to 50 percent of the population of Africans.[41] It is submitted that the economic development of the colonisers were at the expense of African economy.[42]

It is argued that Africa must take a new approach, a strategic approach towards economic development in Africa and consequently the enforcement of socio-economic rights. The AfCFTA agreement is one of the approaches that Africa must pay a lot of attention on as it has a potential. Other trade agreements never really assisted Africa. Further it is submitted that several strategic approaches as they appeared above must be taken in account towards Africa's economic liberation, such are the development of new laws on the natural resources, producing quality products and services, image related strategies which involve great marketing of Africa, its products, and services.

Socio-economic rights are to be recognised, must be seen to be relevant and are acknowledged as opposed to in the past were civil and political rights were mostly attended to and not the socio-economic rights. However, despite the fact that Africa is a resource-rich continent,[43] many of Africa's citizens do not benefit from socio-economic rights due to their respective countries not having the means to enforce such rights – reports show that poverty in Africa effects close to 50 percent of the African population.[44]

The argument made in this research is that, Africa must take a stand that will lead to strategic approach to economic development. Such stance must address commitment from Africa countries to establish 'Made in Africa' products/ services, also immense support to businesses, entrepreneurs and innovators, producers and so on producing Made in Africa products/services. For the socio-economic rights to be enforced fully, Africa must develop economically and for Africa to develop, require regional laws[45] of trade must be enacted that are feasible to Africa.

The said strategic economic development stance must foster lot of productions in Africa, for instance car production. It has been reported that the other top products imported by Africa are motor cars for persons (worth 17 billion USD).[46] The said treaty must cover all spheres of production such as the medical side, for instance Africa cannot produce its own vaccine and rely on other countries to supply it with vaccine, this simply show that something is not right. Such stance must focus on 'Made in Africa' products/services but not only that but also immense support to businesses, entrepreneurs and innovators, producers and so on. The said stance must not exclude great marketing of 'Made in Africa' products/ services. It is argued that failure for Africa to produce lead not only to lot of

[40]Viljoen (2012) at 544.
[41]United Nations Development Programme (UNDP), MDG Report 2015: Assessing Progress in African towards the Millennium Development Goals (2015) xiii.
[42]Austin (2010).
[43]Viljoen (2012) at 544.
[44]United Nations Development Programme (UNDP), MDG Report 2015: Assessing Progress in African towards the Millennium Development Goals (2015) xiii.
[45]Strydom (2016).
[46]Africon Bridging Potentials (2019).

monies leaving Africa due to lot of importing but also poor economic development of Africa.

Intra-African Trade

It is argued that intra-African trade is a need to elevate the challenges of African people, particularly in terms of the enforcement of socio-economic rights. Majority of African countries have and are members of the World Trade Organization (hereinafter referred to as WTO) but African challenges remains. Viljoen argues that equality in trade is undermined by Western hypocrisy, exemplified by advocacy for trade liberalisation in some sectors (in which Western countries are net exporters) and the opposition to free trade in others (in which developing economies stood a chance of competing with local products).[47]

The AU emphasised that 'any failure to incorporate Africa's needs, interests and concerns within the outcome of the Doha Round will not only undermine Africa's already limited trade opportunities, but also erode the autonomy and ability to pursue trade policies that would serve key developmental objectives such as employment, industrialization, food security, rural development and sustained economic growth in Africa'.[48] The special and differential treatment provisions provided by WTO are not enough and have not been helpful to Africa in light of the continent's low participation levels in global trade and the general sentiment that the WTO framework has failed to adequately address the needs of the developing world.[49] This is why it is extremely important for African countries to focus on intra-Africa trade.

The argument has been made that economic diversification must be a priority for Africa and that global value chains tend to bypass Africa as it mostly exports raw or minimally processed goods.[50] For socio-economic rights to be enforced, the researcher argues that there must be policies and laws that will accommodate African states. Considering the levels of poverty in Africa, most of Africa's population currently does not enjoy socio-economic rights. Chirwa and Chenwi argue that economic, social and cultural rights are closely related to development and eradication of poverty.[51]

The intra-African trade can lead to good results for Africa, manufacturing, agriculture, tourism, and transport sectors have the most potential to promote intra-African trade.[52] Reports have shown that with the right infrastructure, enabling policy, Africa can become a world leader in a number of businesses.[53] African

[47]Viljoen (2012) at 83.
[48]Decision on WTO Negotiations Doc. EX.CL/283 (IX) Assembly/AU/Dec.119 (VII).
[49]Special and Differential Treatment Provisions in WTO Agreements and Decisions WT/COMTD/W/239 (2018).
[50]United Nations World Economic Situation and Prospects Report (2020) 129.
[51]Chirwa & Chenwi (2016b) at 43.
[52]International Monetary Fund (IMF) Tackling Challenges Together, IMF 2015 Annual Report (2015) 90.
[53]United Nations Conference on Trade and Development (UNCTAD), Economic Development In Africa Report 2018: Migration for Structural Transformation (2018) at 151.

economic performance improved with the progressive implementation of measure that promote free trade.[54]

The African Continental Free Trade Area

Trade is an essential tool for growth and the overall economic well-being of a nation.[55] Some empirical studies shows that an increase in trade result into faster economic growth and development.[56] Sadly, over the years the overall Africa's share of the global trade has not changed.[57] The African Continental Free Trade Agreement of 2018 (hereinafter referred to as AfCFTA) must be implemented rigorously.

Due to the economic and trade challenges Africa is facing, regional integration can play an important role.[58] With the adoption of the Agreement Establishing the AfCFTA in 2018 it is expected that it will promote regional trade, as well as investment integration.[59] It is anticipated that the AfCFTA will also address issues faced by the African continent, such as the diversification of exports markets.

The AfCTA must not be confused with the Tripartite Free Trade Area (hereinafter TFTA). The TFTA comprises of three trade blocs, which are COMESA, EAC and SADC and with a total of 26 countries.[60] On the other hand the AfCFTA is much broader and comprises a total of 54 countries (all African countries have ratified, with the exclusion of Eritrea).[61] The AfCFTA consists of eight trade blocs, which are ECCAS, ECOWAS, EAC, SADC, COMESA, AMU, CEN-SAD and IGAD.[62]

There is also anticipation that through the AfCFTA, Africa will experience growth and structural transformation and that African countries will benefit from trade expansion following removal of tariff and non-tariff barriers within Africa, and the least developed countries would gain more through expansion of industrial exports.[63] It is expected that the AfCFTA will promote industrialization and the creation of higher-paying productive jobs, especially in the manufacturing sector.

Amongst others infant industries, foreign direct investment (FDI), innovation, science and technology, and labour markets must be addressed by much broader and more strategic set of policies.[64] While some may criticise the AfCFTA on the basis that it will reduce tariff revenue, it must be noted that it is expected to

[54]Bah, Moyo, Verdier-Chouchane et al (2015) 3.
[55]Jita & Mousum (2012) at 48.
[56]Singh (2010) at 1519.
[57]United Nations Conference on Trade and Development (UNCTAD) Economic Development in Africa Report 2015 Unlocking the potential of Africa's services trade for growth and development (2015) at 23.
[58]Economic Report on Africa 2019 in 13.
[59]United Nations World Economic Situation and Prospects Report (2020) at 129.
[60]Southern African Development Community.
[61]Tralac website (2023).
[62]A Tralac guide 4 (2019)..
[63]Economic Report on Africa 2019 'Fiscal Policy for Financing Sustainable Development in Africa' at 13.
[64]United Nations World Economic Situation and Prospects Report (2020) at 129.

stimulate GDP growth by as much as 1–6 per cent, which would increase the broader tax base and boost revenue collection from other sources.[65]

Conclusion and Recommendation

As seen above, it does not make sense for continent full of resources like Africa to have its people suffer the way they are suffering. It is indeed submitted that something must be done. The AfCFTA agreement if coordinated properly will bring positive changed in Africa. The African people must as well be involved in the affairs of Africa, so that when the governments do not do the right thing they can influence the governments to do the right thing. However, in addition to that, this paper argues that a strategic approach must be taken.

This paper submitted several strategic approaches to economic development, such as development of new laws on the natural resources, producing quality products and services, image related strategies which involve great marketing of Africa, its products, and services. Africa has a potential; however, strategies are needed to leave to successful and prosperous Africa.

References

African Charter on Human and Peoples' Rights

African Union at *https://au.int/en/member_states/countryprofiles2*

Africon Bridging Potentials (2019) 'Slide of the month (SOTM) July. Africa's top imports in 2018'. *https://www.africon.de/africas-top-imports-in-2018/#:~:text=The%20other%20top%20products%20imported,billion%20USD)%2C%20and%20parts%20%26*

Agbakwa, S.C. (2002). 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' in *Yale Human Rights and Development Law Journal* 5:177-216.

Arieff, I. (2015). 'If Africa is so rich, why is it so poor?' *https://www.passblue.com/2015/05/18/if-africa-is-so-rich-why-is-it-so-poor*

Austin, G. (2010). 'African Economic Development and Colonial Legacies' in *International Development Policy | Revue internationale de politique de développement* 11-32. *http://journals.openedition.org/poldev/78*

Bah, E.M., Moyo, J.M., Verdier-Chouchane, A. et al. (2015) 'Assessing africa's competitiveness: Opportunities and challenges to transforming Africa's economies' in The Africa competitiveness report 2015. Geneva: World Economic Forum, 3-34

Brown, L 'The Most Eye Opening 10 Minutes of Your Life | Les Brown' *https://www.youtube.com/watch?v=4-wMplMwe6k*

Brown, L 'The Most Eye Opening 10 Minutes of Your Life | Les Brown' *https://www.youtube.com/watch?v=4-wMplMwe6k*

Business Tech 'Mxit is officially dead' (2016). h*ttps://businesstech.co.za/news/mobile/139225/mxit-is-officially-dead/*

Chirwa, D.M. & L. Chenwi (2016a). 'The Protection of Economic, Social and Cultural Rights in Africa' in Chirwa, D.M. & Chenwi, L. (eds.) *The Protection of Economic,*

[65]Economic Report on Africa 2019 at 14.

Social and Cultural Rights in Africa: International, Regional and National Perspectives, pp. 3-30. Cambridge University Press.

Chirwa, D.M. & L. Chenwi (2016b). 'Direct Protection of Economic, Social and Cultural Rights in International Law' in Chirwa, D.M. & Chenwi, L. (eds.) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives*, pp 33-71. Cambridge University Press.

Cramer C., Sender, J. & A. Oqubay (2020). *African Economic Development: Evidence, Theory, Policy*. Oxford University Press.

Economic Report on Africa 2019 'Fiscal Policy for Financing Sustainable Development in Africa'.

Ewing, J. (2014). *Germany's Economic Renaissance: Lessons for the United States.* Palgrave Macmillan Books.

Hauge, J.L. (2016).'Smart Industrial Policy for Africa in the 21st Century' https://www.soas.ac.uk/economics/events/economics-seminars/29feb2016-smart-industrial-policy-for-africa-in-the-21st-century.html

International Monetary Fund (IMF) Tackling Challenges Together Annual Report (2015).

Jita, B. & B. Mousum (2012). 'Impact of Foreign Direct Investment and Merchandise and Services Trade on the Economic growth in India: An Empirical Study' in *IIMS Journal of Management Science* 3(1):47-65.

Lungu, I. (2019). 'A fresh chance for Africa's youth: Labor market effects of the African Continental Free Trade Area (AfCFTA)' GIZ-AU Briefing Paper.

Mashego, K.A. (2020). 'Examining the link between economic development and the enforcement of socio-economic rights in Africa: A study of South Africa and Nigeria'. LL.M. thesis, the University of the Western Cape.

Mbah, B.T. & Ojo, O.Y. (2018). 'Africa's Economic Growth: Trends, Constraints and Lessons from Asia' in *IOSR Journal of Humanities and Social Science (IOSR-JHSS*) 23(3):22-34.

News24 (2020).'BAKAE: Don't you miss Mxit' *https://www.news24.com/citypress/trending/bakae-dont-you-miss-the-days-of-mxit-20200119*

News24 (2023). 'Massive shift ahead for mining in Africa as bans on unprocessed mineral exports surge' at *https://www.news24.com/fin24/climate_future/massive-shift-ahead-for-mining-in-africa-as-bans-on-unprocessed-mineral-exports-surge-20230930*

Nkurmah, K. (1963), 'We must unite now or perish' by former and first President of Ghana Kwame Nkrumah, *https://newafricanmagazine.com/3721/*

Panford, K. (2017). *Africa's Natural Resources and Underdevelopment: How Ghana's Petroleum Can Create Sustainable Economic Prosperity*. Palgrave Macmillan

Quote Investigator (2015). 'If You Build a Better Mousetrap the World Will Beat a Path to Your Door'. *https://quoteinvestigator.com/2015/03/24/mousetrap/*

Rapporteur's Report on the Draft African Charter on Human and Peoples' Rights, OAU Doc CAB/LEG/67/Draft Raot.Rpt.(II) Rev.4.

Shehu, A.T. (2013). 'The Enforcement of Social and Economic Rights un Africa: The Nigerian Experience' in *Journal of Sustainable Development Law and Policy* 2(1):101-120.

Signé, L. & C. Johnson (2018). 'The Potential of Manufacturing and Industrialization in Africa: Trends, Opportunities and Strategies' in *Center of African Studies at Brookings*.

Singh, T. (2010). "Does International Trade Cause Economic Growth? A Survey" in *The World Economy* 33(11):1517-1564.

Southern African Development Community at *https://www.sadc.int/about-sadc/continental-interregional-integration/tripartite-cooperation*

Ssenyonjo, M. (2016). 'The Protection of Economic, Social and Cultural Rights in under the African Charter' in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives*, pp. 91-120.

Strydom, H. (2016). 'International law making as an attribute of state sovereignty' in Strydom, H.,Gvers, Ch., Ruppel, O., Juma, L., Vrancken, P., Kemp, G., Scholtz, W. & Viljoen, F. (eds.) *International Law.* Oxford University Press.

Sun, I.Y. (2017). 'The World's Next Great Manufacturing Center' in *Harvard Business Review*, May–June:122–129.

The AfCFTA website, *https://au-afcfta.org/*

Tralac guide 4 (2019). *The African Continental Free Trade Area*, 6 ed.

Tralac website (2023). *https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html#:~:text=The%2032%20countries%20that%20have,Ethiopia%2C%20The%20Gambia%2C%20Sierra%20Leone*

United Nations Conference on Trade and Development (UNCTAD), Economic Development in Africa Report 2018: Migration for Structural Transformation (2018).

United Nations Development Programme (UNDP), MDG Report 2015: Assessing Progress in African towards the Millennium Development Goals (2015).

United Nations World Economic Situation and Prospects Report (2020).

Venables, A.J. (2016). 'Using Natural Resources for Development: Why Has It Proven So Difficult?' in *Journal of Economic Perspectives* 30(1):161-184.

Viljoen, F. (2012). *International Human Rights Law in Africa.* 2nd ed. Oxford: University Press.

Athens Journal of Law - Volume 10, Issue 1, January 2024 – Pages 175-190

An Analysis of South Africa's Constitutional and UNCRC-imposed Obligations to achieve Children's Socio-economic Rights: A Critique

By Tshilidzi Knowles Khangala[*]

Children require specific protection due to their heightened vulnerability to human rights violations, which can be attributed to several factors such as economic adversity, racial tensions, and armed conflicts. The current situation in South Africa is characterised by a pressing and significant prevalence of severe poverty. The enduring effects of apartheid have contributed to a broad range of socioeconomic challenges inside our deeply divided country. Children are particularly impacted by these issues and experience immediate suffering as a result. In the Republic of South Africa, a significant proportion of the youth population experiences the distressing circumstance of living in poverty. It has been reported that a significant proportion, ranging from 60 to 75 percent, of the youth population in South Africa is experiencing impoverished living conditions. The prevalence of HIV infection and the consequential mortality rates due to AIDS among caretakers have a detrimental effect on the well-being of children. The United Nations Convention on the Rights of the Child (UNCRC) encompasses social, economic, and cultural rights under its provisions. Following the ratification of the UNCRC in June 1995, South Africa is legally obligated to implement the articles pertaining to the rights of children. The formulation and structuring of socio-economic rights and corresponding duties towards children under the South African Constitution were significantly influenced by the UNCRC. The interests of children in South Africa are effectively safeguarded through the provisions enshrined in the Constitution and the duties outlined in the UNCRC. This study assesses the extent to which South Africa has adhered to its constitutional and UNCRC-mandated responsibilities and commitments in order to achieve the socioeconomic rights of children.

Keywords: *UNCRC, socio-economic rights, children, obligations, Constitution*

Introduction

The Constitution of the Republic of South Africa, enacted in 1996, serves as the fundamental framework for the nation's newly founded democratic society, embodying concepts of democracy and social equity. The objective was to reconcile the division resulting from historical events. The specific inclusion of provisions in the South African Constitution that mandate the safeguarding and upholding of constitutional rights by the court is a fortuitous circumstance. The

[*]Advocate; Lecturer, Tshwane University of Technology, Pretoria, South Africa.
Email: Khangalatk@tut.ac.za

South African Constitution is among the constitutions that provide protection for socio-economic rights[1].

Indeed, the South African Constitution is notable for its inclusion of socioeconomic rights pertaining to children within its final draught. This demonstrates that children are granted certain safeguards under the most prominent legislation in South Africa. As a consequence, it has attained a level of equivalence with global human rights accords such as the United Nations Convention on the Rights of the Child (UNCRC). Legal scholarship, both inside South Africa and internationally, widely recognises that children constitute a vulnerable population within society and hence warrant the utmost care.[2] The primary aim of this study is to analyse the socio-economic rights of children, as articulated in the South African Constitution, in relation to the UNCRC.

The Constitutional Court ruled in the case of *S v. Makwanyane & another*[3] that both binding and non-binding international law may be considered in interpreting the Bill of Rights. According to Chaskalson CJ, Chapter 3 of the interim constitution, which encompasses the Bill of Rights, can be comprehensively examined and interpreted within the framework of international human rights law. In addition, it is worth noting that practical measures implemented by pertinent international human rights organisations can provide valuable insights into the appropriate interpretation of specific provisions.

In the case *of Government of the Republic of South Africa & others v Grootboom & others*[4], Jacoob J. asserted that international law can serve as a valuable tool for interpretation. However, he emphasised that the significance attributed to individual international concepts or norms should be subject to variation. Nevertheless, this approach could be promptly implemented in situations when South Africa is bound by the pertinent international legal norm.

While the UNCRC does provide some rights to state parties, it is crucial to acknowledge that these rights are accompanied by corresponding obligations and responsibilities. This study aims to examine the extent to which South Africa is meeting its commitments as outlined in the UNCRC, and to explore the mechanisms by which this is being achieved, if applicable. Insufficient attention has been devoted to the socio-economic rights of impoverished children in South Africa and the potential impact of the UNCRC on these rights, as well as its role in assisting South Africa in meeting its commitments under the UNCRC. The objective of this study is to address this disparity.

Literature Review

It is imperative to acknowledge that within the context of South Africa, there exists a multitude of literary works pertaining to socio-economic rights. However, it is noteworthy that a significant proportion of these works just offer a broad and

[1]Dube (2020).
[2]Wright & Potter (2012).
[3]1995 (3) SA 391 (CC).
[4]2001 (1) SA 46 (CC).

general perspective on the subject matter. Firstly, their discussion lacks emphasis on the socio-economic rights of children. Furthermore, there is a notable lack of consideration of the potential impact of international human rights law, including the UNCRC, on the socio-economic rights of children in South Africa.

Erika de Wet identified and discussed the socioeconomic rights of children.[5] The author analysed international organizations like WHO, FAO, and UNICEF to understand their impact on children's socio-economic rights. However, their analysis was limited in examining the UNCRC's impact on South Africa's constitutional rights. The analysis focused on the horizontal and vertical application of these rights, lacking a comprehensive examination of the UNCRC's impact on South Africa's constitutional rights.

Much of the above criticism applies with equal force to a similar study by Karrisha Pillay[6]. The author classified socio-economic rights into several categories such as social welfare, food, and healthcare, providing a comprehensive analysis of their respective entitlements, implementation strategies, and protective measures. The authors of the study also conducted an analysis of the United Nations Convention on the Rights of the Child (UNCRC) and other international organisations pertaining to child rights. However, they encountered difficulties in elucidating the possible influence of these entities on the socio-economic rights of children in South Africa.

Devenish explored children socio-economic rights in South African Constitution[7]. The author proceeded to illustrate the heightened vulnerability of children to infringements upon their human rights, thereby necessitating the provision of distinct attention and safeguarding measures. The author continued to provide evidence of South Africa's ratification of the UNCRC in a manner that deviated from the norm. However, the author failed to address the potential consequences and ramifications associated with South Africa's membership in this international treaty.

In a resource book on socio-economic rights in South Africa, Khoza came very close to addressing this issue[8]. While the impact of the UNCRC was duly acknowledged and the discourse encompassed socio-economic rights in South Africa, it is noteworthy that children did not constitute the primary focal point of the discussion.

Alston expounds on the socio-economic rights of children, but two flaws in the study's design seem to limit its applicability[9]. First of all, this study was limited to the concept of the "best interest of the child." Second, South Asian nations, Zimbabwe, Burkina Faso, and France were the main subjects of the study. Alston was in no way interested in South Africa.

Rautenbasch[10] gave a lot of consideration to a Bill of Rights clause that was included in the interim constitution at the expense of children's socioeconomic

[5]De Wet (1998).
[6]Liebenberg & Pillay (2000).
[7]Devenish (1998).
[8]Khoza (2007).
[9]Alston (1994).
[10]Rautenbach (1995).

rights that were included in the final constitution. Another work which dealt with children socio-economic rights, including the UNCRC is of Alston, Parker and Seymour[11]. Like Alston, Parker despite the fact that this work was completed before the South African constitution was established, South Africa was overlooked.

Methodology

This study employs desktop research, a qualitative research approach, to assess the UNCRC, the obligations imposed on convention members, and South Africa's adherence to these obligations through legislative measures and legal precedents. This is achieved, among other methods, by the examination of legal texts, legal periodicals, scholarly literature, online resources, significant statutes, appellate court decisions, and Constitutional Court rulings. The International Covenant on Civil and Political Rights will also serve as a source for this study. The Constitution of the Republic of South Africa, 1996, which serves as the supreme law of the land, will also be a significant primary source for this study.

Universal and Forward-looking Principles of the UNCRC

The UNCRC holds equal importance for individuals across the globe. The agreement delineates universally applicable criteria while simultaneously considering the distinct cultural, social, economic, and political contexts of individual States, thereby granting each State the autonomy to determine its own mechanisms for upholding these rights collectively. The convention outlines four fundamental principles. These provisions are intended to facilitate the understanding and analysis of the agreement in its whole, thereby guiding the development and execution of national implementation initiatives. The four principles can be identified as follows[12]:

Non-discrimination[13]

According to the precise language of the text, it is envisaged that states parties will ensure that all children under their jurisdiction have access to this protection and that no child is exposed to any form of discrimination. This principle is applicable to all children, regardless of their race, colour, sex, language, religion, political opinion, national origin, ethnic origin, socioeconomic status, property, disability, birth, or any other status pertaining to the child or the child's parents or legal guardians.

Equal opportunity is widely seen as a key component. It is imperative that both girls and boys are afforded equitable access to opportunities. Irrespective of their ethnic background, country, or association with a minority group, it is

[11]Alston, Parker & Seymour (1992).
[12]Articles 2, 3, 6 &12 of UNCRC. See also De Wet (1998).
[13]Article 2 of UNCRC.

imperative that all children are afforded equal rights comparable to their peers. It is imperative that all children, irrespective of their disability, are afforded the opportunity to lead a life of comfort and well-being.

Best Interest of the Child[14]

When a State's administration makes decisions that have an impact on children, it is imperative that the best interests of the children are prioritised. This guideline must be adhered to by courts of law, legislative bodies, administrative agencies, and both public and private social welfare institutions when making decisions. Implementing this concept in real-world scenarios poses significant challenges, albeit being the central theme of the Convention.

The Right to Life, Survival and Development[15]

The article on the right to life also encompasses the rights to development and survival, which are to be ensured to the utmost extent feasible. In the present environment, it is imperative to adopt a comprehensive definition of "development" that encompasses several dimensions and incorporates a qualitative aspect. This is because development extends beyond physical well-being and encompasses mental, emotional, cognitive, social, and cultural aspects.

The Views of the Child[16]

Children should be afforded the opportunity to use their freedom of expression in all topics that pertain to them. The perspectives of individuals should be assigned the appropriate significance that aligns with their worth, taking into consideration the child's age and level of development. The fundamental tenet posits that children possess an inherent entitlement to be afforded a platform for expression and to have their perspectives accorded due regard, particularly within the context of legal or bureaucratic proceedings that may exert an influence upon them.

Obligations of States Parties to the UNCRC

The fulfilment of socio-economic rights of children constitutes a significant set of requirements that must be met by signatories to the UNCRC. These obligations can be outlined as follows:

1. States Parties are obligated to uphold and safeguard the rights of every child, irrespective of their race, colour, gender, language, religion, political beliefs, national or ethnic background, socioeconomic status, property

[14]Article 3 of UNCRC.
[15]Article 6 of UNCRC.
[16]Article 12 of UNCRC.

ownership, handicap, birth status, or any other characteristic of the child or their parents or legal guardians.[17]

2. States parties have a binding duty to ensure the well-being and optimal growth of the child. States parties have an obligation to use maximum effort in ensuring that the right of every child to obtain medical treatment is not infringed upon. The parties involved recognise the entitlement of children to the highest achievable standard of health.[18]
3. The agreement stipulates that States which have ratified it are obligated to decrease rates of newborn and child mortality, as well as ensure universal access to healthcare for all children. States Parties have a binding obligation to implement all feasible measures to prohibit age-inappropriate customs. According to states parties, it is asserted that every child is entitled to a level of life that is suitable for their physical, mental, spiritual, moral, and social growth. States parties are obligated to implement suitable measures to support parents and individuals with parental responsibilities in the exercise of their rights. When deemed required, states parties should provide tangible assistance and support, specifically addressing food, clothing, and housing requirements.[19]
4. The parties recognise and accept the fundamental right of children to receive an education.[20] The States Parties acknowledge the entitlement of children to protection against economic exploitation, including their engagement in labour that poses potential hazards or disrupts their educational pursuits. Furthermore, children should be safeguarded from work that may jeopardise their health or impede their physical, mental, spiritual, moral, or social growth. Furthermore, it is agreed by States Parties that it is imperative to protect the child from any form of sexual exploitation and abuse.[21]

Steps and Measures taken by South Africa to meet the UNCRC Obligations

Incorporating Children's Rights in the Constitution[22]

Section 28 of the Constitution of the Republic of South Africa, 1996, entitled "children's rights", provides that:

1. Every child has the right to-
   a) A name and nationality from birth;
   b) Family care or parental care, or to appropriate alternative care when removed from the family environment;

[17]Article 2 of UNCRC.
[18]Article 6 of UNCRC.
[19]Articles 24 & 27 of UNCRC.
[20]Article 28 of UNCRC.
[21]Article 32 & 34 of UNCRC.
[22]The Constitution of the Republic of South Africa, 1996.

c) Basic nutrition, shelter, basic health care services and social services;
d) Be protected from maltreatment, neglect, abuse or degradation;
e) Be protected from exploitative labour practices;
f) Not be required or permitted to perform work or provide services that-
    i. Are inappropriate for a person of that child's age; or
    ii. Place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
g) Not be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-
    i. Kept separately from detained persons over the age of 18 years; and
    ii. Is treated in a manner, and kept in conditions, that take account of child's age;
h) Have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result;
i) Not be used directly in armed conflict, and to be protected in times of armed conflict.

2. A child's best interests are of paramount importance in every matter concerning the child.
3. In this section 'child' means a person under the age of 18 years.

Based on the stipulation provided, it can be inferred that minors possess entitlements to a designation, legal membership within a nation-state, and a prescribed level of nurturing. It is imperative that children are provided with essential provisions such as food and shelter, alongside ensuring their protection from abusive, neglectful, and degrading treatment. If an individual of a young age does not meet the minimum age requirement for employment, it is advisable that they refrain from engaging in any tasks or responsibilities that may impede their educational progress or hinder their personal growth and maturation. The subsequent part elucidates the imperative nature of prioritising the best interests of the child in every decision pertaining to them.

In the case of *Government of RSA & others v. Grootboom & others*[23], the court conducted an examination to determine the extent to which citizens have the ability to legally force government action in order to safeguard their social and economic rights. The constitutional requirements outlined in sections 26 and 28(1)(c) of the Constitution of the Republic of South Africa, 1996, pertaining to the guarantee of adequate housing for all individuals and the provision of shelter for children, had come under scrutiny. The initial petitioner, Irene Grootboom, was among a group of 510 children and 390 adults who were compelled to reside in highly unsatisfactory conditions within the Wallacedene informal settlement.

[23]2001 (1) SA 46 (CC).

The High Court determined that the children, along with their parents acting as their representatives, possessed a legally recognised entitlement to seek shelter as stipulated by section 28(1)(c).

In a majority ruling, Justice Yacoob of the Constitutional Court underscored the constitutional obligation of the State to adopt proactive steps in order to assist persons residing in deplorable conditions. The need was to ensure the provision of housing, healthcare, sufficient sustenance and hydration, social security, and other essential requisites for individuals who lacked the means to independently sustain themselves and their dependents. Given the recognition by the Constitution of the inherent challenges involved, it did not impose an expectation on the State to fully utilise all available resources or expeditiously actualize these rights. Nonetheless, it was incumbent upon the State to gradually implement these rights and provide the requisite legal and social structures. The aforementioned programme in the region failed to fulfil this obligation. The court issued directives to the State to provide assistance to individuals who are in need and have not yet received any form of aid.

In another interesting case of *Mahlaule & others v. Minister of Social Development*[24], in this case, constitutional arguments were raised against sections 4(b)(ii) and 4B(b)(ii) of the Social Assistance Act 59 of 1992. The provision of grants for care-dependency and child support was limited to those who had South African citizenship, as specified under the relevant categories outlined in this section. Due to their violations of the rights to social security and social assistance in section 27 and the rights of children in section 28 of the Constitution, the Constitutional Court ruled that those sections were unconstitutional.

Almost similar position was held in the case of *Minister for Welfare and Population Development v. Fitzpatrick & others*[25], The Cape High Court found section 18(4)(f) of the Child Care Act 74 of 1983, which imposed a prohibition on foreigners adopting South African children, as unlawful. During the confirmation process for the Constitutional Court, Justice Goldstone determined that the prohibition was in contradiction with section 28(2) of the constitution. This clause stipulates that the best interests of children must be prioritised in all situations involving them. The court acknowledged that under specific circumstances, it may be in the best interests of a South African child to be adopted by a family that is not of South African origin. The confirmation of the order was determined to be invalid.

Legislative Reform

The UNCRC has exerted a substantial impact on the legal transformation within South Africa subsequent to its ratification in 1995. While the explicit reference to the UNCRC is limited to two statutes, the analysis of the legislation reveals that the priorities outlined in the UNCRC have been duly considered. Legislation that provides specific protections for children includes:

[24]2004 (6) SA 505 (CC).
[25]2000 (3) SA 422 (CC).

i. The Child Care Act 74 of 1983, a legislation that criminalises the act of neglecting to provide a child under one's care with essential provisions such as sustenance, housing, apparel, and medical care.
ii. The Basic Conditions of Employment Act 75 of 1997, which makes it illegal to employ a child under the age of 18 years.
iii. The Domestic Violence Act 116 of 1998, which outlines various types of domestic abuse and details how a child can obtain a protection order against the abuser.
iv. The Films and Publications Act 65 of 1996, which protects children from exploitation in child pornography.
v. The Natural Fathers of Children Born out of Wedlock Act 86 of 1997. This legislation provides legal entitlements to unmarried fathers, allowing them to petition the court for visitation rights, custody, or guardianship of their children. This includes cases where the father's marriage is not officially recognised by the State, such as in Muslim and Hindu marriages. In the determination of child custody or visitation rights, paramount consideration is given to the best interests of the children involved.

Other relevant statutes are:

1. The Adoption Matters Amendment Act 56 of 1998;
2. The Recognition of Customary Marriages Act 120 of 1998; and
3. The South African Schools Act 84 of 1996.

The Children's Act 38 of 2005, which superseded the Child Care Act 74 of 1983, makes reference to the UNCRC as a source of advice. The endeavour is aimed at facilitating a comprehensive comprehension of the entirety of children's rights.

In the case of *Fraser v. Children's court, Pretoria North & others*[26], Laurie Fraser, who was not married, fathered a child that his ex-partner gave up for adoption. The children's court granted the child's request for adoption, but Fraser asked that it be reversed so that he may adopt the youngster himself. A father's consent was not required for the adoption of his children who were born out of wedlock under section 18(4)(d) of the Child Care Act 74 of 1983, but a children's court had to get both parents' consent before issuing an order for the adoption of a legitimate child. The court ruled that this violated the equality right. It was discriminatory towards fathers in weddings conducted in accordance with the traditions of religions like Islam and Hinduism, which were not recognised by the law as marriages. The court, however, decided that further consideration was needed before the clause could be changed, and it gave parliament two years to correct the issue.

[26]1997 (2) SA 261 (CC). See also Articles 32 & 34 of UNCRC

Interpreting Domestic Legislation

In the process of interpreting domestic or national legislation, it is imperative to give due consideration to Section 233 of the Constitution of the Republic of South Africa, 1996. According to Section 233, it is mandated that courts should prioritise reasonable interpretations of laws that align with international law, over interpretations that are inconsistent with international law. International law plays a prominent role in the process of statutory interpretation by providing a distinct and unambiguous framework for interpretation. The aforementioned statement aligns with the final two sentences of General Comment 9 to the International Treaty on Economic, Social and Cultural Rights (ICESCR), which assert that "this interpretive presumption is mandated by international human rights law and by the legal provisions of the covenant."[27]

Six minors in *S v. Williams & others*[28], were subjected to the penalty of "moderate correction" as stipulated in section 294 of the Criminal Procedure Act 51 of 1977, which entailed the administration of a series of light cane blows. The Constitutional Court possessed the jurisdiction to determine the legality of the juvenile whipping penalty. The Court has determined that physical punishment violates the right to be treated or punished in a manner that is free from cruel, inhumane, or degrading treatment, and also undermines an individual's feeling of dignity. It was determined that administering corporal punishment to young individuals was deemed to be a violation of the dignity of both the recipients and those responsible for carrying out the punishment.

Interpreting the Bill of Rights

According to Section 39 of the Constitution of the Republic of South Africa, 1996, any court, tribunal, or forum tasked with interpreting the Bill of Rights is obligated to advance the principles that form the foundation of an open and democratic society, which include human dignity, equality, and freedom. Furthermore, these entities are required to take into account international law and have the discretion to consider foreign law as well.

In the case of *S v. Makwanyane*[29], the Constitutional Court held that, when interpreting the Bill of Rights, it is permissible to use both binding and non-binding international law. Chaskalson CJ, in his capacity at the time, further stated that the field of international human rights law provides a structure through which chapter 3 (Bill of Rights of the interim constitution) can be evaluated and comprehended. Moreover, he noted that the actions taken by relevant international human rights organisations can serve as a source of direction in interpreting specific provisions. Nevertheless, it has been found that among all treaties, the ICCPR has been extensively relied upon as the primary basis for South African court rulings and has been frequently referenced during the process of legal interpretation, specifically in relation to the Bill of Rights. This conclusion was

[27]Heyns & Viljoen (2001).
[28]1995 (3) SA 632 (CC).
[29]1995 (3) SA 391 (CC).

drawn from a comprehensive analysis of the decisions made by the High Courts and the Constitutional Court since 1995.[30]

In the case of *Government of Republic of South Africa v Grootboom and others*[31], the court placed significant emphasis on the role of international law, which was given greater weight compared to the case of S v. Makwanyane. In the aforementioned case, Jacoob J expressed that while international law can serve as a guiding tool for interpretation, the significance attributed to specific principles or rules of international law may differ. However, in cases where South Africa is bound by the relevant principle of international law, it may be directly applicable.

In the case of *Minister of Health & others v. Treatment Action Campaign & others*[32], the government's stance on the prevention of mother-to-child HIV transmission, specifically the restricted implementation of Nevirapine to certain trial sites, was challenged by the Treatment Action Campaign and two other parties. The manufacturers of nevirapine agreed to supply the medication to the South African government without charge for a duration of two years. The court's decision established that the pursuit of research does not provide sufficient grounds for justifying the postponement of a comprehensive scheme. Due to the inability to reach the designated research locations, a significant proportion of women and children who tested positive for HIV experienced detrimental consequences as a result of the policy, as they were effectively deprived of the opportunity to obtain a possibly life-saving medical intervention. The court ruled that the administration of a singular dosage of nevirapine to youngsters was deemed indispensable. Due to the pressing nature of children's requirements, the state was obligated to guarantee the provision of protection as outlined in section 28 of the Constitution of the Republic of South Africa. The government was mandated to abolish the restrictions on nevirapine, authorise and facilitate its utilisation when deemed medically appropriate, and adhere to the court's determination that the policy was illegal.

Conclusion and Recommendations

The UNCRC has exerted a substantial influence on children's rights in South Africa, particularly in the realm of socio-economic rights. This has resulted in considerable modifications to the legal framework in order to align with the established criteria set forth by the UNCRC. The manifestation of this phenomenon is most conspicuous in the safeguards for children enshrined in the Constitution, along with the legislative enactments and judicial decisions pertaining to this matter. The rights of children are addressed in a distinct portion of the Constitution known as the Bill of Rights. However, it is important to note that this designation does not suggest that the rights outlined in other portions of the Constitution are not applicable to children as well. The paragraphs on equality, human dignity,

[30]Heyns & Viljoen (2001).
[31]2001 (1) SA 46 (CC).
[32]2005 (5) SA 721 (CC).

religion, education, and health, among other topics, are particularly relevant and applicable to children.

The majority of the civil, political, and socio-economic rights for children that are delineated in the UNCRC have been integrated into the Constitution of South Africa. Additionally, the South African Constitution specifies that in the process of interpreting the bill of rights, a court, tribunal, or forum is required to consider international law and may also consider foreign law. This suggests that while the consideration of foreign law is discretionary, the consideration of international law is obligatory. Furthermore, South Africa has enacted several legislative measures to defend and protect the socio-economic rights of children.

However, it is noteworthy that South African courts have demonstrated a tendency to either overlook or infrequently invoke the UNCRC when dealing with cases concerning individuals under the age of 18. This is in spite of the assurance provided by sections 39(b) and (c) of the Constitution of the Republic of South Africa, 1996. The aforementioned cases serve as illustrative examples in support of this assertion.

- It is interesting that the UNCRC is not mentioned in *Minister of Health & others v. Treatment Action Campaign & others*[33], a case that particularly addresses the rights of children and mothers to healthcare.
- In the case of *Government of the Republic of South Africa & others v. Grootboom & others*[34], The court or the legal representatives had the option to reference the relevant sections of the UNCRC, such as Article 6(2) which guarantees the right to life and the utmost feasible survival and development for children, as well as Article 24 which ensures the right to health and healthcare services for children.
- The court, counsel, and amici curiae in *Bhe & others v. Khayelitsha Magistrate & others*[35] might have potentially used many articles from the UNCRC to bolster their assertions. These articles include Non-discrimination (Article 2), which emphasises the importance of treating all children equally; the child's entitlement to life and development (Article 6(2)); the child's entitlement to a suitable standard of living (Article 27); and the principle of acting in the child's best interests (Article 3(2)).
- In *Khosa & others v. Minister of social development & others*[36], Justice Mokgoro did not make any reference to principles or norms of international law in the case. The court or the counsel could have made reference to the pertinent rights outlined in the UNCRC. Specifically, these rights include the child's entitlement to receive social security benefits as stated in Article 26, the child's right to survival and development as articulated in Article 6(2), and the child's right to enjoy an appropriate quality of life as outlined in Article 27.

[33]2000 (5) SA 721 (CC).
[34]2001 (1) SA 46 (CC).
[35]2005 (1) SA 580 (CC).
[36]2004 (6) SA 505 (CC).

South Africa's commitment to fully complying with the terms of the UNCRC and safeguarding children's socioeconomic rights could benefit from further enhancements. The South African government has implemented several measures in order to address these issues, such as improvements in the provision of education, efforts to decrease the incidence of foetal alcohol syndrome, and a campaign aimed at combating child maltreatment. However, the nation remains steadfast in its dedication to preserving and safeguarding the rights of children as delineated in the UNCRC. The Covid-19 pandemic has exacerbated the circumstances, nevertheless, there remains a significant disparity between the demand and supply of these services.

As per the provisions outlined in Section 27(2) of the Constitution, it is incumbent upon the state to undertake appropriate legislative and other measures, within the constraints of its financial capabilities, in order to progressively actualize the entitlement to social security. This section highlights the necessity of implementing additional measures in several domains such as administration, business, economy, social policy, justice, finance, and education, in addition to legislative interventions. According to Cassiem and Streak[37], the government bears the responsibility of distributing resources in a manner that expedites rather than incrementally achieves the socio-economic rights of children. It is imperative to allocate a greater proportion of the limited resources to children hailing from disadvantaged households in comparison to other underprivileged groups.

The support provided by the UNCRC to the government's obligation in assisting parents and other legal guardians is deserving of attention. The statement acknowledges that while parents and legal guardians bear the ultimate responsibility for raising their children, states parties are nevertheless obliged to provide them with the necessary assistance, as stated in Article 18. There exists an argument positing that this particular weakness is inherent in nature, hence rendering it inadequate in fully adhering to the principles outlined in the UNCRC. This flaw implies that the state is not obligated to promptly extend aid to economically disadvantaged children who possess parental guardians, nor is it obliged to prioritise the allocation of resources towards impoverished children. It is argued that this represents a limitation in itself and does not fully align with the principles outlined in the UNCRC. This is because it suggests that the government is not obligated to promptly provide for children from low-income families, and furthermore, there is no requirement to prioritise the allocation of resources to impoverished children over other individuals in need.

It is recommended that in order to strengthen the UNCRC's effectiveness in South African courts for the protection of children's socio-economic rights:

- That Presiding officers get ongoing judicial training about the UNCRC and its jurisprudence.
- The Legal Practise Council (LPC) should promote and empower legal representatives to incorporate the pertinent legislation of the UNCRC and

[37]Cassiem & Streak (2001).

its corresponding case law into their submissions presented before the courts.

- The proposed 5-year LLB programme, which the Council on Higher Education (CHE) is advocating for and urging Institutions of Higher Learning to implement, should incorporate a module on the United Nations Convention on the Rights of the Child (UNCRC) within its curriculum.

The fact that South Africa has made significant efforts to ensure that it complies with the commitments owed to all members of the UNCRC is undeniable. Based on the suggestions put forth by the United Nations in 1990, it can be deduced that the detrimental consequences of poverty can be substantially alleviated by the attainment of goals pertaining to the well-being of children, encompassing areas such as healthcare, nourishment, education, and other pertinent spheres. This conclusion appears to be reasonable based on the findings of the study. However, it is imperative to exert additional efforts to construct a robust economic foundation in order to effectively attain and sustain the objectives of long-term child survival, protection, and development. The South African judiciary has the potential to make a constructive contribution to this undertaking by carefully analysing and consistently applying the provisions of the UNCRC when appropriate and applicable.

References

Alston, P. (1994). *The best interests of the child: reconciling culture and human rights.* Oxford, UK: Clarendon Press.

Alston, P., Parker, S. & J. Seymour (1992). *Children, Rights and the Law*. Oxford: Oxford University Press.

Cassiem, S. & J. Streak (2001). *Budgeting for Child's Socio-Economic Rights: Government obligations and the child's right to social security and education.* Cape Town: Idasa.

De Wet, E. (1998). *The Constitutional Enforceability of Economic and Social Rights,* Butterworth.

Devenish, G.E. (1998). *A Commentary on South African Constitution*. Butterworths.

Dube, F. (2020). 'The South African Constitution as an instrument of doing what is just, right and fair' *in die Skriflig* 54(1), a2601. https://doi.org/10.4102/ids.v54i1.2601

Heyns, C. & F. Viljoen (2001). 'The Impact of Six Major UN Human Rights Treaties in South Africa' in *South African Public Law* 16:28-67.

Khoza, S. (2007). *Socio-Economic Rights in South Africa*, 2nd ed. University of the Western Cape: Community Law Centre.

Liebenberg, S. & K. Pillay (eds.) (2000). *Socio-Economic Rights in South Africa: A Resource Book*. Cape Town: Community Law Centre: University of the Western Cape.

Rautenbach, I.M. (1995). *General Provisions of the South African Bill of Rights.* Butterworths.

South African Law Commission, Review of the Child Care Act: Executive Summary (Discussion Paper 103, Project 110, 2002) 1.

Wright., J. & K. Potter (2012). From survival to safeguarding: A history of child protection. British journal of school nursing,

Cases

Bhe & others v. Khayelitsha Magistrate & others 2005 (1) SA 580 (CC). (15 October 2004)
Centre for Child Law v. Minister for Justice and Constitutional Development and others 2009 (6) SA 632 (CC). (15 July 2009)
Fraser v. Children's Court Pretoria North & others 1997 (2) SA 261 (CC). (5 February 1997)
Government of the Republic of South Africa & others v. Grootboom & others 2001 (1) SA 46 (CC). (4 October 2000)
Khosa & others v. Minister of Social Development & others Mahlaule & another v. Minister of Social Development 2004 (6) SA 505 (CC). (4 March 2004)
Minister for Welfare and Population Development v. Fitzpatrick & others 2000 (3) SA 422 (CC). (31 May 2000)
Minister of Health & others v. Treatment Action Campaign & others (No 2) 2002 (5) SA 721 (CC). (5 July 2002)
S v. Makwanyane & another 1995 (3) SA 391 (CC). (6 June 1995)
S v. Williams & others 1995 (3) SA 632 (CC). (9 June 1995)

Legislation

Constitution

Constitution of the Republic of South Africa, 1996

Statutes

Adoption Matters Amendment Act, 56 of 1998
Basic Conditions of Employment Act, 75 of 1997
Child Care Act, 74 of 1983
Children’s Act, 38 of 2005
Domestic Violence Act, 116 of 1998
Films and Publications Act, 65 of 1996
Natural Fathers of Children Born out of Wedlock Act, 86 of 1997
Recognition of Customary Marriages Act, 120 of 1998
South African Schools Act, 84 of 1996

International Treaties

United Nations Convention on the Rights of the Child, 1989
International Covenant on Civil and Political Rights, 1966