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EDITORIAL

This first volume of the *Sorbonne Student Law Review - Revue juridique des étudiants de la Sorbonne* was marked by the British referendum of June 2016 on the United Kingdom's membership of the European Union, which led to the "Brexit", and the election of Donald Trump to the White House on November 2016. These two events, which are now undoubtedly historic, have brought with them a series of political and legal reactions whose impact on the course of the world is intensely being discussed. On this occasion, Pr. Frank Garcia (Boston College Law School) offers us a detailed analysis of the impact of these two events in international economic law, an analysis particularly interesting as it echoes, in the case of Donal Trump, to the work of Pr. Matthew Diller (Fordham Law School) regarding the actual powers of the President of the United States in the American constitutional order.

Beyond the current American President and the "Brexit", question that I studied in regard of its constitutional compatibility with the British principle of parliamentary supremacy, it is the resurgence of "populism" that intrigues and fascinates the authors, whether they study politics or law. In this respect, the review took the opportunity of a conference to examine the preferred tool for the recourse to the people, the referendum. Thus, under the chairmanship of Mrs Camille Gendrot (Ecole de droit de la Sorbonne, EDS), Professor Pierre Brunet (EDS) offered us a critical approach of this instrument of direct democracy on a theoretical level giving to the work of Mrs Bérénice Bauduin (EDS) an interesting perspective, the latter having analysed the constitutional compatibly of the practices of referendums within companies in respect of labor law.

This conference was also the opportunity for Pr. Emmanuel Castellarin (University of Strasbourg) to discuss the practice of referendums in the process of independence under international public law, a study that our readers can find in *Sécession et processus sécessionniste en droit international, européen et constitutionnel*, Paris, Institut Universitaire Varenne, 2017, Olivier Lecucq (ed.): « Le référendum, nouvel outil de droit international pour les aspirants sécessionnistes ? », pp. 63-79. This study was obviously not without echoing the rights of indigenous peoples whose tenth anniversary of the eponymous declaration of the General Assembly of the United Nations was celebrated last year, an opportunity for Pr. Bruce

Duthu (Dartmouth College) to offer an overview of the rights of the native Americans after the Obama presidency and on the eve of the Trump presidency.

Professor Duthu's analysis, mixing politics with law, as a constant reminder that one is consubstantial of the other and vice versa, is not without evoking the Critical Legal Studies' movement, of which Pr. Allan Hutchinson (Osgoode Hall Law School) offers us an eloquent study in the form of introspection in a style that has made him famous. Pr. Hutchinson's study allows us to take a critical distance from the legal phenomenon and highlights the immense difficulty of political and legal debates inherent in social debates, debates that have been analysed by the works of Pr. Paolo Passaglia (Università di Pisa), and of Pr. Mitja Kovac and Ms Eva Erjavec (University of Ljubljana) through questions relating respectively to the abolition of the death penalty and to the fight against inequality in education.

Leaving these questions, we wanted to promote the work of M. Brook-Bekele Kidane, doctoral student at the University of Geneva, and M. Amir Luzon, attorney in Israel, both on alternative dispute resolution methods, as well as those of Dr. Serge Surin (University of Caen) on the French administrative law's principle of "silence is worth acceptance".

The first volume of the Sorbonne Student Law Review - Revue juridique des étudiants de la Sorbonne would not have been possible without the support of the members of the Sorbonne Law School to whom I express my deep gratitude, especially to Prof. François-Guy Trébulle and Dr. Joan Divol, as well as Ms. Eléonore Claret and Ms. Amélie Collin-Ruelle.

I would obviously like to thank our authors for their high-quality work, as well as Mr Héctor Méndez and Ms Olga Giakouminaki for their invaluable assistance.

Finally, it is to the founding members of the review that I would like to offer my last thanks. The success of this project, started a year ago in a café on the rue Soufflot, is yours. Thus, thank you to Mrs Giuliana Marino, Mr Guillaume Pinchard, Mrs Marianna Paschou, Mr Valentin Depenne, Mrs Camille Gendrot, Mr Camille Martini, Mr Victorien Salles and Mr Paul Heckler for the excellence of their work.

Valentin Pinel le Dret
Editor in Chief of the Sorbonne Student Law Review
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Ce premier volume de la *Sorbonne Student Law Review - Revue juridique des étudiants de la Sorbonne* a été marqué par le référendum britannique du 23 juin 2016 portant sur l'appartenance du Royaume-Uni à l'Union européenne, et ayant donné lieu au « Brexit », ainsi que l'élection de Donald Trump, le 8 novembre 2016, à la Maison Blanche. Ces deux événements, dont il n'est à ne pas douter qu'ils sont désormais historiques, ont emporté avec eux une série de réactions politiques et juridiques dont on ne cesse de discuter des incidences sur la course du monde. À cette occasion, le Pr. Frank Garcia (Boston College Law School) nous offre une analyse pointue sur l'impact de ces deux événements en droit international économique, une analyse d'autant plus profonde qu'elle fait écho, pour le cas de Donal Trump, au propos du Pr. Matthew Diller (Fordham Law School) quant aux pouvoirs effectifs du président des États-Unis dans l'ordre constitutionnel américain.

Au-delà de l'actuel président américain et du « Brexit », dont l'auteur de ces lignes a étudié la compatibilité constitutionnelle au regard du principe de suprématie parlementaire britannique, c'est bien la résurgence du « populisme » qui intrigue et fascine les auteurs, qu'ils soient politistes ou juristes. À cet égard, la revue s'est intéressée, à l'occasion d'une conférence, à l'outil de prédilection du recours au peuple, le référendum. Ainsi, sous la présidence de Mme Camille Gendrot (École de droit de la Sorbonne, EDS), le Pr. Pierre Brunet (EDS) nous a offert une approche critique de cet instrument de démocratie directe sur un plan théorique donnant par la même au propos de Mme Bérénice Bauduin (EDS), dont nous avons le plaisir de publier son premier travail en qualité de maître de conférences, une perspective des plus intéressantes, cette dernière s'étant intéressée aux référendums d'entreprises et leur compatibilité constitutionnelle.

Cette conférence a également été l'opportunité pour le Pr. Emmanuel Castellarin (Université de Strasbourg) de deviser sur la pratique du référendum dans le processus d'indépendance au regard du droit international public, une étude que nos lecteurs peuvent retrouver dans *Sécession et processus sécessionniste en droit international, européen et constitutionnel*, Paris, Institut Universitaire Varenne, 2017, sous la direction de Olivier Lecucq : « Le référendum, nouvel outil de droit international pour les aspirants sécessionnistes ? », pp. 63-79. Cette étude ne fut bien évidemment pas sans faire écho aux droits des populations autochtones dont on célébrait l'année dernière le dixième anniversaire de la déclaration éponyme adoptée par l'Assemblée générale des Nations Unies, occasion pour le Pr.

N. Bruce Duthu (Dartmouth College) d'offrir un état des lieux des droits des natifs américains au sortir de la présidence Obama et à l'aube de la présidence Trump.

L'analyse du Pr. Duthu, mêlant le politique au juridique, comme un constant rappel que l'un est consubstantiel à l'autre et réciproquement, n'est pas sans évoquer le mouvement des Critical Legal Studies dont le Pr. Allan Hutchinson (Osgoode Hall Law School) nous offre une éloquente étude sous forme d'introspection dans un style ayant fait sa renommée. L'étude du Pr. Hutchinson nous permet de prendre une distance critique face au phénomène juridique et met en relief l'immense difficulté des débats politico-juridiques inhérents aux débats de société, débats ayant été analysés par les travaux du Pr. Paolo Passaglia (Università di Pisa), du Pr. Mitja Kovac et de Mme Eva Erjavec (Université de Ljubljana) au travers respectivement des questions relatives à l'abolition de la peine de mort et celles relatives à la lutte contre l'inégalité en matière d'éducation.

Au-delà de ces questions à l'actualité brulante, nous avons voulu promouvoir les travaux de M. Brook-Bekele Kidane, doctorant à l'Université de Genève, et de Me Amir Luzon, avocat en Israël, tous deux sur les modes alternatifs de résolution des différends, ainsi que ceux du Dr. Serge Surin (Université de Caen) sur le principe du silence valant acceptation en droit administratif français.

Ce premier volume n'aurait pas été possible sans le soutien des membres de l'École de droit de la Sorbonne auxquels j'adresse ma profonde gratitude, tout particulièrement au Pr. François-Guy Trébulle et à Mme Joan Divol, ainsi qu'à Mme Eléonore Claret et Mme Amélie Collin-Ruelle.

Je remercie bien évidemment nos auteurs pour leurs travaux de qualité, ainsi que M. Héctor Méndez et Mme Olga Giakouminaki pour leur aide précieuse.

C'est enfin aux membres fondateurs de la revue que je tiens à offrir mes derniers remerciements. La réussite de ce projet, commencé il y a de cela un an dans un café de la rue Soufflot, vous revient. Aussi, merci à Mme Giuliana Marino, M. Guillaume Pinchard, Mme Marianna Paschou, M. Valentin Depenne, Mme Camille Gendrot, M. Camille Martini, M. Victorien Salles et M. Paul Heckler pour l'excellence de vos contributions et plus que tout pour votre confiance et dévotion cette année durant.

Valentin Pinel le Dret
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L'ABOLITION DE LA PEINE DE MORT ENTRE POLITIQUE ET JURIDICTION

Paolo Passaglia*

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Abstract

The complete or partial abolition of the death penalty is undoubtedly one of the most memorable decisions that can be adopted in a judicial system and a society.

Ethical, philosophical, religious, as well as criminological, economical and sociological arguments intervene in the realm of politics and law in order to support either the abolitionist option or the opposite one, which is sometimes referred to as "retentionist". The aim of this study is not to contribute to the debate regarding these arguments, but simply to draw a picture of the main processes that can lead to the complete or partial abolition of the death penalty.

Résumé

L'abolition (totale ou partielle) de la peine de mort est incontestablement une des décisions les plus marquantes qui puissent être adoptées dans un système juridique et une société.

Les arguments éthiques, philosophiques, religieux, mais aussi criminologiques, économiques et sociologiques interviennent dans les champs de la politique et du droit afin de soutenir, alternativement, l'option abolitionniste ou l'option inverse, que l'on nomme parfois « rétentionniste ». Le but de cette étude n'est pas de participer au débat concernant ces arguments, mais, bien plus modestement, d'esquisser un tableau des principaux processus qui peuvent porter à l'abolition (totale ou partielle) de la peine de mort.

ABOUT PAOLO PASSAGLIA

Professor Paolo Passaglia's academic education began at the Faculty of Law of Pisa. His links with French legal culture date back to his doctoral curriculum in *cotutelle* with the Università di Pisa and the University of Aix-Marseille III, *cotutelle* which granted him the degree of doctor of law both in Italy and France.

The main areas of research and teaching of our author are comparative law, in particular Franco-Italian comparative law, and public law, with a particular interest in constitutional justice, subjects that he teaches at the Università di Pisa as a professor. Author of numerous articles in Italian, English and French, he is the scientific coordinator of the Department of Comparative Law of the Italian Constitutional Court and a member of the Board of Directors of the Italian Association of Comparative Law.

The contribution that the Sorbonne Student Law Review is pleased to present in this first issue is a revisited excerpt from its remarkable book *The Abolition of the Death Penalty. A comparative study* (Mnemosyne 2012). It is a rigorous comparative legal analysis, informed by historical and political elements, of the *processes* by which the death penalty has been abolished or challenged around the world.

The author leads us to think on the plurality of configurations whereby the abolitionist (or quasi-abolitionist) process can present - both in terms of mechanisms used and bodies and institutions mainly involved - as well as on the link that exists between this procedural aspect and the substance of the resulting abolition.

On the same subject, Professor Passaglia was able to lead the debate among Sorbonne students at a conference entitled "The death penalty between abolition and regulation" held last February. It was notably on this occasion that the Sorbonne Student Law Review team was able to meet him in order to engage in a collaboration that proved to be a real pleasure, especially for the author of these lines since it enabled her to meet again with one of her masters while she was herself a student at the Università di Pisa.

Giuliana Marino
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A PROPOS DE PAOLO PASSAGLIA

La formation académique du Professeur Paolo Passaglia a commencé auprès de la Faculté de droit de Pise. Ses liens avec la culture juridique francophone remontent à son parcours doctoral marqué par une cotutelle avec l'Università di Pisa et l'Université d'Aix-Marseille III lui ayant permis d'obtenir le grade de docteur en droit en Italie et en France.

Les principaux domaines de recherche et d'enseignement de notre auteur sont le droit comparé, notamment le droit comparé franco-italien, et le droit public, avec un intérêt particulier pour la justice constitutionnelle, sujets qu'il enseigne à l'Università di Pisa en qualité de professeur. Auteur de nombreux articles en italien, en anglais ainsi qu'en français, il assure la coordination scientifique du département de droit comparé de la Cour constitutionnelle italienne et est membre du conseil directif de l'Association italienne de droit comparé.

La contribution que la *Sorbonne Student Law Review* a le plaisir de présenter dans ce premier numéro est un extrait revisité de son remarquable ouvrage *L'abolition de la peine de mort. Une étude comparée* (Mnemosyne 2012). Il s'agit d'une rigoureuse analyse juridique comparée, nourrie d'éléments historiques et politiques, des *processus* par lesquels la peine de mort a pu être abolie ou remise en cause dans le monde.

L'auteur nous amène à réfléchir sur la pluralité des configurations que le *processus* abolitionniste (ou quasi-abolitionniste) peut présenter – à la fois en termes de mécanismes utilisés et d'organes et institutions principalement impliqués – ainsi que sur le lien qui existe entre cet aspect procédural et la substance de l'abolition qui en résulte.

Sur ce même sujet, le Professeur Passaglia a pu animer le débat chez les étudiants de la Sorbonne lors d'une conférence « *La peine de mort entre abolition et réglementation* » qui a eu lieu en février dernier. C'est notamment à cette occasion que l'équipe de la *Sorbonne Student Law Review* a pu le rencontrer afin d'engager une collaboration s'étant révélée être un véritable plaisir, notamment pour l'autrice de ces lignes puisqu'il lui a permis de retrouver l'un de ses maîtres alors qu'elle était elle-même étudiante à l'Università di Pisa.

Giuliana Marino
Directrice-adjointe des événements scientifiques de la Sorbonne Student Law Review
Doctorante contractuelle à l'École de droit de la Sorbonne

INTRODUCTION

L'abolition (totale ou partielle) de la peine de mort est incontestablement une des décisions les plus marquantes qui puissent être adoptées dans un système juridique et une société.

Les arguments éthiques, philosophiques, religieux, mais aussi criminologiques, économiques et sociologiques interviennent dans les champs de la politique et du droit afin de soutenir, alternativement, l'option abolitionniste ou l'option inverse, que l'on nomme parfois « rétentionniste ». Le but de cette étude n'est pas de participer au débat concernant ces arguments, mais, bien plus modestement, d'esquisser un tableau des principaux processus qui peuvent porter à l'abolition (totale ou partielle) de la peine de mort[1].

À ce propos, l'aspect qui paraît mériter une attention particulière tient au fait que l'importance de l'option entre abolitionnisme et rétentionnisme est telle qu'elle ne peut évidemment pas être adoptée par n'importe quelle autorité. Mais l'identification de l'autorité appelée à choisir est loin d'être simple, car elle dépend d'un grand nombre de variables, telles que l'histoire du système, la situation politique, les exigences du moment, etc.

La diversité des autorités s'associe à la variabilité des parcours qui conduisent ou qui peuvent conduire à l'abolition. Cela soumet le comparatiste à une grande difficulté lorsqu'il cherche à élaborer des catégories et des paradigmes dans lesquels s'inscrivent les processus, ou les actes d'abolition : à première vue, en effet, chaque système présente des traits d'originalité qui semblent empêcher toute assimilation à d'autres.

Dans le but de tenter une classification de ces processus, une distinction peut être dégagée entre les organes politiques et les juridictions. La plupart des abolitions sont le produit d'une décision des premiers : la peine de mort est abolie simplement parce qu'un acte contraignant issu d'une décision *politique*, adopté par une autorité qui en a le pouvoir, impose que la peine de mort soit effacée de l'ordre juridique.

[1] En raison de l'objectif limité de l'étude, on n'abordera pas le sujet de manière complète, mais on se contentera de prendre en considération seulement les quelques expériences qui s'avèrent plus significatives eu égard au point de vue adopté. Parmi les recherches de plus grande envergure, voy., récemment, J. Martschukat, A. Sarat (dir.), *Is the Death Penalty Dying? European and American Perspectives*, Cambridge University Press, 2011 ; R. Hood – C. Hoyle, *The Death Penalty. A Worldwide Perspective*, Oxford University Press, 5e éd., 2015. Les opinions de l'auteur de cet écrit ont été en partie déjà exposées : voy., P. Passaglia, *L'abolition de la peine de mort. Une étude comparée*, Mnemosyne, 2012.

Bien que leur nombre soit beaucoup plus limité, on ne saurait négliger l'importance des cas où, à défaut d'une action politique, les juridictions ont pris soin de conduire un raisonnement juridique visant à vérifier si la peine capitale était compatible avec les principes constitutionnels. Et, parfois, le raisonnement a conduit à une déclaration d'inconstitutionnalité, frappant soit le châtiment en tant que tel soit sa réglementation juridique.

I. L'ABOLITION « POLITIQUE »

L'histoire de l'abolition de la peine de mort adoptée par les autorités politiques dans les différents pays suggère l'existence de deux grandes catégories, identifiables par rapport à ce que l'abolition de la peine de mort représente du point de vue du passé du système.

La première catégorie est celle de l'« abolition-révolution » : l'abolition de la peine de mort est un choix de rupture par rapport au passé et marque – ou contribue à marquer – une nouvelle phase de l'histoire constitutionnelle du pays.

La seconde catégorie comprend les « abolitions-réformes » : dans ces cas, on ne peut pas parler de ruptures, puisqu'il existe bien une continuité entre la période qui précède et celle qui suit l'abolition. L'élimination de la peine capitale est donc une innovation, à l'évidence, majeure, qui est le produit d'un débat interne au système ; un débat qui voit primer de nouveaux principes ou de nouvelles forces, imposant un changement de politique criminelle.

I.A. L'« abolition-révolution »

Le processus qui porte à l'abolition de la peine de mort est souvent un processus très complexe, au sein duquel la suppression de ce pouvoir de priver de la vie, légalement, certains criminels, n'est qu'une des innovations que l'on vise à introduire dans le système. On peut même arriver à lier la révolution juridique concernant la peine capitale à l'existence d'une révolution juridique générale, c'est-à-dire un changement, non *dans* le système, mais *du* système.

Or, l'instauration d'un nouveau régime paraît être, en effet, la condition essentielle pour qu'il y ait une abolition-révolution. Cela est dû au fait que les abolitions-révolutions font partie d'actes normatifs, généralement de constitutions qui manifestent un changement radical dans l'ordre juridique. Dans ce cadre, l'abolition de la peine de mort a été conçue, la plupart du temps, comme une composante du nouvel élan constitutionnel qui ouvre à la démocratie, soit après une période de dictature soit une fois l'indépendance conquise.

I.A.1. L'abolition et la fin de la dictature

Un grand nombre d'États abolitionnistes ont éliminé la peine de mort, totalement ou pour les crimes de droit commun, après une expérience plus ou moins longue de dictature. L'affirmation ou la réaffirmation de la démocratie s'est associée à celle des droits de l'homme, parmi lesquels une place centrale a été souvent réservée à la protection de la vie, qui s'impose même aux pouvoirs publics[2].

L'expérience européenne est assez parlante : la fin des années quarante a été marquée par l'objectif de tourner la page de la désolation politique et morale des dictatures nazies et fascistes ; les années quatre-vingt-dix se sont engagées dans l'œuvre de démantèlement des régimes socialistes en Europe orientale. Dans les deux cas, le nouvel ordre a été fondé sur les principes issus de la doctrine constitutionnaliste et la crainte d'assister, dans l'avenir, aux abus et aux horreurs que l'on venait de vivre a considérablement accentué le souci d'assurer à la vie ainsi qu'aux droits et libertés des individus une protection adéquate. L'interdiction de la peine de mort s'est insérée dans un tel contexte.

À ce propos, le cas italien est très significatif, puisque l'abolition de la peine capitale pour les crimes commis en temps de guerre fut introduite par l'article 27, alinéa 4, de la Constitution de 1947 (« La peine de mort n'est pas admise, exceptée dans les cas prévus par les lois militaires de guerre »[3]) sans qu'aucune objection soit soulevée au sein de l'Assemblée constituante. La peine de mort était, en effet, un sujet politiquement révélateur, puisque l'abolition avait été une des manifestations les plus importantes du libéralisme qui animait le Code pénal de 1889 (le « Code Zanardelli », du nom du ministre de la Justice) et, au contraire, le rétablissement de la peine de mort avait figuré parmi les premières grandes mesures du régime fasciste, avant même que le Code pénal de 1930 ne fût adopté.

L'élimination de la peine de mort, du moins pour les crimes de droit commun, était donc la conséquence logique de la reconnaissance de la valeur de la personne, non seulement du fait que sa vie doit être conçue comme sacrée, mais aussi parce que, même pour le plus brutal des criminels, le châtiment ne peut en aucun cas se limiter à une simple rétribution, mais doit chercher à protéger la dignité de la personne et, partant, à améliorer sa situation personnelle et

[2] L'affirmation de la protection de la vie est devenue un symbole d'un nouveau cours des choses même pour le droit international. La référence est, en particulier, l'article 3 de la Déclaration universelle des droits de l'homme, adoptée le 10 décembre 1948 par l'Assemblée générale des Nations Unies, aux termes duquel « [t]out individu a droit à la vie, à la liberté et à la sûreté de sa personne ».
[3] La loi constitutionnelle du 2 octobre 2007, n° 1, abrogera les mots suivant la virgule, en rendant ainsi l'abolition complète.

son intégration sociale. La place de l'interdiction de la peine capitale au sein de la Constitution indique de manière très claire l'idée qui était propre au Constituant : l'alinéa qui la précède affirme les principes selon lesquels « [l]es peines ne peuvent consister en des traitements contraires aux sentiments d'humanité et elles doivent avoir pour but la rééducation du condamné »[4].

On peut retrouver des idées largement communes à celles qui ont animé le Constituant italien dans l'élaboration du *Grundgesetz* allemand de 1949, dont l'article 102 affirme tout simplement – et sans réserve – que « [l]a peine de mort est abolie ».

Or, il est vrai que l'abolition de la peine de mort provenait d'une proposition qui était loin de condamner le passé. En effet, au sein du *Parlamentarischen Rats*, la question de l'abolition fut proposée par Hans-Christoph Seebohm, un député de droite (du *Deutschen Partei*)[5], ce qui pourrait paraître paradoxal[6], mais qui s'explique par l'objectif de s'opposer aux exécutions des criminels compromis avec la dictature national-socialiste[7].

On a très vite remédié à ce « vice originaire », non seulement en raison du fait que l'abolition de la peine de mort, tout en étant un sujet débattu, a été votée par une majorité très forte[8], mais aussi et surtout grâce à l'état d'esprit d'un grand nombre de députés qui l'ont votée. À cet égard, l'intervention du député Friedrich Wilhelm Wagner pendant la Cinquantième séance du Comité de direction[9] n'aurait pas pu être plus efficace :

> « Je pense qu'il est nécessaire que la nouvelle Loi fondamentale apporte également une décision sur [la] question. Il me semble indispensable que, dans cette nouvelle Loi fondamentale, dans laquelle il est dit que la vie doit être protégée, la peine de mort elle-même soit aussi abolie. Nous avons derrière nous une période difficile de barbarie et de la plus profonde humiliation de l'humanité. Il me semble donc indispensable d'apporter ici la preuve que le peuple allemand veut vraiment

[4] Sur l'abolition de la peine de mort dans l'ordre juridique italien, voy., N. Bobbio, « Il dibattito attuale sulla pena di morte », *L'Età dei diritti*, Einaudi, 1977, pp. 201 et s. ; I. Mereu, *La morte come pena. Saggio sulla violenza legale*, Donzelli, 1982, réed. 2000, pp. 127 et s. ; P. Costa (dir.), *Il diritto di uccidere : l'enigma della pena di morte*, Feltrinelli, 2010 ; D. Galliani, *La più politica delle pene. La pena di morte*, Cittadella, 2012, pp. 37 et s.

[5] Il est quand même à noter que l'abolition de la peine de mort figurait dans le programme du Parti social-démocrate dès 1906 : voy., Y. Hötzel, *Debatten um die Todesstrafe in der Bundesrepublik Deutschland von 1949 bis 1990*, de Gruyter, 2010, pp. 14 et s.

[6] A. Hammel, « Civilized Rebels: Death-Penalty Abolition in Europe as Cause, Mark of Distinction, and Political Strategy » *in* J. Martschukat, A. Sarat (dir.), *Is the Death Penalty Dying?: European and American Perspectives*, Cambridge University Press, 2011, p. 188, parle d'une « surprise ».

[7] Voy., R.J. Evans, *Rituals of Retribution: Capital Punishment in Germany, 1600-1987*, Oxford University Press, 1996, pp. 929 et s.

[8] Sur les travaux préparatoires concernant l'article 103 (devenu le 102 dans la rédaction finale du *Grundgesetz*), voy., B. Düsing, *Abschaffung der Todesstrafe in der Bundesrepublik Deutschland*, Bollwerk-Verlag, 1952 ; Y. Hötzel, *op. cit.*, pp. 10 et s.

[9] Sten. Prot. S., pp. 669 et s.

> renouveler sa vie et considérer un droit, le droit à la vie, d'une telle importance que l'État ne devrait pas avoir le droit de priver de la vie, puisqu'il ne l'a pas donnée. Il s'agit d'une question fondamentale […].
>
> Tant que nous aurons la peine de mort dans le pays et tant que nous saurons tous que la loi de l'État méconnaît la vie et en prive les personnes, il est, je crois, hors de question d'affirmer que nous avons fait beaucoup de chemin dans notre culture ».

Cette même intervention a été citée par le Tribunal constitutionnel fédéral, dans son arrêt de 1964 par lequel la portée de l'abolition de la peine de mort a été ainsi définie[10] :

> « Il s'agit d'une décision de grande importance du point de vue de la politique nationale et de la politique du droit. Elle comprend une reconnaissance de la valeur fondamentale de la vie humaine et une conception de l'État qui s'oppose à celle d'un régime politique pour lequel la vie de l'individu ne valait que peu et qui, par conséquent, a conduit, par l'usurpation du pouvoir sur la vie et la mort des citoyens, à des abus effrénés. Cette décision doit être considérée eu égard à la situation historique particulière dans laquelle elle a été adoptée »[11].

Le refus du national-socialisme et l'ouverture vers de nouveaux principes furent à l'origine des abolitions de la peine capitale, quoique limitées aux crimes de droit commun, dans d'autres pays fortement marqués par l'expérience dictatoriale, et notamment l'Autriche (1950) et la Finlande (1949).

Quelques années plus tard, à la fin d'une longue période de dictature, l'Espagne s'est ralliée aux pays abolitionnistes : la Constitution de 1978, qui a réaffirmé les valeurs démocratiques et celles du constitutionnalisme, a aboli la peine de mort pour les crimes de droit commun. L'article 15, en effet, associe l'interdiction de la peine capitale à la protection du droit à la vie en tant que droit fondamental : « Toute personne a droit à la vie et à l'intégrité physique et morale. Nul ne peut, en aucun cas, être soumis à la torture ni à des peines ou des traitements inhumains ou dégradants. La peine de mort est abolie, sauf dispositions prévues en temps de guerre par les lois pénales militaires ».

Or les débats qui ont conduit à l'adoption de la nouvelle Constitution n'ont pas mis en exergue la condamnation de la pratique du régime précédent, de sorte que l'abolition partielle de la peine de mort a été surtout soutenue par référence à des considérations liées à son inutilité[12]. Cependant, le fait même d'avoir introduit la prohibition de la peine de mort dans

[10] *Bundesverfassungsgericht*, Premier Sénat, 30 juin 1964 – 1 BvR 93/64 –, BVerfGE 18, 112.
[11] *Ibid.*, 117.
[12] Voy. notamment, l'intervention du député socialiste Gregorio Peces-Barba Martínez, qui a proposé d'introduire dans la Constitution la prohibition de la peine de mort, qui ne figurait pas dans l'avant-projet : séance du 18 mai 1978 de la Commission des « *Asuntos Constitucionales y Libertades Públicas* » du Congrès des députés (*Diario*

l'article consacrant le droit à la vie en tant que droit fondamental est la preuve du lien qui existe entre l'abolition et la conception nouvelle des rapports entre les pouvoirs publics et l'individu. Selon cette conception, ce n'est plus à l'individu de servir les pouvoirs publics, mais c'est à ces derniers d'agir au profit de l'individu. Autrement dit, l'élimination de la peine de mort est un des éléments qui marquent la rupture entre la dictature franquiste et l'État démocratique[13].

Le même esprit a guidé les pays de l'Europe orientale lorsque les régimes socialistes ont implosé. La transition – plus ou moins longue selon les pays – vers un régime de démocratie libérale a vu également partout l'abolition de la peine de mort. À quelques exceptions près, au cours des années quatre-vingt-dix tous les pays ont procédé à l'abolition d'un châtiment que l'on a qualifié de « barbare »[14]. Parfois une telle décision a été adoptée dès les premières grandes réformes, visant à exprimer ainsi le changement de régime par rapport au passé[15].

L'abolition de la peine de mort en tant qu'élément (parmi d'autres) destiné à souligner la clôture définitive d'une expérience dictatoriale n'est pas, cependant, une prérogative européenne. En Amérique latine aussi de telles abolitions ont été décrétées, par exemple au Brésil et au Pérou, en 1979, ainsi qu'en Argentine, en 1984, pour les crimes de droit commun.

Des tournants autres que le passage de la dictature à la démocratie peuvent créer des conditions favorables à l'abolition de la peine de mort, notamment lorsque le changement, radical parfois, est inspiré par l'émergence de forces progressistes.

Les exemples sont évidemment moins nombreux que ceux auxquels on a fait allusion dans les paragraphes précédents. Un des plus significatifs est certainement celui du Venezuela, où l'abolition de la peine de mort remonte à 1863. La date n'est pas sans intérêt, mais pas seulement pour souligner la précocité du choix opéré (le Venezuela est, notamment, le premier État souverain à avoir aboli la peine capitale). En effet, en 1863, le Traité de Coche mit fin à la

de Sesiones, 1978, n° 59, p. 2477). Sur l'élaboration de l'article 15 de la Constitution espagnole, voy., J.-F. Higuera Guimerá, *La prévision constitucional de la pena de muerte (comentario al artículo 15, segundo inciso, de la Constitución Española de 1978)*, Bosch, 1980 ; Y. Gómez Sánchez, « La pena de muerte », *Revista de Derecho Político*, 1992, pp. 178 et s. ; voy. aussi, pour un résumé, A.C. Andrés Domínguez, E. García de Viedma, « La pena de muerte en la legislación comparada y en el Derecho español », *La Pena de Muerte y Su Abolición en España*, Amnistía Internacional – Los Libros de la Catarata, 1995, pp. 15 et s.

[13] G. Rodríguez Mourullo, « Artículo 15. Derecho a la vida », *Comentarios a la Constitución Española de 1978. Artículos 10 a 23 de la Constitución Española de 1978*, Edersa, 1996, p. 292, parle de « [*l*]*a constitucionalización de la abolitición de la pena de muerte* » comme d'un « *signo de civilización y progreso* ».

[14] L'expression est du Président de la Tchécoslovaquie, Vaclav Havel, qui prôna l'introduction de l'interdiction de la peine de mort juste après la Révolution de velours. Le Parlement tchécoslovaque adoptera une loi remplaçant la peine de mort avec la réclusion à perpétuité le 3 mai 1990.

[15] Voy. S. Frankowski, « Post-Communist Europe » *in* P. Hodgkinson, A. Rutherford (dir.), *Capital Punishment. Global Issues and Prospects*, Waterside Press, 1996, pp. 225 et s.

Guerre fédérale, une guerre civile qui opposa, pendant cinq ans, les conservateurs et les partisans du fédéralisme et du libéralisme. La victoire alla à ceux-ci, qui imposèrent un nouveau cours aux institutions vénézuéliennes, inspiré de la doctrine libérale. L'abolition de la peine de mort, prévue par le *Decreto de Garantías* du 16 août 1863 puis consacrée par l'article 14 de la nouvelle Constitution (approuvée le 28 mars 1864)[16], représenta l'une des innovations les plus remarquables découlant du changement imprimé à l'État.

I.A.2. L'abolition et l'indépendance

La fin du colonialisme a eu sans doute une influence majeure sur l'application de la peine de mort. Cette constatation est loin de permettre de conclure que l'accès à l'indépendance implique le refus de la peine capitale : au contraire, la plupart des anciennes colonies ont maintenu ce châtiment, du moins pour une certaine période. Bien que minoritaires, les pays qui ont fait un choix différent sont tout de même assez nombreux.

Il s'agit, toutefois, de préciser les effets concrets de l'accès à l'indépendance sur l'application de la peine de mort. À ce propos, on peut déceler deux grandes catégories de systèmes en se fondant sur un critère d'ordre chronologique.

(*a*) Dans les pays qui se sont affranchis de la domination étrangère avant les années quatre-vingt du XX^{e} siècle, l'indépendance n'a pas porté à l'abolition de la peine de mort, mais, tout au plus, dans un certain nombre de cas, à sa désuétude.

L'absence d'exécutions après la domination coloniale est, en effet, une situation que l'on retrouve aux latitudes les plus diverses, de Malte (déclarée indépendante en 1964) au Venezuela (indépendant depuis 1830, une fois séparé de la Grande Colombie), à l'Océanie (Samoa, 1962 ; Nauru, 1968 ; Fidji, 1970) à un certain nombre d'États africains (Côte d'Ivoire et Madagascar, 1960 ; Cap-Vert, Sao Tomé-et-Principe et Angola, 1975 ; Seychelles, 1976 ; Djibouti, 1977) et, encore, à des États de l'Asie méridionale (Maldives, 1965 ; Brunei, 1984). Allant au-delà de ce cadre chronologique, la désuétude de la peine de mort a pu être constatée en Érythrée (à partir de 1993)[17] ainsi que dans quelques-uns des États issus de l'éclatement des

[16] L'article 14, alinéa 1, de la Constitution des États-Unis de Venezuela de 1864 établit le principe selon lequel « [*l*]*a Nación garantiza a los venezolanos* […] *la inviolabilidad de la vida, quedando abolida la pena capital, cualquiera que sea la ley que la establezca* » (« La Nation garantit aux Vénézuéliens […] l'inviolabilité de la vie, la peine capitale étant abolie, quelle que soit la loi qui l'a établie »).

[17] Il est quand même à constater que la peine de mort en Érythrée reste un sujet de débat, car à défaut de communications officielles par les autorités étatiques, la désuétude ne peut pas être confirmée. On suivra, tout de même, la thèse plus favorable à l'abolition.

fédérations soviétique (Arménie, Kirghizistan, Moldavie, dès 1991) et yougoslave (Bosnie-Herzégovine, dès 1992).

Il est à noter que la plupart des États mentionnés ci-dessus sont, actuellement, des États formellement abolitionnistes ou qui n'admettent en principe la peine de mort que pour des crimes particulièrement graves (Fidji). La désuétude a donc conduit, au fil des ans, à une ratification successive[18], qui est intervenue tantôt assez vite (au Cap-Vert et en Bosnie-Herzégovine, l'attente n'a duré que six ans), tantôt après des décennies (par exemple, les Samoa n'y sont arrivées qu'après 42 ans et la Côte d'Ivoire après 40 ans).

Dans quelques cas la désuétude n'a pas (encore ?) conduit à une abolition : c'est ce qui s'est vérifié à Madagascar, en Érythrée, aux Maldives, à Nauru et au Brunei, pays qui sont donc à ranger, actuellement, parmi les abolitionnistes de fait.

(*b*) Les pays qui sont arrivés plus tard à l'indépendance, et notamment ceux dont la souveraineté a été reconnue à partir des années quatre-vingt du siècle dernier, ont connu une démarche différente, caractérisée par le fait que lorsque l'abolitionnisme était en mesure de s'imposer, l'abolition de la peine de mort, en fait et en droit, a été immédiate, comme en Namibie (indépendante de l'Afrique du Sud depuis 1990)[19] et au Timor oriental (2002[20]). La liste devient longue en Océanie, où tous les pays devenus indépendants après 1978 ont fait le choix d'une abolition totale et immédiate : les Îles Salomon et les Tuvalu en 1978, les Kiribati en 1979, le Vanuatu en 1980, les Îles Marshall et la Micronésie en 1986, les Palaos en 1994.

Enfin, des abolitions immédiates ont été enregistrées au moment de l'accession à l'indépendance d'anciens membres de la Yougoslavie (Croatie, Macédoine et Slovénie, en 1991)[21].

Bien évidemment, les pays dont la souveraineté a été reconnue plus tardivement ont pu bénéficier de la montée du courant abolitionniste mondial et donc s'inspirer de modèles désormais bien ancrés dans la culture constitutionnelle, du moins dans certaines aires de la

[18] Sur ce point, voy., *infra*, paragraphe 3.
[19] Les trois autres pays africains de récente indépendance ont fait des choix différents : l'Érythrée figure, on l'a vu, dans la première catégorie, tandis que le Zimbabwe (indépendant depuis 1980) est un pays rétentionniste, ainsi que le Soudan du Sud (indépendant depuis 2011).
[20] En réalité, au Timor oriental la peine de mort avait été abolie dès 1999 par l'administration provisoire des Nations Unies. Le Brunei, l'autre pays de l'Asie indépendant depuis moins de trente ans, a été rangé dans la première catégorie.
[21] L'indépendance du Monténégro, en 2006, et du Kosovo, en 2008, n'a pas influencé le choix abolitionniste, qui avait été déjà fait par la Serbie-et-Monténégro en 2002.

planète. Cela explique, semble-t-il, l'augmentation des abolitions plus « audacieuses » liées à la fin du colonialisme.

Du point de vue chronologique, les deux grandes exceptions sont représentées par le Panama et la Norvège. Le Panama est devenu indépendant en 1903 et a aboli immédiatement la peine de mort : il s'agit du seul État du continent américain à avoir fait un tel choix, puisque même les pays qui se sont plus récemment affranchis de la domination étrangère (Antigua-et-Barbuda et Belize, en 1981 ; Saint-Christophe-et-Niévès, en 1983) ont opté pour le maintien de la peine de mort, du moins provisoirement[22]. On ne saurait négliger toutefois qu'en 1903, en Amérique latine, les exemples d'États abolitionnistes étaient loin de faire défaut. De ce fait, l'exception panaméenne peut trouver une explication et justifier le rapprochement avec les pays de plus récente indépendance.

Le cas de la Norvège est plus difficile à situer, puisque l'indépendance de la Suède, en 1905, conduisit à l'abolition immédiate de la peine de mort en temps de paix. La législation norvégienne pouvait effectivement compter sur d'autres exemples, même en Europe. Cependant, force est de constater la particularité norvégienne, due vraisemblablement à la forte empreinte des idées libérales qui a, dès le début, caractérisé le droit pénal norvégien[23].

I.B. L'« abolition-réforme »

L'abolition de la peine de mort, on l'a vu, est souvent le produit d'une « révolution » au sein de l'ordre juridique. Toutefois, il n'en est pas toujours ainsi : en effet, on est souvent arrivé à l'abolition dans la continuité, c'est-à-dire à la fin d'un processus de maturation, parfois même assez long, au cours duquel l'idée abolitionniste a gagné progressivement du terrain, jusqu'à primer sur la tradition rétentionniste.

Une telle évolution, aboutissant à des « abolitions-réformes », s'est produite dans un certain nombre d'États, dans tous les continents. On mentionnera quelques exemples, qui sont à ranger, pour des raisons diverses, parmi les plus intéressants, en distinguant entre les cas où l'abolition s'est produite de manière progressive et ceux qui ont été caractérisés par des bouleversements liés à des choix nets entre rétentionnisme et abolitionnisme, d'où la nature « instantanée » de l'abolition.

[22] Belize et Antigua-et-Barbuda figurent actuellement parmi les pays abolitionnistes de fait.
[23] Sur les rapports entre le droit pénal et le droit constitutionnel en Norvège, voy., E. Smith, « Constitutions et droit pénal » – « Norvège », *Annuaire international de justice constitutionnelle*, 2010, pp. 301 et s.

I.B.1. L'abolition « progressive »

Au Royaume-Uni, les réformes ayant conduit à l'abolition de la peine capitale remontent au début du XIX^e^ siècle, lorsque les crimes faisant partie de ce que l'on dénommait le « *Bloody Code* », c'est-à-dire les crimes passibles de la peine de mort, étaient au nombre de deux cent vingt-deux. Un nombre tellement élevé que l'un des opposants historiques à la peine de mort, *Sir* Samuel Romilly, pouvait s'adresser ainsi à ses collègues de la Chambre des communes : « *there* [*is*] *no country on the face of the earth in which there* [*have*] *been so many different offences according to law to be punished with death as in England* »[24].

Des réformes importantes se succédèrent, visant, d'une part, à conférer aux juges le pouvoir de décider, sur la base du cas d'espèce, si la peine de mort pouvait ne pas être infligée[25] et, de l'autre, à limiter le nombre de crimes susceptibles de conduire à l'exécution du condamné. Plusieurs lois furent approuvées dans ce but, la plus importante étant sans doute le *Punishment of Death, etc. Act* 1832 (c. 62), qui réduisit le nombre de *capital offences* à soixante environ. Cinq ans après, grâce à l'*Offences against the Person Act* 1837 (c. 85) et à d'autres lois mineures, ces crimes n'étaient plus qu'au nombre de seize. À la suite de réductions ultérieures, avec le *Criminal Law Consolidation Act* 1861 (c. 100), les *capital offences*, hormis celles prévues par le droit militaire, n'étaient plus qu'au nombre de cinq : meurtre, espionnage, haute trahison, incendie dans un chantier naval, un navire, un magasin ou un entrepôt royal et piraterie avec violence.

Au cours du XIX^e^ siècle, l'œuvre de réduction n'alla pas plus loin, bien que quelques occasions se fussent présentées. La plus importante fut sans doute celle offerte, en 1864, par la mise en place de la *Royal Commission on Capital Punishment*. La Commission n'arriva pas à recommander l'abolition de la peine de mort, mais ses recommandations n'eurent pas une portée négligeable, notamment celle qui prônait une graduation des meurtres pour faire en sorte que seuls les plus graves pussent donner lieu à une condamnation à mort, et celle qui visait à éliminer les exécutions en public[26]. Seule la seconde, toutefois, eut des résultats concrets, car le *Capital Punishment Amendment Act* 1868 (c. 24) mit fin aux exécutions publiques, ne

[24] *Parl. Deb. Commons*, 15, Feb. 9, 1810, p. 366, cité par V. Bailey, « The Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945-51 », *Law and History Review*, 2000, vol. 18, n. 2, pp. 305 et s.
[25] Voy., *Judgement of Death Act* 1823 (c. 48).
[26] Voy., *Report of the Capital Punishment Commission*, Eyre and Spottiswoode for Her Majesty's Stationery Office, 1866.

permettant tout au plus aux shérifs que d'admettre la présence de la presse et d'autres témoins, y compris les parents des victimes.

Les décennies successives furent caractérisées par des réformes sectorielles, parmi lesquelles figurèrent celle qui empêchait l'exécution des mineurs de moins de seize ans[27] et celle qui distinguait de l'homicide l'infanticide commis par la mère de manière à éviter à celle-ci la peine de mort[28]. Mais l'abolitionnisme dut attendre la fin des années vingt pour connaître une nouvelle montée en puissance, associée, en large mesure, à la conquête du pouvoir par le Parti travailliste. Les partisans de l'abolition, qui avaient désormais un grand parti politique de leur côté, bénéficièrent, au mois d'octobre 1929, d'un débat public déclenché par une motion abolitionniste du député William Brown. Le débat aboutit à la mise en place d'un *Select Committee on Capital Punishment*, dans le rapport final duquel la majorité travailliste proposa la suspension des exécutions à titre expérimental pour cinq ans. L'opposition farouche du Parti conservateur et la réticence du Gouvernement firent en sorte qu'une telle proposition ne fut pas mise à l'ordre du jour de la Chambre des communes avant la chute du cabinet, en août 1931.

L'abolition temporaire fut proposée à nouveau au mois de novembre 1938, cette fois par un député conservateur, Vyvyan Adams. La motion fut approuvée, mais avec une majorité qui était loin d'être écrasante, dans une Chambre des communes où le nombre de parlementaires absents était assez élevé pour permettre au Premier ministre conservateur, Neville Chamberlain, de contester la représentativité du vote. Quelques mois plus tard, lors de l'examen du *Criminal Justice Bill*, on chercha par un amendement à introduire ce moratoire. L'éclatement de la Seconde Guerre mondiale imposa de mettre de côté la proposition de loi et, par conséquent, le même sort fut réservé à la question de la suspension des exécutions.

Mais cette mise de côté n'était que provisoire. À la fin du conflit, avec une majorité travailliste à la Chambre des communes, le *Criminal Justice Bill* fut présenté à nouveau, mais privé de la clause sur l'abolition temporaire de la peine de mort. Un nouvel amendement fut alors présenté visant à suspendre les exécutions pendant cinq ans. Le Gouvernement laissa les députés de la majorité libres de faire leur choix, tout en se déclarant opposé à l'amendement, pour des raisons d'opportunité. À la surprise générale, au mois d'avril 1948, l'amendement dit Silverman, du nom du proposant, fut adopté (245 voix contre 222). Mais en juin, le vote de la

[27] *Children Act* 1908 (c. 67). L'âge sera élevé à dix-huit ans par le *Children and Young Persons Act* 1933 (c. 12).
[28] *Infanticide Act* 1922 (c. 18).

Chambre des Lords fut moins surprenant : le projet de loi fut approuvé, mais fut « épuré » de l'« amendement Silverman ».

La crainte d'un conflit entre les deux Chambres, sur un sujet délicat et politiquement sensible, et le risque d'un décalage excessif entre la chambre élue et l'opinion publique suggérèrent aux responsables du Parti travailliste de ne pas insister sur l'amendement abolitionniste.

Une fois le conflit politique quelque peu apaisé, au mois de novembre, le *Home Secretary*, James Chuter Ede, annonça l'institution d'une *Royal Commission on Capital Punishment*, qui fut mise en place de manière officielle en janvier 1949. C'était, à l'évidence, une bonne occasion pour étudier le sujet, mais aussi un excellent moyen pour gagner du temps.

Le rapport de la Commission n'arriva, en effet, qu'en 1953. Un rapport très long et détaillé, sur un grand nombre de questions. Son impact fut cependant plutôt limité, en raison, entre autres, de l'alternance qui avait porté à nouveau, en 1951, le Parti conservateur au pouvoir. Sur l'abolition de la peine capitale, d'ailleurs, la Commission n'avait pas pris de position définitive, optant pour le rétentionnisme « à moins qu'il n'y ait une écrasante majorité dans l'opinion publique en faveur de l'abolition ».

Apparemment sans trop d'importance, le rapport eut, en réalité, l'effet de donner aux partisans de l'abolitionnisme de nouveaux arguments. Ce fut à nouveau le député Sydney Silverman, qui introduisit, en 1955, un *Death Penalty (Abolition) Bill*, visant à abolir la peine ou, du moins, à suspendre les exécutions. La proposition de loi fut approuvée par la Chambre des communes, mais l'opposition de la Chambre haute rendit impossible son approbation définitive. En contrepartie partielle, les *Lords* acceptèrent toutefois l'adoption du *Homicide Act* 1957 (c. 11) qui, en premier lieu, limita la notion de « meurtre », en l'excluant lorsque l'auteur « *was suffering from such abnormality of mind* […] *as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing* » (*section* 2(1)).

La même loi, en outre, distingua entre les meurtres susceptibles de donner lieu à la peine capitale et les meurtres pour lesquels la peine de mort était exclue.

La section 5(1) de la loi conserva la peine de mort pour « (a) any murder done in the course or furtherance of theft ; (b) any murder by shooting or by causing an explosion ; (c) any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful

arrest, or of effecting or assisting an escape or rescue from legal custody ; (d) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting ; (e) in the case of a person who was a prisoner at the time when he did or was a party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting ». La section 6(1) ajouta les récidivistes aux individus susceptibles d'être condamnés à mort.

Pour tous les autres cas, le meurtre n'aurait plus conduit à la peine de mort (*section* 7 du *Homicide Act*).

La restriction de l'application de la peine capitale eut l'effet de réduire considérablement le nombre d'exécutions : l'adoption par la Chambre des communes du *Death Penalty (Abolition) Bill* de 1955 avait induit le *Home Secretary* à suspendre les exécutions, qui n'eurent pas lieu au cours de l'année 1956 ; l'adoption définitive du *Homicide Act* conduisit à une reprise des exécutions. Mais à partir de 1957, le nombre des exécutions par an ne dépassa plus les sept (le chiffre atteint en 1961), tandis qu'avant 1955 – si l'on fait abstraction des huit exécutions de 1948 – chaque année les exécutions avaient été d'au moins douze (en 1947 et en 1955), sans compter qu'au cours de certaines années, le chiffre avait grimpé de manière considérable, notamment en 1952, lorsque les exécutions furent au nombre de vingt-trois.

Les deux dernières exécutions eurent lieu en 1964. La victoire du Parti travailliste lors des élections nationales de cette année donna aux abolitionnistes un nouvel élan. Ce fut, encore une fois, le député Silverman qui présenta un *private member's bill*, qui, finalement, fut adopté par les deux Chambres du Parlement.

Par le *Murder (Abolition of Death Penalty) Act* 1965 (c. 71), la peine prévue pour les meurtres que l'*Homicide Act* 1957 sanctionnait par la peine de mort, devenait la réclusion à perpétuité dans tout le Royaume-Uni sauf en Irlande du Nord. La loi visait à une suspension provisoire des condamnations pendant cinq ans et subordonnait l'abolition définitive à une *affirmative resolution* des deux Chambres avant le 19 juillet 1970. La Chambre des communes vota une telle *resolution* le 16 décembre 1969 ; le même vote de la Chambre des *Lords* arriva deux jours plus tard. La peine de mort était ainsi abolie pour le crime de meurtre.

À ce moment-là, en Grande-Bretagne, la peine de mort ne restait en vigueur que pour l'espionnage, la haute trahison, l'incendie dans un chantier naval, un navire, un magasin ou un entrepôt royal et la piraterie avec violence. Le droit militaire prévoyait, en outre, la peine capitale pour six crimes, notamment la faute grave au cours des actions militaires, l'aide à

l'ennemi, l'obstruction aux opérations militaires, le fait d'avoir envoyé de faux signaux aériens, la mutinerie ou l'incitation à la mutinerie, le fait de ne pas avoir réprimé la mutinerie afin d'aider l'ennemi.

Au fil des ans, la peine de mort fut supprimée pour tous ces crimes, sans qu'il y eût, entre-temps, aucune exécution : le *Criminal Damage Act* 1971 (c. 48) élimina la peine capitale pour l'incendie dans un chantier naval, un navire, un magasin ou un entrepôt royal ; le *Armed Forces Act* 1981 (c. 55) l'élimina pour l'espionnage ; la peine de mort pour haute trahison et piraterie fut abolie, au mois de juillet 1998, par le *Crime and Disorder Act* 1998 (c. 37).

La *section* 21(5) du *Human Rights Act* 1998 (c. 42), du 9 novembre 1998, élimina complètement la peine de mort, en la supprimant pour les crimes prévus par le droit militaire. Lors de la ratification, le 20 mai 1999, du Protocole n° 6 à la Convention européenne des droits de l'homme, le Royaume-Uni avait donc déjà fait le choix de l'abolitionnisme total. La ratification du Protocole n° 13 à la Convention européenne, le 10 octobre 2003, a consacré ce choix au niveau international, choix qui, sur la base de ce que l'on a pu constater, a été le produit d'une longue évolution, marquée par des progrès parfois minimes, de sorte que le Royaume-Uni est peut-être l'exemple le plus sûr d'une abolition découlant d'une (série de) réforme(s)[29].

L'évolution britannique a eu, bien évidemment, des effets majeurs sur les territoires liés à la Couronne, notamment l'Irlande Nord : dans celle-ci, une fois comblé le retard concernant la peine pour le crime de meurtre, grâce au *Northern Ireland (Emergency Provisions) Act* 1973 (c. 53), il a été procédé d'une manière parallèle à celle des autres composantes du Royaume-Uni. Dans les dépendances de la Couronne britannique, la peine de mort a été abolie plus tard, au moment où l'on a donné effet au Protocole n° 13[30] ; dans l'Île de Man, toutefois, la peine a été abolie bien avant, par le *Capital Punishment (Abolition) Act* 1993, quelque cent vingt et un ans après la dernière exécution[31]. Dans les territoires d'outre-mer, la peine de mort pour les crimes de meurtre a été abolie en 1991, par un *order in council* venant de Londres.

Mais l'approche britannique à l'égard de l'abolition a vraisemblablement inspiré la politique abolitionniste d'autres pays historiquement très proches du Royaume-Uni.

[29] Au sujet du long chemin de l'abolitionnisme britannique, voy., B.P. Block, J. Hostettler, *Hanging in the balance: a history of the abolition of capital punishment in Britain*, Waterside Press, 1997.
[30] Par exemple, en ce qui concerne l'Île Jersey, la peine de mort a été éliminée définitivement par le *Human Rights (Amendment) (Jersey) Order* 2006.
[31] Voy,. P.W. Edge, *The Law and Practice of Capital Punishment in the Isle of Man*, 1996, disponible en ligne : http://firedrake.org/drpete/manx2.htm.

Un exemple révélateur est sans doute tiré de l'expérience canadienne. Au Canada, en effet, certains aspects du parcours vers l'abolition sont assez similaires à ceux qui ont marqué le Royaume-Uni. D'abord, le choix d'une réduction progressive des crimes susceptibles de conduire à la peine de mort, une fois constatée l'impossibilité de procéder à une abolition immédiate qui avait pourtant été proposée dès 1914. L'évolution dans ce sens a conduit à l'exclusion de la peine pour viol, en 1954, et, sept ans plus tard, à une réforme du Code criminel visant à distinguer entre les meurtres sanctionnés par la mort, notamment l'homicide prémédité et l'homicide d'un agent de police ou d'un gardien de prison en service, et les meurtres pour lesquels d'autres peines étaient prévues.

Cette réforme eut pour effet une raréfaction considérable des exécutions, si bien que la dernière exécution de l'histoire canadienne eut lieu en décembre 1962. La désuétude que l'on entrevoyait amena à une première motion abolitionniste en 1966, qui fut néanmoins rejetée par la Chambre des communes.

À l'instar de ce qui avait été tenté à plusieurs reprises et qui venait de se produire au Royaume-Uni, la voie vers l'abolition définitive fut ouverte par un moratoire. En 1967, le projet de loi C-168, présenté par le Gouvernement libéral de Lester B. Pearson, fut approuvé : un moratoire de cinq ans fut ainsi établi, jusqu'au 29 décembre 1972, avec pour seules exceptions les homicides des agents de police ou des gardiens de prison. À la fin du quinquennat, quoiqu'avec quelques mois de retard, le moratoire fut réitéré (le 29 mai 1973). Cette fois, avant que les cinq ans de suspension des exécutions ne s'écoulent, le Gouvernement libéral de Pierre Trudeau présenta le projet de loi C-84, visant à l'abolition de la peine de mort à l'exception des cas prévus par le droit militaire. Le 14 juillet 1976 le projet fut adopté par une majorité à la Chambre des communes de 130 voix contre 124, le Gouvernement ayant laissé liberté de vote à ses députés. Onze ans après, un nouveau vote à la Chambre des communes confirma le choix abolitionniste, en rejetant, par un vote libre (148 voix contre 127) une motion visant au rétablissement de la peine capitale.

Comme au Royaume-Uni, une fois éliminée la peine de mort pour les crimes de droit commun, un certain temps s'est avéré nécessaire pour éradiquer de l'ordre juridique les derniers vestiges de ce châtiment. Au Canada, cette élimination s'est produite le 10 décembre 1998, à l'occasion de l'adoption d'une réforme de la Loi sur la défense nationale par laquelle ont été

supprimés tous les cas de peine capitale qui demeuraient dans le droit militaire (notamment pour les crimes de trahison et de mutinerie)[32].

L'expérience canadienne est donc un autre exemple très parlant d'une abolition progressive qui a été soutenue par un grand parti, le Parti libéral en particulier, sans que ce soutien implique pour autant que l'accession au pouvoir du parti conduisît à une abolition immédiate.

I.B.2. L'abolition « instantanée »

Parmi les abolitions dérivant d'un bouleversement des choix entre rétentionnisme et abolitionnisme, on peut indiquer, tout d'abord, la Suisse, où la peine de mort pour les crimes de droit commun fut abolie, pour la seconde fois, et définitivement, en 1942. Dans ce pays, le sort de la peine capitale a été fortement marqué par des référendums : le 18 mai 1879, le peuple se prononça par 52,5 % des suffrages en faveur de la proposition de réintroduire dans la Constitution la peine de mort pour les crimes de droit commun qui avait été abolie en 1874. Le sujet resta, toutefois, très débattu, et les réserves contre l'application de la peine de mort restèrent très fortes, ce qui est prouvé par le nombre restreint (neuf, au total) des exécutions entre 1879 et 1940. Au fil des ans, la cause abolitionniste devint de plus en plus forte. Ceci est attesté par le fait que, par le référendum du 3 juillet 1938, par une majorité de 53,5 % des suffrages, le Code pénal fut amendé dans le but d'éliminer la peine capitale pour les crimes de droit commun. La majorité était claire, mais loin d'être plébiscitaire, surtout en raison du fait que les rétentionnistes étaient en majorité dans un bon nombre de Cantons, voire dans la plupart de ceux-ci. C'est en effet dans un petit canton, Obwald, où la cause rétentionniste avait obtenu près des quatre cinquièmes des suffrages, qu'eut lieu la dernière exécution pour des crimes commis en temps de paix. C'était le 18 octobre 1940[33], deux ans après le référendum, mais plus d'un an avant que la réforme du Code pénal qui avait été votée n'entrât en vigueur (1er janvier 1942)[34].

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[32] Au sujet du processus qui a conduit à l'abolition de la peine de mort au Canada, voy., C. Strange, « The Lottery of Death: Capital Punishment, 1867-1976 », *Manitoba Law Journal*, 1996, vol. 23, pp. 594 et s. ; C. Strange, « The Undercurrents of Penal Culture: Punishment of the Body in Mid-Twentieth-Century Canada », *Law and History Review*, 2001, vol. 19, pp. 343 et s. ; A.S. Thompson, « Uneasy Abolitionists : Canada, the Death Penalty, and the Importance of International Norms, 1962-2005 », *Journal of Canadian Studies*, 2008, vol. 42, pp. 172 et s. ; J. Carter, « Capital Punishment: A Struggle to Satisfy Evolving Standards of Decency – Reviewing the Debate in the United States and Canada », *Southwestern Journal of International Law*, 2011, vol. 17, pp. 249 et s.

[33] L'année précédente une autre exécution avait eu lieu, dans le Canton de Zoug, où l'option en faveur du maintien de la peine de mort avait obtenu, lors du référendum, presque 55 % des voix.

[34] Voy., F. Vassaux, « Peine de mort. L'histoire du dernier tueur tué », *L'illustré*, disponible en ligne : http://www.illustre.ch/peine-mort-hans-vollenweider-comdamne-guillotine_56930_.html.

L'abolition de la peine de mort en Suisse a donc été le résultat d'une majorité populaire étroite qui a basculé au cours des décennies, grâce à plusieurs facteurs, parmi lesquels figure certainement la raréfaction des exécutions, qui a progressivement privé les rétentionnistes de l'argument selon lequel la peine capitale est un instrument indispensable pour lutter contre la criminalité.

Le deuxième exemple, celui de la France, est sans doute plus significatif, puisqu'il montre un véritable bouleversement politique qui conduit à l'abolition de la peine de mort. Un bouleversement aussi fort que l'on serait tenté même de ranger l'abolition française parmi les « abolitions-révolution » ; à proprement parler, toutefois, aucune révolution a eu lieu : en 1981, lorsque le choix abolitionniste fut opéré, aucun changement constitutionnel ne s'est produit, les institutions et les principes fondateurs du système étant restés les mêmes, du moins en théorie. L'abolition française doit donc être rangée parmi les « abolitions-réformes », même si l'on doit remarquer le caractère de rupture qu'a eu cette réforme du point de vue politique.

La France a été le dernier pays de l'Europe occidentale à exécuter des condamnés[35] et le dernier à entreprendre le parcours abolitionniste. Cela peut surprendre, car la peine de mort avait été mentionnée déjà dans les cahiers de doléance de l'époque révolutionnaire et, depuis 1791, de nombreuses propositions de loi avaient été déposées visant à limiter voire à abolir l'application de la peine capitale. En 1908, le Gouvernement avait même présenté un projet de loi prévoyant l'abolition de la peine de mort et son remplacement par une peine d'internement perpétuel : à la suite d'un débat très vif, le projet avait pourtant été rejeté, par 330 voix contre et 201 pour.

Après cela, aucun gouvernement ne s'était plus engagé sur le sujet, laissant aux parlementaires le soin de trancher la question ; cependant, les propositions de loi, qui n'avaient pas manqué au cours de la Troisième, de la Quatrième et de la Cinquième République, n'avaient jamais rencontré le soutien nécessaire au sein du Parlement[36].

Le « retard français » s'est tout de même accumulé principalement au cours de la Cinquième République, ce qui peut s'expliquer par le fait que l'opposition entre abolitionnistes

[35] La dernière exécution remonte au 10 septembre 1977.
[36] Les grands débats parlementaires sur l'abolition de la peine de mort ont été reproduits dans le dossier de La Documentation française, *L'abolition de la peine de mort en France*, mis à jour le 3 mai 2002, disponible en ligne : http://www.ladocumentationfrancaise.fr/dossiers/d000141-l-abolition-de-la-peine-de-mort-en-france. Voy. aussi Sénat, *Les grandes pages de l'histoire de l'abolition de la peine de mort en France*, disponible en ligne : http://www.senat.fr/evenement/archives/D22/abolition1.html, ainsi que R. Micheli, *L'émotion argumentée : l'abolition de la peine de mort dans le débat parlementaire français*, Éditions du Cerf, 2010.

et rétentionnistes correspondait, en large mesure, à celle entre la gauche, d'un côté, et le centre et la droite, de l'autre, la première faisant de l'abolition un sujet marquant de son programme et les seconds étant très majoritairement favorables au maintien de la peine.

La longue hégémonie des partis de droite pendant la Cinquième République a donc été un obstacle, pour ne pas dire un verrou, à l'élimination de la peine capitale. Et la preuve vient du fait que l'un des premiers fruits de l'alternance au pouvoir a été justement l'abolition de la peine de mort.

L'engagement pris pendant la campagne électorale par le candidat à la présidence de la République François Mitterrand a été respecté : quelques semaines après les élections législatives, le 26 août 1981, le Conseil des ministres a arrêté le projet de loi visant à abolir la peine de mort. Soutenu lors des débats par un garde des Sceaux très inspiré, M. Robert Badinter, le projet a été adopté en première lecture, le 18 septembre 1981, par l'Assemblée nationale, par 363 voix contre 117[37] ; le 30 septembre, le Sénat a adopté, à son tour, le projet, par 160 voix favorables contre 126. Par ces votes, la peine de mort a été abolie, en France, pour tous les crimes, et il lui a été substitué « la réclusion criminelle à perpétuité ou la détention criminelle à perpétuité suivant la nature du crime concerné » (article 3 de la loi n° 81-908 du 9 octobre 1981 portant abolition de la peine de mort)[38].

À l'évidence, la victoire abolitionniste a été rendue possible par le bouleversement résultant de l'accès au pouvoir de la gauche. Cette thèse ne saurait être contredite par la constatation qu'un certain nombre de députés (37) – parmi lesquels figurait le futur président de la République, Jacques Chirac – et surtout de sénateurs de centre et de droite a voté en faveur de l'abolition. Le ralliement sur ce sujet d'une partie de la minorité à la majorité paraît davantage être la preuve que le temps était venu de permettre à la France de rejoindre le reste de l'Europe occidentale, ce qui est confirmé par le rejet de toute proposition visant à rétablir la peine de mort déposée aux bureaux des Chambres au cours des années quatre-vingt[39].

[37] La vidéo du débat est disponible en ligne (sur le site internet de l'Assemblée nationale, au sein du dossier sur la *Loi du 9 octobre 1981 portant abolition de la peine de mort*, mis à jour en février 2010) : http://www.assemblee-nationale.fr/histoire/peinedemort/.

[38] Sur l'abolition de la peine de mort en France, voy., J.-M. Carbasse, *La peine de mort*, PUF, 2002 ; S. Costa (dir.), *La peine de mort : de Voltaire à Badinter*, Flammarion, 2007 ; R. Badinter, *L'abolition de la peine de mort*, Dalloz, 2007 ; R. Badinter, *L'abolition*, Librairie générale française, 2011 ; R. Badinter, *Contre la peine de mort : écrits 1970-2006*, Librairie générale française, 2011.

[39] La liste complète des propositions visant au rétablissement est disponible en ligne (sur le site internet de l'Assemblée nationale, dans le dossier sur la *Loi du 9 octobre 1981 portant abolition de la peine de mort*, précité) : http://www.assemblee-nationale.fr/histoire/peinedemort/retablissement.asp.

II. L'ABOLITION « JUDICIAIRE »

L'abolition de la peine de mort est généralement le fruit d'une décision politique. Cela n'empêche pas que la jurisprudence ait pu parfois jouer un rôle majeur, voire décisif, dans le processus aboutissant à l'abolition. À cette fin, la jurisprudence a été appelée, dans plusieurs pays, à se prononcer sur la constitutionnalité de la peine capitale et, à l'évidence, les solutions ont été les plus diverses.

Dans certains pays, la question a porté sur la déclaration d'inconstitutionnalité, d'où l'achèvement par voie judiciaire de l'effacement de la peine de l'ordre juridique. Dans d'autres pays, les juridictions ne sont pas arrivées à ce stade, car elles n'ont pas censuré l'existence de la peine de mort ; elles ont tout au moins limité son application, de manière parfois même considérable.

II.A. Les abolitions achevées

L'abolition par voie judiciaire est le résultat de deux typologies d'interventions de la part des juridictions. La première se produit lorsqu'un ou plusieurs arrêts créent des conditions favorables à l'abolition, qui se réalise par un acte ou par une omission du législateur : l'abolition est donc *provoquée* par la jurisprudence. La seconde implique que les juridictions décrètent directement l'abolition : l'abolition *délibérée* par la jurisprudence présuppose que l'élimination de la peine capitale n'est pas un *choix*, mais plutôt une *nécessité*, qui découle de la constatation de son incompatibilité avec des dispositions et des principes supérieurs.

La différence principale entre les deux catégories d'abolitions jurisprudentielles est que la peine de mort n'est condamnée en tant que telle que dans la seconde, tandis que dans la première, la peine de mort n'est pas considérée comme incompatible en soi avec les principes fondateurs du système, l'incompatibilité découlant plutôt de la règlementation concrète que le législateur a adoptée.

II.A.1. Les abolitions provoquées par les juridictions

C'est aux États-Unis, et notamment dans certains États membres, que l'on trouve les décisions judiciaires qui ont conduit à l'abolition de la peine de mort sans pour autant déclarer, à deux exceptions près, l'impossibilité théorique d'infliger un tel châtiment. La jurisprudence de la Cour suprême fédérale, qui n'a jamais condamné la peine de mort en tant que telle[40], a

[40] Voy., *infra*, paragraphe II.B.1.

évidemment influencé la quasi-totalité des juridictions, qui ne sont pas arrivées à contester la peine capitale de manière radicale. Cependant, plusieurs arrêts, dans un certain nombre d'États, ont révélé une attitude très critique vis-à-vis de la peine de mort, attitude qui a conduit à des déclarations d'inconstitutionnalité de dispositions législatives régissant l'application de la peine de mort au motif que les conditions dans lesquelles la condamnation était prononcée ou le châtiment infligé portaient atteinte à des normes de la Constitution fédérale ou de celle de l'État.

Ce type de décisions a été à l'origine de l'abolition de la peine de mort dans quatre des États actuellement abolitionnistes : le Massachusetts, le Rhode Island, l'État de New York et le Delaware.

(*a*) Au Massachusetts, les années soixante-dix et le début des années quatre-vingt ont été cruciaux pour le sort de la peine capitale, sujet qui a vu une opposition très forte de la *Supreme Judicial Court* vis-à-vis du législateur.

Déjà en 1975, la Cour suprême de l'État avait déclaré l'inconstitutionnalité, pour méconnaissance de l'interdiction de traitements cruels et inusités, des dispositions qui prévoyaient la condamnation à mort obligatoire en cas de meurtre au cours d'un viol ou d'une tentative de viol[41].

Deux ans après, les juges de la *Supreme Judicial Court* avaient été sollicités par la *House of Representatives* afin de rendre un avis sur un projet de loi concernant la prévision de la peine de mort pour assassinat. L'avis rendu avait été défavorable, sur la base de la constatation que la disposition de la Constitution de l'État interdisant les traitements cruels et inusités « *forbids the imposition of a death penalty* […] *in the absence of a showing on the part of the Commonwealth that the availability of that penalty contributes more to the achievement of a legitimate State purpose* […] *than the availability in like cases of the penalty of life imprisonment* »[42].

Bien que par cet avis la Cour suprême eût considérablement limité la marge d'appréciation du législateur, en lui imposant de justifier la prévision de la peine de mort par la preuve de son efficacité dans la poursuite d'un but légitime, le législateur n'avait cependant pas renoncé puisqu'au mois de novembre 1979 il avait adopté une loi portant sur l'application de

[41] Voy., *Commonwealth vs. Robert E. O'Neal* (*O'Neal II*), 369 Mass. 242 (1975), 22 décembre 1975, disponible en ligne : http://masscases.com/cases/sjc/369/369mass242.html.
[42] Voy., *Opinions of the Justices to the House of Representatives*, 372 Mass. 912 (1977), 8 juin 1977, disponibles en ligne : http://masscases.com/cases/sjc/372/372mass912.html, p. 917.

la peine de mort pour assassinat qui correspondait, pour l'essentiel, au texte ayant fait l'objet de l'avis de 1977. Saisie de la question de sa constitutionnalité, en 1980, la *Supreme Judicial Court*, était arrivée à déclarer la peine de mort, en tant que telle, contraire à l'article 26 de la Constitution du Massachusetts, en conséquence de la méconnaissance de l'interdiction de traitements cruels et inusités[43] : la condamnation de la peine de mort reposait sur son incompatibilité avec les « *evolving standards of decency* »[44] et sur l'arbitraire qui caractérisait son application et qui se traduisait dans la cruauté de la peine.

La Cour suprême du Massachusetts était donc arrivée à franchir le pas qu'aucune autre cour des États-Unis, à l'exception de la Cour suprême de Californie[45], n'avait franchi, celui de la condamnation de la peine de mort en tant que telle.

Cependant, le rétentionnisme pouvait encore compter sur de farouches partisans dans le milieu politique. La question d'une déclaration d'inconstitutionnalité ayant comme objet le texte adopté en 1979 avait amené à déclencher, avant même que la Cour suprême ne se prononce, une procédure référendaire visant à donner un fondement constitutionnel à la peine de mort. La déclaration d'inconstitutionnalité avait confirmé les craintes du front rétentionniste et renforcé au sein de celui-ci l'idée que le référendum était désormais une nécessité. Le référendum eut effectivement lieu en novembre 1982 et vit la majorité des suffrages exprimés (54 %) approuver un amendement à la Constitution qui ajoutait à la disposition interdisant les « *cruel or unusual punishments* », la précision selon laquelle « [*n*]*o provision of the Constitution* [...] *shall be construed as prohibiting the imposition of the punishment of death* ». La décision de la Cour suprême de l'État censurant la peine de mort en tant que traitement cruel venait donc d'être invalidée par un amendement constitutionnel reconnaissant expressément la peine de mort.

Sur la base du cadre constitutionnel ainsi renouvelé, le législateur n'avait guère hésité à adopter, en décembre 1982, une nouvelle loi prévoyant la peine de mort pour le crime d'assassinat.

[43] Voy. *District Attorney for the Suffolk District vs. Watson & others*, 381 Mass. 648 (1980), 28 octobre 1980, disponible en ligne : http://masscases.com/cases/sjc/381/381mass648.html.
[44] Sur la notion de « *evolving standards of decency* », telle qu'elle a été élaborée par la jurisprudence de la Cour suprême fédérale, voy., *infra*, paragraphe 2.1.
[45] Voy., *infra*, paragraphe suivant.

Cette loi a fait l'objet, elle aussi, d'un contrôle de constitutionnalité, opéré par la *Supreme Judicial Court* en 1984[46]. Le contrôle déclenché appelait la Cour à trancher une question qui était à la fois ancienne et inédite, car la réforme constitutionnelle de 1982 privait d'effets l'arrêt de 1980, que l'on aurait eu donc du mal à définir comme un « précédent » au sens propre du terme. En effet, sur la base de la nouvelle rédaction de l'article 26 de la Constitution, il était désormais impossible de déclarer l'inconstitutionnalité de la peine de mort en tant que telle. Le texte de l'amendement laissait tout de même à la Cour une marge d'intervention : d'un côté, on constatait que l'« *art. 26* [...] *prevent*[*ed*] *th*[*e*] *court from construing any provision of the Massachusetts Constitution, including art. 26 itself, as forbidding the imposition of the punishment of death* » ; mais de l'autre, les juges remarquaient qu'ils ne voyaient « *anything in the new language of art. 26 which prevent*[*ed*] [*them*] *from invalidating a particular death penalty statute under the Massachusetts Constitution on a ground other than the imposition of the punishment of death* [*was*] *forbidden* »[47].

En d'autres termes, l'obligation d'interpréter le droit positif de manière à ne pas interdire la peine de mort ne pouvait pas impliquer l'impossibilité pour la Cour de vérifier si la réglementation de la peine de mort était constitutionnellement acceptable, même si un tel contrôle pouvait aboutir à l'interdiction de la peine de mort, telle que prévue par le législateur. D'ailleurs, si cette approche n'était pas suivie, l'adoption de l'approche alternative aurait signifié, par exemple, « *that a statute establishing the death penalty for members of one particular race only or providing for the imposition of the death penalty without trial would be valid under the Massachusetts Constitution* »[48].

Une fois que la Cour suprême avait pu ainsi (ré)affirmer sa compétence pour opérer le contrôle de la constitutionnalité de la loi prévoyant la peine de mort, elle a procédé à un examen des dispositions législatives : la conclusion a été une nouvelle déclaration d'inconstitutionnalité, fondée cette fois sur la méconnaissance de l'article 12 de la Constitution du Massachusetts, aux termes duquel « *the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury* ». En effet, la loi de 1982 faisait en sorte que « [*t*]*hose who plead*[*ed*] *guilty in cases in which death would be a possible sentence after trial thereby avoid*[*ed*] *the risk*

[46] Voy., *Commonwealth vs. Colon-Cruz*, 392 Mass. 150 (1984), 18 octobre 1984, disponible en ligne : http://masscases.com/cases/sjc/393/393mass150.html.
[47] Voy., *Commonwealth vs. Colon-Cruz*, précité, *opinion* de la majorité, rédigée par le Juge Liacos, p. 158.
[48] *Ibid.*, p. 161.

of being put to death » : la peine de mort était évitée automatiquement lorsque l'accusé se déclarait coupable, puisque le procès se déroulait alors sans jury ; « [*t*]*he inevitable consequence* [*wa*]*s that defendants* [*we*]*re discouraged from asserting their right not to plead guilty and their right to demand a trial by jury* »[49]. Autrement dit, le législateur ne pouvait pas imposer à l'accusé le choix « tragique » entre revendiquer un droit qui lui était propre (le *trial by jury*) et risquer une condamnation à mort qu'il aurait pu éviter automatiquement en renonçant à exercer son droit.

Le problème de la légitimité de la peine de mort restait en arrière-plan, car l'arrêt se concentrait sur le respect des droits individuels dans la procédure pénale. L'effet était tout de même celui d'invalider la législation concernant la peine capitale, qui devenait à nouveau, après la décision de la Cour suprême, dépourvue de toute base légale.

L'arrêt ne faisait toutefois pas obstacle à l'adoption d'une nouvelle loi rétablissant la peine. Mais, en 1984, les équilibres politiques avaient changé par rapport au passé, notamment du fait que, depuis 1983, l'abolitionniste Michael Dukakis était à nouveau devenu le Gouverneur du Massachusetts. L'adoption d'une nouvelle loi était donc difficile à envisager. La preuve en est qu'au cours des années suivantes, de nouvelles propositions ont été présentées, mais aucune d'entre elles n'est arrivée à rétablir la peine de mort au Massachusetts.

L'abolition de la peine de mort dans cet État a donc été le résultat d'un arrêt que la classe politique – ou, plus exactement, une partie de la classe politique – a subi sans avoir la force et/ou l'intention de renverser[50].

(*b*) L'abolition de la peine de mort au Rhode Island n'a pas fait l'objet d'une opposition entre le pouvoir judiciaire et le pouvoir politique comparable à celle du Massachusetts.

En 1973, en réagissant à des émeutes qui avaient eu lieu dans les établissements pénitentiaires, le législateur avait adopté une loi qui prévoyait la peine de mort pour le coupable d'un meurtre commis en état de réclusion. En 1979, la Cour suprême de l'État avait été saisie d'une affaire concernant un détenu condamné à mort sur la base de cette loi[51]. La décision de la Cour avait conduit à la déclaration d'inconstitutionnalité de la loi, pour violation du huitième amendement à la Constitution fédérale, en matière d'interdiction de traitements cruels et

[49] *Ibid.*, p. 163.
[50] À propos de l'abolition de la peine de mort au Massachusetts, voy., A. Rogers, *Murder and the Death Penalty in Massachusetts*, University of Massachusetts Press, 2008.
[51] Voy., *State v. Cline & State v. Anthony*, 397 A.2d 1309 (R.I. 1979), 19 février 1979.

inusités, découlant de l'automatisme par lequel la condamnation était infligée, sans que le juge puisse considérer les circonstances atténuantes[52].

La Cour n'avait évidemment pas pris position à l'égard de la légitimité de la peine de mort en tant que telle. Toutefois, en fait, à la suite de cet arrêt, aucun crime n'était plus susceptible de conduire à la condamnation à mort. Cinq ans après la décision, le législateur a tiré les conséquences de cette situation, en éliminant toute référence à la peine capitale dans le droit positif. Depuis, les abolitionnistes ont été confrontés à plusieurs tentatives de rétablissement, qui ont cependant toutes échouées. Les conséquences de l'arrêt de la Cour suprême de 1979 demeurent donc le fondement de l'abolition de la peine de mort.

(*c*) Ce qui s'est passé au Rhode Island s'est en large mesure répété, quelque vingt-cinq ans plus tard, dans l'État de New York, où la peine de mort avait été rétablie en 1995, après plus de vingt ans d'abolitionnisme.

En 2004, la législation sur la peine capitale a fait l'objet du contrôle de la *New York Court of Appeals*, la Cour suprême de l'État, qui l'a déclarée inconstitutionnelle en raison d'un aspect particulier de la procédure prévue, c'est-à-dire le sort d'un procès se terminant par une impasse au sein du jury, incapable de déterminer si la peine de mort ou la réclusion à perpétuité sans possibilité de libération devait être infligée au coupable[53]. Dans ce cas, le juge, qui devait préalablement instruire les jurés sur les conséquences de cette impasse, se voyait conférer par la loi étatique la possibilité de déterminer lui-même la peine, qui devait être au moins de vingt ans de réclusion et qui pouvait arriver au maximum à la réclusion à perpétuité sans possibilité de libération. La *New York Court of Appeals* a jugé que de telles prévisions étaient inconstitutionnelles en raison des conditionnements qu'elles pouvaient créer chez les jurés : l'impasse au sein du jury, en donnant au juge le pouvoir de déterminer la peine, était susceptible de produire l'effet de réduire sensiblement la condamnation (jusqu'à vingt ans de réclusion) ; cela pouvait conduire les jurés favorables à la réclusion à perpétuité, si le risque d'impasse était réel, à accepter la peine de mort, plutôt que de laisser au juge la possibilité de prononcer une

[52] De cette manière, la Cour suprême du Rhode Island s'était conformée à la jurisprudence de la Cour suprême fédérale (voy., *infra*, paragraphe 2.1.). Sur l'abolition jurisprudentielle de la peine de mort au Rhode Island, voy., P.T. Conley, R.G. Flanders Jr., *The Rhode Island State Constitution: a reference guide*, Praeger Publishers, 2007, pp. 81 et s.

[53] Voy., *People v. LaValle*, 3 N.Y.3d 88 (2004), 24 juin 2004, disponible en ligne : http://www.law.cornell.edu/nyctap/I04_0098.htm.

condamnation bien plus douce. En définitive, la loi méconnaissait la *due process clause* de l'article I, section 6, de la Constitution de l'État de New York.

Comme au Rhode Island, l'arrêt de la juridiction suprême de l'État de New York ne mettait pas en cause le principe de la peine de mort, mais se limitait à censurer la procédure qui avait été choisie par le législateur pour l'application en concret de la peine. L'opposition entre les Républicains, partisans de la peine de mort, qui contrôlaient le Sénat de l'État, et les Démocrates, hostiles à cette peine, qui contrôlaient l'Assemblée, a conduit à un blocage dont l'effet a été de conserver le *statu quo*. Et comme la déclaration d'inconstitutionnalité de 2004 empêchait l'application concrète des normes sur la peine capitale, l'État de New York a fini par devenir abolitionniste. La transformation définitive s'est produite en 2007, lorsque le dernier condamné présent dans les couloirs de la mort en raison d'une condamnation antérieure à l'arrêt de 2004, a vu sa condamnation invalidée par la *New York Court of Appeal*, qui a suivi la *ratio decidendi* élaborée en 2004 et l'a appliquée à cette nouvelle affaire[54]. L'année suivante, le Gouverneur David Paterson, démocrate, a ordonné la clôture et le démantèlement des couloirs de la mort, renforçant ainsi par une décision politique le choix que le pouvoir judiciaire avait suggéré[55].

(*d*) Plus récemment, en 2016, dans le Delaware, une abolition provoquée par la jurisprudence s'est aussi produite, lorsque la Cour suprême de l'État a déclaré l'inconstitutionnalité de la procédure aboutissant à la condamnation à mort en raison de la marge discrétionnaire excessive laissée aux juges au détriment des pouvoirs des jurés[56]. La décision a été rendue dans un contexte où le législateur étatique avait déjà entrepris une procédure visant à l'abolition de la peine capitale, procédure qui avait été suspendue justement dans l'attente de la décision de la Cour suprême.

Eu égard à la confluence entre l'opinion juridique de la Cour et l'action politique du législateur de l'État, quoique simplement « provoquée », l'abolition judiciaire de la peine de mort au Delaware aurait pu être considérée susceptible de se consolider et d'éliminer ainsi de manière stable le châtiment de l'ordre juridique. Au cours des mois suivant l'arrêt de la Cour

[54] Voy., *People v. Taylor*, 9 N.Y.3d 129 (2007), 23 octobre 2007, disponible en ligne : http://www.law.cornell.edu/nyctap/I07_0135.htm.
[55] Sur l'abolition jurisprudentielle de la peine de mort dans l'État de New York, voy., A. Marzullo, « *Last Man Out*: People v. Taylor and Its Precursors in New York Death Penalty Jurisprudence », *University of Pennsylvania Journal of Law and Social Change*, 2007-2008, vol. 11, pp. 271 et s.
[56] Voy., *Benjamin Rauf v. State of Delaware*, 145 A.3d 430 (Del. 2016), 2 août 2016, disponible en ligne : *https://courts.delaware.gov/Opinions/Download.aspx?id=244410*.

suprême, toutefois, le climat politique a changé de manière significative, jusqu'à ce que la Chambre des représentants adopte, au mois de mai 2017, un projet de loi visant au rétablissement de la peine de mort. Au Sénat, l'examen du projet de loi a été retardé et, à ce jour, n'a pas été soumis à un vote. Le sort de la peine de mort au Delaware est donc encore un sujet de débat.

II.A.2. Les abolitions décidées par les juridictions

Les arrêts rendus par les juridictions des États membres des États-Unis mentionnés au paragraphe précédent ont démontré que l'abolition peut être bien la conséquence indirecte d'un arrêt judiciaire. Dans certains cas, toutefois, l'abolition a été une conséquence directe, puisque la peine de mort a été éliminée par le juge, sans que le législateur fût mis dans les conditions de pouvoir la rétablir (une réforme de la constitution étant à cet effet indispensable).

(*a*) *L'expérience américaine*. – Parmi les expériences dont on a parlé jusqu'à présent, le seul cas d'abolition délibérée enregistré est celui de l'arrêt de la *Supreme Judicial Court* du Massachusetts de 1980. Cet arrêt toutefois n'a pas été le premier, car en 1972, la Cour suprême de Californie avait déjà déclaré inconstitutionnelle la peine de mort, du fait de sa cruauté, de son incompatibilité avec la dignité humaine et de la possibilité d'atteindre les objectifs de sûreté par d'autres moyens[57].

Les efforts de la Cour suprême de Californie ont été très vite frustrés. Quelques mois après l'arrêt, un amendement à la Constitution californienne a été adopté dans le but d'exclure expressément la possibilité de qualifier la peine de mort de « traitement cruel ou inusité » et de confirmer, par conséquent, la validité de toutes les lois concernant la peine de mort qui étaient en vigueur lorsque la Cour avait rendu son arrêt déclarant la peine inconstitutionnelle[58]. Devant une réaction aussi forte, la Cour suprême estimera ensuite ne pas pouvoir s'opposer à la volonté populaire[59].

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[57] Voy., *People v. Anderson*, (1972) 6 C3d 628, 18 février 1972, disponible en ligne : http://online.ceb.com/calcases/C3/6C3d628.htm.

[58] L'article I, section 27, de la Constitution californienne, issu de l'adoption par référendum de la *Proposition 17*, est ainsi rédigé : « *All statutes of this State in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution* ».

[59] Voy., *People v. Frierson*, (1979) 25 C3d 142, p. 189, 31 août 1979, disponible en ligne : http://online.ceb.com/calcases/C3/25C3d142.htm.

Malgré un impact limité en pratique, l'arrêt californien reste une pierre angulaire dans l'histoire de l'abolition jurisprudentielle, avec l'arrêt rendu, huit ans plus tard, au Massachusetts.

Ces deux arrêts partagent plusieurs éléments qui contribuent à les rendre singuliers, en les distinguant aussi des autres arrêts qui arriveront à des résultats équivalents concernant l'inconstitutionnalité de la peine de mort.

D'abord, ce sont les deux premiers cas dans lesquels une cour suprême a déclaré l'inconstitutionnalité de la peine de mort en tant que telle : pour d'autres décisions arrivant à de pareilles conclusions, il faudra attendre les années quatre-vingt-dix. Ce passage n'est pas sans influence, puisque toutes les cours qui ont déclaré l'inconstitutionnalité de la peine capitale plus récemment ont pu trouver un soutien fort à leurs positions en faisant référence aux actes de droit international, ce qui, évidemment, n'était possible ni en Californie ni au Massachusetts[60]. Cela a contribué à différencier les normes constitutionnelles de référence, qui, pour les cours américaines, étaient limitées essentiellement à l'interdiction des traitements cruels et/ou inusités, alors que les autres cours ont pu compter sur un paramètre constitutionnel bien plus riche.

Un autre élément que la Californie et le Massachusetts partagent est l'échec : l'un comme l'autre des arrêts abolitionnistes ont été contournés par une réforme de la constitution étatique mise en place dans le but spécifique de réagir à l'abolition judiciaire de la peine de mort. Les cours abolitionnistes des années quatre-vingt-dix ne seront pas confrontées à de telles résistances, puisque le pouvoir politique se soumettra, ou n'aura pas la force de s'opposer.

(*b*) *Les autres expériences*. – Parmi les raisons qui peuvent expliquer l'acceptation de la part du pouvoir politique des abolitions délibérées par voie judiciaire on ne saurait exclure l'influence de la situation politique et institutionnelle : dans les six cas que l'on va mentionner, la juridiction constitutionnelle a déclaré l'inconstitutionnalité de la peine de mort en tant que telle au cours d'une période de transition, plus ou moins avancée, vers un système de démocratie libérale. Ce type d'abolition a caractérisé un bon nombre de pays de l'Europe orientale, notamment la Hongrie (1990), la Bosnie-Herzégovine (1997), la Lituanie (1998), l'Albanie

[60] Même s'il n'est pas à négliger que l'arrêt de la Cour suprême de Californie, tout en n'ayant pas les moyens de recourir au droit international, a tout de même fait emploi de l'argument comparatiste : en effet, dans l'arrêt figure un cadre assez détaillé de la situation de la peine de mort aux États-Unis et dans les autres pays, aboutissant à la constatation que la peine capitale était, « *literally, an unusual punishment among civilized nations* » (arrêt *People v. Anderson*, *opinion* du *Chief Justice* Wright, p. 656).

(1999) et l'Ukraine (1999). La liste des abolitions jurisprudentielles est complétée par l'Afrique du Sud (1995), dont l'histoire récente peut effectivement suggérer un rapprochement, du point de vue de la politique abolitionniste, avec les expériences européennes précitées.

Les abus commis dans le passé ont vraisemblablement eu l'effet d'accroître le consensus autour de décisions qui bridaient les pouvoirs publics, en évitant par cela que des dérives débouchant sur la privation arbitraire de la vie ne puissent se produire à nouveau dans l'avenir. Autant dire que l'abolition judiciaire de la peine de mort a contribué à fonder un nouvel ordre dans le système de protection des droits individuels, d'où la possibilité de la définir comme une « abolition-révolution », même si la décision n'est souvent intervenue qu'avec quelques années de retard par rapport au changement de régime. On peut même s'interroger sur la nécessité d'une correspondance entre l'abolition judiciaire et l'« abolition-révolution » pour garantir une stabilité aux effets des arrêts abolitionnistes : bien que les « abolitions-réformes » des cours suprêmes de Californie et du Massachusetts paraissent donner un soutien à la thèse affirmative, on ne saurait aller au-delà de la simple constatation que l'« abolition-révolution » augmente les probabilités que l'arrêt soit bien reçu par l'opinion publique et la classe politique. Ces probabilités, en effet, se réduisent – semble-t-il – dans le cas d'une « abolition-réforme » judiciaire : intervenant dans une démocratie « stable », l'arrêt abolitionniste risque d'être interprété – les cas américains en sont la preuve – comme un empiètement des juges dans le domaine politique.

Il s'agit, bien entendu, de remarques dérivant de l'observation du passé, qui pourraient très bien être démenties, dans l'avenir, par des « abolitions-réformes » par voie judiciaire ayant un succès durable.

L'alternative entre abolition-révolution et abolition-réforme, d'ailleurs, ne paraît pas aussi décisive que ce qu'on pourrait penser, puisque d'autres aspects sont également à prendre en considération si l'on veut chercher à expliquer l'impact différent qu'ont eu les arrêts européens et sud-africains par rapport aux arrêts américains précités.

On ne saurait sous-estimer, en particulier, les arguments fondant l'inconstitutionnalité de la peine capitale : les cinq cours européennes ont toutes fait référence à l'existence d'une incompatibilité entre les dispositions nationales prévoyant la peine capitale et les engagements internationaux du pays, ce qui a fait de la décision d'abolition une décision en quelque sorte conditionnée, voire obligée.

À ce propos, le cas de l'abolition partielle de la peine capitale en Bosnie-Herzégovine est emblématique, même si force est de constater que les particularités de l'arrêt de 1997 de la Chambre des droits de l'homme pour la Bosnie-Herzégovine[61] dérivent, en large mesure, de la particularité de la situation de transition dans laquelle l'arrêt a été rendu ainsi que des dispositions constitutionnelles très ouvertes vers le droit international qui caractérisent le système.

L'inconstitutionnalité de la peine de mort pour les crimes commis en temps de paix a été fondée, effectivement, sur la méconnaissance de l'article I de l'Annexe 6 des Accords de Dayton du 14 décembre 1995, qui ont mis fin aux combats interethniques. L'article cité est ainsi rédigé : « [*t*]*he Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex* ».

Les engagements internationaux, décisifs dans le cas de la Bosnie-Herzégovine, ont également joué un rôle central dans l'arrêt de 1999 de la Cour constitutionnelle albanaise[62]. Avant d'aborder la question du point de vue des dispositions constitutionnelles internes, la Cour a en effet souligné que « la République d'Albanie [avait] signé et ratifié la Convention européenne des droits de l'homme, les protocoles additionnels 1, 2, 4, 7 et 11 à cette Convention, et s'[était] acquittée de nombre d'obligations imposées par l'Assemblée parlementaire et le Comité des ministres du Conseil de l'Europe ».

Tout en regrettant le retard dans la ratification du protocole, la Cour constitutionnelle a pu constater que la Constitution a été élaborée sur la base des mêmes principes qui inspirent et ont inspiré le Conseil de l'Europe, d'où la conséquence que « les citoyens albanais, faisant partie de l'espace européen où l'abolition de la peine de mort est devenue une nécessité », ne pouvaient pas être mis « dans une situation défavorable [par rapport] à celle des autres citoyens européens » quant à « la jouissance de leurs droits et libertés fondamentaux ».

[61] Human Rights Chamber for Bosnia and Herzegovina, *Damjanović v. Federation of Bosnia and Herzegovina* (affaire n° CH/96/30, 5 septembre 1997), disponible en ligne : http://www.hrc.ba/database/decisions/CH96-30%20Damjanovic%20Merits%20E.pdf.

[62] Cour constitutionnelle de la République d'Albanie, 10 décembre 1999, n° 65, dont le texte intégral, traduit en français, est disponible en ligne : http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm.

Une telle déclaration n'est pas restée purement théorique : la déclaration d'inconstitutionnalité de la peine de mort frappera, en effet, les dispositions du droit pénal albanais mais uniquement en tant qu'il prévoyait la peine de mort en temps de paix ; et cela du fait que « [l]a Constitution, en étant l'acte fondamental de l'État, est élaborée en pleine conformité avec les principes du Statut du Conseil de l'Europe, avec la CEDH et les autres traités internationaux prohibant l'application de la peine de mort en temps de paix »[63].

Dans les arrêts des autres cours constitutionnelles européennes, le droit supranational (international et, surtout, du Conseil de l'Europe) a eu, également, une influence remarquable, tout en n'arrivant pas à fonder, à lui seul, la déclaration d'inconstitutionnalité. En Lituanie et en Ukraine, les cours ont fait référence à plusieurs reprises aux sources supranationales pour interpréter les dispositions constitutionnelles, tandis qu'en Hongrie la mention du Pacte de New York de 1966, et notamment de son article 6, alinéa 6, a permis de reconnaître une indiscutable évolution vers l'abolition de la peine de mort, évidemment renforcée par les deux autres textes cités, c'est-à-dire l'article 2 alinéa 1er de la Convention européenne des droits de l'homme et le Protocole n° 6[64].

L'idée d'une avancée de l'abolitionnisme a été relancée et développée dans l'arrêt de la Cour constitutionnelle lithuanienne, qui se caractérise pour avoir fait précéder les argumentations concernant la conformité des dispositions législatives à la Constitution d'une longue introduction portant sur les aspects théoriques généraux concernant la peine de mort et sur l'évolution à cet égard du droit international général et régional[65].

Les références au droit international, ainsi qu'au droit comparé, n'ont évidemment pas eu les mêmes effets légitimant pour la Cour constitutionnelle sud-africaine, bien que l'analyse très ponctuelle de la jurisprudence américaine, de l'arrêt de la Cour constitutionnelle hongroise, ainsi que de la jurisprudence de la Cour européenne des droits de l'homme aient représenté un soutien très important, voire parfois nécessaire aux argumentations qui ont conduit à déclarer l'inconstitutionnalité des normes portant sur la peine de mort. Cela dit, il faut tout de même

[63] La limitation de la règle abolitionniste dérive du fait que la Cour ait rendu son arrêt avant que le Protocole n° 13 soit même rédigé.

[64] « [*A*] *development towards the abolition of capital punishment* » : Cour constitutionnelle de Hongrie, 31 octobre 1990, n° 23/1990, dont le texte intégral, traduit en anglais, est disponible dans G. Brunner, L. Sólyom, *Constitutional judiciary in a new democracy: the Hungarian Constitution Court*, University of Michigan Press, 2000, pp. 118 et s. (le passage cité est à la page 123). Il est à remarquer que dans une opinion concurrente (celle des Juges Lábady et Tersztyánszky) le droit supranational est l'argument qui fonde l'inconstitutionnalité de la peine de mort (voy., pp. 124 et s.).

[65] Voy., Cour constitutionnelle de la République de Lituanie, 9 décembre 1998, n° 2/98 (dont le texte intégral, traduit en anglais, est disponible en ligne dans l'infobase Codices), §. 3.2.

constater que les problèmes concernant la légitimité de la Cour sud-africaine pour trancher une question aussi délicate que la peine de mort avaient été exclus *a priori* lors de l'élaboration de la *Interim Constitution*, en 1991 : en effet, la *South African Law Commission* avait expressément déféré la question, très discutée dans le milieu politique (malgré le moratoire en vigueur depuis 1989), à la Cour constitutionnelle qui allait être mise en place :

> *« the Law Commission decided [...] to adopt a "Solomonic solution" under which a constitutional court would be required to decide whether a right to life expressed in unqualified terms could be circumscribed by a limitations clause contained in a bill of rights »*[66].

En Afrique du Sud, on est donc arrivé à renverser les coordonnées généralement adoptées lors du processus aboutissant à l'abolition de la peine de mort : au lieu de réserver au pouvoir politique une décision sur une question « *highly controversial* », on a confié à un arbitre-garant des droits le soin, voire le devoir, de la trancher, pour éviter que la *rule of constitutional law* – qui venait à peine d'être restaurée – ne s'effaçât au profit du retour à un système de *parliamentary sovereignty*[67].

II.B. Les abolitions inachevées

Dans les régimes rétentionnistes, à défaut d'une « abolition politique », l'alternative de l'« abolition judiciaire » est assez souvent expérimentée. L'objectif n'est atteint qu'en des occasions rarissimes, du fait que les juridictions ont la tendance à ne pas empiéter sur un domaine aussi politiquement sensible que le châtiment des criminels les plus dangereux : le principe de la peine de mort est, par conséquent, très souvent accepté par les juridictions. Il n'en demeure pas moins que la saisine des juges constitutionnels ou des cours suprêmes est loin d'être dépourvue de toute efficacité pour le justiciable et pour la société, puisque le refus d'abolir la peine de mort s'accompagne parfois de l'adoption de conditions d'application impératives et d'obstacles à son imposition, afin de rendre sa réglementation et sa mise en œuvre conformes aux principes inspirateurs du système.

[66] Voy., Cour constitutionnelle, *State v Makwanyane and Another* (CCT 3/94), [1995] ZACC 3 (6 juin 1995), §. 21. L'arrêt a été cité *supra*, Chapitre II, paragraphe 1.3., et Chapitre III, paragraphe 2.2.2. Sur cet arrêt, voy., T. Metz, « Human dignity, capital punishment, and an African moral theory: Toward a new philosophy of human rights », *Journal of Human Rights*, 2010, vol. 9, pp. 81 et s. ; selon cet auteur, la Cour constitutionnelle sud-africaine a pu se référer implicitement à la valeur de la dignité humaine telle qu'elle est reconnue par la tradition culturelle de l'Afrique subsaharienne.
[67] *Ibid.*, §§. 17 et s.

II.B.1. L'acceptation du principe de la peine de mort

Dans les systèmes rétentionnistes, il n'est pas rare que les justiciables s'adressent aux juges pour contester la constitutionnalité de la peine de mort. On a analysé, plus haut, les cas où de telles instances ont conduit à l'abolition de la peine de mort. Toutefois, les cas où ce résultat n'a pas été atteint sont bien plus fréquents. Il serait impossible d'en dresser une liste, compte tenu du nombre d'arrêts par pays et, surtout, de la difficulté d'identifier les instances dans lesquelles l'inconstitutionnalité de la peine capitale a fait l'objet d'une des nombreuses questions que l'on a posées. On ne saurait cependant omettre de mentionner quelques-uns des exemples les plus importants.

(*a*) Le premier de ces exemples ne peut être que celui des États-Unis, où la peine de mort a été longtemps pratiquée sans que soit soulevé aucun doute sur sa compatibilité avec la Constitution fédérale[68].

S'il est vrai que la Déclaration d'indépendance du 4 juillet 1776 aurait pu soulever quelque doute à cet égard, du fait d'avoir consacré la vie (à l'instar de la liberté et de la recherche du bonheur) comme un des droits inaliénables dont les hommes ont été « doués par le Créateur », la Constitution fédérale, et notamment le *Bill of Rights* intégré dans la Constitution en 1791, a offert à la cause de la peine de mort des arguments très forts. Le cinquième amendement, en effet, prévoit que « *no person shall* […] *be deprived of life, liberty, or property, without due process of law* » ; d'où la reconnaissance, implicite mais trop claire

[68] Une bibliographie sur la peine de mort aux États-Unis, tout en n'étant pas exhaustive, occuperait plusieurs pages de cet article. On se contentera donc de citer quelques-unes des contributions, choisies parmi les plus significatives et parmi les plus récentes, tout en admettant d'ores et déjà le caractère forcément arbitraire de la sélection : M.V. Tushnet, *The Death Penalty*, Facts on File, 1994 ; H.A. Bedau (dir.), *The Death Penalty in America: Current Controversies*, Oxford University Press, 4e éd., 1998 ; R. Goldman, *Capital Punishment*, CQ Press, 2002 ; H.A. Bedau, *Killing as Punishment: Reflections on the Death Penalty in America*, Northeastern University Press, 2004 ; P.N. Stearns, *Revolutions in Sorrow: The American Experience of Death in Global Perspective*, Paradigm Publishers, 2007 ; F.R. Baumgartner, A.E. Boydstun, S.L. DeBoef, *The Decline of the Death Penalty and the Discovery of Innocence*, Cambridge University Press, 2008 ; L.E. Carter, S.W. Howe, E.S. Kreitzberg, *Understanding Capital Punishment Law*, LexisNexis Matthew Bender, 2e éd., 2008 ; J.L. Culbert, *Dead Certain: The Death Penalty and the Problem of Judgment*, Stanford University Press, 2008 ; D. Garland, *Peculiar Institution. America's Death Penalty in an Age of Abolition*, Oxford University Press, 2010 ; W.W. Berry, « Criminal Law : Repudiating Death », *Journal of Criminal Law & Criminology*, 2011, vol. 101, pp. 441 et s. ; D. Garland – R. McGowen – M. Meranze (dir.), *America's Death Penalty. Between past and Present*, New York, New York University Press, 2011 ; J.D. Bessler, *Cruel & Unusual. The American Death Penalty and the Founders' Eighth Amendment*, Northeastern University Press, 2012 ; L.S. Entzeroth, « The End of the Beginning: The Politics of Death and the American Death Penalty Regime in the Twenty-First Century », *Oregon Law Review*, 2012, vol. 90, pp. 797 et s. ; L.J. Palmer, Jr., *The Death Penalty in the United States. A Complete Guide to Federal and State Laws*, McFarland, 2e éd., 2014 ; A. Sarat (dir.), *Final Judgments: The Death Penalty in American Law and Culture*, Cambridge University Press, 2017. En français, voy., notamment, A. Garapon, I. Papadopoulos, *Juger en Amérique et en France*, Odile Jacob, 2003, pp. 277 et s. ; A. Kaspi, *La peine de mort aux États-Unis*, Plon, 2003 ; N. Norberg, « La peine de mort aux États-Unis : évolutions jurisprudentielles et sociales », *Revue de science criminelle et de droit pénal comparé*, 2008, pp. 575 et s.

pour être contestée, de la possibilité pour les pouvoirs publics de *priver de la vie*, pourvu que cela soit fait dans le respect d'une procédure légale régulière[69]. Ce principe étant posé, on n'en saurait trouver un démenti dans le huitième amendement, qui interdit d'infliger « *cruel and unusual punishments* », d'autant que cette même formule, introduite en Angleterre par le *Bill of Rights* de 1689, n'empêchait pas, depuis plus d'un siècle, l'application de la peine capitale.

Les débats qui ont accompagné l'adoption des dix premiers amendements à la Constitution sont, à ce propos, assez éloquents. Nous ne faisons pas référence aux débats qui ont eu lieu au sein du Congrès fédéral, où l'expression « châtiments cruels et inusités » a été surtout critiquée pour son ambigüité[70], mais plutôt à ceux qui se sont déroulés lors de la ratification du *Bill of Right* par les États membres. D'où l'on a pu conclure que l'expression était surtout conçue comme un obstacle insurmontable à la torture et à l'infliction de châtiments qui auraient abouti à des souffrances inutiles pour les condamnés[71].

La jurisprudence de la Cour suprême fédérale fit longtemps référence à ces débats, puisqu'elle a interprété huitième amendement comme interdisant les châtiments qui étaient conçus comme « cruels et inusités » lors de l'adoption du *Bill of Rights*[72]. Cette jurisprudence fut confirmée jusqu'en 1910, lorsque la Cour suprême adopta une approche évolutive[73], qui la conduisit, par la suite, à établir un lien entre l'interprétation à donner du huitième amendement et les « *evolving standards of decency* » : il s'agissait d'assurer le respect du principe inspirateur de l'amendement même, à savoir « *the dignity of man* »[74].

La compatibilité de la peine de mort avec le huitième amendement, qui, auparavant, n'était pas contestable, devenait désormais une question à trancher[75]. Au cours des années

[69] Voy., par exemple, L.S. Entzeroth, *op. cit.*, p. 801.
[70] Voy., l'arrêt de la Cour suprême fédérale *Furman v. Georgia*, 408 U.S. 238 (1972), disponible en ligne : http://www.law.cornell.edu/supct/html/historics/USSC_CR_0408_0238_ZO.html, p. 262.
[71] Voy., M.D. Dean, *op. cit.*, pp. 383 et s. Sur l'introduction du Huitième Amendement, voy., C. Rumann, *op. cit.*, pp. 661 et s.
[72] Voy., J.D. Bukowski, *op. cit.*, pp. 419 et s.
[73] Voy., l'arrêt *Weems v. United States*, 217 U.S. 349 (1910), disponible en ligne : http://www.law.cornell.edu/supremecourt/text/217/349.
[74] « *The basic concept underlying the Eighth Amendment is nothing less than the dignity of man* » ; « [*w*]*hile the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards* » ; « *the words of the Amendment are not precise, and that their scope is not static* », « [*t*]*he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society* » : Cour suprême des États-Unis, *Trop v. Dulles*, 356 U.S. 86 (1957), disponible en ligne : http://www.law.cornell.edu/supct/html/historics/USSC_CR_0356_0086_ZO.html, pp. 100 et s.
[75] Et ceci bien que dans l'arrêt *Trop v. Dulles* la Cour ait expressément exclu la cruauté de la peine de mort : « *Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment – and they are forceful – the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty* » (arrêt précité, p. 99).

soixante et au début de la décennie suivante, la jurisprudence de la Cour suprême démontra toutefois une attitude très peu favorable à la cause abolitionniste[76], qui avait pourtant gagné du terrain dans l'opinion publique[77], parallèlement à une diminution considérable des exécutions, dont le nombre était tombé, de quarante-sept par an en 1962, à sept en 1965, pour arriver à une seule exécution en 1966 et à deux en 1967. Depuis lors, aucune exécution n'avait plus eu lieu lorsque la Cour suprême, en 1972, rendit son célèbre arrêt *Furman v. Georgia*.

Par cette décision, la Cour déclara l'inconstitutionnalité de la peine de mort infligée de manière arbitraire : c'était la première fois que la Cour affirmait que la peine capitale méconnaissait le huitième amendement (ainsi que le quatorzième). Cependant, la structure de l'arrêt était loin d'être tranchante, car si la majorité de cinq juges s'était formée sur le dispositif, leurs opinions divergeaient de manière significative quant aux motifs qui conduisaient à l'inconstitutionnalité.

La base de la déclaration était à rechercher, pour deux juges (Brennan et Marshall), dans l'incompatibilité de la peine de mort en tant que telle avec le huitième amendement ; les trois autres, par contre, étaient arrivés à la même déclaration eu égard à la réglementation concrète de la peine de mort et à son application, qui s'avérait arbitraire : un juge (Douglas) avait mis en exergue l'application discriminatoire des normes régissant la peine ; un autre (Stewart) avait plutôt censuré l'imprévisibilité d'une peine qui était infligée au hasard à un justiciable plutôt qu'à un autre ; le troisième (White) avait dénoncé l'application concrète de la peine de mort qui avait perdu son efficacité, du fait qu'elle n'était que rarement demandée et infligée.

On aurait pu penser qu'à la suite de l'arrêt *Furman* la peine de mort aurait vite disparu de l'ordre juridique des États-Unis : cinq ans après la dernière exécution, la Cour suprême avait rendu inconstitutionnelles toutes les réglementations de la peine de mort, fédérales et des États membres. Les conditions paraissaient donc très favorables pour que l'abolition « provoquée » par le pouvoir judiciaire soit en quelque sorte complétée par l'inactivité des législateurs, qui aurait eu l'effet de ne pas introduire une nouvelle réglementation de la peine de mort qui

[76] Voy., notamment, l'arrêt *McGautha v. California*, 402 U.S. 183 (1971), disponible en ligne : http://www.law.cornell.edu/supremecourt/text/402/183, qui fera l'objet d'un revirement jurisprudentiel lors de l'arrêt *Furman v. Georgia*, de l'année suivante.

[77] Pour la seule fois jusqu'à présent, en 1967, le sondage mené chaque année sur les opinions en matière de peine de mort avait donné comme résultat une majorité défavorable (47 % contre 42). Voy., l'analyse des sondages effectués au cours des décennies qui est disponible en ligne : http://www.gallup.com/poll/1606/death-penalty.aspx. À propos de l'attitude de l'opinion publique des États-Unis vis-à-vis de la peine capitale, voy. K.J. Cook, *Divided Passions: Public Opinions on Abortion and the Death Penalty*, Northeastern University Press, 1997 ; A. Normandeau, « L'opinion publique et la peine de mort aux États-Unis », *Revue de science criminelle et de droit pénal comparé*, 2004, pp. 983 et s.

substitue celle qui était devenue inapplicable à la suite de la déclaration d'inconstitutionnalité. En fait, l'arrêt eut des effets exactement contraires : l'opinion publique se tourna de manière indiscutable vers l'option rétentionniste et les législateurs furent moins influencés par les deux juges contraires au principe de la peine de mort que par les trois qui avaient censuré sa réglementation ou son application concrète. De ce fait, la plupart des États (trente-cinq au total) et la Fédération adoptèrent de nouvelles lois concernant la peine capitale, de manière à éviter que son application ne puisse plus encourir la censure fondée sur l'arbitraire qui avait été la base de l'inconstitutionnalité de l'arrêt *Furman*[78]. C'est à ce moment-là que cet arrêt, qui avait été perçu comme une victoire de l'abolitionnisme, se transforma en occasion perdue[79]. Une occasion qui ne se présentera plus par la suite, même si les nouvelles lois firent l'objet, dès 1976, d'autres arrêts de la Cour suprême.

Mais, en 1976, la société et le contexte politique n'étaient plus les mêmes qu'en 1972, ce qui aurait rendu plus difficile pour la Cour d'arriver à une « abolition délibérée ». Et en effet, lorsque la Cour eut à se prononcer sur la constitutionnalité de la peine de mort en tant que telle, la réponse y fut favorable.

Dans l'arrêt *Gregg v. Georgia*[80], la Cour avait été saisie de la question de savoir si la peine de mort pour le crime de meurtre était en soi incompatible avec le huitième amendement. Dans le but d'exclure une telle incompatibilité, la Cour souligna d'abord que « [*t*]*he imposition of the death penalty for the crime of murder has a long history of acceptance both in the United States and in England* » et que « *the penalty continued to be used into the 20th century by most American States* »[81]. Ensuite, elle fit référence aux dispositions de la Constitution fédérale, dont l'analyse conduisait à reconnaître « *that the existence of capital punishment was accepted by the Framers* »[82]. Les mêmes conclusions étaient suggérées par la jurisprudence de la Cour suprême, jusqu'à l'arrêt *Furman*, dont l'élément nouveau n'était représenté que par l'opinion

[78] Sur l'impact de l'arrêt *Furman*, voy., R.M. Hills Jr., « Counting States », *Harvard Journal of Law & Public Policy*, 2009, vol. 32, pp. 17 et s. ; A. Frost, « Defending the Majoritarian Court », *Michigan State Law Review*, 2010, pp. 757 et s.
[79] Voy., la *concurring opinion* du Juge O'Connor dans l'arrêt *Thompson v. Oklahoma*, 487 U.S. 815 (1988), disponible en ligne : http://www.law.cornell.edu/supct/html/historics/USSC_CR_0487_0815_ZS.html. « *We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute, and even more difficult to reject* » (p. 855).
[80] *Gregg v. Georgia*, 428 U.S. 153 (1976), disponible en ligne : http://www.law.cornell.edu/supct/html/historics/USSC_CR_0428_0153_ZS.html. L'arrêt est le principal d'une série de cinq, les *July 2 Cases*, tous concernant la peine de mort et tous rendus le 2 juillet 1976.
[81] *Ibid.*, pp. 176 et s.
[82] *Ibid.*, p. 177.

de deux juges seulement[83]. Mais précisément, la réception de l'arrêt *Furman* par le Congrès et par les législateurs des États membres rendait évident que « *a large proportion of American society* » percevait encore la peine de mort « *as an appropriate and necessary criminal sanction* »[84] :

> « [the] recently adopted statutes have attempted to address the concerns expressed by the Court in Furman primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory for specified crimes » ; « [b]ut all of the post-Furman statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people »[85].

Certes, l'acceptation de la peine de mort par la société ne pouvait pas suffire en elle-même, car « the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering »[86] ; dans ce but, cependant, la Cour ne manquait pas de mettre en exergue que « [t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders »[87].

En définitive, « [c]onsiderations of federalism[88], as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require[d the Court] to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder [was] not without justification, and thus [was] not unconstitutionally severe »[89].

Sur la base des arguments évoqués, la conclusion n'aurait pas pu être différente.

En fait, cet arrêt a marqué un tournant jurisprudentiel : si, auparavant, le principe de la peine de mort pouvait être contesté, par la suite il n'a presque plus été remis en question[90]. La jurisprudence de la Cour suprême a sans doute évolué depuis, mais c'est dans la perspective de ne censurer, tout au plus, que certains aspects de la réglementation de la peine de mort ou de

[83] *Ibid.*, pp. 178 et s.
[84] *Ibid.*, p. 179.
[85] *Ibid.*, pp. 180 et s.
[86] *Ibid.*, p. 183.
[87] *Ibid.*
[88] La Cour suprême avait été saisie d'une affaire relevant du droit pénal de la Géorgie.
[89] *Ibid.*, pp. 186 et s.
[90] Le cas le plus récent de contestation est peut-être celui du recours qui a donné lieu à l'arrêt *Glossip v. Gross*, 576 U.S. (2015), *docket* n° 14-7955, 29 juin 2015, disponible en ligne : *http://www.supremecourt.gov/opinions/14pdf/14-7955_aplc.pdf*. Le Juge Breyer, dans son opinion dissidente, a souligné de manière très forte son idée que la peine capitale porte atteinte au Huitième Amendement.

son application. Les résultats n'ont pas été négligeables dans la pratique, il n'en reste pas moins que l'abolition jurisprudentielle n'a plus été vraiment envisageable.

(*b*) La jurisprudence fédérale des États-Unis n'est évidemment pas la seule qui a été confrontée au problème de la constitutionnalité de la peine de mort. Parmi les nombreuses expériences que l'on pourrait citer, une place à part est à réserver à l'Inde, où la constitutionnalité de la peine de mort a été contestée à partir des années soixante-dix. Dans une affaire datant de 1972[91], la Cour suprême exclut la prétendue méconnaissance des droits reconnus par la Constitution, et notamment du droit à la vie, dont la protection n'est pas absolue, car l'article 21 de la Charte en admet la privation « *according to procedure established by law* ». Cette approche fut confirmée huit ans plus tard par la Cour suprême[92], dans un arrêt qui pourtant imposa de vérifier au cas par cas l'existence d'alternatives à la condamnation à mort. La Cour suprême a ainsi ouvert la voie à une jurisprudence de plus en plus restrictive vis-à-vis de la peine capitale, sans toutefois conduire, jusqu'à présent, à une déclaration d'inconstitutionnalité de la peine en tant que telle[93]. Et, du reste, l'approche adoptée ne fait pas entrevoir un revirement sur ce point : la Cour suprême a récemment pris soin de préciser les limites propres au pouvoir judiciaire dans ce domaine en affirmant que « [*i*]*t is only the legislature which can abolish the death penalty and not the courts* » ; « [*a*]*s long as the death penalty exists in the statute book it has to be imposed in some cases, otherwise it will tantamount to repeal of the death penalty by the judiciary* » ; « [*i*]*t is not for the judiciary to repeal or amend the law, as that is in the domain of the legislature* »[94].

(*c*) Le cas du Japon est aussi à mentionner, car, en l'absence de toute référence dans la Constitution[95], la peine de mort a été contestée dès la fin des années quarante, comme étant un traitement cruel, méconnaissant en cela l'article 36 de la Charte, aux termes duquel

[91] Supreme Court of India, *Jagmohan Singh vs State of U.P.* (3 octobre 1972), 1973 AIR 947, disponible en ligne : http://indiankanoon.org/doc/1837051/.
[92] Supreme Court of India, *Bachan Singh vs State of Punjab* (9 mai 1980), AIR 1980 SC 898, disponible en ligne : http://www.indiankanoon.org/doc/307021/.
[93] Sur cette jurisprudence, voy., P.R. Advani, A. Saha, « The Death Penalty: A New Perspective in Light of Santosh Bariyar Case », *NUJS Law Review*, 2009, vol. 2, pp. 669 et s.
[94] Voy., Supreme Court of India, *Ajitsingh Harnamsingh Gujral vs State of Maharashtra*, 13 septembre 2011, disponible en ligne : http://indiankanoon.org/doc/1844894/.
[95] L'article 13 de la Constitution, qui reconnaît le droit à la vie, paraît toutefois donner des arguments non négligeables en faveur de la constitutionnalité de la peine de mort : si « [t]ous les citoyens devront être respectés comme individus », « [l]eur droit à la vie, à la liberté, à la poursuite du bonheur […] demeure le souci suprême du législateur et des autres responsables du gouvernement », mais ceci seulement « dans la mesure où il ne fait pas obstacle au bien-être public ».

« [l]'imposition de tortures ou de châtiments cruels par un fonctionnaire est absolument interdite ».

Saisie de la question, la Cour suprême a exclu que la peine capitale pût être qualifiée de « traitement cruel », la portée de l'interdiction constitutionnelle étant seulement de limiter les méthodes d'exécution[96]. L'approche de la Cour n'a pas manqué de soulever des critiques[97]. Cependant, au cours des décennies, la jurisprudence est restée fidèle au précédent de 1948[98], jusqu'à en faire une pierre angulaire du rétentionnisme japonais[99].

(*d*) En Corée du Sud le rétentionnisme a également trouvé un soutien judiciaire, notamment à l'occasion de l'arrêt de février 2010, par lequel la Cour constitutionnelle, à une majorité de cinq juges contre trois dissidents et un partiellement dissident, a précisé que le droit à la vie, tout en étant un droit fondamental, peut subir des limitations, pourvu que celles-ci soient prévues par la loi et s'avèrent nécessaires « pour la sécurité nationale, le maintien de la loi et de l'ordre public ou pour le bien-être de tous » (article 37, alinéa 2, de la Constitution). Sur la base de cette prévision, la peine de mort n'a pas été jugée incompatible avec la Constitution, une fois constaté que son application était justifiée par les objectifs de prévention qu'elle poursuit et par l'impossibilité de les poursuivre autrement de manière aussi efficace[100].

II.B.2. Les limites à la peine de mort

Le principe de la peine de mort n'étant pas en question ou étant rendu juridiquement indiscutable, les juridictions ont souvent pris soin de préciser dans quelles conditions sont admissibles la prévision de la peine ainsi que son application. Les limites que l'on a imposées

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[96] Voy., Cour suprême du Japon, en banc, 12 mars 1948, cité par P. Schmidt, *Capital punishment in Japan*, Brill, 2001, p. 91. L'arrêt a été adopté à la majorité des juges ; une minorité n'est pas arrivée à contester la constitutionnalité de la peine de mort, mais a donné de la notion de « cruauté » une interprétation différente, en la rattachant au sentiment public, qui ne percevait pas cette peine comme cruelle, mais qui, dans l'avenir, aurait bien pu changer d'avis, ce qui aurait pu entraîner une déclaration d'inconstitutionnalité.

[97] Voy., P. Schmidt, *op. cit.*, pp. 92 et s.

[98] Voy., par exemple, l'arrêt rendu par la Cour suprême le 21 septembre 1993.

[99] Sur la peine de mort au Japon, voy., P. Schmidt, *op. cit.* ; M. Puéchavy, « La peine de mort au Japon et aux États-Unis. Derniers développements », *Revue trimestrielle des droits de l'homme*, 2009, n° 79, pp. 709 et s. ; K. Takayama, M.V. Yamamoto, « The death penalty in Japan », *Towards universal abolition of death penalty*, *op. cit.*, pp. 291 et s. Pour ce qui concerne la pratique, voy. notamment, International Federation for Human Rights, *The Death Penalty in Japan: A Practice Unworthy of a Democracy*, *Report of the International mission of investigation*, n° 359/2, mai 2003, disponible en ligne : http://www2.ohchr.org/english/bodies/cat/docs/ngos/IFDH.pdf ; D.T. Johnson, « Japan's Secretive Death Penalty Policy : Contours, Origins, Justifications, and Meanings », *Asian-Pacific Law & Policy Journal*, 2006, vol. 7, n. 2, pp. 62 et s. ; J.M. Ramseyer, « Who Hangs Whom for What? The Death Penalty In Japan », *Journal of Legal Analysis*, 22 août 2012, disponible en ligne : http://jla.oxfordjournals.org/content/early/2012/08/21/jla.las013.full.pdf+html.

[100] Voy., Cour constitutionnelle de Corée, 25 février 2010, affaire 2008Hun-Ka23, dont la traduction en anglais est disponible en ligne (voy., *Major Decisions*) : http://english.ccourt.go.kr/.

dans un bon nombre de systèmes juridiques concernent des aspects divers de la réglementation et de sa mise en œuvre. Ci-dessus, certaines de ces limites seront très brièvement évoquées.

(*a*) *La peine de mort comme châtiment exceptionnel*. – Parmi les limites qui s'imposent à la réglementation de la peine de mort, la plus importante est, vraisemblablement, celle qui a trait à sa qualification de châtiment exceptionnel.

En effet, dans un grand nombre de pays, la peine capitale est désormais conçue comme une sanction à laquelle il n'est possible de recourir que dans des conditions très rigoureuses du point de vue des crimes susceptibles de provoquer cette condamnation (*i*). Le caractère exceptionnel de la peine de mort se traduit aussi par la nécessité de laisser aux juges une marge d'appréciation lors de la condamnation, pour que l'infliction du châtiment suprême soit réservée aux cas extrêmes (*ii*).

i. La réglementation de la peine de mort peut être – et c'est souvent le cas – limitée, en premier lieu, par l'obligation de respecter le principe de proportionnalité entre crime et sanction, de manière à ne permettre une telle condamnation que pour des crimes très graves. Cette limitation figure dans plusieurs actes de droit international, et notamment dans le Pacte international relatif aux droits civils et politiques de 1966[101] et dans la Convention américaine relative aux droits de l'homme de 1969[102], qui, en outre, exclut expressément la peine de mort pour les délits politiques[103].

Sur la base de ces prévisions, les organes internationaux ont pu développer une jurisprudence plutôt restrictive, visant à n'admettre la peine de mort que dans les cas où les crimes commis auraient eu pour effet de priver la victime de la vie[104] ou auraient été commis dans des circonstances tout à fait exceptionnelles[105].

[101] Voy., l'article 6, alinéa 2, du Pacte : « Dans les pays où la peine de mort n'a pas été abolie, une sentence de mort ne peut être prononcée que pour les crimes les plus graves […] ».
[102] Voy., l'article 4, alinéa 2, de la Convention : « Dans les pays qui n'ont pas aboli la peine de mort, celle-ci pourra être infligée qu'en punition des crimes les plus graves […] ».
[103] Voy., l'article 4, alinéa 4, de la Convention : « En aucun cas la peine de mort ne peut être infligée pour des délits politiques ou pour des crimes de droit commun connexes à ces délits ».
[104] C'est la position du Comité des droits de l'homme : voy., par exemple, *Chisanga c/ Zambie*, Communication n° 1132/2002 (2005), disponible en ligne : http://www.unhchr.ch/tbs/doc.nsf/0/d52555073a526481c12570c20057fd58?Opendocument (la traduction en français est disponible en ligne : http://www1.umn.edu/humanrts/hrcommittee/French/jurisprudence/1132-2002.html), §. 7.4.
[105] Voy., l'*advisory opinion* OC-3/83 du 8 septembre 1983, *Restrictions to the Death Penalty (arts. 4(2) and 4(4) American Convention on Human Rights)*, de la Cour interaméricaine des droits de l'homme, disponible en ligne : http://www.corteidh.or.cr/docs/opiniones/seriea_03_ing.pdf : « *The fact that the Convention limits the imposition of the death penalty to the most serious of common crimes not related to political offenses indicates that it was designed to be applied in truly exceptional circumstances only* » (§. 54).

L'approche restrictive, toutefois, n'est pas propre aux seules instances internationales, car plusieurs juridictions nationales ont aussi délimité le champ d'application de la peine de mort, dans le but d'en faire une mesure visant à sanctionner uniquement certains crimes.

La jurisprudence de la Cour suprême des États-Unis est très révélatrice à cet égard. La référence assez récente est, en particulier, l'arrêt *Kennedy v. Louisiana*[106], dans lequel la prévision de la peine de mort pour le crime de viol d'un enfant n'ayant pas abouti à la mort de celui-ci a été déclarée inconstitutionnelle[107], du fait que « [*a*]*s it relates to crimes against individuals,* [...] *the death penalty should not be expanded to instances where the victim's life was not taken* »[108].

Il en résulte qu'en ce qui concerne les crimes contre des individus, seuls les meurtres peuvent conduire à la condamnation à mort. Il est à noter que l'arrêt *Kennedy v. Louisiana* a expressément limité la portée du principe établi aux crimes commis contre des individus, de ce fait pour les crimes d'autres types, et notamment les crimes contre l'État, la question reste à trancher[109].

La Cour suprême indienne est peut-être allée plus loin, en établissant, dans un arrêt de 1980, que la peine de mort ne peut être infligée que dans des cas rarissimes (« *the rarest of rare case* »), c'est-à-dire lorsque le crime et la responsabilité de l'auteur sont tellement graves que l'on ne saurait indiquer des peines alternatives[110].

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[106] 554 U.S. 407 (2008), disponible en ligne : http://www.law.cornell.edu/supct/html/07-343.ZS.html.

[107] Dans les années soixante-dix, la Cour suprême fédérale avait déclaré inconstitutionnelle la prévision de la peine capitale pour le crime de viol d'un adulte : voy., l'arrêt *Coker v. Georgia*, 433 U.S. 584 (1977), disponible en ligne : http://www.law.cornell.edu/supct/html/historics/USSC_CR_0433_0584_ZS.html.

[108] Voy., l'arrêt *Kennedy v. Louisiana*, précité, p. 434.

[109] « *Our concern here is limited to crimes against individual persons. We do not address, for example, crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State* »: *ibid.*, p. 434.

[110] « *A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality* » ; « [*t*]*hat ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed* » : arrêt *Bachan Singh vs State of Punjab*, précité, p. 207. Dans l'arrêt *Machhi Singh vs State of Punjab* (20 juillet 1983), 1983 SCR (3) 413, disponible en ligne : http://indiankanoon.org/doc/545301/, la règle concernant « *the rarest of rare case* » a été détaillée de manière plus précise : « *(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability ; (ii)* [*b*]*efore opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'* » ; « *(iii)* [*l*]*ife imprisonment is the rule and death sentence is an exception* » ; « *(iv)* [*a*] *balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised* » (p. 433). Plus récemment, la Cour suprême a introduit des précisions complémentaires, visant à réduire encore l'application de la peine de mort. À cette fin, elle a fait découler de la règle concernant « *the rarest of rare case* » la nécessité d'un contrôle à double détente : d'une part, l'évaluation traditionnelle de la responsabilité de l'auteur du crime et de la gravité de celui-ci, de l'autre l'analyse portant sur la possibilité d'une réinsertion du coupable (voy., l'arrêt *Santosh Bariyar vs State of Maharashtra*, 13 mai 2009,

ii. Le souci de limiter les condamnations aux cas les plus graves se heurte au fait qu'il est parfois prévu que des condamnations soient obligatoirement prononcées dès qu'est constatée la commission d'un certain crime ou l'existence de certaines conditions.

Il y a encore dans un bon nombre de systèmes des normes limitant de manière absolue le pouvoir d'appréciation du juge, mais une tendance à leur élimination est désormais très forte sous toutes les latitudes[111].

À ce sujet aussi, l'expérience des États-Unis est très intéressante, car la marge d'appréciation laissée aux juges et aux jurés à l'occasion d'une condamnation à mort a donné lieu à des arrêts fondamentaux. La référence est, en premier lieu, l'arrêt *Furman v. Georgia*, qui a acquis une portée générale, mais dont le dispositif a déclaré l'inconstitutionnalité des modalités qui régissaient la procédure d'infliction de la peine capitale au motif que le pouvoir discrétionnaire des juges et des jurés était trop élevé pour ne pas risquer de déboucher sur l'arbitraire.

Or, la réaction du Congrès et des législateurs des États membres a conduit à l'adoption de nouvelles réglementations visant à limiter cette marge d'appréciation. Et parmi les solutions élaborées, figurait celle qui éliminait complètement l'aléa par l'introduction de « *mandatory sentences* ». Il s'agissait d'une solution qui n'avait guère été expérimentée, du moins dans les décennies les plus récentes, puisque sa compatibilité avec la Constitution était loin d'être acquise, eu égard notamment aux principes découlant d'un arrêt de 1937, par lequel la Cour

disponible en ligne : http://www.indiankanoon.org/doc/1312651/). La Cour suprême japonaise a adopté la même approche, notamment dans l'arrêt de la deuxième chambre basse du 8 juillet 1983, qui a souligné que « [l]a peine capitale ne peut être appliquée que lorsque la responsabilité de l'auteur du crime est extrêmement grave et que la peine maximale est inévitable du point de vue de l'équilibre entre le crime et le châtiment ainsi que du point de vue général de la prévention, en tenant compte des circonstances, notamment la nature, le motif et les modalités du crime, en particulier la persistance et la cruauté du moyen de mise à mort, la gravité des conséquences, en particulier le nombre de victimes tuées, les sentiments des proches en deuil, les effets sociaux, l'âge et les antécédents de l'auteur du crime et les circonstances qui suivent la commission de celui-ci » (voy., Comité des droits de l'homme, *Examen des rapports présentés par les États parties conformément à l'article 40 du Pacte. Cinquièmes rapports périodiques des États parties attendues en 2002 – Japon*, CCPR/C/JPN/5, 25 avril 2007, disponible en ligne : http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/415/74/PDF/G0741574.pdf?OpenElement, p. 34).

[111] Voy., S. Lehrfreund, « International Legal Trends and the Mandatory Death Penalty in the Commonwealth Caribbean », *Oxford University Commonwealth Law Journal*, 2001, vol. 1, pp. 171 et s. ; B. Tittemore, « The Mandatory Death Penalty in the Commonwealth Caribbean and the Inter-American Human Rights System: An Evolution in the Development and Implementation of International Human Rights Protections », *William & Mary Bill of Rights Journal*, 2004, vol. 13, pp. 445 et s. ; E. Fitzgerald, K. Starmer, *A Guide to Sentencing in Capital Cases*, The Death Penalty Project Ltd., 2007, disponible en ligne : http://www.deathpenaltyproject.org/documents/A_Guide_to_Sentencing_in_Capital_Cases.pdf ; A. Novak, « The Decline of the Mandatory Death Penalty in Common Law Africa : Constitutional Challenges and Comparative Jurisprudence in Malawi and Uganda », *Loyola Journal of Public Interest Law*, 2009, vol. 11, pp. 19 et s.

suprême fédérale avait reconnu la nécessité de moduler toute condamnation en tenant compte des faits mais aussi de toutes les circonstances et de la condition personnelle de l'auteur[112].

La Cour suprême a donc été vite saisie de la question concernant la conformité à la Constitution du régime des condamnations obligatoires. La déclaration d'inconstitutionnalité a été prononcée en 1976, par l'un des cinq arrêts sur la peine de mort rendus le 2 juillet[113]. La Cour a exclu que la condamnation obligatoire puisse être une réponse efficace aux exigences mises en exergue dans l'arrêt *Furman*[114], car elle traitait de manière égale des situations qui auraient pu ne pas l'être. Elle excluait, en particulier, toute possibilité de prendre en considération des éléments et des arguments dont le condamné aurait pu bénéficier : cette neutralité absolue, loin de se révéler un élément de justice, se traduisait par une méconnaissance des valeurs qui fondent le huitième amendement, et notamment le respect de l'être humain en tant que tel, d'où le refus de tout « automatisme condamnatoire ».

L'attitude de la Cour suprême des États-Unis à l'égard des « *mandatory sentences* » a été imitée dans beaucoup d'autres pays.

On peut mentionner, en premier lieu, le système indien, où l'inconstitutionnalité de la condamnation obligatoire, déclarée en 1983[115], a pu être identifiée comme un corollaire de la règle concernant « *the rarest of rare case* »[116] : « [*a*] *standardized mandatory sentence, and that too in the form of a sentence of death, fails to take into account the facts and circumstances of each particular case* » ; « [*i*]*t is those facts and circumstances which constitute a safe guideline for determining the question of sentence in each individual case* »[117].

[112] Voy., l'arrêt *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51 (1937), disponible en ligne : http://www.law.cornell.edu/supremecourt/text/302/51.
[113] Supreme Court of the United States, *Woodson v. North Carolina*, 428 U.S. 280 (1976), disponible en ligne : http://www.law.cornell.edu/supct/html/historics/USSC_CR_0428_0280_ZS.html.
[114] « [*A*] *mandatory death penalty statute may reasonably be expected to increase the number of persons sentenced to death, it does not fulfill* Furman*'s basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death* » : *ibid.*, p. 303.
[115] Supreme Court of India, *Mithu vs State of Punjab*, 7 avril 1983, 1983 SCR (2) 690, disponible en ligne : http://www.indiankanoon.org/doc/590378/.
[116] Voy., P.R. Advani, A. Saha, *op. cit.*, pp. 680 et s.
[117] Arrêt *Mithu vs State of Punjab*, précité, p. 707.

Plus récemment, les condamnations obligatoires ont fait l'objet de censure par des organes internationaux, et notamment par la Commission interaméricaine des droits de l'homme[118] et par le Comité onusien des droits de l'homme[119].

De telles censures ont vraisemblablement eu une influence significative sur l'évolution des systèmes rétentionnistes des Caraïbes. En effet, à partir de l'an 2001, la Cour d'appel des Caraïbes orientales[120], puis, à partir de 2002, le Comité judiciaire du Conseil privé ont déclaré illégitimes les normes des divers pays soumis à leur juridiction prévoyant des condamnations à mort obligatoires[121]. Ceci en raison du fait que « *to deny the offender the opportunity, before sentence has been passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity* »[122].

Cette jurisprudence a eu un impact qui est allé bien au-delà des Caraïbes. Même l'évolution récente des droits africains a bénéficié en large mesure de la jurisprudence du *Privy Council*, à laquelle il a été fait référence à plusieurs reprises, ainsi qu'aux arrêts précédemment cités des Cours suprêmes des États-Unis et de l'Inde. C'est la Cour constitutionnelle ougandaise qui a ouvert la voie, en déclarant l'inconstitutionnalité des dispositions prévoyant les condamnations à mort obligatoires, principalement parce qu'elles portaient atteinte au principe de la séparation des pouvoirs : il a été jugé incompatible avec l'exercice des missions confiées au pouvoir judiciaire le fait que le Parlement puisse limiter, voire exclure le pouvoir

[118] Les premières censures remontent, semble-t-il, aux affaires *Downer and Tracey (Jamaica)*, Report No. 41/00, et *Baptiste (Grenada),* Report No. 38/00, 13 avril 2000 (les *reports* sont disponibles en ligne : http://www.cidh.org/annualrep/99eng/merits/Jamaica12.023.htm ; http://www.cidh.org/annualrep/99eng/merits/Grenada11.743.htm).

[119] Voy., *Eversley Thompson v Saint Vincent and the Grenadines*, Communication n° 806/1998 (2000), dans *Selected Decisions of the Human Rights Committee onde the Optional Procotol*, vol. 7, pp. 102 et s., disponible en ligne : http://www.ohchr.org/Documents/Publications/SDecisionsVol7en.pdf.

[120] Eastern Caribbean Court of Appeal, *Spence & Hughes -v- The Queen (St Vincent and the Grenadines and St Lucia)*, 2 avril 2001, non répertorié, disponible en ligne : http://www.internationaljusticeproject.org/pdfs/spence.pdf.

[121] Judicial Committee of the Privy Council, *Reyes v the Queen*, [2002] 2 AC 235. L'arrêt, qui concernait le Belize, a vu sa portée étendue aux autres pays des Caraïbes britanniques par d'autres arrêts du même Conseil privé : voy., les arrêts *R v Hughes*, [2002] 2 AC 259, concernant Sainte-Lucie ; *Fox v R*, [2002] 2 AC 284, pour Saint-Christophe-et-Niévès ; *Boyce and Joseph v the Queen*, [2005] 1 AC 400, à l'égard des Barbados ; *Matthew v The State*, [2005] 1 AC 433, pour Trinité-et-Tobago ; *Watson v The* Queen, [2005] 1 AC 472, concernant la Jamaïque ; *Bowe and Davis v The Queen*, [2006] 1 W.L.R. 1623, à l'égard des Bahamas. Tous les arrêts cités sont disponibles en ligne (sur le site du *Privy Council)* : http://privycouncil.independent.gov.uk/judicial-committee/judgments/.

[122] Voy., l'*opinion* de *Lord* Bingham dans l'arrêt *Reyes v the Queen*, précité, §. 43.

d'appréciation réservé aux juges, qui ne pouvaient que prononcer des « *blind sentences on convicted persons* »[123].

La violation des principes régissant le procès équitable ainsi que la méconnaissance de l'interdiction de traitements inhumains et dégradants ont conduit à la même conclusion dans des arrêts de la Haute Cour du Malawi[124] et de la Cour d'appel du Kenya[125].

(*b*) *Les justiciables susceptibles d'être condamnés*. – Dans maints pays, la peine de mort connaît des limitations significatives par rapport aux justiciables mêmes, susceptibles d'être condamnés. Les limitations peuvent avoir trait, notamment, (*i*) à l'âge et (*ii*) à la santé mentale.

i. Dans beaucoup de systèmes rétentionnistes, la condamnation à mort est interdite pour les individus qui n'avaient pas atteint la majorité lorsqu'ils ont commis un crime capital : dans ce cas, c'est l'élément de la responsabilité atténuée par le défaut de maturité qui prime incontestablement sur les autres.

La peine de mort infligée aux mineurs est devenue très rare, étant interdite par le Pacte international relatif aux droits civils et politiques de 1966[126], par la Convention américaine relative aux droits de l'homme[127], par la Convention internationale des droits de l'enfant de

[123] Voy., Constitutional Court of Uganda, *Kigula v. Attorney General*, Constitutional Petition No. 6 of 2003, 10 juin 2005, dont le texte intégral, en anglais, est disponible en ligne dans l'infobase Codices. À cet argument, la Cour supreme, ensuite, en a associé un autre, tiré du principe d'égalité : la condamnation obligatoire a été censurée aussi parce que « [*i*]*t provides in essence that a person accused of stealing a chicken may not only be heard in mitigation, but may actually request the court to inquire into his character and antecedents for purposes of assessing appropriate sentence for him, while on the other hand, a person accused of murder and whose very life is at stake, may not do likewise* » ; cette constatation se heurtait à celle que « [*n*]*ot all murders are committed in the same circumstances, and all murderers are not necessarily of the same character* », « [*o*]*ne may be a first offender, and the murder may have been committed in circumstances that the accused person deeply regrets and is very remorseful* » ; la Cour ne voyait pas de raison « *why these factors should not be put before the court before it passes the ultimate sentence* » (voy., Supreme Court of Uganda at Mengo, *Attorney General v. Susan Kigula & 417 Others*, Constitutional Appeal No. 03 of 2006, 21 janvier 2009, disponible en ligne : http://www.eji.org/files/Attorney%20General%20v.%20Susan%20Kigula%20(Supreme%20Court%20of%20Uganda)_0.pdf, p. 18).

[124] High Court of Malawi, *Kafantayeni v. Malawi*, Constitutional Case No. 12 of 2005, 27 avril 2007, [2007] MWHC 1, disponible en ligne : http://www.eji.org/files/Kafantayeni%20v.%20Attorney%20General.pdf.

[125] Court of Appeal of Kenya at Mombasa, *Mutiso v. Republic*, Criminal Appeal No. 17 of 2008, 30 juillet 2010, disponible en ligne : http://kenyalaw.org/Downloads_FreeCases/76411.pdf.

[126] Voy., l'article 6, alinéa 5, du Pacte : « [u]ne sentence de mort ne peut être imposée pour des crimes commis par des personnes âgées de moins de 18 ans et ne peut être exécutée contre des femmes enceintes ».

[127] Voy., l'article 4, alinéa 5, de la Convention, précité.

1989[128], par la Charte arabe des droits de l'homme de 1994[129] ainsi que par certaines constitutions nationales[130]. Certes, quelques exceptions peuvent encore être recensées : des exécutions de mineurs ont été récemment attestées, par exemple, en Iran ; au Japon, puisque la majorité est fixée à vingt ans, le seuil des dix-huit ans prévus pour la peine de mort n'exclut pas la condamnation à mort des mineurs. Il peut être assez surprenant que les États-Unis figurent, jusqu'en 2005, parmi les exceptions : en 1988, la Cour suprême fédérale avait déclaré l'inconstitutionnalité des dispositions prévoyant la peine de mort pour les délinquants de moins de seize ans[131], mais l'année suivante les individus ayant atteint cet âge avaient été expressément assimilés aux adultes[132]. Sur ce point, un revirement ne se produira qu'en 2005, avec l'interdiction des condamnations pour tous les mineurs de moins de dix-huit ans[133].

ii. L'infliction de la peine de mort devrait se fonder sur la responsabilité de l'auteur du crime : c'est sur cette base, en particulier, que les mineurs ne devraient pas être condamnés ; et c'est sur cette même base que se posent les problèmes concernant la condamnation et/ou l'exécution des personnes frappées d'aliénation mentale ou atteintes de handicap mental.

En ce qui concerne les aliénés, toute condamnation à mort devrait en principe être exclue, eu égard aux principes qui régissent la responsabilité pénale. La question se pose pour ce qui concerne les condamnés à mort qui sont frappés d'aliénation mentale dans l'attente de l'exécution. À ce propos, le Conseil économique et social des Nations Unies a interdit, dès 1984, une telle pratique[134], que le Comité des droits de l'homme a pu qualifier, dès 1995, de

[128] Voy., l'article 37 de la Convention, aux termes duquel « [l]es États parties veillent à ce que : a) Nul enfant ne soit soumis à la torture ni à des peines ou traitements cruels, inhumains ou dégradants : ni la peine capitale ni l'emprisonnement à vie sans possibilité de libération ne doivent être prononcés pour les infractions commises par des personnes âgées de moins de 18 ans ; […] ».
[129] Voy., l'article 12 de la Charte : « [l]a peine de mort ne peut être appliquée contre des personnes âgées de moins de dix-huit ans, contre une femme enceinte jusqu'à son accouchement et contre une mère nourrice jusqu'à l'expiration de deux ans après la naissance de l'enfant ».
[130] Voy. par exemple, l'article 18 de la Constitution du Guatemala, l'article 33 de la Constitution du Soudan et l'article 21 de la Constitution du Soudan du Sud.
[131] Supreme Court of the United States, *Thompson v. Oklahoma*, 487 U.S. 815 (1988), précité.
[132] Supreme Court of the United States, *Stanford v. Kentucky*, 492 U.S. 361 (1989), disponible en ligne : http://www.law.cornell.edu/supct/html/historics/USSC_CR_0492_0361_ZS.html.
[133] Supreme Court of the United States, *Roper v. Simmons*, 543 U.S. 551 (2005), disponible en ligne : http://www.law.cornell.edu/supct/html/03-633.ZS.html.
[134] Voy., les *Garanties pour la protection des droits des personnes passibles de la peine de mort*, approuvées par le Conseil économique et social dans sa résolution 1984/50 du 25 mai 1984 (§. 3), dont le texte est disponible en ligne : http://www2.ohchr.org/french/law/garantie_dp.htm.

traitement cruel et inhumain[135]. Les États, du moins en principe, se sont conformés à cette jurisprudence, et l'ont parfois anticipée, comme cela a été le cas des États-Unis[136].

Si l'interdiction d'exécuter les personnes frappées d'aliénation mentale fait l'objet d'un consensus très répandu, le consensus devient beaucoup moins large dans le cas du handicap mental.

Le Conseil économique et social des Nations Unies, en 1989, a recommandé aux États membres de supprimer la peine capitale « tant au stade de la condamnation qu'à celui de l'exécution pour les handicapés mentaux ou les personnes dont les capacités mentales sont extrêmement limitées »[137]. Cependant, dans la pratique des États, les condamnations et les exécutions des handicapés mentaux demeurent une réalité. Parfois, ceci est dû au refus pur et simple de l'interdiction : les États-Unis ont longtemps été un exemple à ce sujet, car la Cour suprême fédérale, encore en 1989, avait admis en principe l'exécution d'un handicapé mental[138], et n'a changé de jurisprudence qu'en 2002, lorsqu'elle a déclaré inconstitutionnelle, en tant qu'incompatible avec le huitième amendement, la législation de la Virginie admettant l'exécution de ces handicapés[139].

Toutefois, la question des handicapés mentaux et de leur éventuelle exécution ne relève pas toujours d'une approche strictement juridique. En effet, des exécutions de handicapés mentaux sont parfois mises en œuvre ou, plus exactement, les exécutions sont parfois contestées en raison de la santé mentale du condamné : cela s'explique par la difficulté de définir de manière précise la notion de « handicap mental », s'agissant d'une notion qui n'est pas dépourvue d'un certain subjectivisme et dont l'application n'est presque jamais incontestable.

(*c*) *La question des couloirs de la mort*. – La détention dans les couloirs de la mort a été qualifiée de traitement inhumain, notamment par la Cour européenne des droits de l'homme,

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[135] Voy., *Francis v. Jamaica*, Communication n° 606/1994 (1995), disponible en ligne : http://www1.umn.edu/humanrts/undocs/html/vws606.htm.

[136] Voy., Supreme Court of the United States, *Ford* v. *Wainwright*, 447 U.S. 399 (1986), disponible en ligne : http://www.law.cornell.edu/supct/html/historics/USSC_CR_0477_0399_ZS.html. L'arrêt a été depuis confirmé par la jurisprudence de la Cour suprême, et notamment par l'arrêt *Panetti v. Quarterman*, 551 U.S. 930 (2007), disponible en ligne : http://www.law.cornell.edu/supct/html/06-6407.ZS.html.

[137] Voy., la résolution 1989/64 du 24 mai 1989 du Conseil économique et sociale sur l'*Application des Garanties pour la protection des droits des personnes passibles de la peine de mort*, §. 1, lettre (*d*), disponible en ligne : http://www.peinedemort.org/document.php?choix=3267.

[138] Voy., Supreme Court of the United States, *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), disponible en ligne : http://www.law.cornell.edu/supct/html/historics/USSC_CR_0492_0302_ZS.html.

[139] Voy., Supreme Court of the United States, *Atkins* v. *Virginia*, 536 U.S. 304 (2002), disponible en ligne : http://www.law.cornell.edu/supct/html/00-8452.ZS.html.

qui, dans son arrêt *Soering*[140], est arrivée à la conclusion que si la décision ministérielle d'extrader un ressortissant allemand détenu en Angleterre vers les États-Unis avait reçu exécution, il y aurait eu une violation de l'article 3 de la Convention, aux termes duquel « [n]ul ne peut être soumis à la torture ni à des peines ou traitements inhumains ou dégradants ». En effet :

« [e]u égard […] à la très longue période à passer dans le "couloir de la mort" dans des conditions […] extrêmes, avec l'angoisse omniprésente et croissante de l'exécution de la peine capitale, et à la situation personnelle du requérant, en particulier son âge et son état mental à l'époque de l'infraction, une extradition vers les États-Unis exposerait l'intéressé à un risque réel de traitement dépassant le seuil fixé par l'article 3 [de la Convention] »[141].

Le syndrome du « couloir de la mort » a donc été indiqué comme la manifestation d'un traitement inhumain qui est interdit, en tant que tel, par la Convention.

Les couloirs de la mort sont pourtant une conséquence inévitable de l'existence de la peine capitale : de ce fait, soit on admet leur présence soit on déclare l'inconstitutionnalité de la peine de mort, car l'alternative serait de mettre en œuvre l'exécution juste après la condamnation, ce qui méconnaîtrait de manière patente les garanties dérivant du droit à l'appel et/ou à la révision de la condamnation[142].

Or, si dans les États rétentionnistes la légitimité des couloirs de la mort n'est pas contestable, cela n'a pas empêché les juridictions de censurer parfois les conditions de la détention, notamment en raison du temps excessif que le condamné a été obligé de passer dans l'attente de l'exécution.

La Cour suprême indienne, en 1983[143], a parlé d'un « dehumanising factor of prolonged delay in the execution of a sentence of death »[144], pour conclure dans le sens que « [m]aking all reasonable allowance for the time necessary for appeal and considered of reprieve, […] delay exceeding two years in the execution of a sentence of death should be considered sufficient to

[140] Cour européenne des droits de l'homme, plén., *Soering c/ Royaume-Uni*, req. n° 14038/88, du 7 juillet 1989. L'arrêt est disponible en ligne (sur le site internet de la Cour européenne, en accédant à la base de données Hudoc) : http://www.echr.coe.int/ECHR/fr/Header/Case-Law/Decisions+and+judgments/HUDOC+database/.
[141] Arrêt *Soering c/ Royaume-Uni*, précité, §. 111.
[142] Sur ce point, voy. aussi, Cour suprême du Canada, *Kindler c. Canada (ministre de la Justice)*, [1991] 2 R.C.S. 779, 26 septembre 1991, disponible en ligne : http://www.canlii.org/fr/ca/csc/doc/1991/1991canlii78/1991canlii78.html.
[143] Voy., Supreme Court of India, *T.V. Vatheeswaran vs State of Tamil Nadu*, 16 février 1983, 1983 SCR (2) 348, disponible en ligne : http://indiankanoon.org/doc/1536503/.
[144] *Ibid.*, p. 354.

entitle the person under sentence of death to […] demand the quashing of the sentence of death »[145].

Dix ans plus tard, la Cour suprême du Zimbabwe s'est référée expressément à la jurisprudence indienne afin de qualifier d'inhumaine et de dégradante la détention de condamnés à mort qui s'était prolongée 52 à 72 mois, eu égard à l'« *acute mental suffering and brooding horror of being hanged* » qui a atteint les condamnés « *over the long lapse of time since the passing of sentence of death* »[146].

Une approche similaire a été adoptée, toujours en 1993, par le Privy Council, dans un arrêt concernant la Jamaïque, où l'on a conclu que « in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute "inhuman or degrading punishment or other treatment" », une fois constaté que « [t]here is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years »[147].

Ces arrêts ont été repris par la Cour constitutionnelle ougandaise, qui a constaté que les trois ans généralement passés par les condamnés dans les couloirs de la mort étaient un « *reasonable time* », tout en admettant que si la période était plus longue, alors s'imposerait la constatation de l'atteinte portée aux droits des détenus[148].

Assez curieusement, cette jurisprudence n'a eu que de très faibles échos aux États-Unis, où les cours ont rejeté, en principe, les arguments visant à censurer une détention longue dans les couloirs de la mort, et ont plutôt souligné que la longueur de la détention est, en soi, un allongement de la vie du condamné, qui permet, en outre, de nourrir l'espoir que des décisions favorables à son égard puissent survenir[149].

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[145] *Ibid.*, p. 361.
[146] Voy., Supreme Court of Zimbabwe, *Catholic Commission for Justice and Peace in Zimbabwe v. Attorney General of Zimbabwe*, 24 juin 1993, disponible en ligne : http://www.unhcr.org/refworld/country,,ZWE_SC,,ZWE,,3ae6b6c0f,0.html.
[147] Voy., Judicial Committee of the Privy Council, *Pratt and Morgan v Attorney General of Jamaica*, 2 AC 1 (1993).
[148] Voy., Constitutional Court of Uganda, *Kigula v. Attorney General*, précité.
[149] Voy., par exemple l'arrêt rendu par la Cour d'appel du Neuvième Circuit dans l'affaire *McKenzie v. Day*, 57 F.3d 1461 (9th Cir. 1995), disponible en ligne : https://law.resource.org/pub/us/case/reporter/F3/057/57.F3d.1461.95-99006.html.

Le sujet n'a pas encore été abordé par la Cour suprême fédérale, qui a jusqu'à présent déclaré irrecevables toutes les demandes de *certiorari* qui lui sont parvenues, bien que des opinions dissidentes aient pu se manifester à cet égard[150].

(d) *Les méthodes d'exécution*. – L'exécution d'un condamné doit être mise en œuvre de manière à la rendre le moins pénible possible. Le Conseil économique et social des Nations Unies l'a souligné dès 1984[151] et le Comité des droits de l'homme l'a confirmé, en 1992, en énonçant le principe selon lequel la peine de mort doit « être exécutée de manière à causer le moins de souffrances possible, physiques ou mentales »[152].

Le principe étant acquis, des questions se posent en ce qui concerne les méthodes concrètement adoptées. À ce propos, s'il n'a pas été possible d'identifier la méthode qui assure le moins de souffrances, on a parfois censuré certaines méthodes comme étant cruelles et/ou dégradantes.

Le Comité des droits de l'homme a pu constater, notamment, que l'asphyxie par le gaz de cyanure ne répond pas au critère du minimum de souffrances possible et, de ce fait, constitue un traitement cruel et inhumain, en violation de l'article 7 du Pacte onusien de 1966 : cette méthode peut en effet provoquer des souffrances et une agonie prolongées et n'entraîne pas la mort aussi rapidement que possible, « puisque l'asphyxie par le gaz de cyanure peut prendre plus de 10 minutes »[153].

Mais c'est au niveau national que les méthodes d'exécution ont fait le plus souvent l'objet de contrôle de la part des juridictions. L'expérience la plus riche en ce domaine est vraisemblablement celle des États-Unis, où les cours ont eu l'occasion de déclarer la méconnaissance de l'interdiction de traitements cruels et inusités dérivant de l'adoption des

[150] Voy. notamment, les opinions dissidentes du Juge Breyer dans les déclarations d'irrecevabilité *Elledge v. Florida*, 525 U.S. 944 (1998), disponible en ligne : http://www.law.cornell.edu/supct/html/98-5410.ZD.html, et *Knight v. Florida*, 528 U.S. 990 (1999), disponible en ligne : http://www.law.cornell.edu/supct/html/98-9741.ZA.html. La question des couloirs de la mort a été évoquée aussi au Japon, où, toutefois, la Cour suprême, dans son arrêt du 19 juillet 1985, cité par K. Takayama, M.V. Yamamoto, *op. cit.*, p. 295, a exclu que trente ans passés dans les couloirs de la mort puissent être qualifiés de traitement cruel.

[151] Voy., les *Garanties pour la protection des droits des personnes passibles de la peine de mort*, précitées, §. 9 : « [l]orsque la peine capitale est appliquée, elle est exécutée de manière à causer le minimum de souffrances possibles ».

[152] Voy., l'*Observation générale no. 20 : Remplacement de l'observation générale 7 concernant l'interdiction de la torture et des traitements cruels (art. 7)*, 10 mars 1992, disponible en ligne : http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/720dfcebc8e2a75d80256523004b0109?Opendocument.

[153] Voy., la constatation du 5 novembre 1993, *Ng c/ Canada*, communication n° 469/1991 (en français dans *Sélection de décisions du Comité des droits de l'homme prises en vertu du Protocole facultatif*, vol. 5, New York – Genève, 2005, pp. 109 et s., disponible en ligne : http://www.ohchr.org/Documents/Publications/SDecisionsVol5fr.pdf), §§. 16.3. et s.

méthodes de la chambre à gaz[154] et de l'électrocution[155], mais ne sont pas arrivées aux mêmes conclusions à l'égard de la pendaison[156] et, plus récemment, de l'injection létale[157].

S'il est vrai que ces dernières décisions sont loin d'être incontestables, il est tout aussi vrai que bien d'autres méthodes actuellement employées semblent beaucoup plus cruelles. On ne saurait toutefois proposer un classement macabre des souffrances.

CONCLUSION

Des remarques qui précèdent on constate que les différences entre les deux catégories d'autorités qui abolissent la peine capitale se reflètent également sur le type d'abolition qu'ils décrètent, ce qui renforce l'idée d'une opposition entre l'« abolition politique » et l'« abolition judiciaire ». Il ne s'agit pas simplement d'identifier l'autorité – politique ou juridictionnelle – qui a procédé à l'abolition et les arguments qui ont été évoqués à cet effet et/ou qui pouvaient l'être ; l'opposition se fonde aussi, et peut-être principalement, sur la portée de l'abolition, car selon la nature de l'autorité qui la décrète, la portée de l'abolition change considérablement.

En effet, l'« abolition politique » est le fruit d'une décision qui parait, en principe, toujours contestable et, par cela, susceptible de révision, voire d'élimination, à la suite de changements du contexte institutionnel, politique et/ou social : lorsque l'abolition est adoptée par voie politique, l'enjeu véritable est celui de lui assurer une stabilité, de la mettre à l'abri des contestations et des retours en arrière ; il en résulte que la variable fondamentale de la décision politique a trait à la force formelle qu'on lui confère, c'est-à-dire au rang de l'acte normatif où sont insérées les dispositions portant l'abolition.

Par contre, en ce qui concerne l'« abolition jurisprudentielle », la déclaration par laquelle on élimine la peine de mort de l'ordre juridique paraitrait forcément plus stable, puisqu'elle, en principe, ne pourrait être mise en question qu'à la suite d'une contestation radicale de la décision, une contestation qui ne pourrait qu'affecter la légitimité même de l'organe qui l'a

[154] Voy., l'arrêt rendu par la Cour d'appel du Neuvième Circuit dans l'affaire *Fierro v. Gomez*, 77 F.3d 301 (9th Cir. 1996), disponible en ligne : http://bulk.resource.org/courts.gov/c/F3/77/77.F3d.301.94-16775.html.
[155] Voy., Supreme Court of Georgia, *Dawson v. Georgia*, 274 Ga. 327 S.E.2d (2001), disponible en ligne : http://www.leagle.com/xmlResult.aspx?xmldoc=2001691554SE2d137_2689.xml&docbase=CSLWAR2-1986-2006, et Supreme Court of Nebraska, *State v. Mata*, 275 Neb. 1 N.W.2d 229 (2008), disponible en ligne : http://caselaw.findlaw.com/ne-supreme-court/1182026.html.
[156] Voy., United States Court of Appeals for the Ninth Circuit, *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), disponible en ligne : http://www.eji.org/files/Campbell%20v.%20Wood_1.pdf.
[157] Voy., Supreme Court of the United States, *Baze v. Rees*, 553 U.S. 35 (2008), disponible en ligne : http://www.law.cornell.edu/supct/html/07-5439.ZS.html ; plus récemment, le sujet est retourné à l'attention de la Cour suprême dans l'arrêt *Glossip v. Gross*, précité.

rendue, généralement une cour constitutionnelle ou une cour suprême. Dans la pratique, notamment aux États-Unis, on a pu constater que cela s'est produit de manière assez frappante, au point que, pour faire en sorte que la décision juridictionnelle ait un impact réel dans le système, la collaboration des autorités politiques, du moins sous la forme d'une omission d'initiatives contraires, est indispensable pour assurer des effets concrets à l'« arrêt abolitionniste ».

C'est peut-être pour cette raison que, lorsque le consensus politique est loin d'être acquis pour la cause abolitionniste, les juridictions s'engagent plutôt à limiter les aspects les plus contestables de la réglementation ou de la mise en œuvre de la peine de mort. L'expérience américaine suivant l'arrêt *Furman* de 1972, est assez parlante à l'égard des effets pervers d'une décision trop fort contraire à l'opinion politique dominante. Le *self-restraint* est donc le moyen pour assurer des résultats, quoique partiels, visant à rendre un peu plus humain un châtiment qui a bien peu d'humanité, comme en témoignent les réflexions d'Albert Camus :

> « l'exécution capitale n'est pas simplement la mort. Elle est aussi différente, en son essence, de la privation de vie, que le camp de concentration l'est de la prison. Elle est un meurtre, sans doute, et qui paie arithmétiquement le meurtre commis. Mais elle ajoute à la mort un règlement, une préméditation publique et connue de la future victime, une organisation, enfin, qui est par elle-même une source de souffrances morales plus terribles que la mort. Il n'y a donc pas équivalence. Beaucoup de législations considèrent comme plus grave le crime prémédité que le crime de pure violence. Mais qu'est-ce donc que l'exécution capitale, sinon le plus prémédité des meurtres, auquel aucun forfait de criminel, si calculé soit-il, ne peut être comparé ? Pour qu'il y ait équivalence, il faudrait que la peine de mort châtiât un criminel qui aurait averti sa victime de l'époque où il lui donnerait une mort horrible et qui, à partir de cet instant, l'aurait séquestrée à merci pendant des mois. Un tel monstre ne se rencontre pas dans le privé »[158].

[158] A. Camus, « Réflexions sur la guillotine » *in* A. Camus, A. Koestler, *Réflexions sur la peine capitale*, Calmann-Lévy, 1957, pp. 141 et s.

COMING HOME (AGAIN): A JURISPRUDENTIAL EXPLORATION

Allan C. Hutchinson*

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Abstract

It has become a rather trite insight to concede that where one sets off in life can have a significant effect on where one ends up. Of course, there are many exceptions to this as people have achieved great success from the humblest of beginnings (and some have managed little success from the most privileged of backgrounds). However, there is still much wisdom and worth in tracing back one's life's journey in order to understood how one got from there to here, as it were. But, in doing so, it is also interesting to think about a certain reversal of that traditional sagacity - where we want to go might well have affected where we started. This insight might seem a little counter-intuitive, but it can be illuminating in thinking about the past in terms of the present and about why the journey from one to the other took the course that it did. For academics and especially self-proclaimed theorists, it seems a tantalizing prospect to take a stab at charting the intellectual route that has been travelled or, at least, appears to have been travelled. Accordingly, after several decades in the jurisprudence business, I want to make what some will consider a vain and self-serving attempt at writing my own intellectual biography.

Résumé

C'est une idée devenue plutôt banale que de reconnaître que l'endroit d'où l'on s'engage dans la vie peut avoir un effet significatif sur l'endroit où l'on se retrouve. Bien sûr, il y a de nombreuses exceptions à cette règle car les gens ont obtenu de grands succès des débuts des plus humbles (et certains ont achevé de moindres succès malgré un milieux plus favorisé). Cependant, il y a encore beaucoup de sagesse et de valeur à retracer le cheminement de sa vie pour comprendre comment, pour ainsi dire, on en est arrivé là. Mais ce faisant, il est également intéressant de penser à un certain renversement de cette sagacité traditionnelle - là où nous voulons aller, cela pourrait bien avoir affecté notre point de départ. Ce point de vue peut sembler un peu contre-intuitif, mais il peut être éclairant lorsqu'on pense au passé en termes de présent et à la raison pour laquelle le voyage de l'un à l'autre a pris le chemin qu'il a pris. Pour les universitaires et surtout les théoriciens autoproclamés, il est tentant de tracer le chemin intellectuel qui a été parcouru ou, à tout le moins, qui semble l'avoir été. Par conséquent, après plusieurs décennies dans le domaine de la théorie du droit, je veux faire ce que certains considéreront comme une tentative vaine et intéressée d'écrire ma propre biographie intellectuelle.

ABOUT ALLAN C. HUTCHINSON

Are Critical Legal Studies (CLS) dead? Today it is referred to them as a vanished current that had its hour of glory for a brief decade. But we sometimes forget a little quickly the mass of work, of immense quality, that these supposedly brief years made it possible to produce. Allan Hutchinson is one of those fellow CLS travellers who continue to cast a distant, ironic glance on the world, absolutely devoid of any form of arrogance and certainly not indifferent to the world around him, quite the contrary! He observes, he scrutinises, he watches, he notes, he analyses, he deconstructs. He's rebuilding too. He takes stock of the efforts that one makes to rationalise the irrational and to present the polytheism of law as an evidence or a necessity of our modern times. And speaking of mass, do we have any idea of how many books and articles Allan Hutchinson has published? Given what French law libraries contain, it is difficult to get a precise idea. The whole is as dense as it is varied. Because the law as Allan sees it is far from being reduced to a few complex rules that would be the subject of scholarly commentary, not even to a few exemplary cases, nor to a few judges sometimes erected as icons. If Allan Hutchinson has devoted several volumes to the Common Law[1], as well as to remarkable cases[2] or to "great" judges[3], it is not because of a taste for celebration but rather because of a perfectly assumed theoretical point of view on the law. As he himself wrote in *Evolution and the Common Law*, "law is a rhetorical activity which can only be properly appreciated in its historical and political context; tradition and transformation are locked into a relationship which mutually reinforces them, but which remains completely contingent". The law - and in particular the Common Law - is therefore not the result of an established grand plan; it is a "perpetual work-in-progress" as evolutionary, hesitant and inductive as possible when some would like it to be fixed, teleological and perfectly deductive. It would therefore be as wrong as it would be vain to think it outside and beyond society since it is entirely situated within it and evolves with it. In these circumstances, it is understandable that, some seven years later, Allan Hutchinson went in search of the qualities that make a common law judge a "great judge". Certainly, mastery of the legal technique is necessary. But it is far from enough. As he put it in a Holmes-style formula: "the act of judging is less an opportunity for logical operations

[1] A. Hutchinson, *Evolution and the Common Law*, Cambridge University Press, 2005.
[2] A. Hutchinson, *Is Eating People Wrong? Great Legal Cases and How They Shaped the World*, Cambridge University Press, 2011 et A. Hutchinson, *Is Killing People Right?: More Great Cases that Shaped the Legal World*, Cambridge University Press, 2016.
[3] A. Hutchinson, *Laughing at the Gods: Great Judges and How They Made the Common Law,* Cambridge University Press, 2012.

than an exercise in operational logic"[4]. We know that he also likes to refer to Thurgood Marshall's other famous formula saying of himself that he "had done what he could with what he had". This is a large part of Hutchinson's doctrine: the "good" jurist or the "great" judge (of Common Law, certainly...) is not the one to whom everything succeeds or the one who knows everything but the one who feels how to adapt the past to the present - hence the inextinguishable need to articulate a sense of social justice and the desire to share a political vision. "Politics": the word is finally pronounced. Allan Hutchinson, as said previously, remains committed to the CLS slogan: "law is politics". This leitmotif is far from being used at home as a banner covering an obscure junk shop or as a misleading advertising slogan. It deserves a short explanation.

Each of Allan Hutchinson's books or texts is driven by the same need to take seriously the institutional and political consequences to which a critical analysis of law and judgment can lead. This analysis is critical in that it rejects a conception of judgment as an objective activity of a purely neutral application of the rules. Hutchinson is also not concerned with the question of the basis of law or judgment: judging is a specific professional practice, intimately linked to the social context in which it is embedded and always proves to be a deeply ideological undertaking and not a theoretical reflection. As a practice, judgment is really about using the old to make new. Under these conditions, the best criterion for evaluating such a practice is itself political and cannot consist in a search for the conceptual coherence of the theoretical reflections in which judges engage. And the law is as much a matter of political morality as judgment itself is a matter of personal choice. In other words, the law is deeply and completely "political" in both a personal and a partisan sense. And this is, for Hutchinson, a good reason to strengthen social justice and not an obstacle to its implementation: by making ideological choices, judges can assume their democratic responsibilities.

Under these conditions, legal reasoning cannot be seen as a *more geometrical* demonstration, but rather as an attempt to justify a solution that will express the personal preferences of judges. Should we think that judges are totally free to do what they want? As a matter of fact, such a question is not so relevant as it assumes a simplistic alternative between the absence of freedom and total freedom. The freedom that judges enjoy is commensurate with the justification they must provide. As for a game presupposes certain rules that constitute the

[4] A. Hutchinson, *It's All in the Game: A Nonfoundationalist Account of Law and Adjudication*, Duke University Press, 2000, p. 175. ("it is not a logical operation but an exercise in operational logic").

game, legal reasoning implies playing with the rules themselves: the whole art of judgment consists in passing off one's subjective will as that of objective law.

If the law is a practice and not a set of rules laid down in advance that could simply be described, the theory of the law, for its part, seeks not to say how the rules should be used but rather to reveal the presuppositions of judges, clarify their possible contradictions and formulate some suggestions not in the name of a great hidden truth that the science of the law would reveal but with a view to making some improvements to this practical activity that is the law. So where do Hutchinson's rules fit in? Would they constitute the constraint that judges cannot overcome and from which they cannot escape, as some formalist lawyers think? Or are they, on the contrary, toys that could even be dispensed with as other "anti-formalist" lawyers sometimes think? It is not surprising to read in Hutchinson that the alternative itself is misleading: at the same time, they give the practice of law its structure, the rules are also the very object of this practice.

The article we are going to read emphasises several of the main thesis to which Allan Hutchinson devoted so much effort to try to convince his audience and justify his position. The merit of this article is also to restore the path of a spirit as free as inventive and to show that nothing, at the beginning, predestined him to his brilliant career. Although he certainly showed a critical spirit very early on, it was not said that he came to join the path of Critical Legal Studies. Who could imagine him leaving Stammler for Duncan Kennedy?

Eventually, I would like to underline, without any flattery, an ultimate quality of Allan Hutchinson (beyond his extreme kindness and great simplicity): his writing is both as clear and mind-blowing as sharp and direct as it can be imaginative and metaphorical. It is always captivating and pleasant to read. I presume French readers may quickly succumb to his charm. No doubt here is Allan Hutchinson's secret and strength it is hard to resist. In one word, his style.

Pr. Pierre Brunet
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A PROPOS D'ALLAN C. HUTCHINSON

Les *Critical Legal Studies* (CLS) sont-elles mortes ? On en parle aujourd'hui comme d'un courant disparu qui eut son heure de gloire le temps d'une brève décennie. Mais on oublie parfois un peu vite la masse de travaux, d'immense qualité, que ces prétendument brèves années ont permis de produire. Allan Hutchinson est de ces compagnons de route des CLS qui continuent de jeter sur le monde un regard distancié, ironique, absolument dépourvu de toute forme d'arrogance et certainement pas indifférent au monde qui l'entoure, bien au contraire ! Il observe, il scrute, il surveille, il note, il analyse, il déconstruit. Il reconstruit aussi. Il prend la mesure des efforts que les uns et les autres déploient afin de rationaliser l'irrationnel et de présenter comme une évidence ou une nécessité ce polythéisme de nos temps modernes qu'est le droit. Et à propos de masse, a-t-on une idée du nombre d'ouvrages et d'articles qu'Allan Hutchinson a publié ? Eu égard à ce que contiennent les bibliothèques juridiques françaises, il est difficile de s'en faire une idée précise. L'ensemble est aussi dense que varié. Car le droit tel que le voit Allan est loin de se réduire à quelques règles complexes qui seraient l'objet de commentaires savants, ni même à quelques cas exemplaires, ni non plus à quelques juges parfois érigés en icônes. Si Allan Hutchinson a consacré plusieurs volumes au droit de Common Law[5], ainsi qu'à des *case*s remarquables[6] ou encore à des « grands » juges[7] c'est moins par goût de la célébration qu'en vertu d'un point de vue théorique sur le droit parfaitement assumé. Comme il l'écrivait lui-même dans *Evolution and the Common Law*, « le droit est une activité rhétorique qui ne peut être appréciée à sa juste mesure que dans son contexte historique et politique ; tradition et transformation sont enfermées dans une relation qui les renforce mutuellement mais qui reste complètement contingente ». Le droit – et notamment le droit de *Common Law* – n'est donc pas le résultat d'un grand plan établi ; c'est un « perpétuel *work-in-progress* » aussi évolutif, hésitant et inductif que possible quand certains voudraient le voir figé, téléologique et parfaitement déductif. Il serait donc aussi erroné que vain de le penser en dehors et au-delà de la société puisqu'il est tout entier situé en elle et évolue avec elle. Dans ces conditions, on comprend que, quelque sept années plus tard, Allan Hutchinson soit parti à la recherche des qualités qui font d'un juge de *Common Law* un « grand juge ». Certainement la maîtrise de la technique juridique est-elle nécessaire. Mais elle est loin d'être suffisante. Comme il le dira d'une formule à la Holmes : « l'acte de juger est moins l'occasion d'opérations

[5] A. Hutchinson, *Evolution and the Common Law*, Cambridge University Press, 2005.
[6] A. Hutchinson, 2011, *op. cit.* ; A. Hutchinson, 2016*, op. cit*.
[7] A. Hutchinson, 2012, *op. cit*.

logiques qu'un exercice de logique opératoire »[8]. On sait qu'il aime aussi se référer à cette autre célèbre formule de Thurgood Marshall disant de lui-même qu'il « avait fait ce qu'il pouvait avec ce qu'il avait ». On trouve là une grande part de la doctrine de Hutchinson : le « bon » juriste ou le « grand » juge (de *Common Law*, certes…) n'est pas celui à qui tout réussit ni celui qui sait tout mais celui (ou celle) qui sent comment adapter le passé au présent – d'où le besoin inextinguible d'articuler un sens de la justice sociale et le goût de faire partager une vision politique. « Politique » : l'adjectif est enfin prononcé. Allan Hutchinson, on l'a dit, reste attaché au mot d'ordre des CLS : « law is politics ». Ce *leitmotiv* est, chez lui, loin d'être utilisé comme un étendard recouvrant un bric-à-brac obscur ou comme un slogan publicitaire trompeur. Il mérite d'ailleurs une courte explication.

Chacun des livres ou des textes de Allan Hutchinson est mû par le même besoin de prendre au sérieux les conséquences institutionnelles et politiques auxquelles une analyse critique du droit et du jugement peut conduire. Critique, cette analyse l'est en ce qu'elle rejette une conception du jugement comme un activité objective de pure application neutre des règles. Hutchinson ne se préoccupe pas non plus de la question du fondement du droit ou du jugement : juger est une pratique professionnelle spécifique, intimement liée au contexte social dans lequel elle est inscrite et s'avère toujours être une entreprise profondément idéologique et non une réflexion théorique. En tant que pratique, le jugement consiste en réalité à utiliser l'ancien pour faire du neuf. Dans ces conditions, le meilleur critère d'évaluation d'une telle pratique est lui-même politique et ne saurait consister en une recherche de la cohérence conceptuelle des réflexions théoriques auxquelles les juges se livrent. Et le droit est tout autant affaire de moralité politique que le jugement lui-même une affaire de choix personnels. En d'autres termes, le droit est profondément et complètement « politique » au sens tant personnel que partisan du terme. Et ce constat est, pour Hutchinson, une bonne raison de renforcer la justice sociale et non un obstacle à sa mise en œuvre : en faisant des choix idéologiques, les juges peuvent assumer leurs responsabilités démocratiques.

Dans ces conditions, le raisonnement juridique ne peut être vu comme une démonstration *more geometrical* mais bien plutôt comme une entreprise de justification d'une solution laquelle exprimera les préférences personnelles des juges. Doit-on pour autant penser les juges comme totalement libre de faire ce qu'ils veulent ? Là encore, c'est mal poser les termes du problème, car on suppose ce faisant, une alternative simpliste entre absence de liberté

[8] A. Hutchinson, 2000, *op. cit.*

et liberté totale. Or, la liberté dont bénéficient les juges est à la mesure de la justification qu'ils doivent fournir. Comme pour un jeu qui suppose certaines règles constitutives du jeu, le raisonnement juridique implique de jouer avec les règles elles-mêmes : tout l'art du jugement consiste à faire passer sa volonté subjective pour celle du droit objectif.

Si donc le droit est une pratique, et non un ensemble de règles posées à l'avance que l'on pourrait se contenter de décrire, la théorie du droit, de son côté, cherche non pas à dire comment les règles doivent être utilisées mais bien plutôt mettre au jour les présupposés des juges, éclairer leurs éventuelles contradictions et formuler quelques suggestions non au nom d'une grande vérité cachée que révèlerait la science du droit mais en vue d'apporter quelques améliorations à cette activité pratique qu'est le droit. Quelle place occupent alors les règles selon Hutchinson ? Sont-elles cette contrainte que les juges ne peuvent surmonter et à laquelle ils ne peuvent se soustraire, comme le pensent certains juristes formalistes ou sont-elles, au contraire, des jouets dont on pourrait même se passer comme le pensent parfois d'autres juristes antiformalistes ? On ne s'étonnera pas de lire chez Hutchinson que l'alternative est elle-même trompeuse : en même temps qu'elles donnent à la pratique du droit sa structure, les règles sont également l'objet même de cette pratique.

L'article que l'on va lire reprend plusieurs des thèses auxquelles Allan Hutchinson a consacré tant d'effort pour tenter de convaincre son auditoire et justifier sa position. Mais le mérite de cet article est aussi de restituer le cheminement d'un esprit aussi libre qu'inventif et de montrer que rien, au départ, ne le prédestinait à la très brillante carrière qui fut la sienne. S'il a certes très tôt fait preuve d'esprit critique, il n'était pas dit qu'il en vienne à rejoindre la voie des *Critical Legal Studies*. Qui aurait pu l'imaginer passer de Stammler à Duncan Kennedy ?

On voudrait enfin souligner, sans flagornerie aucune, une ultime qualité d'Allan Hutchinson (au-delà de son extrême gentillesse et de la grande simplicité qu'il sait introduire dans les rapports sociaux quotidiens) : son écriture est à la fois limpide et ébouriffante, aussi tranchante et directe qu'elle peut être imaginative et métaphorique. Elle est toujours captivante et agréable à suivre. Les lecteurs francophones pourraient fort bien succomber à son charme - et sans doute est-ce là tout le secret et toute la force d'Allan Hutchinson auxquels il est fort difficile de résister – en un mot, son style.

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INTRODUCTION

"We shall not cease from exploration
And the end of all exploring
Will be to arrive where we started
And know the place for the first time."

T.S. Eliot[9]

It has become a rather trite insight to concede that where one sets off in life can have a significant effect on where one ends up. Of course, there are many exceptions to this as people have achieved great success from the humblest of beginnings (and some have managed little success from the most privileged of backgrounds). However, there is still much wisdom and worth in tracing back one's life's journey in order to understood how one got from there to here, as it were. But, in doing so, it is also interesting to think about a certain reversal of that traditional sagacity - where we want to go might well have affected where we started. This insight might seem a little counter-intuitive, but it can be illuminating in thinking about the past in terms of the present and about why the journey from one to the other took the course that it did. For academics and especially self-proclaimed theorists, it seems a tantalizing prospect to take a stab at charting the intellectual route that has been travelled or, at least, appears to have been travelled.

Accordingly, after several decades in the jurisprudence business, I want to make what some will consider a vain and self-serving attempt at writing my own intellectual biography. For one who has insisted on the connection between the context of writing and the context of the writer, this seems to be the least that I can do[10]. So, mindful of the obvious pitfalls of imposing a dubious and inexorable rhyme and reason on a much more haphazard and serendipitous process, this essay offers itself as an honest-as-I-can-be and warts-and-all account of where I started, where I have been (with detours and trips down blind-alleys), and where I am now. After revisiting my graduate studies, I will draw out the themes that were beginning to emerge and that I developed and revised over the years. However, this is not simply an historical or indulgent piece. The overriding aim is to understand my present jurisprudential commitments in light of my past orientations and, as Eliot put it, to "know the place for the first time". And, of course, in undertaking that journey, I will likely be charting new paths forward and exploring fresh territory ahead.

[9] "Little Gidding", *Four Quartets*, 1943.
[10] See A. Hutchinson, *Taking a Stand: Politics, Prisons, and Football, in* A. Hutchinson, *Law, Life And Lore: It's Too Late To Stop Now,* Cambridge University Press, 2017.

I. GETTING STARTED

My undergraduate studies in Jurisprudence fell within the shadow of the Hart-Fuller debate. In many ways, this set the context and tone of much that we covered. It seemed very much that we had a simple choice – go with Hart's positivistic insistence on the separation of law and morality or go with Fuller's efforts to defend a morality of law. If expressed in those stark terms, I went with Hart. And would still do so today. After all, Hart was an English jurist and was building on the Austinian tradition that had dominated English jurisprudence for a century or more. Indeed, although taught by someone who fired up my interest in legal theory, the Jurisprudence course followed the pattern of much of my legal studies[11]. The plan and objective was to present law as a self-contained body of rules and principles to be learned and applied in a quasi-scientific manner. There was not only no expectation that students would develop their own views or stance on any issue, but also a strong understanding that students should not allow their personal views to intrude on their appreciation of law and its practical application. This was high formalism in pedagogic action.

But I never really accepted that the choice – positivism or naturalism? -- was so stark. To me, the question was the wrong question to ask and, therefore, was bound to lead to the wrong answers. If the issue was whether bad law could be law, the favoured response seemed obvious and apparent. Of course, there could be a valid legal system even if it plumbed immoral depths and contained immoral directives; history and experience (e.g., British Empire, South Africa, Nazi Germany, etc.) offered ample testimony to that. But this seemed such a limiting way of thinking about the relation between law and morality – an all-or-nothing stance was ill-suited to the complexities of jurisprudential scrutiny. A better way to approach the positivism/naturalism quandary was to think less about the analytical or philosophical identity of law, but more about how law and morality could be understood as related in more constructive and productive, if contingent ways. Although not its necessary corollary, positivism's exclusive focus on the "is" of law tended to downgrade or marginalize the important study of what law "ought" to be. For me, this worked to turn jurisprudence into more of a intellectual indulgence, much like completing crossword puzzles, than a compelling debate about the role of law in modern society and its possible contribution to a more just society.

[11] After an immature rebellion against schooling during my final year of high school, I blew off my A-levels and managed to enroll in an external degree of London University at Leicester Polytechnic. Grey Denham taught me Jurisprudence. Although more a practicing barrister than legal academic, he lit a spark in me for legal theory.

If the positivists carried the day over law's validity, they seemed to have little useful to contribute when it came to talking about law's substance as a matter of political morality. In this sense, the naturalists had much to commend them. Whether it was by way of the modest Fullerian proposals or the more full-blown Dworkinian ones, they addressed the morality of law and held it to a higher standard. Because they were mistaken in insisting that morality was a necessary condition of law's validity, this does not mean that the naturalists should be dismissed out of hand when it came to making proposals for the content or substance of law. In other words, there is no reason to throw out the moral baby with the naturalist bathwater – concern for the rules' content is vitally important, but simply not as a condition for their validity or identity as law.

So, for example, Fuller's eight "principles of legality" had much to recommend them -- (1) generality – the legal system should have general rules; (2) promulgation – laws should be published; (3) prospectivity – laws should be prospective; (4) clarity – laws should be clearly stated and understandable; (5) consistency – laws should be consistent with one another; (6) possibility – laws should not command the impossible; (7) constancy – laws should not be subject to constant change; and (8) congruence – consistency between the law as officially declared and as actually administered[12]. Any legal system would do well to adopt and maintain these institutional commitments as part of the Rule of Law. Of course, the historical record shows that, without more, there is no necessary or historical connection between respect for the Rule of Law and the achievement of a substantive just society[13]. Accordingly, a commitment to these "principles of legality" is a desirable, but not sufficient feature of good and just governance.

So, it seemed to me that, even though its virtues are considerable, the Rule of Law is more aptly thought about as much in terms of its functional institutional efficacy as its substantive political morality. In line with this, legislation that did not align with "the inner morality of law" was law but might be open to serious moral scrutiny and even political condemnation. The legitimacy of any legal system that ignored these principles was in serious moral jeopardy. For me, therefore, the Rule of Law seemed best and most realistically understood simply as a prized precept of good democratic governance. By respecting its dictates, a state might bring about more good than bad. Accordingly, the Rule of Law is neither

[12] L. Fuller, *The Morality of Law*, Yale University Press, 1969, pp. 46-91.
[13] See, for example, B. Tamanaha, *On The Rule Of Law: History, Politics, Theory*, Cambridge University Press, 2004.

the answer to all law's problems nor irrelevant to their resolution. However, those governments that respect Fuller's imperatives rather than ignore them are already displaying a concern for the citizenry that is neglected or ignored by more dictatorial or totalitarian regimes. Accordingly, reliance on the Rule of Law works best as a judicially-monitored principle of democratic aspiration, not as a condition of either legal validity or even constitutional soundness.

II. KANT DO THAT

After I completed my law degree, I went off to the Inns of Court to qualify as a barrister. My time at Gray's Inn was a mixed blessing. Although I found that the pomp and pomposity of the place reinforced my working-class sense of alienation from the law and a future career as a barrister, my studies there allowed me to become even more convinced that the traditional English style of lawyering and thinking about law was seriously wanting. The task set for us was simply to learn the law in as much procedural and practical detail as possible. The governing image of the "good lawyer" was that he (and, unfortunately, that was what most of us still were) served justice best by paying little heed to law's substantive content or its effect in any individual case; doing an advocate's job well was its own reward (along with a handsome chunk of remuneration). In so proceeding, my colleagues and myself could rest assured that we were making a sterling contribution to English justice whose general wisdom and overall beneficence was taken for granted despite any aberrational lapses or loopholes. In short, our Tennyson-like duty as young advocates was not to reason why, but simply to do and go home.

Clear that the Bar was not for me, I enrolled in an LL.M. in 1975 at Manchester University. My plan was to research and write a thesis in Jurisprudence that would allow me to explore the possibilities for getting beyond the Hart-Fuller debate in order to put legal theory on more secure and defensible footings. With enormous *chutzpah*, I drew on some passing references from my undergraduate studies about the work of European theorists. I decided that the Continent offered much greater and more fruitful prospects for jurisprudential progress than the relatively sterile and pinched preoccupations of Anglo-American legal thought. This brought me to the dense writings of the German jurist, Rudolph Stammler, and his neo-Kantian efforts to elaborate "natural law with a variable content". Even though I had never studied philosophy and knew not a word of German, I had the idea that this largely unknown and difficult source of jurisprudential wisdom, at least in England, might deliver a more sustaining

and compelling set of theoretical goods[14]. I suppose that, being slightly familiar with ideas of Karl Savigny and Hans Kelsen, I mistook pretension for sophistication and obscurity for rigour.

I began with great hope that Stammler would lead me out of what I considered to be the dead-end of much contemporary Anglo-American jurisprudential thinking in its efforts to establish the proper the relation between law and morality. His project appeared attractive to me because, although he drew upon a rarefied set of conceptual and analytic resources by way of a new and revised Kantianism, he eschewed the idea of there being a once-and-for-all answer to all life's problems. Indeed, one of the initial attractions of Stammler was his view that positivism was an insular and sterile notion that ignored the ultimate problems of law, morality and life. He compared a legal positivist to a caterpillar who "gnaws the leaf which alone it knows, without the least concern about the trunks and roots of the supporting tree"[15]. For me, this seemed a promising place to start on my further jurisprudential studies.

Stammler claimed to offer a critical theory of law that elucidated certain formal and objectively valid principles of justice whose application would vary from one socio-historical situation to another. It was his attempt to traverse the theoretical and the practical: he sought to integrate a positivist understanding of law into a broader and more fulfilling account of a just society. He recognised that the worlds of "is" and "ought" were separate. But he maintained that it was possible to construct a scientific methodology that, while distinct from each, could be used to bolster the other. As such, he developed an empirical analysis of the is-world (fact) and a teleological one of the ought-world (values). Armed with such an approach, he first identified the pure forms of law and justice; he then put the former in the service of the latter. While he accepted that legality and justice were not conceptually linked (and would, therefore, have been on Hart's side of the law-morality debate), he believed that law and morality could be united through a universally valid method. In a famous passage, he concluded that:

> "Hence old jurists were wrong when they sought for a determinate law of absolute significance. But they would have been on firm ground if they had striven

[14] In a stroke of outrageous good fortune, I was given as a supervisor a young lecturer, Andrew Ashworth. Only a couple of years older than me, he was primarily a criminal lawyer, but did some teaching on the Jurisprudence course. He must have thought that I was truly mad in both ambition and preparation. Yet he tolerated me and tried to keep me on the straight and narrow. He went on to great academic success and became the Vinerian Professor of Law at Oxford University. Over the years, we kept in touch and he has been a valued source of continuing support over my career.

[15] Rudolph Stammler, "Fundamental Tendencies in Modern Jurisprudence", *Michigan Law Review,* 1923, vol. 21, p. 864.

> for natural law with a changing content – that is, precepts of right and law which contain a theoretically just law under relations empirically conditioned."[16]

As I delved deeper and read more broadly, I quickly became disenchanted. His work was frustrating because, although his goal was laudable, his efforts to achieve it were unconvincing. Indeed, the more I struggled with Stammler's ideas, the more I realised that they were drawing upon a problematic philosophical tradition and headed in the wrong direction. His resort to the scientific pretensions of neo-Kantianism was very much a case of barking up the wrong tree. For him, the "empirically conditioned" could be handled and brought to heel by reliance on a rationalist method and by the guiding authority of right thinking. In short, for all his historicist protestations, Stammler insisted that the "natural" was eternally valid and ordered and took priority over the ephemeral content of history's disorder. For me, this was the crux of the problem, not the basis for its solution. Indeed, by the time, I completed the thesis in June 1978, I was sufficiently convinced of this that I included in its preface a bald statement of my own disenchantment:

> "Looking back, it is difficult to remember or understand why I became so intrigued by this dialectically difficult author whose juristic writings rely on a long-forgotten and obscure branch of German philosophy. Nevertheless, I was and resolved to attempt to penetrate the dialectic and linguistic confusion that shrouded Stammler's work and contributed to his relative obscurity. Although, in my preliminary studies, I took an openly and generously sympathetic view towards his ideas, I soon became disillusioned and realised that this confusion permeated the whole of [his] work and that only through such confusion was he able to attain any superficially satisfactory or attractive results. I am now convinced that Stammler's work is of historical value and significance only. In any work of a jurisprudential nature, I have come to realise that any attempt to take up an objective and neutral standpoint can never be entirely successful."

My thesis was an immature and middling effort; it was larded with too many references to others' writings and ideas. I was only half-way, at best, in the important process of getting out ahead of my sources and bringing them into my own thematic arguments. But that seems to be the fare and fate of many graduate theses. Nevertheless, I learned much from completing the thesis about how to do research, hang together ideas, and write decently. But, most importantly, it gave me a set of questions and queries that have conditioned and motivated my whole jurisprudential career[17]. Although my thesis dispensed with Stammler's work as a possible solution to jurisprudence's problems, I now realise that the claim that "any attempt to take up

[16] R. Stammler, *Economics And Law According To The Materialist Conception Of History*, 1896, p. 181.
[17] At the time, the critical work of Alf Ross was important here, even though his own emotivist or behaviourist account of justice is extreme and unconvincing. See A. Ross, *On Law and Justice,* Stevens & Sons, 1958. See also W. Friedmann, *Legal Theory*, Columbia University Press, 5th ed., 1967, p. 185.

an objective and neutral standpoint can never be entirely successful" has informed and sustained my critical project over the ensuing decades.

Indeed, I have hardened my stance and now insist that "no attempt to take up an objective and neutral standpoint can ever be successful". I have tried to be an uncompromising critic of the presumptuous assumption that it is either possible or desirable to achieve "the view from nowhere". The flight to abstraction is little more than a ruse or distraction. Unless one is prepared to defend the existence of some mystical universe, there is no place to be other than in the socio-historical world. Any "nowhere" is always influenced by and beholden to a "somebody" and, therefore, a "somewhere". If authors (including myself, of course) are standing anywhere, it is on a platform that they have built for themselves and that is hurtling along through history. Any sense of stability or groundedness is illusory. As it has become rather clichéd to note, if the world is supported by a giant turtle that is resting on another turtle, then "it is turtles all the way down"[18].

But my graduate studies also made me more alert to the fact that striving for the "view from nowhere" was not the only sleeveless errand that jurists were running. Related to this more basic failing is what I will call the "mind the gap" problem -- the effort to move seamlessly and impersonally between theory and practice. Or, to put it in more political terms, the unmet challenge of relating general principles to specific instances. Although there have been better and worse efforts to resolve the dilemma of moving from abstract emptiness to concrete application, these explanations are doomed to fall short. That being the case, it is important to understand, especially in law, why continuing efforts are being made to do this and why they persist in the face of an overwhelming pile of substantial evidence to the contrary.

III. LOOKING FOR NOWHERE

In the Age of Reason, there occurred the push to explore and discover new lands and places across the globe. At the same time, philosophers were also on a pioneering expedition. In contrast to their kindred geographical spirits, they were looking for "nowhere"[19]. Rather than risk death and suffering from multiple sources of existential peril, these theoretical explorers rarely left the comfortable sanctuary of their libraries and offices. But theirs was no less an intrepid endeavor, at least in the own minds. Seeking to overthrow the all-embracing dominion

[18] There are many sources for this tale. But a recent and unlikely source can be found in Justice Scalia's plurality opinion in *Rapanos v. United States*, 2006.
[19] I borrow the term from Thomas Nagel, but do not treat the idea in the same way that he does. See T. Nagel, *The View From Nowhere*, Oxford University Press, 1986.

of religion and superstition, they were looking to place men (as women did not really count in their reflections) at the centre of the world; man could be the author of his own fate, not merely a cipher in another's script. Ironically, they did this by looking to replace the belief in God as an architect and controller of the universe with the idea that rationality and truth could offer similar benefits and reassurances. Immanuel Kant was in the thick of this shift.

Some continued to seek an ideal place that would reveal the true nature of life and living; this was the lingering ambition of Plato and his followers. However, others, like Kant, were less sanguine about the prospects of such a venture. Instead, they settled for locating a method that would allow them to bestow on the products of rational inquiry a certain objective authority and lasting truth. Either way, the ambition was the same – to establish a set of enduring and abstract principles for living. A divine vision was traded in for "the view from nowhere". Of course, in many ways, this development was no less pernicious than the one it sought to displace. Maintaining that there are right methods that will produce right results, these philosophers claimed to speak in the authoritative accent of truth and objectivity. For the humble person, the authority of priest was to be replaced by that of philosophers. If the former held forth in the accent of divine authority, the latter declaimed in the voice of universal reason. In place of divine wisdom, human reason and rationality became the new gods. As Friedrich Nietzsche aphorized, "god is dead, but … there will perhaps be caves, for ages yet, in which his shadow will be shown."[20]

As such, philosophy's traditional task became to explain the world by understanding what the world is, what is our relationship to it, and how we can be sure that what we understand or know about the world is reliable. And, to do this, it was thought that philosophers must first excuse themselves from the real world in order to get a better and purer sense of what thought was all about. At the heart of this rationalist endeavor was the belief that it was possible to generate a grand theory that was able to distinguish the necessary from the contingent, the universal from the particular, and the conceptual from the concrete.

As I began my professorial career in Canada, this was an attractive idea. However, try as I might, I simply could not buy into it. Although I was embarking on my own personal voyage of discovery, I knew that I was leaving and perhaps escaping one "somewhere" - a very class-conscious England, especially in universities. But I never thought that coming to Toronto

[20] F. Nietzsche, *The Gay Science*, 1882 (transl. W. Kaufman, Vintage, 1974), Book III, aphorism #108. In his best-selling book *A Brief History of Times*, Stephen Hawking states that the discovery of why the universe exists will be equivalent to knowing "the mind of God".

was getting me nearer to "nowhere"; it was, for me, simply a better place to be – less interested in where you had been and more in where you were going. Of course, as with so much else, it was not a one-man expedition: I was supported and tutored along the way by the work of others, particularly Duncan Kennedy. As with comedy, in jurisprudence, timing is everything. I came of jurisprudential age when Critical Legal Studies was in its most potent phase. While I did not embrace all that was on offer, I was bolstered in my own critical and non-traditional approach by the writings and doings of this motley American crew as they took the educational and scholarly agenda of others to task. Indeed, I remain very much a CLS-er at heart, even if it is no longer an active movement[21].

Two significant philosophical interventions, one ancient and one modern, will suffice to illustrate this sense of how we are always "somewhere" even if some pretend that they are "nowhere". Abstract philosophers come no greater or larger than Plato. His signature move was to look beyond the horizons of contingent circumstances and strive for a more enduring realm of intellectual existence. However, even his life and times influenced his philosophy; his "view from nowhere" was very much anchored in his own "somewhere". He wrote what he did not in spite of, but in large part because of his local Greek context. His philosophy grew out of the need to find practical solutions to practical problems. Philosophy was intended to be a preparation for politics; it was not intended as an end in itself: he believed that philosophy must earn its keep in the house of politics. He was very much "a man of his times". Of course, to reduce the sweep of Plato's philosophy to the details of his life is as absurd as ignoring the context of his life in understanding his philosophical ideas. Although Plato's writings lend themselves easily to the interpretations that have come to dominate, it is Plato's followers who have turned those writings into the archetypical "view from nowhere" philosophy that it has become.

The three central hallmarks of the Platonic approach tie in neatly with the way he lived his life and the influence of his times upon him -- a retreat from the daily hustle and bustle of social living, the establishment of an elite corps of thinkers, and the practice of philosophy as a quasi-scientific undertaking. At its core, philosophy was construed as something of a mystical trek or religious pilgrimage. Those with the necessary intellectual aptitude and moral commitment would leave the world of ordinary people behind and ascend to some higher, more removed and abstract plane. Once the peak was achieved, the purer air of rationality would take

[21] See A. Hutchinson, *Critical Legal Studies*, Rowman & Littlefield, 1989.

hold; the disabling influences of social interests, commitments, fuzziness, history, culture, ideology and the like would be filtered out. Suitably refreshed and inspired, the surviving few would encounter "eternal nature not varying from generation and corruption" and be guided by the clear light of truth that would dispel the lingering shadows of conventional thinking. So enlightened, the philosophers might then carry back such infinite insights for the hoi polloi's edification and enlightenment - the more recalcitrant the problem, the higher the ascent; the more entrenched the controversy, the more transcendent the escape; and the more convoluted the possibilities, the purer the ambition.

This notion of philosophy would be comical, if it were not so commonplace over 2500 years later. These Platonic-like philosophers presumed to illuminate the transcendent features of humanity with the intellectual lightning of analytical insight. Plato's insistence on the primacy of the mathematical sciences - remember that the Academy's imposing welcome was "do not enter unless you know geometry" - has done as much harm as good. Philosophers have been intoxicated by their own rhetorical excesses and begun to believe that not only is there a truth about humanity, but also that it is a simple and universal one that is discoverable by those and only those with the appropriate analytical and abstract gifts. That Plato was an elitist cannot be doubted. He believed that a select group of sages (i.e., philosophers like him) should govern in accordance with a particular ideal form of social life as revealed and applied by reason; there was a perfect way of life that we must pursue and, having found it, we must live in accordance with it. Cast as an authority-figure, the philosopher could pretend to stand outside history and, from that privileged vantage-point, judge competing claims about the worth or truth of human practices, such as art, morals, science, religion, law, etc. Indeed, there is the whiff of the cult about Plato's philosophical pursuits; his writings leave the impression of a masonic or monastic order of mountaineering mystics.

The claim that the best way to provide solid and secure footings for life is by becoming more and more abstract is doubly mistaken. First, there are no solid and secure philosophical footings for life that are not themselves part of the very social and historical debate that they are intended to ground and underwrite: there is no escape from the messy and contingent facts of social living. And, secondly, insofar as it is possible to think critically about life, it cannot be done by escaping its concrete and contextual circumstances: life is a practical enterprise and theory is simply one and only one way of undertaking that enterprise. Those that argue differently or claim to have hit upon universal truths about life, law or whatever, no matter how successful they are or how emulated their methods are, have passed off a practical triumph as a

theoretical victory. This does not undermine their worldly success, but simply checks their other-worldly vanity. Although I did always accept it, their views warrant scrutiny and perhaps allegiance, but not because they are objective or universal in origin and content.

A more modern example of the "view from nowhere" tendency can be found in the influential work of John Rawls (and, by extension, Ronald Dworkin). He does not simply put out a proposal for making society more just, but offers a full-blown defence of it as being objectively and apolitically validated. Indeed, in my thesis, I took aim at his Kantian-like methodological strategy whereby any proffered principles of justice will be mandated by people's rational choice. To achieve this, Rawls resorts to the idea of people being placed in the "original position" behind a "veil of ignorance": people will be stripped down to their basic moral and noumenal selves with appreciation of the basic facts of social life, but no knowledge of their own social position or status. The upshot of this is the celebrated two-part account of justice that Rawls believes would be agreed to by most rational people [22].

However, the problem is that Rawls's principles of justice reflect his own political aspirations and demand only a modest overhaul of existing social condition in American society. The "view from nowhere" is very much "somewhere". After his grand and abstract detour through abstract philosophy, he comes out much at the place he started – a spruced-up version of the 1964 Democratic Party's political platform of liberal progressivism. Of course, I appreciate Rawls's use of "reflective equilibrium" as an effort to validate his outcome. This epistemic device calls for a to-and-fro deliberative process: moral practices/instincts and theoretical principles are brought into temporary balance through adjustment and modification. The obvious limitation with this way of proceeding is that extant practices/insights are given ethical weight in the justificatory method simply by virtue of their present existence and acceptance; there is no critical threshold to be crossed before they are taken seriously as valid or credible ethical resources[23]. As such, Rawls's theory of justice is less a "view from nowhere", but more a sophisticated defence of the "view from somewhere".

Before turning to how this mind-set continues to haunt legal philosophy, I want to offer some important cautions and caveats. First, I am not suggesting that any effort to nurture sophisticated skills will not depend on developing generalisations that can be used as operating

[22] J. Rawls, *A Theory of Justice,* Oxford University Press, 2nd ed., 1999, pp. 251-64, 34-40.
[23] See N. Daniels, *Justice and Justification: Reflective Equilibrium in Theory and Practice,* Cambridge University Press, 1996, pp. 21-46. Of course, the question of how people's political instincts and, as Rawls put it, "sense of justice" arise and change remain a mystery; individuals with similar experiences and backgrounds can develop very different moral compasses.

guidelines for practical implementation. Understood in this way, there is an important difference between generalising and theorise. Whereas generalising is inevitable and functions as a revisable way of coping with the bewildering barrage of facts and experiences, theorise is an effort to offer a complete, integrated account of what a practice can and should comprise. Instead, a rejection of the "view from nowhere" recommends that the pressing question of how people should live or think about life is not a methodological puzzle of abstract dimensions, but a substantive challenge of historical proportions.

Secondly, none of this means that, having rejected strong objectivity, I think that everything is subjective. This is a silly view. First, the reliance on a dichotomy between "objectivity" and "subjectivity" is cramping and problematic; it perpetuates the very problems that it is meant to resolve. Released from the debilitating effects of the objective/subjective framework, I suggest that there can be degrees of judgment and detachment that put some distance between an observer and their personal feelings or values. This is not the "view from nowhere": it is part of, but not entirely hostage to a "somewhere". Such a stance does not render all knowledge illusory, turn all truths into falsehoods, throw all order into chaos, or reveal all objectivity as sham. Rather than engage in a fruitless search for the "view from nowhere", philosophers can accept that they are part of the local and historical experience of which they try to make sense. As one uncompromising critic noted, "there is no room for moral theory as something which is more philosophical and less committed than moral deliberation, and which is not simply an account of our customs and styles of justification, criticism, protest, revolt, conversion, and resolution"[24]. This is a noble, if more modest undertaking.

Thirdly, a demonstration that some philosophers' conclusions are not as universal or absolute as they claim does mean that we can simply ignore their ideas. While it robs them of their claimed authority as objective truths, their proposals must still be judged as another contingent proposal for making sense of the world and its transformative possibilities. The loss of transcendental authority is no loss at all because there never were any such constraints in the first place. Rather than waste valuable energy in intellectual grandstanding, they should come down from their mountain tops and deal with more down-to-earth problems, such as unemployment, racism, poverty, and the like; they should stop looking for justificatory height in order to attain moral depth. If there is general agreement on the problems, then more time can be spent on their practical resolution than on pseudo-disputes about philosophical niceties.

[24] A. Baier, *Postures of The Mind,* University of Minnesota Press, 1985, p. 232.

If there is disagreement, it will not help much to take time out and argue about abstract notions of truth and objectivity. Even if there was an agreement about such matters, it has no necessary consequences for the more crucial efforts to improve the quality of people's lives. Instead, it is more productive to unpack and identify what is shared and to work to persuade each other how best to go forward as part of a common commitment to improve society.

IV. JURISTIC EVASIONS

So what has all this got to do with the more mundane world of lawyers and judges? The answer is an emphatic "lots". As I settled into the academic milieu, I began to gain a fuller of appreciation of the lengths that colleagues were willing to go to defend and justify the traditional project of demonstrating that law and jurisprudence had a separate logic and independent domain that was properly fenced off from other disciplinary and ideological sites. This ambition was particularly acute the year that I arrived as full professor in Canada. The *Charter of Rights and Freedoms* was introduced in April 1982. It put the work of courts even more at the centre of the constitutional compact; they now had the authority to strike down legislation that offended the document's political substance, as interpreted by the judges themselves, of course. As well as empowering courts, these interventions also conferred enormous power on those academics who saw their role to be advisors and apologists for the courts as objective and neutral arbiters. The advent of the *Charter* was a boon to my own jurisprudential project. Somewhat perversely, as I now recognise, my academic career has much to be thankful for to the *Charter*: it provided more grist for the critical mill than anyone could ever wish for[25]. The worlds of lawyers and judges remained very much in thrall to the philosophical mind-set that sought to find and substantiate the "view from nowhere".

Although contemporary lawyers are more pragmatic and sceptical in their sensibilities, they operate in and gain professional prestige from the influential sphere of the judicial function. In both cases, the approach taken to their tasks is heavily affected by legal philosophers. As much as any other sub-section of the philosophers' guild, jurists have drunk the Kool-Aid. Despite their protestations of modesty and practicality, they insist on maintaining that there is some "view from nowhere" or, at least, in more recent times, some "view that is not here, but on the road to nowhere". What is found there is touted as being able to provide meaningful guidance through an available methodology that can inform their work, insulate

[25] See A. Hutchinson, "The Politics of Constitutional Law: A Critical Approach", *in* P. Oliver, P. Macklem, N. Des Rosiers (eds.), *The Oxford Handbook of the Canadian Constitution,* Oxford University Press, 2017.

them from charges of improper political or moral partiality, and relieve them of the personal responsibility for decisions made and judgments rendered. The closer to nowhere that can be reached, the more dependable and sturdier the outcomes reached[26].

Moreover, these theories about what judges are doing or are supposed to be doing influence what judges do or think that they are doing. However, the link between theories of adjudication and adjudication itself is contentious and problematic; there seems a constant toing-and-froing between claims about whether theories of adjudication are descriptive, prescriptive or a baffling mix of both. However, although somewhat extravagant, Keynes's trenchant observations (about economists) are not far from the point when it comes to the relation between jurists and judges: "madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back"[27]. Of course, many judges deny such a cosy or influential dependency, but the connection is by no means imaginary. Less philosophical and more pragmatic, judges are fellow travellers, albeit in the rear, with their jurisprudential colleagues on the road to "nowhere".

Judges and lawyers translate the search for the "view from nowhere" into the position that law, not judicial values or politics, is the source and underwriter of their judicial opinions. In this rendering, "nowhere" becomes not-where-they-are. Law is viewed as a relatively independent body of norms and argumentative techniques that can be accessed and relied upon to guide and validate decisions. In the same way that philosophers seek to place some methodological distance between their own views and those that have universal or impersonal warrants, so do lawyers and judges. When lawyers do law, they think of themselves as engaged in a process that is objective and rational; they do not stand on their own two feet within an extant socio-political situation, but claim to be transported to some terrain that is distinctively separate from themselves and that context. However, on closer inspection, it turns out that, like philosophers, they are caught within the same circular process – where they end up is the same place or very close to where they started. Like Rudolph Stammler and his neo-Kantian brethren, judges and jurists travel long distances, but arrive safely back home where they started.

Of course, as philosophers have moderated some of their more extravagant claims since Plato's time, so lawyers and judges have toned down the idea that law is entirely its own universe and has its own special rationality à la Coke or Blackstone. Instead, they settle for a

[26] The most celebrated example of this tradition, albeit in a low theoretical key is P. Hogg, *Constitutional Law of Canada*, Carswell, 5th ed., 2010.
[27] J.M. Keynes, *The General Theory of Employment, Interest And Money*, Palgrave Macmillan, 1936, p. 383.

more modest stance that concedes that there is some seepage from politics into law. The most common position is that, in so-called hard cases, judges will inevitably have to stray into the ideological fray and allow political values to inform their legal analysis. However, the traditional stance has been that such a resort to ideology is and should not be either personal or partisan. Judges are not left entirely to their own devices and should not simply legislate their own political preferences. There are a variety of interpretive theories on hand – originalism, literalism, purposivism, dialogism, etc. -- that recommend that judges can safely bridge the gap between law and ideology so that the law is applied and developed according to relatively neutral and objective criteria. The standard move is to concede that "law is … deeply and thoroughly political …, but not a matter of personal and partisan politics"[28].

The seductive appeal of this approach is that, by claiming that a favoured interpretive way of proceeding has a secure theoretical foundation, then the outcomes reached will be seen to trump all competing judicial performances that lack such a secure theoretical base – law (or, at least, legal theory) will be seen to determine and vouchsafe decisions, not ideology. "Theory" (or, at least, a successful one) is seen as something that is unsullied by partisan politics; it is thought to gain its political traction from the fact that it offers an accurate, detached and reliable account of a particular phenomenon that can claim some institutional authority because it is not compromised by ideological influences. Despite the popularity of this jurisprudential technique, it is by no means established or clear that theory has such another worldly authority in providing an epistemological warrant for judicial decision-making. Judges rarely, if ever, reach decisions that do not square generally with their sense of justice. The epistemological dimension (i.e., what is the correct methodology to access the true meaning of law?) is intertwined with the ideological dimension (i.e., what political interests and values are promoted by a particular interpretive methodology?). Two prominent and influential examples will suffice to make this point – the juristic work of Ronald Dworkin and the judicial craftsmanship of Brian Dickson, both leaders in their respective fields.

The prolific Dworkin developed and defended a "left liberal" theory of justice that placed an egalitarian account of freedom as its core. He presented this not as some personal preference, but as the result of a rigorous process of deduction from first principles that had objective and enduring merit. When it came to law, he developed a critique of judicial decisions, particularly in the American constitutional tradition, in line with that theory of justice. However

[28] R. Dworkin, *A Matter of Principle*, Oxford University Press, 1985, p. 146.

– and this is the kicker – he did not propose that some decisions were good and some decisions were bad because of their fit with his account of justice, but because the Constitution itself demanded such outcomes. In effect, constitutional law and adjudication were not simply best read in terms of his account of liberal equality, but were tantamount to what the constitution mandated if understood rationally and objectively: judges' decisions that took a different approach were not simply bad law, but invalid law[29]. Dworkin's constitution was not only his preferred constitution, but was *the* constitution. While many might like (or dislike) Dworkin's proposed reading of the constitution, it defies any reasonable belief that constitutional law would perfectly align with one theorist's vision of justice as a matter of law. In a manner of speaking, for Dworkin, his "view from nowhere" was squarely located in his own study.

Chief Justice Brain Dickson took a similar, if more modest approach to his judicial task. A middle-of-road liberal who moved further away from the law's conservative side over the decades, the Chief Justice offered and defended an approach to constitutional law that eschewed a legalistic stance. In particular, he relied upon a purposive and generous reading of the Canadian Charter that grounded a large and liberal understanding of individual rights. Whether he was dealing with the Rule of Law or social improvements generally, he turned (or "twisted", depending on your political leanings) the law to advance his own liberal sense of justice. While it would be mistaken to pretend that he had a full-blown theory of justice in the style of a Dworkin or Rawls, Dickson was considered a great judge in many people's eyes not in spite of his liberal values and normative commitments, but because of them. Wherever his decisions went or the law took him, he always seemed to end up back home in the same place with "a large and liberal interpretation" of the law[30]. For him, law was to be put in service to an account of both law and justice that had a decidedly Dicksonian slant to it.

While there is no doubt that politics and ideology are major drivers of judicial decisions, as Chief Justice Dickson's career reveals, it is mistaken to imagine that a judge's politics map directly onto that of a simple political ideology, liberal or conservative, let alone that of a contemporary political party. Both abstract political principle and partisan political posturing are in the judicial mix; they inform judges' thinking in important and indistinct ways. Moreover, these ideological predispositions do not easily or straightforwardly cash-out in some of the complex issues that present themselves for decision in courts -- civil procedure, state rights,

[29] See, for example, R. Dworkin, *Freedom's Law,* Harvard University Press, 1996. For a more philosophical defence of his theory of law and justice, See *Justice For Hedgehogs*, Harvard University Press, 2011.
[30] R. Sharpe, K. Roach, *B. Dickson: A Judge's Journey*, Toronto University Press, 2003.

cabinet authority, administrative tribunals, and even free speech. A person's ideology is not a template for resolving difficult moral or political issues, but a framework or an orientation for thinking about and through them. Further, that ideology can shift and change over time; judges are influenced and affected by the work they do as much as the work they do is influenced and affected by who they are.

V. MIND THE GAP

In perhaps too dogmatic a fashion, I saw politics in every judgment and at every turn. As befitted my approach to most things, I was headstrong and unyielding in the claim that "law is politics". However, the more that I became immersed in legal doctrine, the more that I began to appreciate that vast stretches of law were not necessarily riven with complete indeterminacy and in the service of bad politics. I turned down the rhetorical heat a little in order to increase the analytical light; I recognised that the critical beam worked best with a dimmer switch, not only an on/off switch. This resulted in what I now saw as a strengthening of my critical stance, not a dilution of it. So I moved off the idea that jurists and/or judges were involved in a grand and devious Machiavellian scheme to pull the wool over people's eyes (although I do still maintain that some get perilously close to doing exactly that). Like Stammler in legal philosophy, most are committed to making a serious effort to do their job, be it juristic or judicial, in good faith[31]. But, as is well-known, the road to hell is paved with good intentions.

Despite their putative good ambitions, jurists and judges cannot pull off the feat of demonstrating that the answers that they give to concrete and specific problems are dictated or derived inexorably from either first philosophical principles or the ruling legal norms. Looked at systemically, it is apparent that there are a range of legal principles and rules that push and pull in different directions: no one principle or rule can be isolated or fixed as being the only governing rule without more. It is not that they are necessarily indeterminate in character, but that all legal norms can become indeterminate in contingent contexts and circumstances. Moreover, there is the unavoidable challenge of "minding the gap". Despite their best efforts, judges and jurists are unable to trace a single or authoritative path from general principle to specific applications – there is always a definite gap between practical achievement and

[31] See the development from A. Hutchinson, *Dwelling on The Threshold: Critical Essays On Modern Legal Thought,* Carswell, 1988 to *A Walk In The Park: Toward An Informal Account Of Legal Interpretation*, Cambridge University Press, 2016.

theoretical ambition. The space in which politics takes hold can be narrowed down, but never done away with.

Although I am not a particular admirer of Charles Fried's work (because he is too much of a political conservative and doctrinal apologist for my liking), he does offer a nice way of capturing the predicament and reality of judging. In a bastardised form that suits my purposes, he states that:

> "The picture I have, then, is of [law] proposing an elaborate structure of arguments and considerations which descend from on high but stop some twenty feet above the ground. It is the peculiar task of [the judge] to complete this structure of ideals and values, to bring it down to earth; to complete it so that it is seated firmly and concretely... The lofty [legal] edifice does not determine what the last twenty feet are, yet if the legal foundation is to support the whole, then ideals and values must constrain, limit, inform, and inspire the foundation."[32]

This seems about right. Legal principles, rules and standards can only get you so far; they must be supplemented by the judge's "ideals and values" to bridge that gap between general norms and specific circumstances. This does not mean that judges act in an arbitrary or irrational fashion, only that these "ideals and values" cannot be explained or justified by resort to any detached and objective methodology. This, of course, is what accounts for the indeterminate character of law and adjudication: the personal equation can never be entirely eliminated in favour of some self-executing legal logic or determinate rationality. In this way of thinking about law and adjudication, law and ideology are not so much separate and competing fields that pull in competing and occasionally contradictory directions. Rather, each infiltrates and informs the other to the extent that it is no longer sensible or convincing to talk about law and ideology or their determinate and structured interaction. There is only law-and-ideology as the basis for and understanding of judicial decision-making.

When I read many legal judgments, I very often have the familiar and frustrating experience that I am reading a faux-thriller or potboiler. There is often an elaborate account of the different legal norms in play and how they have been utilized by the rival lawyers to advance their own position. While there may be hints and intimations of where the judgment is heading, the plot frequently thickens and develops into something of a cliffhanger as to what the result of applying the law will be. Indeed, on occasion, one might be kept in suspense until the very last paragraph of the judgment. This way of proceeding leaves me with the distinct impression

[32] C. Fried, "The Artificial Reason of the Law or: What Lawyers Know", *Texas Law Review*, 1981, vol. 60, p. 57. I substitute 'law' for philosophy'. Also Fried ends his analogy with the line that "the law really is an independent, distinct part of the structure of value." Obviously, that is not my sense of things.

that the outcome could have gone either way and that there is no necessary or persuasive connection between the legal arguments offered and the result arrived at. This is all by way of saying that the gap between doctrine and decision cannot be leapt over or filled by one and only one telling argument; there are always too many options for judges to choose from and convincingly explain why the law as opposed to their version of it has carried the day.

Examples of this abound. One fertile doctrinal area is the Supreme Court's recent efforts to explain and apply when there is and is not a duty of care in operation. The three-part test – is the relationship already recognised? is there foreseeability and proximity? and are there residual and limiting policy considerations? - is easily laid out in general terms. However, efforts to explicate these notions further and to apply them to particular facts are baffling. For instance, in the leading case of *Cooper v. Hobart*, Chief Justice McLachlin's attempts to flesh out the crucial meaning of "proximity" create even more confusion in the name of clarification[33]. This is further muddied by reference to the different kinds of substantive policies that are to be taken into account at different stages in the overall analysis. At the end of all this, the application of these guidelines to the particular facts at hand is surprising and counter-intuitive, to say the least. It is not that I am suggesting that the Court got it wrong as a matter of law; that would be to misunderstand my whole line of critique. Instead, it is that there is no way that the Court can get it right in the sense of resting a decision on one distinct and necessary legal argument that supercedes and trumps all others. That is because there is none.

Another area is administrative law. In a very recent decision, the judges of the Supreme Court managed to capture neatly the inescapable gap between adherence to general principles and their specific application. The question at issue was the vexed one of the appropriate standard of review to be applied to an arbitrator's decision – correctness or reasonableness[34]. All the judges agreed on the general doctrinal structure to be worked with and within, but they disagreed completely over the standard to be applied and, even where they agreed, they disagreed on how one standard or another should be applied to the circumstances at hand. In terms of both principle and application, therefore, the judges were all over the adjudicative map. Of course, if this is the situation among sitting Supreme Court judges, what hope is there in identifying clearly and applying consistently the law for other judges, lawyers, arbitrators educators and law students, let alone ordinary citizens?

[33] *Cooper v. Hobart*, [2001] 3 SCR 537. Another example exhibiting the same vertiginous and inconclusive sense of analysis is *Childs v. Desormeaux*, [2006] 1 SCR 643.
[34] See *Dunsmuir v. New Brunswick*, [2008] SCC 9.

A majority held that the reasonableness standard "necessarily" applied in the circumstances and that the arbitrator's decision was reasonable[35]. In a judgment that concurred in the result, Justices Brown and Rowe insisted that it ought to be the correctness standard that was applied to the arbitrator's jurisdiction and that he had erred, on this threshold matter. In regard to other matters in the case, they maintained that a reasonableness standard was appropriate and that he did act reasonably. Finally, in a strong dissent, Justice Cote insisted that the correctness standard also applied. However, she concluded the arbitrator was not only incorrect, but also unreasonable. In short, in seeking to confront the gap between doctrine and decision, the judges were at sixes and sevens. As such, rather than allay concerns about the difficulty of closing the gap between theory and practice, they combined to highlight its unavoidable and persistent character for those seeking to understand and follow the law.

So, in light of such characteristic performances, I remain confident that, like Stammler and his philosophical ilk, judges are unable to move seamlessly between theory and practice; they are destined to fall short in their efforts to resolve the dilemma of abstract emptiness and concrete application. Of course, the need to keep trying to achieve this impossible task is mandated by the precarious position in which judges have placed themselves. It may be one thing for political theorists or jurisprudential critics to offer a personalized view of justice, but it is perceived to be an entirely different thing for judges to do so. The judiciary's felt need for legitimacy is made to hinge on the very claim that, in a non-trivial way, it is the law that directs and controls their decisions. In a democracy, it is supposed to be about the Rule of Law, not the Rule of Five. Importantly, they insist that the law does not change in line with the individuals who occupy the bench on any particular day. If there is to be change, it must be generated and validated by something other than the changing judicial personnel and their different "ideals and values". For good and bad, the law is what the judges say it is. And what they say it is depends on who the judges that are speaking are – the law, it is them.

CONCLUSION

Of course, I both have and have not ended up in the same place that I began. I have stayed generally true to my opening gambit that "in any work of a jurisprudential nature, … any attempt to take up an objective and neutral standpoint can never be entirely successful". However, after much "exploration", while I have "arrived where I started", I believe that I have developed and modified that critical stance to such an extent that I might now "know the place

[35] *Quebec (Attorney General) v. Guerin*, [2017] SCC 42 at §. 31.

for the first time". And one of the things that I am certain about is that there is no "view from nowhere" or any place that even vaguely approximates to it; any postulated "nowhere" is a very much part of the view from somewhere. To paraphrase one astute scientist, the footprint that we find on the future shores of the unknown will be our own[36]. Although some will consider this a cause for disappointment and even anguish, I embrace this idea as being something to be cherished. In particular, it means that judges and jurists can no longer abdicate personal responsibility for what they recommend or propose as a just path to follow. It is (or, at least, should be) no longer acceptable for them to claim that "theory" or the "law" made them do it. As is fitting in a society that claims to be democratic in spirit and substance, this leads to more, not less accountability and more, not less opportunity to craft our own collective fate.

I do not offer these fragments and insights about "standpoint" as compromising some integrated, let alone harmonious whole that can be passed off as a grand theory of law or justice. This would be a stark contradiction on my own terms. Indeed, unlike many jurists and judges, I make no apology for not trying to conceal or validate my "view from somewhere" behind some grand façade of theorise or methodology. Too many jurists and judges are a little like the Wizard of Oz; they project and maintain a fearsome image of philosophical power and legitimacy. But we need to abandon that act and become more like Dorothy's undaunted dog, Toto. When he pulled back the heavy curtain that hid the Wizard, there was revealed an ordinary middle-aged humbug of a man who had no special powers or insights; his dubious authority depended on others' naïve suspension of critical disbelief. I glimpsed that fact back in 1978 when I completed my thesis. Today, I realise that there was much more to that critical position than I appreciated then. I presume to suggest that I have managed to fill out and justify that possibility of "much more".

[36] A. Eddington, *Space, Time and Gravitation: An Outline of The General Relativity Theory,* Cambridge University Press, 1920, p. 220.

RETHINKING TRADE LAW IN AN ERA OF TRUMP AND BREXIT

Frank Garcia*

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Abstract

International trade and economic globalization are in crisis. In the U.S. and elsewhere, current regimes like NAFTA and the EU, and trade deals like the TTIP and the TPP, have become targets for the political backlash against trade and its larger context, economic globalization. Brexit and the 2016 U.S. election remind us that many feel betrayed by current trade policies, that free trade is being imposed on them at their cost but for others' benefit.

At the heart of this crisis, however, there are as always opportunities. First, we have an opportunity to return to trade's roots in ***consent****. Trade is nothing more or less than the economic bargains we agree to, and the rules we agree on to protect, support and facilitate these bargains. However, by this standard much of what passes today for trade is not really trade at all but something else: coercion, exploitation, or worse. Second, we have an opportunity to look below the surface of contemporary events, where deeper underlying trends point towards the early days of a larger, more inclusive set of socioeconomic relationships we can call global market society.*

These two lines of investigation themselves converge into the present inquiry: what kind of trade regulation does a global market society need in order to flourish? How is that different from conventional, contemporary "trade" agreements? And how do we support the most vulnerable workers and others marginalized by economic globalization in the process of

collectively pursuing these economic and social opportunities? If the heart of trade is consensual economic exchange, then this has ramifications throughout the entire social framework we use to recognize, support, protect and facilitate consensual economic exchanges.

Résumé

Le commerce international et la mondialisation économique sont en crise. Aux États-Unis et ailleurs, les régimes actuels, comme l'ALENA et l'UE, et les accords commerciaux comme le TTIP et le TPP, sont devenus des cibles de la réaction politique contre le commerce et son contexte plus large, la mondialisation économique. Le Brexit et les élections américaines de 2016 nous rappellent que beaucoup se sentent trahis par les politiques commerciales actuelles, que le libre-échange leur est imposé à leurs dépens, mais pour le bénéfice des autres.

Mais au cœur de cette crise, il y a toujours des opportunités. Premièrement, nous avons l'occasion de revenir aux racines du commerce au travers du ***consentement****. Le commerce n'est, en quelque sorte, rien de plus que les opportunités économiques que nous acceptons et les règles sur lesquelles nous nous entendons pour protéger, soutenir et faciliter ces opportunités. Cependant, selon cette norme, une grande partie de ce qui passe aujourd'hui pour du commerce n'est pas vraiment du tout du commerce mais quelque chose d'autre : la coercition, l'exploitation, voire pire. Deuxièmement, nous avons l'occasion de regarder sous la surface des événements contemporains, où des tendances sous-jacentes plus profondes indiquent les premiers jours d'un ensemble plus vaste et plus inclusif de relations socioéconomiques que nous pouvons appeler la société de marché mondiale.*

Ces deux axes d'investigation convergent eux-mêmes vers la présente réflexion : de quel type de réglementation commerciale une société de marché mondiale a-t-elle besoin pour prospérer ? En quoi cela diffère-t-il des accords "commerciaux" conventionnels et contemporains ? Et comment pouvons-nous soutenir les travailleurs les plus vulnérables et les autres personnes marginalisées par la mondialisation économique dans le processus de recherche collective de ces opportunités économiques et sociales ? Si l'échange économique consensuel est au cœur du commerce, cela a des répercussions sur l'ensemble du cadre social que nous utilisons pour reconnaître, soutenir, protéger et faciliter les échanges économiques consensuels. .

ABOUT FRANK GARCIA

Frank J. Garcia, professor at Boston College Law School, is the author of several books including the now famous "Global Justice and International Economic Law: Three Takes" (Cambridge University Press). At Boston College, he teaches and writes in the areas of globalization and the global justice debates, global business law and international legal theory. He also leads various projects in the field of International Investment Law, including the BC Law-PUC Working Group on Trade & Investment Law Reform and a Boston College-based research collaborative on Third-Party Funding in International Investment Arbitration. Since 2015, at the Sorbonne law school, he has been a visiting scholar giving talks and teaching to the Master II students in Anglo-American law directed by Professor Sophie Robin-Olivier and to the Master II cohort specializing in Global business law and Governance - including students from partner institutions City University of Hong Kong, Columbia and Melbourne law schools. He also was an inspiration to the JD/LLM partnership with Boston College offering degree exchange opportunities to postgraduate students on both sides of the Atlantic.

It was a rewarding moment for Sorbonne Law to host Professor Garcia and attend to his 2017 Sorbonne public lecture "Rethinking International Trade Law in an Era of Trump and Brexit". As a trade expert, he explained how the U.S., current regimes like NAFTA and the EU, and future trade deals like the TTIP and the TPP, have become targets for the political backlash against trade and its larger context, economic globalization. He reminded us that Brexit and the 2016 U.S. election suggest that many of us are feeling betrayed by current trade policy, and to respond fully we must address that betrayal. For Professor Garcia, one must take advantage of this opportunity to look below the surface of current events and discern deeper lines of convergence, towards an emerging global market society rather than a return to the economic Dark Ages. He like no other offered to step back and re-examine what trade is really all about: nothing more or less than the economic bargains we agree to, and the rules we agree on to protect and support those bargains.

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À PROPOS DE FRANK GARCIA

Frank J. Garcia, professeur à la Boston College Law School, est l'auteur de plusieurs ouvrages dont le désormais célèbre « Global Justice and International Economic Law : Three Takes » (Cambridge University Press). Au Boston College, il enseigne et écrit dans les domaines de la mondialisation et des débats sur la justice internationale, du droit commercial international et de la théorie du droit international. Il dirige également divers projets dans le domaine du droit de l'investissement international, notamment le BC Law-PUC Working Group on Trade & Investment Law Reform et une collaboration de recherche du Boston College sur le financement par des tiers dans l'arbitrage international en matière d'investissement. Depuis 2015, il est professeur invité de l'École de droit de la Sorbonne où il donne des conférences et enseigne aux étudiants du Master II de droit anglo-américain dirigé par le Professeur Sophie Robin-Olivier ainsi qu'aux étudiants du Master II spécialisé en droit des affaires et gouvernance mondiale. Il a également été une source d'inspiration pour le partenariat JD/LLM avec le Boston College qui offre des possibilités d'échange de diplômes aux étudiants de troisième cycle des deux côtés de l'Atlantique.

Ce fut un moment gratifiant pour l'École de droit de la Sorbonne d'accueillir le Professeur Garcia et d'assister à sa conférence publique de 2017 à la Sorbonne « Rethinking International Trade Law in an Era of Trump and Brexit ». Il a expliqué comment les États-Unis, au travers des régimes actuels comme l'ALENA et l'UE, et les futurs accords commerciaux comme le TTIP et le TPP, sont devenus des cibles pour la réaction politique contre le commerce et son contexte plus large, la mondialisation de l'économie. Il nous a rappelé que Brexit et les élections américaines de 2016 nous laissent pour la plupart d'entre nous le sentiment d'avoir été trahis par la politique commerciale actuelle. Pour le professeur Garcia, il faut profiter de cette occasion pour regarder sous la surface de l'actualité et discerner des lignes de convergence plus profondes, vers une société de marché mondiale émergente plutôt qu'un retour à l'âge des ténèbres économiques. Il a ainsi proposé de prendre du recul et de réexaminer ce qu'est réellement le commerce : rien de plus ou de moins que les opportunités économiques sur lesquelles nous nous entendons, et les règles sur lesquelles nous nous entendons pour protéger et soutenir ces opportunités.

Sa contribution à la Sorbonne Student Law Review - Revue juridique des étudiants de la Sorbonne converge vers une question fondamentale : de quel type de commerce une société de marché mondiale a-t-elle besoin pour s'épanouir ? Et comment soutenons-nous les travailleurs les plus vulnérables et les autres marginalisés par la mondialisation économique ?

Nous aimons penser que le professeur Garcia est un auteur pionnier et ouvert d'esprit, et nous sommes profondément d'accord avec lui qu'il n'y a jamais eu un moment plus important pour réexaminer la nature et la réglementation du commerce international, vers une compréhension plus profonde de ses possibilités progressives.

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INTRODUCTION

As I write this, the effects of the Brexit referendum and the Trump election (also, in its own way, a referendum on a half-century of internationalist and neoliberal US policies at home and abroad) are revealing themselves in a slow-motion drama with many repercussions. Within trade, the economic and political integrity of the EU has been seriously challenged, and US trade policy is falling into deeper and deeper disarray, as current or future agreements like NAFTA, KORUS, the TPP and TTIP become targets for a political backlash against trade and its larger context, economic globalization.

Every crisis, however, brings with it an opportunity. For trade policy, provided we can get below the surface waves of current trade politics, the opportunity may be to re-think what trade law is about. By trade law, I mean not just the law of inter-state trade relations—the GATT-WTO system—but international economic law (IEL) most broadly: trade, investment, finance, banking law—in short, the regulatory structure for the global economy. We have thus far pursued a kind of economic globalization that has not only left many countries behind—that is not new news, that has been going on for decades—but also marginalized and undermined the economic lives of many within our own societies. Through these *referenda* the British Midlands and the US heartland have woken the rest of us up to the fact that, at least in their view (and there is more than a kernel of truth in it), current global economic policies and their domestic effects have impoverished and disenfranchised them as they have in the developing world.

How can we respond to all of this most effectively? In this essay I will offer three recommendations. First, that we seize this chance to re-think trade law by recovering trade law's roots in consensual economic exchange. Second, that we accept that the rising inequality and the distributive effects of IEL *within* societies, not just between societies, are all problems of international economic law, and not "someone else's problem". Finally, that in responding to the crisis politically and legally we look as far ahead as possible and prepare ourselves for the next 50 years, rather than try to restore the status quo of the last 50 years, which would only set us up for the next crisis.

In my view, all of this means understanding that beneath the roiled surface water of today's crisis we may in fact be seeing the emergence of a global market society. The question for international economic law, both at the heart of the crisis and as the way out, is this: what *kind* of global market society do we want to build?

I. TRADE AND CONSENT

If we want to fully understand and address the roots of the current crisis as a kind of reactive economic populism against contemporary global economic structures and their related domestic policies[1], we need to better understand the nature of trade law today as a powerful engine for implementing economic policies throughout a global market regulation framework. In my view, this means returning to trade's roots in consensual exchange.

I.A. Trade as Consensual Exchanges

Trade transactions are all about the expectation of a mutual exchange—they are mutual in nature, involving a *bilateral* exchange of economic value[2]. We can experience this in both a positive and a negative dimension. The simultaneous face-to-face barter transaction is perhaps the paradigmatic experience and image of trade and embodies this bi-laterality in its positive form: I hand you something of value to you, and in return you hand me something of value to me.

In contrast, theft is a type of unilateral transaction, helpful in clarifying the nature of trade. A theft involves an *involuntary* transfer of value. It could be said that a theft is not a trade because it is unilateral, but a simple thought experiment clarifies that this is not the essence of the distinction. A thief in the paradigmatic "your money or your life" scenario could give you a cheap watch in return for your wallet, but it would still be a theft despite its bilateral quality. We would not call this a trade, nor would we call it even a coerced exchange.

Thus trade must also be voluntary, which introduces the key notion of consent—both parties must consent to the transaction or there is some element of theft or violence. Return for a moment to the example of the paradigmatic barter transaction I began this section with, and now imagine a third person, standing behind one of the two exchange parties, holding a gun at her back to drive the exchange forward. Our understanding of the nature of the moment changes entirely—whatever it is, it is not trade.

The voluntariness of bilateral exchange can be understood through the centrality of the idea of bargaining in contract law, an institution "central to our social and legal systems, both as reality and as metaphor"[3] and "long…recognized as one of the most powerful statements of

[1] On the role of economic populism in the Trump election, K. Himes, "The State of our Union", *Theological Studies*, 2017, vol. 78, issue 1, p. 147.
[2] The following account is drawn from F. Garcia, *Consent and Trade: Trading Freely in a Global Market*, Cambridge University Press, forthcoming 2018.
[3] M. Eisenberg, "The Bargain Principle and its Limits", *Harvard Law Review*, 1982, vol. 95, p. 741.

the nature of freedom in our society"[4]. The notion of consensual bargain is foundational to the field of contract law[5]. If we look at the core justifications under which a contract is declared void or voidable—mistake, duress, or fraud—we see that they reflect the absence of or an impingement upon bargained-for consent[6].

I.B. B. What is Not Trade, and Why

Based on this preliminary inquiry, I would now like to turn to an examination of several alternatives to trade (i.e., other economic interactions that we do not consider trade), in order to paint a fuller picture of what trade is and what it is not.

I.B.1. Predation

As Simone Weil writes, one cannot seek consent where there is no power of refusal[7]. At the private-party level, contract law recognizes this difference through the concept of duress, a defense to the finding of a contractual obligation. In other words, where one party's formal consent to a contract was not freely given, but was given under some form of pressure, the law will not recognize this as a meeting of minds and will not find a contract.

Thus through contract law's exploration of this subtle terrain of consent and economic relationships, we have as a society identified a space short of the criminal law of theft, within which the absence of consent nevertheless has important consequences. Within that space, we withhold the conceptual apparatus of contractual obligation and enforcement because we have determined that such apparent agreements are not in fact contracts—deals, bargains, promises—despite the formal appearance of consent.

I.B.2. Coercion

Short of predation, we can recognize a subtler weakening of consent, involving what we call coercion. Coercion occurs when a transaction is mutual, and in some basic way consensual, but something weakens the fullness or freedom of the consent, short of outright theft or duress[8].

[4] T. Rakoff, "Contracts of Adhesion: An Essay in Reconstruction", *Harvard Law Review*, 1983, vol. 96, pp. 1173, 1235.
[5] Eisenberg, *op. cit.,* p. 741.
[6] See *infra* notes 26–30 and accompanying text.
[7] S. Weil, "Justice and Human Society" *in* S. Weil, Eric O. Springsted ed., 1998, p. 123.
[8] See generally Robert Hale's groundbreaking essay, "Coercion and Distribution in a Supposedly Non-Coercive State", *Political Science Quarterly*, 1923, vol. 38, n.3, pp. 470-494 (even voluntary market exchanges can be coercive in the presence of disparities in bargaining power, resources or knowledge). I am indebted to my friend Jeffrey Dunoff for introducing me to Hale's work.

The experience of coercion often involves a restriction on the range of possible bargains that the parties are free, or not free, to propose and consider. To take the paradigmatic case, if I want the flat-screen plasma television from a traditional "big-box" store, I have to surrender my right to judicial resolution of any disputes, accepting the non-negotiable arbitration clause embedded in the form contract[9]. Thus, coercion can presuppose an inequality in bargaining power, where one party works to limit the range of possibilities "on the table," so to speak. The resulting agreement will in an important sense be voluntary, yet in an equally important sense will be motivated less by a desire to do the act in question, than by "a desire to escape a more disagreeable alternative"[10].

As with duress, contract law also wrestles with this issue and reflects this distinction between coerced and voluntary agreements[11]. As Robert Hale points out, since coercion is a market reality independent of the law, the law cannot eliminate coercion – at most, it can change the terms of coercion for better or worse[12]. For this reason, contract law provides particular protections for consumers and those with weaker bargaining power when they deal in what the law calls "adhesion contracts": contracts with commercial parties or manufacturers who possess greater bargaining power, and which are presented in a "take it or leave it" manner[13]. In such cases, courts will look carefully before assuming the consumer consented to the adverse terms of the contract, despite the fact that, in all other material respects, it looks as if a contract was voluntarily entered into.

I.B.3. Exploitation

One dimension common to both theft and coercion is that the party violating our consent, or pressuring us for it, is present within the transaction, so to speak, as is the offending behavior. What about a situation in which the violation or pressure have occurred outside the four corners of the transaction, yet throw a profound shadow over the resulting bargain, the range of choices, and the decision to consent or not? In considering this possibility, we are uncovering the nature of exploitation.

[9] See T. Rakoff, *op. cit.*, pp. 1265–66 (discussing the problem of the enforceability of arbitration clauses in contracts of adhesion).
[10] R. Hale, *op. cit.*, p. 472.
[11] On the difficult, but possible, task of drawing a line between coerced consent and no consent at all, see D. Beyleveld, R. Brownsword, *Consent in the Law*, Hart Publishing, 2007, pp. 345–46.
[12] R. Hale, *op. cit.,* pp. 493–94.
[13] See T. Rakoff, *op. cit.*, (re-conceptualizing the law of adhesion contracts).

To get at the nature of the experience of exploitation, theorists have used a range of approaches, focusing either on the fairness of the transaction or its degrading or abusive quality[14]. What the various accounts share in common is the notion of unfair advantage-taking[15]. This occurs when there is a flaw in the circumstances of the transaction—Risse and Wollner call it a moral defect in a distribution and its history[16]—that, whether due to an injustice in the background conditions, a vulnerability[17], a rights violation, or some other form of disrespect, results in one apparently free party seemingly inexplicably accepting a bargain that is not *fair*, but without evidence of direct coercion[18]. We take the party benefitting from the flaw to be exploiting the situation, and the vulnerable party as the exploited party.

When applied to trade, this suggests that where a party benefits from a defect in the background conditions, say, or a unique economic vulnerability, to the detriment of the other party, the resulting exchanges are not trade, but rather exploitation. The offeree's consent was granted within a restricted range of choices, a restriction that worked in favor of the offeror to permit a bargain that would otherwise be considered unfair. Thus any consent happens in response to an unfair advantage-taking that is essential to the "deal" having been struck at all.

I.C. Trade as Public Transactions: Consensual Flows and Patterns of Exchange

What does this account of consent in trade say about what we call trade between states? We can begin with the notion of trade between states as a transnational pattern of private exchanges, often (but not necessarily) facilitated by state action (here is one place where notions of trade and "free trade" touch). At a purely economic level, we can measure commercial flows of various kinds between states and call those "trade"—certainly, this is at least an element of what we call "trade" between states (i.e., commercial flows seen as patterns of exchange)[19].

[14] See M. Zwolinski, "Structural Exploitation", *Social Philosophy and Policy*, 2012, vol.29, issue 1, pp. 154, 157.
[15] A. Wertheimer, *Exploitation*, Princeton University Press, 1996; M. Risse, G. Wollner, "Three Images of Trade: On the Place of Trade in a Theory of Global Justice", *Moral Philosophy and Politics* 2014, vol. 1, issue 2, pp. 201, 214; M. Zwolinski, *op. cit.*
[16] M. Risse, G. Wollner, *op. cit.*, p. 215.
[17] Vulnerability is a useful term to describe the situation that makes one ripe for exploitation, whether an individual or a state. See R. Goodin, "Exploiting a Situation and Exploiting a Person", *in Modern Theories of Exploitation*, Sage Publishing, 1987, p. 166.
[18] M. Zwolinski, *op. cit.*, pp. 158–61.
[19] It is certainly a key element of economic globalization. See David Held (dir.), *The Global Transformations Reader: An Introduction to the Globalization Debate*, Polity Press, 2nd ed. 2003, p. 67 ("flows facilitated by infrastructure" a key dimension of globalization). This raises an important question: if we conclude that mere economic flows are not enough to count as trade, then much of what is currently constituting economic globalization and justified publicly as "global trade" may not in fact be trade but something else. This ominous

But we can draw on the same thought experiments regarding theft and private exchange above to dig a bit deeper into patterns of exchange between states, as we did for exchanges between individuals.

I.C.1. Theft and Economic Flows Between States

Imagine if we came newly onto the scene and witnessed goods and commodity flows between states – we could be justified in thinking this to be trade, understood as patterns of exchange of economic value. Imagine further, however, that we then discovered that one state had recently conquered the other, and the flows we could see and measure were in actuality the spoils of war. Would we then be as confident that this was trade? I'm not so sure.

What I am exploring here is whether our sense of trade *versus* theft at the private level, is in some way equally characteristic of similar patterns of exchange at the public level between states, when goods are exchanged by force or as the result of the past exercise of force, or perhaps even the ongoing threat of force. We would not be inclined, I think, to consider such wealth extraction to be "trade," though the commercial flows themselves are undeniably essential to the relationship, whatever we may decide to call it.

My sense is that the analogy to theft in private relations holds here. In socioeconomic terms, the aggregate equivalent to theft—transactions which are not mutual and where consent is not present—can be called wealth extraction, plundering or predation; add a political element and we call it imperialism or colonialism[20]. In these cases, there is a pattern of economic benefit flowing from one party to the other, but it is not mutual in a meaningful sense, and most importantly, it is not consensual. Rather, the flow of economic benefit in these cases is achieved through power inequalities as expressed by economic or military force—there is no power of refusal[21].

I.C.2. Coercion and Economic Flows Between States

What if we came upon the same scene and discovered that in addition to the commercial flows we can see and measure, there was a treaty between the two states, calling itself a trade

possibility chimes with elements of the current globalization backlash. I will return to this point in the concluding chapter.

[20] For an interesting account of the wrongs of colonialism with respect to equality, reciprocity, agency and relationship, see generally L. Ypi, "What's Wrong with Colonialism", *Philosophy & Public Affairs*, 2013, vol. 41, issue 2, p. 158.

[21] *Ibid*. There remains the difficult issue of determining the limits of acceptable "influence" or persuasion between states (through forms of soft power, for example), which the discussion of coercion below only partly answers.

agreement, covering these commercial flows. Would this then assure us that what we are indeed in the presence of trade, given that the treaty was duly ratified, indicating at least formal consent? I'm not so sure. Consider if we dug further as before and discovered again that there had been an armed conflict between these states, that one state had won, and the victorious state had used its military advantage to compel the losing state sign an agreement formalizing a process of wealth extraction or "market opening".

The analogy to my earlier account of coercion between private parties seems valid here as well regarding forced agreement at the public level. States can coerce other states just as readily as individuals coerce other individuals. Coerced patterns of exchange between states seem just as much to be something other than trade, as coerced exchanges between individuals.

Private law's reflection on coercion within contracts suggests in the state trade situation that such a pattern of exchange is consensual in some important way, and yet nonconsensual in another important way. It seems too much to conclude that this is a theft, as we did with the examples of predation above. And yet, to say it is simply "trade" and go no further, also seems to miss the mark. Such a move would be akin to concluding under contract law that a coerced exchange is a contract, full stop, and ending our scrutiny of the bargain because there was in fact some degree of voluntary consent.

In the private law context, we have decided we need to go further, and so too between states[22]. Nevertheless, we—and the law—are uncomfortable with this ambiguity.

I.C.3. Exploitation and Economic Flows Between States

What about exploitation? Does the characterization of exploitation between private parties explored above also hold true at the public level? Consider again the same example of coming across a pattern of commercial flows between states that looks like trade and may even be carried out under an agreement calling itself a trade agreement. What if we discover that a few decades earlier the more powerful of the two states had taken active diplomatic and military steps to warn other powerful commercial states away from that hemisphere, declaring it to be uniquely the province of that powerful state, and used the resulting patterns of commercial dependence by the weaker states to negotiate commercial agreements in which the weaker states had little choice but to accept poor terms or even unilateral terms?

[22] See D. Lefkowitz, "The Legitimacy of International Law", *in Global Political Theory,* Polity, 1st ed., pp. 98, 108 (costs of non-agreement on the part of a weaker state may not be so severe as to render the agreement non-voluntary, yet still raise serious consent issues affecting the agreement's legitimacy).

Such a pattern maps in important ways onto the private experience of exploitation I characterized above as being something other than trade, despite the fact that it involves bilateral exchanges, perhaps even some negotiation and even a degree of consent which may even be formalized by a treaty[23]. Exploitation in transnational settings has increasingly become a subject of normative and legal reflection, no doubt due to the salience of such unequal economic relationships in many global contexts, such as capital and labor in foreign investment[24]. In the inter-state context, exploitation or unfair advantage-taking may take the form of a range of policies, structures and institutional behaviors, which for one reason or another result in a situation where a state accepts from another state a poorer bargain than it otherwise could have pursued but for the vulnerability of its circumstances.

Critically for our purposes, the negotiation of trade agreements themselves can be a form of structural exploitation—following Zwolinski's intuition, the trade agreement is not just an element in the background conditions for exploitation, it *is* the exploitation[25]. Moreover, the trade agreement can create the conditions for subsequent private exploitations of the citizens of the weaker state[26].

I.C.4. Theft, Coercion and Exploitation in Contemporary Trade Agreements

Contemporary trade practice furnishes many examples of what from a consent perspective does not appear to be trade at all, but can better be characterized as forms of theft, coercion or exploitation between states. I can only offer two examples here, one involving domestic law reform in the CAFTA agreement between the United States and the Central American States (including the Dominican Republic)[27] and the other market access in the US-Korea FTA or KORUS[28]. These illustrate vividly the non-trade dynamics which have

[23] See M. Risse, G. Wollner, *op. cit*., pp. 211–12 (noting that exploitation is a powerful concept for the analysis of trade because "[a] core aspect of exploitation is that it may occur even if everybody's fate is improved through the activity in question, and even if everybody participates voluntarily. Trade exhibits these features…").
[24] See generally M. Zwolinski, *op. cit*.
[25] *Ibid.* pp. 175–77. See M. Risse & G. Wollner, *op. cit*., p. 211 (noting that "States can take unfair advantage of each other. Bigger states can exploit their bargaining power in negotiations, bilaterally or within the WTO").
[26] I am thinking for example of a treaty whose market access provisions open an industry to unsustainable levels of competition, or at an unsustainably fast pace, for reasons that benefit the more powerful state. *See, e.g*., *ibid.* pp. 219–20 (discussing a Vrousalis' account of exploitation as domination for self-enrichment) ("Some economists argue that trade liberalization may, under certain circumstances, be detrimental to a country's prospects for growth and poverty alleviation (e.g. Rodrik 2007). Some such cases can be understood as exploitative. Powerful actors, states like the US or organizations like the WTO, that require particular institutional set-ups or the pursuit of specific trade and industrial policies detrimental to the prospects of weaker actors, engage in exploitation as domination.").
[27] Dominican Republic-Central America Free Trade Agreement, Costa Rica-Dom. Rep.-El Sal.-Guat.-Hond.-Nicar.-U.S., Aug. 5, 2004 [hereinafter CAFTA].
[28] U.S.-Korea Free Trade Agreement, Kor.-U.S, June 30, 2007 [hereinafter KORUS].

contributed to the widespread popular resentment of trade agreements and their domestic effects that we see today[29].

The CAFTA services chapter requires Costa Rica to undertake significant substantive revisions of its domestic agency and distribution law[30]. That this is even an agenda item for trade agreement negotiations already illustrates the powerful reach of trade policy today, with serious domestic implications. In this case, agency and distribution laws typically offer enhanced, judicially supervised protections for agents and distributors in the event of termination, as they are generally understood to be the weaker parties in such contracts and hence subject to exploitation[31]. The US had identified these rules, a source of frustration to US business, as a key goal for CAFTA reform[32]. The US aim was to weaken these protections for the benefit of foreign—in this case United States—principals.

The treaty requires Costa Rica to weaken its agency and distribution laws in a variety of ways, including mandating that termination with notice—but absent any breach of obligation—is nevertheless to be considered termination for just cause, thus waiving all rights of the agent or distributor to indemnification[33]. Most remarkably, all such contracts, even those in force at the time of ratification, would now be deemed subject to private arbitration unless expressly subject to litigation, even though under the old law access to Costa Rican courts could not be waived by contract even with explicit arbitration clauses[34].

The CAFTA treaty thus requires what is in essence a retroactive modification of any agency and distribution contracts then currently in force to submit the parties to arbitration, by creating the rebuttable presumption that where the contract is silent as to judicial settlement of disputes, such silence indicates an intention to settle any disputes by arbitration[35]. The CAFTA provision thus also retroactively amends the Costa Rican statute by creating a presumption that expressly contradicts the terms of the law then in force, in a way that contradicts what are likely

[29] For more examples, see F. Garcia, *op. cit*.
[30] See CAFTA, *op. cit*., at annex 11.13, § A, pts. 1–6 (mandating changes to Costa Rica's Law No. 6209, "Law for the Protection of the Representative of Foreign Companies").
[31] P. Perales Viscales, "The Good, the Bad and the Ugly in Distribution Contracts: Limitations of Party Autonomy in Arbitration?", *Penn State Journal of Law & International Affairs*, 2015, vol. 4, issue 1, pp. 213, 219.
[32] *Free Trade with Central America: Summary of the U.S.-Central American Free Trade Agreement*, Office of the U.S. Trade Representative (Dec. 17, 2003), https://ustr.gov/archive/Document_Library/Fact_Sheets/2003/Free_Trade_with_Central_America_Summary_of_the_US-Central_America_Free_Trade_Agreement.html (discussing dismantling distribution barriers that locked US firms into distributor arrangements).
[33] See D. Martinez, "At Termination, Independent Sales Reps are Anything But", *Latin American Law and Business Report*, 1999, vol. 7, issue 5, p. 19.
[34] *Ibid*.
[35] CAFTA, *op. cit*., at annex 11.13, § A, pt. 3.

to have been the reasonable assumptions of the contracting parties themselves under that regime[36]. Such a modification would under contract law be unenforceable as an example of duress, and which works a kind of theft against the party losing valuable rights without its consent[37].

This imposition of arbitration by the US in an asymmetric trade negotiation seems particularly opportunistic and unprincipled, given that under US domestic law the imposition of arbitration through contracts of adhesion is one ground for their unenforceability[38]. In other words, one of the places where private firms exercise their unequal bargaining power over consumers is by imposing arbitration instead of litigation, and US contract law typically rejects such provisions. It is ironic that the US is using a highly unequal treaty negotiation process to impose such measures on Costa Rican parties *as a class*, acting as an agent of the US manufacturers *as a class*, provisions that US courts themselves would be reluctant to enforce in parallel private law circumstances at home. This kind of coercion at the state level also results in duress or even theft (understood as the non-consensual stripping of a private party's valuable legal rights) with respect to private parties[39].

The prospect of CAFTA sparked huge protests in Costa Rica in 2007 in anticipation of a referendum on the treaty, the only referendum on CAFTA held by any CAFTA country, with protestors violently criticizing the treaty in terms eerily reminiscent of the terms we hear today in US economic populism to criticize US trade agreements[40]. The fact that only a slim majority of the 59% of eligible voters participating in the referendum voted in favor of the treaty, coupled with alleged irregularities in the campaign, meant that in this case the referendum failed to give legitimacy to the treaty or settle the issue of neoliberal integration for Costa Rica or anyone

[36] As one author puts it, the Costa Rican case reveals that even "mandatory" laws aimed at protecting the weaker party in such contracts are not enough, as they are not truly mandatory under the effects of the trade regime. P. Viscales, *op. cit*., pp. 239–41.
[37] See CAFTA, *op. cit*., at annex 11.13, § A, pt. 4.
[38] Although the Federal Arbitration Act favors the enforcement of arbitration agreements, they are still subject to challenges under state law principles of unconscionability. Generally, to be unenforceable a contract of adhesion must be both substantively and procedurally unconscionable. Given that under CAFTA arbitration may be implied by law, those agreements are arguably already procedurally unconscionable. Thus, if these were U.S. contracts, absent the unique imprimatur of federal law, their enforceability would depend solely on the ability of their substantive terms to withstand strict scrutiny. See generally T. Oehmke, J. Brovins, "The Arbitration Contract—Making It and Breaking It », *in American Jurisprudence Proof of Facts, Lawyers Cooperative Publishing*, 3rd ed, 2005, p. 83.
[39] As a further irony, were a state to engage in such a taking with regard to a foreign private party, it would almost certainly amount to a compensable expropriation under international investment law.
[40] J. McPhaul, *Huge Crowds in Costa Rica Protest US Pact*, Reuters (September 30, 2007), https://www.reuters.com/article/us-costarica-usa-protests-idUSN3023528720070930.

else[41]. In the end, all CAFTA states formally ratified the treaty—it was unlikely that Costa Rica or any such small economy would jeopardize the core trade liberalization benefits it urgently needs from a market such as the US, even when such domestic law reforms are imposed on them as a price. In this sense, CAFTA might even be considered an adhesion treaty[42].

In the case of the KORUS and market access, we see a slightly different pattern of outcomes, but the underlying dynamics seem quite similar. In the market access area, gaining better access to Korean agriculture was a top priority for the US, given its comparative advantage in agriculture[43]. However, and equally importantly, maintaining the viability of an admittedly less efficient agriculture sector was key to the Korean government, for reasons of rural unemployment, orderly adjustment, food sufficiency and social stability[44].

In this area the US achieved its objective, securing commitments liberalizing access in virtually all Korean agricultural sectors[45]. The exception was rice, long considered a national security and cultural identity product and therefore a unique product in Korean society[46]. This certainly represents an important success for Korea. However, for our purposes here, the key issue may be not so much that Korea managed to maintain its rice industry protections while CAFTA states could not (although that is noteworthy), but whether Korean producers, even in other sectors, got equivalent benefits in return for the rest of the liberalization commitments. It is always about the balance. Unfortunately, Korea did not achieve that balance. Other than rice, Korea failed to achieve any of its most important goals in agriculture, textiles, services and trade remedies[47].

As in Costa Rica, in Korea the signing of the KORUS and its subsequent introduction into Parliament for ratification provoked huge public protests and much criticism of the

[41] A. Breuer, "Costa Rica's 2007 Referendum on the Dominican Republic - Central American Free Trade Agreement (CAFTA-DR): Citizen Participation or Manipulation?", *Representation*, 2012, vol. 45, issue 4, p. 455.
[42] See A. Corbin, *Corbin on Contracts*, West Publishing Company, rev. ed. 1993, § 1.4 (noting the origin of the term 'adhesion contract' was the international law term for a treaty which states must accept or reject despite having no voice in formulating its provisions).
[43] Key U.S. goals necessary for Congressional consent included agriculture liberalization, addressing the imbalance in Korean auto exports into the United States, and the special treatment of Korea's outward processing zone or OP with North Korea, the Kaesong Industrial Complex. See also Y.-S. Lee, J. Lee, K. Sohn, "The United States-Korea Free Trade Agreement: Path to Common Economic Prosperity or False Promise", *East Asia Law Review*, 2011, vol. 6, issue 1, pp. 111, 115.
[44] *Ibid*. p. 135.
[45] *Ibid*. pp. 135–36.
[46] Multifunctionality refers to the idea that agriculture is more than just food, and can create non-commodity outputs. "*Multifunctionality, or Multifunctional Agriculture"*, OECD (Mar. 10, 2003), https://stats.oecd.org/glossary/detail.asp?ID=1699.
[47] See generally Y.-S. Lee et al. *op. cit*.; see also J. Schott, S. Bradford, T. Moll, « Negotiating the Korea-United States Free Trade Agreement », *Institute for International Economics*, 2006, available at https://piie.com/sites/default/files/publications/pb/pb06-4.pdf (reviewing the parties' negotiating goals).

government, including an opposition MP igniting a tear gas canister on the floor of Parliament to highlight widespread and vociferous opposition to the deal and to delay ratification[48]. Once again, the treaty was approved amidst allegations of surprise votes and procedural irregularities, and widespread public criticism of the domestic economic effects of the treaty were inadequate to stop it[49].

None of this is surprising when viewed as part of power politics between nations (though it may still be disappointing), but when viewed through the lens of consent, it suggests something other than trade is going on. Commentators suggest that in the end, the essential US role in Korean security, and increasing security pressures in the region, meant that Korea was not going to reject any trade bargain, no matter how lopsided[50]. Insofar as the essential US role in Korean security meant that Korea was not going to reject any trade bargain, no matter how lopsided, the US was arguably exploiting the security situation as a background condition.

Moreover, Korea has since discovered that the coercive dilemmas around trade do not end when the agreement is signed. At the time of this writing, the US has just announced that it has "successfully renegotiated" key provisions of KORUS that it felt unfairly burdened US manufacturers[51]. The Administration was able to do so after threatening to group South Korea into the steel and aluminum tariffs the US planned to impose predominantly on China[52]. By doing so, the Administration succeeded in reducing Korean auto exports into the US while securing larger import quotas into Korea for US cars, a US goal in the initial negotiations for KORUS which it had not met in the negotiations themselves[53]. Thus through this most recent

[48] H. Siddique, "South Korean MP Lets Off Tear Gas in Parliament", in *The Guardian* (Nov. 22, 2011, 8:51 AM), https://www.theguardian.com/world/2011/nov/22/south-korean-mp-lets-off-teargas.

[49] "South Korean Lawmakers Approve Korea-US Trade Deal", *Voice of America* (November 21, 2011), https://www.voanews.com/a/south-korean-lawmakers-approve-korea-us-trade-deal-134315453/148562.html

[50] *Ibid*.; Lee *et al.*, *op. cit*., p.153 (for Korea, an unbalanced agreement may not be sufficient reason not to conclude an FTA with the United States given its essential security role).

[51] White House Fact Sheets, "President Donald J. Trump is Fulfilling His Promise on The U.S.–Korea Free Agreement and on National Security", *The White House* (March 28, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-fulfilling-promise-u-s-korea-free-trade-agreement-national-security/.

[52] A. Rappeport, J. Tankersley, "Trump Gets First Major Trade Deal as South Korea Looks to Avoid Tariffs", *New York Times*, Mar. 27, 2018, at A7. Despite the threat to impose steel and aluminum tariffs on South Korea, there is some indication that South Korea would have been exempt from these tariffs as the United States cited national security concerns as the basis for imposing the tariffs and South Korea had previously been granted exemptions from national security concerns. J. Brinkley, "U.S.-S. Korea trade Pact Revision is Full of Holes", *Forbes* (Mar. 27, 2018, 3:30 PM), https://www.forbes.com/sites/johnbrinkley/2018/03/27/us-korea-fta-revision-is-full-of-holes/#304be1da20a3.

[53] The KORUS revisions extended U.S. tariffs on South Korean pickup trucks for 20 years, increased the quantity of U.S. automobile imports from 25,000 vehicles to 50,000 vehicles, and cut South Korean steel exports by 30 percent. S. Lester, "The First Trump Trade Deal: The KORUS Renegotiation May Be Complete", *International Economic Law and Policy Blog*, (Mar. 26, 2018, 8:23 AM), http://worldtradelaw.typepad.com/ielpblog/2018/03/the-first-trump-trade-deal-the-korus-renegotiation-may-be-complete.html.

coercive action, the US was able to revisit negotiations and secure concessions that Korea had resisted in the first place[54].

I.C.5. Summary

When these negotiation dynamics are considered through a consent analysis, they can be understood to illustrate a broader problem endemic in trade negotiations today[55]. Rather than being simply a (repeated) case of hard bargaining, trade negotiations carried out under conditions of such unequal bargaining power and against troubling background conditions have a built-in potential for coercion and exploitation. When these possibilities are acted on by stronger states, weaker states are compelled to negotiate bilateral and regional trade agreements that are inherently redistributive, further shifting power and resources from weaker states to stronger states[56].

When economic agreements between states work through coercive or exploitative dynamics instead of consensual trade, and are then forced through a referendum or ratification process in undemocratic or illegitimate ways, the social costs are long-term and serious. Over time, it is not surprising that this kind of "trade" results in the public and damaging resentments we see affecting global economic and political relationships today.

However, coercive or exploitative behavior between states and the democratic deficits of "Other" countries are only part of the problem we face today. Developed countries have on the whole grown quite accustomed to watching, from what is presumed a safe distance, these resentments as they play out in developing countries we trade with. Trump and Brexit have woken us up to the necessity of considering the effects of such agreements, coupled with our own political deficits, on key domestic constituencies *within* developed states. Inequality and the distributive effects of trade are not just problems between states, but within states as well, and contemporary trade policies are implicated.

II. ECONOMIC GLOBALIZATION AND DISTRIBUTIVE EFFECTS WITHIN STATES

To the extent that international economic law has focused on the issue of inequality, it has done so in terms of inequality between states. Largely overlooked has been the topic of

[54] In return, the U.S. promised to exempt South Korea from the steel tariffs targeted at China. A. Rappeport, J. Tankersley, *op. cit*.
[55] Joseph Stiglitz also highlights such dynamics as contributing to the problems facing globalization today. J. Stiglitz, *Making Globalization Work*, W.W. Norton & Company, 2007.
[56] T. Hale, D. Held, K. Young, *Gridlock: Why Global Cooperation is Failing When We Need It Most*, Polity, 1st ed., 2013, p. 162.

inequality within states and how international economic law has influenced that reality. From the perspective of international economic law, the inequality issue is closely entwined with the topics of colonialism and post-colonialism, the proper meaning of development, and globalization.

II.A. Inequality and International Economic Law

International economic law has undoubtedly contributed to the rise of inequality. We can see that key elements of the international economic law system favor the intensification of inequality at national and global levels. First, at the level of trade and investment flows, while trade has grown within this framework, and *may* decrease inequality in developing countries, such decreases come in part by *flattening* wages in the middle class; moreover, trade may be *increasing* inequality in developed countries by decreasing wages and shifting jobs at the bottom[57]. Similarly, foreign investment increases inequality in home and host countries, outbound by facilitating transfer of low-skill jobs from developed countries, increasing returns to capital; and inbound in developing countries by increasing the skill premium, a good thing in certain respects, but also un-equalizing, promoting new elites[58]. Thus, while trade openness is generally associated with lower inequality (though at some cost to absolute income levels), greater financial openness is associated with rising income inequality[59].

Technological change also has a well-understood effect on inequality, which is magnified through trade and investment channels. New technologies intensify inequality within countries by increasing skill premiums, substituting automation for human labor, and promoting non-traditional work. The effect of new technologies is particularly acute in developed economies, themselves ironically also the lead innovators, where new technologies have contributed to the destruction or offshoring of old jobs in traditional areas of employment[60]. As older, less-skilled work is destroyed or moved offshore, a premium is attached to higher-skilled labor. Technology thus helps deliver a larger share of income gains

[57] Era Dabla-Norris, K. Kochhar, N. Suphaphiphat, F. Ricka, E. Tsounta, "Causes and Consequences: of Income Inequality: A Global Perspective" *IMF discussion note*, 2015; B. Keeley, "Income Inequality: The Gap between Rich and Poor", *OECD Insight*, 2015, pp. 33–50.
[58]E. Dabla-Norris, K. Kochhar, N. Suphaphiphat, F. Ricka, E. Tsounta, *op. cit.*; *The World Bank, Development Goals in an Era of Demographic Change*, 2016, http://www.worldbank.org/en/publication/global-monitoring-report; B. Keeley, *op. cit*., p. 42.
[59] E. Dabla-Norris, K. Kochhar, N. Suphaphiphat, F. Ricka, E. Tsounta, *op. cit*., p. 23
[60] See (B. Keeley 2015, pp. 42, 50). The growing importance of skill-biased technological progress for growth and rising demand for higher skills will lead to continued polarization of the wage distribution.

to the owners of capital, and a smaller share to the people who work for them through a reduction in human labor[61].

Third, social regulation is often both more complex and less effective on a global level, and national regulation is under great pressure. To take just one example, the global structure for income taxation facilitates tax avoidance, which in turn depresses national budgets when states can least afford lost revenues in confronting inequality problems, among others[62]. At the ideological level, the dominant global regulatory ideology, neoliberalism, depresses national social welfare systems in both dominant and client states by labeling them either protectionist or unsustainable and then dismantling them, thereby exacerbating inequality and limiting the range of domestic policy tools through which to ameliorate it[63].

Finally, global inequality is having domestic political effects, intensifying the reactivity of domestic politics and further complicating our policies towards inequality and political reform[64]. One can see this in everything from the Euro crisis to Brexit to the reactionary nationalism of US, French, Hungarian, Polish and Austrian politics, to list only a few examples[65]. Global inequality thus creates unique political problems for domestic societies, when socio-economic resentments and migration pressures stoke nativism, xenophobia and reactive domestic politics.

This question of domestic politics brings us full circle again to the task of re-thinking trade law and economic globalization in the wake of Trump and Brexit. In particular, it connects to a further dimension of consent and trade revealed by the current crisis: the consensual domestic political bargains with vulnerable constituencies—the "country within the country"—

[61] See B. Keeley, *op. cit*., p. 42. The labor share has declined in nearly all OECD countries over the past 30 years and in two-thirds of low-and middle-income countries between 1995 and 2007. OXFAM, An Economy for the 1%: How Privilege and Power in the Economy Drive Extreme Inequality and how this can be Stopped", 2016, p. 12, https://d1tn3vj7xz9fdh.cloudfront.net/s3fs-public/file_attachments/bp210-economy-one-percent-tax-havens-180116-en_0.pdf. A declining labor share reflects the fact that improvements in productivity and growth in output do not translate into a proportional rise in earnings for workers, thereby severing the link between productivity and prosperity.

[62] OECD, OECD/G20 Base Erosion and Profit Shifting Project: Explanatory Statement, 2015; H. Ault, W. Schoen, S. Shay, "Base Erosion and Profit Shifting: A Roadmap for Reform", *Bulletin for International Taxation,* 2014, p. 275.

[63] See D. Kotz, T. McDonough, "Global Neoliberalism and the Contemporary Social Structure of Accumulation", *in Contemporary Capitalism and its Crises: Social Structure of Accumulation Theory for the 21st Century*, Cambridge University Press, 2010 (documenting the hollowing out of the modern welfare state under neoliberalism).

[64] See generally K. Lehman Schlozman, H.. Brady, S. Verba, *Citizen Voice in the New Gilded Age: Megaphones for a Few-Whispers for the Rest*, 2016, (unpublished manuscript) (on file with author).

[65] G. Aisch, A. Pearce, B. Rosseau, "How Far is Europe Swinging to the Right?", *New York Times*, Jul. 5, 2016, http://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html (graphically demonstrating the rise of nationalistic politics across Europe).

that undergird a polity's decision to pursue liberalized trade relations, and how our current domestic and global economic rules have betrayed that consensus.

II.B. The social contract of trade – vulnerable workers

This crisis affords us an important opportunity to consider whether we have allowed ourselves to believe we can pursue trade not only without consent abroad, but without meaningful consent at home as well. The crisis reminds us that our misunderstanding of the consensual nature of trade may have repercussions *within* our domestic societies as well as between trading partners.

Addressing this misunderstanding involves looking at the intersection of economic consent in trade and the political process of reaching consensus—meaning shared consent, not unanimity—on the pursuit of a free trade policy. We can call this intersection the social contract of trade[66].

II.B.1. The Social Contract of Trade

The social contract of trade involves the decisions we make as a society to pursue a free trade policy, and as part of those decisions, the commitments we make to vulnerable groups within our own society who are at risk when we undertake as a society to engage in free trade. It is grounded in what it means to consensually pursue a policy of free trade—transnational consensual exchanges—which for structural reasons having to do with national and global economies might nevertheless work to the temporary or permanent disadvantage of other members of our society. It thus includes the obligation to respect the political commitments made to secure consent to a free trade policy, in particular to compensate those within our polity who are vulnerable to trade's downside risks.

One important element in the social contract of trade, as I am using the term here, consists of the obligations we undertake towards these vulnerable workers to hold them free from harm, or more precisely, to ensure they are no worse off than they would have been had we not embarked on a free trade policy. This obligation has deep roots in liberal theory[67] and

[66] See F. Garcia, T. Meyer, "Restoring Trade's Social Contract", *Michigan Law Review Online*, 2017, vol. 116, pp. 78, 82 http://michiganlawreview.org/restoring-trades-social-contract/.

[67] Aaron James, for example, calls this the Duty of Collective Due Care, one of the three equitable principles he finds inherent in the collective social practice he calls mutual reliance on markets, or mutual market reliance for short. A. James, *Fairness in Practice: A Social Contract for a Global Economy*, Oxford University Press, 2012, pp. 17–18.

in the economic justifications for free trade[68], as well as in the consensual nature of trade itself. It follows from the consensual nature of trade that trade policy decisions should also reflect the consent of those on whose behalf such agreements will, at least formally speaking, be negotiated. Otherwise, a trade policy decision, altering as it must the balance of rights, opportunities and burdens trading parties will face, risks works a kind of theft, or nonconsensual economic extraction, on those subject to it if there has been no consensual process underlying it.

In particular, it is important that any promises made as a necessary part of securing a party's consent towards free trade be honored. In an advanced capitalist welfare society, a key site for investigating this relationship lies in the area of adjustment assistance for displaced workers. Adjustment assistance consists of a package of enhanced benefits that OECD and other governments offer to workers who have lost their jobs as a result of trade. It is designed to support displaced workers as they face unemployment or under-employment, and the re-training and relocation often necessary for them to rebuild their lives and their communities.

For many social welfare democracies, particularly in Europe, adjustment assistance is seen as part of the basic social contract of their form of the welfare state[69]. In the United States, trade adjustment assistance or TAA is explicitly linked to securing Congressional support for free trade negotiations[70], making it a kind of a special or specific social contract. In either case, how we deliver (or not) on our commitment to adjustment assistance following a decision to engage in trade is a key site for assessing the consensual nature of our trade agreements and trade policy, and for examining the fractured relationship between contemporary economic globalization and important constituencies within developed countries. I will take the US as my example.

[68] See F. Garcia, T. Meyer, *op. cit*., p. 82 (importance of domestic adjustment policies in fairly distributing gains from liberalized trade). See generally C. Aho, T. Bayard, "Costs and Benefits of Trade Adjustment Assistance", in *The Structure and Evolution of Recent U.S. Trade Policy*, University of Chicago, 1984, pp. 153, 157–60 (reviewing economic justifications for adjustment assistance).

[69] See J. F. Hornbeck, *Congressional. Research Service., CRS 7-7500, TAA and Its Role in U.S. Trade Policy*, 2013, pp. 1–3 (summarizing equity arguments); C. Aho, T. Bayard *op. cit*., pp. 154–57 (reviewing in depth equity-based arguments for TAA in the context of either a general or trade-specific social contract between government and workers).

[70] This dates back to the Kennedy Administration. See F. Garcia, T. Meyer, *op. cit*., p. 85. See generally S. Park, "Bridging the Global Governance Gap: Reforming the Law of Trade Adjustment", *Georgetown Journal of International Law*, 2012, vol. 43, issue 3, p. 797.

II.B.2. Betraying the Social Contract of Trade

The current political crisis in the US has revealed that many view the process of formulating a consensus for trade as broken, and the commitment to deliver meaningful trade adjustment assistance as having been violated[71]. Within the US, we have overlooked, neglected or actively betrayed the consent of the most vulnerable within our own polity, as we have pursued "trade" agreements that have similarly ignored, coerced or violated the consent of our trading partners. We have undermined consent both at home and abroad.

When we look at the current terms of TAA in the US, it is sadly too apparent that we have in fact defaulted on the core promise of effective trade adjustment assistance for those whose jobs are at risk due to our decision to pursue trade. When TAA was first created in 1962, benefits were limited to training programs to promote re-employment, and some income support during the training period. Eligibility under the Act was also much more limited than under contemporary TAA programs, and many of the initial applications were denied[72]. By 1974, when Congress next revisited trade policy, support within organized labor for TAA had collapsed, the unions dismissing TAA as nothing more than "burial insurance"[73]. In the 1980s, the Reagan administration proposed abolishing TAA completely, and the program lapsed briefly[74].

Since then, the renewal of TAA, such as it is, has always been tied to new rounds of trade negotiations. Congress has renewed or extended TAA each time it has granted the president trade promotion authority (TPA) or approved a new round of trade agreements, reinforcing the connection between decisions to trade and decisions to compensate at-risk workers, but underscoring its political vulnerability as well[75]. Once TPA is granted or the agreements ratified, TAA funding has tended to diminish, further reinforcing the many program defects inherent in the way TAA has been designed, and leading to widespread acknowledgment that TAA as currently constituted is a failure[76].

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[71] See F. Garcia, T. Meyer, *op. cit*., pp. 82–84 (citing 2016 Presidential campaign poll data).
[72] The first application accepted for benefits did not take place until November 1969. E. Kapstein, "Trade Liberalization and the Politics of Trade Adjustment Assistance", *International Labour Review*, 1998, vol. 137, issue 4, pp. 501, 508.
[73] *Ibid.* p. 509.
[74] J.-F. Hornbeck, *op. cit*., p. 9.
[75] J.-F. Hornbeck, *op. cit*., pp. 10–12.
[76] See F. Garcia, T. Meyer, *op. cit.,* p 87; see also T. Meyer, "Saving the Political Consensus in Favor of Free Trade", *Vanderbilt Law Review*, 2017, vol. 70, p. 985.

II.B.3. Restoring Trade's Social Contract

Fortunately, there are ways to honor the social contract of trade and repair the consensual basis of trade as a domestic policy. This means, however, directly addressing the domestic distributive effects of trade as *part* of trade policy, and not as a political add-on. While I will use the US and its TAA program as an example I suspect that, *mutatis mutandis,* the same basic issues and challenges are present outside the US in many other trading states as well, as the crises in Europe suggest, and that therefore these suggestions may have a wider possible field of application[77].

The core element in any attempt to restore the social contract of trade is to ensure first that any promises made in the process of securing consent for trade are in fact honored. This means, in the US, that we should reform how trade adjustment assistance is designed and delivered in the US[78]. The key to a successful TAA program is worker retraining towards sustainable re-employment. By both increasing investment in worker retraining as a percentage of GDP and offering a more effective training and apprenticeship process that better matches training to market needs, rewards early intervention (sometimes before unemployment even occurs), brings adequate relocation assistance and offers more thorough and effective job counseling, a significant number of trade-displaced workers can find alternative meaningful employment, as Europe has demonstrated[79].

The bottom line is that a well-designed and well-executed TAA program would fulfill the social contract of trade both formally and substantively[80]. However, meeting this obligation would require a deeper and more consistent commitment to funding, and here we find TAA's most spectacular failure. Overall, there has been no effort to link funding levels to data on levels of demand or need for the program[81]. As a result, TAA funding has consistently been set too low for program needs, and has fluctuated due to political trends rather than political

[77] See F. Garcia, T. Meyer, *op. cit*., pp. 84–85.
[78] These suggestions also have implications for other countries as they consider how best to design effective compensation programs. Tim Meyer has argued that for this reason the commitment to undertake domestic adjustment policies should itself be internationalized in the form of commitments within trade agreements, thus binding all parties to a collective decision to support the social contract of trade throughout the free trade zone they collectively create. T. Meyer, *op. cit*.
[79] These successful cases are being studied widely and are starting to be emulated in other OECD countries. See OECD, *Connecting People with Jobs: The Labour Market, Activation Policies and Disadvantaged Workers in Slovenia*, 2016, pp. 116–118.
[80] J. Nie, E. Struby, "Would Active Labor Market Policies Help Combat High U.S. Unemployment?", *Federal Reserve Bank of Kansas City,* Third Quarter, 2011, pp. 43, 48, 51–54.
[81] S. Park*, op. cit.,* pp. 847–848.

commitments[82]. Moreover, in comparative terms the United States is consistently near the bottom of all OECD countries in terms of adjustment spending[83]. This means that restoring trade's social contract must address funding, and not simply program design and delivery, a subject I will return to at the conclusion of this essay.

But before I do, we must enlarge the frame of our inquiry. Restoring trade's social contract requires fundamental changes to domestic trade and welfare policy, beyond even the terms of labor adjustment assistance. However, these distributive effects and the social policies to address them are not confined within any one state, and in fact are part of the larger story to be understood in the current crisis: that we are in the throes of developing a global market and therefore a global market society.

III. CONVERGENCE, GMS AND CONSENSUAL ECONOMIC RELATIONSHIPS

Towards the end of his passionately argued book *Making Globalization Work*, Joseph Stiglitz urges us to consider a new "global social contract," by which he means "an economic regime in which the well-being of the developed and developing **countries** are better balanced"[84]. However, from a sociological, epistemic and normative perspective I don't think Stiglitz goes far enough, though I agree with his policy prescriptions, globalization has brought us far beyond the inter-state social framework that Stiglitz writes within as a backdrop to his prescriptions. We are in, to quote the much-missed Hans Rosling[85], "an entirely new, converging, world"[86]. This means that any idea of a global social contract can no longer be conceived of simply as the transnational complement to a "domestic" social contract, such as the social contract of trade I outlined in the preceding section[87]. Instead, as I will argue below, we are in the throes of working out what a global social contract might mean for a truly *global*

[82] For example, the most recent TAA reauthorization was in 2015, extending TAA through 2021 and capping the annual funding at $450 million, a *reduction* from the amounts authorized in 2009 and 2011. U.S. Dep't of Labor, Side-by-Side Comparison of TAA Program Benefits under the 2002 Program, 2009 Program, 2011 Program, and 2015 Program 2 (Nov. 9, 2015), available at https://www.doleta.gov/tradeact/pdf/side-by-side.pdf [https://perma.cc/3YA8-MNVA]; T. Meyer, *op. cit*., pp. 1010–11.

[83] J. Nie, E. Struby, *op. cit.*, (demonstrating both that the United States is third from the bottom of twenty-one OECD countries studied, and that the United States currently ranks second from the bottom among the thirty-five OECD countries in its level of TAA as a percentage of GDP, ahead of only Mexico).

[84] J. Stiglitz, *op. cit.,* p. 285 (emphasis added).

[85] K. McVeigh, "Hans Rosling, Statistician and Development Champion, Dies Aged 68", *The Guardian* (Feb. 8, 2017, 2:34 PM), https://www.theguardian.com/global-development/2017/feb/07/hans-rosling-obituary.

[86] Hans Rosling's 200 Countries, 200 Years, 4 Minutes (BBC television broadcast July 25, 2017).

[87] This discussion of the boundaries between domestic and global, and its relation to the social contract metaphor, echoes longstanding debates over the boundaries of Rawls' liberal project. See, e.g., F. Garcia, *Trade, Inequality and Justice: Towards a Liberal Theory of Just Trade*, Brill – Nijhoff, 1st ed, 2003, pp. 124–28 (reviewing what was even then an old debate).

socioeconomic space, a global social contract built around shared participation by *people* as well as countries in a global market.

Such a social contract should not and realistically cannot entirely supplant what we now consider as the domestic social contract. However, its emerging reality fundamentally alters the space within which any society works out its own foundational commitments. In particular, the possible emergence of a global social framework means that the question of consent is not simply a question for states in their "internal" and "external" trade relationships. As economic exchanges become global, the regulation of economic exchanges and the concomitant protection—or weakening—of consent also become global. We thus face the possibility of constructing a consensual—hence dynamic and flourishing—or oppressive *global* socioeconomic framework.

I will first summarize below the socioeconomic and normative convergences within the global space today, about which I have written more fully elsewhere[88]. These convergences fundamentally alter the domain within which any adequate response to the current crisis must find traction, since they point towards the emergence of a global market society, within which our aspirations for opportunity and fairness must now take place.

III.A. Convergences

In my view, there are two principal kinds of convergence at work today, the socioeconomic and the normative, that at their confluence point to one thing: an emerging global market society[89].

III.A.1. Socioeconomic Convergence

III.A.1.a. The Global Economy is Deepening

Perhaps the most salient converging trend is the globalization of the economy. Contemporary data suggests the emergence of a global economy characterized by diminishing geographic segregation, decreasing discrimination according to source, and increasingly integrated global production processes, with both transactional and institutional

[88] See F. Garcia, "Convergences: A Prospectus for Justice in a Global Market Society", *Machester Journal of International Economic Law*, 2016, vol. 13, issue 2, p. 128.
[89] I don't mean to say that this is an inevitably teleological process, and of course the politics of the moment seem to suggest the opposite. However, I do believe that underneath the surface of politics one sees these deeper trends and processes, even as we have serious cause for concern about maintaining and deepening the progressive possibilities inherent in these trends.

manifestations[90]. Trade as a percentage of global gross domestic product rose from 27% in 1970 to 43% by 1995, and then to 59% by 2014[91]. Foreign direct investment has risen from approximately $10 billion in 1970 to $320 billion by 1995, and then to $1.56 trillion by 2014[92]. This surge in FDI has in turn facilitated the development of global value chains, within which nearly half of world trade in goods and services takes place[93].

Therefore, both in absolute and relative terms, and over time and to the present day, outcome-based indicators illustrate the deep connections characteristic of a global economy. Removal of institutional impediments has been a necessary condition for such cross-border integration, and in this respect, institutions (and through them, states) have largely demonstrated a commitment to global economic integration[94].

This presents us squarely with a question: what *kind* of global economy are we creating?

III.A.1.b. Global Inequality is Worsening

For one thing, we seem to be creating a very unequal one. The problem of inequality is not new, yet economic globalization has intensified the nature of inequality today to astronomical proportions. To summarize some contentious statistics, overall we see today a disturbing reversal of the 20th century trend towards growth with lower inequality[95]. Global inequality (between people, across countries) greatly exceeds national inequality (.70 Gini versus .40s for US, .20s to .30s for Europe)[96]. While it may be that inequality *between* countries is decreasing and a lower percentage of the world's population lives in poverty (thanks largely to the gains in China and India), inequality *within* countries is increasing, at least partially

[90] P. Lloyd, "Global Economic Integration", *Pacific Economic Review*, 2010, pp. 71, 72.
[91] Trade (% of GDP), The World Bank, http://data.worldbank.org/indicator/NE.TRD.GNFS.ZS?start=1970 last visited July 15, 2016).
[92] Foreign Direct Investment, Net Inflows (BoP, Current US$), The World Bank, http://data.worldbank.org/indicator/BX.KLT.DINV.CD.WD?end=2014&start=1970 (last visited July 15, 2016). Between 1970 and 2014, FDI as a percentage of global GDP has risen continuously, from 0.5% in 1970 to 2% in 2014, *ibid.*
[93] World Trade Organisation., *International Trade Statistics 2015*, 2015, available at https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf. Global value chains allow firms to "do" the part of the process they are best at, using intermediate goods and services from elsewhere without having to develop a whole industry. OECD, « Interconnected Economies: Benefitting from Global Value Chains », 2013, *available at* https://www.oecd.org/sti/ind/interconnected-economies-GVCs-synthesis.pdf.
[94] *Ibid*, p. 95.
[95] T. Piketty, *Capital in the Twenty-First Century*, Belknap Press: An Imprint of Harvard University Press, 2013; F. Garcia, "Capital in the Twenty-First Century. By Thomas Piketty", *Journal of International Economic Law*, 2015, vol.18, issue 2, p. 188 (reviewing Thomas Piketty's "Capital in the Twenty-First Century").
[96] F. Bourguignon, "Inequality and Globalization: How the Rich Get Richer as the Poor Catch Up", *Foreign Affairs*, Jan./Feb. 2016, p. 11; see also Department of Economic and Social Affairs (UN), *Inequality Matters: Report on the World Social Situation 2013*, U.N. Doc. ST/ESA/345, 2013 (reviewing recent trends in global inequality).

offsetting reductions in global inequality. Depending how you read the data, it could be that domestic inequality entirely offsets reductions in global inequality—it could even be that overall inequality has increased despite the gains mentioned[97].

As discussed above, major elements of the international economic law system as configured today favor the intensification of inequality at national and global levels. The pattern of allocations generated by the international institutions which today frame and regulate the global economy raises significant distributive concerns, in areas as diverse as taxation, access to capital, control over natural resources, and the social costs of investment, to name a few. These patterns present a host of compelling social, political, legal and normative issues for international economic law since, as the regulatory framework of the global economy, all of these issues land in its lap, so to speak[98]. There is much work to be done to ensure that the global economy works fairly for everyone.

III.A.1.c. Global Social Relations are Thickening

Economic globalization is embedded in a larger framework of social, informational and symbolic globalization with immense consequences for economy, politics and society. Globalization is transforming human relationships in ways that affect our inter-connectedness, the basis for solidarity, and the effective reach of our awareness, understanding and actions with respect to others. I can only summarize here what I discuss at greater length elsewhere[99]; but in essence globalization is contributing to the emergence of elements of global community around a range of institutional practices and common challenges[100].

The intensification of global social and economic interaction—in areas as diverse as global finance, refugee crises, terrorism, climate change—create common interests and can contribute to the subjective awareness of a shared fate[101]. These build on what can be called a

[97] C. Lakner, B. Milanovich, "Global Income Distribution: From the Fall of the Berlin Wall to the Great Recession", *World Bank Policy Research*, Working Paper No. WPS6719, 2013 (correcting for underreporting of high-income levels across national data sets leads to significantly higher levels of global inequality (.76 as measured by national Gini coefficients)); *see also* Bourguignon, *op. cit*. (noting this possibility).
[98] See Department of Economic and Social Affairs (UN), *op. cit*.,(inequality poses serious threats to wellbeing of people at all levels of the income distribution); The World Bank, *Development Goals in an Era of Demographic Change*, 2015, (inequality one of three top challenges to development today). See generally T. Piketty, *op. cit*.; J. Stiglitz, *The Great Divide: Unequal Societies and What We Can Do About Them*, W. W. Norton & Company, 2015; E. Anderson, "What is the Point of Equality?", *Ethics*, 1999, vol. 109 Ethics, p. 287.
[99] See generally See F. Garcia, *Global Justice and International Economic Law: Three Takes*, Cambridge University Press, 2013.
[100] *Ibid*.
[101] Of course, they can also lead to divergence, suspicion, resentment, and resurgence nationalism as well. For a heartfelt and searching examination of how these global dynamics have contributed to the causes and politics of these darker responses in recent times, see K. Himes, *op. cit.*

community of knowledge, created by global social media and the information revolution so characteristic of our everyday experience of globalization. Thanks to these infrastructures, we know so much—more than ever before—about how we collectively experience these and other risks, 24/7, around the globe, instantaneously. Finally, globalization is also building a set of shared understandings and practices around how we respond to such risks and to globalization's opportunities as well[102]. We see this in areas such as the use of markets and the regulation of markets through law and institutions, as well as in new and emerging regimes around challenges as diverse as climate change and global tax avoidance[103].

Together this represents in my view a trend towards a fundamental shift in social organization on the planet[104]. One of the surprising features of this new global social space is how it resembles what we used to call "domestic" space, which also consists of regions of wealth, urbanization and industrialization, and regions of agrarianism, poverty and underdevelopment, all linked by an overarching framework of economic, legal, political and social networks of causality, influence and responsibility. We are in the habit of associating this "domestic" space with an identifiable community structured by a set of shared social norms and governance institutions, and for these reasons also used to contrasting it to the "international" on the basis of the absence of such elements in the latter. However, because of globalization, we can no longer easily oppose this "domestic" space of communities to the "international" space "between" communities and insist that the latter lacks shared understandings and institutions. It is all simultaneously local and global[105].

[102] See, e.g., F. Garcia, "Between Cosmopolis and Community: Globalization and the Emerging Basis for Global Justice", *New York University Journal of International Law and Politics*, 2013, vol. 46, p. 1.
[103] See OECD, *Base Erosion and Profit Shifting (BEPS) Action Plan*, 2013, available at https://www.oecd.org/ctp/BEPSActionPlan.pdf; Fiona Harvey, "Paris Climate Change Agreement: The World's Greatest Diplomatic Success", *The Guardian* (Dec. 14, 2015, 2:51 PM), https://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations.
[104] See, e.g., D. Messner, "World Society—Structures and Trends", in *Global Trends and Global Governance*, Pluto Press, 2001, p. 22. Perhaps, if not a world of "us," at least a world of "I and Thou"? See M. Buber, "I and Thou", 1937.
[105] See W. Gabardi, *Negotiating Postmodernism*, University of Minnesota press, 2000, ("globalization is marked by the development of diverse, overlapping fields of global-local linkages . . . [creating] a condition of globalized panlocality . . ."). See generally S. Sassen, Territory, *Authority and Rights: From Medieval to Global Assemblages*, Princeton University Press, 2008.

III.A.2. Normative Convergence

III.A.2.a. International Economic Law is Unifying

As the global economy continues to deepen, formerly distinct areas of international economic law are converging into a single, unified body[106]. The functionalist paradigm of disparate international economic law regimes established by states to address specific issues is breaking down in the face of the deepening interconnections between policy areas and the linkage issues these connections create.

This convergence also reflects the deepening of the global economy, as the global commercial integration of goods, services, labor, intellectual property and capital comes to reflect more and more the way a "domestic" economy operates. Within a well-run domestic economy, regulations covering these disparate aspects of economic activity are harmonized through legislative and administrative action and brought into as close a working relationship as possible, for efficiency reasons. The fact that international economic law is undergoing a similar process is both evidence of the larger convergences I am charting, and an opportunity to ensure in a coordinated fashion that global economic regulation is not only efficient in the narrow economic sense, but also efficient in the broader long-term sense, sustainably supporting a flourishing global society.

III.A.2.b. Global Law is Emerging

The evolutions in international economic law are part of a larger process of law's adaptation to the new global social reality[107]. Through globalization, we see in addition to the usual abundance of "national" and "international" law-making, an increase in the number of bodies producing "softer" norms, often through transnational processes, that influence or guide

[106] There is a small but growing body of literature analyzing the parallels between trade law and investment law and arguing their convergence. See, e.g., R. Alford, "The Convergence of International Trade and Investment Arbitration", *Santa Clara Journal of International Law*, 2013, vol. 12, p. 35; T. Broude, "Investment and Trade: the 'Lottie and Lisa' of International Economic Law?", *TDM Special: Intersections: Dissemblance or Convergence Between International Trade and International Investment Law*, 2011; R. Echandi, M. Newson, "Influence of International Investment Patterns in International Economic Law Rulemaking: A Preliminary Sketch", *Journal of International Economic Law*, 2014, vol. 17, issue 4, p. 847; S. Puig, "The Merging of International Trade and Investment Law", *Berkeley Journal of International Law*, 2015, vol. 33. Not all commentators, however, fully accept the comparison or agree with the convergence thesis, for a variety of reasons. See, e.g., N. Di Mascio, J. Pauwelyn, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?", *The American Journal of International law*, 2008, vol. 102, pp. 48, 53–55 (contrasting the trade and investment regimes in terms of goals and political economies). However, in my view the similarities outweigh the differences.

[107] Or, as Zumbansen characterizes it, "attempts towards the development of an appropriately designed framework of legal analysis and regulation in light of a radically disembedded regulatory landscape." P. Zumbansen, "Transnational Legal Pluralism", *Transnational Legal Theory*, 2010, vol. 1, issue 2, p. 141.

state or private actor behavior or facilitate coordinated regulation by states[108]. We can see such transnational norm creation in a number of areas spanning the waterfront of global social policy, from crime to tax to food safety and beyond[109].

In response, "traditional 'national' legal responses that draw on architectures of normative hierarchy, separation of powers and unity of law are likely to fall short of grasping the nature of the evolving transnational normative order"[110]. The business of law is becoming both transnational and global[111]. A defining feature of regulation in the new global space is a dynamic pluralism involving the interaction of different types and sources of law, with manifold effects on different actors and in different spaces, and subject to contending ideologies[112].

III.A.2.c. Global Justice and Development Discourses are Transforming

The final convergence I want to trace involves our post-war discourse concerning the issues of fairness raised by complex socioeconomic activity and regulation both "within" and "across" the "national." Conventional development discourse has been trapped in certain contradictions and assumptions that are no longer viable if they ever were. The very idea of development began in an unstable binary structure: "we are the developed nations, you are not". To this it added a specific teleology: you want to be like us and to have what we have, in the way we have it—you exist to become us.

Global justice also investigates the subjects that development concerns itself. As Gilbert Rist reminds us, justice discourse too has been marked by the binary structure, yielding a bifurcated vision for a just society: the democratic social welfare state in the countries of the North, and "development" programs in the South[113]. In political philosophy Rawls typifies this

[108] The Basel Accords and the Basel Committee process are a good example, as is the OECD's BEPS Project, both in collaboration with the G-20. See, e.g., OECD, *op. cit.*; I. Drumond, "Bank Capital Requirements, Business Fluctuation Cycles and the Basel Accords: A Synthesis", in *Issues in Finance: Credit, Crises & Policies*, Wiley-Blackwell, 2010 (tracing the channels through which the Basel Accords influence central banking policy and therefore the domestic business cycle and overall macroeconomic stability). On the soft law phenomenon, see generally G. Shaffer, M. Pollack, "Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance", *Minnesota Law Review*, 2010, vol 94. p. 706.

[109] See generally D. Messner, *op. cit.*, pp. 34–40; P. Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism", *Transnational Law and Contemporary Problems*, 2012, vol. 21, issue 2, pp. 305, 312–13 (cataloguing global social challenges calling for transnational approaches).

[110] P. Zumbansen, *op. cit.*, p. 153.

[111] See F. Garcia, "Globalization's Law: Transnational, Global or Both?", in *The Global Community: Yearbook of International Law and Jurisprudence 2015*, Oxford University Press, 2016, p. 31.

[112] See P. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, Cambridge University Press, 2012; P. Zumbansen, *op. cit.*. See generally F. Garcia, *op. cit.*, p. 4 (discussing the necessary role of pluralism in global justice theory).

[113] G. Rist, *The History of Development: From Western Origins to Global Faith*, The University of Chicago Press, 4th ed., 2014.

split: investigating the justice of institutional frameworks, or what Rawls calls the "basic structure", is a key task for political theory, but conceived of as a *domestic* inquiry[114].

Globalization has rendered such binary structures and assumptions unsustainable for critics and advocates of justice and development alike. "North" and "South", "developed" and "developing", all of these binaries are increasingly blurred, challenged and deconstructed through globalization's alchemical properties[115]. The most visible effects are in the economy, where globalization raises profound questions for justice and development: how is the global economy affecting growth, returns on investment, wealth creation, inequality, production and employment patterns, innovation, and human capital investment within both national *and* transnational economic spaces—in short, all of the social conditions of vital interest to development and justice alike.

Economic globalization also enlarges the set of institutions, actors and relationships which justice must consider. We must now include both domestic institutions, such as public and private law, the political process, and socioeconomic structures such as the market; and their international correlates such as international law and international organizations, together with the global market and its international and domestic regulatory bodies; as well as the range of private and quasi-private actors involved in transnational norm creation[116].

Globalization is thus critically reconstructing the discourse around global justice and development, towards a new global post-development discourse around, simply, justice. If justice is the first virtue of institutions, and institutions are increasingly transnational in scope, then so too must the justice conversation be transnational.

III.B. At the Vanishing Point: A Global Market Society?

From my perspective, these convergences—economic, social, regulatory and normative—point towards a newly emerging global space, with key characteristics that challenge our settled categories and create new opportunities for meaningful economic, social and legal activity. For one thing, the transnational space within which what we used to call

[114] For Rawls, beyond national boundaries, different fairness norms apply. *See* Rawls, *op. cit.*, at 3–10; P. Maffetone, "The Law of Peoples: Beyond Incoherence and Apology", *Journal of International Political Theory*, 2011, vol. 7, issue 2, p. 191.
[115] See generally F. Garcia, *op. cit.*; *see also* F. Garcia, *Transcending a Binary View of Development and Justice: Globalization, Opportunity and Fairness*, 2016, (unpublished manuscript) (on file with author).
[116] In global justice theory these are referred to collectively as the "global basic structure." See F. Garcia, *op. cit.*, p. 174; A. Føllesdal, "When Common Interests Are Not Common: Why the Global Basic Structure Should Be Democratic", *Indiana Journal of Global Legal Studies*, 2008, vol. 16. Issue 2, p. 585.

development is supposed to take place, now resembles more closely what we think of as domestic space, than it does our traditional accounts of the international context of development. Moreover, our ongoing investigation of justice, traditionally limited to national spaces, has found the very notion of national space exploded by and permeated with the global, dramatically expanding the boundaries for the justice conversation. And international economic law has grown from a set of functionally specialized regimes that structure the transnational economic relationships of national economies, into a steadily-integrating framework regulating an emerging global economy through global legal processes.

Globalization is creating this space, but we have not yet fully recognized it or absorbed its implications, nor have we thoroughly examined and recast or rejected old legal and normative tools and invented new ones[117]. If we want to fully respond to the current crisis, which means understanding what economic justice will mean for the 21st century, we need to try to understand this new social space.

III.B.1. Emergence of Global Market Society

One way to characterize the social space that is emerging is as a **global market society**[118]. That it is *global*, can readily be seen from the nature of contemporary globalization and its transnational effects on social connections, in particular on economic transactions and business practices and the increasingly global means by which we regulate them. That it is based on *markets*, understood here as networks constituted by acts of buying and selling facilitated through a medium of exchange[119], is also clear from the kinds of economic interactions and relationships that constitute it, by the institutions and regulatory structures employed to govern it (principally through international economic law), and by the ideology these structures follow[120].

[117] As Rist writes, development is no longer about "the success or failure of this or that 'development project' but a general way of envisaging harmonious and equitable cohabitation of all those living today—and in the future—on this planet. Rist, *op. cit.*; *see also* V. Bornschier, "The Civilizational Project and Its Discontents: Toward a Viable Global Market Society?", *Journal of World-Systems Research*, 1999, vol. 5, pp. 165, 175 (existing international agreements and regimes have not yet grown to reflect the political consequences of globalization).

[118] The debt to Polanyi in what follows is clear. K. Polanyi, *The Great Transformation* , 1944; *see also* Bornschier, *op. cit*. (recognizing the emergence of a global market society and offering a critique of its current structure that points towards its progressive possibilities).

[119] K. Hart, C. Hann, "Introduction: Learning from Polanyi", *in Market and Society: The Great Transformation Today*, Cambridge University Press, 2009.

[120] I use the term ideology here in its classical sense, as a set of ideas and values favoring markets over other forms of socioeconomic organization, recognizing full well the more pejorative uses of the term in connection with neoliberalism and "free market" ideology, a mistake to which I will return below.

That it is a global market *society* is perhaps the most controversial characterization of the three, but in my view this is what the convergences outlined above point to[121]. One simple working definition of society could be "a large group of people sharing decisions and work around a common life"[122]. At the global level, we to see evidence that work is shared through a global market, and that decisions are shared—to the extent they *are* shared—through some blend of national and transnational political and regulatory processes[123].

III.B.2. Economic Regulation in the Global Market Society

To the extent that globalization is understood as extending a particular version of market ideology—under-regulated capitalism or the "Washington Consensus", for example—globalization and the very idea of a global market will naturally be resisted as inimical to the interests of the non-capital classes[124]. While I agree with the substance of this critique, I think the underlying conflation of markets with neoliberalism is a mistake, reflecting an understandable normative judgment about the global spread of under-regulated capitalism as a *particular* form of market society, more than a considered judgment of the idea of a global economy or a market society *per se*[125].

Equating markets and market regulation with a specific—and contested—market ideology masks the power of the market *as an idea* that cuts across social models, ideologies and levels of development[126]. Markets are here to stay, and in my view that is a good thing. As Sen has written, the freedom to participate in both the market for labor and the market for products is a key freedom, intrinsically and instrumentally, and therefore a cornerstone of development for anyone in any country[127].

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[121] See also, e.g., K. Hart, "Money in the Making of World Society", *in Market and Society: The Great Transformation Today*, *op. cit*., p. 91 (humanity formed a world society—understood as a single interactive social network—in the latter part of the 20th century, massively unequal and imperfect, yet a society nonetheless).
[122] "Society", Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/society (last visited Mar. 15, 2018).
[123] I go deeper into this and the points above in my essay on convergences and IEL. See generally Garcia, *op. cit*..
[124] See A. G. Hopkins, "Globalization in World History", *Pimlico*, 2002, pp. 42–43 (2002) (dangers posed by weakened regulatory power over capitalist system). Had Polanyi lived and worked during the current era of globalization, he might well agree, given his central concern with the dangerous "fiction" of a self-regulating economy. K. Polanyi, *op. cit*., pp. 31–32. However, I consider the equation of the two—globalization and neoliberalism—to be a mistake, as I explain above.
[125] In this sense, I read Polanyi not as an indictment of market society understood as a society relying on markets for economic organization, but as an indictment of a society organized by markets—neoliberalism, in other words. The task, which this project seeks to contribute to, is to reassert the primacy of society over economy, even (especially) in a market society. See K. Polanyi, *op. cit*., p. 259.
[126] D. Slater, F. Tonkiss, *Market Society: Markets and Modern Social Theory*, Polity, 2001.
[127] A. Sen, "Development as Freedom", *Anchor*, 1999, pp. 6–8.

Neoliberalism notwithstanding, market societies have certain structural weaknesses and are prone to certain kinds of oppressive tendencies, such as the tilt towards inequality that Piketty warns us of and which we see playing out globally today[128]. In response, market societies seeking some degree of social stability and sustainability develop social practices or domestic institutions capable of supplementing and mitigating the rigors of capitalism even minimally, for example by compensating the "losers" through some form of wealth transfer[129]. Aaron James calls this the practice of mutual market reliance[130]. By this, James means something beyond the shared practice of relying on a domestic market model: the mutual reliance on the emerging global market itself, as a transnational market that lives in, through and beyond the sum of each state's individual markets. This shared practice is itself generative of a broader set of global social relationships and practices that deeply inform the nature and challenges of regulating a global market and keeping it roughly fair.

III.B.3. Consent and the Global Market Society

The emergence of a global market society has profound consequences for how we approach transnational problems of politics, economics and law, including how we chart a course out of the present crisis. Realizing this opportunity depends entirely on how the global market is regulated and according to what norms, and the recent *referenda* tell us we have so far done this badly. This opens up new opportunities for economic law, which plays an essential role in safeguarding markets through defining and protecting consensual economic agreements[131], to play this role on a global level towards a truly *global* network of consensual exchanges.

The key is recognizing that a flourishing trading system which respects the consent of its private individual and state participants, will incidentally also be a more just system of global economic relations, since individuals and states will have fewer reasons to accept bad bargains, and will instead negotiate and conclude more equitable bargains at the transactional and treaty levels. A truly consensual system of trade will therefore promote similar outcomes to what we have sought to promote through the global justice debate, but through a route that ideally cuts across normative traditions, does not assume a difference between "development" and domestic

[128] See T. Piketty, *op. cit.*; see also D. Slater, F. Tonkiss, *op. cit.,* pp. 34–35 (noting disorder, irrationality and oppressive behavior as endemic to market societies, not "transitional" problems); *supra* notes 100–104 and accompanying text (growing inequality).
[129] D. Slater, F. Tonkiss, *op. cit.*, p. 120.
[130] A. James, *op. cit.*.
[131] D. Slater, F. Tonkiss, *op. cit.*, p. 105.

justice, and seems intuitively plausible to any market participant, thus fitting into the larger social and economic norms of an emerging global market society.

IV. PROTECTING CONSENT AND PURSING FAIRNESS IN A GLOBAL MARKET SOCIETY

Taking full advantage of the current crisis in global trade and politics means opening ourselves to the full range of implications when we set up trade and other economic structures at a global level, structures that deeply impact our own societies and the societies of our economic partners. This means we must work to build consensual trade agreements, agreements that directly address the domestic distributive effects of the global market, within a larger framework of building a balanced and inclusive global market society that offers opportunity and fairness for all participants.

IV.A. Creating Genuine Trade Agreements

Agreements such as CAFTA and KORUS contain provisions that are significantly unbalanced in terms of the rights, interests and goals of the various negotiating parties, and are by no means unique in this respect. Understanding why this is so requires that we recognize the (unsurprising) truth that power inequalities tend to produce unbalanced agreements, and the greater the inequality, the more the unbalance. What is perhaps more surprising is that we have allowed ourselves to believe that this is trade, when in fact it seems to better fit patterns of what in other areas we call predation, coercion and exploitation.

If we want to address these dynamics and thereby begin to undo the damage which these recent *referenda* have both revealed and intensified, the most important first step is to change our expectations of trade agreements. Once we understand the consensual nature of trade, then it follows that the policy goal of international trade law should be more than simply liberalizing commercial flows by eliminating economically distorting domestic legislation. The goal should be to maintain an environment in which *trade* can take place and flourish, much as the goal of economic regulation in a domestic setting is to protect and promote a healthy and thriving market, which means recognizing, protecting and promoting consent at all levels. Put another way, promoting and protecting a healthy and thriving global market requires more than simply reducing or eliminating protectionist regulation: it means building a *trading* system and not a disguised system for predation, coercion, or exploitation.

If we work to change our understanding of trade and therefore what we expect of our leaders when they negotiate trade agreements, and what we are willing to support or protest as

citizens and consumers, we have gone a long way towards altering the political environment in which trade—or oppression—takes place. Going farther requires a look at how we might change trade negotiations, even between highly unequal parties, to take this new understanding into account when we negotiate new agreements.

Negotiations among unequal parties, whether they involve explicit coercion or exploitation, need not always result in bad bargains—it all depends on how the negotiations are managed[132]. Scholars analyzing trade negotiations note a variety of strategies both "away from the table" and "at the table" which weaker parties can in fact pursue to attempt to offset this disadvantage. While these strategies are far from perfect and the success stories are perhaps outnumbered by the failures, they are nevertheless a starting point towards consensual agreements, particularly when they follow from a changed paradigm of trade and are coupled with domestic and transnational policies addressing the distributive effects of trade.

IV.B. Wealth Transfers and Economic Inequality

If we hope to fully respond to the current crisis, we must accept that it is unsustainable to inflict neoliberalism abroad while maintaining social welfare state at home when we are living in a global economy and an emerging global market society. But what should be done instead? This depends on very complex causality issues, but at heart it is about working comprehensively to ensure opportunity and fairness for all in a global market society.

For international economic law this means first ensuring that the global economy itself promotes opportunity and fairness. We need to reform international economic rules and institutions where they exacerbate inequality in areas such as trade and investment[133], tax law[134], IMF and World Bank lending[135], global finance[136], resource and borrowing

[132] J. Odell, "Negotiating from Weakness in International Trade Relations", *Journal of World Trade*, 2010, vol. 44, issue 3, pp. 545, 545.
[133] See, e.g., F. Garcia, L. Ciko, A. Gaurav, K. Hough, "Reforming the International Investment Regime: Lessons from International Trade Law", *Journal of International Economic Law*, 2015, vol. 18, issue 4, p. 861 (discussing reform of investment treaty framework).
[134] I. Benshalom, "The New Poor at Our Gates: Global Justice Implications for International Trade and Tax Law", *NYU Law Review*, 2009, vol. 85, issue 1; J. Repetti, "Democracy and Opportunity: A New Paradigm in Tax Equity", *Vanderbilt Law Review*, 2008, vol. 61, p. 1129.
[135] F. Garcia, "Global Justice and the Bretton Woods Institutions", *in The Future of International Economic Law*, Oxford University Press, 2008.
[136] R. Buckley, E. Avgouleas, D. Arner, *Reconceptualising Global Finance and Its Regulation*, Cambridge University Press, 2016.

privileges[137], and policies favoring multinational corporate immunity[138]. We also need to reform the rules by which global institutions operate through unequal governance structures, to enhance the voice of the members most burdened by development and inequality challenges and most affected by institutional policies[139].

Going beyond this, we also need to ensure that IEL is reformed to support efforts to realize opportunity and fairness through our domestic institutions and policies. In IEL terms, this means protecting policy space for local measures aimed at ameliorating inequality. IEL institutions should incorporate as a policy something like the principle of subsidiarity pioneered at the institutional level by the EU: if there are successful local policies, how can we protect their policy space, support similar policies and policy experimentation in other "locales", and scale them up for transnational or global application as appropriate? Some countries *have* been able to buck the trend of rising inequality, suggesting that domestic social and economic policies can play a crucial role in determining inequality trends[140]. IEL institutions must ensure, at a minimum, that their policies support such successful local efforts, so the multilateral level can work as partner, not overseer[141].

Both strands—the fairness of the international economic law system itself, and its impact on the fairness of domestic societies—come together around the need to protect and fulfill the social contract of trade as outlined above. A properly designed and implemented adjustment assistance program is key to honoring trade's social contract. Going a step farther, *how* we fund such programs is also key. In my view, it would be most consistent with the social contract of trade, understood as a promise from all of us to those most at risk from free trade, that the funding to support those most vulnerable to trade come from trade itself. While this could in principle be done through traditional legislative redistribution of the gains from trade,

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[137] T. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, Polity, 2nd ed, 2008; L. Wenar, "Property Rights and the Resource Curse", *Philosophy & Public Affairs*, 2008, vol. 36, issue 1.
[138] See, e.g., S. Waddock, "Building a New Institutional Infrastructure for Corporate Responsibility", *Academy of Management Perspective,* 2008, vol. 22, issue 3, p. 87 (surveying the emerging institutional infrastructure for ensuring responsible corporate activity in the face of formal regulatory gaps).
[139] See, e.g., H. Torres, "Reforming the International Monetary Fund—Why its Legitimacy is at Stake", *Journal of International Economic Law*, 2010, vol. 10, issue 3, p. 443.
[140] UN Department of Economic and Social Affairs, *Inequality Matters: Report on the World Social Situation,* 2013, p. 99, http://www.un.org/esa/socdev/documents/reports/InequalityMatters.pdf (last accessed 15 April 2017).
[141] For example, the IMF has recently begun recommending that client governments implement policies to facilitate better access to education, improved health outcomes, stronger labor laws and redistributive social welfare policies to help raise the income share of the poor and the middle class irrespective of the economic development of a country. See Department of Economic and. Social Affairs, *op. cit*., at 103–05; E. Dabla-Norris et al., *op. cit*., p.27. However, it is important for the IMF to avoid past mistakes and recognize that such policies should be implemented in a manner cognizant of local needs and conditions, not as one-size-fits-all programming. See E. Dabla-Norris *et al*., *op. cit*., p. 28.

the history of trade politics at least in the US shows that we cannot rely on this for anything as constitutive as the basic bargain underlying trade's social contract.

Instead, we should consider incorporating a financial transaction tax (FTT) into all new or renegotiated trade agreements. This would represent a paradigm shift in how we think of trade and its distributive effects, but the current crisis asks for nothing less than this kind of radical change in our thinking. An FTT linked to trade agreements offers a direct way of harnessing the wealth creation of free trade agreements themselves towards supporting domestic adjustment assistance programs. An FTT with revenue earmarked for adjustment assistance would place entities that benefit tremendously from trade liberalization—major financial institutions—in the role of assisting those who suffer most from the same.

FTT proposals are not new, and a number of these mechanisms have been adopted or proposed around the globe[142]. While a comprehensive review of the extensive literature on FTTs, and a detailed exposition of the features of an FTT such as I am proposing, are beyond the scope of this essay[143], the essence of the arrangement is that parties to a free trade agreement would agree that each party shall impose an incremental tax on specified financial transactions (such as securities, derivatives and currency trades) of anywhere from 0.01% to 0.1% (the rate to be the same in each member state). This is not enough to discourage productive investment transactions, yet it is enough to generate hundreds of millions for adjustment assistance for workers sharing the risks but not getting the benefits of trade's joint venture.

A social contract FTT would need to be carefully designed in terms of scope[144] and jurisdiction[145]. Even with such jurisdictional and scope limitations, such a tax could generate considerable revenue towards funding adjustment assistance obligations. The EU Commission calculated that its earlier 2011 FTT proposal could generate as much as €57 billion with a tax

[142] See F. Garcia, T. Meyer, *op. cit*., pp. 94–95.
[143] *Ibid*. pp. 95–98.
[144] It should be designed to tax wholesale capital market transactions (stocks, bonds, derivatives and currency trades) between major financial institutions such as banks, investment firms, insurance companies, pension funds, and hedge funds; and not "retail" transactions such as home mortgages and business loans. See generally *Proposal for a Council Directive: Implementing Enhanced Cooperation in the Area of Financial Transaction Tax***,** at 17, 36, COM (2013) 71 final (Feb. 14, 2013) [hereinafter *Proposal for a Council Directive*] (weighing the costs and benefits of taxing various transactions and institutions, and concluding that certain institutions, including refinancing institutions, should not be taxed with an FTT). It is important for political as well as normative reasons that the tax not apply to ordinary consumers at the retail level. See L. Burman, W. Gale, *The Pros and Cons of a Consumption Tax*, Brookings (Mar. 3, 2005), https://www.brookings.edu/on-the-record/the-pros-and-cons-of-a-consumption-tax/ [https://perma.cc/WA73-KXJJ].
[145] Jurisdictionally, taxable transactions could be defined as those between counterparties when at least one counterparty is resident within the free trade area, as the EU does, although in the context of free trade agreements thought should be given to whether the proposal should require both counterparties to be resident. *Proposal for a Council Directive, op. cit*., p. 18.

rate of 0.1% on all wholesale stock and bond transfers and 0.01% on all derivatives trades, with all twenty-seven Member States participating[146]. An FTT with the same tax rate and jurisdictional structure, if applied in the NAFTA zone today, could yield as much as $64 billion towards adjustment costs in the NAFTA area[147].

However, implemented and allocated, creating a trade-related FTT would be a breakthrough in trade adjustment financing and, more broadly, in mechanisms to address the social costs and inequality effects of trade. Linking such a tax to transactions within the economic zones that free trade agreements create would directly harness their wealth-creating potential and tie the funding for adjustment assistance to financial parties that benefit tremendously from the agreements themselves. Implementing such a reform would fulfill the social contract of trade and render it self-sustaining, rather than subject to the vicissitudes of budgetary politics, and help protect not only vulnerable workers but the trade liberalization process itself and all who stand to benefit from it. Any economic structure as powerful and invasive as the global economy requires no less, and as we are learning, we neglect this at our peril.

CONCLUSION - CONSENT AND FAIRNESS IN A GLOBAL MARKET SOCIETY

Referenda are not of course always a clear indicator of true public sentiment, as they can be manipulated by a variety of actors towards private ends that do not serve the public interest, as we saw in Costa Rica and, of course, Brexit. Nevertheless, *referenda*, especially in a time of resurgent economic populism, can be an accurate signal of where the fault lines lie, and in particular how the electorate is constructing—or can be manipulated to construct—the key narrative of "Us" and "Them"[148].

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[146] *Commission Proposal for a Council Directive on a Common System of Financial Transaction Tax and Amending Directive*, SEC (2011) 1102–03 final (Sept. 28, 2011). This would calculate to a tax yield of 0.3% of total EU nominal GDP for 2011 (€18.3 trillion), using GDP as a proxy for the tax base, although other measures such as total EU volume of wholesale capital market transactions could be more accurate. *See, e.g.*, *European Union GDP*, TRADING ECON., https://tradingeconomics.com/european-union/gdp (last visited May 9, 2018) [https://perma.cc/3UQW-8FBV].

[147] Assuming the same 0.3% calculation on a 2016 combined NAFTA GDP of $21.4 trillion. *See Report for Selected Countries and Subjects*, International Monetary Fund (Apr. 2017), http://www.imf.org/external/pubs/ft/weo/2017/01/weodata/weorept.aspx?sy=2016&ey=2016&scsm=1&ssd=1&sort=subject&ds=.&br=1&c=273,156,111&s=NGDPD,PPPGDP,LP&grp=0&a=&pr.x=53&pr.y=13 [https://perma.cc/R94U-J2S8]. To put this in perspective, the combined annual budget for all active labor market policies, TAA included, among the United States, Canada, and Mexico totaled $25 billion in 2015.

[148] On the destructive tendency of populism to construct and reinforce alienating binary oppositions, see *Twenty-First Century Populism: The Spectre of Western European Democracy*, Palgrave Macmillan, 2008; C. Mudde, "The Populist Zeitgeist", *Government and Opposition*, 2004, vol. 39, issue 4, p. 541.

Rather than simply bemoan the manipulations and distortions which fear works, or which fear leaves us vulnerable to, in the political process, we would be wise to look more closely at the issues and concerns underlying the volatility of the moment. In our case, insofar as globalization has collapsed the boundaries between the local and the global, then reimagining both trade and fairness in a global environment means reconstructing our paradigm so that artificial distinctions between opportunity and fairness for "Us", and what passes as "opportunity" and "fairness" for "Them," are eliminated.

In particular, the Trump and Brexit *referenda* have brought it painfully home to all of us that we can no longer afford to assume that "Us" and "Them" are easily distinguishable by national boundaries (hence ignorable by the Global North). In reality, the comparison is a between those favored by economic globalization in its current form, and those who feel themselves to be left out, and these are transnational and even post-national categories that may include our closest neighbors.

Successfully implementing a new trade agenda requires first that we understand that a post-Trump and Brexit trade policy, which is to say the economic policy for a new economic globalization, must be designed to operate in the new global socioeconomic reality. Trade and its pathologies outlined thus far are taking place on a global scale, with implications in all regions and economies of the world, as the global "backlash" against trade and globalization today vividly illustrates. If we are truly living in a global market and emerging global market society, as I believe we are, then we should regulate it appropriately, and seriously examine what kinds of social and other goods we expect a market society to deliver.

Even more urgently, the emergence of global market society means that the grave shortcomings in the global regulatory structure today cannot be adequately addressed by even the most virulent populist national backlash, as Act Two of the Trump and Brexit dramas is making clear. Against this backdrop, a consensual basis for a fairer economic system has an intuitive market-based appeal that can make it useful for structuring a global market system. Insofar as markets thrive on consensual exchanges, so a global market society will thrive on a shared global understanding of the role of consent in exchange.

COMPLIANCE OR EVASION?

An Assessment of Tribal Sovereignty in the United States on the 10th Anniversary of the UN Declaration on the Rights of Indigenous Peoples

N. Bruce Duthu*

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Abstract

On September 13, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples. Initially, the United States voted against adoption of this accord, one of only four countries to do so. In December 2010, however, the United States reversed course (as did the other "no" voting countries) and elected to endorse it. In this essay, I contend that, at best, the United States has an uneven record in terms of compliance with the Declaration. Nonetheless, in endorsing it in 2010, the United States purported to align its long-standing recognition of tribal nations as "political entities that have inherent sovereign powers of self-governance," with the goals and aspirations of the Declaration. For the sake of brevity, this assessment will examine only a select number of articles from the Declaration, with the aim of analyzing those articles whose subject matter has given rise to important developments in the federal-tribal political and legal relationship.

Résumé

Le 13 septembre 2007, l'Assemblée générale des Nations Unies adoptait la déclaration sur les droits des peuples autochtones. Les États-Unis faisaient initialement partie des quatre États à s'être opposés à l'adoption de cet accord. Cependant, en décembre 2010, les États-Unis renversèrent leur position (à l'instar des autres États ayant voté « non ») et choisirent de la supporter. Dans cet essai, nous soutenons que les États-Unis ont, au mieux, un bilan partagé en termes de conformité avec la déclaration. Néanmoins, en la signant en 2010, les États-Unis ont entendu s'aligner avec leur tradition séculaire de reconnaissance des nations tribales comme « entités politiques ayant des droits souverains inhérents à l'auto-administration, » avec les objectifs et aspirations de la déclaration. Par soucis de brièveté, cette étude examinera seulement un nombre restreint d'articles de la déclaration, avec l'objectif d'analyser ceux dont l'objet a donné lieu à d'important développements dans le cadre de la relation politique et juridique entre les tribus et le gouvernement fédéral.

ABOUT N. BRUCE DUTHU

N. Bruce Duthu is the Samson Occom Professor and former Chair of Native American Studies at Dartmouth College, which he joined in 2008. Prior to that, he was Professor of Law at Vermont Law School, where he served as Vice-Dean for Academic Affairs.

A tribal member himself (he is an enrolled member of the United Houma Nation of Louisiana), Pr. Duthu is an internationally recognised scholar on Native American Law and Policy. He has been an invited Professor at Harvard Law School, the University of Sydney (Australia), the University of Wollongong (Australia), and the University of Trento (Italy). He has lectured on indigenous rights throughout the globe, from Russia, China, and Bolivia to New Zealand and Canada, amongst others. He also practiced law as an attorney prior to beginning his academic career and regularly serves as a consultant on Native American questions for tribes, governmental entities, universities, and private institutions.

Amongst Professor Duthu's prolific work, it is worth mentioning *Shadow Nations: Tribal Sovereignty and The Limits of Legal Pluralism* (Oxford University Press, 2018) and *American Indians and the Law* (Viking/Penguin Press, 2008). He was also a contributing author of F. S. Cohen's *Handbook of Federal Indian Law* (Matthew Bender Co., 2005), the leading treatise in the field of federal Native American law. N. Bruce Duthu's analysis in this field can also be appreciated on screen with *Dawnland,* a 2018 documentary film on the legacy of Maine's Indian child welfare system which he co-produced with Adam Mazo.

Pr. Duthu visited the Sorbonne Law School in October 2017, where he gave a lecture on the assessment of tribal sovereignty in the United States in light of the UN Declaration on the Rights of Indigenous People. This was no easy task, for he was faced with an audience mostly composed of European students and researchers (the author of these lines included) with close to no prior knowledge in the field of indigenous rights and Native American Studies in particular. Pr. Duthu did not shy away from the challenge and, insofar as it is permitted for a young fellow to assess the work of a distinguished Professor, his two-hour lecture was quite fascinating. It is this conference that constitutes the basis of the present essay, which the Sorbonne Student Law Review is honoured to publish in its inaugural issue. We hope that our readers will find here a broad yet detailed insight into the field of indigenous rights and Native American Studies.

Paul Heckler
Editor of the Sorbonne Student Law Review
Doctoral Fellow at the Sorbonne Law School

À PROPOS DE N. BRUCE DUTHU

Bruce N. Duthu est Professeur Samson Occom et ancien titulaire de la chaire d'études des natifs américains à l'Université de Dartmouth, qu'il a rejointe en 2008. Il était, avant cela, Professeur de droit à l'École de droit du Vermont, ou il fut vice-doyen des affaires académiques.

Lui-même membre d'une tribu (il est membre enrôlé de la Nation Unie Houma de Louisiane), Pr. Duthu est un universitaire internationalement reconnu dans le domaine du droit et de la politique des natifs américains. Il a été Professeur invité à l'École de droit de Harvard, l'Université de Sydney (Australie), l'Université de Wollongong (Australie) et à l'Université de Trente (Italie). Il a donné des conférences sur les droits autochtones à travers le monde, de la Russie, la Chine ou la Bolivie à la Nouvelle-Zélande ou au Canada, entre autres. Il a également exercé la profession d'avocat en droit privé avant d'entamer sa carrière universitaire et intervient régulièrement comme consultant sur les questions relatives aux natifs américains à la fois auprès de tribus, d'entités gouvernementales, d'universités et d'institutions privées.

Parmi les travaux du Professeur Duthu, on peut mentionner *Shadow Nations: Tribal Sovereignty And The Limits Of Legal Pluralism* (Oxford University Press, 2018) et *American Indians and the Law* (Viking/Penguin Press 2008). Il a également contribué à l'ouvrage de F. S. Cohen, *Handbook of Federal Indian Law* (Matthew Bender Co., 2005), traité de référence sur le droit fédéral des natifs américains. L'analyse de Bruce Duthu dans ce domaine peut également être appréciée à l'écran avec *Downland,* un documentaire sorti en 2018 sur l'héritage du système de protection des enfants indiens dans le Maine, qu'il a coproduit avec Adam Mazo.

N. Bruce Duthu a été invité à l'École de droit de la Sorbonne en octobre 2017 ; il y a donné une conférence sur l'évaluation de la souveraineté tribale aux États-Unis au regard de la déclaration sur les droits des peuples indigènes. La tâche n'était pas simple puisqu'il faisait face à un public d'étudiants et de chercheur (l'auteur de ces lignes compris) n'ayant presque aucune connaissance dans ces domaines. Pr. Duthu n'a pas reculé devant ce défi et, s'il est permis à un jeune chercheur d'évaluer le travail d'un Professeur renommé, ces deux heures de conférence furent fascinantes. C'est cette présentation qui constitue la base du présent essai, que la Revue juridique des étudiants de la Sorbonne est honorée de publier dans son numéro inaugural. Nous espérons que nos lecteurs y trouveront un aperçu varié tout en étant détaillé du domaine des droits des peuples indigènes et de l'étude des natifs américains.

Paul Heckler
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INTRODUCTION

On September 13, 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (hereinafter Declaration)[1]. Initially, the United States voted against adoption of this accord, one of only four countries to do so. In December 2010, however, the United States reversed course (as did the other "no" voting countries) and elected to endorse the Declaration[2].

The United States' initial reluctance to sign on to the Declaration may seem puzzling, especially in light of the fact that international declarations are typically viewed as aspirational accords, lacking the legally binding force of international conventions or treaties. A partial explanation for the United States' behavior was concern that its approval of the Declaration might give rise to legal claims by tribal nations seeking to exercise their inherent sovereign powers beyond the extant limits recognized under federal policies of self-determination. Since 1970, the United States' official policy in Indian affairs has been to support forms of tribal self-determination within tribal lands. The precise "metes and bounds" of tribal self-determination have never emerged fully formed but instead have been worked out gradually and laboriously over the years, largely through federal legislation and litigation.

Until the adoption of the United Nation's Declaration, there were no formal external measures by which tribal nations, or the United States, could chart the evolution or progress of tribal self-determination. In that regard, the tenth (10^{th}) anniversary of the UN's adoption of the Declaration provides an opportune occasion to provide at least a tentative assessment of the state of tribal self-determination in the United States.

In this essay, I contend that, at best, the United States has an uneven record in terms of compliance with the Declaration. To be sure, the historical and legal record of formal engagement between the federal government and tribal nations in the United States is a long and complicated one, spanning centuries and marked by inconsistent, even contradictory, federal policies in Indian affairs[3].

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[1] Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/Res/61/295 (Sept. 13, 2007).
[2] Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples (Dec. 16, 2010) at 3, available at http://usun.state.gov/documents/organization/153239.pdf.
[3] The literature on the political and legal relations between the tribal nations and the United States is voluminous. The following is merely a partial listing of the leading source material: N. Newton, F. Cohen, R. Anderson, *Cohen's Handbook of Federal Indian Law*, Lexisnexis, 2012; B. Duthu, *American Indians and the Law*, Viking Penguin Press, 2008; B. Duthu, *Shadow Nations: Tribal Sovereignty and the Limits of Legal Pluralism*, Oxford University Press, 2013; F. Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution*, Oxford

Nonetheless, in endorsing the Declaration in 2010, the United States purported to align its long-standing recognition of tribal nations as "political entities that have inherent sovereign powers of self-governance," with the goals and aspirations of the Declaration. In offering this assessment, we will focus attention primarily on developments from the so-called "modern era," (i.e. since the dawn of the United States policy of self-determination in the early 1970s) but on occasion, it will be necessary to provide a bit of historical context and background information. For the sake of brevity, this assessment will examine only a select number of articles from the Declaration, with the aim of analyzing those articles whose subject matter has given rise to important developments in the federal-tribal political and legal relationship.

I. THE RIGHT OF SELF-DETERMINATION

> Article 3
>
> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> Article 4
>
> Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Among the cardinal doctrines in federal Indian law is the principle that Indian tribes exist as political bodies, separate and distinct from the United States and its associated states. The beginning point for that understanding comes from the United States Constitution. Article I of the Constitution enumerates the powers of Congress, including the power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes."

Subsequent cases of the United States Supreme Court, from the famous *Cherokee Cases*[4] of the early 1830s down through the present day, have reaffirmed this principle. Importantly, though, the courts have also characterized the inherent powers of tribal self-government as existing in a state of subordination to an overarching and dominant federal authority. The courts have employed various rationales to justify this dominant federal power

University Press, 2009; D. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice*, University of Texas Press, 1997; C. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, Yale University Press, 1987; R. Williams, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America,* University of Minnesota Press, 2005.

[4] *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia,* 31 U.S. 515 (1832).

in Indian affairs – often referred to as the "federal plenary power" doctrine - but most scholars agree that it essentially represents the legacy of settler colonialism as codified in law. The tempering influence on this federal power, at least in theory, is the existence of a trust relationship that obligates the federal government to ensure the political status and territorial integrity of the tribal nations and their lands. The historical record would suggest that the United States has been, at best, a temperamental, opportunistic and self-serving trustee. At least one justice of the current Supreme Court, Associate Justice Clarence Thomas, has noted the inherent tension in the court's Indian law jurisprudence and has questioned the legitimacy of the federal plenary doctrine[5]. His concern, however, is less about protecting tribal sovereignty and more about federal power operating unmoored from its constitutional foundations.

In its signing statement endorsing the Declaration, the United States affirmed the legal status of tribal nations as political entities with inherent sovereign powers of self-government. Significantly, though, the United States took pains to characterize the right of self-determination for Indigenous Peoples as being fundamentally different from the existing right of self-determination in international law. The UN's Declaration, according to the United States, promotes the "development of a new and distinct international concept of self-determination *specific to indigenous peoples*." (emphasis added). In support of this view, the United States referenced Article 46 of the Declaration that states the right of self-determination for Indigenous Peoples "does not imply any right to take any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." This characterization of the right of self-determination for Indigenous Peoples thus allowed the United States to declare that its recognition of and relationship with the tribal nations as distinct political entities is entirely "consistent" with the Declaration.

In similar fashion, the United States offered its own interpretation of the protections afforded in Article 10 for Indigenous Peoples to remain secure in their ancestral homelands, free from the threat of forcible removal. The Declaration provides that relocation shall only take place in accordance with "the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible with the option of return." In its signing statement, the United States construed this provision as a "call

[5] "The court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty. The Court cites the Indian Commerce Clause and the treaty power. I cannot agree that the Indian Commerce Clause 'provide[s] Congress with plenary power to legislate in the field of Indian affairs'. At one time, the implausibility of this assertion at least troubled the Court, and I would be willing to revisit the question." (citations omitted). *United States v. Lara,* 541 U.S. 193, 224 (2004).

for a process of meaningful consultation with tribal leaders, but *not necessarily the agreement of those leaders*, before the actions addressed in those consultations are taken." (emphasis added). In these and other provisions of the signing statement, the United States makes clear its intent to maintain the existing regime of domestic federal Indian law, including the entrenched (but constitutionally questionable) paramount authority of Congress in Indian affairs. At least in regard to the fundamental right of self-determination, therefore, the Declaration has provoked no meaningful change in the United States' relationship with tribal nations.

II. FREEDOM AGAINST GENOCIDE OR OTHER FORMS OF STATE VIOLENCE

> Article 7
>
> 1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
>
> 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

The historical record is replete with accounts of state-sponsored violence directed at the Native peoples of the United States. A few of the more notorious episodes can easily be recalled by many Americans – e.g. the Trail of Tears, the Long Walk, Wounded Knee, Sand Creek. Other comparable events are less known in the popular culture but were no less destructive to tribal cultures and peoples. Whether these various forms of state-sponsored violence can be characterized as genocide is a matter of some scholarly debate[6], though historian Benjamin Madley builds a powerful case for exactly that in his recent history on California's efforts to exterminate its Indigenous population during the mid-19th century[7]. The overt forms of state-sponsored violence against the tribal nations that spilled over into warfare or at least armed subjugation were mainly confined to the earlier years of the nation's history and were largely (though not entirely) concluded by the end of the 19th century. This is not to suggest that other, more covert forms of state-sponsored violence did not continue to operate within tribal communities well into the 20th century. The principal example of this activity included the forcible removal of Indian children from their tribal homes and relocation to government or church-run boarding schools. The ultimate goal of the boarding schools was to assimilate Indian

[6] See e.g. G. Anderson, *Ethnic cleansing and the Indian: The crime that should haunt America*, University of Oklahoma Press, 2015.
[7] B. Madley, *An american genocide: The United States and the california indian catastrophe*, Yale University Press, 2017.

children into the majority mainstream white American culture. Government agents and educators, primarily Christian missionaries, working in Indian country embraced the prevailing mantra to "kill the Indian, save the man," with disturbing zeal and efficiency. During the 1950s and early 60s, with most of the federally-supported boarding schools closed or closing, federal Indian policy makers turned to the Indian child welfare system to encourage the adoption of Indian children by white families. While the means were different, the ends were the same: the assimilation of Indian children into white society. The results were staggeringly successful, at least from the perspective of state and federal officials. In a short period of time, the rate of outplacement of Indian children from their tribal homes into predominantly white homes far outpaced the rate at which children of other racial or ethnic groups were removed. One study estimated that in this period, between 25 and 35 percent of all Indian children had been removed from their families and tribal cultures and placed in non-Indian homes or institutions[8].

In the aftermath of the federal shift to a policy of tribal self-determination in 1970, tribal leaders urged Congress to enact legislation to reform the Indian child welfare system. The result was the *Indian Child Welfare Act* of 1978, a law that allowed tribal governments to play an important, sometimes decisive, role in decisions about whether, when and where to remove an Indian child from their tribal home.

Notwithstanding this legislation, several states continued to operate their child welfare systems in violation of the legal interests recognized in the ICRA. Among them was the state of Maine in far northern New England. At the urging of an Indigenous social service organization in Maine, the tribes of that state – the Penobscot, Passamaquoddy, the Maliseet and Micmac - joined with the state government in 2012 to form a Truth and Reconciliation Commission, the first of its kind in the United States, to investigate the state's child welfare system practices and to propose necessary reforms.

The Commission visited every tribal community in Maine and obtained statements from nearly 160 individuals, Native and non-Native, with the vast majority of the witnesses electing to have their names attached to their statements, "so that this does not happen again." The Commission's final report, submitted in 2015, concluded, in significant part, that Maine's Indian child welfare system operated in a form that constituted "cultural genocide" as defined

[8] J. Williams, *et al*., *Indian Child Welfare Act: Measuring Compliance*, Casey Family Programs, March 2015, available at https://www.casey.org/media/measuring-compliance-icwa.pdf.

by the Convention on the Prevention and Punishment of the Crime of Genocide (1948)[9]. The Commission based this finding on evidence of systemic state resistance to the mandates of the federal *Indian Child Welfare Act,* and other state practices that ignored, marginalized, discriminated against or disparaged indigenous family structures and tribal sovereignty. According to the commission, "Given the long history of practices that have removed Native children from their families, ranging from boarding schools to adoption movements, it is critically important to note this connection."[10].

Maine is not alone in operating a dysfunctional Indian child welfare system. Indian children across the United States remain disproportionately represented in the foster care system, at more than double the rates of the general US population[11]. Unlawfully severing the connections between Indian children and their tribal families and communities poses existential threats to the socio-cultural and political integrity of tribal nations. Ensuring greater state compliance with the mandates of the *Indian Child Welfare Act*, at minimum, would help minimize these threats, though there is no federal oversight body to monitor and enforce such compliance. More broadly, there is a need for broad-based education on the legacy of state-sponsored violence against tribal nations and their children that continues to disrupt tribal families and lead to the separation of Indian children from their Indigenous cultures. Until those efforts can be fully realized, the United States will remain complicit in the erasure of Indian culture by condoning this quiet form of cultural genocide.

III. RIGHTS OF RELIGIOUS FREEDOM AND CULTURAL PROTECTION

> Article 12
>
> 1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
>
> 2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms

[9] *Beyond the mandate/continuing the conversation*, Report of the Maine Wabanaki-State Child Welfare Truth & Reconciliation Commission, June 14, 2015, p. 68.
[10] *Ibid*.
[11] J. Williams, *et al., op.cit*., p.6.

In contrast to the previous subject matter, the United States earns slightly better marks in the modern era for ensuring protection of Native American religious expression and cultural practices. To be sure, the historical record is marred by systemic government efforts to eradicate Indigenous religious, spiritual and cultural practices, including sacred ceremonies like the Sun Dance, the Ghost Dance, or the sacramental use of peyote. Contemporary federal legislation and presidential acts, on the other hand, present a more sanguine disposition toward Indigenous rights in these areas, although Native religious practitioners still encounter challenges in the courts when it comes to protecting sacred sites.

A federal law from 1990, entitled the *Native American Graves Protection and Repatriation Act* (NAGPRA) affords protection for human remains and associated items of cultural patrimony that are located on federal or tribal lands or are in the custody of federal agencies or institutions that receive federal funds (including museums). Among its most notable features, the law imposes an obligation on institutions to repatriate human remains and associated cultural items to tribes that so request it and can demonstrate cultural affiliation with those ancestors and cultural items.

Likewise, federal statutes and/or executive orders now afford protection for the sacramental use of peyote, as well as the ceremonial use of animal parts like eagle feathers that would otherwise violate federal law.

Tribal religious practitioners have encountered more challenges, however, when it comes to protecting sacred sites, in particular, those that are located on public lands outside the boundaries of tribal lands. While federal statutes (like the *National Historic Preservation Act*, as amended in 1992) and executive orders (like President Bill Clinton's 1996 Executive Order 13007) require federal officials to consult with tribal leaders and otherwise seek to accommodate their religious interests in certain circumstances, the tribes do not have veto power to block activities on public lands that have otherwise been sanctioned by the federal government. Thus, under an accommodation with tribal religious practitioners, the National Park Service regulates, but does not prohibit, rock climbers from ascending Devil's Tower or the Lodge of the Bear, in Wyoming, during summer, the period when neighboring tribes traditionally conduct the Sun Dance at this site.

The Constitution's First Amendment guarantee of religious freedom has proven to be of little value in protecting sacred sites located on public lands. In the only case to reach the United States Supreme Court on this issue, *Lyng v. Northwest Indian Cemetery Protective*

Association (1988)[12], the court held that the Constitution only protects against government action that either compels an individual to engage in actions that are proscribed by their religious tenets or punishes them for having acted in conformity with their religious beliefs. A subsequent federal statute, the *Religious Freedom Restoration Act* (RFRA) has been interpreted by the lower federal courts as affording essentially the same narrow protections that exist under the Constitution. Thus, tribal leaders relying on RFRA were unable to prevent the federal government from allowing treated sewage water to be used in snowmaking at a ski resort located on federal forest lands in Arizona. Those lands are considered sacred by the Navajo, Hopi and other Native peoples of the southwest. Tribal medicine people and elders had argued, unsuccessfully, that the spraying of treated sewage water on even a small portion of the mountain would result in spiritual contamination ("ghost sickness") of the whole, much as a human body injected by an infected needle is at risk of biological contamination[13].

More recently, tribes of the southwest United States have encountered yet another threat to their sacred lands – the issuance of an executive order (by President Donald Trump) shrinking the acreage of national monuments established by a prior administration. The president's order, if allowed to stand, would reduce by 85% the territory of Bears Ears National Monument, a spectacular landscape that contains several sites considered sacred by the Navajo, Zuno, Hopi, Ute Indian Tribe and Ute Mountain tribes. The order exposes a number of sacred sites to development by extractive industries since the lands would no longer be under federal protection. The president's action has triggered a number of lawsuits contesting, on statutory and constitutional grounds, the power of the executive branch unilaterally to alter the boundaries of a national monument established by a prior president.

The legal challenges involving sacred sites illustrate the continued vulnerability of Indigenous religious practices that require private access to spaces located on public lands. Part of the challenge, of course, as recognized by the Supreme Court in the *Lyng* case, is the risk of creating Indigenous rights to religious servitudes on potentially vast swaths of public lands. The present regime of consultation with and accommodation for tribal members provides a measure of protection but ultimately, it does not account for the gross disparity in bargaining power between tribes and the federal government. Still, as illustrated above, this is an area of law and

[12] *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).
[13] See generally*, Navajo Nation v. United States Forest Service,* 535 F.3d 1058 (9th Cir. 2008).

policy wherein the United States can legitimately advance a claim of meaningful compliance with the terms of the Declaration.

IV. RIGHTS OF ECONOMIC DEVELOPMENT

> Article 20
>
> 1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
>
> 2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

One of the starting points in assessing the contemporary state of economic development in Indian Country is to recognize the legacy of past government policies that devastated traditional tribal economies, dramatically reduced the size of ancestral homelands and imposed constraints on the tribes' capacity to participate fully and fairly in market economies. From the decimation of buffalo herds in the Upper Plains in the 19th century, to the industrialization of fishing in the Pacific Northwest and the diversion of limited fresh water supplies in the Great Southwest during the 20th century, tribal traditional economies were dealt a crushing, and sometimes fatal, blow by a rapidly growing nation eager to displace and dispossess tribal nations in favor of white, Christian homesteaders[14].

The federal policy of opening Indian lands for white settlement operated for nearly half a century (from 1887 to 1934), by which time tribes had lost about two-thirds of their extant reservation lands or, if they retained at least a portion of their reservation lands, tribes were often sharing them with newly arrived white neighbors. Federal law imposed severe constraints on what tribes and their members could do with tribal lands, a fact that continues to hamper entrepreneurship and development at the local level.

Genuine improvement in this state of affairs did not begin in earnest until the federal policy of tribal self-determination in the 1970s. Over the ensuing decades, federal census data has shown marked improvement in a number of socio-economic measures, including reductions in poverty levels, increases in educational achievement levels and improvements in

[14] For an insightful account of the history and modern developments in this area, see R. Miller, *Reservation, "Capitalism:" Economic Development in Indian Country*, Praeger Press, 2012.

employment. Still, despite those marginal gains, American Indians continue to lag the national population on most census-measured indexes.

For their part, and against this backdrop, tribal governments have employed a variety of means to stimulate their local economies. Some tribal nations have effectively used their inherent sovereign powers of taxation to derive revenue from extractive industries operating within tribal lands, sometimes in conjunction with contractually-based royalty revenue. Others have worked cooperatively with state and local governments or the private sector to attract businesses onto reservation lands or otherwise invest in tribal enterprises. The Navajo Nation recently attempted, without success, to purchase the Remington gun company, among the oldest and largest gun manufacturers in the United States. The tribe planned to shift the company's operations away from private consumers and toward supplying police forces and defense contracts[15].

None of those activities, however, have rivaled the revenue generating capacity of the gaming industry that exploded in Indian country starting in the 1980s. In 1987, the United States Supreme Court ruled in *California v. Cabazon Band of Mission Indians*[16] that tribal gaming enterprises were not subject to state gaming laws so long as the tribes' activities were consistent with state public policies regarding gaming. That ruling spurred Congress finally to enact federal legislation to provide a comprehensive regulatory structure for the gaming industry in Indian country. While the *Indian Gaming Regulatory Act* of 1988 (IGRA) substantially advanced tribal interests in self-government and economic development, it also provided significant roles for states in decisions regarding the nature and scope of certain gaming operations. Tribal casinos, for example, can only operate pursuant to a compact negotiated between the tribe and the state.

In the three decades since the passage of the IGRA, gaming in Indian country now generates over $30 billion dollars (US) annually ($32.4 billion in 2017 according to federal sources[17]), with over 500 gaming enterprises owned and operated by nearly 250 different tribal nations spread across 29 states. This income, however, is unevenly distributed, with the majority of revenue generated by a handful of tribes located close to major population centers.

[15] A. Sorkin, "A Surprising Bid for Remington, and an Unsurprising Rejection"*, New York Times*, July 16, 2018, available at https://www.nytimes.com/2018/07/16/business/dealbook/remington-sale-navajo-nation.html.
[16] *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987).
[17] See National Indian Gaming Commission, at https://www.nigc.gov/news/detail/2017-indian-gaming-revenues-increase-3.9-to-32.4-billion.

In addition, an increasing number of states are approving gaming operations outside of Indian country, a development that will inevitably cut into tribal revenues.

Some tribal ventures into the market economy have raised concerns about possible misuse of the tribe's sovereign status and the associated rights of governmental immunity that come with that status. In 2017, the Saint Regis Mohawk Tribe struck a deal with Allergan, a major pharmaceutical company, allowing the tribe to take ownership of patents for an eyedrop product (Restasis) and in turn, giving the company an exclusive license to continue to make and profit from the drug. Allergan paid the tribe nearly $14 million dollars up front with provisions for annual royalties of about $15 million dollars. Allergan generated about $1.5 billion annually from this product so the payments to the tribe, while substantial, paled in comparison. This arrangement allowed the tribe to invoke its sovereign immunity in proceedings before the US Patent and Trademark Office (PTO) where generic drug makers had brought challenges to Allergan's patents. Allergan's ultimate objective was to delay market competition from lower-cost generic versions of drugs like Restasis[18]. While the PTO has rejected the tribe's arguments in this particular matter, a bill in the US Senate would permanently strip all tribes of their sovereign immunity in these types of proceedings[19]. This outcome exposes the risks and limits of tribes seeking to maximize – or, for some observers, allowing outsiders to exploit – their sovereign powers of self-government.

The legacy of historical dispossession of tribal lands, resources and opportunities casts a long shadow in contemporary Indian country. The rebuilding of tribal economies continues to be painstaking work and recent efforts have yielded uneven results. For a nation still contending with or adjusting to the reality of tribes as sovereign nations, it may be an even greater challenge for the United States to conceive of and support tribes as genuine forces in the broader market economy.

V. PROTECTIONS FOR INDIGENOUS WOMEN AGAINST VIOLENCE AND DISCRIMINATION

> Article 22
>
> 1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

[18] G. Ablavsky, L. Larrimore Ouellette, "Selling Patents to Indian Tribes to Delay Market Entry of Generic Drugs", *JAMA Internal Medicine*, Jan. 2, 2018 (online).
[19] S. 1948, 115th Cong. (2017).

> 2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

According to the US Department of Justice, Native women in the United States experience the highest rates of sexual violence in the country. The overwhelming majority of perpetrators are non-Native men, particularly white men[20]. Typically, crimes of domestic or sexual violence are resolved by local governments. Indian tribes, however, lack the inherent sovereign power to prosecute non-Indians, at least according to US Supreme Court. While Congress acted to provide a partial corrective, major gaps in law enforcement remain. Congress can and should act to resolve these gaps so that tribal nations, as the governments closest to and best equipped to respond to these crimes, can provide justice for the victims of sexual violence.

In 1978, the Supreme Court held in *Oliphant v. Suquamish Indian Tribe*[21] that Indian tribes lacked inherent sovereign power to prosecute non-Indian defendants for violations of tribal law. The decision has been widely criticized by scholars and tribal leaders for employing reasoning unfounded in law and for its reliance on outdated views about tribal justice systems. In 2013, Congress finally enacted legislation, in the form of amendments to the *Violence Against Women Act* (or VAWA), that partially overruled the *Oliphant* ruling in limited situations involving violence against women. The legislation recognizes and affirms inherent tribal authority to exercise "special jurisdiction" over any defendant, regardless of race or ethnicity, for a narrow class of crimes. In order to exercise this power, however, tribes must adjust (or remake) their justice systems so that they operate, in structure and practice, essentially like their state or federal counterparts. For example, tribal judges in these cases must be law-trained (not all tribal courts have this requirement); defendants must be provided an attorney at the tribe's expense (some tribes already provide for this, others do not, or they provide alternative forms of advocacy); and defendants are entitled to a jury that is largely representative of the local tribal community. While these legal protections are not objectionable in and of themselves, their imposition on tribal governments by federal fiat presumes that existing tribal justice systems are inadequate. In other words, the legislation seeks to accomplish

[20] See generally, S. Deer, *The Beginning and End of Rape: Confronting Sexual Violence in Native America*, University of Minnesota Press, 3rd ed, 2015.
[21] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

a form of *judicial assimilation* of tribal justice systems as the *quid pro quo* for allowing tribal courts to adjudicate criminal actions against non-Indian defendants.

In the five years since this legislation was enacted, at least eighteen (18) tribes have been authorized by the federal government to exercise this special jurisdiction. According to a recent study by the National Congress of American Indians, there have been nearly 150 arrests by these tribes with about 74 convictions, 5 acquittals and several cases still pending[22].

Despite these developments, there are still significant problems in tribal law enforcement because of limitations or gaps within the federal legislation. The legislation defining the tribe's "special jurisdiction"does not apply to children or to law enforcement officials who may be harmed by the offender. It also does not apply to offenders who are unknown to the victim (i.e. the "stranger" offender). Beyond these technical flaws, there are lingering questions about whether Congress even has the constitutional power to enact legislation that subjects non-Indian US citizens to criminal tribunals operated by governments (tribal nations) that are not subject to the constraints and protections of the US Constitution (including its guarantee of individual liberty). Given the current composition of the US Supreme Court, there is a strong possibility that a majority of the justices would find this legislation unconstitutional. This was the conclusion of the Congressional Research Service, a non-partisan team of legal advisors to members of Congress, when it reviewed this legislation in 2012[23].

Congress has another opportunity to review and make adjustments in this area of law since the VAWA is up for reauthorization in 2018. It remains to be seen whether Congress will focus narrowly and redress only the existing flaws within the law or whether it will act more boldly and do what many tribal leaders and scholars have urged from the start: enact legislation that overrules *Oliphant* completely and reaffirms the powers of tribal courts over all criminal matters arising within their territory, regardless of the offender's race or ethnicity. Individuals within the tribe's jurisdiction already have access to the federal courts under existing legislation to challenge the legality of their detention in tribal courts. That expression of government-to-

[22] National Congress of American Indians, *VAWA 2013's Special Domestic Violence Criminal Jurisdiction Five-Year Report*, March 20, 2018, http://www.ncai.org/resources/ncai-publications/SDVCJ_5_Year_Report.pdf.
[23] See J. Smith, R. Thompson II, "Tribal Criminal Jurisdiction over Non-Indians in the Violence Against Women Act (VAWA) Reauthorization and the SAVE Native Women Act", *Congressional Research Service*, April 18, 2012.

government relationship in the administration of criminal justice in Indian country would come closest to meeting the aspirations of the UN's Declaration.

VI. PROTECTION OF THE ENVIRONMENT

> Article 29
>
> 1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
>
> 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
>
> 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

One of the iconic images from the dawn of the nation's environmental movement during the late 60s and early 70s was a public service television campaign urging Americans to stop pollution. The ad featured a male figure presented as an American Indian who serves as nature's witness to the despoliation of the natural world. A voice solemnly intones, "Some people have a deep, abiding respect for the natural beauty that was once this country. And some people don't." The figure then turns facing the camera, a solitary tear running down his cheek, while the voice intones, "People start pollution; people can stop it."[24].

The campaign builds upon a long-standing trope, if not stereotype, of Native peoples as the first, true environmentalists. That image is flawed in some ways. After all Native peoples, like all human societies, engage in and with the natural world and consequently, their activities invariably exact some toll on its ecosystems[25]. Nonetheless, there are also profound truths embedded in this imagery, most notably in the form of an Indigenous land ethic or what the celebrated Kiowa writer, N. Scott Momaday has called, a "moral comprehension" of the earth and air[26]. Underlying this land ethic or moral comprehension is the notion of *reciprocity* that operates in the manner of a sacred covenant between Indigenous societies and the natural world.

[24] It was later revealed that the male figure in the campaign was not actually a Native person but an actor of Italian descent, Espera Oscar de Corti, whose stage name was Iron Eyes Cody.
[25] See generally, S. Krech III, *The Ecological Indian: Myth and History*, W.W. Norton and Co, 2000.
[26] S. Momaday, *The Man Made of Words: Essays, Stories, Passages*, St. Martin's Press, 1997, p. 49.

For Anishinaabe scholar and activist Winona LaDuke, the value of reciprocity represents an understanding that "you take only what you need and leave the rest."[27].

The federal government has recognized the important role that tribal nations have and must continue to play in managing their lands and natural resources. In 1984, the federal Environmental Protection Agency (EPA) announced its policy for working with Indian tribes, the first federal agency to do so in the era of tribal self-determination. The EPA's policy, in pertinent part, states the following:

> "In keeping with the principle of Indian self-government, the Agency will view Tribal Governments as the appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace."[28]

Shortly thereafter, Congress amended a number of the major environmental statutes, including the *Clean Air Act*, the *Clean Water Act* and *Safe Drinking Water Act*, to provide opportunities for tribal nations to participate in the nation's system of environmental federalism and to serve in regulatory roles comparable to the states.

The Pueblo of Isleta in New Mexico became the first tribe in the country to gain authorization to work with federal environmental regulators under the Clean Water Act. Not surprisingly, they were also involved in the first legal challenge to this environmental regulatory regime when the City of Albuquerque in New Mexico challenged the authority of the federal government to accord this sort of power to tribal nations. The federal courts upheld this regulatory structure and, in the process, provided important vindication for the tribal interests in protecting their lands and natural resources. The practical outcome of the case was that Albuquerque was required to comply with the Pueblo's water quality standards that were set at levels to protect, among other things, the tribe's ceremonial uses of the Rio Grande River[29].

Following the example of the Pueblo of Isleta, nearly 60 other tribes are similarly eligible to administer water quality programs for water bodies under their jurisdiction. Of these

[27] W. LaDuke, *Foreword to The New Resource Wars: Native Struggles Against Multinational Corporations,* South End Press, 1993, p. xi.
[28] US Environmental Protection Agency Policy for the Administration of Enviromental Programs on Indian Reservations, 1984, available at https://www.epa.gov/sites/production/files/2015-04/documents/indian-policy-84.pdf.
[29] See *City of Albuquerque v. Browner,* 97 F.3d 415 (10th Cir. 1996).

tribes, about 44 of them have established water quality standards that have been approved by the EPA[30].

In addition to this network of federal statutes, treaties are another source of legal protection for tribal environmental and natural resource interests. In 2016, for example, the United States Army Corps of Engineers denied a construction permit for a proposed export terminal to be constructed north of Seattle because of the likely negative impacts on treaty-based fishing rights of the Lummi Tribe of Indians. The terminal was designed to export dry bulk commodities, principally coal destined for Asian markets. In the memorandum of decision by the Army Corps, the deciding officer cited the well-established principle that Indian treaties constitute a form of property rights under US law:

> "The rights defined in Indian treaties were not a grant of rights from the United States to the tribes, but were instead a reservation of rights held by the tribe as a sovereign people from time immemorial. Indian treaty rights are property rights which may not be taken without an act of Congress."[31]

In sum, the federal record in terms of compliance with this provision of the Declaration is comparatively strong. Clearly, this is an area where there is practical and ideological convergence between the interests of tribes and the broader society. Beyond that, tribes have a proven track record in terms of acting effectively to protect their local environments and natural resources. William H. Rodgers, Jr., among America's preeminent legal environmental scholars, wrote the following assessment about the tribes' role as environmental stewards:

> "Count me among the believers that the U.S. Indian Tribes are the most creative and effective agents for positive environmental change in play today. Evidence is everywhere. Tribes have the better laws and they expect more of them. They are uniquely positioned to combat the corrosive influences that have undermined the modern environmental laws."[32]

[30] US Environmental Protection Agency, *Tribes Approved for Treatment as State (TAS*), available at: https://www.epa.gov/tribal/tribes-approved-treatment-state-tas.

[31] See US Army Corps of Engineers, Memorandum for Record, May 9, 2916, p. 19, available at: http://www.nws.usace.army.mil/Portals/27/docs/regulatory/NewsUpdates/160509MFRUADeMinimisDetermination.pdf. See also, K. Johnson, "US Denies Permit for Coal Terminal in Washington State", *New York Times*, May 9, 2016, available at: https://www.nytimes.com/2016/05/10/us/washington-state-army-corps-denies-permit-coal-terminal.html.

[32] W. Rodgers, Jr., "Tribal Government Roles in Environmental Federalism", *Natural Resources and Environment*, 2017, vol. 21, issue 3.

CONCLUSION

This brief and highly selective assessment of the United States' record of compliance with the UN's Declaration on the Rights of Indigenous Peoples reveals that while there have been notable achievements, there is also considerable room for improvement and progress. From the perspective of tribal nations, the formative arrangements between the federal government, embodied in the US Constitution and in innumerable treaties, statutes, executive orders and judicial opinions, embrace a commitment to a legally plural society, one in which multiple legal systems (Indigenous and non-Indigenous) co-exist peacefully among each other in shared territories. As seen in the US' reformulation of the meaning of self-determination relating to Indigenous Peoples, however, the United States seeks to preserve the existing hierarchical political and legal structures that secure its position of supremacy and domination over the tribal nations. Nonetheless, the Declaration serves as an important moral template by which the tribal nations may continue to advance their interests and hold the United States accountable for its Indian policies and to its formative commitments to a legally plural society.

THE LIMITS OF THE POWERS OF THE US PRESIDENT

Transcript of lecture given at the Sorbonne School of law
on the 25th of October 2017

Matthew Diller*

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* Matthew Diller is the Dean and Paul Fuller Professor of Law of Fordham University School of Law.

ABOUT MATTHEW DILLER

Dean of Fordham Law School, New York, Matthew Diller has been, for the academic year 2017-2018, visiting scholar at Paris 1 Panthéon-Sorbonne University. Throughout his academic career, Matthew Diller is interested in social welfare law and policy issues ranging from public assistance, social security to disability law and policies.

During his stay at Paris 1 Panthéon-Sorbonne, Matthew Diller gave a speech during a conference on another widely discussed topic in the United-States, as well as in the rest of the world: the powers of the United States President and more specifically, their control by the Constitution of the United States. The exercise of the U.S. presidential powers remains a contemporary intellectual topic finding a particular echo in the election of the 45th U.S. President, Donald Trump. This election has raised, and is still raising, a myriad of concerns from both the civil society and the academic community. It is in this context that Matthew Diller enlightened us on the articles and amendments provided by the U.S. Constitution in order to control the U.S. presidential powers. Hence, after recalling and illustrating, the separation of powers and the possibility to raise veto, Matthew Diller expatiated on the 25th amendment providing the appointment of a new vice-president.

Undoubtedly, the contribution of Matthew Diller will allow people not acquainted with U.S. Constitutional Law to apprehend its peculiarities with respect to the current U.S. presidency.

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À PROPOS DE MATTHEW DILLER

Doyen de l'École de droit de l'université Fordham de New York, Matthew Diller a été, lors de l'année universitaire 2017-2018, chercheur invité à la Sorbonne. Tout au long de sa carrière, Matthew Diller s'est intéressé au droit et aux politiques de la sécurité sociale dans toutes ses dimensions de l'assistance publique à la sécurité sociale, en passant par les programmes, politiques et questions juridiques relative au handicap.

Lors de son séjour à la Sorbonne, Matthew Diller s'est entretenu lors d'une conférence sur un autre sujet d'actualité faisant couler beaucoup d'encre tant aux États-Unis que dans le monde : les pouvoirs du Président des États-Unis et particulièrement son encadrement par la Constitution américaine. L'exercice du pouvoir présidentiel aux États-Unis demeure un des sujets de réflexion contemporains toujours aussi vif et qui a trouvé un écho particulier lors de l'élection du 45e Président, Donald Trump. Cette élection a suscité – et suscite toujours – de grandes craintes tant de la société civile que dans le monde universitaire. C'est dans ce contexte que Matthieu Diller nous offre son éclairage sur les articles et amendements qu'offre la Constitution étatsunienne pour encadrer les pouvoirs présidentiels. Après avoir rappelé, et illustré, la séparation des pouvoirs mais aussi la possibilité d'opposer un veto, Matthew Diller discute avec précision de l'amendement 25 disposant de la nomination d'un nouveau vice-président.

Indéniablement, cette contribution de Matthew Diller permettra aux non-spécialistes du droit constitutionnel américain d'appréhender ses subtilités au regard de la présidence actuelle.

Camille Gendrot
Doctorante à l'École de Droit de la Sorbonne

Victorien Salles LL.M.
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TRANSCRIPT[†]

Good afternoon, everybody. My name is Matthew Diller. I'm the Dean at Fordham University School of Law in New York. I want to talk to you about a subject that all of us in the United States have been thinking about since November 2016—the role of the executive in our constitutional system of government. Our constitution has been around for over 200 years. It is a very bare-bones, elemental constitution, which leaves a lot to be filled in through tradition, experience, and interpretation. Since November 2016, everyone has been really focused on the question of "What can the president do and not do?" and "What are the limits on the president's powers?" I will just be upfront with you and say I'm from New York City, and the vast majority of us were dismayed with the outcome of the election. We spent more time thinking about the parts of the Constitution that limit the powers of the president so that we could sleep better at night. I don't know how many of you have studied the U.S. Constitution. So for some of you this might overlap with what you have studied, but I think it will have new dimensions too.

Before we talk about the limits of the powers of the president, we have to spend some time on what the affirmative powers of the president are so that we can see how they are limited. There are two sources of presidential power. The first is in Articles 1 and 2 of the Constitution, and I will talk briefly about that. I've given you copies of the Constitution to follow along if you can. I feel honored to be able to spread the Constitution of the United States. Article 2 establishes the Office of the President and sets forth the powers of the presidency. Article 1 establishes the legislature, which is our Congress. The president has some direct powers with respect to legislation and the legislative process. On a day-to-day basis, many of the powers of the president have been delegated to the president through Congress. Congress enacts laws that establish government agencies and government programs that the president, as the chief executive officer of the United States, is responsible for implementing. So we really want to look for the range of powers of the president. A lot of them are not only in the Constitution, but also in the legislative delegation.

These basic powers of the president come from Article 2. I won't talk about them in detail because I will talk about them more specifically later. I do want to mention the veto power. That's a legislative power. In Article 1 of our Constitution, when Congress passes a proposed law (a proposed law is called a bill), it goes to the president for his signature. If the

[†] We are grateful to Valentin Depenne, Secretary-General of the Sorbonne Student Law Review, for his transcript of Dean Diller's conference.

president does not sign the bill or vetoes it, it does not become law. However, if it isn't signed by the president, it can still become law if Congress repasses it with a two-thirds supermajority vote. That's the president's direct role in legislation.

Let's go to what really interests me in this day and age, which is the limits on the president's power. One set of limits comes from the structure of government in the United States, which is our principle of federalism. In the United States, we have 51 sovereigns. Each state is considered a sovereign, and the federal government (the national government) is an additional 51st sovereign. There is a complex relationship between them. For those of us who are interested in the limits of the president's powers, one of the first places we look is to the states. In particular, if the national government is not regulating in an area, generally, the states are free to regulate. Where this comes up in my mind is a lot of advocates and supporters of environmental and health and safety regulations are now looking to state governments for protection. One good example of this is greenhouse gasses. President Trump wants to roll back all regulation of greenhouse gasses on a national level. The states can still regulate greenhouse gasses. In 2005, when George W. Bush was president, he was not in favor of regulating greenhouse gasses. Six states in the Northeast adopted an interstate agreement acknowledging that they would regulate carbon dioxide emissions in their states. That's just one example of how states can, to some extent, fill the void. The risk here is that anything regulated by the states is subject to the Supremacy Clause, which means when the national government does act, it trumps the states' laws and agreements.

I want to talk for a moment about what is called the commandeering principle. There's a series of Supreme Court decisions from the 1990s that basically limits the ability of the national government to interfere with functions of the state governments. The most important principle is that the national government cannot commandeer state officials to enforce national law. That's a very important point. It was obscure when the Supreme Court decision came down in the '90s, but it's now moved to the front of debate in the U.S. with regard to the issue of immigration. States and localities are increasingly saying they will not allow their police departments and other law enforcement agencies to cooperate or participate in enforcing the immigration laws and arrest undocumented immigrants within their jurisdictions.

The commandeering principle says the national government cannot force state governments to cooperate or participate. That would be an interference with the state's sovereignty. That has led to a number of cities declaring themselves to be sanctuary cities, where the cities would protect undocumented immigrants. That's a very controversial and

ambiguous notion in the United States. When I say ambiguous, I mean that the states won't actively enforce the immigration laws, but they also can't stop the national government from enforcing its laws. They can't keep the federal officers out, but they can refrain from helping them. This is particularly important with respect to sharing information, especially about things like arrests. If someone is arrested for a particular crime and it turns out he is an immigrant without a proper visa, will the local law enforcement tell the national law enforcement about it or not?

Recently, local officials are increasingly deciding not to do this. The Trump administration has argued that states and localities are required to cooperate. President Trump has threatened to withhold federal funding from states and localities that don't cooperate. The reason the emphasis is on funding is because the federal government can't directly order states and localities to cooperate. That would violate the commandeering principle. The Feds can't commandeer state officials. Withholding funding is an indirect way to achieve the same goal: unless state and local governments cooperate with immigration, the Trump administration is threatening to cut off federal funding. Can they do that? They may be able to do that to some extent. The states have to agree to conditions in order to receive federal funding. But there are also limits on what the federal government can require of the states through legislation. One of the big limits is a Supreme Court case that says that the federal government can't condition funding on a wholly unrelated state issue. So, you can't withhold highway funding or education funding because the state won't enforce immigration laws. There has to be a connection between the funding and the conditions. This topic will be a major subject for debate over the coming years.

Other limits over the president's powers come from the separation of powers. The United States government's powers are limited in one of two ways. One is through the federal-state structure. The other is the separation of powers among the different branches of government. Under our Constitution, we have three branches of government: the first is the legislature, which is Congress; then there's the president, who is the chief executive officer of the government; and the third is the judiciary. The functions of each branch set limitations on the others. Under Article 2 of the Constitution, it says the executive powers shall be vested in the president. That's been interpreted to mean that the president is vested with executive power, but not vested with judicial power, and not vested with legislative power.

Let's talk about some of the more specific limits on the power of the president. One is that the president is the commander of the armed forces of the United States, which, of course,

is a tremendously important power. There are two key limitations on this power. One, Congress has to appropriate the money for the military. So, the president is always dependent on Congress to fund the military. Therefore, if the president ignores Congress's will and gets Congress upset, Congress can always cut the funding. That will always, to some degree, bring the president back in conversation with Congress. The second is Congress, under the Constitution, has the sole power to declare war. This sounds a lot more powerful than it is—the last time Congress declared war was in 1941. So, we've had major conflicts, including the conflicts we are currently engaged in, that have never been declared to be wars by Congress. There doesn't have to be a declaration of war every time the United States sends troops into battle. There was a lot of interesting debate over this when the United States went to war in Iraq in the 2000s. People argued that a declaration of war was, strictly speaking, constitutionally necessary with some congressional approval. So, Congress passed an authorization for the use of military force in Iraq in 2001, which is still the legal basis for the U.S.'s military involvement in the Middle East today. This is somewhat stunning. Congress's power to declare war turns out to be less significant than you would think.

The president has the power to pardon criminals. There are a couple of key points to know about this. The president recently pardoned a local sheriff in Arizona who had been found in contempt of court for violating the civil rights of immigrants. He had not yet received a sentence, so the proceedings were not yet over. Despite this, President Trump pardoned him. Under our Constitution, he can do that. There's no real review or check on how the president exercises the pardon power, but there are a few limitations. One is that the president can only pardon federal crimes. So, if there's a state crime, then the president can't pardon that person. That has led people to call for states to investigate Trump and his associates, because any convictions would be beyond Trump's power to pardon.

The treaty power is very important and much in the news. Under the Constitution, the president has the power to enter into treaties on behalf of the United States, subject to the advice and consent of the Senate, which means it has to be approved by the Senate. The challenge to it is that in recent years, presidents have entered into international agreements that have the international force of law of treaties but are not treaties for purposes of U.S. domestic law. They are what we call executive agreements. The reason this is important is that an executive agreement is not confirmed by the United States Senate under the treaty power. A great example of this is the Paris Climate Accord, which, for international law purposes, is a treaty. For U.S. domestic purposes, it is an executive agreement. When it was implemented in the United States,

President Obama enacted it as a regulation with his traditional domestic powers the way one would enact any other regulation domestically. It never went through the mechanism of being approved by the Senate as a treaty. The Constitution is silent about withdrawing from treaties. Let's say the Paris Climate Accord had been ratified by the Senate. The Constitution is silent about whether Senate agreement is required to withdraw from a treaty. People disagree on whether there's a necessity for Senate ratification of a withdrawal from a treaty. It's less important. Both the Paris Climate Accord and the Iran Sanction Agreement are not treaties under U.S. law. They were never sent to the Senate for ratification. They were only enacted domestically through the president's domestic powers.

The appointment power is very important because when it comes to running a government and shaping it to the individual will of the president, the ability to put one's own people into key positions of power is obviously central. In the United States, the president appoints all the secretaries (equivalent to your ministers)—all the heads of offices, but they are subject to confirmation by the United States Senate. So the Senate could reject nominees, and already with Trump a couple of nominees have withdrawn because it was seen as unlikely that the Senate would approve them. This remains a very active check and balance.

I want to spend a minute talking about the filibuster rule. How many of you have heard of the filibuster? The filibuster rule is an internal rule of the United States Senate providing that in order to close off debate on a matter and bring it up for a vote, you need a supermajority in the Senate. You need 60 of those senators. You only need 51 to actually confirm a nomination or approve a proposed law, but to get to the vote you need 60, or else it never comes up for a vote. For those of us who are Democrats, like myself, that's key during Trump's presidency. If the Democrats have at least 40 senators, they can stop things from coming up for a vote. There are a couple of wrinkles to this. One is that the filibuster is an internal rule to the Senate itself, which means it's subject to change by a simple majority of the Senate. There was a period of years when one side would threaten to filibuster and the majority would say, "You keep filibustering, we're going to change the rule." A confrontation would ensue, which would lead to a compromise. The threat that the rule could be changed weakens the power of the rule. Recently, the rule was changed with respect to judicial nominees. The filibuster no longer applies to judicial nominees, which is how Justice Gorsuch, who was a Supreme Court nominee of Trump confirmed last spring, was approved. The Democrats threatened to filibuster and the Republicans changed the rule to say that the filibuster doesn't apply to judicial nominees. It still applies to other officers, agency heads, ambassadors, and other officers of the United States.

One more point on appointments. Congress has to establish the offices. Congress has to fund the offices. Congress can set qualifications for who holds the office. What Congress can't do is say, "We, Congress, want this person to be appointed as a secretary." There have been cases before the U.S. Supreme Court that have struck down statutory systems retaining the appointment power in Congress as infringing on the president's power.

One of the requirements of Article 2 is that the president has to take care that the laws are faithfully executed. Basically, this is what it means to be an executive and to execute the laws. Of course, that means the president must execute the laws, not violate the laws. The other thing about this is the power to remove officers has been read into the "take care" clause. The Constitution makes points about hiring officers. It doesn't say anything about firing officers or removing officers. There's been a lot of debate and discussion over whether Congress can limit the president's power to fire officers. That's been a hotly debated issue regarding the presidency for basically a hundred years. The basic outcome is, for key executive officers, Congress can't limit the president from firing someone. The ability to remove someone from office is part of taking care of executing the laws. Congress can put limitations on a number of positions by requiring that the president have good cause for removing people. There are many high-level offices in the United States where the tenure of these officials is protected by these good-cause requirements. The phrase "independent agencies" in the United States, such as the Federal Communications Commission and the Federal Trade Commission, means that those commissioners can only be removed by the president for good cause. That's considered a significant limitation on the president's power. How much Congress can limit the president's ability to remove officers continues to be a highly debated issue.

The veto power I mentioned can be overridden with a two-thirds vote.

Let's talk for a minute about limits on powers derived from delegation. On a day-to-day basis, this is really critical. Much of what the president does is under authority that has been granted to him by statutes passed by Congress. When Congress passes the statutes, it sets standards and requires procedures, and the president can be held accountable to those standards and procedures. A great example of this would be the Clean Air Act, which is one of the basic environmental statutes in the United States adopted in the late 1960s. It tells the executive branch, "You have the power to create regulations which limit air pollutants in order to protect health and safety." It will require when and how the president should use this power. This power is delegated to the Environmental Protection Agency, which is an agency, or a ministry as you would call it, within the executive branch. A statute called the Administrative Procedure Act,

the APA, would govern how the Environmental Protection Agency, the EPA, conducts its business. What's important here is that when an agency enacts a set of regulations, it has to go through particular procedures. It has to provide advance notice and opportunity for public comment. That all sounds very simple, right? When it issues its final regulations, it has to explain its reasoning and explain its views on the comments it received. An agency's explanations can be challenged in court. If they are found not to be sufficient, the court can overturn the regulation. It's been cumbersome and slow for agencies to issue regulations because this procedure has gotten more and more involved. When the EPA issues regulations, manufacturers often sue to challenge them, and it takes years for them to go into effect. That can be very frustrating if you're in favor of the regulations. That cumbersome process can seem like a major problem. However, and this is the important point, the courts have held that when an agency rescinds regulations—when it takes them back, or deregulates—it has to use all the same procedures that it used when it initially issued them. It has to give notice and opportunity for comment. It has to give reasoned explanations for rescinding them. It can't just say the president didn't like it. It has to point to evidence of the effects of the negative regulations. The reasoning can be challenged in court, and it can take years.

The reason I'm stressing this is because I'm going to give a key example. President Trump has announced that he's pulling out of the Paris Climate Accord, as I'm sure you all know. As I said, the Paris Climate Accord was not a treaty under U.S. law. It was an executive agreement. It was implemented by a set of regulations adopted by the Obama administration through this process using domestic authority, and Obama called his regulations the Clean Power Plan, which regulated carbon dioxide emissions by power generation. All of those regulations went into effect. Now President Trump wants to get rid of them and has announced that he will be repealing the Clean Power Plan. Because of all of these limitations, he cannot just say, "All of these regulations are gone," even though they were issued by an executive department. He has to propose to withdraw them. He has to provide explanations to withdraw them. He has to take comments on whether or not to withdraw them. He has to provide explanation on why he is accepting or rejecting the comments. Those explanations are subject to contest in court. It could take years. That is a major check on the president. To deregulate requires the same process as regulation, and that's a cumbersome process.

Judicial limitations on the president's power. This has been mentioned already in some of my discussion. Executive actions can be challenged in the courts. They are subject to challenge for violation of the Bill of Rights, which is the individual set of rights guaranteed by

the Constitution in the first ten amendments: freedom of speech, freedom of religion, due process, etc. Executive action is also subject to challenge for violating statutory requirements, and that's related to what I was saying in the last slide. If the executive agency rescinds regulations without proper reasons, you can sue to challenge that. One limitation to this, which I just want to dwell on for a moment, is the case of controversy requirement. In order to bring a lawsuit in the United States in the U.S. courts, you need "standing" to bring the case, which means the court has to find that whatever you're suing about is a case for controversy within the meaning of the Constitution. That means you need to be an individual or an organization directly affected by the government action, and you need to show that the remedy will alleviate the harm that you're suffering. There are also some things that are considered political controversies and not cases. These are non-justiciable. I don't know if you have justiciability principles in France. My guess is that you probably do. These come up on some macro-level, grand issues. I'll give you an example. In the 1960s, the Vietnam War was incredibly controversial. There were many people opposed to the Vietnam War. Many lawsuits were filed challenging the legality of the Vietnam War on a number of bases. One was that Congress never declared war. How can we have a war if Congress never declared war? The courts did not hear those cases. They considered them to be political questions, that the plaintiffs did not have standing, or there was no case for controversy. There is some level of generality that will deem things to be not justiciable. In the Vietnam War cases, the courts said yes, Congress did not declare war. But it had provided funding for the Vietnam War, it had approved all the funding requests, and there were many statutes that showed complicity in the Vietnam War. The Court decided Congress can take care of itself on things like that. In many cases of controversy between the president and Congress, the courts will just step aside, saying this is for the president and Congress to solve through the political process themselves.

I want to just touch on one other important subject that everyone has their mind on, especially us in the Northeast of the United States, and it may have even occurred to people in France. Which is: Under the Constitution, how do you remove a president? We have two mechanisms for this. The first is what's known as impeachment. I won't talk about this at length, but the Constitution sets up a process that is kind of framed as a judicial process. It's interesting because it's Congress that actually impeaches—the House of Representatives files the accusation, and the Senate acts as the jury and the judge. It's all framed in terms of crimes. The president can be accused of treason, bribery, or other crimes or misdemeanors. It looks like criminal law models. Maybe one of these scandals will explode and show major criminality.

Some people think it already has. A key point for impeachment to come into play is it has to come through Congress, and at the moment both houses are controlled by Republicans. This is really not a realistic option unless something totally disastrous happens.

I want to spend a little time on the next one. How many of you have heard of the 25th Amendment? I thought I would get a different response on that. The reason you haven't heard of it, first, is because it's one of our newest amendments. It was adopted in 1967. It deals with unsettled issues of presidential succession and has a provision for the removal of a president that many people don't realize is tucked in there. On the face of it, it deals with many different issues, like if the office of vice president is vacant, as has happened many times, how do we get a new vice president? If you pause to think about it, when John F. Kennedy was assassinated and Johnson was president, we had no vice president for several years until Lyndon Johnson was elected as president. There was no mechanism in the Constitution for getting a new vice president. The 25th Amendment creates a mechanism where the president can nominate and Congress can name a new vice president. That's how Gerald Ford got to be president. Richard Nixon resigned and Spiro Agnew had been elected vice president and then resigned. Congress, through the 25th Amendment, had appointed Ford as vice president, and then he became president.

That's not what I really wanted to spend time on. I really want to focus on Sections 3 and 4 of the 25th Amendment. Section 3 deals with when the president is unable to discharge the powers and duties of his office. He can transmit a declaration to that effect and name the vice president as acting president. He can do this on a temporary basis. This has happened a number of times, mostly when presidents have undergone medical procedures. In a nuclear age, it doesn't make sense to have any ambiguity about who's in charge or who has authority. So if the president is going to go under anesthesia, he will appoint, using this power, the vice president as acting president while he's out.

Section 4 of the 25th Amendment provides that the vice president and the majority of the principal officers of the executive bodies or such other bodies Congress may by law provide, may transmit to the Senate and the Speaker of the House the written declaration that the president is unable to discharge the powers and duties of his office and the vice president shall immediately become acting president. The vice president and the majority of Congress can declare the president unable to carry out the duties of his office. In such a case, the vice president becomes acting president and the president is removed from his authority immediately. However, if the president disagrees—if there's a conflict about this—the president can then file

a written objection with Congress, and Congress will have 21 days to resolve the matter. To ultimately remove the president in this manner requires two-thirds vote of Congress. This is a fascinating provision. The thing that's so interesting about this is that it is the only way to remove the president without criminality. Impeachment requires crimes. The 25th Amendment doesn't require any criminal conduct at all.

Many people have been looking at this. As people get more anxious about President Trump, they focus on whether the 25th Amendment is an answer. The people who wrote the 25th Amendment, what they would say is that this is intended to deal with disability. This is not about being competent. This is not about a president who was elected and we decided we made a bad mistake. That's not what this is about. It's not for correcting a big mistake at the ballot box. You can dig down one level deeper. Many people say, let's not be so quick; let's not say that this is unrelated to medical issues. Because if you see medical issues as encompassing both physical issues and mental health, there's a case to be made. The 25th Amendment case on Donald Trump is if he is unable by reason of a mental disability or psychological disability to carry out the duties of his office. On this point, people may begin to discuss it. I've seen some reports that say that something like a third of all presidents may have had psychological issues. If a psychological issue was a disqualifying factor in itself, then half of all presidents would have been removed because it tends to be extreme personality types that end up being president in the first place. There are also examples, like during the American Civil War, when Lincoln's son died from tuberculosis and he went into a terrible depression. Could he or should he have been removed by the 25th Amendment? The 25th Amendment didn't exist 100 years ago, of course. If it had, would he have been subject to removal? No one wants that. So people are cautioning not to be too fast on declaring things to be psychologically incapacitating on mental health grounds. You can imagine that debate, as things continue to unfold, gaining some steam. The American Psychological Association put out an opinion last year saying that it's inappropriate for psychologists to venture opinions on the psychological state of people they haven't examined. That was a way of saying that psychologists shouldn't be offering professional opinions that Trump is crazy, because they haven't examined him. You might think he's crazy, but that's not a professional opinion.

The bottom line is, for the 25th Amendment to be involved, the vice president and the majority of the president's cabinet must be on board. If the president contests it, two-thirds of each house of Congress must agree. So we're nowhere near close to this, but people are fantasizing about it and now you can too.

I would like to wrap up. I set out to think about this topic in the wake of the election. Thinking about, can I sleep better at night knowing that there are substantial checks on the powers of the United States president such that the president cannot do all kinds of crazy things by himself and we'll all be okay? The answer is kind of mixed. There are a lot of things that look like checks on the president. They look like checks on paper, but a great qualification is that the checks all come from different branches. If Congress is controlled by the same party as the president, then they don't work so well. This whole system is based on the idea that we have three independent branches that act independently, but if the president and Congress are not acting independently—if they are all part of the same political party that are all acting together in concert—then a lot of these limitations don't really function as limitations at all. Some of them do. Some of them will continue. There's a lot of resilience in the American system, which is why—to a certain extent—those limitations on rescinding regulations have a lot of practical bite, rather than some of the requirement of going back to Congress. Anytime you can get the courts involved, that's going to be a lot more substantial check than bringing Congress into play. It's all still in flux. We will see. I can't say I have necessarily succeeded in comforting myself or you, but I will say we have some questions to think about.

LET'S NOT TALK ABOUT BREXIT

on the Practice of Referendum and its Compatibility with the British Principle of Parliamentary Supremacy

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Abstract

Parliament reigns supreme in the United Kingdom. This constitutional balance that the Government has been trying to disrupt for countless years, particularly through its prerogative powers, is not without finding a new "adversary" with the practice of referendum. Indeed, as supreme as it may be, can Parliament ignore the will of the people as expressed in a referendum? And if it cannot, what must we conclude from this constitutionally speaking, especially since the referendum initiative is essentially governmental? Could Westminster have denied the result of the Brexit in 2017? Was the latter binding toward it? If so, what should we conclude from this?

Résumé

Le Parlement règne suprême au Royaume-Uni. Cet équilibre constitutionnel que le Gouvernement essaie, ce depuis d'innombrables années, notamment au travers de ses prerogative powers*, de perturber n'est pas sans trouver un nouvel "adversaire" avec la pratique du référendum. En effet, aussi suprême soit-il, le Parlement peut-il ignorer la volonté du peuple telle qu'exprimée lors d'un référendum ? Et s'il ne le peut, que doit-on en conclure constitutionnellement, d'autant que l'initiative référendaire est essentiellement gouvernementale ? Westminster aurait-il pu, en 2017, dénier le résultat du Brexit ? Ce dernier était-il contraignant à son égard ? Si oui, que doit-on en conclure ?*

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Referendums are part of both French and British constitutional traditions although not under a similar status. While the Constitution of the Fifth French Republic establishes an elaborate referendum status as the legacy of a bicentennial practice that made and unmade the Republics[1], the British constitutional rules remain laconic on this relatively new mechanism.

The practice of referendum under the Fifth Republic remains associated with its use made during De Gaulle's presidential term. The first president of the Fifth Republic used this mechanism four times, two of them as quasi-plebiscites: first in 1962 with success and second in 1969 with failure, leading to his eventual resignation[2]. Since then, the use of referendums has been moderate and always justified by pressing political issues, namely the European integration (1972, 1992 and 2005), the status of New Caledonia (1988) and the length of the presidential term (2000). The successive presidents seemed to make a scarce use of this constitutional mechanism and preferred to bypass it by resorting either to the regular parliamentary process or to its extraordinary form in Congress[3]. In the United Kingdom, the question does not arise in these terms. While the French executive tends to favour Parliament in order to bypass a referendum decision-making process, the British executive seems to use referendums in order to "short-circuit" Parliament, which in the United Kingdom reigns supreme.

The first British national referendum was held in 1973 on the question of the independence of Northern Ireland[4]. Since then, ten national referendums have been held. Apart from the "Alternative Vote" referendum, which dealt with the electoral system[5], six

[1] Since the Revolution, twenty-four national decisional referendums were held in France. Nine of them were held under the Vth Republic (without taking into account the 1958 referendum whereby the Constitution of the Vth Republic was adopted).
[2] In 1961 and 1962, De Gaulle used the referendum in order to decide whether or not Algeria should become autonomous (1961) then independent (1962). In 1962 again, he used the referendum in order to revise the constitutional status of the president of the Republic, namely its election by a direct universal suffrage, and eventually to strengthen his institutional influence within the new Fifth Republic. In 1969, he used it a last time under the pretext of an institutional reform of the Senate and local authorities in order to overpass his political weakness due to the events of May 1968, which led to a failure and eventually his resignation.
[3] Following the negative outcome of the 2005's referendum on the "European Constitution", Nicolas Sarkozy preferred to ratify the Lisbon Treaty, a quasi-similar version of the 2005's project, through Parliament rather than by referendum.
[4] March 1973 (held in Northern Ireland) referendum on whether Northern Ireland should remain part of the United Kingdom or join with the Republic of Ireland to form a united Ireland (remain). The use of referendum on the independence of Ireland was already discussed in the past during the Irish Home Rule movement but remained purely speculative, A. Dicey, "Ought the referendum to be introduced in England?", *Contemporary Review*, 1890, vol. 57, p. 2890.
[5] 5 May 2011 (held nationwide): referendum on whether to change the voting system for electing MPs to the House of Commons from first past the post to the alternative vote (no).

referendums were about devolution principles[6], two were about membership of the European Communities/Union[7], one was about peace in Ireland[8] and two on the independence of constituent nations, namely Northern Ireland and Scotland[9].

While it is indisputable that the referendum line adopted since the 1970s seems to respond to a need to address the delicate question of sovereignty, it appears in fact that the origin of each referendum is a political gamble rather than a will to let British citizens decide on these fundamental questions. In 1975 for instance, when the Prime Minster Wilson held the referendum on the British membership of the European Communities, it was less for engaging a debate on the role of the United Kingdom in Europe (the accession had happened three years before) than a necessity to escape a political quagmire. As a quasi-plebiscite, the 1975 referendum permitted to control the political debate and to divert attention from the fall of the bipartisan antagonism at Westminster, the internal dissension of the Labour party and the vivacity of the Irish and Scottish movements of independence. An even more striking example can be found with David Cameron. The Conservative Prime Minister used three times the referendum as a political gamble, the first two being successful but not the last one. David Cameron's use of referendum was only a matter of political strategy. His objective was to take his political opponents short by making the people rule against them. Thus, the Alternative Vote (2011) was driven, apart from the necessity to comply with his coalition agreement with the Liberal-democratic party, to demonstrate the relevance of the Conservative party's position regarding the voting system against its own coalition partner and the 2014 referendum on the Scottish independence was driven by the necessity to quickly respond to the victory of the Scottish National Party (SNP) in Scotland by demonstrating that the Scottish electorate would not approve secession from the United Kingdom. Those two referendums were successful for

[6] March 1979 (held in Scotland): Scottish devolution referendum on whether there should be a Scottish Assembly (40 per cent of the electorate had to vote yes in the referendum, although a small majority voted yes this was short of the 40 per cent threshold required to enact devolution); March 1979 (held in Wales): Welsh devolution referendum on whether there should be a Welsh Assembly (no); September 1997 (held in Scotland): Scottish devolution referendums on whether there should be a Scottish Parliament and whether the Scottish Parliament should have tax varying powers (both referendums received a yes vote); September 1997 (held in Wales): Welsh devolution referendum on whether there should be a National Assembly for Wales (yes); May 1998 (held in London): Greater London Authority referendum on whether there should be a Mayor of London and Greater London Authority (yes); March 2011 (held in Wales): Welsh devolution referendum on whether the National Assembly for Wales should gain the power to legislate on a wider range of matters (yes).

[7] June 1975: UK Membership of the European Community referendum on whether the UK should stay in the European Communities (yes); June 2016: UK Membership of the European Union referendum on whether the UK should remain a member of the European Union or leave the European Union (leave).

[8] 22 May 1998: Northern Ireland Belfast Agreement referendum on the Good Friday Agreement (yes).

[9] September 2014 (held in Scotland): referendum on whether Scotland should become an independent country (no).

David Cameron in the sense that the British citizens voted against the Liberal or SNP proposals giving eventually to his government more political strength and legitimacy. However, the bet turned to a complete failure with the referendum on the membership of the European Union, known as Brexit. Hoping to take advantage of the growing power of anti-European movements, David Cameron proposed the referendum on Brexit to strengthen his political design. Advocating for Remain, the unexpected response of June 2016 marked however the end of his political career.

This opportunistic use of referendums echoes the lack of constitutional framework for this practice[10]. However, we can deduce two constitutional customs in regard of the principle of the parliamentary sovereignty: first, referendums must be authorised by an Act of Parliament and second, they are by principle consultative, not decisional. Indeed, as far as a government may use a referendum in order to defend a given political line, the ultimate level of decision-making remains the Parliament[11]. In other terms, the government cannot short-circuit Westminster in the decision-making process, unless the latter agreed to be so. As the supreme legal authority of the Kingdom, Westminster is the only one able to limit its own sovereignty through Acts of Parliament[12]. Consequently, it remains free to approve or not the holding of a referendum as well as to determine its modalities, especially whether or not its outcome will be legally binding. So far, no referendum has been held under a decisional clause.

As long as the Parliament has "the right to make or unmake any law whatsoever; and [that] no person or body is recognised by the law as having a right to override or set aside [its] legislation"[13], it remains always free to undo whatever limitation it agreed on. For instance, if the Parliament agreed to delegate its law-making powers to the institutions of the European Union, it did so through an Act of Parliament, namely the European Communities Act 1972, an Act it can withdraw as it sees fit. Unsurprisingly, this ability was not without raising difficulties in the wake of the referendum on Brexit. Indeed, the government intended to implement the result, namely by triggering the Article 50 of the Treaty on European Union, without going

[10] The Political Parties, Elections and Referendums Act 2000 provides a technical framework of referendums to be held in the United Kingdom, however it does not provide relevant elements as to its status.
[11] A. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, 8th ed, 1915, p. 38.
[12] We can isolate four limitations to Parliamentary sovereignty: 1) the respect of fundamental rights as stated in the Human Rights Act 1998, 2) the independence of the UK Supreme Court as stated in the Constitutional Reform Act 2005 which put an end to the judicial function of the House of Lords, 3) the principe of devolution whereby Westminster delegated some of its prerogatives to the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly and the London Assembly, and 4) the membership to the European Union as enacted by the European Communities Act 1972.
[13] A. Dicey, *op. cit.*

through a parliamentary procedure. To this extent, it argued that its prerogative powers allowed it to act in this way[14]. However, if indeed the government was entitled to notify the European Union of the British withdrawal, such a notification would have rendered the 1972 Act ineffective as it acts as a "conduit pipe"[15] between European and British law, leading to an indirect violation of the principle of parliamentary supremacy[16]. In consequence, the Supreme Court prevented in January 2017 the government from acting as planned and let the MPs decide on whether or not authorising the government to notify the European Union[17].

The Supreme Court's decision stirred up all sorts of considerations ranging from constructive criticism[18] to denunciations of conspiracies since it gave the impression of depriving the referendum from any legal value[19]. However, if it is true that the 2016 referendum had no legal value for the reasons hereupon exposed, the Supreme Court was not to blame. It considered no more than the question of which constitutional body was competent and, on what ground, for implementing the result, but not the result in itself[20]. By deciding that the Parliament remained the ultimate decision-making body with regard to the decision to leave the European Union, thus preventing the government to act on a sort of mandate conferred by the result of the referendum, the Supreme Court merely reaffirmed a principle already well rooted in the British constitution, namely the supremacy of Westminster. Even though it remains a question of common sense that the Parliament would politically never decide against the referendum's

[14] The government argued that it was competent according to its prerogative power to conduct the British foreign affairs, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5. This attempt to bypass a vote in Parliament in light of a clear vote offered by referendum was analysed by A. Blick as an attempt to assert a new constitutional doctrine based on the idea of a mandate given by the people to the government to implement the decision taken by referendum, the "May Doctrine", A. Blick, "Taking back control? The EU referendum, parliament and the 'May Doctrine'*", The Federal Trust for Education and Research*, 2016.

[15] J. Finnis, "Brexit and the Balance of Our Constitution", *Policy Exchange*, 2016; *Miller, ibid*., §§ 65-69; §§ 78-80.

[16] *Miller*, *ibid.*, § 67-68.

[17] *Miller*, *ibid.*, § 83. Eventually, the Parliament confirmed the outcome of the referendum and empowered the government to give notice to the European Union in March 2017 (royal assent), through the European Union (Notification of Withdrawal) Act 2017.

[18] *Miller*, *ibid., per* Lord Reed (dissenting) spec. § 177, *per* Lord Carnwath (dissenting) spec. § 259.

[19] Following the first *Miller* judgement given by the High Court in November 2016 against the government, [2016] EWHC 2768 (Admin), the Daily Mail had accused in headline the High Court's Justices of being the "enemies of the people".

[20] As clearly stated by the Supreme Court:

> "It is worth emphasising that nobody has suggested that this is an inappropriate issue for the courts to determine. It is also worth emphasising that this case has nothing to do with issues such as the wisdom of the decision to withdraw from the European Union, the terms of withdrawal, the timetable or arrangements for withdrawal, or the details of any future relationship with the European Union. Those are all political issues which are matters for ministers and Parliament to resolve. They are not issues which are appropriate for resolution by judges, whose duty is to decide issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society".

in Miller, *ibid.*, § 3.

outcome, it remains that, legally speaking, it would not be bound by its result insofar as it did not agree to be so. Yet, the Parliament remains politically accountable toward its electorate. Past governments were well aware of this delicate position and did not hesitate to use the referendum to their advantage. If it is certain that Parliament cannot politically neither refuse the holding of a referendum nor its outcome, then the government enjoys a significant political advantage with this mechanism within a constitutional tradition marked by Westminster's supremacy. The practice of referendums would therefore have a bright future ahead of it.

LE REFERENDUM D'ENTREPRISE

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Abstract

In recent years, labour law has undergone a series of major reforms. In substance, these are characterised by the objectives pursued by the legislator. In particular, the latter wished to disrupt the sources of labour law by promoting collective company agreements in their relations with branch agreements and the employment contract. The rise of the company referendum is fully in line with this normative upheaval insofar as it was conceived as a means of facilitating the conclusion of collective agreements at the company level. However, such an orientation is not without its difficulties with regard to constitutional rights and freedoms.

Based on this observation, this contribution proposes an analysis of the methods adopted by the legislative to develop the company referendum, in the light of the right to freedom of association and the right to participate in the collective determination of working conditions.

First, it is argued that the company referendum is compatible with constitutional social rights when combined with a process ensuring negotiation. However, this position does not dispense from questioning the precise modalities adopted by the 22 September 2017 Ordonnance and from regretting that the Constitutional Council did not take its analysis further.

Secondly, this article makes arguments in favour of the unconstitutionality of a company referendum when it is purely and simply substituted for collective bargaining. It thus proposes a critical study of the Constitutional Council's response of 21 March 2018 to the appeal lodged against the law ratifying the 22 September 2017 Ordonnance.

Résumé

Au cours de ces dernières années, le droit du travail a connu une succession de réformes majeures. Sur le fond, celles-ci se singularisent par les objectifs poursuivis par le législateur. Ce dernier a, notamment, souhaité bouleverser les sources du droit du travail en favorisant les accords collectifs d'entreprise dans leurs relations avec les accords de branche et le contrat de travail. L'essor du référendum d'entreprise s'inscrit pleinement dans ce bouleversement normatif dans la mesure où il a été conçu comme un moyen de faciliter la conclusion d'accords

collectifs au niveau de l'entreprise. Or, une telle orientation n'est pas sans poser des difficultés au regard des droits et libertés constitutionnels.

Partant de ce constat, la présente contribution propose une analyse des modalités retenues par le législateur pour développer le référendum d'entreprise, à l'aune du droit de la liberté syndicale et du droit de participation à la détermination collective des conditions de travail.

En premier lieu, il est soutenu que le référendum d'entreprise est compatible avec les droits sociaux constitutionnels lorsqu'il est combiné à un processus assurant une négociation. Cette position ne dispense toutefois pas de s'interroger sur les modalités précises retenues par les ordonnances du 22 septembre 2017 et de regretter que le Conseil constitutionnel n'ait pas poussé plus loin son analyse.

En second lieu, le présent article mobilise des arguments en faveur de l'inconstitutionnalité du référendum d'entreprise lorsque ce dernier se trouve purement et simplement substitué à la négociation collective. S'y trouve ainsi proposée une étude critique de la réponse apportée le 21 mars 2018 par le Conseil constitutionnel au recours déposé contre la loi de ratification des ordonnances du 22 septembre 2017.

INTRODUCTION

La négociation collective s'opère traditionnellement entre représentants. Au niveau de l'entreprise, la négociation se fait entre les représentants des salariés et les représentants de l'employeur. Ce sont plus particulièrement les délégués syndicaux qui, lorsqu'ils sont présents dans l'entreprise, sont chargés de représenter les intérêts des salariés lors des négociations. Il leur revient de négocier l'accord et ce dernier n'entrera en vigueur que s'il est signé par eux. Ce système a longtemps été hostile à toute généralisation du référendum.

Cette hostilité n'est pas surprenante quand on sait que le référendum d'entreprise est souvent opposé au fait syndical[1]. En effet, pour certains, le recours au référendum relève d'une stratégie visant à contourner les organisations syndicales, souvent dans des périodes difficiles, pour demander aux salariés de consentir à certains sacrifices pour le bien de l'entreprise[2]. Pour d'autres, au contraire, il serait l'expression de la démocratie directe puisqu'il permet d'imposer la volonté des salariés à des corps intermédiaires dont les préoccupations seraient parfois devenues trop éloignées de leurs attentes[3].

En tout état de cause, le recours au référendum ne peut être considéré comme un substitut de la négociation collective. Dans la mesure où il n'est « qu'un enregistrement passif des volontés »[4], il ne permet ni véritable discussion ni concessions réciproques, contrairement à la négociation. Le référendum ne peut donc être regardé comme l'équivalent de la négociation collective. Référendum et négociation sont deux mécanismes intrinsèquement différents. En conséquence, pendant longtemps, le recours au référendum n'était rendu possible qu'au travers de dispositions éparses prévoyant des hypothèses spécifiques[5].

À l'occasion de la loi du 8 août 2016 puis des ordonnances du 22 septembre 2017, cette technique a connu une promotion sans précédent. Cette promotion s'explique par la volonté du législateur d'accroître la force de l'accord d'entreprise en multipliant les hypothèses dans lesquelles il va s'imposer face à la convention de branche, face à la loi ou face au contrat de

[1] J. Le Goff, *Droit du travail et société,* PUR, 2002, p. 560, « Nul ne conteste qu'utilisée de manière anarchique, une telle procédure de consultation ne recèle de réels dangers pour les instances de représentants » ; voy. égal. J. Auroux, *JO* débats AN, 2ème séance du 10 juin 1982, p. 3245 : « Le référendum, c'est la mort du fait syndical ».
[2] F. Henot, « Pratiques référendaires et gouvernabilité de l'entreprise » *in* J. Chevallier *et al.* (dir.), *La gouvernabilité,* Paris, PUF (CURAPP), 1996, p. 129, spéc. pp. 143 et s. ; J. Dechoz, « Produire le consentement : du militantisme au partenariat social », *Dr. ouvrier*, 2016, p. 547, spéc. p. 553. L'auteur souligne le piège de l'argument démocratique.
[3] B. Gauriau, « Le référendum, un préalable nécessaire ? », *Dr. soc.*, 1998, p. 338 : « La tentation est forte d'y voir une manifestation de la vie démocratique plutôt qu'une cérémonie funèbre à la mémoire du syndicalisme ».
[4] *Ibid*.
[5] Voy. par ex. s'agissant des garanties collectives de prévoyance : CSS, art. L. 911-1 ; J. Barthélémy, « Le référendum, source de garanties collectives de prévoyance », *Dr. soc.*, 2012, n° 1, p. 70.

travail. Une telle montée en puissance de l'accord d'entreprise nécessite que ce dernier ait une apparence de légitimité. Or, quel accord semble plus légitime qu'un accord collectif validé directement par les salariés ? Par ailleurs, une politique tendant à favoriser la négociation dans l'entreprise n'a de sens que si des conventions collectives sont effectivement conclues à ce niveau. Sa réussite suppose donc d'envisager des remèdes pour éviter que la négociation ne se solde par un échec. Faire valider par référendum un accord collectif qui n'a pas reçu suffisamment de signatures émanant de syndicats permet de réduire les probabilités d'un tel échec, sans pour autant renier l'exigence de légitimité.

Ainsi, le législateur oscille entre cette recherche de légitimité de l'accord et la volonté de faciliter la conclusion de ces accords pour limiter les risques d'échecs de la négociation collective. Ces deux objectifs peuvent paraître contradictoires dans la mesure où la légitimité d'un accord suppose, *a priori*, un durcissement des conditions de conclusion ce qui n'est guère conciliable avec la volonté de favoriser la conclusion des accords. Le référendum permet de concilier ces deux objectifs, mais n'en reste pas moins un outil controversé.

Au-delà des considérations idéologiques qu'il soulève, l'essor du référendum dans l'entreprise est de nature à mettre en lumière de nouvelles problématiques sur le terrain du droit constitutionnel. En particulier, le recours au référendum en matière de négociation collective est de nature à restreindre la portée de deux droits « particulièrement nécessaires à notre temps » issus du Préambule de la Constitution de 1946. Il s'agit, d'une part, de la liberté syndicale dont le Conseil constitutionnel a tiré le principe selon lequel les syndicats ont une vocation naturelle à participer à la négociation collective sans toutefois disposer d'un monopole en la matière[6]. Il s'agit, d'autre part, du droit de participation à la détermination collective des conditions de travail, qui est traditionnellement le support de la négociation collective et dont le texte constitutionnel lui-même indique qu'il doit s'exercer par le biais de représentants[7].

Les problématiques constitutionnelles ne sont cependant pas les mêmes selon que les dispositions légales combinent négociation et référendum (I) ou opèrent une substitution pure et simple du référendum à la négociation (II).

I. LE REFERENDUM COMBINE AU PROCESSUS DE NEGOCIATION

L'association du référendum au processus de négociation n'est pas une technique complètement nouvelle en droit du travail, mais elle était réservée à des hypothèses

[6] Cons. const., Décision n° 96-383 DC du 6 novembre 1996, (cons. 8).
[7] Alinéa 8 Préambule de 1946.

relativement restreintes. Ainsi, jusqu'à la loi du 8 août 2016, le référendum était essentiellement intégré dans le droit de la négociation dérogatoire, c'est-à-dire celle qui a lieu en l'absence de délégués syndicaux dans l'entreprise.

Depuis longtemps, le Code du travail prévoit des cas dans lesquels, en l'absence de délégué syndical, l'accord pourra être négocié avec des salariés mandatés, mais n'entrera en vigueur que s'il est validé par un référendum majoritaire[8]. On sait que de telles hypothèses ne portent pas atteinte à la liberté syndicale dans la mesure où cette négociation dérogatoire n'est prévue qu'en l'absence de délégués syndicaux. La Constitution ne réservant pas aux syndicats de monopole en matière de négociation collective[9], le législateur peut avoir recours à d'autres intermédiaires pour permettre la conclusion d'accords collectifs en leur absence. Un tel mécanisme permet en outre de mener une *concertation appropriée* avec des représentants du personnel (les élus mandatés ou les salariés mandatés) ce que le seul recours au référendum ne permet pas[10]. La combinaison d'une négociation avec des représentants et de la validation par référendum ne porte donc pas atteinte à l'alinéa 8 du Préambule de 1946 qui garantit aux salariés la participation « par l'intermédiaire de ses délégués, à la détermination collective des conditions de travail »[11].

Au regard de ce qui précède, il apparaît que le référendum, intégré dans un processus de négociation ayant lieu dans une entreprise dépourvue de délégués syndicaux ne porte, en lui-même, atteinte ni à la liberté syndicale ni au principe de participation.

Dans ce prolongement, il convient de constater que le référendum issu de la loi El-Khomri du 8 août 2016 était conçu non pas comme un instrument à la disposition de l'employeur, mais comme un outil laissé aux syndicats eux-mêmes. Rappelons en effet que l'article L. 2232-12 du Code du travail dans sa rédaction issue de la loi El-Khomri prévoyait que l'accord collectif n'ayant pas recueilli la signature d'organisations syndicales représentatives représentant la majorité des suffrages exprimés en faveur d'organisations

[8] C. trav., art. L. 2232-21-1 (anc.) ; C. trav. art. L. 2232-23-1 (nouv.).
[9] En revanche, le législateur ne peut pas confier « la négociation de conventions ou accords collectifs à d'autres qu'à des syndicats représentatifs dès lors qu'au moins un syndicat investi de cette qualité est présent » : B. Teyssie, « Loi et contrat collectif de travail : variations à la lumière de la jurisprudence du Conseil constitutionnel », *Cah. Cons. const.,* 2004, n° 17, p. 103, spéc. p. 107.
[10] « La médiation est indispensable à la négociation préalable qui seule permet une évolution des positions en présence, ou, au minimum, à la concertation. Le référendum, lui, ne peut donner lieu qu'à une approbation ou à un rejet en bloc » : M.-A., Souriac-Rotschild, « Regards sur le referendum », *Liaisons soc. Mag,* 1993, n° 84, p. 88, spéc. p. 89 ; voy. égal. I. Odoul-Asorey, *Négociation collective et droit constitutionnel*, LGDJ, coll. Bibliothèque de droit social, T. 59, 2013, p. 70 : « Il est pour le moins difficile de concevoir un référendum comme une 'concertation appropriée' ».
[11] Alinéa 8 Préambule de 1946.

représentatives, mais tout de même plus de 30 % de ces suffrages serait soumis à une validation par référendum si suffisamment d'organisations syndicales signataires exprimaient ce souhait. Ainsi, non seulement l'accord soumis à référendum restait négocié avec les organisations syndicales et signé par elles, mais, en plus, seuls les syndicats signataires pouvaient demander le recours au référendum, à condition d'avoir recueilli une certaine audience. Dans ces conditions, l'employeur n'avait aucun pouvoir sur la tenue ou non de ce référendum. Il ne pouvait pas décider d'y recourir. Il ne pouvait pas non plus refuser de l'organiser.

Ainsi, le référendum, combiné avec un processus de négociation, ne porte atteinte ni à la liberté syndicale ni au principe de participation lorsque la maitrise du recours au référendum est confiée aux organisations syndicales représentatives signataires de l'accord. En permettant à l'employeur d'avoir l'initiative du référendum, les ordonnances du 22 septembre 2017 ont complexifié la problématique.

Désormais, l'article L. 2232-12 du Code du travail prévoit qu'en présence d'un accord collectif n'ayant pas recueilli la signature d'organisations syndicales représentatives représentant la majorité des suffrages exprimés en faveur d'organisations représentatives, mais tout de même plus de 30 % de ces suffrages, l'employeur peut demander l'organisation d'un référendum destiné à valider l'accord, en l'absence d'opposition de l'ensemble de ces organisations. Dans la mesure où le texte de l'accord soumis à référendum dans ces conditions est issu d'une négociation avec des représentants du personnel, ici les délégués syndicaux, toute contrariété avec le principe de participation semble écartée.

Malgré tout, ce mécanisme nous semble poser une difficulté inédite au regard de la liberté syndicale au sens constitutionnel. Celle-ci peut être formulée en ces termes : la possibilité offerte à l'employeur de recourir au référendum pour valider un accord collectif, en présence de délégués syndicaux, constitue-t-elle une atteinte inconstitutionnelle à la liberté syndicale ? Le rapport de force existant entre l'employeur et les organisations syndicales s'en trouve profondément modifié. Est-ce suffisant pour considérer que ce dispositif porte atteinte à la liberté syndicale ? Pour y répondre, il convient de déterminer si la « vocation naturelle à assurer, notamment par la voie de la négociation collective, la défense des droits et intérêts des travailleurs »[12] que reconnaît le Conseil constitutionnel aux syndicats se satisfait de la simple participation de ces derniers à la négociation et de la signature d'un accord collectif ultra-minoritaire. Il convient également de savoir si le fait qu'une organisation syndicale signataire

[12] Cons. const., Décision n° 96-383 DC du 6 novembre 1996, (cons. 8).

puisse s'opposer à la tenue de ce référendum suffit à garantir que le référendum d'initiative patronale ne soit pas un obstacle à cette vocation naturelle reconnue aux syndicats.

Ces questions n'ont pas été soumises au Conseil constitutionnel. On peut, sans trop s'avancer, considérer qu'aucune de ces problématiques n'aurait véritablement retenu l'attention du Conseil constitutionnel. Rappelons, en outre, qu'il est possible de porter atteinte à la liberté syndicale, même si elle a valeur constitutionnelle. Il suffit que l'atteinte soit justifiée par un droit de même valeur, voire par l'intérêt général, et proportionnée au but recherché. Il est tout à fait possible de voir dans le fait de soumettre au référendum un accord qui a déjà été signé par une organisation syndicale représentative une atteinte proportionnée à la liberté syndicale qui, de plus, permet la poursuite d'un objet d'intérêt général : favoriser la conclusion d'accords collectifs et éviter le blocage des négociations.

Il n'en reste pas moins que l'incursion du référendum dans le droit commun de la négociation collective modifie profondément la conception originelle de ce dernier. Lorsque le référendum se voit substitué au processus de négociation, c'est, cette fois, le droit de la négociation collective qui s'en trouve bouleversé.

II. LE REFERENDUM SUBSTITUE AU PROCESSUS DE NEGOCIATION

Avant même l'entrée en vigueur des ordonnances du 22 septembre 2017, le Code du travail prévoyait quelques hypothèses dans lesquelles l'employeur pouvait se dispenser de toute négociation et faire directement approuver un projet unilatéral par un référendum auprès des salariés. Ces hypothèses étaient cantonnées à des aspects bien précis tels que le repos dominical ou la participation des salariés aux résultats de l'entreprise. Il n'est pas inutile d'en faire un bref rappel afin de voir en quoi les modalités de référendum issues des ordonnances du 22 septembre 2017 s'en distinguent.

En premier lieu, il est possible pour l'employeur de mettre en place un intéressement[13] ou une participation des salariés aux résultats de l'entreprise[14], en soumettant un projet en ce sens au référendum. Le projet doit être ratifié à une majorité des deux tiers des salariés et la ratification doit être demandée conjointement avec au moins une organisation syndicale

[13] Le Code exige cependant une « ratification, à la majorité des deux tiers du personnel, d'un projet d'accord proposé par l'employeur. Lorsqu'il existe dans l'entreprise une ou plusieurs organisations syndicales représentatives ou un comité d'entreprise, la ratification est demandée conjointement par l'employeur et une ou plusieurs de ces organisations ou ce comité : C. trav., art. L. 3312-5.
[14] C. trav., art. L. 3322-6.

représentative. Le document proposé au référendum par l'employeur n'est pas issu d'une négociation ni même d'une concertation[15].

En second lieu, le travail dominical peut être autorisé par le préfet au vu d'un accord collectif ou à défaut, d'une décision unilatérale de l'employeur prise après consultation des élus du personnel et approuvée par référendum[16], ayant pour objet de fixer « les contreparties accordées aux salariés privés du repos dominical »[17]. L'ouverture dominicale peut donc se faire, en dehors de toute négociation, sur le fondement d'une décision unilatérale, approuvée par référendum. Cependant, il convient de relever que le recours au référendum ne suffit pas à assurer l'ouverture dominicale dans la mesure où, *in fine,* la dérogation est appréciée par le préfet.

Ces exemples renvoient à des hypothèses précises, mais témoignent d'une même volonté : faire approuver aux salariés un texte qui n'est pas négocié. Or le référendum ne permet pas de proposer des modifications au texte. Il ne peut donc pas s'agir d'une véritable négociation. Un tel procédé ne permet donc pas aux salariés de participer pleinement à la détermination des conditions de travail comme le leur garantit pourtant l'alinéa 8 du Préambule de 1946.

Cependant, dans ces deux hypothèses, le texte soumis au référendum n'avait qu'un objet précis : mettre en place un intéressement ou déterminer les conditions permettant l'ouverture dominicale. Par ailleurs, dans ces textes, la décision unilatérale n'est pas, en elle-même, qualifiée d'accord collectif : elle remplace un accord collectif dans un cas précis, mais ne devrait pas nécessairement en suivre le régime.

Les ordonnances du 22 septembre 2017 sont allées beaucoup plus loin.

Désormais, dans les entreprises dépourvues de délégué syndical et dont l'effectif habituel est inférieur à onze salariés : l'employeur peut proposer un projet d'accord aux salariés, qui porte sur l'ensemble des thèmes ouverts à la négociation collective d'entreprise prévus par le Code du travail[18]. Lorsque le projet d'accord est approuvé à la majorité des deux tiers du

[15] « Il n'est point sûr que s'il avait à connaître d'un dispositif (…) plaçant sur un pied d'égalité négociation avec les organisations syndicales représentatives, adoption d'un accord au sein du comité d'entreprise et ratification d'un projet d'accord par la collectivité des salariés, le Conseil constitutionnel ne le censurerait pas » : B. Teyssie, *op. cit.*
[16] C. trav., art. L. 3132-25-3, I°, al. 3.
[17] C. trav., art. L. 3132-25-3, I°, al. 3.
[18] C. trav. art. L. 2232-21.

personnel, il est « considéré comme un accord d'entreprise valide »[19]. Ce procédé est également applicable dans les entreprises dont l'effectif habituel est compris entre onze et vingt salariés, en l'absence de membre élu de la délégation du personnel du comité social et économique[20].

D'emblée, la différence avec les procédés précédents saute aux yeux. D'une part, le mécanisme est généralisé à l'ensemble des thèmes ouverts à la négociation collective d'entreprise. D'autre part, le projet ainsi ratifié est assimilé à un accord collectif : il en suivra donc le régime et produira les mêmes effets[21].

Cet accord très particulier ainsi que les modalités qui permettent son adoption posent évidemment des difficultés au regard de l'alinéa 8 du Préambule de 1946 selon lequel « tout travailleur participe, par l'intermédiaire de ses délégués, à la détermination collective des conditions de travail ainsi qu'à la gestion des entreprises ». Nous évoquerons ici les deux principales.

La première difficulté concerne les modalités de participation à la détermination collective des conditions de travail. Les salariés qui n'ont d'autre faculté que d'approuver ou de refuser un projet se voient-ils réellement offrir la possibilité de participer à la détermination collective de leurs conditions de travail ? Répondre par l'affirmative à cette question suppose de souscrire à une vision particulièrement réductrice de ce qu'implique une détermination collective des conditions de travail. Une telle appréhension de la participation est donc contestable, mais reste néanmoins possible.

La seconde difficulté est liée au fait que le droit de participation doit, selon le texte constitutionnel, s'exercer par l'intermédiaire de délégués. Selon l'alinéa 8, la participation se fait par l'intermédiaire de représentants, seules personnes ayant la possibilité de mener une négociation pour le compte de la collectivité de salariés. Or, force est de constater que le nouveau procédé d'adoption d'accords collectifs dans les très petites entreprises se dispense de tout représentant de salarié. Sur ce point, la contrariété avec le principe de participation du huitième alinéa du Préambule de 1946 paraît manifeste.

Le recours contre la loi de ratification des ordonnances des 22 septembre et 20 décembre 2017 soumettait au Conseil constitutionnel ces questions. Il y était soutenu, d'une part que le principe de participation implique nécessairement l'intervention de délégués, et d'autre part que

[19] C. trav., art. L. 2232-22.
[20] C. trav. art. L. 2232-23.
[21] V. Cohen-Donsimoni, « Le référendum comme mode de validation d'un accord collectif », *Dr. soc.*, 2018, n° 5, p. 422.

le principe de participation suppose une véritable négociation avec la possibilité de faire des contre-proposions.

De manière surprenante, le Conseil constitutionnel a conclu à la conformité des dispositions contestées avec le droit de participation. Pour ce faire, il a suivi un raisonnement en trois temps qui, nous semble-t-il, n'emporte pas la conviction.

En premier lieu, il a identifié le but poursuivi par le législateur. Il relève que ce dernier a « souhaité développer les accords collectifs dans les petites entreprises ». Ainsi pour le Conseil constitutionnel, un projet ratifié par référendum peut effectivement être un accord collectif si le législateur le décide. Il est regrettable que le Conseil constitutionnel se soit dispensé de toute réflexion sur la notion d'accord collectif et, notamment, sur l'aspect contractuel de la convention collective[22]. Avant les ordonnances du 22 septembre 2017, le référendum était essentiellement conçu comme une condition permettant à la convention collective d'entrer en vigueur et de produire son effet réglementaire, pas pour suppléer l'absence totale de signature d'un représentant des salariés.

En deuxième lieu, le Conseil constitutionnel a souligné que ce dispositif n'est prévu que dans les entreprises dépourvues d'élus. Ce faisant, il s'est engagé dans un raisonnement similaire à celui que l'on connaît pour la liberté syndicale. Le Conseil constitutionnel a depuis longtemps énoncé qu'en l'absence de délégués syndicaux, le législateur peut prévoir d'autres modalités de conclusions d'accords collectifs car, malgré leur vocation naturelle, les syndicats n'ont pas de monopole en la matière[23]. Appliqué au droit de participation, ce raisonnement est cependant surprenant. En effet, contrairement à la liberté syndicale, la question ici ne portait pas tant sur l'atteinte directe dont pouvait faire l'objet le droit de participation, mais sur les garanties attachées à son exercice. En effet, il appartenait au législateur de garantir l'exercice du droit de participation, y compris dans les entreprises dépourvues d'élus. La question n'était donc pas de savoir si les modalités prévues par le législateur entravaient les prérogatives d'élus inexistants, mais bien de savoir si les modalités prévues permettaient aux salariés d'exercer le droit de participation. Sur ce point encore, le raisonnement du Conseil constitutionnel ne paraît guère convaincant.

À cet égard, le fait que le Conseil constitutionnel prenne la peine de relever, en troisième lieu, les modalités précises d'organisation de la consultation des salariés, ne permet pas de

[22] Pour quelques réflexions sur cet aspect v. J. Barthélémy, « À propos du référendum », *Cah. DRH*, 1er nov. 2017.
[23] Cons. const., Décision n° 96-383 DC du 6 novembre 1996, (cons. 8).

répondre à la seule question qui importait : la possibilité pour les salariés d'approuver ou de refuser par référendum un projet d'accord rédigé unilatéralement par l'employeur garantit-elle l'exercice du droit de participation qui suppose de participer à la détermination collective des conditions de travail par l'intermédiaire de délégués ?

Il est donc regrettable que le Conseil constitutionnel ne se soit pas livré à une réflexion approfondie sur ce qu'implique la participation à la détermination collective des conditions de travail alors même que l'essor du référendum dans l'entreprise l'y invitait.

LE PRINCIPE DU SILENCE VAUT ACCEPTATION CINQ ANS APRES : MYTHE OU REALITE ?

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Abstract

Since the 1860s, in France, arguably to facilitate the public administrative action, the regulatory authorities have established the principle according to which the requests addressed by users of the public administration had to be considered as refused if they had not received any answer within a specified period. This silent decision by the administration, called "implied decision of rejection", could be immediately challenged before the administrative courts. But the public administration has been considered more and more disconnected from the real needs of its users, which has led to a certain deterioration of the relations between them. That led to modify this principle of "silence is worth rejection" to become in 2013 the principle of "silence is worth acceptance". This inversion of the principle established up to then aimed to restore confidence between public administration and its users. But it seems that the result is not as clear as originally expected. This paper aims to contribute to assessing the new rule, which has been implemented for almost five years now.

Résumé

Depuis les années 1860, en France, sans doute dans le souci de faciliter l'action administrative, il a été établi, par le pouvoir réglementaire, le principe selon lequel les demandes adressées par des usagers à l'administration publique n'ayant reçu de réponse dans un délai déterminé devaient être considérées comme étant refusées. Cette décision administrative silencieuse, qui a tout de suite été baptisée de « décision implicite de rejet », ouvre immédiatement accès au juge de l'excès de pouvoir contre elle. Mais la dégradation des relations entre une administration publique considérée de plus en plus comme déconnectée des besoins réels de ses usagers a conduit à modifier ce principe du « silence vaut rejet » pour devenir en 2013 le principe du « silence vaut acceptation ». Cette inversion du principe établi jusque-là avait pour vocation de rétablir la confiance entre l'administration publique et ses usagers. Mais force est de constater que le résultat n'est pas aussi perceptible que ce que l'on pouvait attendre de cette réforme. Cet article a pour objectif de faire le bilan de la nouvelle règle établie depuis maintenant près de cinq ans.

INTRODUCTION

Le principe du silence gardé par l'administration pendant plus de deux mois à compter d'une demande qui lui a été présentée vaut acceptation est, en droit administratif, une nouveauté de la loi n° 2013-1005 du 12 novembre 2013 habilitant le Gouvernement à simplifier les relations entre l'administration et les citoyens. Cette loi est à l'origine de l'ordonnance n° 2015-1341 du 23 octobre 2015 qui a créé le nouveau *Code des relations entre le public et l'administration* (CRPA). Jusqu'à l'avènement de cette loi de 2013, c'est le principe opposé qui s'appliquait, à savoir que le silence gardé par l'administration pendant plus de deux mois valait décision implicite de rejet ouvrant automatiquement l'accès au juge de l'excès de pouvoir. Compte tenu de l'objectif de ce nouveau Code, celui d'améliorer les relations entre l'activité administrative à tous niveaux (État, collectivités territoriales[1], hôpitaux) et les usagers, il n'est pas étonnant que le législateur ait fait le choix de renverser la règle du silence vaut décision implicite de refus, dans la mesure où celle-ci était devenue de plus en plus incompréhensible dans un climat politique tendu entre usagers et action administrative. En effet, les citoyens critiquaient tant l'action administrative (retard, oubli, mauvais accueil, etc.) que l'État a été sommé de réformer les services publics en vue de resserrer les liens entre l'administration et ses usagers. C'est ainsi que toute une série de réformes ont vu le jour dans les années 1970 dans l'objectif de rendre l'administration plus transparente. C'est ce qu'on a appelé la « démocratie administrative » qui vise à permettre la participation du citoyen à la fois dans la confection et le fonctionnement des services publics par le biais de recours soit de nature administrative, soit de nature juridictionnelle[2]. Cette vague de réforme devait continuer dans les années 1990 en visant, cette fois, une « démarche-qualité » qui débouchera sur l'adoption de la *Charte Marianne* de janvier 2005 marquant la volonté du gouvernement de faciliter la vie des Français, notamment par la simplification des procédures et démarches administratives. Le nouveau principe du silence vaut acceptation s'inscrit également dans ce contexte. Mais cette

[1] S'agissant de l'application du principe à l'activité des collectivités territoriales intervenue par décret en 2014, voy. S. (d') Auzon, « Le 'silence vaut acceptation' perd encore un peu de terrain », *Le moniteur.fr*, 20 mai 2016, https://www.lemoniteur.fr/article/le-silence-vaut-acceptation-perd-encore-un-peu-de-terrain-32299255 (Consulté le 11 avril 2018) ; « Le 'principe' du silence de l'administration valant accord mis en œuvre au sein des collectivités territoriales et des établissements publics locaux », *Seban et Associés*, 19 novembre 2015, http://www.seban-associes.avocat.fr/le-principe-du-silence-de-l-administration-valant-accord-mis-en-oeuvre-au-sein-des-collectivites-territoriales-et-des-etablissements-publics-locaux/ (Consulté le 11 avril 2018).

[2] Ces réformes ont été concrétisées par la création de plusieurs mécanismes : création du Médiateur de la République (devenu Défenseur des droits depuis 2009) par la loi n° 73-6 du 3 janvier 1973 ; création de la Commission d'accès aux documents administratifs (CADA) par la loi n° 78-753 du 17 juillet 1978 ; création de la Commission nationale de l'informatique et des libertés (CNIL) par la loi n° 78-17 du 6 janvier 1978 ; mise en place du principe d'une motivation des actes administratifs par la loi n° 79-587 du 11 juillet 1979. Et, bien évidemment, les décisions de ces organismes sont susceptibles de recours devant le juge administratif.

nouvelle donne que l'on présente comme une révolution tant au sein de l'administration que dans la pensée juridique n'est en réalité qu'un changement d'apparence. La règle n'a pas changé, elle semble même être confortée par le prétendu nouveau principe.

Depuis la seconde moitié du XIXe siècle, ce principe a fait son apparition dans plusieurs textes juridiques[3] tant de nature réglementaire que de nature législative. Le principe du silence vaut rejet a d'abord formellement été créé par le pouvoir réglementaire avant de faire l'objet de reprises législatives à des périodes diverses. Cela montre l'importance qu'il a prise au sein du système juridique français au fil des années.

Ces différentes dispositions, au départ réglementaires puis législatives, ont, selon le Conseil d'État, « pour seul objectif de garantir aux justiciables un accès au juge »[4]. Dans le même esprit, le Conseil d'État avait déjà jugé en 1920 qu'elles ont été élaborées « en vue de faciliter l'exercice des recours contentieux devant le Conseil d'État pour la défense de leurs droits, en empêchant que les administrations puissent, par leur silence sur les réclamations dont elles sont saisies, mettre les réclamants dans l'impossibilité d'introduire une action en justice »[5]. Cependant, malgré l'affichage de ce noble objectif, il ne peut être ignoré que bien des autorités administratives ont utilisé cette formalité pour décourager les justiciables car les procédures contentieuses, bien qu'elles soient ouvertes par le dispositif, sont suffisamment lourdes, coûteuses et complexes, sans compter le caractère incertain de l'issue du recours, pour dissuader le justiciable non seulement de s'adresser à l'administration mais aussi et surtout d'engager toute saisine du juge. Cette situation a pu contribuer à une criante irresponsabilité de l'administration à l'origine de la crise de confiance entre celle-ci et ses usagers. C'est dans ce contexte paradoxal que la loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations est venue clarifier la règle du silence vaut rejet et que celle du 12 novembre 2013 précise enfin que la règle est désormais celle du silence vaut acceptation. Si cette situation a pu donner l'impression à l'usager et au potentiel justiciable qu'il est mieux considéré, nous verrons qu'il n'en est rien.

En effet, si du point de vue théorique, l'article L. 231-1 du CRPA dispose clairement que « [l]e silence gardé pendant deux mois par l'administration sur une demande vaut décision d'acceptation », la réalité est tout autre. L'expression d'un tel principe ne signifie pas que

[3] Voy. *L'application du nouveau principe silence de l'administration vaut acceptation*, Étude adoptée le 30 janvier 2014 par l'Assemblée générale plénière du Conseil d'État, La Documentation française, Juin 2014, p. 10.
[4] *Ibid*.
[5] CE, 30 juillet 1920, Servan, Rec. p. 780.

l'organe qui l'édicte souhaite qu'il soit effectivement respecté ; elle permet seulement de donner l'apparence d'un changement du principe du silence vaut rejet qui s'appliquait jusque-là sans que rien ne change véritablement sur le plan pratique. Pour le comprendre, il convient d'analyser les différentes dispositions relatives à ce nouveau principe inséré dans le CRPA. En effet, après avoir posé fermement le principe du silence vaut désormais acceptation, le législateur paraît reprendre immédiatement d'une main ce qu'il a semblé offrir aux usagers des services publics de l'autre main à travers une série d'exceptions, si nombreuses, qu'elles permettent au principe de devenir l'*exception* et les exceptions le *principe*.

Pour illustrer ce constat, il convient tout d'abord d'analyser la liste des exceptions dressées[6] par le législateur au principe du silence gardé par l'administration vaut acceptation (I) afin de démontrer ensuite que l'on ne se trouve pas face à un *principe*, mais à une *exception qualifiée de principe* par le législateur dont le seul objectif est, semble-t-il, de donner l'impression de responsabiliser l'administration quant à son comportement vis-à-vis des demandes de ses usagers (II).

I. LES PROBLEMATIQUES EXCEPTIONS AU PRINCIPE DU SILENCE VAUT ACCEPTATION

Les exceptions au nouveau principe du silence de l'administration vaut acceptation d'une demande qui lui a été adressée relèvent tantôt d'une situation de fait (A), tantôt d'une situation de droit (B) qu'il convient de mettre en lumière compte tenu des interrogations juridiques qu'elles soulèvent.

I.A. Des exceptions de fait à la marge du droit

Les exceptions au principe du silence vaut acceptation pouvant être qualifiées d'exceptions de fait sont issues d'une situation de fait. Elles découlent de la simple observation du contenu des demandes présentées à l'administration comme l'illustrent les dispositions consacrées à ce nouveau principe dans le CRPA. En effet, son article L. 231-4 dispose :

> « Par dérogation à l'article L. 231-1, le silence gardé par l'administration pendant deux mois vaut décision de rejet :
>
> 1° Lorsque la demande ne tend pas à l'adoption d'une décision présentant le caractère d'une décision individuelle ;

[6] Pour les domaines dans lesquelles le silence de l'administration vaut décision implicite d'acceptation, une liste exhaustive, mais pas moins complexe, a été dressée à travers plusieurs tableaux consultables en ligne. Voy. Légifrance, https://www.legifrance.gouv.fr/Droit-francais/Silence-vaut-accord-SVA, Consulté le 14 avril 2018. Deux décrets adoptés en 2014 (*infra*) viennent également préciser certains domaines spécifiques échappant au nouveau principe.

> 2° Lorsque la demande ne s'inscrit pas dans une procédure prévue par un texte législatif ou réglementaire ou présente le caractère d'une réclamation ou d'un recours administratif ;
>
> 3° Si la demande présente un caractère financier sauf, en matière de sécurité sociale, dans les cas prévus par décret ;
>
> […] ;
>
> 5° Dans les relations entre l'administration et ses agents. »

Toutes ces situations listées par le législateur relèvent d'une constatation de nature factuelle qui conduit à des exceptions automatiques au nouveau principe du silence vaut acceptation. Pour le moment, dans le silence des textes et en l'absence d'une décision de justice sur ce point[7], il ne semble pas possible de préciser la procédure de constatation de ces situations de fait. Mais compte tenu des termes de ces dispositions législatives du CRPA, il paraît clair que c'est la simple lecture des termes des demandes adressées à l'administration qui lui permettra de constater qu'il s'agit d'une situation de fait conduisant d'office à l'inapplication du nouveau principe. Par exemple, si une demande de permis quelconque présentée devant l'administration requiert l'accord de plusieurs autres personnes, il pourrait être considéré que cette « demande ne tend pas à l'adoption d'une décision présentant le caractère d'une décision individuelle ». Autrement dit, si la réponse de l'administration à la demande risque d'impacter d'autres personnes, le nouveau principe pourrait ne pas s'appliquer. Dans ces conditions, il est à craindre que puisse émerger un risque d'arbitraire dans l'examen des demandes par l'administration.

Cette conclusion est loin d'être hâtive dans la mesure où le Conseil d'État affirme lui-même que, statuant au contentieux, il ne lui appartient pas « d'effectuer de simples constatations, mais de juger de la légalité d'un acte administratif »[8] et que, par conséquent, « il ne peut être saisi de conclusions tendant au seul constat de l'existence d'un acte et de ses conséquences »[9]. Cela implique que « [l]es conclusions de la requête tendant, d'une part, à constater que le silence gardé pendant quatre mois sur la demande de nomination aux fonctions d'avocat au Conseil d'État et à la Cour de cassation vaudrait acceptation implicite de cette

[7] À l'heure actuelle, les quatre décisions rendues par le Conseil d'État portant sur le principe du silence vaut acceptation (CE 28 juin 2018, N° 404576 ; CE SSR 30 décembre 2015, N° 386532 ; CE SSR 30 décembre 2015, N° 386805 ; CE Ord. 20 mai 2015, N° 389314) ne permettent pas d'observer une procédure de constatation des exceptions nées de situations de fait exposées dans le CRPA.
[8] CE 28 juin 2018, N° 404576.
[9] *Ibid*.

demande et, d'autre part, à constater l'existence d'une telle décision ne sont, dès lors, pas recevables »[10].

Le décret n° 2014-1280 du 23 octobre 2014[11] et le décret n° 2014-1280 du 23 octobre 2014[12], quoi qu'ils soient assez intéressants eu égard aux détails qu'ils donnent sur les exceptions au principe du silence vaut acceptation, sont muets sur la procédure de constatation des situations de fait, alors même que, on l'a vu, le juge administratif n'assume pas cette responsabilité. Par ailleurs, il faut noter que la Compagnie nationale des conseils en propriété industrielle et d'autres organismes de ce secteur avaient, en 2015, réussi à faire annuler en partie par le Conseil d'État le décret n° 2014-1280 du 23 octobre 2014 en tant qu'il inclut parmi les exceptions au principe du silence vaut acceptation les décisions sur les demandes de brevet d'invention et les décisions d'homologation du cahier des charges des indications géographiques, industrielles et artisanales ainsi que le décret n° 2014-1281 du 23 octobre 2014 en tant qu'il prévoit un délai de six mois à l'issue duquel le silence de l'administration sur les demandes d'inscription de changement de nom, de forme juridique ou d'adresse au registre des marques, brevets, dessins et modèles visées par les articles R. 512-17 et suivants, R. 613-57 et suivants et R. 714-6 et suivants du Code de la propriété intellectuelle, vaut acceptation[13]. Le Conseil d'État a accepté d'annuler les dispositions contestées de ces textes aux motifs que, compte tenu du fait que « ces demandes doivent faire l'objet d'un examen effectif, en particulier des conditions de diplômes, de pratique professionnelle et de moralité, le pouvoir réglementaire aurait dû inclure les décisions en cause parmi les catégories de décisions pour lesquelles, en application du II de l'article 21 de la loi du 12 avril 2000, eu égard à l'objet de la décision ou pour des motifs de bonne administration, le silence gardé par l'administration vaut rejet »[14]. Dans le gênant silence des textes, ces décisions du Conseil d'État confirment le risque d'arbitraire de la part de l'administration dans l'examen des situations de fait permettant d'écarter l'application du nouveau principe.

[10] *Ibid*.
[11] Décret n° 2014-1280 du 23 octobre 2014 relatif aux exceptions à l'application du principe « silence vaut acceptation » sur le fondement du II de l'article 21 de la loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations (ministère des finances et des comptes publics et ministère de l'économie, de l'industrie et du numérique).
[12] Décret n° 2014-1281 du 23 octobre 2014 relatif aux exceptions à l'application du délai de deux mois de naissance des décisions implicites d'acceptation prévues au II de l'article 21 de la loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations (ministère des finances et des comptes publics et ministère de l'économie, de l'industrie et du numérique).
[13] CE SSR 30 décembre 2015, N° 386805, Cons. 23 et 24.
[14] *Ibid*., Cons. 24.

Outre les exceptions nées de situations de fait, le législateur a également prévu des exceptions relevant d'une situation de droit.

I.B. Des exceptions de droit extrêmement étendues

Outre les exceptions de fait sus-rappelées, le législateur a pris soin de permettre au pouvoir réglementaire d'exclure du champ d'application du principe du silence vaut acceptation tout domaine qu'il juge bon. Contrairement aux exceptions de fait, on peut raisonnablement qualifier certaines exclusions permises par le législateur d'exceptions de droit car elles ne sont pas automatiques, en ce sens qu'elles ne découlent pas de la simple observation du contenu de la demande adressée à l'administration.

Le CRPA mentionne deux fois une exception de droit au principe. Premièrement, le 4° de l'article L231-4 précise que le nouveau principe ne s'applique pas « [d]ans les cas, précisés par décret en Conseil d'Etat, où une acceptation implicite ne serait pas compatible avec le respect des engagements internationaux et européens de la France, la protection de la sécurité nationale, la protection des libertés et des principes à valeur constitutionnelle et la sauvegarde de l'ordre public ». Ensuite, son article L. 231-5, précise quant à lui que « [e]u égard à l'objet de certaines décisions ou pour des motifs de bonne administration, l'application de l'article L. 231-1 peut être écartée par décret en Conseil d'État et en conseil des ministres ».

Du point de vue pratique, on peut comprendre que le législateur choisisse de limiter par des règles juridiques dérogatoires l'application du principe. Cependant, ces exceptions de droit posent des questions juridiques majeures au regard de l'objectif même affiché par le législateur, à savoir responsabiliser l'administration en la contraignant à davantage de réactivité quant aux demandes qui lui sont adressées par ses usagers. En effet, dans un premier temps, la crise de confiance dans l'action administrative et, en définitive, dans la démocratie, avait conduit le législateur à clarifier la règle selon laquelle le silence de l'administration valait décision de rejet par la loi n° 2000-321 du 12 avril 2000 relative aux droits des citoyens dans leurs relations avec les administrations. Mais cette clarification s'est montrée insuffisante au regard d'une exigence de dextérité et de promptitude que les usagers font de plus en plus peser sur les autorités administratives à leur égard.

C'est la première fois que le législateur, toujours dans le souci affiché d'améliorer[15] les relations entre l'administration et les citoyens, renverse cette règle pourtant bien établie depuis

[15] Voy. la lettre de mission du Premier ministre, Jean-Marc Ayrault, du 13 août 2013, *in L'application du nouveau principe silence de l'administration vaut acceptation*, *op. cit*., pp. 89-91.

les années 1860. En effet, comme le releva René Chapus, depuis les années 1960[16], le gouvernement était habilité par décret à « renverser la règle et décider que dans certains cas le silence vaudra acceptation de la demande »[17]. Cette analyse est conforme à l'article 3 du décret du 11 janvier 1965 qui, jusqu'à aujourd'hui, prévoit que « [l]es dispositions du présent décret ne pourront être modifiées que par décret en Conseil d'État ».

Il convient de noter que le Conseil d'État a toujours refusé de reconnaître le caractère de principe général du droit au principe du silence vaut décision implicite de rejet[18], contrairement à la jurisprudence du Conseil constitutionnel qui, depuis 1969, précise « que d'après un principe général de notre droit le silence gardé par l'administration vaut décision de rejet et, qu'en l'espèce, il ne peut y être dérogé que par une décision législative »[19]. C'est peut-être là la manifestation du fait que le Conseil constitutionnel était, jusqu'en 1971, considéré comme un « nain institutionnel »[20] dont l'intérêt et l'importance étaient nuls[21]. Cependant, le Conseil constitutionnel semble refuser de reconnaître à l'ancienne règle du silence vaut décision implicite de rejet le caractère d'un principe fondamental reconnu par les lois de la République (PFRLR)[22]. Cette position du Conseil n'est en rien incohérente puisque la règle, jusqu'à l'avènement de la loi de juillet 1900[23], était posée par un simple texte règlementaire émanant d'un régime non républicain (le Second Empire). Mais, finalement, si l'on s'en tient à la jurisprudence du Conseil constitutionnel qui reconnaît une valeur de principe général du droit à l'ancien principe du silence vaut rejet, la loi du 12 novembre 2013 n'a fait qu'exécuter cette jurisprudence qui a pris soin de préciser « [qu']il ne peut y être dérogé que par une décision législative ». Ainsi, selon cette jurisprudence, on peut considérer que si les exceptions au principe ne peuvent provenir que du législateur, *a fortiori*, le principe en lui-même ne pouvait juridiquement être posé que par la loi.

[16] Décret n° 65-29 du 11 janvier 1965 relatif aux délais de recours contentieux en matière administrative qui est toujours en vigueur.
[17] R. Chapus, *Droit du contentieux administratif*, LGDJ, 13ème éd., 2008, p. 200.
[18] CE, Ass. 27 février 1970, *Commune de Bozas* et CE, 23 avril 1975, *Vilain*.
[19] Décision n° 69-55 L du 26 juin 1969, Cons. 5. *Nature juridique de certaines dispositions modifiées, des articles 4, 9 et 12 de la loi du 2 mai 1930 relative à la protection des monuments naturels et des sites de caractère, historique, scientifique, légendaire ou pittoresque, des articles 2 et 13 bis de la loi du 31 décembre 1913 sur les monuments historiques et de l'article 98-1 du code de l'urbanisme et de l'habitation* ; Décision n° 94-352 DC du 18 janvier 1995, Cons. 12. *Loi d'orientation et de programmation relative à la sécurité*.
[20] D. Rousseau, *Radicaliser la démocratie. Propositions pour une refondation*, Seuil, 2015, p. 190.
[21] En effet, le Conseil constitutionnel, en 1958, n'a pas été considéré comme un juge pouvant imposer notamment le respect des droits et libertés fondamentaux. C'est à partir de sa décision n° 71-44 DC du 16 juillet 1971 ayant reconnu valeur constitutionnelle à la liberté d'association qu'il a érigé en PFRLR que l'institution va s'affirmer en tant que juge constitutionnel d'un rang égal à celui de ses homologues étrangers.
[22] Décision n° 2018-763 DC du 8 mars 2018, §§ 14-18, *Loi relative à l'orientation et à la réussite des étudiants*.
[23] La loi de juillet 1900 a généralisé la règle selon laquelle le silence vaut rejet.

La conclusion de cette analyse soulève un problème juridique majeur. On peut en effet se demander si, en permettant au pouvoir règlementaire de déroger à un principe général du droit qui, en plus, ne peut être dérogé que par une « décision législative », le législateur n'a pas méconnu ses compétences et responsabilités constitutionnelles, et donc si ce comportement n'est pas contraire à la Constitution. En effet, seul un décret en Conseil d'État suffit à remettre en cause le principe qui, pourtant, est posé par le législateur lui-même ; et même si la procédure d'adoption et, partant, le contenu de ce type de décret sont plus contraignants que ceux d'un décret simple, il demeure, quoi qu'on en dise, un simple acte réglementaire, donc inférieur à un texte législatif. Ainsi, nous y reviendrons, le législateur semble se dégager de sa propre compétence alors que le juge constitutionnel ne paraît pas lui laisser le privilège d'un tel choix.

Selon les analyses de René Chapus, le Conseil d'État avait jugé que « la dérogation [au principe] résulte (à défaut d'une loi) d'un décret »[24]. Il concluait ainsi à l'illégalité d'une dérogation instituée par un arrêté ministériel[25]. Mais cette jurisprudence du juge administratif n'est pas de nature à invalider l'analyse juridique qui est conduite ici au regard notamment de la jurisprudence claire du Conseil constitutionnel et du principe de la hiérarchie des normes ; étant entendu que la hiérarchie des normes suppose que le pouvoir règlementaire ne peut pas agir à la place du législateur sans autorisation expresse et précise de celui-ci.

Il convient désormais de s'interroger plus précisément sur les exceptions que permettent la loi au principe du silence vaut acceptation au regard de certains principes de nature constitutionnelle.

II. DES EXCEPTIONS ILLUSTRATIVES D'UN LEURRE LEGISLATIF RISQUANT L'INCONSTITUTIONNALITE

La totalité des exceptions, notamment celles découlant d'une situation de droit, sans condition précise, permises par le législateur de 2013 paraît encourir l'inconstitutionnalité à un double titre. D'abord, la facilité de la possibilité de renverser le principe permet de qualifier ledit principe de *leurre* législatif qui soulève la question de la sincérité du législateur (A). Ensuite, en renvoyant au pouvoir réglementaire la possibilité de renverser un principe qui, selon la jurisprudence constitutionnelle, ne peut être dérogé que par « décision législative », le législateur paraît méconnaître sa propre compétence (B).

[24] R. Chapus, *op. cit.*
[25] CE, 8 novembre 1995, *Association française des CRFP du Barreau*.

II.A. Le problème de la facilité de la possibilité de renverser le principe du silence vaut acception

Cette possibilité offerte par le législateur au pouvoir réglementaire de remettre en cause ce principe risque l'inconstitutionnalité. En effet, le législateur ne précise pas les circonstances qui peuvent éventuellement conduire l'administration à écarter l'application du nouveau principe du silence vaut acceptation, si bien que celle-ci peut, du moins théoriquement, puisque le législateur le lui permet, décider à sa guise d'écarter de manière systématique l'application du principe. En d'autres termes, cette inconditionnalité de la possibilité d'écarter l'application du principe risque fort bien de se transformer en abus car l'administration peut très bien recourir à son pouvoir règlementaire à chaque fois qu'elle le souhaite au détriment du principe qui, pourtant, semble poser une règle qui accorde un droit aux usagers des services publics, celui d'avoir une réponse expresse et précise aux demandes qu'ils ont adressées à leur administration, « garantissant [ainsi] l'accès de l'administré au juge »[26]. Dans ces conditions, c'est la sincérité même du législateur qui paraît en jeu alors que, depuis 2005, l'absence de clarté et sincérité du législateur expose sa décision à l'inconstitutionnalité[27].

Pourtant, le Conseil constitutionnel a lui-même précisé que la décision implicite de rejet est une garantie du droit à un recours juridictionnel effectif. En effet, dans sa décision n° 2018-763 DC du 8 mars 2018[28], le Conseil a décidé :

> « 14. Le quatrième alinéa du paragraphe I de l'article L. 612-3 précise que le silence gardé par un établissement sur une candidature présentée dans le cadre de la procédure nationale de préinscription ne fait naître aucune décision implicite avant le terme de cette procédure.
>
> […]
>
> 17. Toutefois, les dispositions contestées se bornent, afin de tenir compte de la durée et des caractéristiques de la procédure de préinscription, à fixer le délai spécifique au terme duquel une décision est réputée avoir été prise à l'issue de cette procédure. Elles garantissent ainsi la naissance d'une décision implicite de l'administration au plus tard à la fin de la procédure de préinscription, qui permettra au candidat de contester, le cas échéant, le refus de chacun des choix qu'il a formulés. Dès lors, elles ne portent aucune atteinte au droit à un recours juridictionnel. Par ailleurs et en tout état de cause, manque en fait le grief tiré de la méconnaissance d'un principe fondamental reconnu par les lois de la République que les requérants demandent au Conseil constitutionnel de reconnaître. »

[26] *L'application du nouveau principe silence de l'administration vaut acceptation*, *op. cit*., p. 9.
[27] Décision n° 2005-512 DC du 21 avril 2005, Cons. 4, *Loi d'orientation et de programme pour l'avenir de l'école*.
[28] Décision n° 2018-763 DC du 8 mars 2018, §§. 14-18, *Loi relative à l'orientation et à la réussite des étudiants*.

Ainsi, permettre aussi facilement au pouvoir réglementaire de déroger au principe du silence vaut acceptation ne conduit pas seulement à s'interroger sur la sincérité du législateur dans sa démarche de renversement de l'ancien principe ; ce fait permet également de supposer, du moins, à travers ce nouveau principe, que le législateur a peut-être tout simplement trompé les administrés face à un mécanisme aussi complexe en arrachant leur silence malgré le fonctionnement d'une administration qui ne s'améliore pas.

II.B. Une possibilité imprécise méconnaissant la compétence du législateur

La possibilité offerte par le législateur au pouvoir réglementaire d'écarter, sans condition, rappelons-le, l'application du principe qu'il a lui-même posé fait naître une autre question de constitutionnalité non négligeable. En effet, le législateur paraît méconnaître sa propre compétence en permettant à l'administration de déroger au principe de manière inconditionnée.

Certes, la Section du rapport et des études (SRE) du Conseil d'État estime « que le pouvoir réglementaire pouvait, de lui-même et sans habilitation législative préalable, instituer par décret des régimes de décision implicite d'acceptation dans les matières relevant de sa compétence »[29]. Cette position de la SRE rappelle que l'ancien principe du silence vaut rejet et ses exceptions n'étaient, au départ, posés que par le pouvoir réglementaire et non par la loi ; mais, depuis les années 2000, on l'a vu, le législateur a définitivement occupé seul ce terrain. Dans ces conditions, à moins de considérer que le Conseil d'État défiât délibérément le Conseil constitutionnel, cette affirmation de la SRE ne peut être considérée comme valide qu'en la cantonnant aux fondements réglementaires du principe et non aux fondements législatifs clairs et constants intervenus au moins depuis la loi du 12 avril 2000.

D'un point de vue constitutionnaliste, cette position de la SRE renvoie à la question de savoir si le législateur pouvait, comme il l'a fait, permettre par un simple décret, fût-ce un décret en Conseil d'État et en Conseil des ministres, la remise en cause d'un principe dont l'affirmation ne relève que de sa seule compétence. On peut admettre que le législateur décide de déléguer au pouvoir réglementaire la compétence pour préciser des modalités selon lesquelles s'applique un principe qu'il pose ; mais, dans ce cas, il lui revient nécessairement de *préciser* le champ d'intervention de celui-ci. Or, on l'a vu, dans le cas des exceptions de nature réglementaire au principe du silence vaut acceptation, le législateur ne fait qu'affirmer que le pouvoir

[29] *L'application du nouveau principe silence de l'administration vaut acceptation*, *op. cit*., p. 11. Il s'agit là d'une interprétation de la décision d'assemblée du Conseil d'État *Commune de Bozas* du 27 février 1970 précitée.

réglementaire peut déroger au principe, notamment « [e]u égard à l'objet de certaines décisions ou pour des motifs de bonne administration ». Ainsi, l'incompatibilité « avec le respect des engagements internationaux et européens de la France », « la protection de la sécurité nationale », « la protection des libertés et des principes à valeur constitutionnelle », « la sauvegarde de l'ordre public », « l'objet de certaines décisions » et « une bonne administration », sans autre précision et sans aucun garde-fou, suffisent à écarter l'application du principe législatif du silence vaut acceptation, ce qui laisse une latitude extrêmement étendue au pouvoir réglementaire qui, ainsi, pourra seul faire ce qu'il veut, même au détriment du droit des usagers à une réponse rapide, claire et précise de la part de l'administration. Le risque d'inconstitutionnalité tient donc cette fois de l'imprécision du champ d'intervention du pouvoir réglementaire. En effet, le Parlement peut se dessaisir de sa propre compétence, mais seulement sur demande du gouvernement dans un cadre très précis et dans un délai limité (en vertu des ordonnances prévues par l'article 38 de la Constitution). C'est ce qu'a précisé le Conseil constitutionnel dans sa décision n° 2005-510 DC du 20 janvier 2005[30]. De plus, depuis sa décision n° 86-207 DC du 26 juin 1986, le Conseil précise que le « texte [de l'article 38 de la Constitution] doit être entendu comme faisant obligation au Gouvernement d'indiquer avec précision au Parlement quelle est la finalité des mesures qu'il se propose de prendre et leurs domaines d'intervention »[31]. Ainsi, si l'on s'en tient à cette jurisprudence, le Parlement ne pouvait pas déléguer, sans aucune précision et sans une demande expresse du gouvernement, ce pouvoir d'écarter l'application du principe du silence vaut acceptation à l'autorité réglementaire à travers un décret en Conseil d'État. Or, faut-il le préciser, le Conseil des ministres et le Conseil d'État, chargés d'adopter les décrets dérogeant au principe, peuvent être considérés comme étant deux administrations de l'État qui se « serrent les coudes » dans l'objectif de régler ces questions en toute quiétude sans craindre que le Conseil d'État-juge pense, par la suite, à remettre en cause la légalité d'un tel décret que le Conseil d'État-administration aura précédemment édicté au côté du Conseil des ministres. De ce point de vue, le principe du silence vaut acceptation a davantage l'apparence d'un leurre législatif visant à calmer les tensions entre l'administration et ses usagers et non à contraindre cette administration à davantage de réactivité et de dextérité dans son comportement au regard des réels besoins des citoyens. Pour tenter de remédier à ce camouflage du législateur, il conviendrait de demander

[30] Décision n° 2004-510 DC du 20 janvier 2005, Cons. 27, 28, et 29, *Loi relative aux compétences du tribunal d'instance, de la juridiction de proximité et du tribunal de grande instance*.
[31] Décision n° 86-207 DC du 26 juin 1986, Cons. 13, *Loi autorisant le Gouvernement à prendre diverses mesures d'ordre économique et social*.

l'avis du Conseil constitutionnel sur les exceptions de nature réglementaire que permettent les dispositions législatives consacrées à ce nouveau principe.

Dès lors, si l'analyse des exceptions au principe du silence vaut acceptation permet de soulever une impression de leurre du législateur, l'étude du nouveau principe au regard du domaine particulier du droit fiscal confirme cette impression.

II.C. Un domaine particulier exclu : le domaine fiscal

Le domaine du droit fiscal illustre parfaitement le leurre législatif dissimulé derrière ce nouveau principe du silence vaut acceptation. En effet, le législateur a pris soin d'évacuer toutes les demandes ayant un caractère financier, hormis le domaine de la sécurité sociale, du champ d'application du nouveau principe. Or l'essentiel des démarches fiscales (1) ont un caractère financier. En outre, comme le montre l'actualité du contentieux fiscal, si certains rescrits fiscaux paraissent concernés, l'on peut raisonnablement parler d'une application à demi-teinte du nouveau principe à leur égard (2).

II.C.1. Les réclamations fiscales et les autres demandes exclues

S'agissant de la matière fiscale, peut-être plus qu'ailleurs, le principe demeure largement le suivant : le « silence de l'administration pendant le délai imparti vaut décision implicite de rejet ». Pour s'en convaincre, il suffit d'observer la liste résultant à la fois du Livre des procédures fiscales (LPF), qui prévoit que les réclamations fiscales sont exclues de la nouvelle règle du silence vaut acceptation à l'expiration d'un délai de deux mois, et de textes réglementaires allant dans le même sens.

En vertu de l'article R. 190-1 al. 1er du LPF, un contribuable qui conteste le bien-fondé ou la régularité d'un impôt doit formuler une réclamation auprès de l'administration fiscale avant de pouvoir saisir les tribunaux. Ce point est une belle illustration du fait que les relations que les contribuables peuvent avoir avec l'administration fiscale sont bien souvent exclues de l'application du principe du silence vaut acceptation. Au contraire, au bout de six mois de silence gardé par l'administration, le contribuable peut saisir les tribunaux. Dans ce cas, le silence s'assimile presqu'à un refus de l'administration.

Outre les réclamations fiscales, bien d'autres demandes sont exclues du nouveau principe. C'est le cas, notamment, pour le crédit d'impôt développement durable : conventionnement d'un organisme pour la délivrance du label RGE (« reconnu garant de l'environnement ») (décret n° 2014-812, 16 juillet 2014, art. 2) ; pour la réduction d'impôt au

titre des investissements dans des résidences hôtelières à vocation sociale (RHVS) : agrément d'un organisme pour exploiter une résidence (Code de la construction et de l'habitation, art. L. 631-11 et R. 631-15) ; pour le contrôle fiscal : réalisation d'une vérification de comptabilité sur demande du contribuable (LPF, art. L. 13 C et L. 13 CA) ; pour le fichier immobilier : publication et inscription (décret n° 55-22, 4 janvier 1955, art. 1er) ; de même, il existe plusieurs exclusions s'agissant des professionnels actifs dans le domaine des ouvrages en métaux précieux et de l'agrément des entrepositaires de boissons alcooliques et de tabacs manufacturés (exclusions prévues aux annexes II et IV du Code général des impôts).

Par ailleurs, pour ce qui concerne les entrepôts fiscaux, on retrouve cette même règle pour l'autorisation de création, de modification et de gestion d'un entrepôt fiscal de produits énergétiques (Code des douanes, art. 158 D) et la création et la fin d'activité des entrepôts fiscaux de carburant d'aviation (EFCA) en application de l'article 4 du décret n° 2009/805 du 26 juin 2009 (Code des douanes, art. 265 bis, 1, b).

Au regard de toutes ces exclusions en matière fiscale, on peut au moins se demander si le législateur n'a pas laissé de côté un domaine qui, pourtant, aurait dû être au cœur du champ d'application du principe du silence vaut acceptation. En effet, les attentes des contribuables en termes de rapidité dans le traitement de leurs demandes sont particulièrement fortes en la matière dans la mesure où, de la réponse de l'administration fiscale, dépend leur capacité de financement de nouveaux projets et/ou d'investissement.

Enfin, l'actualité récente fournit un exemple intéressant qui illustre qu'en matière fiscale si le principe du silence vaut acceptation vient à s'appliquer dans un cas précis, ici un rescrit fiscal, le législateur ou les autorités réglementaires prennent soin de le préciser, ce qui confirme que le principe peut raisonnablement être tenu pour une exception.

II.C.2. La relative particularité du rescrit fiscal sur le prélèvement à la source applicable à compter du 1er janvier 2019

Le prélèvement à la source est en effet une question d'actualité en droit fiscal. Les questions que ce nouveau mécanisme pose aux contribuables expliquent le choix du législateur de préciser expressément, dans le domaine fiscal, les cas où le principe du « silence vaut acceptation » a vocation à s'appliquer. Cela montre que l'application de ce principe dans ce domaine du droit s'applique seulement à demi-teinte.

Dans le cadre de l'introduction du prélèvement à la source à compter du 1er janvier 2019, de nombreuses questions se posent sur l'« année blanche ». Rappelons que, dans le cadre de

cette réforme, les revenus de chaque année continueront à être déclarés, et en principe imposés, mais que le législateur a prévu d'affranchir de l'impôt une partie des revenus de l'année 2018, pour éviter d'alourdir les impôts normalement dus.

En effet, l'impôt sur les revenus de 2018 devrait en principe être payé en 2019 alors que la réforme conduira les contribuables à commencer à payer dès janvier 2019 l'impôt sur les revenus 2019.

Mais seuls les traitements et salaires de 2018 de nature non exceptionnelle seront concernés par cet effacement, ce qui peut poser des questions d'appréciation en cas de versement de certaines primes. Les revenus non exceptionnels s'entendent des revenus imposés selon les règles afférentes aux traitements, salaires, pensions et rentes viagères, que la loi n'a pas expressément exclus de l'assiette du crédit d'impôt modernisation du recouvrement (CIMR) au terme d'une liste limitative ou qui ne sont pas, par nature, susceptibles d'être recueillis annuellement (la plupart des indemnités de rupture de contrat de travail ou d'un mandat social notamment). Sont également exclues les gratifications surérogatoires, c'est-à-dire les gratifications accordées sans lien avec le contrat de travail ou le mandat social, ou qui vont au-delà de ce qu'ils prévoient, quelle que soit la dénomination sous laquelle l'employeur a procédé à ces versements.

Il est prévu, en cas d'incertitude, que les employeurs (versant par exemple des primes discrétionnaires) disposeront d'une procédure de rescrit afin d'obtenir une prise de position formelle de l'administration sur le traitement fiscal qui sera appliqué en 2019 aux différents éléments de la rémunération qu'ils verseront en 2018. Le texte prévoit que l'absence de réponse de l'administration dans les trois mois à la demande (et non deux mois comme prévu par le principe général) vaudra acceptation de la qualification proposée par l'entreprise. Bien qu'aucune obligation formelle n'existe à cet égard, cette procédure de rescrit devrait permettre à l'employeur qui le souhaite d'indiquer au salarié la qualification des rémunérations qu'il lui verse au regard du champ d'application du CIMR. En effet, les salariés auront à procéder eux-mêmes, sur la déclaration de l'année 2018, à la distinction entre les revenus éligibles au crédit d'impôt exceptionnel et les autres.

Dans ce contexte, dès lors que le silence de l'administration vaut acceptation de la demande de rescrit, il est recommandé de formuler celle-ci comme une proposition de traitement fiscal d'un revenu ou d'un élément de rémunération et non comme une question ouverte sur la nature de celui-ci. Enfin, le champ très restreint du rescrit fiscal (hormis quelques

rares exceptions) n'est pas de nature à écarter l'analyse consistant à mettre en garde les contribuables sur le fait que le domaine fiscal demeure largement exclu de l'application du nouveau principe.

CONCLUSION

Face à la complexité de ce nouveau principe du silence vaut acceptation et surtout à son caractère véritablement d'*exception* plutôt que de *principe*, il paraît urgent de le repenser dans un sens plus favorable à la confiance que les citoyens doivent avoir dans leur administration et, plus généralement, dans le concept de démocratie administrative qui, on l'a vu, s'est développé à partir des années 1970. Pour cela, il convient de penser à cet objectif à travers les moyens, notamment technologiques, offerts par l'intelligence artificielle[32], alloués aux différents services publics de sorte que ceux-ci puissent, en toute *responsabilité*, répondre avec un minimum de rapidité, de dextérité et de précision aux demandes et besoins réels des citoyens-usagers. À cet égard, il est heureux de constater que le Conseil constitutionnel a, dans sa récente décision n° 2018-765 DC du 12 juin 2018[33], validé le principe du traitement par algorithme des demandes adressées à l'administration, tout en assortissant cette validation de certains garde-fous auxquels avait déjà pensé le législateur, comme la possibilité pour l'usager dont la demande a été traitée par algorithme de demander des comptes à l'administration qui doit pouvoir lui expliquer « en détail et sous une forme intelligible »[34], « la manière dont le traitement a été mis en œuvre à son égard »[35]. Cet objectif passera également et nécessairement par une réforme du Code des relations entre le public et l'administration en réduisant de manière drastique les trop nombreuses exceptions[36] qui rendent si complexe, et donc si inaccessible et inintelligible le nouveau principe du silence vaut acceptation.

[32] À cet égard, la « chaîne de blocs » (ou *Blockchain*) est vue comme un outil révolutionnaire pouvant être utilisé par les services de l'État en vue notamment « *d'imposer la responsabilité dans de nombreux services publics* » P. Boucher, S. Nascimento et M. Kritikos (rapp.), *Comment la technologie de la chaîne de blocs pourrait changer nos vies. Analyse approfondie*, Unité de la prospective scientifique (STOA), Publications de l'UE, Février 2017, p. 19).

[33] Décision n° 2018-765 DC du 12 juin 2018, §§. 65-72, *Loi relative à la protection des données personnelles*.

[34] *Ibid*., §. 71.

[35] *Ibid*.

[36] À cet égard, on peut particulièrement regretter que le nouveau principe ne s'applique pas dans le cadre des « *relations entre l'administration et ses agents* » (article L. 231-4, 5°, du CRPA). Pourtant, l'application du nouveau principe à de telles relations pourrait permettre aux agents publics d'avoir davantage de confiance dans leur administration.

MORE EFFICIENT ARBITRATION CLAUSES?

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Abstract

Over the past several decades the use of arbitration has become increasingly widespread. This has largely been due to its perception as a more efficient means of resolving disputes, delivering speedier results at a lower cost. In recent years however, these supposed advantages of arbitration have come under increased scrutiny in academic and professional debate regarding US and international arbitration. This paper analyzes the state of arbitration in Israel through the prism of this debate and identifies several possible inherent systemic failings that could explain its inefficiency. The key conclusion of this analysis suggests that in the ex-post stage (i.e. after a given conflict has arisen) all actors have conflicts of interest that grossly hinder the chances for efficient proceedings. This paper examines whether potential litigants can solve or mitigate these issues through better, tailor-made arbitration clauses. This paper further examines the fundamental problems that prevent such future issues from being resolved in the ex-ante stage. This paper proposes an innovative and creative approach to finding possible solutions, such as a hybrid mechanism that combines ex-ante and ex-post arrangements. Further research into a mechanism of this sort is needed. This paper approaches the debate from a new angle and may contribute to a better understanding of arbitration inefficiencies in the Israeli system and can hopefully contribute to the ongoing international debate regarding arbitration efficiency.

Résumé

Au cours des dernières décennies, le recours à l'arbitrage est devenu de plus en plus répandu. Cette situation s'explique en grande partie par le fait qu'elle est perçue comme un moyen plus efficace de régler les différends, ce qui permet d'obtenir des résultats plus rapidement et à moindre coût. Ces dernières années cependant, ces avantages supposés de l'arbitrage ont fait l'objet d'une attention accrue dans le débat académique et professionnel concernant l'arbitrage américain et international. Cet article analyse l'état de l'arbitrage en Israël à travers le prisme de ce débat et identifie plusieurs défaillances systémiques inhérentes possibles qui pourraient expliquer son inefficacité. La principale conclusion de cette analyse suggère qu'à l'étape ex post (c'est-à-dire après l'apparition d'un conflit donné), tous les acteurs ont des conflits d'intérêts qui entravent considérablement les chances d'une procédure efficace. Le présent article examine si les parties potentielles peuvent résoudre ou atténuer ces questions par le biais de meilleures clauses d'arbitrage. Il examine plus en détail les problèmes

fondamentaux qui empêchent que de telles questions ne soient résolues au stade ex ante et propose une approche novatrice et créative pour trouver des solutions possibles, comme un mécanisme hybride qui combine des arrangements ex ante et ex post. Il est nécessaire de poursuivre les recherches sur un tel mécanisme. Ce document aborde le débat sous un angle nouveau et peut contribuer à une meilleure compréhension des inefficacités de l'arbitrage dans le système israélien et peut, espérons-le, contribuer au débat international en cours sur l'efficacité de l'arbitrage.

INTRODUCTION

For centuries, arbitration has been used as a means of resolving disputes among people without official state intervention, primarily among members of closed circles. With the rise of the Alternative Dispute Resolution (ADR) movement, arbitration has become increasingly popular and widespread over the past few decades in large part because it is perceived as a less costly and faster way of handling conflicts, particularly commercial disputes. In recent years, however, these supposed advantages of arbitration have come under increased scrutiny in academic and professional debate in arbitration in the United States and international arbitration. So, is arbitration truly a more efficient process and if not, why?

Numerous research papers and studies delve into this question and several differing analyses have been put forward. There is a consensus, however, that changes made to arbitration as an institution have resulted in decreased efficiency. Several researchers have put forward possible solutions, suggesting that various changes to behavior and conduct on the part of the relevant actors may reverse this problem.

This paper will focus on the arbitration process in Israel. Until 2008, arbitration was held in little regard among the country's legal and business communities who did not trust the process. Changes were made to the Arbitration Law to address these concerns and build up arbitration as a common means for resolving disputes. Since then, arbitration as a field has evolved in Israel and several private arbitration institutions were established, likely as a result of increased demand[1]. Despite this apparent increase in popularity, practitioners in the field of commercial litigation have experienced and observed glaring systemic inefficiencies in arbitration proceedings in Israel.

In the absence of empirical data regarding arbitration in Israel, this paper will look at the findings of researchers involved in the ongoing debate about arbitration efficiency who have written about the matter from an international perspective and will use those findings to identify possible inherent systemic failings in the Israeli arena. This paper will further examine whether the litigants themselves, as those who ultimately suffer the most from such inefficiencies, can take steps to prevent or at least mitigate some of these issues by drafting better *ex-ante* arbitration provisions. This paper will hence hopefully contribute to an improved understanding of the pitfalls of arbitration in Israel.

[1] A. Reich, "Why Israel Should Adopt the UNCITRAL Model Law on International Commercial Arbitration", *Bar-Ilan Law Studies*, vol.30, issue 2, p. 707.

This paper concluded that the chief issue at the core of the overall systemic problem is that in *ex-post* stage (*i.e.* after a given conflict has already arisen between the parties) all the relevant actors, meaning the litigants, their counsels, and even the arbitrators themselves, likely have differing and conflicting interests. Unfortunately, seeking to solve this problem with better *ex-ante* arbitration clauses is not an easy task, and may require exhaustive and extensive forethought. All these issues will be addressed hereafter.

Part I. Background will present the general relevant background regarding ADR, arbitration, and arbitration as an institution in Israel. It will lay out the inefficiency problem at the heart of this paper. Part II. Possible reasons for the inefficiency of arbitration in Israel will examine the potential sources of the problem. Part III. More efficient arbitration clauses? will discuss the difficulties in solving or even simply mitigating some of these failings. Part IV. Thinking about possible solutions will suggest a new approach to the problem that incorporates solutions to the specific challenges discussed in this paper.

I. BACKGROUND

There is a vast number of books, articles, and additional professional literature regarding Alternative Dispute Resolution and arbitration. Thus, this part will provide a relatively brief and succinct overview of the relevant background and concepts discussed in this paper.

One of the main incentives for the use of ADR is to save on costs[2] - including by lowering transaction costs - and time which can also lead to resolving disputes more efficiently in comparison with court proceedings[3]. Nowadays, ADR includes not only arbitration and mediation but also many other mechanisms, such as Conciliation, Fact-Finding, Mini-Trial, Summary Jury Trials, Court-Ordered Arbitration, Ombudsman, Med-Arb, Small Claims Courts, Rent-a-Judge[4].

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[2] See J.-K. Lieberman, J. Henry, "Lessons from the alternative dispute resolution movement", *The University of Chicago Law Review*, 1986, vol. 53, n. 2, pp. 427-429.

[3] For an economic analysis of ADR see, for example, S. Shavell, "Alternative dispute resolution: an economic analysis", *The Journal of Legal Studies*, 1995, vol. 24, n. 1, pp. 1-28 and A. Van Aaken, T. Broude, "Arbitration from a Law & Economics Perspective" *in* T. Schultz, F. Ortino (ed.), *The Oxford Handbook of International Arbitration*, Oxford University Press, 2017.
See T. Stipanowich, "ADR and the 'Vanishing Trial': the growth and impact of 'Alternative Dispute Resolution'", *Journal of Empirical Legal Studies*, 2014, vol. 1, n. 3, pp. 843-912; R. Mnookin, "Alternative dispute resolution", *Economics and Business Discussion Paper Series*, 1998, Paper 232.

[4] K. Stone, "Alternative dispute resolution" *in* S. Katz (ed.), *Encyclopedia of Legal History*, Oxford University Press, 2004.

This paper will focus on only one form of ADR: Arbitration. In recent decades there has been a rise in the popularity of the ADR movement and the use of commercial arbitration has become similarly widespread[5].

I.A. Arbitration

Broadly speaking arbitration can be described as a dispute resolution process handled in front of a neutral third party who is referred to as the arbitrator (or a panel of arbitrators)[6]. An arbitrator is a private person, *i.e.* not necessarily an officer of the law or court system, which is usually nominated by the parties themselves or by a mechanism previously agreed upon by said parties[7]. The parameters of a given arbitration procedure are restricted to the issues and claims stated and agreed upon by the parties in an arbitration agreement[8]. The arbitration can be heard by an *ad-hoc* arbitrator[9] or within an arbitration institution[10].

Arbitration was established as a practice even before law was introduced[11]. International arbitration was once, and often still is, a common way of solving disputes between countries[12], or cross-border conflicts when a state entity is one of the sides in the dispute[13]. One can also find arguments supporting the use of arbitration as an alternative to court proceedings between civil litigants as early as the 18th century[14]. Despite the considerable history of arbitration, the Common Law did not enforce arbitration agreements until the 20th century[15].

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[5] G. Born, "Keynote address: Arbitration and the freedom to associate", *Georgia Journal of International and Comparative Law*, 2009, vol. 38, p. 7, spec. pp. 8-10.

[6] R. Mnookin, *op. cit*; L. Montgomery, "Expanded judicial review of commercial arbitration awards bargaining for the best of both worlds: *Lapine technology corp. v. Kyocera corp*", *University of Cincinnati Law Review*, 2000, vol. 68, n.2, pp. 529-554 spec. p. 532. For simplicity's sake, in this paper arbitrator refers to a single arbitrator or a panel of arbitrators, unless stated otherwise.

[7] R. Mnookin, *op. cit.*

[8] R. Mnookin, *op. cit.*; L. Montgomery, *op. cit.*, pp. 532-533.

[9] "An arbitrator 'chosen for the particular case only'" *in* B. Aaron, "Some procedural problems in arbitration", *Vanderbilt Law Review*, 1957, vol. 10, n. 4, p. 736.

[10] W. Mattli, "Private justice in a global economy: from litigation to arbitration", *International Organization*, 2001, vol. 55, n. 4, p. 921.

[11] F. Emerson, "History of Arbitration Practice and Law", *Cleveland State Law Review*, 1970, vol. 19, p. 155.

[12] H. Fraser, "Sketch of the History of International Arbitration", *Cornell Law Quarterly*, 1925, vol. 11, p. 179.

[13] L. Bouchez, "Prospects for International Arbitration: Disputes between States and Private Enterprises", *Journal of International Arbitration*, 1991, vol. 8, p. 81.

[14] E. Wolaver, "Historical Background of Commercial Arbitration", *University of Pennsylvania Law Review*, 1934, vol. 83, p. 132; F. Emerson, *op. cit.*; Multiple contributors, *The advantages of settling disputes by arbitration*, F. Jollie, 1795, p. 5.

[15] L. Montgomery, *op. cit.*, p. 534.

I.A.1. The Goals of Arbitrations and Incentives For Its Use

This paper will limit its scope to commercial dispute arbitration among sophisticated parties where none have excess power over the other side (at the point when the parties agreed to arbitration). In this type of disputes both sides have similar incentives to choose arbitration. This section will review those key incentives and the assumed advantages of arbitration:

Saves time and lowers costs - like all ADR procedures, parties choose arbitration because they are seeking quicker and less costly proceedings;

Confidentiality - because arbitration is usually a private procedure, the matters discussed are not accessible to the public as they would be in court proceedings. Therefore, the parties can enjoy the benefits of confidentiality and do not need to risk the possible disclosure of trade secrets or any other information related to their businesses/conduct/disputes;

Flexibility - the parties can jointly agree on matters such as the identity of the arbitrator and the latter's familiarity with the relevant subject, whether he will be bound to any specific jurisdiction or only to general commercial principles, and the rules to which they wish the arbitration procedure to be beholden;

Judicial review - arbitrator decisions and arbitration awards are appealable only on very limited grounds, namely due to faults in the procedure as opposed to factual mistakes or errors in applying the law, unlike court decisions or verdicts[16].

This paper will focus on the parties' desire to save time and costs. As will be discussed below, this desire tends not to be fulfilled.

I.A.2. Arbitration and The Efficiency Debate in Recent Years

As previously mentioned, one of the main incentives for parties to choose arbitration is to save time and lower costs in comparison with other judicial proceedings. This analysis will focus on this goal alone and will use the term "arbitration efficiency" to mean only this limited definition of the term even though "efficiency" in its broad economic definition can also be

[16] P. Sanders, *Quo vadis arbitration?: sixty years of arbitration practice*, Kluwer law international, 1999, pp. 2-6; T. Oehmke, *Commercial Arbitration* (Vol. 2), Thomson/West, 2008; M. Kantor, "OTC Derivatives and Arbitration: Should Counterparties Embrace the Alternative", *Banking Law Journal*, 2000, vol. 117, pp. 414-416; R. Mnookin, *op. cit*.

measured by other parameters such as social welfare maximization and/or utility measures/maximization; and not only as "saving time and lowering costs"[17].

As discussed in the previous section, mainstream writing on arbitration still commonly ascribes efficiency as a characteristic of arbitration. Arbitration has been praised for its efficiency for a long time and present-day writings on the subject tend to address this claim as axiomatic[18].

Despite this automatic assumption regarding the efficiency of arbitration, a debate has begun in recent times among researchers about whether arbitration can still be considered an inherently efficient procedure. Some scholars' findings show that in recent years arbitration procedures have changed a great deal, and those same researchers also presented evidence that arbitration proceedings have become more and more costly[19]. Their findings also suggest that efficiency as it relates to the saving of time is no longer what it used to be[20]. In the following chapter, some of the findings presented by these scholars will be discussed in the context of Israeli arbitration. However before doing so the next section will present a review of the types of arbitration agreements and a brief general summary of the relevant characteristics of Israel's Arbitration Law.

I.B. Arbitration Agreements

Arbitration agreements can be divided into two types of groups: post-dispute agreements and pre-dispute agreements[21]. This section reviews these two types of contract forms and their key features.

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[17] For example, M. Goltsman, J. Hörner, G. Pavlov, F. Squintani, "Mediation, arbitration and negotiation", *Journal of Economic Theory*, 2009, vol. 144, n. 4, pp. 1397-1420.

[18] For example, L. Willey, "Arbitrate, don't litigate! Avoiding the high costs of litigation", *The Entrepreneurial Executive*, 2005, p. 10.

[19] J. Gotanda, "Awarding Costs and Attorneys' Fees in International Commercial Arbitrations", *Michigan Journal of International Law*, 1999, vol. 21, p. 1; A. Weiss, E. Klisch, J. Profaizer, "Techniques and Tradeoffs for Incorporating Cost-and Time-Saving Measures into International Arbitration Agreements", *Journal of International Arbitration*, 2017, vol. 34, n. 2, pp. 257-273.

[20] See examples in T. Stipanowich, "Arbitration: The New Litigation", *Illinois Law Review*, 2010, p. 1; J. Fellas, "A fair and efficient international arbitration process", *Dispute Resolution Journal*, 2004, vol. 59, n. 1, p. 78.; I. Welser, "Chapter II: The Arbitrator and the Arbitration Procedure, Efficiency – Today's Challenge in Arbitration Proceedings" *in* P. Christian Klausegger, *Austrian Yearbook on International Arbitration*, 2014.

[21] S. Shavell, *op. cit.*; B. Hay, "Procedural justice-ex ante v. ex post", *UCLA Law Review*, 1997, vol. 44, n. 6, pp. 1803-1850.

I.B.1. *Ex-Post* Agreements

These kinds of arrangements are arbitration agreements which the parties agreed upon only after the conflict between them arose. In that situation the parties have more detailed knowledge of the specific dispute they want to resolve[22]. Therefore, they can perform a better cost-benefit analysis of the procedure they believe will yield the best possible mechanism to deal with their particular conflict[23].

Because arbitration is a voluntary procedure by which both parties must agree to be bound, it is not always easy to reach such an agreement at this stage of the dispute. Sometimes when the conflict already exists the parties find it hard to negotiate or to even agree on choosing arbitration[24]. At this stage the parties may temporarily diverge in a manner which could have been avoided had they agreed *ex-ante* to settle disputes through a particular procedure, such as arbitration[25].

A good example of a situation such as this can be a plaintiff seeking a speedier procedure that will also grant him the award he believes he is entitled to while the defendant's interest at this stage (after the conflict has arisen) is to postpone payment to the plaintiff. If one would ask both parties if they prefer a quicker procedure before the conflict arose, meaning before they even knew which one of them would be the plaintiff and which the defendant, both would probably say they prefer a more rapid mechanism for solving future disputes[26].

The aforementioned situation could explain why parties to a potential future dispute sometimes agree *ex-ante* on the manner in which they will settle future conflicts prior to their existence, and indeed no such conflict may ever arise[27].

I.B.2. *Ex-Ante* Agreements

Ex-ante arbitration agreements are also known as arbitration provisions or arbitration clauses, as they are usually provisions/clauses in contracts signed between the parties before

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[22] B. Hay, *op. cit.*

[23] *Ibid.*; S. Shavell, *op. cit.*; also see M. Bodie, "Questions about the efficiency of employment arbitration agreements", *Georgia Law Review*, 2004, vol. 39, n. 1, pp. 1-82, who uses cost-benefit analysis in the context of labor laws but whose analysis may also be relevant for commercial *ex-post* arbitration agreements.

[24] A. Weiss, E. Klisch, J. Profaizer, *op. cit.*

[25] B. Hay, *op. cit.*

[26] See also A. Weiss, E. Klisch, J. Profaizer, *op. cit.*

[27] For a theory of *ex-ante* selection in arbitration see C. Drahozal, "Ex Ante Selection of Disputes for Litigation", *Working Papers*, 2004.

there is any conflict between them[28]. At this stage, the parties are collaborative and they only foresee the potential for a future dispute between them. This potential future dispute may be something relatively predictable, such as a potential breach of contract, or it may come as a consequence of an unforeseeable situation.

Based on their own cost-benefit analysis the parties may decide that both prefer to bind themselves already at this early stage to a mechanism which will ensure that future potential disputes are resolved[29].

Scholars have found that *ex-ante* arbitration clauses can increase the parties' well-being[30], even though at this stage the sides face a knowledge problem - they do not know what kind of specific conflict they may end up having. They cannot always anticipate the scope of the dispute, whether it will center solely on professional issues or whether it will involve legal issues, and crucially they cannot predict which procedure will solve the dispute in the most efficient manner.

This paper focuses only on the pre-dispute (*ex-ante*) type of arbitration agreements, in other words, the arbitration clauses. This provision is common nowadays in many fields and in particular in commercial trading contracts, mergers and acquisition contracts, joint ventures and labor agreements[31]. As stated above, this paper will focus only on those clauses that are meant to solve commercial disputes, where both parties are sophisticated, and neither has excess power over the other side.

I.C. The Israeli Legal System and Arbitration

I.C.1. General background on the Israeli legal system

Israeli law originates from two different legal traditions, the laws of the Ottoman Empire and the common law following the British Mandate. As " based on Anglo-American common law"[32], the court system is grounded on an adversary mechanism. Although the Israeli judicial

[28] S. Shavell, *op. cit.*; B. Hay, *op. cit.*

[29] *Ibid*.

[30] See S. Shavell, *op. cit.*

[31] R. Mnookin, *op. cit.*

[32] N. Ebner, Y. Efron, Y. Winkler, G. Manobla-Landman, "Alternative Dispute Resolution in Israel" *in* G. Palo, M. Trevor (eds.), *Global Trends in Mediation: The Southern Mediterranean* Vol. II, Kluwer Law International, 2007.

system is well-developed, in recent decades it has suffered under an excessively heavy workload like many other legal systems[33].

The next section will introduce a short overview of the relevant arbitration laws and mechanisms in Israel with an emphasis on commercial disputes.

I.C.2. Arbitration in Israel

The Israeli Arbitration Law, 5728-1968 ("The Law"), regulates the arbitration procedures in Israel. This law, established in 1968, states that arbitration agreements between parties will be binding (Chapter B to The Law), including when such agreements are spelled out in an *ex-ante* provision (Article 1 of The Law). The Law governs the arbitrators' power and authority[34].

Under Israeli law, arbitration is a voluntary procedure and is subject to the agreement of all relevant parties, the latter may also determine its scope and procedures. In case the parties have not defined the specific rules or procedures of arbitration, The Law provides default rules which will apply (Article 2 of The Law).

Judicial intervention in arbitration awards used to be allowed only on the basis of the closed list reasons stated in Article 24 to The Law and included only ten specific justifications[35]. This list limits judicial intervention mainly to faults in the procedure and does not allow such intervention in the case of factual mistakes or errors in the application of the law, even when the parties agree that the arbitration is subject to Israeli law and even when the mistake was an obvious one[36].

In the 1980s, arbitration in Israel was used "primarily by labor and management, cooperative and friendly societies, and religious groups"[37]. Before the second amendment to The Law in 2008, arbitration as an institution in Israel suffered from a lack of public trust[38] and

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[33] A. Reich, *op. cit.*

[34] For a review in English of the main aspects of The Law, see E. Doron, A. Hertman, "Arbitration agreements under Israel's arbitration law", *IGLC -International Arbitration*, 2007.

[35] D. Lavi, "Not Only Arbitration and Not Only Mediation - a Proposal to Adopt 'Med-Arb' as a Response to the Weaknesses of the Institution of Arbitration in Israel", *Mishpatim Law Review*, 2011, p. 42.

[36] *Ibid.*; A. Straschnov, "Government Attitude toward Arbitration", *Contemporary Asia Arbitration Journal*, 2008, vol. 1, p. 91.

[37] S. Ottolenghi, "Arbitration Institutions in Israel", *Arbitration Journal*, 1983, vol. 38, n. 3, pp. 53-60; A. Polinsky, D. Rubinfeld, "Aligning the interests of lawyers and clients", *American Law and Economics Review*, 2003, vol. 5, n. 1, pp. 165-188 spec. p. 53.

[38] A. Reich, *op. cit.*

only around 650 cases of arbitration were initiated every year in comparison to the 1.3 million cases that were initiated in the court system on a yearly basis[39]. As a result of this lack of trust and in an attempt to lessen the workload of the Israeli court system The Law was amended, and two new features were introduced:

- The first feature was the parties' ability to agree that the arbitration award will be appealable through two possible tracks. In front of a "new" third party arbitrator[40] or alternatively in front of a court judge, if permission to do so is given by the latter, and only on the basis of a fundamental mistake in the application of Israeli law by the arbitrator, which resulted in a miscarriage of justice (Article 29B to The Law);
- The second feature was compelling the arbitrator to state the reasons why a particular award was given (Para. p to The Law First Addendum) unless the parties agree to release the arbitrator from this obligation[41].

In Israel, there is no official public institution for arbitration and most arbitrations are handled by private arbitrators or a private partnership of several arbitrators[42]. Before the second amendment to The Law, the existence of private institutions for arbitration was not very widespread. However after the amendment came into force three new private arbitration institutions were established (and even nowadays the trend appears to indicate continued growth; see the Center for Arbitration and Dispute Resolution established in 2009, which has been expanded since then, and ITRO, The Institution for Arbitration and Dispute Resolution established in 2008 after the second amendment to The Law). This trend is likely sustained by the rise in popularity of commercial arbitration[43].

One of the main purposes of the arbitration procedure in Israel is to enable the parties to benefit from a more efficient procedure, as The Law states (unless otherwise agreed by the parties):

> "The arbitrator will act in the most effective manner, as he/she sees fit, to reach a speedy and just settlement to the dispute and will rule to the best of his/her judgment on the matter before him/her; the arbitrator will not be bound by material

[39] D. Lavi, *op. cit.*

[40] Article 21A to The Law.

[41] D. Lavi, *op. cit.*

[42] N. Ebner, Y. Efron, Y. Winkler, G. Manobla-Landman, *op. cit.*

[43] Because these institutions are private and seek to maximize their profit, there is an assumption that they would not have been established or have been expanded if there was not an increase in the demand for commercial arbitration.

law, the laws of evidence, or by due process as enacted in the courts." (Para. o to The Law First Addendum).

Despite this statement, this paper suggests that although efficiency is one of the most important goals of the arbitration procedure as also stated in the language of the addendum itself, in practice the commercial arbitration proceedings in Israel suffer from failings and pitfalls that hinder the achievement of this goal.

I.D. The Efficiency Problem in Israeli Arbitration

In recent years, practitioners in the field of commercial litigation in Israel have experienced and observed that many of the arbitration procedures are highly inefficient in regard to lowering costs and saving time, despite the fact that both sides to these proceedings had *ex-ante* expectations that the integration of arbitration clauses in their agreements would lead to a quicker and cost-effective conflict resolution.

Some of the pitfalls that cause this inefficiency can be traced back to the litigants' conduct in the proceedings. In many instances litigants in arbitration proceedings tend to inflate the volume and number of their claims and defendants tend to submit more counterclaims than in court proceedings. Moreover, arbitrators have a hard time establishing orderly procedures or enforcing procedural discipline. Sometimes arbitration proceedings can end up lasting many years and costing the parties more than anticipated.

Unfortunately, no empirical research has ever been undertaken on this subject. The arbitration process in Israel is private and thus confidential; there are no public arbitration institutions and no regulations that require private institutions and arbitrators to publish information regarding the proceedings they carry out[44]. Therefore, it is doubtful that the relevant data can ever be gathered so as to allow for empirical research[45].

Support for some of these observations can also be found in financial newspapers and periodicals in articles published over the years by writers focusing on some of the problems to be found in Israeli arbitration. We must admit that due to time constraints we did not attempt to carry out such empirical research for use in this paper. However, the absence of data or the

[44] A. Reich, *op. cit.*

[45] The problems with empirical research regarding arbitration are well known in other jurisdictions (for example, see S. Franck, "Empirically evaluating claims about investment treaty arbitration", *North Carolina Law Review*, 2007, vol. 86, p. 1 and C. Schreuer, "The Future of investment Arbitration" *in* M. Arsanjani, *Looking to the future: essays on international law in honor of W. Michael Reisman*, Brill, 2010, pp. 787-804, spec. 788-789, including the reasons it is so difficult to obtain information regarding arbitration).

inability to obtain empirical evidence need not imply that it is impossible to discuss the failings of the Israeli arbitration system, it simply makes the task more complicated.

Another observation is that even sophisticated parties tend to use very simple and general arbitration clauses. Moreover, they do not try to negotiate and agree on tailor-made arbitration provisions in order to deal with some of the potential future problems and create a more efficient procedure. One could have expected these types of parties to demonstrate a learning process which would result in better and more detailed arbitration clauses. As this is not the case we have often wondered whether the drafting of better arbitration provisions could be a possible route to solving many of these problems, as the parties have flexibility in shaping the arbitration procedures.

To the best of our knowledge no scholar has thus far attempted to examine the body of recent writing regarding arbitration in the US and other international arbitration systems, and later used the findings of those researchers to try to explain the pitfalls of the Israeli arbitration system. This paper then presents a new approach to the issue and can contribute to a better understanding of the inherent problems in Israeli arbitration.

II. POSSIBLE REASONS FOR THE INEFFICIENCY OF ARBITRATION IN ISRAEL

This part points out some of the failings that may be the cause of inefficiency in arbitration in Israel as described previously.

The failings that will be presented in this section are the result of structural pitfalls of the Israeli arbitration system or pitfalls that have been observed in arbitration proceedings in the US and in international arbitration that may also be applicable to the following analysis of the Israeli system. It should be noted that the order in which the following failings will be presented is arbitrary because no empirical research has examined the influence and effect of each failing in the context of the Israeli system. Note that the purpose of this paper is to try to focus on the macro (to see the "big picture") and thus to present a brief overview of the many problems at hand and attempt to explain their cumulative effect.

II.A. Conventional Arbitration Pitfalls

Arbitration can be conducted in various ways. For instance, under conventional arbitration the litigants make their arguments to the arbitrator, who can decide to accept or decline their claims, and thus to award them with any amount the arbitrator believes is just (limited by the scope of the claim). Under "last offer arbitration" the arbitrator is compelled to

choose between offers made by both sides, finally deciding on one of them[46]. The decision of which mechanism to choose can affect the sides' incentives to either move towards the middle ground in their arguments or to inflate their claims and polarize them further.

The Israeli legal system is based on the adversary model which has similarities to the conventional model of arbitration. This can explain why arbitration proceedings in Israel are handled by the conventional mechanism. Game theory analysis of this mechanism shows that the arbitrator tends to split the difference between the plaintiff and the defendant[47]. Thus, each litigant has an inherent interest in inflating their claim[48]. The same logic can also explain the incentive for submitting a counterclaim.

As one can see, litigants in this kind of arbitration tend to stake out a more extreme position - conduct that may well prolong the proceedings and increase its overall costs, while also disincentivizing settlements[49].

II.B. The Scope of Judicial Intervention in Arbitration Awards

As previously mentioned, the scope for judicial intervention in arbitration awards in Israel is limited mainly to faults in the arbitration procedure itself. The judicial intervention of the court system in Israel is thus limited. However, one reason for this intervention which can affect the arbitration efficiency is stated in Sub-Article 24 (4) of The Law:

> "24. Following a legal 'request for nullification' submitted by a litigant, the Court is entitled to nullify an Arbitration Award, entirely or in part, or to complete it, amend it, or to return it to the Arbitrator, for any one of the following reasons: […] (4). The litigants were not given sufficient opportunity to make their cases or to produce their evidence."

This reason for intervention can explain why arbitrators find it difficult to limit the parties' submission of evidence, documents and the length of their arguments.

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[46] For a list of some of the optional mechanisms see Y. Sinar, M. Alberstein, "Court Arbitration by Compromise: Rethinking Delaware's State Sponsored Arbitration Case", *Cardozo Public Law, Policy & Ethics Journal*, 2014, vol. 13.

[47] Some will claim in the middle and others disagree, see the discussion *in* A. Van Aaken, T. Broude, *op. cit.*, pp. 20-21.

[48] S. Brams, "Negotiation Games: Applying game theory to bargaining and arbitration (Vol. 2)", *Psychology Press*, 2003, pp. 63-99.

[49] See also W. Notz, F. Starke, "Final-Offer Versus Conventional Arbitration as Means of Conflict Management", *Administrative Science Quarterly*, 1978, vol. 23, n. 2, pp. 189-203; D. Bloom, C. Cavanagh, "Negotiator Behavior Under Arbitration", *The American Economic Review*, 1987, vol. 77, n. 2, p. 353.

Interestingly, what is required of arbitration proceedings is not required of court proceedings. In order to make court proceedings more efficient Israeli judges have the authority to decide on procedural constraints that litigants must then comply with. For example, judges can limit the length of court documents, restrict the time for cross-examinations or even the number of witnesses that each litigant may summon. Even in the Israeli Supreme Court there is a common practice that for every civil appeal the Court Registrar limits the number of allowed argumentation pages.

Allegedly, arbitrators have the same authorities to shape the arbitration procedure rules so they will be more efficient. However, the existence of such potential judicial intervention may mean that even though arbitration is supposed to promote more efficient procedures, arbitrators opt not to exercise their authority and use those controls with the frequency and degree of magnitude that might be expected of a system whose *raison d'être* is efficiency.

II.C. No Court Fees

When litigants initiate a pecuniary claim in the Israeli judicial system, they are obligated to pay court fees. These court fees are derived from the total claim amount (nowadays equal to 2.5% of the total claim amount, which is paid in two instalments). A litigant's potential award is limited to the claim amount for which they paid the court fees for in advance. This court fee payment is non-refundable, with a few exceptions, such as when claims are settled in mediation outside the courtroom.

This court fees mechanism creates a financial incentive for the parties to submit a claim that is limited only to their real award expectations (or otherwise pay excessive court fees). Correspondingly when defendants want to submit a counterclaim, they are also subject to the same court fees rule, so they have the same financial incentives.

However, in arbitration proceedings in Israel, there are no fees paid upfront which are based on the total claim amount, and no fees as a result of submitting counterclaims. Thus, the litigants do not have the same financial incentive to limit their total claims amount or to limit the submission of counterclaims.

Note that we are aware of the fact that the administrative cost and the arbitrator's wages can also increase in the case of a claim for a larger amount. However, this increase does not have the same effect as court fees for two reasons: Firstly, the parties do not pay those amounts upfront as they would with court fees. Secondly, because arbitration costs are usually split in

equal proportion between all parties, they all bear their share of the cost regardless of their own conduct during the proceedings.

This has similarities in economic principals to the Tragedy of the Commons[50] in the sense that even if the conduct of one of the sides results in an increase in cost, that side will not be the sole bearer of the cost of the increase and the others will have to cover their own proportional shares in that same increase. This means that one side's conduct can create externalities that impact the others. Because this is the case individuals can be said to have an incentive towards exhibiting excessive negative behaviors. Not only do arbitration litigants not have the same incentives to curtail such behavior as they would in a court case, in arbitration proceedings the cost of prolonging the procedure is borne proportionally by all parties and thus by default one side forces the others to also pay for the increase in cost.

II.D. Bad Faith Conduct

This is not the case in every claim but in some cases, litigants may have an interest in prolonging the proceedings[51] either because they are defendants seeking to gain more time before the arbitrator rules in favor of the plaintiff[52], or because they are trying to prolong the procedure in order to increase the incentives for the opposite side to compromise and settle. Such conduct can be considered "bad faith conduct"[53].

In the Israeli court system, the court has at its disposal measures to combat this kind of bad faith conduct. These measures can even include ignoring or striking out litigants' arguments. In arbitration, the most appropriate penalty for such conduct is through the awarding of costs and expenses[54]. However, these kinds of awards, as will be explained in the next section, are not very effective in arbitration. As discussed previously, if an arbitration litigant tries to prolong the proceedings it would be forcing the other parties to share the increased cost.

It is important to know that under Israeli Law the arbitrator potentially has all the authority necessary to take strong measures against bad faith conduct:

50 G. Hardin, "The Tragedy of the Commons", *Science*, 1968, vol. 162, issue 3859, pp. 1243-1248.

51 M. Moses, "Arbitrator Power to Sanction Bad Faith Conduct: Can it Be Limited by the Arbitration Agreement?", *Australian Law Journal*, 2010, vol. 84, p. 82.

52 Y. Shilo, "Integrating arbitration in the judiciary mechanism", *Mechkarei Mishpat Law Review*, 1989, p. 90.

53 M. Moses, *op. cit.*; J. Hinchey, T. Burch, "An Arbitrator's Authority to Award Attorney Fees for Bad-Faith Arbitration", *Dispute Resolution Journal*, 2005, vol. 60, n. 2, p. 10.

54 M. Moses, *op. cit.*

> "If this arbitrator has ordered a litigant to do something related to the arbitration process and, for no justifiable reason, the litigant has not complied with that order, after warning that litigant the arbitrator is entitled to defer the suit, if an order has been issued against a prosecutor, or to vacate the defense and to settle the dispute as if the defendant did not offer a defense, if an order has been issued against a defendant".

Some of the scholars who have participated in the ongoing debate on arbitration efficiency have suggested that parties must change their conduct during arbitration[55] as part of their recommendations on dealing with the inefficiency problem. Of course, the adoption of these recommendations depends on the litigant's goodwill, and in such cases where the parties' interests diverge these recommendations become irrelevant and cannot solve the problem.

II.E. Cost and Expenses Awards

There are two known rules regarding the awarding of costs and expenses in litigation proceedings - the American Rule and the English Rule. The former is more common in the US legal system and the latter in the English one. The American rule states that each side to any litigation must bear their own costs and expenses (including lawyers' fees). In contrast, the English rule states that the side that loses the proceeding must compensate the other side, paying full costs and expenses[56]. It is interesting to note that studies have found that among sophisticated parties to agreements the British rule is preferred alongside *ex-ante* arbitration provisions[57].

The Israeli legal court system's approach lies somewhere in between. While judges usually award the side in favor of which they rule compensation for costs and expenses (including attorney's fees), the compensation sum is decided by the judge based on their own considerations and not on the actual out-of-pocket costs and expenses, which are usually higher[58].

The Israeli Arbitration law provides the arbitrator with the authority to determine their own wage (Article 31 to The Law), with the default rule determining that these costs will be

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[55] For example, J. Shearer, "Reducing costs of arbitration through increasing the parties options", *Arbitration Journal*, 1985, vol. 40, n. 2, pp. 14–76.

[56] T. Eisenberg, G. Miller, "The English vs. the American rule on attorneys fees: An empirical study of attorney fee clauses in publicly-held companies' contracts", 2010, available online: https://ssrn.com/abstract=1706054.

[57] T. Eisenberg, G. Miller, *op. cit.*, pp. 26-28.

[58] T. Eisenberg, T. Fisher, I. Rosen-Zvi, "Attorneys' fees in loser-pays system", *University of Pennsylvania Law Review*, 2014, vol. 162, n. 7, pp. 1619-1662.

shared equally by all parties[59]. The arbitrator also has the authority to award parties with costs and expenses:

> "The arbitrator is entitled to issue instructions regarding the expenses of the parties, including the lawyers' fees, arbitrator's wages and expenses, in total or in part, and may issue instructions regarding the deposit of these sums or the provision of guarantees of their payment; in cases where the arbitrator has issued no other orders, the litigants are obligated to pay his/her salary and expenses in equal parts." (Para. s to The Law First Addendum).

As is easily discernable, this is very generalized language that does not give the arbitrator uniform directives for determining these kinds of awards. Researchers have found that in the field of international arbitration, whenever such a general rule is in use, arbitration cost award decisions were arbitrary and not uniform[60]. It also has a negative impact on the parties as it is harder for them to estimate the consequences of their conduct as litigants in advance and even makes it more difficult to reach a settlement as a result of such uncertainty[61].

II.F. "Arbitration the New Litigation"

In the recent decades, commercial arbitration proceedings have become more and more similar to litigation[62]. Stipanowich in the "Arbitration the New Litigation"[63] argues that these changes also stemmed from the evolution of relevant regulation in the US, which have set out new and more formal rules for arbitration proceedings.

As aforementioned, lin 2008 the second amendment to the (Israeli) Law, also follows this trend, as it enables the parties two optional tracks to appeal the arbitration award. Moreover, the arbitrator is now required to detail his reasoning for the award given. As explained, this amendment was intended to increase the parties' trust in the arbitration institution. However, it is also made the arbitration process more formal and thus may increase the cost of these proceedings.

II.G. The Lawyers as Another Potential Problem

It is not something unique to arbitration proceedings but when the contract specifies that lawyers are paid by hourly fees there is an inherent conflict of interest because their

[59] This is also the default rule of all the private arbitration institutions in Israel.
[60] J. Gotanda, *op. cit.*
[61] *Ibid*.
[62] T. Stipanowich, *op. cit.*; Moses, *op. cit.*
[63] T. Stipanowich, *op. cit.*, pp. 11-19.

compensation depends on the length of the proceedings[64]. There is evidence that such conflicts of interest can affect the representative's behavior[65].

But even in cases where the lawyers' fees are not calculated by the hour, a conflict of interest can occur. It is not unreasonable to assume that clients' willingness to pay their legal fees, even using other billing mechanisms (like contingency or a lump sum), is tied to the scale of the claim. For example, one can assume that clients will find it reasonable to pay higher legal fees for a 10 million USD claim than for a one million claim.

II.H. The Arbitrator - A Solution or Another Problem?

The arbitrator's responsibility is to carry out an efficient procedure, that is, a quicker and less costly one. However, if one analyzes their incentives one can conclude that they do not have any real incentives to do so. The arbitrator's wage is usually calculated by the hour. Thus, the arbitrators themselves have a conflict of interest with the parties and have little incentive to shorten the procedure.

Moreover, even when this is not the case, one can assume that the claims' magnitude may affect the parties' willingness to pay higher arbitration costs. This can also be intuited from online calculators offered by various international arbitration institutions which are meant to assist potential litigants in estimating the cost of such arbitration. Indeed, these calculators are based on two main parameters: the total amount of the claim and the number of arbitrators; not on the complexity of the issue or other allegedly relevant variables that one could assume would also be relevant in estimating costs.

One would expect that arbitrators, as professionals - and especially the most respected ones in the field of international arbitration - would not be affected by this systemic conflict of interest. However, researchers have found empirical evidence that supports the conclusion that arbitrators' conduct is affected by their desire for future compensation[66]. The arbitrator wants not only to get paid more as part of the current procedure, but they also want the parties to use them for future disputes and thus have fewer incentives to place harsh restrictions on the parties, even if these can promote the efficiency of the proceedings.

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[64] For example, see A. Polinsky, D. Rubinfeld, *op. cit.*

[65] See discussion in H. Kritzer, W. Felstiner, A. Sarat, D. Trubek, "The impact of fee arrangement on lawyer effort", *Law and Society Review*, 1985, pp. 251-278.

[66] See, for example, S. Puig, "Blinding International Justice", *Virginia Journal of International Law*, 2016, vol. 56, pp. 647-745.

This conflict of interest can also potentially decrease the incentive for arbitrators to call out bad faith conduct on the part of one of the litigants. If the arbitrator did not ban this conduct during the proceedings and only placed sanctions on the litigant at the very end, the counter-party may assume that failing to call out such behavior during the proceedings was a result of the arbitrator's conflict of interest (*i.e.* the arbitrator's potential incentive to have the proceedings prolonged) thus compromising the perception of the arbitrator's integrity.

In Israel, to the best of our knowledge, only one private arbitration institution offers a lump-sum total cost for arbitration proceedings. However, even in this case, the lump sum costs are derived from the total claims amount. The purpose of this private institution rule, as published in the Israeli financial press, was fairness: to fight the high cost of arbitration procedures and to promote certainty, so that parties will be able to accurately anticipate the cost of arbitration . Note that this kind of mechanism is also not free from difficulties as it can create a negative incentive for the arbitrator not to invest all the effort necessary to reach a just decision.

In cases where there is a panel of arbitrators in which each side has the right to appoint one or more arbitrators, there are also different possible conflicts of interest and biases[67].

II.H.1. The Arbitrator's Reputation Has an Ambiguous Effect

Supposedly, the arbitrator's reputation and their desire to secure future compensation should mitigate the structured conflict of interest discussed above. However, the arbitrator's reputation has an ambiguous effect. On the one hand, the arbitrator has the incentive to fulfil the parties' initial aspiration and the institution's goals, namely, to handle the proceedings in a quick and cost-efficient manner so that they will have a good reputation. On the other hand, the arbitrator has the incentive to please the litigants and not to put harsh procedural restrictions on them, as this could damage their reputation with the litigants.

Finally, as discussed above, the arbitrator has an incentive to act in such a way that judicial intervention will not be imposed on their decisions, and will make sure the litigants will not be in a position to claim that they did not give them the opportunity to fully make all their arguments.

For the reasons mentioned above, and because due to the confidentiality of the arbitration proceedings details of a particular arbitrator's performance are not made public, it

[67] S. Puig, *op. cit.*

can be said that reputation considerations have an ambiguous effect on the arbitrator's willingness to shorten the proceedings and make them less costly.

II.H.2. Arbitration Institutions (None) Competition Effect

In Israel arbitration institutions may also suffer from another, similar, structured conflict of interest. Whenever proper competition among arbitrators prevails, they will have the interest in attracting potential customers/litigants, and thus they will act to shorten the procedures. One can, as a matter of fact, observe such a process taking place over the past several years at international arbitration institutions as a result of jurisdictional competition[68]. For example, one of the measures was to state that the arbitrator's fees will be decreased if they prolong a procedure[69].

However, in Israel, judging from the financial press, it appears that the primary competition among private arbitration institutions in Israel centres on recruiting prestigious former judges as arbitrators, and then charging a high fee for their services. The only encouraging indication for such competition is the relatively new tracks for quicker arbitration procedures for small claims arbitration proceedings offered by those institutions, some of which may also offer the option of lump sum payments for such proceedings.

In summary - All the failings discussed above demonstrate possible reasons why arbitration is so inefficient in Israel with regard to saving time and lowering costs. An overview of all these failings may indicate that all the relevant actors in arbitration during the *ex-post* conflict period (meaning after the conflict has arisen between the sides) have little to no incentive to confront or deal with these failings and act in a way that will fulfil the litigants' initial desires:

At this stage, the parties' interests sometimes diverge and at least one of them may wish to prolong the proceedings. Moreover, even when their interests are shared, the conventional arbitration mechanisms incentivize them to stake out more extreme positions rather than bring them towards the middle ground.

Lawyers have an inherent conflict of interest because they benefit financially from prolonging the proceedings.

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[68] M. Bühler, "Costs" *in* J. Trenor, *Global Arbitration Review - The Guide to Damages in International Arbitration*, 2016, pp. 253-270.
[69] *Ibid*.

Arbitrators have a similar conflict of interest and while one might expect the arbitrator's desire for a good reputation to serve as enough of an incentive to mitigate this issue, the issue of their reputation seems to have an ambiguous effect.

These conclusions lead to the question of whether the parties can negotiate and address such failings with a better drafting of arbitration clauses (*ex-ante*).

III. MORE EFFICIENT ARBITRATION CLAUSES?

As discussed previously, ADR mechanisms in general and arbitration in particular enable parties to have greater flexibility in shaping the rules for resolution proceedings between them. One would expect therefore that sophisticated parties to an agreement would use that flexibility to attempt to draft better arbitration clauses in their agreements; provisions that will help them secure more efficient future arbitration proceedings. These provisions are called "tailor-made" or "self-tailored" provisions - clauses drafted specifically to fit a potential dispute that may arise between those specific parties[70].

This part will try to discuss whether this learning process can indeed be a practical solution to the efficiency failures of arbitration in Israel. As mentioned previously in the *ex-ante* stage two sophisticated parties, neither of which having excess power over the other, share the same interest to agree upon a less costly and more time effective arbitration procedure[71].

III.A. These Provisions Cannot Address All the Failings

As a starting point, if one looks at the failings described in the previous part, some of them are inherent structural failings that are not tied to the specific arbitration agreements between parties. Thus, even if they want to address those failings they do not have the ability to do it because even tailor-made provisions will not be able to solve these issues.

For example, the parties cannot resolve the conflict of interest between their lawyers and themselves or the future arbitrators by adding a clause to their agreement. It does not matter what the parties agree to between themselves; these conflicts of interest will not disappear.

[70] S. Choi, "The Problem with Arbitration Agreements", *Vanderbilt Journal Transnational Law*, 2003, vol. 36, p. 1233.

[71] See also A. Weiss, E. Klisch, J. Profaizer, *op. cit.*, who has a good analogy to the *ex-ante* stage between the parties based on Rawls known use of the "Veil of Ignorance".

As discussed above, even if they choose, *ex-ante*, to only litigate before the only Israeli institution that does not bill hourly fees for arbitration, this will not solve the arbitrator's conflict of interest as this alternative wage mechanism also has pitfalls that create conflicts of interest.

Another limitation of the arbitration clauses is the inability to completely resolve arbitrators' concerns regarding potential future judicial intervention and their subsequent hesitancy in imposing restrictions on litigants. The parties cannot waive their privilege to request judicial intervention as this right is a mandatory law, even if all parties agree to waive this right in the *ex-ante* stages.

The conclusion from this section is that even though parties have flexibility and they can draft better arbitration provisions with more sophisticated arbitration mechanisms, these clauses will be limited in their ability to deal with all the possible failings that may prevent more efficient arbitration procedures.

The fact that better provisions cannot address all possible failings does not imply, though, that parties should not try to resolve or at least mitigate some of these failings. However, the next section will demonstrate why tailor-made clauses also have practical problems.

III.B. The Problems with Tailor-Made Arbitration Clauses

Some of the failings of the Israeli arbitration system can allegedly be solved or at least mitigated by tailor-made provisions.

In order to promote more efficient arbitration, parties can add tailor-made arbitration clauses to their agreement, detailing various mechanisms, such as:

- Limit the length of their future arbitration documents;
- Incorporate financial incentives to submit only justified claims (and not to inflate those claims) - for example, to state that with every claim submitted the plaintiff has to provide a bank guarantee for the amount derived from the total claim amount, in order to ensure the counter sides' cost and expenses;
- Decide to waive the right to submit written arguments and elect to have an oral proceeding before the arbitrator;
- Decide on liquidated damages;
- Agree that the arbitration will be held before a professional expert in the relevant field.

Moreover, they can even decide that the arbitration process will be handled without either side being represented by a lawyer.

Of course, the above lists only some examples of such mechanisms out of many possible others[72]. The crucial point is that parties to commercial agreements must choose the right mechanisms and provisions to ensure maximum efficiency in connection with their specific engagement.

For example, an effective arbitration mechanism fit to solve a dispute over the purchase of specific goods or services will not have the same characteristics as a very complex agreement regarding the supply of numerous goods and services across different time periods and with many potential hurdles. Moreover, even in the latter type of engagement not every potential dispute suits the same mechanism. For example, a dispute regarding one specific payment is not the same as a dispute about the quality of goods or services.

For this reason, the *ex-ante* specific provisions are called tailor-made arbitration clauses as they are meant to suit specific future potential conflicts by dealing with specific complexities. As will be discussed in the next three sections– the drafting of such clauses faces considerable obstacles, which decrease and limit the ability of those tailor-made provisions to address the previously discussed failings.

III.B.1. Transaction Costs and The Knowledge Problem

In order to draft tailor-made arbitration clauses, the parties (or their representatives) should try to anticipate what their future potential disputes may be and then draft arbitration procedural rules that will be effective for settling those specific potential disputes. This process increases the parties' transaction cost[73] in trying to predict all potential future disputes and then drafting provisions for them. These costs will be added to the transaction cost of drafting an *ex-ante* agreement.

From an economic point of view, one expects parties to be willing to bear these transaction costs only if the potential benefits gained by the inclusion of tailor-made clauses will outweigh the cost of including them. These gains should be calculated by taking the expected savings on arbitration costs in the event of a dispute and multiplying them by the

[72] For example, see the latest suggestions for such mechanisms in A. Weiss, E. Klisch, J. Profaizer, *op. cit.*

[73] C. Drahozal, E. O'Connor, "Unbundling Procedure: Carve-Outs from Arbitration Clauses", *Florida Law Review*, 2014, vol. 66, p. 1945.

probability of such a dispute arising. This calculation should also factor in the time dimension as the transaction cost is an immediate out-of-pocket cost while any potential gains are future ones, and thus a discount factor should also be taken into consideration in the cost-benefit analysis.

The problem with such economic cost-benefit analysis is that it does not take into full account the Knowledge Problem[74]. This issue recognizes the complexities of ongoing real commercial markets and acknowledges the fact that even if one is willing to invest money in trying to predict the future, even unlimited investment in searching costs will not ultimately obtain all the relevant knowledge and/or anticipate all the potential future situations that may occur. So even if one is willing to pay the additional costs and invest their time and money in drafting such provisions, one still faces the risk that these provisions will not suit the actual future conflict.

In this context it is interesting to note that in very important economic writings (in the field of contract and corporate Law&Economics), third party mechanisms (such as arbitration) are suggested to decrease the investment needed in drafting costs of agreements and transactions for future specifications between parties. This suggestion is made in order to overcome such knowledge problems, meaning parties' inability even at tremendous cost to anticipate *ex-ante* all the potential future situations that may occur between them and draft a good enough and specific enough contract[75]. As one can see, continuing from the discussion presented above regarding the difficulties of drafting good enough and specific enough arbitration clauses - it is actually a vicious cycle– the drafting process of more efficient tailor-made arbitration clauses faces the knowledge problem, the very same problem that some scholars suggest can be dealt with by those very arbitration mechanisms.

III.B.2. Parties' Lack of Willingness to Invest in Drafting

The drafting problem described above in the previous section can perhaps explain the results of empirical research which has found that sophisticated parties do not negotiate the terms of arbitration clauses and prefer to stick to standard provisions[76]. Additional research has found that parties to agreements do not want their lawyers to waste time and money in drafting

[74] F. Hayek, "The use of knowledge in society", *The American economic review*, 1945, pp. 519-530 spec. pp. 522-525.
[75] O. Williamson, "Transaction-cost economics: the governance of contractual relations", *The journal of Law and Economics*, 1979, vol. 22, n. 2, pp. 233-261.
[76] S. Choi, *op. cit.*

arbitration clauses[77]. In addition, some studies also show that parties tend not to negotiate arbitration clauses *ex-ante* because they are concerned about damaging business ties or complicating the discussion[78].

If that is the case, there is no reason to believe that in Israel the parties to such commercial agreements would prefer departing from the standard arbitration provisions (and as mentioned above, this paper does not offer empirical evidence). As there is no public entity for arbitration in Israel, such standard provisions are suggested only by private intuitions, by private lawyers and by the Israeli Bar Association. None of these offers any mechanisms or guidelines suggesting anything that may increase or promote efficiency in arbitration proceedings.

That can be explained by the difficulties described above in drafting generalized recommendations, and perhaps also by the fact that all of those suggestions come from entities with no interests in making the arbitration process more efficient.

III.B.3. The Potential Inability to Enforce Tailor-Made Arbitration Clauses

One more risk that should be taken into consideration when drafting tailor-made arbitration clauses is the risk that such provisions will not be enforceable. While judges and arbitrators are already familiar with the wording of the standard provisions, the use of new ones carries with it the risk that these clauses will not be enforceable[79], in effect rendering the entire arbitration agreement null and void. This could have severe consequence for the parties. For example, if the confidentiality of their future disputes is crucial to both and the tailor-made arbitration clause they drafted appears to be unenforceable, they may find themselves resolving their dispute in a public courtroom.

IV. THINKING ABOUT POSSIBLE SOLUTIONS

The conclusion from our discussion thus far is that tailor-made arbitration clauses do not provide a simple solution for all the problems and failings dealt with in this paper. Does that mean that parties to a commercial agreement should give up and not try to improve the

[77] H. Kirsh, "Pitfalls, Perceptions and Processes in Construction Arbitration", *Advoc. Quarterly*, 2012, vol. 40, p. 311; also see the discussion *in* T. Stipanowich, "Arbitration and Choice: Taking Charge of the 'New Litigation'(Symposium Keynote Presentation)", *DePaul Business and Commercial Law Journal*, 2009, vol. 7, n. 3, p. 383 for a more detailed report which explains why parties tend to stick to the standard arbitration clauses.

[78] T. Stipanowich, *op. cit.* 2009, p. 390.

[79] T. Stipanowich, *op. cit.* 2010.

efficiency of their potential arbitration proceedings? This paper suggests that the answer is no. However, this paper does suggest that the parties should be aware of the limits of relevant possible solutions that cannot address all these issues and failings. There is no simple solution for all cases but it might be possible to find some solutions to address some of the failings.

In the ongoing debate regarding arbitration efficiency in the US and in international arbitration institutions, some of the scholars have made recommendations centering on the conduct of the arbitration actors[80]. The newest writing on this subject suggests that parties include more time and cost saving measures to the *ex-ante* mechanisms[81]. This kind of suggestion ignores the limitations of arbitration provisions discussed in this paper. Therefore, a more innovative approach is required as the current suggested solutions do not seem feasible.

The solutions that will be described in this part are only initial recommendations. Their applicability and feasibility should be examined in future studies. This paper does not pretend to suggest a comprehensive solution, and perhaps such a solution is not even possible. The following ideas should be considered in that context.

IV.A. The Simple Cases

In simple cases where the parties are engaged in a straightforward contract and believe that they can easily predict and define possible potential future disputes in the *ex-ante* stage, they should consider investing the resources in drafting tailor-made arbitration provisions. In those simple cases, where the risk of an unexpected turn of events is low (for example, because it is the kind of transaction that people tend to get into on a daily basis, and thus they can easily predict what can go wrong and how), tailor-made arbitration clauses can offer solutions to at least some of the efficiency failings.

However even in these cases the parties should be aware of the limits and risks of such provisions, and perhaps should consider defining exactly which types of future conflicts will be addressed by the tailor-made provisions they have agreed upon in the agreement and all other possible future disputes (some of which could not possibly have been foreseen by the parties) should use the standard arbitration clauses or be resolved in the regular court system, as it could be that the tailor-made provision drafted by the parties does not suit a particular dispute and may end up damaging the parties more than helping them.

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[80] *Ibid*.; J. Shearer, *op. cit.*; I.Welser, *op. cit.*

[81] A. Weiss, E. Klisch, J. Profaizer, *op. cit.*

If the parties do not want to bear the necessary transaction costs involved in drafting such detailed provisions, they can also define some future potential disputes that will be discussed only in the new quick track arbitration offered by some Israeli arbitration institutions.

IV.B. Mid-Arb and Other ADR Solutions

Understanding all the aforementioned requires an understanding of the limitations of arbitration as they regard the issues of cost and duration. This understanding may lead the parties to consider other ADR solutions that can be more efficient in resolving disputes[82].

Some scholars have suggested a hybrid mechanism that combines mediation and then, in the event that mediation fails to solve the issue, turns to arbitration[83]. This hybrid solution can save time and money for the parties, but it too has problems and limitations.

For example, in such mechanism the parties will fear to disclose information (and particularly informal information) in front of the arbitrator, as this information may influence the arbitrator in the event that mediation fails. Another major problem with the suggested mechanism is that because while playing mediator the arbitrator's suggestions are not binding, it can prolong the proceedings in cases where one side wishes to do so and thus abuse the mediation process by, for example, proceeding with the mediation process despite having no intentions of settling the dispute in this way. This kind of mechanism will also not solve the arbitrator's conflict of interest and can even exacerbate it, as the arbitrator will also have an interest in keeping the parties from reaching a settlement through mediation.

IV.C. Introducing the Preliminary Arbitration Procedure

Solutions to all the aforementioned limits will require innovative thinking. Such solutions may perhaps be a mechanism that can take into consideration the restrictions imposed by the knowledge problem *ex-ante*, and the parties' divergences *ex-post* - meaning a hybrid of *ex-ante* and *ex-post* mechanisms. For example, by *ex-ante* parties' agreement to *ex-post* expropriate the authority to shape the arbitration procedure from themselves and the arbitrator and pass it to a neutral third party as will be explained below.

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[82] See less costly ADR mechanisms in T. Stipanowich, *op. cit.* 2010.

[83] See suggestions in T. Stipanowich, *op. cit.* 2010; J. Rosoff, "Hybrid Efficiency in Arbitration: Waiving Potential Conflicts for Dual Role Arbitrators in Med-Arb and Arb-Med Proceedings", *Journal of International Arbitration*, 2009, vol. 26, p. 89.; A. Weiss, E. Klisch, J. Profaizer, *op. cit.*; and D. Lavi, *op. cit.*, which suggests this kind of mechanism as a solution to some other failings of arbitration specific to Israel.

This kind of hybrid solution can be, for example, the parties deciding *ex-ante* to pass on the authority of drafting their tailor-made arbitration clauses in connection with a specific dispute that may arise between them to a neutral third party that will provide them (*ex-post*) with the most efficient tailor-made arbitration clauses/procedural rules to solve their particular conflict. This process can be called Preliminary Arbitration Procedure.

In order to agree upon such a mechanism, the parties could simply add a section such as the following, or similar to their standard arbitration clauses:

> "In case of dispute between the parties, they hereby agree to attend within ___[Fill in the number of days] days a Preliminary Arbitration Procedure before _____[Fill in the neutral third party identity] who will serve as a neutral third party and who will appoint an arbitrator for them and determine the specific arbitration procedures, terms and rules. This neutral third party will have all the authority given to the parties in shaping the arbitration process. Moreover, any of the third-party's decisions will be considered as a binding and valid agreement between the parties. This neutral third party should take into full consideration the parties' desire for a just, quick and less costly arbitration process while keeping the specific characteristics of the dispute in mind. The preliminary arbitration procedure will be short as possible, and in any case, will not last longer than ___ [Fill in the number of days] days."

The use of new wording of this sort in arbitration clauses will enable the neutral third party to determine the tailor-made rules that will promote arbitration efficiency, for example:

- They will appoint the specific arbitrator and decide whether they will be a professional in a specific field or former judge for example;
- They will be able to decide the arbitration procedures rules– such as the allowed length of any documents submitted; the number of witnesses allowed; the cause of the claim that will be discussed in the arbitration; determine the ability to submit counterclaims, etc.;
- They will define a deadline for the arbitration award;
- They will decide which of the parties will pay the arbitration fee in the first place, and what the guidelines will be for the awarding of costs and expenses;
- Any other additional rules that will promote a faster and less costly arbitration process, while taking into consideration the specific conflict characteristics[84].

[84] For more examples, see also suggestions in I. Welser, *op. cit.*, the suggestions made there for the arbitrator can suit this idea with a few changes.

This neutral third party will not face the same conflict of interest as the arbitrator, and they will also not be tied to the parties' *ex-post* divergence of interests or by their potential interesting in staking out more polarized positions. In this stage of the conflict, the knowledge problem regarding the specific dispute will be less of an issue than in the *ex-ante* stage when it required investment through transaction costs. Thus, this solution can perhaps provide the parties with a better, more efficient, tailor-made arbitration procedure that can suit their specific dispute. It can overcome the problems which were discussed in the *ex-post* stage and also the ones of the *ex-ante* stage; thus it is a hybrid *ex-ante* and *ex-post* mechanism. This mechanism will bind *ex-ante* the parties to a mechanism, the specifics of which will only be decided *ex-post*.

The identity of this neutral party can be a former judge or a very experienced lawyer in the litigation field, or even a business executive who has expertise in the relevant field. It can also be a former court registrar who has much experience in setting procedural rules. This will be up to the particular parties to decide, as they alone will know which characteristics could make them trust a third party.

Of course, this solution like any other solution, has its own limitations and problems. For example, it is perhaps counter-intuitive to think that adding another actor to the arbitration process will decrease arbitration time and costs. Another crucial question that arises is, of course, what could serve as an incentive for that neutral third party to make decisions in the best interests of the parties. Another problem, which can also be considered as an additional knowledge problem, is how this third party will be able to quickly understand the conflict at hand well enough to determine which provisions would be best to help resolve it. There are many other challenges and potential questions but unfortunately, they are outside the scope of this paper.

While assessing this proposal one should consider that at least one scholar has reported the use of a similar (but not identical) neutral party's pre-arbitration process described as "managing conflict in long-term contractual relationships by setting up dynamic programs for tailoring processes to disputes at the time conflict arises"[85]. Stipanowich explains the main features of this mechanism, and even reports on the successful use of this mechanism in several cases in Hong Kong:

[85] T. Stipanowich, *op. cit.*, p. 56.

> "Such an approach would obviate the need for a detailed pre-dispute template for conflict management and avoid negotiations over procedural details at contract time; it would permit a process to be specifically formulated for the dispute at hand. If a facilitated negotiation failed to produce agreement on procedures to be employed, the third-party neutral might even have the authority to formulate procedures. There are precedents for such an approach, including a contract-based conflict management program centered on the person of a 'Dispute Resolution Advisor' that was successfully employed on several construction projects in Hong Kong."[86].

This report strengthens our belief that such a mechanism should be further developed in future studies[87].

Another aspect that should be considered regarding this mechanism in future writings is also to suggest that this third party may try to mediate between the parties. There is a similar but not identical preliminary procedure (pre-trial) before a judge in the Israeli court system, where judges can also offer to mediate between parties. This procedure was established to try to increase the number of cases settled without court intervention.

This kind of solution, if it were to be found feasible, can benefit from the advantages of the Mid-Arb mechanism, without some (but not all) of its disadvantages. For example, it can mitigate the parties' fear that the arbitrator will be influenced by the informal information disclosed by them in the pre-arbitration mediation process - as the third party will not be the arbitrator himself, this concern will become irrelevant and thus may increase the chances to successfully mediate between the parties without having to resort to arbitration.

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[86] *Ibid*.

[87] For a more detailed report and discussion on the "Dispute Resolution Advisor" mechanism in Hong-Kong and conflict management approaches see, T. Stipanowich, "The multi-door contract and other possibilities", *Ohio State Journal on Dispute Resolution*, 1997, vol. 13, p. 303 spec. pp. 386-403.

PUBLIC LAW, HIGHER EDUCATION, AND THE *EX ANTE* REMOVAL OF THE CAUSES OF INEQUALITY

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Table of content

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Abstract

Globalized markets, digital economies, robotization, artificial intelligence and their impact on social inclusion have recently received increasing scholarly attention in economics, law, sociology, philosophy and development studies. Super-fast economic changes spurred by world-widely integrated markets and related explosive social inequality represent one of the most triggering questions of the modern world. One that can even rival the fatal issue of the global climate change. This paper seeks to address the role of public law as an ex ante mechanism designed to remove the causes of inequality in the first place and not to treat its consequences. This paper, while employing an example of the optimal regulatory intervention in the field of public law, particularly its regulation of public education, joints critical debate and expresses the view that legal system might indeed be in certain circumstances superior to the classic ex post interventions (e.g. tax-and transfer system or all-encompassing subsidies) at reducing income inequality. The paper is an attempt to find out what new light the legal theory can shed on the issues of social exclusion, inequality, public law regulation of higher education, optimal governmental intervention and of their possible success or failure in order to help to clarify it.

Résumé

Les marchés mondialisés, les économies numériques, la robotisation, l'intelligence artificielle et leur impact sur l'inclusion sociale ont récemment reçu une attention croissante de la part des chercheurs en économie, en droit, en sociologie, en philosophie et en études du développement. Les changements économiques ultra-rapides provoqués par l'intégration mondiale des marchés et les inégalités sociales explosives qui y sont liées représentent l'une des questions les plus déclenchantes du monde moderne. Une question qui peut même rivaliser avec la question fatale du changement climatique mondial. Cet article cherche à aborder le rôle du droit public en tant que mécanisme ex ante conçu pour éliminer les causes de l'inégalité en premier lieu et non pour traiter ses conséquences. Le présent article, tout en utilisant un exemple d'intervention réglementaire optimale dans le domaine du droit public, en particulier sa réglementation de l'éducation publique, suscite un débat critique conjoint et exprime l'opinion que le système juridique pourrait effectivement, dans certaines circonstances, être supérieur aux interventions ex post classiques (par exemple, système d'imposition et de transfert ou subventions globales) pour réduire l'inégalité des revenus. Cet article est une

tentative pour découvrir sous quelle nouvelle lumière la théorie juridique peut apporter sur les questions d'exclusion sociale, d'inégalité, de régulation de l'enseignement supérieur par le droit public, d'intervention gouvernementale optimale et de leur succès ou échec possible afin d'aider à la clarifier.

INTRODUCTION

The importance of poverty and inequality on the existence and stability of social fabric can hardly be overstated. Super-fast economic changes spurred by world-widely integrated markets and related explosive social inequality represent one of the most triggering questions of the modern world. Namely, in last thirty years, the gap between rich and poor has reached its highest level[1]. Today, in OECD countries, the richest 10% of the population earn 9.6 times the income of the poorest 10%[2]. In emerging economies, particularly in Latin America, income inequality has narrowed, when income gaps remain generally high[3]. Moreover, also the frontier of economic development is not immune to the growing inequality and to even more troublesome wage-stagnation below the high-earner level[4]. Domhoff for example reports that between 1997 and 2016 median US household income fell by 6% after the adjustment for inflation and that is still stagnating[5]. Income inequality continued to increase during the period of crisis and is accompanied with a ruinous fall in employment rates which, accompanied with economic depression, form a vicious cycle. Such a vicious cycle then represents a heaven-like environment for all sorts of populisms, extremisms, demand for trade protection, restriction on immigration, union protectionism, numerous anticompetitive measures, useless government subsidies and represent an outmost threat to, as history witnessed numerous times, fragile social fabric[6]. In other words, identified high inequality slows down economic growth, destroys social fabric, adversely affects social mobility, hampers social wealth and opens "Pandora's box" of the apocalyptic, evil forces of Sauron.

What should then be done about this rising inequality? What would the optimal policy intervention and what should be done at the EU level? In this respect, traditional economic literature offers *ex post* tax-and transfer system (*ex post* redistribution) and direct transfers as the exclusive institutional mechanisms that should regulate inequality and social exclusion[7].

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[1] OECD, *OECD Science, Technology and Innovation Outlook 2016,* OECD Publishing, 2016, available online: http://dx.doi.org/10.1787/sti_in_outlook-2016-en (visited February 11, 2018).
[2] OECD, "Chapter 5: And the Twain Shall Meet: Cross-Market Effects of Labour and Product Market Policies", *Employment Outlook*, OECD, 2002.
[3] *Ibid*.
[4] See e.g. K. Phillips, *Wealth and democracy: a political history of the American rich*, Broadway Books, 2002.
[5] W. Domhoff, "Wealth, Income and Power" 2018, available online: https://www2.ucsc.edu/whorulesamerica/power/wealth.html (visited March 17, 2018).
[6] It should be also emphasized that in the countries that experienced the most severe economic depression real household incomes decreased more substantially at the lower end of the income distribution.
[7] See e.g. S. Shavell, "A note on efficiency vs. distributional equity in legal rulemaking: should distributional equity matter given optimal income taxation?", *American Economic Review Papers & Proceedings*, 1981, vol. 71, pp. 414-418; L. Kaplow, S. Shavell, "Why the legal system is less efficient than the income tax in redistributing income", *Journal of Legal Studies,* 1994, vol. 23, issue 2, pp. 667-681; L. Kaplow, S. Shavell, "Should legal rules

Moreover, it is widely accepted that measures to reduce income inequality could increase economic efficiency by reducing political pressures for inefficient policies. Bismarck's programmes of governmental health, accident and disability insurance, and old-age pensions have effectively reduced such political pressures and have *de facto* decreased inequality[8]. However, such extensive social safety nets might be just too expensive to be expanded further without jeopardizing the solvency of EU member states and produce an explosive, ruinous and growing public debt which in the end resort in complete economic and social collapse[9].

However, one may wonder whether such an *ex post* tax-and-transfer system should be indeed employed as an exclusive tool to address inequality. Should perhaps also legal rules do something about this dismal situation? In other words, is the tax-and-transfer system a superior, exclusive remedy and should the attempts in legal science to address the issue of inequality also via legal rules be declared as futile? Conventional economic wisdom provides a clear-cut answer and suggests that legal system should focus only on efficiency and that efficiency-equity tradeoffs should be made only in the tax system and inequality arguments should be irrelevant in property law, contract law, public and administrative law or any field of law except tax law[10]. The main reason advanced in the literature is the so-called "double-distortion" argument under which any legal rule that redistributes income only adds to the economic distortions already present in the tax system[11]. This double-distortion argument launched by Louis Kaplow and Steven Shavell[12] has been a subject of extensive debate and recent cataclysmically growth of inequality has amplified the media-political-scholarly interest in their argument[13]. However, it should be emphasized that several law and economics scholars seem to challenge Kaplow and Shavell's decisive argument advocating formation of the equity-distributive-informed legal rules[14]. Dimick for example argues that there is no reason to believe that legal rules that have

favour the poor? Clarifying the role of legal rules and the income tax in redistributing income", *Journal of Legal Studies*, 2000, vol. 29, issue 2, pp. 821-835..

[8] R. Posner, *Economic Analysis of Law*, Wolters Kluwer, 8th ed., 2011, p. 635.

[9] For example, the vast social expenditures in EU MS in last economic depression

[10] See e.g. L. Kaplow, S. Shavell, *op. cit*., 1994.

[11] Hence, traditional law and economics literature suggests that it would be better for everyone, and especially for the poor, to instead adopt a more efficient, non-redistributive rule, and then increase transfers to the poor or reduce everyone's taxes. Thus, as argument goes, the law should concern itself only with the efficiency-making the pie bigger-and not with distribution-how to divide the pie; D. Weisbach, "Should legal rules be used to redistribute income?", *University of Chicago Law Review*, 2003, vol. 70, p. 439. See also A. Alstott, "Work v. Freedom: A liberal challenge to employment subsidies", 1999, *Yale Law Journal*, vol. 108, issue 5, pp. 967-1058, p. 972.

[12] L. Kaplow, S. Shavell, *op. cit.*

[13] See e.g. Z. Liscow, "Reducing inequality on the cheap: when legal rule design should incorporate equity as well as efficiency," *Yale Law Journal*, 2014, vol. 123, issue 7, pp. 2478-2509, p. 2480.

[14] See e.g. R. Avraham, D. Fortus, K. Logue, "Revisiting the roles of legal rules and tax rules in income redistribution: a response to Kaplow and Shavell", *Iowa Law Review*, 2004, vol. 89, p. 1125; R. Kaplan, "Economic Inequality and the role of law," *Michigan Law Review*, 2003, vol. 101, issue 6, pp. 1197-2006; T.

redistributive effects will always reduce efficiency and that legal rules are likely to be more attractive than taxation precisely in cases where inequality itself or normative concerns about inequality are high[15]. He suggests that a mix of legal rules and taxation, rather than taxation exclusively, might be the best way to address economic inequality[16].

This paper, while employing an example of the optimal regulatory intervention in the field of public law, particularly administrative law and its regulation of public education, joints this critical debate and challenges the classical viewpoint and expresses the view that legal system might indeed be intrinsically superior to the classic *ex post* interventions (e.g. tax-and transfer system or all-encompassing subsidies) at reducing income inequality. Moreover, this paper argues that the policy maker should focus on the policies that prevent inequality from occurring *ex ante* and that a priority should be given to the *ex ante* policies that do not induce moral hazard and opportunism, are fiscally sustainable, economize on transaction costs, and that do not distort dynamic efficiency (preserve incentives for productive, entrepreneurial social-wealth increasing behavior). Namely, Kenneth Arrow, the Nobel prize laureate for economics, proved that not only are all perfect markets efficient but also that all efficient outcomes can be achieved employing a competitive market, by adjusting the starting position[17]. He actually argues that when one is trying to balance the excesses of competitive markets she should not interfere with the markets themselves but should adjust the starting block by making lump-sum payments and levying onetime taxes. As it is in practice due to the asymmetric information problem unfeasible one should hence via public education put everyone on an equal footing. Afterwards perfect markets then find every possible opportunity to make everybody better off from their revised starting points.

Moreover, professor De Geest in his recent groundbreaking article on removing rents introduces a pathbreaking differentiation between different sources of inequality and related, until now overlooked, phenomena of rents as a source of inequality. De Geest observes that

Blumkin, M. Yoram, "On the limits of redistribution taxation: establishing a case for equity-informed legal rules", *Virginia Tax Review*, 2005, vol. 25, issue 1 and A. Fennell, R. McAdams, "The distributive deficit in law and economics", *Minnesota Law Review*, 2016, vol. 100, p. 1051.

[15] M. Dimick, "Should the law do anything about economic inequality?", *Cornell Journal of Law and Public Policy*, 2016, vol. 26, issue 1.

[16] Dimick emphasizes that since legal rules can sometimes be both more efficient and redistributive, policy makes must consider each situation, case-by-case, to determine whether legal rules should or should not be used to redistribute income. He states that the double-distortion argument does not save us from the hard work of comparative and institutional analysis. *ibid.,* p. 67.

[17] K. Arrow, "General Economic Equilibrium: Purpose, Analytic Techniques, Collective Choice", *The American Economic Review*, 1974, vol. 64, issue 3, pp. 253-272. See also K. Arrow, G. Debreu, "Existence of an equilibrium for a competitive economy", *Econometrica, The Econometric Society*, 1954, vol. 22, issue 3, pp. 265–290.

there are two fundamental ways to correct income inequality[18]. The first one advocated by Shavell and Kaplow is the so-called *ex post* approach that intervenes after income inequality has occurred and the second one coined by De Geest as the "*ex ante* approach" which tries to prevent income inequality from occurring in the first place. De Geest also argues that if the inequality is not caused by the differences in efforts or talents but by rent-seeking behavior (rents)[19], then the *ex ante* legal intervention is superior because it prevents income inequalities from occurring in the first place – this is what he calls an *ex ante* approach[20]. Identified rents are in reality enabled by a variety of market failures such as network externalities, prohibitive transaction costs, various asymmetric information problems, cartels, behavioral biases and their exploitation, lock-in effects, temporary market powers and decreasing economies of scale.

While opening an unprecedented avenue for potential further research, De Geest convincingly shows that legal rules that prevent rents from occurring are intrinsically better at correcting these market failures and that preventing them *ex ante* is intrinsically superior to correcting them *ex post*[21]. Hence, as argument goes, legal rules that prevent rents therefore reduce labor and price distortion and that the trade-offs between equity and efficiency should be made in the legal system whenever legal rules generate or reduce rents[22].

In line with De Geest's argument public law and related legal regulation of education appears as one of the most important legal areas which can *ex ante* cure market failures, deter rents, reduce information asymmetries, and hence remove the causes of income inequality in first place. This paper offers *ex ante* investments in education (human capital) and related regulatory intervention as one of the most significant measures that will address/prevent wage stagnation without increasing EU MS public indebtedness. Furthermore, due to the outmost importance of education as an *ex ante* mechanism for rent prevention and for removing the causes of ruinous inequality paper calls for an EU-wide regulatory policy intervention. In addition, the shift of the law-maker's (policy-maker) regulatory attention from the *ex post*

[18] G. De Geest, "Removing Rents: Why the legal system is superior to the income tax at reducing income inequality", *Washington University in St. Louis School of Law Legal Studies Research Paper Series*, October 2013, paper n. 13-10-02, available online http://papers.ssrn.com/sol3/papers.cfm ?abstract_id=2337720.
[19] He defined rents as profits that would not have been earned in a perfectly competitive and transparent economy, *ibid*.
[20] Although this is a largely untested hypothesis at this point it may well be that prevention of rents might be the most understated, overlooked function of legal systems from ancient Roman law onwards.
[21] G. De Geest, *op. cit*.
[22] *Ibid.* He also emphasizes that rents are from analytical perspective implicit commodity taxes causing labor and price distortions.

policy intervention which merely treats the inequality's symptoms towards the *ex ante* focus on removal of its causes appears as one of the main arguments of our paper.

In relation to suggested *ex ante* focus on removal of inequality's causes one should note several EU and global initiatives that emphasize the role of education as one of the most significant tools to tackle the issues of inequality. For example, European Commission recently launched an initiative on the development of higher education policies in EU MS (formation of inclusive and connected education systems and supporting effective and efficient higher education systems), whereas World Economic Forum (hereinafter as WEF) in its recent study on how to tackle the sources of inequality emphasizes the importance of the *ex ante* measures[23]. Moreover, United Nations in 2015 launched the "2030 Agenda for Sustainable Development" which among other 17 goals that should ensure global sustainable development (which should end poverty) has as its fourth goal the assurance of the inclusive and equitable quality education[24].

This paper attempts at contributing to the existing literature in several ways. First, it emphasizes the *ex ante* role of law as one of the main inequality preventive mechanisms. Second, it shows that public law and its regulation of public education might feature as one of the most important *ex ante* mechanisms for removing the causes of inequality. Third, it argues that the shift of the EU law-maker's regulatory attention from the *ex post* policy intervention which merely treats the inequality's symptoms towards the *ex ante* focus on removal of its causes is of vital importance.

Having said all that, it should be emphasized that proposed *ex ante* education mechanism should not be regarded as a sole or the only possible regulatory tool to tackle the income inequality. Namely, we argue that an effective policy maker should, while tackling the inequality problem, design its policy in line with the golden Tinbergen rule – N problems requires N solutions. This rule, employed in natural sciences as a general research maxim, was

[23] Namely, WEF correctly advocates reforms that promote strong, inclusive growth that by its nature reduces inequality. Their approach focuses on *ex ante* reducing inequalities of opportunity and broadening the base of participants in the growth process, thereby ensuring that more people benefit from it. WEF's range of policies that can stimulate inclusive growth is indeed very broad, yet they emphasize education is a key instrument for tackling the notorious inequality. Improving the availability and quality of education expands the talent pool in the labor force and upgrades and broadens its skills base. Early childhood development programs, for example, have been demonstrated to provide lifelong educational benefits and the foundation for success in the workplace; World Economic Forum, *What's the best way of tackling inequality*, 2015, available online https://www.weforum.org/agenda/2015/09/whats-the-best-way-of-tackling-inequality/ (visited March 17, 2018).
[24] United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development,* 2015, available online https://sustainabledevelopment.un.org/post2015/transformingourworld (visited March 18, 2018).

formulated by the Dutch economics Nobel laureate, Jan Tinbergen in 1952 and is generally stated as "for each policy objective, at least one policy instrument is needed - there should be at least the same number of instruments as there are targets"[25]. Hence, a smart, enlighten policy maker should identify different sources of market failures/rents/inequality and apply for each of them its specific, *ex ante* or *ex post* (or combination of both) instrument[26].

However, several caveats should be stated. Namely, this paper omits discussion on whether statistics on income inequality provide a clear-cut guidance for social policy or even a clear picture of income inequality[27] and instead takes the problem of inequality as an undisputable one. Moreover, paper does not discuss the perplexing issue of whether inequality is at all inefficient and what might be an "optimal" amount of inequality in a given society. Moreover, due to the limited scope of the paper we focus merely upon the EU Member States. Moreover, the analytical approach employs interdisciplinary dynamic[28] analysis and enriches it with the concepts used in the economic analysis of law[29].

This paper is structured as follows. First part recapitulates current findings on the inequality, redistribution and its consequences. In the second part, the rationale behind the *ex post* tax-and-transfer system is presented. This is also a widely used view which argues that only tax system should be used to redistribute income and to mitigate current explosive inequality. The third part challenges this widely accepted premise and offers arguments in support of *ex ante* intervention. In this part paper offers a set of arguments that public law and its regulation of public education might feature as one of the most important *ex ante* mechanisms for removing the causes of inequality and might be superior in reducing income inequality. In fourth part paper particularly focus on WEO's initiatives, on the regulation of

[25] J. Tinbergen, *On the Theory of Economic Policy*, North-Holland, 1952.
[26] Numerous rules in contract law might be interpreted exactly in that way. For example, doctrines of mistake, fraud, duress, misrepresentation, unjustified enrichment, *culpa in contrahendo*, antitrust rules, good faith can also have such an *ex ante* function. However, this does not imply that legal rules should not be, while drafted, *ex ante* primarily concerned with redistribution goals. On contrary, legal rules should still be designed in line with economic suggestions – such rules would actually than maximize social wealth and *ex ante* tackle the notorious rents and inequality problems.
[27] Posner for example argues that by taking a snapshot of incomes for one year, scholars misleadingly compare people in different stages of their life cycle. For example, he emphasizes that the statistics places a young lawyer who has just joined the a firm and a senior partner in the same firm in different income classes, yet both may earn the same amounts in their lifetimes (or the young lawyers might probably earn even more); R. Posner, *op. cit.*, p. 627.
[28] Dynamic part of analysis employs recent behavioral insights that offer a novel assessment of how will parties react in their daily behavior upon different set of rules and norms.
[29] For a synthesis of law and economics scholarship, see G. De Geest, *Contract Law and Economics – Encyclopaedia of Law and Economics, Volume 6*, Edward Elgar Cheltenham, 2nd ed., 2011. Also see R. A. Posner, *op. cit*.

education as an *ex ante* legal remedy and call for an EU-wide harmonization of legislation in the field of education and critically examines the proposed 2030 Agenda for Sustainable Development. Finally, some conclusions will be presented.

I. WEALTH INEQUALITY AND ITS CONSEQUENCES: A SYNTHESIS

This part summarizes the main findings from economic literature on the wealth inequality and on its consequences.

I.A. Inter-generational social mobility

An important channel through which public policies could influence intergenerational social mobility is by affecting intra-generational inequality[30]. Galbraith and Kum (2005) argue that inequality has risen with globalization in most parts of the world[31]. Further, the household income inequality is distributed more consistently across the world that one would believe[32]. According to Gottschalk and Danziger increased family income inequality primarily reflects increased inequality of wage rates which in turn reflects differences in returns to education[33].

I.B. Institutional framework

Differences in wage distribution across countries are also influenced by the institutional environment. In the 1996 and 2003 studies by Blau and Kahn emphasize an important role of institutions affecting wage inequality through resource allocation was identified[34]. Contrary to the expected Blau and Khan study found that the low-skilled workers have higher employment rations compared to higher-skilled workers in the US than in other countries. To some extent through labor market policies (government employment, training programs and subsidies) governments are trying to diminish negative effects of wage-setting institutions. In OECD countries wage leveling policies are encouraged by the government, on the one hand, to achieve desired level of wage inequality and, on the other hand, to provide safety net for low-wage

[30] O. Causa, Å. Johansson, "Intergenerational Social Mobility in OECD Countries", *OECD Journal: Economic Studies*, 2010, vol. 2010.
[31] J. Galbraith, H. Kum, "Estimating the Inequality of Household Incomes: A Statistical Approach to the Creation of a Dense and Consistent Global Data Set", *Review of Income and Wealth*, 2005, vol. 51.
[32] *Ibid*.
[33] P. Gottschalk, S. Danziger, "Inequality of Wage Rates, Earnings and Family Income in the United States, 1975-2002", *Review of Income and Wealth*, vol. 51..
[34] Even though an adverse impact of resource allocation would be expected. We would expect that this reallocation will have positive impact on employment and productivity. F. Blau, L. Kahn, "International Differences in Male Wage Inequality: Institutions Versus Market Forces", *Journal of Political Economy*, 1996, vol. 104; F. Blau, L. Kahn, "Understanding International Differences in the Gender Pay Gap", *Journal of Labor Economics*, 2003, vol. 21.

workers. Acemoglu (2003) developed a theory where labor market institutions creating wage compression in Europe also encourage more investment in technologies increasing the productivity of less-skilled workers, thus implying less skill-biased[35] technical change in Europe than in the US[36]. If we believe that SBTC indeed causes higher wage inequality than this is good news for Europe. However, it is far from the entire story of inequality.

In OECD (2002) study a number of policies and institutional factors affecting the labor market, anti-competitive product market regulations (e.g. establishing entry barriers in potentially competitive markets or restricting price competition) were found to have significant negative effects on the non-agricultural employment rates of OECD countries[37]. The evidence also points to significant effects of employment protection legislation[38] and industrial relations regimes[39] (e.g. bargaining arrangements, business associations, business codes of conduct, etc.) on innovation activity in manufacturing. Across OECD countries, wage dispersion is lower in countries where institutions compress the distribution of wages (e.g. the Nordic countries). However, recent OECD studies showed that such institutions likewise reduce employment among older workers and therefore reduce the overall share of wage-earners in the economy. Bassanini and Duval (2006) study found institutional effect on employment not only through their impact on aggregate unemployment but also through their effects on labor market participation[40]. In the average OECD country, high unemployment benefits and high tax

[35] Shift in the production technology that favors skilled over unskilled labor by increasing its relative productivity and its relative demand. Many discussions were held about whether technological change is the primary source of wage inequality or not (as opposed to policy and institutions).

[36] If we believe that SBTC indeed causes higher wage inequality than this is good news for Europe, however it is far from the entire story of inequality. D. Acemoglu, "Cross-Country Inequality Trends", *Economic Journal*, 2003, vol. 113.

[37] OECD, *op. cit*., 2002.

[38] Countries where product market regulations and employment protection legislation are relatively strict also tend to specialize in industries characterized by low wage premia. Features of the institutional and regulatory environment affecting the functioning of labor markets, indicators of the strictness of Employment Protection Legislation (EPL) based on institutional procedures regarding dismissal practices for regular workers and legislation on fixed-term and temporary work agency contracts, may reflect differences in the innovation process across industries, see OECD (2002).

[39] Can have independent effects on innovation activity, but the intensity of this effect is likely to depend on the way these policies and institutions interact with each other. Restrictive EPL and highly coordinated industrial relations regimes generally encourage firms to resort to internal labor reallocations and undertake firm-sponsored training. industrial relations regimes raise job turnover and tend to increase wage dispersion and skill premia, see OECD (2002).

[40] Particularly for those groups at the margin of the labor market, group-specific employment rate equations are also estimated. These effects are high and long-lasting unemployment benefits, high tax wedges and stringent anticompetitive product market regulation which increase aggregate unemployment, when coordinated wage bargaining systems are estimated to reduce unemployment. A. Bassanini, R. Duval, "Employment Patterns in OECD Countries: Reassessing the Role of Policies and Institutions", *OECD Economics Department Working Papers*, 2006, n. 486.

wedges are found to be associated with lower employment prospects for all groups studied, namely prime-age males, females, older workers and youths[41].

I.C. Sources of inequality – education and social fabric

The relationship between wage inequality and intergenerational income persistence is not straightforward, as a range of factors might influence observed results, sometimes in opposite directions, as the countries with a wide distribution of income are also likely to be those where the returns to education are relatively high[42]. On the one hand, countries with a wide distribution of income are also likely to be those where the returns to education are relatively high. As discussed above, if parental background affects access to investment in education through credit or other constraints, then the ability to take advantage of the high returns from education is limited to the offspring of relatively advantaged parents. After the crisis we observed inequality grow at an alarming rate, therefore a need to develop tools for gauging inequality had risen[43]. According to Corak almost one half of children in the US born to low income parents become low income adults. The fraction is also high in the United Kingdom at four in ten[44], and Canada where about one third of low income children do not escape low income in adulthood[45]. In the Nordic countries[46], where overall child poverty rates are noticeably lower, it is also the case that a disproportionate fraction of low income children become low income adults[47].

In this respect d'Addio provides clear evidence of relative immobility across generations in many fields such as income, occupations and education, showing that children largely "inherit" their parents' socio-economic status[48]. Resources can be inherited from the

[41] *Ibid*.
[42] Countries with a wide distribution of income are also likely to be those where the returns to education are relatively high. S. Mat, M. Harun, N. Bakar, "Determinants of Social-economic Mobility in the Northern Region of Malaysia", *International Journal of Economics and Financial Issues*, 2016, 6 (7S), pp. 109-114. Retrieved online http://dergipark.gov.tr/ijefi/issue/32000/353038.
[43] F. Chang, Felix, "Asymmetries in the Generation and Transmission of Wealth", *Ohio State Law Journal, Forthcoming,* 26 April 2017, available online SSRN: https://ssrn.com/abstract=2939878.
[44] M. Corak, "Do Poor Children Become Poor Adults? Lessons from a Cross Country Comparison of Generational Earnings Mobility", *IZA Discussion Papers,* 2006, No. 1993.
[45] *Ibid*.
[46] Denmark, Finland, Norway, and Sweden.
[47] M. Corak, *op. cit*.
[48] While education is a major contributor to intergenerational income mobility, several studies suggest that a large portion of the mechanisms governing the transmission of income across generations is unexplained by it (for example see J. Blanden, *Essays on Intergenerational Mobility and Its Variation over Time, Place and Family Structure*, PhD Thesis, University of London, 2005; J. Blanden, P. Gregg, L. Macmillan, "Explaining Intergenerational Income Persistence: Noncognitive Skills, Ability and Education", *Centre for Market and Public Organisation,* 2006, Working Paper n. 06/146; S. Bowles, H. Gintis, "The inheritance of inequality", *Journal of Economic Perspectives*, 2002, vol. 16, issue 3, pp. 3-30; S. Bowles, H. Gintis, "Schooling in Capitalist America

parents either directly through genes and wealth, or indirectly when children learn behaviors and attitudes[49]. These resources interact with the cognitive and non-cognitive[50] abilities of children in ways that can work together to strongly influence their future life chances and to strengthen the transmission of inequality[51]. Literature also suggests that the family should be regarded as an important social policy institution. There is the need to understand all the aspects of family background, which are correlated or uncorrelated with parental earnings or incomes, and that are important in explaining the influence of the family on intergenerational mobility[52]. Among these, the mechanisms that contribute to transmitting parental education, occupations, values, beliefs and attitudes across generations seem to be critical. Burtless and Jencks suggest that it makes sense to evaluate policies aimed at changing the distribution of income by asking whether they are consistent with widely held norms about justice[53]. The political impact of changes in economic inequality could be reduced by designing a political system that minimizes the influence of money and further by mobilize less affluent voters around distributional issues. However, the US does not provide such political system, as both major political parties have become dependent on large contributions from the wealthy citizens. They argue that within the range of rich democracies, inequality does not have large and obvious effects on growth, mobility, and longevity. Furthermore, rich countries have relatively similar living standards[54]. The difference among wealthy democracies is the relative political influence of different economic and ideological groups, which further explain higher equality within such democracies. According to several studies higher cross-sectional inequality tends to be

Revisited", *Sociology of Education*, 2002, vol. 75, issue 1, pp. 1-18; S. Bowles, H. Gintis, M. Osborne Groves, "Introduction" *in* S. Bowles, H. Gintis, M. Osborne Groves (eds.), *Unequal Chances: Family Background and Economic Success*, Russell Sage, pp. 1-22; A. D'Addio, "Intergenerational Transmission of Disadvantage: Mobility or Immobility Across Generations? A Review of the Evidence for OECD countries", *OECD Social, Employment and Migration Working Papers*, 2007, n. 52.

[49] *Ibid.*

[50] Non-cognitive skills may moderate the effect of genetic components on socio-economic outcomes and affect the extent of income mobility across generations. J. Blanden P. Gregg, L. Macmillan, *op. cit.,* consider a range of non-cognitive and cognitive factors and argue that the former account for 19% of intergenerational earnings correlation and the latter for 27%.

[51] Genetics allow inherited traits, and more particularly genetic endowments, to influence income transmission across generations and are largely unexplained. See A. D'Addio, *op. cit*.

[52] G. Solon, "Chapter 29 - Intergenerational Mobility in the Labor Market" *in* O. Ashelfenter, D. Card (eds.), *Handbook of Labor Economics*, Elsevier, 1999, vol. 3, part A.

[53] G. Burtless, C. Jencks, "American Inequality and its Consequences" *in* H. Aaron, J. Lindsay, P. Nivola (eds.), *Agenda for the Nation*, 2003.

[54] Living standard is most directly influenced by long-run permanent income, such as household disposable income. L. Chadwick, G. Solon, "Intergenerational Income Mobility among Daughters", *American Economic Review*, 2000, vol. 92; G. Solon, "A Model of Intergenerational Mobility Variation over Time and Place" *in* M. Corak (ed.), *Generational Income Mobility in North America and Europe*, Cambridge University Press, 2004, pp. 38-47; C.-I. Lee, G. Solon, "Trends in Intergenerational Income Mobility", *Nationl Bureau of Economic Research Working Papers*, 2008, n. 12007, available online.

associated with lower mobility[55]. In reality, this association[56] is positive in European OECD[57]. Similarly, there is a positive association across European OECD countries between intergenerational persistence in wages and poverty rates, although weaker than the association between persistence and inequality[58].

I.D. Redistribution and its effects

Redistributive policies are generally perceived as a main mechanism that should enable disadvantaged families to invest in their children's human capital. Moreover, social and redistributive policies might, as argument goes, narrow the gap between current incomes of parents, so that the incomes of their offspring could regress to the mean more quickly[59]. Therefore, such well-targeted redistributive policies could reduce inequalities. However, such redistributive policies are concerned solely with the static efficiency but disregard the issues of dynamic efficiency its incentive for productive behavior and for related entrepreneurial creation of new social wealth. may have detrimental effects upon dynamic efficiency. Namely, such policies may also lower incentives to undertake effort and invest in human capital, deter entrepreneurial activity and innovation as the net returns from these investments are reduced[60]. One measure of the redistribution of the taxes is the progressivity in the personal income tax schedule, which varies significantly across OECD countries and over time[61]. Cross-country estimates suggest that higher tax progressivity correlates across countries with a lower influence of parental background on their offspring's cognitive achievement in secondary education, as well as on their wages[62]. One interpretation of the positive correlation between student performance and wages is that redistributive policies allow disadvantaged parents to provide children with a better environment, more time and resources for their education. However, it should be emphasized that correlation is not causation and that omitted bias variable problem makes such studies poisoned.

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[55] See D. Andrews, A. Leigh, "More Inequality, Less Social Mobility", *Applied Economics Letters*, 2009, vol. 16; A. Björklund, M. Jäntti, "Intergenerational Income Mobility in Sweden Compared with the United States", *American Economic Review*, 1997, vol. 87, issue 5, pp. 1009-1018; M. Corak, 2006, *op. cit.* ; A. D'Addio, *op. cit.*; G. Solon, *op. cit*., 2004.

[56] Measured by the Gini coefficient of household disposable income.

[57] O. Causa, C. Chapuis, "Equity in Student Achievement across OECD Countries: An Investigation of the Role of Policies", *OECD Economics Department Working Papers*, 2009, n. 708.

[58] O. Causa, S. Dantan, Å. Johansson, "Intergenerational Social Mobility in European OECD countries", *OECD Economics Department Working Papers,* 2009, n. 709.

[59] M. Corak, 2006, *op. cit.*

[60] O. Causa, Å. Johansson, *op. cit.*; O. Causa, S. Dantan, Å. Johansson, *op. cit*.

[61] J. Arnold, B. Brys, C. Heady, A. Johansson, L. Vartia, "Tax and Economic Growth", *OECD Economics Department Working Papers*, 2008, n. 620.

[62] O. Causa, C. Chapuis, *op. cit.*; O. Causa, S. Dantan, Å. Johansson, *op. cit.*

The unemployment benefits policy implications are not clear, because empirical evidence suggests that the presence of transfer income among parents is associated with lower wage prospects for their offspring[63]. Furthermore, a substantial degree of intergenerational persistence in reliance on welfare could imply sustained cycles of welfare dependency[64]. Therefore, income support programs are more likely to remove obstacles to intergenerational mobility if they are designed to encourage labor market participation and self-sufficiency across generations, while at the same time providing adequate income support during job search.

II. THE RATIONALE BEHIND THE *EX POST* TAX-AND-TRANSFER SYSTEM

This section provides a synthesis of general arguments advanced in the economic literature that favors the *ex post tax-and-transfer system* as an optimal inequality remedy.

II.A. Conventional economic wisdom

Conventional economic literature offers tax system and not the legal system as the optimal mechanism for income redistribution and as a superior tool to address the notorious inequality problem. Shavell and Kaplow in their seminal, widely cited article, coined the double distortion argument where they argue that although *ex post tax-and-transfer system* might cause certain economic distortions using the legal system in order to address inequality would produce the same distortions and also undermine other social functions of an effective legal system[65]. Their basic claim is that "using legal rules to redistribute income distorts work incentives fully as much as the income tax system and also creates inefficiencies in the activities regulated by the legal rules"[66].

Consequently, "redistribution through legal rules offers no advantage over redistribution through the income tax system and typically is less efficient"[67]. From this analysis they also draw the more general conclusion that "it is appropriate for economic analysis of legal rules to focus on efficiency and to ignore the distribution of income in offering normative judgments"[68]. Thus, effective and smart legal system should not focus on inequality and should instead focus merely on efficiency. Moreover, the efficiency versus equity tradeoffs should be made only in

[63] M. Corak, 2006, *op. cit*.
[64] M. Page, "New Evidence on the Intergenerational Correlation in Welfare Participation" *in* M. Corak (ed), 2004, *op. cit.*
[65] L. Kaplow, S. Shavell, 1994, *op. cit*.
[66] *Ibid.*, p. 668.
[67] *Ibid*., p. 667.
[68] *Ibid*., p. 677.

the ex post tax-and-transfer system[69]. Hence, the argument goes inequality arguments should not be part of public or administrative law-making procedure and the correction of income inequality should not be its goal. To sum up, current leading law and economics textbooks offer Kaplow and Shavell's argument as the main, leading policy-law-making principle[70].

II.B. *Ex post* instruments: progressive taxation and social welfare programs

Traditionally economists argue that progressive taxation and *ex post* social welfare programs are the most effective mechanisms to pursue redistributive goals and mitigate the inequality problem. As the argument goes, pursuing redistributive goals is an exceptional use of law that special circumstances may justify but that ought not be the usual use of for example private law[71]. Cooter and Ulen for example offer several different reasons supporting the supremacy of ex post-tax-and-transfer mechanisms[72]. They argue that a) income tax precisely targets inequality, whereas redistribution by private legal rules relies on crude averages; b) the distributive effects of reshuffling private rights are hard to predict; c) the transaction costs of redistribution through private legal rules are typically high; and d) redistribution by private law distorts the economy (incentives) more than progressive taxation does[73]. Thus the general principles of private law cannot rest on wealth redistribution[74].

III. PUBLIC LAW, PUBLIC HIGHER EDUCATION AS AN OPTIMAL *EX ANTE* INTERVENTION AT REDUCING INCOME INEQUALITY

This part presents a set of recent law and economics arguments for why the legal system might be more efficient than the income tax system for redistributing income and why public law's regulation of higher education might be instrumental in removing the causes of rents and inequality.

III.A. Superiority of *ex ante* legal intervention

Generations of lawyers from Roman times onwards[75] have intrinsically always felt that legal rules, despite economists' objections, are the right way to pursue distributive justice and

[69] *Ibid.* See also L. Kaplow, S. Shavell, 2000, *op. cit*.
[70] See e.g. R. Cooter, T. Ulen, *Law and Economics*, Pearson, 2008; R. Posner, *op. cit*.
[71] *Ibid.*, p. 8.
[72] *Ibid*., p. 9. See also R. Posner, *op. cit.*, p. 15 onward.
[73] *Ibid*., p. 9 onward.
[74] It should be emphasized that Cooter and Ulen focus merely upon the *ex post* role of law and that they do not address the potential *ex ante* capacity of legal rules to remove the sources of inequality and rents in first place.
[75] See e.g. Cicero M. Tulllius, *De Officiis*, (transl. A. Peabody, Little Brown and Co.,1887).

to tackle the ruinous inequality problems. However, their analytical justification remained tautological or based on general standards of morality, good faith and ethical behavior. The contradicting economic arguments were, at least for last decades, the prevailing ones. Yet, recent legal scholarship managed to make a first revolutionary step in refuting traditional economic wisdom. Namely, De Geest in his recent groundbreaking article on removing rents introduces a pathbreaking differentiation between different sources of inequality and related, until now overlooked, phenomena of rents as a source of inequality. De Geest observes that there are two fundamental ways to correct income inequality[76]. The first previously discussed Shavell and Kaplow's article (the general economic one) that intervenes after income inequality has occurred and the second one coined by De Geest as the "*ex ante* approach" which tries to prevent income inequality from occurring in the first place. De Geest also argues that if the inequality is not caused by the differences in efforts or talents but by rent-seeking behavior (rents)[77], then the *ex ante* legal intervention is superior because it prevents income inequalities from occurring in the first place – this is what he calls an *ex ante* approach[78]. Namely, legal system has an information advantage combating ruinous inequality in comparison to the *ex post tax-and-transfer system* since it needs less information than the later[79].

Moreover, the *ex post tax-and-transfer system* leaves the source of inequality and the price distortions associated with rents unaffected. In other words, *ex post tax-and-transfer system* cannot observe the causes of inequality and cannot in line with Kenneth Arrow's insight by adjusting the starting position achieve perfect markets and their efficient outcomes[80]. Arrow shows that when one is trying to balance the excesses of competitive markets then she should not interfere with the markets themselves but should adjust the starting block. As it is in practice due to the asymmetric information problem unfeasible one should hence via public education put everyone on an equal footing. Afterwards perfect markets then find every possible opportunity to make everybody better off from their revised starting points. Furthermore, De Geest convincingly shows that legal rules that prevent rents from occurring are intrinsically

[76] G. De Geest, *op. cit.*
[77] He defined rents as profits that would not have been earned in a perfectly competitive and transparent economy; *ibid*.
[78] Although this is a largely untested hypothesis at this point it may well be that prevention of rents might be the most understated, overlooked function of legal systems from ancient Roman law onwards.
[79] De Geest shows that legal system needs less information than the tax system since it intervenes at an *ex ante* stage where there is less information required than at an *ex post* stage, where the symptoms have to be removed. In order to effectively address inequality and rents problem legal system need merely information on the total amount of rents and not on individually received rents and consequent inequality; G. De Geest, *op. cit*., p. 10 onward.
[80] K. Arrow, *op. cit*. See also K. Arrow, G. Debreu, *op. cit*.

better at correcting these market failures and that preventing them *ex ante* is intrinsically superior to correcting them *ex post*[81]. Hence, as argument goes, legal rules that prevent rents therefore reduce labor and price distortion and that the trade-offs between equity and efficiency should be made in the legal system whenever legal rules generate or reduce rents[82]. Thus, one should make an analytical distinction between different sources of rents and consequential income inequality and design legal rules accordingly.

III.B. Public law and public higher education

Previous section emphasizes the potential advantage of an *ex ante* regulatory intervention in comparison to the *ex post* one in instances where the inequality is not caused by the differences in efforts or talents but by rent-seeking behavior (rents). However, if indeed such approach is the most efficient one, the issue of what kind of such an *ex ante* approach should be employed becomes the second most important questions that triggers the attention of legal scholars. Should a policy maker then introduce an *ex ante* lump sum individual taxation that would depend on future income or shall a law-maker, while designing regulation, pursue redistribution goals and neglect the other social objectives of law?

We argue that an effective law-maker should, while tackling the inequality problem, design its policy in line with the golden Tinbergen rule – N problems requires N solutions. This rule, employed in natural sciences as a general research maxim, was formulated by the Dutch economics Nobel laureate, Jan Tinbergen in 1952 and is generally stated as "for each policy objective, at least one policy instrument is needed - there should be at least the same number of instruments as there are targets"[83]. Hence, an informed law-maker should identify multiple sources/causes of inequality (rents) and for each of them design its own *ex ante* regulatory instrument. Legal rules should be designed to *ex ante* deter/prevent formation of inequality that is caused by rent-seeking behavior (rents). If, however, inequality is caused by the differences in efforts or talents then such an inequality should be allowed and might be eventually, according to specific, efficiently justified, normative preferences of a national law-maker, tackled only with the economically suggested *ex post tax-and-transfer system* of redistribution. We argue that the potential *ex post* intervention should only be done in line with previously emphasized economic principles. In other words, *ex post* pursuit of distributive justice should

[81] G. De Geest, *op. cit*.
[82] G. De Geest, *op. cit.* He also emphasizes that rents are from analytical perspective implicit commodity taxes causing labor and price distortions.
[83] J. Tinbergen, *On the Theory of Economic Policy*, North-Holland, 1952.

not be done via modifying or reshuffling private legal rights but only via progressive taxation and social welfare programs.

Following this line of reasoning public law and related legal regulation of higher education appear as one of the most important legal areas/disciplines which fits into this *ex ante* framework of instances where the inequality is not caused by the differences in efforts or talents but by rent-seeking behavior (rents)[84].

According to the still dominant legal scholarship, public law is a coherent set of rules, ordered by some general principles, like the rule of law, impartiality, transparency, and proportionality, and characterized by its own specifi c features, such as the existence of public law entities, the special prerogatives of the Executive and its related branches, the decision-making procedure, and the judicial review[85]. On the other hand, the law and economics literature has traditionally paid very little attention to public and administrative law and their rules[86]. Notwithstanding its great expansion also in nonmarket fi elds, it is still an "unexpected guest" in the public law context[87]. Modern law and economics analysis of public law divides into two strings of work. One dealing with causes and consequences of bureaucratic action inside bureaucracies and the other focusing on external interaction, such as between legislators and the bureaucratic institutions comprising executive branch, between the latter institutions and the citizens and enterprises[88]. Surprisingly, the potential employment of public law as an *ex ante* mechanism to tackle the sources of inequality has received very little attention in law and economics scholarship.

This paper argues that the public law and its regulation of higher education is one of the most important mechanisms for an *ex ante* efficient curing of market failures, deterring rents, reducing information asymmetries, and hence facilitating the removal of the causes of income inequality in first place.

The importance of higher education for removing the causes of inequality and for adjusting the starting positions can hardly be overstated. In economic terminology higher

[84] For an excellent synthesis of public law regulation of education see D. Tyack, T. James, A. Benavot, *Law and the Shaping of Public Education*, *1785-1954*, The University of Wisconsin Press, 1987.
[85] See e.g. M. Elliot, R.Thomas, *Public Law*, Oxford University Press, 2017; A. Le Sueur M. Sunkin, J. Khushal Murken (eds.), "Public Law Text, Cases, and Materials*"*, Oxford University Press, 3rd ed., 2016.
[86] G. Napolitano, "Administrative law" *in* A. Marciano, G. Rammello (eds.), *Encyclopedia of Law and Economics,* Springer, 2014, available online: DOI 10.1007/978-1-4614-7883-6_526-1.
[87] T. Ulen, "The unexpected guset: law and economics, law and other cognate disciplines, and the future of legal scholarship", *Chicago-Kent Law Review,* 2004, vol. 79, issue 2, pp. 403-429.
[88] W. Weigel, "Why Promote the Economic Analysis of Public Law?", 2006, *Homo Economicus*, vol. 23, issue 2, pp. 195-216.

education is generally regarded as a public good with extensive, significant positive externalities[89]. For example, research and teaching at universities are a major source of production and dissemination of knowledge. Knowledge is a public good, with an open access, and when embedded by entrepreneurs in new investments, it increases the quantity and quality of goods and services (including public services) offered to all higher education feeds the labor market and the society with highly skilled manpower, which allows for increases in workforce productivity and favors professional mobility[90]. The positive impact of education and human skills on economic growth and development is a also a widely recognized externality[91]. In other words, the social benefits of higher education are higher than individual benefits and hence in the absence of the state intervention (pure market situation – market provided higher education), higher education would be under-produced and under-consumed[92]. In addition, the benefits of tackling the disastrous effects of inequality should be accounted for on the benefit side of such an equation. In such instance, the arguments for publicly provided higher education became even more persuasive.

However, it should be emphasized that current EU MS public law provisions and its regulatory framework in the field of higher education differs substantially. Analysis reveals that current EU MS public law regimes could be classified into three broad groups: a) EU MS with no or low tuition fees and generous student support systems in the form of student loans/vouchers or grants (governed by public law in The Netherlands, Denmark, Sweden, Finland and Norway); b) EU MS with low tuition fees and less-developed student support systems (Austria, Belgium, Czech Republic, France, Germany, Ireland, Italy, Poland, Portugal, Switzerland, Slovenia and Spain); and c) EU MS with high tuition fees and well-developed student support systems (United Kingdom)[93]. The discussion on which of these systems is a more effective one, although a very substantive one, exceeds the limits of this paper and can be

[89] However, one might also argue that higher education should not be regarded as a public good, since it can be appropriable and excludable.
[90] P.-B. Ruffini, "Economic Models of Higher Education: An International Perspective", *International Dialogues on Education: Past and Present*, 2015, vol. 2, issue 2.
[91] See e.g. M. Gradstein, M. Justman, "Education, Social Cohesion and Economic Growth", *The American Economic Review*, 2002, vol. 92, issue 4, pp. 1192-1204; J. Tilak, "Higher education: a public good or a commodity for trade?", *Prospects*, 2008, vol. 38, issue 4, pp. 449-466; D. Cecchi, *The Economics of Education: Human Capital, Family Background and Inequality*, Cambridge University Press, 2006; Z. Griliches, "Education, Human Capital, and Growth: A Personal Perspective",*Journal of Labor Economics*, 1997, vol. 15, issue 1, part 2; G. Becker, *Human Capital: A Theoretical and Empirical Analysis with Special Reference to Education,* The University of Chicago Press, 3rd ed., 1994; and T. Schultz, *Investment in Human Capital. The Role of Education and of Research,* Free Press, 1971.
[92] *Ibid*.
[93] OECD, *Education at a Glance: OECD Indicators*, OECD Publishing, 2016.

found elsewhere[94]. However, one should note that the quality of provided education, the obtained results, high levels of innovation, low levels of inequality, high human development indexes offer a broad scope of evidence in support of a "Nordic model"[95]. Moreover, the OECD report shows that the most successful EU MS The Netherlands, Norway, Sweden and Denmark actually combine grants and loans[96]. For example, The Netherlands employs the so-called participation system which is publicly governed/provided higher education scheme but which is actually designed to mimic the market[97]. Such a system induces universities to provide high-quality higher education and also induces citizens with incentives to make rational choice decisions, to invest and make efforts and consequently allocating economic and human resources to their best effective use. This system also derives its operational mode from the so-called "protestant doubt-full scientific approach" and from the early works of the Erasmus of Rotterdam. Namely, his seminal statement, motto that "*de einige manier om beter te worden is je eigen werk afkeuren*" ("the only way to get better is to reject your own work")[98] can be employed as an illustration of such a higher education model.

In relation to this discussion, government-provided public higher education could be taken as an example of a free non-market service. However, such a system conceals the fact that the poor do not get the same quality of education that the rich do. Namely, the real information on values, quality, costs and benefits are in such a "free" system very often blurred. In a market system, where one would have to pay out-of-pocket directly for his education, the information on how much it costs to provide good, high quality higher education and who would be willing to pay for such an education would emerge immediately. On the other hand, the existing non-market *free-for-all* public higher education struggles with these basic questions. Moreover, such a system is prone to low-quality-education service (and consequent poor performance of graduates) since it, in general, disincentivizes providers of education (reduces its quality) and triggers benevolent, free-riding attitude on the side of students/citizens.

Would than a public subsidization of higher education as well as for example the introduction of mortgage interest deduction schemes for home ownership represent the correct

[94] For an excellent assessment and overview see: EU Commission, *Education and Training Monitor*, 2017 available online: https://ec.europa.eu/education/policy/strategic-framework/et-monitor_en.
[95] *Ibid*.
[96] OECD, *op. cit*.
[97] The Netherlands actually experienced the transition from a partly grant-based system to low-interest loans, enrolments initially dropped in higher education but recovered in 2016; see EU Commission, *Education and Training Monitor 2017 Netherlands*, Luxembourg: Publications Office of the European Union, 2017.
[98] Erasmus Desiderius, *De correspondentie van Desiderius Erasmus. Deel 7: Brieven 993-1121,* (trad. István Bejczy en John Piolon, 2010), Donker Rotterdam.

public regulatory intervention? The basic insight is that subsidization of higher education is effective insofar as it cannot be tracked down to the individual recipient. For example, if the bank knows that you receive an income tax deduction, it will adjust its interest rate accordingly. In similar, but slightly different vein the loans to students might result in a similar outcome: admission fees will be such that a large part of the benefit to the student will end up in the accounts of the University. This, of course, forms a substantive problem for the welfare state and for the effective removal of causes of inequality. Direct income transfers must either be so small that it doesn't pay for commercial parties to adjust their pricing to recoup the subsidization or be distributed in such a way that it is very difficult or impossible to determine whether or not an individual customer belongs to the group of recipients. In short information asymmetry must be conserved. To sum up, the so-called Nordic system might be taken as raw model for potential EU-wide regulatory intervention.

IV. TOWARDS THE OPTIMAL EU *EX ANTE* REGULATION OF HIGHER EDUCATION AND CREATION OF SOCIAL FABRIC

Addressed *ex ante* investments in education (human capital) and related public law intervention features as one of the most significant measures in deterring rents, removing the causes of inequality, simultaneously addressing/preventing wage stagnation without increasing EU MS public indebtedness. Identified regulation of higher education as one of the core *ex ante* mechanism for removing the causes of ruinous inequality generated by rent-seeking behavior paper calls for an EU-wide regulatory policy intervention. In addition, the shift of the law-maker's (policy-maker) regulatory attention from the *ex post* policy intervention which merely treats the inequality's symptoms towards the *ex ante* focus on removal of its causes appears as one of the main arguments of our paper.

However, it should be stated that the EU has recently in the field of higher education launched several, outmost promising, initiatives that represent long-awaited steps towards fully harmonized public law framework of higher education[99]. Paper argues that such a policy should be fully supported and designed to tackle the disastrous problem of inequality and related

[99] At a general level EU has in place the "EU promotion of equity, social cohesion and active citizenship" program that aims at fostering the education of disadvantaged children and young people, by ensuring that EU MS education and training systems address their needs. Moreover, policy framework on promoting inclusion and fundamental values through education, as well as an online compendium of good practices are also launched. See http://ec.europa.eu/education/policy/strategic-framework/social-inclusion_en.

destruction of social fabric and cohesion that threats/undermines the sole existence of our European project.

IV.A. EU development of higher education policies

Through its Erasmus+ and Horizon 2020 programs, the EU indeed supports international exchanges for students, academic staff and researchers, as well as structured cooperation between higher education institutions and public authorities in different countries. The stated objective is to create new opportunities for people in higher education to learn from one another across national borders and to work together on joint projects to develop good learning and teaching, undertake excellent research and promote innovation[100].

Moreover, the EU Commission works closely with MS policy-makers to support the development of higher education policies in EU countries in line with the Education and Training 2020 strategy (ET2020)[101]. This renewed EU agenda for higher education, which should also academic credits, adopted by the Commission in May 2017, identifies four key goals for European cooperation in higher education: a) tackling future skills mismatches and promoting excellence in skills development; b) building inclusive and connected higher education systems; c) ensuring higher education institutions contribute to innovation; and d) supporting effective and efficient higher education systems[102]. To achieve each of these ambitious, and long-awaited goals, the EU Commission proposes a set of specific actions at EU-level, primarily supported by different strands of the Erasmus+ and Horizon 2020 programmes. In order to ensure that these aims are met the EU Commission is also developing and supporting tools to promote mobility (such as ECTS and the Diploma Supplement), increase the recognition of skills and qualifications, and provide better information about higher education in Europe. In addition, the EU Commission also provides support to the Bologna Process, designed to promote higher education reform with a view to establishing a European

[100] See EU Commission, *Education and training: Supporting education and training in Europe and beyond*, 2017.
[101] Under this ET2020 strategy each EU country is responsible for its own education and training systems. EU policy is designed to support national action and help address common challenges, such as ageing societies, skills deficits in the workforce, technological developments and global competition. Education and training 2020 (ET 2020) is the framework for cooperation in education and training. Moreover, it is also a forum for exchanges of best practices, mutual learning, gathering and dissemination of information and evidence of what works, as well as advice and support for policy reforms. In order to ensure the successful implementation of ET 2020, Working Groups composed of experts nominated by member countries and other key stakeholders work on common EU-level tools and policy guidance; see https://ec.europa.eu/education/policy/strategic-framework_en.
[102] *Ibid.*

Higher Education Area, and promotes the exchange of good policy practices between different countries through the ET2020 higher education working group[103].

Obviously, considering previous discussion the Education and Training 2020 strategy (ET2020) should be applauded for and is actually designed in line with our suggestions as an *ex ante* mechanism that should remove the causes of inequality and that tackles the part of ruinous income inequality that is caused/enabled by unjustified rents and rent-seeking behavior.

IV.B. 2030 Agenda for Sustainable Development

While addressing EU initiatives one should briefly mention also the 2030 Agenda for Sustainable Development and its 17 goals to transform our world. The very first goal of this Agenda is to end poverty in all its form everywhere, and even thought poverty rates have been cut by fifty percent in the last three decades without increasing social mobility many people risk slipping back into poverty. The term poverty refers not only to the lack of resources (income or wage), but include limited possibilities to education, social discrimination and exclusion as well as hunger in extreme cases. Economic growth must be inclusive to provide sustainable jobs and promote equality[104]. One of the goals is also to ensure equal right to economic resources[105] and to reduce exposure and vulnerability to economic, social and environmental shocks and disasters. Agenda also suggests a creation of a sound policy framework at the national, regional and international levels, based on pro-poor and gender-sensitive development strategies, to support accelerated investment in poverty eradication actions. Another goal closely connected to social challenges is ensuring inclusive and quality education for all and promote lifelong learning, as obtaining a quality education is the foundation to improving people's lives and sustainable development.

CONCLUSIONS

[103] In addition ET2020 sets the following outstanding EU education benchmarks for 2020: a) at least 95% of children (from 4 to compulsory school age) should participate in early childhood education; b) fewer than 15% of 15-year-olds should be under-skilled in reading, mathematics and science; c) the rate of early leavers from education and training aged 18-24 should be below 10%; d) at least 40% of people aged 30-34 should have completed some form of higher education; e) at least 15% of adults should participate in lifelong learning; f) at least 20% of higher education graduates and 6% of 18-34 year-olds with an initial vocational qualification should have spent some time studying or training abroad; and g) the share of employed graduates (aged 20-34 with at least upper secondary education attainment and having left education 1-3 years ago) should be at least 82%; *ibid*.
[104] UN, *op. cit*.
[105] Including basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance.

Traditional economic literature offers *ex post* tax-and transfer system (*ex post* redistribution) and direct social transfers as the exclusive institutional mechanisms that should regulate inequality and social exclusion. This paper, while following De Geest ground-breaking insights, employs an example of the optimal regulatory intervention in the field of public law and its regulation of public higher education, supports the view that legal system might indeed be intrinsically superior to the classic *ex post* interventions (e.g. tax-and transfer system or all-encompassing subsidies) at reducing income inequality that has been caused by the rent-seeking behavior (and not by the differences).

This paper offers *ex ante* investments in higher education (human capital) and related regulatory public law intervention as one of the most significant measures that will in long run address wage stagnation without increasing EU MS public indebtedness. Furthermore, due to the outmost importance of education as an *ex ante* mechanism for rent prevention and for removing the causes of ruinous inequality paper calls for an EU-wide regulatory policy intervention. In addition, legal rules should be designed to *ex ante* deter/prevent formation of inequality that is caused by rent-seeking behavior (rents). If, however, inequality is caused by the differences in efforts or talents then such an inequality should be allowed and might be eventually, according to specific, efficiently justified, normative preferences of a national law-maker, tackled only with the economically suggested *ex post tax-and-transfer system* of redistribution. We argue that the potential *ex post* intervention should only be done in line with previously emphasized economic principles. In other words, e*x post* pursuit of distributive justice should not be done via modifying or reshuffling private legal rights but only via progressive taxation and social welfare programs.

DEFRAGMENTING INVESTMENT DISPUTES

Multilateral Court of Investment Disputes as a Panacea?

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Table of content

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Abstract

Never was there a time whereby investment dispute settlement came to the forefront of every possible communication outlet, from academia and mainstream news to civil societies and an outright protest of the public. TTIP and CETA brought ISDS to a broad daylight scrutiny in many parts of Europe getting the attention of law and policy makers at EU and national level. The criticisms and anxiety over ISDS relates to divergent interpretation of similar or identical International Investment Agreements (IIAs) provisions that lead to inconsistency and unpredictability of decisions, lack of transparency in investment disputes, lack of independence and impartiality of arbitrators, the elite group of arbitrators, costs, diversions of public money from public goods and services, 'chilling effect' on state regulatory powers and bypassing national judicial systems.

With a view to establish and tackle the problem with a meaningful solution to the legitimate concerns and anxieties, the EU, with its competence to conclude the Investment Agreements, attempted to create two mechanisms. The inclusion of Investment Court System (ICS) in newly concluded IIAs and the creation of a multilateral investment court.

This article will assess the three systems together, i.e. the ISDS, ICS, and the multilateral investment court, in terms the pros and cons and attempt to envisage the policy shortcomings or benefits under any of the systems.

Résumé

Jamais il n'y a eu une époque où le règlement des différends en matière d'investissement a été au premier plan de tous les moyens de communication possibles, qu'il s'agisse d'universitaires, de la presse grand public, de la société civile voire d'actions publiques. La TTIP et la CETA ont permis à l'ISDS de faire l'objet d'un examen minutieux dans de nombreuses parties de l'Europe, attirant l'attention des législateurs et des décideurs politiques au niveau européen et national. Les critiques et l'anxiété à l'égard de l'ISDS ont trait à l'interprétation divergente de dispositions similaires ou identiques des accords internationaux d'investissement (AII) qui conduisent à l'incohérence et à l'imprévisibilité des décisions, au manque de transparence dans les différends en matière d'investissement, au manque d'indépendance et d'impartialité des arbitres, à l'élite des arbitres, aux coûts, aux détournements de fonds publics

des biens et services publics, à l'"effet paralysant" sur les pouvoirs réglementaires des États et au contournement des systèmes judiciaires nationaux.

En vue d'établir et d'aborder le problème avec une solution significative aux préoccupations et aux inquiétudes légitimes, l'UE, avec sa compétence pour conclure les accords d'investissement, a tenté de créer deux mécanismes. L'inclusion de l'Investment Court System (ICS) dans les AII nouvellement conclus et la création d'un tribunal multilatéral de l'investissement.

Cet article évaluera les trois systèmes ensemble, c'est-à-dire le SIPDS, le SCI et le tribunal multilatéral de l'investissement en termes d'avantages et d'inconvénients et tentera d'envisager les lacunes ou les avantages de l'un ou l'autre des systèmes.

INTRODUCTION

Though not a new invention in and of itself, the Investor – State Dispute Settlement (ISDS) has never been celebrated like recently. In particular, the reaction from the public in parts of the world where ISDS discussed vastly was notable. It was the central debating issue during the negotiations of the mega-regional trade agreements. This is the case in the EU in the context of the negotiations of the Comprehensive Economic and Trade Agreement (CETA) with Canada and the Transatlantic Trade and Investment Partnership (TTIP) with the United States[1].

Investment protection and ISDS have been at the forefront of a vigorous public debate in the EU on TTIP, hence with, The EU Commission organized a public consultation between 27 March and 13 July 2014 to develop further the EU approach on these important issues[2]. In May 2015, mindful of the public consultation, the Commission presented a concept paper *"Investment in TTIP and beyond – the path for reform - Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court"*[3]. The criticism and anxiety of ISDS can be categorized as criticisms concerning divergent interpretation of similar or identical International Investment Agreements (IIAs) provisions that lead to inconsistency and unpredictability of decisions; pro-investor interpretation of substantive treaty protections; lack of transparency in investment disputes; lack of independence and impartiality of arbitrators; the elite group of arbitrators; costs, diversions of public money from public goods and services; 'chilling effect' on state regulatory powers; ISDS allows international companies to circumvent national judicial systems; the US, EU and Canada have efficient rule of law legal systems; there is no evidence that investors have ever lacked appropriate legal protection through these systems; when governments concede to demands for ISDS provisions, they may be less willing to agree to other reforms, such as greater market access.

[1] Le Monde, "Des milliers de manifestants à Bruxelles contre les traités de libre-échange transatlantiques", Le Monde.fr avec AFP, 20.09.2016 à 19h39, mis à jour le 20.09.2016 à 20h47, available online: http://www.lemonde.fr/economie-mondiale/article/2016/09/20/des-milliers-de-manifestants-a-bruxelles-contre-les-traites-de-libre-echange-transatlantiques_5000915_1656941.html. The Economist, "Why Germans are protesting against free trade", 16/09/2016, available online: https://www.economist.com/blogs/economist-explains/2016/09/economist-explains-9. The New York Times, "German and Austrians Protest EU Trade Courts with US and Canada", 17/09/2016, available online: https://www.nytimes.com/2016/09/18/world/europe/germans-and-austrians-protest-eu-trade-talks-with-us-and-canada.html.

[2] European Union Commission official website, available online: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179.

[3] The European Union Commission official website available online: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

The EU Commission established a two-step systemic approach to ameliorate the actual *ad hoc* ISDS system. The first approach proposed was the creation of an institutionalized court system, investment court system (ICS), for adjudication of investment disputes and incorporate it to future standalone IIAs or FTAs that contain investment protection. The second method was that the EU should, alongside the ICS, work towards the creation of an international investment court and review mechanism, *i.e*. appellate instance, with tenured adjudicators. The intention and project is that the multilateral International Investment Court would replace all the ICS. The ambition of the EU Commission is not envisaged not only to the EU member countries but also to trade partners who are willing to introduce the International investment court in their IIAs and FTAs that contain investments issues and replace the existing dispute settlement mechanism, be it ICS or ISDS[4].

To that end, rhetorical and practical measures were launched with various trade partners both at the technical and political level to reform the current ISDS system and to acquire consensus for the creation of a permanent multilateral investment court[5].

[4] The European Commission, Commission staff working document impact assessment, "Multilateral reform of investment dispute resolution", COM 2017, 493 final, SWD 2017, 303 final, Brussels, 13 September 2017, p. 16.
[5] The European Commission and the Government of Canada co-chair a dedicated session in the margins of UNCTAD's World Investment Forum in Nairobi, Kenya, 17-21 July 2016. Read the co-sponsored discussion paper, accessible at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155266.07.13%20Non-paper%20on%20multilateral%20investment%20court%20(rev2)(clean).pdf; The European Commission and the Government of Canada co-chair technical exchanges at the OECD-hosted Investment Treaty Dialogue in Paris, France, 17 October 2016, read the co-sponsored discussion paper accessible at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155265.pdf last accessed 03/01/2018. The EU and Canada agree in a Joint Interpretative Instrument to CETA to "work expeditiously towards the creation of the Multilateral Investment Court", 28 October 2016, accessible at http://data.consilium.europa.eu/doc/document/ST-13541-2016-INIT/en/pdf. The European Commission and the Government of Canada co-host an inter-governmental expert meeting of investment policy makers from over 40 countries in Geneva, Switzerland, 13-14 December 2016, read the co-sponsored discussion paper accessible at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155267.12.12%20With%20date_%20Discussion%20paper_Establishment%20of%20a%20multilateral%20investment%20Geneva.pdf. EU Trade Commissioner Malmström and Canadian Minister of International Trade Freeland co-host an informal ministerial meeting at the World Economic Forum in Davos, Switzerland, 20 January 2017, read the co-sponsored discussion paper accessible at http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155264.pdf and the Commissioner's blog post accessible at https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/davos-discussing-investment-disputes_en. The United Nations Commission on International Trade Law (UNCITRAL) agreed to work on the possible reform of investor-State dispute settlement (ISDS), 10 July 2017, read the UNCITRAL press release accessible at http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl250.html and listen to the audio recordings of the EU interventions in the morning, accessible at https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/1b00d406-0d09-4dec-a1ab-74cf6dcf8428 and afternoon sessions, accessible at https://icms.unov.org/CarbonWeb/public/uncitral/speakerslog/a398c977-b19c-450f-af33-9f9cac812088. Commission hosts the side event "Multilateral reform of ISDS: Possible paths forward" in the margins of UNCTAD's Annual High-level IIA Conference, 9 October 2017, information and Commission's presentation is accessible at http://investmentpolicyhub.unctad.org/Pages/unctad-annual-high-level-iia-conference-phase-2-of-iia-reform and watch the video recording of the event available online: https://owncloud.unog.ch/index.php/s/nYMA273kunWs1GE/download. From 27th November to 1st December 2017, UNCITRAL Working Group III held its first session and is available online: http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html.

I. WHAT IS WRONG WITH ISDS AND WHY IS IT IMPORTANT TO REFORM THE SYSTEM

I.A. What is the fundamental problem that required a reform, what is the extent of the Problem

It has been well over half of a century since investment dispute between investors and host states of their investments are adjudicated via ISDS created through the different International Investment Agreements[6]. Up-to-date the investment hub policy under the auspices of United Nations Conference on Trade and Development (UNCTAD) registered 2951 standalone bilateral investment treaties of which 2363 are in force and 373 treaties with investment provisions (TIPs) of which 310 are in force[7]. The dispute that arises from these agreements is in the form of violations or inconsistencies of legal obligation enshrined in it such as, the Most Favoured Nation (MFN) principle that guarantees equal treatment of different foreign investors, National Treatment that guarantees equal treatment as domestic investors and protection against unlawful expropriation and ensuring fair and equitable treatment of investors and investments[8].

The unique feature of the ISDS proceeding is that it allows individual investors to bring claims where their rights, duly enshrined in the agreements, are violated or that certain measures are inconsistent with the investment agreements. The investor is not required to request its government to bring the case thereby avoiding any diplomatic or politicization of the dispute.

As per the IIAs, investment disputes are usually adjudicated by an ad hoc tribunal where each litigant appoint one arbitrator and the selected arbitrators appoint the third one or in situations where the appointed arbitrators are unable to reach agreement concerning the appointment of the third arbitrator an appointing authority will be requested to undertake the appointing task. Unlike standing full-fledged courts, these *ad hoc* tribunals are made to be disbanded once adjudication is terminated and a final award is pronounced. The decisions pronounced by the tribunals has a binding effect only to the parties to the dispute and that it has no legal precedent to other similar dispute under the same IIAs since the adjudication is in *ad hoc* basis and that it is disbanded only to leave the next case for another composition.

[6] R. Abbott, F. Erixon, M. F. Ferracane, "Demystifying investor-state dispute settlement (isds)", European Center for International Political Economy, ECIPE occasional paper, 2014, n. 5, p. 5.
[7] United Nations Conference on Trade and Development (UNCTAD), "investment policy hub", available online: http://investmentpolicyhub.unctad.org/.
[8] Organisation for Economic Co-operation and Development Investment Division, "Dispute settlement provisions in international investment agreements: A large sample survey", 2012, p. 25.

The arbitration procedure and rule of conduct of arbitrators are usually incorporated in the IIAs. The most frequented arbitration rules are the Arbitration Rules under the International Convention for the Settlement of Investment Disputes (ICSID Convention)[9], or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL)[10].

Arbitration awards rendered by the ISDS *ad hoc* tribunals are final, binding on the disputants and are not subject to review or appealable on grounds of grave errors of law or misrepresentation of facts[11]. It is only upon the request of either of the disputing parties that an award can be annulled or set-aside, in full or in part, under very limited procedural grounds[12]. UNCATD's investment dispute settlement navigator shows that, as of 31st of July 2017, there have been 817 ISDS arbitration of which 528 are concluded, 278 are pending and 11 have an unknown status[13]. Of the concluded arbitrations 36.6 percent are decided in favour of state, 26.9 are decided in favour of investors, 23.5 percent are settled and 10.6 percent are discontinued[14].

As has been indicated the ISDS system has been criticized for numerous reasons throughout the world but particularly in the EU upon the negotiation of CETA and TTIP. The EU commission has assembled all the concerns from different stakeholders and highlighted the deficiency of the system in terms of legitimacy, predictability and interpretative consistency of case law, lack of possibility of review of decisions, lack of transparency and costs of the proceedings. To tackle these shortcomings the EU Commission, since 2015, started an attempt to institutionalize the adjudication system of investment related disputes (ICS) in recently concluded agreements and to replace the old agreements ISDS system through time or wait until they phase themselves out.

The proposal forwarded by the EU Commission establishes a Tribunal of First Instance and an Appeal Tribunal with permanent tribunal members that are to be appointed by the EU and its respective FTA or investment treaty partners[15]. The appointed members of the tribunals will be expected to have well-established qualifications as is the case for major international

[9] ICSID Convention, "Regulations and rules", available online: https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf.
[10] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available online: http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.
[11] The European Commission, "Multilateral reform of investment dispute resolution", Commission staff working document impact assessment, COM 2017, 493 final, SWD 2017, 303 final, 13 September 2017, p. 7.
[12] *Ibid*., p. 8.
[13] UNCTAD, "Investment dispute settlement navigator", available online: http://investmentpolicyhub.unctad.org/ISDS.
[14] *Ibid*. Note that an unspecified percentage of certain disputes' status is indicated as unknown.
[15] *Supra* note 8, p. 10.

tribunals in the world and disputes will be allocated to these adjudicators on a random basis. Furthermore, a detailed and well-constructed code of conduct will be drafted to guide the adjudication procedures.

In terms of remuneration duly and jointly appointed members of the tribunal will be paid a monthly retainer fee to guarantee the availability of highly qualified individuals in a short notice. They are also paid a daily fee per day actually worked. The costs of the monthly retainer fees and the daily fees for the Appellate Tribunal members are to be shared by the Parties to the agreement. In order to circumvent the deficiency of transparency the procedure of the tribunal will be subject to the UNCITRAL rule on transparency[16] that means that hearings, documents and awards will be made available to the public.

The desire to engage on a multilateral reform of investment disputes adjudication aims at addressing issues that arose from two scenarios; ISDS – The classic problems pinned to ISDS continue to exist which relates to legitimacy, consistency and predictability, lack of possibility of review, transparency and high costs for users. ICS and ISDS coexistence – the incorporation ICS solves a number of problems of ISDS such as legitimacy, lack of review and transparency. However, the problems of predictability, consistency of case laws and cost remain to be unresolved.

I.A.1. Issues arising from ISDS

I.A.1.a. Lack of consistency and predictability of case Law

To highlight the source of the problem one has to focus notably on the impermanency of the *ad hoc* tribunals i.e. the tribunals are created only for a specific dispute and render a binding decision only to the actual dispute only then to be disbanded. There is no coherence, judicial dialogue or coordination between the different tribunals and no formal possibility of consistent interpretations of substantive rules of investment protection despite the fact that most, if not all, of the IIAs contain identical or similar protections of MFN and national treatment of non-discriminatory principles, compensation against unlawful expropriation and fair and equitable treatment (FET)[17]. The majority of the IIAs are bilateral and that the substantive provisions must be read in light of each agreement's context and the parties' intention.

[16] UNCITRAL, "Rules on Transparency in Treaty-based Investor-State Arbitration", available online: http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf.
[17] *Supra* note 12, p. 12.

Ad hoc tribunals in ISDS are tremendously fragmented and has no incentive or obligation to refer to preceding awards to interpret substantive obligations before them despite the fact that similar claims under same treaty has been already adjudicated thereby a certain interpretation has been established. In addition, there is no review mechanism that could have created a two-tiered process, which enhance quality and build a coherent body of jurisprudence.

The inevitable consequence of the deficiency of coherent and consistent body jurisprudence is lack of predictability which has a significant impact on legal certainty, expectations and confidence for investors, states and other stakeholders. More importantly it erodes the ability of all the actors to adjust, calibrate and plan their actions by relying on previous interpretations and anticipate the outcome of disputes. With the ISDS system disputes can repeat infinitely in hoping that some tribunal will take it wasting time, money and energy.

The anxiety and concern is not a mere potential problem. An ISDS case under the US-Argentina Bilateral Investment Treaty exposes such troubling reality in practical terms. While the tribunal that adjudicated the LG&E[18] case accepted Argentina's plea of necessity justifying the breach of the obligations, another tribunal that adjudicated the CMS[19] case found that the conditions for accepting the defence of necessity were not met. This meant that damages were payable in one case but not the other, although both cases were brought under the same treaty and based on the same facts. Another example of conflicting decisions with regard to similar BITs on identical facts is the two cases brought by the company CME and its shareholder Ronald Lauder against the Czech Republic under this country's investment treaties with the Netherlands and the US[20]. The tribunals gave two contradictory awards, with one dismissing the claim while the other awarded damages to CME. Among other provisions, the tribunals interpreted differently the scope of the standard of full protection and security. While one tribunal found that the standard may only be breached in case of physical violence or damage to the investment, the other tribunal adopted a much broader view encompassing also a duty to provide legal protection to investors[21].

[18] ICSID, "LG&E Energy Corp. LG&E Capital Corp. LG&E International, Inc. (Claimants) vs Argentine Republic (Respondent)", Proceedings, ICSID case n. ARB/02/1, Date of dispatch to the parties: July 25th, 2007.
[19] ICSID, "CMS Gas Transmission Company vs Argentine Republic", Proceedings, ICSID case n. ARB/01/8, Date of dispatch to the parties: September 25th, 2007.
[20] UNCITRAL, "Ronald S. Lauder v. The Czech Republic", 3 September 2001.
[21] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 2nd ed., 2012.

I.A.1.b. Lack of legitimacy and safeguard for Independence

It is an undisputable and unmistakeable fact that impartiality, efficacy and quality are the foundational elements of an effective justice system. ISDS dispute proceedings differ considerably from the classical or traditional court of law adjudication for all the reasons discussed before. However, ISDS tribunals are not comparable to one-off arbitration since ISDS tribunals are interpreting treaties that first, bear a great deal of similarity and second, need to be applied repeatedly. Partly for this reason and partly because it is applied to solve disputes between an individual and a state, the use of ISDS has been broadly criticised[22].

I.A.1.c. Lack of appeal review Mechanism

As has been indicated in the introductory part the ISDS dispute settlement system procedures establish very limited grounds for appeal. Under ISDS, awards can only be cancelled, in full or in part, or set aside in situations such as corruption, erroneous constitution of the *ad hoc* tribunal, breaches of procedural rules. Conversely, awards rendered by the ISDS systems review is not possible under the grounds that decisions contain a grave legal error or when decisions are factually misrepresented and flawed which is detrimental to the quality of the award rendered by the ad hoc tribunals in ISDS system. ICSID annulment committee in CDC group plc. *v*. Republic of Seychelles demonstrates that:

> "The main function of annulment is to provide a limited form of review of awards in order to safeguard the integrity of the proceedings"…"this [limited review] mechanism protecting against errors that threaten the fundamental fairness of the arbitral process (but not against incorrect decisions) arises from the ICSID drafters desire that the Awards be final and binding …"[23]

The deficiency of the lack appeal review system is seriously problematic. There is no coming back from awards that are inaccurate in interpretations which manifest evidently irrational examination of facts and erroneous application of law.

I.A.1.d. High Cost

ISDS dispute settlement mechanism is highly expensive for disputing parties that resort to the system that can create a problem of access to the system and availability of legal remedies.

[22] J. C. Thomas, H. K. Dhillon, "The Foundations of Investment Treaty Arbitration", *Foreign Investment Law Journal*, 1st October 2017, v. 32, Issue 3, pp. 459-502.
[23] ICSID, "CDC group plc. v. Republic of Seychelles", decision on Annulment, ICSID case n. ARB/02/14, 29 June 2005, § 36.

Research[24] by the OECD indicates that the average legal and arbitration cost for a claimant is around $8 million. The largest cost component is the expense incurred by each party for their own legal counsel and experts that is about 82 % of the cost of an ISDS case. Arbitrator fees average about 16% of costs. Institutional costs payable to organisations that administer the arbitration and provide secretariat are low, generally amounting to about 2% of the costs[25].

The EU Commission stated that:

> "An OECD survey carried out between 2006 and 2011 of 100 ISDS cases indicates that almost a quarter (22%) of the claimants were either individuals or very small corporations with limited foreign operations (one or two foreign projects). Almost half the cases (48%) were brought by medium and large enterprises, varying in size from several hundred employees to tens of thousands of employees, while only 8% of these were large multinational companies. In 30 % of the cases there was little or no public information on the type of claimant. Data on potential claimants who did not bring claims due to excessive costs is not available. It is possible that micro-enterprises are practically deprived from this dispute resolution route, given the average costs"[26].

I.A.1.e. Transparency

Following the practice of commercial arbitration, one of the features of the ISDS adjudication is its strict confidentiality of the proceedings. Different ISDS proceedings involve degree of transparency from the constitution of the *ad hoc* tribunal to the rendering an award. One thing that is common is the lack of full disclosure that might include vital information such as the identity of the litigants, their claims and the final award rendered by the *ad hoc* tribunal.

A considerable effort to rectify and reform the deficiency of transparency in ISDS proceedings is being taken at the international level in a not systematic manner where certain states include transparency requirements in their investment agreements while others put it in practice. A notable example of this attempt at the international level is the adoption of the UNCITRAL Rules on Transparency in Treaty - based Investor – State Arbitration[27] that creates access of hearings and documents to the public. Furthermore, it created a channel that permits third parties to make their submission. In line with this initiation is the Mauritius Convention on Transparency in ISDS[28] which has entered into force in October 2017. As of this moment

[24] D. Gaukrodger, K. Gordon, "Investor-State Dispute Settlement a Scoping Paper for the Investment Policy Community", *OECD Working Papers on International Investment*, 31 December 2012, n. 3, p. 9.
[25] *Ibid*.
[26] *Supra* note 15, p. 15.
[27] *Supra* note 13.
[28] United Nations, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, the "Mauritius Convention on Transparency", date of adoption 10 December 2014, Entry into force 18 October 2017.

the convention has three parties[29] and 19 signatories. The Convention is an instrument by which Parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration. The convention has the potential to eventually apply the UNCITRAL transparency rules to all existing investment agreements. Nevertheless, with respect to pre-existing investment treaties, these rules only apply where individual states have agreed to apply them via the Mauritius Convention. As Lord Hewart CJ has stated "*it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*"[30]. Importantly, without transparency, the public can never justifiably believe that ISDS is predictable. How can we judge that it is operating predictably if we cannot see how it is operating? Perceptions of predictability are just as important as actual predictability for the future of the institution. Transparency is a widely held value in almost all the legal systems. It is an important virtue of systems that carry a liberal democracy in which the decision making process is based on. It is an integrated part of adjudication process. The most important feature for the ISDS is that citizens presume that publicly open dispute settlement establishes fairness and equity. A lack of transparency combined with appointment of arbitrators by the disputing parties erodes such expectation of the people. Consequently, the continuing lack of transparency is a problem in itself and contributes to problems of consistency in case-law.

I.A.2. Problems remaining under ICS or arising where ISDS and ICS Coexist

The incorporation of ICS in investment treaties helps to tackle various deficiencies legitimacy and independence, consistency and predictability of case-law within each agreement, possibility of review and transparency.

However, tackling those deficiencies at bilateral level will be proliferation of ICSs and that it will become burdensome in terms of administration and cost as it demands a significant amount of resource to handle well over 3000 IIAs. In light of those shortcomings the problems and deficiencies created by the ISDS system can only meaningfully be tackled and addressed in engaging in multilateral reform of the current investment dispute resolution mechanism.

[29] Canada, Mauritius and Switzerland.
[30] UK High Court of Justice, "R v Sussex Justices, Ex parte McCarthy", 1 KB 256, 259, 1924.

I.A.2.a. Lack of consistency and predictability of case – Law

Even though the incorporation of the ICS systems helps to address some of the deficiencies of the ISDS system, it has its own limitations. It can be effective in bringing consistency and predictability of case laws with regard to a substantive interpretation of standards that is enshrined in a given investment agreement. The limitation of the system in guaranteeing a consistent interpretation of substantive obligations enshrined in IIAs emanates from the fact that fragmented and different ICS exist for each IIAs. In this case the risk of different interpretation of identical or similar substantive provisions by different ICS remains to be a deficiency.

I.A.2.b. Costs

The EU Commission calculated the cost of ICS in order to show why the multilateral investment court proposal is advantageous. Accordingly,

> "The inclusion of an ICS in each EU agreement has implications for the EU budget. It is estimated that each ICS, if active with one case before the First Instance Tribunal and one case under Appeal, would cost around EUR 800,000 per Contracting Party per year. Calculations are based on permanent judges and members of the Tribunal of First Instance and of the Appeal Tribunal being part-time and remunerated on the basis of retainer fees and fees for day actually worked. In some EU trade and investment agreements (e.g. EU-Viet Nam FTA), it has been decided that the division of costs amongst the EU and its treaty partner will take account of the development level of the Parties, which in practice may mean that the EU would bear a significant amount of the costs"[31].

In comparison with ISDS, the ICS is normally efficient in terms of cost. Research by the OECD12 indicates that the average legal and arbitration cost for a claimant is around $8 million. The largest cost component is the expense incurred by each party (investor and state) for their own legal counsel and experts (about 82 % of the cost of an ISDS case). Arbitrator fees average about 16% of costs. Institutional costs payable to organisations that administer the arbitration and provide secretariat are low, generally amounting to about 2% of the costs[32]. However, a multilateral investment court can save resources by centralizing the adjudication of investment disputes in on multilateral investment court.

[31] *Supra* note 8, p. 16.
[32] European Commission, "Investor to State Dispute Settlement (ISDS), some facts and figures, Towards an EU-US trade deal, making trade work for you", 12 march 2015, p. 9.

II. WHAT ARE THE VARIOUS OPTIONS TO REFORM THE INVESTMENT DISPUTE SETTLEMENT AND THEIR FEASIBILITY?

II.A. Baseline Scenario

According to the baseline scenario, it would mean to continue to negotiate bilateral trade and investment or standalone investment agreements and incorporate ICS as a mechanism to settle investment disputes between the parties. As far as ISDS is concerned, it will continue to coexist as long as pre-ICS treaties exist that utilizes the system or at least until the treaties phase out in due time.

As has been indicated in the premise the deficiencies that are related with the system of ISDS will gradually be avoided with considerable limitations. Creation of ICS for each newly concluded bilateral trade and investment or standalone investment agreements is not only challenging to manage due to limited resources but also it does not help to heal the fragmentation and inconsistencies of interpretations of identical or similar substantive investment obligations that is well spread in different IIAs. Furthermore, practically the inclusion of ICS can only be feasible to new agreements.

II.B. Renegotiation of BITs and free trade and investment Agreements

Renegotiating all the existing standalone investment and free trade and investment agreements' dispute settlement anew and introduce the ICS system is another path for the reform. The introduction of ICS will come with the incorporation of specific provisions that would systematically address the appointment of arbitrators that creates a considerable effort of permanency detaching it from the disputing parties. The system will also introduce an appeal system and incorporate the UNCITRAL rules on transparency.

It is a very burdensome and somewhat risky attempt to amend each and every single IIA. Cost and time wise, it is consuming to be engaged with partners to sit down and revisit the investment dispute settlement system not to mention the risk that partners will seize the opportunity to reopen negotiations on matters that are not related to the investment dispute settlement system. There exist also no guarantees that the renegotiation of well over 3000 IIAs will end up being coherent.

II.C. Reform of international arbitration Rules

Reforming international arbitration rules would be restructuring the several rules of arbitration that governs the proceedings of ISDS such as rules of ICSID, of UNCITRAL, or of

the PCA so as to bring these rules in line with ICS constitution that will introduce the much preferred values of permanent seat of adjudication for arbitrators, appointment of arbitrators without the involvement of the parties and an appeal mechanism.

Though fool proof is the policy in theory, it has its own defaults and shortcomings. To begin with, there is no common institutional framework for the procedural aspect of ISDS; this is to mean that apparently to renegotiate several sets of arbitration rules where it is different according to the system chosen by a given arbitration system, i.e. some, for instance, used predominantly adjudication of commercial dispute instead of investment. As a result, renegotiating would be complex and a difficult task.

Several reasons can be illustrated why reforming the existing investment dispute settlement forum in order for it to function as a multilateral investment court does not seem feasible. The notable one is the fact that ISDS does not function in a uniform rule; therefore, reforming an institution or a given arbitration rules does not tackle disputes under another institution or arbitration rules. Furthermore, some of these institutions have an established jurisdiction to apply certain established rules that requires unanimous consent of the members to amend it. Other reason relates to legitimacy. For instance, some of the main actors in the field are closely related to business interests.

II.D. Establishment of a multilateral appeal Instance

An appealing reform with the creation of a permanent multilateral appeal instance that will have jurisdiction to adjudicate appeals based on grave errors of law and misrepresentations or misinterpretations of facts. The multilateral appeal instance will be receiving appeals from *ad hoc* tribunals of ISDS and ICS.

A permanent multilateral appeal instance means consistency and predictability of case laws even though it will be limited only to the amount of cases appealed. It ensures legal certainty as a two-tier adjudicating systems fosters an enhanced quality of decisions. It is also in line with the advantages of ICS in relation with cost and transparency.

Nevertheless, this is not without some drawbacks. The significant obstacle will be remanding cases. Appeal instances rules on questions of law and send back the case to the first instance. A standing functional first instance is a prerequisite for the proper operation of appeal instance. In cases where the first instance has erred in law or in fact and the appeal instance has reversed the decision it send it back to the first instance to correct accordingly. Under this

scheme the idea of multilateral investment appeal instance will work without a problem for all the IIAs that contain ICS but not ISDS. The ISDS tribunals are created to adjudicate a certain dispute and then are disbanded after the final award. The competence of an appeal instance is to only hear questions of law. It is not of the task of the appeal instance to be engaged in adjudicating facts[33].

Another problem that is significant is that it will not tackle all the problems enumerated at the first instance level under both ISDS and ICS. All the major concerns involving legitimacy, consistency and predictability and consistency, at least with regard to awards that were not appealed, costs and transparency at the first instance level of ISDS and ICS remain to be unresolved. Consequently, although multilateral investment appeal instance has a potential to serve to the amelioration of investment disputes, it is not enough to address and tackle all the problems.

II.E. Establishment of multilateral investment Court

The multilateral investment court will be consisted of a tribunal of first instance and an appeal instance and would have the jurisdiction to adjudicate investment disputes of all kinds. The Court would deal with the agreements (both existing and future ones) between two countries when both countries have ratified the agreement establishing the multilateral investment court and both countries have agreed that the bilateral investment agreement or FTAs with investment provisions between them should be subject to the multilateral court. By the same token similar mechanism is applied for the UNCITRAL Transparency Rules for Treaty-based Investor-State Arbitration to existing agreements. The Appeal Instance would hear appeals of the decisions of the First Instance Tribunal. Both instances would be staffed by tenured adjudicators remunerated on a permanent basis and should have a secretariat to support their daily work. The precise design, functioning and technicalities of several aspects of the Court would depend on the multilateral negotiations.

The features of the Court present more than one possible sub-options which include:

A. Composition of the court:
   a) Number of adjudicators – depends on the number of contracting parties or volume of cases;

[33] In the WTO dispute settlement system, divisions of the permanent Appellate Body only examine issues of law and do not have the possibility to remand cases to the ad hoc panel. This is an issue of concern to the EU in the WTO. The EU has made proposals to change the system.

b) Terms of office – long or short, renewable or one – time;
c) Employment status of adjudicators – full time or part time;
d) Adjudicators' qualifications – experience –based or knowledge based;
e) Adjudicators' ethical requirements: precluding any other professional activity or only those related to investment dispute settlement;

B. Procedural aspects:
a) Appointment of adjudicators: by the Contracting Parties, by a separate body or by an independent body;
b) Case allocation: random or according to disputing party's choice;
c) Scope of appeal: allowing for a certain review of the facts;

C. Institutional aspects:
a) Secretariat: creation anew or relying on an existing organisation;
b) Mechanism to be part of the Court: through and opt-in or re-negotiating each treaty;
c) Support to SMEs: yes or no;
d) Support to Developing Countries: yes or no;

D. Financial aspects:
a) Allocation of costs among Contracting Parties: according to level of development or equally; and
b) Mixed financing (i.e. user fees): yes or no

II.F. Negotiation of multilateral substantive investment Rules

Simply put, this would be seeking to negotiate multilateral substantive rules on investment protections as a wider framework for the negotiation of the investment dispute settlement mechanism. This is not a new proposal; an attempt has been done before. Negotiations on a proposed multilateral agreement on investment (MAI) were launched by governments at the Annual Meeting of the OECD Council at Ministerial level in May 1995. The objective was to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures, open to non-OECD countries. Negotiations were discontinued in April 1998 and will not be resumed[34].

[34] OECD, Multilateral Agreement on Investment, SG/PRESS (95)65, Paris, 27th September 1995.

Despite the failure of the initiation the EU Commission has pick up the pieces and tried to pursue the agenda particularly it strives to negotiate clearer and more precise investment substantive rules in its most recent BITs.

Yet, although theoretically attractive, it is not politically feasible at the actual atmosphere to engage in multilateral negotiations on substantive investment rules. According to the EU Commission:

> "There is currently insufficient appetite across countries to re-start such negotiations, in part because countries do not agree on the broad parameters of what such a discussion should encompass. Also, nothing suggests that there is a willingness to leave legal approaches behind in favour of a unified approach to substantive investment standards."[35]

At the WTO level there is a new initiative in various tracks including investment facilitation. On investment facilitation, 70 WTO members, recognizing the links between investment, trade and development, announced plans to pursue structured discussions with the aim of developing a multilateral framework on investment facilitation. The proponents, who account for around 73% of trade and 66% of inward foreign direct investment (FDI), agreed to meet early in 2018 to discuss how to organize outreach activities and structured discussions on this topic[36].

It is a long term project that it is worth achieving. However due to lack of determination the longevity of the negotiations it not considered feasible to embark on multilateral substantive investment protections rules negotiations.

II.G. Improving ISDS in BITs

One of the ways forward is instead of a radical reform of the existing investment dispute settlement system multilaterally, reforms should be taken in bilateral investment agreements that are deeper than just a mere ICS. This includes introduction of more stringent ethical requirements for arbitrators in order to prevent possible conflicts of interest and overall address their neutrality and the system's legitimacy; possibility for interested stakeholders to meaningfully intervene in ISDS proceedings; introduction of the necessary flexibilities so that the fees system in ISDS is not prohibitive for SMEs; extension of the type of remedies available under ISDS to introduce the possibility of non-pecuniary remedies, including mandating a

[35] *Supra* note 27, p. 31.
[36] WTO, "Joint Ministerial Statement on Investment Facilitation for Development", Ministerial Conference Eleventh Session Buenos Aires, WT/MIN (17)/59, 10-13 December 2017, 13 December 2017.

change in the host State's legislation; and exhaustion of domestic remedies (i.e. obligation to seek redress at the host state's courts) as a pre-requirement to file an ISDS dispute.

However, this option includes points that are not part of the EU's or Member States' traditional approach in investment, such as exhaustion of domestic remedies. Similarly, investment policy makers have consistently rejected the idea of non-pecuniary remedies as being too intrusive on the right to regulate. In addition, it is based on a bilateral approach and would require the EU to renegotiate the agreements where an ICS has been included and that it seeks to negotiate a further reformed system in future negotiations. It would therefore require large resources and still not guarantee a uniform outcome to all such negotiations.

II.H. Making national courts competent to decide on investment Dispute

It is also possible to envisage the current ISDS investment dispute settlement mechanism to be phased out and that disputes between an investor and host state be settled by the competent domestic courts of the host state. In variation, recourse to domestic courts would apply in host states that are considered to provide sufficient guarantees regarding their judicial systems. In those states that fail to give satisfactory guarantees, a parallel ISDS system would be in place.

Making national courts competent to hear investment disputes arising from treaties with third countries would run counter to the main purpose of international dispute settlement systems (e.g. ICJ, WTO dispute settlement system and International Tribunal for the Law of the Sea (ITLOS)), which is to provide an international and neutral forum for the resolution of cross-border disputes. This builds on the assumption that a potential for bias exists where a foreign investor seeks redress in a domestic court of a partner country, especially against the government of that country. For this reason, international systems (i.e. different from national fora) for the resolution of disputes are considered necessary. International investment agreements are of course based on the principle of reciprocity – the idea is that both countries consider it desirable that their nationals, when operating in a third country, are afforded the opportunity to be heard by international tribunals and be protected under international law.

To put this into practice would require either removing all existing treaties and hence dismantling the existing system, or requiring that all such treaties be directly effective which is against the constitutional practices of a significant number of states.

III. WHAT ARE THE IMPACTS OF THE DIFFERENT POLICY OPTION, WHO WILL BE AFFECTED AND WHAT IS THE BEST WAY FORWARD

III.A. Baseline Scenario

There is no change envisaged under the baseline scenario i.e. the negotiation will continue in incorporating ICS in newly negotiated bilateral trade and investment or investment agreements while ISDS will coexist as long as BITs that use the system exist and did not yet phase out.

III.A.1. Composition of Tribunals

III.A.1.a. Where ISDS Applies

ISDS is known to be impermanent as *ad hoc* tribunals are constituted solely for a given investment dispute only to be disbanded thereafter. Independence of arbitrators is not guaranteed as they are appointed by the disputing parties which in turn erode the legitimacy criteria.

The lack of security of tenure and the party-appointment mechanism are perceived to have a negative impact on the right to a fair trial and effective remedy because such features do not ensure the confidence of all stakeholders in the system.

III.A.1.b. Where ICS Applies

In comparison with ISDS, the ICS systems contributes significantly to the permanency of tribunals since its structure is a two-tier proceeding with permanent adjudicators sitting at a first and appeal instance. The ICS system resolves also the question of legitimacy as it requires the disputing parties to refrain from appointing adjudicators that in turn creates a safeguard of impartiality and independence of tribunals. As an appeal instance is an integrated structure of the ICS system it helps to create a consistent and predictable case laws.

Introducing tenure and permanency has a positive impact on the right to a fair trial and an effective remedy and contributes to the global objective of supporting the principle of rule of law.

In terms of efficiency however, the multiplication of ICSs in bilateral agreements would require significant human and financial resources to manage.

III.A.2. Procedural Aspects

III.A.2.a. Where ISDS Applies

Under the ISDS system there is no appeal therefore the goal of having a two-tiered system is unachievable. Even though very limited grounds are available for appeal purposes, it is nowhere near to a full-fledged classical appeal mechanism.

Enforcement of arbitral decisions is therefore due (subject to the specificities of the applicable regime, whether the ICSID Convention or the New York Convention) regardless of any possible legal or factual errors. This does not bring legitimacy to the system. Predictability and consistency of case-law are not achieved since arbitrators are not bound by previous decisions and there is no systemic requirement to take account of them. The lack of uniform coverage of binding transparency rules (since enhanced requirements have only been adopted by some countries) only makes the system more opaque and inaccessible to citizens.

The absence of an appeal and the limited transparency in the traditional ISDS system has a negative impact on the right to a fair trial and effective remedy.

III.A.2.b. Where ICS Applies

The existence of an appeal instance brings predictability and consistency of case-law within given bilateral agreements. The appeal allows preventing any legally incorrect decision be enforced. Under the ICS, decisions are enforced under the same terms as under ISDS. This is done by referencing the relevant existing rules (e.g. ICSID Convention or New York Convention) in the underlying FTA. Transparency is achieved through important disclosure requirements embodied in the UNCITRAL Rules on Transparency. Introducing an appeal instance and providing for transparency rules has a positive impact on the right to a fair trial and effective remedy and contributes to the global objective of supporting the principle of rule of law.

III.A.3. Institutional Aspects

III.A.3.a. Where ISDS Applies

Existence of a permanent institution with a secretariat support fosters a dispute settlement smooth operation and consistency of case laws as there exist a standing court available whenever an investment dispute arises. Such institution is not the feature of ISDS, *ad hoc* tribunals under ISDS are not permanent. The lack of permanency and fragmentation does

not contribute to predictable and consistent case-law. These features do not contribute to the legitimacy of ISDS.

III.A.3.b. Where ICS Applies

The EU has designated, regarding CETA[37] and the agreement with Vietnam, ICSID to provide a secretarial support. Among the different services the support includes managing judges' payment[38], provide logistic support and act as repository for disputes. To have ICSID as a single forum of secretariat for all the ICS dispute settlement enhances an efficient usage of resources.

III.A.4. Financial Aspects

III.A.4.a. Where ISDS Applies

Generally speaking, under the ISDS dispute settlement procedure, costs borne by States are those related to their status as respondent in a given dispute, i.e. the arbitrator's fees, the fees of the arbitration institution handling the dispute, the costs of experts and the costs for legal counsel.

However in other circumstances, arbitral tribunals have ruled that each disputing party should bear its own costs while others have applied the principle that "costs follow the event", making the losing party bear all or part of the costs of the proceeding and attorney fees. Examples of arbitration on apportionment of costs are UNCITRAL Article 40(1) and ICSID Article 61(2). Article 40(1) of the UNCITRAL Rules provides that the costs of arbitration shall in principle be borne by the unsuccessful party. It also grants the Tribunal discretion to apportion the costs otherwise between the Parties if it considers a different apportionment reasonable taking into consideration the circumstances of the case. Article 61(2) of the ICSID Convention provides that:

> "the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of facilities of the Centre shall be paid. Such decision shall form part of the award".

[37] CETA, Article 8.27: the ICSID Secretariat shall act as Secretariat for the Tribunal and provide it with appropriate support.
[38] *Ibid*., Article 8.13.

The costs of ISDS proceedings are high that costs a claimant up to 8 million USD[39]. Such high cost can discourage small actors from having access to justice due to the incapacity to afford for the litigation.

III.A.4.b. Where ICS Applies

States are better off in ICS in terms of costs than ISDS. For instance, the EU Commission has observed the following:

> "The ICS is partly funded (in particular the appeal instance) by the Parties to the agreement, which diminishes the risk that costs discourage users from bringing cases. Where the ICS is active, the EU proposal in the TTIP negotiations makes a distinction between costs that are borne equally by the Contracting Parties and costs that are allocated by the tribunal among the disputing parties. The tribunal will be able to order that all or part of the costs which fall to the respondent as a disputing party be borne by the unsuccessful disputing party according to the "loser pays principle". To estimate the costs when ICS is active, an assumption of one case before the first instance tribunal and one case under appeal was made. This resulted in estimated costs of around EUR 800,000 per Contracting Party per year."[40]

The problem is the existence of various ICS in each agreement to be concluded and the difficulty that emanates from an efficient management and cost necessary to manage all ICS.

III.A.5. Multilateral investment Court

This policy option is a preferred objective according to the EU Commission that requires a multilateral dialogue with other interested countries.

III.A.6. Composition of the Court

III.A.6.a. Number of adjudicators of the first level tribunal and appeal Tribunal

The structure of the multilateral court consists of a first instance and appeal tribunal. As a matter of jurisdiction the first instance tribunal will adjudicate legal claims, evidence, and legal analysis and render a decision and the Appeal tribunal would receive appeal claims. A better consistency of case laws and predictability of cases can be achieved through the multilateral investment court.

[39] D. Gaukrodger, K. Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", *OECD Working Papers on International Investment*, OECD Publishing, 2012, n. 3, p. 19.
[40] *Supra* note 32, p. 37.

The proposal provides two alternative choices regarding the number of adjudicators under the multilateral court; number linked to the number of contracting parties or number linked to the volume of cases.

III.A.6.b. Number linked to the number of contracting Parties

This practice is often used in international courts to ensure that there is at least one adjudicator from each Contracting Party. However, it means that less suitable candidates may become adjudicators (since origin may be prioritised over qualifications or competences). In addition, the number of adjudicators appointed might be too high unless there are a corresponding number of cases. Such a scenario risks leading to inefficiencies.

III.A.7. Number linked to the volume of Cases

This would be more in line with the objective of efficiency. Considering that the number of Contracting Parties to the multilateral Court is unknown but would be expected to grow over time, the number of adjudicators should be flexible enough to adapt to the workload. This is the approach favoured by most recently established international courts (such as the International Criminal Court (ICC) and ITLOS).

In terms of impacts, the estimated cost for the (fixed) remuneration of one adjudicator is around EUR 285,000 per year on the basis of the average annual remuneration level of judges in international courts and tribunals. It is impossible to be certain at the time of the EU Commission's proposal the number of adjudicators but on the basis of a reasonable estimate (nine adjudicators at first instance, five on appeal) the remuneration of adjudicators under the multilateral court is estimated to cost almost EUR 4 million per year (i.e. around EUR 2.5 million for the First Instance plus around EUR 1.5 million for the Appeal Tribunal)[41].

Regarding the number of adjudicators, it is likely that this figure would be lower if it were tailored to the effective workload, which would result in overall lower costs for the EU and indeed all participants. This sub-option would be more advantageous for the EU budget as well for the budgets of Member States[42]. Tailoring the number of adjudicators in the First Instance and Appeal tribunals to the volume of cases would therefore appear to be the most

[41] Explanation of cost analysis can be found in annex 4 of the Commission staff working document impact assessment "Multilateral reform of investment dispute resolution". *Supra* note 4.
[42] *Ibid*.

efficient option although this would of course depend on the outcome of negotiations and of the future Court's overall structure.

III.A.8. Terms of Mandate

Judges of the multilateral investment court will be appointed for a fixed period of time, i.e. permanent, instead of on a case by case basis as is the case in the current ISDS investment dispute settlement system. Deficiencies of impartiality and independence would be address under such structure.

Regarding how the mandate will be assigned to the judges, two main alternatives has been provided by the proposal; long and non-renewable mandate or long or short mandate renewable once.

III.A.8.a. Long and non-renewable Mandate

A long and non-renewable mandate, where adjudicators cannot be reappointed, would be most consistent with the goal of independence, inasmuch as adjudicators would carry out their functions knowing that, regardless of their decisions, they will not be re-appointed. Long mandates would lead to fewer appointment procedures (i.e. happening less often) and the associated administrative burdens.

III.A.8.b. Long or short mandate renewable once

Whether longer or shorter, renewable mandates allow the Parties to dispose of ineffective adjudicators after the end of their first mandate and to ensure that particularly effective or experienced ones serve for a longer period (i.e. for a second term).

Opting for a long and non-renewable mandate would be the best guarantee for independence of adjudicators in line with the right to an effective remedy before an independent tribunal. This option would also imply a lower administrative burden for the appointing authorities. Subject to the outcome of negotiations and of the overall structure of the future Court, it is therefore the preferred option.

III.A.9. Employment status and remuneration of Judges

Two main possible alternatives regarding the employment status and remuneration of judges; Judges could work full-time, be employed by the Court and receive a fixed salary; or judges could work part-time, be self-employed and receive monthly or daily fees for service.

III.A.9.a. Judges could work full-time, be employed by the Court and

The EU Commission is of the opinion that fulltime judges with secure tenure and fixed remuneration would not be exposed to conflict of interests, hence enhancing their independence and impartiality. Nevertheless, it has also a concern on the fact that fulltime judges could be under-utilised yet unable to accept any other position in case that would be prohibited. It also underlines that this option might be relatively costly, require higher administrative resources and not be the most efficient if only a few cases are submitted to the Court.

III.A.9.b. 2. Judges could work part-time, be self-employed and receive monthly or daily fees for Service

This second way complies less with the objective of independence and impartiality of the system given that the adjudicators could be exposed with conflicts of interests because of their other occupations. Possible conflicts of interest would therefore have to be managed through the ethics regime in the code of conduct.

Compared to full-time adjudicators, part-time self-employed adjudicators would be less costly and may be more efficient when only few cases are submitted to the Court, which can be the situation in particular at the beginning of the functioning of the Court[43]. However, part-time self-employed adjudicators would not be the preferred approach, since it would address the issues of conflicts and of legitimacy to a lesser extent.

Despite the higher costs and administrative burden, the option that adjudicators be employed by the Court, receive a fixed salary and be entitled to benefits (e.g. health insurance and pensions) is the preferred option because it brings a higher level of independence and impartiality. However, the option that adjudicators be part-time before becoming fulltime should not be excluded provided that possible conflicts of interest are effectively managed through the code of conduct.

III.A.10. Qualifications

Judges are required to meet high qualification in order to preside over the court and render a timely quality decision. The proposal set out two possible ways for the appointment of judges; criteria defined in broader terms; or expertise in more specific areas required.

[43] *Supra* note 42.

III.A.10.a.Criteria defined in broader Terms

This follows the footsteps of the ICJ which states under article 2 of its statute "*the Court shall be composed of a body of judges…, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris consults of recognized competence in international law*". The reason is that broadly defined criteria would ensure a consistent approach to dispute resolution across cases and contribute to predictability of case-law.

III.A.10.b.Expertise in more specific areas Required

A specific qualification is also another way of appointing judges to the multilateral investment court. Such specific requirement can be in trade law, intellectual property and economics, experience in arbitration and mediation, background in the field of human rights, environmental, social and health law as well as domestic law. High qualification criteria are necessary to ensure legitimacy and independence of adjudicators, as well as consistency and predictability in the functioning of the Court. They are also essential to ensure that the right to a fair hearing is effectively observed. However, overly strict requirements would have negative social impacts on a reduced group of persons, i.e. the pool of candidates who would otherwise be eligible.

Consequently, defining qualification criteria according to broader terms would appear preferable, although the most important criterion for the functioning of the system is having highly effective adjudicators.

III.A.11.Ethics

Similar to any international or domestic courts, judges who would preside over the multilateral investment courts will be subject to a code of conduct. For instance, the ICJ under article of its statute describes the structure of the court to be filled as: "*the Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character*". Following the model of various international courts, the judges that are to sit over the multilateral investment court may not exercise any political or administrative function, or engage in any other occupation of a professional nature; no member of the Court may act as agent, counsel, or advocate in any case; no member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate

for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.

In situations where incompatibilities of judges happen to exist, the proposal set up two ways of handling the situations; any other professional activity; or only legal activities related to other investment disputes.

III.A.11.a.Any other professional Activity

A broad regime of incompatibilities encompassing any professional activity would be fully aligned with the objective of independence and impartiality of adjudicators, although it may be less efficient in that it may discourage good candidates from taking office particularly at the beginning of the operation of the Court.

III.A.11.b.Only legal activities related to other investment Disputes

Under the second sub-option, adjudicators would only be precluded from exercising certain activities carrying a high risk of bias such as, having a role in other investment disputes. This approach would achieve less satisfactory results in terms of independence and impartiality of adjudicators, inasmuch as it might expose them to potential conflicts of interest. It would however be efficient, in that it would not risk discouraging good candidates although the question of encouragement would derive also from other factors.

Setting out high ethical standards and safeguards would be consistent with the right to an independent adjudicator. The regime of incompatibilities should be sufficiently strict to effectively prevent conflicts of interest, although it should not result in driving away good potential candidates to serve as adjudicators. This issue is also related to whether adjudicators are employed full time. An overly strict regime of incompatibilities may have a certain social impact on the professional opportunities of the potential candidates to serve as adjudicators.

III.B. Procedural Aspects

III.B.1. Appointment of Judges

The multilateral investment court envisages that judges need to be appointed to form part of a pool of judges serving under the Court, who will later be allocated to hear specific cases. Concerning the procedure of how the judges will be appointed to a given dispute, it provides three mechanisms; directly by the contracting parties (i.e. States); by a separate body composed by contracting parties and other stakeholders; or by an independent body.

III.B.1.a. Directly by the contracting Parties (i.e. States)

Allowing the states party to the agreement to directly appoint adjudicators is the sub-option that disincentivises the most any bias in favour of investors. However, this might not contribute significantly to the independence of adjudicators, arguing that the appointment process could be subject to undue influence from other government branches.

III.B.1.b. By a separate body composed by contracting parties and other Stakeholders

The modalities to identify the groups are not specified in the proposal but underlines that by allowing broader groups of stakeholders (i.e. potential plaintiffs in addition to respondents) to be involved in the appointment of adjudicators, this possibility would bring a higher degree of legitimacy and independence to the Court and its adjudicators.

III.B.1.c. By an independent Body

Under this sub-option, an independent body where neither contracting parties nor investors would be represented would have a key role in the appointment or screening of adjudicators. It could be made up, for example, of senior serving or former judges or senior academics. This approach would ensure the highest degree of depoliticisation and hence of legitimacy and independence, since no potential disputing party would be involved in the appointment.

The proposal states the preference of the third sub-option and states that subject to the outcome of multilateral negotiations, the third sub-option would be the preferred approach since it would bring the highest degree of independence and legitimacy.

III.B.2. Case Allocation

Cases arriving to the Court would need to be allocated to adjudicators of the Court for deciding on their merit. Two main alternatives are available: according to objective criteria (i.e. random allocation); or allowing the disputing parties to intervene.

III.B.2.a. According to objective Criteria

The proposal highlights the practice of the most notable international tribunals. It recalls that judges of the ICJ are allocated to a specific case by decision of the Court[44]; in other courts

[44] As is the case regarding disputes between Iran and the United States.

they are distributed by lot drawing from a list or cases are allocated to chambers[45]; while a system of rotation is provided for others[46].

III.B.2.b. Allowing the disputing parties to Intervene

Conversely, allowing the disputing parties to have a say would run counter to the goal of moving the resolution of investment disputes onto a basis that is more legitimate, independent and impartial.

Random allocation of cases would increase adjudicators' independence and impartiality and improve the system's legitimacy, in compliance with the right to an effective remedy before an independent and impartial tribunal.

III.B.3. Scope of Appeal

In line with domestic international practice a well-established court system is comprised of a first instance and appeal tribunal where decisions of the lower courts can be reviewed in appeal for reasons of procedure or errors of law. This benefits the system's consistency and predictability of case laws.

The process of the appeal is to be conducted in either of the following two ways, according to the proposal; a complete fresh analysis of the facts; or an analysis limited to check manifest errors in the appreciation of facts.

III.B.3.a. A complete fresh analysis of the Facts

Allowing for a complete fresh analysis of the facts would be burdensome since it would amount to re-litigating the case and have a negative impact on the efficiency of the Court system because it would be equal to a second analysis of the case. Since this would translate in additional workload, this sub-option would increase the costs of the Court and of the secretariat, which would have to be borne by the budgets of the EU and its Member States, as well as other contracting parties.

III.B.3.b. An analysis limited to check manifest errors in the appreciation of Facts

The second alternative would give the possibility of review and correction of errors of fact made by the First Instance Tribunal that are manifestly wrong. This approach strikes a good

[45] The Court of Justice of the European Union and the European Court of Human Rights.
[46] The Appellate Body of the World Trade Organization.

balance between the need of having an efficient dispute settlement system and reasonable administrative and budgetary burden for the contracting parties. It would not increase the length of proceedings and/or costs for disputing parties dramatically. It would therefore not impact all parties' access to justice and to a fair trial.

Stare decisis is Latin for "to stand by things decided". It is as well a doctrine which is often used by courts that decides to abide by a point of law which was previously held by a court of equal or superior judicial hierarchy. The notion of *stare decisis* purports to promote stability, certainty, reliability, uniformity, convenience and expediency. Principles like FET, MFN and NT have been applied in a diverse manner. When it comes to investment arbitration different tribunals put emphasis on different criteria. Further inconsistency is caused since the elements which one tribunal finds to be important may be of absolutely no relevance to another tribunal. The Lauder[47] arbitrations provide a perfect example of how different tribunals can take different views even though the facts remain the same. Therefore, the second sub-option, which favours an appeal in cases of manifest errors in the appreciation of facts, in addition to procedural errors and substantial errors of law, is the preferred approach inasmuch as it ensures the right to an effective remedy without requiring a high budgetary or administrative burden for the contracting parties and disputing parties. It therefore brings efficiency. It secures the objectives of having an appeal that provides for consistency and predictability of case-law and secures legal correctness of decisions but limits the necessary resources by circumscribing the cases where a factual review can be conducted.

III.C. Institutional Aspects

III.C.1. Secretariat

To any full-fledged court a secretariat is necessary for a smooth and efficient operation. The secretariat of the proposed court will be expected to cover legal analysis to assist them in their substantive work, registrar services to manage the flow of cases and general administrative tasks.

Two alternative ways can be projected on how the secretariat of the proposed court can function; creating a self-standing secretariat; or housing that secretariat in an existing organisation.

[47] UNCITRAL, "Ronald S Lauder v. Czech Republic", Czech Republic-United States BIT, 1976, available online: https://www.italaw.com/browse/international-investment-agreement-name?field_case_treaties_tid=408.

III.C.1.a. Creating a self-standing Secretariat

The main advantage of setting up a new secretariat and employing new staff would be not being obliged to fit the new system into an existing one. However, this sub-option would be more costly. It is estimated that it would cost under EUR 6 million per year[48]. It would also be more burdensome to set up, since the whole system, including staff regulations for the employees, would need to be designed anew.

III.C.1.b. Housing a secretariat in an existing Organisation

The second alternative would have lower cost implications. Since the actual level of fees has not been agreed and estimating the number of day's staff will work would be highly speculative, the calculation of a fee-based remuneration system for staff was not carried out. Undoubtedly, a fee-based remuneration system alone would cost less than a fixed remuneration system[49]. It will also be efficient because the Court would rely on the expertise and experience of an existing organisation.

The issue of which organisation could host the Court's secretariat would have to be decided through a careful examination of which organisations are willing to do so and some key aspects such as their existing membership, voting rules and public perception. The issue of which organisation could host the Court's secretariat would have to be decided through a careful examination of which organisations are willing to do so and some key aspects such as their existing membership, voting rules and public perception. In any event, such a scenario could only exist if the existing organisation takes the decisions to permit this to happen. At this writing stage nothing has been provided in the proposal to that effect.

In terms of impacts, creating a self-standing secretariat would entail higher financial implications. It would have a positive impact on global governance to the extent that specific expertise would be developed without borrowing it (from other organisations) and would also ensure the complete independence of the staff, which would increase the Court's legitimacy.

III.C.2. Procedures to be part of the multilateral Court

Following the appetite of worldwide concern to ameliorate the investment dispute settlement system, it is expected that membership of the system grow in time and a certain

[48] *Supra* note 43.
[49] *Ibid.*

procedure must be put. To that end the proposal envisage two alternatives to accede to the multilateral court; an opt-in system; or re-negotiating and/or amending each treaty.

III.C.2.a. Opt-in System

Through an opt-in system, countries would agree in the legal instrument establishing the multilateral Court to subject their investment treaties to the jurisdiction of the Court. The Court would then supersede ISDS or ICS provisions in investment treaties of the EU and EU Member States with third countries or between third countries. This mechanism would be highly efficient in that it would discharge states from the potentially complex and lengthy processes of re-negotiating the underlying investment treaties to amend their dispute settlement rules to submit them to the jurisdiction of the Court.

An opt-in mechanism would allow submitting existing and future investment treaties to the jurisdiction of the Court and it would bring a certain degree of flexibility to the system which would need to be balanced with objectives such as consistency of case law.

This approach would bring permanency and transparency to the system, since all agreements under the scope of the Court would be referred to in the instrument establishing the Court.

III.C.2.b. Re-negotiating and/or amending each Treaty

A second approach could be to re-negotiate or amend each investment treaty that is to be brought under the jurisdiction of the Court. For the reasons set out above, this approach would be inefficient since large resources are needed, and run counter to the objective of predictability, since the outcome of negotiation for each treaty would be uncertain. It would not necessarily be transparent since the results of potentially many different negotiations would have to be examined.

An opt-in mechanism allowing to replace all existing treaties at once would be efficient and have lower cost impacts than the potentially complex and lengthy processes of renegotiating the totality of underlying investment treaties to amend their dispute settlement rules. This approach would also contribute more to the objective of transparency and would give enhanced predictability to future agreements.

III.C.3. Support to small and medium sized Enterprises (SMEs)

There are various difficulties faced by SMEs. Principally the problem created by the current ISDS system is accessibility. In order to address such a problem, it is plausible to create specific measures to ensure access to the Court for SMEs such as simplified procedural rules or the waiving of certain costs; or not to create any specific procedure for SMEs.

III.C.3.a. Simplified procedural Rules

Having specific assistance in place for SMEs would ensure that the high costs of litigation do not prevent any investor from resorting to an effective dispute settlement system. In this sense, it would contribute to the goal of efficiency and to ensuring an effective remedy.

On the downside, this approach meets political difficulties such as agreeing on a definition of SMEs and that the contracting parties agree to bear the costs of any such assistance. This sub-option would therefore have financial implications.

III.C.3.b. Not to create any specific Procedure

A different approach would be not to grant any additional assistance to SMEs, considering inter alia that the size of the disputants is not necessarily related to the importance, significance or difficulty of such case. Bigger businesses consider that enhanced support for SMEs risks creating categories within investors and that simplified procedures should apply according to the size of the claim instead.

Though the first option is costly given that SMEs exist to a considerable degree worldwide it should be an option to explore according to the proposal.

III.C.4. Support developing Countries

A criticism commonly made in relation to ISDS is that it puts developing countries and least-developed countries at a disadvantageous position *vis-à-vis* investors, as the former do not always have the budget and/or the expertise to effectively defend themselves in arbitration proceedings. The question in relation to developing countries is whether: there should be a more favourable system of support to developing countries to ensure access to the multilateral investment Court; or there should be no specific procedures for developing countries.

III.C.4.a. More favourable system of Support

Ensuring that the Court caters for the special needs of these countries would contribute to making the system more legitimate. Although the costs at the writing stage are not calculated, it states that it would be more costly for developed countries but the benefits would in all likelihood however outweigh costs.

The proposal also takes into consideration, based on the model of the Advisory Centre for WTO Law (ACWL), that an advisory centre to provide legal advice and training to developing and least-developed countries could be set up.

III.C.4.b. No specific Procedures

The other view is that the existing mechanisms to support developing countries are sufficient and that no additional assistance is needed. While it is true that most if not all states allocate budget lines to dispute settlement, many of them are affected by financial and human resource constraints that do not affect developed countries.

Facilitating access for developing countries to the multilateral system (or failing to do so) will have important implications on the inclusiveness of the multilateral project. A system of support for developing and least-developed countries would ensure an effective access to justice for all states in the event that they are sued by a foreign investor, regardless of their size and GDP. Granting some sort of special assistance to developing and least-developed countries would therefore be the preferred approach. The specific features of that assistance will however have to be negotiated.

III.D. Financial Aspects

III.D.1. Allocation of costs among Members

In order to ensure that the multilateral investment court can fully operate, sufficient financing will have to be provided. Since the Court aims to include countries with different levels of economic development, there are two main possibilities of apportionment of the costs of the Court: a system that reflects the level of development of members, as operated by different international organisations; or a system that equally allocates costs among members.

III.D.1.a. A system that reflects the level of development of Members

Major international institutions take into consideration the level of developments of its members. Such organizations include UNCTAD[50] and tribunals including the WTO[51] and the European Court of Human Rights[52].

It is in line with the principles of fostering multilateral cooperation and good global governance. However, it would have higher budgetary implications.

III.D.1.b. A system that equally allocates costs among Members

In contradistinction, although setting up a system that allocates costs among members on the basis of equal shares would be less expensive for developed countries, it would however be contrary to the practice of main international organisations and courts and would run counter to the general objective of promoting an international system based on stronger multilateral cooperation and good global governance as it would make participation of developing and least developed countries in the system too costly for their available financial means. Consequently, this system would render the whole Court overall less efficient, in that it could hamper access for countries with less means available.

III.D.2. Mixed Financing

It would need to be decided who bears the costs of establishing and operating the multilateral Court. The costs of the Court could be covered by: contracting parties' contributions exclusively; or contracting parties' contributions and user fees.

III.D.2.a. Contracting parties' contributions exclusively

Dispute settlement mechanisms between states, such as the WTO, and dispute settlement mechanisms set up by states for claims by individuals, such as the Court of Justice

[50] United Nations list of least developed countries, available at http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx.

[51] In the WTO, contributions are determined according to each Member's share of international trade (%), based on trade in goods, services and intellectual property rights for the last five years for which data is available. There is a minimum contribution of 0.015 per cent for Members whose share in the total trade of all Members is less than 0.015 per cent. See: https://www.wto.org/english/thewto_e/secre_e/contrib_e.htm.

[52] The ECtHR is financed from the budget of the Council of Europe, which divides the costs between the member states based on the formula involving national GDP and the annual national population. See http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017SC0302&from=EN.

of the European Union, do not generally require a filing fee for claimants. Conversely in ISDS requires claimants to pay their share while lodging the case[53].

This would bring added legitimacy to the system by limiting financial control of the Court to the Contracting Parties, thereby contributing to approximate investment dispute resolution to international and domestic tribunals. Although it would be more costly for states, it may help reduce the upfront costs which may be attractive for more participants.

III.D.2.b. Contracting parties' contributions and user Fees

A system of user fees could be introduced to cover the costs of the Court in addition to the contributions of Contracting Parties. Such user fees would obviously not be equal to those that apply under the current system, but could be destined to cover specific services like the registrar. This approach would be less costly.

Limiting the Court's funding to Contracting Parties would improve the system's legitimacy, while requiring users to contribute to the costs would relieve members' budgets to some extent. Both options seem to present pros and cons and, although the first sub-option appears preferable at this stage, it cannot be excluded that a certain system of user fees needs to be introduced. In any event, such fees should not be prohibitive for users, particularly SMEs, turning into a de facto barrier to access.

The proposal of the EU Commission finalizes by strongly recommending the establishment of the multilateral investment court due to the advantages enumerated above.

CONCLUSION

Fragmentation of international law is a phenomenon that is a melting pot for academics and practitioners alike. The anarchic decentralized nature of international law coupled with the proliferation of independent yet overlapping norms without a meaningful coherence is an open secret subjected to a scrutiny both from the practitioners and the academia, in short the fragmentation of international law. The lack of pace of international law to cope up with the lightning speed of formations of countless subsystems pause a legitimate question of coherence

[53] For instance, in ICSID, the lodging fee must be paid with the submission of the relevant request and, for post-award remedies, within the prescribed time limit set out in the ICSID Convention or Additional Facility Rules. A non-refundable fee of US$25,000 is payable to the Centre by a party: requesting the institution of conciliation, arbitration or fact-finding proceedings under the ICSID Convention or the Additional Facility; or applying for annulment of an award rendered under the Convention.

and effective implementation and compliance of various obligations enshrined in different legal texts.

The challenge that international law faces can be best illustrated from proliferations of international adjudicative bodies. One of the most important problems caused by a multitude of international tribunals and courts with concurrent jurisdiction is the security, predictability and legitimacy of international law. An obvious concern is multiple tribunals addressing the same dispute, without adequate rules for dealing with overlapping jurisdiction.

The proliferation of *ad hoc* investment dispute settlement procedures is one symptom of the general fragmentation infested international law. In a classical approach academics approach such problem from international rules and principles relating to the interpretation and application of treaties to find out the appropriate fora. More recent projects and proposals to curb and tackle fragmentation includes new governance project. The Multilateral court of investment dispute is of such a kind. Even though it is still a fresh paint it is welcoming news. Various sub-systems like Environmental law went one step ahead, the perfect example is the synergy process of Chemical Conventions.

This is a progressive and actual challenge that international law faces in these challenging times. The luxury of having access to multiple fora is a blessing. However, states running to and fro due to lack of coherence threaten security, predictability and confidence for the constituents of the international legal system. Under the VCLT principle of good faith (expressed succinctly in the maxim of *pacta sunt servanda*), states sign treaties with the intention of full application and enforcement between the signatories. Taking advantage of access to multiple dispute fora, which the positive progression and sophistication of international law provides, threatens the integrity and legitimacy of international law.

From such a noble view, the proposal from the EU is very much appreciated. Nevertheless, how it will be treated by other partners will be revealed soon enough but for now the EU and Canada are on the forefront of the initiation.

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