Younger Comparativists Committee of the American Society of Comparative Law

6th Annual Conference

28-29 April 2017
Koç University Law School, İstanbul

BOOKLET

nasamer
KOÇ ÜNİVERSİTESİ DR. NÜSRET – SEMAHAT ARSEL ULUSLARARASI TİCARET HUKUKU UYGULAMA VE ARAŞTIRMA MERKEZİ

KOÇ ÜNİVERSİTESİ

ASCL
American Society of Comparative Law

This booklet contains the abstracts of papers presented in the symposium entitled 'American Society of Comparative Law Younger Comparativists Committee 6th Annual Conference' hosted in 2017 by Dr. Nüsret-Semahat Arsel International Business Law Implementation and Research Center (NASAMER) of Koç University Law School.

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AMERICAN SOCIETY OF COMPARATIVE LAW

YOUNGER COMPARATIVISTS COMMITTEE
6th ANNUAL CONFERENCE
KOÇ UNIVERSITY LAW SCHOOL – ISTANBUL 28-29 April 2017

PROGRAM

THURSDAY, 27 APRIL 2017

WELCOME RECEPTION	**FUAT PAŞA HOTEL TERRACE**	**19:00**

FRIDAY, 28 APRIL 2017

DEPARTURE FROM FUAT PAŞA HOTEL *(Shuttles will be available in front of the Hotel)*	**08:15**

08:45 ***Registration & Coffee*** *– Koç University Campus Sevgi Gönül Auditorium*

09:00 – 09:30 **OPENING SPEECHES**

Prof. Umran İnan – *President of Koç University*

Prof. Bertil Emrah Oder – *Dean of Koç University Law School*

Prof. Virginia Harper Ho – *YCC Chair*

09:30- 10:15 **KEYNOTE SPEAKER SEMINAR**

Prof. Helena Alviar Garcia

Robert F. Kennedy Visiting Professor at Harvard Law School Former Dean of the Law School at the Universidad de Los Andes

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10:30 -11:50 **PARALLEL PANELS**

Panel I: "Regulating Markets" Venue: SOS B07

Chair: Ayşegül Buğra

Speakers:

- Virginia Harper Ho*: China's Green Credit Reforms: Creditor Monitoring & Environmental Transparency*
- Daniele D'Alvia: *The remarkable story of SPACs between a legal standardised regulation and a standardisation by market practices*
- Emek Toraman Çolgar: *The Mandatory Bid Rule: A Comparative Analysis of Turkish, European Union and English Laws*

Panel II: "Democratic Decay: Challenges for Constitutional Democracies in a Changing World and Challenges to the democratic principle in National and Supranational Legal Orders"

Venue: SOS B08

Chair: Saadet Yüksel

Speakers:

- Ali Ersoy Kontacı: *Judicial Protection of Rights and Liberties in State of Emergency: An Evaluation of the Turkish Constitutional Court's Past and Present Performance*
- Malwina Ewa Kolodziejczak: *The Extraordinary Measures in Selected Countries: Legal Aspects*
- Atagün Mert Kejanlıoğlu: *The Unconstitutional "Semi-Presidentialism" in France and Turkey: How Do Popular Consent Enable Presidents to Abuse Power?*
- Stefan Somers: *Constitutional review as leveler of the differences between common law and civil law*

Panel III: "Observing the Observance of International Law: A Comparative Analysis of Normative Pull to Enforceability"

Venue: SOS B21

Chair: Başak Çalı

Speakers:

- Zeynep Elibol Brönneke: *"The effect of the perception of the authority of international law on passing the 'object and purpose test' – a comparative analysis of the ICCPR reservations of Turkey and France"*
- Valentina Azarova: *Intentionality in the Observance of International Law: From Compliance to Obedience (through Internalisation)*
- Irina Crivet: *Observing the depths of (non-)compliance with ECtHR judgments: The cases of Moldova and Lithuania*
- Betül Durmuş: *Testing the Adequacy of Home-Grown Norms: The Notion of 'Indirect Discrimination' before the UN Human Rights Treaty Bodies*

Panel IV: “Trade, Movement of Goods and Consumer Protection”,

Venue: SOS B11
Chair: Yasin Alperen Karaşahin
Speakers:

- Lydia Velliscig: *EU New Approach to Customer Protection in the Insurance Market: The Example of “Product Governance”.*
- Belma Bulut*: Smart Containers and Their Possible Effects in Transport Law: A Comparative Study Between English Law and Turkish Law*
- Rosa Maria Rojas Vertiz Contreras: *A comparative analysis of Consumer Bankruptcy in Latin America*
- Meltem Ece Oba: *The Law Applicable to the Non-Contractual Liability of the Producer Against Third Parties*

11:50- 12.10 ***Coffee Break***

12:10- 13:30 **PARALLEL PANELS**

Panel I: “Good Governance and the Economy”, Venue: SOS B08

Chair: Emek Toraman Çolgar
Speakers:

- Radwa Salah Elsaman*: How Could Corporate Governance Contribute to the Development of the Economy in the MENA Region?*
- Seda Palanduz*: One Size Doesn’t Fit All: Business Ethics and Corporate Governance for the Sharing Economy*
- Cem Veziroğlu*: Buyout Remedy For Oppressed Minority Shareholders: Comparative Analysis of Turkish, Swiss and English Laws*

Panel II: “Education, Freedom of Speech and Cultural Rights: Global Challenges”,

Venue: SOS B07
Chair: Zehra G. Kavame – Eroglu
Speakers:

- Jing Li: *Legal Profession of China in a Globalized World: Innovations and New Challenges*
- Manvendra Singh Jadon, *The Modern Law of Sedition and Freedom of Speech and Expression in India with a Comparative Discussion on the State of Law in Malaysia, UK, USA*
- Yin Cheng Hsu, *Cultural Rights, Digital Culture and Self-Regulation for ‘Cyberians’*
- Amir Mostaghel: *Using Technology for Making Governments More Accessible To People: The Comparison between Successful and Unsuccessful Countries*

Panel III: "Limits of Civil Liability from a Comparative Perspective"

Venue: SOS B21
Chair: Francisco de Elizalde
Speakers:

- Işıl Yelkenci: *When 'Full Compensation' Fails to Compensate Torts: Challenging Civil Law Jurisdictions through a Social Justice Perspective*
- Tuğçe Oral: *A Comparative Approach to the Violation of Personality Rights of Legal Entities*
- Işık Önay: *Legal Consequences of the Birth of an Unplanned Child due to a Wrongful Act: A Comparative Overview of Wrongful Conception, Wrongful Birth and Wrongful Life Cases*

Panel IV: "Women and Children: Their Right to Political Participation and to be Free from Violence and Exploitation"

Venue: SOS B11
Chair: Mehmet Polat Kalafatoğlu
Speakers:

- Valentina Rita Scotti *"Women's Political Participation in Turkey between secular and religiously-oriented policies"*
- Fulya Ezgi Akkuş, "*Violence Against Women: Comparative Constitutional Law Perspective"*
- Amna Rashid, *"CEDAW and the Rights of Women in Pakistan—Hopes and Realities"*
- Mina Sadat Sharifian, *"Role of NGOs in Children's Rights During Armed Conflicts: Comparative Analysis of the Wars in Syria, Kosovo and Iraq"*

13:30 – 15:00 ***Lunch***

15:00 - 16.20 **PARALLEL PANELS**

Panel I: "Criminal Law in Comparative Context"

Venue: SOS B11
Chair: R. Murat Önok
Speakers:

- Rajat Banerjee: *The Effectiveness of the Law on Plea Bargaining: A Comparative International Perspective*
- Reem Radhi: *Modernising Corporate Criminal Law: Restorative Justice for Corporate Criminal Liability and Sentencing in the UK and USA*
- Shama Farooq: *Lawyering Up: Contemporary Challenges & Solutions in Implementing the Privilege against Self-Incrimination*
- Irmak Erdoğan: *Offences Against the Confidentiality, Integrity and Availability of Computer Data and Systems*

Panel II: “Powers of the Executive in Comparative Perspective”

Venue: SOS B21
Chair: Bertil Emrah Oder
Speakers:

- Giacomo Fantini: *The Coup and the Referendum: Ascent and Decline of military influence on Turkish Constitutionalism*
- Matteo Frau / Elisa Tira: *The Interpretation of the Commander in Chief Clause in the American Living Constitution in Comparison with the Recent Transformation of the Prerogative Power to Deploy Troops in the Unwritten British Constitution*
- Mehmet Utku Öztürk: *A Comparative Analysis Regarding the Role of Prime Minister in Differentiating Parliamentarian Government Models: United Kingdom and Germany – A Suggestion for Turkish Quest for System of Government*
- Abdulkareem Azeez: *How Democratic is the Removal of Presidential Term Limit Cum Electoral College?*

Panel III: “Religious and Societal Influences on Public Institutions”

Venue: SOS B07
Chair: Yiğit Sayın
Speakers:

- Sara Saosan Razai: *Judicialization of Politics in the Arab World*
- Danya Shocair Reda: *The Rule of Law in Comparative Perspective: Islamic Law and Contemporary China*
- Raphael Lorenzo Aguiling Pangalangan: *Relative Impermeability of the Wall of Separation: An Uphill Battle for Marriage Equality in the Philippines*

Panel IV: “Comparative Concerns with Dispute Resolutions”

Venue: SOS B08
Chair: Virginia Harper Ho
Speakers:

- Estu Dyah Arifianti: *Challenges of Implementing Small Claims Court in Indonesia*
- Mehmet Polat Kalafatoğlu: *Online Dispute Resolution for Cross-Border (International) E-Consumer Disputes*
- Amr Elattar: *Enforcement of Annulled Arbitration Award: The Resurrection of Chromalloy and justifying clear criteria*
- Wasiq Abass Dar: *Decrypting the Role of ‘Public Policy’ in Private International Law and International Commercial Arbitration*

SATURDAY, 29 APRIL 2017

09:30 - 10: 50 **PARALLEL SESSIONS**

Panel I: "State Rights (Sovereignty), Human Rights, and Various Tensions"
Venue: SOS B07
Chair: R. Murat Önok
Speakers:

- Umar Rashid, *Analyzing the Impact of International Investment Law and Human Rights Law on the Doctrine of Sovereignty*
- Anna Lukina, *Russia v. ECtHR-Resistance or Dialogue: a Comparative Analysis*
- Ivan Mugabi, *A Comparative Study of the Models of Disability Under Treaties of Int'l Human Rights and Int'l Humanitarian Law*
- Gwenaelle Dereymaeker: *The Constitutionality of Criminal Procedure and Prison Laws in Africa – A Comparative Analysis*

Panel II: "Legal Transplants and Judicial Review in a Comparative Perspective"
Venue: SOS B21
Chair: Valentina Rita Scotti
Speakers:

- Fernanda Mambrini Rudolfo: *The Utilization of Italian Doctrine by Brazilian Supreme Court (STF)*
- Mulki Shader: *Human Rights-Based Approach on the Protection of Right to Speedy Trial in the Settlement of Judicial Review of Legislation in the Constitutional Court of Indonesia*
- Nafay Choudhury: *Legal Transplants and Development: A Social Networks Approach*
- Valentin Rétornaz - *Private Law Legal Transplants and Public Law Context: A Tale of Soil and Weather*

Panel III: "Performance of Obligations and Instruments Ensuring Performance"
Venue: SOS B11
Chair: Francisco de Elizalde
Speakers:

- Başak Başoğlu and Kadir Berk Kapancı: *Close Link Between the Right to Specific Performance and Penalty Clauses: A Comparative Approach*
- Safak Parlak Börü: *The Enforcement of Penalty Clauses in the Light of Comparative Law*
- Uğur Sarper Boz: *Punitive Damages; a Necessity in Civil Law*
- Yasin Alperen Karasahin: *Non-Possessory Security Rights on Movable Goods*

Panel IV: "Contemporary Challenges to Commercial Insurance Contract Law"

Venue: SOS B16
Chair: Virginia Harper Ho
Speakers:

- Ayşegül Buğra*: The convoluted state of voyage conditions: increase of the risk of loss, applicability of the Insurance Act 2015 and of the Principles of European Insurance Contract Law*
- Katie Richards*: Redressing the balance: Fabricated insurance claims and (harsh) civil remedies*
- Christopher Whitehead*: Why there was a PPI scandal in England but not in France— according to an Anglo-French insurance lawyer*

10:50 – 11:10 **Coffee Break**

11:10 – 12:30 **PARALLEL SESSIONS**

Panel I: "Judicial Interpretation in Comparative Perspective"

Venue: SOS B11
Chair: Valentina Rita Scotti
Speakers:

- Arina Kostina: *Consistency in the Interpretation of the Constitutional Norm*
- John J. Magyar: *English and American Textualism*
- Nazim Ziyadov: *Comparing Judicial Interpretation Techniques of the Russian Constitutional Court with Its Foreign Counterparts: Judgment of 14 July 2015, No21- П – Misinterpretation of International and Comparative Law?*
- Luigi Lonardo: *The Political Question Doctrine for EU Foreign Affairs Law*

Panel II: "State Regulation of Social Relationships and Identities: New Comparative Insights on Its Gendered Dimensions"

Venue: SOS B21
Chair: Zeynep Elibol Brönneke
Speakers:

- Thiago Amparo: *"Zika epidemic and Regulation of Women's Bodies in Latin America: a Solid Ground for Legal Change?"*
- Daniela Alaattinoğlu: *"Framing Violations in the Nordic Welfare State: Involuntary Sterilization and Castration, Rights and Responsibility"*
- Stefano Osella: *"Legal Gender Classification and the Disciplinary Creation of the Gendered Subject in the Italian Constitutional Jurisprudence"*

Panel III: "Courts and Flows in Institutional Design"

Venue: SOS B08
Chair: Saadet Yüksel
Speakers:

- Pablo Echeverri: *The 2015 Power-Balacing Reform in Colombia: A Missed Opportunity to Disrupt the Ecosystem of Structural in the Halls of Justice*
- Muhammad Reza Winata: *Relations Trend between Constitutional Court and Lawmaker in Indonesia: Legislative Overrides Constitutional Review Decision*
- Shams El Din El Hajjai - *Judicial Accountability in Egypt*
- Riccardo de Caria: *Interest Representation Before Courts: A Comparative Analysis*

Panel IV: "Contract Law from a Comparative Perspective"

Venue: SOS B16
Chair: Işık Önay
Speakers:

- Francisco de Elizalde: *The sources and effects of contractual terms. Towards an approximation of Common Law and Civil Law*
- Dimitar Stoyanov: *The Contractual Prohibition of Assignment of Receivables in a Comparative Perspective*
- Aysha Jessica Beavers: *The Apparent Agency: A Comparison Between Italian and Chinese Solutions*
- Sanne Jansen: *Consumer Sales Remedies: Hierarchy and Self-Help*

12:30 – 13:30 ***Lunch***

13:30 – 14:50 **PARALLEL SESSIONS**

Panel I: "Judicialization of Social Rights, Global Public Goods and Sustainable Development"

Venue: SOS B07
Chair: Bertil Emrah Oder
Speakers:

- Serkan Yolcu: *Enhancing of Judicial Protection: A Comparative Study of Monitoring in Constitutional Adjudication of Social Rights*
- Dustin Klaudt: *Can a 'Living Tree' Constitution Remedy Climate Change? A Review of Foreign Climate Litigation and the Potential to Seed Climate Justice with Canadian Litigation*
- Feyzan Özbay: *An Illustration of the Challenges to the Application of Environmental Constitutionalism in Turkey: Mehmet Kurt Case*

Panel II: “Issues on Regulation and Tax Law”,

Venue: SOS B16

Chair: Zehra G. Kavame - Eroglu

Speakers:

- Asim Jusic: *Technologizing Financial Regulation: FinTech, RegTech, and the International Anti-Money Laundering Standards and Regulatory Regimes*
- Chuanman You: *A Comparative Study of Recent Development of FinTech Regulations in China*
- Ezgi Arık: *Protection of the Tax Payers’ Rights during the Tax Audits: Impartiality within the Scope of the Proportionality Principle*

Panel III: “The International Criminal Court: Entrenching Legal Authority in the Midst of Conflicting Norms”

Venue: SOS B21

Chair: Zeynep Elibol Brönneke

Speakers:

- Alexander Skander Galand: *“Is it time for the International Criminal Court to adopt the foreseeability test?”*
- Dorothy Makaza: *“African States and ICL; Re-thinking the Narrative and Contextualising the Discourse”*
- Marina Aksenova: *“Sentencing Perpetrators of Atrocities in Colombia: Where International and Domestic Values Converge”*

Panel IV: “Competition Law Around the World”

Chair: Zeynep Ayata

Venue: SOS B11

Speakers:

- Payam Ahmadi Rouzbahani: *Archaic Concepts of Competition Law under Islamic Rule; a Comparative Perspective on the Origins of Ḥīsbah*
- Ayşe Gizem Yaşar: *Article 9(3) in Turkish Competition Law - A Discussion on Due Process Issues in Antitrust Proceedings*

14:50: 15:10 ***Coffee Break***

15:10 – 16:30 **PARALLEL SESSIONS**

Panel I: "Big Data, Big Problems"

Venue: SOS B11

Chair: Yasin Alperen Karaşahin

Speakers:

- Nafiye Yücedağ: *Data Protection Concerns in Cyberspace: Making Data Available to the Public by its Subject*
- Yıldız Sekban: *Striking the Balance between Big Data and Privacy: A Comparative Perspective*
- Elena Falletti: *Could wearable technology transform the traditional concept of habeas corpus?*

Panel II: "Historical and Cultural Challenges in Legal Frameworks"

Venue: SOS B16

Chair: Yiğit Sayın

Speakers:

- Chiara Correndo: *Cognitive Mistakes in the Colonial Works about the Indian Village Institution and Their Impact on the Independent India Governmental Policies*
- Elisa Bertolini: *The Western Constitutional Thought in the Shaping of the Role of the Japanese Emperor in the 1889 and 1946 Constitutions*
- Julie Rocheton: *An endeavor to find the 19th century United-States Civil Codes project*

Panel III: "International Crimes Tribunals of Bangladesh Through the Prism of Comparative Law"

Chair: Işık Önay

Venue: SOS B21

Speakers:

- Rayhan Rashid: *Prescription versus Obligation to Import Foreign Norms: The Case of the International Crimes Tribunals of Bangladesh*
- Bahzad H. Joarder: *Prosecuting Crimes Against Humanity at the International Crimes Tribunals of Bangladesh*
- M Sanjeeb Hossain: *Trials in absentia at the International Crimes Tribunals of Bangladesh: Jurisprudence and Commentary*

Panel IV: “Protecting Knowledge and Creativity”

Venue: SOS B07
Chair: Zeynep Ayata
Speakers:

- Andrea Borroni: *Protecting Recipes?*
- Giovanna Carugno*: Copyright Protection and Choreographies: New Issues, Old Solutions?*
- Marco Seghesio: *The Protection of Traditional Knowledge in a Globalized World*

16:30-17:15 **CLOSING CEREMONY –** *Founders’ Hall*

Presentation of Awards & Closing Speeches

DEPARTURE FROM CAMPUS *(Shuttles will be available back to the Hotel & Metro Station***)**	**17:30**

China's Green Credit Reforms: Creditor Monitoring & Environmental Transparency

Virginia Harper Ho

University of Kansas

Building on initiatives first adopted in the mid-2000s, the Chinese government introduced next-generation green finance policies in 2015 and 2016 that appear to give financial institutions and capital markets an even bigger role in promoting China's green development agenda. This paper examines one dimension of China's green finance framework – green credit – and considers the potential for creditor monitoring to drive greater transparency within China's capital markets around borrowers' environmental risk and performance.

Environmental transparency has several dimensions. At a minimum, the creation of green financial markets requires recognized standards for "green" financial products and environmental performance, as well as mechanisms for regulators and financial institutions to evaluate whether those standards are achieved. Beyond this sort of baseline "internal" transparency, pricing green securities in the capital markets so that capital can be allocated on the basis of "green" criteria will ultimately require a greater degree of external or public transparency. However, research on China's earlier green finance policies has identified significant gaps and deficiencies in the environmental transparency of financial institutions and firms.

Because much of the research and policy leadership on "environmental, social, and governance" (ESG) transparency has emerged from shareholder-centric jurisdictions, such as the United States and the U.K., considerable attention has focused on the impact of shareholders and consumers as drivers of corporate transparency, financial performance, and sustainability outcomes. However, corporate finance theory suggests that creditor monitoring may play an even more important role in driving managerial accountability, particularly in jurisdictions like China where equity is a relatively small source of capital for most firms and creditors' influence is therefore much stronger. Accordingly, green credit could play an important role in overcoming the recognized deficiencies of environmental risk monitoring and disclosure and in motivating firms and investors to pay greater attention to environmental risks and growth drivers.

This Article draws on an analysis of the annual reports and sustainability reports of twelve publicly traded Chinese banks to assess the extent to which Chinese financial institutions, as green credit lenders, have

the incentives and capacity to improve the quality of environmental information available to the capital markets by identifying and monitoring environmental risk. These public sources of information on financial

institution policies and practice shed light on financial institutions' current ability to promote better internal transparency — the quality of environmental information provided to financial institutions for purposes of making an initial credit determination and throughout the life of the obligation. This analysis also provides an indication of another type of internal transparency — the quality of information bank regulators and other administrative agencies may obtain about financial institutions' own environmental performance, the quality of their environmental risk management systems, and the effectiveness of green credit policy implementation at a macro level. Although sources relied on here cannot directly illuminate how and whether creditor monitoring impacts clients' environmental risk management and disclosure, the state of financial institutions' monitoring capacity is an important precondition for their ability to influence debtors' own environmental risk management and disclosure. This Article also provides some preliminary quantitative evidence of the scale of green credit and the factors that might influence financial institutions' ability to monitor the firms and projects they fund, offering a foundation for future research.

In brief, this study finds evidence of substantial progress in capacity building and in the level of green credit lending by Chinese commercial banks. However, current public reporting evidences a lack of consistency and transparency regarding the identification of lending as "green," and suggests that banks do not yet view environmental and social credit risk as material to their operations. This study also identifies a number of concerns regarding the sources of information on environmental impacts or compliance that banks draw on to make credit risk assessments. It also concludes that while some of the obstacles to the implementation of green credit reform derive from China's unique institutional context, others are common to green finance initiatives generally. However, China's early policy reforms in green finance may, even if imperfect, still motivate greater transparency around environmental risk by financial institutions and their clients.

The Remarkable Story of SPACS Between A Legal Standardised Regulation and A Standardisation By Market Practices

Daniele D'Alvia

Birkbeck University of London

Special Purpose Acquisition Companies ('SPACs') are a new phenomenon in financial markets and the academic literature on the topic is still scant. In addition, SPACs are usually considered as a high-risk investment vehicle because they are the direct descendants of blank check companies that dominated the American Penny Stock Market in the 1980s. Blank check companies were investment vehicles that did not possess records of a previous financial history or assets. In other words, they could be defined in general terms as cash-shell companies. The main objective of a blank check company was to be listed on the market in order to complete a business combination and generate profits for its shareholders.

Nonetheless, the risk of fraud in the Penny Stock Market, and the common use of blank check companies to perpetrate such frauds against investors influenced the U.S. Securities and Exchange Commission ('SEC') to enact different rules in order to impose restrictions and disclosure duties to blank check companies. The SEC adopted the Rule 419 by which blank check companies were compelled to fulfil different regulatory provisions.

Following the sharp fall of blank check offerings due to the imposed strict regulation, a new phoenix arose from the ashes with the name of Special Purpose Acquisition Company. SPACs were exempted from the application of Rule 419 because they started to issue securities through initial public offerings, which did not fit into the definition of penny stocks. However, they voluntary complied with Rule 419. This self-imposed regulation could represent an instance of indirect soft law approach that lasted until 2008. Indeed, since 2008 the U.S. has implemented a possible 'SPAC-friendly' approach. To this end, new listing rule of the NYSE and NASDAQ – approved by the SEC in 2008 – promote the listing of SPACs pursuant to the regulatory provisions set forth in Rule 419.

Nonetheless, in the same fashion of blank check companies, SPACs are a particular form of cash-shell companies that do not possess records of a previous financial history. So it could be argued that investors could not possess enough information to assess investment risk. Indeed, the managers of the SPAC are the only 'asset' that could be of importance in this regard, because the decision to perform a business

combination and its success (*i.e.* the future cash-flows deriving from the acquisition) depends only on the competencies of the board of directors. It is the well-known agency costs problem between insiders of the firm, namely the management, and outsiders of the firm, *i.e.* investors. In particular, information asymmetry is very likely to rise during the initial public offering ('IPO') of a SPAC, and the reputational issue of management becomes crucial. Therefore, information asymmetry issues could affect the behaviour of agents by virtue of what is known as agency theory leading to moral hazard concerns. In other words, the economic issues at stake still persist, and the risk that managers will act differently during and after the IPO remains high.

For these reasons, the paper mainly aims to identify a policy intervention in relation to SPACs capable of mitigating the economic issues at stake, namely information asymmetry, agency costs and moral hazard. To this end, the main research question is connected to international financial regulation techniques. Nowadays from a comparative point of view it seems that the securities regulation of SPACs is either standardised by the law[1] or by a codification/reception of market practices that has been implemented through hard law as well as soft law listing requirement regulation[2]. After this comparative study the paper aims to consolidate and outline the limits, perspective and benefits of these different regulatory approaches in relation to the SPAC phenomenon, and to identify the most suitable regulators that should be in charge of the implementation of such policies (*i.e.* State, governmental agencies or exchanges). Indeed, the specific economic and legal features of SPACs constitutes a challenge to a classic 'by law approach' operated by the State.

[1] For instance, Korea is the only legal system that provides investors with a legal framework for the listing of SPACs on the Korean Exchange.

[2] For instance, the U.S. listing requirements of Exchanges such as the NYSE and the NASDAQ as well as the soft law listing requirements of Bursa Malaysia and Toronto Stock Exchange.

The Mandatory Bid Rule: Comparative Analysis of Turkish, European Union and English Laws

Emek Toraman Çolgar

Koç University

The mandatory bid rule (MBR) puts anyone who obtains effective control over a listed company under the obligation to make a general offer to all remaining shareholders of the target, to acquire the residual shares. This rule provides an "exit right" for the minority shareholders by offering them an opportunity to leave the company at a "fair price", after it has been taken over. Therefore, the principal purpose behind the mandatory bid rule is deemed to be the promotion of minority shareholders' rights.

MBR was first implemented in the UK, soon after the adoption of the City Code in 1972. On a European level, "Pennington Report", dated 1974, can be seen as a first attempt to harmonise company law throughout the European Union. The report was strongly modelled on the City Code and also suggested the obligatory introduction of mandatory bid rule on the European level. However, after years of long discussions, member states finally agreed on the adoption of a Takeover Directive[1] in 2004 with the most controversial points "watered down". In Turkish law MBR was first introduced in the article 17 of the Communiqué Serial IV-8[2]. The said Communiqué was amended in 1996 and 2003 and abolished with the article 19 of the Communiqué Serial IV-44[3]. Finally after the new Capital Markets Law[4] (CML) came into force, the MBR was more broadly amended in the articles 25 and 26 of the CML and the Communiqué Serial II- 26.1[5].

Since MBR is one of the most controversial rules accepted in order to protect minority shareholders, it is not unexpected that the rule was amended so many times since it was first accepted. There is an ongoing debate whether this rule is efficient at all. Therefore, this study firstly conducts an economic analysis of the rule and discusses the views supporting and opposing the rule. Then, the study focuses on Turkish, European Union and English jurisdictions to emphasize the main characteristics of the mandatory bid rule.

Since, MBR applies in cases where the bidder has gained control of the target company, firstly the threshold

[1] Directive 2004/25/EC on takeover bids (OJ L 142/12, 30.04.2004) (the "Takeover Directive" or "Directive").

[2] See 09.03.1994 dated and 21872 numbered Official Gazette.

[3] See 02.09.2009 dated and 27337 numbered Official Gazette.

[4] See 30.12.2012 dated and 28513 numbered Official Gazette.

[5] See 27.02.2015 dated nd 29280 numbered Official Gazette.

that triggers the MBR has to be clarified. The price that must be offered to the remaining shareholders is another key element to provide equal opportunity. Most jurisdictions determine this price by reference to prior acquisitions of the bidder. This rule causes another debate whether the shareholders should share the control premium equally. After, having explained the terms of "change of control" and "fair price", the exemptions from the MBR and the situations where mandatory bid obligation do not arise will be examined in the three mentioned jurisdictions. Finally the legal consequences of breaching the rule will be discussed, with special emphasis on the claim of specific performance.

Judicial Protection of Rights and Liberties in State of Emergency: An Evaluation of the Turkish Constitutional Court's Past and Present Performance

Ali Ersoy Kontacı

Ankara University

A state of emergency is an exceptional constitutional/legal regime that is resorted to deal with extraordinary circumstances that pose a significant threat and an imminent danger to the existence of a political community and its institutions. Those threats may be as diverse as socio- political (such as domestic insurrections, terrorist attacks or international armed conflicts), economical (such as financial collapses and depressions) and natural (such as environmental disasters and epidemic outbreaks).

The most important legal consequence of a state of emergency is the departure from the established constitutional/legal order and a consequent transition to an exceptional constitutional/legal order whereby the governmental powers are exercised in an unusually expansive manner. Such transition may also include a suspension and/or relocation of several key functions of the legislative and the judiciary.

However, despite being a means of coping with perceived threats to the society, the state of emergency itself triggers some serious challenges to democratic theory. Indeed, liberal democracies derive their legitimacy, inter alia, from the promise that the fundamental rights and liberties are guaranteed by the constitution and that the independent judiciary protects those rights and liberties effectively. Therefore, questions regarding the legitimacy and the legality of responses to emergencies arise when governmental actions involve limiting people's freedom in liberal democracies.

Turkey has an unusually rich history of state of emergencies since the early 1990's. However, those state of emergencies have been declared in the south-eastern part of Turkey, where an armed struggle had been going on between the Turkish Security Forces and the PKK, a terrorist organisation fighting for the

independence of the Kurdish population, and thus they had little or no impact outside this region. However, soon after the attempted coup d'Etat on July 15th, 2016, the Council of Ministers, meeting under the chairpersonship of the President of the Republic, declared a state of emergency throughout the country, which was further extended by the Parliament. Arguably, the most important aspect of this emergency regime in Turkey is the authority of issuing "decrees having the force of law" by the executive. According to the Article 121 of the Turkish Constitution, "*...the Council of Ministers, meeting under the chairpersonship of the President of the Republic, may issue decrees having the force of law on matters necessitated by the state of emergency*".

What matters here most is the overarching scope of these decrees. Indeed, Article 15 of the Constitution stipulates that with those decrees; "...the exercise of fundamental rights and freedoms may be partially or entirely suspended, or measures derogating the guarantees embodied in the Constitution may be taken to the extent required by the exigencies of the situation, as long as obligations under international law are not violated".

This broad definition of authority given to the executive in emergency situations brings the critical question of "minimum rule of law" and "judicial control" on the table. Indeed, what differentiates a "democracy in state of emergency" from an "outright dictatorship" is the fact that in a state governed by the rule of law, a state of emergency is still a constitutionally defined and thus limited status.

The role of the judiciary in general and the Constitutional Court in particular becomes most important in this respect. In the past, the Turkish Constitutional Court had effectively limited the scope and impact of such decrees and had made a considerable contribution to the effectiveness of the rule of law in the Country. Nevertheless, in a very recent and notorious decision, The High Court seemed to have overruled its precedent and created a vacuum regarding the protection of rights and liberties during a state of emergency in Turkey.

This paper aims to present an evaluation of the Constitutional Court's past and present performance in this regard. Furthermore, those decisions will be put to test under the light of available data gathered from a comparative study of the good practices found in several modern democracies.

The Extraordinary Measures in Selected Countries: Legal Aspects

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The extraordinary measures in the Republic of Poland introduced in certain situations, if ordinary constitutional measures are inadequate. According to the Polish Constitution currently in Poland there are **three states**: the state of natural disaster, the state of emergency, and the martial law[1]. Separately should be discussed the state of war and a time of war, which can be related to the martial law, but it is not obligatory[2]. Although both the Constitution as well as three separate laws regulate them in detail, there are still difficulties in terms of legal interpretation and - importantly - to define and assign the appropriate individual cases, which of the states should be introduced.

It is also worth mentioning that the situation, which does not change or does not seek to change the essence of the organization can not be considered not only as a condition for the introduction of one of the states of extraordinary measure, but not even for the crisis. Otherwise, this situation is eg. in France, where, unfortunately, the recent practice could draw should look like the smooth introduction of the appropriate state of emergency.

According to the Constitution of the Republic of Poland, a state of natural disaster can be introduced in order to prevent the effects of natural disasters or technical failures and to remove them (art. 232). Statutory definition has been expanded to include the possibility of introducing a state of natural disaster, if these effects were caused by a terrorist attack or attack in cyberspace.

On the other hand, President can introduce a state of emergency in the event of threats to the constitutional

[1] Ustawa z dnia 18 kwietnia 2002 r. *o stanie klęski żywiołowej,* (Dz. U. z 2014, poz. 333, 915), ustawa z dnia 21 czerwca 2002 r. *o stanie wyjątkowym,* (Dz. U. z 2014 r. poz. 1191) oraz ustawa z dnia 29 sierpnia 2002 r. *o stanie wojennym i kompetencjach Naczelnego Dowódcy Sił Zbrojnych oraz jego podległości konstytucyjnym organom Rzeczypospolitej Polskiej* (Dz. U. z 2015 r., poz. 529).

[2] M. Kołodziejczak, *Różnica pojęć: wojna, konflikt zbrojny, kryzys, zagrożenie występujących w naukach o bezpieczeństwie – ujęcie prawne*, [w:] *Zagrożenia bezpieczeństwa narodowego Rzeczypospolitej Polskiej w XXI wieku. Pojecie, zakres i kwalifikacja*, pod. red. W. Sójka, M. Kołodziejczak, Wyd. AON, Warszawa 2016.

order of the state, public safety or public order (art. 230). Just as in the state of natural disasters, statutory definition allows to enter a state of emergency, if these situations are caused by a terrorist attack. Martial law to be introduced in the case of external threats to the state, an armed attack on the territory of Poland or when an international agreement the results of commitment to the common defense against aggression (art.229).

The laws are defined key terms "external threat", and given reasons for entering specific conditions. According to the author, these definitions provide too much detail evidence, creating a closed list, which in the face of recent events related to the terrorist attacks appears to be inadequate. The legislator did not also referred to the cases where would be entered all states. Above all, however, it is difficult to distinguish, that state would be appropriate at a terrorist attack. What seems interesting, the paper will be presented hypothetical situations and examples of solutions and an indication of the inability of their application to existing legislation.

In this article author would like to present the issues associated with each of the states of emergency: their essence and definition, the risks that may lead to the introduction of a specific state. It will discuss the procedure of entry, powers of public authorities in their duration, as well as restrictions on the rights of man and citizen, which may occur in a given state. Due to the value of the comparative method, the author would like to introduce rules for an emergency occurring in selected European countries. States of emergency will be presented in the context of security - on the one hand, the citizens themselves, on the other - the state.

Thus, the conclusions of the research will include analysis of existing legislation in Poland regarding states of emergency, and descriptions of the solutions above matter in selected European countries and include recommendations for changes in the status quo.

The Unconstitutional "Semi-Presidentialism" in France and Turkey: How Do Popular Consent Enable Presidents to Abuse Power?

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When Maurice Duverger wrote his article[1] on semi-presidential systems, he was aiming to defy the binary approach stuck between presidential and parliamentary form of government. However, the category and its definition are still contested. Despite the debate around the concept, France remains an archetype to this form of government for majority of scholars. When Duverger classified France as an example of semi-presidential government and a country with all-powerful presidency, he pointed out merely four cases of unconstitutional use of powers and concluded thatthe consent of Prime Ministers enabled the transfer of powers to the President. Yet, asthe French cohabitation experience proved, Article 21 of the Constitution statesclearly that the head of government is not the President of Republic but the Prime Minister and the consent of Prime Minister does not clear the unconstitutional nature of this transfer of power. The French experience of semi-presidentialism is a particular example to compare with Turkey in this sense, as Turkey's current President is the first President that has been popularly elected, and de facto transfer of Prime Minister's powers to the President is a gradual and continuing phenomenon within the system. I argue that implementing a popularly elected president to aconstitution originally designed for a rationalized parliamentary regime creates a risk regarding the abuse of presidential power. To this aim, the transformation of Turkish and French systems will be analyzed not only in a strictly legal perspective but also within the historical and political circumstances surrounding the election of firstpopularly elected Presidents.

In Part I, the parliamentary origins of French and Turkish systems is compared, as both systems were not originally designed with a popularly elected headof state. In order to understand the implications of this origin, this part focuses on a rule preserved by these two Constitutions: the counter signature. Counter

[1] Maurice Duverger, 'A New Political System Model: Semi-Presidential Government'(1980) 8 European Journal of Political Research 165

signature, which is usually perceived as a mechanism transferring the focus of the power from the head of state, to the Prime Minister and the cabinet in parliamentary regimes, is preserved in both of these Constitutions while several exceptions are made. The aimof this mechanism and its efficacy is discussed while pointing out the major loophole in Turkish Constitution that enables the rise of presidential power: the absence of a clear regulation stating the exception to the counter signature rule.

Part II focuses on the question of popular consent to this shift of power despitethe clear constitutional rules by analyzing the historical and political context. To treat this problem, two major turning points in French and Turkish political history will be addressed: referenda on the constitutional amendments regarding the popular election of President and the first renewal of parliamentary elections by Presidents. The circumstantial similarities in which these votes have taken place are striking. The discourse for abolishing an old and malfunctioning parliamentary regime was abundant as well as the image of a charismatic leader surpassing the attacks against himself and the democracy: attack of Petit-Clamart and Algerian military coup for De Gaulle; the Turkish military memorandum in 2007 and terrorist attacks shaking Turkey since June 2015 for Erdogan.

In Part III, I explain how and why Prime Ministers relinquish their constitutional power in favor of the President mainly by focusing on the nomination and so-called revocation of Prime Minister in Turkey and France as well as a main difference between two countries: the presidency of the Council of Ministers. I try to demonstrate that this transformation undermines the constitutional guaranteesregarding the liability of executive, as these constitutions are designed for rationalizedparliamentary regimes with non-liable heads of state having important but limited powers as a guarantor of the Constitution.

Finally, to illustrate my claim more precisely, I briefly compare how executivepower is shared between Prime Minister and President in Portugal in the final part. Differently from Turkish and French examples, Portuguese constitution was not amended, it originally embodies a popularly elected head of state and it possesses different, possibly larger, constitutional powers. Yet, parliamentary regime mechanisms work better in Portuguese system as latest coalition government proves.

Constitutional Review as Leveler of the Differences Between Common Law and Civil Law

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For many observers, Brexit came as a surprise. It was assumed that a majority of the British voters would vote to remain in the European Union. Observers thought that the Britons would be rational and reasonable but history turned out differently. For those who are active in the field of European Studies, this might not come as a surprise. The democratic deficit of the EU has always been an important topic in this field of study. However, within this context hardly any attention has been given to the influence of the come into being of a supranational legal order on the balance of power between the lawmaker and the judiciary. For example, if we look to the work of the German philosopher Jürgen Habermas, it is surprising that although he developed theories on both the position of the judiciary in democratic societies and on the democratic deficit in the European Union, he did not connect these two topics. Habermas did not investigate whether the European Court of Justice (ECJ) and the national courts when they make judgments in the context of EU-law, have an impact on the democratic deficit in the EU. This is regrettable since the ECJ has had u huge influence on the way the EU has been constructed. Interestingly, the EU is not the only international organization or treaty that is contested in the democratic arena. Similar criticisms, although less pronounced, were addressed to the European Court of Human Rights and free trade agreements, as the recent elections in the US and the troubles regarding the ratification of the CETA agreement between the EU and Canada illustrated.

This evolution raises the question as to how international law and supranational organizations in particular can influence the balance of power between the judiciary and the lawmaker in democratic societies. This contribution will elaborate on how the institutional setting of supranational legal orders changes the balance of power between the judiciary and the lawmaker and how this might be reconciled with different notions of democracy. The contribution will do so mainly from a theoretical perspective. It will however take into account notions of supranationalism and federalism and will draw upon reflections on the functioning of the European Union and the European Court of Human Rights. In particular, this contribution will pay

attention to the influence of this evolution on the forming of private law in continental European legal systems. In this context, the hypothesis is developed that due to the influence of for example human rights, civil law systems more and more develop an approach that is in line with common law.

The Effect of the Perception of The Authority of International Law on Passing the 'Object and Purpose Test' – A Comparative Analysis of The ICCPR Reservations of Turkey and France

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Reservations to human rights conventions have long been the subject of harsh criticism due to the inadequacy of the reservations regime of the 1969 Vienna Convention on the Law of Treaties (VCLT) with respect to normative treaties and the perception of reservations as a leeway to disregard treaty obligations. Indeed, the VCLT regime fails to establish a "strong authority relationship" between international law and national authorities. Article 19 stipulates that a state cannot formulate a reservation incompatible with the object and purpose of a treaty, but does not provide an ante hoc mechanism to determine incompatibility. The absence of such mechanism signifies a weak duty structure, leaving compatibility assessments to reserving states and other state parties. Depending on how the compatibility test is applied, a reservation may well mean that the state is taking its treaty obligations seriously and trying to implement the treaty to the extent of its domestic capabilities, or that it is aiming to subordinate its international obligations to its domestic law, rather than bringing its law into conformity with international standards. While Turkey's reservation to Article 27 of the International Covenant on Civil and Political Rights (ICCPR) is criticized for being a subordination reservation and failing the object and purpose test, France's reservation to the same Article is deemed justified, and Turkey points to the French reservation as an excuse to keep its reservation. Is this a legitimate excuse? Could it be that Turkey's reservation fails the object and purpose test whereas France's passes it? How serious do these states take the object and purpose compatibility criteria? The paper provides a comparative analysis of the Turkish and French reservations to the ICCPR, and demonstrates how the key differences pertain to the countries' respective perceptions of the authority of international law.

Intentionality in the Observance of International Law: From Compliance to Obedience (Through Internalisation)

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In a little-known process of international law observance, international law-observing states rely on the assessment of the international law compliance practice of partner countries, in the context of their intergovernmental and private interstate dealings, to ensure their own full implementation of international and domestic law and policy. While states enjoy a margin of appreciation in the internalisation of international norms, their need to rely on the practice of another authority drives law-observing states to analyse the 'deep structures' of a country's institutional practice to detect and avoid giving effect to non-corresponding interpretations and applications of international law norms. The paper draws on the study of syntax and grammar to reveal the rules and laws that can provide further insight on the varied forms of state compliance with international law, and the ways in which other states analyse and determine the adequacy of the use of international law as a language among states. The paper discusses the coordinates for such measures of diligent observance of international law by states and their activation of domestic law-based obligations of abstention from recognising as lawful, internationally unlawful acts and facts. The compliance dynamics of internalised international law are the drivers of as yet underexplored processes of peer enforcement of international law.

Observing the depths of (non-)compliance with ECtHR judgments: The cases of Moldova and Lithuania

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The complexity of measuring compliance with the judgments of the European Court of Human Rights (ECtHR) is a function of the different measures states are required to undertake as part of the remedies prescribed by the Convention and the Court. The paper contributes to the analysis of the implementation of the general measures of human rights judgements within the European Human Rights system by looking at the extent to which Moldova and Lithuania have been responsive to the general measures required by the judgments of the ECtHR. It compares how two post-soviet states have sought to prevent repetition of violations on the right to liberty, and assesses the nature and quality of these response measures by examining compliance from three different perspectives: judicial, executive and administrative. It interrogates the content of the obligation of compliance under the European system and examines the factors contributing to compliance, before providing observations on the degree of compliance by Moldova and Lithuania with human rights judgments. The paper aims to understand the extent to which Moldova and Lithuania are willing to implement the general measures of the ECtHR's judgments by classifying states' modes of compliance in one of these categories: full compliance, partial compliance and non-compliance. The paper concludes by reflecting on the standing states have vis-a-vis regional judicial authorities, and the influence the latter can wield over different state authorities.

Testing the Adequacy of Home-Grown Norms: The Notion of 'Indirect Discrimination' before the UN Human Rights Treaty Bodies

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The paper analyses the emergence and development of the notion of 'indirect discrimination' as a case-in-point for the interpretative practice of state authorities and the loopback effect that such norm-making developments have on international law, as reflected in the UN treaty body jurisprudence. The paper adopts a comparative approach to the judicial practice of the United States, Canada, European Union and European Court of Human Rights to analyze different approaches to indirect discrimination. It observes how this legal transplant has been received and perceived at the international level by the UN human rights treaty bodies by looking at their views on individual complaints, general comments/recommendations, and concluding observations. It argues that although such quasi-judicial bodies have not developed an original interpretation of indirect discrimination, they apply the concept in a broader sense - particular in their concluding observations- as approximating to systemic or structural discrimination. The reception of this home-grown notion reflects both on the continuing role of states in the development of international law, and norm-making, as well as on the role of international bodies in shaping the obligations of the state.

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EU New Approach to Customer Protection in the Insurance Market: The Example of "Product Governance"

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The purpose of this paper is to illustrate the recent development of costumers' protection in the European and national legislations with reference to the insurance market. Following the regulation in the capital market, the new European directive (UE) 2016/97 (so called IDD) introduces the so called "product governance" in the European regulation and, through it, also in the national systems.

The European capital market firstly renewed the prudential regulations for investment firms, secondly it strengthened investors' protection within the retail market. In the same way, the insurance market has just renewed insurers' prudential regime through Solvency II and now it is introducing a new way to protect customers through product governance.

Formally, the notion of "product governance" has been introduced for the first time for investment firms and financial markets by MiFID II Directive (UE) 2014/65 and MiFIR Regulation (UE) 2014/600 and it is used to indicate product approval arrangements, specifically requirements and activities that should be fulfilled by "manufactures of products". Identifying a "target market" for each product and developing products that can insure customers' best interest are the strategic objectives.

In the same way, the insurance market is facing a change in the customer protection from an approach based on information transparency and rules of conduct for insurance undertakings and intermediaries to a more complete approach also based on product governance. That means that manufactures should fulfill a process for the approval of each insurance product in order to design suitable products to an identified target market.

The analysis is organized as follows: a first part will provide a description of the meaning of product governance and a description of the regulations at European level. Then the paper will focus on the new rule of conduct for manufactures, represented by the duty of product governance: purpose of the rule -

applied in all the stages of the life-cycle of products, from the ideation of the product to the distribution of the product itself- is to achieve the customer's best interest.

The reconstruction of this trend will be completed with mention to circulations of models and solutions at the European level: it is interesting to note that not only this new insurance regulation on product governance comes, as it often happens, from the regulation of financial markets, but it is also interesting to note that, a few years earlier, national regulators have already started to change the perceptions of the best way to protect the interests of customers. and to think at the process of approval of the product as a way to solve problems in the customer's protection. As an example, the UK FCA and Italian Regulator (CONSOB) started, from the crisis era, to think how to overcome limits to customer's protection and to give a new perspective in the consumer's protection, outlining first forms of product governance.

Then the paper will try to consider this anticipation of the customer's protection as a correction to the last trends characterized by market' transparency in favor of a more protective approach to the retail market. As is common knowledge, for a long time customers' protection relied on information: due to asymmetric information between insurance undertakings/ intermediaries and customers, information disclosure in insurance relationship has long been the way for costumers to obtain all the information in order to make a more informed decision. However the financial crisis showed limits to this approach and the product governance approval, broaden customer's protection from the sale to the design of the product itself, is the current European answer to the lack in the customer's protection itself. So manufacturers have to take into consideration how to create appropriate products to the needs of an identified target market. Furthermore all relevant risks to such identified target market should be assessed, before the product is marketed.

To reinforce retail market's protection, product governance gives close attention to the identification of the potential target market and to the design and the development of products so that sale and distribution of products potentially in contrast with the clients' best interest are discouraged.

Smart Containers and Their Possible Effects in Transport Law: A Comparative Study Between English Law and Turkish Law

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The use of containers in transportation began in the mid-1950s, and today, 90% of the world's cargo is transported via containers.[1] The container revolution triggered the emergence of multimodal carriage, and ever since the mid-1950s multimodal carriage has increased dramatically.[2] Containerization and multimodal carriage brought along some legal issues such as, damage localization, liability and security issues, therefore in order to keep up with technological developments some new rules were created in transport law.[3]

However, recent developments in technology have brought the shipping industry into a new era: the era of smart containers. A container would be deemed as a smart container if it provides information regarding the location of the cargo in real-time, and contains e-seal that reports unauthorized access and some sensors which monitor the conditions inside the container, such as temperature, humidity, motion, tilt, light, vibration and so forth.[4] In addition to the abovementioned information, a smart container may provide information on the contents of the container, the time when the goods are stuffed, when the container is sealed, left its origin, loaded abroad the vessel, arrived the destination, unloaded from the vessel, who supervised loading/unloading the cargo, who is responsible for activating the smart container system and locking the doors, if it is programmed so.[5] All such information obtained by sensors located inside smart

[1] https://ec.europa.eu/jrc/en/research-topic/monitoring-container-traffic-and-analysing-risk accessed 27.12.2016

[2] 2 UN Doc., A/CN.9/WG.III/WP.29 paras 18, 25. For the statistics on the growth of container trade see http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx accessed 05.07.2015; D Bernhofen and others, 'Estimating the Effects of the Container Revolution on World Trade' (Feb 2013) CESifo Working Paper No. 4136 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2228625 accessed 05.07.2015.

[3] Such as uniform, network or modified liability system. Also, the Multimodal Convention 1980 and the Hamburg Rules were created to meet the needs of industry arisen after the container revolution.

[4] JR. Giermanski, 'Smart containers: their use, their payback' WCO News –No 60 (October 2009), 23.

[5] ibid 24.

containers is transmitted in real-time and so the competent authorities can interfere the conditions inside the containers if any changes occur. For example, if the temperature inside the container increases an alarm is sent to the competent authorities and with the help of remote controlling system the competent authorities can decrease the temperature. As it is seen, unlike normal containers, smart containers provide end-to-end visibility and comprehensive control over the goods during the carriage.

In the light of rapid developments in smart technology, it can be asserted that smart containers will be commonly used in global transportation soon enough. As happened after the container revolution, with the use of smart containers transport law will need to be updated in order to meet the needs of shipping industry. This paper estimates that there would be some changes in the following matters: a) rights, obligations and liability of the parties to the contract of carriage; b) position of the third parties, such as software developers; c) contract particulars inserted on the transport documents and their evidentiary effects; and d) insurance. This paper will tackle the abovementioned possible effects arisen out of the use of smart containers by adopting a comparative analysis to present how current rules under English law and Turkish law would react, and make some suggestions on the modification of those laws.

A Comparative Analysis of Consumer Bankruptcy in Latin America

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Insolvency law has suffered a big turnaround. Originally, creditors could pay themselves with the assets and body of their debtor. Insolvency was a sort of felony, so the debtor had to be punished. Seizing the body of the debtor was satisfactory enough. Then, a distinction was made between individual traders and non-traders, allowing only the first to become bankrupt and to be released from liabilities for any existing debts upon surrendering their existing assets, even if their value wasn´t enough to repay existing debts. Such release is now known as "discharge". Together with the consolidation of discharge, notions of rehabilitation of the debtor started to develop, but it was until the 19th century that bankruptcy and discharge were made available to non-traders. Today, many countries have developed bankruptcy proceedings for individuals providing for a discharge, which usually differ from the proceedings available to traders, and are commonly known as "consumer insolvency proceedings". This paper will focus exclusively on the bankruptcy of non-trader individuals, also referred to as consumers. Several benefits arising from consumer bankruptcy or debt restructuring proceedings contemplating a discharge have been identified, such as, encouraging responsible lending, more accurate risk assessment, more efficient mechanisms for finding value, more equitable distribution of available value, and the creation of value by encouraging debtors to be productive and maximize returns as they know they will enjoy most of the value created. On January 2011, the World Bank conducted a survey involving 58 countries. Results showed that 21 out of 25 high-income countries regulated a consumer bankruptcy proceeding and 20 out of 25 regulated a consumer debt restructuring proceeding, while only 16 out 33 low or middle-income countries provided a proceeding of such nature. Moreover, 22 out of the 25 high-income countries surveyed contemplated a discharge for debtors. Findings show that consumer insolvency proceedings are becoming more and more popular in high-income countries. In the U.S.A. only from July to September 2015, 206,568 applications were filed. Consequently, some Latin American countries, such as, Peru, Colombia and Brazil have recently implemented consumer insolvency proceedings. The aim of this paper is to compare the characteristics attributed to such proceedings, and to analyze which factors may cause an increase in the number of filings.

Comparison is based on literature, governmental information and statistics. Findings, so far, show that filings for consumer insolvency proceedings in Latin American countries are much less in number, among other factors, due to the stigma of bankruptcy, lack of information, and more restrictive measures, such as, failing to regulate a debt restructuring mechanism.

The Law Applicable to the Non-Contractual Liability of the Producer Against Third Parties

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In today's global world with the flourish of cross-boundary trade, a great majority of the companies have involved in international production with the motivation of profit maximization. As an outcome of the industrial mass production led by global companies, it becomes very probable that a defect at a certain line of production might cause serious damages to a significant number of people across the globe.

Indeed, as disasters occurred that amounted even to fatal diseases due to the spread of defective products among societies, the issue of non-contractual liability of the producer against third parties and the determination of the law applicable to this issue with an international element became more important. Especially towards the conclusion of the industrialization movement, the prominent view among legal authorities began to evolve in such a way that for the benefit of the society, the general principle which requires the presence of negligence to hold the producer liable ceased to be sought as a condition to held the producer responsible for the defects of the products s/he manufactured.

Today, the European Union Council Directive no. 85/374 of 1985, adopted by all member states, aims at harmonizing the issue of liability of the producer for the damage caused by the defective products. On the other hand, under Turkish substantial law even though certain codification attempts were made during the integration process to the European Union in the context of consumer protection law with regard to the liability of the producer against consumers arising from defective products, such attempts are not considered sufficient among legal scholars.

Though very complex and stimulating the substantive law regulating the issue of the non-contractual liability of the producer against third parties shall not constitute the main focus of this study. The main concentration of this study, will be the elaboration of the conflict of laws rules in connection to the non-contractual liability of the producers against third parties in light of the Turkish Private International law,

European Union law and the Hague Convention on the Law Applicable to the Manufacturers' Responsibility.

The aforesaid Hague Convention dated 2 October 1973, introduces conflict of laws rules in the field of the liability of the producer. Accordingly, four different connecting points in various combinations might be applied namely: the principal place of business of the person claimed to be liable; the place of the habitual residence of the person directly suffering damage; the place where the product was acquired by the person directly suffering damage; the place where the damaged has occurred.

Under European Union law, Article 5 of the Regulation on the Law Applicable to Non-Contractual Obligations (No. 864/2007) stipulates a detailed conflict of laws rule applicable to the non-contractual liability of the producer against third parties arising out of damage caused by a product. The connection points stipulated under the said article, puts a special emphasis on the place of the marketing of the defective product.

Under Turkish law, Article 36 of the Turkish Code of Private International and Procedural Law regulates the aforementioned issue. Accordingly, the damaged party is given a right to designate between the law of the state of the habitual residence or work place of the damaging party or under a certain condition to the law of state where the product is acquired.

Determination of law applicable to the liability of the producer and the substantive content of the competent rules in this regard have a special significance in developing economies like Turkey. It is critical to find a balance that would not deter the producer from making investments in Turkey and to ensure that possible victims of product defects are being protected. Thus, two possible suggestions to the Turkish lawmaker might be a revision of Article 36 of Turkish Code of Private International and Procedural Law and a codification of a comprehensive act regulating the Turkish domestic law in the field of product liability in light of the aforesaid European Union Directives.

How Could Corporate Governance Contribute to the Development of the Economy in the MENA Region?

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The concept of corporate governance is relatively new in the MENA region. Serious actions were taken to enhance the concept of corporate governance in the MENA countries in the last 10 years, mainly the establishment of institutions that are competent with the development of corporate governance and the issuance of corporate governance codes. For instance, the Egyptian Institute of Directors, established in 2003 as the first institute focusing on corporate governance in the MENA region, has the main purpose of spreading awareness of corporate governance in Egypt and the MENA region. In addition, the Hawkama (the Institute for Corporate Governance) was established in the UAE in 2006 with the main purpose of guiding companies and regulators on the development of corporate governance. Most MENA countries have now issued specialized governance codes for companies, banks, SMEs, and others.

A question arises whether the actions taken in the MENA region are sufficient to enhance the concept of corporate governance. That is particularly relevant knowing that though the corporate governance codes issued are mandatory in some MENA countries such as the UAE, Oman, and Jordan, they are still voluntary in other countries such as Algeria, Egypt, Lebanon, Morocco, and Tunisia. Keeping codes voluntary raises a question regarding their seriousness and the willingness of stakeholders to accept a binding corporate governance code.

Another concern arises in connection with the entities addressed with the corporate governance codes in the MENA region. The corporate governance codes are mainly addressed to large companies within the regional capital markets and banks dealing with such companies. The MENA Region needs to move its focus of corporate governance beyond the area of listed companies and address corporate governance in connection with the rest of the market players such as micro finance institutions, private equity, and SMEs.

In particular, there is a huge trend in the MENA region toward the promotion of SMEs, which represent more than 80 percent of all businesses and employ 70 percent of private sector employees.

The unstable political situations in many of the MENA countries require legal reform on different levels to help develop the economy and attract foreign investors. One of the major aspects of this legal reform is the development of corporate governance schemes. This requires a deep analysis of the current situation of corporate governance in MENA countries, particularly those that suffer from political unrest. It also requires a detection of the deficiencies in the current rules regulating corporate governance in MENA countries.

Part I of this paper elaborates on the current situation in connection with corporate governance in MENA countries. Part II examines the most common areas of deficiency in the organization and practice of corporate governance in the MENA countries. Part III analyses the role of corporate governance in developing the economy in the MENA region, highlighting successful examples of companies/businesses making progress due to compliance with corporate governance rules. Finally, Part IV recommends how to overcome the obstacles meeting corporate governance in the MENA region.

One Size Doesn't Fit All: Business Ethics and Corporate Governance for the Sharing Economy

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Sharing economy is a business model that allows individuals to share goods, offer services, and access these through specifically designed online platforms. Sharing economy businesses operate in a variety of different fields, with the most popular examples being ride-sharing and house-rental companies such as Airbnb, Uber, and Lyft. The model emerged around the beginning of 2000s going hand in hand with developments in mobile technologies and has since become increasingly popular.

Mixing the personal with the professional, sharing economy businesses strive and usually manage to escape the regulatory grip on comparable non-sharing economy businesses that provide similar goods and services. Courts, regulators, competing businesses, and participants frequently raise concerns regarding public safety, privacy, and unfair competition. In some jurisdictions, these concerns result in outright prohibition or excessive regulation. Regulators have the difficult job of balancing two concerns: On the one hand, excessive regulation might hinder innovation and deprive many people of a service that they obviously find helpful. On the other hand, insufficient regulation might create health and safety risks or insulate businesses from liability.

This paper approaches the sharing economy from the perspective of business ethics and corporate governance. It seeks to do two things: First, establish that the stakeholder theory fits the sharing economy corporations better than pure shareholder primacy; and second, explain that this principle should be institutionalized through procedural corporate governance mechanisms. Drawing on the literature on self-regulation and meta-regulation, this paper aims to guide regulators and lawmakers dealing with sharing economy businesses to favor corporate governance rules and social accountability over strict regulation.

Part I presents the stakeholder theory and applies the relevant business ethics literature to the case of sharing economy to demonstrate its advantages for both stakeholders and businesses. The stakeholder theory, put forward by R. Edward Freeman claims that directors must focus on creating value for all groups of

stakeholders who may be affected by the actions of a particular firm, not only shareholders. A meticulous look at the characteristics of the sharing economy reveals that it calls for a more stakeholderoriented approach compared to other business models. The paper argues that a stakeholder approach to the sharing economy has both an empirical and a normative component: Empirically, it can be observed that the sharing economy can be characterized by very high involvement of stakeholder constituencies within the business. Normatively, it is ethically imperative that corporations take this fact into consideration when determining their policies.

Part II describes ways to implement a more stakeholder-friendly model within the firms through corporate governance mechanisms. Various jurisdictions already have rules that compel corporations, albeit to varying degrees, to include stakeholders into their decision-making. After a brief comparative analysis of these rules, the paper argues that the most efficient way for the sharing economy to be more responsive to stakeholder interests is through two procedural governance mechanisms, namely disclosure and consultation. Disclosure gives stakeholders right to information and enables them to make informed choices about participating in the sharing economy. This, in turn, makes sharing economy practices more sensitive to stakeholder concerns. Consultation, on the other hand, implies that corporations should have procedural requirements to be informed of stakeholder concerns. This opens the door for more dialogue and stakeholder participation. Consequently, stakeholders and regulators get to use public pressure as a control mechanism. There is empirical evidence that regulators take a more favorable stance towards corporations that are more responsive to stakeholder interests, allowing them to continue operations despite previous bans. This potentially paves the way for more innovation-friendly rules and regulations.

Buyout Remedy for Oppressed Minority Shareholders: Comparative Analysis of Turkish, Swiss and English Laws

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Shareholders in public companies representing at least ten per cent of the share capital are granted the right to request corporate dissolution for good causes under Article 531 of the Turkish Commercial Code No. 6102 ("TCC"). The provision, however, equips the court with a wide remedial discretion, such as ordering buyout of the claimant or adopting another appropriate solution, in lieu of corporate dissolution. Considering, inter alia, stakeholders' interests and traditional avoidance of judges in continental Europe from actively intervening in corporate affairs, it is anticipated that the buyout will be the most frequently adopted remedy by Turkish judges. Indeed this has already been signalled by the decisions of Turkish Court of Appeals since the TCC entered into force on 1 July 2012.

This paper conducts an economic analysis of the buyout remedy for oppressed minority shareholders under TCC Art. 531 with a comparative and functional approach. The study focuses on Turkish, Swiss and English jurisdictions. Since Turkish company law is heavily influenced by Swiss law in general, and more particularly, TCC Art. 531 is directly received from the Swiss Code of Obligations Art. 736/4, Swiss jurisdiction is inherently a point of reference for our research. Accommodating the historical roots of the buyout remedy, English law provides a dynamic case law and literature upon buyout orders within the 'unfair prejudice' mechanism enshrined in ss. 994-999 of the Companies Act 2006.

An order for buyout of the minority shares at a fair value is expected to operate as a put option conditional upon serious oppression. Hence the remedy is supposed to ex ante incentivize the majority towards respecting the minority's interests. However, we argue that the current provision is not designed so as to provide the expected incentives. In this regard we suggest that (i) the claimant has to be allowed to specify the remedy sought, rather than leaving the issue to the sole discretion of the court, (ii) the oppressive majority has to be the purchaser of the claimant's shares, (iii) the remedy to be adopted should correspond to the level of misconduct, while dissolution order should not be given in cases where there is a going-

concern value to protect, and finally, (iv) the valuation of the claimant's shares has to be made, in principle, on a going concern and pro rata basis.

Legal Profession of China in a Globalized World: Innovations and New Challenges

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It is already nearly seven years since the seminal piece of The Death of Big Law from Prof. Larry Ribstein,[1] was published. While the title is somehow "hyperbolical"[2], actually no one can deny that the so-called "Big Law" does face huge challenges in today's global marketplace.[3] Given the persistent need from the clients for increased efficiency, predictability, and cost effectiveness in the services they purchase from law firms, the dynamics of supply and demand have undergone profound long-term changes, indicating that the legal profession now lives in a buyer's market, at least in the US.[4] While this has certainly to do with the "fragile" business model of the Big Law intrinsically,[5] external market forces and new technological developments have also been playing an increasing role in making it even shakier. To give an idea: legal services have never been so commodified as today. Notarized wills are retailed at supermarkets,[6] and the required legal documentation for registering a new business can be completed online within minutes. Individuals and small and medium-sized enterprises ("SMEs") with no regular need for a fixed corporate legal counsel can access to lawyers by paying a cheap monthly subscription fee.[7] From the perspective of the general public, the access to justice and legal protection has never been made so simple, versatile and creative; but from the perspective of law firms, these rapidly emerging new business alternatives pose unprecedented challenges to the conventional model of pricing and billing of their legal service provision. And the issue is far from being just financial costs. On the flip side of the non-reversible trend of standardization, legal

[1] Larry E. Ribstein, The Death of Big Law, 2010(3) WISCONSIN LAW REVIEW 749 (2010).

[2] Aderant Holdings Inc., In Defense of Big Law's Future, BUSINESS IMPACT WHILE PAPER SERIES, Dec. 2013, http://www.aderant.com/wp-content/uploads/2015/08/In-Defense-of-Big-Laws-Future1.pdf, at 5.

[3] Id., at 2.

[4] Georgetown Law Center for Study of the Legal Profession & Peer Monitor, 2015 Report on the State of the Legal Market, available at: https://www.law.georgetown.edu/news/press-releases/georgetown-law-and-peer-monitorrelease- 2015-report-on-the-state-of-the-legal-market.cfm, at 15.

[5] Ribstein, supra note 1, at 759.

[6] For example, such services is offered in supermarkets like Walmart, Tesco, and HEMA.

[7] The most representative exemplar of such business is Legalzoom (www.legalzoom.com).

services have also become increasingly multi-disciplinary and transnational, calling for cross-border collaboration of practitioners across vastly different jurisdictions, and also key input from experts in areas such as accounting, finance, taxation, management and organizational studies. Against such background, pure "legal" services would run short of the sophistication needed by clients to justify the expensive premium they are paying for the fragile "reputational bond" of the Big Law.

Compared to other lines of business, lawyers maintain a highly confident relationship with their clients, bearing the fiduciary duty to act solely in the latter's interests. Because the knowledge of law and the provision of legal services are highly specialized expertise, there is natural information asymmetry between lawyers and clients. As such, lawyers are subject to the regulation of strict ethical codes, designed for the purposes of securing the clients' independent access to justice. One of the key implications of such regulation is the prevalent requirement of non-lawyer ownership in law firms, so that legal practitioners are free from the kind of pressure that the management of a corporation faces from their shareholders, and are thus able to maintain their independent professional decision-making power. The US, as the largest and most developed legal market in the world,[8] and continental Europe, most typically Germany,[9] still defend this school of thought. This prohibition on paper, however, has not been able to totally preclude innovative attempts from emerging. Although being highly debated, practices such as litigation financing, as well as the new generation of legal outsourcing and legal talents consultancy firms like Axiom[10] and Outside GC[11] have as a matter of fact gained considerable market share from traditional partnership-like law firms, yet without triggering the delicate nonlawyer ownership redline as they are not "law firms" per se. From the business operations perspective, this fact means that they can attract outside capital such as private equity investment, thus enabling them to further expand and compete with conventional firms on an even greater scale. In contrast, Australia has opened and the UK has reinforced a new and more entrepreneurial approach by confronting the real needs of clients and liberalizing their legal services regulation. From 2007, non-lawyers in the UK are able own up to 100% of a legal service provider under the regime of alternative business structures ("ABS").[12] Following the new wind, a number of common law countries soon jumped

[8] MODEL RULES OF PROF'L CONDUCT R. 5.4 (2013).

[9] Jakob Weberstaedt, English Alternative Business Structures and the European Single Market, 21 INTERNATIONAL JOURNAL OF LEGAL PROFESSION 103 (2014).

[10] https://www.axiom.com./

[11] https://www.outsidegc.com./

[12] Legal Service Act (2007), Part 5.

on the same boat and more are considering the same. Under the ABS regime, law firms are overserved to have issued shares to the public on stock exchanges, and embraced the concept of multi-disciplinary practice on a both broader and deeper level.

As the world's second largest economy, China's exponential growth has given rise to a great demand for corporate and business related legal services. The recent birth of the world's largest law firm (by the number of lawyers), namely, Dacheng-Dentons,[13] exemplifies how the ambitious Chinese legal practitioners have avidly responded to the demand. But there is definitely much more than that going on in this vast emerging legal market. For a country whose private legal profession was spun out of the state apparatus only less than 30 years ago, it is surprising to see how fast China's corporate law practice has been catching up with the innovative trend globally, benefiting from the Opening Door policy as well as the rapid technological advancements. While it is now the time to bring China also into the global discussion about the implications of the innovative business models on the long-term development of legal profession, it has to be noted that China is not just "another country" joining the panel. A unique feature of China is that its legal profession is constantly in the effort of (re)defining its autonomy vis-a-vis the powerful regulation and influence from the state and the Communist Party. Existing research on this topic has been largely focusing on this institutional feature. The analysis thereof, however, is still based on the conventional competitive landscape, leaving the burgeoning innovation in the legal profession out of the consideration. This is questionable, especially in the realm of corporate and business transactional practices where the state control is relatively remote while the forces of innovation are surely most observable if compared to, e.g., criminal and administrative law litigations. Along this line, this paper provides the very first state-of-the-art sketch of China's legal profession, in particular the latest innovative and alternative business models. On the basis of such depiction, it goes on by comparatively analyzing the Chinese experience against the current revolutionary trend sweeping the other major legal markets and discussing the potential implications thereof. It finds that, the latest developments in China's legal profession in general converge into the similar trends as seen elsewhere in the world, tilting the market towards the buyers' side. The current wave of massive mergers among Big Law on the one hand, and the deepened collaboration of Chinese law firms and their foreign counterparts on the other, are vivid examples of this finding. This said, there is still an acute demand for access to legal services when it comes to SMEs and the general public, whose legal needs are typically of small financial value and thus are not the targeted clientele of high-end service providers.

[13] http://www.dentons.com/en.aspx.

As such, it is argued that the new generation of Internet-based legal service portals such as Pocket Lawyer serve to provide an effective alternative to improve the access. Instead of being organized as traditional law firms, these sites are founded and financed by non-lawyers, and have rather adopted various creative business models which pose new challenges to China's restriction on non-lawyer ownership. In this vein, China makes a unique contribution into the broader discussion on alternative business structure in general.

The Modern Law of Sedition and Freedom of Speech and Expression in India with a Comparative Discussion on the State of Law in Malaysia, UK, USA

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"Affection cannot be manufactured or regulated by law."- Mahatma Gandhi Sedition Trial, 1922

In the Pre-Independence era, the role of British autocratic mind-set played a key role in stifling the Right of Freedom of Expression which led to mass arrests of Freedom Fighters and other Indian Politicians during the colonial rule. The British Colonial rule tried to dampen the voice of Indian Independence struggle by enacting a number of equivocal legislations and carrying out trials which they thought would curb the ongoing struggle and strengthen their stronghold in the country. British laws were a travesty in the Interest of Justice, Equity, Democratic principles and penalized activities of the Indian citizens who were going against the idea of despotic rule of the British. To serve their darker purpose, the British passed the punitive "Law of Sedition" in India vis-à-vis to the "Law of Sedition" as it existed in Britain. The law is embodied in Section 124A of the Indian Penal Code and can be found under Part IV defining "Of Offences Against the State".

Sedition Laws have existed in the modern society for as long as we can remember the concept of Government. Most of the common law Jurisdictions of the world throughout the history including India, Britain, USA, and Australia had laws enforcing the punishment against sedition and seditious libel. Though the law is becoming archaic and obsolete with the modern society which safeguards and guarantees the Fundamental Rights of the citizens, it still exists in common law countries like India. Furthermore, developed countries like New Zealand and Britain have already repealed the Sedition laws in late 2000's which clearly establishes the sort of tyrannical nature and scope of this law.

Fandom of the Law of sedition among the political regime of a large number of countries is clearly evident from the number of sedition trials that has been carried out in Iran, Saudi Arabia, Malaysia, India and Britain restricting the freedom of press, speech, expression and dissent. In a landmark judgment of

Handyside v. United Kingdom, it was held, "*Freedom of expression constitutes one of the essential foundations of a society, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population*." Though courts have laid down such principles a number of times the question still remains, why continue with a law which finds no consonance with the Freedom of Speech and Expression? A right so basic and natural that in ignorance of such right, the society would fall and the development of the mankind would cease.

With the advent of Globalization, Liberalization and Modernization of the social world, there is no place for such a law which is not more than a weapon for the malevolent political stalwarts and parties against the voice of the masses.

Cultural Rights, Digital Culture and Self-Regulation for 'Cyberians'

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There are three options usually mentioned regarding the governance of cyberspace: no regulation, government regulation and self-regulation. Each of these options has its own pros and cons. However, if cultural rights include digital culture, self-regulation will be the most appropriate option. Although the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) is mainly composed by three types of human rights: economic rights, social rights and cultural rights, cultural rights may be the most unvalued one. First, except the "package term" which repeats the three types of rights, the ICESCR only mentions cultural rights for everyone "to take part in cultural life" in Article 15(a). It merely reaffirms Article 27 of the 1948 Universal Declaration of Human Rights regarding cultural rights without further development. Second, until now, the applications of cultural rights are only for indigenous groups and the protection of cultural heritage without the extension. Such self-limiting practices are not only off-target the original aim ("all people and all peoples have culture, not merely certain categories or geographies of people", A/HRC/31/59, para. 8), but also make cultural rights irrelevant to general public. Although "culture" indicates the totality of human life, which may be too broad to easily become norms, it does not mean that international community should not try to do so. In fact, Human Rights Council encourages further development of cultural rights ("cultures are human constructs constantly subject to reinterpretation", A/HRC/31/59, para. 8). It also provides that "'everyone has the right freely to participate in the cultural life of the community,' which today must be understood to refer to the plural form 'communities' (A/HRC/14/36, para. 10)."

Digital culture is an example which not only can, but also should be included into cultural rights. If one considers cyberspace is merely a developed telephone, a tool only for communication, one may disagree with any development regarding cultural rights for interment users. However, if one admits that cyberspace is a virtual world and people can conceptually stay there, one must accept the existence of digital culture. If cultural rights are natural rights hold by any community, the "Cyberians", which refers to notional inhabitants of Cyberia, enjoy cultural rights for their digital community. As indigenous groups, the Cyberians are a group of people with different self-identity from mainstream society. Their minds partially connect to digital bodies, the so-called "avatar", on internet rather than physical bodies. Although present

technology cannot really separate mind and body, and the Cyberians cannot live on the internet full time, both object criterion and subject criterion can draw a line between the Cyberians and general people. On the one hand, the Cyberians stay on cyberspace longer than real life and some of them even use internet all the time except for sleeping. On the other hand, the Cyberians consider themselves are the inhabitants of Cyberia and hold different values.

Since it is hard to know where the limitation of technology is, and it is also hard to know whether or not people will have ability to upload consciousness in cyberspace one day, law makers still choose the most conservative option. They do not acknowledge "Cyberians" as a legal term and disagree with the *sui generis* cultural rights, not to mention the possibility of self-regulation. If one accepts that becoming a Cyberian is one's free will rather than morally wrong, there may be no reason to ignore the Cyberians' willing to be self-regulated. The Cyberians have different values from the people in the real world. For the Cyberians, the most important issues are the freedom of accessing and sharing digital resources and the protection of privacy. However, most contemporarily cyber regulations serve for governmental policies. Since the governmental policies usually reflect the interests of non-Cyberians instead of "cyber values" and "cyber standards", the interests of Cyberians are sacrificed in most cases. For those reasons, self-regulation is a better option as a compromise between the interests of governmental policies and the Cyberians.

This article applies the concept of cultural rights for digital cultures and questions the traditional cyber policies without any consideration of cyber cultural rights. Furthermore, this article criticizes that the interests of Cyberians are usually sacrificed by the external law for policy aims. From the consideration of the protection of cultural rights, the self-regulation approach is the most appropriate approach among the three commonly discussed options: no regulation, government regulation and self-regulation.

Using Technology for Making Governments More Accessible to People: The Comparison Between Successful and Unsuccessful Countries

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The “Freedom of the Press Act” in Sweden is recognized today as the first “freedom of information” law in history and it has been used as a model for similar laws in countries all over the world. Given that the spirit of this law is to prohibit the enforcers from secrecy. The paper sets out to examine in the over the world, not only it is customary to neglect free access to information law and ignore the spirit of the law but also many organizations and public bodies have got accustomed to working in secret and avoiding leaks, over the years. With reference to the legislation of the countries such as United States of America, Canada and Switzerland in this regard, it can be found that some electronic bodies can be established to quickly respond to citizens' questions about the release of information. On the other hand, we have taken a look at these laws and regulations we find that in some countries that basically do not have a commitment to public accountability and have caused trouble for performing electronic freedom access. According to The Electronic Freedom of Information Act Amendments of 1996 and similar regulations, the article concludes by proposing that using technology make documents more easily and widely available to the public.

When 'Full Compensation' Fails to Compensate Torts: Challenging Civil Law Jurisdictions through a Social Justice Perspective

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Tort laws in civil law jurisdictions generally adopt a limited interpretation of the *restitutio ad integrum* (restoration to the previous condition) principle when awarding damages. Any award exceeding the loss suffered by the victim is considered to be extra-compensatory and unlawful, since tort law's primary concern is to compensate the victim but not to punish the tortfeasor.

However, such a limited interpretation renders some social groups more open to tort risk and under-compensation than the rest of the society. This paper takes the case of Turkish tort law as an example and attempts to reveal the clear bias against certain disadvantaged social groups. In connection with this bias, the paper makes a normative analysis in the light of American tort law theory and suggests breaking the myth of "full compensation" in favor of "fair compensation". The dichotomy of full versus fair compensation as explained on the basis of the history of common law may lead tort laws in civil law jurisdictions to a more progressive compensation framework.

I. The Myth of "Full Compensation"

Under Turkish tort law, as in other civil law jurisdictions, the court decides the extent of liability through a twofold analysis for pecuniary loss and non-pecuniary loss. When a personal injury is at issue, the damages for pecuniary loss is mainly calculated on the basis of two principal determinants: work life and income expectancies of the victim. For both kinds of compensation, loss suffered by the victim constitutes a cap for the court's award of damages.

Behind this formal equality and neutrality, there is a hidden bias against certain disadvantaged social groups.

Regressive Distribution of Risk: It is cheaper to risk an individual with lower work life and income expectancies than an individual with higher work life and income expectancies. Considering the fact that *homo economicus* determines his course of action in a way to maximize his utility by weighing expected costs against expected benefits, the relative cheapness results in the rational choice of risking the low-income rather than the high-income.

Regressive Distribution of Wealth through Under-Compensation: The limited understanding of *restitutio ad integrum* operates on the assumption that it is possible to undo the wrongdoing and restore the status quo ante by compensating the victim with an amount of money equal to the losses. While this assumption may be true for torts resulting in property damage, it proves to be wrong in personal injury cases both on theoretical and practical senses. Theoretically, the detriment of a personal injury is a non-market value which is not commoditized; therefore, it is not possible for a commodity to neutralize a personal injury. Practically, a tort victim has a strong preference towards the state in which the tortious act had not happened in the first place. The 'subjective' value of the damage assessed by the tort victim substantially differs from the 'objective' value assessed by the court.

II. Replacing the Principle of Full Compensation with Fair Compensation

In order to tackle with the limited understanding of *restitutio ad integrum*, it is essential to deal with the assumption that it is possible to restore the status quo ante with an amount of money equal to the losses. John C.P. Goldberg explains the fallacy of this assumption by distinguishing between two conceptions of damages on the basis of the history of common law. According to the first conception, tort law is understood to be a system of indemnification. The concept of injury is associated with loss; and therefore an amount of damages which equals to the loss erases not only the loss itself but also the injury so that the status quo ante is restored. Thus, tort law fulfills its function by indemnifying the victim with "full compensation" which is described merely on the basis of loss suffered. The second conception understands tort law as a system of redress for wrongs. The concept of injury is associated with a completed wrong; and therefore it is not possible to erase the injury with any amount of damages. Thus, redress is possible through "fair compensation" which considers not only the loss, but also the aggravating or mitigating circumstances.

This paper suggests reshaping *restitutio ad integrum* through fair compensation. Hence, tort law would not go beyond its limits by granting an award exceeding the loss; quite the contrary, it is the only way for tort

law to fulfill its functions under some circumstances. This would be a step towards a more egalitarian tort law, while still preserving its character of being compensatory but not punitive.

A Comparative Approach to the Violation of Personality Rights of Legal Entities

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Due to the advancement of technology and the increment in the utilisation of the internet, as well as social media, violations against personality rights have been augmenting. As any information found on the internet and social media spreads at a great pace, the importance and significance of the protection especially of legal entities' personality rights have been increasing, since any violation of personality rights may cause the ruin of the legal entity.

In this presentation, I begin by listing legal entities' personality rights, such as right to a name and the right to prevent misappropriation of the same, the right to respect of its privacy, reputation and generally economic personality.

Secondly, I will deal with the legal possibilities to protect the personality rights of legal entities. In particular, I will examine whether it is possible to claim damages for non-pecuniary loss in the case of a violation of personality rights. While dealing with this question, I will present cases on this issue from the perspective of different countries from both the common law and civil law systems, namely Austria, Belgium, Croatia, Czech Republic, Denmark, France, Germany, Greece, Hungary, Italy, the Netherlands, Poland, Portugal, Turkey, the United Kingdom and the United States of America. In the United Kingdom it is accepted that a legal entity is entitled to damages for non-pecuniary loss, whereas in the United States of America this view is not adopted, although they are both common law countries. According to Continental European countries' practice and doctrine, except for Hungary, it should as a rule be accepted that legal entities have a right to request damages for non-pecuniary loss.

Finally, and on the basis of the conclusion reached under the previous section, I will discuss the quantification of the compensation of non-pecuniary damage resulting from the violation of personality rights for the legal systems that adopt the possibility to compensate such non-pecuniary damage. This will be done from a comparative perspective.

Legal Consequences of the Birth of an Unplanned Child due to a Wrongful Act: A Comparative Overview of Wrongful Conception, Wrongful Birth and Wrongful Life Cases

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In the event that an unplanned child is born due to a wrongful act, the question arises whether parents or the child itself can demand compensation from the wrongdoer. In wrongful conception cases the child is conceived after and due to another's negligence, whereas in wrongful birth cases the negligent act occurs after the conception. In both scenarios, the claimants are usually the parents who demand damages for the pecuniary and non-pecuniary harm they suffered. In the so-called wrongful life cases, it is the child who demands compensation. This is usually the case when the child is born with a disability. It must be noted that the cause of the disability is not the negligent act of the wrongdoer. It is only the birth or the conception which is caused by the wrongdoer and the child bases its claim on the fact that it would not have existed if not for the wrongful act.

In the last decades, courts in many jurisdictions had to deal with these questions and the solutions adopted seem to be manifold. The paper aims to present and analyze the solutions offered by the courts and scholars. The proposed solutions will be grouped per their approach to the problem and the jurisdictions which will be covered within the discussion include but are not limited to Germany, Switzerland, the Netherlands, France, Poland, the United Kingdom and the United States.

The debate revolves around the following questions: In wrongful birth and conception cases; (i) Does the birth of a child qualify as loss for the parents? (ii) Can the parents claim pecuniary and/or non-pecuniary damages and if so to what extent? (iii) Does the parents' duty to mitigate losses include abortion or giving up the child for adoption? In wrongful life cases, does a life with a disability qualify as damages when compared with non-existence?

Women's Political Participation in Turkey Between Secular and Religiously-Oriented Policies

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A very relevant indicator for understanding the status of gender equality in a country is the presence of women in decision-making assemblies, and notably in National Parliaments. Despite Turkey promoted women's rights since the proclamation of the Republic in 1924, and granted the right to vote and to be elected since 1930 in local elections and 1934 in national elections, the political participation of women has generally proved very low. Having as target the analysis of the reasons for that as well as of the instruments provided to overcome the problem, this paper is divided into two parts.

The first part discusses, from a constitutional and legislative point of view, the process of women emancipation, also commenting on the bottom-up approach followed in the first republican period – linking women's rights to the need of modernization of the Republic and to secular discourse put forward by the leading Kemalist elite – as well as on the "modesty" approach progressively advanced by the Islamic-inspired AKP since its rise to the power in 2002. On the latter, a specific focus concerns the debates occurred during the approval of the controversial 2010 constitutional reform – introducing for the first time a constitutional provision aimed at protecting women, but as a disadvantaged group on an equal footing as disables or elders – when women's organizations failed to claim for the introduction of gender quotas in the Assembly and of positive discrimination for women.

Starting from this debate, the second part of the paper is devoted to the institutional instruments rejected from Turkey, as the quota system, and already into force, as the provision of specific bodies, for taking care of women's interests and for increasing their political participation. Notably, the paper, making also reference to the activism of CSOs, discusses the role and the efficacy of the General Directorate of Women's Status (KSGM), and of the Parliamentary Commission on Equal Opportunities, in order to verify whether they served to the declared scope of ensuring policies respecting, and furthermore promoting, gender equality. Indeed, they have been at the center of an interesting evolution. The General Directorate

seems to represent the last simulacrum of the Minister of Women's Status, whose name significantly has been changed in Minister of Family and Social Policies in 2012. The Parliamentary Commission, instead, though entitled of vast competences – such as analyzing from a gender perspective any proposal of ordinary laws or of constitutional amendment, ensuring the compliance with the international treaties on gender equality and particularly with the CEDAW, and hearing the appeals based on gender discrimination coming from Turkish society – actually has a limited power.

Therefore, in the concluding remarks, the paper analyzes the reasons of the weakness of both these institutions and provides some hints, deriving from the comparative analysis, for empowering them and better ensuring women's political participation in the country.

Violence Against Women: Comparative Constitutional Law Perspective

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Legal and political functions of constitutional jurisdiction as a mechanism to protect human rights spread from national level to international and supranational level. International jurisdiction institutions also protects human rights effectively. Moreover, such kind of supranational tribunals succeeds each other's reasonings and reforms by their decisions. It may be the last part of spreading constitutional jurisdiction in this century. This interaction between supranational tribunals widens the protection area of human rights. This research focuses on elimination of violence and discriminatory treat against women on supranational level by tribunals. Generally they use the same methods according to comparative perspective and this methods are very crucial to determine fort he other rights that need to protect.

Case of Opuz v. Turkey Judgement (2009) of The European Court of Human Rights, *Case of Gonzalez et al. (Cotton Field) v. Mexico Judgement* (2009) of Inter-American Court of Human Rights and *Jessica Lenahan (Gonzales) et al. v. United States Case Report (2011)* of Organization of American States will be analysed in this study with the comparative constitutional methods in terms of the characteristic of widening the protection level of women rights. In terms of sociological background, discrimination and violation against women begin with class discrimination. After 1989, identity politics becomes more important in the World. Standing against unequivalent position of women and men in social and economic relations begins with modernisation. Violence against women also expands from inside the four walls to every visible relationship of outside. Correspondingly protection mechanisms of women rights also expands from national level to international level. Supranational tribunals specified criteria to protect women against violence that is analysed in this research paper.

CEDAW and the Rights of Women in Pakistan—Hopes and Realities

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Pakistan is a signatory to a number of core international human rights treaties, including the UDHR, ICCPR, ICESCR and CEDAW. In 1994, the UNHCR appointed the Special Rapporteur on Violence against Women who concluded a country visit to Pakistan in 1999. Despite this, the state of Pakistan has continuously failed to protect the rights of women. Pakistan is constantly ranked low on the Global Gender Gap Report published by the World Economic Forum. Women face discrimination in educational institutes, healthcare sector, economic sector as well as their homes. Their educational, economic and social activities are restricted and they are subject to physical and psychological abuse.

Pakistan is time and time again called upon to abide by the international human rights documents. The recent Protection of Women against Violence Act 2016 is an effort by the Punjab government to provide relief and protection to victims of domestic abuse. The Act, if properly implemented, will go a long way in protecting women who are victims of violence. The Council of Islamic Ideology (CII) and various religious and political parties termed the Act un-Islamic and un-constitutional and the Punjab government was asked to repeal it. CII asserts that the 2016 Act is contrary to Article 14 (privacy of home, dignity of man), Article 35 (preservation of family life) and Chapter IX (Islamic Provisions) of the 1973 Constitution of Pakistan. CII states that the Act purports to establish a family model different from the traditional Pakistani culture. The Act will disrupt family life, it's certain provisions are contrary to property laws and family laws in Pakistan. Furthermore, CII asserts that the Act is a way to "westernize" Pakistani culture and impose "western norms" on society. CII is a constitutional body tasked with advising the National Assembly or the Provincial Assemblies on religious matters. The status of CII is ambiguous, while CII stresses that it's mandatory to consult CII and its advice is binding on the respective Assembly, lawyers and academics argue CII only has an advisory capacity.

The progress in the advancement of women rights in Pakistan is extremely slow. Against this backdrop I base my research. My paper will explore the realities of Pakistan (a military nuclear power and an Islamic

state) and analyse the progress made by Pakistan in complying with its international commitments towards the advancement of rights of women. I would then explore the hurdles to the fulfilment of these international commitments and establishment of a strong system for protection of women rights in Pakistan. In specific, I would explore the impact of CII and clergy on the protection and promotion of the rights of women. I would provide a critique on the national framework for the protection of the rights of women in Pakistan, in light of the international instruments. Finally, I would conclude with a comparison of the criticisms towards CEDAW and the Bill of Rights and compare it with criticisms to the 2016 Act in particular, and steps for advancement of women rights in general, in Pakistan. I would try to see how cultural realities in an Islamic South Asian country hinders the advancement of women rights and how CEDAW, and subsequent international human rights systems, aim to address these obstacles.

Role of Non-Governmental Organizations in Children's Rights During Armed Conflicts: Comparative Analysis of the Wars in Syria, Kosovo and Iraq

Mina Sadat Sharifian

Children are the most vulnerable group in every society who need training, caring and living in a safe and comfortable environment, However today with the wars around the world, we are witnessing the displacement of thousands of children and most of these children lose their parents during the war and become orphans, which these and similar issues makes them face a serious crisis in the future. Sometimes they are moved in their own country or take refuge in other countries to get rid of war, and this is the beginning of the bitter and vague fate of the children of war. In other hand, many conventions and international declarations have been written and approved to protect the children of war, which are accepted by many countries. But the big challenge is that, in the recent wars in the Middle East we face terrorist groups and militants who basically do not have a commitment to international law and have caused trouble for International organizations to perform their duties; and now this question arises: How NGOs encourage the protection of children in war? According to the Rome Statute of 1988, it affirms that violence against children could be considered as a crime against humanity, and cause the committing person to be punished. The article analyzes the Statue and it recommends that the ICC focus attention on the ways to punish the committers of the crime by encouraging NGOs to participate in courts.

The Effectiveness of the Law on Plea Bargaining: A Comparative International Perspective

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The law on plea bargaining, a significant yet controversial procedural criminal law, is far from being settled in many parts of the world. This is not only because the law is seen to trench on certain fundamental rights of the accused, including the rights of the accused persons to due process (both procedural and substantive) and the rights against self-incrimination, but also because the law suffers from some inherent flaws and infirmities. Even in countries such as the United States where plea bargaining is a recognised practice being backed by the 14th Amendment read with the 5th Amendment to the U.S. Constitution, the law has often been challenged (mainly by the academia) since the decision of the U.S. Supreme Court in Brady v United States in 1970. In other municipal jurisdictions also, irrespective of they being adversarial or inquisitorial criminal systems, the law is meandering through an unchartered territory, having failed to receive the sanction of the respective constitutional norms. In a nutshell, plea bargaining continues to remain as an unfamiliar legal subject and the statutory procedural remedy has only found a few takers. The main argument of this paper (which is an extract of the LL.M dissertation of the author) is that until and unless a criminal procedural law such as the law on plea bargaining is explicitly recognised by the constitutions of the respective states, the law is bound to fail. The aim of this paper is to understand the effectiveness of the law on plea bargaining particularly in reference to some common law and civil law countries that have embraced the practice, either recently or earlier. The main objective of this paper is to know why plea bargaining has been fairly successful in countries such as the U.S. but not in other countries such as China, Japan, India, Germany, Netherlands, etc. Yet another objective of this paper is to understand the effectiveness of the law on plea bargaining in light of the constitutional provisions. The paper makes a comparative study, in a historical context, of plea bargaining as existing in common law countries such as India and the U.S. and in civil law countries such as Germany and France. The paper refers to a few case laws on the constitutionality of the law on plea bargaining. The paper concludes by suggesting a few recommendations that may be adopted by the respective countries to consolidate and amend their laws on plea bargaining so as to make them familiar and compatible with the exiting criminal justice systems.

Modernising Corporate Criminal Law: Restorative Justice for Corporate Criminal Liability and Sentencing in the UK and USA

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Despite the increased globalization of corporations and cross-border agreements, jurisdictions diverge on whether corporations should be subject to criminal laws, and the mechanisms of dealing with corporate violations.[1] American and British corporations have similar corporate structures in comparison to other governance structures in Europe, yet they still hold distinctive positions on how corporations should be held liable and sentenced under the criminal law.[2]

Wrongdoings by a corporation uniquely lead to long-term harmful impacts on different parties, including communities and/or the environment.[3] In particular, corporate environmental crimes have directly impacted natural resources and caused long-term harmful impacts to individuals in the community where the illegal wrongdoing was done.[4] Additionally, current research criticizes corporate crime sentencing for failing to adequately regulate corporations and to motivate to motivate them to help federal prosecutors detect and punish corporate crime.[5] Restorative Justice potentially offers a solution to this problem; it is a criminal justice theory that offers a unique perspective to criminal liability and sentencing, and perceives crime as a primary conflict between individuals that results in injuries to individuals, communities, and the offenders, and only as a secondarily violation against the state. Offenders, hence, have a primary obligation to repair the harm caused or resulting from the criminal behavior, completed through cooperative processes that

[1] Christina de Maglie, 'Models of Corporate Criminal Liability in Comparative Law' [2005] 4

[2] David A. Skeel, 'Corporate Governance and Social Welfare in the Common Law World' (2014) 92 Texas Law Review 973, 975.

[3] David M. Uhlmann, 'The Pendulum Swings: Reconsidering Corporate Criminal Prosecution' [2016] 49 UC Davis Law Review 1235, 1251-1252.

[4] Centre For Justice and Reconciliation At Prison Fellowship International, 'What Is Restorative Justice?' (2005) <http://www.d.umn.edu/~jmaahs/Correctional Assessment/rj brief.pdf> 1 accessed 5 December 2016.

[5] Jennifer Arlen, 'The Failure of the Organizational Sentencing Guidelines.' (2012) 66 U. Miami L. Rev. 321, 321.

include all stakeholders.[6] Would having a system that places emphasis on repairing the harm between all stakeholders (victims, community, and defendant) be more effective than the current system that places emphasis on what the defendant owes to the state? Would adding restorative processes to the traditional current criminal justice processes be beneficial in reducing corporate crime?

The paper aims to comparatively explore current criminal justice theories that have formed corporate criminal laws in the United Kingdom and the United States to understand why they have failed, in practice, to reduce corporate crime. The paper will return to theories that have moulded the current criminal justice system to understand the century-old discourse that shaped how legislatures treat corporations in criminal law. It will further examine how American and British jurisdictions dealt with corporate crime historically and in the present, and study weaknesses of the current criminal justice system that criminalises corporations. Additionally, it will study restorative justice as a liability and sentencing theory, and comparatively study how it has been applied in practice in different contexts, and its principles have be applied in practice in the context of corporate crime. The paper will endeavor to employ restorative justice in connection to corporate crime, and propose a wide array of necessary regulatory and structural reforms and look towards building a restorative justice model for corporate crime.

It is argued that there is a need to modernize criminal laws governing how liability is imposed on corporations and what sentences should be imposed on corporations that commit crimes in a way to reflect current realities of the economy. Incorporating restorative justice either as a component added to the conventional criminal justice processes and/or as an alternative model for dealing with certain types of corporate crime, would be more effective in combatting corporate crime.

[6] Centre For Justice and Reconciliation At Prison Fellowship International (n 4).

Lawyering Up: Contemporary Challenges & Solutions in Implementing the Privilege against Self-Incrimination

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Legal systems around the world recognize a criminal defendant's privilege against self-incrimination and implement it in divergent ways reflecting the varying sources of its origins. The contemporary rationale behind the right to not be forced to give evidence against one's self includes an abhorrence of torture historically by the state and the unreliability of coerced confessions. Earlier research indicates it was in fact the development of the right to an "active" defense counsel that made the privilege effective in some common law systems and allowed defendants to exercise the corollary right to remain silent.

Today, criminal justice systems face a range of challenges while implementing the privilege against self-incrimination that critically undermine the integrity of the criminal justice system. These include the belief among judicial actors and the public that a defendant has the right to lie and that adverse inferences are allowed from silence under the law, as well as the mechanical nature of rights-waiving procedures. Across different systems, the defense counsel's role, whether as an active or inactive participant, remains key in giving meaning to the right to remain silent.

While comparative scholarship on the privilege against self-incrimination has focused on a handful of legal systems as exemplifying the common and civil law traditions, the development of this privilege in post-colonial countries like Tunisia, Pakistan, and the United States is instructional for appreciating its role and impact today. Criminal justice systems in these countries have navigated through different legal codes and sociological conditions to enforce the rights of criminal defendants.

With a particular focus on post-revolutionary Tunisia, this work will attempt to make recommendations on the role lawyers can play to ensure that courts give meaning to the privilege against self-incrimination. In Tunisia, legal developments, including the 2014 Constitution that granted new rights to criminal defendants and recently enacted legislation on the right to counsel during police interrogations, have opened the door for defense attorneys to take an active role in ensuring their clients' right to remain silent.

Offences Against the Confidentiality, Integrity and Availability of Computer Data and Systems

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Unlike crimes in real world that have been covered by criminal laws, cybercrimes in virtual world are recent and common people are not effectively protected against such crimes. The aim of the paper is to present offences against the confidentiality, integrity and availability of computer data and systems, while discussing comparative regulations in Europe, the United States and China. First, illegal access to computer systems (hacking) and different regulations that criminalize unlawful access will be discussed. It will be followed by the definition of illegal data acquisition (data espionage) and examination of recent models of data acquisition such as "phishing". In order to provide a more complete overview, data interference which violates the integrity of data by viruses and other means as well as system attacks via computer worms and denial of service (DoS) attacks will be investigated. Finally comparative Cybersecurity regulations and acts regarding the aforementioned offences in various jurisdictions such as Electronic Communications Privacy Act and Computer Fraud and Abuse Act in the United States, Computer Misuse Act in the United Kingdom, Commonwealth Model Law, IT Security Act in Germany, National Security Law and Cybersecurity Law in China, and finally The Council of Europe Convention on Cybercrime will be examined.

The Coup and the Referendum: Ascent and Decline of military influence on Turkish Constitutionalism

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While Maurice Duverger may not have been the first to use the term semipresidentialism nor the only to highlight the exceptionality of the French constitutional system after 1958, his studies on the Cinquième République were indeed ground-breaking: the definition[1] he gave of the French form of government remains highly influential, as the continuous attempts to bring it up-to-date prove. However, while solving the controversy between those who had wanted to recognize in the French system a peculiar parliamentarism[2] and those who had wanted to recognize in it a peculiar presidentialism[3], Duverger's definition also opened a whole new debate about exactly "how considerable" presidential powers should be in order to make us recognize a semipresidential form of government. The problem with this never-ending debate has been well described by G. Sartori as a "circularity": if we cannot agree on a fixed set of concrete cases we cannot formulate a proper definition… and without a proper definition we cannot identify or compare any case of semipresidentialism[4]. In an attempt to overcome this controversy and create at least a common ground of discussion among scholars, in 1999 R. Elgie proposed a new definition of semipresidentialism which excluded the issue of presidential powers from the classificatory phase[5].

The fundamental assumption this paper is based on is the complementarity of M. Duverger's and R. Elgie's definitions of semipresidentialism: while it is true that Duverger included the measuring of presidential powers in the definitory moment and Elgie did not, Elgie's theory is far from being a rebuttal of the importance of presidential powers. In fact, it is only under a clearer definition of the semipresidential

[1] M. Duverger, A New Political System Model: Semi-Presidential Government, in European Journal of Political Research, 8, 1980, p. 166.

[2] For example: J.C. Colliard, Les régimes parlamentaires contemporains, PFNSP, Paris, 1978, p. 280.

[3] For example: O. Duhamel and Y. Mény, Dictionnaire constitutionnel, PUF, Paris, 1992, p. 72.

[4] G. Sartori, Ingegneria Costituzionale Comparata, Il Mulino, Bologna, 2013, p. 136.

[5] R. Elgie, Semipresidentialism in Europe, Oxford, Oxford University Press, 1999, p. 13.

category that a more profitable discussion on the amount and the role of presidential powers in semipresidentialism can be conducted. Still, there is then ample space left for the three sub-categories Duverger hypothesized (respectively: "all-powerful presidency", "balanced presidency", "figurehed presidency"); which can be defined and filled precisely in reason of those troubling presidential powers. Those three subcategories, when combined with Elgie's broadened definition, would also allow to reabsorb some residual – and possibly outdated - categories like the "dualist parliamentarian" one, which can quite effectively be replaced by Duverger's "semipresidentialism with a figurehead presidency". A second assumption stemming from this first one is that when the necessity to analyse semipresidentialism in practice arises, the analytical model proposed by M. Duverger is a valid and useful choice.

As the paper seeks to demonstrate, the Turkish case - while also extremely interesting in itself - can prove itself to be an effective verification of those two basic assumptions. Consequently, the aims of this work are: firstly, to verify the semipresidential nature of the current Turkish form of government and, secondly, to better define this specific form of government through Duverger's analytical model[6]. This model is based on four factors, the same we tried to investigate: A) the content of the Constitution, B) the combination of Tradition and Circumstances, C) the composition of the parliamentary majority and D) the position of the President in relation to this majority. Thus, in my paper I firstly outline the most recent constitutional reforms and especially the 2007 one; at the same time comparing the Turkish Constitution with the French one, which Sartori had previously proposed as the archetype of semipresidentialism. Then, I analyse the parliamentary tradition of Turkey, with special attention to the role and the powers of the Turkish Cumhurbaşkanı through the 1924, 1961 and 1982 Constitutions. Finally, I sketch both a brief history of Turkish political parties and the current political situation. In the Conclusions, I make clear why Turkey - much like France - is in fact a peculiar case of semipresidentialism; in which the Constitution may not provide the President with "quite considerable" powers but such powers can indeed be drawn from tradition, circumstance and – even more – the political landscape.

[6] M. Duverger, A New Political System Model: Semi-Presidential Government, in European Journal of Political Research, 8, 1980, p. 177.

The Interpretation of the Commander in Chief Clause in the American Living Constitution in Comparison with the Recent Transformation of the Prerogative Power to Deploy Troops in the Unwritten British Constitution

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The essay provides a comparative analysis concerning the war powers of the Executive Branch in the British and in the American experiences.

This parallelism is interesting because, despite the profound differences existing between these two legal systems, the nature of the constitutional war powers of the British Executive – once exercised by the King and today passed to the Prime Minister and the Government – has been in substance for a long time similar to that of the US President as Commander in Chief. Indeed Hamilton, describing in “The Federalist” the powers of the Commander in Chief, makes explicit reference to the military prerogatives of the British Monarch in the eighteenth century, except for the power to declare war, that the US Constitution gives instead to the Congress. For a long time, the discretionary powers of the American President and of the British Prime Minister in relation to the decision to use the armed force in contexts of conflict have been very similar. Until the beginning of the new millennium it was for the British Prime Minister to decide whether and when to involve Parliament in the decision to begin a military action. Therefore, the situation in the United Kingdom did not differ from what happens in the US practice (where the involvement of the US Congress implies however the demand for a real statutory authorization).

This framework has changed completely since the UK Cabinet Manual of 2011 has identified the existence of a new convention of the Constitution according to which, except for cases of emergency, every significant military action of the UK must now be subjected to a previous debate in Parliament. On the occasion of the Syria vote in 2011, the British Prime Minister considered therefore necessary a prior parliamentary passage even only to "take into account" a military action against the Assad regime. Moreover, the unfavorable vote of the House of Commons in that case was reputed as binding by the Premier, thus strengthening the new Convention. Lastly, this Convention was respected also before the

intervention against the “Islamic State”, which was approved by the British Parliament. It is clear that the new constitutional convention implies a deep change in the operating mode of one of the most established prerogative powers of the Executive, namely the "power to deploy troops overseas". Some indicators show that the British public opinion endorses the fact that the Government does not decide autonomously the beginning of a conflict, but previously appeals to the Parliament.

In the United States the situation is very different, although the matter of the constitutional war powers is still controversial, so much so that the scope and meaning of the Commander in Chief Clause and of the War Powers Clause are subjected to opposing views. Neither the proponents of an “originalist” approach nor the proponents of a “functionalist” approach has so far been able to bring decisive arguments for the purpose of a convincing delineation of the role of the two political branches in the exercise of war powers, that is an argument on which, in addition, the Courts cannot decide because of the political question doctrine. Though the question is still debated, to prevail is certainly the strict interpretation of the War Powers Clause established in favor of the Congress and, at the same time, the recognition of the substantive decision-making supremacy of the President as Commander in Chief. Even the controversial War Powers Resolution of 1973, which provides for important powers of consulting, reporting and authorization, has not been able to ensure an effective involvement of the Congress in the decision to introduce the armed forces into hostilities.

In conclusion, is it possible that the evolution of the constitutional war powers in the European experiences and, above all, in the United Kingdom can now influence the debate on the interpretation of the war powers in the US Constitution, in the sense of suggesting a reconsideration of the Congress role? Does it exist in the United States a request, maybe supported by public opinion, which is able to guide the development of the so-called Living Constitution? And to what extent the foreign law can be a useful element of consideration in the interpretation of these matters?

A Comparative Analysis Regarding the Role of Prime Minister in Differentiating Parliamentarian Government Models: United Kingdom and Germany – A Suggestion for Turkish Quest for System of Government

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The preference of governmental system has always been a highly disputable issue since the promulgation of 1982 Constitution. Even though parliamentarian system of government has been accepted in line with the legal tradition of Ottoman-Turkish era in the Constitution itself, expansive powers of head of the state kept controversial argumentations alive regarding different types of systems such as "semi-presidentialism" and "parliamentarian government with the president". Consequent to the contradictive decision of Turkish Constitutional Court in 2007, majority of the parliament initiated a referendum process, which led to a constitutional amendment that gives people to elect the head of the state by a popular vote. From 1982 to 2007, the common denominator was "empowerment of head of the executive" in all this evolutionary process. When it comes to December of 2016 a constitutional amendment package has been presented to Turkish Grand National Assembly, which includes a radical abandonment of parliamentarian system by establishing the least powerful legislative organ of all republican era constitutions. Throughout this period, especially by the domination of single party since 2002, system of parliamentarian government was always at stake politically.

In debates regarding governmental systems, one can easily state that the system of presidential government has more definitive qualities in comparison to the parliamentarian system. Because of this basic distinction, in the academic literature, there is a tendency of arranging common denominators of different parliamentarian governmental systems, instead of taking a stand on the definitive approach. To illustrate this statement, when we analyze the role of prime ministers in different countries, it can easily be observed that parliamentarian system of government has various alterations as Giovanni Sartori stated. For example, the prime minister of United Kingdom has a great impact on both legislative and executive organs, whereas in Germany the Chancellor wield less power, but also an effective control on both organs. By comparing

the role of prime ministers in these two parliamentarian systems, we may observe different models of power sharing between the legislature and executive and observe different types of parliamentarian governments under the heading of "parliamentarism". This paper argues that whereas adopting a totally new system of government involves certain amount of unpredictability, in path solutions within the preferred system of government might also be an option for Turkey.

How Democratic is the Removal of Presidential Term Limit Cum Electoral College?

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The most adored and over preached democracy by both developed and developing countries may perhaps not be the best system of government as professed by the aficionados. The philosophy that democracy is the best system of government which preserve, protect and provides that the general will of the people shall prevail in a free, fair and transparent election may indeed be a sham when considered with the attempts by different states who have inserted presidential term limits in their respective constitutions and the just concluded presidential election in the United States wherein the popular will of the people was subverted under the doctrine of electoral college.This paper is an attempt to interrogate the real meaning of democracy vis-a-vis its application in our contemporary societies and draw a conclusion as to whether what most countries referred to as democratic governance or what most countries practiced as democracy can indeed be qualified as such.

Judicialization of Politics in the Arab World

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The political significance of judges has been the subject of increasing scholarly examination in western democracies in recent years. Although the integrationist perspectives between politics and law have made valuable contributions in socio-legal studies, literature on this subject in the modern Arab legal world has so far been scarce. The purpose therefore is to elaborate on existing conceptual frameworks for judicialisation in a novel setting - the Arab Middle East – and the extent to which judges in the Arab world are politically signficiant.

Owing to changes of relationship between state and society, judicialisation of politics describes the phenomenon whereby judges usually at the top tier courts are increasingly acting as political agents. Judicialisation of politics aims to explain and evaluate the underlying factors behind the growth of judicial power in contemporary society. The phenomenon is widely recognised in the American, and to some degree the European context. However, relatively little attention has been paid to judicialisation in the Middle East from a comparative point of view.

This presentation seeks to explore the underlying factors that promote judicialisation of politics within a representative range of four Arabic speaking countries: Saudi-Arabia, Lebanon, Jordan, and Egypt. It assesses the political role of the judiciary in all tiers and branches found in these states by examining several factors aknowledged as conducive to the political significance of the judiciary. These include: judges themselves, especially their career and their role perception; the judicial system in which they operate, especially its structure, and the power it entrusts to judges and; the basic characteristics of the political culture in which the judiciary operates. The paper also introduces new central elements that are unique to the Arab region, in particular the religious influence which has come to influence thought and practice of the administration of justice.

The central argument advanced is that judicialisation is in fact *legitimized* in Islamic legal culture and *encouraged* by the inherently secular designs of the judicial systems in these four countries. As such, the fusion between Islamic legal culture and practice combined with secular legal traditions expands the scope of judicialisation of politics beyond western liberal democracies.

This paper is part of an on-going empirical legal research project that began in 2014 and is aimed to be finished by March 2016. The approach consists of primarily two components: textual analysis of legal documents to identify the actual structure of the judiciary within each state as well as qualitative empirical methods. The empirical data have been obtained through online surveying and interviewing on site to seek inshight from key-players within the judiciaries under inquiry. The findings have been and are analysed through an interdisciplinary prism such as psychology, political science, law and anthropology. Needless to say, the discoveries present a novel aspect of the judicial role vis-à-vis the political environment in the region. This aspect challenges existing definitions and conceptions of the Arab judicial role as traditionally understood by primarily the western world.

The Rule of Law in Comparative Perspective: Islamic Law and Contemporary China

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I am teaching in the heart of the new China—Shenzhen—a boom-town representing everything China is becoming. Peking University's law school has selected a small class to be trained in an American-style pedagogy. The government is in the midst of a rule of law initiative, with efforts to professionalize the practice and cultivate a legal elite to shepherd through its modernization efforts.

Teaching Islamic law in this context, I hope to slow the pace of my students' frenetic learning, to get them to reflect on what law actually is or might achieve. I begin with Wael Hallaq's *Shari'a: Theory, Practice, Transformations*. In opposition to classical orientalist accounts, Hallaq claims the rule of law for Islam, but as an epistemological order that resides outside of the state or political authority.

It is this aspect of Hallaq's vision—that shari'a's authority derived in part from its rootedness in a shared system of meaning and values—that is most striking to students. Most significant to the success of Islamic law, in their view, is the moral beliefs of the governed. "Here," they say, discussing their own country, China, "no one believes in the law. So it must be forced on them." To my students, it is as if a shared sense of morality is what creates the rule of law, i.e.-the rule of law is a moral system. This flips traditional notions of the rule-of-law on its head, but is it all that different from what Hallaq is arguing?

This article draws on classroom observations in a two-fold endeavor. First, it offers a new lens for considering Islamic studies debates on law and the contemporary state, and second, it aims to complicate modern views of the rule-of-law concept, with particular emphasis on the relationship between coercion, law, and the state.

In his *Shari'a,* Hallaq argues Islamic law is a rule-of-law system. This is so, because it produces predictable, consistent application of legal rules that are independent of government authority (or, in the modern era, the state). Hallaq suggests that this means the law operates without (or with limited) coercive force. This

aspect of the work has stirred up significant criticism and debate. Rule of law itself has come under attack as an underspecified, underdetermined concept and as primarily an ideological instrument that supports particular socio-political forms. What does it mean to claim this concept for Islamic law?

Likewise, today, Chinese law students aspire for the law in China to be predictable and consistently applied. To the extent that predictability and consistency allows for the operation of a market-based economy, then the students' assessment will be in line with many rule-of-law advocates, who predicate a system's rule-of-law character on the market-based character of the economy in which it operates.

Both of these rule-of-law visions carve out room for law consistent with authoritarianism or, at least, for one reliant upon significant coercion. These sit in substantial tension with substantive accounts of the rule of law. Both my Chinese students and Hallaq suggest that the rule-of-law character of a system depends on the faith status of the legal subject. To believe in law is, in a sense, to make it a rule-of-law.

Given the substantial scholarly concern with the "underspecified" character of the rule-of-law concept, reading Islamic rule-of-law claim alongside the Chinese rule-of-law project, suggests it may be more honest, and ultimately useful, to recognize rule-of-law as a relative concept. A rule of law system is one in which its subjects believe; it is a legal system with legitimacy. The form it takes, structure, methodology for legal analysis, all of this is open. Arguments for something more specific and normative must take on a more directly political content.

The comparative inquiry allows us to reflect more specifically on the nature of Islamic law. We may ask, first, to what extent is polycentricity a fundamental characteristic of sharia? To what extent is polycentricity incompatible with the modern state? To what extent might polycentricity be fulfilled within the nation state form (instead of the erstwhile "legal schools" form)?

Second we may consider, to what extent are Hallaq's concerns that shari'a is 'impossible' today because of the rise of the modern state, alleviated through the development of a truly democratic Muslim state? That is, to the extent that shari'a's very nature is characterized by its "socially-embedded" character that meshed with community norms and ideals, can a modern nation-state never serve this purpose?

Relative Impermeability of the Wall of Separation: An Uphill Battle for Marriage Equality in the Philippines

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The Philippine legal system, while founded on American constitutional tradition, has grappled with unshackling the remnants of the Spanish civil law system. As a colony of Spain for 350 years, the Philippines adopted the union of church and state; only to be ceded to the United States of America through the 1898 Treaty of Paris, which mandated the separation of church and state. The principle of separation would be adopted in doctrine by all subsequent Philippine Constitutions; but only to be compromised in practice. This is most evident in the legal institution of marriage, which has been brazenly shaped by Canon Law. This paper will look at how the issues of church-state separation and same-sex unions are tightly intertwined. Here we will study the shared principle of religious freedoms in relation to two cases on marriage equality: Obergefell v. Hodges decided by the U.S. Supreme Court, and Falcis v. Civil Registrar-General pending before the Philippine Supreme Court.

Challenges of Implementing Small Claims Court in Indonesia

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Indonesian Centre for Law and Policy Studies

Critics of the procedures in implementing the old, rigid, and expensive of the civil procedural law is one factor the form of small claims court in Indonesia. The existing civil procedural law is still based on the updated-Indische Herzeine Regelling (HIR) and Reglemen Buitengewesten (RBg) as the Netherlands' legacy. Both are considered no longer compatible with the dynamics of today's society, especially for the settlement of civil cases that are simple –clear parties, clear objects, simple case, and small value. The efforts to reform the civil procedural law by the Indonesian government has been done through the arrangement of the Bill on Civil Procedural Law. However, the Bill has not being discussed in the House of Representatives, until today. Therefore, the Supreme Court –according to its authority to regulate matters relating to the smoothness of judicial process- established rules regarding civil procedural law, one is about the small claims court.

Being enacted since 7 August 2015 through the Supreme Court Regulation (Perma) No. 2 in 2015, small claims court offers a new procedure for the simple civil cases settlement. In consideration of Perma, the existence of small claims court is to widen public access in getting justice. To attain this, some breakthroughs in this newly procedures are, (i) both Parties –Plaintiff and Deffendant- may go in court without lawyers; (ii) cost less than akin other procedures; and (iii) quickest settlement. However, those offerings should also be tested, because until 24 November 2015, there are only 634 small claims cases registered in courts (equals 3.67% of total claims cases in each year).

This paper intends to analyze the causes of the low numbers of small claims cases in court. The findings, both in regulation and implementation in several regions, will be explained in this writing. A comparison study of small claims court in Philippines will also be enhanced the understanding of the issue.

In conclusion, several boundaries are estimated as the cause of the low numbers of small claims court cases. First, the requirement of plaintiff and the defendant must be within the same jurisdiction. Second, the

principal of each party –from plaintiff and deffendant- must be present at the hearing. Third, Rp 200.000.000, as the highest value of the claim is considered too small for civil disputes, especially in big cities. Fourth, the uncertainty of the implementation of decisions due to uncertainty regarding the sequstration and payment mechanisms. This paper also found that the unmassive socialization from Indonesian government has contributed to the low numbers of small claims court cases.

Online Dispute Resolution for Cross-Border (International) E-Consumer Disputes

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Internet is one of the most important phenomenon of the 21st century and it has changed our daily life in serious ways. Online trade is an important part of this change. Nowadays, it is very common to use Internet for purchasing goods or services. Accordingly, this "online" environment of transactions brings its own legal problems. The use of Internet develops very fast hence, jurists and lawmakers are trying to follow these developments to find efficient solutions.

This paper focuses on the out-of-court settlement of consumer disputes related to consumer transactions made online (hereinafter "**e-consumer disputes**"). E-consumer disputes concern low-cost and high volume contracts established entirely or partly online. Since these disputes concern low-value purchases, consumers may prefer not to seek redress for their claim (in case of a faulty article, non-delivery, late delivery, etc.) against sellers before State courts because of the high cost of litigation or the delays to receive a satisfactory decision. Moreover, the inherent difficulties of an online transaction are multiplied when faced with a cross-border dispute. As it is very easy to purchase something from abroad by using Internet, the online transaction may acquire easily a cross-border nature. In this case, the consumer would face difficulties related to conflict of jurisdictions, conflict of laws and enforcement of a decision in a foreign country where the seller is located.

Only way to overcome these difficulties in an efficient manner is to use online dispute resolution methods (hereinafter "**ODR**"). ODR is a form of out-of-court dispute settlement mechanism placed on online environment. In other words, the ODR is the use of alternative dispute resolution methods on an online platform without the need to physically participate to the proceedings. Depending on the national laws, ODR might take different forms. In principle, it is a step-by-step procedure, starting with negotiations following with out-of-court amicable settlement of the dispute (such as mediation or conciliation) or a binding arbitration procedure. The objective of the use of ODR for e-consumer disputes is to offer an

efficient, accessible, transparent and impartial dispute resolution to consumers and to increase the number of settlement between disputing parties and finally to promote online trade.

This paper covers various ODR methods for domestic and cross-border e-consumer disputes to bring out common principles and approaches and to propose practical solutions for existing shortfalls of different methods. In this respect, focus will be given to the critical analysis of four different ODR models, namely, the eBay model as a private dispute resolution method established by the eBay combined with a forceful feedback mechanism; the Turkish law for domestic consumer disputes in distance sales providing binding decisions with a possibility to appeal before the Consumer Courts; the EU law concerning the use of ODR for domestic and infra-EU disputes; and the UNCITRAL Technical Notes on ODR for cross-border disputes. For each model, the paper studies its characteristics, procedural rules and principles, and finally the effect of the proposed solution/binding decision (depending on the applicable rules) of the neutral third person.

The analysis shows that the ODR for e-consumer disputes is indispensable. The comparison of different existing models provides a general set of principles and conditions common to these models. However, each model has also something to learn from the others to improve its efficiency. For example, in the case of Turkish law, these common principles should guide us to find a better/suitable mechanism for ODR for domestic disputes where, for this moment, only the complaint can be filed online and the rest of the procedure relies on hardcopies and an offline procedure.

The use of ODR is also considered for cross-border e-consumer disputes. However, the most problematic issue is the so-called final stage where feasibility of a binding arbitration procedure is discussed. Considering the underlying public policy and public interest issues, i.e. the protection of the weaker party, it seems highly unlikely to have a consensus on an international level. This result is also confirmed by the outcome of the UNCITRAL Technical Notes. Therefore, non-binding procedures such as mediation/conciliation where a neutral third person assists the disputing parties to reach a settlement or proposes an amicable solution without a binding effect seems to be the preferable method for cross-border e-consumer disputes. However, if there is no amicable settlement between the parties, it will be necessary to recourse to national courts (unless arbitration of consumer disputes is accepted in the relevant national law). In addition, the eBay example shows us that the digital market provides also its “checks and balances” with a useful feedback system. The risk to receive negative feedbacks from consumers should motivate the sellers/professionals to comply with the proposed solution by the neutral.

Enforcement of Annulled Arbitration Award: The Resurrection of Chromalloy and Justifying Clear Criteria

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Arbitration is considered a very effective mean for settlement of commercial disputes. Such popularity based on several grounds such as, the ability of the parties to submit their dispute to a private tribunal outside the traditional litigation forum, the parties' freedom to choose the applicable law to the dispute, whether substantive or procedural, avoiding delay resulting from long and costly proceeding, and finality of the arbitration award issued by the tribunal.

In fact, all these advantages, in addition to others, are very encouraging and promising for parties to submit their disputes to arbitration, however, enforcement of an arbitral award in a foreign country is the most important characteristic of arbitration. No doubt that the success of an arbitration process is based on the ability of the parties to enforce the outcome of that process which is the arbitration award.

For that purpose, Convention on Recognition and Enforcement of Foreign Arbitral Award "known as the New York Convention" was drafted in order to facilitate enforcement of foreign arbitral awards. However, Article V of the New York Convention states the grounds under which the court of the enforcing state may refuse enforcement of an arbitral award. Article V (1) (e) provides that recognition and enforcement of an arbitral award may be refused, if the award has not become binding on the parties, or has been set aside, or suspended by the competent authority of the country in which, or under the law of which, the award was made.

Nonetheless, domestic courts in different jurisdiction adopted a new approach contrary to what is provided under Art. (V)(1)(e) of the New York Convention. In both United States and France, for example, domestic courts granted recognition and enforcement to arbitral awards which had been set aside by the domestic courts of the seat of arbitration.

In 1996, for the first time, an American court granted enforcement to an arbitral award which had been set aside in Egypt. Such case known as "Chromalloy case" is considered the first case to examine the issue subject to this discussion. The issues in hand is whether an arbitral award, which was annulled in the state of the seat of arbitration (primary jurisdiction), can be enforced in another state (secondary jurisdiction). Recently, in 2013 this issue was discussed by the American courts in *Pemex case*. Between 1996 and 2013, different court decisions adopted different point of views.

This issue was examined in many occasions before several domestic courts in different jurisdictions such as France and the United States. Interestingly, there is two main different approaches regarding the aforementioned issue.

The first approach, supported by some US courts, applies a strict interpretation of Art. V(1)(e) of the New York Convention, according to which, courts of the enforcing state (secondary jurisdiction) may refuse enforcement of an arbitral award which was set aside by the courts of the state of the seat of arbitration (primary jurisdiction).

The second approach, backed by other US Courts and French courts, states different point of view, as it goes to the possibility of enforcing an annulled award which was set aside at the seat of arbitration. Still, courts adopting the same approach are resting upon different criteria for justifying enforcement of annulled arbitral award. French courts, for example, depends on Art. VII of the New York Convention which enable it to apply its own domestic arbitration law "as the most favorable law to the enforcing party". Other courts refuse such justification based on Art VII and based their judgements on the bases of "violating the basic notion of justice" criteria, per which if the annulment of the award violates the "basic notion of justice" the enforcing state may grant enforcement to this annulled award regardless its annulment at the seat of arbitration.

This paper shall evaluate these different criteria aiming, humbly, to reach understanding to the issue in hand and provide a clear guidance for enforcing annulled arbitral awards.

Decrypting the Role of 'Public Policy' in Private International Law and International Commercial Arbitration

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It is no secret that the doctrine of public policy has its roots in private international law, as along with the doctrine of comity, it is one the founding pillars of the private international law regime. The doctrine of public policy plays a vital role 'in demarcating the limits of principles of tolerance' that the domestic legal system of the forum state can show towards the foreign legal system, be it in terms of the application of foreign law or enforcement of a foreign judgment.[1] National court of a state can be presented with a situation where it has to take a call for safeguarding its fundamental interests, and for that it has to disregard the applicable foreign law or refuse enforcement of a foreign judgment.[2]

As a matter of practice, courts are under an obligation to ensure that if application of a choice of law clause or giving effect to a foreign judgment would produce a result that would go contrary to the fundamental interests of the forum state, effect to such choice of law or judgment should be denied.[3] And the tool used by the national courts to evaluate and decide upon such challenging situations is the provision of public policy exception. But this exception comes with its own dangers, biggest being its vagueness. If used disproportionately, it has the potential of severely deterring crossborder commerce and other interactions.[4]

The doctrine of public policy plays an equally significant role in one of the most popular alternative dispute resolution mechanisms, i.e. International Commercial Arbitration. It would be important to note here that

[1] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (August, 2008) Vol. 4, No. 2, Journal of Private International Law 235

[2] Peter Hay, 'The Development of Public Policy Barrier to Judgments Recognition in European Community' in H. Bonne and M. Khachidze (eds), Selected Essays on Comparative Law and Conflict of Laws, (C.H. Beck 2015) 887. Also see, Ivana Kundu, Internationally Mandatory rules of a Third Country in European Contract Conflict of Laws – The Roman Convention and the Proposed Rome I Regulation, (Rijeka, 2007) 298

[3] Shaheed Fatima, Using International Law in Domestic Courts, (Hart Publishing, 2005) 398

[4] Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcements of Private Legal Arrangements' (2016) Vol. 94, No. 3, Nebraska Law Review 708

in international commercial arbitration, public policy, doesn't not appear only at the stage of enforcement of awards, but it plays a significant role throughout the process of arbitration. Right from concluding of an arbitration agreement, followed by procedures involved during the arbitration proceedings, and ultimately leading to the annulment and enforcement stages, public policy is almost omnipresent.[5]

The mysterious nature of public policy and its role in private international law and international commercial arbitration itself carves out a case for an in depth examination, that would be both academically and practically useful. The paper will begin with digging into the origin and development of the concept of public policy doctrine, followed by analyzing its role in private international law and international commercial arbitration. Focus of the discussion will remain on application of the doctrine in matters of 'choice of law' and 'enforcement of judgments/awards'. A comparative approach will be adopted while performing the analytical comparison as far as the application of the doctrine in various jurisdictions is concerned.

Paper will highlight the need and significance of a more harmonious approach in terms of interpretation and application of the concept. Suggestions made will aim at rejuvenating cross border trade relations, and creating more conducive environment for stakeholders in international commerce as far as safeguarding their interests in dispute resolution is concerned.

[5] Hantaniau and Caprasse, 'Public Policy in International Commercial Arbitration' – Enforcement of Arbitral Agreements and International Arbitral Awards: The New York Convention in Practice (Cameron May, 2008) 787

Analyzing the Impact of International Investment Law and Human Rights Law on the Doctrine of Sovereignty

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Doctrine of state sovereignty has played one of the most significant role in the development of different areas of international law since the inception of modern international law under the Westphalian system. It is of central importance under the UN system as enshrined in article 2 of the UN Charter. Notwithstanding its importance and status as a jus cogens the concept of sovereignty has been characterized with ambiguity; it has been intrinsically linked with notions of freedom, power and authority; and has played a vital role both during the colonization era and during the decolonization period of international law. As a result the doctrine of sovereignty has been marked with tension and competing interests. This can be observed during the colonial era, the decolonization period and also during the current era of international law.

The concept of sovereignty played a fundamental role during the colonial era in justifying the acquisition of and control over colonial lands. While during the decolonization era the newly independent states relied on the doctrine of sovereignty to oppose any kind of limitations on state action within their territories. The developing countries also used the doctrine to argue for greater control over their natural resources, under the concept of economic sovereignty; and for changes in the international economic law under New International Economic Order (NIEO).

Also during the decolonization era, newly independent states understanding of sovereignty was at variance with the understanding of those wanting to prevent the atrocities of the World Wars period. The end of colonialism left a legacy where newly independent states were particularly sensitive about their sovereignty, both internal and external, and principles of non-intervention. While the premise of UN system of peace and security and economic regulation was based on the idea of transforming the meaning of legitimate political authority from one based on absolute power and effective control to one based on maintenance of basic standards and values that no political agent should be able to abrogate, which would lead to checks

on sovereign authority. This idea of basic standards was central to the development of international economic and human rights law.

This paper will analyse the historical development of the doctrine of sovereignty to understand its impact on the genesis of both intentional investment law and international human rights law. It will then move on to address how the current developments in these two areas of international law is affecting the future development of the doctrine of sovereignty. The purpose behind a comparative analysis of international investment law and international human rights law, is based on the rapid growth in the jurisprudence of both these areas in the past decades and the resultant governance regimes that have developed. Though both areas insistence on certain basic standards imposes limits on traditionally understood concept of sovereignty and state freedom, the global governance regime under international investment law is far more effective and strong when compared to the global human rights regime. Arguments based on state freedom and sovereignty have been far less effective in international investment law and arbitration tribunals, while they have been far more effective when it comes to international human rights enforcement. Interestingly, though direct enforcement of international human rights instruments have been almost non-existent (primarily because of state sovereignty concerns), human rights norms are becoming increasingly important in the development of international investment law, with states using human rights arguments in international investment law tribunals to increase their freedom of action. The use of international human rights norms by national courts as aides to interpretation of national law is also becoming an increasingly significant area of development. Prima facie this raises the specter of contradiction within international law: sovereignty is used by states to limit the impact of international human rights governance regime on the one hand, while at the same time within the international investment law regime states use arguments based on international human rights law to argue for greater freedom of action and also use sovereignty to argue for greater freedom to protect human rights. This paper will look at these current developments and analyse the impact that the developments in these diverse areas of international law, is having on the doctrine of state sovereignty and will try to provide answer to the questions concerning the future of state sovereignty.

Russia v. ECtHR - Resistance or Dialogue: A Comparative Analysis

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This paper attempts to illuminate and contrast practices of the Russian Constitutional Court (RCC), German Constitutional Court, and the UK Supreme Court in relation to European Court of Human Rights' (ECtHR) decisions.

It is focused on a recent Russian case – RCC's response to the ECtHR decision in *Anchugov and Gladkov v Russia*[1], in which the constitutional court has found it impossible to implement on the grounds of the right to universal suffrage extended to prisoners – the subject matter in *Anchugov and Gladkov* - directly contradicting a provision of the Russian Constitution, applying a procedure adopted by the Parliament a year earlier.

While the commonly accepted narrative highlights possible political implications of the case such as Russia's distrust of European institutions, this paper intends, while still considering these short-term and long-term political factors in turn, to revisit them and see the RCC's decision as providing a constitutional brake as a solution to resolve the conflict of two legal instruments (European Convention as interpreted by the ECtHR and the Russian Constitution). In this context, the paper analyses similar devices applied by higher courts in Germany and UK in order to establish i) whether the situation in Russia is unique; and ii) whether the constitutional brake adopted by the RCC is legitimate.

In Germany, the particular focus remains on the often cited *Görgülü*[2] case, in which a possibility of rejecting a ECtHR decision that contradicts the Basic Law is entertained and accepted. However, German

[1] Desision (*Postanovlenie*) of the Russian Constitutional Court, 19.04.2016 <http://doc.ksrf.ru/decision/KSRFDecision230222.pdf> accessed 22 September 2016.

[2] 2BvR 1481/04 (BVerfGE 111, 307).

Constitutional Court offers a more legitimate justification, placing the balance of rights and protection of private interests rather than mere hierarchy of laws in its foundation.

In the UK, common law (*e.g.*, *Pinnock*[3]) has accepted the possibility of using fundamental constitutional principles as grounds for constitutional brakes in the form of *dicta*, however, there, similarly to Germany, it has not been applied in practice. Moreover, the Supreme Court places a large emphasis on restricting constitutional brakes only to those related to the fundamental constitutional principles and serious breaches, creating a stronger threshold and a more legitimate justification than in Russia.

Concluding that the RCC's response could not be construed as sufficiently legitimate when compared to similar instances of constitutional brakes in Germany and UK, the paper proceeds with analysing alternative options that could have been available to Russia based on UK experience: a statement of mistake made by the ECtHR (similarly to *Horncastle*[4]), flexible interpretation of the legislation in question (like in *Ghaidan*[5]), alternative remedies such as a declaration of incompatibility, and mere declaratory judgment. On the facts of *Anchugov v Gladkov*, only the latter two appear to be applicable, however, they would not have made much difference in the Russian constitutional and political context.

All in all, in spite of all criticism, RCC has made a decision that was not ideal in terms of legitimacy, but nevertheless reflected one of the very few possibilities of resolving a conflict between the ECtHR decision and a constitutional provision. Therefore, the case is truly unique even while compared with instances of constitutional brakes in other jurisdictions, and should be used in order to correct the way international bodies apply similar principles of international law to diverse states characterised by distinct constitutional frameworks.

Therefore, the present paper aims to utilise comparative legal methods in order to offer a distinct, more refined perspective on a recent topical case. The conclusions adopted represent a rather critical view on the international human rights law and related policies, and might be of a practical as well as theoretical interest.

[3] [2010] UKSC 45.

[4] [2009] UKSC 14.

[5] [2004] UKHL 30.

A Comparative Study of the Models of Disability Under Treaties of Int'l Human Rights and Int'l Humanitarian Law

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The paper shall is using the models of disability as lenses of developing a comparative design of exploring and examining the implications and impacts of the differences in legal approaches to issues of disability in treaties of international human rights and those of international humanitarian law. The paper exhibits an innovative approach of using the theory of disability studies by correlating it in the context of treaties of public international law. That theory has been rarely constructed in the context of understanding the legal history of the sources used by public international law. The theory applied relates to models of disability such as; the Individual model, (ii) Medical model (iii) Charity/Tragedy model, Institutional /Rehabilitation/Consumer model, Social/ Social model /Social right based model.[1] In that regard the paper is designed to demonstrate that a significant number of charted treaties mechanisms on human rights have shown a tendency of shifting towards to the social right based model of disability ever since the coming into force of the Convention on rights of persons with disabilities (CRPD).[2] However the Geneva Convention (I-IV) and the Additional Protocols have hardly responded issues of disability in the same manner. The treaties of the latter are still perceiving disability through lenses of a medical model.[3] They also associate disability to sickness, wounding and medicalisation,[4] with less emphasis or clarity on aspects

[1]B. M Altman, 'Disability definitions, models, classifications scheme and applications', G. L Albrecht, K. D. Seelman and M. Bury (eds.) Handbook of Disability: Disability studies (Sage Publishers, 2001) pg. 97-121, see also T. Shakespeare, 'Disability right and wrongs', (Routledge publishers, 2006), M. Oliver, Understanding disability from theory to practice, (Palgrave Publishers, 1996) pg. 30-42, B. Armer, 'In search of a social model of disability', in C. Barnes and G. Mercer (eds.) *Implementing the social model of disability: Theory and research* (The Disability Press, 2004) pg. 1-17.

[2] UN General Assembly, Convention on the Rights of Persons with Disabilities, 13 December 2006, Entry into force: 3 May 2008 A/RES/61/106, Annex I, available at: http://www.refworld.org/docid/4680cd212.html [accessed 27 October 2016]. See also UN Commission on Human Rights, Human rights and disability., 3 March 1992, E/CN.4/RES/1992/48, available at: http://www.refworld.org/docid/3b00f04024.html [accessed 29 October 2016]

[3] UN Human Rights Council, Thematic study on the rights of persons with disabilities under article 11 of the Convention on the Rights of Persons with Disabilities, on situations of risk and humanitarian emergencies, 30 November 2015, A/HRC/31/30, available at: http://www.refworld.org/docid/56c42c744.html [accessed 10 October 2016]. Para. 3.

[4] Geneva Convention (1-4) Common Article 3 in conjunction with Additional protocol 1. Cf. UN Human Rights Council, Thematic study on the rights of persons with disabilities under article 11 of the Convention on the Rights of Persons with Disabilities, on situations of risk and

of inclusion in aspects applying the equal of fundamental guarantees or special considerations to the protection to objects useful for the continued or aftermath integration of civilians with disabilities. The paper uses the differences in the models to deconstruct a presumption that multilateral treaties for international human rights and international human rights are complementing each other during armed conflicts.[5]

humanitarian emergencies, 30 November 2015, A/HRC/31/30, available at: http://www.refworld.org/docid/56c42c744.html [accessed 10 October 2016]. Para. 4. Cf. S. Sivakumaran, 'The law of non-international armed conflict', (Oxford University Press, 2012) pg. 476.

[5] UN Human Rights Council, Thematic study on the rights of persons with disabilities under article 11 of the Convention on the Rights of Persons with Disabilities, on situations of risk and humanitarian emergencies, 30 November 2015, A/HRC/31/30, available at: http://www.refworld.org/docid/56c42c744.html [accessed 10 October 2016]. Para. 55.

The Constitutionality of Criminal Procedure and Prison Laws in Africa – A Comparative Analysis

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The second half of the 20th century saw the development of international human rights law recognising rights to arrested, tried and detained persons. Over the same period, many African countries adopted new criminal procedure legislation and prison laws. A few decades later, many African countries underwent constitutional reform, which afforded rights to detained and accused persons.

Starting from this premise, the author conducted, an extensive comparative exercise of the constitutions and laws of Burundi, Côte d'Ivoire, Kenya, Mozambique and Zambia in 2016. She reviewed 41 rights of arrested, accused and detained persons at different stages of the criminal justice process: at police arrest, during police custody, in pre-trial detention, during trial, and in detention post-sentence.

The 2016 research report examined whether and to what extent the rights recognised under international human rights law and in African constitutions with detailed Bills of Rights (in particular the Kenyan and South African constitutions) were upheld in the five constitutions and in the relevant subordinate legislation of Burundi, Côte d'Ivoire, Kenya, Mozambique and Zambia. The research report is detailed yet descriptive.

The proposed conference paper will seek to draw from the 2016 research to identify, compare and analyse trends across jurisdictions on the rights of arrested, accused and detained persons under international human rights law, constitutional law and subordinate legislation.

Firstly, the conference paper will seek to identify trends in the upholding of the rights of arrested, accused and detained persons, and the kind of rights that are recognised across jurisdictions compared to the kind of rights that seldom receive constitutional and/or legislative recognition.

Secondly, the paper will seek to analyse the constitutional and legal language adopted in the different jurisdictions, and to extent to which the constitutions and laws adopt more of a rights-driven or procedurally-driven language.

Thirdly, it will seek to analyse whether the tradition of civil law or common law has any impact on the extent to which the rights of arrested, accused and detained persons are recognised and upheld.

Fourthly, the paper will examine the extent of judicial activism in upholding the said rights, but also the courts' consideration of international human rights and constitutional law in their rulings. The fact that a jurisdiction is of monist or dualist tradition may also have an impact on the nature and content of court rulings.

The conference paper will conclude with some recommendations to lawmakers, independent human rights institutions, academics and civil society organisations on possible avenues to improve constitutional and legislative compliance with the rights of arrested, accused and detained persons, as recognised under international human rights law; as well as improving legislative compliance with constitutional prescripts on the rights of arrested, accused and detained persons. The manner in which rights are reflected in other jurisdictions will specifically be highlighted.

The Utilization of Italian Doctrine by Brazilian Supreme Court (STF)

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The globalization phenomenon has been the cause of a series of homogenization processes of law – which cannot be confounded with generalization or universalization of rights. We perceive, therefore, an intense model circulation, especially constitutional models, but, generally, in an extremely superficial way.

In this context, constitutional comparatists may have as mission avoid the uncritical importation of models, also considering cultural conditions, in view of the fact of the constitutional models circulation come together with the adaptation to the exigencies of receiver legal systems.

Whereas the models circulation (also known as borrowing or transmission) may happen by means of transplant (also known as transfer), imposition or reception (as a presupposed assertion), this paper focuses on the discussion about the reception of penal criticism (theories of *garantismo*) in Brazil. In other words, it deals with the utilization of penal criticism as a guide to the interpretation and the application of fundamental rights, presenting eventual methodological distortions that can maculate the results obtained by brazilian Supreme Court (*Supremo Tribunal Federal*) in judicial decisions involving criminal proceedings.

It´s often the case that legal operators do not know the real theories that supposedly receive (even in an unconscious way), sometimes applying as reason to adopt certain posture something other than effectively claims. Assuming, thus, the classification of imitations in global and partial, we shall put in question if, among the judicial partial imitations that are put into practice, receiving foreign doctrine, (a) there are cases in which are not performed the necessary and appropriate adaptations to the judicial-political brazilian context (absence of adaptations that would be successful) and (b) other cases in which are performed excessive mutations (incompatible formation of hybrid theories). Yet, we shall verify (c) the possibility of occurring the bad imitations, which are the cases when it occurs a divergence between the model and the reception result.

Seeing that penal criticism (garantismo) is not a brazilian theory, it is necessary to compare formants of the law (*formanti juridichi*), in this case different ones, with the special purpose of checking the application of penal criticism as basis of judicial decisions (judgments) involving penal proceedings, eventually disrespecting fundamental rights. Therefore, it´s essential to examine the circulation – or the dissociation – between formants of distinct systems, italian doctrine and brazilian jurisprudence (court decisions).

There are uncountable judicial decisions that refer the application of penal criticism, in an express way or even implied, given by judges and courts in all the country – Brazil – and even by *Supremo Tribunal Federal*, higher instance of brazilian judiciary. The *STF* accumulates the functions of Supreme Court and Constitutional Court, to whom are the judgments that involve the Constitution and, therefore, fundamental rights. These were the reasons why I have chosen to study *STF* decisions, relative to the express or implied application of penal criticism in brazilian criminal proceedings, with the purpose to assure fundamental rights.

In this paper, I aim to analyze dogmatic and empirically the analogies and the differences between brazilian jurisprudence and italian doctrine, considering the relevance of the society and the cultures, valorizing pluralism and not being ignorant of living in a time distinguished by a new discover of cultural rights inside occidental models of law creation, as in Brazil case.

By means of a quantitative research, limited in time – judgments of January to June 2016 –, similarities, analogies and differences are verified, in a socio-cultural context and understanding legal alterity.

Therefore, using especially systematic and comparative methods, some judicial decisions given by *Supremo Tribunal Federal* in which italian doctrine is referred are presented, studying the way as penal criticism (*garantismo*) is applied to interpret fundamental rights in brazilian criminal proceedings (qualitative research).

Human Rights-Based Approach on the Protection of Right to Speedy Trial in the Settlement of Judicial Review of Legislation in the Constitutional Court of Indonesia

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The right to speedy trial is an essential component in the relation between society and the court. If the society view the settlement of cases running slowly, the trust to the court or even to the sense of justice will be affected. Therefore, a judicial system is required to give a decision quickly without compromising the quality of justice and principle of equality and impartiality.

In the context of the settlement of judicial review of legislation in Indonesia, there is no legal instrument which regulate a technical step to protect right to speedy trial of the applicant. The absence of this technical arrangement makes the existence of the right to speedy trial is often not realized, even by the Constitutional Court judges. In case number 34/PUU-XIII/2015 on the review of law on local election, Judge Ahmad Fadlil Sumadi stated that they will not consider the request of case priority settlement filed by the applicants because it will disturb the settlement of other cases. Another example, in case number 14/PUU-XI/2013 on the review of law on presidential election, the court considered intentionally delayed to pronounce its decision. It became controversy because there was 10 months gap between the final deliberation sessions of judges with the pronunciation agenda of the decision. Whereas, both cases needed to be solved immediately because it was related to the election agenda.

The aim of this paper is to analyze the ideal concept of right to speedy trial in judicial review of legislation based on human right-based approach. In addition, this paper will also be equipped with a comparative study regarding the protection of the right to speedy trial in the settlement of judicial review of legislation in Austrian and South Korean Constitutional court.

This paper indicates that based on the human-right based approach, the constitutional court as the duty barrier plays an important role in protecting the right to speedy trial of the right holders, especially the applicant of the case. That role can be done by assessing the need of priority, in terms of length of time, at

the preliminary hearing of each case. This paper also found that the time limitation is applied in both Austrian and South Korean Constitutional Court as preventive mechanism to protect the right to speedy trial of the applicant.

Legal Transplants and Development: A Social Networks Approach

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One of the persistent troubles within the law and development enterprise surrounds the issue of legal transplants. Legal transplants are regularly introduced into developing societies to help promote the rule of law and foster economic development. However, the results of such transplants have been very unclear, ranging from successful to flat out failures. The unpredictable outcomes of legal transplants point to the need for a better understanding of the mechanisms with a legal order that facilitate and inhibit legal reforms. This article proposes the use of social networks for understanding the viability of legal transplantations. A social networks approach helps to represent societies as interconnected web of social relations. Social networks emphasize the multiplex (i.e. multiply overlapping) relationships between networks actors. Networks get stronger as the number of overlapping relationships increase. Legal transplants introduced into a new environment never enter a void but rather enter a network of social relations that follows its own regulatory logic. The extent to which a legal transplant has an effect will depend on the structure of the network and the nature of the relations between the parties. A social networks approach can provide valuable knowledge on how the existing legal order in developing country should be studied before introducing legal transplants to that environment.

Private Law Legal Transplants and Public Law Context: A Tale of Soil and Weather

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Since the publication of the seminal book by the late Professor Watson in 1974[1], legal transplants have regularly been studied by comparative law scholars. From the very beginning on, the concept had been heavily disputed[2]. Our aim with the present paper is to analyze a specific aspect of the process of legal transferring between Turkish and Swiss Civil Law. We will not only focus on pure private law issues, but also take into consideration the public law context, namely the constitutional framework of both countries.

Turkish Civil Law is characterized by the almost literal reception of Swiss legislation shortly after the foundation of Republic. However, Turkish public law is under other influences. This last point is crucial as far as constitutional review of legislation is concerned. Turkey has a fully fledged Constitutional Courts entrusted with the power to vacate laws contrary to the Constitution, whereas Switzerland still belongs to the small group of European countries without such a constitutional redress. Both countries share in common the European Convention on Human Rights and the wide case-law of the Strasbourg Court. This is creating a general background which is impacting both Turkey and Switzerland in the same way in spite of the differences at a constitutional level. If we may dare to draw a botanical comparison, to study a legal transplant from Swiss to Turkish Civil Law context, is more or less like examining the grow and development of a cutting (legal transplant) put on a different soil (Public Law context), the weather and all the environmental factors being the same (European Human Rights Law).

We have decided to examine a specific situation where public law is influencing the development of a legal transplant in the field of private law: the timelines to start litigation on filiation issues. Both countries have a tradition of imposing clear deadlines on those who either want to challenge the paternity of an individual, or may seek an affiliation order in respect of a child. The matter is addressed by applying two different

[1] ALAN WATSON, Legal Transplant – An approach to Comparative Law, Scottish Academic Press, Edinburgh, 1974.

[2] See for instance, PİERRE LEGRAND, On the impossibility of 'Legal Transplants', 4 Maastricht J. Eur. & Comp. L. 111 (1997).

timelines during which the contestation may be brought to a court: a first one which runs from the time where the interested party learns that the biological and legal filiation are diverging, and a second, longer one, which runs from a specific event even if nobody is aware of the discrepancy. Everyone who wants to lodge a claim should respect both time-limits. This restrictive approach has been challenged by the European Court of Human Rights in its case-law on the right to private and family life.

This tension has been resolved in a different way in the two countries. The Turkish Constitutional Court has gradually annulled all the provisions concerning the periods expiring without the knowledge of the interested party. The claimant needs now only to comply with timelines running after he has learned of the biological paternity. In Switzerland, the Federal Supreme Court decided to create a specific remedy in the form of a "declaratory action of biological paternity" which leaves the legal filiation untouched. This interesting way to solve a same issue through different means can only be explained by the differences between the Swiss and Turkish constitutional framework. Since Swiss courts do not have the power to vacate the legislation contrary to the fundamental rights, the Federal Supreme Court decided to create a specific remedy which can be granted in spite of the strict deadlines of the Civil Code. This was not necessary to the Turkish Constitutional Court which could take a more radical approach.

As a matter of conclusion, we will go back to our botanical metaphor. Constitutional law being like the soil on which a cutting is growing, we can measure its fundamental importance even for Civil Law legal transplants. This can be perfectly demonstrated by the examination of a case where the evolution of the legal transplants is dictated by influencing factors, which like the weather, are shared by the legal order of origin.

Close Link Between the Right to Specific Performance and Penalty Clauses: A Comparative Approach

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In a contractual relationship, the debtor is liable for a full and due performance. Furthermore, the parties can also agree on a penalty clause to be performed, in case where the obligation is not diligently performed. Penalty clauses are side-agreements enlarging the scope of liability of the debtor by establishing a penalty to be paid in case of breach of contract. Thus, these clauses guarantee the performance by creating pressure on the debtor and are awarded even if there is no damage. On the other hand, penalty clauses are to be separated from liquidated damages clauses which are also side-agreements aiming to estimate damages in case of a possible breach of contract. In other words, such clauses simply aim to measure damages that are hard to prove once incurred. Liquidated damages clauses can easily be enforced by the courts in both civil and common law countries. However, this is not the case for penalty clauses.

In civil law systems, penalty clauses are generally valid and enforceable, unless they are highly disproportionate or manifestly excessive or sometimes if the contract is partly performed. In such cases, penalty clauses are subject to reduction under the supervision of the judge. However, court's intervention is rather limited if they are concluded between merchants. In common law systems, on the other hand, the penalty clauses are not allowed at all. Even liquidated damages clauses that seem to have penalty character are also deemed null and void.

In short, contrary to their approaches to liquidated damages, civil law and common law systems have divergent approaches to the penalty clauses. Such a difference finds its roots back in the old debate and divergence between these systems with regard to the specific performance. In a civil law system, specific performance is considered as the "backbone of the obligation" while in a common law system, it is an exceptional and a secondary "remedy". Therefore, the contrast between these approaches to the penalty clauses which is an instrument that enforces specific performance, is neither a surprise nor a contradiction.

This paper aims to focus on the divergence between civil law and the common law systems on the right to specific performance, and accordingly explain the effects of such divergence on the approach to the validity of penalty clauses and finally elaborate on the attempts of harmonization of such divergences.

The Enforcement of Penalty Clauses in the Light of Comparative Law

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There are certainly some different regulations and provisions relating to the contract law between continental law tradition and common law tradition. The subject of my paper is “penalty clauses” which constitutes one of these different legal institutions.

Penalty clause may be considered as a sum of money, which is to be paid by a party for the failure to perform its contractual duties timely and duly. It is regulated between the provisions 179-182 in Turkish Code of Obligations.

The parties of a contract may decide about the penalty clause freely (contractual freedom) according to the Civil law approach. The enforcement of conventional penalties does not require proof of any real damage and is possible even if the aim is “to punish” the other party. However, if the amount is grossly excessive, it may be reduced by civil law courts. According to the Common law approach, common law courts on the basis of just compensation principle may declare a clause, which stands for a penalty, unenforceable, especially if these clauses have a penal (punitive) character. The general rule under the common law is that a payment clause is only enforceable when it functions as a liquidated damages clause.

The main difference between these two legal traditions lies essentially on their different notions about contract liability. In common law system, the payment of damages constitutes true fulfillment of the contractual promise. Whereas, in civil law system, contract liability is an effect arising from the breach or a sanction. Thus, the amount stipulated is always intended to be higher than the loss from a civil lawyer’s point of view.

Common law and civil law systems do not seem to agree on the function of penalty clauses. Whereas these clauses are seen as a way of enriching contract law in civil law, they are forbidden in common law.

The legal provisions and the enforcement are not totally same even within the civil law countries. The literal enforcement of conventional penalties was a rule of classical Roman law that entitled the aggrieved party to recover the agreed sum without any restriction. In the 19th century, the codification brought back the principle of literal enforcement of penalty clauses to continental European laws. The French Civil Code (1804) established the literal enforcement of conventional penalties. The Napoleonic Code was the model for the neighboring nations and their laws copied this regulation. Nonetheless, this principle of literal enforcement of penalties was progressively abandoned and most European legislations converged on allowing the judge to moderate the contract penalties which are grossly excessive.

After having explored the clash between the civil and the common law traditions and the existing disparities among civil laws in the field of penalty clauses, there is definitely a necessity for the adoption of transnational rules to secure the enforcement of penalty clauses. Although the international community acknowledged this need years ago, the harmonization projects have generally failed in that respect. The reasons that might explain this failure are: 1.All these projects have always aligned with the civil law legal tradition, 2.Common law countries are unwilling to give up the prohibition of penalties, even when the parties to a contract are merchants. As a result, in the absence of coordination instruments among the several jurisdictions, the will of the contracting parties is at risk.

Nevertheless, from a practical point of view, given the failure of all the attempts of the international community in the field of the enforcement of penalties, a quick and safe solution for now is the shielding of the enforcement of penalties in international commercial contracts in common law jurisdictions by means of their statutory recognition at national level. This recognition in each state would be restricted to penalties expressly agreed by the parties in contracts in which at least one party is non-national and the choice of law designates a foreign law according to which penalty clauses are permissible.

My purpose is to analyze the regulation and enforcement of penalty clauses in Turkish law (Code of Obligations) in comparison with other civil law countries, legal provisions and within different legal systems from a general point of view.

Punitive Damages; a Necessity in Civil Law

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Money makes the World go round: The World turns thanks to money; not because of other virtues such as nobility or love. This was underlined by Charles Dickens in his novel "Dombey and Son": "*It (money) can do everything*." demonstrating how dependent our society is on money.

In case of a tort, an individual who is subject to a Common-Law jurisdiction may receive payment in excess of her provable injuries. This is **in sharp contracts with Civil Law** as per which damages are awarded as modus operandi for compensation for loss or injury suffered and limited thereby.

Policies underlining punitive damages have no concern with making claimant richer. They focus contrariwise on status of wrongdoer seeking **punishment** therefor and **deterrence** for future wrongdoers. Interests therefor are **society's interests** in general rather than financial interests of victim. Hence, punitive damages should not be regarded as legal system's instruments standing for detriment thereof but, in opposition, that function for its benefit. In the end, they are not awarded based on the claimant's injury but wrongdoer's state of mind. In sooth, punitive damages are not instruments of legal order for compensation of victims but, as the name suggests, they are tools for **punishing** wrongdoers. Accordingly, they seek the correction the aggrieved public order by the wrongful act. Thus, they are not recoverable for breaches of contract in most of the states in the United States. Generally, they are only recoverable for torts. The claimant thereof must demonstrate that the wrongdoer's conduct was in a manner that warranted such damages to be awarded thereto. If the wrongdoer's conduct lacked the aggravated factors that are necessary for awarding punitive damages, the wrongdoer may not be required to pay punitive damages no matter what is degree of her intention in committing the relevant tort or injury of the claimant. As the court has reasoned in Clay v. Ferrelgas, "***wrongdoer must have some culpable mental state***".

Awarding the claimant with damages in excess of her injuries or loss in Civil Law countries may raise number of questions and cast doubt on this system to which individuals living in Civil Law countries are

not used. Therefore, the punitive damage mechanism should be introduced in a Civil Law country after scrutiny reviews. For example, the party with whom the burden of proof lies is not harmonized in the United States. While only preponderance is the degree of acceptable standard of proof under New York Law, Colorado Law requires clear and convincing evidence to be demonstrated by the party requesting punitive damages. Colorado Law's solution that is also recommended by the American Bar Association regarding the burden of proof issue may be more proper for Civil Law countries who are not experienced with the system to avoid unforeseeable court awards. Besides, since Civil Law is foreign to awarding victims in excess of their injury, they may create a mechanism by which damages paid in excess of victim's injury is not received thereby but by an institution selected by judge. This will also act as a solution for criticism for amounts of awards highness of which are at stake. Since tort law reform is being discussed in US doctrine – specifically aiming to regulate and limit punitive damages - current state of US doctrine is of invaluable value. If this instrument is imported in an "updated" manner answering shortcomings of Common Law, the relevant country may paradoxically export the "updated" punitive damage system back to the United States.

When the future wrongdoer in a society fears to suffer a great loss in the event she commits the tort by which she is determined to maliciously harm the victim, she will be discouraged from committing it. These are the societies of Common law countries. Individuals in Civil Law countries deserve no less: They deserve equally "corrected" societies. Bearing in mind the fact that it is money that makes World turn, shortcomings in society can be "corrected" by using money: By punitive damages to punish the actual wrongdoers and defer future wrongdoers so that societies be more "corrected" with less "wrongs" therein.

Non-Possessory Security Rights on Movable Goods

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In legal systems from different legal families, a traditional method of establishing a security right on movable goods (personal property) is the pledge which is classified as a possessory security right. In order to create a pledge, the security provider has to transfer possession of the movable good to the secured creditor or a third party that acts on behalf of the secured creditor so that the security provider cannot exercise direct and sole control over the movable good. The dispossession of the security provider is required to provide publicity which is necessary to protect third parties that can be potential creditors of the security provider. However, this requirement is accepted to be impracticable for both the security provider and the secured creditor. The security provider cannot use the goods which might reduce his/her ability to produce revenues and eventually pay his/her debt to the secured creditor. Furthermore, the requirement to transfer possession causes costs of storage and preservation of the goods. Because of these reasons the pledge is unattractive in practice.

This fact can be observed in German legal practice where the pledge is practically extinct. The security function is instead fulfilled by other legal instruments, namely retention of title (retention of ownership) and fiduciary transfer of ownership, which were mostly developed in practice and then recognized as valid by case law. However, as it will be explained in the paper, these instruments lack any means of publicity in German law. Therefore, third parties are exposed to a serious risk about the creditworthiness of the security provider. In comparison, the rules of Swiss law about retention of title and fiduciary transfer of ownership provide the necessary protection for third parties. However, as it will be explained in the paper, these rules diminish the attractiveness of these instruments in the practice.

As illustrated by German and Swiss legal systems, there is a clear need for non-possessory security rights in order to increase the use of movable goods as security. However, there is also a need for a method to provide publicity so that third parties are not exposed to serious risks. A method used in some states, like France or the United States, is the registration of non-possessory security rights in a public registry.

Furthermore, the model rules in UNCITRAL Model Law on Secured Transactions and Draft Common Frame of Reference (Principles, Definitions and Model Rules of European Private Law) provide a comparable system of registration. It should be noted, however, that once a registered non-possessory security right is provided for in a legal system, several new issues arise. The regulation of these problems has a decisive effect on whether non-possessory security rights can and will be used widely in practice.

In this paper the common features of a non-possessory registered security right on movable assets will be sketched based on the law of the United States and the model rules in UNCITRAL Model Law on Secured Transactions and Draft Common Frame of Reference. One feature of these regulations is the difference that they make between the creation of the security right (attachment) and the third-party effectiveness of this right (perfection). Such a distinction is unfamiliar to German and Swiss laws. Another feature of the examined rules is that they allow the creation of a security right on future assets insofar as these assets are determinable. An important feature is that a comprehensive approach is used with regard to all instruments with a security function although in some legal systems they may not be classified as a security right in a technical sense, such as retention of title, fiduciary transfer of ownership or financial lease. Finally, the general system of priority will be explained. The explanation of these features will provide some insights about the requirements of a successful regime of non-possessory security rights on movable goods.

The Convoluted State of Voyage Conditions: Increase of the Risk of Loss, Applicability of the Insurance Act 2015 And of the Principles of European Insurance Contract Law

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The rules on marine insurance which are almost invariably identical in a number of jurisdictions such as Australia, Canada, Hong Kong, New Zealand and Singapore due to the influence of the English Marine Insurance Act, 1906 ('the 1906 Act') contain voyage conditions on change of voyage, change of destination, deviation and delay in voyage. All these circumstances has the identical consequence that the insurer is discharged from liability, respectively, as from the time when the determination to change is manifested;[1] when the actual deviation from the agreed route takes place,[2] and when the delay becomes unreasonable.[3] The remedy of discharge from liability resulted in the consideration of these conditions by the Law Commission of England and Wales[4] and the Australian Law Reform Commission1[5] as terms operating similarly to 'warranties' in the 1906 Act sense; whereas they are, in effect, alteration of risk provisions. They are accordingly not caught by the provisions of the Insurance Act 2015 ('the 2015 Act') on warranties.

Some of the enumerated conditions are now however largely obsolete as they are replaced by express terms in standard form contracts. These terms either operate to discharge the insurer from liability, or require the policyholder to notify the insurer of the happening of an event as a condition precedent to the liability of the insurer. The rationale behind the remedy of discharge or the requirement of notification rests upon the

[1] The 1906 Act s 45(2)

[2] The 1906 Act s 46

[3] The 1906 Act s 48

[4] The Law Commission Consultation Paper No 204 and The Scottish Law Commission Discussion Paper No 155, Insurance Contract Law, The Business Insured's Duty of Disclosure and the Law of Warranties, published on 26 June 2012, para 12-16

[5] The Australian Law Commission in their Review of the Marine Insurance Act 1909 Report No 91, 9.213-9.214 had gone a step further and proposed that these provisions should be treated in the same way as warranties, i.e. that they should be repealed and be dealt with as an express term of the contract.

view that the voyage so changed or delayed is no longer the voyage assumed under the contract, yet constitutes an increase of the risk initially undertaken by the insurer.

The 2015 Act provides in section 11 that where the insurance contract contains a term that would tend to reduce the risk of loss when complied with by the assured, the non-compliance with it shall not give the insurer the right to limit, exclude or discharge his liability where such non-compliance could not have increased the risk of the loss which actually occurred. This is yet another provision of the 2015 Act which reflects the objective of protecting the policyholder. The current scarcity of commentary and case law on the 2015 Act due to its recency gives rise to the finding that, according to the best knowledge of the author, the issue whether terms replacing voyage conditions in standard form contracts could be subject to the provision in section 11 has not yet been elaborated elsewhere. The paper will thus seek to fill this gap by also placing special emphasis on the standard wordings recently published by Lloyd's Market Association on contracting out of section 11.

The pro-policyholder approach of the 2015 Act is echoed in the Principles of European Insurance Contract Law ('PEICL') – a set of opt-in model rules which aims at establishing a common insurance contract law sphere across the European Union.[6] The existing tendency in various jurisdictions of subjecting marine insurance to general insurance law principles affected the scope of PEICL as well which, in principle, apply also to marine insurance.[7] The provisions of PEICL on increase of risk are fairly comprehensive and encompass the requirement of 'materiality of aggravation'; the duty of notification of aggravation by the assured and the consequence of its breach; and the consequence of the failure of causal connection between the loss and the aggravation. Most of these elements are not otherwise provided for in the 2015 Act.

The paper will therefore assess to what extent PEICL and the 2015 Act, both of which adopt an approach based on the protection of the policyholder, could approximate the conceptual and practical differences between English law and the continental approach to insurance contract law as regards increase of the risk of loss. It will moreover seek to highlight any divergences which may in turn become apparent in the

[6] The latest version of PEICL dated November 2015 is available at: https://www.uibk.ac.at/zivilrecht/forschung/evip/restatement/draft.html (last accessed, 18 December 2016)

[7] Jürgen Basedow, John Birds, Malcolm Clarke, Herman Cousy, Helmut Heiss and Leander Loacker, Principles of European Insurance Contract Law, 2nd expanded edition (Sellier European Law Publishers, Verlag Dr. Otto Schmidt KG 2016) 61

upcoming years following the adoption of PEICL and the application of the 2015 Act to newly arising disputes.

Redressing the Balance: Fabricated Insurance Claims And (Harsh) Civil Remedies

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The Association of British Insurers (ABI) puts the annual cost of detected insurance fraud at £1.3bn, which equated to 2500 fraudulent claims every week in 2015.[1] The scale of the fraud problem has been used by the English courts to develop a rule designed to deter fraudulent claims. The remedy of forfeiture, a rule of common law origin which now appears in statute,[2] operates to deprive the assured of the entire claim to which the fraud relates, including any genuine part. The rule was developed in the context of exaggerated claims where the assured took advantage of genuine loss for financial gain. This is a civil penalty which goes no further than removing the claim the assured would otherwise have had. The rule does not, for example, seek to punish or impose additional financial penalties. This can be readily understood; after all, the Fraud Act, 2006 provides criminal penalties for insurance fraud, including the possibility of a lengthy prison term.

The problem with forfeiture, however, is that it is the only civil response to insurance fraud. This is problematic because fraud is not a singular offence but a range of offences characterised by different degrees of financial gain, planning and moral culpability.[3] To deprive the assured of the entire claim makes sense in the context of exaggeration but is less appropriate in relation to other types of claim. Forfeiture, for example, constitutes no sanction whatsoever in the case of a wholly fraudulent claim where the assured submits a claim for non-existent loss or deliberately caused the loss himself. The assured never had a cause of action against the insurer and therefore has nothing to forfeit. By contrast, forfeiture constitutes a disproportionate response to valid claims supplemented by false evidence, relatively minor wrongdoing.

[1] ABI, 'From Mr Whippy to giggling conmen no let up as insurers turn up the heat on insurance cheats' (13/09/2016) available at: https://www.abi.org.uk/News/News-releases/2016/09/From-Mr-Whippy-to-giggling-conmen-no-let-up-as-insurers-turn-up-the-heat-on-insurance-cheats (accessed 11/12/16).

[2] Insurance Act, 2015 s.12 ('the 2015 Act').

[3] K Richards, 'Deterring insurance fraud: A critical and criminological analysis of the English and Scottish Law Commissions' current proposals for reform' (2013) 24 ILJ 16, 18.

The lack of any correlation between the seriousness of wrongdoing and the effect of forfeiture is counterintuitive.

The recent English Supreme Court decision in The DC Merwestone[4] rectified this imbalance in relation to fraudulent device claims. The forfeiture rule will no longer operate against the assured who bolsters his claim with false evidence. Though to be welcomed, neither this decision nor recent legislation[5] do anything to address the absence of a civil sanction for wholly fraudulent claims. This absence is surprising in several respects. Historic under-resourcing in the criminal law has placed the onus on the civil courts to sanction, and by extension deter, insurance fraud. Given that the courts have conceptualised deterrence as contingent on harsh penalties, the absence of an effective penalty for fabricated claims, and much less a severe one, makes little sense. In addition, these claims also impose considerable costs on public resources and the environment. This further justifies the creation of a civil sanction for the wholly fraudulent claim.

This paper adopts a comparative approach to argue in favour of civil sanctions at the top end of the fraudulent claims spectrum. In particular, the discussion will draw upon the response to fabricated claims in English criminal law and consider the use of financial penalties in related areas of private law. In addition, reference is made to the Canadian context where exemplary damages are used to sanction the wholly fraudulent assured. Building on these perspectives, the suggestion made here is that exemplary damages should be routinely sought by underwriters to combat wholly fraudulent claims. This is not a particularly novel suggestion since the wholly fraudulent claim would seem to fulfil the second criterion in Rookes v Barnard;[6] wrongful conduct by the defendant calculated to make a profit.[7] Moreover, exemplary damages have been successfully sought in several first instance cases involving fraud in consumer motor policies[8] but these actions are piecemeal. The argument made here is that a cause of action should be contained within the 2015 Act and used to target commercial fraudsters.

Large financial penalties are regarded as exercising a deterrent effect in related areas of law, not least the Fraud Act and the Proceeds of Crime Act, 2002. Empirical research on decision-making lends further

[4] Versloot Dredging v HDI Gerling (The DC Merwestone) [2016] UKSC 45.

[5] Law Commission, Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment (Law Com 353, 2014) [22.28]-[22.31].

[6] Rookes v Barnard (No. 1) [1964] A.C. 1129.

[7] Rookes 1226 per Lord Devlin.

[8] For example, Direct Line v Akramzadeh (15/06/16) (unrep); Hassan v Cooper [2015] EWHC 540 (QB); Vasile v Pop Loan, Axa (17/11/15) (Willesden County Court); Axa v Jensen (10/11/08) (Birmingham County Court).

credence to the view that large penalties are effective in relation to serious wrongdoing and that these penalties should be communicated to potential targets. Statutory rights to redress would constitute the first step in such communication. Furthermore, exemplary awards are sought more readily in Canada where there is much greater judicial engagement with the broader policy considerations. The availability of such remedies would overcome the twin objections that the forfeiture rule does not deter the wholly fraudulent claim and operates in a counterintuitive fashion.

Why There Was A PPI Scandal in England But Not in France— According to An Anglo-French Insurance Lawyer

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The year 1998 saw the beginning of England's payment protection insurance (PPI) "scandal"—PPI being insurance that "you take out [with] a loan or mortgage" to "cover your loan repayments if you have to stop work because of illness [or] accident", "become disabled", "lose your job", or "die" (online: <https://www.citizensadvice.org.uk/debt-and-money/insurance/payment-protection-insurance/>). The scandal started with the press reporting on perceived problems with PPI, including the amount of premiums and exclusions.

Though the scandal is an ongoing one, there are indications that it is coming to an end. England has now moved away from its former rules-based model of financial services regulation to a more principles-based model, enabling the authorities to take striking enforcement action. Furthermore, the authorities have introduced PPI-specific rules, in particular prohibitions on selling single-premium PPI and on selling PPI at the same time as the loan.

Having trained as a common and French civil lawyer, I was able to work as legal counsel to businesses based in England and France on PPI intended for residents of these countries. I perceived a concern—again, in both countries—that the French authorities would come to regulate PPI as restrictively as their English counterparts had. However, the French authorities never did any such thing, and still have not.

It would be incorrect to describe the French PPI market as problem-free. There is one group of actors on the French market that has attracted considerable criticism: France's banks. The country's banks have traditionally dominated its PPI market at the business-to-customer level, and the authorities have been working to make the market more competitive. However, otherwise, the authorities have largely disregarded it as a priority for reform.

Surprisingly, the authorities have even largely disregarded a would-be PPI scandal, setting consumer association UFC-Que Choisir against certain financial services groups. Recently, the association persuaded the court to order two financial services groups to pay compensation for having failed to share certain PPI-related profits with their customers. However, in a recent press release, the association described the order as merely "symbolic" and called upon the authorities to "take a position" (online: <https://www.quechoisir.org/actualite-assurance-emprunteur-condamnation-encourageante-d-un-assureur-et-d-un-preteur-n1269/>).

In this paper, I attempt to explain this overall state of affairs—to explain why there was a PPI scandal in England but not in France.

As I see it, the reason is mainly one of legal culture. UK private law is based more on the principle of *caveat emptor* (buyer beware) than any principle of caveat venditor (seller beware). Therefore, for some time, businesses operating on the UK PPI market did so on a *caveat emptor* basis, rather than on a *caveat venditor* basis. Ultimately, it was not in their best interests to do so, as it was in doing so that they precipitated the PPI scandal—or, as we sometimes refer to it, the PPI *mis-selling* scandal. One reason that there arose no equivalent scandal in France is that French private law is based more on the principle of *caveat venditor*, effectively forcing businesses to "put the customer first". If there is a French-law equivalent of the UK-law concept of mis-selling, it is *défaut de conseil* (failure to advise). But the concept of mis-selling is much more limited in scope than the concept of *devoir de conseil* (duty to advise): the *devoir de conseil* is a fundamental concept of law. It is not specific to the financial services, and businesses have never been able to opt out of it. I

n addition, there is an "extra-legal" reason why there occurred a PPI scandal in England but not in France: a difference in insurance business culture. Unlike the UK financial services sector, the French financial services sector has never sold single-premium PPI en masse. In France, it is market practice to write PPI as regular-premium insurance, and to limit the length of the premium-payment period to one year. As a result, France never saw any of the problems typically associated with single-premium PPI—such as the customer repaying his/her loan early but not receiving a rebate for the unused premium.

For reasons such as these, France never saw—and should never see—an English-type PPI scandal. The French authorities will continue to take measures to reform the PPI market, but these measures will never be particularly disruptive to businesses operating on the market. The measures will continue to be of the

kind most recently proposed: legislation confirming that the customer may cancel his/her mortgage PPI year-on-year, in line with general French insurance contract law.

Consistency in the Interpretation of the Constitutional Norm

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If the history of constitutional court is at all complex, a researcher will find in practice, that the requirement of total consistency he has accepted will prove too strong, unless he develops it further to include the idea that he may, in applying this requirement, disregard some part of institutional history as a mistake. For he will be unable, even with his superb imagination, to find any set of principles that reconciles all court decisions. Of course, any set of decisions can be explained historically, or psychologically, or sociologically, but consistency requires justification, not explanation, and the justification must be plausible and not sham. If the justification makes distinctions that are arbitrary and deploys principles that are unappealing, then it cannot count as justification at all. Ronald Dworkin in his theory for 'hard cases' highlights the importance of consistency requirement; he also shows how new principle can strike out on a different line so that it justifies a decision or a series of decisions on grounds very different from what their opinion initially proposed. In strong liberal democracies, this argumentation line of courts can be taken as 'a brilliant fraud.' However, in fragile democracies it can serve as a ground for assault on constitutional norms. Recently a district judge in Moscow adjudicated that the events of February 2014 in Ukraine were a coup d'etat, to which the Russian scholarship responded stating that 'It is not the decision of Supreme or Constitutional Courts. Our judges write many things. That does not mean anything.' If indeed the conformity of practice of lower courts is ensured by the Supreme Court through its resolutions and reviews of judicial practice, the question remains open how is it sustained at the level of Supreme and Constitutional Courts. It feels that Russia as a system based on principles of legality inherited from Soviet experience shall not witness the problem of inconsistent decisions in constitutional proceedings, however, there are no complex studies of the theory of legal argumentation as the one of Dworkin in the US. Indeed, it is difficult to maintain a legal system if judges are known to be externally motivated. Although there is a distinction between the intrusion of motivation and a structure of acceptable argumentation, it prevents consistency in judgements which is important for consistent doctrinal development. The discretion for motivational argumentation broadened with tendency to use both the 'spirit' and the 'letter' of law in the interpretation

of constitutional norms. If in the US it allowed to come up with 'brilliant frauds,' in Russia the frauds might not be that brilliant. However, I do not intend to present solutions or argue about the rules on how to prevent it in the Russian system, my focus will be on Ukraine as it represents a more interesting case study as a system stuck in the bifurcation between the traditions represented by the US and Russian experiences. Except an attempt to study rules for consistency in the interpretation of the constitutional norm and the role of 'spirit' and 'letter' dichotomy in their realization, the article will allow to provide analysis of a system not commonly studied in comparative constitutional studies.

English and American Textualism

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Textualism is the doctrine of statutory interpretation practised by a small but very prominent group of judges at the US federal courts over the past thirty-five years, including the late Justice Antonin Scalia. It is generally regarded as a modern American phenomenon. However, when textualism is identified by the central principles and practices put forward by the judges who self-identify as textualists, it becomes apparent that the doctrine has a temporal and geographical reach that extends far beyond its modern American presence. Properly understood, textualism is an Anglo-American doctrine developed via a transatlantic dialogue in the treatises on statutory interpretation published in the Victorian era. Furthermore, Textualism became entrenched in England after the turn of the 20th century, and remained the orthodox approach there until approximately 1980. As such, there are distinctive English and American iterations of textualism which retain the central features, but which are adapted to each nation's social and legal culture.

American textualism is predicated on strong originalism for reasons that are political, at least in part. The technique of arguing for the original public understanding has provided compelling justifications for constitutional interpretations favourable to the political right wing while relying upon traditional modes of doctrinal legal reasoning. The success of the doctrine has further politicized an already politicized judiciary. English textualism did not embrace originalism, ostensibly because of the very different nature of the English constitution. Textualism was equally political in England, however, it was advanced by both the political left and the political right for different reasons. The political right wing supported the doctrine as a means of denying the influence of political preferences in judicial decisions, while the left wing supported the doctrine out of concern that right-wing judges would interfere with left wing government legislation. It is quite remarkable that this resulted in the depoliticizing of the English judiciary.

Despite the very different social and political circumstances in England and America, textualism in both nations was based upon the same basic elements: the belief that judges have no authority to make or change the law; the insistence that, as a constitutional necessity, legislators must legislate but courts alone have the

authority to interpret legislation; the categorical rejection of legislative history; and a sophisticated approach to statutory text predicated on the plain meaning rule and a series of presumptions and canons of interpretation that have been judicially accepted for centuries. Despite claims that this approach is rigid to a fault, textualism has proved to be both flexible and adaptable to dramatically different political circumstances and significant social change within particular jurisdictions over time. The doctrine is resilient. Textualism was fully developed as a doctrine by the 1880s, remained entrenched as the orthodoxy in England for better part of the 20th century, and it is poised to continue its role as the dominant influence at the US Supreme Court for the foreseeable future. Textualism is a testament to the power of doctrinal legal research, and the ability of common law judges to adapt doctrinal theories to the particular circumstances of their jurisdictions.

Comparing Judicial Interpretation Techniques of the Russian Constitutional Court with Its Foreign Counterparts: Judgment of 14 July 2015, No21- II – Misinterpretation of International and Comparative Law?

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The constitutional review concept in the Russian legal history is an innovative element. It was first introduced with the establishment of the USSR Constitutional Control Committee in the late 1980s. Although in its short history of existence, the Constitutional Control Committee could deliver some revolutionary decisions, it was eventually criticized due to its alleged stance in highly politicized issues (including its position regarding the attempt of August coup d'état in 1991). The unsuccessful 'legal transplant' experiment in the USSR ended with a unilateral dissolution decision of the Committee itself. This unsuccessful attempt was followed by the establishment of the Constitutional Court of the Russian Federation ("Constitutional Court") that came into existence in 1991. Currently, this Court plays a watchdog role of the Constitution of the Russian Federation of 1993 ("Constitution") and serves as guidance to the domestic courts to interpret the law. It has delivered series of very important judgments where it acted as a real protector of the constitutional rights and freedoms. However, the Court has been heavily criticized for some of its controversial judgments too.

On July 14, 2015, following an application from a group of members of the lower house of the Russian Parliament (State Duma), the Constitutional Court delivered its "*Judgment №21-П on questions of constitutionality of Article 1 of the Federal Law on "Ratification of the [European] Convention on Human Rights and Fundamental Freedoms and Protocols thereof", Sections 1 and 2 of Article 32 of the Federal Law on "International Treaties of the Russian Federation", Sections 1 and 4 of Article 11 and paragraph 4 of Section 4 of Article 392 of the Civil Procedural Code of the Russian Federation, Sections 1 and 4 of Article 13 and Paragraph 4 Section 3 of Article 311 of the Arbitration Procedural Code of the Russian Federation, Sections 1 and 4 of Article 15 and Paragraph 4 of Section 1 of Article 350 of the Code of Administrative Proceedings of the Russian Federation, Paragraph 2, Section 4 of Article 413 of the*

Criminal Procedural Code of the Russian Federation" ("Judgment №21-П"). In this judgment, the Constitutional Court evaluated the scope of enforceability of judgments of the European Court of Human Rights ("ECtHR") in the Russian law. Judgment №21-П may be considered as a final word of the Constitutional Court on the relationship of the Court with the ECtHR. Indeed, the Court declared that *when judgments of the ECtHR delivered against the Russian Federation contradict to provisions of the Constitution, the Russian Federation is free not to enforce them at domestic level*.

The Russian Law contains a series of provisions regarding the interrelationship between the domestic and public international law. However, it provides no direct answer to the question on the limits of enforceability of the judgments of the ECtHR (or any other international court or tribunal) in the territory of this country by public authorities and courts. It remained unclear what happens when there is a conflict between a judgment of the ECtHR (or any other international court or tribunal) and the text of the Constitution. However, in the Judgment №21-П, the Constitutional Court provided an opinion to this unaddressed question. Similar questions were brought before the highest courts of other members of the Council of Europe. As the Constitutional Court claimed in the Judgment №21-П, it acted in a very identical way as its European counterparts.

An objective of the paper is to compare interpretation techniques used by the Constitutional Court with two other categories of courts. First, the interpretation given by the Constitutional Court will be compared to interpretation applied by the highest courts of other members of the Council of Europe to which it made references (Germany, Austria, Italy and the United Kingdom). Secondly, it will be compared to the interpretation of the same norms by the ECtHR. This critical review of comparative methods used by the Constitutional Court will demonstrate how comparative law can be applied to reach misleading interpretation of international and municipal law provisions.

The Political Question Doctrine for EU Foreign Affairs Law

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The political question doctrine (PQD) is a bar to adjudication whereby Courts recognise that some issues are too politically sensitive to be decided by a judge. It is a legal theoretical and practical tool that Courts may use to decide when a controversy is justiciable.

The doctrine is well established in the US tradition. In the 1962 case *Baker v Carr*, the US Supreme Court spelt out the requirements to be met for an issue to be caught under the PQD. The Court of Justice of the European Union (CJEU), however, has never endorsed – nor indeed discussed – this doctrine. This paper discusses the opportunity of a 'legal transplant' of the doctrine into EU foreign affairs Law, by proposing a test that Courts may apply.

Recent developments in the CJEU's case law justify an analysis of the PQD and the proposition to transpose it into EU law. Article 24 of the Treaty on the European Union (TEU) mandates that the CJEU shall not have jurisdiction on the provisions on Common Foreign and Security Policy (CFSP). Despite the clear text of that norm, recent (C-455/14 *H v Council and Commission*) and pending (C-72/15 *Rosneft*) cases point to another direction. They indicate that indeed the CJEU is willing to expand its jurisdiction on at least some CFSP acts – while other "fall outside the ambit of judicial review" (as the Court stated in its *Opinion 2/13*). A question then arises: which, precisely, are the Foreign Policy acts on which the Court does not have jurisdiction?

The paper seeks to contribute to shaping the answer to such a question by suggesting the design and introduction of a European version of the PQD.

Therefore, the paper proposes a formulation of the PQD in EU foreign affairs for CFSP measures. These are measures adopted under Articles 24-46 TEU and whose substantive content falls under the CFSP. The test to be applied by the CJEU to establish when it lacks jurisdiction is as follows. A CFSP measure, even

if at the centre of a controversy, cannot be reviewed in its substance if the issue it presents turns on either: a) Policy choices already made by another branch and which require unquestioning adherence; or b) Standards that defy judicial application; or c) Initial policy determinations to be made, but which are unsuitable for judicial discretion.

The paper explores the conditions of the test and explains their rationale. In particular, it clarifies why the test should apply in particular, albeit not exclusively, to Foreign Policy. It also clearly spells out the distinction between a policy determination and a legal determination. Finally, the explains the moral and epistemological reasons for the introduction of a political question doctrine. Moral reasons are those based on accountability and on the safeguard of democracy by the separation of power. Epistemological is the argument based on the expertise of judges.

The paper concludes by reflecting upon the opportunity of generalising the PDQ in EU law. The doctrine could be used not only in matters regarding foreign relations, but in general any time that a controversy presents a politically sensitive issue which is best non decided by Courts: for example, cases involving major policy decisions in the Economic and Monetary Union.

Zika epidemic and Regulation of Women's Bodies in Latin America: A Solid Ground for Legal Change?

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Central European University

By looking at different state responses in Latin America to the Zika epidemic – from calls for lifting abortion bans to abstinence – this paper will outline how the legal regulation of women's bodies framed the debate on Zika epidemic in the region. In particular, it will show how women's groups have used the Zika epidemic to denounce restrictive abortion laws in Latin America, from gender, race and class standpoints, including through strategic litigation as the Brazilian case illustrates clearly. Finally, this paper will then argue that Zika epidemic – while giving momentum to calls for greater reproductive freedom for women in the region – provides a fragile ground for legal reform given the exceptional character of the epidemic itself and the disparity of scientific evidence associating Zika to neurological problems in foetuses.

The paper will map, first, the legal framework of reproductive rights in Latin America, from highly restrictive systems such as the case of Brazil and Chile to more liberal legal systems such as in Uruguay. It will look at those disparate legal systems from the perspective of the legal discourse adopted by the women's movements in the region. At this moment, the paper will enquire whether differences in the legal discourses of women's movements, from a comparative standpoint, can at least partially explain the differences in the legal regulation of women's reproductive rights, in particular abortion.

Secondly, the paper will present the case of the Zika epidemic and how this epidemic mobilized women's groups in the region to push for legal reform. Here, the Brazilian case will be key: it will show how women's rights advocates used the Zika epidemic to gain momentum for an overreaching legal reform, including accessing Brazil's apex court in that endeavour.[1] Brazilian case exposes complex questions of autonomy (epidemic vs. right to choose), questions of class and race (most victims of the epidemic are poor black

1 DINIZ, Debora, The Zika Virus and Brazilian Women's Right to Choose, New York Times, Feb. 8 2016, available at: http://www.nytimes.com/2016/02/08/opinion/the-zika-virus-and-brazilian-womens-right-to-choose.html?_r=0.

women and their children), and tensions with the movement of persons with disabilities. In contrast, other countries, in particular Colombia and El Salvador, have used the Zika epidemic as a reason to further restrict women's autonomy pursuing an abstinence policy.[2] Those differences reveal that, grounding women's right to reproductive autonomy on an epidemic such as the Zika, offered a fragile ground for legal change. Finally, the paper will argue that women's movements will likely promote sustainable legal change when they will be able to ground their legal discourse on long-lasting principles of law, such as privacy or freedom, rather than on exceptionalities of the Zika epidemic.

[2] THE GUARDIAN, Rights groups denounce Zika advice to avoid pregnancy in Latin America, Jan. 27 2016, available at: https://www.theguardian.com/global-development/2016/jan/27/rights-groups-denounce-zika-advice-to-avoidpregnancy- in-latin-america.

Framing Violations in the Nordic Welfare State: Involuntary Sterilization and Castration, Rights and Responsibility

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Sweden and Norway have had a history of similar sterilization and castration practices in the 20th century. However, the two countries have legally conceptualized the practices differently. This paper looks into the regulatory framework surrounding involuntary sterilization and castration in Norway and Sweden, focusing on notions and descriptions of rights and state responsibility. Looking at how sterilization and castration practices have been established, regulated, challenged, and abolished, the paper is particularly interested in the reasoning behind the regulation of surgical interventions aimed at extinguishing an individual's fertility and/or sexual drive, the framing of it as a part of legal history, and its consequences.

In both countries, involuntary and voluntary sterilization and castration practices came up on the political agenda in a eugenic context. In Norway, sterilization and castration were first legally regulated in 1934. The same year, the first sterilization act was established in Sweden, while castration did not become regulated in Sweden until 1944. The application changing over time, the sterilization laws (with the exception of the Swedish castration law) were changed in the 1970s to better adapt to the spirit of the time: placing a greater emphasis on sterilization as a form of voluntary family planning and on individual interests.

In the same decade, the 1970s, both countries introduced sterilization and castration practices in order to accommodate for another group: trans*people – particularly transsexuals – who wanted to change their legal sex. For people wanting to change their legal sex, sterilization or castration was mandatory: in Sweden through law and in Norway through administrative practice. The rigid regulations, making room for no exceptions, were increasingly criticized, and ultimately abolished in Sweden through a civil society-led adjudication process in 2012/2013, and through a civil society-informed political process in Norway in 2016. Both legal changes were officially motivated by human rights arguments.

Despite relatively similar practices of legal involuntary sterilization and castration, the two countries have adopted different views on state responsibility, reparations to victims, and legal-historical framing. In Norway, the practices of sterilization and castration from the 1930s to the 1970s have been framed by the Government – fed by Romani social and legal mobilization – as part of historical oppressive assimilation politics against the Romani minority. As an active group, only Romani people have been recognized as victims of involuntary sterilizations and castrations, ultimately receiving remedies such as official apologies, state investigations, museums, compensation, and collective funds.

Sweden, on the other hand, was traumatized by an international "scandal" in 1997 that followed the "discovery" of the 1934–1975 sterilization practices. In Sweden, the legal-historical framing of the former sterilizations has been wider than in Norway, and recognized that the sterilizations victimized a wide range of groups and individuals, hitting the most disadvantaged and marginalized the hardest. The remedies from the Swedish Government – a state investigation, an official apology and a specially established compensation law to the victims of involuntary sterilization – have reached a relatively broad group of victims.

In 2016 – after three years of civil society intensive campaigning and strategic litigation to realize state responsibility – the Swedish Government acknowledged their intent to establish a special law to also compensate the trans* victims of involuntary sterilization. With little pressure from civil society, the Norwegian Government has shown no intention of doing the same. Seen against the different legal conceptualizations of sterilization and castration history in the two countries, the paper poses the question of whether it is possible to understand the recent remedial practices and diverging acceptances of state responsibility by looking at earlier framings of violations and state responsibility regarding involuntary sterilization.

The paper will investigate and analyze the practices and reparations – particularly the difference in remedial outcomes and conceptualization of state responsibility – in the two countries by particularly looking at three factors: 1) utilization of and response to rights and state responsibility language by civil society and state actors; 2) international and transnational influences; and 3) legal-historical framing of sterilization/castration practices.

This comparative paper will contribute with an additional layer to the panel, as its analysis focuses not only on how law has regulated and conceptualized, but also how rights and law have been conceptualized and

politically employed themselves, in order to provoke, or prevent, legal change. This said, the paper offers original comparative insights into the complex and multifaceted relationship between sexuality and gender in law and society.

Legal Gender Classification and the Disciplinary Creation of the Gendered Subject in the Italian Constitutional Jurisprudence

Stefano Osella

European University Institute

The paper will discuss, from a comparative standpoint, the criteria for gender classification and reclassification of trans individuals in Italy, the United Kingdom, and at the European Union level. Firstly, the paper will present a succinct account of the rules on the gender reassignment – and of their evolution – in the mentioned jurisdictions. At this stage, the paper will essentially address one question: What are the prerequisites that trans persons have to satisfy to obtain legal gender recognition? It will emerge that gender reassignment is usually conditioned on medicalized procedures. The purpose of these mechanisms is to make gender classification objective, take it away from the self-determination of the individual, and entrust it to "experts" determined by the law.

Secondly, the paper will discuss the rationales of such rules and address the following questions: why is so important that each person is assigned to one, objective, legal gender? What are the legal consequences of such an assignment? As the paper will present, there are several areas of the law where gender classification (to the female or male gender) constitutes the primary element for the establishment of differential legal positions: e.g. family law and the organization of the administrative state. The width of the different consequences of gender classification emerges neatly through the comparison. So, while in Italy courts exclusively focused on the connections between gender classification and family law, in the United Kingdom courts – alongside the preservation of the heterosexual matrix of marriage – concentrated also on the administration of criminal law and social security. Finally, the "administrative" component of gender classification finds its most evident manifestation at the European Union level. As gender classification is relevant both to private and public law, states claim a legitimate interest in controlling it: such an objective can be achieved, the legal actors argue, only by subtracting gender assignment to individual self-determination. The paper will then theorize legal gender in the dogmatic terms of "legal status", following the definition provided Austin – and re-worked by Jeremy Waldron. According to such definitions, status

is “a particular package of rights, powers, disabilities, duties, privileges, immunities, and liabilities accruing to a person by virtue of the condition or situation they are in.”1[1]

Finally, the paper will argue, relying on Foucault, that the stability of the status contributes actively to the shaping of a “subject of governance:” the rules on gender assignment and reassignment create a gendered subject, the ideal holder of the legal status, which, while described *in abstracto*, ends up being enforced on the individual, through a penetrating anatomopolitical endeavour.

1 J. Waldron, “Is Dignity the Foundation of Human Rights?” (2013) New York University Public Law and Legal Theory Working Papers, Paper 374, 25 <http://lsr.nellco.org/nyu_plltwp/374>, accessed 16 December 2016.

The 2015 Power-Balancing Reform in Colombia: A Missed Opportunity to Disrupt the Ecosystem of Structural in the Halls of Justice

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In roughly 15 years, Colombia rose from the ashes of a quasi-failed state to become the third largest economy in Latin America behind Brazil and Mexico. Despite enormous progress in security and economic development, the state of justice in Colombia poses serious challenges. The country's judicial institutions are perceived as inefficient and untrustworthy, which is often attributed to the resilient aura of clientelism that surrounds them. Without dismissing the cultural roots of clientelism, this article addresses its structural causes. The chief cause is the "revolving door," a favor-trading market in which judicial officers use their constitutional powers to nominate and appoint other judicial officers for personal advancement. This ecosystem is also often referred to as the "I elect you, you elect me" mechanism. I argue that the recent 2015 constitutional reform was a missed opportunity to redesign the roles of judicial officers to remove the web of perverse incentives that gives birth to the revolving door. I suggest several ways in which this goal could be at least partially achieved, including imposing a set of restrictions on the types of positions that outgoing judicial officers may accept, which would limit political maneuvering without discouraging upward mobility within the halls of justice. With the government on the verge of finalizing a renegotiated peace agreement with the FARC that could put an end to half a century of war, Colombia urgently needs an overhaul of its justice system.

Relations Trend between Constitutional Court and Lawmaker in Indonesia: Legislative Overrides Constitutional Review Decision

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Constitutional Court as the last interpreter of constitution has the power to reviews constitutionality of law. Ideally, countries that accept idea of constitutionalism must guarantee constitutional review decisions is implemented consistently by every citizens and all state institutions. Nevertheless, in practical, regulations of main state organs and even local government still overrule the decisions. The disobedience phenomenon against Constitutional Court's decisions occurred in several countries of the world. Tom Ginsburg as one of constitution comparative expert in his book "Judicial Review in New Democracies" said there are four responses from other state institutions to Constitutional Court's decisions that are accept, ignore, overrule, and counter attack. The overrule reaction to the decisions is problematic because it tends endanger the constitutionalism paradigm. This paper concern identifies factors which cause another state institutions not comply to the Court's decisions especially by lawmaker and impacts that appear to legal system especially in validity of norm.

In Indonesia context, Constitutional Court established since 2003 until 2016 has been received 954 applications and reviewed 478 acts, the Court has granted 206 cases which mean only 21,5% from total applications. Whether in Article 24 C (1) of Constitution and Article 10 Law No. 24 2003 on Constitutional Court stipulate the Court's decisions are final and binding, furthermore Article 10 (1) point d. Law No. 12 2011 on Law and Regulation Making states the substance of law must follow the Court's decisions. But, in reality, several laws clearly rearrange the norms which has stated null and void by the Court. In some interviews, lawmaker officials argues remain in accordance with original intent of Constitution rather than the Court's decision. Yet, Constitutional Court justices only respond it is out of their responsibility to ensure lawmaking correspond to their decision.

Based on analyze to laws which overrule Constitutional Court's decisions, this research results several factors and impacts. Factors which cause lawmaker overrules decisions, including: (a) Lack of understanding and misinterpretation to implement Court's decision by lawmaker; (b) No certain procedure and administration system to oversight the compliance of implementation; (c) No special organ which has specific task to ensure evaluate the consistency; (d) Variety of Court's decision especially role as positive legislators; and (e) Sectoral ego from each institutions to use their authority without respect others organ power. So, two major categories of factors which lead to inconsistency, that are confusion of though by other institutions to apply their authority and laxity of system to guarantee compliance to the decisions. Whereas, the impacts to legal system, such as: (a) degradation the enforcement of constitutionalism doctrine; (b) conflict to validity of norm between constitutional validity and political validity; (c) legal uncertainty to society against the norm which binding, is it Court's decision or new law; and (d) bad precedent for another state institutions or citizens to respond Court's decision. These implications not only trigger chaos on legal system, but also may adverse to citizen constitutional rights.

In conclusion, factors and impacts show the urgency to research more deeply about legal mechanism to ensure compliance to Constitutional Court's decisions especially in lawmaking process. Commonly, a constitutional democratic state which agreed to admit constitutionalism notion and constitutional review, certainly guarantee all state institutions respect and implement Constitutional Court's decision consistently. However, opposite perspective also says there is possibility to deviate the decisions in some particular conditions, because maybe the decision no longer compatible with development and needs of community. For further research, comparative study is important to search best practices on strengthening enforcement of constitutional review decision in another countries.

Judicial Accountability in Egypt

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The issue of judicial accountability raises three main questions. These questions are who is accountable? to whom? and for what? In any usual case of democratic system, the answer to the first question would the judiciary, whether as an institute or individual judges. The answer to the second question would be to the public or to the other authority in the state (legislative and executive). Finally, the answer to the third question would be for legal violations and improper political participation. The issue would take different dimension in the countries, where the democracy is not yet a settled law. The lack of real separation of power and "checks and balances" between these powers would lead the judiciary to become another office in the executive, rather than an independent authority that monitor the violation of the law. In such countries, the lack of judicial independence, which represented in the separation of powers and leads to lack of real judicial accountability. In another word, accountability would be a tool in the hand of the executive as a tool of retribution over non-obedience judges. This research argues that the domination of the executive authority over judicial accountability is a major constrain in judicial reform. This research aims two targets. Firstly, it aims to prove that the current rule of accountability is not a suitable rule and lead to impartiality and arbitrariness against judges in Egypt. This would be the easies task. Even though there is no much writing about that issue, the research would depend on the testimony of some of the judicial members that they made to the public to prove that claim. Secondly, this research aims to answer the question of "if the rules is not working, so what is the solution?" In order to present this question, I shall tackle it from the perspective of the comparative law. I would start with presenting the accountability rules in five different jurisdictions. This process would help in make mix and match to what would be suitable to the current situation in Egypt. This research is divided into four sections. The first sections deals with the accountability rules in four developed countries, which two of them represent the civil law system (Germany and France) and the other two represent Common law countries (UK and USA). The second part deals with the current puzzles of the judicial accountability and political participation in the Egyptian

Judiciary. The Third part tackles the proposed reform to the accountability rules. Finally, the importance of the judicial accountability to the governance is last part of the research.

Interest Representation Before Courts: A Comparative Analysis

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The paper addresses the issue of lobbying in front of judges (both ordinary and constitutional ones). Rather than focusing on the traditional fora where interest representation is practiced, i.e. the legislature and the executive, the paper tackles a far less investigated topic: interest representation before courts. In particular, the work investigates the institutional drives that favour, or on the other hand discourage, this practice; and it does so in a comparative perspective, studying the Us as a legal order epitomising common-law jurisdictions (where courts are just another forum of interest representation), and some continental European countries (Italy, Germany, France), as examples of civil law jurisdictions (where the lobbying of courts is regarded as something highly suspicious and harmful for democracy). The goal is to assess to what extent interest representation before courts is favoured by such diverse institutional factors as: individual access to judicial review of legislation; popular election of judges (and prosecutors); regulation of class actions; the existence of amicus curiae briefs; regulation of collective interest associations; the case-law on standing; duration (and cost) of court proceedings; legal and fiscal incentives to the financing of 'matter of principle' litigation. Building on such analysis, the conclusion reflects on how this topic influence jus dicere in the respective jurisdictions, and offers some de iure condendo remarks, trying to understand whether and how some of the institutions favouring interest representation before courts in certain jurisdictions (chiefly, the Us) can be successfully transplanted into legal systems where on the other hand the lobbying of courts is much more unsuccessful and obscure (chiefly, Italy).

The Sources and Effects of Contractual Terms. Towards an Approximation of Common Law and Civil Law

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It is self-evident that in key aspects of Contract Law, there are differences between Common and Civil Law. Nor need it be stated that the generation of uniform rules at an international level adopts as its core objective the elimination of those differences between the various national legislations that would represent a barrier to cross-border trade. The aim of this work is an attempt to demonstrate that, in one individual but decisive aspect of Contract Law, namely the content of the contract, a convergence between Common Law and Civil Law may be observed. It is meanwhile worth noting that this convergence occurs, on occasion, irrespective of the existence of uniform rules. It is widely accepted that the content of the contract constitutes a rule generating binding effects between the parties. Beyond this shared concept, though, Common Law and Civil Law have traditionally been considered as divergent legal families as regards the sources of the express and implied terms, and in connection with the effects that the terms generate - guarantees, duties and obligations derived from the contract. The hypothesis of this paper is that convergence is occurring on both levels. The development of the paper assumes a functional perspective of Comparative Law in order to demonstrate whether the abovementioned hypothesis is correct and, if so, its boundaries. Hence, the major legal traditions will be at the core of the presentation, which will be framed within the rapid evolution that Contract Law is experiencing. The topic, thus, will be presented in connection with common international policy changes in the Law of Contracts.

The Contractual Prohibition of Assignment of Receivables in a Comparative Perspective

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The present article examines the notion and legal effects of the contractual prohibition of assignment, also known as "*pactum de non cedendo*". The comparative analysis reveals several types of legal approach to the problem concerning the possible inclusion of a clause prohibiting assignment and its legal consequences. It should be pointed out that the prevailing approach among national legislations limits the effect to a mere contractual restraint on alienation where the breach of the anti-assignment clause does not affect the validity and legal consequences of the assignment itself. The reason for adopting this type of legal approach can be found in the socio-economic utility of permitting creditors to transfer rights, especially in the context of business activities and commercial transactions. However, there are some national legal systems that allow the debtor and creditor to restrict effectively the assignment of receivables, thus making the contractual prohibition of assignment enforceable against any third party. Its main advantage lies in the profound protection of the debtor who is entitled to discharge himself by paying his debt to his initial creditor despite being notified of the assignment. The lack of coherence among different national legislations concerning the legal effect of "*pactum de non cedendo*" can be found on a supranational level as well. Some international attempts to harmonise the contractual prohibition of assignment, such as art. 9.1.9 of the UNIDROIT Principles, as well as art. 9 of the UN Convention of the Assignment of Receivables in International Trade have resulted in adopting the first legal approach in order to facilitate cross-border business transactions. In contrast, the provisions of two of the most important sources of "soft law" in European private law – the Principles of European Private Law (art.11.301) and the Draft Common Frame of Reference (art.III. – 5:108) seek to strike a balance between the legal interests of all parties involved in the assignment (the assignor, the debtor and the assignee) and provide more complex solutions, taking into consideration various other circumstances, such as the good faith of the assignee, the consent of the debtor etc.

The Apparent Agency: A Comparison Between Italian and Chinese Solutions

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This paper starts with a definition: *There is apparent agency when the circumstances determine the belief in the third party in bona fide of the existence of the authorization and legitimization of the conduct of the agent.* A generally acceptable definition by jurists, that does not have a specific meaning, and, at the same time, it can have specific ones' depending on contextualization. This latter determines the concrete conditions in which the definition can assume specific meaning. Meaning is provided by a plurality of significant elements and criteria that depend on legal environment, language, rules and culture. The differences can be based on historical, religious, economical, geographical, or political, criteria, or all the previous all together. Consequently, the definition can have at least two different meanings.

The general definition is the common starting point to develop the analysis of this abstract entity in two legal systems: the Italian and the Chinese. Differences arise already when considering the legal source of the institute, where the apparent agent is the legal product of case-law and legal doctrine in Italy (developed from the unauthorized agent, disciplined at article 1398 Civil Code), it is clearly disciplined by the PRC Statutory law (article 66 General Principles of Civil Law – 1986 - and article 49 Contract Law – 1999) in China. The development of the analysis considers the different, and similar, aspects of the general concept of agency, and the elaboration of a theory of appearance. The analysis further focuses on the circumstances that have been considered relevant for the legal qualification of a factual situation as "apparent", and when it has been considered unauthorized agency. This includes important general principles that are closely cultural related: like *bona fide*, the *pater familia* standard to determine the liability of the principal and the third party, and other. It will emerge that, the circumstances concerning authorization and legitimation have an important role in determining the appearance, although, their legal discipline, from a systematic point of view, can determine limits to the application of the institute itself.

The definition in the two legal systems is considered separately, the conclusions provide a synthetic comparison of each relevant element of the definition and from a systemic point of view.

Consumer Sales Remedies: Hierarchy and Self-Help

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A couple buys a couch. After delivery, they notice that the legs of the couch are not rectangular, like they ordered, but circular. After some angry calls and letters they introduce an action before the court to terminate the contract in order to get their money back. Against all expectations, the Belgian court of appeal of Ghent decides completely against the couple.[1] According to the court, the couple disregarded the consumer sales rules in the Civil Code, implementing the EU Consumer Sales Directive.[2] They did not respect the strict hierarchy of remedies which favors repair or replacement over termination and price reduction: the buyers should have sued for repair or replacement instead of trying to terminate the contract. Moreover, they transgressed the notification rules: they should have notified the seller about the shortcoming, before invoking a remedy.

This case and many others, show that *confusion* reigns in the area of the organization of consumer sales remedies. The strict hierarchy of remedies imposed by the EU Consumer Sales Directive might be insufficiently protective for consumers. Moreover, after withdrawing the CESL[3]-proposal,[4] the EU Commission issued new projects, treating, amongst others, the contractual remedies in the e-commerce sector.[5]

Also in the US there is an on-going debate about the organization of remedies in contract law and the UCC. Over the last decades, many publications appeared about the irreparable injury-rule and adequacy-rule

[1] Ghent 20 October 2010, *DCCR* 2012, 124.

[2] Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, *OJ. L.* 1999, 171/12.

[3] Proposal of the European Commission of 11 October 2011 for a regulation of the European Parliament and the Council on a Common European Sales Law, COM(2011) 635 final.

[4] Http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011PC0635.

[5] See Proposal for a directive of the EP and the Council on certain aspects concerning contracts for the online and other distance sales of goods, COM (2015) 635 final; Proposal for a directive of the EP and the council on certain aspects concerning contracts for the supply of digital content.

favoring damages over specific performance.[6] It has drawn the attention of law & economics specialists,[7] legal philosophers, and more recently the behaviorists have expressed their interest in the topic. At the same moment, academics are working on a restatement of US consumer contract law.[8]

The organization of remedies is a vivid topic, both in the US and EU. Nevertheless, a thorough cross-examination of the EU consumer sales law system (mainly based on the civil law tradition) and the US common law system is not sufficiently present in the current debate.[9] Therefore, this paper will address this on the basis of in-depth comparative research. The paper firstly assesses the so-called *'hierarchy'* of remedies that is prescribed by law. Another aspect that has an important impact on the aforementioned hierarchy of remedies are the different *notification duties* and their limitation periods. The last element that will be assessed and which greatly influences the hierarchy of remedies is the ability (or not) to invoke remedies *extrajudicially*. The main question is: what is the best possible organization of remedies to move forward to protect consumers? Answer to this question will be based on the principles of coherence of the legal system, legal certainty and the level of consumer protection.

[6] See e.g.: Laycock, D., "The Death of the Irreparable Injury Rule", 103 *Harv. L. Rev.* 3 (1990), 696. See recently Bray, Samuel L., "The Supreme Court and the New Equity", 68 *Vanderbilt Law Review* 4 (2015), 997-1054.

[7] See e.g. Schwartz, A., "The Case for Specific Performance", *Yale L.J.* (1979), 271-306 (pro specific performance). See e.g. pro status quo: Kronman, A.T., "Specific Performance", 45 *U. Chi. L. Rev.* (1978), 351-382; Yorio, Edward, "In Defense of Money Damages for Breach of Contract", 82 *Colum. L. Rev.* (1982), 1365-1424.

[8] Https://www.ali.org/projects/show/consumer-contracts/.

[9] Nevertheless e.g. Miller, L., "Specific Performance in the Common and Civil Law" in Giliker, P., *Re-examining Contract and Unjust Enrichment*, (Leiden: Martinus Nijhoff, 2007),281-310 and Musgrave, T.D., "Comparative Contractual Remedies", *U.W. Austl. L. Rev.* (2008-09), 300-372.

Enhancing of Judicial Protection: A Comparative Study of Monitoring in Constitutional Adjudication of Social Rights

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The upward trend concerning judicial review of social rights in comparative legal studies is remarkable. Despite the on-going controversy at theoretical level, courts have been enforcing social rights all around the world. Especially the last few decades have witnessed an explosion of judgments. However, uncertainty remains regarding the *effectiveness* of court decisions. In other words, we still know little about whether these rulings have really been implemented. Accordingly, it's still a crucial question in comparative public law discourse whether judicial review is actually an effective way in favor of social rights. A ruling might say a lot about in terms of what is necessary for protecting rights. However, the real impact of these decisions is only visible if the requirements of the decision are monitored by some sort of mechanisms. Therefore, realizing social rights through judicial decisions requires a deeper analysis of the implementation of judicial decisions.

In this regard, this paper will focus on monitoring constitutional adjudication of social rights in a comparative perspective. In other words, this paper tries to engage in comparative study of compliance of social rights judgments. This paper inquires as to why and how the monitoring mechanisms implemented by Constitutional Courts of South Africa, Colombia and Supreme Court of India might contribute to enforcing social rights. These courts not only played a great role for defending the rights of impoverished people by giving outstanding decisions; but they also monitored whether their rulings have been implemented by relative authorities by using various mechanisms such as follow-up decisions, setting up special committees or asking regular reports. A comparative study of the practice of these three leading jurisdictions will reveal the similarities and differences in monitoring of the constitutional adjudication of social rights.

Given the fact that protecting social rights through judicial review is a fragile area, this paper asserts that social rights are capable of judicial review. However, the traditional understanding of judicial review needs to be revisited and monitoring judicial decisions should be considered.

Can a 'Living Tree' Constitution Remedy Climate Change? A Review of Foreign Climate Litigation and the Potential to Seed Climate Justice with Canadian Litigation

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Climate change is arguably the greatest anthropogenic threat of modern times. Legal efforts to remedy it have focused on international law agreements which have had lukewarm effect in obtaining necessary emissions reductions. Following the 2015 Paris Agreement, there was renewed hope that a sustained international effort had coalesced that could reduce emissions to avoid catastrophic climate change. That renewed hope appears increasingly fragile due to the 2016 United States presidential election of Donald Trump, a known climate change denier.

Alongside the international efforts resulting from the Paris Agreement, climate activists have increasingly resorted to domestic laws and courts to compel state and sub-national governments to mitigate climate change. Notable successes include the Netherlands, Pakistan, and the United States (both in federal and state courts). Pending litigation is attempting to model these successes in at least a dozen other jurisdictions.

With uncertainty of the international law approach's future success, insight into navigating domestic legal mechanisms will be pivotal to ensure global efforts to mitigate climate change survive changing political winds. Some insights will be universal in nature, yet, the comparative legal focus will be my native Canada, often a laggard state at redressing climate damage which still lacks recognition of any constitutional right to a healthy environment.

Key insights include: i) the validity of the scientific evidence behind climate change and the role state and sub-national government's play in causing the problem has been accepted; ii) human rights based causes of action (most often constitutional rights linked to life, liberty, security of the person, and health) have been the most successful legal avenues to justify change whereas private law actions such as tort have failed; iii) when lack of justiciability is raised as an issue (such as the political questions doctrine) courts

will not shrink from addressing the issue of climate change; and iv) a number of novel remedies compelling various forms of positive government action have been utilized to address the diverse issue of climate change.

Salient examples of climate injustices in Canada will be identified and the foreign litigation insights will be explored within the Canadian context. The Canadian constitutional right to life, liberty, and security of person will be reviewed as the most viable legal mechanism to compel Canadian governments to take further positive actions on climate change. Three major legal lineages of the Canadian *Charter of Rights and Freedoms*, have already embraced some form of substantive environmental constitutional rights redressing climate change, using variations of the right to life, liberty, and security of the person (the British common law lineage in Pakistan, the European human rights lineage in the Netherlands, and the American due process lineage in Washington state court and the Oregon district federal court). Additionally, the most enduring constitutional metaphor in Canada, is that of the 'living tree', which roots the Canadian doctrine of constitutional dynamism. Paradoxically, this reference to nature has not yet sprouted any form of constitutional environmental rights.

The combination of a comparative review of the foreign legal traditions sprouting environmental rights to redress climate change and the 'living tree' doctrine could lead to a similar result in Canada, compelling governments to take further progressive actions to mitigate climate change. A comparative law review of successful arguments will invaluably benefit efforts in both Canada and other states and regions to reduce emissions and avoid climate catastrophe. Viable domestic legal avenues using constitutionally entrenched rights to mandate progressive action on climate change are increasingly important in the current global political context, with the rise of populism and rejection of scientific expertise. They may well be the best shot at necessary sustained emissions reductions materializing.

An Illustration of the Challenges to the Application of Environmental Constitutionalism in Turkey: Mehmet Kurt Case

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The increased industrial activities of corporations have triggered the occurrence of many major incidents that caused environmental degradation concomitantly. Questioning the environmental accountability of corporations have been channeled to the international law sphere by recourse to the civil liability regimes under the sphere of international environmental law or human rights litigation. However; international environmental law and governance regime is argued to fall short of providing effective enforcement tools and accountability mechanisms to prevent environmental degradation. As a result, *'environmental constitutionalism'* has recently emerged as a new concept to respond to environmental problems. Roughly 3/4 of nation states have already reflected the fairly new phenomenon in their constitutions by adopting either the basic right to a quality environment or the right to information, participation, and justice in environmental matters. The 1982 Constitution also sets forth the right to live in a healthy and balanced environment in Article 56; however, as Mehmet Kurt case indicates there are two main constitutional issues motivating this study to address. Having regard the inapplicability of Article 56 before the Constitutional Court, the first challenge is to assess the effectiveness of individual application mechanism in environmental matters. The second challenge relates to extent to which horizontal applicability of environmental rights is allowed to enhance the accountability of corporations in Turkey.

Technologizing Financial Regulation: FinTech, RegTech, and the International Anti-Money Laundering Standards and Regulatory Regimes

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FinTech, the use of technology for financial innovation and the provision of financial services through crowdfunding, marketplace lending, virtual- and crypto-currencies, prepaid cards, etc, is arguably a foundational change promising to democratize and transform traditional finance worldwide. Its ascendance opened up a question of how to secure the compliance of FinTech companies with the international, regional, and national regulations without stifling their potential for innovation and growth. The dilemma of choosing the most effective regulation is most relevant when it comes to prevention of the use of FinTech for money laundering and terrorist financing (MLTF) given that, according to the Financial Action Task Force (FATF) - the main worldwide anti-money laundering (AML) standard-setting body - FinTech is extremely susceptible to it. The ongoing search for optimal regulation based on FATF standards and regional and local needs leaves FinTech in a situation of considerable legal uncertainty as to compliance with AML regulations.

Drawing on cases and examples from the EU, the GCC, China, and the US, I firstly provide a preliminary assessment of the impact of interconnectedness and multiplicity of the global FATF risk-based standards and the regional and national regulations for the prevention of MLTF on FinTech. Secondly, I discuss whether FinTech's 'twin', RegTech 3.0, the latest generation of technology for financial regulation and compliance, will manage to sustain FinTech's inclusive and financially beneficial aspects while making its compliance with AML regulations less costly, more effective, truly internationalized *and* adjusted to local needs.

It is shown that, thus far, the impact of AML regulations appears to have been somewhat limiting to FinTech's beneficial effects. This has been due to the current FATF risk-based approach being costly and producing data clutter; exceeding of the FATF standards in regional regulatory frameworks such as the EU's Fourth Money Laundering Directive; and the reliance on the FATF risk-based standards as a formal

pretext for application of the old-fashioned administrative "enforcement and/or engagement" measures by regulators in China, the US and the Gulf. While RegTech 3.0 appears a comparatively superior tool for both AML regulation and compliance, the argument advanced is that without the reorientation of both the FATF's standards and regulatory attitudes towards the danger of MLTF in FinTech, "technologizing regulation" through RegTech 3.0 will not necessarily aid FinTech (or improve financial regulation in general). Rather, the technologizing of regulation appears to be an offspring of the risk-based standards, and will, therefore, likely fall prey to the limitations of regulatory regimes and cultures, further stifling the democratic and financial potential of FinTech.

A Comparative Study of Recent Development of FinTech Regulations in China

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FinTech innovation has thrived in China in the past decade. As one leading sector of FinTech innovation, the P2P lending market has experienced an unparalleled growth in China with Chinese market acceding to be the largest market in the world. This rapid development, while satisfies the financing need, has brought about industrial risks and regulatory challenges. This article first starts with an empirical survey of the explosive development of P2P lending industry in China and an examination of its underlying economic and institutional driving forces. The article then turns to inspecting, comparatively, the featuring regulatory approaches as adopted by the newly established regulatory regime. The third part interrogate two of critical challenges which have not been resolved by the new regulatory regimes. The tentative conclusion is that the newly established regime is a welcome regulatory development. Not only has it provided a comprehensive legal protection for participants of the P2P lending market in China; it may also contribute a new model to the global regulatory map for the sustainable growth of the P2P lending market, and the FinTech industry in general.

Protection of the Tax Payers' Rights during the Tax Audits: Impartiality within the Scope of the Proportionality Principle

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At the global level, there is a growing trend to prevent the base erosion and profit shifting in the tax jurisdictions. The most concrete example of this trend is the Base Erosion and Profit Shifting Action Plans ("BEPS Action Plans") prepared by the OECD and published in 19 July 2013 to identify actions needed to be addressed to prevent the profit shifting and base erosion in the tax jurisdictions[1]. Within this scope, the aim of the OECD was to establish international standards to prevent the harmful tax practices. To that end, OECD offers stronger rules and structure for the tax administrations to be implemented in national tax laws as international standards. As a matter of fact, the Final Reports of the BEPS Action Plans is finalized in 2015 and countries have already begun to implement the recommendations of the OECD.

Within the scope of the most current developments in international area, it is inevitable to consider the reflections of the BEPS Action Plans on tax audits procedures. In a survey conducted by Ernst and Young it is revealed that the companies are experiencing an increasing number of audits and more aggressive enforcement from tax authorities around the world[2]. For instance, 49% of the respondents stated that they observe the tax authorities raise tax audits that reflect the BEPS focus areas[3]. The tax administrations aim to provide stronger tax audit procedures to prevent the treasury loss in their jurisdictions. Although the desire of the tax administrations to strengthen the tax audit system is understandable, tax payers' rights during those audits shall never be underestimated. In other words, the more the strict rules are applicable in tax audits, the more the tax payers' rights should be protected in order to keep the balance between the authority of the government and the right of the individuals.

[1] OECD, Action Plan on Base Erosion and Profit Shifting, (2013), https://www.oecd.org/ctp/BEPSActionPlan.pdf.

[2] EY Survey, Unlocking the Future, (Dec. 27, 16:05 PM), http://www.prnewswire.com/news-releases/ey-surveyreveals- increasing-tax-audit-presence-driven-by-beps-300340521.html.

[3] *Id*.

As being aware of the importance of the tax payers' rights, International Fiscal Association ("IFA"), discussed the issue of "the practical protection of taxpayers' fundamental rights" in Basel Congress held on 2015[4]. The aim of IFA in this Congress was to identify the tax payers' rights and to show their practical protection in different countries through their branch reports. As a result of the study conducted on the reports of IFA, it is considered that the best practice in tax audits should follow four foundation principles and one of which is the proportionality principle[5]. The proportionality in tax audits means that the tax authority shall use its authority by limiting the tax payers' rights in the least restrictive manner to reach its aim. Therefore, the acts of the tax authorities shall be reasonable and they shall also avoid the arbitrary actions. In this case, the avoidance of arbitrariness intends to serve the principle of fairness[6]. One of the methods to reach the fair result is impartiality during the tax audits.

Although impartiality is one of the crucial elements in tax audits, it is usually difficult to enable the impartiality during the tax audits, because recognizable authority is usually given to tax authorities. In this way, the tax payers stand as the weakest party in the tax audits, while the tax authorities stand as the strongest. In order to have fair outcome as a result of the tax audits, the tax authorities should always act impartial. At this point, I raised the concern whether the tax audits are conducted as impartially in Turkey. As a result of the study on Turkish legislation regarding the impartiality of tax audits, I encountered that the impartiality of tax audits is not a considered issue. Additionally, the impartiality provisions in a legislation cannot be considered as sufficient on its own, but rather there should be also the control mechanisms on whether the impartiality is satisfied and if not, there should be protection mechanisms of the tax payers' rights within this scope.

Consequently, I assert that the lack of impartiality in Turkish tax audits affects the protection of tax payers' rights in a negative way. In order to suggest alternatives for Turkish legislation to ensure impartiality, I conducted a study on the legislation of Finland, Denmark, France and Australia, because these countries have considerably important structures to enable the impartiality in tax audits.

[4] International Fiscal Association, Cahiers Volume 100B: The Practical Protection of Taxpayers' Fundamental Rights (2015).

[5] *Id*. at 36.

[6] *Id*.

Is It Time for the International Criminal Court to Adopt the Foreseeability Test?

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Despite being a fundamental principle of criminal law, the principle of legality remains one of the touchiest issues of international criminal law (ICL). None of the international criminal statutes prior to the Rome Statute of the International Criminal Court contained an article providing for its application. Indeed, there is not yet a uniformly agreed definition of the term and the scope of its application to ICL. While the Nuremberg Tribunal bluntly denied the relevance of the legality principle to its proceedings, the *ad hoc* tribunals for the former Yugoslavia and Rwanda declined several jurisdictional challenges based on it by simply referring to the doctrine of 'accessibility and foreseeability' as developed by the European Court of Human Rights (ECtHR). This approach, however, was only maintained when the tribunals' jurisdiction was challenged. When business went as usual, the tribunals were more concerned with developing their case law than paying attention to their legal pedigree.

In its recent judgment in *Vasiliauskas v. Lithuania*, the ECtHR struck a harsh blow to the *ad hoc* tribunal's developed case law. Indeed, in this case where a violation of the principle of legality was found, the ECtHR decided to dismiss the relevance of the *ad hoc* tribunals' jurisprudence as it was not convinced the applicant could have foreseen the 'judicial guidance' they offered on the meaning of the phrase 'in part' in the definition of genocide. The purpose of this paper is to assess whether the *Vasiliauskas* case constitutes a warning to the ICC liberal approach in interpreting its substantive criminal provisions. To do so, I compare - by using the 'case law method' - the reasoning of the ad hoc tribunals judgements dismissed by the ECtHR with the one adopted by the ICC in its two most ground breaking jurisprudential developments.

The paper starts with a deep examination of the Jelisic and Krstic judgements where the *ad hoc* tribunals developed its innovative qualitative approach to the term 'in part' in the definition of genocide. By going into the details of the motivation of these judgements, I show that the *ad hoc* tribunals interpreted the genocide definition in light of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), while they should have, as it is the general rule in a criminal trial, strictly construed the terms of their

Statutes. In other words, this first part maintains that the *Vasiliauskas* case entails that the ECtHR considers that the interpretation of criminal law in light of the VCLT constitutes *prima facie* a violation of the principle of legality.

The second part looks at rules of interpretation applicable at the ICC. It shows that the drafters of the Rome Statute wished to put a hold on the expansive and liberal approach to construction taken by the judges of the *ad hoc* tribunals. In particular, Article 22 (2) Rome Statute calls the judge to strictly interpret the definition of the crimes contained within the Statute. Nevertheless, the paper demonstrates that despite the clear intention of the Statute's drafters to limit the discretion of the judges, the ICC has also engaged in teleological interpretations on the grounds that the Rome Statute is first of all a treaty, thus resorting to Article 31 VCLT before conforming to strict construction. By scrutinizing two ICC jurisprudential developments –co-perpetration based on "control over the crime", and the definition of an organization based on its capacity to infringe human rights – I demonstrate that the interpretative method adopted by the ICC judges is similar to the one adopted by the *ad hoc* tribunals, which the ECtHR decided to discard in the Vasiliauskas case.

The third part juxtaposes the approach adopted by the ICC with the ECtHR's foreseeability requirement. To do so, I analyze the argumentation and reasoning put forward by the parties and the judges during the *Lubanga Confirmation of Charges*, i.e. the sole case where the foreseeability doctrine was raised before the ICC. While the defence in this case used the language developed by the ECtHR, the ICC majority took this challenge as related to a mistake of law rather than to the principle of legality. By doing so, it demonstrates that there is a lack of uniform language in addressing the legality principle before the ICC. It is then argued that this institutional misunderstanding can be resolved by looking at how the ECtHR applies the requirement of foreseeability in cases involving a violation *of nullum crimen sine lege stricta*.

African States and ICL; Re-thinking the Narrative and Contextualising the Discourse

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Over the past few years, it appears that the relationship between African states and international criminal law (ICL) has been strained. For instance, the legal obligation that state parties have to cooperate with the ICC which is enshrined in the Rome Statute requires the full cooperation of states parties regardless of the fact that the individual indicted is a sitting head of state. Therefore, according to the ICC Pre-trial Chambers decisions, the various states that have hosted and failed to arrest and surrender indicted Sudanese President Al Bashir fell short of their Rome Statute obligations. On the other hand, some African Union (AU) member states are of the view that they are obliged to uphold the customary international law rule of immunities of heads of state and therefore have defended their decision not to arrest President Bashir. The AU has gone as far as implementing policies of non-cooperation with the ICC among member states indicating their strong convictions on this contentious matter.

To date, three states; South Africa, Burundi and The Gambia, have given their formal notice of withdrawal from the ICC. Although they were due to different reasons, the withdrawals are an indication of dissatisfaction with the current ICC ICL system and might be signalling a potential crisis of the loss of ICL relevance among some African states. The AU Commission has also in recent years been catalysing the process of creating a regional criminal law system through an African court that will have jurisdiction over international crimes beyond the ambit of the ICC. While it is clear that a solution needs to be found before two divergent systems of international criminal justice are created, it is important to first establish why the AU led state parties interpret ICL differently and to contextualise the tensions involved. The paper uses a law-in-context method of research through an interdisciplinary comparative approach in order to do so.

As a first step, the paper explores some often unacknowledged historical connections which influence the contemporary relationship between African states, ICL and subsequently the ICC. Through analysing the historical context upon which ICL was founded, developed and continues to thrive, the paper illustrates the ethnocentric and Eurocentric foundations upon which the ICC and other international justice institutions such as the United Nations Security Council (UNSC) are built. The paper shows that the version of ICL

interpretations that remain predominant today are so by historical design. A closer examination of the travaux preparatoires of the Rome State and the Nuremberg Charter reveal that the version of ICL that the ICC inherited safely guards the interests of powerful states to the detriment of states that are considered weaker, most of which happen to be African states.

Thereafter, the article will link historical factors to some contemporary issues regarding the lack of equity in global affairs that were inherited from the colonial era and continue unabated despite the principle of sovereign equality of states enshrined in the UN Charter. An identification and analysis of the provisions within the Rome Statute as well as the UN Charter that perpetuate the structures of inequality of global power to the detriment of African states is undertaken. In addition, a comparison of the use of universal jurisdiction in the global North as well as the global South will demonstrate unevenness in the exercise of global justice that much resembles precolonial sentiment. By highlighting the inequalities in the structure of the global order and the enforcement of ICL, the paper demonstrates that, with a background of slavery and colonial history, contemporary global inequalities should be taken more seriously than they currently are. Furthermore, the historical factors and current global inequalities are driving some African state parties´ scepticism towards ICL and affect their interpretation of ICL which has led to what is deemed to be non-compliance with their ICL obligations.

The third part of the paper discusses the assumption that the interpretation of ICL is universal thereby broadening the perspective regarding the consequences of its uneven application. It will be argued that embracing a pluralistic perspective might help to enlighten and advance understanding regarding the contentious issues currently straining the relationship between the ICC and some African states. The article provides a glimpse into what might be the potential role of comparative law in pluralising ICL interpretations by bringing ICL into historical context and questioning its very foundations, its development, interpretation, application and the parties involved therein.

Sentencing Perpetrators of Atrocities in Colombia: Where International and Domestic Values Converge

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The ICC prosecution team has been conducting preliminary examinations in Colombia for over ten years. During that time, it has not made a determination to move to the next stage, that of formal investigations, but rather oversaw the implementation of local accountability mechanisms for crimes committed during the lengthy civil war. The OTP also provided limited backing, mostly in terms of expertise and outreach support, for peace negotiations between the government and FARC guerrilla forces. On 24 August 2016, after four years of negotiations, the parties reached a peace deal. Strikingly, the Colombian voters refused, by a thin margin, to approve it during the referendum five weeks later.

One of the main concerns raised by the public was the possibility of rebels to avoid jail time if they confessed to crimes and demobilized. The revised peace deal ratified by the government on 1 December 2016 (and not going to be subject to a second referendum) fails to address this concern. Such outcome raises an important issue pertaining to legal standards applicable to Court's preliminary examinations: while the ICC consistently supported genuine accountability in Colombia, including effective punishment of perpetrators,[1] it nonetheless chose not to proceed to the stage of formal investigations. In doing so, the OTP assessed, among other things, whether reduced or suspended sentences rendered to senior perpetrators by the local judiciary are adequate in light of the gravity of the crimes committed during the continuing civil war.

Theoretically speaking, drastically curtailed sentences of 5-8 years of imprisonment for war crimes and crimes against humanity that had already been rendered to perpetrators in Colombia could have alerted the ICC Prosecution and attested to Colombia's unwillingness to undertake genuine investigations. This, in turn, could have paved the way to formal investigations. This scenario was highly unlikely, however, because such interference by the OTP would have had the potential of disturbing fragile peace negotiations.

[1] Eg. Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army, 1 September 2016, available at https://www.icc-cpi.int/Pages/item.aspx?name=160901-otp-stat-colombia

According to Article 53 of the Rome Statute, one way to avoid proceeding to the stage of investigation, even when other criteria of admissibility and jurisdiction are met, is when it would not serve the 'interests of justice'.

Since 2007, the formal position of the Office of the Prosecutor has been to distinguish the 'interests of justice' and 'interests of peace', the latter falling outside of the mandate of the OTP. The Colombian 'non-intervention' attests, however, to some deference the ICC showed to peace process. The supporting idea might have been the following: it is inevitable that the values conceived internationally must be adjusted to the domestic terrain, hence international community must allow certain flexibility when it comes to sentences coming across as too lenient by the ICC's own standards. What is striking is that the Colombian voters rejected the peace deal precisely on the grounds that would have qualified the Colombian situation for investigations by the ICC. Does this outcome mean that international values and domestic values are not as far apart as they might first appear?

The paper will contrast legal framework applicable to sentencing at the ICC with the provisions of the peace deal and domestic criminal law. While it is essential to note that the ICC is conducting preliminary examinations in Colombia and thus is not specifically tasked with assessing sentences rendered domestically, this factor nonetheless plays a role in evaluating Colombia's ability and willingness to conduct its own investigations. This, in turn, ensures that the ICC takes a 'back seat' pursuant to its complementary regime. The paper will also incorporate information obtained during interviews to be conducted with stakeholders in Colombia in March 2017.

Archaic Concepts of Competition Law under Islamic Rule; a Comparative Perspective on the Origins of Ḥīsbah

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The primitive Islamic legal system was based on a body of customs, which were recognized and used by Arabs since pre-Islamic times, with some minor modifications made by first Muslim rulers, including the prophet himself. In this primitive legal system, as far as the regularization of the transactions is concerned, the customs were rooted in the commercial life of Arabs who had their own lex mercatoria. In the pre-Islamic Arab society, some principal concepts of trade, such as equity (īnṣāf), sale contract (bey‘ va shīra’), exchange (mū‘āwaḍah), and market (al-sūq), were known. These concepts were endorsed after the advent of Islam and their recognition continued under Islamic rule.

Although the Arabs knew and used the market, the existence of a specific regulatory system for framing and determining the rights and duties of its actors is controversial. Nevertheless, some rules and institutions concerning the regulation of the markets that survived into Islam from Arabic customary law indicate the existence of such system, at least in a concise and primary form. One of such institutions that associated with regulating the markets was the institution of ḥīsbah.

Ḥīsbah, under primitive Islamic rule, was an office responsible for supervising the morals in the society in general, and the due process of business in the markets in particular. The ḥīsbah officer (mūḥtasīb / āmīl al-sūq) was also in charge of the surveillance of the fair competition in the market. The regulations made by the mūḥtasīb, as a part of its duties, constitute a primitive Islamic competition law.

The fact that the ḥīsbah was a complex institution with specific rights and duties for its holder, and that the neighboring civilizations of Arabs had comparable institutions, raise the question of the origin of ḥīsbah. The Roman aedile-curule, the Byzantine agoranomos (ἀγορανόμος), the Sassanid wāzārbad, and the Babylonian rawāshūk had the same duties as the mūḥtasīb; they inspected the markets, regulated the weights and measures, controlled the prices, and settled down the disputes.

To determine whether there has been a conscious borrowing in the establishment of ḥīsbah, a structural functionalist approach will be applied to the comparative study of the different comparable institutions which their adoption by Arabs, in a historical and geographical context, could be potentially plausible. The possibility of the adoption of ḥīsbah from its Romano-Byzantine counterparts has been noticed and discussed by several authors; however, some fundamental discrepancies make this assertion contestable.

According to the Near-Eastern background of Arabic and then Islamic legal system, a direct connection between Romano-Byzantine norms with this setting of customs and rules in the first phases of the advent of Islam is not easily perceived. The undeniable influence of Hellenistic world on Islamic culture was not completely established until the third and fourth centuries A.H. (ninth – tenth centuries A.D.).

There must have been an intermediate that played a key role in transferring the rules and institutions from the older, more prosperous system to the younger one. In the case of ḥīsbah, as the office of market inspector, this intermediate seems to be an administrative mélange which was operative in the Near-Eastern satellite states of the Byzantine Empire.

Recognizing the origin of ḥīsbah will help us trace the roots of Islamic competition law into a far more complicated system than the simple Arab body of commercial customs; therefore, allowing better interpretation of this unknown aspect of Islamic law in its primitive, as well as its modern status.

Article 9(3) in Turkish Competition Law - A Discussion on Due Process Issues in Antitrust Proceedings[1]

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In Turkish competition law, the "supreme evil of antitrust"[2] is not collusion; it is Article 9(3) of Law No. 4054 on the Protection of Competition (Law No. 4054). According to Article 9(3), "[t]he [Turkish Competition] Board, prior to taking a decision pursuant to the first paragraph, shall inform in writing the undertaking or associations of undertakings concerned of its opinions concerning how to terminate the infringement." This provision is based on Article 3(3) of Council Regulation No. 17/62 in European Union (EU) competition law, a regulation which is no longer in force. The Turkish Competition Board (the Board) has been increasingly using this provision to issue opinions to companies especially in scope of preliminary investigations, ordering them to cease any anticompetitive conduct, without imposing fines.[3] Practice shows that failure to comply with the Board's Article 9(3) decisions will likely result in an investigation and fines.[4] The Board may also factor in this failure as a mitigating circumstance in the calculation of fines.[5]

Why are Article 9(3) decisions evil? It is long established that due process must be guaranteed in competition law proceedings.[6] Article 9(3) decisions, on the other hand, disregard the companies' due process rights. The Board resorts to Article 9(3) largely in its preliminary investigation decisions, i.e. where

[1] The findings in this abstract are the results of preliminary research and may be amended in the final version of this paper.

[2] The United States Supreme Court has stated that collusion is the "supreme evil of antitrust" (*Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004)).

[3] Latest examples include the Board's *Dokum Makina* decision (10 February 2016, 16-04/67-25); *Google* decision (28 December 2015, 15-46/766-281); *EMO-Eskisehir* decision (2 December 2015, 15-42/688-245); *Diye* decision (12 December 2014, 14-51/900-410).

[4] The Board's *Philips* decision (27 September 2013, 13-55/762-321); *Izmir Kum II* decision (28 August 2012, 12-42/1320-433); *Renault Trucks* decision (25 February 2009, 09-08/155-48); *Kablo TV* decision (25 December 2003, 03-83/1003-405); *Turk Telekom* decision (8 January 2014, 04-01/27-9).

[5] Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance, Article 6(2)(a); the Board's *PUIS/TABGIS* decision (18 September 2000, 00-35/392-219).

[6] Italianer, A. (2010) "Safeguarding Due Process in Antitrust Proceedings", *Fordham Competition Law Institute Annual Conference on International Antitrust Law and Policy*, available at http://ec.europa.eu/competition/speeches/text/sp2010_06_en.pdf, 3; Forrester, I.S. (2009) "Due process in EC competition cases: a distinguished institution with flawed Procedures", 34 E.L.Rev. 817, 822; Bellamy, C.W. and Child, G.D. (2006) *European Community Law of Competition (6th Edition)*, Oxford University Press, ¶ 13.028, 13.029.

it decides not to launch a full-blown investigation following a preliminary investigation. The outcome is that companies are forced to comply with a vague decision resulting from a procedure they may not even have been made aware of, since the Board is under no legal obligation to notify the undertakings concerned in preliminary investigations. In the same vein, the parties are not able to defend their conduct, as Law No. 4054 does not grant any defence rights to the parties in the preliminary investigation phase. As opposed to the investigation phase where the parties submit three written defences and have the right to a hearing (Articles 44 and 45 of Law No. 4054), the undertakings concerned are not granted any such defence rights during the preliminary investigation phase. Moreover, Article 9(3) decisions often entail substantial changes to undertakings' established trade practices without explaining how the conduct in question is capable of constituting an infringement, since the reasoned decisions usually lack any substantial legal analysis.

The paper will set out how the Turkish competition law is currently facing significant due process concerns emanating from the application of Article 9(3). Within this scope, the Board's Article 9(3) case law will be put under the microscope. It will then move on to discuss potential solutions to these due process concerns turning to legislation and case law from different jurisdictions, especially the EU.

Data Protection Concerns in Cyberspace: Making Data Available to the Public by its Subject

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The digitalization of information has made personal data more easily accessible in cyberspace. This paper focuses on two of the many dimensions of data protection on the internet.

The first part of the article deals with the protection afforded to the IP addresses of peer-to-peer (P2P) networks users. Since users' IP addresses are visible to others users while downloading/uploading files, one could then be tempted to argue that internet users make this data (their IP addresses) publicly available when they access P2P networks. However, how conscious the peers are that, by accessing a P2P network, they are effectively revealing their IP addresses, is a question that needs to be answered more categorically. One might still consider, indeed, that the peers have a reasonable expectation that their IP addresses will only be visible by other users for file sharing purposes. This paper will thus address the question of whether, by downloading/uploading a file, a user makes their IP address available to the public (the P2P network). Even if this first question is answered in the affirmation, in other words even if it is accepted that in P2P networks the IP addresses can be regarded as personal data made available to the public, a further points arises that needs to be tackled. In many cases, copyright holders collect the personal data of P2P network users (their IP addresses) through software, in order to protect their copyrighted works made available on the network. Copyright holders obviously have a legitimate interest in enforcing copyright claims against infringers. However, whether they are entitled to mandate private entities to monitor IP addresses through software in order to combat illegal downloading/uploading of copyrighted works, is an entirely different issue.

In this internet era, many users leave traces in cyberspace by creating user generated content on social media. The second part of this paper examines the conditions under which processing of user generated content on social media networks can be regarded as lawful. Again, it is difficult to determine when such data becomes available to public. Many social network users can, by carefully managing their settings, create both a public and a private sphere within a single account. Can social networks be distinguished either public or private spheres considering the amount of people the information is shared with (such as

when access is limited to user's 'friends')? When a person publishes user-generated content on the internet, for instance by sharing a picture of themselves, is their privacy violated by the publication of this information on the same or any other social network by third parties? In such a case, should the social network be considered as a public sphere or a private sphere? It is therefore necessary to examine which criterion can be taken into account, in today's digital age, when assessing the lawfulness of the processing of data made available by its subject. In this respect, the paper examines the 95/46/EC Directive, German Law and Swiss Law and Turkish Law in a comparative perspective.

Striking the Balance Between Big Data and Privacy: A Comparative Perspective

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With the availability of large data sets where technological limits have shifted so dramatically, the use of advanced data analytics by big data industry has increased worldwide. Such use facilitates discovering additional personal data about consumers, which is used subsequently for the purposes of consumer profiling. To the extent that the discovered data is characterized as personal data, the use of discovered data for consumer profiling will inevitably lead to concerns over data protection and privacy that need to be addressed by privacy regulators in different countries. This study provides a comparative law analysis of how to protect consumers' privacy with regard to the European Union, United States and Turkey. In this study, these regulatory frameworks are examined to give insights about how to address privacy issues in big data in the applications of data analytics by the big data industry to discover personal data for consumer profiling. Considering the ever-growing interest in big data and the recent enactment of the Law on Protection of Personal Data in Turkey, the study becomes more relevant insofar as it helps determining applicable privacy principles against the risks and challenges of big data.

Could Wearable Technology Transform the Traditional Concept Of *Habeas Corpus*?

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In the XVIII century the “habeas corpus” concept was developed to limit the illegal invasion of people's lives by public authorities and to guarantee the respect of individual integrity and freedom against unjust detention. It has been recently extended in some jurisdictions, as in Germany, also towards the protection of the digital environment where individuals live their virtual lives, such as computers and smartphones.

The comparative law experience suggests that an individual’s right to define his or her own life without interference from the state authorities should be recognized. In this sense, the German Federal Constitutional Court affirmed it in a landmark ruling issued in 2008 (causes 1 BvR 370/07 and BvR 1 595) which recognizes the existence of a principle relating to the "Habeas data". It means that each telematic technologies user is entitled to shield his o her digital freedom as an expression of a digital personality and therefore protect his or her digital space where the user can enclose digital communication, even if collected in a webmail service or laptop. Similar statements were affirmed in some Constitutional Charters of South American countries such as Brazil (since 1988), Paraguay (since 1993), Argentina (since 1994).

Now, it could be interesting to investigate the development of this concept through digital technology of “wearable apps”. The term “wearable app” refers to miniaturized computing devices that are incorporated into items or accessories that can be easily attached to clothes or worn on the body to enhance personal activities.

One of the most common examples of wearable apps refers to medical devices monitoring the wearer's health, which could transform the concept of habeas corpus among peers, especially individuals and companies in a horizontal sense. In fact, there is a strong transformation of the relationship between the body and technology: on the one hand, the provider of the technology reaps the greatest benefits in terms of collection of personal data voluntarily or involuntarily transferred from the technology wearer. It could use the collected data for profiling users and their life environment. On the other hand, both the wearer who enjoys some benefit from the technology and the person who interacts with the wearer could be stripped of information against their will or without knowing.

Under a scholar perspective, weareable apps may fall under the conceptual field of the Internet of Things, which is a developing study area of legal interest. Specifically, the abovementioned circumstances may involve the management of some problems associated with the privacy of individuals, as well as with the management of massive collecting of personal data.

On the one hand, an specific example could be the massive collection of such data for healthcare reasons. This data collocation could have important private and public concern regarding health implications, especially in insurance contracts, work discrimination, freedom of movement and of course the ever growing issues of intellectual property in this field.

On the other hand, international public opinion seems to accept privacy reduction in order to improve anti-terroristic measures and wearable apps could represent some relevant mass surveillance tools, but at the same time could have a role in cyberterrorism attacks.

The aim of this abstract is to understand whether and how the concept of habeas corpus can be applied horizontally, between users themselves and between users and companies of this type of wearable technology. Especially: 1. under a perspective of comparative law related to the analysis of legal solutions already approved or case law on this issue; 2. under a perspective of privacy protection related to the storage of these data on clouds or on other separate virtual environments; 3. under a perspective of direct and constant control by the original data rightholder on the use of these data by the final data user.

Cognitive Mistakes in the Colonial Works about the Indian Village Institution and Their Impact on the Independent India Governmental Policies

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Often described as the quintessence of the Indian legal tradition, the informal council at the local level (*panchayat*) has attracted the attention over the centuries of colonisers, politicians and researchers and its nature has been investigated more or less faithfully and objectively on various occasions. However, despite the efforts expended on the study of panchayat in India, there is no consensus regarding its nature and characteristics, and analysis has often been filtered by the prejudices of the observer and, in certain cases, by his or her political agenda. This is reflected in differing and often a-critical uses of the term, which has been employed to describe a series of judicial or administrative institutions in which decisions are made about disputes or other internal issues within groups of varying composition. The very indeterminacy of the word may have played an essential role in the longevity of the concept of panchayat, which has been flexibly adapted to diverse situations and needs, always maintaining a certain refractoriness to precise categorisation.

According to a certain critical literature, the binomial *village-panchayat* is fruit of an analysis carried out by the first colonisers, who condensed information obtained from ancient writings and inscriptions and bestowed (or tried to bestow) clear and comprehensible traits on these councils. Some authors are extremely diffident about these approaches and emphasise that, despite its apparently belonging to the most ancient Indian tradition, the concept of panchayat, as theorised today, is the entirely modern offspring of Orientalist analysis.

Indeed, these analytical trends fall within the most recent criticism of the concept of Orientalism, which tends today to be described not simply as a discourse of the West about the East, but as “the Western way of thinking about its experience of non-Western cultures”.

The interest of the colonisers in the structure of Indian society was principally related to the pragmatic desire to develop more efficient taxation rules and to create as high-functioning a legal system as possible. In conducting their analyses, they elaborated a new epistemic framework of reference for the subject of

panchayat and local government, which fitted perfectly into the strategy already identified by Ronald Inden of the production of scientific knowledge by and in the service of colonial power, with a high potential for distortion and subversion.

In light of these aspects and theoretical frameworks, in the present work I shall therefore investigate the content of the English historiography and the earliest literature of the colonial administration in order to show how these reflected doctrines and political projects born in the West and the legacy of wrong cognitive approaches in the policies developed by the independent Indian state.

In particular, analysing the dynamics of knowledge production about the Indian village, I will, first of all, underline what the political intentions behind this knowledge strategy were, and, secondly, what the cultural traits of the West, protagonist of this creation, were.

Secondly, starting from the idea that "Orientalism orientalises", I shall investigate how the analytical grammar produced by the colonial literature has shaped the very self-perception of the colonised population by filtering and influencing not only subsequent anthropological studies, but also the rural development policies elaborated by independent India.

The Western Constitutional Thought in the Shaping of the Role of the Japanese Emperor in the 1889 and 1946 Constitutions

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Japan has been – and still is – the most remarkable example of a successful double legal transplant. Double because the two topic moments in the legal history of the country where characterised by a legal transplant. The first, after the Meiji Restoration of 1868, whose greatest achievement from a legal standpoint have been the 1889 Constitution and the Civil Code, was pursued by the Japanese government, while the second, after the 1945 tragedy, was imposed by the Allied.

In the XIX Century, the Western model was represented by Germany (1850 Prussian Constitution and the 1900 BGB) and France (*Code Napoléon*), whereas in the XX Century by the US (both at constitutional level and primary source, in particular when coming to antitrust).

The success of the Japanese experience lays not just in the adoption of foreign institutions and legal concepts, but in the capability of the Japanese society to "Japanize" this "Westernisation" movement. This is more difficult if one considers the substantial cultural difference forming the basis of Western and Japanese societies. One may argue that the effective degree of acceptance of these foreign concepts is still very low – the preference for extra-judicial conflict resolution continues to be the most used argument – but all the same there has been a remarkable framing of certain pillars of the Japanese tradition within a Western framework. This is the case of the Imperial institution, namely both the Emperor and the Imperial Family.

Probably the Emperor is the very one identifying character of the Japanese culture, the pillar supporting the whole society. The role of the Emperor, his duties and functions have never been properly codified until the Meiji Constitution. Despite this, his central role in the society – mainly as the chief-priest of the autochthonous religion (the Shintō) as well as his symbolic character – have never been discussed. The ceremonial/religious sphere belonging to the Emperor, the political one to the Shōgun (1185-1868).

The Meiji Restoration was based on the core idea of modernising – better, Westernizing – the country. Therefore, the first step was an institutional reform, which went through the establishment of a new form of government, based on a Constitution enshrining the founding principles of a Liberal form of State. Thus, the Emperor, despite being the sovereign by divine right and the heart of the State (the so called *kokutai*, which is the typical and unique trait of the Japanese form of State/government), reigned but not ruled (*Le roi n'administre pas, ne gouverne pas, il règne*, according to the saying by Adolphe Thiers). The German doctrine on sovereignty has been fundamental in shaping the constitutional position and powers of the Emperor. However, the preference for the German model derived from a free choice of the Japanese élite, which consciously considered it the most fitting and adaptable to the Japanese traditional culture. Therefore, this first transplant was profound since it entailed a drastic institutional transformation but still was, in some respect, in tune with the Japanese traditional background.

In the aftermath of the war, Japan had to undergo an overall dismantling of the traditional *kokutai* – democratisation, demilitarisation, liberalisation of the economy, protection of rights and freedoms –, as imposed by the Potsdam Declaration and the Instrument of Surrender. The occupation period (1945-1952) was dominated by the personality of the Supreme Commander for Allied Powers (SCAP) General Douglas MacArthur. This second transplant was more invasive, since it was performed against the government (but less against the public opinion) and affected more substantially the core elements of the Japanese tradition, mainly the alteration of the sovereignty principle (from the Emperor to the people). This controversial constitutional amendment, together with the *Declaration of Humanity* broadcasted by the Emperor on the 1 st of January 1946, completely reformed the *kokutai*, depriving the Emperor – both formally and substantially – of any political power. He was then transformed not properly into a head of State (despite being entitled of analogous powers), rather than into the «symbol of the State and of the unity of the people».

Nevertheless, the tradition is still highly influencing the perception of the Imperial institution by the society and his sacred aura remains. The present-day debate on the abdication of the Emperor – which is not provided for neither by the Constitution nor by the Imperial Household Law – is emblematic. Moreover, again the eyes have turned to the comparative law and to foreign monarchies, including the Vatican, looking for a possible solution to this potential constitutional crisis.

An Endeavor to Find the 19th Century United-States Civil Codes Project

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During the 19th century, eight civil codes can be found on the Untied-States territory, they are in Louisiana, New York, Georgia, California, Dakota Territory, North Dakota, Montana and South Dakota and scattered through almost 1 century (1808-1899). The implementation of codes is no hazard it's the result of a precise will.

Through an analysis of the code commissioner's reports, adoption acts and codes preface and introduction the idea that is to see how those codes where enacted with the intent to transform the state legal reality. Most of all the idea is to see what were the agenda of the states. I intended to look at how they decided to change the source of legislation via this new and innovative legal tool, as the legislation goes from a judicial source to a legislative one.

Regarding their "codification project" the choice has been made to focus on the list of reasons and impulses driving these codes, and putting aside the external factors and the list of the sources of the codes. Indeed, the aim of my research is to understand and identified the exact project and reasons of the codes and of this call for codification of their civil law. The codes are not studied as separate entity, even if the state they are arising from are sometimes quite opposite, but they are studied in a comparative and historical perspective in order to try to find a 19th century USA private law codification project.

First I have examined the question of codification, looking at the different definition they used and work methodology. I looked at the codification definition they choose and all of its consequence and also at the semantic of their work. As for the work methodology I looked at the different question they asked themselves regarding the shape and content of the codes.

Then I looked at how they implement their codes, meaning the use of the legislative way which was supposed to be a revolution; and how those codes were meant to be applied.

However even if those states all decided to “codify our laws” and identified the same problems, they didn’t do it in the same way. Some of them transplanted some existing codes when the others autonomously adapt some models like the French Napoleonic code. Those difference of method can be explained easily: a code has always been a fruit of a culture and society, as much as it has been a political tool, it represents the society of when it was enacted.

Prescription versus Obligation to Import Foreign Norms: The Case of the International Crimes Tribunals of Bangladesh

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In 2010, the government of Bangladesh set up the International Crimes Tribunals, a domestic justice process under the International Crimes (Tribunals) Act of 1973, to ensure accountability for grave international crimes perpetrated during the war of 1971. While the original 1973 Act was widely hailed as groundbreaking at the time of its enactment some four decades ago, its actual application from 2009 onwards saw various national and international actors insisting on significant updating of the provisions of the Act. It was prescribed by these actors that the Act should assimilate and apply in the trials the present day substantive and procedural standards of international criminal law so far developed in the recent decades by various international institutions and tribunals. This paper aims to assess the jurisprudential validity of such prescriptions to assimilate imported norms in a domestic tribunal, set against the strictly positivist obligation to adhere to the norms of a domestic legal order.

Prosecuting *Crimes Against Humanity* at the International Crimes Tribunals of Bangladesh

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This paper focuses on crimes against humanity defined in the Bangladeshi statute – International Crimes (Tribunals) Act 1973 and the jurisprudence of the two Tribunals and the Appellate Division. The commentary also compares the legislative language of the aforementioned statute to other international instruments and compares the jurisprudence of the Bangladeshi 'courts' to that of other national, supra national and international forums. It addresses the many contentions and criticisms and concludes that the Bangladeshi courts drew on the 'jurisprudential' and 'normative' developments from other jurisdictions and indeed shares a 'common spirit' with the language enumerated in other instruments of international law and the statutes of hybrid, ad hoc, and permanent justice forums.

Trials *in Absentia* at the International Crimes Tribunals of Bangladesh: Jurisprudence and Commentary

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The concept of trials conducted in absentia shares an 'uneasy' relationship with the right of an accused to be present during trial. This paper evaluates the provisions relating to *trials in absentia* under the International Crimes (Tribunals) Act 1973 and how those trials played out in practice at the International Crimes Tribunals of Bangladesh. This is achieved by appreciating Bangladesh's domestic obligations of law and also the range of standards employed in *trials in absentia* across national, supranational and international justice forums. By deriving a diverse set of procedural safeguards from such forums, this paper concludes that while there is room for improvement as is the case with any justice mechanism, statements that sweepingly 'dismiss' trials in absentia before the ICTs as 'unfair' or 'illegitimate' processes are not grounded on sound logic.

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American Society of Comparative Law

Protecting Recipes?

Andrea Borroni

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More and more attention is currently been paid to gastronomy and the culinary art, both because the properties of food and its health implications are being investigated in depth, and because lately chefs have benefited from mediatic attention becoming, transcending the role of person who merely cooks in a restaurant, a media personality and food can no longer be defined a nourishment but it has become a *status* and a fashion.

Legislatures have not remained idle in the face of this ebullience; an example of this has been the European Parliament's legislative resolution of 13 September 2012, on the proposal for a regulation on agricultural product quality schemes, whose article 17, dealing with the Traditional Specialties Guaranteed, states that: "*A scheme for traditional specialities guaranteed is established to safeguard traditional methods of production and recipes by helping producers of traditional product in marketing and communicating the value-adding attributes of their traditional recipes and products to consumers*."

This legislative choice could potentially revolutionize the current copyright protection systems in this field in the European Union, because, for the first time, not only a *methods of production* but also *recipes* are deemed worthy of protection.

In the United States, in the meantime, this issue has been touched upon in a few judgments but it has never been the object of any legislation so far.

Regardless, outside the legal domain, a practice has also gained ground whereby homage is paid in the menu to the creator of a signature dish.

In this paper, the author discusses this phenomenon, compares the approaches that have emerged in practice in the USA and in EU, describes the possible options available to legislatures (no protection unless it relies on specific and innovative piece of technology, a parallel with the protection granted to the Geographical Indications or the Traditional Knowledge), and concludes by proposing a possible unitary solution.

Copyright Protection and Choreographies: New Issues, Old Solutions?

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The legal literature on intellectual property has rarely focused on choreographies.

Choreographic works are different from the others protected under copyright law because they consist in a limited number standardized building blocks (musical notes, dance steps and athletic movements) which are, then, arranged in original, creative and reproducible combinations every time.

The question for the lawyer is if the combination of these elements is deemed worthy of protection by the legal domain in its entirety, or whether the musical part and the movement sequence can only find protection as separate components of the choreographic work; and, either way, where the threshold for protection is and what remedies are available.

In this paper, the author examines, from a comparative standpoint, some concrete cases, analyzing how they are tackled by the legal system, with particular reference to the issue related to the originality of the choreography in comparison with other creative works.

In conclusion, the author will discuss if and when choreographies as a whole are eligible for protection and, in that case, it is necessary to come up with a "new" doctrine, or if, on other hand, it possible to extend by way of analogy the solution used to protect copyright in the musical field to choreographies.

The Protection of Traditional Knowledge in a Globalized World

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A recent and increasing trend in the field of intellectual property has seen the extension of protection also to unwritten and unrecorded cultural expression, generally known as folklore. Thanks to this new development, a veritable treasure trove of knowledge and information can finally be protected to the great advantage of the country and cultures of origin.

To roll back this protection now certainly constitute an attack on diversity and local cultures.

Furthermore, traditional cultural expressions are often ineligible for protection under existing intellectual property laws. The history of the world is without a doubt longer than the history of modern legal systems; and yet contemporary perceptions of ownership are used to govern expressions of ideas that were created long before these legal systems were made.

The "*traditional knowledge*" and practices of local communities that are developed and passed from one generation to the next are a valuable heritage, for it outlines a series of best practices through which a sustainable use of resources and, more in general, biodiversity can be achieved.

This important role is acknowledged in the Convention on Biological Diversity (CBD), which has been ratified by over 170 countries. In particular, Article 8(j) of the CBD mandates that "[*e*]*ach Contracting Party shall, as far as possible and as appropriate: (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices*."

As is common knowledge, the moral core of the Intellectual Property Rights lies in the balance among conflicting social goals; on the one hand, the need to reward an inventor's investment in research and

development and, on the other, the necessity to allow the public at large to be able to improve on his invention, thereby achieving progress.

This paper aims to analyze this conflict of values and interests, from a comparative standpoint, in order to propose a possible way to successfully balance them a globalized world.