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***Governing Transnational Commons Through Strategic Associations: A Comparative Case of Radio Frequency Management in Europe***

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The European Conference on Politics, Economics and Law 2014  
Official Conference Proceedings

**Abstract**

This paper explores the nature of collective action in the governance of transnational common resources and proposes a private regimes approach for its study. Using the example of the radio spectrum as a global resource – representing the totality of radio frequencies used largely for wireless communications – the paper argues that the variation in property systems witnessed in global commons cannot be fully explained by negotiations between public actors managing the access and use of these shared resources. Instead, it proposes greater recognition of the role of industry actors organised in strategic associations that negotiate technical standards for the extraction of economic value from the radio resource. This argument is derived from two case studies that address the rule systems formed in the 900MHz band for the deployment of second-generation mobile communications in the late 1980s, and in the 800MHz band for the deployment of mobile broadband in the late 2000s in Western Europe. Using the method of process tracing, the paper shows that, faced with different competitive pressures, industry actors respond by relaxing their rights of use in the first case study and, respectively, by relaxing their rights of access to the resource in the second case study. This occurs irrespective of the presence of a weak or strong public administrator.

Keywords: property systems; global commons; radio spectrum; private governance

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## Introduction

The study of collective action is at the core of the social sciences. Collective action refers to “activities that require the coordination of efforts by two or more individuals” (Cornes and Sandler, 1996, p. 324). However, the development of the rational choice theory of collective action has drawn particular attention to the difficulties that short-term self-maximising individuals encounter to produce collective goods for the benefit of all. Depending on their application, the problems of collective action have been referred to as “the free rider problem” (Grossman and Hart, 1980), “the credible commitment dilemma” (Lichbach, 1997), “the tragedy of the commons” (Hardin, 1968) or “the tragedy of open access” (Fox, 1993)<sup>1</sup>. Their proposal, in particular with reference to collective action in shared resources, has generally focused on the delegation of rule-making, monitoring and enforcement powers to an external authority – be it the state or the market – as the only way to achieve stable and sustainable governance:

“A managed commons describes either socialism or the privatism of free enterprise. Either one may work, either one may fail: the devil is in the detail. But with an unmanaged commons, you can forget about the devil: as overuse of resources reduces carrying capacity, ruin is inevitable” (Hardin, 1998, p. 683).

However, the behavioural theory of collective action has gained considerable ground against Hardin’s prescriptions, bringing evidence that profit-driven individuals are able to self-govern in a stable and sustainable manner, without overcrowding or depleting a shared resource they otherwise derive economic value from (Bromley et al 1992; Feeny et al, 1990; Ostrom et al 1988; Ostrom 1990; Wade 1986). This literature has made a valuable contribution to the study of collective action in shared resources, highlighting that the physical properties of the resource, as well as the institutional setting in which collective interactions occur, constrain the rationality of short-term self-interest individuals against collective inaction. However, this evidence has been largely taken from small or medium size shared resources such as fisheries, forests or agricultural land, managed by local communities with a relatively high remoteness from the involvement of public or private enterprise.

The overall question in this article is whether we can identify similarly high levels of self-governance – described as the ability to create, monitor and enforce rules – by direct resource beneficiaries in the global commons. This assessment can be hindered by two limitations identified in policy and scholarly analyses of the global commons. The first limitation is that the analysis of governance in the global commons – such as the atmosphere, the oceans, the outerspace or the worldwideweb (Buck, 1998; Hess, 1995; Vogler, 2000) – have focused on state actors as the main negotiators of global governance. And although these studies account for the presence of industry or civil society actors in the negotiation process, these private actors are largely perceived as privileged beneficiaries of access to policy-making in exchange for the provision of otherwise costly knowledge and technical expertise (Buck 1998, Vogler 2000). The second limitation is that the analysis of governance in the global commons does not fully account for the polycentric structure of authority in rule-making, rule-monitoring and rule enforcement. V. Ostrom (1991) defined polycentricity as the ability of

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<sup>1</sup> Ostrom provides a brief review of these different approaches; see E. Ostrom (1998).

different elements of authority to “make mutual adjustments for ordering their relationship with one another within a general system of rules where each element acts with independence of other elements” (V. Ostrom, 1999, p. 57).

This article proposes that these limitations can be partially overcome if we adopt a club theory approach to the governance of the global commons. Several authors have previously proposed this approach in the analysis of voluntary private governance, which can lead to the creation of stable global standards in the absence of positive or negative incentives imposed by an external authority such as a public administration (Buthe, 2009, Potoski and Prakash, 2009). This approach is important to the study of global commons because it claims that private actors are motivated to create clubs from which they draw exclusive benefits, but which also produce positive externalities that translate into public goods of benefit to all. It is also important because it focuses attention on the role of private rather than public actors as main negotiators of rules for managing global commons, without disregarding the position of public actors in this process.

This article considers whether industry actors establish private clubs in global commons that produce exclusive benefits for their members but also public benefits in the form of positive externalities derived from their private action (Buthe 2009). The article looks at the electromagnetic radio spectrum – representing the totality of radio frequencies used largely for wireless communications – as an example of a global common that has been managed in a stable and relatively sustainable way. The radio spectrum exhibits the characteristics of a common pool resource, similar to other natural resources such as oceans, forests or the atmosphere. In a state of nature, the radio spectrum exhibits high rivalry in consumption and high difficulty in excluding non-contributing beneficiaries from use, which essentially makes it prone to pollution (radio interference) and overcrowding. However, at present, considerable economic value is derived from the use of radio frequencies for wireless communications without witnessing the pollution or overcrowding of this resource.

This article selects two case studies to explore the evolution of this stable governance in wireless communications. It looks particularly at how rules of access and rules of use were negotiated between industry actors deriving direct economic value from this resource. The two types of industry actors considered are operators and developers of mobile communications. First, the paper looks at the creation of rules of access and use of the 900MHz frequency band for the deployment of second-generation mobile communications in Western Europe in the late 1980s. Second, it looks at the creation of rules of access and use of the 800Mhz frequency band for the deployment of mobile broadband in Western Europe in the late 2000s. The two case studies have been selected to address some of the limitations of the analysis of global commons outlined above. Thus, they focus on regional coordination, rather than national or global coordination, to account for the presence of polycentric authority. Also, they focus on Western Europe as the geographic region with a considerably high number of industry actors situated in a considerably high number of jurisdictions interested in maximising their profit from the use of the radio waves, making it more susceptible to pollution and/or overcrowding. The method of inquiry into the two case studies is process-tracing, based on an evaluation of official documents, official communications and official statements of industry experts and policy makers present at the respective negotiations. Each case study is structured in three sections, which

explore the motives of cooperation, the methods of cooperation and the effects of cooperation.

## **I. The Choice of Complex Standards for Governing the 900MHz Band**

In September 1987, in Copenhagen, mobile operators from thirteen countries in Western Europe signed the GSM Memorandum of Understanding (GSM MoU 1987), a cooperation agreement that, soon afterwards, made the object of “Council Directive 87/372/EEC on the Frequency Bands to be Reserved for the Co-ordinated Introduction of Public Pan-European Cellular Digital Land-Based Mobile Communications in the European Community” – also known as the GSM Directive (1987). In short, the GSM Directive reserved the 900MHz band, on an exclusive basis, for cellular digital mobile communications without specifying the communication standard to be deployed on this band. However, at the time, the GSM standard was the only cellular digital mobile communications standards in the world. Thus, within a few years since its adoption, the GSM standard was used exclusively for deploying cellular communications in Western Europe and increasingly exported elsewhere. Cross-border coordination for the delivery of public wireless communications in the 900MHz band – i.e. the public good – has been attributed either to successful diplomatic relations between thirteen administrations, each with their own national telecommunications champions (Temple, 2001) or to the growing presence of the European Commission as research and development programme coordinator in the European Communities (Esser, 1996; Fuchs, 1994; Pelkmans, 1987; Peterson 1991).

The latter assumption is particularly problematic because, whereas the European Commission was indeed broadening its competences in industry sectors as a result of the establishment of the common market, it was only at an incipient stage in the development of such competences in telecommunications policy (Alabau and Guijarro, 2011; Hulsink, 1999; Sauter, 1995). Instead, this section suggests that cross-border coordination for the delivery of public communications in the 900MHz band was achieved by industry actors negotiating rules of access and use in the Conference of Postal and Telecommunications Administrations (CEPT) – a voluntary decision-making body set up by telecommunications operators across Europe. Below, I evaluate the motives, methods and effects of this cooperation among operators and developers of telecommunications and their role in determining flexible rules of use of the 900Mhz band.

### **The Motives for Cooperation**

Against a background of telecommunications liberalisation in the late 1980s, telecommunications operators and developers across Western Europe had two motives for developing a single standard for digital mobile communications, to be deployed in the harmonised 900MHz band. The first motive was farming a newly opened resource. The 900Mhz band was mostly unoccupied when negotiations in CEPT started in the early 1980s. The second motive was internal competition within CEPT in the absence of a dominant technology. These two factors gave CEPT members an opportunity to minimise internal rivalry among them while developing an exclusive standard that would be complex enough to contain a majority of proprietary technologies.

In the late 1980s, when telecommunications sectors in Western Europe and the United States were opening up at different speeds, mobile cellular systems were using analog technologies that were occupying considerable frequencies, were expensive to develop, purchase and deploy and were not benefiting from the economies of scale and scope we witness today. Instead, in Western Europe, analog mobile communications continued to reflect the fragmentation of telecommunications markets along national lines, with a single operator – generally a Postal, Telegraph and Telephone Administration (PTT) – relying on an established national developer – generally a national champion – to manufacture otherwise proprietary telecommunications technologies. This vertical integration along national lines had contributed to the widespread development of proprietary, incompatible systems that made cross-border intercommunications difficult and costly to achieve. Against this fragmentation on the European continent, the Scandinavian operators agreed to develop a decentralised cross-border network that relied on a single standard – Nordic Mobile Telecommunications (NMT) – to be deployed in the harmonised 450MHz band. NMT-450 was designed to be an open standard but the technology behind it was mostly proprietary, corresponding to a joint venture by Ericsson and Televerket of Sweden. By the early 1980s, NMT-450 had considerable export capacity, which made it a very successful standard for analog mobile systems.

Faced with increased competition among proprietary standards<sup>2</sup>, the overcrowding of the 450MHz band, as well as with pressures from the Scandinavian PTTs to consider the pan-European harmonisation of the 900MHz band (GSM Doc 3/82), representatives of eleven telecommunications operators in Western Europe formed Groupe Spécial Mobile (GSM) within the CEPT. The establishment of the GSM Group within CEPT was preferred for two reasons. First, it allowed for close coordination and monitoring of development activity among competing telecommunications sectors across Europe. Second, it allowed for the possibility of proposing a winning technology that, if supported by everyone, would benefit from deployment across a harmonised market derived from the farming of the 900MHz band.

### **The Methods of Cooperation**

The practice of cooperation within CEPT followed that of a transnational regional association of telecommunications operators, which adopted non-mandatory decisions by consensus. At the time, the CEPT was not a standardisation organisation, and the common development of standards among competing national champions in Europe had been largely unheard of. However, in the context of competition among manufacturers, as well as the privatisation of telecommunications operators, coordinating for the 900MHz band was a way of monitoring competitors while attempting to push through a single, dominant technology.

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<sup>2</sup> In the late 1970s and early 1980s, national mobile operators across Europe had chosen incompatible standards for delivering analog services. As such, analog networks in France used Radiocomm 2000, in Germany C-Netz, in the United Kingdom TACS and in Italy RTMI.

Two steps in the cooperation process confirm this assumption. First, in 1982, industry representatives had to decide whether analog or digital systems were to be developed for the 900MHz band. Whereas industry representatives from the Scandinavian states were proposing digital systems, following enhancements in radio interface technology, industry representatives from France and Germany were largely focusing on analog technologies. In the absence of a dominant technology and strong presence in competing markets, both methods of speech transmission were considered, following consensus rules within GSM-CEPT. Thus, the initial proposal of the Dutch and Nordic PTTs to include digital speech transmission as an a priori system characteristic was removed from the main system specifications and adopted only as a working assumption (GSM Doc 53/83). Second, in 1986, industry representatives had to decide among eight competing proposals for the GSM system to be potentially deployed in the 900MHz band. Whereas, by now, most proposals included digital speech transmission, the competition was taking shape between alternative access techniques based on either code division multiple access (CDMA) versus time division multiple access (TDMA). When the proposed radio access technologies were tested against broad system specifications previously agreed within GSM-CEPT (GSM Doc 97/85), the technology that scored the highest was the proposal made by Elab and based on TDMA (*Table 1*). However, following consensus decision-making within CEPT, and in the absence of a single dominant technology, the proposal was once again shelved.

Table 1. Competitive Proposals for GSM Trials 1986

<b>System</b>	<b>Developers</b>	<b>Main Access Technique</b>	<b>Key partnerships</b>
<b>CD-900</b>	Alcatel/SEL/A EG/SAT/Italtel	Wideband TD/CDMA	SEL (former ITT subsidiary) sold to CGE/Alcatel in 1986 & SAT part of Alcatel group
<b>MATS-D</b>	Phillips	Hybrid narrow/wideband FD/TM/CDMA	Phillips through TeKaDe/TRT subsidiaries
<b>S 900-D</b>	ANT/Bosch	Narrowband TDMA	ANT acquired by Bosch in 1992
<b>SFH 900</b>	LCT	Narrow/Wideband CD/TDMA with frequency hopping	Lab Central de Telecommunications France, subsidiary of Matra
<b>DMS-90</b>	Ericsson	Narrowband TDMA	Ericsson acquired Marconi share of SRA (radio systems) and Magnetic (base stations) in 1983
<b>MAX</b>	Televerket	Narrowband TDMA	In partnership with ERA labs
<b>-</b>	Nokia	Narrowband TDMA	
<b>ADPM</b>	Elab	TDMA	Project sponsored through FMK project

Source: Adapted from Arnold et al (2008); Bekkers (2001, p. 288); Dupuis (2001)

However, by this point, essential exchanges of intellectual property had already taken place among industry members of the CEPT. The most important one was the quadripartite patent partnership among telecommunications operators in France, Germany, Italy and the United Kingdom. This patent exchange was, however, threatened when the German operator announced the support of the TDMA instead of the CDMA technology put forward by the Frech backed proposal (i.e. CD-900). Thus, a breach of the patent agreement could have also jeopardised the considerable investment allocated to research and development.

The compromise was the creation of a complex standard – the GSM standard<sup>3</sup> – that put together the most important technological contribution of all competitors in CEPT group. An official statement made by the main contributors read: “Europe must have a single standard supported through the CEPT. This should be based on a narrowband TDMA concept defined by CEPT at its Madeira meeting in February 1987, enhanced in the area of modulation and coding to provide the greatest flexibility in receiving equipment implementation” (Bonn Declaration 1987). Thus, a single standard was to be adopted through the CEPT only if narrowband TDMA, the technology supported largely by Scandinavian telecommunications industry, was enhanced in the area of modulation and coding with the technology supported largely by the French and, partly German, industry. The creation of a complex standard for exclusive deployment in the 900MHz band means that industry actors were able to alter the rules of use of the radio frequency at the 900MHz in their favour, developing a wide compatibility standard that allowed for specific technologies to be included in the use of the band.

### **The Effects of Cooperation**

The above statement, made in the Bonn Declaration, was soon formalised in the GSM Memorandum of Understanding, signed by all members of GSM-CEPT (GSM MoU 1987). The GSM MoU was also, at least in its original phase, a patent exchange program designed to keep all technology incorporated in the standard open to all the signatories. However, based on the GSM MoU, the standard was to be exclusively deployed by all signatories, helping them draw exclusive economic value from the radio band at 900MHz in Western Europe. This allowed for a reduction in rivalry among all contributors, while ensuring that the standard was complex enough to deliver a considerable economic yield for each participant. Essentially, the GSM standard was a club good – i.e. low rivalry among members and high exclusion of non-members – that also produced positive externalities in delivering wireless communications to wider public. The creation of the GSM standard led to the deployment of affordable wireless communications, making the mobile phone the indispensable accessory it is today. The effects of this cooperation led, in fact, to the creation of the most successful mobile communications standard in the world to date<sup>4</sup>.

## **II. The Choice of Complex Rules for Governing the 800MHz Band**

In May 2010, the European Commission passed “Decision 2010/367/EU on Harmonised Technical Conditions of Use in the 790-862MHz Frequency Band for Terrestrial Systems Capable of Providing Electronic Communications Services in the European Union”. Essentially, the Decision reformed the 800MHz band (790-862MHz) from exclusive use by broadcasting services to non-exclusive use by communication services with a capacity to provide mobile broadband (Art 1, Decision

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<sup>3</sup> Note that the acronym GSM was changed from Groupe Special Mobile – the name of the working group within CEPT – to Global System for Mobile Communications – to reflect the worldwide deployment of this standard.

<sup>4</sup> GSM is the standard with the largest market share in mobile communications at global level. By the early 2000, the GSM standard had a global market share of over 86%. By the end of 2013, it was still the most widely deployed standard worldwide, with a market share of over 60% (WCIS Database, Informa).



2010/267/EU). As in the case of the GSM Directive (1987), negotiations for refarming the 800MHz band did not take place within the established policy-making venues within the European Union. However, in this case, the European Commission had established extended competences in telecommunications policy and, most importantly, new competences in harmonising radio spectrum bands (Directive 2002/21/EC and Decision 676/2002/EC). Thus, whereas in the previous case study, the European Commission had limited competences in the field of radio spectrum management, in the current case, the European Commission was an established agenda-setter for spectrum policy as well as an established lobbying venue.

However, instead of lobbying the European Commission for the deployment of mobile broadband in the 800MHz band, at the expense of broadcasting services that were occupying the band, the mobile communications industry organised itself in a private regime and carried negotiation within the Radiocommunications Sector of the International Telecommunications Union (ITU-R). In this context, this section suggests that cross-border coordination for the delivery of mobile broadband in the 800MHz band was achieved by a select group of industry actors that held dominant technologies in mobile communications and were able to establish complex rules as well as to develop complex bargaining power in order to ensure continued presence in mobile communications markets. Below, I evaluate the motives, methods and effects of cooperation among operators and developers of mobile communications and their role in determining flexible rules of access in the 800MHz band.

### **The Motives for Cooperation**

The development of mobile broadband communications took place against a background of relative caution from both industry and policy makers. In the early to mid 2000s, the mobile communications industry in Western Europe, as well as globally, was suffering from a market slowdown following the deployment of third generation mobile communication services. Across Europe, these services brought relatively little changes to mobile communications technology in an already oversupplied market, compared with the generous investments made in infrastructure development and license fees (Bohlin et al, 2007; Lehr and McKnight, 2003). This had the effect of bankrupting a considerable number of small and medium size industry players. In this context, the mobile communications industry was cautious to invest in new technology development for networks and services, while acknowledging that the previous strategies of proposing complex standards for deployment on an exclusive basis were not as successful in mature markets as in incipient markets such as the early GSM one.

In this case, the incentives to organise did not come originally from the industry, but from a political actor, in the form of the European Commission. In the early 2000s, the European Commission noted that terrestrial broadcasting services – i.e. those using radio frequencies as opposed to cable or satellite – were still using analog technologies. As outlined in the previous case study, analog technologies would occupy up to five times more radio frequency space than digital technologies, space that could otherwise be utilised for enhanced broadcasting services as well as for other communications services. The location of terrestrial broadcasting services was between the 400MHz and the 900MHz band. As such, the Commission proposed to digitise terrestrial broadcasting services in what was widely known as the Digital

Switchover (COM(2003) 541). The digital switchover, then, did not necessarily mean a relocation of broadcasting services from the 800MHz band.

However, in the context of the digitalisation of terrestrial broadcasting services, the 800MHz band raised the interest of the mobile communications industry. There are two reasons why the industry decided to cooperate and propose mobile broadband as a fourth-generation wireless communications technology. First, the 800MHz band was one of the most sought after bands in the commercial radio spectrum, due to its very good propagation characteristics, which meant less investment in infrastructure for a wider market. This was particularly attractive for the mobile telecommunications industry, especially mobile operators, whose previous investments in infrastructure deployment and license fees had squeezed their profit margins. Second, the 800MHz band was adjacent to the 900MHz band, which had just received non-exclusive status for mobile telecommunications deployment. This meant that, mobile operators that had exclusive allocations to the 900MHz band for second-generation technologies were now gaining the freedom to refarm the frequency with whichever technology they preferred, as long as their acquired licenses. In this context, aligning the 800MHz band with the 900MHz band would mean a larger pool to organise the delivery of more flexible networks that did not keep operators locked into a particular resource. Thus, the second motive of the telecommunications industry was to reconfigure their technology systems in a way to reshape the market back into profit. The only way to do so, that would also be attractive for the political actor in charge of reallocating the frequency space, was to propose technology development in the form of a new generation of mobile communications – i.e. mobile broadband or fourth generation mobile communications.

### **The Methods of Cooperation**

Whereas cooperation in GSM-CEPT followed that of a transnational regional association of telecommunications operators, with only a limited number of members and relatively homogenous preferences, the situation was different in the mid 2000s. By then, the CEPT remained a transnational organisation for broad policy alignment, including radio spectrum harmonisation, but the standardisation powers it acquired with the creation of the GSM Group were soon transferred to the European Telecommunications Standards Institute (ETSI). ETSI operates as a voluntary standards development association for manufacturers and operators within the CEPT geographic area and is one of the largest standardisation bodies in the world. However, although ETSI remains a voluntary association, the decision-making rules within its working groups had changed from consensus to voting through proportional adjustment at every stage of the standards development process. This decision-making structure resolved the problem of heterogeneity of group preferences as well as the problem of increasing decision-making costs to unacceptable costs for its members.

However, the industry structure had also changed considerably, with increased competition among operators and a strengthening of the position of a few manufacturers with dominant technologies. Essentially, these technologies were patented at the time of the emergence of global standards such as GSM (second generation mobile communications) and UMTS (third generation mobile communications), allowing them considerable leverage in negotiations (Bekkers, 2001). Because of this tiered decision-making process in ETSI, the largest

manufacturers of mobile communications gathered momentum for mobile broadband outside the established route of standards development in ETSI. Instead, they set up the Wireless World Research Forum (WWRF) to reflect a coordinated research and development in the direction of mobile broadband. However, instead of suggesting an evolutionary radio technology, they proposed an evolutionary core network that would support backward compatibility with technologies from previous generations, as well as a new radio technology for mobile broadband entitled Long-Term Evolution (LTE).

Thus, in 2003, the proposed vision of the new system architecture suggested by the WWRF was passed as ITU-R Recommendation M1645<sup>5</sup>. The Recommendation clearly restated the approach adopted in the WWRF, based upon “the functional fusion of existing, enhanced and newly developed elements of IMT-2000, wireless access systems and other wireless systems with high commonality and seamless interworking” (ITU-R M1645: 6). Having passed the network design through the ITU-R, the focus of the mobile communications industry between 2003 and 2007 was to build a case for frequency allocations in the 800MHz band.

### **The Effects of Coordination**

The approach to network design for mobile broadband was negotiated mostly outside of ETSI, between two collaborative associations of manufacturers and, respectively, operators. These were the Mobile Industry Backing Terrestrial Spectrum for IMT (MiB Group) of manufacturers represented by the original founders of the World Research Forum, and the Next Generation Mobile Network Alliance (NGMN) of mobile operators representing more than half of all mobile phone users worldwide. The main requirement made by the NGMN was that the proposed system integrated all previous technologies in a flexible manner, so that operators could phase in and out of their systems, without being constrained by technology or service limitation imposed by licensing (NGMN White Article 2006, Robson 2009). In order to ensure enough spectrum capacity for this flexible approach, representatives of the WWRF formed the Mobile Industry Backing Terrestrial Spectrum for IMT (MiB) just a few months prior to the ITU World Radiocommunication Conference (WRC 2007). The role of the MiB was to advocate new spectrum allocations, preferably in bands adjacent to those that had been allocated to mobile cellular communications on a primary basis at international level. Prior to the conference, MiB had advocated an additional need of approx 700MHz to 1,000MHz of new radio spectrum allocations in the Europe Radio Region. These findings were presented at CEPT and ITU-R and were directly based on the requirements of the new system design and network growth.

But most importantly, MiB advocated for the identification of harmonised bands for IMT mobile communication services at the global level that, as the head of the MiB group, noted “would enable operators to plan an orderly growth of their network with

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<sup>5</sup> ITU-R or the ITU Radiocommunication Sector is charged with the international management of radio frequency spectrum and satellite orbits. ITU-R can also issue non-mandatory recommendations for international technical standards to be deployed in specified radio frequencies. However, it is not a certification body nor does it have the formal role of a certification body.

global roaming capacity” (Costa 2007). In this context, the 800MHz band was indicated as highly viable for global harmonisation, largely because it was already allocated to mobile cellular systems in the Americas and was open for digital switchover in the wider Europe Region. As a result, the WRC 2007 identified the 790-960MHz band for IMT cellular-based mobile networks (Resolution 224, WRC-07). This decision overturned the allocation of broadcasting services on a primary basis in the 800MHz band. But, most importantly, coordination in the WWRF, NGMN and MiB, outside of the formal decision-making of CEPT or the EU, led to the recommendation for allocating the 800MHz band on a global basis to a specific cellular-based system - i.e. IMT. This system, based on a horizontal network that integrated previously competing technologies, without overspecifying them in band allocations, narrowed the regulatory choices available at national or regional level in the 800MHz band, regardless of the choice of flexible rights of access as specified by regulatory decisions.

## **Conclusions**

This paper asked what explains the governance of transnational commons such as the radio spectrum. Focusing on two case studies of radio spectrum management, it questioned whether the origin and development of rules of access and use of radio frequencies rest solely with public administrators, as the literature sometimes indicates. Instead, the paper proposes that rules of access and use of radio spectrum are created by industry actors when they negotiate technical standards for the extraction of economic value from the common yet limited resource. This paper further inquired whether mobile communications, as public goods derived from the exploitation of radio frequencies, are in fact positive externalities of club goods established by industry actors. Such a proposition would confirm the club theory of global private regimes that this paper suggested as relevant for the study of governance in the global commons. This paper finds that the first case study – the governance of the 900MHz band - confirms this hypothesis. However, the second case study – the governance of the 800MHz band – shows that industry players with a strong market presence can sometimes form factions outside established clubs in order to alter the rules for farming the spectrum resource in their favour. In the second case, clubs do not create immediate positive externalities to facilitate advancement in mobile communications for the wider public but relax rules of access in order to redefine markets and increase profits. Overall, this paper concludes that, whereas such practices ensure the stability of governance in radio spectrum, they do not and cannot guarantee the sustainability of governance for global resources.

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*Appraising the Appraisal Remedy: Is it really the  
Best Option for Dissenting Shareholders?*

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**Abstract**

The availability of appraisal as a remedy for dissenting shareholders in a country's company law statute places an obligation on corporations to repurchase the dissenters' shares at a fair value, where it appears that their rights or interests are about to be adversely affected. Appraisal therefore provides a 'buy-out' option for both sides of the divide i.e. the majority seeking to effect or explore a particular line of action; and the minority shareholders opposed to their decision; thereby offering amicable resolution to a potentially explosive situation. Also known as appraisal rights, or dissenters' rights; the remedy is available in jurisdictions including the United States, Canada, Germany, New Zealand, and more recently South Africa.

Although forging an amicable resolution as stated above, applicability of the remedy is often fraught with problems, leading to the question of whether appraisal is actually the best remedy for dissenting shareholders, or whether it merely provides an illusion of peaceful resolution in the jurisdictions in which it is applicable. The paper will take into consideration the mode or extent of applicability of the remedy in some of these jurisdictions. Problems associated with appraisal include its potential to aid minority freeze-out, and the difficulty of arriving at a fair valuation of the dissenter's shares. The paper will assess these problems; consider appraisal against other possible remedies; and determine if appraisal is indeed the best alternative for dissenting shareholders.

Keywords: Appraisal Remedy; Dissenters' Rights; Minority Shareholders; Minority Buy-out; Share Valuation.

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The appraisal remedy gives an aggrieved shareholder the right to demand payment from the corporate issuer of his shares at a fair value (Paine 2005). Also known as dissenters' rights, minority buy-out, share-purchase remedy, or simply as appraisal, this remedy is available in jurisdictions including the United States, Canada, New Zealand and South Africa.

Justifications for the application of appraisal are that it compensates the minority for the loss of their veto power; offers a cash exit as opposed to being forced to take up stock in a new entity, and protects the majority by expediting corporate transactions (MacIntosh 1986; Wertheimer 1998). There are several instances in which appraisal may be used, depending on the jurisdictions in question. These include mergers and consolidations; schemes of arrangement; substantial transfers of assets; dissolutions; liquidations, and amendment to a company's Memorandum or Article of Incorporation.

## **THE APPRAISAL REMEDY IN SELECT JURISDICTIONS**

Appraisal is available in the company law statutes of several countries, either as a sole remedy or alongside other remedies. This discussion will be limited to three jurisdictions namely: the United States of America (the US); New Zealand and South Africa.

### **The United States**

The current Model Business Corporation Act (the MBCA), as developed by the American Bar Association provides for appraisal rights in the US. The remedy is incorporated into the company law statutes of all US states, most of which formulated their appraisal provisions from the MBCA, although varying in scope and application.

Chapter 13 of the MBCA provides for appraisal. Section 13.02(a)(1)-(8) recognises the shareholder's appraisal right in the following situations: consummation of a merger requiring shareholder approval in which the dissenter is entitled to vote; conclusion of a share exchange in which the company's shares will be acquired; disposition of the company's assets; an amendment to the company's articles of incorporation which reduces the number of shares of a class owned by the shareholder to a fraction of a share if the corporation has the obligation or right to repurchase the fractional share created; any other situation involving the above events to the extent allowed; a domestication resulting in the dissenter receiving shares with less favourable terms than before; conversion of the corporation's status to non-profit; and, its conversion to an unincorporated entity.

The procedure for appraisal is set out in s13.20. Where any of the changes envisaged in section 13.02(a) is to be approved by shareholders, they must be accordingly notified of the applicability of appraisal rights; and a copy of chapter 13 must accompany the notice. To enable them make an informed decision, disclosure of financial information and other material facts is usually required.

In terms of section 13.21, to be entitled to payment, a dissenter who wishes to demand for appraisal must inform the company in writing before the shareholders' votes are taken, and must not vote or execute a consent in favour of the decision. Other

formalities include delivery of statutory forms and notices by the company, and completion of the forms and deposit of share certificates (where certificated) by the shareholder (section 13.22&13.23). Importantly, the company is further required under section 13.22 to provide the shareholder with an estimate of the fair value of the shares, and an assurance that it could provide on request, the number of shareholders demanding appraisal, and their total shareholding. This is to enable unsure shareholders reassess their demand.

Barring a withdrawal from appraisal under section 13.23(b), a shareholder who has deposited share certificates or returned the forms (in case of uncertificated shares), loses all shareholder rights in that company. In terms of section 13.24(a), cash payment being the company's estimate of the fair value of the dissenter's share, plus interest, must then be made to complying shareholders within 30 days, together with information on their right to demand further payment.

Despite having been available for a long time in the US, appraisal has not always proved popular with shareholders. In the case of mergers, it has been said that apart from practical factors discouraging reliance on appraisal, a combination of factors usually result in shareholders being offered fair value for their shares, hence the need for the remedy does not arise in the first place (Betzen & Shurte 2005). Hagan (2003) attributed the recent increase in reliance on appraisal in part to the decline in tender offers, increase in mergers and the Supreme Court's direction to shareholders with voting powers which would not have effect on the outcome of a vote to turn to state law remedies like appraisal, rather than proxy rules of the Federal Security Laws. Notwithstanding, reliance on appraisal remains infrequent.

Some of the impediments to appraisal in the US include the cumbersome nature of the procedure; the problem of arriving at a fair valuation method, although *Weinberger v UOP Inc* (1983) has since dealt with this issue; and the fact that the MBCA acts only as a guide. Hence state provisions could vary from those of the MBCA. For instance, state laws might not incorporate all the appraisal-triggering transactions recognised under the MBCA, thus limiting the scope of the procedure. For instance, in Delaware, the remedy is available in the event of a merger or consolidation (section 262, Delaware General Corporation Law 2001).

## **New Zealand**

The Companies Act 1993 provides for the appraisal remedy in New Zealand; with amendments introduced by the Companies (Minority Buy-out Rights) Amendment Act 2008. Appraisal is entrenched in section 110 of the Act. Importantly, in addition to the company, section 111(2)(a)and(b) and section 113 also allows a third party to purchase the dissenter's shares. The company is required to inform the shareholder of the proposed offer price; how valuation was arrived at following the formula under section 112(2), or using another method if the provided formula would otherwise be unfair.

If the shareholder does not agree with the valuation, a written notice to this effect must be delivered to the company within ten working days (section 112(4)), in which case the matter must be referred to arbitration for determination of a fair and reasonable valuation; and available remedies for the parties (section 112A(1)). In the

meantime, the company must pay a provisional price to the dissenting shareholder pending the end of arbitration, when it may be ordered to pay a balance on it (section 112A(1)and(2)).

It is submitted that the above procedure will ensure fairness to the parties. Referring the matter to arbitration first of all avoids recourse to the court. Importantly also, requiring the company to pay a provisional price pending determination of fair value holds the company accountable while awaiting the outcome of arbitration. This gives shareholders the confidence that they would receive some payment in the meantime, pending determination of a possibly bigger value, while the company is prevented from taking undue advantage of proceedings to prolong payment.

It must be noted that prior to the introduction of the Companies (Minority Buy-out Rights) Amendment Act 2008, there was insufficient guidance on valuation and the timelines involved. In *Natural Gas Corp Holdings Ltd v Infratil (2005)*, the court criticised the lack of detail in New Zealand's appraisal provisions, stating that there was urgent need for review. Significant changes introduced by the 2008 Amendment Act include providing under section 112(3) for the application of a different valuation method where the stipulated ones were unfair.

The remarkable provisions of the New Zealand Act notwithstanding, the provisions of sections 114 and 115 could limit the rights of the shareholder to appraisal, in that they exempt the company from purchasing the dissenter's shares in certain circumstances, which include inability to finance the purchase and insolvency. The situation is only slightly mitigated by the fact that the court must be satisfied that the company has made necessary efforts where indicated to ensure purchase by a third party, thereby placing the burden on the company to reasonably ensure purchase of these shares. On the whole however, the possibility of purchase by a third party means that in any of the situations where the company could be exempted from the obligation to purchase the shares, a neutral party could purchase these shares, resulting in a win-win situation for both the company and the shareholder.

### **South Africa**

The appraisal remedy was introduced into South African company law by the Companies Act 2008. Prior to this, the available shareholder remedies were personal action and derivative action. Section 164 of the Companies Act 2008 provides for appraisal where a company intends to amend its Memorandum of Incorporation; or commence proceedings for certain fundamental transactions like disposal of all or a greater part of its assets or undertaking (section 112), amalgamation or merger (section 113), and the scheme of arrangement (section 114).

In terms of section 164, the dissenter must give notice objecting to the resolution before it is passed by the company, which must then notify dissenters of its adoption of the said resolution. Shareholders may then demand to be paid the fair value of their shares. Once this has been done, the shareholder has no further rights in respect of the shares.

The Act does not offer adequate guidance on how to arrive at a fair value, which has been a major problem associated with appraisal. Rather, it leaves determination of fair

value at the discretion of the directors (section 164(12)), only requiring that they provide a statement on how it was arrived at. The shareholder is however empowered to turn to the courts for redress where the company fails to make an offer, or the proposed offer is deemed inadequate, and the court is thereafter empowered to determine fair value. In this regard, it is suggested that provisions similar to section 112A of the New Zealand Companies Act be introduced whereby the company is required to pay a provisional price to the shareholder pending the court's determination of the appropriate price, with the difference, if any, to be paid later.

It must be noted that the court's discretion in this case extends to appointing appraisers who can help in determining what constitutes fair value; and allowing a reasonable interest to be paid to the dissenters (section 164(15)(c)). The implication of not providing enough guidance under the Act on the determination of fair value is that there will be undue recourse to the courts, thereby negating the idea of limiting court's interference in appraisal proceedings.

It is important to note the implication of section 164(17), which allows the court to vary the company's obligations under the appraisal remedy. In terms of the subsection, if there are reasonable grounds to believe that paying dissenting shareholders would result in the company being unable to pay its debts as they fall due over the next twelve months, the company could apply to the court for an order varying its obligations to the dissenting shareholders, and the court will make an appropriate order, having regards to the company's financial circumstances. It is submitted that this provision could act to defeat the purpose of appraisal provisions, with companies attempting to show that paying the dissenters would negatively affect their financial standing. Meanwhile, at this stage, title to the shares would have long passed to the company, while the shareholder will be forced to wait until such a time that the company will be deemed able to pay, leaving the shareholder in a vulnerable state. It is important that the company is not allowed to hide behind this provision in delaying payment to dissenting shareholders, or affecting valuation of their shares, since the possibility that the court could be more inclined to show sympathy to a company that has applied for variation of its obligations owing to foreseeable financial problems must be strongly considered. A ready solution to the problem created by this provision is the introduction of a provision enabling third-party purchases similar to the New Zealand Act. The availability of a third-party purchaser of the dissenter's shares will effectively dispense with the need to rely on subsection 17, since the pressure on the company to purchase the shares would have been removed by the third party.

Equally worrisome is the wording of section 164(17)(b)(ii), which simply requires the company relying on section 164(17) to pay dissenters "at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable". This provision gives the company too much leeway, and is detrimental to the interests of the dissenting shareholders. Rather, it is advisable to give specific timelines within which the company must pay, once it is shown that its finances are in order. It is also advisable for the court to verify the financial standing of a company relying on this provision at designated times to determine how soon the variation on its obligation can be brought to an end. To achieve this, court appointed auditors or assessors may be commissioned to investigate and report their findings to the court.

## **MERITS OF APPRAISAL**

The foremost benefit of appraisal is that it implies a win-win situation for both parties involved. The company is able to proceed with the transaction in question without the fear of being held back by the minority, or without being termed as oppressive, while the minority avoids forcefully going along with the majority, thereby effectively taking charge of their affairs in the company, and being compensated for loss of their veto power while at it (Hagan 2005).

An offshoot of applying the appraisal remedy is that it encourages an amicable resolution of what could have otherwise been an explosive situation. By providing for the appraisal remedy, a country's statutes empower the dissenting shareholder, in a manner of speaking. Even though they are unable to wield the kind of power necessary to influence the company's decision, respite is offered to dissenting shareholders in the form of the remedy. Availability of the remedy – as opposed to forcefully going with the majority's decision – could prevent tension. Thus, unless a dispute arises over the value of their shareholding, or the company's inability to pay due to non-availability of funds, the issue will be peacefully resolved.

Also an individual shareholder can pursue the appraisal remedy. There is no complicated requirement requiring an aggregate of shareholding or a number of shareholders before the remedy can be sought. Further, appraisal is designed to be cost effective, as it does not primarily involve litigation. Should the procedure go as envisaged between the parties, there would be no recourse to the courts. The New Zealand provisions emphasise this point, in that any issue on determination of fair value is initially referred to arbitration, and not the courts.

Appraisal is also expected to be done over a shorter period of time than other procedures. Hence, proceedings are expected to be concluded in as little time as possible. This explains the very short timelines given by appraisal statutes generally. For instance, one of the improvements made by the Companies (Minority Buy-Out Rights) Amendment Act in New Zealand was to reduce the time required for the Board's notice to the shareholder under section 112(1) of the Companies Act to five working days.

## **DEMERITS OF APPRAISAL**

As important as the shareholder appraisal remedy is in company law statutes, it is not without its problems. First of all, working against the remedy is the fact that it brings an end to the membership of the shareholders concerned. Naturally, a procedure with this end result must be viewed with caution. Secondly, the majority could misuse the availability of this remedy to freeze-out the minority (*Matteson v Ziebarth* 1952; *Yuspeh v Koch* 2002). As pointed out by Wertheimer (1998), it is sometimes intended from the onset to end in minority freeze-out.

A major problem with appraisal, which has been the subject of much debate, is the issue of how to determine the fair value of the shareholding in question. As Hagan (2003) has pointed out, an offer or demand for appraisal itself does not ordinarily result in litigation. Rather, as seen from cases on the subject such as *First Western Bank Wall v Olsen* (2001) and *Weinberger v UOP Inc* (1983), arriving at the fair

value of the shares does. The underlying reason, as opined by Adebajo (2008) is that the value of shares is never static; since, from the time of purchase to the time of appraisal, it would have changed periodically, depending on the company's performance per time.

There are several methods of valuation available. The Discounted Cash Flow (DCF) method, popular in Delaware, assumes that the value of a company's assets equals the current value of their expected cash flow into the future; the Comparable Companies Method, involves comparing a company with its publicly traded competitors in the same industry; the Comparable Transactions Approach, uses multiples of valuation metrics e.g. earnings, calculating them as the ratio of the transaction price to the metrics; the Net Asset Value Method, uses the company's balance sheet to arrive at the book value of assets; while, the Market Value Method either compares similar corporations or relies on previous sales of the shares of the closely held corporation (Jarvis 2005; Hagan 2003).

Hence pin-pointing the method which would be the fairest to all parties is a difficult task. However, appraisal should strive to strike a balance between law and equity to ensure that parties are treated fairly (Hagan 2003). To achieve this, it has been suggested that the court's approach should be based on fairness, while duly weighing the facts and circumstances of each case (Adebajo 2008).

A leading case on valuation is *First Western Bank Wall v Olsen* (2001), where the court held that fair market value was an incorrect method of valuation, and ordered the company to pay the difference between the previous amount and the newly calculated value, which judgment was affirmed on appeal. In *Allied Chemical & Dye Corporation v Steel & Tube Co* (1923), the court stated that sound value was not a fair indication of the market value, and the fact that it was usually quoted to potential investors did not detract from this fact. In *Weinberger v UOP Inc* (1983), valuation methods were extended to include methods which were considered generally acceptable in the financial community.

Also militating against the appraisal remedy is the complicated and demanding procedural rules involved, which tend to discourage reliance on the remedy. To counter this problem, it is proposed that appraisal provisions be simplified as much as possible. This will be especially beneficial to shareholders who could be laymen with only a very basic understanding of business or legal issues. A similar problem is that the proceedings tend to drag for longer than expected, usually owing to valuation disputes, with some dragging for years. This could discourage reliance on the remedy.

Yet another worrisome issue is the inclusion in some appraisal provisions of clauses which enable the company to rely on lack of funds to frustrate the proceedings, such as obtains in New Zealand and South Africa. The inclusion of provisions such as section 114 in New Zealand and 164(17) in South Africa effectively negates the whole essence of appraisal. Although it must be pointed out that in New Zealand, the availability of a third-party purchaser could effectively tackle this problem, and in any event, in terms of section 114(2)(a), the court is empowered to set aside the resolution which triggered appraisal, and even liquidate the company (section 114(2)(d)). These powers are necessary to counter any reckless reliance by the company on this provision.

## **ALTERNATIVES TO APPRAISAL**

Apart from appraisal, there are other possible remedies which a dissenting shareholder could rely on, depending on their availability in the jurisdiction concerned. These would be considered below.

### **Personal Action**

In terms of section 163 of the South African Companies Act 2008, personal action as a shareholder remedy can be instituted by an aggrieved shareholder against the company for wrong done to that shareholder or a group of shareholders where an act or omission is deemed oppressive or unfairly prejudicial to the interests of the applicant; where the company's business is carried on in a manner that is unfairly prejudicial or oppressive to the applicant's interests; or the directors' powers are being used in such manner. It protects the minority who otherwise would be left at the mercy of the majority.

The merits of personal action include the fact that it enables the minority to challenge the majority's decision (unlike appraisal which does not give room to challenge the majority's decision); the aim of the remedy is not for minority shareholders to exit the company; the reliefs that could be obtained under it are limitless (it could be anything from reversal of the act/omission in question, amendment to the company's Memorandum of Incorporation, to liquidation or business rescue); the court has unfettered discretion, enabling it to rule on future conduct; and the remedy is not limited to acts but includes omissions.

There are also considerable demerits to personal action. Firstly, because the relief is entirely at the court's discretion, a shareholder who has put in an application for this relief has no further input, and must abide by the court's decision. Also this relief is only applicable in cases of unfairly prejudicial, unjust or inequitable conduct. Hence in the absence of any fraud or illegality, dissenting shareholders are stuck with the majority's decision. Further, the relief is litigation-based, hence the primary port of call for the shareholder is the court. Hence such things as costs, and court procedures must be considered.

Choosing this route implies leaving everything in the hands of the court. The shareholder must also bear in mind that though the majority's decision to adopt the resolution in question may be unfavourable to the minority, this does not automatically presuppose oppression or unfairly prejudicial conduct. Hence, personal action may not yield the desired result. Thus, where personal action is available alongside appraisal, it is important to weigh the limitations before opting for that relief instead of appraisal.

### **Derivative Action**

The derivative action can be instituted by a shareholder on behalf of all shareholders (except the wrongdoers) in respect of unratifiable wrongs where the company has refused to act (Cilliers et al 2000). It can be brought under common law or under statutes. The common law derivative action was abolished in South Africa by the 2008 Companies Act, leaving only the statutory action under section 165. In terms of

the section, a shareholder, director or employee (or their representatives) may serve a demand on the company to proceed with legal proceedings to protect the company's interests. The company then investigates this demand to determine its plausibility and its response will determine the next line of action. If it fails to do so, the initiator may then apply for leave of court to initiate proceedings in the company's name and on its behalf (section 165(5)). In exceptional circumstances however, the individual is allowed under section 165(6) to apply directly to the court without first calling on the company to do so.

Advantages of the procedure include that any stakeholder can make use of this remedy, unlike what obtains with appraisal which is restricted to shareholders only. Also, the remedy is primarily designed to protect the company's legal interests and everything is done in the company's name and on its behalf, whereas appraisal aims to protect the interests of the minority shareholder and will be pursued in the shareholder's name. Importantly also, the applicant's earlier ratification of the decision in question does not affect eligibility to rely on this remedy (section 165(14)), unlike under appraisal, which requires that the shareholder not vote in favour of the said resolution.

It must be borne in mind however the derivative action relies on litigation to achieve its aim, hence the possibility of the process dragging for a long time, and costs involved must be factored in, although section 165(10) allows the court to make any order as to the costs of parties to the proceedings.

### **Subjecting the corporate transaction to a business-purpose test in court**

Here, the minority shareholder applies to court to determine if the proposed transaction has a genuine business motive (MacIntosh 1986). Its aim is to eliminate transactions which manifestly lack any business purpose. However, as MacIntosh (1986) pointed out, subjecting fundamental changes in a company to a business purpose test will not fully protect the minority from "redistributional predation", just as the court's competence to determine issues related to a company's business judgment will also be called into question. Also, the remedy is considered expensive, time-consuming and riddled with uncertainty, with the costs borne by the applicant, notwithstanding that other shareholders who have not made any contribution stand to benefit (MacIntosh 1986).

The Supreme Court of Delaware had previously held in *Singer v Magnavox Co* (1977) that proposed mergers must, in addition to the requirement of fairness, pass the business purpose test to have validity. However, this requirement of satisfying the business purpose rule was rejected by the court in *Weinberger v UOP Inc*, wherein it stated instead that appraisal proceedings were sufficient to resolve issues concerning share valuation.

Other possible remedies include private action, which is available to a member in their private capacity for the enforcement of rights which accrued in a private capacity, for instance as an officer of the company; and, also application to inspect the company's books (Cilliers et al 2000).



## CONCLUSION AND RECOMMENDATIONS

This article has examined appraisal rights as a shareholder remedy, focusing on three jurisdictions. It considered the merits and demerits of appraisal, as well as alternatives to appraisal, and their merits and shortcomings as well. It is suggested that one or more of these other remedies may be made available in addition to appraisal, as obtains in South Africa where in addition to appraisal, both personal action and derivative action are also available to shareholders. This will give minority shareholders a broader range of choices to pick from, after considering their individual needs.

It is submitted that appraisal is a viable remedy for dissenting shareholders, with the potential to benefit parties on opposing sides when a corporate transaction is being considered, thereby enabling a win-win situation. The fact that it can be applied with little or no recourse to the court also works in its favour. However, major downsides of appraisal, which include the problem of valuation, the inevitable recourse to the court, lack of funds on the company's part to pay the share price in question, and the tendency for the procedure to drag for longer than necessary (contrary to the projection for the remedy) constitute a stumbling block. To get the best out of appraisal therefore, these issues should be addressed. Ways of resolving these problems include referring the matter of valuation to arbitration, and providing for the possibility of a third party purchasing the dissenter's shares, as the found in the New Zealand appraisal provisions, as well as stipulating applicable valuation methods, for the sake of clarity.

Importantly, the dissenting shareholder, in deciding, must not lose sight of the fact that appraisal will bring an end to their membership. For this reason, appraisal should be seen as a last resort for members who are not eager to end their membership. Thus the available options should be weighed carefully before a choice is made.

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*The European Doctrine of Margin of Appreciation  
What ASEAN can learn from its Concept and Application in  
Universalizing “Controversial” Asean Declaration of Human Rights?*

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**Abstract**

The European Court of Human Rights has developed the doctrine of Margin of Appreciation in supervising when member states of the Council of Europe breach the European Convention of Human Rights (ECHR). This paper argues that the margin of appreciation is not a particularity in the traditional sense; rather, it is a moderate way to bridge the unresolved issue between universality and particularity of human rights.

In the ASEAN context, particularity and universality of human rights have been the topic of everlasting debate among the scholars and human rights activists. Most of them have argued that ASEAN promotes the particularity of human rights by inserting “Asian [ASEAN] values” to its human rights concept as stated in the “controversial” ASEAN Declaration of Human Rights and also in their constituent instrument ASEAN Charter.

This paper concludes and reiterates that human rights should be universally accepted. However, to avoid the reluctance of this universal value of human rights in this region, the incremental acceptance of the principle is needed – its particularity of human rights; particular in terms of application. The acceptance of asian values in ADHR could bridge the reluctances. As in the Europe, ASEAN will also put international human rights standard in their region.

Keywords: Margin of Appreciation – Universality – Particularity – European Court of Human Rights – ASEAN Values – ASEAN Human Rights Declaration

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## 1. Introduction

Due to lack of references discussing deeply about ASEAN (Asean) as international regional organization as well as its member states, the researcher uses a lot of books or journals focusing on the study of Asia. Since ASEAN is part of Asia, the use of such materials is still relevant.

This paper will try to seek the European Doctrine of Margin of Appreciation (MoA) used by The European Court of Human Rights (ECtHR) in supervising when member states of the Council of Europe breach the European Convention of Human Rights (ECHR). The concept, process, and application of this doctrine will be the outcome of this paper to be a lesson learned for ASEAN in universalizing “controversial” ASEAN Declaration of Human Rights (AHRD).

This paper argues that the MoA is not a particularity in the traditional sense; rather, it is a moderate way to bridge the unresolved issues between universality and particularity of human rights. Therefore, for the most part ASEAN can learn from Europe.

To that end, this paper is divided into three parts. The first part deals with the need to redefine human rights; second and third part are the main parts, second part deals with the discussion on MoA which aims to prove that MoA is a concrete form of particularism in European regime; third part will come with the analysis of lesson learned from the concept and application of MoA for ASEAN to universalising their ADHR; these parts are followed by a conclusion.

## 2. Redefining Human Rights: The Need for Effective Human Implementation

Beginning with the definition of human rights, this part will identify the problem of universality and particularity of human rights especially in ASEAN context. Human rights derive from dignity and worth inherent in the human person (Vienna Declaration, 1993). The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world (The Preamble to the UDHR 1948). The preambles of the two main human rights covenant - ICCPR and ICESCR, restate that human rights derive from the inherent dignity of human person, but neither addresses this concept further (Connie de la Vega, 2013, 72). Human rights are the rights of all human beings (Smith et al, 2008, 7). It is based on the dignity of human nature endowed by reason and conscience inherent in human beings (UDHR, 1948). Smith argued that human rights are believed to have a universal value and moral with no boundaries of space and time inherent to all human (Rachminawati, 2014).

Human dignity is the basis of human rights, and therefore human rights norms and principles are universally accepted. However, Shaw in his book highlights that the implementation of human rights in the domestic level will slightly contradict the main principle in international law, that is the principle of ‘State Sovereignty’ (Shaw, 2008, 265). He strongly argued that indeed respect for human rights is the foundation for the world peace, but emphasizing the role of the state as the main sources of international human rights law as in the ICJ judgement in the Military and Paramilitary Activities in and against Nicaragua case stated that “... the fundamental

principle of State sovereignty, ‘is a basic tenet,’ on which the whole international law rest,” (Shaw, 2008, 268). Similar to Shaw, Bedi (Bedi, Shiv R S, 2007, 37) argues that the development of human rights on the international level is one of the most startling innovation in modern international law, because it has a potential to unleash explosive forces that challenge the basic tenet of international law system—the principle of state sovereignty. However, ‘third world states’ claim that human rights is a product of western world. Western world often used ‘the principle of state sovereignty’ as a tool to refuse any interferences on behalf of human rights.

Considering the big role of the state in the implementation of the universal human rights norms and values, the internal dynamics of normative development in each society should be considered equally important (Baik, 2012, 48). Amartya Sen in Baik (2012, 48) articulates that the liberty and rights ideas, the antecedents of individual freedom exist not only in Western culture, but in Asian [ASEAN] cultures as well. The cultural roots of humanism and the concept of human dignity are also recognised in Asian society in its religious or philosophical traditions. Kim emphasizes that because human rights are not attributed solely to Western concepts or philosophical traditions, the recognition of diversity and particularities in different cultures is increasingly important (Baik, 2012, 49).

In the context of ASEAN, the important thing to note is to not always refuse the Asian values in ‘human rights tunnels,’ but to make sure that the Asian values did not misuse the ‘tunnels.’ Today ASEAN member states show good performance in the use of this ‘flexibility’ term for the best implementation of human rights in their regime. The establishment of the ASEAN Declaration of Human Rights (hereinafter ADHR) shows the improved recognition of human rights in ASEAN countries. However, critiques highly remain. Most human rights activist claims that ADHR contains particularity of human rights. In contrast, I would argue that ADHR cannot be considered containing particularity of human rights and therefore does not abrogate the universality of it. It is indeed a new form of universalism (Rachminawati, 2014). This positive optimism should be build to encourage the full realisation of human rights.

The diversity of the nations contribute to the differences of concepts of human rights as well as the promotion and protection. Diverse perspectives of states on human rights issues affect the procedure of implementation. Human rights conception is also influenced by the attitude and thinking of the nation and its member, hence the concept of particularity of human rights existed. This fact shows the paradox of universal human rights, which is universal in terms of principle, but particular in terms of application (Rachminawati, 2014).

At the same time, world community at large question the role and function of international human rights law regime today. The slow response from the UN and ‘big players’ countries around the world in cases of Palestinians bombing and invasion by Israel shows that human rights is only a tool for putting pressure on a weaker country by a stronger country with ulterior motives. To conclude, I strongly agree with Baik (2012, 51) that the particularities embedded in the norms are the products of the actual process of norms adoption and tension that exist in each Asian [ASEAN] society today. It is important to appreciate those particularities in the norms in each society without compensating the universal nature of human rights.

### **3. Margin of Appreciation: A Concrete Form of Particularism in European Region**

This part will begin the discussion by giving the definition of margin of appreciation doctrine and its application in several landmark case, before the author will identify the forms of particularism of human rights contained in the doctrine, then conclude it with respected contribution of MoA towards universal human rights enforcement in Europe.

MoA is a doctrine of the European Court of Human Rights (hereinafter ECtHR) to consider whether a member state of the Council of Europe has breached the European Convention on Human Rights (hereinafter ECHR (Greer, 2006, 222)). The MoA, typically described as a 'doctrine' rather than a principle, refers to the room for maneuver the Strasbourg institutions are prepared to accord national authorities in fulfilling their Convention obligations (Greer, 2006, 222).

The concept of this doctrine is an original feature of the jurisprudence of the ECtHR, which seeks to balance the primary of domestic implementation with supranational supervision (Baik, 2012, 66). Learning from the case of *Hanyside v. United Kingdom* (1976), the court applied wide MoA in assessing what measures are necessary to protect moral standards and declare that the interference of public authority is not in breach of article 10 of the convention. Article 10(2) leaves a room for the states margin of appreciation. The court found that there was not a uniform European conception of morals, and that this margin was given both to the domestic legislator and to the bodies, judicial amongst other, that are called upon to interpret and apply the law in force (*Handyside v. United Kingdom*, 24 ECHR (Ser. A) (1976) para. 43).

Manfred Nowak (63) also calls the doctrine as a limitation human rights clause in the ECHR. At first, I agree with Nowak that this is a limitation clause, but throughout the process, I see that this doctrine is more appropriately a doctrine of limitation clause implementation as enshrined in the ECHR by the ECtHR in many cases.

The background of the doctrine is the difficulty of the state parties in imposing the rule of law set out in the ECHR because the diversity in social, economic, political and cultural aspects. It was recognized by the Europeans themselves that they are heterogeneous. On the contrary, the non-Europeans often think that Europeans are homogeneous. Margin of appreciation will be applicable where there is an absence of a uniform European conception of the implications of the convention (De Schutter, 2010, 447). ECtHR realizes that national authorities are in a better position to obtain and assess local knowledge, which the court may not have either, or the significance of which it may misjudge (Greer, 2006, 224). However, this MoA goes hand-in-hand with a European supervision embracing both the law and the decisions applying it (Greer, 2006, 224).

Member states enjoy a certain MoA in asserting whether and to what extent differences in otherwise similar situations justify different treatments in law. The scope of margin will vary according to circumstances, subject matter, and its background (*Handyside v United Kingdom*, 1984). Necessary conditions for the limitation of Human Rights called MoA are: first is Legality (is measure prescribed by

law?); second, Proportionate to the legitimate aim; third is necessity in a democratic society. What has been always criticized are: Are the measures proportionate? How to define that it is necessary in a democratic society?

Since drawing the line between difference and discrimination involves matters of social policy (which includes cultures, economic, and politics), the width of the MoA 'will vary according to the circumstances, the subject matter and its background' (Greer, 2006, 222). Therefore, there are wide and narrow margin of appreciation.

As Simor and Emmerson show in Steven Geer, the width of the margin of appreciation will vary according to 'such factors as the nature of the Convention right in issue, the importance of the right for the individual, the nature of the activity involved, the extent of the interference, and the nature of the state's justification'. However, it involves weighing difficult and controversial political, rather than judicial, questions (Greer, 2006, 224). I will elaborate more on the following cases. The wide margin of appreciation usually applies in matters of moral, particularly on matter of belief. The national authorities enjoy this wide margin of appreciation to limit their citizen religion and belief pursuant to their specific need as to condition mentioned previously.

Article 9 ECHR rules about the freedom of thought, conscience and religion. It also contains the limitation of this rights as stated in paragraph 2: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".

In *Vergos versus Greece* case (2004): Vergos wanted to establish a praying house on a land he owned. Greece did not give permission even though it was in its own land and for his religious manifestations. The Court found that there was no violation of Article 9, as states have MoA in matter of town planning. In the *Sahin vs. Turkey* case, a case of headscarf banning in the university or any other public areas in Turkey. The Court found that it was justified because Turkey had proposed to be a secular state (Greer, 2006, 98).

In *Norris* case, the court found that there was no violation of article 8 of the ECHR. Irish government ruled the prohibition against homosexual conduct. Norris thought that Ireland had been intervened against his right to privacy enshrined in article 8 ECHR. Court argued that the intervention was not a violation of Article 8, but was necessary to protect the moral values growing in Ireland (especially Catholics) (Nowak, 65). The court applied narrow MoA in this case. I strongly criticize that the court judgment in *Sahin* and other related cases of manifestation of the religion is not in accordance with the principle of necessity in a democratic society. The judgment in the *Sahin* case could be criticized for having too readily endorsed Turkish fears about Islamic fundamentalism gaining a toehold in national public institutions (Greer, 2006, 98). Pluralism is an indivisible part of a democratic society, so why should it be forced to be homogeny?

On the contrary, the *Lopez Ostra* case, the Court put the protection of individual at the frontier and applied wide MoA (Mowbray, 2004, 183). The court stated that:



“Having regard to the foregoing, and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town’s economic well-being - that of having a waste-treatment plant - and the applicant’s effective enjoyment of her right to respect for her home and her private and family life.”  
(*Lopez Ostra v. Spain*, 1994)

There have been certain developments since 1986 in the law of some of the member States of the Council of Europe. However, reports accompanying the resolution adopted by the European Parliament on 12 September and Recommendation 1117 (1989) adopted by the Parliamentary Assembly of the Council of Europe on 29 September 1989—both of which seek to encourage harmonization of laws and practices in this field- reveal, as the Government pointed out, the same diversity of practice. Accordingly, in regard to the existence of no common ground between the member States, this is still an area in which they enjoy a wide margin of appreciation. In particular, it cannot at present be said that a departure from the Court’s earlier decision is warranted in order to ensure that the interpretation of Article 8 of ECHR on the point at issue remains in line with present day conditions (Mowbray, 2004, 133).

#### **4. Margin of Appreciation Doctrine: some Lessons Learned for ASEAN in universalizing AHRD**

The application of the doctrine of Margin of Appreciation in the cases discussed above shows that the universal values of human rights, enshrined in the ECHR, have nothing in common and no uniformity in terms of its application. Under Bakircioglu emphasizes that "margin of appreciation" refers to the power of a Contracting State in assessing the factual circumstances, and in applying the provisions envisaged in international human rights instruments (Bakircioglu, 711).

The diversity of application of this doctrine by the ECtHR is a fact that there is no homogeneity among European States (Rachminawati and Syngellakis, 2012, 108). It was designed to provide flexibility in resolving conflicts emerging from diverse social, political, cultural and legal traditions of Contracting States within the European context (Bakircioglu, 711).

The application of human rights under the ECtHR, as described in the previous part, clearly shows the application of the concept of particularism from the viewpoint of the Universalist. The ECtHR provides room for States to carry out legitimate human rights restrictions (Legality, proportionate to the legitimate aim, and Necessary in a democratic society) taking into account the social, cultural, economic and political conditions. Those restrictions were then assessed by the Court whether it is just or not, whether there is a violation of the convention or not.

Moreover, ECtHR subjectivity in assessing any justification restrictions, regardless of whether the inconsistency is due to a sharp assessment of any conditions are different for each case or background of political interests or values, - the Margin of Appreciation was never consistent. However, dynamism is a fundamental value of the

law because the law has to grow dynamically pursuant to the development of society (Tümay, 2008, 210).

The application of limitations on human rights is still a contentious issue since the problem is still not being answered. This takes precedence on the right or democracy or human rights principles such as non-discrimination principles, principles of subsidiary, and the principle of proportionality (Nowak, 63) and positive obligation. Steven Greer concludes that the basic principle of human rights is mediate between the 'rights', 'democracy', and 'priority' principles. Furthermore, the principles of proportionality and strict/absolute necessity determine the strength of the 'priority' principle in different contexts. The principles of review, commonality, evolutive, dynamic, and autonomous interpretation derive from the 'rights' principle, while the margin of Appreciation doctrine (strictly interpreted) derives from the 'democracy' principle (Greer, 2006, 213).

Mahoney in Steven Greer deems that the margin of appreciation provides the appropriate degree of judicial restraint. However, it contributes a lot to bridge and apply the convention (Greer, 2006, 214) since the principle of proportionality has also been read into the obligation undertaken by states in Article 3 of Protocol No. 1 to hold free elections (Greer, 2006, 217). It is for the Court to assess whether the States in doing such action is proportional or not.

Similar to Mahoney that the Margin of Appreciation will help the enforcement and implementation of the convention. Why so? Since in many cases, the Court uses the doctrine of margin of appreciation and the principle of proportionality to resolve conflicts between rights written in the Convention and between the 'European rights' and 'national rights', though there is no real scope for discretion on the part of national non-judicial authorities during and in the drafting of the convention (Greer, 2006, 220).

Accordingly, it is no longer appropriate to conflict universalism and particularism of human rights. The presence of the bridging margin of appreciation is a universal value. However, it is also a relative implementation and ideal concept in the protection and enforcement of human rights in Europe. What actually more important in the enforcement of human rights is the implementation of the principle of proportionality rather than absolute enforcement of universal human rights. The absolute enforcement of universal human rights would be counter-productive and the imposition and application of it are forms of the real human rights violations.

Despite its contribution, the shortcomings of the doctrine of Margin of Appreciation have still remained. The need for the articulation of solid and foreseeable criteria is not only crucial for the future existence of the doctrine, but also for the legal certainty as well. Without it, the confidence in European Convention system cannot be maintained. However, it should be kept in mind that States Parties have increasingly incorporated the European Convention into their domestic legal systems, i.e., a more harmonized judicial system will prevail in the near future among the Member States. In other words, the MoA doctrine, to a certain extent, might lose its importance in the near future, for the absence of a European common ground in certain areas will no longer be an obstacle for the Court to exercise its supervisory function effectively.

Nevertheless, today the doctrine can be used as an effective tool for the better enforcement of Convention rights, since the rich legal and cultural traditions of the Member States of Council of Europe present considerable difficulties in the harmonious application of the Convention rights. It has been enriched with the participation of former socialist countries (Bakircioglu, 732).

As frequently stated in this paper, ECtHR relies on the fact that national authorities are in a better position to obtain and assess local knowledge, which the court may either lack, or the significance of which it may misjudge (Greer, 2006, 213). However, this MoA goes hand in hand with a European supervision embracing both the law and the decisions applying it (De Schutter, 2010, 334).

In response to those theses above, ASEAN needs to have an ASEAN Human Rights Court (Rachminawati and Syngellakis, 2012, 121) whose jurisdiction is to assess whether member states apply the Asian values enshrined in the ADHR proportionately pursuant to international human rights law. Judges of ASEAN Court of Human Rights are required to have a broad knowledge concerning the condition of each member states economically, socially, politically and culturally. AICHR does not seem to be able to play this function and role respectively (Rachminawati, 2014).

Asia [including ASEAN countries) is the only area in the world that does not have a human rights court, despite the potential human rights system is indeed emerging (Baik, 2012, 1). European countries have showed that their human regional system have developed its aim to supplement global human rights institution (Baik, 2012, 1). The expansion of regional human rights system is largely based on the impressive performance demonstrated by the institution in Europe and in the Americas (Baik, 2012, 2).

As in Europe with its margin of appreciation, Asian values to be developed by the ASEAN Court of Human Rights is considered an influential source of law. It concludes that the experience of Europe has proved that regional institution can promote and protect human rights with higher standards than the global system do (Baik, 2012, 2). The promotion and the protection of human rights in European region could not be separated from the application of human rights by the Court. Margin of appreciation doctrine is believed as an important element in realization and effectiveness of human rights. Europe makes available flexible remedy measures and enhanced implementation of the norms when domestic institutions violate or neglect human rights (Baik, 2012, 2).

## **5. Conclusion**

I believe the successful experience in European system with its margin of appreciation negates the presumption that the recognition of particularity of human rights will harm the universality of human rights. This optimism, however, must be accompanied with the establishment of human rights mechanism including the human rights court.

This paper concludes and reiterates that human rights should be universally accepted. However, to avoid the reluctance of this universal value of human rights in South East Asian region, the incremental acceptance of the principle is needed – its particularity of human rights; particular in terms of application. The acceptance of Asian values in

ADHR could bridge the reluctances. As in the Europe, ASEAN could also put international human rights standard in their region.



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***Mining in Rajasthan (India) and Effects on Earth-Environmental Issues,  
Affecting Human Rights and Burning Legal Aspects.***

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**Abstract**

In Rajasthan (India) mining is being conducted since ancient past. The Rajasthan produce 42 varieties of major minerals and 23 varieties of minor minerals. In Rajasthan most mineral deposits are concentrated all along the Aravali range that runs through large parts of the state and, mining activity is wide spread here. The environmental impact of mining is Air pollution, water pollution, loss of biological diversity, deforestation, soil erosion, release of harmful gases, acid mine drainage and land degradation. Violation of Environmental Laws, Labour Laws, statutory safety measures and ignorance of WTO and ILO guide line, our earth is suffered. Uncontrolled mining and blasting in Rajasthan, affects other country also like if uncontrolled mining happens in Rajasthan than its effects on all those country where the Aravali range situated. Chances of earth quick, acid rain and other environment problems increase. In 2012 Supreme Court gave decision in this matter and told to close all green marble mining near Keshriajee, Udaipur. The literacy rate of Mine labour is only 3.26 % and due to lack of knowledge, they fully exploited, especially women. Many tribes living in Aravali range are forced to work in these mines. Unregulated mining not only destroying nature's fine equilibrium, but also threatening the life, culture and social milieu of many tribes. Public awareness and new strict laws must be introduced. All shall be well if "economy and ecology", "development and environment" go hand in hand

Keywords: Mining activities, , Environmental issues, Affecting human rights, Legal Aspects.

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## Introduction

In ISHO-UPNISHAD<sup>1</sup> it mentioned that the whole universe together with its creatures belongs to the Lord (nature) implicit in this thought is that no creature is superior to any other and that a human being should have absolute power over the nature. Let no one species encroach over the right and privilege of the other species. No one can enjoy the bounties of nature by giving up greed. This shloka of Isho-upnishad gave same message that I want to give in my paper because Mining in Rajasthan (India) is creating many problems on earth. Rajasthan is a largest state of India with total area of 3, 42,239 square kilometres of land within its domain. Out of this, three fifth of the land in the state is sandy desert. Fore stand land under pasture is gradually shrinking in the state, due to population pressure and unsustainable practice of mining. Mining sector in Rajasthan is another pre-eminent sector next to Agriculture. In Rajasthan highest number of mining leases in the country for major and minor minerals. Most mineral deposits in Rajasthan are concentrated in all along the Aravali range<sup>2</sup>.

Rajasthan holds reserves for 44 major and 28 minor minerals and is the only producer of garnet, jasper, selenite, wollastonite and zinc concentrates. It is also the leading producer of calcite, lead concentrate, ball clay, fireclay, ochre, phosphorus, silver and steatite. But it is best known for its production of marble, sandstone and other stones. It produces 10 per cent of the world's and 70 per cent of India's output of sandstone. , and greatest producer of non-ferric metals such as copper and zinc and accounts for 40% of the country's copper production and 100% of zinc production. The state also accounts for 85% of lead production, 94% of gypsum, 76% of silver ore, 68% of feldspar, 84% of asbestos and 12% mica.<sup>3</sup>

In Rajasthan Ajmer, Bhilwara, Bikaner, Dungarpur, Jaipur, Pali, Rajsamand, and Udaipur are its main mining districts. But major minerals do not reflect the true picture of mining in Rajasthan; minor minerals and stone quarries do. This sector provides employment to more about three million workers throughout the state.<sup>4</sup> Rajasthan has thousands of unorganised mines, which can be as small as one-twentieth of a hectare. They fall out of the purview of government control and there are no accounts of these mines and The state government has failed to regulate illegal mining in forest areas because many unauthorised small illegal mines are also there and these mines located in remote areas, including in forest area are very difficult to monitor and another reason is the lack of assessment of Rajasthan's natural resources. A number of areas remain unexplored and the mineral resources in these areas are yet to be assessed. In Rajasthan mining activity continuously increases due to demands of minerals. We need minerals to make cars, computers, appliances, concrete roads, houses, tractors, fertilizer, electrical transmission lines, and jewellery. Without mineral resources, industry would collapse and living standards would plummet. Mineral resources are essential to our modern industrial society and they are used everywhere. For example, at breakfast we drink some juice in a glass (made from melted quartz sand), eat food in a ceramic plate (made from feldspar and quartz).

Dr.Bhupendra kumar Soni<sup>5</sup>, said that-Due to illegal and excess mining arrangements of plate tectonics is disturbs and chances of earth quick and volcanic activity increases. There are no provisions in any Indian law that what extant mining can be excavate. Greedy mine owner excavate mines more than 80 to 100 meter deep beyond the legal norms. These greedy owner influence mining engineers are being offered

very handsome amount by mine owners. This amount is 4 to 5 times higher than what they get in their entire tenure of service.

There are so many laws for regulation of mining industries. But due to improper execution and disobeying provision of laws, ultimately environment adversely effected and mine workers suffered.

### **Environmental issues**

The meaning of environmental is “All or any of the following media, namely the air, water and land and the medium of air includes the air with in other natural or manmade structures above or below ground.”

Virendra gour v. State of Hariyana<sup>6</sup>, declared that word environmental is broad spectrum which brings with its ambit hygienic atmosphere and ecological balance.

The problem of the issue is the impact of mining on the environment vs. Necessity of the minerals mined. These practice called Mining Pollution. Mining pollution can be defined as an undesirable change in the physical or biological characteristics of the air, water or land that can harmfully affect health, survival or activities of human or other living things.<sup>7</sup>

The main impact on environment by mining is - Land degradation, Degradation of forest and loss of biodiversity, Soil contamination, Air pollution, Surface and ground water pollution, noise and vibrations, Deterioration of natural drainage system. **Land degradation** is one of the significant impacts of mining activity which is mainly in the form of alteration of land structure due to excavation, interference with natural drainage, ground water depletion, stacking of mine waste, loss of fertile top soil, degradation of forest land, adverse effect on aquatic biodiversity and public health.

The fine dust, generated and released in the atmosphere, leads to surface scaling of the adjacent land after it settles down, consequently the infiltration rate is reduced and the run-off increases.

In Rajasthan, extensive mining of sandstone, marble and other minerals has converted the Aravallis into a rocky wasteland. Soil erosion is rampant, natural recharging of groundwater has been affected, and riverbeds have been flooded with coarse sand. This is despite they being notified as an ecologically sensitive area (ESA) in 1992. Despite Supreme Court orders and threats since 1996, mining has continued unabated in the Aravallis.

In spite of ban on any mining activity in forestland envisaged in Forest Act, 1980, Government of Rajasthan granted nearly 400 leases of marble mines in and around Sariska Tiger Reserve. Thiming activity caused havoc to the environment by way of deforestation, degradation of agricultural land, pastures and hydrology of the area resulting in loss of conventional employment and hence income of the local people. Air and noise pollution due to mining activity affected the health of the mine workers. Noise due to blasting accompanied by deforestation affected the habitat of the tiger and other wild animals in the Sariska Tiger Reserve .Local people led by Tarun Bharat Sangh (NGO), went to the Supreme Court of India against his illegal mining



activities which threatened to jeopardize the ecosystem of the Tiger Reserve and its inhabitants. The highest court ordered for closer of 262 mines falling within the buff zones of the national park. Government of India<sup>8</sup>

Aravali region (in which also falls Bijolia as an eco-sensitive area in general and banning mining activities in Sariska area in particular Since then mining activities has come to a close but the mining lobby is still active to get the stay vacated and carry out mining illegally at some place. Political leadership of Rajasthan is also keen on reopening of the mines.

### Loss of biodiversity

Biodiversity is defined by Janet N Abramowitz and Robert Nicholas is “The sum of genes, species and ecosystem coexisting on earth at any point in time.”<sup>9</sup> Rajasthan is always famous for its attachment towards environments. The world’s famous Chipko movement was witness of this. Chipko Movement of village Kherjarilli of Rajasthan where Amrita bai and her four family members and other person sacrificed lives to save trees of the village they all stuck with trees to protected trees from cutting (properly known as green Khjarlli) the episode took place in 1731 A.D. thus we have a culture where trees are regarded more precious and revered then our lives but now a days situation is going change. Due to excess and illegal mining biodiversity is directly affected and Being rich in mineral resources, Aravali hills also have witnessed years of illegal mining and illegal mining creates mining pollution.

This area is rich in floral diversity mainly medicinal rich plants like Kadaya (giving medicinal gum) Gugal (use in dental and stomach medicine), Amla (for antioxidant and cancer), and Moosli (for physical stranth). The main trees are khair, salai, Modad, Dhavada, khakhara and **Timru**. In Rajasthan the main species occurring in the forests during 1969-70 was *Anogeissus pendula* (Dhokra). The other species in the forests were *Acacia leucophloea* (Aranja), *Acacia catechu* (khair), *Holoptalia Spp.* (Chural), *Butea monosperma* (Palas) and *Zizyphus jujube* (Ber) etc. However during 1992 main species found in the area were *Anogeissus pendula*, *Acacia catechu* and *Butea monosperma* (Sinha 1994). According to District Gazetteer of Bhilwara the main species occurring in the forests during 1969-70 was *Anogeissus pendula* (Dhokra). The other species in the forests were *Acacia leucophloea* (Aranja), *Acacia catechu* (khair), *Holoptalia Spp.* (Chural), *Butea monosperma* (Palas) and *Zizyphus jujube* (Ber) etc. However, during 1992 main species found in the area were *Anogeissus pendula*, *Acacia catechu* and *Butea monosperma* (Sinha 1994). The rare animal comprise Sloth bear, striped hyena, Leopard, Blue Bull, porcupine, fox, numbers of reptiles, the rare bird of this area are stork spoonbill, osprey, white backed vulture and black vulture but now some of flora and fauna species vanished due to mining. With the loss of trees and forest and animals we loss the valuable drugs like anti-cancerous and anti-AIDS drugs worth millions of dollars and some species of animals which helps in our eco-system and for food chain.<sup>10</sup>

### Effects on Water System

Rig vedas<sup>11</sup>, Manu Smriti<sup>12</sup>, Charak Sanhita<sup>13</sup> have emphasized on the purity of water and healing and medicinal value of water because of these injections a system of

MARYADA (code of conduct) developed in Indian society to keep the water clean and wholesome but due to excess mining activities hydrological system of earth is going imbalance. Mining in the catchments has also played its part in threatening the region's water bodies. In Rajasthan due to mining average water level fall down 40 feet to 400 feet. Mining activity restricts the sub-surface movement of water. With the removal of vegetation, the rate of evapotranspiration is reduced and as a result, there is a change in the hydrological balance in the Rajasthan.

The Hydrogeological survey shows that the mining has affected the course of main stream The ground water table fell up to 2to 3 meter down wards. The marble slurry imposes serious threats to the ecosystem in the state. When dumped on land , it adversely affects productivity due to decreased porosity, water absorption and water percolation. Slurry dumped areas cannot support any vegetation and remain degraded. When dried, the fine particles become air-borne and cause severe air pollution. During the rainy season, the slurry is carried away to rivers, drains and local water bodies, affecting the quality of water, reducing storage capacities and damaging aquatic life. Near around mining area ground water is unfit for drinking and cooking and food cooked in such water literally churns the stomach.

The Government Higher Secondary School at Senti, a nearby village, had the Public Health Engineering Department laboratory test its groundwater. The level of total dissolved solids was found to be 5,040 milligram per litre (mg/l) when the acceptable limit is 500-1,500 mg/l. Total hardness (calcium carbonate) was 2,550 mg/l when the acceptable limit is 200-600 mg/l),” says the report.<sup>14</sup>

### **Air Pollution Due to Mining**

We can defined Air Pollution as the presence of materials in the air such concentration which are harmful to man and his environment. The Mining and its associated activities of drilling, Blasting and transportation increase the suspended particulate matter in the air which is harmful to the health of the workers exposed to the mine environment. These activities adversely effected both to flora and fauna. A high volume sampler was used for collecting air samples from different mines, which gave SPM values ranging from 411 to 467 mcg/m<sup>3</sup>. One sample was collected far away from the mining area to obtain the background figure of fresh air which gave SPM value of 199 mcg/m<sup>3</sup>. Though the value of 411 to 467 mcg/m<sup>3</sup> is well within Central Pollution Control Board (CPCB) standards for areas coming under industrial and mixed us(i.e. 500 mcg/m<sup>3</sup>), it is more than double of 199mcg/m<sup>3</sup> coming from fresh air which the villagers would be exposed to but for working in the mines.

The maximum SO<sub>2</sub> and NO<sub>2</sub> values varied between 30 and 70 mcg/m<sup>3</sup> while CO levels were Belo detectable limits. Results show that all the values for SO<sub>2</sub> and NO<sub>2</sub> and CO are well within the CPCB standards for areas coming under industrial and mixed use (i.e. 120 mcg/m<sup>3</sup> for SO<sub>2</sub> and NO<sub>2</sub> and 5000 mcg/m<sup>3</sup> for CO) Fine dust inhaled by workers leads to diseases related to lungs and liver such as “silicosis”, “bronchitis”, “asthma” and “tuberculosis.

## **Affecting Human Rights**

Mining is one of the most hazardous professions because of safety as well as health concerns. Most of mine workers are from rural areas and not very well educated. Bhils, Gameti, Khardi, Koted, Pargi, Meghwal, Gujjar, Khatik, Regar, Kholi, Balai, Banjara, Meena, Kumhar and other cast/tribes living in the Aravalis constitute, due to poor economic condition they were bound to work in mining sector, where unregulated mining is not only destroying nature's fine equilibrium but is also threatening the life, culture and social milieu of the Adivasis.

These and other human rights problems in the mining industry are linked to deep-rooted government failures of oversight and regulation, Human Rights Watch said. Some key regulatory safeguards are virtually set up to fail because of poor design. But in many cases, the problem is that implementation is so shoddy that it renders relatively good laws ineffective, Human Rights Watch found.

Mine Worker's habitations, safety, wages and medical facilities are always trifling matter to mine owners. Workers habitation is often haphazard shanty-towns, tiny cubicles covered with tin-sheets on stone pillars, most of them just about two-and-a-half feet high (one has to crawl into it to gain access). These are the only shelters available to the mining work force come sweltering summer or freezing cold and Conventional mining safety gear like boots and helmets are unheard of and people in these mines work barefoot, with bare hands because they were illiterate they did not know about their safety of life. In most of open cast mines, workers are made to toil even in temperatures as high as 45 to 47 degrees Celsius. Instead of using shafts, these mines deploy cranes to lower workers 300 metres or more below the ground level. Every time a mine is blasted, workers have to huddle together in the open, taking shelter behind rocks. Injuries are common, due to the unscientific and crude methods adopted by the mine owners and contractors. No trained and licensed workers are employed for blasting; instead labourer themselves fix the explosives in the drilled pit. Mine workers thus have to come out of 300 plus feet deep mine pits within five minutes. Missing even seconds in this process can cost them their life. During the rainy season, mine collapses tend to increase. The ropes become slippery as fine marble dust stick to them, causing accidents. 50-60 deaths occur every year here. Mine owners usually settle compensation through middlemen by giving few thousands rupees to surviving family members and get done with it. Mines here also resort to the illegal practice of employing children for working in some hazardous operations. While deployment of child labour in the mines is common knowledge, collusion between the government machinery and the mine-owners/contractors have meant that not a single mine-owner or contractor has so far been arrested. The deaths and injuries caused by accidents go the same way. Basic facilities such as toilets and water do not exist, nor do safety procedures or compensation for accidents. employer for other mine owners.

The condition of women workers are worst then men.

The age-wise distribution of women mine-workers in the state is an interesting indicator of the extent of women's exploitation in mining. According to Article 39(e) of the constitution mentioned the health and strength of workers. Women should not be forced to work under inhuman and hazardous condition. In the small private or

unorganised mining sector, where majority of women workers are employed, there are no work-safety measures worth mentioning, and the women are susceptible to serious health hazards which also affect their reproductive health, and more often than not, they are also exposed to sexual exploitation.<sup>15</sup> In the case of **Vishaka vs. State of Rajasthan**<sup>16</sup> has held no sexual harassment at work place.

If there are accidents like mine collapse, where the women are killed or disabled, these are most often hushed up by the families themselves, for fear of police action or facing the company's wrath. Women are required to work long hours even in advanced stages of pregnancy, have no leave entitlement or crèche facilities, and are always under threat of being thrown out. In the stone crushers, most women have contacted and suffer from tuberculosis (and so are their infants who are brought to the work place and left around to fend for themselves in the quarrying sites while their mothers are working). Even this work is but seasonal for them. Wages of women workers are almost always less than those for men. Women do not get even a weekly off, leave alone a paid holiday. Even pregnancy or childbirth is not considered. Article 42<sup>17</sup> and section 5<sup>18</sup> related to maternity benefits and right to payment of maternity benefits but these provisions are not followed by mine owners. No work equipment is provided to them, and there are no proper toilets or rest shelters or facilities. **Section 19 (f)(b), sec 19 (2), sec 27 and sec 42(1)**<sup>19</sup> provisions are related to working facilities to women but not followed in mining industries.

The women are exposed to the exploitation, physical and sexual, of the mine-owners, contractors and other men, having to walk back several kilometres to return to their villages and are vulnerable to assault on the way. Women workers in the mines, like all other workers are also susceptible to and suffer from several occupational illnesses right from respiratory problems, silicosis, tuberculosis, leukaemia, and arthritis. These types of human rights problems are solve by the education and awareness of their mining rights.

I had visited fourteen mines in different areas of Rajasthan, I found that the average condition of workers are same but one of the M/S Agrim Stone Pvt Ltd, a Granite mine at Katar, near Village Asind, Dist- Bhilwara, the conditions of workers working there are so good & well managed in all aspects. Their habitation, safety, wedges and medical facilities are quite good. The owner of this mine Mr.kaushal Jain told that "Its our legal duty to protect them and gave all the facilities that they deserved. His team are giving free education and free legal aid to mine workers and their children. I think Mr.Kaushal is ideal employer for other mine owners.

Another mines with similar kind of facilities M/S Sojat Lime Company, at Sojat City, is also a good example for workers being enjoyed good living. The owner Mr.Prakash Kachhawa proudly says that it their moral duty to look after his workers.

### **Legal aspects**

To regulate the mining sector there are many laws are available. Honorable supreme court justice K.G.Balakrishnan gave many decision on environment protection and gave direction to stop mining activities near araveli range, The Mines and Minerals (Development and Regulation Act, 1957, ('MMDR') and the Mines Act, 1952,

together with the rules and regulations framed under them, constitute the basic laws governing the mining sector in India.

The relevant rules in force under the MMDR Act, are the Mineral Concession Rules, 1960, and the Mineral Conservation and Development Rules, 1988. The health and safety of the workers is governed by the Mines Rules, 1955 created under the jurisdiction of the Mines Act, 1952.

The Mineral Concession Rules, 1960 outline the procedures and conditions for obtaining a Prospecting Licence or Mining Lease. The Mineral Conservation and Development Rules, 1988 lays down guidelines for ensuring mining on a scientific basis, while at the same time, conserving the environment. The provisions of Mineral Concession Rules and Mineral Conservation and Development Rules are, however, not applicable to coal, atomic minerals and minor minerals. The minor minerals are separately notified and come under the purview of the State Governments. The State Governments have for this purpose formulated the Minor Mineral Concession Rules. The mica mines labour welfare fund, 1946. the mines act, 1952. the mines rules, 1955. the Coal mines regulation, 1957. the mineral concession rules, 1960. the mines rescue rules, 1985. the colliery control rules, 2004 are the important acts. Section 19 to 27 of the mining act, 1952, mention the provision as to health and safety. Section 28 to 48 deals with hours and limitation of employment, in section 49 to 62 mentioned about leave and wages. In The mining rules -1955, section 21, 22, related to court inquiry, sec, 29a to 29w related to medical examination of person employed or to be employed in mines. sec, 62 to 74 related to welfare amenities. Mineral conservation and development rules, 1988, section 31 to 41 related to environmental protection. With these acts labour welfare act, workmen compensation act, industrial dispute act are directly or indirectly related to regulate mining industries.

The Mines and Minerals (Development and Regulation) Act, 1957 does not provide for any profit sharing formula between Government and local people. But the draft Minerals (Development and Regulation) Bill (MMDR bill), 2011 provides some. There are so many Laws available for mining regulating mining industries and for protection of mining workers but proper implementation and well defined specific mining Laws are missing, due to this all in vain.

### **Conclusion and suggestions**

To protect our earth from excessive mining and For the immediate remedy there is an urgent need of a well-defined specific mining law, based on conservation and Environment Management Plan with special reference to the site of mining activity, removal and disposal of surficial materials, blasting with special reference to the distance from the habitation, precautionary measures against accidents and health hazards, deforestation and afforestation, disposal of overburden, conservation of water channels and above all, the reclamation of the abandoned mining pits on one hand and the participation of local people vis-à-vis duty of mine owner on the other. For this well evolved Dumb-bells model for the development of both, natural as well as social environment must be worked out. The model emphasises the two ends of the dumb-bells as most active; one end being the site of a particular mineral and the other end is the seat of the human being.<sup>22</sup>

I propose the following measures, which will go long way in establishing the environment safety and protection of mining workers' rights and protection of our earth-

1. The maximum plantation, green boundaries and water reservoirs should be made for public interest.
2. The practice of dry drilling in the area should be completely stopped. Provisions should be made on a joint basis that the water collected in the worked out areas during the rainy season is used for the purpose of drilling and sprinkling over waste dump.
3. Controlled blasting techniques are adopted to reduce damage to the rock and improved the competence of the rock at perimeter of the excavation.
4. The government department and NGO's should be involved to take up environmental awareness camps in mining area.
5. Bound to Mining Owners to Provide Medical Facilities to their workers.
6. All dump hills should be vegetated by native plant species like *Azadirachta indica*, *Withaniasomnifera*, *Aloevera*, *Commiphora Wightii*, *Dendrocalamus strictus* (bamboos) which are of high economic value and can thrive on all kinds of habitats.
7. Where the mined-out pits are deep and filled with water they should be developed for "pisciculture".
8. Dump material should be taken away for construction purposes and for making bricks.
9. Minerals should not be mined for immediate gain only. Present generation has to act as trustees of these natural resources for posterity. Mining of minerals for non – essential purposes which do not add to the development process and have devastating effect on the environment must be stopped. Karoli stone is a glaring example of such wasteful non –essential mining. These stones are used only for facing the walls of buildings constructed by rich people and is not essential. Mining should not be done for export, in raw form, to earn foreign exchange at the cost of environment.
10. The mine owners shall be made liable for compulsory maintenance of medical and life insurance policy for each mine worker at the mine owner's expense.
11. Effective coordination with Indian Bureau of Mines and Director General of Mines Safety shall be maintained in regular inspections of mines with a view to enforce safety standards laid down in various provisions of Rules and Acts.
12. Proper rest shelters and wash rooms shall be erected in Mining areas for workers. For this purpose separate guidelines shall be issued regarding concessionary land allotment in mining areas.
13. No mining activities shall be allowed within the notified boundaries of any wild life sanctuary /national park.

14. Effective implementation of existing provisions of various Acts and Rules related with Environment Protection and protection of human rights shall be ensured and for this purpose Department of Mines & Geology shall be strengthened accordingly.

15. Keeping in view the local requirement of minerals & employments, rationalization of wild life sanctuary boundaries shall be considered and a committee shall be constituted to recommend the cases of rationalization.

16. Zero waste mining principle shall be implemented in true sense.

17. Dumping area for waste generated during minor mineral production shall be earmarked. A penalty provision shall also be introduced for defaulters who are not dumping waste at earmarked places.

18. Norms and targets for plantation by mining lease holders. There are two main points that must be understood Firstly, the community must be convinced that something can be done about the existing situation and secondly, that it can happen only with their involvement. Awareness and efforts can save our Earth. There is still time to reverse the exploitative model of development and to evolve an Indian indigenous culture based developmental economy. Everything shall be well if “economy and ecology”, “development and environment” go hand in hand. The new legislation, new regulation and new hopes will save our environment and earth.

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## ***Conflict Resolution and Crisis of Governnance in Africa: The Case of Nigeria***

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### **Abstract**

Undoubtedly, everyman desires on the conviction that it is the secret of development, and self attainment. Yet, societal relationship elicits unprecedented contest which sometimes degenerates into violence at individual and communal levels. Man is therefore faced with the contradiction of desires and reality. The adequacy of a modern government could largely be measured by her immediate response to these situations and the prevention of its occurrence in Africa. This paper focuses on conflict resolution and crisis of government in Africa with Nigeria as the case study. The paper equally provides a blueprint for managing crisis and the essential duty of government in providing security of life, property and general welfare of its citizenry; it goes further to take a brief look at some centres of turmoil in the continent and argues that, there are no discernible differences in the causes of unrest in those states and Nigeria. This also indicates that conflict resolution is a primary function of government, unfortunately state actors in Nigeria/Africa are indeed in crisis of legitimacy and competence, hence, protraction of violence and conflict. Furthermore, the effect of conflict and state helplessness are also given attention. The study concludes that all hope is not lost as recommendations to that effect is ability to provide liberal and true democracy, access to sound and quality education, giving more attention to poverty eradication programmes among others.

Key Words: Conflict, Resolution, Crisis, Governance, Africa

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## Introduction

Human history is replete with conflict and human race come to face this reality as “every man, desires to have his own way, think and act as he likes” (Appadora; 2004:3). Indeed, as every man strives for the accomplishment of personal desires, he encroaches on the desires of others. This elicits reactions and counter-reactions. This situation extends beyond the relationship of the duo to the community or other members of the society. Undoubtedly, such also abound among states especially as “sovereignty and territorial boundaries have not restrained states from trying to change events and situations in other countries” (Ugwueje and Madu, 2012:39). This explains inter-state conflicts as recently evident in the invasion of Afghanistan and Iraq by the United States.

This perhaps explains why Igbalajobi (2014) asserts that, there is no hope in sight on when crisis will be brought to a halt in the globe. The redefining and attempt at humanization of relationships among human species by the United Nations, non-governmental organizations and other national and transnational organizations notwithstanding, conflicts occurs, as evident in the Middle-East brouhaha, Syria’s “liberation war” self determination face off in Crimea, Ukraine, “nationalist” struggle in Turkey, Greece’s economic upheaval among others. The case of Africa is particularly mind boggling and scandalous. Rather than benefit from the wave of optimism of world peace at least on a relative scale that engulfed the globe after the cold war, Africa became a blood spilling ground with the emergence of war lords which precipitated the “privatization” of security which paved way for unquestionable impurity (Sesay, 2012) as experienced in Liberia, Sierra-Leone, Burundi, Somalia, D.R. Congo, Sudan, Rwanda, Chad, Ethiopia and Eritrea among others. Thereby prompting the United Nations for Humanitarian Affairs to declare eight of the fifteen “complex emergencies” in the last decade and a half on Africa. (Herbst 1998; Cilliers and Mills 1999, cited by Galadima, 2006). The situation is so tense that Adetula (2006) asseverates that about three to four million people were killed in Democratic Republic of Congo, 160,000 in Sierra Leone, millions in Sudan, Uganda and Coted’Ivoire, 140,000 in Ethiopia and Eritrea. Although, the Economist (2005) cited by Adetula (2006) noted that Africa made appreciable progress in 2004 particularly with Liberia and Sierra-Leone cases, but equally warned of “two grave worries” which are the ethnic cleansing in Dafur and the other being the potential for fresh crisis in states with bad government, tyrant leaders, stagnant economy and states with abundant valuable minerals.

The warning of the Economist was probably ignored, or how do we explain the protracted uprising in Dafur and new centres of horror as clearly seen in Central Africa Republic, Mali, South Sudan, Egypt, Libya, Zimbabwe, Nigeria among others? Of course, the primary responsibility of government in any human community is the assertion of order. Government enacts or ensures order through conflict prevention and resolution, system of law, reward and punishment system, redistribution of income through the provision of services and the maintenance of good relationship with the people in order to elicit their cooperation for an organized community. It is unarguably under this type of condition that the human race stand to actualize their dreams. Perhaps that is what made Aristotle (cited by Enemuo, 1999:65) to assert that any individual outside the state or an organized setting is a “beast or god”.

The protraction of violent conflict in many African states and Nigeria in particular, despite the existence of government, which ordinarily ought to ensure conflict resolution cannot but make this research a necessity. This is further instigated by the fact that government is the object of attack and ridicule in the conflicts. This raises question of legitimacy or acceptance of government in these countries and Nigeria in particular. Of course, this optimises crisis in governance.

### **Conceptual Discourse**

The concepts to be placed under discourse for a better understanding of this paper are Conflict, Conflict Resolution and Crisis of Governance.

**Conflict:** Intellectuals differ greatly on what a definition of conflict should be as they prefer definitions according to their social persuasion and ideological school. While some see it in almost the same direction, others view it differently. The division is so obvious that Akpuru-Aja, Nwaodu and Udochu (2012:31) state that, “scholar’s perception and theoretical interpretation of the phenomenon itself manifests conflict situation”. Meanwhile, Schmidt cited by Abiodun and Igbalajobi (2012:182) sees it as “a struggle over values or claims to status, power and scarce resources. He went further to assert that the group of individuals involved may not only try to obtain the desired values but may try to neutralize, injure, or eliminate rivals”. Coser (1956) cited by Akpuru-Aja, et al (2012:31) sees it as the “struggle over values and claims to scarce status, power and resources in which the aims of the opponent are to neutralize, injure or eliminate” He also refers to it as physical confrontation, clash, controversy, hostility, tension, disagreement, competition, struggle etc among individuals and groups in a society. He submits that, its major causes include: ethnic competition for the control of the state, struggle for regional succession, warfare arising from state collapse, broader disputes, poverty, corruption, human rights abuses, frustration, oppression, insecurity, foreign domination among others. The above, have established the fact that conflict arises as a result of value or interest by different set of individuals and violence mostly follow as parties attempt to lord their will over others. Garver (1991) gives a clear idea about this when he says, the basic fact about conflict is that parties violate one another in terms of their obsession and competition for scarce resources in the political and economic realm. Perhaps no one puts it succinct than Marx (1937) cited by Abiodun and Igbalajobi (2012:182) when he says that “the history of all existing society is the history of class struggle”.

Indeed, the basis for struggle among the classes Marx refers to is interest. While the dominant class want to maintain the status quo, so that his interest can continue to be preserved and served, the dominated class want a change of the existing order. Interest, which is the basis for conflict can be economic, political and socio-cultural. It is within this context that, the view of Francis (2006:) that by definition, conflict “is an intrinsic and inevitable part of human existence” becomes relevant. He goes ahead to define it “as the pursuit of incompatible interests and goals by different groups”. This work therefore sees conflict as human activity which is a product of the pursuit of incompatible interest which propelles the use of ammunitions which generates tension, violence and human casualties.

**Conflict Resolution:** It came into being as a result of conflict. Like conflict it has no universally adopted definition. Miller (2003:8) for instance, sees it as “a variety of

approaches aimed at terminating conflicts through the constructive solving of problems, distinct from management or transformation of conflict. Best (2006:94) opines that it “connotes a sense of finality, where the parties to a conflict are mutually satisfied with the outcome of a settlement and the conflict is resolved in a true sense”. The major trust of the concept of conflict resolution is the fact that a number of actions calculated at bringing conflict to an end are deliberately taken and this eventually bring the conflict to a halt. Again, the parties to the conflict embrace such actions either due to a coercive authority or because of conviction but what is of utmost importance is the fact that, the process returns peace to an hitherto hostile group or communities. The peace so attained is also sustainable and capable of yielding a productive relationship between the parties in no distant future. The view of Mitchel and Bank (1996, cited by Best, 2006:94) is apt in explaining the above view. They posit that it is

*an outcome in which the issues in an existing conflict are satisfactorily dealt with through a solution that is*

*mutually acceptable to the parties, self sustaining in the long run and productive of a new, positive relationship between parties that were previously hostile adversaries.*

The position of this study is that, conflict resolution is a number of direct and indirect action taken by government and its officials in a bid to bring violent confrontation among people to an end and also restore relationship among the people. The actions entails legislations, allocation of resources, positions, infrastructure, wealth of the nation among others. Indeed, care must be taken in the allocation because the distribution has potential to plague the country into another round of conflict.

**Crisis of Governance:** This refers to the inability of government to exercise control over the state of affairs in the country. This greatly stiffens the social system and put the people at the mercy of indigenous and foreign intruders in the social and economic realms of life. This is merely evidential of the “seminal absence of intellectual rigour” (Achebe, 1998:13) and incompetence of state actors as well as absence or sudden disappearance of their acceptance by the people. In other words, it is a manifestation of the absence or erosion of legitimacy because the people are grossly disappointed by their governance style and means of emergence.

### **Centres of Turmoil in Africa**

Indeed, many countries in Africa are at present entangled in conflict with varying levels of crisis that have also attracted attention of the international community. In these conflicts, scores of casualties are recorded, as some take the form of ethnic cleansing, rape, abduction, torture and looting. In Mali for instance, rebels have again started their campaign against the government. In Egypt, it is the case of multiple conspiracy and illegality. The military which owing to public outcry sacked democratically elected government of Muhammed Morsi is now hunting members of the Justice Party which is dominated by the Muslim brotherhood. Infact, the Muslim brotherhood has been declared a terrorist group with over 1000 members sentenced to death. In Libya, groups loyal to former leader Muammar Al-Gadaffi have refused to allow peace to reign. They see the overthrow of Gadaffi as a product of foreign

instigation; they are therefore determined to ensure the liberation of their father land. In South-Sudan, the crisis is largely ethnic as President Salva Kiir Dinka's ethnic nationality continues to slog it out with vice president Riek Machar's ethnic group. This division is also evident in the South-Sudanese army as it became polarized and the two groups picked arms against each other, while the president made allegation of coup ([www.google.com.nglgwt/x?gI=NG&hl=en-](http://www.google.com.nglgwt/x?gI=NG&hl=en-))

The crisis in Darfur region of Sudan lingers, despite scores of death, which made the International Criminal Court (ICC) to issue arrest warrant on President Omar Al-Bashir. The confrontation is essentially over an alleged neglect and monopolization of power by Arab majority at the expense of the people in Darfur. This impoverished the region and made the people resort to armed struggle as a means of actualizing their dream of political relevance and economic empowerment. In central Africa Republic, Christians and Muslims continue to attack one another. This was after the Seleka coalition rebels had pushed President Francis Bozize out of power and installed Michel Djotodia who was later forced to resign in January, 2014. In Somalia safety of life and properties remain in doubt as the Al-Shabaab militant group continues to launch attack.

It is indeed clear from the above survey that, conflicts in Africa can be summarized as being instigated by, or centred on struggle for political participation, ethnic sub-nationalism, distribution of resources, self determination, military intervention, religion, territory or boundaries and political legitimacy (Adetula 2006, Alli, 2006).

It should be noted that, the present day conflicts in Nigeria are also along the above line even before independence. In a beautifully analysed argument, Abiodun and Igbalajobi (2012) observed that, conflicts in twenty-first century Nigeria are either community induced, emancipation induced, state induced, politics induced or religious induced. They cited the Odi Massacre, Zaki-Biam onslaught, Gbaramotu kingdom attack as examples of state induced conflict. The general neglect of the welfare of the people and development efforts, failure to promptly act in times of national emergency. as well as the use of wrong approach to solving socio, political and economic problems also fall within this realm. Indeed "corruption, human right abuses skewed allocation of resources, harassment of social activists and academics, subservience to foreign (western) determined and dictated ideas" (Ihonybere, 2001:15) by state actors influence conflict in Nigeria. How do we explain how a government that cannot properly fund education can cough out N10 billion for ministers to charter jets, or release N130.7 billion to the military between January and April 2014? The level of insincerity in governance largely explains why the Nigerian government lost the command and respect of the people.

In the political realm, the political elites struggle for political power and relevance through appeal to inordinate sentiments at great cost to national loyalty. At best they instigate the people against themselves. They blame their failure and the appalling situation of the people on other tribes and religions. Ake (2001:5) captures this when he says;

*many of them had sought power by politicizing national, ethnic and communal formations. Now in office, some of them manipulated ethnic and communal loyalties as a way to deradicalize their followers and contain the emerging class division of*

*political society, which could isolate and destroy them. So they began to place emphasis on vertical solidarities across class lines. In particular, they tried to establish mutual identity and common cause by appealing to national, ethnic, communal and even religious Loyalties.*

The incessant crises during Babangida's administration was partly blamed on blunders of political elites. The post presidential election crisis that ensued in Northern Nigeria in 2011 is better attributed to the inordinate debate over the People's Democratic Party (PDP) zoning arrangement which made Northerners to think that Southerners sought to use their turn in power.

The various minority communities in the country also relentlessly engage themselves in a free for all fight on issues concerning land ownership and who governs certain areas. An example is the Jos crises.

In like manner, emancipatory or self-determination conflict came to the fore, when a critical look is taken at the purported struggle for liberation by the Niger Delta Militant. The deadly Boko Haram that seek a complete change of the existing governance system can also be said to have a link on emancipation but for the inhuman, cruel and murderous method they adopt. Today, activities of Boko Haram according to Human Rights Watch has claimed 1500 lives between January and March 2014. The United Nations High Commissioner for Refugees also stated that 40 villages in the North-East zone had been sacked, creating a humanitarian crisis in which over 300,000 persons mostly women, children, the aged and disabled had been displaced within Nigeria, Cameroon, Chad and Niger Republic (Punch Editorial 9/04/14). The case of Boko Haram can be likened to the Al-Shabab of Somalia especially as it also takes a religious dimension. Although Muslims have denounced them, the fact that they lay claim to perpetrate their evil in the name of Islam brings about a challenge of who stands on the true teachings of Islam. This is because of the contradiction which this epitomizes. Today, North-Eastern Nigeria is on the verge of state collapse as violent attacks persist, despite the declaration of state of emergency in Adamawa, Borno and Yobe by President Jonathan. The activities of Boko Haram has alarmed the United Nations, continental and regional bodies, to the extent that, the United Nations passed a motion declaring the group a terrorist organization. Their nefarious activities also precipitated a meeting in Paris on Saturday 17th May, 2014 between the Presidents of Nigeria, France, Benin Republic, Chad and Cameroon, with the United Kingdom Secretary of Defence in attendance. This was followed by another meeting in South Africa on Saturday 24th May, 2014 between the Presidents representing the five regions in Africa. The Presidents of Rwanda, Chad, Ghana, Ethiopia, Mauritania, Algeria, D.R. Congo, Angola, were all in attendance to perfect strategy with which they can roll back terrorism in Nigeria and the continent at large. They pledged their commitment to presenting a proposal to this effect at the June African Union Assembly of Heads of States and Governments Summits. Despite all these meetings and the arrival of the United States military in Nigeria, violence still rages in the North, East and Jos Plateau.

### **Conflict Resolution, Crisis of Legitimacy and Competence of government**

Unarguably, conflict resolution falls within the realm of basic governmental functions. Although, government owe the people a duty of conflict prevention but

when conflict especially its violent dimension occurs, it relentlessly becomes urgent for government to ensure that it is resolved. This is because government is expected to be viewed by all parties concerned as an unbiased arbiter to which they have submitted their natural and respective power, so as to assert authority through which the “greatest happiness of the greatest number” (Mukherjee and Ramaswamy, 2008:259) of people is ensured. In Nigeria, rather than embrace the peace process unveiled by the government, they engage the state in violence. They take up arms against the government and contest its sincerity and neutrality. They display flagrant disregard for the authority of the state. Thereby putting the acceptance or legitimacy of the state in serious doubt. Where this does not take place, the incompetence of the state in handling conflict situation is evident. This has not only been displayed in the Niger Delta crisis before the Yar’Adua/Goodluck amnesty programme, it is at present manifesting in the fight against Boko Haram, as the Presidency and Northern State Governors have given different accounts of the emergence, intent and vision of the dastard group. They also criticize in the open the approach of one another and eventually resort to name calling, while the group owe sway even in the Federal Capital Territory. The general loss of legitimacy or non acceptance of both central and state government’s intervention in conflict situation is a function of some or a combination of the following:

(a) **Emergence of Leadership:** The means through which leaders emerge in Nigeria put their legitimacy on the line. This comes in two ways. The first is the electoral law which only emphasise highest number of votes and not absolute majority. In a multi ethnic and religious state like Nigeria, where people are sharply divided on virtually every issue on ethno-religious lines, the electoral law should provide for above fifty percent, for who becomes the chief executive at the federal and state levels. This is necessary for such a person to convincingly command support of majority across the regions/groups that make up the country. Indeed, with the exception of Late President Musa Yar’Adua, other Chief Executives – Shehu Shagari, Olusegun Obasanjo and Goodluck Jonathan for instance, have been enmeshed in the trouble of acceptability in some parts of the country. President Shagari was disliked by South Westerners, General Obasanjo by his own people and during his second term by the North. President Goodluck Jonathan is not accepted by the core North, majority of the South-Westerners are also against him. His main supporters are the South-South, South-Easterners and Northern minorities.

Put differently, the fraud that accomplishes electoral process in Nigeria erodes what would have attracted legitimacy to whoso ever is declared elected by the electoral body. Akinlade and Igbalajobi (2012) asserts that all elections in Nigeria from 1964, with the exception of 1993 have been characterized by irregularities with the attendant effect on the psyche of the people which brings about loss of confidence in democracy, upsurge in violence and loss of sense of value and integrity among the civil populace.

(b) **State Failure:** In Nigeria, government is summarily seen as a means of personal accomplishment by the political class. Majority of the people view government as a bunch of wicked and corrupt set of people who are bent on making life difficult for the people with little or no sense of responsibility. The poor state of the people justifies this type of thinking. For instance, about 10 million children are out of school in Nigeria, thereby making it a country with one of the largest number



of out of school children in the world. Over 50 million people are unemployed, there is infrastructural deficiency, portable water is not accessible, among others. It is one of the two countries in the world with polio in 2014.

The officials of the government, particularly the police toy with the lives of the people, the few developmental projects are always of very low quality and people particularly the youth live without hope. The various sectors of the economy epitomise great failure. The recent rebasement of the Nigerian economy which puts the nation first in Africa and twenty-sixth in the world is at the height of embarrassment because the majority of the people live in penury and schools are closed for months due to teachers industrial action over government inability to fulfil its agreement with them. The words of Douglas inevitably become the guiding principle. He states that “where justice is denied, where poverty is enforced where ignorance prevails and where one class is made to feel that society is an organized conspiracy to oppress, rob and degrade them, neither persons nor properties will be safe” (cited by Mudiaga-Odje, 2009:2). Indeed, Nigeria particularly the North has summarily been turned to a slaughter slab. All these put pressure on the legitimacy and capacity of the State to command respect and deal with conflict among the people. Jinadu (2012:3) puts this into perspective, when he states that indeed;

*there is every reason to believe that there is a strong correlation between social security and state capacity: the weaker social security is, the weaker state capacity also is; the stronger social security is, the stronger state capacity will also be. For social security provides an important constitutive foundational rock for the social trust so vital for engendering and sustaining state capacity.*

The 1999 constitution was clear on the fact that security and welfare of the people shall be the primary responsibility of the government. The government has neither guaranteed security nor welfare of the people. In fact, Boko Haram, emerged out of concern about the failure of state under the present arrangement.

(c) **Interested Party:** The persons in governmental positions in Nigeria are mostly seen as interested parties in most of the conflicts, thereby making the government an object of attack. This perception greatly hampers all effort by the government at resolving conflicts. Government is sometimes blackmailed, so that it can resolve the conflict using the prescription of a particular group. This is more pronounced when the press takes side with one of the parties. For instance, about ninety five percent of popular privately owned print and electronic media in Nigeria are owned by three ethnic groups and people of a particular religious persuasion. Therefore, information on conflicts involving such group is always biased. The case of Plateau State also readily comes to mind, where the indigenes will blackmail federal government intervention, if the head of state is of Hausa/Fulani extraction. This occurred when President Yar'Adua attempted setting up a panel of inquiry on the protracted crisis in Plateau state in 2008. The state government questioned the authority and competence of the federal government to set up such panel. The Hausa/Fulani community in Plateau State also often allegedly see the state government as instigating some of the crisis in the state.

(d) **Ethno/Religious Appeal:** A substantial number of the conflicts in the country take ethno/religious coloration and such are the most violent and difficult to resolve because people find it difficult to shift ground when such issues are floated. Although, it is the humble view of this work that, most conflict that appear religious in the North are not, but are ethnic and political in nature.

### **Effects of Conflict & State of Helplessness in Nigeria**

It is obvious from the above, that the Nigerian state suffers great crisis of governance and this produces the following effects with respect to the protraction of conflicts.

**Loss of Lives and Properties:** Many lives and properties were lost, the number of refugees increase daily, some towns has been left desolate, while others destroyed.

**Economic Woe:** The economy of places that are known for the protraction of conflict in the country have either collapsed or is on the verge of collapse. Investors do not only take to their heels, they also close their business as they run for safety. Unemployment sets in and Infrastructures that can facilitate economic activities such as bridges, telecommunication mast among others are damaged, thereby adding to the economic failure.

**Pressure on Resources:** The government divert resources both material (wealth) and human that ought to be used for developmental purpose into the purchase of ammunitions and other security materials such as the close circuit television. The fact that the 2013 and 2014 budgetary allocation to security is the largest in Nigeria affirms this fact.

**Damage to the Unity of the Nation:** There is an increasing hatred in Nigeria among people of the different religious believes and regions as the crisis in the country particularly in the North increases. They now call for an end of the federation, so that the different ethnic nationalities can go in the direction which they like.

**Loss of Confidence in the Leaders/government:** Today, majority of Nigerians question the competence of our leaders as well as the continuous existence of the country as the crisis deepens.

**Brain Drain:** Many people that should have developed the country have fled to other nations

### **Conclusion**

It is clear that, conflicts in Nigeria like in other African countries is centered around self determination, re-distribution of wealth and political participation. Unfortunately, government has not been able to stem the tide primarily because it suffers crisis of legitimacy and incompetence.

### **Recommendations**

To reduce the upsurge of conflict in Nigeria, the following must be quickly done.

\* The government must embrace good governance.

- \* The electoral body should be made truly independent, so that, it can conduct free and fair elections.
- \* Absolute majority as an electoral system is strongly advocated.
- \* Government should treat all parts of the country equally and must not do anything that would suggest its interest in some sections at the expense of others.
- \* There should be tolerance among the ethno/religious groups.
- \* The mass media should step up campaign for the enlightenment of the people on the need to prioritize national patriotism.
- \* Sound and qualitative education must be provided for all
- \* More attention should be given to poverty eradication programmes



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*Criminal Networks and their Influence in  
Democratic Systems: Baltic States Examples*

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**Abstract**

Political corruption associated to organized crime is a growing concern for a number of international organizations around the world. The crime-politics nexus erodes the principles of democratic governance, such as rule of law, equal exercise of citizenship rights, responsiveness, and transparency. The transnational expansion of organized crime makes this a global concern, also for Europe. However, there are few known examples that illustrate how the nexus between organized crime and politicians is forged and maintained, and how it undermines democratic politics.

Drawing from extensive research in the Baltic States, this paper intends to contribute to filling this gap by documenting four cases in Latvia, Estonia and Lithuania where organized crime networks and politicians have allegedly engaged with one another. These cases describe the avenues used to build these relations, as well as the entry points in the political system in each country or locality that allowed these relations to flourish. The paper pays close attention to some common features of these cases, such as the benefits they produce on both politicians and criminals; citizens' responses – or lack thereof – to these corrupt practices; and the use of donations and vote manipulation to achieve political gains.

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## Introduction

Political corruption is defined as the abuse of power by the top level of the public sector for private gain (U4, 2004). Organized crime's definition is more contested. It can be drawn by looking at the illicit activity that it is being conducted, the people involved in these activities, or both (UNODC, 2014). For the purpose of this paper, we look at both parameters to capture a broad scope of activities and networks (UNODC, 2000; Shaw and Kemp, 2012: 7).

The destabilizing effects that organized crime poses on economic growth and development have been recently studied by various organisations (Reuter, 2012; OECD, 2014; Kar and LeBlanc, 2013). According to them, corruption associated to organized crime drains the state of resources needed to fulfil its mandate. But political corruption not only affects economic growth and development, but also democratic governance. Although it is not alien to authoritarian systems, corruption is particularly damaging to democracy as it erodes its very principles, such as rule of law, equal exercise of citizenship rights, responsiveness, and transparency.

While organized crime becomes more transnational, so does the problem of political corruption linked to it, and Europe is part of this challenge (European Commission, 2013: 28). However, there are few known examples that illustrate how this takes place, which is key in order to enact appropriate policy responses to these challenges. This paper thus explores these issues, drawing from extensive desk and field research. The field research was conducted through interviews with a wide range of organizations, as well as three national and one regional event to validate the findings. The project also benefited from input by local researchers and experts from the Stockholm Institute for Security and Development Policy (ISDP)<sup>1</sup>. A report summarizing these findings was published in 2013 (Villaveces-Izquierdo and Uribe Burcher, 2013).

Based on the research, this paper describes four cases where organized crime networks and politicians have allegedly worked in tandem. The cases describe the avenues used to forge these relations, as well as the entry points in the political system that allowed these relations to flourish. The paper pays close attention to some common features of these cases, and how citizens have responded to these corrupt relations.

### Organized crime's political interests

If asked organized crime, most people would think about Mexico or Italy. Yet, no region has escaped the increase of organized crime activities (UNODC, 2010: 28), which have not only affected the 'usual suspects', namely where much of the products trafficked by these networks are produced – such as Colombia (UNODC, 2011 a: 2) and Afghanistan (UNODC, 2011b) –, but also increasingly transit regions and money laundering hubs. Organized crime activities in these places are much murkier though,

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given that they often involve transactions with clean businesses (Uribe Burcher, 2014).

In the Baltic States, exposure to organized crime activities is closely connected to its larger neighbour, Russia. Not only has the region been occupied by this country at various points in its history (Ziemele, 2003), but even during independence these countries hold important interests for Russia; organized crime is one such area (Galeotti, 2002). These small neighbours hold the keys to the European Union (EU) since 2004 when they joined in and became part of the Union's easternmost border, also becoming an important transit area for illicit products and connecting various criminal networks operating on both sides of the border (Kegö and Molcean, 2012: foreword). Native Baltic organized crime networks flourished as a consequence (Gillmore, 2010: 1), although differently in each country (AML, 2009: 36).

Organized crime needs politics. In order to conduct their activities, they require protection from law enforcement. Thus, political corruption is paramount to control the chains in the link of business (Dobovšek, 2008). Local level politicians are the ideal target for illicit networks: they sit where the activities take place (e.g. border check-points, harbours, warehouses) and enjoy fewer controls by national authorities (Casas-Zamora, 2013: 8). Baltic States politicians are no exception, and oligarchs in the region have often been associated to the challenges to further consolidate democratic gains (see Ozolts, 2011; Rulle, 2011a and b; Egle, 2006; Delfi, 2004, 2011a and 2011c; TV Net, 2004; Leijējs, 2007; Kapitāl, 2010; Zatlers, 2011; LA, 2011; Finance Net, 2011).

## Case studies

### *Zilupe municipality, Latvia*

Zilupe is located in Eastern Latvia, at the border with Russia. In order to cross to Russia, it is necessary to go through the Terehova checkpoint in Latvia. Since 2000 people noticed that the checkpoint was busier and the situation only worsened. In 2004, approximately 99,000 trucks crossed the checkpoint; in 2006 the number reached over 138,000 (Eida, 2007). Authorities lacked the capacity – or willingness – to meet this high demand and up to 2,000 trucks started queuing; some trucks waited three days to cross, with great losses for their businesses (Delfi, 2007; Cauce and Radzevičūte, 2001).

This chaotic situation was apparently seized by Oļegs Agafovovs, city Mayor, who had notoriously been involved with organized crime groups in the past (anonymous interviews, Riga 2012). The main accusation against him involved organizing a special corridor for trucks willing to pay a bribe in order to cross the checkpoint without queuing (Velss, 2013). The allegedly also used extortion, fining drivers who refused to pay while the Police exerted intense control over those vehicles. In addition, this system was supposedly used to facilitate a smuggling scheme to bring goods from and to Russia. Border officials were ordered to avoid checking the trucks that carried the goods (anonymous interviews, Riga 2011 and 2012). This scheme apparently involved other authorities, such as border officials from the State Border Guard, the State Revenue Service, and the State Police. These accusations prompted an investigation by the State Police and other law enforcement agencies that



culminated in 2008 with the arrest of twenty six public officials, including mayor Oļegs Agafonovs. The process is still ongoing.

In spite of the accusations (Kandidati Uzdelnas, 2011), the Mayor continues to enjoy high popularity levels among the citizenry. He was re-elected in 2009 and his Party, Harmony Centre, received 12 out of 13 posts in the local council. Speculations about the reasons for this include his populist policies by sponsoring various events and investment in infrastructure projects with his private resources, and supposedly even lending money to people (anonymous interviews, Riga 2012). The Mayor also escaped any accountability by his party, National Harmony Party, who defended him during the criminal investigation (TV Net, 2007).

#### *Gariūnai market, Vilnius municipality, Lithuania*

The Gariūnai market, established in 1994 by Vilnius City Council ordinance No. 2510, originally comprised an area of 60,698 m<sup>2</sup>, but later expanded to 32,5 Ha. From the onset, the three companies involved in the market, Gerūda, Jurgena and Posūkis – whose majority shareholders are the same people –, seem to have enjoyed particularly favourable conditions, as the market was considered a ‘project of national economic interest’ (Government of the Republic of Lithuania, 2000). This meant that, upon meeting certain conditions, the companies were exempted from taxes. Those conditions were even removed in 2004 by the Minister of Economy and the Prime Minister at the time, both members of Lithuanian Social Democratic Party (LSDP) (Government of the Republic of Lithuania, 2004; Packauskaite, 2005). That Minister was later replaced by V. Uspaskich of the Labour Party (Lithuanian Social Democratic Party, 2013) who put forward, together with the Governor of Vilnius at the time – from the LSDP party –, a resolution to recognize the market as a project of national importance.

The decision, which also transferred the rights to the land during 50 years to the three companies mentioned above, was approved in 2005 by Resolution No. 808 (Delfi, 2005; Government of the Republic of Lithuania, 2005), in spite of strong opposition. Various government officials and the Parliament anti-corruption committee argued *inter alia* that other companies should be given the opportunity to bid in a public tender. Others worried that the project did not provide sufficient cost and impact assessments, and that the land should eventually be returned to its lawful owners, who were expropriated during the soviet occupation (anonymous interviews, Vilnius 2012; Parliament of the Republic of Lithuania, 2005). But it was not until 2011 that the Police, the State Tax Inspectorate and the Financial Crimes Investigation Service (FCIS) found an organized crime network that had been operating in the market (Government of the Republic of Lithuania, 2010).

Apparently, employees from the companies Robitas and Sunrise LT, jointly with members of two organised criminal groups, used Gariūnai market to import goods from China through Poland and Latvia (Verslo Naujienos, 2011). This involved forging documents with fixed prices and quantities, moving the money through intermediaries using accounts in companies registered in the Cayman Islands. The investigation also revealed that the market was used for trading smuggled tobacco, alcohol, drugs, and counterfeit products (Delfi, 2011b).

The investigation, which is still ongoing, thus far indicates the alleged existence of a corruption network that facilitated this system. Apparently, there was a symbiotic relationship with key people in the government and Parliament who provided political support, in return for targeted donations to several parties (Širvinskas, 2012). Indeed, the three companies managing Gariūnai market were active donors to the parties who were involved in the resolutions that granted these companies control over the land and the market's operations. They contributed over 700,000 LTL (approximately 203,000 EUR) since 2004 to various political parties, including 10,000 LTL (approximately 2,900 EUR) to a LSDP candidate during the 2009 presidential election; 40,000 LTL (approximately 11,600 EUR) to the Homeland Union-Lithuanian Christian Democrats (HU-LCD) party during the European Parliament elections in 2008, a sum that increased to 78,000 LTL (approximately 22,600 EUR) in 2010; 15,000 LTL (approximately 4,300 EUR) to the Social Democrats and the Movement of Liberals; and 140,000 LTL (approximately 40,500 EUR) to the Labour Party, led by V. Uspaskich (Central Electoral Commission of the Republic of Lithuania, 2013; Pauliuvienė, 2011).

Apparently, the companies did not only exert political influence but also had important connections with law enforcement agencies. One of the companies' shareholders used to head the Financial Crimes Investigation Services and between 2010 and 2012 was Chief of Vilnius 6<sup>th</sup> Police Station. Another MP was member of the Business and Employment Commission and the Anti-Corruption Commission; in addition, she was married to the Director of the FCIS. Her party, the Liberal and Centre Union, received 20,000 LTL (approximately 5,800 EUR) from Jurgena just two months before election (Parliament of the Republic of Lithuania, 2004; Digrytė, 2006). In 2006 she moved to the Liberal Movement; Posūkis and Jurgena consequently donated 66,000 LTL (approximately 19,000 EUR) to that party (Central Electoral Commission of the Republic of Lithuania, 2005).

Speculations point to the high level of political influence the three companies had in these law enforcement agencies as the reason why no investigations were conducted until 2010 (anonymous interviews, Vilnius 2012). It was not until 2010, when a new Director to the FCIS was appointed, that he started investigating the case. But he could not survive the political pressure this case generated. In the midst of the investigations in 2012, the Minister of the Interior at the time, from the Union of Liberals and Centre party, dismissed him together with his deputy. The case is still under investigation.

#### *Pagėgiai municipality, Lithuania*

The town of Pagėgiai is strategically located at the border with the Russian enclave Kaliningrad. The Nemunas River that runs in parallel to the border has facilitated over the years the movement of goods – licit and illicit – across the border. The political scene in this town has been largely in the hands of Kęstas Komskis, member of the Order and Justice Party and mayor between 2003 and 2008. Afterwards he became MP. His brother, Virginijus Komskis and member of the same party, took over the post after his brother. Members of their party hold most positions in the local Council and control all bureaucratic structures in the municipality, as well as many companies with strategic importance (Grižibauskienė, 2010; Ramanauskienė, 2011). The brothers have repeatedly been accused of dealing in corrupt practices. In 2007, for example,

the results of the municipal election were annulled after reports of vote manipulation, as well as political finance mishandling. In particular, their party was accused of receiving funds of unknown origin (Supreme Court of the Republic of Lithuania, 2007).

Most importantly, they have been accused of having direct links with the smuggling activities in Pagėgiai, supposedly using their political position to become brokers in the business and receiving dirty donations from people involved in smuggling (anonymous interviews, Vilnius 2011 and 2012; Tauragės Kurjeris, 2010; Pancerozas, 2010a). Some indications that this was taking place include the decision in 2003 of then mayor Kęstas Komskis to rent two lakes and a river to the ‘Centre of Sports and Tourism’, administrated by the Deputy Mayor. These properties were strategically connected to the Nemunas River, thus gaining access to the border, which was allegedly used to facilitate smuggling of goods into Lithuania (anonymous interviews, Vilnius 2011). It is not surprising that the smuggling rates increased considerably after that (Republic of Lithuania, 2004). Other indications of the connection of mayor Kestras Komskis with organized crime networks are his supposed links with Russian ‘thief in law’<sup>2</sup> Anzori Aksentjev Kikalishvili, after a meeting they held, together with an MP, the head of the border-guard service, and another member of the Order and Justice Party (Žalys, 2004; anonymous interviews, Vilnius 2012).

Apparently, Kestras Komskis also used his position as head of the Parliamentary Anti-Corruption Commission to hinder investigations into corrupt practices that might have linked his associates (anonymous interviews, Vilnius 2011; Parliament of the Republic of Lithuania, 2001). During his term the Commission failed to initiate any investigation. In addition, when the Criminal Code was being amended in 2011, his party not only rejected the proposal to increase the fines for smuggling, but they even lowered them. Finally, the brothers have been accused of repressing media coverage into their business, apparently using the administration resources to harass some papers publishing unfavourable reports (Kauno Diena, 2010; Alfa, 2010). This prompted accusations in 2010 by the Speaker of Parliament at the time that Kestras Komskis was involved in smuggling (Liberal Democratic Party of Lithuania, 2011; Gudavičius, 2010; Pancerozas, 2010b). Investigations into these accusations are still ongoing.

#### *Paldiski municipality, Estonia*

The municipality of Paldiski is located in the Pakri peninsula, in north-western Estonia (Paldiski municipality, 2014). The ports are important connecting points for transport of people and goods between Europe and Russia. The cargo that goes through these ports includes vehicles, containers and heavy cargo (Paldiski Northern Port, 2014; Port of Tallinn, 2014); there are indications that illicit goods are also smuggled through some of the containers (anonymous interviews, Tallinn 2011 and 2012). The ports are also important because they attract investment by national and EU authorities (Port of Tallinn, 2014).

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<sup>2</sup> A criminal with special authority in the criminal underworld (Volkov, 1999:744)

The port is divided in north and south, each belonging to different companies who have traditionally competed to gain preferential routes and clients. There are allegations that a Russian politician tried – apparently successfully – to gain ownership of one of the harbours, although he kept his identity secret by operating through frontmen. This politician supposedly had important connections to Russian and Russian-speaking organized crime networks operating in Estonia. Their main interest apparently was gaining free access to the harbour and controlling officials to secure infiltration of products into legal containers (anonymous interviews, Tallinn 2012).

The political scene of Paldiski, on the other hand, has been traditionally dominated by former mayor Jaan Mölder, who held this position for nearly 15 years. In 2009 he lost the election, in part due to accusations of his participation in various corrupt dealings involving municipal resources, as well as his supposed connections with Russian speaking organized crime networks, particularly the Russian politician mentioned above (anonymous interviews, Tallinn 2011).

To successfully hide these dealings, and to secure preferential treatment for each harbour, the northern and southern groups apparently sought support of local politicians. The companies have allegedly been involved not only in routinely lobbying, but also bribery and offering ‘support’ during elections. In 2009, for instance, two men were arrested during the local elections for apparently buying votes on behalf of former mayor Mölder. Local criminals seemingly also mobilized voters, organising parties and taking people to vote for the candidate they indicated (anonymous interviews, Tallinn 2012). However, the two groups supposedly reached a truce and made agreements to divide their interests (anonymous interviews, Tallinn 2012).

## Conclusions

The cases mentioned above reveal more than just interesting anecdotes. The Zilupe and Pagēgiai cases, for example, illustrate the *mutual benefits when organized crime works in tandem with politicians*. These networks do not operate as predatory entities. Rather, the relations work both ways. Some politicians, especially those in strategic locations, seek to venture into crime activities, either by creating their own networks or forging links with existing groups. If the allegations are true, these town mayors successfully created systems to smuggle goods from and to Russian.

These two cases, furthermore, expose the *multi-purpose use of the public administration’s resources*. Local bureaucracies were apparently used, not only to allow illicit goods to move freely across borders, but also to directly use the administration’s human resources and property to get bribes and extort people, as well as using state-owned property to move and store smuggled products.

The Zilupe case in particular also provides important insights into the *capacity and willingness of citizens to hold their politicians accountable*. In spite of his numerous scandals, the Mayor suffered little political backlash. Instead, citizens mobilize in his support, not contesting the accusations but rather defending his legitimacy by pointing to the various services he provided. This suggests the strong connection between the provision of services and the capacity society has to exert political accountability.

When those services are provided – even through illicit resources – citizens might feel less inclined to challenge the position of the networks and politicians involved in corrupt practices.

The Gariūnai market and Pagėgiai cases provide interesting accounts regarding the *systematic use of financial donations to political parties and candidates by organized crime to stir political decisions*. Targeted donations were apparently used to influence decision-making processes to *inter alia* obtain infrastructure permits and favourable conditions for businesses, as well as to secure routs for moving illicit goods. These two cases also expose how these networks successfully *tampered law enforcement efforts against their activities*. On both accounts, politicians supposedly offered their links with law enforcement agencies to the service of their crime associates. In the Gariūnai market case, the direct and indirect power key politicians involved in this scheme apparently prevented authorities from investigating the continued allegations of corruption and organized crime activities in the market. Similarly, in the Pagėgiai case a politician supposedly used his position to hinder investigations into corrupt practices that might have linked his associates. Not only that. While in Parliament, he apparently influenced legislation that softened the punishment for certain organized crime activities he was connected with. Finally, the Pagėgiai and Paldiski cases offer a good understanding of how these networks have *used vote manipulation to gain alliances with local politicians*. In these municipalities, the connections with organized crime networks bore fruits for politicians during election time through vote manipulation, vote-buying and mobilizations of voters by local criminals.

Interestingly, all these cases take place at the local level, where organized crime interests are located. This suggests a high level of vulnerability of local governments and the risks that weak democratic governance poses especially at the local level, as it increases the risks and challenges of facing organized crime.

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***When Judicial Review Becomes a Fading Shadow of Constitutional Democracy:  
Toward a Comparative Understanding of Judicial Review in  
Cameroon and Post-Apartheid South Africa***

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## Introduction

The end of the cold war and the collapse of the Berlin wall in Europe were certainly influential factors that brought about respect for human rights in Africa and what Huntington, Samuel calls the third wave of democratization. What really brought a change in the constitutional protection landscape was the emergence of the constitutional reform movement in the early 1990s which culminated in certain regime changes and amending of constitutions which subsequently resulted in the introduction of constitutional rights protection. Cameroon generally followed this approach, while retaining the Fifth French Republic's Constitutional Council design of 1958 without any modifications. South Africa partially followed the same Kelsenian model in that it has a Constitutional Court but also allows inferior courts to attend to constitutional matters to a limited degree.

When Cameroon gained independence in 1960, it used the fifth French Republic's Constitution of 1958 as a blueprint to construct its own constitution. (Africa report no. 160 Cameroon 2010: 6-7). Generally, French Constitutions have been in opposition to the power of judicial review based on ideological and historical foundations (Cappelletti 1971:3). For this reason, a *conseil Constitutionnelle* was established for the purpose of enforcing "*le contrôle de la constitutionnalité des lois*. (This is a kind of *a priori* and abstract review of statutes. There are no oral hearings, no adversary litigation and no genuine parties to a case. The CC's role is merely preventive and its function is to curtail inroads by the legislature into the preserve of the executive in France. Cappelletti).

Cameroon followed in the same footsteps, as the Cameroon Constitution of 1972 (Law no.06 of January 1996) was amended by that of 1996 and this new constitution made provision for a *Conseil Constitutionnelle*, copying the French model of quasi-judicial review of 1958 in its original form with all its defects and weaknesses. (Fobad 2011: 1018).

The fact that part VII of the Cameroon constitution providing for a constitutional Council deliberately rules out judicial review (Fombad 1996: 3) reveals to what degree the constitution of Cameroon is influenced by the French Constitution of 1958. This French model is an example par excellence of a very restricted and a fairly ineffective means of avoiding governments from violating the constitution. (Fombad 2012: 1064) Part VII of the constitution in articles 46 and 47 (1) merely mention about *la constitutionnalité des lois*, which is an abstract and not a concrete review. Judicial review is therefore used as a generic term in respect of Cameroon in this paper.

The Union of South Africa was born in 1909 under the South African Act enacted by the British Parliament. (Nwabueze 1967: 236) The South African Parliament thus attained a sovereignty that was supreme and boundless and the court was not qualified to question any of its enrolled and promulgated Acts. (Nwabueze 1967) However, in 1994, South Africa witnessed the dawn of a democratic dispensation after a national liberation struggle and a supreme constitution in 1996 which embraced a Constitutional Court with the power of judicial review. (Klug 2010: 5) The courts and the Constitutional Court to be specific are required to review the practices of government and private parties where the need arises to ensure the protection of these

rights. (Klug 2010) In this paper, I employ a comparative study paradigm with the hope of establishing that it is conspicuous that the new South African Bill of Rights trumps the decision of Parliament on certain rights. (Davis, Chaskalson & De Waal in V Wyk, Dugard, De Villiers & Davis 1994: 1). While the Bill of Rights allow the Constitutional Court to review an unconstitutional statute, Cameroon's nominal *Conseil Constitutionnelle* is vested with a limited judicial review system seen to be manifestly defective and merely a farce intended to shroud the interest to nip constitutional adjudication in the bud. (Fombad 2012: 1064) The second part of this paper deals with the emergence and background of judicial review in Cameroon and South Africa, the third part deals with the application and nature of judicial review in both countries and the last part is a comparison and appraisal of the two judicial review systems and the conclusion based on lessons learnt from this comparative review.

### **Emergence and general background of judicial review in Cameroon and South Africa**

Given that Cameroon and South Africa were born out of regimes (colonialism and apartheid) of unfettered legislative (Du Plessis 2011: 99/351) and executive (Koning, Nyamnjoh 2003: 35 see fn 3 & 5) powers over the people who formed majority of the population, gives more reason why a check on the power of the majority who are in control would avoid majority tyranny over the minority as an essential tenet of constitutional democracy. (Sarkin 1997: 138)

Judicial review is most often traced to the groundbreaking case of *Marbury v Madison* (5 US 1 Cranch 137 (1803) where Chief Justice Marshall and his colleagues, guided by the spirit of the constitution discerned judicial review amid its unclear provisions. (Perry 1994: 26) However, prior to *Marbury*, judicial review had been in existence way back for several centuries. (Cappelletti: 38-39) English colonies were habitually established in the form of commercial enterprises under crown charters. (Cappelletti: 38-39) Since the charters served as constitutions in the various colonies, laws which were not in line with the sovereignty of parliament were to be struck down. (Cappelletti: 38-39) *Marbury* introduced judicial review in the US; (Perry: 26) however, the US constitution does not enshrine judicial review. (Perry: 26)

### **The nature and application of judicial review in Cameroon and South Africa**

For the purpose of keeping the comparison in context, we shall progress by way of individual evaluation of the two countries. The evaluation or examination shall constitute the following: The nature of the reviewing organ, the types and degree of control, the controlling organs of judicial review, and the procedure of review.

#### **The situation in Cameroon**

##### *The nature and application of judicial review*

The Cameroonian Constitution does not provide for judicial review of legislation. Article 46 says the Constitutional Council shall rule on the constitutionality of laws. Article 47 (1) (1) and (2) are more specific about the kind of review envisaged – the constitutionality of laws, treaties and international agreements; the constitutionality of the standing orders of the National Assembly and the Senate “prior to their

implementation". (Only abstract *a priori* review is permitted and not concrete *a posteriori* review)

#### *Structure of the reviewing mechanism*

Even though the constitution of 1996 made provision for a Constitutional Council, this institution has not yet gone operational eighteen years after the Constitution was promulgated. In anticipation of such a challenge, article 67 of the constitution vests powers in the existing institutions to continue the job of the institutions still to be established. So the Supreme Court of Cameroon continues to discharge the duties of the Constitutional Council. In my analysis, the following will be observed: The nature of the organ carrying out judicial review will be examined, the types and degree of review, its jurisdiction and procedure followed.

#### *The nature of the reviewing organ*

In Francophone Africa, constitutional justice was incorporated in the Supreme Court, and assigned to a particular bench of the court. (Kante 2008: 158) Constitutional justice only began taking root in Africa generally, and, in Cameroon in particular, in the 1990s as a result of the democratic transitions. (Kante 2008: 158) The manner in which matters are referred to the Council are laid down by article 47 (2) of the Constitution. (President of the Republic, National Assembly, Senate, one third of the members of National Assembly and of the Senate) In other Francophone jurisdictions which are former French colonies such as Benin, the Constitutional Court of Benin can act *sua sponte* or on its own motion; in what is commonly known as *auto-saisine* action.<sup>1</sup> In other words, the courts can unilaterally take an internal order permitting it to initiate a spontaneous process based solely on its conviction of the relevance of such a subject matter. (Ngenge 2013: 452)

#### *Jurisdiction and access to the reviewing organ*

Most Francophone African countries including Cameroon copied the defective system of preventive control by an organ with restricted constitutional competence from France. (Fombad 1996: 180) The Council exercises a quasi-judicial role through preventive review of constitutionality of legislation which is done strictly before promulgation. (Art 46 of the Constitution of the Republic of Cameroon 1996).

The category of people that can challenge the constitutionality of a law before the Constitutional Council are: President of the Republic, the President of the National Assembly, the President of the Senate, one-third of the members of the National Assembly and one-third of the members of the Senate. (Art 47 (2)) Under article 47 (2) (1) of the Constitution the Presidents of regional executives may refer matters to the Constitutional Council whenever the interests of their regions are at stake. In effect, what this means is that an ordinary citizen of Cameroon does not have the *locus standi* to defend any dispute before the Constitutional Council. Ruling out private individuals from challenging the constitutionality of laws reveals the inefficiency of the judicial review system in Cameroon. (Fombad 1996: 178).

#### *Types and degree of review*

This paper intends to challenge the manner in which judicial review operates or is applied in Cameroon. The organ charged with the application of judicial review has

two major roles to carry out which are to review the constitutionality of law (Art 46 of the Constitution of Cameroon, 1996) and an institutional regulation task. (Art 47 (1) para 3) The strong influence France had on its former colonies, (Ngenge 2013: 442) led Cameroon as one of such colonies to copy the French system of judicial review. This French review model is abstract on constitutionality than in a specific outlined context of its execution. (Shapiro 1989: 14) Cameroon has maintained this restrictive abstract *a priori* and pre-promulgated constitutional control of legislation, (Fombad 2011: 95) even though article 61(1) of the French Constitution has introduced the *exception d'inconstitutionnalité*. (Fabbrini 2010:1312)

The 2008 constitutional reform in France made provision for a form of *a posteriori* constitutional review of laws in France. Article 47 outlines two ways in which preventive control of pre-promulgated laws can be carried out: in article 47 (1) (1) the control is carried out on statutory laws and international agreement. The other way is set out by article 47 (1) (2) the control of standing orders of the National Assembly and the Senate “prior to their implementation”. According to article 47 (1) the Constitutional Council shall give the final ruling on these two control measures. The setback existing in Cameroon is that the system does not have the *auto- saisine* mechanism and has to depend on a limited group of persons for referral to the Constitutional Council. (See generally Art 47 (2) Cameroonian Constitution). In civil law jurisdictions, known as ‘monist’ states, following French constitutional law, a treaty becomes part of the domestic law immediately, following ratification. (Viljoen 2012: 518) Cameroon has a dual or *bi-jural* legal system consisting of common and civil law with the civil law system dominating. Given that it is not a domestic bill, it will certainly require going through compulsory constitutional control to be sure that it is not inconsistent with the constitution. Be that as it may, article 47 (1) (1) will not necessitate such a scrutiny since it is a domestic bill. Given that the bill is voted in Parliament, it is implied that the domestic legislators will take notice of its constitutionality prior to passing the bill.

#### *Procedure of review before the Constitutional Council*

According to article 47 (1) of the Cameroonian Constitution, the Constitutional Council is empowered to give a final ruling on the constitutionality of laws, treaties and international agreements. More so, article 47 (3) (1) specifies that enactment deadlines shall cease to lapse once an instrument has been referred to the Constitutional Council. However, rulings must be handed down within a fifteen days period from when the referral was made, even though such a time-limit can be reduced to 8 days at the request of the President of the Republic. (Art 49) Even though the above provisions have been mentioned, it should be noticed however, that article 52 says: a law shall lay down the organization and functioning of the Constitutional Council, the conditions for referring matters to it as well as the procedure applicable before it. Finally, article 50 says that the rulings of the Constitutional Council shall not be subject to appeal. They shall be binding on all public, administrative, military and judicial authorities, as well as, on all natural persons and corporate body.



## **The situation in South Africa**

### *The nature and application of judicial review*

Section 2 of the Constitution of the Republic of South Africa when read in conjunction with section 165, states that judicial authority is vested in the courts and the courts are independent and subject only to the law and which must be applied without prejudice. (Bekink 2012: 59) Section 167 (4) (b) and (d) directly address the issue of constitutionality of instruments. Section 167 (4) (b) states that only the Constitutional Court may decide on the constitutionality of any parliamentary or provincial bill, but may do so only in the circumstances anticipated in section 79 and 121. Section 169 (a) of the Constitution of the Republic of South Africa says any high court may decide any constitutional issue except those issues out rightly outlined in section 169 (a) (i) (ii) and (b). Magistrates' Courts and all other courts may decide any matter determined by an Act of Parliament, but any court of a status inferior to the High Court may not enquire into or rule on the constitutionality of any legislation (section 170).

All high courts can hear constitutional challenges and can ascertain a constitutional violation in a specific case, but the powers to declare the law or action unconstitutional are reserved for the Constitutional Court exclusively. (Klug 2010:232)

### *Structure of the reviewing mechanism*

At this juncture, the structure or operation of the reviewing mechanism for judicial review will be scrutinised, paying attention to the enumerated factors as has been done in the case of Cameroon above. From the operation of the reviewing mechanism, lessons will be drawn regarding the performance of judicial review in South Africa when compared with Cameroon.

### *The nature of the reviewing organ*

At the constitutional negotiations of South Africa in 1993, it was agreed amongst the negotiating parties that there should be an independent, competent and impartial judiciary that would have jurisdiction to safeguard and implement the constitution and fundamental rights (Klug 2010: 231). It was decided that in addition to high courts challenging the constitutionality of acts albeit not declaring their unconstitutionality, a separate Constitutional Court was created with final jurisdiction over constitutional matters (Klug 2010: 232).

The Constitutional Court and the Appellate Division are treated like co-equals, except for the fact that the Appellate Division is expressly bared from adjudicating matters within the jurisdiction of the Constitutional Court (Van Wyk *et al* 1994: 168). However, other divisions of the Supreme Court of Appeal, in addition to their normal or usual competence also have first-instance constitutional competence (Van Wyk *et al* 1994: 168).

This implies that the organ of judicial review in South Africa is hybrid; a mix of the European model and ordinary courts which have a limited jurisdiction to adjudicate over the Constitution. (Motala & Ramaphosa 2002: 55). Both centralized and decentralized system owing to the fact that the review is carried out by both the

Constitutional Court which is a specialized court and all other judicial organs in the legal system known to be decentralized courts (Motala & Ramaphosa 2002: 55).

*Jurisdiction and access to the reviewing organ[s]*

Jurisdiction over constitutional matters is not limited to the Constitutional Court alone. Section 173 attests to this view, and there exist additional clauses of the Constitution which indisputably compel courts at all levels to develop a common law where required to 'give effect to' or appropriately derogate (Roux 2013: 11-6) a right in the Bill of Rights (section 8 (3)).

In *S v Boesak* (2001 (1) SA 912 (CC), 2001 (1) BCLR 36 (CC)) the Court laid down six categories of matters that fell within the term 'constitutional matter'. The categories included (Roux 2013: 381) disputes which involve a claim that a legislation either violates the Constitution on its face or should be interpreted conformably to the Constitution, and disputes about the fulfillment of an inferior court's duty to interpret a statute or develop the common law so as to promote the 'spirit purport and objects of the Bill of Rights' amongst other. (Roux 2013: 381)

Whenever any matter falls within the exclusive jurisdiction of the Constitutional Court, it exercises both original and appellate jurisdiction (Motala & Ramaphosa 2001: 60). In most cases where the Constitutional Court discerns the absence of justice, it controls access to itself by way of granting "leave" in such cases where if done otherwise, the ends of justice would be defeated (Motala & Ramaphosa 2001: 60). In this light, section 102 (2) provides for direct access to the Constitutional Court in any matter in which it has jurisdiction, if the interest of upholding justice is the defining purpose (Motala & Ramaphosa 2001: 61). Where majority of the cases on appeal are emanating from the Supreme Court of Appeal, the Constitutional Court will act as an appellate tribunal (Motala & Ramaphosa 2001: 61).

*Types and degree of review*

In the South African constitutional system, the courts which have jurisdiction in constitutional matters have authority over *a priori* and *ex post facto* and concrete and abstract control (Motala & Ramaphosa 2001: 255-256). Prior control is done prior to promulgation of the legislation in order to determine if the instrument in question is consistent with the constitution (Rautenbach & Malherbe 2004: 228). *Ex post facto* control means that the investigation for consistency with the constitution is only conducted after the adoption of the law (Rautenbach & Malherbe 2004: 228). Concrete control on the other hand occurs in the face of a dispute in court where litigation takes place over the application of the Constitution (Rautenbach & Malherbe 2004: 229). Abstract control refers to review carried out on the constitutionality of a legal rule when the rule has not actually been applied in a case. This type of review makes it possible to obtain finality over the legitimacy of rules of law prior to their application in order to avoid possible severe consequences (Rautenbach & Malherbe 2004: 228).

Section 144 addresses the element of any amendment on the provincial constitution or any text of the provincial constitution as not becoming law unless the Constitutional court certifies that it complies with the constitutional provisions on its adoption. In *Ex parte President of the Republic of South Africa in re Constitutionality of liquor bill* (2000 1 BCLR 1 (CC), 2000 1 SA 732 (CC)) Cameron AJ ruled that the legislation on

liquor was inchoate. He ruled that even though parliament had passed a bill, it had not received the assent of the President who referred it to the Constitutional Court for a decision on its constitutionality. The judge pointed out with reference to Presidential referral under section 79; that the Constitution subjects all legislation to review for constitutionality and if found inconsistent with the constitution then it becomes invalid.

As concerns concrete and *ex post facto* control and their degree of review, the competent courts as guardian, these courts are usually called upon to overrule certain decisions of the majority. This action usually precipitates political and constitutional tensions and this tension defines constitutional democracy (Bekink 2012: 61). It is therefore clear that the courts must apply the constitution and not be obsequious to majority opinion regarding certain controversial beliefs such as death penalty and others. *S v Makwanyane* (1995 (3) SA 391 (CC)) puts the issue in context where the Constitutional Court declared the death penalty to be unconstitutional irrespective of public opinion (Bekink 2012: 61). The court struck down this post-promulgated law on death penalty because it was inconsistent with the reading of the constitution.

#### *Procedure of review before the Constitutional Court*

Given that the South African system does not apply only a single concentrated or European style review, or a diffused American style review but a mix of the two, wherein the Constitutional Court and other courts of the judicial system conduct review, the courts which have jurisdiction in constitutional matters regulate their own process. Section 173 of the South African Constitution vests the power in the Constitutional Court, the Supreme Court of Appeal and High Courts to have inherent powers to regulate their own process and to develop the common law, taking into account the interest of justice. Moreover, section 71 contemplates that the courts shall function according to what national legislation says. The rules and procedures to be followed will therefore be determined by national legislation. The South African Parliament passed the Constitutional Court Complementary Act in 1995 and in 1997 another Act was passed for the referral of constitutional matters to the Constitutional Court for confirmation (Motatla & Ramaphosa 2001: 61). This exercise of referral for confirmation usually occurs when an inferior court has made a ruling of invalidity in relation with an Act of Parliament or a provincial Act (Motala & Ramaphosa 2001: 61). Section 167 (3) says that as the highest court in the land, it decides only constitutional issues and decisions and it also has the final decision on constitutional matters or decisions on constitutional matters. Section 167 (5) also confirms that it has the last say on Acts of Parliament and provincial Acts and must endorse an order of invalidity emanating from the Supreme Court of Appeal, High Court or courts of same rank to give an order force. The Constitutional Court's decisions are binding on all other courts and institutions. (Motala & Ramaphosa 2001: 58)

#### *An appraisal of the differences and similarities of judicial review in Cameroon and South Africa*

After having carefully analysed the various variations of judicial review as practiced in the different countries on an individual basis, appraising the significance of their comparison is the way to go. As I mentioned earlier, South Africa portrays an opposing paradigm or model of the best practice in constitutional protection of norms in Africa if not the world, as opposed to Cameroon on the other side of the spectrum,

outstanding as a quintessence of the worse model of judicial protection of constitutional norms in Africa and perhaps in the world.

#### *The nature of the reviewing organ*

The existence of mechanisms which provide control for constitutionality for the sake of protecting fundamental rights will be rendered nugatory if an individual alleging that his rights have been infringed upon by the legislature or executive is incapable of getting protection from a body distinct and independent of these organs (Nwabueze 1967: 231). Cameroon's organ for the control of constitutionality provides a model quite distinct from that of South Africa. While Cameroon has a more centralized organ for the review of constitutionality of legislation, South Africa has certainly made greater strides in the efficacy of review of governmental acts and individual constitutional guarantee. While the Constitutional Council of Cameroon looks more political than judicial; given its nature of appointment of judges and referrals to the Council, (Fombad 2012: 178-179) the South African Constitutional Court and judicial system in general is quite independent. (Roux 2013: 161-168). While the members of the Constitutional Council are not judges and are not required to have any prior legal knowledge, as per chapter 8 of the South African Constitution and specifically sections 165-170, all members of the judicial system including the Constitutional Court which all have jurisdiction in constitutional matters are judges. The members of the Constitutional Council are all appointed by politicians who are at the same time the only ones capable of seising the Council (Fombad 2003:98). This restrictive scope of persons vested with competence to seise the Council might account for the reason why no constitutional challenge has ever occurred in Cameroon. Judges in South Africa are pre-selected, nominated and appointed in a more democratic and reliable manner. Sections 174 and 178 depict a mix of legal professionals, politicians and others in the selection process, making it more balance than the Cameroonian one which is strictly conducted by a distinct group of political cohorts as seen in article 51 of the Constitution of Cameroon. The judicial power is in part V while the Constitutional Council falls under a separate area; part VII of the Constitution. This is contrary to the situation of the Constitutional Court of South Africa which falls under judicial authority in chapter 8.

#### *Jurisdiction and access to the reviewing organ*

While constitutional matters are limited solely to the jurisdiction of the Constitutional Council in Cameroon, in South Africa, the Constitutional Court, the Supreme Court of Appeal, the High Court and even the Magistrate Court, where Parliament has strictly authorized it as per article 170 have jurisdiction over constitutional matters. Even though it is contemplated that the Constitutional Court will act like a court of last resort, whenever justice is at stake, the matter could be referred to the Constitutional directly. Even though in France the 2008 reforms brought hope in terms of constitutional protection, yet whereas a citizen might be able to have access to the French *Conseil Constitutionnel*, he may not go directly as in South Africa but the matter may rather be referred by the *Conseil d'Etat* or *la Cour de Cassation* to the *Conseil* within a time limit (Ngenge 2013: 439). In Cameroon, the only people who can seise the Constitutional Council are a group of politicians or candidates to disputed Presidential or Parliamentary elections. However, in Germany, a citizen may have the opportunity of directly seising the Federal Constitutional Court or South African Constitutional Court to petition for the review of a statute that has violated his

fundamental right in the form of a constitutional complaint (Brewer-Carias 1989: 209).

### *Conclusion*

It must recall that article 51 does not limit the appointment to people who have prior knowledge of the law but simply “personalities of established professional renown,” per article 51 (1) (1). As a result of the prospects of future elevation to a more prominent position, the members of the Constitutional Council might apply judicial review with the reservation of such a promotion at the back of their minds. This is different in South Africa where those who apply judicial review are all judges and chapter 8 of the constitution provides security of tenure to all of them.

This paper juxtaposes the two systems of judicial review as applied in Cameroon and South Africa with the ultimate intension of depicting one of the most defective systems of judicial review in Africa and perhaps in the world against one of the most progressive judicial review systems in Africa and perhaps the world over.

The fact that since the creation of the Constitutional Council in 1996 no matter has yet been referred to the Council for judicial review reveals government’s bad faith and the absence of any goodwill to protect citizenry fundamental rights. This absence of good faith is predicated upon the fact that Cameroon copied France’s defective quasi-judicial review system of 1958 with the intension of obfuscating judicial review while transferring responsibility of the defectiveness and the unproductivity of the judicial review model to the French on whose model they merely relied without any addition or subtraction. However, Cameroon’s bad faith is made more explicit by the fact that France’s constitutional reform of 2008 which contemplated *a posteriori* concrete review in France, did not influence Cameroon to bring about a shift in its judicial review policy as a consequence. Rather, Cameroon has regressed into a situation and design worse than that of 1996. This conduct has simply unveiled Cameroon’s constitutional engineer’s original intension in 1996; which was to ultimately deprive the citizens of their fundamental rights by preventing access to the Council.

The structure of the Constitutional Council in Cameroon, its politics and activities lead to no other conclusion but that it is an institution whose model of judicial review is a fading shadow of constitutional democracy and merely a charade of judicial review intended to obstruct the desire to nip constitutional adjudication in the bud.

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## *Establishment of Economic Courts in Egypt*

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### **Abstract**

No one can deny that "The Phenomenon of the Slow Pace of Litigation" expands to include all wings of the judicial system, Civil, Criminal, and Administrative issues. And extends deeper to affect all categories of litigants: Rich and Poor, Men and Women. To paint a dark picture of what could be called a "Crisis of Justice in Egypt".

So, Egyptian legislator created special Economic Courts to solve this disputes, and to avoid its negative effects, by Law No. 120 of 2008. Which decide that this kind of litigation can be solve by judges specialized in this kind of litigation, to encourage investment, and achieve a safe environment for investment, provide maximum protection for economic activity and help develop the plans and ensure justice.

The Economic Court Law entered into force in October 2008. establishes Economic Courts in each Court of Appeal Circuit. which consists of Courts of First Instance, Courts of Appeal. These courts have a jurisdiction over criminal cases stemming from investment operations, consumer protection, commercial, banking transactions.

The Economic Court system is a three-tiered system, with first instance, intermediate, and final appellate courts. And Each Trial Chamber should be composed of three presidents of courts of first instance, consists each of the Chambers of Appeal of three judges of the appellate courts to be at least one of whom is President of the Court of Appeal.

So, I will discuss the steps taken by the legislature to set up Economic Courts in Egypt.

Keywords: Law, Economy, Economic Courts, Egypt, Litigation, Slow Pace of Litigation, Crisis of Justice.

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## Introduction:

Law and economy are firmly connected. Adding to that the economic life has an effect on the judicial thinking. So, rules of law should be characterized by the care of the existing economic attitude in the state in a way that law seems to be a mirror in which the existing economic attitudes in most branches of law are reflected even if they are not of direct shape<sup>1</sup>. Judiciary may be an attracting factor for investment through understanding and the speed of settling the disputes achieving quick justice. On the other hand, it may be a factor of dispelling of investment and development via prolonging the period of litigation and being not aware of the nature of such disputes<sup>2</sup>.

The progress of production, the advance towards investment and flourishing in the economic life, in general, necessitates a good climate in which the feeling of trust towards legality prevails. Also, the clarity of the acts of legislation and regulation of production relations and the other relationships in society, facilitating means of justice and settling the disputes quickly<sup>3</sup>. The entire aforesaid make the legislator set the legal rules that govern such relations and set the suitable legal frames to be applied<sup>4</sup>. As long as these economic litigation procedures may take a long time to be heard in courts returning harm on the wronged, the case may take 10 years without judgment and may take 15 years in Cassation Courts or even more. This is nothing but aggression. This makes the creditor lenient with his rights or may leave them altogether thinking they will never be attained<sup>5,6</sup>. Thus, the delay of litigation

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- <sup>1</sup> Sahar Abdul Sattar. (2008). *Economic Courts in Egyptian Law* (1<sup>st</sup> ed.). Cairo, Egypt: Dar Elnhda Alarabeah. no. 1, pp. 9-10, Sahar Abdul Sattar. (2010, March 10-11). *Law of Economic Courts in Egyptian Law*. Paper presented at the Recent Legislative Trends on Judicial Organization Conference, Alexandria University, Egypt. p. 265, Ahmed Badie Balegh. (2004). *Between the Judiciary and Law and Economic Courts*. Paper presented at the Eighth Annual Conference, The Judicial System and Local Variables, Faculty of Law, Mansoura University, Egypt. p. 4, Hassan Basiouny. (2012). *Towards a Contemporary Legal and Judicial Thought, The Road to Modernization and Development Legal and Judicial System*. p. 61.
- <sup>2</sup> Ahmad Sharaf Al-Den. (1986, January-July). Economic Transformations of the Law. *Legal and Economic Sciences Journal*, 28, 1-128, Ahmad Sharaf Al-Den. (1987, January-July). Economic Transformations of the Law. *Legal and Economic Sciences Journal*, 29, 1-68, Mohamed Abdelnaby Elsayed Ghanem. (August 4-5, 2014). *Reasons for Establishing the Economic Courts in Egypt*. Paper presented at the Business and Social Science Research Conference, Grand Hotel Park, Dubrovnik Croatia, Mohamed Abdelnaby Elsayed Ghanem. (2014). Reasons for Establishing the Economic Courts in Egypt. *The MacrotHEME Review*, 3(7), 169
- <sup>3</sup> Osman Hussein Abdullah. (1992). Legislative and Judicial Reform Necessity for Economic Development. *Judges Journal*, 7. 21, Basiouny, 2012, *Towards a Contemporary Legal and Judicial Thought*, p. 70.
- <sup>4</sup> Ghanem, 2014, *Reasons for Establishing the Economic Courts*, p. 174.
- <sup>5</sup> Samiha Al-Qalyoobi: Professor of Commercial Law, Faculty of Law, Cairo University.
- <sup>6</sup> Abeer Al-Damarany. (2008, Tuesday May 6). The Economic Courts. *Al-Ahram*. p. 20, Abdel-Aal Elderby. (2012). *Development of the Egyptian Legal System and*

procedures hinders the progress and economic development and puts obstacles against the attraction of foreign investment and stops many projects in the fields of industry, commerce and exportation in addition to perplexing the markets, the increase of manipulation of some commercial dealings and hindering the banking and fiscal sectors<sup>7</sup>. That is why the state did not seem helpless towards commercial or investment disputes. Further, it did many attempts representing in:

### **1. The good offices of the State to settle disputes in investment:**

The State established specialized circuits for some disputes such as division in Council of State to hear administrative disputes related to investment and assigning circuits in Trial Courts to hear investment cases<sup>8</sup> aiming at facilitating litigation procedures and settling the disputes quickly in cases that demands special knowledge or experience<sup>9</sup>.

#### **A. Setting up Circuits in the Council of State to hear administrative disputes related to investment**

The Council of State made big efforts to set up independent circuits to hear such disputes to limit its passive effects. The council of state has actually set up, according to the decree of the head of the council of state No. 333 of 2006 "concerning setting up an independent circuits for investment disputes in the courts of administrative

*Justice Benefits of Speed Justice, A Study on Motives and Mechanisms* (1<sup>st</sup> ed.): National Centre for legal Versions. p. 56, Basiouny, 2012, *Towards a Contemporary Legal and Judicial Thought*, p. 68.

<sup>7</sup> Hoda Mohamed Majdy. (2009). *Economic Courts Between Rationing and Application, Comments on the Provisions of the Law No. 120 of 2008*: Dar Elnhda Alarabeah. pp. 4-5, Safaa Sdky. (2010). *Causes of Slow Pace of Litigation in Egypt*. Paper presented at the Justice and Slow Pace of Litigation in Egypt, Cairo, Egypt. p. 3, *Conference Recommendations* (2010). Paper presented at the Justice and the Slow Pace of Litigation in Egypt, Cairo, Egypt. p. 1. *See Also*: Khalid Mamdouh Ibrahim. (2010, March 10-11). *The Limits of Economic Courts in Arbitration Matters*. Paper presented at the Recent Legislative Trends on Judicial Organization Conference, Alexandria University, Egypt. p. 240, Mohy Mohamed Mossad. (2010). *The Role of Economic Courts in the Judicial and Economic Reform*. Paper presented at the Recent Legislative Trends on Judicial Organization Conference, Alexandria University, Egypt. p. 631, **For More details about Slow Pace of Litigation in Economic Issue**, *See*: Ghanem, 2014, Reasons for Establishing the Economic Courts, pp. 169-173.

<sup>8</sup> Abdul Sattar, 2008, *Economic Courts*, no. 4-5, p. 19, Abdul Sattar, 2010, *Law of Economic Courts*, pp. 271-272.

<sup>9</sup> Mohamed Eid El-Ghareb. (2006). *The Impact of Special Court In Judicial Provisions*. Paper presented at the International Conference of the Judiciary and Justice, Riyadh, K.S.A. p. 775 etc, p. 781, p. 785, Mohamed Eid El-Ghareb. (2006, October). Criminal Justice and the Idea of Creating Specialized Economic Courts. *Journal of Legal and Economic Research*. no. 3, 78-79, Ahmad Sharaf Al-Den. (2009). *The Problems of the Subject Matter Jurisdiction of the Courts of the Economic Courts, Study in Some Aspects of the Economic Courts Law* (Judges Club ed.). Cairo, Egypt. no. 1, p. 7, Ibrahim, 2010, *The Limits of Economic Courts in Arbitration Matters*. p. 241 and footnote no. 1 at the same page.

jurisdiction in Cairo and in some governorates" <sup>10</sup> provided that it starts work on the first of October 2006 <sup>11</sup>.

These courts specialize, according to the first article of the decree of the Chief of Council of State and excepted from the rules of local specialization apart from the other circuits of administrative judiciary, in hearing disputes related to the following:

- 1- "The Laws of Guarantee, Investment Incentives, Central Bank, Fiscal and Banking System, Capital Market, Central Deposits for Monetary Papers, Intellectual Property, Preventing Monopoly Practices, Dumping, Saving Consumers, Supervision on Insurance, Financial Rent and Financial Real Estate.
- 2- Import and Export, Guardianship, Confiscation, Insurance, Estimation, Disputes of Land Registration and Real Registration.
- 3- The administrative decrees issued to fulfil the judgments of international trade treaties and all disputes among investors and administrative bodies".

Such a Council is intended to hear disputes arising among investors and administrative bodies depending on the fact that existing disputes among investors and any of government bodies are basically referred to the Council of State to hear and decide it according to a legal term which cannot be surpassed on the basis that it is the owner of the original specialization to decide disputes which the government or any of its bodies is a part of it according to the specializations of the Council of State <sup>12</sup>.

The implementation of this idea has several legal and administrative setbacks which restricted its success in the Council of State. It turned to be a bureaucratic procedures rather than a step forward to accelerate the lawsuit towards a just and quick judgments <sup>13</sup>.

**The most important defects resulting from this are as follows:**

- 1- The establishment of one circuit covering all the state is not enough to accelerate the settlement of disputes and provide the rapid full justice depending on constitution and legislation. Further, it leads to increase its burdens and prolong the period of time to decide the disputes and make it groan from the great number of cases.

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<sup>10</sup> Decision of the Head of the State Council No. 333 of 2006 Issued in September 3, 2006, Egyptian Gazette, No. 208. September 12, 2006, p. 16.

<sup>11</sup> Article No. 7 of the Decree of the President of the State Council States that: "The provisions of this decision begins from October 1, 2006, and the competent authorities should take the necessary measures to be implemented with effect from the date of issue".

<sup>12</sup> Abdul Sattar, 2008, *Economic Courts*, no. 4, p. 19, Elderby, 2012, *Development of the Egyptian Legal System*, pp. 59-61.

<sup>13</sup> Fahr Abdel Azem Saleh. (2008). *Explanation of Economic Court Law* (1<sup>st</sup> ed.): Al-Safa Press. p. 59.

- 2- The aim of setting up such a circuit was to leave aside the complicated and prolonged procedures to accelerate the settlement of disputes but this circuit abides with the rules and general judgments set in the Civil and Commercial Law<sup>14</sup>.

### **B. Assigning specialized circuits to hear investment disputes in Trial Courts:**

Seven circuits in north of Cairo Court, depending on the decree of General Assembly of the court are assigned to hear investment cases quickly to settle disputes rapidly and achieving full justice. After that the assignment of these courts is generalized in the other Trial Courts.

#### **The work of this circuit has some defects as follows:**

- 1- Assigning particular circuits in trial courts to decide in investment disputes does not mean that they have some specialize regarding the legal procedures followed in this circuits or contestation the judgements they issue.
- 2- This circuits are run according to the set rules, and that its setting up is only a regulating works that has nothing to do with the specific specialization for the circuits set up in its circuit. Further, it is a way to benefit from the advantages of specialization and dividing work among judges inside courts through setting up specialized circuits to hear investment cases<sup>15</sup>.
- 3-

It has become quite clear that these circuits which are set up according to the decree of the Head of the Council of State or the decree of the General Assembly of the Court of North Cairo has been exposed to criticism and has complained of, like the other courts in general, prolonged procedure and the accumulation of cases in a way that necessitates finding a solution for such a big problem<sup>16</sup>.

### **2. The Beginning of the Law of Economic Courts:**

The talk about the idea of setting up the economic courts<sup>17</sup> has been formed after the issuing of the judgement of Supreme Constitutional Court concerning the unconstitutional of judgement texts in the Law of Capital Market No. 95 of 1992<sup>18</sup> on January 2002<sup>19</sup>, This has created a constitution vacuum resulted in about 3584 disputes concerning Capital Market estimated by one billion pounds according to the estimation of the Authority of Capital Market in 2003<sup>20</sup>. In spite of all this the specialized authorities did not present quick and alternative solutions which guarantee the speed of setting these disputes.

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<sup>14</sup> Ibrahim Ali Hassan. (2006, January 7). Independent Courts or Only Economic Judicial district? *Al-Ahram*, Elderby, 2012, *Development of the Egyptian Legal System*, p. 60.

<sup>15</sup> Abdul Sattar, 2008, *Economic Courts*, no. 5, p. 20.

<sup>16</sup> Elderby, 2012, *Development of the Egyptian Legal System*, p. 59.

<sup>17</sup> Majdy, 2009, *Economic Courts*, p. 31.

<sup>18</sup> Issued at June 22, 1992, Official Gazette, No. 25 Repeated, June 25, 1992.

<sup>19</sup> Case No. 55, 23 (The Supreme Constitutional Court, January 13, 2002).

<sup>20</sup> Majdy, 2009, *Economic Courts*, p. 31, Elderby, 2012, *Development of the Egyptian Legal System*, p. 59.

After the issue of the decree of the Chief of the Minister Cabinet No. 1816 of 2004, a national committee has been formed to modernizing the economic legislator<sup>21</sup> and the work plan in the first year focused on the first subject which is the project of the law of Economic Courts to accelerate the settlement of these disputes and avoiding its passive effects<sup>22</sup>.

### 3. The Issue of the Law of Setting up Economic Courts:

The idea of setting up Economic Courts in Egypt has come to light as an aspect of developing the legislative structure for the Egyptian society as we hope with the initiative of president Mubarak in his speech to the Shura and People's Assembly on December 19, 2005 where he said: " I will work, along with you, on the development of our legislative structure to achieve this and that the government will present, during this period, a number of projects of law which reinforce the governing structure of our social and economic life and reflects the priority of providing more job opportunities... through raising the standard of investment and economic developments". One of these projects that " the economic law which sets up an independent judicial system specializes in judgment and settling the disputes among companies and working entities in the economic field in easy procedures which ensure the speed of litigation and its justices<sup>23, 24</sup>.

This, this idea has come to light in a form of a law during the first week on July 2006<sup>25</sup> where the Cabinet of Ministers agreed on and then it was sent to the President of the Republic to refer it to the assemblies of Shura and People Assembly to discuss and confirm it<sup>26</sup>. But the project hasn't been decreed for two years owing to the big

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<sup>21</sup> National Program to Support Legislative Reform, Fouad Gamal Abdel Kader. Legislative Reform in Egypt, The Achievements of the National Program to Support Legislative Reform During the Five-Year Plan 2002-2007. Specifically The First Axis: Legislative Reform, and Axis II Comprehensive Legislative Development.

<sup>22</sup> Elderby, 2012, *Development of the Egyptian Legal System*, p. 59.

<sup>23</sup> The Speech of President Hosni Mubarak at the opening of the new Parliamentary Session of Parliament, 2005-2010, Monday: December 19, 2005, *See Also*: The Speech of the next parliamentary Session, Sunday: November 19, 2006, And the Speech of the next parliamentary Session, November 15, 2007.

<sup>24</sup> Mahmoud Murad. (2006, January 7). Independent Courts or Only Economic Judicial district? *Al-Ahram*, Majdy, 2009, *Economic Courts*, p. 13.

<sup>25</sup> Ahmed Ibrahim Ali. (2010, Wednesday-Thursday: March 10-11). *Comparative Economic Judiciary*. Paper presented at the Recent Legislative Trends on Judicial Organization Conference, Alexandria University, Egypt. p. 85. **To view the most important domestic and international considerations that support the importance of the issuance of this law at this time**, *See*: Mossad, 2010, The Role of Economic Courts, p. 646, On a Local Level, p. 646, International Level, pp. 647-648, **For more details about the evolution of the idea of Economic Courts**; Shams Al-Den Mirghani. (2008). *Economic Courts*. Cairo, Egypt: Al-Ahram Economic Book. p. 5 etc.

<sup>26</sup> Elderby, 2012, *Development of the Egyptian Legal System*, p. 59, p. 236 and footnote no. 2 at the same page.

number of legislations which the Egyptian Authorities have taken as priority, The Constitutional Amendment, and the Law of Taxes were part of it <sup>27</sup>.

The understanding of the government and its recognition for the importance of such a law has an effect on the activation the system of economic legislations and the increase of competitiveness of the climate of investment has the greatest effect on the acceleration of the discussion of this law to achieve a quick justice to a settle the economic disputes quickly which are estimated to be millions <sup>28</sup>.

Some have expected at that time that: <sup>29</sup> " this law will contribute to improvement and development of the environment of practicing business and as a result the ability of the economy to attract in investments" <sup>30</sup>.

Though a big number of Jurisprudence have objected to the idea of reviving the case preparation panel at the time of issuing the law No. 76 of 2007 <sup>31</sup>, There were different opinions in the committee of legislation held to disusing the project of the Law of Economic Courts. But the majority of the committee thought they keep the text of the article numbers of the project the same and adopted the system of preparation panel <sup>32</sup>. That is because the legislator still hopes to be able to benefit from the Case Preparation System.

From this course, the legislator has been issued the law No. 120 of 2008 to set up Economic Courts in Egypt <sup>33</sup> to hear judicial cases of economic nature by specialized judges in such a kind of judicial cases <sup>34</sup> to lop with the technological and economic

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<sup>27</sup> Karim Fouad. (2008, May 5). Economic Courts in Egypt See the Light. *Mohet, Arab Media Network*, Wael Ali. (2008, Thursday June 19). Law Experts: Unconstitutionality Follow Up The New Economic Law Courts, and We Expect Removed from Service after Two Years. *Al-Masry Al-Youm*. p. 10, *See Also: Specialized Economic Courts to Push the Movement of Investment in Egypt*. (2008, Friday March 14). *Al-Ghareda*. p. 32.

<sup>28</sup> Saleh, 2008, *Explanation of Economic Court*, p.10, Elderby, 2012, *Development of the Egyptian Legal System*, p. 56.

<sup>29</sup> **Mahmoud Mohi Al-Den, Minister of Investment.**

<sup>30</sup> Rem Tharwat. (2008, Saturday: April 26). Courts Act Addresses Economic Disputes for a Wide Range of Citizens, Institutions and Companies. *Al-Masry Al-Youm*. p. 6, Elderby, 2012, *Development of the Egyptian Legal System*, p. 237.

<sup>31</sup> Nabil Ismail Omar. (1999). *Judge Preparation System in French Law and Civil Prosecution System Which is Proposed to Work in Egypt*. Alexandria: Dar Algama Algedada. p. 38 etc, Abdul Sattar, 2008, *Economic Courts*, p. 8, and footnote no. 1, p. 83.

<sup>32</sup> The Report of the Joint Committee, People's Assembly, February 26, 2008, Abdul Sattar, 2008, *Economic Courts*, pp. 82-83.

<sup>33</sup> **Law No. 120 of 2008. May 22, 2008, Official Gazette No. 21 Repeated, May 22, 2008, p. 2 etc.**

<sup>34</sup> Sharaf Al-Den. (2009). *The Problems*, no. 1, p. 7, Mahmoud Althewy. (2010). *Preparing a Lawsuit in the Economic Courts, The Idea of the Preparation of the Lawsuit and How to Organize with the Evaluation of this System, An Analytical*

development of encourage the movement of investment nationally and internationally<sup>35</sup>. It came in to effect on the first of October 2008<sup>36</sup> to officially announce the birth of two legal branches for the first time in Egypt: The Economic Law<sup>37</sup>, and the Law of Economic Courts<sup>38</sup>.

#### 4. Some of the Most Important Aspects and Substantive and Procedural Developments Included in the Law are:

- A. The case preparation panel has been originated to prepare disputes and cases which the Economic Court specializes in according to the text of article No. 8 of the Law of Economic Courts.
- B. Stating that it's not allowed to contestation against the issued judgments of the economic courts expect as the article No. 11 of the law stated<sup>39, 40</sup>.
- C. Originating a panel to examine contestation in Cassation Court and stating the right of Cassation Court to decide in the subject of case even if it was for the first time according to what article No. 12 of the Law of Economic Courts included<sup>41</sup>.

#### 5. Conclusion:

It should be noted that these two articles didn't give an integrated system for Cassation appeals to say that the rules of Civil and Commercial Procedure Law argument takes no effect<sup>42</sup>.

All these characteristics are to reach a quick justice and the quick settlement of disputes without adding more burdens on the litigants<sup>43</sup> within the frame of

*Study*, Alexandria: Dar Algama Algedada. p. 1, Abdul Sattar, 2008, *Economic Courts*, p. 29.

<sup>35</sup> Mirghani, 2008, *Economic Courts*, p. 5 etc, Saleh, 2008, *Explanation of Economic Court*, p. 9, p. 11, Mohamed Ali Eweda. (2009). *Rules of Civil Procedure in the Economic Courts, An analytical Study* (1<sup>st</sup> ed.). Alexandria, Egypt: Legal Books, Monshat Al-Maref. p. 3.

<sup>36</sup> Ahmad Al-Sayed Sawy. (2010). Economic Courts. *Majallat Al-Hoqouq; Legal and Economic Research Journal*, 1. 460, Mostafa Metwally Kandel. (October 2011). Toward Independence Processing Suit Stage from Stage of the Proceedings. *Rooh El Kwanen; Spirit of Laws Journal*, 56(II). 860.

<sup>37</sup> Ahmad Sharaf Al-Den. (1988). *Economic Law, A Study in the Economic Transformation of the Law*. Cairo, Egypt. no. 1, p. 3 etc, Sharaf Al-Den. (2009). *The Problems*, no. 5, pp. 16-19, Honey Mohamed Nabil. (2008, January). Theory of Economic Law at the Thought of Pareto. *Masr Al-Moasra*, 100. 417 etc.

<sup>38</sup> Ahmed Hashish. (2010). *Principles of Economic Courts in the Light of the Principle of the Primacy of Divine Law*: Dar Elnhda Alarabeah. no. 1, p. 7, Majdy, 2009, *Economic Courts*, pp. 33-34.

<sup>39</sup> **Article No. 11, Law of Economic Courts.**

<sup>40</sup> For more details: Althewy, 2010, *Preparing a Lawsuit*, pp. 41- 46.

<sup>41</sup> **The article No. 12, Law of Economic Courts states that:** "The Court of Cassation form a circle or more competent, but not others, to adjudicate in appeals of revocation provisions set forth in Article No. 11 of this law ...".

<sup>42</sup> Althewy, 2010, *Preparing a Lawsuit*, p. 5.

facilitating the litigation procedures and to settle the cases quickly aiming at creating an attracting environment for investment in Egypt <sup>44</sup>.

From this course, the legislator has been issued the law number 120 of 2008 to set up economic courts in Egypt to hear judicial cases of economic nature by specialized judges in such a kind of judicial cases to lop with the technological and economic development to encourage the movement of investment nationally and internationally <sup>45</sup>. It came in to effect on the first of October 2008 to officially announce the birth of two legal branches for the first time in Egypt: The Economic Law, and the Law of Economic Courts.

The logo for the International Association for Business and Law (iafor) is centered on the page. It features the word "iafor" in a light blue, lowercase, sans-serif font. The text is enclosed within a circular graphic composed of two overlapping, semi-transparent arcs: a larger, light blue arc and a smaller, light red arc, both curving around the text.

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<sup>43</sup> Mohamed Mahmoud Elewa. (2011). *Comment on the Law of Economic Courts, Including the Most Important Economic Principles Established by Economic Courts*. p. 3.

<sup>44</sup> Syed Ahmed Mahmoud. (2010, March 10-11). *Notes on the Project and Law No. 120 of 2008 about Establishment of Economic Courts*. Paper presented at the Recent Legislative Trends on Judicial Organization Conference, Alexandria University, Egypt. p. 345, p. 347, Althewy, 2010, *Preparing a Lawsuit*, pp. 2-4, Abdul Sattar, 2008, *Economic Courts*, p. 29, Ibrahim, 2010, *The Limits of Economic Courts in Arbitration Matters*. p. 239, Mossad, 2010, *The Role of Economic Courts*, p. 631, p. 650.

<sup>45</sup> **For More details about Benefits of Economic Courts**; Mohamed Abdelnaby Elsayed Ghanem. (September 1-3, 2014). *The Benefits of Economic Courts in Egypt under Law No. 120 of 2008*. Paper presented at the Annual International Conference on Law, Economics and Politics, (AICLEP), Green Templeton College, University of Oxford, United Kingdom.



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## ***Development Theory and its Threatening Other***

Adam Clark, Newcastle University, UK

The European Conference on Politics, Economics and Law 2014  
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### **Abstract**

Since its heyday in the 1980s and 1990s, neoliberalism as an approach to development theory and policy has fallen spectacularly from grace, particularly in the academic community. As a theory it was folly, putting profits ahead of what development is supposed to be about: people. As a practice it resulted in a 'lost decade.' Fortunately, Washingtonian universalism has been discredited: *“The idea that there should be a single forward path and development model lies well behind us.”* It is recognised now that *“the rulebook for developing countries must be written at home, not in Washington”* (Rodrik, 2008) Yet what *is* neoliberalism? As time goes by the term seems to grow increasingly fuzzy. In this paper it shall be argued that neoliberalism has ceased to represent anything that was ever advocated by the World Bank or IMF. Rather, it has been given the threatening characteristics of development theory's 'Other.' The first section of the essay will provide an overview of the characteristics ascribed to development theory's threatening Other through the work of J.M. Keynes and some post-war modernisation theorists. Focussing on the Washington Consensus, we shall then look at how the critique of neoliberalism has constructed that approach in this manner.

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## The Threatening Other

In *The Archaeology of Knowledge*, Michel Foucault was concerned with how concepts we regard as natural – such as economics or politics – come into being; that is, how they become differentiated from other concepts. For Foucault, concepts such as economics are not based on something objectively definable. The discourse on madness, for example, is not based on the existence of an object called 'madness'. Rather, the concept is defined by the collection of statements that are accepted as being about madness and those that are not. The question for Foucault is how and why certain statements emerge and are associated with the subject of madness, and others either do not emerge or are not accepted as part of the discourse. The conditions of existence, coexistence, maintenance, modification, and disappearance Foucault calls the “*rules of formation*” of a discourse (1972: 38). There are three inter-related aspects of the rules of formation: the “*field of initial differentiation*” where the discourse defines its object and differentiates itself from other discourses; the “*authorities of delimitation*” who are regarded as having the authority to make truth statements about the object; and the “*grids of specification*”, according to which the various parts of the discourse are “*divided, contested, related, regrouped, classified, derived from one another.*” (1972: 41-2). For the purposes of this essay the relevant aspect is the first, where a discourse “*finds a way of limiting its domain, of defining what it is talking about, of giving it the status of an object – and therefore of making it manifest, nameable, and describable.*” (1972: 41) Many radical critiques of development – such as those by Said (1978) and Escobar (1996) – have been based on the idea that the object of development theory was formerly the Third World. Through development theory the West creates and defines the underdeveloped world as an object upon which it can act.

Be that as it may, it does not explain the existence of a field called development studies. Development *theory* as a discipline must be able to differentiate itself from other (possible) fields of study which could name and describe the Third World. On what basis does development theory claim such authority? This is no idle question: in the 1980s the academic position of development theory was severely undermined first by neoliberalism and then by post-development. The field's reclaiming of lost ground since the 1990s is, we believe, closely linked to the othering of neoliberalism. The object of development *theory* – what it is talking about – is social change. 'Development' as a phenomenon is a particular form of social change, and development theory is the body of knowledge that conceptualises and describes it. When development theorists define their field they do so by differentiating it from alternative ways of conceptualising social change. Development theory sees itself as the guide and guardian of a cooperative endeavour of striving toward a developed world for all – a striving that both the popularly-called developed and underdeveloped countries are part of.

Of course, for a 'guardian' identity to be meaningful one requires a threat. The threat in the development literature is a world without development policies, where social change is essentially unguided and unlimited. This alternative form of social change – which was originally the idea of progress – is given four primary characteristics: it is selfish/materialistic, Darwinian, Eurocentric, and conservative. The effect of this Self/Other dichotomy is to construct change as something that happens spontaneously as completely other and as threatening to social-change-as-development, which is

social change that is intentional and teleological. This construction reinforces the need for development theory, as guide and guardian.

### *Selfish and materialistic*

The primary and overriding characteristic of the conceptualisation of social change from which development is attempting to distinguish itself from is its selfish and materialistic impulses. In all four periods in which this process of othering was dominant, the then existing form of social was presented by development theorists as being solely motivated by selfishness and materialism. Keynes saw selfishness and materialism at the heart of social change as it existed. He argued that the ruling passion in the individualistic, capitalist society in which he lived was the 'money motive', which he described as a 'somewhat disgusting morbidity' and a 'semi-criminal, semi-pathological propensity' which should be handed over to 'the specialists in mental disease.' He believed that the 'game' of capitalism ought to be played for lower stakes than at present – that true social progress would require society to overcome all that condoned and encouraged self-seeking activity (1936[1960]: 374). Keynes described the moral problems of present society as: love of money; the dominance of the money motive; individual economic security as the highest good; the 'hoarding instinct' as the means of providing for one's family. He saw in Soviet Russia the “*first confused stirrings*” of a non-supernatural social religion which would finally condemn these immoralities, a social experiment which “*tries to construct a framework of society in which pecuniary motives as influencing action shall have a changed relative importance, in which social approbations shall be differently distributed, and where behaviour which was previously normal and respectable ceases to be either one or the other.*” (1925b: 305, 302).

In the post-war era, too, we find that the argument for 'development' rests in part on a portrayal of social change as otherwise being based on selfishness and materialism. David Apter, for example, warned that an unplanned social change effected by private entrepreneurs would result in mounting “*social dysfunctionalities*”. This is because people would be concerned with their own interests rather than the wider social consequences of their activities. It would be “*at best a gambler's environment in which planning for the game takes second place to the overall consideration of winning.*” (1971: 197) According to Arthur Lewis, who was one the few modernisation theorists to write an explicitly normative justification of economic growth, counted increased 'economism' and 'individualism' among the costs of growth, arguing that both would have to be limited if the desired benefits were to materialise (1955: Appendix). More recently, a UNESCO report on citizenship education argued that a deliberate inculcation of civic virtues was necessary because existing society is characterised by “*a lack of cohesive spiritual and social values, and unrestricted acquisitiveness ... ; this ruling social passion is tied to a peculiar conception of 'freedom,' one shaped by highly individualist perceptions and impulses around crass indifference and materialism.*” (Howe and Marshall, 1999)

### *Darwinian*

The second characteristic of the threatening Other is a societal-level consequence of the selfish individual-level motivations guiding social change: it is presented as Darwinian, in the sense that the weak are left to the mercy of the strong who are set free to act on these selfish and materialistic impulses. This “old-fashioned individualism and laissez-faire” was characterised as a system of “economic anarchy”



(Keynes, 1925a: 329). Keynes identified the uncertainty and lack of direction inherent in the present system as the source of the problem, and proposed instead the economic activity ought to be guided by considerations of social justice rather than individual whim, which would only perpetuate the present inequalities. For this the world needed a “*new wisdom for a new age*” (Ibid: 337; 1926) which he was happy to provide in his *General Theory* (1936[1960]) The new wisdom was necessary because the old way had served to benefit the rich without providing them with an incentive to help the poor out of their vicious circle of poverty. Clearly it would not do for those who saw themselves as helping the poorer nations out of their present economic misery.

Paul Rosenstein-Rodan (1943) in what is often considered the founding text of modernisation theory, noted that the “*social conscience*” could no longer accept the miseries that accompanied social change in the “*darwinist nineteenth century*.” Post-war development theorists were particularly suspicious of the operation of the international economic system, where the economic anarchy that was being overcome within Western societies still reigned. Some had argued in the post-war era that the task of US foreign policy ought to be to recreate the world of nineteenth century Europe, but most modernisation theorists set themselves explicitly against the free trade liberalism of that era. It was believed that “*the working of capitalism would maintain the same unequal world division of labour as has previously been enforced by imperial might*” (Toye, 2006). Although scholars such as P.T. Bauer were conceded to genuinely believe that liberal economic policies would benefit Third World development, such an attitude was more often considered a mark of an uncaring stance regarding the poorer nations (Rostow, 1984). According to Thomas Balogh (1966[1974]) such an approach “*decried the motives of deliberately helping the poor*” and would leave them to their fate as the plaything of powerful market forces. David Apter saw a “*hit and miss, private and public pattern of manipulative and exploitative aid*” which, despite the best efforts of multilateral agencies, rendered the international system “*essentially hostile*” (1971: 204n, 46) He described it as “*the repugnant purveyor of anti-humanism*.” It was not 'development'. True development policies would have to protect the poor from the selfish and materialistic impulses that still existed.

### *Eurocentrism*

A third characteristic of the threatening Other is that it is Eurocentric. It is presented as being derived in theory from the Western experience and imposed in practice as a template for the non-Western world to follow. Post-war development theorists argued that people like PT Bauer were promoting “*a projection for the whole world of a conception of change that was believed, erroneously, to be true of the societies of Western Europe*.” (Black, 1966:7) Today, we are quite used to hearing that the old approaches to and theories of development – from colonialism to post-war modernisation to neoliberalism – were Eurocentric. Yet the unquestioned acceptance of this account obscures the fact that those development theorists saw themselves as providing a bulwark *against* Eurocentrism.

Thus Daniel Lerner wrote his *The Passing of Traditional Society* (1958[1966]), which marked the beginning of the 'golden decade' of the political modernisation school, in opposition to existing methods of development which he believed sought to impose Western models on non-Western societies. Despite the title of his book, Lerner did not believe that development was a process of the Traditionals gradually coming to

accept the ideals and institutions of the modern, Westernised elites. He takes issue with those who suggest it might be so, asserting that “[t]here is no uniform Tomorrow just as there was no single Yesterday.” (1958[1966]: 74). Rather, developing societies must “have the wisdom to distinguish between the generally applicable functions of modernity and the institutional forms derived from alien traditions...” (Black, 1966:97)

The modernisation theorists were in far greater agreement about which aspects of the West ought to be *rejected* than which ought to be adapted or adopted by the developing nations. The latter were largely at the discretion of the particular developing nation; the former were threatening to social-change-as-development wherever it occurred. To be rejected were of course the values and practices associated with social change that was not development – represented again by selfishness and materialism. Throughout the modernisation literature these are presented as constant dangers of the development process; they could be kept in check with the help of the knowledge created by development theorists. Modernisation theorists argued that this threatening Other would, if it wasn't for the protection afforded by the development industry, sweep away all valued patterns of life that were not conducive to growth (eg. Apter, 1971). Development theorists and practitioners have always seen it as part of their task to protect indigenous peoples and cultures from destruction by the pernicious influence of Western ways of life. These individualistic Western values led young people to abandon their fragile traditional villages and cultures to seek white-collar jobs in the cities. This educated urban minority was regarded as self-seeking and materialistic, and disruptive of attempts to promote community and national development. Disconnected from their traditions, these displaced persons could not hope to be the engine of true development (see e.g. UNESCO, 1961; Thompson, 1981). If set free, as they would be without proper development policies, a country's 'valued patterns of life' would be threatened from within, by an *internal* Eurocentrism.

#### *Conservative/Cynical*

Finally, it is conservative of the existing system, with all its inequalities and miseries, and cynical of the possibility of promoting change. According to Keynes, the watchwords of the British government in his day remained “*Negation, Restriction, Inactivity. ... Under their leadership we have been forced to button up our waistcoats and compress our lungs. Fears and doubts and hypochondriac precautions are keeping us muffled up indoors.*” Keynes' new wisdom required a more optimistic outlook: “*There is no reason why we should not feel ourselves free to be bold, to be open, to experiment, to take action, to try the possibilities of things.*” (1929) Modernisation theorists argued that the old way was too “*slow and halting*” and “*unlikely to be satisfying*” (Pearson, 1970; Singer, 1949). Like Keynes they presented themselves as occupying a middle-ground between the unguided social change envisaged by liberal economists such as P.T. Bauer, and the revolutionary social change advocated by socialists. The former would maintain the *status quo*, the latter would not produce lasting, stable change. Thus according to Rostow: “*The central task of an effective political leader consists in narrowing the gap between the status quo and the theoretical optimum dynamic political equilibrium position, without destroying the leader's underlying basis of political support or the constitutional system itself...*” (1971: 25).

In conclusion, development theory defines itself in opposition to an alternative form of social change to which it ascribes threatening and undesirable characteristics: selfishness, materialism, individualism, Eurocentrism, social Darwinism, cynicism. This form of social change is presented as what would exist without the protection of the development industry. As Rostow claimed with respect to the development industry's work on the international scene: *"in an inherently divisive, world, with ample capacity to generate international violence, institutionalized development aid has been perhaps the strongest tempering force, quietly at work, giving some operational meaning to the notion of a human community with serious elements of common interest."* (1984: 258) Development is of course a form of social change that is the opposite of these things. It is motivated by altruism, not selfishness; community spirit, not individualism; normative values, not crass materialism; concern for the poor, not social Darwinism; it respects traditional cultures, rather than simply imposing Western ways; and it is optimistic, not cynical. In sum, it helps people rather than leaving them to their fate.

### **Neoliberalism as a threatening Other**

This construction of a threatening Other serves to reinforce the necessity of development theory as a distinct area of concern: it represents a world that had existed before – in the cruel, irresponsible Industrial Revolution – and would exist again were it not for correct development policies. As an example, we shall now look at the interpretation of neoliberalism as an approach to development.

According to John Williamson, by the end of the 1980s a consensus had emerged within the IFIs around ten general policy areas. First, with regards annual budgets it recommended fiscal discipline. Williamson emphasised that this did not necessarily mean balanced budgets, but rather than the debt-to-GDP ratio out not to increase further. Deficits had in the past been financed by inflation, which primarily hurts those on low or fixed income (such as pensioners) and can be avoided by the rich who can move their money abroad. On public expenditure the consensus was that the level of non-merit subsidies should be reduced in favour of greater expenditure on pro-growth and pro-poor areas, including education, healthcare, and infrastructure. On tax reform, the basic principle was that the tax base should be broad and marginal rates reasonable. Tax increases were an alternative to expenditure cuts in the pursuit of fiscal discipline. *"Much of technocratic Washington [e.g. the IMF and World Bank] finds political Washington's aversion to tax increases irresponsible and incomprehensible."* (Williamson, 1990) On interest rates it recommends liberalisation with prudential supervision in order to correct the distortions that had occurred due to political allocation of credit. There was no consensus on how quickly liberalisation ought to occur.

On exchange rates the consensus was that a competitive exchange rate was more important than how the rate was determined. The exchange rate should be competitive enough to promote exports but not to the extent that it creates inflationary pressures or reduces domestic investment. On trade policy the consensus was for liberalisation as the goal, although again there was no consensus on how quickly it should occur. Two qualifications to free trade commanded consensus: infant industry protection and a moderate tariff rate. Tariffs were considered preferable to other import-export policies such as quotas because they were a source public revenue. On FDI it was regarded as

foolish for a developing country to artificially limit the importation of foreign capital and intermediate goods, skill, and know-how. Political Washington favoured subsidising FDI, the World Bank and IMF disagreed, questioning whether the additional investment would really be of productive benefit to the development nation.

Privatisation was favoured for a number of reasons: first, it reduced the government's fiscal burden; second, selling off national enterprises would provide much-needed funds; third, and most importantly, the private sector was regarded as more efficient than the public. Governments of developing nations were urged to put more faith in the capacity of their indigenous private sector. Williamson (2004a) would later note that it soon became clear that it mattered a great deal *how* privatisation was done. On deregulation there was a consensus on the need to ease barriers to entry and exit, that is, “*controls on the establishment of firms and on new investments, restrictions on inflows of foreign investment and outflows of profit remittance, price controls, import barriers, discriminatory credit allocation, high corporate income tax rates combined with discretionary tax-reduction mechanisms, as well as limits on firing of employees*” (Balassa et al, 1986, cited in Williamson, 1990). There is no mention of abolishing regulations in areas such as safety, the environment, and pricing in non-competitive industries (such as healthcare and infrastructure). Finally, it was generally agreed that property rights in Latin America were insecure or unattainable, particularly in the informal sector.

Thus what neoliberalism proposed for development theory and policy was, ultimately, a rethinking and rebalancing of the relationship between state, market, and civil society, which had been heavily biased toward the state under the modernisation approach. As a result of this faith in the state (although 'mistrust of markets' may be a better characterisation) governments in developing nations had become overburdened and consequently ineffective; even, in some case, harmful and parasitic. Lal's 'second-best' approach was based on the premise that imperfect government interventions may actually be more detrimental to a country's development than imperfect markets. The recommendation was not no planning, but a more rational and selective development planning which would supplement rather than supplant the market and, more specifically, the price mechanism. According to Lal, “*neo-classical economics ... has provided the justification for rational dirigisme, by showing that there are methods of 'planning' through the price mechanism which may be both feasible and desirable.*” (Lal, 1983[1997]: 175; cf. World Bank, 1981: ch. 4). The role of government would recede, but it is clear from the original Washington Consensus list that fiscal discipline was not to be achieved (solely) by cutting expenditures. Government expenditure was to re-purposed from unproductive and distorting subsidises toward productive investment and pro-poor programmes. Although public administration was generally regarded as bloated, Williamson (2004a) later made clear that there was no consensus regarding the desirable size of government. Nor did he think there ever would or should be. Nevertheless, perhaps knowing what their approach may be interpreted as, both Lal (1983[1997]: 40) and the Berg Report (World Bank, 1981, Foreword) took care to explicitly distance themselves from *laissez-faire*. In the event, their protestations were in vain. Neoliberal development, and particularly the PR disaster that was the term *Washington* consensus, came to refer to something that had never been anywhere near consensus-level, particularly not at the IMF and World Bank, and couldn't be derived from the original set of policies: it was given the

characteristics of the threatening Other.

*The threatening Other is social change motivated by selfishness and materialism.* Neoliberalism, according to Peet and Hartwick (2009: 99), is based on little more than an assumption about people as “*rational, freedom-loving, and self-interested*” who have no moral relationships, nor a sense of trust, fairness, or responsibility. Graham Harrison has said that it sees *homo economicus*, the selfish utility maximiser of economic theory, as the “ordinary state of the human being” (2010: 3); that it sees people as individualised, utilitarian, and egoistic, and that society is, for neoliberals, constituted by this “*classic image of the self created by European liberal political economy.*” (Ibid: 22) Neoliberalism “*places on stage egoistical, atomized individuals devoid of social and moral obligations, who are interested only in the exchange of goods and not at all in their fellow-beings.*” (Rist, 1997[2008]: 248)

Neoliberals rest their hopes for development solely on market exchange; “*the only form of exchange that excludes all sociability as a matter of principle.*” (Rist, 1997[2008]: 249) It is, say Peet and Hartwick, a vision of unplanned development through the “selfish choices” of these maximising individuals, harmonised by the market. Neoliberalism's glorification of selfishness has led to a generation of adults that is “*all too inclined to focus on their own problems*” (UNESCO 1996). The neoliberal principles of self-interests and material rationality “*now fuel the common sense of the age and shape a certain way of seeing and behaving in the world.*” (Rist, 1997[2008]: 246; cf Mintzberg et al, 2002)

*The threatening Other is a Darwinist social change in which the strong thrive.* Neoliberalism, according to Harrison (2010: 17), is “*based on an economic core belief in the free market and (near) perfect competition*” through which global poverty and inequality are perpetuated (Cammack, 2002: 160) When they speak of the 'free individual,' neoliberals do not mean the workers, or women, or the poor. “*They mean ... the entrepreneur, the capitalist, the boss. And they mean, by freedom, the opportunity to make money... . These theorists are against the state because it may limit the freedom of the rich to make more money, and it might redistribute existing wealth. These theorists disguise their support for rich people to become even richer, using the lofty terms of 'freedom' and 'democracy'.*” (Peet and Hartwick, 2009: 100) The law of competition is, according to Rist (1997[2008]: 251), “*invoked only to push down wages.*”

For Colin Leys, neoliberalism is an approach to development that 'assigns all initiative to the market', that sets capital free to seek profit on whatever terms it can impose, and that subordinates everything to global market forces. It elevates the “competitive selfishness” of the few to “a higher order of the common interest.” (Peet and Hartwick, 2009: 99) Moreover, “*the 'common interest' defined in this selfish way becomes an alienated social force, controlling individuals rather than being controlled by them, so that they are compelled by ruthless competition to do things they know to be socially and environmentally destructive.*” (2009: 99-100) Markets are “*irrational and dictatorial*” whereas “*the democratic state can signal a higher order of rationality by deliberately increasing prices by adding sales taxes*” (2009: 100).

*The threatening Other is social change modelled on the Western experience and*

*universalised. Neoliberalism is “an attempt to impose Western models of society on the diversity of forms throughout the rest of the world.” It seeks “not to make a model that is more adequate to the real world, but to make the real world more adequate to its model.” (Clarke, 2005: 58) The Washington Consensus is a set of policies that the IMF and WB have “compelled” (Harrison, 47) developing states to adopt, thus resulting in a new imperialism which projects a vision of the political good from the West to the rest of the world. It is social change pursued not by developing states themselves but through “the interventions of Western states and IGOs in African development policy making.” (Harrison, 2010: 18) Neoliberal interventions aim “to destabilise existing habits ... and to produce notions of conduct based on efficiency, transparency and utility.” (Ibid: 75) Ultimately, according to Cammack (2002: 159), neoliberalism “virtually abolishes the idea of development as a specific concern, in favour of a universal set of prescriptions applied to developing and developed countries alike.”*

*Finally, the threatening Other is a conservative social change, cynical of attempts to help the poor and disadvantaged. Neoliberalism “demobilized” development by dismissing its political and social ideals in favour of economic ones, “subordinating everything to the arbitration of ‘global market forces.’” It denies that people and societies can have any positive influence on the development process, assigning instead “all initiative to ‘the market’ (i.e. to capital).” (Leys, 1996: vi) It advocates a nightwatchman state unconcerned with welfare policies and income redistribution. Consequently, neoliberalism “reinvented [development], not as a form of resistance to the logic of capitalism, but as a programme for surrendering to it.” (Cammack, 2002). As Colin Leys concludes: “If development theory is to be useful and interesting again it must focus carefully on these decisions [to set capital free etc] and consider ways and means to re-create a world in which it is once again possible to pursue social goals through the collective efforts of the societies and communities to which people belong.” (1996: vi)*

To reiterate, this view of neoliberalism as ideological and market fundamentalist has little if any correspondence with reality. The Washington Consensus and the Berg Report were both concerned with particular areas of the world considered within their particular historical contexts: Latin America in the case of the Washington Consensus and Sub-Saharan Africa in the Berg Report. Both were suffering the effects of decades of state planning, and thus the critique of the state-centric modernisation approach was relevant in both cases. However, in neither is there any claim to the universal applicability or timeless validity of the reforms advocated, nor do they purport to offer anything beyond broad recommendations which must be adapted to the particular conditions in which they are eventually applied. The Western experience was invoked, but, as it was for modernisation theorists, it was a cautionary tale more than a model to follow (e.g. World Bank 1989: 4). Indeed, the Washington Consensus was not even a list of policy prescriptions (Williamson, 2004b). It was a snapshot of policies that Washington generally regarded as desirable for Latin American countries at the time. It was not an unchanging, rigid ideology to be imposed on all but a shifting consensus that evolved with new crises, successes, and opportunities and with new approaches and concerns. Nor was either an exhaustive development agenda. The Berg Report deferred to the Lagos Plan on, for example, issues of science and technology, and Williamson's Washington Consensus did not include (as the name ought to imply) policies that did not command a consensus in

Washington.

In all the anti-neoliberal passages cited above – and there are many more – direct quotations from neoliberals are sparse. Occasionally a word such as 'self-interest' is taken out of context to back up the analysis, but ultimately critics tend to take a caricature of a set of policies that a particular group of people at a particular point in time thought desirable for a particular part of the world, and speak of it as if it is the 'true' neoliberal development model, universal and eternal. Neoliberal development is market fundamentalism, *homo economicus* unleashed, surrender to the whims of capital. Changes in IFI policy – such as 'adjustment with a human face', good governance, participation, and the increased emphasis on pro-poor growth in the early 1990s – can be little more than masks hiding the true nature of neoliberal development. At best they have created an 'augmented' Washington Consensus – but only to make the original list more palatable and efficient. Thus Harrison (2010) writes: *“Each of these reforms [to the original Washington Consensus] is articulated on the premiss that social interaction is based on 'rational' self-interested individuals who weigh up – through some form of utilitarian mindset – the costs and benefits of alternative forms of action.”* Similarly, Cammack (2002: 157): *“The World Bank and its allies [have established] a new neoliberal orthodoxy that is faithful to the discipline required for capitalist accumulation on a global scale, and [have created] a legitimising ideology that obscures the presence of those disciplines at its core.”* This ideology *“disguises [neoliberalism's] logic, and promotes it as a solution for the very conditions – poverty and inequality on a global scale – that it itself produces. ... The effect is to present a set of policies infused with the disciplines and class logic of capitalism as if they were of universal benefit.”* (Cammack, 160, 178) No attempt is made to demonstrate that this model is or has ever been advocated or pursued by the IFIs, much less that it is or has ever been a consensus position there.

## Conclusion

We have argued in this essay that the Self of development has been constructed in opposition to a threatening Other, an alternative way of conceptualising social change which was originally the idea of progress. What our self-other distinction represents is not one between developed and undeveloped but between the altruistic and just society social-change-as-development will lead us to and the self-seeking and Darwinian social change that is presented as its only alternative. Put in this way, it is clear to all right-thinking people that neoliberal 'development' is undesirable. So clear, in fact, that a certain complacency has crept into development theory regarding the field's past practical and theoretical failures. The late 1980s and 1990s saw a great many critical histories of development studies, but now the critique has done its work: development theory and practice has changed, and the age of critique is over. As Jan Nederveen Peitersen (2012) put it:

*“Now the long drawn out critiques of Western economic, institutional, ideological and cultural hegemonies are gradually becoming superfluous. The major target of criticism of the previous period has become a background issue, still pertinent, but on the backburner. With American capitalism unravelling, who needs critiquing American ideologies?”*

Yet that critique, apparently the observations of a neutral academic bravely

undermining the hegemonies produced by Western capitalist society, is in fact vital to the reproduction of the identity of development theory. As a consequence of being represented as this threatening Other calling someone a neoliberal is essentially to accuse them of engaging in a kind of sinister conspiracy against the Third World, the poor, minorities, and so forth. The term has become an academic swear word, almost entirely disconnected from anything advocated by the institutions with which it is associated – the World Bank and the IMF. Neoliberalism is no longer an alternative approach to development: it isn't development at all. It is not something to be engaged with; it is something to be resisted. It became a threat from which we need protection – and of course development studies could once again cast itself in the role of protector. Thus in constructing neoliberalism as a threatening Other, the then-beleaguered field of development theory once again rediscovered its purpose and reaffirmed its right to existence.

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***A Glance into the Innovation and Patent  
Management System of Indian Universities***

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**Abstract**

The patent system has been introduced to encourage innovation throughout global economies. The intention is to promote the development of new ideas and technologies. India, being one of the fastest growing developing nations, is a huge playing field for development of new technologies and sees a lot of innovation at the grass root level, also known as “Jugaad/Frugal Innovation”.

Recent studies have shown a surge in the R&D activities at major Universities in India. Higher autonomous education institutes such as IIT’s or NIT’s are now seen to focus more on researches and knowledge production. The interest of these institutes, in innovation along with the protection and commercialization of the IP has been increasing ever since. However, despite the increase in innovation and research, the growth in filing of patent applications by Indian Universities, is not relative and does not capture the growth of innovation at University level in India. Indians still lag behind in terms of patents granted or technologies commercialized.

The few main reasons accounting for lack of growth of patents are:

1. Lack of specific legislation or policy for protection of innovation
2. Lack of awareness in public/innovators towards Intellectual Property and its Management
3. High cost towards Patent Prosecution.

This paper addresses above reasons, amongst others, along with specific case studies of few universities, who have devised unique IP Management System for protection of both, the Innovators and Universities, which shall contribute towards building an ideal model for other Universities in India and throughout the world.

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## Introduction

The patent system has been introduced to encourage innovation throughout global economies. The intention is to promote the development of new ideas and technologies. India, being one of the fastest growing developing nations, is a huge playing field for development of new technologies.

In order to understand the dynamics of innovation under the Indian Universities, it is important to understand the Indian Higher Education System. The Indian is the third largest education system in the world after the countries of United States America and China.<sup>1</sup> India, amasses a total of 700 universities, as of 2013 and the number is rapidly growing.<sup>2</sup> Out of these 700 universities, 50 % falls into the category of Central and State Universities, as can be seen in the Table below:

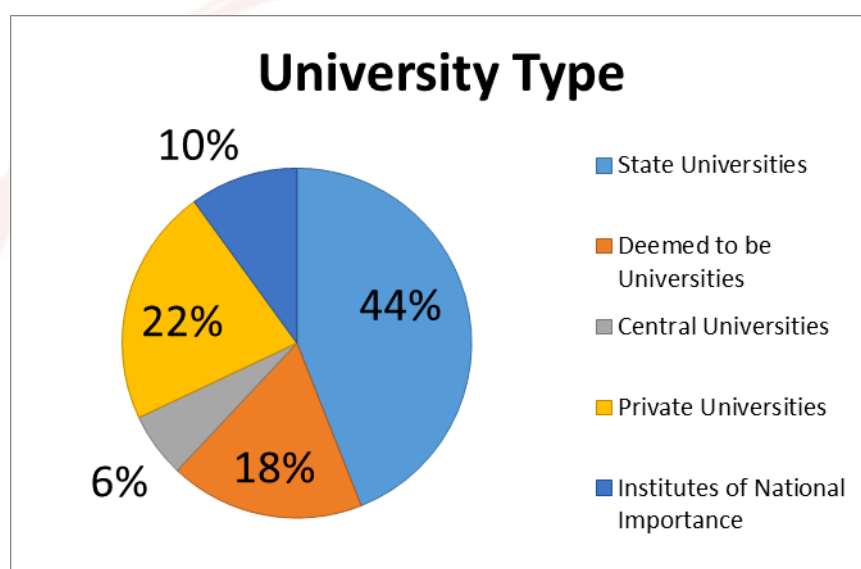


Table I

India has abundance of creative talent, which can be utilised to promote science, technology and innovation. As is universally accepted, Innovation plays a major role in development of a country. We have the examples of countries like United States of America, Germany, Japan, Korea and China, wherein innovation driven models were incorporated by these countries, to develop its economy and contribute to gross domestic product. Countries like Germany, Japan and Korea, despite being small in size and population, have been able to successfully develop into major economies by adopting a technology and innovation driven model.

As technology and innovation were major tools of national development, India too, recognising the importance of technology and innovation, introduced various policies for growth of technology and innovation in India. As a result, India sees a lot of

<sup>1</sup> "India Country Summary of Higher Education", World Bank;  
[\[http://siteresources.worldbank.org/EDUCATION/Resources/278200-1121703274255/1439264-1193249163062/India\\_CountrySummary.pdf\]](http://siteresources.worldbank.org/EDUCATION/Resources/278200-1121703274255/1439264-1193249163062/India_CountrySummary.pdf)

<sup>2</sup> UGC Publication: Higher Education in India at a glance June,2013, UNESCO Institute of Statistics and Statistics of Higher and Technical education in Indi, 2009, Government of India Ministry of Human Resource Development (MHRD)

innovation at the grass root level, also known as “Jugaad/Frugal Innovation”. However, an important aspect of innovation is the capability of commercial exploitation of such innovation, wherein the creation and sharing of intellectual property play the dominant role.

India has a storehouse of more than 20 million students, which are enrolled in the universities.<sup>3</sup> It is pertinent to note that out of these 20 million students, about 22 % of students are in the fields of science and technology.<sup>4</sup> Recent studies have shown a surge in the R&D activities at major Universities in India. Higher autonomous education institutes such as IIT’s are now seen to focus more on researches and knowledge production. The interest of these institutes, in innovation along with the protection and commercialization of the IP has been increasing ever since. However, despite the increase in innovation and research, the growth in filing of patent applications by Indian Universities, is not relative and does not capture the growth of innovation at University level in India. Indians still lag behind in terms of patents granted or technologies commercialized. One of the main reason for lack of growth of patents is the absence of specific legislation or policy for protection of innovation.

This paper addresses above reason, along with specific case studies of few universities, who have devised unique IP Management System for protection of both, the Innovators and Universities, which shall contribute towards building an ideal model for other Universities in India and throughout the world.

## **Law In India**

It is very important that a country like India should have a comprehensive legal framework for creation and sharing of intellectual property developed at the University level, wherein performance linked rewards and investments should be provided to promote innovation in Indian Universities. There is no specific legislation till date, which deals with Intellectual Property developed by Universities or Government Funded Agencies. However, two prominent bills were introduced in the recent years which deal with promotion of innovation in Indian Universities and protection and commercial exploitation of Intellectual Property developed therein. We will deal with both the bills in details:

### **1. The Protection and Utilization of Public Funded Intellectual Property (PFIP) Bill, 2008:**

The PFIP Bill, 2008 was introduced in the year 2008 in Rajya Sabha to boost research and development in public funded research institutes/universities. It is currently pending in Rajya Sabha only. It is also known as India’s Bayh-Dole.<sup>5</sup> The bill

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<sup>3</sup> Ibid

<sup>4</sup> See Supra Note 1

<sup>5</sup> The Bayh–Dole Act/ Patent and Trademark Law Amendments Act is an US legislation dealing with IP arising from federal government-funded research. Sponsored by two senators, Birch Bayh of Indiana and Bob Dole of Kansas, the Act was adopted in 1980, is codified at 94 Stat. 3015, and in 35 U.S.C. § 200-212, and is implemented by 37 C.F.R. 401. The Act permits a university, small business, or non-profit institution receiving a grant, to elect to pursue ownership of an invention in preference to the government, and decentralized control of federally funded inventions, vesting the responsibility and authority to commercialize inventions with the institution or company receiving a grant, with certain responsibilities to the government, the inventor, and the public.

recognizes that the creation of new products and processes through technological innovation is essential for a country's economic growth. The bill provides that the realization of such technological innovation would not be possible due to the following reasons:

- (a) Low level of commercialization.
- (b) Lack of funding from industry for new products and processes.
- (c) Government control of the intellectual property developed in research institutions/universities through public funds.<sup>6</sup>

The Bill provides for sharing of the right to intellectual property with the institutes and scientists who created them, and incentivise the students, faculty and scientists by payment of royalties or income. It also provides that the intellectual property created in government funded research institutions shall be governed by the terms of the funding agreement.

#### Highlights of the PFIP Bill, 2008:

- (a) The Bill seeks to provide incentives for creating and commercializing IP from public funded research.
- (b) The Bill requires the scientist who creates an IP to immediately inform the research institution. The institution shall disclose this information to the government within 60 days.
- (c) The scientist shall not publish or disclose the PFIP without prior notice of 30 days to the institution or the government.
- (d) The institution is required to inform the government of the countries in which it proposes to retain the title to the PFIP. The title in all other countries will vest in the government.
- (e) The scientist shall be paid a minimum of 30 per cent of net royalties received from the PFIP.
- (f) Failure of the scientist to intimate the institution and of the institution to inform the government carries penalties, which include fines and recovery of the grant funds.
- (g) The institution has to get permission from the government before it can assign its right to PFIP to any person or body, and the institution shall not grant the PFIP unless he manufactures products using such intellectual property in India, which can be overturned by the government by reasons in writing.
- (h) Penalties: If the institution does not fulfill any of the terms of the agreement and contravenes the provisions of the Act, the government shall recover the grant amount with interest rate of 10 per cent per annum and bar such recipients from future grants. If the institution violates any of the provision:
  - (i) It may be punished with a fine of up to 50 per cent of the grant amount.
  - (ii) If the scientist does not disclose the required information on the specified time limit he shall not be given his share of the royalty and be punishable with a fine, which may extend to 25 per cent of the grant received by the recipient.

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<sup>6</sup>[http://www.prsindia.org/uploads/media/1229425658/LB\\_Protection%20and%20Utilisation%20of%20Public%20Funded%20Intellectual%20Property%20Bill.pdf](http://www.prsindia.org/uploads/media/1229425658/LB_Protection%20and%20Utilisation%20of%20Public%20Funded%20Intellectual%20Property%20Bill.pdf)

Timeline under the PFIP Bill, 2008:

- (a) The recipient of the funds should disclose the invention to the government within 60 days of conception;
- (b) Within 90 days of above but within specified period specified by the law, for receipt of application in the designated countries for protection of public funded intellectual property, intimate, in such form as may be prescribed, to the Government, his intention to retain the title of the PFIP with respect to the designated countries;
- (c) If the recipient fails to disclose the public funded intellectual property under or give such intimation within the specified time, the title of the PFIP, shall vest in the Government;
- (d) In case of public disclosure, shall give intimation regarding public disclosure, publication or exhibition at least fifteen days before such disclosure, publication and exhibition to enable the Government to file application in countries other than the designated countries.

Criticism of the PFIP Bill, 2008:

The PFIP Bill has received a lot of criticism for being poorly drafted, burdensome, potentially coercible, most abusable piece of legislation.<sup>7</sup> It is also pertinent to point out that the PFIP is drafted without suggestions or recommendations of premier science and technology institutions in India. The very objective of the Bill to base public research on commercial potential alone will be detrimental to the existence of the Bill. Further, the bill requires every researcher has to inform that intellectual property has been generated within a specific time. However, no standard is provided decide what a potential intellectual property is. The whole process of the inventor forwarding everything to the institution's intellectual property committee to decide what is potential intellectual property, with the committee then forwarding it to the government who will decide whether or not to file the potential intellectual property will yield into nothing but colossal amounts of paper work. This will result into selective harassment of institutions and researchers. The PFIP is also criticized on several other grounds.

Further, public interest seems to be heavily compromised in the bill. No safeguards for public health interest have been provided and no clause has been incorporated to check the pricing of products resulting from public-funded research, by the Government. Also the sovereign right of the government to take over an Intellectual Property if required in public interest or national interest, without giving any reasons, is an inexcusable omission, and puts a question mark on the objective of the Bill.

**2. The Universities for Research and Innovation Bill, 2012:**

The Universities for Research and Innovation (URI) Bill was introduced in the year 2012 in Lok Sabha for setting up world-class research and innovation universities as per the recommendation of the National Knowledge Commission.<sup>8</sup> It has currently lapsed and would be reintroduced in the parliament. This bills acknowledging the importance of innovation in the global knowledge economy, provided for establishment of innovation universities to aspire for attaining the pinnacle of knowledge in a particular area by innovation in design and producing research that

<sup>7</sup> <http://timesofindia.indiatimes.com/india/Scientists-fume-over-new-patent-bill/articleshow/5486588.cms>

<sup>8</sup> <http://www.prsindia.org/billtrack/the-universities-for-research-and-innovation-bill-2012-2347/>



will eliminate deprivation, by bridging linkages between research institutions and industry.

Highlights of the URI Bill, 2012:

- (a) The URI Bill allows the central government Union government, or by private bodies — domestic or foreign to set up Universities for Research and Innovation through notifications. These universities shall be deemed to be institutions of national importance. The Bill allows both private and foreign universities to apply to set up universities for research and innovation.
- (b) The central government may declare any existing public funded university to be a university for research and innovation after an expert committee (formed by the central government) has assessed it.
- (c) A new university may be established by a promoter if he meets certain requirements and conditions. If the promoter is an organization, it has to be a non-profit company, a society or a trust with proven expertise in innovation. If it is an Indian university, it has to be established for at least 25 years. If it is a foreign university, it has to be established for at least 50 years.
- (d) The university which creates a new technology from research which is funded by the Central Government or by anybody under the Central Government and leading to an intellectual property shall disclose the formulation of such IP to the Central Government about the same as soon as the said IP comes into being.
- (e) The innovation universities are visualized to be totally autonomous in all academic aspects. Only government-funded institutions will follow the existing policies of reservation in admission of students. The role of the Government in short is limited in these universities — publicly-funded or otherwise being free from government regulation, supervision, monitoring or social control.
- (f) The proposal for setting up the university has to be approved by the central government within six months as far as practicable.
- (g) Each such innovation university will be governed by a board of governors, being appointed or nominated or sponsored by the promoter, with no members of government agencies except that 1/3 of the members of the board will be appointed or nominated from teachers or officers of the university concerned with no requirement of having any academic personality or university administrator on the board.
- (h) The present Bill allows setting up of any number of innovation universities without any separate legislation for each university.
- (i) Each university shall constitute a committee to review the performance of the university within 15 years of it being set up. Subsequent reviews shall be every 10 years.
- (j) Each university shall determine the standards of education it will be providing, which have to be higher than the minimum standards in the relevant field as specified by any other law, and in case of no standards are specified, the university shall aim to maximize relative global scales in the relevant field.

Key Objectives of the Innovation Universities:

The key objectives of the universities shall be:

- (a) to achieve excellence in knowledge;
- (b) to conduct research to address societal problems;

- (c) to be transparent in admission, appointment and academic evaluation; and
- (d) to build linkages with research institutions and industry

#### Management of Intellectual Property from Public Funded Research:

When a university creates intellectual property through public funding, the Bill specifies certain requirement as to disclosure of IP to the government, the conditions under which the title may be retained by the university or refused by the government. The income or royalties received from the IP shall be given to the university, which shall share it with the intellectual property creator.

#### Criticism of the URI Bill, 2012:

One of the main grounds on which the URI bill is criticised is non accountability of the proposed autonomous universities. The government has almost no role of any kind in the innovation universities, and in the case of publicly-funded innovation universities, too, it is extremely limited. Further, the bill was also condemned for not being made accountable to the University Grants Commission or any other public body. The bill also allowed the indirect entry of the Foreign Universities without any regulatory approval or supervision of any government authority.

#### **IP Policies of Selected Indian Universities**

As is clear from the last section, India, in the absence of a specific legalisation to deals with IP developed by Universities or Government Funded Agencies, leaves a lot to be desired. Even the two proposed bills have received a lot of criticism and are far from addressing the genuine concerns of the stake holders and intellectual property creators. However, premier Indian Institutions like Indian Institutes of Technology (IITs), Indian Institute of Science (IISc) and Jawaharlal Nehru University (JNU) have devised unique IP Management Systems for protection of both, the Innovators and Universities. We have discussed the intellectual property policies of the following universities:

- IIT–Delhi, Bombay, Indore, Kanpur, Roorkee, Madras, Kharagpur,
- (Central University);
- Banaras Hindu University (Central University);
- Anna University (State University);
- Indian Institute of Science (Deemed to be University);
- Manipal University (Deemed to be University)
- Jawaharlal Nehru University.

Further, we have analysed the following topics of the IP policies of the above universities, to showcase the IP Management System of these Universities, which shall contribute towards building an ideal model for other Universities in India and throughout the world:

- Ownership of IP;
- Transfer & Use of IP:
  - IP Licensing and assignment;
  - Revenue sharing.

## Indian Institute of Technology, Delhi (IIT-D)

- Ownership of IP:
  - Exclusively by IIT-D if:
    - developed either solely with the use of funds / facilities provided by IIT-D or with a mix of funds/facilities of IIT-D and external agencies but without any formal associated agreement;
    - developed with the use of external funds / facilities, including, that of sponsored research and consultancy projects without any associated agreement;
    - developed under any contract arrangement including “work for hire”, work commissioned and/or outsourced by IIT-D;
    - developed pursuant to a written agreement where ownership has been transferred to IIT-D.
  - By Third party(ies) (exclusively or jointly with IIT-D) if:
    - developed with external funding from Third party(ies) including sponsored research, consultancy projects and other collaborative activity(ies) with a formal associated agreement;
    - developed without external funding from third parties under collaborative project(s) or activity(ies) with Third party(ies) with associated agreement(s);
    - developed out of the work carried out by IIT-D faculty/student/project staff/supporting staff during their visit to a Third party Institution/organization.
  - By Inventors if:
    - None of the above conditions arises and the IP is not related to inventor’s engagement with IIT-D.
- Transfer and Use of IP
  - IP Licensing and Assignment
    - The inventor/creator has the first right on the terms and conditions that are agreeable by IIT-D;
    - IIT-D shall strive to identify potential licensee for the IP to which it has ownership.
  - Revenue Sharing:

Inventor(S)	University	(Foundation for Innovation and Technology Transfer) FITT	Industrial R&D Unit (IRD)
60%	20%	10%	10%

## Indian Institute of Technology, Indore (IIT-I)

- Ownership of IP:
  - Invention(s):
    - Inventor if IP work is created without the use of any IIT-I resources and not connected with the profession for which employed at IIT-I:
      - Jointly by external sponsoring agencies/bodies and IIT-I in case of funded research, based on their mutual agreement;
      - IIT-I in all other cases.
- Transfer and Use of IP:
  - IP Licensing and Assignment:
    - IIT-I may contract the IP to a Technology Management agency, which manages the commercialization of the IP;
    - If IIT-I is not able to commercialize the IP in a reasonable time, then it may reassign the rights of the IP to the Inventor(s) of the IP.
  - Revenue Sharing:
    - With Inventor: (See table below)

Owner/Inventor	Up to Rs. 100 Lakh	Rs. 100 Lakh – Rs. 200 Lakh	> Rs. 200 Lakh
Inventor	70%	50%	30%
University	30%	50%	70%
Total	100%	100%	100%

- When IIT-I reassigns the rights of the IP to its Inventor(s) for any country, the Inventor(s) shall reimburse the costs incurred by IIT-I for the protection, maintenance and marketing and other associated costs from the cumulative earnings from successful commercialization in that country as under:
  -

Case	Cumulative Earning	Inventor(s) Share	IITI's Share
A	Upto twice the cost incurred by IITI for protection, marketing and other associated costs.	50%	50%
B	Beyond A	100%	0%

## Indian Institute of Technology, Kanpur (IIT-K)

- Ownership of IP:
  - IIT-K when:
    - the intellectual property was created with the significant use of funds or facilities administered by IIT-K;
    - The intellectual property was created (i) as a part of the normal professional duty or (ii) work for hire;
    - The intellectual property was created in the course of or pursuant to a sponsored/consultancy research agreement with IIT-K. In such cases, specific provisions related to IP made in contracts governing such activity will determine the ownership of IP;
    - The intellectual property was created as a part of academic research and training leading towards a degree or otherwise.
  - Inventor/Author Ownership when:
    - None of the situation defined above for IIT-K-ownership of intellectual property applies;
    - it is created outside their assigned/normal area of research/teaching, for example, popular novels, poems, musical compositions, or other works of artistic imagination, without the use of significant institute resources;
    - IIT-K will not claim ownership of copyright on books and scientific articles authored by IIT-K personnel. However, IIT-K will have the copyright if books and reports have been created using funds specifically provided for this purpose by IIT-K.
  - Third-Party Ownership when:
    - Funds provided partially or fully by a third-party to IIT-K will be governed by specific provisions in the contract between the third-party and IIT-K;
    - Exchange programs between IIT-K and other institutions will be governed by specific provisions in the contract between the third-party and IIT-K;
    - In case no such specific contract exists, IPR will remain with IIT-K.
- Transfer and Use of IP:
  - IP Licensing and Assignment:
    - IIT-K shall market the IP and identify potential licensee(s) for the IP to which it (i) has ownership & (ii) for which rights have been assigned to it;
    - If IIT-K is not able to commercialize the IP in a reasonable time, then it may reassign the rights of the IP to the Inventor(s) of the IP.
  - Revenue Sharing: With Inventor: (See table below)

Owner/Inventor	Up to Rs. 100 Lakh	Rs. 100 Lakh – Rs. 200 Lakh	> Rs. 200 Lakh
Inventor	65%	45%	25%
University	25%	45%	65%
Service Account	10%	10%	10%
Total	100%	100%	100%

## Indian Institute of Technology, Roorkee (IIT-R)

- Ownership of IP:
  - Invention(s):
    - Inventor if IP work is created without the use of any IIT-R resources and not connected with the profession for which employed at IIT-R;
    - Jointly by external sponsoring agencies/bodies and IIT-R in case of funded research, based on their mutual agreement;
    - IIT-R in all other cases.
- Transfer and Use of IP:
  - IP Licensing and Assignment :
    - IIT-R may contract the IP to a Technology Management agency, which manages the commercialization of the IP;
    - If IIT-R is not able to commercialize the IP in a reasonable time, then it may reassign the rights of the IP to the Inventor(s) of the IP.
  - Revenue Sharing:
    - With Inventor: (See table below)

Owner/Inventor	Up to Rs. 100 Lakh	Rs. 100 Lakh – Rs. 200 Lakh	> Rs. 200 Lakh
Inventor	60%	50%	40%
Department	20%	25%	30%
University	20%	25%	30%
Total	100%	100%	100%

- When IIT-R reassigns the rights of the IP to its Inventor(s) for any country, the Inventor(s) shall reimburse the costs incurred by IIT-R for the protection, maintenance and marketing and other associated costs from the cumulative earnings from successful commercialization in that country as under:

Case	Cumulative Earning	Inventor(s) Share	IITR's Share
A	Upto twice the cost incurred by IITR for protection, marketing and other associated costs	50%	50%
B	Beyond A	100%	0%

### **Indian Institute of Technology, Madras (IIT-M)**

- Ownership of IP:
  - Invention(s):
    - IIT-M shall be the owner unless specific contracts are entered into b/w the funder & institute/Inventor or between the institute and Inventor;
    - If contract is silent vis a vis ownership then, joint ownership of the IIT-M and the sponsor;
    - An Employee of the institute who is sabbatical or on long leave if, creates an IP while working for an organisation (with the permission of the institute) will be permitted to negotiate the IP sharing agreement. However, any fees/royalty that is received by the student/ employee while on duty at the institute will be subject to the revenue sharing policy of the institute;
    - IP developed by the said employee/student without the involvement of the Inventors who are employees or students of the institute shall be outside the purview of this policy;
    - However, any IP if created by the said employee or student during the leave period as mentioned above is based in part or full on prior IP developed at the institute the employee/student is required to inform the institute and enable the institute to enter into a licensing agreement with the organisation in which the said employee /student is temporarily engaged.
- Transfer and Use of IP:
  - IP Licensing and Assignment :
    - The licensing is done by IITB through Patent Cell / Office of Centre for IC & SR, which handles the evaluation, marketing, managing and licensing of the IP generated by the institute.
  - Revenue Sharing:
    - Shall be divided among the Inventors of the IP as per the prevailing IPR Revenue Sharing Norms the same being subject to the contract with the funder if any;
    - In case the patent filing and reg. Cost for one or more countries aren't borne by the institute the Inventor can first deduct the cost incurred by the Inventor in this regard and in regard to maintenance of such patents from income accruing to the Inventor from the commercial exploitation of the patents in those countries;
    - Excess income beyond such recovered costs will be shared as per the prevailing norms of the institute;
    - Any MOU signed by the institute with a sponsor shall supersede the said norms.

### **Indian Institute of Technology, Kharagpur (IIT-Kgp)**

- Ownership of IP:
  - Invention(s):
    - Inventor, if IP work is created without the use of any IIT-Kgp resources and not connected with the profession for which employed at IIT-Kgp;

- Jointly by external sponsoring agencies/bodies and IIT-Kgp in case of funded research, based on their mutual agreement;
  - IIT-Kgp in all other cases.
- Transfer and Use of IP:
- IP Licensing and Assignment:
    - The licensing is done by IIT-Kgp through IPR&TC Cell, which handles the evaluation protecting, marketing, licensing and managing the IPR generated at the University;
    - The Inventors of the IPR shall provide all the necessary information to the cell for the management of the IPR.
  - Revenue Sharing:
    - Institute's share - 50% & Inventor's share - 50%;
    - In case there is a third party (i.e. funding agency), the Institute's and Inventor's respective shares will be calculated on the net receipts after deducting the third party's share;
    - The Inventor's share will continue to be paid irrespective of whether the individual continues in the employ of the Institute.

### **Indian Institute of Technology, Bombay (IIT-B)**

- Ownership of IP:
- Patents:
    - Title to inventions and patentable subject matter that are created in IIT-B with the use of significant IIT-B resources are assigned to and owned by IIT-B, based on the mutual agreement between the funding agency (if any) and IIT-B.
- Transfer and Use of IP:
- IP Licensing and Assignment:
    - The licensing is done by IIT-B through Industrial Research and Consultancy Centre (IRCC), which handles the evaluation, marketing, negotiations and licensing of the entire institute owned IP.
  - Revenue Sharing:
    - With Inventor: (See table below)

Inventor(S)	University
70%	30%

### **Banaras Hindu University (BHU)**

- Ownership of IP:
- Patents:
    - Jointly by university and Inventor wherein the IP is developed using substantial use of university's facilities and resources;



- Jointly by university, Inventor and Corporate funding agency wherein the IP is developed using substantial use of university's facilities and resources using the funding provided by external Corporation, Foundation, Trust or Industry, provided such funding is more than Rs. 10 Lakh for a particular research/invention/intellectual creation under a specific agreement with the University;
  - Inventor will own the rights in all the IP works developed without substantial use of University resources;
  - Works of art, literature and music recordings are owned by their Inventors despite the use of University resources so long as such works are not the products of University research, neither created under the direction and control of the University, nor developed in the performance of a sponsored research or other third party agreement.
- Transfer and Use of IP:
- IP Licensing and Assignment:
    - The inventor/creator has the first right on the terms and conditions that are agreeable by BHU;
    - BHU shall strive to identify potential licensee for the IP to which it has ownership.
  - Revenue Sharing:
    - With sponsor – 60% to the sponsor and 40% to the university.
    - With Inventor: (See table below)

Owner/Inventor	University	Individual Researcher/Research Team	Support Staff
University	60%	35%	5%
Individual Researcher/ Team	35%	60%	5%

### Anna University

- Ownership of IP:
- Patents:
    - Anna University shall be the owner, with Inventors specially stated as Inventors for inventions developed by faculty members, research scholars, students and those who make use of the resources of Anna University;
    - The Inventors shall be the owner of the inventions created by Anna University personnel(s), without using university's resources and created outside their assigned/normal duties/areas of research /teaching. The revenue generated by such inventions shall be shared in the ratio of 75:25 between the Inventor and the University respectively;

- If an IP has emerged as a result of an Institutional/Industrial consultancy, sponsored to Anna University, the concerned industries and Anna University Chennai shall jointly own the IP;
- If the IP is a result of funds sponsored by an outside agency, then the IP will be shared between Anna University and the sponsoring agency on case by case basis, as per MoU/Agreement/Undertaking between them.

➤ **Transfer and Use of IP:**

- **IP Licensing and Assignment:**
  - The inventor/Inventor has the first right on the terms and conditions that are agreeable by Anna University;
  - Anna University Chennai shall strive to identify potential licensee for the IP to which it has ownership.
- **Revenue Sharing:**
  - With sponsor – as per their mutual agreement.
  - With Inventor: (See table below)

<b>Owner/Inventor</b>	<b>Total Lump Sum</b>
Inventor	60%
Concerned Department	20%
Centre For Intellectual Property Rights	5%
Centre for Technology and Transfer	5%
Centre for Professional Development Education	10%

**Indian Institute of Science (IISc)**

➤ **Ownership of IP:**

- **Patents:**
  - Absolutely by university for all in-house research work, except in respect of the activities carried out jointly with other institutions or agencies or under a sponsorship by an agency, in which case the ownership will be decided and agreed upon mutually;
  - Jointly by university and sponsoring agencies for IP works being produced on behalf of sponsoring agencies, if the sponsoring agency bears the cost of IP protection equally with the university. However if the sponsoring agency does not bear the cost of IP protection and maintenance, then university will be the absolute owner;
  - IP created during the course of collaborative research undertaken jointly by Institute with Collaborating Institutions, shall be jointly owner;
  - Any IP generated when an Inventor from the institute works in a university or company abroad/in India on EOL/sabbatical leave/earned leave, will be jointly owned by IISc and the University/Company.

➤ Transfer and Use of IP:

- IP Licensing and Assignment:
  - In case of joint ownership, the Organization/Industry which has sponsored the activity, will have the first right to commercially utilize and exploit Intellectual Products emanating from the collaboration activity;
  - In the event of the other collaborating organization/industry not undertaking the commercial exploitation within two years from the first date of development of the technology, IISc reserves the right to transfer the technology third party for its commercial exploitation and use. However, IISc shall share the net proceeds equally with the collaborating organization/industry.
  
- Revenue Sharing:
  - With sponsor – As per the agreement between the sponsor and the university;
  - With Inventor: 60:40 between inventors and IISc.

## Conclusion

The above case studies prove an important point that in the absence of a specific legislation, various Indian Universities have devised their indigenous IP Management System, which has aided in the creation and development of innovation in India. Nevertheless, there is a growing need of a specific legislation to deal with the public funded research institutes/universities. However, before proceeding with the drafting of any legislation, a comprehensive study should be taken out by the Government to analyse the factors responsible towards creation, protection and commercialization of intellectual property in in the educational sector of India. Further, while drafting any legislation governing public funded research institutes/universities, sufficient care should be taken to provide flexibility to various institutions/universities in customisation of their IP management system as per their requirements. Further, the aspect of “public interest” especially in relation to public health should also be factored in the proposed legislation. There is also a need for establishment of a centralized regulatory body which shall make a uniform policy for Public funded universities and research centres. Another point which needs to be given importance is the awareness in public/innovators towards Intellectual Property and its Management. All these suggestions, when put into practice would definitely go a long way in creating a legal environment for India Universities, which shall be conducive to innovation and development on new technologies. However, till the introduction of a specific legislation, the successful IP Management model adopted by Indian Universities provides an ideal benchmark for various other universities in India and all over the world, where there is no specific legislation to deal with public funded IP.

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*The Sponsorship Contract and New  
Contract Tools for Valorising Cultural Heritage*

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**Abstract**

Scope of the review is the predisposition of contractual tools for protecting and valorising cultural heritage, contributing to the development of the society. Cultural heritage has an economic value, because it becomes one of the most important conditions to attract activities, investments, inhabitants, and tourists. In Italy, public intervention aimed at the protection and valorisation of the national cultural heritage has proven to be inadequate due to cuts in public spending, as well as public administrations' organizational inefficiencies. In this context, based on the principle of horizontal subsidiarity, under Article 118 paragraph 4 of the Constitution, the involvement of private actors (individuals, businesses, Non-profit-organisation) has increased. Therefore, private sponsorship of cultural heritage, which may take several forms, plays an important role. However, models of public-private partnership (PPP), where the private sector takes on directly the management of the cultural heritage, are less common. They can be related only to the valorisation of the cultural heritage, into the limits set by Article 9 of the Constitution, whereas the protection and preservation of the heritage is reserved only for the public sector. The modifications of the Cultural Heritage's Code due to d.lgs. 62/2008, caused the almost complete re-writing of sponsorship contract. These variations, together with other recent laws (such as d.l. 91/2013) and legislation in other countries (especially Germany which has a best practice regulation), will be a good example to analyse the main subjects of sponsorship and its use in the context of heritage.

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## 1. Cultural Heritage as an element of a territory's attractiveness<sup>1</sup>

Cultural assets and heritage conservation can be promoted in the context of developing new direct, indirect, and induced business and employment growth, with significant impacts on economic, social, and environmental conditions. The artistic or ecological resource contributes to the beauty of the site or landscape. Indeed, cultural heritage sites have the same peculiarity: the beauty. It is a soft value that characterizes all these sites, which depends on relationships and then on ecological, economic and social processes.

Beauty has also an economic value, because it becomes one of the most important conditions in attracting activities, investments, inhabitants, and tourists. The beauty of a landscape or a site can be compromised by pollution or improper usage such as inappropriate "modernization". Cultural and environmental integrated conservation produces relevant economic and social benefits overall. For example, tourism represents an economic sector of increasing importance for many local, regional, and national economies. The success of tourism depends on a set of elements including transportation accessibility (infrastructure and network links), attractiveness due to natural and cultural resources (beaches, mountains, and monuments), and the supply of various amenities and services (cultural and social). It is characterized by a major positive multiplier effect on business activities, employment, investment, and development by drawing in revenues and resources from outside of the marketplace. Direct employment resulting from renewed cultural assets can be calculated to generate 1.5 overall new jobs for every 10,000 visitors, to which new jobs specifically in the tourism sector along with temporary construction and renovation jobs in the field of heritage investments must be added. Tourism helps increase property values, wealth, jobs, incomes, and a positive international balance of payments for the tourist destination and its surrounding region and nation. This is also its limitation, because of the negative impacts of tourism on the same resources (the natural and built environment) on which it is based. Each site has a specific "carrying capacity" that should not be overly utilized.

The risk of the tourist approach is the "spectacularisation" as an end in itself, and not as a process for valorisation of local physical, social, and cultural resources: the production of empty and ephemeral images, not rich of meanings experiences. Investing heritage conservation can be a major catalyst of economic development and regeneration, far beyond the simple appeal to cultural and/or physical attractiveness.

## 2. The role of the cultural sector in Italy and its financing in the current economic crisis

The cultural heritage sector is not only necessary for preserving history and culture of a territory, but creates real economic growth with many jobs and businesses. A recent report conducted by *Fondazione Symbola* and *Unioncamere* shows that cultural industry did not sink under the blows of the crisis, and it has become one of the pillars

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of Italian flying in exports. During the most difficult years for the Italian economy, exports have grown by 35% - from 30.7 billion in 2009 to 41.6 in 2013 - and today culture marks a surplus of foreign trade of 25.7 billion, second only to the mechanical supply chain and well above the metallurgical one.

According to this report, the Italian cultural industry generated last year \$ 80 billion of turnover, around 5.7% of GDP (including public and non-profit organizations). Moreover, it was able to mobilize - thanks to a multiplier effect of 1.67 (every euro produced by the culture activates 1.67 in other sectors) - 134 billion extra in other sectors (such as tourism, food industry), arriving at the threshold of 214 billion, in other words 15.3% of Italian GDP. To move this engine that inherits the best of our past and represents the hope for our future, it is a galaxy encompassed by 443.458 enterprises (-0.8% compared to 2011), 7.3% of Italian manufacturing base. Enterprises active in the creative industry (architecture and design), in culture (movies, music, books and printing), museums, entertainment and conferences. Culture employs 1.4 million people, 5.8% of the Italian occupation (6.2% including the public sector and non-profit).

At least 50 per cent of the world's heritage it is concentrated in Italy. This assumption, perhaps excessive, gives a measure of the phenomenon's significance. 60 per cent of Italian cultural Heritage are located in Southern Italy. Even if there is not yet a study which quantifies the value of the whole Italian cultural Heritage, the *Corte dei Conti* (Constitutional Institution with the role of safeguarding public finance and guaranteeing the respect of jurisdictional system) estimated that the Italian cultural Heritage is worth at least 234 billion euro. The southern region of Campania has the majority and the highest concentration of cultural heritage sites. For instance, Naples, on its own, can boast of a budget indicated at € 50 billion (due to the Treasure of *San Gennaro* which is credited to be the richest ever, more than the Crown of England and the treasure of the Czar of Russia). The yield of all this, however, is less than it could be. (The case of *Riace* Bronzes in *Calabria* is emblematic of this phenomenon).

Italy has, despite its treasures, fallen behind its European counterparts. Since the 2009 economic crisis a deep reduction for public expenses has taken place. This is especially true for the cultural heritage sector. In 2013, Italy merely allocated 87 million euro for cultural heritage protection and 1.5 billion for the whole cultural sector. This represents 0.19 of Italian public expense. In ten years the resources for culture have been reduced by 27 per cent. Italian citizens are also last in Europe in terms of cultural participation. Only 30 per cent of Italians visited a museum in 2013 (compared to 44 per cent Germans or 39 per cent French).

The international comparison reveals that the resources for the conservation and enhancement of monuments have become increasingly thin. Until 2009, in fact, Italy allocated 0.9% of GDP to the cultural sector, in 2010 that percentage fell to 0.6 in 2013. Among the EU countries, only Greece has acted in the same manner as Italy, while Estonia and Slovenia are on the top positions investing 1.9% of their GDP.

To improve the situation, the first taboo that must be broken is the appreciation of the assets that we have inherited and which surround us. Assigning a value does not mean to belittle or create the conditions for the sale (that is among other things impossible). It just means being aware of just how lucky Italy really is.

Some studies argue that the ability to extract value from a cultural asset in the United States is sixteen times higher than in Italy. Just this data suggests that there are many areas for improvement and how much income can be recovered and how much employment be offered.

Culture is even in times of crisis a good attractor of sponsorship: 159 million between 2012 and 2013 (+ 6.3%). A good performance, which could further improve. Private investment including foreign ones are welcomed. For this reason Italian legislators recently issued a decree “Bonus Art” with which the government has broken one of the “Italian taboos”: the public-private alliance. The tax relief provided by the decree is a tax credit of 65% on gift contracts.

### 3. Italian Legislation on Cultural Heritage

In Italy the preservation and valorization of cultural Heritage is stated in art. 9 of the Constitution which affirms that “the republic promotes the development of culture and of scientific and technical research. It safeguards natural landscape and the historical and artistic heritage of the nation”.

According to this Constitutional not modifiable provision, cultural heritage protection is reserved to the Republic and cannot be delegated to other entities, such as private investors. Despite this function, the enhancement of cultural heritage can be carried out by private individuals. This function is, however, as provided by art. 117, paragraph 3 of the Italian Constitution, under State / regional concurrent legislation. The involvement of private exploitation of cultural heritage, however, is permitted and indeed encouraged by many provisions of the Code of cultural Heritage (*d.lgs* 42/2004). In this context, in order to finance public measures of protection and promotion of cultural heritage, the legislator is trying to attract private funds.

Today, the most widespread form of attraction of private funds in the cultural sector is the sponsorship contract which is an atypical, onerous and bilateral contract; it is stipulated between two parties: sponsee and sponsor. A sponsorship contract of cultural heritage is a unique public-private partnership that is characterized by the association of the name, trademark, image or the product of a company with a cultural asset or event. This contractual tool is attracting growing interest both by the public administration and by enterprises. For public entities, this contract enables in an easy way the availability of resources, or of goods and services, which can be diverted to the pursuit of their institutional purposes (protection of cultural heritage). On the other hand, private investors can benefit from advantages obtained by the combination of the company or its products with the prestigious national cultural heritage site. For these reasons, sponsorship contracts - traditionally present in other socio-cultural sectors as sport and entertainment - is developing as an effective instrument for the conservation and enhancement of cultural heritage.

The Cultural Heritage Code (*d.lgs.* no. 42/2004) dedicates article 120 to cultural heritage sponsorship. This article is contained in Title II (Exploitation and enhancement), Chapter II (Principles of the valorization of cultural heritage) of the second part of the Code. The rule provides, in the first paragraph, a broad notion of cultural heritage sponsorship, which includes all contributions, including goods or services, provided for the design or implementation of initiatives in relation to the

protection or enhancement of cultural heritage meant to promoting the name, trademark, image, activities or products of the sponsor. The promotion of the above, pursuant to the second paragraph of that article, is through the association of the name, trademark, image, activities or products of the sponsor to the initiative of the contribution. The forms of promotion must be compatible with the character of artistic or historic, appearance and decorum of cultural property from the protection or enhancement and are established with the sponsorship contract. In the field of protection of cultural heritage, the purpose of its sponsorship becomes therefore the protection and enhancement of cultural heritage through the provision of private individuals, who find their remuneration in the association between their name, products or activities and the sponsored initiative.

With specific reference to the object of the contract, the obligation imposed on the sponsoring person is an obligation of means and not of results because it precludes any possibility for the sponsor to complain on the lack of image return.

Furthermore, the cause of all sponsorship contracts is to be identified in the sponsor's image promotion. This does not have to lead this type of contract to an advertising one, because by signing an advertising contract, parties want to improve the development and sales of the sponsored product. Otherwise sponsorship represents a real process of association between sponsee and sponsor; through sponsorship the sponsor's image will be promoted and indirectly also its products.

Because of the multiplicity of characteristics which substantiates sponsorship contract, the doctrine has tried to lead it to other typical contracts, in order to identify the applicable legislation. However, none of these attempts was successful, thereby affirming the conviction, confirmed by case law, that sponsorship contract is an atypical contract, with no similar contractual tools (*ex multis*, *Consiglio di Stato*, sect. VI, December 4, 2001, n. 6073; Cass. civ., sect. 1, 13 December 1999, no. 13931). This feature does not prevent the usability of this contract by public authorities, which can be free, as any individual, to stipulate every contract. Indeed, public entities can without any doubt conclude atypical contracts, as long as they are aimed at achieving worthy protection of interests.

### 3.1 Technical, pure and mixed sponsorship

The types of sponsorship contract that may be concluded by public entities are three and they have different disciplines.

#### 3.1.1 The technical sponsorship

This type of sponsorship consists in a form of partnership extended to the design and implementation of part or the whole intervention in the care and expense of the sponsor of the services required. In addition to works or services provided by the sponsor they may include, services and supplies, which are instrumental to the first (*eg.* installation and assembly of equipment and facilities, supply of furniture). With regard to legislation, technical sponsorship is subject to the application of artt. 26 and 27 of *d.lgs.* no. 163/2006 and for the choice of sponsor to art. 199-*bis* of the Code. In a nutshell, this type of sponsorship contracts:



- does not apply the law on public tendering;
- sponsor choice must be made by a notice published on the website of the administration. The notice must contain a description of the intervention to be carried out, including the minimum value and the time of implementation, with the request for tenders to increase the minimum amount of funding. In addition, the notice shall indicate the factors and criteria of evaluation of tenders and the award is made in favor of those who have proposed the best offer;
- the requirements for planners and executors of the contract are dictated by *d.lgs.* 163/2006;
- for all matters concerning the planning, direction and execution of the contract, the sponsor is subject to the control and the requirements issued by the contracting authority or other entity.

The sponsor may rely on third parties for the execution of the work, if the other companies are in possession of the same requirements listed on the notice.

### 3.1.2 The pure sponsorship

In this contract the sponsor is committed only to finance payment obligations. The standard reference for this type of contract is art. 199-*bis* of *d.lgs* no. 163/2006, but it is simplified. The choice of the sponsor must be made by a notice published on the website of the administration. According to the law, it is sufficient that the notice includes a description of the intervention to be carried out, including the minimum value and the time of implementation, with the request for tenders to increase the minimum amount of funding. The award is made in favor of the investor that offers the greatest funding.

### 3.1.3 The mixed sponsorship

Mixed sponsorship results from the combination of the first two. By signing this sponsorship type, the sponsor can provide directly the design, and then only fund the work provided. In this case it will be applied both the provision on technical and pure sponsorship.

In all cases of sponsorship below the amount of 40,000 EUR, public entities must operate only under the principles of legality, good performance and transparency of administrative action. This implies the possibility for the administration to identify the contractor in any form, provided in a transparent, fair and non-discriminatory way. In particular, such obligations may be considered to be adequately fulfilled if such sponsorships are published on the website of the administration and if it decides to negotiate directly with the first operator that expresses interest.

## 3.2 The choice of the sponsorship type

The administration has always an obligation to predetermine the type of contract in the notice. The decision to entrust a technical, pure or mixed sponsorship contract depends on the ability of the public to manage the tender process and the subsequent phases of execution of the contract, the level of definition of the design available and the type of intervention to be carried out:

- a pure sponsorship will be chosen, if a project is available for which the public entity merely needs a financial resource for implementing it.
- otherwise technical sponsorship will be preferred in the event that the administration intends to avoid procedural costs related to the management of procurement and the subsequent construction stages. Through this contract the administration avoids direct involvement in complex and challenging construction phases of the operations, and has only a supervisory role.
- mixed sponsorship may further be considered preferable if the administration has a feasibility study and needs sponsor funding for realizing it.

In order to prevent disputes in the implementation of the contract, it is important that the contracting authority provides in the public a description of the intervention as stated in art. 120 of *d.lgs.* no. 42/2004.

### 3.3 Use of advertising bills

If the sponsorship contract provides the affixing of signs or other means of advertising on buildings or areas protected as cultural heritage, the general rules laid down in art. 49, *d.lgs.* no. 42/2004 will apply. This article states that it is forbidden to place or affix billboards or other means of advertising on buildings or in areas protected as cultural property. Moreover it shall be forbidden to place hoardings or other means of advertisement along roads located within or near these properties.

In relation to these properties the superintendent may, after assessing compatibility with their artistic or historical nature, authorize or permit the use for advertising purposes of the coverings of the scaffoldings mounted for the execution of conservation or restoration work for a period of time that does not exceed the duration of the work. For this purpose, the tender contract for the aforesaid works must be attached to the application for the permit or assent.

## 4. Other contractual tools for the cultural heritage valorization

In addition to sponsorship contracts, there are other related contractual figures that can be used by the administration to create partnerships between public and private sectors.

- Patronage;
- partnerships with non-profit organization (third sector);
- adoption of a monument;
- project financing;
- Concession of advertising space.

### 4.1 Patronage

Sponsorship contracts are onerous and bilateral. These features differentiate this contract to donations or patronage. Compared to the sponsorship, such cases are distinguished by the fact that the investor has no equivalent in the expected benefit from the publicity of his role as a patron. It is outside the scheme of sponsorship, even if the funder benefits a return of the image due to the beneficiary behavior. Patronage, therefore, does not fall into the category of bilateral contracts but, depending on the concrete behavior of the case, can be divided in two different contractual

arrangements: the modal donation, *donation sub modo*; and the so-called “internal sponsoring”.

This distinction does not lead to different administrative and fiscal regime of the two cases. In both cases for the administration there is no duty of competitiveness to be observed in the choice of the patron and no special procedural formality is requested.

#### 4.2 Partnership with non-profit organizations

Cultural agreement of valorization between a private lender and the administration is similar to patronage, and concerns a broader program or project of public-private partnership, referring to the restoration of an asset or group of assets and articulated in cultural activities relating directly or indirectly related to the protection of cultural heritage. It is a complex figure related to cultural agreements stated in art. 112, *d.lgs.* no. 163/2006 (where the enhancement must be understood primarily as improving the protection, but also such as public use improvement of the asset).

Although these agreements are considerable complex and may contain the prediction of specific *facere* obligations for the administration, they are related to patronage and are, therefore, free from authorization. Hence, art. 199-*bis* of the Code of public contracts does not apply and the direct engagement after specific proposal and initiative of the patron it is possible.

#### 4.3 Monument adoption

Once clarified the distinction between the relations of sponsorship and donations, it is worth to define the “adoption of a monument”. Indeed, this expression does not match an autonomous legal institution, but it has a purely factual valence in the description of a phenomenon, which is likely to be attributed to both the sponsorship agreement, and patronage. The adoption of a monument is the provision of a private entity, in order to fully compensate one or more specific needs for protection and / or enhancement of cultural property, often for a specific period of time, so that the private individual assumes the care of the monument. The term “adoption of a monument” is interchangeably used in two cases.

In the first case as patronage because there is any intervention for the public entity. In the second case, it is a strong sponsorship that is qualified by the special intensity of the relationship with the cultural heritage site / object. In fact, while sponsorship relationship involves an association between the sponsor and a specific intervention for the protection or enhancement, adoption of the monument allows the private individual to directly link his / her name to the cultural property, creating a greater economic utility for the adopter.

#### 4.4. Project financing

In project financing, public administrations are taking advantage of funding sources for institutional activities, alternative and / or additional to those obtained through traditional channels, however, unlike in sponsorships, project financing in the economic relationship is more complex, since the promoter / financier, not only deals with the implementation, but also the management of the public and the cash flow

gets the return on invested capital, according to the typical pattern of granting construction (completion of the restoration work) and management (public service provided by the well in the case of cultural heritage, public service opening to public use and enhancement of the well restored).

In project financing private investors play an active role. The basic framework is artt. 153 *et seq.* of the Code of public contracts, which include various forms of procedure, for realizing project financing. Since project financing are bilateral operation, unsolicited proposals can never lead to the signing of contracts for direct procurement.

#### 4.5 Concession contracts for advertising space

A very common case is that the administration funds conservation work of cultural property by affixing posters or other means of advertising on scaffolding installed for the execution of the work. In such cases, it is necessary to determine whether the relationship can be traced back in the scheme of the sponsorship agreement, or if gives rise to a different contract for the sale of advertising space. It's not worth to differentiate this two categories because both fall under the legislation pursuant artt. 26, 27 and 119-*bis*, *d.lgs.* 163/2006.

#### 5. German legislation on cultural heritage

Art and culture as provided by the German Constitution are a responsibility of each *Land* and of the State. The federal government takes over with around 1.2 billion euros approximately thirteen percent of total spending on art and culture. The State is competent for cultural institutions and projects of national importance for maintaining German cultural heritage in a good state of conservation. Indeed, valorization of cultural heritage is one of the focal points of the cultural policy of the federal government; therefore, there are various federal programs. One of them is "National valuable cultural monuments" which was launched to support the conservation of monuments, archaeological monuments and historic parks and gardens. From 1950 to 2012, this program obtained about 342 million euros permitting the restoring of more than 600 cultural monuments.

Conservation and historic preservation are indeed competence of the *Länder*. In addition, there are considerable resources provided by communities, churches, foundations and private monument owners. Donations are regulated in the German civil code – *bürgerliches Gesetzbuch* BGB under sect 516 *et seq.* The classification as a "donation, gift" does not prevent that the company may install a plaque with its name (indeed, according to § 516 BGB the gift must be free). Private funders receive tax relief and a certain compensation for their investments. Therefore, particularly in these last years, a lot of importance was given to income tax law. According to this law, there are two tax reductions for owners of historic buildings or monuments. Both if the building is let or not.

Finally, it is evident that Germany has introduced a significant number of tax measures which should benefit the owners of historic properties and ensure that these properties are adequately maintained for future generations.

## 6. Conclusion

The private patronage of culture in general, and in particular, restoration of cultural heritage cannot be considered a rare phenomenon. It should be noted, however, that prior to the entry into force of *d.lgs.* no. 42/2004, the legislator had never issued a comprehensive law on this topic with the result that interventions took place outside of a precise frame of reference. Indeed, by the lack of legislation on sponsorship, the actions of individuals to support the conservation of cultural heritage were labeled as *donatio sub modo*, contracts of service, advertising contracts or simply among the different forms of patronage. Following the full recognition by the doctrine and jurisprudence of sponsorship contract as an atypical, onerous and corresponding contract was due by the intervention of the legislator. It issued provisions contained, both in general (with art. 43, l. 449/1997, art. 119, *d.lgs.* no. 267/2000 and art. 26, *d.lgs.* no. 163/2006), and special laws (art. 120, *d.lgs.* 42/2004 “Code of Cultural Heritage”).

Also in Italy, sponsorship can be considered - at least in the abstract - the most appropriate and effective tool in terms of collaboration and partnership between public bodies and private entities for the protection and enhancement of historical and artistic heritage.

This review has showed that the role of individuals in the field of cultural heritage must be considered essential for the development of the sector, especially in times of economic crisis. In this context, the tools used up to now are related, for the most part, to finance activities which are then taken directly from the public subject to protection, enhancement and management of the cultural property. Between these instruments, one of liberal disbursements found a lack of practical application for the reasons already mentioned, the inadequacy of their fiscal convenience, the lack of visibility and / or image return to the donor, for certain burdensome bureaucratic procedures, the existence of other forms of donation alternatives regarding initiatives that are perceived by the donor of higher ethical value. Sponsorship, however, has had better luck. However, despite some practical application of the institution, the regulation has the same uncertainties and unresolved issues, both for the phase identification of the sponsor, as well as for the adjustment of the contractual relationship later.

To this end, the best practices that could be created, prepared model type, better mechanisms for the tax benefit of the sponsor.

However, in order for the involvement of private capital, the sponsorship contract has limitations that belong to the very nature of the contract. Firstly, the fact that the return of the cost incurred by the sponsor is obtained only indirectly from the operation, being tied to the positive impact that advertising has on a certain business. The increase in revenue of a certain commercial activity could, however, also be achieved by pursuing different paths. It is also known that the costs of advertising are the first companies reduce in times of crisis, since it is not closely related to the costs of production and, therefore, fixed at least in the short or medium term.

Moreover, for implementing investors' participation in cultural heritage financing, it is necessary to provide to private individuals a direct return on their investments. As the German legislation has indicated.

This opens the way for the use of contracts for public private partnership, with the application of new models and the definition of new roles for the public partner and the private sector, in relation to cultural heritage.

The application of these models to the field of cultural heritage, as it was pointed out, poses serious problems for the constitutionally provided necessity of their direct protection by the state and the nature of public goods, which could be contradicted by their subjection to private management. The private management of cultural heritage should, therefore, be limited to the enhancement.

These difficulties may, however, be a certain limit to the interest of private transactions of this nature. Once again, the reasons of efficiency, which is traditionally the responsibility of economists, must be reconciled with those of equity, a task for the legislators.

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***Public Participation in New Local Governance Spaces:  
The Case for Community Development in Local Strategic Partnerships***

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**Abstract**

Research into public participation in local decision-making has increased over the past forty years, reflecting increased interest in the subject from academic, policy and practitioner perspectives. The same applies to community development, a values-based profession promoting a transformational agenda.

During the New Labour government's period in office (1997-2010), public participation featured centrally in several policies, reflecting their adherence to communitarian theory and Third Way politics. Additionally, the language of community development (promoting community empowerment and social justice) featured in these policies. Guidance for Local Strategic Partnerships (LSPs) – central to New Labour's local government reforms – required them to facilitate public participation in decision-making, and used the language and values of community development.

This paper reports on research into LSPs' public participation practice. Applying a constructivist methodology, the research applied an evaluative framework reflecting the community development values in all 22 LSPs in the Yorkshire & Humber region. Data was collected through documentary review and interviews with LSP officials in each participating LSP. Case study research was conducted in one LSP, concentrating on two communities, generating deeper understanding of the process of facilitating public participation in different circumstances.

Notions of power feature centrally in the analysis, and the research concludes that local authorities struggle to relinquish power to communities in any meaningful way, even within the context of government guidance requiring this process to be implemented. These findings are extrapolated to present a brief critique of the present UK government's stated commitment to de-centralising power to communities in various policy areas.

Key Words: Community development, community empowerment, public participation, New Labour, public policy.

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## Introduction

Public participation in local decision-making has featured increasingly as a central tenet of public policy over the past forty years, particularly in relation to planning (Damer & Hague, 1971; Innes & Booher, 2004), health (Mitton *et al*, 2009) and environmental issues (Webler & Tuler, 2007). Theories have evolved over this time to help better understand the impact and evaluate the effectiveness of various public participation initiatives, and to shape future policy (e.g. Arnstein, 1969; Wilcox, 1994; OECD, 2001; IAAP, 2007). Over the same period, the community development profession has evolved, such that it is recognized a values-based profession promoting a transformational agenda (Banks, *et al*, 2013).

This paper aims to explore the extent to which these professional values provide a useful framework with which to evaluate public participation policy and programmes. It draws on the findings of research conducted into the public participation practice of new local governance 'structures' in Yorkshire & the Humber region, and aims to contribute to the wider debate on the translation of policy into practice using these cases as exemplars. The paper has the following objectives:

- To review public participation theory, addressing its relationship with community development, focusing on how it incorporates consideration of issues of power.
- To present an overview of the public participation policy of the New Labour governments of 1997-2010, specifically relating to Local Strategic Partnerships.
- To assess the extent to which these policies were translated in practice by LSPs, based on the community development model.
- To reflect on the current government's approach to public participation.

## Community Development Values

This paper uses as the basis of its analysis the set of professional values that underpins community development practice, as laid out in the National Occupational Standards (NOSs) for Community Development (LLUK, 2009). Banks *et al* (2013: 144) suggest that practitioners need to exhibit these in an open and explicit manner in order to enhance the likelihood of successful outcomes in work with communities. The NOSs expand on these values to promote a wider understanding of their application and to ensure they are reflected in any activity described as community development practice (*op cit*: 7-9):

- **Equality & Anti-Discrimination** - challenging structural inequalities and discriminatory practices, recognising that people are not the same, but are all of equal worth and therefore entitled to the same degree of respect and acknowledgement.
- **Social Justice** - involves identifying and seeking to alleviate structural disadvantage and advocating strategies for overcoming exclusion, discrimination and inequality.
- **Collective Action** - supporting groups of people, increasing their knowledge, skills and confidence so they can develop an analysis of and identify and act on issues.

- **Community Empowerment** - supporting people to become critical, liberated and active participants, taking control over their lives, communities and environment.
- **Working & Learning Together** - enabling participants to learn from reflecting on their collective experiences, based on participatory and experiential processes.

Notions of power feature centrally in the community development values, especially equality and anti-discrimination, social justice and community empowerment, and effectively underpin and hold them all together (Ledwith, 2011). When assessing LSPs' policies, it should be possible to identify how closely they align with these values, which align closely with definitions of public participation.

## Public Participation

Public participation is the process by which individuals and groups affected by any proposed intervention are involved in the decision-making process relating to that intervention (IAPP, 2007a; IAIA, 2006). **Political participation** – “taking part in the processes of formulation, passage and implementation of public policies” (Parry, Moyser & Day, 1992: 16) – differs from **developmental participation**: “collective efforts to increase and exercise control over resources and institutions on the part of groups and movements of those hitherto excluded from control” (Stiefel & Wolfe, 1994: 5). **Citizen participation** is “about power and its exercise by different social actors in the spaces created for the interaction between citizens and local authorities” (Gaventa & Valderama, 1999: 7). It is a “categorical term for citizen power ... the strategy by which the have-nots join in determining how information is shared, goals and policies are set, tax resources are allocated, programmes are operated, and benefits like contracts and patronage are parcelled out” (Arnstein, 1969: 216).

Public participation is perceived increasingly as a ‘right’ of citizenship, both locally and at national / international levels (Cornwall, 2002: 2), with communities of interest effectively demanding the right to be included in the decision-making process (Gilchrist, 2004: 17). Three key drivers of the recent focus on public participation in decision-making have been identified. Firstly, the ‘**democratic deficit**’ is evidenced by a decline in public participation in traditional decision-making processes (Electoral Commission, 2005), and other activities associated with political participation, (Power Inquiry, 2006; Pattie, Seyd & Whiteley, 2004). As well as a decline in voter turnout at elections, it includes a lack of trust in political institutions and a fall in membership of political parties and trades unions (Prendergast, 2008; Bender, 2003; Barber, 1984). Furthermore, considerable challenges face **civil society**. While the scale of voluntary and community sector (VCS) remains substantial (870,000 formal civil society associations with £210 billion assets), Carnegie Trust (2010) identifies a blurring of values in pursuit of financial security, increased inequality between VCS organisations and weakened influence in key policy areas. **Citizen action** is less clear-cut, as recent mass demonstrations demonstrate citizens’ commitment to challenge governments; whose resulting action has demonstrated an intransigence on the part of the political classes, unwilling to respond to the concerns expressed by their citizenry. For example (Figure 2), the UK government invaded Iraq despite the largest demonstration in British history; the Egyptian military overthrew the

democratically elected Muslim Brotherhood government; and Russia annexed Crimea, after demonstrations in Ukraine resulted in a change in government.

**Figure 1: State Response to Citizen Action**



Politicians appear to believe that the seeming downward spiral of participation – which undermines the effectiveness of representative institutions in managing public affairs – reflects disengagement, disinterest and apathy on the part of the populace. This results in a fragmented and isolated social life, a culture of distrust and hierarchical political structures. Several writers (e.g. Bang, 2009; Li & Marsh, 2008; Norris, 2007) challenge this perspective, citing the emergence of new forms of public participation – such as single-issue citizen activism and web-based organizing – as contradictory evidence. They emphasise the importance of power relations, citing alienation as a more likely cause of the decline in public participation (Marsh, O’Toole & Jones, 2006). They also suggest that the increased complexity of governance in a globalised and individualised system has resulted in some of the weakest and most vulnerable groups and individuals being excluded from the decision-making process by powerful politicians, bureaucrats and corporatist interests (e.g. Bang, 2004: 4). Consequently, new forms of public participation outside the conventional arenas have emerged, reflecting participants’ identities and project politics, and state institutions accept that the complexity of the policy arena requires a broader range of stakeholders to engage more directly in the policy process (Keeley & Scoones, 1999: 29). These include ‘virtual’ or electronic forums for campaigning (examples in Figure 2).

**Figure 2: E-Participation Platforms**



More fluid boundaries have emerged between loose networks, coalitions and decentralised organisational structures, and there is an increasing focus on achieving social change through direct action and community-building (Norris, 2007: 638-9). People engage in issues that affect them directly, seeing action as a more effective form of participation than voting (Kane et al, 2009: 123). This ‘micro-political’ participation allows individuals to influence people with responsibility for implementing specific policies that impact on their own lives, as opposed to engaging

in policy-making processes at a more remote level (Pattie, Seyd & Whiteley, 2004: 113). A significant proportion of the population is engaged in some form of civic activism (Pattie, Seyd & Whiteley, 2003: 465), with an increased emphasis on self-actualisation identified as a motivation for participation in these less formal processes, with young people in particular motivated more by individual purpose than obligations to government (Brooks, 2009: 2.3).

### Values of Public Participation

Cornwall (2000: 77) distinguishes between ‘induced’ and ‘invited’ participation and a form of citizen participation through which “people come to create their own spaces and enact their own strategies for change”. Oakley (1995) views participation as either a developmental process (undertaken as an end in itself), or an instrumental process (aiming to affect the outcome and quality of decisions made). This distinction represents a choice between utilitarian and empowerment models (Morgan, 2001: 221; Nelson & Wright, 1995: 1). As summarised in Figure 3: in the utilitarian model, an agency may promote public participation to achieve its stated aims more efficiently, effectively or cheaply; in the empowerment model, communities promote public participation as an end in itself, using it as a tool to diagnose their needs and control their own development.

**Figure 3: Public Participation as a Means or an End**

	Public Participation as:	
	A means	An end
Alternative moniker	Instrumental Participation	Transformational Participation
	Utilitarian model	Empowerment model
Rationale	Pragmatic	Normative
Basis of interaction between community and agency	Consultative, Collaborative	Collegial
Characterisation of interactions	Community participates in agency’s agenda	Agency addresses community’s priorities
Goal	Efficiency	Empowerment

(Adapted from Nelson & Wright, 1995)

These distinctions reveal how decisions about the intended focus of participation are likely to be informed by values. For example, relating public participation in decision-making to notions of justice, Sen argues that it should be understood as a “constitutive part of the ends of development” (1999: 291). The International Association for Public Participation identifies seven core values for use in implementation of public participation processes (Figure 4). Aiming to ensure decisions better reflect the interests and concerns of potentially affected people, these correspond closely with the community development values.

**Figure 4: Core Values of Public Participation**

- 1 Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
- 2 Public participation includes the promise that the public's contribution will influence the decision.

- 3 Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision makers.
  - 4 Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
  - 5 Public participation seeks input from participants in designing how they participate.
  - 6 Public participation provides participants with the information they need to participate in a meaningful way.
  - 7 Public participation communicates to participants how their input affected the decision.
- (IAPP, 2007b)

### **Public Participation & New Labour Policy**

New Labour's public participation policy sought to reconfigure the roles and relationships of citizens, communities and government (Prior, 2005: 357), and embraced community as the locus of many reforms (Imrie & Raco, 2003: 5), seeing it as "a natural and desirable social formation, based on the diminution of difference and conflict and the inculcation of shared values" (*ibid*: 8). The New Labour government sought to challenge the failings of the prevailing neo-liberal political hegemony, introducing policies that rejected the view that societies can flourish simply by promoting 'competitive individualism' and unfettered private enterprise (Driver & Martell, 1997). They highlighted roles in shaping society both for government and individuals based on values of co-operation and collaboration to contain the excesses of the market system, believing that a society of individuals recognising the extent to which they are inter-dependent is likely to be more effective than one in which they simply seek to assert their individual rights and preferences. This perspective incorporates implied ethical and explicit moral imperatives, inasmuch as community must be accepted as a 'good thing', in which people should subscribe to a clearly defined set of shared values (*ibid*: 35). However, while making repeated reference to 'values', New Labour failed to encourage people to subscribe fully to them, due to the vagueness of their exposition of these values, and because they were imposed, rather than emerging from a dialogue with the citizenry (Hall, 1998: 11). This reflects the fact that New Labour governments saw it as their role to lead the process of fostering community in society, through exhortation, symbolic action and legislation (Driver & Martell, 2000: 159).

'Community' remained the cornerstone of New Labour policies throughout their tenure, Tony Blair asserting that community is "the governing idea of modern social democracy" (2001: 5). Community was conceived as being a fundamental component in addressing social problems, promoted as a "practical means of furthering the social and material refurbishment of neighbourhoods, towns and larger local areas" (Giddens, 1998: 79). Reflecting the view that people have the "moral power of personal responsibility for ourselves and each other" (Blair, 1996: 3), New Labour policy promoted a view of the citizen as an individual with rights and responsibilities, one of which is to contribute to the welfare and governance of their community (Pratchett, 1999: 7). Citizens were viewed as having a responsibility to exercise individual choice and participate in collective decisions (Jordan, 1999: 119); meanwhile, communities were characterised as instruments of policy delivery,

particularly in disadvantaged areas, encompassing latent values that government programmes could revive or re-define (Fremaux, 2005: 271).

New Labour conceived public participation as part of a fundamental re-modelling of the public sector, requiring a re-negotiation of the relationship between the state and its citizenry, and a shift in emphasis from the individual to communities (DETR, 1998). While aiming to re-engage people isolated by an increasingly individuated society, generating enhanced accountability and re-kindling the urge to participate in democratic institutions, policy also sought to draw on the knowledge, ideas and experience of the public to inform change in the nature and quality of services (Martin, 2009; Pratchett, 1999). Policy also acknowledged that different initiatives would be undermined if public participation focussed only on one of these stated purposes while overlooking others (ODPM, 2002a: 3).

### **Local Strategic Partnerships**

The Local Government Act 2000 (DETR, 2000a) required local authorities and local agencies to prepare Community Strategies, to promote the economic, social and environmental wellbeing of their areas. Proposals for the establishment of formal partnerships to oversee this work and neighbourhood renewal recommended that LSPs adopt a collaborative approach to addressing inequalities between areas within each locality, bringing together the public, private, voluntary and community sectors to do this (DETR, 2000b).

Government guidance (DETR, 2000c) urged local authorities to ground the Community Strategy in the views and expectations of individuals, groups and communities, putting local people at the heart of partnership working. Further guidance (DETR, 2001) emphasised the opportunities LSPs provided to focus on issues that matter to local people, and promote equity and inclusion. Involving local people was identified as a “vital” force for change, and LSPs were urged to adopt imaginative and flexible approaches to secure public participation, to improve service delivery and strengthen social inclusion, developing empowered communities. Additional guidance highlighted the need for LSPs to engage groups traditionally excluded and alienated from local decision-making processes (ODPM, 2002b: 10-11). The implicit commitment to community development values in these was made explicit in subsequent policy (DCLG, 2006a).

Other independently produced guidance (LGA, 2002, 2001; CDF/Urban Forum, 2001; CDF, 2000) suggested that LSPs should create a culture and dialogue in which the contribution of the community is valued, that they support local community groups in raising their capacity, and that local people challenge LSPs about their participative structures. Subsequent policy included a clear expectation that the third sector would be actively involved in shaping the local area (DCLG, 2006b), and introduced a duty to involve the local community (i.e. inform, consult or involve representatives of local people) in the exercise of LSPs’ functions (DCLG, 2007a). Proposals to strengthen LSPs’ role included the statement of a set of principles of representation of the VCS, which aimed specifically to ensure greater accountability, equality and openness in their work (DCLG, 2007b).

LSP evaluations identified a lack of clarity about LSPs' different communities, proposing the following as guiding principles for public participation: participants' ownership, inclusivity, a commitment to change and support, training and development for community members (ODPM, 2004a; 2004b). They highlighted the continued existence of barriers to community engagement, particularly to young people and BME communities, including overly complex structures, the imposition of externally determined priorities and excessive time lags between decisions and action.

### Researching LSPs in Yorkshire & the Humber

Research was conducted in all 22 LSPs in the Yorkshire & Humber region, to explore the translation of New Labour's public participation policies into practice. This research explored the extent to which LSP practice reflected theoretical perspectives and the community development values. This sample of LSPs included: rural and urban areas; locales served by District and County or Unitary / Metropolitan Councils; the full range of economic conditions, from among the poorest neighbourhoods to some of the wealthiest in the country; boroughs and constituencies represented / controlled by all major political parties. This sampling sought to allow for extrapolation of the findings to LSPs throughout the country displaying similar characteristics. One LSP was selected as a case study, allowing for themes emerging from the wider sample to be explored in more detail and to generate greater depth of understanding of processes.

An analytical framework (Figure 5) was devised to allow for comparison between the LSPs, and to help in generating conclusions about general patterns and trends. This built on previous typologies characterising community development practice (Toomey, 2011; Popple, 1995; Glen, 1993), allowing for distinctions to be drawn between radical, consensual, reformist and service management approaches to public participation. Practice in each LSP was assessed against this framework, and each was ascribed to one of these four elements of the typology.

**Figure 5: Outline Analytical Framework**

LSP:		Element of Model				
		Radical	Consensual	Reformist	Managerial	
Characteristics	Context	Community Models, Relationships & Strategies				
		Governance				
	Approach	Community Empowerment				
		Community Capacity				
	Participation	Focus				
		Initiation				
		Form				

	<b>Roles</b>	Practitioner Role				
		Community Role				
	<b>Values</b>	Political				
		Professional				
		Community Development				
<b>Overall Category:</b>						

A key part of this analysis considered the extent to which the community development values were implemented, and how these had helped to shape each LSP's approach to public participation. While all five of the values were likely to be in evidence to some extent in the practice of all LSPs, it was felt likely that greater weight would be given to one or more of the values depending on which element of the typology prevails (Figure 6).

Where the radical model is dominant, practice may be informed by belief in the need for disadvantaged groups and communities to overcome institutional barriers to individuals and communities fulfilling their potential. The aim of public participation would be community empowerment, ultimately enabling them to overcome injustices and oppression, and LSPs would recognise the need to support and respond to collective action within communities. If the consensual model were dominant, LSPs practice might focus on seeking out common priorities, with agencies and communities working with and learning from one another to pursue the common good, characterised here as social justice. While LSPs operating with the reformist model in the ascendancy use the language of social justice, their practice is more likely to focus on equality of opportunity than of outcome. Given the focus on service-specific issues and the involvement of individuals more often than groups to identify ways to improve service delivery, LSPs where the service management model dominates would only specifically promote the working and learning together value.

**Figure 6: Community Development Values**

<b>Radical</b>	<b>Consensual</b>	<b>Reformist</b>	<b>Service Management</b>
Collective Action Community Empowerment	Working & Learning Together Social Justice	Equality & Anti- Discrimination	Working & Learning Together
Equity and social justice over efficiency and effectiveness		Efficiency and effectiveness over equity and social justice	

### **Key Findings**

The following selected findings are presented as a representation of how effective LSPs were in implementing policy and guidance on public participation, and the



extent to which this work was informed by political and professional values, and – specifically – those of the community development approach.

Overall, there was significant evidence of local communities participating in consultations on the development of Community Strategies and other high level strategies. Most LSPs had also established complex structures to facilitate the participation in decision-making of representatives of the community sector. In many cases, too, local authorities and other partners in the LSP employed staff to support communities' participation in local service planning processes, or / and in overseeing implementation of projects at a local scale. However, in all cases, local people expressed concern that their input had little or no impact on the key decisions affecting their communities, feeling that much of their effort was wasted. In several cases, community representatives on LSP structures complained that their presence was merely tolerated, and that they felt their participation was tokenistic at best and – in many cases – an opportunity for them to be manipulated by partners.

A fundamental weakness in the approach of all LSPs to promoting and facilitating public participation was their unwillingness to cede any power – over decisions or resources – to local communities. In particular, local authority personnel (both officers and elected members) demonstrated a strong reluctance to facilitate genuine community empowerment. Many officers claimed they had a duty to act objectively and draw on their professional expertise to plan and manage services on behalf of their citizens (who they asserted prefer bureaucrats to make these decisions on their behalf). Likewise, Councillors decried the process of promoting public participation as anti-democratic, asserting that they knew their community better than anyone, particularly self-selecting individuals with vested interests or 'axes to grind'.

A third of Community Strategies focused on neighbourhood renewal, aiming explicitly to 'narrow the gap' between the most deprived communities and their more affluent neighbours. Hence, public participation here – as in most other LSPs – was based on a deficit model, focusing on engaging people from more disadvantaged areas.

Only one LSP had a 'public participation strategy', although five LSPs were developing one. A further six LSPs use their local authority's policy to guide work in this area, with two more planning to do so once the authority completed work on their policy. In one case, devising additional stand-alone strategies was said to be contrary to their stated intention of minimising bureaucracy and limiting the LSP's area of responsibility to producing a Community Strategy.

LSP Managers and Co-ordinators highlighted the fact that consideration of values influences LSPs' approach to identifying and approaching their community. In particular, there appears to have been considerable difficulty in balancing the 'rights versus responsibilities' dichotomy. Half of LSP's stated aims reflected more closely the former, while the policy agenda they were required to implement pushed the latter. They also ranked the community development values in order of importance ascribed to them by their LSP. Although the results indicate that LSPs place most emphasis on community empowerment, it is clear from other responses that their practice is not designed to bring about this result. One explanation for this might be that reference to community empowerment features to such an extent in policy and

guidance that – when presented with this choice in the survey – respondents recognised the term, without necessarily fully appreciating the meaning (even though a definition was provided). It is possible that a similar phenomenon explains the priority given by five respondents to social justice in this survey, when there is little evidence to corroborate these claims elsewhere. Equality and anti-discrimination were identified as important by all those who responded to this question, which corresponds with the stated goals in many of the Community Strategies. While it is perhaps unsurprising that eight respondents feel that collective action is neither important nor unimportant to their LSP, the same rating for working and learning together is perhaps more unexpected. With the majority of Community Strategies committing their LSP to working with communities to identify common priorities, one might have expected for this value to be rated as more important. Although they were not all ranked by all respondents, it is interesting to note that nobody felt that any of the community development values are unimportant or contrary to their LSP's approach.

### **Public Participation under the Con-Dem Coalition**

After the 2010 general election, the Conservative-Liberal Democrat coalition government stated its commitment to disperse power more widely (Cabinet Office, 2010: 7). The coalition sought to reform the relationship between citizens and the state, creating a '*Big Society*' to engender greater personal, professional and civic responsibility so that social issues are addressed by the communities they affect, and problems resolved by social action instead of state intervention. In this vision, the role of the state is to stimulate social action, helping every adult citizen participate in an active neighbourhood group (Conservative Party, 2010a), thereby fostering and supporting a new culture of voluntarism, philanthropy and social action (Cameron, 2010a). The *Big Society* is to be brought about by giving more power to communities (e.g. in reform of the planning system, or in 'saving' threatened local services), and promoting / supporting more active involvement in local volunteering. As with New Labour, the objectives of reforms have been grouped under three themes (Cabinet Office, 2010; Conservative Party, 2010b): enhanced social action (or 'mass engagement'), reformed public services, and community empowerment. The rationale is to shift power, emphasising the government's belief that "when people are given the freedom to take responsibility, they start achieving things on their own and they're possessed with new dynamism" (Cameron, 2010b).

The *Big Society* is presented as a rethinking of the nature of society from first principles, an approach to policy making that emphasises "the three-way relation of enabling state, active individual and linking institution" (Norman, 2010: 6-7). Also akin to New Labour's approach, these ambitions include an implicit commitment to partnership approaches and delivery models, with relationships between government and the community subject to radical change (Cameron, 2010c). A voluntary and community sector strategy (OCS, 2010) details government plans to give local communities the right to buy or bid to run community assets, and requires public service commissioning to allow charities to bid for public contracts. The Localism Act and associated guidance outlines six 'essential actions' to transfer power from the state to local communities (DCLG, 2011): reduce bureaucracy, empower communities, increase local control of public finance, diversify the supply of public services, increase public scrutiny, and strengthen accountability to local people.

The *Big Society* agenda could be perceived as a continuation of New Labour's public participation policies. McCabe (2010: 5) reports a shift in tone, however, in the implementation of these policies, from voluntarism under New Labour to 'aspirational compulsion' under the coalition government's proposals. Similarly, Scott (2011: 20) notes the irony that the *Big Society* agenda is being implemented in a top-down manner by the government, when the stated intention is to facilitate bottom-up, community-led action. At the same time, the language accompanying announcements on the *Big Society* reflects a shift in values, and disguises a deliberate attempt to co-opt "the language of transformational development" (McCabe, 2010: 6-7). For example, the vague notion of 'fairness' is used in place of social justice, while 'social action' has replaced 'community engagement'. Social justice features in ongoing critique of the *Big Society* agenda (e.g. Coote, 2010; NEF, 2010), with concerns expressed that the policy is most likely to further disadvantage people already excluded from society, as it remains unclear about how power will be transferred between different groups.

The *Big Society* vision appears consistent with community development practice, recognising that everyone has assets (not just problems), and encouraging citizens' involvement / action, to strengthen social networks and to use local knowledge to get better results (NEF, 2010). However, not everyone will be able to benefit from the *Big Society*, as participation relies on individuals and communities having sufficient capacity, meaning that benefits will not be distributed equally, thereby having a negative impact on social justice, equality and cohesion. Partnership features at the heart of recommendations about how the *Big Society* agenda should be implemented. Coote (2010) asserts that – in contributing towards the *Big Society*'s goals – partnerships should moderate the relationship between citizens and government, requiring power and responsibility to be shared on an open and equal basis between professionals and intended beneficiaries, to promote social justice and to narrow inequalities.

## Conclusions

There appears to be a close relationship between public participation theory and the stated aims of / the values subscribed to by community development practitioners. Indeed, the relevance of the community development approach in helping to achieve New Labour's policy goals was articulated explicitly by them, and their public participation guidance for LSPs drew heavily on community development theory and practice. However, their policy guidance and practice promoted an instrumental form of participation, failing to grasp the opportunity to support public participation as a developmental process.

The research has demonstrated that the practice of exercising and sharing power by key stakeholders – specifically local authorities – is central to considerations of public participation. The extent to which individuals believe they can exert power and influence over decision-making has affected the way in which they participate in the public realm, and goes some way to explaining the increase in direct citizen action. The prevalence of these forms of citizen participation in specific types of activity seems to prevail over traditional political participation; while the work of LSPs seems to have been located in the realm of developmental participation.

LSPs have faltered in their translation of government public participation policy, failing to translate their stated commitment to transferring power from the state to its citizenry, and potentially further alienating communities from the democratic process this policy was intended to revitalize. In particular, their reluctance to cede power to communities demonstrates state agencies' inability to accommodate the changes needed if local people are to be afforded a genuine opportunity to shape their own destinies. Even where the VCS demonstrated its ability to engage in meaningful dialogue with local stakeholder agencies, and with structures established to facilitate their input, it appears that they were able to make very little impact on the development of local policies and services. Resources to support the development of community capacity to participate were not matched by changes in decision-making processes, leading to frustration on their part as the results of their inclusive processes were often ignored when decisions were taken by LSPs or individual agencies.

Despite having access to ample evidence (based on New Labour's experience) to help shape their own public participation policy, it appears that the coalition government has achieved even less than their predecessors in this area of policy. The stated aims of their *Big Society* agenda have yet to be achieved, as public service reforms seems to have created more opportunities for the private sector to deliver the kinds of services it was suggested could be provided by VCS organisations. The impact of cuts in resources to support public participation in local partnerships and the downgrading of LSPs and other local governance structures means that communities are even more disadvantaged in this regard than they were under New Labour.

Community development, and the values it espouses, would appear to offer a legitimate means of achieving the stated goals of public participation, and could be said to be as important now as it was in 1997, as the symptoms their policies (and those of the coalition government) sought to address continue to prevail. The process of disaffection and alienation from the political system have been shown to be likely to continue as long as people feel disempowered, and the divide between the "haves" and "have-nots" (as Arnstein described them) persists and widens.

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