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A Godless Constitution? Faith, Politics and Speech in the Bill of Rights of the United States

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Abstract

This article takes a fresh look at the place of religion in the US Constitution. By reviewing the most important literature on the First Amendment and by considering the key judicial rulings on the matter, this piece argues that US constitutional law adopts an exceptionally careful approach when it comes to the place of religion in America's public sphere. This approach is both sympathetic towards private belief, yet uncompromising about the importance of Church-State separation. I conclude that the distinction of the US legal system lies within its very capacity for achieving this balance.

Keywords: first amendment, establishment clause, religion, separation, church and state, United States

1. Introduction

The complexity of America's relationship with religion is nowhere more apparent than in its legal system. The Founding Fathers agreed on the importance of religion for the American Nation, but were also aware of the dangers that a connection between secular and spiritual authorities posed to the existence of their highly pluralistic polity. The tough question they faced, therefore, was how to reconcile a Christian but multi-denominational country with religious freedom for all. The answer they gave was as genial as it was ambiguous: precisely because religion was so important *and* so divisive, it was not the business of the federal government to deal with it. It was, however, the business of enlightened constitutional framers to guarantee both the separation of the civil from the sacred, as well as the protection of religious freedom in general. The carefully drafted compromise was reached in 1791 and resulted in the seemingly uncomplicated formula of the US First Amendment: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble and to petition the Government for redress of grievances."

The First Amendment is a uniquely American product, the direct result of the country's historical legacy. It is an amalgam of the five key freedoms to be found in any democratic polity—religion, expression, press, assembly and petition—and, as such, it is the pivot around which the entire US constellation of rights turns. However, by no means is the passage easy to comprehend, precisely because it fulfills so many functions at once, and rarely has the interpretative history of a constitutional provision raised more problems. "People who disagree about nearly everything else in the law agree that the Establishment Clause doctrine is seriously, perhaps distinctively, defective", one author observed (Gedicks, 1995: 1). Yet it is the construction of the First Amendment in its entirety that is problematic, and given its broad wording and crucial role in US law, this is hardly surprising. From the very beginning, the courts were faced with the daunting task of clarifying in precise terms what even the Founding Fathers could only summarily sketch: namely, a definition of freedom in America. That the Framers managed to build such a construction in forty-five words is thus not only a testimony to their prescient genius but also to the complexity of their chosen formula, a complexity that the judiciary subsequently reflected. This contribution is dedicated to such judicial intricacy.

2. The 'Marketplace of Ideas' and the Importance of Freedom of Expression in US Law

In the eighteenth century an unprecedented number of events—increased population, migration, the Great Awakening, unrest among the black population and the Enlightenment— transformed America from a place that punished dissent into a place where heterodoxy and criticism were the norm, a 'marketplace of ideas', as it has

been called (Note 1). There is, historically speaking, much speculation on whether this marketplace was the cause or the consequence of the religious fervour that inflamed the US in those years. Whatever the historical truth, however, the First Amendment treats religion as a form of expression (albeit a particularly important one). Therefore, before turning to the religion clauses of the First Amendment, we need to consider the degree of protection given by US law to free expression in general, as the former considerably benefits from, and significantly expands upon, the guarantees given to the latter.

2.1 The 'Marketplace of Ideas' and the US Supreme Court

The 'marketplace of ideas' theory was first spelled out by John Stuart Mill in 1859 in his *Liberty of Thought and Discussion*, an essay where the author argued that an erroneous idea is as valuable as a truthful one because without the former, the latter would lose part of its strength. Banning wrong opinions, Mill thought, is damaging because it deprives humanity of "the clearer perception and livelier impression of truth, produced by its collision with error" (Mill, 1999: 121). Although this idea of free expression as the best antidote against error was at the time rejected by the British, it was enthusiastically embraced on the other side of the Atlantic and became an ingrained part of the country's psyche, particularly from the mid-twentieth century onwards (Lambert, 2002: 203). It is the theoretical underpinning upon which the US judiciary wrote a good portion of First Amendment jurisprudence. It helps explain the central role given to free expression by US law, as well as the contention that in America, everything in the end becomes a First Amendment question. "The ultimate good desired is better reached by free trade in ideas", Justice Holmes wrote in *Abrams v United States* (1919: 250 US 616), the first judicial endorsement of the marketplace model. "The best test of truth is the power of the thought to get accepted in the competition of the market, because truth is the only ground upon which people's wishes safely can be carried out" (250 US 630).

The Supreme Court has explicitly adopted this model but has not always ruled consistently with it, and it is significant that Justice Holmes wrote in dissent. Yet the marketplace model conveys one central principle underlying First Amendment jurisprudence, namely, the extraordinary protection accorded to free expression by US law vis-à-vis the minimal governmental interference allowed on the matter. Since the marketplace of ideas is only one step away from the marketplace of religions, it is important to analyze briefly, in chronological order, the most significant passages of the Supreme Court's conceptual journey in establishing such a model and in giving it the protection of the law.

2.1.1 Flag Salute, Libel Actions and Student Symbolism

An early application of the 'marketplace of ideas' was *West Virginia Board of Education v Barnette* (1943: 319 US 624), a case concerning compulsory flag salute and recitation of the pledge of allegiance at school. Here the Supreme Court, by a 6-3 majority, held unconstitutional a measure that obliged public school students, without exceptions or opt-out provisions, to salute the flag and recite the pledge of allegiance daily. The case is significant because it recognized that the purpose of the First Amendment is to ensure that individuals have a private sphere of freedom of thought and belief that even the government or its agencies (like schools) cannot invade. "If there is any fixed star in our constitutional constellation", Justice Jackson famously wrote in a key passage, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein" (319 US 642). When Justice Frankfurter, in dissent, objected that the flag salute and pledge recitation could legitimately be imposed by the government since they are not religious acts but merely practices "promoting good citizenship and national allegiance" (319 US 654), the majority answered that this was irrelevant because government officials cannot compel individuals to espouse beliefs at odds with their conscience, no matter whether they are religious or not. "Authority here is to be controlled by public opinion", the Court concluded, "not public opinion by authority" (319 US 641).

The most interesting period for the marketplace model in US law is undoubtedly that of the 1960s and 1970s, a time when national tumult and social unrest percolated to the Supreme Court. In a series of decisions, the justices emphasized the central—indeed, sacred—importance given to First Amendment freedoms, and the best known of these cases is *New York Times v Sullivan* (1964: 376 US 254). A newspaper had published an advertisement soliciting funds to cover the legal expenses of jailed students protesting against racial segregation, but contained a number of factual mistakes, such as allegations of police attacks on demonstrators. A police commissioner sued for libel and was awarded $500,000 but the Supreme Court reversed the ruling, upholding the newspaper's right to criticize government officials. Writing for the Court, Justice Brennan justified the decision by reference to "the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly

sharp attacks on government and public officials" (376 US 270). Instead of censorship, the best way forward for society was rebuttal of factual inaccuracies through counter-speech (376 US 297).

A few years later, the Supreme Court again had the opportunity to balance free expression and state interests in a case particularly important for the heated political situation of the time. In *Tinker v Des Moines School District* (1969: 393 US 503) the question was whether a public school regulation prohibiting students from wearing armbands against the Vietnam War was constitutional. By a 7-2 majority, the Court decided that it was not. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gates" (393 US 506), Justice Fortas wrote for the majority. "In our system, state-operated schools may not be enclaves for totalitarianism and students may not be regarded as close-circuit recipients of only that which the State chooses to communicate" (393 US 511). School officials, the Court concluded, cannot censor student speech simply because of an "undifferentiated fear or apprehension" (393 US 508), but "must reasonably forecast that the student speech will cause a substantial disruption or invade the rights of others" (393 US 514).

Justice Hugo Black disagreed with this stance and in a forceful dissent accused the Court of ushering in "a new revolutionary era of permissiveness in this country fostered by the judiciary" (393 US 518). Yet the case is significant precisely because of the majority's answer to Justice Black's objection: "Any departure from absolute regimentation may cause trouble", the *Tinker* court wrote. "Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the view of another person may start an argument or cause a disturbance. But our Constitution says that we must take this risk…and our history says that it is this sort of hazardous freedom, this kind of openness, that is the basis of our national strength…" (393 US 508-9). Importantly, this strength was precisely the 'marketplace of ideas' embodied by the First Amendment (Note 2).

2.1.2 Hate Speech, Vulgar Speech and School Censorship

The attachment to freedom of expression in the US is perhaps most noteworthy in relation to anti-discrimination laws, and *Brandenburg v Ohio* (1969: 395 US 444) is one of the most contentious decisions on the matter. The case involved a video showing Ku-Klux-Klan supporters, some hooded and carrying firearms, gathering around a large burning cross and making racist remarks such as "This is what we are going to do to the niggers", "A dirty nigger", "Send the Jews back to Israel", "Bury the niggers" and "Save America" (395 US 445-6). The appellant was a KKK leader and was shown in the video making a speech in which he said: "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengence taken" (395 US 446). Mr Brandenburg was convicted under an Ohio statute that prohibited advocating criminal syndicalism, but the Supreme Court found that his speech was mere encouragement rather than actual incitement to violence and overturned the conviction. The First Amendment, the Court said, protected Mr Brandenburg's speech because "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (395 US 447). The concurring opinion of Justice Black left no doubt as to the importance of free speech in US law: "Government has no power to invade that sanctuary of belief and conscience" (395 US 457), even if that meant advocating racial superiority.

Justice Black's "sanctuary" of free expression was again under attack two years later, and once more America's highest Court respectfully declined to invade it out of devotion to the 'marketplace of ideas'. In *Cohen v California* (1971: 403 US 15) a man was convicted for expressing his views against the compulsory Vietnam conscription by painting the words "Fuck the Draft" on his jacket and wearing it in a courthouse. The Supreme Court nonetheless reversed the decision because it violated the man's freedom of expression: "We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process", Justice Harlan wrote for the majority. "Indeed, governments may soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views" (403 US 29). The justices recognized the "distasteful" (403 US 21) character of Mr Cohen's expression but held that "surely the state has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us" (403 US 25). The best remedy, the Court convened, was, and remained, the free marketplace of ideas.

Several other cases in the 1980s and 1990s reaffirmed this determined belief in free expression, *Board of Education v Pico* (1982: 457 US 853) being the key example. The lawsuit involved a school decision to withdraw some books, including civil rights pieces on racial discrimination, from the library because they were

considered inappropriate for young people. The Supreme Court, however, decided that school officials had violated the First Amendment because academic forums should encourage the free exchange of ideas, not limit it. "Local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what is orthodox in politics, nationalism, religion or other matters of public opinion'" (457 US 872), the Court ruled. The free flow of information had to prevail and was all the more important in a case involving a school, which the Court defined as "the principal locus of academic freedom" (457 US 868).

2.1.3 American Flag, Racial Speech and Public Parade

This liberal stance was reaffirmed a few years later in *Texas v Johnson* (1989: 491 US 397), one of the most controversial examples of the 'free marketplace of ideas' model. During a political demonstration, Mr Johnson publicly burned the nation's flag and chanted: "America, the red, white and blue, we spit on you" (491 US 399). He was convicted under a Texas law that prohibited the "desecration of a venerated object" (Texas Penal Code, 1989: 42.09 (a) (3)) but the Supreme Court ruled in his favour and struck down the Texas statute on the grounds that it illegitimately restricted his freedom of expression. "If there is a bedrock principle underlying the First Amendment", Justice Brennan wrote for the majority, "it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable" (491 US 414). Chief Justice Rehnquist, together with two other justices, strongly dissented on the grounds that the national flag had a unique place in America "that justifies a governmental prohibition against flag burning…" (491 US 422). Nevertheless, the majority was undeterred and noted that its ruling simply reflected the importance given to dissent by the First Amendment (Note 3). *Johnson* provoked a political firestorm and in 1990, Congress passed a federal law against flag-burning (Flag Protection Act, 1990: 700). The Supreme Court once again struck down the legislation on the basis of the free market of ideas in *United States v. Eichman* (1990: 496 US 310). As Justice Kennedy noted in *Johnson*, "it is poignant but fundamental that the flag protects those who hold it in contempt" (491 US 414). Far from being a weakness, the freedom to express controversial opinions is, according to the Supreme Court, America's greatest asset.

More than twenty years after *Brandenburg*, the Supreme justices ruled *RAV v City of St.Paul* (1992: 505 US 377), another case that, as counsel for petitioner argued at the hearing, "once again will demonstrate whether or not there is room for the freedom for the thought that we hate and for the eternal vigilance necessary for the opinions that we loathe" (Irons, 1997: 201). It is a case where freedom of expression was brought to new heights. Two teenagers had placed and burned a cross in the backyard of a black couple living in a white neighbourhood. They were convicted under a St Paul's hate crime ordinance which prohibited the placing on any property of a symbol that might arouse "anger, alarm, or resentment in others on the basis of race, colour, creed and gender" (505 US 379). The Supreme Court, however, unanimously reversed the conviction and held that the statute was a violation of the boys' freedom of expression, though it was divided on the exact nature of the violation. The majority found that the St Paul ordinance prohibited only a certain kind of hate speech and was thus an unconstitutional and an under-inclusive, content-based limitation of expression. The four concurring justices, on the other hand, argued that the ordinance was too broad because "the mere fact that expressive activity causes hurt feeling, offence or resentment does not render the expression unprotected" (505 US 414). Either way, the boys' freedom of expression had been violated and the future of hate-speech legislation in the US was put in serious doubt.

Finally, an important case where freedom of expression prevailed over anti-discrimination measures is *Hurley v Irish-American LGB Group of Boston* (1995: 515 US 1). In 1992 the Irish-American Gay, Lesbian and Bisexual Group of Boston applied to join the St Patrick's parade. They were turned down, but a judge held that this was an unconstitutional exclusion based upon sexual orientation and allowed them to march. One year later the Massachusetts Supreme Court confirmed this stance, but in 1995 the US Supreme Court reversed it. In a rare unanimous decision, it held that the free expression of the parade's organizers had been violated because the state was "requiring petitioners to alter the expressive content of their parade" (515 US 15). "Our tradition of free speech", the Court ruled, "commands that a speaker who takes the street corner to express his views in this way should be free from interference by the State based on the content of what he says" (515 US 21-2). Participation of gay, lesbian and bisexual people in the parade was a right, the Court emphasized, but expression of their message within the St Patrick parade was not, since "disapproval of a private speaker's statement does not legitimize use of the Commonwealth's power to compel the speaker to alter the message by including one more acceptable to others" (515 US 23-4).

2.2 Limits to the 'Marketplace of Ideas': State Regulation of Private Expression

As the above discussion suggests, it is difficult to overstate the importance of freedom of expression in US law. "If there is any principle of the Constitution that more imperatively calls for attachment than any other", Justice Holmes put it in *US v Schwimmer* (1929: 279 US 644), "it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate" (279 US 655). This liberty to allow the expression of views that are not only controversial, but are even flirting with illegality, is one of the key traits of the US Constitution as well as one of the grounds that distinguishes it from other legal systems.

Important as it undoubtedly is, however, such a remarkably robust 'marketplace of ideas' is not entirely unregulated, nor could it possibly be, since any government permitting this would come close to chaos. Reputations can be ruined, people's rights can be affected and a nation's existence can, in extreme circumstances, be jeopardized by unconditional freedom, with the result that states may have a residual interest not only in following the development of the 'market of ideas' but also in intervening when certain boundaries are crossed. Yet where does the border lie? When is the regulation of free expression justified? In other words, when does freedom become abuse?

Considering free expression's almost saintly importance in US law, one would expect regulation to take place only when narrowly-defined and very important values are at stake. Yet while this is true in theory, it has not always been the case in practice. The following examples of judicial intervention are instructive not only of the constant tension between individual expression and state regulation but also, and perhaps inevitably, of judicial intricacy. If we want to know what kind of expression US law permits, we must also look at what it prohibits.

2.2.1 Subversive Activities and 'Clear and Present Danger'

Self-preservation is a key concern of governments as well as individuals and, in fact, one of the earliest limitations to free expression in US law occurred in the field of advocacy of illegal acts against the state. In 1919 the Supreme Court drew a distinction between protected and unprotected advocacy in *Schenck v United States* (1919: 247 US 47), a case involving the constitutionality of the Federal Espionage Act of 1917. "The question in every case", the Supreme Court wrote, "is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree" (247 US 52).

Despite its importance for First Amendment jurisprudence, the 'clear and present danger' test was broad and prone to abuse, particularly in times of war and national emergency when the Supreme Court already had (and was going to further develop) a reputation for bowing to governmental interests. Time arguably proved critics right when only a few years after *Schenck*, the justices gave a remarkably deferential interpretation of what constituted illegal advocacy in *Gitlow v New York* (1925: 268 US 652): "If the expression's natural tendency and probable effect is to bring about the substantive evil which the legislative body might prevent" (268 US 671), the *Gitlow* majority wrote, then such expression is not protected by the First Amendment. Congress, in other words, could choose to "suppress the threatened danger in its incipiency" (268 US 669) simply by showing the expression's "bad tendency" (268 US 671).

In the following years the Court realized the potential risk of this decision and, in *Whitney v California* (1927: 274 US 257), corrected its posture by adhering to Justice Brandeis's statement according to which "only emergency can justify repression" (274 US 377) and by ruling that the danger had to be "clear", "imminent", and "substantial" (274 US 379). Yet confusion did not dissipate completely and the doctrine of 'clear and present danger' was also used to curtail legitimate political dissent (Note 4). The matter has since been clarified by *Brandenburg v Ohio* (1969: 395 US 444), a case that forbids only advocacy directed to "inciting or producing imminent lawless action and is likely to incite or produce such action" (395 US 447). It should nevertheless be noted that the Supreme Court still fluctuates between libertarian and deferential approaches, with the latter particularly frequent in times of national emergency, such as the aftermath of the 9/11 terrorist attacks in New York and Washington.

2.2.2 'Low Value' Speech and 'Fighting Words'

Another important example of limitation to free expression is provided by so-called 'low-value speech'. The idea was first introduced by *Chaplinsky v New Hampshire* (1942: 315 US 568), a case involving public utterance of offensive words. Mr Chaplinsky publicly inveighed against a City Marshal and called him "a God damned racketeer" and "a damned fascist" (315 US 569). He was sentenced under a state law that prohibited "offensive words" (New Hampshire, 378, 2) but appealed, arguing that the law was an unconstitutional violation of his freedom of expression. The Supreme Court disagreed: after noting that "the right of free speech is not absolute at

all times and under all circumstances" (315 US 571), the justices observed that "there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem". "These", the Court continued, "include the lewd and obscene, the profane, the libellous, and the insulting or 'fighting' words, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (315 US 571-2). Otherwise put, because of their meagre social value these expressions simply did not deserve entry into the free market of ideas. Yet if the Court's definition of 'fighting words' was memorable, its mention of approximate ideas like 'obscenity', 'immorality' and 'profanity' was not and led critics to argue that these expressions were 'well-defined' and 'narrowly-limited' only in the justices' minds (Note 5).

2.2.3 'Obscenity' and 'Immorality'

When the Court attempted to define 'obscenity', it became apparent that not even the Supreme justices were in agreement on these definitions. As Justice Brennan wrote in *Roth v United States* (1957: 354 US 467), "obscenity is not within the area of constitutionally protected speech or press" (354 US 485) because "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance" (354 US 484). Yet, when they tried to define the concept, the justices stumbled into major difficulties. The question to be posed, the *Roth* court tentatively wrote, was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (354 US 489). This explanation betrayed the vagueness that unavoidably accompanies attempts at defining obscenity, a vagueness that was graphically expressed by Justice Stewart in *Jacobellis v. Ohio* when he wrote a sentence that he later came to regret: "I know it when I see it" (1964: 378 US 184). Justice Brennan himself, after having categorically stated in *Roth* that obscenity was unprotected speech, ultimately had to recognise, in dissent, that 'obscenity' was impossible to define.

Yet, the majority was unconvinced and, in *Miller v California* (1973: 413 US 15), revised the *Roth* test and defined 'obscenity' as those "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value" (413 US 24). Although this definition was less controversial, the *Miller* Court was bitterly divided because, as Justice Douglas wrote in dissent, the justices were dealing with tastes and literature rather than law. "Obscenity—which even we cannot define with precision—is a hodge-podge", he wrote. "To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process" (413 US 43-4). Other interesting cases decided in 1991 and 1992 suggest that the Supreme Court's intermittent fascination and difficulty with ideas of 'immorality' and 'social acceptability' is not confined to a bygone age but is very much a contemporary issue (Note 6).

2.2.4 Importance of the 'Marketplace of Ideas'

Freedom of speech has consistently been regarded as a most (if not *the* most) fundamental component of US law, as well as the single most significant political freedom within the American constellation of rights (Isler, 2001). The First Amendment prohibits the federal government from "abridging the freedom of speech", and since the 1920s its tenets have been extended to include protection against state and federal actions. Moreover, the definition of 'speech' has been broadened by the judiciary to include *symbolic* speech consisting of those actions that express an opinion. This then incorporates both the burning of flags as a sign of protest, as well as the display of religious signs at schools and in other places, within the rubric of expressions to be protected.

Free speech is not absolute and can be limited if it is seen as sedition, libel, 'fighting words' or obscenity, all of which are narrowly defined. Yet given the importance of free speech in US law, America's 'marketplace of ideas' is built so as to protect most forms of expression, and can only be restricted for reasons of public order .

3. The 'Marketplace of Religions' and the Importance of Religious Freedom in US Law

Under US law, freedom of religion is a form of protected expression that benefits from the conceptual and legal safeguards mentioned above. Because of a number of historical developments, however, religion and religious symbolism also possess a unique place in America's legal system, and the wording of the First Amendment leaves little doubt about this. The first freedom of the First Amendment of the US Bill of Rights states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof…", A product of the country's short but intense religious past, this passage was meant to recognise both that America's unusually diverse marketplace of religions was incompatible with the establishment of one over another, and that religious liberty was among the nation's most cherished achievements. The two aspects are connected because, as Madison observed, America's crowded bazaar of faiths is the most important guarantee of religious freedom (Haynes, 2007: 16).

In order to deal with, and preserve, this market of religions, the Founding Fathers drafted a system which carefully balanced the civil and the religious, embodied by the Establishment Clause of the First Amendment. Yet it soon became apparent that a complete and hermetical separation was impossible to achieve because the secular and the spiritual tend to naturally overlap—especially in the eyes of religious people, for whom universal sovereignty *precedes* the civil one. "Before any man can be considered as a member of Civil Society", Madison admitted, "he must be considered as a subject of the Governor of the Universe" (in Grunt, 2001: 185). The difficult question that the Founding Fathers intentionally left open, and that the Supreme Court had to answer in interpreting the subtle words of the First Amendment was whether it was a sovereign government and a limited God, or whether it was the reverse.

That such a question involved very practical problems became clear from the early life of the Supreme Court and is exemplified by the following Sophoclean dilemma: when a law prescribes a behaviour that is at odds with the tenets of a specific religion, are exemptions for people practising that religion allowed? Put another way, can religious beliefs be accepted as a justification for an act that the law forbids? The Supreme Court's position has been far from linear. Torn between a reluctance to carve out religious exceptions and the acknowledgement of spirituality's central place in the US, the justices' legal pendulum has moved erratically. As a general principle, however, religious freedom is not delineated by the US legal system in the positive (i.e. in terms of what religions *can* do), but rather in the negative (i.e. in terms of *exceptions* to such a freedom). Religious freedom is thus the rule to which only two exclusions can apply, namely, generally applicable laws and the Establishment Clause. Both of these need to be considered in some detail.

3.1 First Limit to Religious Freedom: Generally Applicable Laws

3.1.1 Polygamy and Conscientious Objection

The question of 'religious immunity' was initially given a negative answer in *Reynolds v United States* (1878: 98 US 145), an early but crucial case involving polygamy. Mr Reynolds, a Mormon, married a second wife and was thus convicted of bigamy. He appealed against the decision and argued that the anti-bigamy statute violated his religious freedom because Mormonism required him to marry more than once. The Supreme Court, however, rejected his argument and set an important precedent: a man could not excuse his unlawful practices because of his religion, as "to permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself" (98 US 166-7). The Court recognised that Mr Reynolds's beliefs were sincere but ruled that while he was free to *believe* in bigamy, he was not free to *practise* it.

While *Reynolds* fixed an important principle in US law, it was hardly a difficult case to decide as it involved an illegal practice that was widely abhorred. The following years offered more subtle (and successful) challenges based on religious exceptions to general laws—and conscientious objection was one of them.

The early cases were invariably answered in the negative. In *United States v Schwimmer* (1925: 279 US 644), for example, the Supreme Court turned down an applicant for US citizenship because she refused to promise that she would take up arms in defence of the country due to her belief that "all human beings are the children of God" (279 US 684). "If all or a large number of citizens oppose such defence", the justices concluded, "the 'good order and happiness' of the United States cannot long endure" (279 US 651), with the result that the state had an interest in fostering nationalism and in "safeguarding against admission of those who are unworthy" (279 US 649). Only a few years later the Court confirmed this stance in *United States v Macintosh* (1931: 283 US 605), a case where another conscientious objector declared himself willing to give allegiance to the United States but unwilling to put that allegiance ahead of God. This was not enough, the Court wrote, because "unqualified allegiance to the nation and submission and obedience to the laws of the land…are not inconsistent with the will of God" (283 US 625).

After a series of analogous arguments, the turning point came a short while later. The Supreme Court, heavily relying on religious tolerance, reversed its position (by now considered "fallacious" and even "abhorrent"), and allowed a Seventh-Day Adventist to serve in the army as a conscientious objector in *Girouard v USA* (1946: 238 US 64). "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual", the justices acknowledged. "The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State" (238 US 68). Only a few years later, in *United States v Seeger* (1965: 380 US 163), believers in non-traditional but 'theistic' variances of monotheism were also offered the opportunity to object, and in 1970 the right was finally extended to those with "moral" and "ethical" beliefs in *Gillette v USA* (1971: 401 US 437). After initial resistance, therefore, an important general freedom was carved out of a religious exception.

3.1.2 Child Labour and Compulsory School System

As a means of ensuring the transmission of knowledge to younger generations, education has always been crucial for religions as well as for governments. Since both claim a strong interest in the child's intellectual development—the first via the parents' right to enforce a religious upbringing, the second via the duty to ensure that an adequate education takes place—there is an obvious potential for conflict, particularly when religious practices diverge from the mainstream. This is exactly what happened in *Prince v Massachusetts* (1944: 321 US 158), a case involving child labour. Mrs Prince, a Jehovah's Witness, was convicted for permitting her offspring to sell religious magazines in the street, contrary to a Massachusetts statute that prohibited child labour. She maintained that this infringed her religious tenets as well as her right to bring up her child, but a divided Supreme Court upheld the statute. The State has a broad power to oversee the acts of children, the majority ruled, and parental authority may be restricted when doing so is in the interests of a child's welfare.

Given *Prince*'s uncompromising stance in a case involving minor events, one would have expected the Supreme Court to reject claims of religious exceptions levied against the compulsory school system. Yet *Wisconsin v Yoder* (1972: 406 US 205) carved out just such an exception. The case involved the withdrawal from school of children belonging to the Old Order Amish religion upon request of their parents, who believed that the education of children over the age of 14 was "too worldly" (Shawn, 2003: 28). "When the children get to that age", one Amishman stated, "You got to get that religion in them. Just like when you plant a tree, you got to plant it straight or it will always be crooked" (Shawn, 2003: 94). After noting that "the values of parental direction of religious upbringing and education of their children in their early and formative years have a high place in our society" (406 US 413-4), the Court ruled that the state's interest in educating children should succumb to Amish parents' religious freedom. "Long before there was general acknowledgement of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs", the Court concluded (406 US 414). The Wisconsin statute compelled Amish parents to perform acts which were at odds with a fundamental tenet of their religion, and since the state's interest was not as substantial as the parents', Wisconsin had to carve out an exception to the compulsory educational system specifically for Amish children.

3.1.3 'Right to Discriminate' and Religious Exemptions in the Workplace

Just how important religion is to US constitutional law was made clear by the Supreme Court in *Corporation of the Presiding Bishop v Amos* (1987: 483 US 327), a case involving the constitutionality of exemptions to anti-discrimination statutes. After being fired by his employer (a corporation affiliated to the Church of Jesus Christ of Latter-day Saints) because he was not a member of that congregation, a building engineer sued, claiming that he was discriminated against on religious grounds. The Supreme Court recognised that this was the case, but unanimously found that the dismissal was justified because religious organizations were exempt from religious discrimination law. "It is a permissible legislative purpose", the Court wrote, "to alleviate significant government interference with the ability of religious organizations to define and carry out their religious missions" (483 US 335). Put another way, since government had an interest in guarding against interference in religion, religious organizations could be constitutionally exempted from certain laws that apply to others.

Religious exceptions in the workplace had a more tortuous outcome. In 1963 the Supreme Court, in *Sherbert v Verner* (1963: 374 US 398), ruled that a member of the Adventist Church who had been fired because of her refusal to work on Saturdays (her faith's Sabbath) had a right to unemployment benefits. Deciding differently would, the Court wrote, "force her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" (374 US 404). Justice Douglas wrote in a concurring opinion that this would amount to interference "as plain as it is in Soviet Russia" (374 US 412). According to the majority, states had to recognize the unique requirements of religious traditions, because "to condition the availability of benefits upon the applicant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties" (374 US 406). This was not tantamount to giving special privileges to religious people, the justices concluded, but simply guaranteed equality.

Although *Sherbert* has long been considered the reference case for religious exceptions in the workplace, in 1990 the Supreme Court took a different path in *Employment Division v Smith* (1990: 494 US 872), a case where the justices held that neutral, generally applicable laws can be applied to religious practices even when they are not supported by a "compelling governmental interest" (494 US 873) as decided in *Verner*. Interestingly, however, the justification given was not based upon secular arguments but rather on the fact that ruling otherwise would have endangered the very existence of America's marketplace of religions: "Any society

adopting religious exceptions to general laws would be courting anarchy", the majority wrote, "but the danger increases in direct proportion to the society's diversity of religious beliefs…. Precisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference', we cannot afford the luxury of deeming presumptively invalid … every regulation of conduct that does not protect an interest of the highest order" (494 US 888). This decision was the object of much criticism in America and several states passed laws that confirmed *Sherbert*, circumventing the Supreme Court's strictness. Yet this controversy remains emblematic of the dilemma in balancing individual conscience and state rules.

3.2 Second Limit to Religious Freedom: The Establishment Clause

Although the markets of ideas and religions are intimately connected, they differ in three fundamental and problematic respects. The first is that contrary to popular opinion, religious beliefs involve practices as well as thoughts, and this is exactly why the First Amendment protects the *exercise* of religion as well as its *belief.* The second is that religion is only *apparently* a private matter. Concerned as they are with human conduct, religious movements take, by definition, a holistic approach to life, which is by necessity reflected in public issues as well. The third aspect of difference is a question of priority: although civil and religious authorities stand on different levels, for a religious person there is usually little doubt which one prevails in case of conflict (McConnell, 1990: 1446). Although this duality is not necessarily negative—as Lord Acton wrote, it is "to that conflict of four-hundred years that we owe the rise of civil liberty" (in McConnell, 1990: 1513)—it is a potential problem for governments, particularly in a country where religions number in the hundreds.

The Founding Fathers were deeply aware of all this and responded by creating a unique constitutional mechanism where religious freedom is balanced against the words of the Establishment Clause, which states that "Congress shall make no law respecting an establishment of religion". This provision has two important implications. First, contrary to what happens in the marketplace of ideas, in the matter of religious exceptions to generally applicable laws America's marketplace of religions is not only a *source* of religious freedom but also an important *limit* to it, because the larger the number of religious groups, the more imperative it becomes for a government to maintain neutrality. The second implication has to do with the interpretation of the religious clauses: the difficulty of finding a constitutional balance between free exercise and anti-establishment produces a situation of internal inconsistency that at times favours religion and at other times appears hostile to it. The fact that the first situation is regarded by secularists as a judicial deformation of a godless Constitution, and the second is seen by religious groups as an inaccurate interpretation of a spiritually-oriented system, is one more example of the controversial, but crucial, place occupied by religion in US law. This section briefly analyzes such complexity in the Establishment Clause jurisprudence with reference to three sensitive areas of education, namely, public contributions, curriculum and religious symbolism.

3.2.1 Public Contributions

The matter of public contributions to religious education provides a good example of Establishment Clause complexity and is best illustrated by *Everson v Board of Education* (1947: 330 US 1), a case most renowned for the justices' comprehensive—indeed, all-inclusive—definition of 'establishment' (330 US 15-6):

> The 'establishment of religion' clause of the First Amendment means at least this. Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another… No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Since this passage seemingly outlawed public funds for all religious purposes whatsoever—and considering that *Everson* involved a law authorizing public schools to reimburse parents for the money spent on the transportation of children to religious schools—one would have expected the Supreme Court to strike down the legislation as unconstitutional. Yet this did not happen. The justices held that the statute was valid because the money was given to parents, not to schools, and thereby narrowed the broad definition of establishment that they had just spelled out.

Everson is all the more peculiar when compared with the Supreme Court's approach in the other leading case on financial contributions to religious education, *Lemon v Kurtzman* (1971: 403 US 602). At issue here were two statutes that financially aided teachers of *secular* subjects in church-related schools. Entirely distancing itself from the *Everson* test and outcome, the Court concluded that both pieces of legislation were unconstitutional. In order to determine whether a statute violated the Establishment Clause, the justices argued, a new three-pronged test was necessary: "First, the statute must have a secular legislative purpose. Second, its principal or primary

effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'excessive entanglement with religion'" (403 US 612-3). The legislation at issue did not pass the third test and was thus held as unconstitutional. As for the *Lemon* test, it still remains the main lens through which the Supreme Court assesses Establishment Clause queries, but its broad wording has only reduced—and certainly has not dissipated—the doubts created by *Everson.*

3.2.2 School Prayers, Bible Reading and Ten Commandments

The complexity of the Supreme Court's approach on Establishment Clause issues is also visible in the matter of religious symbolism. Although the justices have been fairly consistent in their rejection of public religious symbols *at school*, this directly conflicts with their position on symbolism in other areas of public life.

In the leading case on the matter, the justices decided that state-enforced school prayers were unconstitutional even if *voluntarily* recited. "The constitutional prohibition against laws respecting an establishment of religion", the Court wrote in *Engel v Vitale* (1962: 370 US 421), "must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious programme carried on by government" (370 US 425). This position was confirmed one year later in *Abington v Schempp* (1963: 374 US 203), where the Court decided that official and daily school readings of Bible passages were unconstitutional because they amounted to "religious exercises required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion" (374 US 225). Although, like in *Engels*, the *Abington* Court conceded that "today, as in the beginning, our national life reflects a religious people" (274 US 213), it countered that "religious freedom is…likewise as strongly embedded in our public and private life" (274 US 214) and warned that "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent" (374 US 225).

Indeed, issues related to this contentious matter continued, and in 1980 it was the turn of the Ten Commandments to fall under the scrutiny of the Supreme Court. Although a Kentucky law had required the posting of the Commandments in every public school, the Supreme Court decided that this was unconstitutional: "The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths", the justices wrote in *Stone v Graham* (1980: 449 US 39), "and no legislative recitation of a supposed secular purpose can blind us to that fact" (449 US 41). Being sacred, the Commandments can do nothing *but* encourage a religious education, and will "induce schoolchildren to read, meditate upon, perhaps venerate and obey, the Commandments", the Court wrote. "However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause" (449 US 42).

Finally, a few years later the Supreme Court extended its jurisprudence of neutrality on public school symbolism when it decided, in *Wallace v Jaffree* (1985: 472 US 38), that an Alabama law authorizing a period of silence in public schools for the purpose of "meditation or voluntary prayer" (472 US 40) also violated the Establishment Clause. "The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice", the Court concluded. "Such an endorsement is not consistent with the establishment principle that the government must pursue a course of complete neutrality toward religion" (472 US 60).

3.2.3 Public Display of Religion Outside of School

While the Supreme Court has been consistent in opposing public religious symbolism at school, the same cannot be said for religious insignia *outside* the classroom. Not only have the justices explicitly recognized the constitutionality of religious holidays displays and Sunday closing laws, in *Marsh v Chambers* (1983: 463 US 783) they found that the Nebraska practice of beginning the legislative session with a prayer given by a publicly-funded chaplain was constitutional on the grounds that "the use of prayer is embedded in the nation's history and tradition" (463 US 786) and "religion has become part of the fabric of society" (463 US 783). This hardly squares well with the justices' interpretation of religious symbolism mentioned above. Moreover, it sits rather uncomfortably with the fact that the Supreme Court itself, like Congress, regularly opens it sessions with an official prayer.

4. Conclusion

Religion plays a controversial but crucial role in US constitutional law, and given the position of the Founding Fathers on the matter this is hardly surprising. While they were convinced that religious feelings were vital for the well-being of individuals as well as nations, they also agreed that precisely because of this, states had no right to intrude into the private conscience of its citizens and that religion should be left out of government. "Our rulers can have authority over such natural rights only as we have submitted to them", Jefferson famously wrote. "The right of conscience we never submitted, we could not submit" (in Lipscomb & Bergh, 1903: Vol. 12, 388).

The basic lesson of the First Amendment, therefore, exists in the acknowledgement that the US system is remarkably liberal when it comes to guaranteeing freedom of expression and religion at the individual level, but also remarkably strict when it comes to the separation of Church and State, with the marginal exception of certain practices regarded as possessing historic and symbolic significance. The brilliance of the Founding Fathers thus lies in three key areas: in this balancing between individual conscience and the law, on the one hand, and between private religious beliefs and Church-State division, on the other; in the consensus regarding the critical, if highly controversial, place of religion in the US constitution; and in the acknowledgement that it is precisely this controversy over conscience and spirituality, over the existence of an entity that is higher and morally superior to the state—whether that entity is religious or otherwise—that characterizes the US legal system and that gives sense to its entire constellation of rights. In this perpetual debate, in the constant tension between the secular and the spiritual, lies America's freedom.

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Notes

Note 1. The 'marketplace' idea was first spelled out in the dissenting opinion of Justice Holmes, Jr. (joined by Justice Louis Brandeis) in *Abrams v. United States*, 250 U.S. 616 (1919) and was then confirmed in several other cases. "Persecution for the expression of opinions seems to me perfectly logical", Justice Brandeis wrote. "If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition...But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution". This article is a revised version of my *Veiled Threats? Islam, Headscarves and Religious Freedom in America and France* (2008).

Note 2. *Tinker* was later limited by *Hazelwood v Kuhlmeier* and *Bethel School District v Fraser*—as well as more recently by *Morse v Frederick*, 127 S Ct 2618 (2007), holding that schools can punish the advocacy of illegal drugs, however ineffectual the advocacy. Yet *Tinker* has been strongly reaffirmed when it comes to political speech and the Court has forcefully protected religious speech.

Note 3. "The way to preserve the flag's special role", the court wrote in a sentence that graphically expressed the primacy of the free marketplace model, "is not to punish those who feel differently about these matters. It is to persuade them that they are wrong… .We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents" (491 US 420).

Note 4. The most notable example was the McCarthy era, when the Supreme Court justified limitations to freedom of expression of Communist Party members by arguing that given the "inflammable nature of world conditions" (341 US 498, 511) a "highly organized conspiracy with rigidly disciplined members" (351 US 587) justified state intervention.

Note 5. Although 'fighting words' is an exception that has not been extended much beyond *Chaplinsky.*

Note 6. In *Barnes v Glen Theater* (501 US 560, 1991) two women working in a strip-tease club claimed that an Indiana law prohibiting nude dancing among consensual adults violated their First Amendment right to express an erotic message. A divided Supreme Court, however, ruled that "public indecency statutes…reflect moral disapproval of people appearing in the nude among strangers in public places" (501 US 560, 568). "Our society prohibits", Justice Scalia wrote, "and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, *contra bonos mores,* ie, immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution and sodomy" (Id. 575). According to the Court, 'immorality' is thus enough to justify a limitation to freedom of expression. What that term meant, however, the justices declined to say.

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Abolishing Obsolete Crown Prerogatives Relating to: Martial Law, Conscription and Billeting

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Abstract

This article indicates that there are various rights, or privileges, of the Crown (so - called '*Crown prerogatives'*) which still exist under English law and which are at variance with modern society and human rights. Indeed, one would assert the Crown prerogative is the biggest impediment in English based legal systems to an extension of human rights at present, since it is so ample in scope and yet so indeterminate in nature.

This article argues that martial law - that is, the right of the Crown to apply military law to civilians (which often resulted in their summary trial and execution in past rebellions) - should be abolished. It is unnecessary and contrary to modern human rights. Also abolished should be the right of the Crown to billet members of the armed forces on the public - now governed by legislation. Finally, the Crown prerogative to forcibly conscript able-bodied male subjects into the army and navy should be abolished. It was replaced by legislation during World War I and II since it was thought to be too uncertain, legally.

In conclusion, if these Crown prerogatives were abolished throughout the Commonwealth it would remove much old law and help human rights. It would also allow legislation enacted by Parliament to cover the field, as and when required in the case of martial law.

Keywords: martial law, conscription, impressment, billeting

1. Introduction

A previous article in the Nottingham Law Journal advocated the abolition of various obsolete Crown prerogatives relating to the military.[1] As noted in that article, a vast number of decisions are taken in the name of that mysterious - and amorphous entity - '*the Crown*', although the Queen herself, today, only retains a ceremonial role and she is not held accountable for such decisions. Thus, such decisions often result in a distinct lack of Parliamentary oversight and control. The House of Commons, Public Select Committee, in 2004 - in a report entitled '*Taming the Prerogative: Strengthening Ministerial Accountability to Parliament*' [2] - expressed concern that many Crown prerogatives had come to be delegated by the sovereign to ministers and that they could be exercised without Parliamentary approval or scrutiny. The report also indicated that various Crown prerogatives were in need of reform and that others were obsolete.[3] This article argued for the abolition of prerogatives of the Crown to:

- impress subjects for the navy (no longer applied after 1814);
- issue letters of marque (obsolete after 1856);[4]
- issue letters of safe conduct (obsolete c. 1836);
- prohibit subjects from leaving the realm (in abeyance pre-1688);[5]

[1] McBain (2011a), vol 20, 14-37.

[2] House of Commons (2004).

[3] A draft Bill contained in the report which is entitled Ministers of the Crown (Executive Powers) Bill, s 4 expressly refers to: 'The desirability that any obsolete, unnecessary or inappropriate [Crown] powers be abrogated.'

[4] For some comments on the early law of reprisal, see Bruce (1717), 16-20. For the recalling of letters of marque issued by Elizabeth I (1558-1603) and by James I (1603-25) see Hume (1884), vol 4, 398-9. See also Hale (1736), vol 1, 162-3.

- order subjects to return to the realm (in abeyance pre-1688);[6]
- dig for saltpetre in order to make gunpowder (obsolete by the 19th century, at the latest).

The purpose of this article is to consider some further obsolete Crown prerogatives and to argue for their abolition. These are Crown prerogatives to:

- impose martial law;
- conscript (impress) subjects into the army and navy;
- billet members of the armed forces on the general public.

There are few legal texts dedicated to the Crown prerogatives.[7] The most useful are:

- Staunford, *Exposition of the King's Prerogative* (1607);[8]
- Hale, *The Prerogatives of the King* (written c. 1640's);[9]
- J Chitty Jun, *A Treatise of the Law of the Prerogatives of the Crown* (1820);[10]
- Coke, *Institutes of the Laws of England* (1628-41);[11]
- Blackstone, *Commentaries on the Laws of England* (1765-9);[12]
- Halsbury, *Laws of England*.[13]

Although the Abridgments - both major[14] and minor[15] - contain material on the Crown prerogatives, they add little to these texts. Finally, there are also modern texts on constitutional law [16] and history[17] - as well as some general texts concerning Crown prerogatives which are of incidental interest. [18]

Martial Law[19]

What martial law is under English law and - indeed, whether it even exists - is open to dispute. Martial law has been interpreted to mean, at least, four things and - quite possibly - more. Thus, it can refer to:

> a. the system of military law imposed by the Crown which regulated the discipline of the armed forces, *prior* to legislation being introduced to govern the military after the Glorious Revolution of 1688;[20]

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[5] See also an authority not cited in my earlier article (n 1). Forsyth (1969), 164 (a legal opinion of a law officer referred, in 1788, to the practice of prohibiting, by proclamation, naval personnel from going abroad in order to enter a foreign naval service when the state of Europe [ie. the power of France] would render it dangerous to weaken the strength of the British nation. The grounds for the exercise of the Crown prerogative to prohibit naval personnel from going abroad in that opinion no longer apply). See also Hallam (1897), vol 2, 58 (a proclamation of Charles (1625-49) as late as 1638 ordered that no one might leave for New England (in the USA) without a licence). For an attempt c. 1530 to make it treason to depart from the realm contemptuously (if owing allegiance) and taking an oath to a foreign potentate renouncing allegiance to the English king, see Bellamy (1979), 25.

[6] It was accepted, by 1718, that, in practice, there was little the Government could do in order to force a subject to return from abroad. See Forsyth, n 5, 164. In 1718, the Solicitor General (Sir William Thompson) stated 'As to those already abroad, if they are required by proclamation to return home, and do not obey, I do not know of any method of getting at them by any process abroad.'

[7] Earlier texts are listed in Sweet & Maxwell (1955).

[8] Staunford (1607).

[9] Hale (1976). See also Brecknock (1764).

[10] Chitty (1820).

[11] Coke (1824).

[12] Blackstone (1765-9).

[13] Halsbury. See alsoHalsbury (Statutes).

[14] Statham (c. 1495), Fitzherbert (1577), Brooke (1586), Rolle (1688).

[15] Hughes (1660-3), Sheppard (1675), Nelson (1725-6), Bacon (1798), Viner (1741-57), Comyns (1822), Lilley (1765). Viner has been reprinted by the Law Book Exchange, with word search.

[16] Barendt (1998), Bradley & Ewing (2006), De Smith & Brazier (1998), Dicey (1948), Heuston (1964), Phillips & Jackson (2001), Jennings (1959), Marshall (1971).

[17] Hallam, n 5; Jolliffe (1948), Maitland (1963), Stubbs (1874), Taswell-Langmead (1960), Wilkinson (1958).

[18] Allen (1849), McGlynn (2003), Wormuth (1939).

[19] For a list of texts on early military law, see Sweet & Maxwell, n 7. See also Clode (1869), Scott (1968), Finlason (1867), Finlason (1866), Clark & McCoy (2000), Capua (1977), Fairman (1943), Gross & Aolain (2006), Dennison (1974), Bowman (1916). See also Stephen (1883), vol 1, 207-16. However, care needs to be taken with some of the observations of Stephen. His review of the source material is scant and some of his observations are too general. Care also needs to be taken in respect of Finlason, who held very pronounced, conservative, views. See also Holdsworth (1902), Earle Richards (1902), Dodd (1902) and Pollock (1902). See also Bellamy, n 5, App.

[20] The Oxford English Dictionary (OED)(definition of martial law), 'Formerly sometimes applied to what is now called 'military law'. *viz* the body of enactments and rules for the government of the army; an enactment or rule forming part of this.' Also, 'In early examples the adj[ective]

b. the application of military law (and military courts) to civilians during peacetime;[21]

c. the application of military law (and military courts) to civilians during: (i) riots or rebellion; or (ii) war.[22] This concept of martial law is often confused with other Crown prerogatives; *viz.* its power to act in the case of emergency and its power to maintain the peace.[23] While these *may* include using the armed forces to quell riots and rebellions, they do not, thereby, subject civilians to military law and, thus, comprise martial law;

d. where the country is run by a military government (*junta*) and many civil rights are suspended;[24]

It may be noted - at the outset:

- That (a) has now been wholly superceded by legislation governing the armed forces. Thus, martial law is simply an archaic reference to military law;
- In the case of (b), the Petition of Right 1627, section 8 makes illegal subjects being governed by military (martial) law during peacetime;[25]
- In the case of (c), riots and rebellions would almost certainly be treated as being in peacetime today and - in the case of war time - the Crown prerogative to declare martial law is no longer required and should no longer be used. In a modern democracy, it should be the responsibility of Parliament alone to enact legislation imposing military law on civilians in any exceptional situation where this might be required since it is such a severe curtailment of human rights;
- In the case of (d), this has never occurred, as such, in England throughout its long history. Further, it is not '*law*' - it is rule by military dictatorship.[26]

These various interpretations of the concept of martial law are now considered in detail to determine whether it is necessary - or appropriate - for any Crown prerogative to impose martial law to be retained in modern times.

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is often assimilated in spelling to marshal.sb. and it was a common opinion that 'marshal law' was so called as being the law emanating from the lord marshal.' Bellamy, n 5, p 231 'The phrases '*law marshall*' or '*marshal law*' were simply the English form of the Norman-French *leys et usages d'armes* and the latin *leges et consuetudines…coram constabulario et marescallo*…'.(ie. the laws and customs of the court of the constable and marshal). Anson (1935), vol 2, pt 1, 315 'Martial law …is historically the law administered in the court of the constable and marshal, which included the administration of the regulations enacted by the Crown to govern its forces in war; it covers the military law under the Mutiny Act and the Army Act which superceded it.' Philips & Jackson, n 16, 397 'In former times, what we now call military law was sometimes referred to as martial law.'

[21] That is, proclamations and commissions from the Crown to military personnel, authorizing them to apply military law to civilians.

[22] Halsbury, n 13, vol 8(2), para 821, n 1, 'the term 'martial law' is now generally applied to that state of affairs which exists in time of *war,* when the Crown by proclamation, or by notice issued by the military authorities, warns the public that certain offences will be tried and punished by a military court.' (italics supplied). Clode, n 19, vol 2, 162 (quoting Lord Brougham 'the proclamation of martial law renders every man liable to be treated as a soldier.').

[23] See **6.** See also Gross, n 19, 33 quoting Corwin (1932), 97 'Martial law' in other words, is little more than a general term for the operation in situations of public emergency of certain well known principles of the common law – the right of self-defense of the individual, his right – attended by the correlative liability – to abate a nuisance, his right and duty to arrest one whom he knows to have committed a felony or whom he observes in the act of committing a breach of the peace.'

[24] OED, n 20, (definition of martial law).'That kind of military government of a country or district, by which the ordinary law is suspended, and the military authorities are empowered to arrest all suspected persons at their discretion, and to punish offenders without formal trial.' Dicey, n 16, 287 'Martial law, in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England.' See also, pp 291 & 293. Phillips & Jackson, n 16, 398 refers to a variant on this, when limited to particular territory within a country 'The law administered by a military commander in occupied enemy territory in time of war. This is sometimes called martial law by international lawyers. It is unnecessary to say more than that the law so administered amounts to arbitrary government by the military, tempered by international custom (eg. the Hague Convention), and such disciplinary control as the British Government think fit to exercise.'

[25]For the full text of the Petition of Right (and the legislation cited therein), see Rushworth (1721), vol 1, 588-90. The Petition of Right is treated the same as a statute. See generally, McBain (2010) 545, n 64.

[26] Cromwellian government during the Civil War (1642-9) is the nearest England has come to military rule. However, this is not further considered since all statutes and ordinances of that period were repealed. Doubtless, if Britain were to have a military dictatorship it would claim that its acts were not specifically military but also civil and would argue for their legitimacy (to be rejected on a return to democracy).

2. Martial Law - Meaning Military Law Prior to 1688

2.1 Military Law: 1189 - 1660

At least, since the Norman Conquest of 1066 up to the reign of Charles I (1625-49) it was accepted that the Crown (in the form of the sovereign in person) was commander-in-chief of the armed forces and that he (or she) alone had power to regulate them.[27] Successive sovereigns recruited armies in England, in a variety of ways. In particular, by way of: *military tenure, indenture* and *commissions of array*. As to these:

- Subsequent to the Norman Conquest of 1066, William I (1066-87) granted land in England to subjects in return for an obligation to perform military duties (a system of *military tenure*).[28]Thus, England was divided in some 60,000 'knight's fees' - each fee having a value of (possibly) £20 per annum. The obligation of the relevant knight (or soldier) was to attend the sovereign, when required, for 40 days, without pay, with the requisite horse and arms.[29]This system of military tenure - often avoided by substitution or the payment of money from the time of Henry II (1154-89) - lingered on until its abolition by the Tenures Abolition Act 1660;[30]
- With the decline in military tenure, English armies often comprised English troops assembled by way of *indenture* - a form of contract in which the soldier agreed to serve for an allotted term at an agreed rate of pay. This system seems to have been rarely practised after the accession of Edward IV (1461-83);[31]
- English sovereigns also utilised *commissions of array,* an arrangement in which the sovereign granted commissions to selected officers, empowering them to assemble men capable of military action in a particular county, in military array.[32] Hallam says the earliest example of a commission of array he could find was in 1324, the latest in 1557.[33] This system had become redundant by the time of James I (1603-25);[34]
- English sovereigns also - from time to time - employed foreign mercenaries (stipendiaries). They also (albeit rarely) forcibly recruited (that is, impressed) soldiers, exercising the Crown prerogative (see 9). Sometimes, recruitment was also achieved by special practices such as recruiting criminals, a pardon being granted for their crimes;

As well as the army, English sovereigns also created special units of soldiers for specific purposes.[35]

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[27] This almost certainly prevailed in Anglo-Saxon times as well. See the discussion in Samuel (1816), ch 1. See also McBain, n 1,16, n 20 (quoting Sir Thomas Smith, Coke, Blackstone and Fitzherbert).

[28] Prior to the Conquest, the position was not so certain although there was in place a system of the *trinoda necessitas* (the threefold necessity) where service of the citizenry was required to repel internal insurrection, foreign invasion (or the expectation of it) and the construction of military defences such as fortresses, public works, repairing bridges and highways. See Samuel, n 27, ch 1.

[29] Samuel, n 27, 18. In 1086, all the landholders in England were summoned to meet William I (1066-87) at Sarum (Salisbury) and to submit their lands to military tenure and take an oath of fealty. See ibid, 20. See also Blackstone, n 12, vol 1, 397 and Anson, n 20, vol 2, pt 2, 200. See also Carter (1944), 10.

[30] Military tenures (with minor exceptions such as grand and petty sarjeanty) were abolished by the Tenures Abolition Act 1660, s 4. Walker (1980) (definition of military tenures) 'In feudal law, the tenures in which the duty owed was some form of military service, including grand sarjeanty, knight service, cornage [ie.sounding a horn to warn of the approach of an enemy], and the like.' See also McBain, n 25, especially 541. See also Maitland, n 17, 275-6; Tytler (1806), 30, 33 and Hume, n 4, vol 1, 362. Hallam, n 5, vol 2, 129 'The military tenants were frequently called upon in expeditions against Scotland, and last of all in that of 1640; but the short duration of their legal service rendered it, of course, nearly useless in continental warfare.' See also Clode, n 19, vol 1, 3

[31] Samuel, n 27, 32. See also Tytler, n 30, 42.

[32] Ibid, 28. By the time of Henry IV (1399-1413) it was accepted that such troops were not obliged to serve outside the realm, nor beyond the borders of their own county, save in cases of urgent necessity. In the time of Henry VIII (1509-47) lords lieutenant were appointed to execute such commissions. See also Maitland, n 17, 277-9 and Tytler, n 30, 32.

[33] Hallam, n 5, vol 2, 133 (citing Rymer (1727-35)). Cf. Hallam, n 5, vol 2, 133 (he refers to an Order in Council of 1638). See also Tytler, n 30, 576-7 (commissons of array granted by Charles I (1625-49) deemed to be illegal and unconstitutional). See generally, Noyes (1930). See also Clode, n 19, vol 1, 31-2.

[34] The Statutes concerning Armour were repealed by 1 Jac 1 (1604) c 25 and 21 Jac 1 (1623) c 28. See also Blackstone, n 12, vol 1, 398 and Tytler, n 30, 53. Charles I (1625-49), at the outset of his reign, published a proclamation commanding all persons who had an income of £40 *per annum* or more deriving from their land, to become knights. However, afterwards, he received a large composition in lieu of the same. See also Samuel, n 27, 48.

[35] Samuel, n 27, 32 mentions special groups such as the yeoman of the guard, sarjeants- at- arms and gentlemen pensioners. For the levying of troops by sovereigns up to the time of Charles I, see Samuel, n 27, ch 2. See also Hallam, n 5, vol 2, 131 and Clode, n 19, vol 1, 52.

In the case of the royal navy in England - which developed later than the army - recruitment was usually by way of *indenture* or *impressment.* The latter comprised the forcible enlistment of men (usually mariners) by the Crown exercising its prerogative.[36]

When recruited, what law governed these people? Surprisingly, perhaps, it took time for the Crown to develop a coherent body of military (martial) law separate to the common law. Indeed, there was no attempt to systematise the same in writing until the time of Henry V (1413-22). Legal writers often refer to one of the earliest military laws being a charter of Richard I (1189-99). It applied to those going by sea to the Holy Land, on crusade [37]and it was likely issued in 1189. The ordinance in question imposed barbaric punishments on military - and naval - personnel in order to maintain discipline on board ship and it may have borrowed much from the laws of Oleron.[38] Among other things, this ordinance provides:

> He, who kills a man on ship - board, shall be bound to the dead man, and thrown into the sea; if a man is killed on shore, the slayer shall be bound to the dead body and buried with it. Anyone convicted by lawful witnesses of having drawn his knife to strike another, or who shall have drawn blood of him, to lose his hand. If he shall have only struck with the palm of his hand without drawing blood, he shall be thrice ducked in the sea.[39]

Later ordinances and statutes of war - up to 1422 - are as follows:

- Likely in 1385, *Richard* II (1377-99) promulgated '*The Statutes, Ordinances, and Customs to be observed in the Army*;'[40]
- In the period 1415-21, Henry V (1413-22) promulgated - and likely expanded - various war statutes (*De re Militari*)[41] which were developed from the *statutes* and ordinances of Richard II. An article by Curry lists 5 versions and some 47 clauses.[42] The imposition of the death penalty for various crimes figures prominently;[43]
- To a certain extent these ordinances were supplemented by the law of treason. Thus, from early times, it was likely treason to *desert* the field of battle or to *aid the enemy*.[44] The latter was enshrined in the

[36] See generally, McBain, n 1, 18-20. The Crown did not have its own ships until the reign of Henry VIII (1509-47).The first ship the Crown actually owned is said to be the '*Great Harry'*, built 1512-4, see Butler (1777), 69. This text contains useful references to writs and commissions to impress mariners from the time of king John (1199-1216). Prior to that, the Crown impressed ships and men to serve in wars (in particular, the Cinque Ports had an historic obligation to provide men and ships, for the crossing of the Channel). However, impressment was invariably of mariners, and by way of indenture (ie. accompanied by the payment of wages). See also Anson, n 20, vol 2, pt 2,217-8.

[37] 'Richard, by the grace of God, king of England, Duke of Normandy *etc* To all his men going by sea to Jerusalem, greeting. Know ye, by the common council of all good men, we have made the underwritten ordinances. ' See Samuel, n 27, p 60 and Brand & Nelson (1867), 89. The LCJ was Cockburn CJ.

[38] The laws of Oleron are said to have been compiled by Richard I at the Isle of Oleron, off the coast of France. See also Blackstone, n 12, vol 4, 405 and Coke, n 11, vol 4, 144.

[39] Samuel, n 27, 60. See also Donaghan (2008), 142.

[40] See Samuel, n 27, 61. See also Twiss (1871), vol 1, 453-7 (copy of the statutes and ordinances). As Donaghan, n 39, 142, notes, these articles of war were very close to those of Henry V (as text above). For an ordinance of Edward III (1327-77) c 1348 (empowering captains of his galleys to try all crimes by sea and land), see Forsyth, n 5, 193. See also Brand, n 37, 89 and Hale, n 9, 120.

[41] Ibid, p 60. Henry V declares that 'we have…promulgated the same in our army by public proclamation, enacting, that all and every one of the captains in our said army, shall have these our constitutions in writing, that our publication may be considered as a sufficient warning, and that all those concerned may not pretend ignorance of the said constitutions.' See also Samuel, n 27, 62; Rymer, n 33, vol 10, 106 and Hale, n 9, 120.

[42] Curry (2008), 214-49.

[43] eg. to: (a) touch the Eucharist or vessel in which it is held; (b) kill a cleric; (c) rape women; (d) go forward before the banner of their lord or master (unless authorized lodging personnel); (e) rob victuals; (f) make contest or debate in the host on account of past, or future, hatreds; (g) cry havoc; (h) raise the banner or pennon of St George (or any other)in order to draw men out of the host (ie. the army) to go anywhere; (i) give a safe conduct to a prisoner, or enemy, without authorization; (j) rob or pillage after peace has been proclaimed; (k) try to rescue a man condemned to death; (l) take beasts of labour without authorization; (m) reproach members of the army because of their nationality; (n) take an enemy who has been sworn or billeted - or anyone who owes allegiance to the king - other than to the ward of the constable or marshal;(o) carry out burning.

[44] See McBain (2007), 94-134. Glanvil (c. 1189) in his treatise held treason to cover '*betrayal of the realm'.* So did Bracton (c.1240) .'*Betrayal of the realm'* probably included desertion, aiding the enemy and, possibly, levying war against the sovereign.

> Treason Act 1351 (still extant).[45] This Act specified various individual treasons; these were then extended by subsequent legislation and by judicial constructive interpretations. The fact that desertion was not enshrined in legislation at any early stage[46] is explicable by the fact that deserters were likely dispatched on (or near) the field of battle.[47] As for senior commanders, they were impeached in Parliament in the period 1376-1559 for surrendering castles without the consent of the sovereign (after 1559, to surrender a castle for a bribe was treated as treason under the Treason Act 1351).[48]

In respect of the enforcement of these statutes and ordinances of war, they would likely have been enforced by the king in person - as commander-in-chief - as well as by the Court of Chivalry (also called the court military or the court of the constable and marshal), a court which was operating prior to Richard II (1377-99).[49] Adye (writing in 1769) summarises this court thus:

> The court of chivalry, or marshal's court, the judges of which were the high constable, and the earl marshal, is the fountain of marshal law [i.e. martial or military] in England.[50]

The marshal (or earl marshal) comprised an office which existed since the 12th century. It has been held since 1672 by the Howards, Dukes of Norfolk.[51] Another office was that of lord high constable - albeit it was placed in abeyance after 1521 so no such person sat in the Court of Chivalry after that date.[52] This Court of Chivalry functioned in medieval times. However, its jurisdiction started to fall away after trial by battle became obsolete[53] and after the common law encroached more and more on its civil jurisdiction concerning military contracts *etc*.[54]

- In respect of the military jurisdiction of the Court of Chivalry, since 1688, it passed to courts martial;[55]
- One would suggest - however - that courts martial (i.e. military courts operated by military personnel, separate to the Court of Chivalry) existed long before 1688. Hallam maintains that the Court of Chivalry

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[45] The Treason Act 1351 makes it a crime if a man '*be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm, or elsewhere*'. See McBain, n 44, 119 *et seq.*

[46] 18 Hen VI c 19 (1439, rep) declared desertion to be a felony. See Samuel, n 27, 71-4; Blackstone, n 12, vol 1, 403 (who noted that a lighter penalty prevailed in practice in his time) and Burn (1799), 20 (fine and imprisonment). See also Bruce, n 4, 263 and Tytler, n 30, 41-5.

[47] Samuel, n 27, 60.

[48] McBain (2011b) 858-9. For the position during the Civil War (1642-9), see Samuel, n 27, 606 (Articles of the Earl of Essex, see n 71, 'if any town, castle, or fort, be yielded up, without the utmost necessity, the governor thereof shall be punished with death.').This punishment prevailed after the Civil War, see eg. Bruce, n 4, 259 (writing in 1717).

[49] Walker, n 30 (court of chivalry) 'A judicial body dealing with military disputes and questions of the law of arms. In most countries courts-martial regulating the conduct of persons involved in war came first. They were presided over by monarchs or great officers of state such as earls marshal. In time heralds became the principal officers of and practitioners before these courts and the law of arms became more and more concerned with rights to armorial bearings. In England the court of chivalry or court military, also known as the court of the constable and marshal, was held before the Lord High Constable and Earl Marshal of England. It had jurisdiction, civil and criminal, in deeds of arms and war, armorial bearings, matters of precedence, and, held before the earl Marshal alone, as a court of honour.' This court last sat in 1737. However, it was temporarily revived in 1955 to deal with armorial matters.

[50] Adye (1769) 1. See also Hawkins (1739), bk 2, ch 4 and Grazebrook (1895).

[51] Walker, n 30 (definition of earl marshal). Adye (writing in 1769), n 50, 2 'The office of earl marshal still subsists, but his right of being one of the judges of martial law seems to have long since subsided.' See also Hale, n 9, ch 12.

[52] This office was hereditary and the holder was an important military figure, commanding the royal army as well as being master of the horse. However, on the attainder of the 3rd Duke of Buckingham in 1521, this office was extinguished. Edward Stafford, 3rd Duke of Buckingham and Lord High Constable, was attainted of treason in 1521 for plotting against Henry VIII (1509-47), see Oxford Dictionary of National Biography (ODNB) (Earl of Stafford). See also, Coke, n 11, vol 1, s 102 (commentary) and Blackstone, n 12, vol 3, 68. For the great power of the Constable during the Wars of the Roses (1455-87), see Maitland, n 17, 266 and Tytler, n 30, 381-5. See also a commission of high constable of 1631. Ibid, 388-92.

[53] Trial by battle was formally abolished in 1819. See 59 Geo III c 46 (1819) which was subsequent to *Ashford v Thornton* (1819) 1 B & Ald 405 (106 ER 149) (appeal of felony). See generally on the role of the court in such matters, Coke, n 11, vol 4, 122-3 (who cites various cases) and Bellamy (1970).

[54] Blackstone, n 12, vol 3, 103. Stephen, n 19, vol 1, 208 says that 'When standing armies were introduced [ie. after 1688], the powers of the constable and marshal fell into disuse.' However, the latter occurred before 1688. Capua, n 19, 158 considered that the Court of Chivalry was not functioning by 1496.

[55] Holdsworth (2009), vol 1, 577 'Since 1689 jurisdiction over the army has passed to these courts martial which have been legalized and extended by the successive Mutiny Acts of the eighteenth and nineteenth centuries. Thus, the military jurisdiction of the court of the Constable and Marshal ceased to exist because it was not needed.'

> fell into disuse under the Tudors.[56] Further, at least on the continent, courts martial were referred to as early as 1570.[57]

In respect of the rise of courts martial – and the decline of the Court of Chivalry - reference to the former may have been made as early as the ordinances of Henry V (1413-22); they refer to army personnel being condemned to death by:

> king, constable, marshal [ie. the Court of Chivalry] or 'judge ordinary [i.e. common law courts] *or any other officer lawful*' (italics supplied).[58]

As for the position, post-1422, in respect of the promulgation by the Crown of military ordinances:[59]

- In 1487, various Ordinances of War were proclaimed by Henry VII (1485-1509).[60] And, certain Statutes and Ordinances of War were published in 1491;[61]
- In the reign of Henry VIII (1509-47), various statutes and ordinances of war were promulgated in May 1513, prior to war with France.[62] More followed in 1544; they contained some 54 articles;[63]
- Subsequent to this, there was tendency for articles of war to be made by the commander-in-chief under commission from the sovereign. Thus, the Earl of Leicester made such articles in 1585-6[64] and, in 1622, James I (1603-25) issued a commission to Sir Horace Vere, Captain - General of the army, '*To make and proclaim ordinances of war, for the government of the army, and to enforce the observation thereof.*'[65]

It may also be noted that royal proclamations expressly imposed martial law on mariners and soldiers, where there might be doubt. For example, Elizabeth I (1558-1603) issued a proclamation in 1585 that various soldiers, levied to fight in the Low Countries under a commission granted by her to Sir John Norris (Norreys), were subject to his orders and that those who had received pest [i.e. press] money and who offended against such orders or sought to withdraw

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[56] Hallam, n 5, vol 1, 240. Hale (1971), 27-8 states 'In this military court, court of honour, or court martial, the civil law has been used and allowed in such things as belong to their jurisdiction; as the rule or direction of their proceedings and decisions, so far forth as the same is not controlled by the laws of this kingdom, and those customs and usages which have been obtain'd in England, which even in matters of honour are in some points derogatory to the civil law. But this court has long been disused upon great reasons.' (spelling modernized). See also Baker (2003), vol 6, 216-9 and Tytler, n 30, 46. Also, Squibb (1953) and Grazebrook, n 50.

[57] Bruce, n 4, 315 refers to an Edict by the Duke of Alva (Fernando de Toledo (1507-82), a mercenary commander and governor of the Low Countries (the Spanish Netherlands) in 1570) 'That a court martial shall be the sole judge in all military crimes'.

[58] Cf. Adye, n 50, 2 'When this sort of court [ie courts martial] was first instituted, I cannot exactly ascertain'. See also Brand, n 37, 95.

[59] See generally Donaghan, n 39, ch 8. 'English ordinances or articles of war…had a long history, but they underwent a revolutionary change in the late sixteenth century.'

[60] Hughes & Larkin (1969), vol 1, 14. These ordinances were very short and imposed the death penalty for: (a) robbery, including robbing churches; (b) ravishing women; (c) taking victuals without paying the reasonable price thereof. Also, they stipulated imprisonment for various other offences. The proclamation ended 'And whensoever it shall please the king…to command any of his officers of arms to charge any thing in his name, by his high commandment or by the commandment of his constable or marshal, that it be observed and kept, upon pain of imprisonment and his body to be punished at the king's pleasure.' See also Samuel, n 27, 63.

[61] *Here Begynneth Certain Statutes and Ordenaunces of Warre made ordeined enacted and estalysshed by the most noble victorious and most christen Prince oure moste drad souerayn Lord King Henry the VII. King of Fraunce and of Englond* (1492)(rep EEBO eds, London. Printed by Richard Pynson, 1492?). See also Beadle & Hellinga (2001), 2 (2):107-119.

[62] *Hereafter Ensure Certaine Statuts and Ordenances of Warre made etc by Kynge Henry the VIII* (1513). See also Hughes & Larkin, n 60, 106-20. Everyone was made obedient to the king and to the marshal of the host, on pain of death.

[63] These statutes were promulgated prior to the embarkation of Henry VIII on an expedition against France in 1544.They state 'His Majesty, minding due order to be observed and kept among all sorts of men of his highness's most royal and puissant army, as well captains, soldiers as others, in such wise as appertained both towards God and the world, hath devised and commanded to be set forth certain ordinances and statutes for the war, as hereafter ensueth *etc*.' See also Samuel, n 27, 64.

[64] *Lawes and Ordinances set down by R. Earle of Leycester the Queenes Maiesties Lieutenant and Captain General of her armie and force in the Lowe Countrie is meete and fit to be observed by all such as shall serve in the said countries* (1586). The Earl of Leicester was Robert Dudley (1532/3-88), see ODNB, n 52. See also Donaghan, n 38, 144. In 1593, Sutcliffe (1593) published his military text.

[65] Sir Horace Vere, 1st Baron Vere of Tilbury (1565-1635), see ODNB, n 52. See also Donaghan, n 39, 145 (ordinances of 1625 & 1627).

> Her majesty doth hereby notify that every such person so offending, and the offence duly proved, shall be punished with death by martial law.[66]

At the outset of the Civil War (1642-9), both the Crown and Parliament issued military ordinances:

- On the side of the Crown, in 1639, the Earl of Arundel (Charles I's general against the Scots) published *Laws and Ordinances of Warre*.[67] And, in 1640, the Earl of Northumberland, Lord General of the royalist army, published '*Laws and Ordinances of Warre';*[68]
- On the side of Parliament, in 1642, Robert Rich (2nd Earl of Warwick) Lord General,[69] published '*Laws and Ordinances of Warre'* established for the better conduct of the Army.[70] In 1643, the Earl of Essex, Lord General, published similar laws and ordinances, which remained in force in the Parliamentary army throughout the Civil War.[71]

Analysing the laws and ordinances of the Earl of Warwick, it may be noted that they imposed the death penalty for a large number of offences.[72] Indeed, out of the 90 odd offences mentioned, no less than 43 were punishable with death. Some of these were for relatively small infractions, *viz.*

> None in their march through the counties shall waste, spoil or extort any victuals, money, or pawn from any subject, on pretence of want whatsoever, on pain of death (spelling modernised).

Even when death was not imposed, penalties for offences were often stated to be the '*severest*' or '*without mercy'*. Further, these rules were declared to be supplementary to the '*general customs and laws of war*.'[73] Finally, there was also a heavy moral overtone to them.[74] Donaghan, having analysed the most comprehensive versions of the articles of war of the Crown and of Parliament in the Civil War period (1642-9), concludes:

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[66] Hughes & Larkin, n 60, vol 3, 27 (proclamation of 4 October 1588). For a proclamation subjecting volunteers under letters of marque to martial law in April 1545, see ibid, n 60, vol 1, 348. For Sir John Norreys (1547-97) see ODNB, n 52.

[67] Donaghan, n 39, 146. The Earl of Arundel referred to be Thomas Howard, 14th Earl (1585-1646), see ODNB, n 52. See also Clode, n 19, vol 1, 22-3 & 429-40. See also Clode (1872).

[68] Samuel, n 27, 65. This was the 10th Earl of Northumberland, 4th Baron, Algernon Percy (1602-88). See also those of the Earl of Holland in 1641, ibid, p 147. See also Brand & Nelson, n 37, 91.

[69] Robert Rich (1587-1658), see ODNB, n 52.

[70] Entitled '*The Lawes and Ordinances of Warre established for the better Conduct of the Army'*, it is addressed to 'all the Officers of the Army, Colonels, Captains, Elder Sarjeants, other Officers and Soldiers of Horse and Foot, and all others whom the Laws and Ordinances may concern'. See also The *Laws of War and Ordinances of the Sea* (established and ordained by the Parliament of the Commonwealth, 1652 – it lists 39 offences) and *Laws and Ordinances of Warre established for the Good Conduct of the Army by Colonell Michael Jones* (printed by William Bladen, 1647). Spellings have been modernized. See also Donaghan, n 39, 148-51 and Acland (1921) 190-201. *The Instructions of the Admirals and Generals of the Fleet for Council of War* issued in 1653 instituted the first naval courts martial in the English navy. See also the *Cadiz Expedition's Instructions* issued in 1596 by the Earl of Essex and Lord Howard of Effingham (29 articles).

[71] R Devereux, *Laws and Ordinances of War established for the better conduct of the Army by his Excellency the Earl of Essex, Lord General of the Forces raised by the Authority of the Parliament* (London, printed for J Partridge & J Rothwell, 13th May 1643). See also Samuel, n 27, p 65. For Robert Devereux, (1591-1646), 3rd Earl of Essex, see ODNB, n 52. See also Scott, n 19, 56; Clode, n 19, vol 1, 24 & 442-5 and Holds worth, n 55, vol 6, 226.

[72] *viz* (a) intelligence with the enemy; (b) releasing the enemy; (c) yielding up forts; (d) violating a safeguard; (e) spies; (f) using words tending to the death of the Lord General; (g) striking an officer; (h) leaving the captain (or a servant, his master); (i) resisting against correction; (j) mutinous assembly; (k) resisting the provost marshal; (l) seditious words; (m) rape and unnatural abuses; (n) theft above 12d; (o) murder; (p) embezzling munitions; (q) waste and extortion; (r) taking horses from the plough; (s) straggling from the colours; (t) swerving from the camp (ie. departing more than a mile from the army or camp); (u) drawing swords after the watch is set; (v) giving a false alarm; (x) revealing the watchword; (y) offering violence to victuallers; (z) sentinel asleep or drunk; (aa) remaining unrolled (ie. unregistered) in the army; (bb) failing at the rendezvous; (cc) departing without leave; (dd) failing to repair to his colours; (ee) deserting the battlefield; (ff) throwing away weapons; (gg) burning houses or spoiling crops of friend or foe; (hh) throwing away gunpowder; (ii) embezelling booty; (jj) concealing prisoners; (kk) pillaging without licence; (ll) failing to prevent duels (for commanders and officers); (mm) drawing a sword against an officer; (nn) mustering false and counterfeit troops (for commanders and officers); (oo) embezzling food and munition (for commanders and officers); (pp) muster masters conniving at counterfeits; (qq) presenting oneself in a muster by a counterfeit name or surname; (rr) braving (ie. defying) the marshall's court.

[73] 'All other faults, disorders, and offences not mentioned in these articles, shall be punished according to the general customs and laws of war'.

[74] eg. 'Let no man presume to blaspheme the holy and blessed trinity, God the father, God the son, and God the holy ghost; nor the known articles of our Christian faith, upon pain to have his tongue bored with a red hot iron.' Also, 'All those who often and willfully absent

> Of the offences in the royalists' one hundred and fifty-three articles, fifty-four (35 per cent) merited death; of these the penalty was mandatory for thirty and discretionary for twenty-four. In parliament's one hundred and two articles, forty-eight offences (47 per cent) merited death but the penalty was mandatory for only fourteen and discretionary for thirty-four.[75]

Finally, it may be noted that - in the Civil War - on the royalist side, persons fighting for Parliament were often executed - as '*traitors and rebels'* - not on the basis of any ordinance or statute of war, but on the basis of the law of treason under the Treason Act 1351, since it was a sub-crime under that Act:

> if a man do levy war against our lord the king in his realm.[76]

Perhaps bizarrely, Parliamentarians often executed royalists on the same basis - arguing that its soldiers were engaging in war against Parliament and that this comprised rebellion and treason against the king pursuant to the laws and statutes of the realm.[77] As to the meaning of '*martial law'* - by the time of the Civil War - it was being used synonymously with '*military law'*, as Donaghan notes:

> Contemporaries referred to the articles of war indiscriminately as martial law or military law…[78]

Donaghan also refers to occasions when Parliament applied martial law to civilians. Thus, in 1644, Parliament gave power to a commission of soldiers and MP's to apply martial law to civilians accused of plotting with the enemy (i.e. with Charles I).[79] Also, in 1645, a council of war (against the background of a possible seizure of Dover castle) was empowered to punish all cases that came under military cognizance. Both these powers were only temporary.[80]

In conclusion, the statutes and ordinances of war - from Richard I in 1189 to the end of the Civil War in 1649 - evidence that the Crown's exercise of the royal prerogative to impose martial law was plenary. The clear intent of these statutes and ordinances of war were to impose the death penalty (and more severe and unusual punishments) on military personnel in cases where the common law did not.[81] Thus, martial law prior to 1688 was ill framed, extensive (prodigal) and designed to apply 'in terrorem'.[82]

2.2 Military Law post-1660

Although, on the restoration of the monarchy, Charles II (1660-85) abolished military tenure,[83] he retained a standing army of 5,000 men. James II (1685-8) increased this to some 15-20,000 men after the Monmouth rebellion of June - July 1685.[84] The paramount control of the Crown in respect of military matters was re-stated in the Preamble to the Militia Act of 1661which declared that:

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themselves from sermons, and public prayer, shall be proceeded against at public discretion: And all such who shall violate places of public worship, shall undergo severe censure.'(Spelling modernized).

[75] Donaghan, n 39, 170.

[76] '*si home leve de guerre contre nre dit seignr le roi en son roialme*.' See generally, McBain, n 44 and Donaghan, n 39, 130-1.

[77] Dongahan, n 39, 130-1.

[78] Ibid, 171. Cf. 173, 'It is important to remember that in the war years 'martial law' was more likely to bear the neutral meaning of military law than the constitutionally loaded modern sense.' Holdsworth, n 19, 120 'It became known not as martial but as military law.'

[79] See Tytler, n 30, 71-9. Also, Cobbett (1812), vol 13, 270.

[80] Donaghan, n 39, 172. See also Brand & Nelson, n 37, 45-6.

[81] Samuel, n 27, 97-8 refers to military punishments such as dis-memberment, maiming (or fracturing) of limbs, boring the tongue with a red hot iron, cutting off the left ear, branding the cheek, running the gauntlet (*gantlope*), riding the wooden horse and the whirligig (a circular wooden cage which was whirled round). See also Donaghan, n 39, 179, 182.

[82] Donaghan, n 39, 142, 'Military punishments for breaches of military law were shaped by principles of flexible, exemplary, and '*in terrorem*' administration of justice.' See also 194. Some of the ordinances applied not only to military personnel but to those who trafficked with them. For example, the ordinances of Henry V (1413-22) provided that common women (prostitutes) who came within the king's army (or within 3 miles of the same) were to be burnt on the right cheek (first offence) and - for a second offence - to be imprisoned as long as should please the marshal. Such a woman who remained in any fort, or garrison, after being ordered to quit the same was to have her left arm fractured. See Samuel, n 27, 92-3.

[83] See n 30.See Clode, n 19, vol 1, 446-9 (Orders and Articles of War, 1666).

[84] Samuel, n 27, ch 4 (Blackstone gives the figure as 30,000, see n 12, vol 1, 401). At 168, 'the military part of the feudal policy was formally abolished…at the Restoration [1660]; but the successive kings of England uninterruptedly exercised the right of commanding and legislating for the army, to the period of the Revolution [of 1688].' One of the earliest texts on military law (it is more a work on the drilling of soldiers) is Anon, *Abridgment of the English Military Discipline* (rep by his Majesty's special command, 1682. The 1686 edition, printed by Charles Bell *et al,* London, has been reprinted by EEBO). See also Harford (1680).

> The sole supreme government command and disposition of the militia and of all forces by sea and land and of all forts and places of strength is and by the laws of England ever was the undoubted right of his majesty and his royal predecessors kings and queens of England.[85]

However, lasting change to this – and to the unfettered control of the military by the Crown – occurred when James II abdicated and William and Mary (1689-1702) were chosen by Parliament as king and queen. Indeed, the foundations of modern military law commence with the provision in the Bill of Rights 1688 that:

> The raising and keeping a standing army within this kingdom in time of peace unless it is with the consent of Parliament is against law.[86]

In 1688, in order to deal with a mutiny that had taken place,[87] Parliament enacted the first of the Mutiny Acts, to punish mutiny and desertion (these Mutiny Acts were annually renewed thereafter).[88] This Mutiny Act of 1688 also authorised the Crown to establish courts martial, replacing any Crown prerogative in respect of the same with legislation.[89] Samuel, in his *Historical Account of the British Army* (1816), noted:

> From the exercise of the power of legislation over the higher order of offences, and from the assertion of a like right in all, the step to the actual assumption of an authority by the parliament over military offences in general, was short and in the usual course of things. From year to year this legislative power was manifested in successive mutiny acts, each discovering some new accession of influence, until it became universally prevalent.[90]

Martial law (military law), therefore, after 1688 became a separate body of law which governed the armed forces *alone* and not civilians. Samuel stated:

> Military or martial law…is a particular rule of conduct, prescribed by the legislative authority of the state, for the government of the military force of the nation, in contra - distinction to the law, which regulates, or is intended to regulate the general conduct of the people in their civil relations.[91]

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[85] 13 Car II st 1 c 6 (1661) (rep) (king's sole right over the militia). See also 14 Car II (1662) c 3 and 15 Car II (1663) c 4. These three Acts remained the statutory authority for the militia until 1757. See also Blackstone, n 12, vol 1, 399; Samuel, n 27, 162; Robertson (1935), 28 and Tytler, n 30, 95-6.

[86] Samuel, n 27, p 149 'The declaration…made the parliament, in effect, a constituent power in the creation of the army; which, thenceforward, could not look to the Crown, as in foregoing seasons, as the sole author of its being.' See also Blackstone, n 12, vol 1, 401; Forsyth, n 5, 207; Tytler, n 30, 101 and Clode, n 19, vol 1, 499.

[87] This was a mutiny among troops quartered at Ipswich. They disarmed their officers, seized the regimental chests and declared for James II (1685-9). Also, about 500 troops attached to the Royal Scotch and Dumbartons' regiments deserted. The mutiny was soon quelled. See also Tytler, n 30, p 102; Scott, n 19, 58 and Clode, n 19, vol 1, 142.

[88] 1 Will & Mar c 5 (rep) 'every person being …mustered and in pay as officer or soldier who shall… excite cause or join in any mutiny or sedition in the army or shall desert their majesties service in the army, shall suffer death or such other punishment as by a court-martial, shall be inflicted.' See also Samuel, n 27, 138 and Robertson, n 85, 110-1. The Mutiny Act became the Army Act in1881, see Anson, n 20, vol 2, pt 2, 203.

[89] It authorized (s 3) their Majesties or the general of their army to grant commissions to any lieutenant general (or other officers not under the rank of colonel) to call, and assemble, courts-martial. See also Samuel, n 27, pp 138-9. In 1718, courts martial were allowed to punish mutiny and desertion with death, see Hallam, n 5, vol 2, 261. It may be noted that, in the 1st World War (but not the 2nd World War), desertion was still punishable with death.

[90] Samuel, n 27, 139. In *Grant v Gould* (1792) 2 H Bl 69 (126 ER 434) per Loughborough CJ at 98, 'Where martial law prevails, the authority under which it is exercised claims a jurisdiction over all military persons, in all circumstances…' See also Samuel, n 27, 184. Forsyth, n 5, 553 'These regulations [passed under the Mutiny Acts] form a code which is sometimes called martial, but more properly military law'.

[91] Ibid, Introduction. Also, 'It will be seen, in the progress of the inquiry, that the military regulations, obtaining in the earlier periods of our history, were not formed, as now, for the control of a separate class of men, but for the whole mass of the people; not operative on a particular body, but on the members of the community at large, each one of whom being liable, when capable of bearing arms, to the burden of military service. These regulations enjoined certain duties on citizens, under described penalties, when acting in the capacity of soldiers; but as such capacity was occasional only, the regulations having reference to it, had but occasional force.' *Wolton v Gavin* (1850) 16 QB 61 (117 ER 794) per Campbell CJ at 61 'none are bound by the Mutiny Act or the Articles of War except her Majesty's forces: and I am most anxious, as a constitutional judge, that this should be fully understood to be my opinion.' In 1879, the provisions of the Mutiny Act and of the Articles of War were consolidated into a code of military law, the Army Act 1881. Anson, n 20, vol 2, pt 2, 215 'The effect of the substitution of the present Army Act [ie. of 1881] for the old Mutiny Act is to bring the entire code of military law annually under the consideration of Parliament, which no longer gives power to make rules and constitute courts, but enacts the rules, provides the jurisdiction for enforcing them, and the punishments for their breach.'

As a result, references to '*military law*' became more and more common[92] and the term '*martial law'* became reserved to situations where military law was imposed over subjects in extreme cases - such as in the case of plots, rebellions or war time.[93] This can be seen in changes in texts on military law from the 18th[94] to the 19th centuries.[95] By 1881 - at the latest - with the Army Act 1881, legislation covered the field of military law.[96] Thus, any reference to martial law imposed by virtue of the Crown prerogative (except in the case of plots, rebellions and war, see 4 and 5) was eclipsed - as was the distinction between '*martial*' and '*military law'* when referring to the law governing the armed forces.[97]

In conclusion, martial law - in so far as it refers to the law imposed by the Crown on military personnel prior to 1688 - no longer has any meaning. All the Crown statutes and ordinances of war dealing with the same up to that date – including the imposition of the death penalty, other military punishments, the Court of Chivalry and courts martial established pursuant to the Crown prerogative – have long been superceded by legislation. With legislation covering the field, the term 'martial law' has become subsumed into the term 'military law'; which, today, refers to that body of law governing the armed forces but not civilians. Thus, any Crown prerogative to impose 'martial law', when used as an archaic reference to 'military law', is wholly obsolete.

3. Martial Law - Military Law Imposed on Civilians in Peacetime

As well as comprising an early reference to military law in general, the term '*martial law*' was often more specifically used to describe the application of military law to civilians in peacetime. Legal writers in the 17th and 18th centuries asserted - in strong terms - that this was not possible for the Crown to do, since it was made illegal by the Petition of Right 1627 (still extant).

3.1 Deprecation of Martial Law by Legal Writers

Martial law - in the context of legal writers such:

- Lord Coke (his *Institutes of the Laws of England* were published between 1628-41);
- Hale CJ (his *History of the Common Law of England* was written between 1640's - 1660's but first published in 1713); and
- Blackstone (his *Commentaries on the Laws of England* were published between 1765-9)

[92] OED n 20, (military law) 'the body of enactments and rules for the government of an army.' Bruce, n 4, (writing in 1717) refers to military law and not martial law eg. 3 'Since war then is the occasion of the military law…' Tytler (writing in 1806), n 30, 1 'The foundation of the military or martial law, is that which is common to all law whatever – the necessity of things.' Dodd, n 19, 152 'martial law …down to the end of the seventeenth century, if not later, is what we now call military law.'

[93] Samuel, n 27, xv deprecates 'imaginary resemblances, or from abuse of terms, fancied to be synonymous, but certainly not convertible, in assuming the law military to be the same thing with what commonly passes under the denomination of martial law; which will appear, on examination, to be nothing more than the offspring of necessity, covering itself with the clothing and taking the name and place of law, though in reality it be, if not a subversion, at least a temporary supercession of all that is sound in legislation, justified and justifiable only in perilous and critical conjunctures, when social order is vitally threatened; when violence can only be resisted by violence; when the sense of danger is so imminent, as to overwhelm every other consideration; where the end or existence of society is sustained, in a natural and spontaneous preference, to the means by which it is brought and held together; when the public safety is preserved at the expense of the public ordinances.'

[94] Brewster (1725) ; Burn, n 46. Cf. Sullivan (1779)(treats martial law the same as military law, eg 2 'the law martial of England is indisputably authorized by an act of the legislature.').

[95] Adye (1769), n 50; Tytler, n 30, Hardesty (1718), Samuel, n 27 and Bruce, n 4.

[96] See n 91.See also Stephen, n 19, vol 1, 208. Referring to Victorian legislation he states 'They form a code, which is sometimes called martial, but more properly military, law.'

[97] Heuston, n 16, 151 'martial law includes first, military law.' Samuel (writing in 1816), n 27, 186 'The law military,whatever might have been its range in older times, is now restricted in its obligatory force to the definition and declaration of the duties of soldiers, and the enforcement of them, under appropriate penalties.' At 187 'At the commencement of the reign of Queen Anne [ie. 1702,] the Mutiny Act had made a large stride towards a general jurisdiction, not only in primary but in secondary acts of crime; so as to leave little that is essential to complete the exercise of the ordinary legislative power over the entire list of offences, peculiar to the military state.' At 203-4 'Towards the end of the reign of George the Second [1727-60], nearly the whole mass of the offences, of which officers or privates, might be guilty, is embraced by the Mutiny Act; not, perhaps, so distinctly or precisely as at this day, but enough to show that the legislature had the intention of exercising, and were actually exercising, a full and general authority therein.'(Spelling modernized).

tended to comprise a reference both to military law imposed by the Crown prerogative prior to 1688[98] *and*, in a narrower context, to military law applied to civilians in peacetime. In both senses, these legal writers strongly dis-approved of it. The first, because it was excessive and arbitrary in comparison with the common law - depending solely on the will of the sovereign (see 2). The second, because it was made illegal by the Petition of Right 1627. Blackstone (in 1765) stated:

> For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions is as sir Matthew Hale [ie. Hale CJ] observes, in truth and reality no law, but something indulged, rather than allowed as a law: the necessity of order and discipline in an army is the other thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the law of the land.[99]

Blackstone referred to Hale CJ who stated, in his *History of the Common Law*:

> But touching the business of martial law, these things are to be observed, *viz*. First, that in truth and reality it is not a law, but something indulged rather than allowed as a law; the necessity of government, order, and discipline in an army, is that only which can give those laws a countenance, *quod enim necessitas cogit, desendit.*[100]
>
> Secondly, this indulged law was only to extend to members of the army, or to those of the opposite army, and never was so much indulged as intended to be (executed or) exercised upon others; for those who were not listed under the army, had no colour of reason to be bound by military constitutions, applicable only to the army, whereof they were not parts; but they were to be order'd and govern'd according to the laws to which they were subject, though it were a time of war.[101]
>
> Thirdly, that the exercise of martial law, whereby any person should lose his life or member, or liberty, may not be permitted in time of peace, when the king's courts are open for all persons to receive justice, according to the laws of the land. This is, in substance, declared by the Petition of Right [1627],3 Car 1, whereby such commissions and martial law were repealed and declared to be contrary to law.[102]

Both Blackstone and Hale referred to Coke and the third volume of his Institutes (published in 1641). He stated:

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[98] Brand & Nelson, n 37, 78 'it must be borne in mind that, as appears from the language of Lord Coke and Lord Hale, the term martial law, as understood at that time, meant simply military law.' See also, 99-100.

[99] Blackstone, n 12, vol 1, 400. Both Samuel (n 27) and Tytler, n 30 (eg vii, 12-3) assert that Blackstone - in his denigration of martial law - was inaccurate when describing the position in his time. This is true. However, it is more likely that Blackstone was indicating that martial law was '*no law'* with reference to the position pre-1688. See also Samuel, n 27, 171 *et seq* Further, Blackstone (see n 12, vol 1, 403) was unhappy that Articles of War promulgated by the Crown pursuant to the various Mutiny Acts, were so indeterminate – something which no longer prevails since the Army Act 1881. Clode, n 19, vol 2, 162 'Martial law exercised against enemies or rebels is only a more regular and convenient mode of exercising the right to kill in war: a right originating in self-defence…It is nothing more than a sort of better regulated decimation, founded upon choice, instead of chance.'

[100] 'Because necessity compels, descend'. However, it should be '*quod enim necessitas cogit, defendit*' (it is to be defended/justified because necessity compels), see Brand, n 37, 57. A similar sentiment may be found in Hardesty, n 95, xi who (writing in 1718) said that a person who refers to the 'long and heavy train of military charges formerly laid on our ancestors, for the honour and defence of their country may just[ly] conclude that those ages were rather a state of meer [mere] slavery and servitude than of the so much boasted freedom of the subject.' See also Sullivan, n 94, 2 'Martial law, in general hath been defined, a temporary execresence, bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom.'

[101] Hale, n 56, 26 '*Always, preparatory to an actual war, the kings of this realm, by advice of the constable (and marshal), were used to compose a book of rules and orders for the due order and discipline of their officers and soldiers, together with certain penalties on the offenders; and this was called martial law. We have extant in the Black Book of the Admiralty, and elsewhere, several examples of such military laws.*' See Anson, n 20, vol 2, pt 2, 214.

[102] Ibid, 27. See also *Grant v Gould* (1792) 2 H Bl 69 (126 ER 434) per Loughborough CJ at 98 'martial law, such as it is described by Hale, and such also as it is marked by Mr Justice Blackstone does not exist in England at all. When martial law [ie. military law] is established and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by court martial, it *bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded*. Where martial law [ie. military law] prevails, the authority under which it is exercised, claims a jurisdiction over all military persons, in all circumstances.' The words in italics refer to the position pre-1688.

> If a lieutenant, or other that hath commission of martial authority, in time of peace hang, or otherwise execute any man by colour of martial law, this is murder for it is against Magna Carta, cap 29[103] and is done with such power and strength, as the party cannot defend himself; and here the law implied malice.[104]

In denying the right of the Crown to impose martial law over citizens in peacetime, all of Coke, Hale and Blackstone referred to the precedent of Edmund of Woodstock. He was Earl of Kent (1301-30) and the brother of Edward II (1307-27).[105] It was said that letters of his containing treason (a plot to free the deposed Edward II) were shown to his nephew, Edward III (1327-77) and that Edmund acknowledged this before the coroner of the king's household, when arrested. Articles of treason were then brought against Edmund in Parliament in March 1330 and (it seems) he acknowledged them. He was sentenced (as Hale puts it) by '*a kind of military court by a summary proceeding'*. However, in 1331, this judgment (attainder) was reversed in Parliament (albeit after his execution) and Edmund was formally pardoned because he was executed without a proper trial in time of peace (*tempus in quo morte adjudicatur fuit, fuit tempus pacis*).[106] Hale CJ continues:

> And accordingly the judgment [against Edmund, Earl of Kent] was revers'd; for martial law, which is rather indulg'd than allow'd, and that only in cases of necessity, in time of open war, is not permitted in time of peace, when the ordinary courts of justice are open.[107]

Thus, all three authors argued that martial law should not apply to civilians in peacetime - citing the precedent of the Earl of Kent in 1330. And peacetime was when the king's courts were open. However, it seems clear that - despite this precedent - until the Petition of Right 1627 there were many instances in English history where the Crown sentenced people to death, pursuant to some form of military tribunal *in peacetime*. These are now considered.

3.2 Proclamations and Commissions Imposing Martial Law – Pre-1625

The background to the Petition of Right 1627 is that martial law was applied to civilians in the course of English history during peacetime - albeit this was relatively rare. Cases cited by Coke of important persons being tried by martial law in peacetime - besides Edmund, the Earl of Kent in 1330 (see above) - are:

- Thomas, Earl of Lancaster. The cousin of Edward II (1307-27), in 1322, he was tried for treason for levying war against that sovereign ('with banners displayed', *explicatio vexilli regis*).[108] It seems he was

[103] Magna Carta 1297, ch 29 (still extant) provides 'No man shall be taken, or imprisoned, or be dis-seized of his freehold, or liberties, or free customs, to be outlawed, or exiled, or any other wise destroyed; nor will be pass upon him, nor [condemn him] but by lawful judgment of his peers, or by the law of the land…'See also also GS McBain, Abolishing Obsolete Legislation on Crimes and Criminal Procedure, Legal Studies, (Dec 2010), vol 30, no 3, pp 1-12

[104] Coke, n 11, vol 3, 52. One would assert that Coke was wholly right in this in that the Court of Chivalry (*re* criminal matters) in peace time was part of the king's court and, thus, it was 'open' *qua* the king's court. Grazebrook, n 30, 7 'Court of Chivalry; during times of war it was with the army, and in times of peace sat in the *aula regis*, or king's great court.' Blackstone, n 12, vol 1, 400 'And it is laid down, that if a lieutenant, or other, that hath commission of martial authority, doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder; for it is against Magna Carta.' Even in the case of mutinous soldiers there were doubts whether they could be executed according to martial law when not near to the enemy. See Donaghan, n 39, 171. Cf. 178. See also the opinion of the lawyers and judges of the Council Board in July 1640 that 'martial law could not be executed in England but when an enemy is really near to an army of the king's.' See Clode, n 19, vol 1, 23, 56 & 440-1.

[105] See Edmund of Woodstock, ODNB, n 52. Also, Hume, n 4, vol 2, 183.

[106] See Hale, n 56, 27. See generally, McBain, n 48, 836, n 213 and Finlason, n 19, 76. There seems little doubt that, in olden times, the sovereign had plenary power over military matters and that he could authorize others to execute it for him. The execution of persons such as the Earl of Lancaster in 1322 (when caught in open insurrection, see ns 108-11) would have been legitimized by Edward II (1307-27), who seems principally responsible for condemning him, on the basis the Earl had committed manifest treason (levying war, treated as treason prior to the Treason Act 1351). Further, Edward II would probably have asserted that the sovereign, as commander-in-chief, had the legal right to order the execution of rebels after battle on his own authority. It may be noted that Edward II's father, Edward I (1272-1307), had been a notable exponent of ordering the execution of rebels after battle, with scant, or no, trial. See Bellamy, n 53, n 44, ch 3, especially 40 (Scots rebellion of 1306). For an example of extensive Crown powers in military matters granted in later times, see a commission for the office of high constable granted to Earl Rivers in 1468. See also Tytler, n 30, 381-5; Hume, n 4,vol 4, 348 and Capua, n 19, 154.

[107] Ibid.

[108] Coke, n 11, vol 3, 52-3 and 1 ST 41.Coke notes that the Earl 'being taken in an open insurrection, was by judgement of marshall law put to death.' See also McBain, n 48, 835, n 210 and Thomas, Earl of Lancaster, ODNB, n 52 ('on 22 March 1322, after what amounted to a show trial,

tried before the sovereign and some other great men of the realm and condemned on the basis that his crime was notorious. He does not have appeared to have been given the opportunity to defend himself.[109] In 1327, judgment against him was set aside - in part - because it was in time of peace and, also, he had not been judged by the correct legal procedure.[110] Cockburn CJ, in his address to the jury in *R v Brand and Nelson* (1867), was dubious whether this was a case of martial law. More likely, it was one of summary trial before the king and some peers - as opposed to a required full trial before the lords in Parliament;[111]

- Roger Mortimer, Earl of March. The lover of Isabella - the mother of Edward III (1327-77) - he was brought before Parliament on 24 November 1330. Fourteen charges were preferred against him including '*accroaching royal power*'. With no opportunity being given to defend himself, Mortimer was condemned on the basis that his crimes were notorious and executed.[112] Judgment against him was reversed in Parliament in 1354.

These three cases - including that of Edmund, Earl of Kent - however, are rather special since they concern a common law crime (treason) rather than a specifically military one. Also, at the trial of the Earl of Lancaster, at least, a common law judge was present (Sir Robert Malberthorp). Thus, it is uncertain whether these are examples of civilians being tried under martial law in peacetime - or they were cases of judgment on the sovereign's record, the crime also being '*notorious*.'[113]

Leaving aside these cases of famous individuals allegedly tried by martial law, as to the rank and file - in the case of peacetime rebellions in medieval times - it is likely that many civilians were tried and executed after the battle - by some sort of military tribunal or pursuant to a royal commission which authorised the application of martial law to the rebels.[114] As to major rebellions in the period 1381-1569, the following may be noted:

- Commissions were granted by Richard II (1377-99) to try rebels in the case of the Peasant's Revolt (Wat Tyler's Rebellion) (1381).[115] It seems a large number of rebels were also executed extra-judicially after the rebellion, and an Act of Indemnity was issued to pardon the perpetrators;[116]

[the Earl of Lancaster] was executed at Pontefract'). See also Rolls of Parliament (RP) ii 3; Stephen, n 19, vol 1, 163 and Hume, n 4, vol 2, 159-60 (the Earl was condemned by court martial).

[109] Bellamy, n 53, 51 'The Crown was using charges which had been employed by Edward I [1272-1307] to convict his enemies on his own record [ie. on his own testimony].' Also, 'It was the process against Thomas of Lancaster which first connected conviction on the royal record with trial for treason under the law of arms.' The Earl was also charged with accroaching royal power, ibid, 52 and 1 ST 43. See also Hale, n 9, 121 (judgment *coram rege et presentibus magnatibus*). See also Capua, n 19, 154.

[110] 1 ST 41 'when he was sentenced to death, was time of peace; in particular because, throughout the whole time aforesaid, the chancery and other places of the courts of the lord the king were open, and in them law was done to every one as it used to be done, nor did the same lord the king ever in that time ride forth with banners displayed.' Bellamy, n 53, 48 'In 1327 Henry, Earl of Lancaster argued successfully that men could only be convicted on the king's record if their treasons had been committed in time of war, which was when the king marched with his own banner displayed.' See also RP, n 108, ii 5. Bellamy notes that the use of the king's record in treason trials ended in 1327 save only where the crime was of fighting against the king in open war. See Bellamy, n 53, 158-9, 201, n 3. Cf. 170 (Duke of Clarence who was tried and executed for treason in 1478 on the testimony of this brother Edward IV (1461-83)).

[111] Brand & Nelson, n 37, 26 'The Earl, it seems, was tried by the king and certain of his peers, instead of being tried, as he ought to have been, by his peers in Parliament. It was an irregular trial undoubtedly, but I question very much whether it was a case of martial law…At all events the attainder was reversed in the subsequent reign, on the ground that the whole proceeding had been quite irregular, the ordinary courts having been then open, before which the case ought to have been brought.' See also Rymer, n 33, vol 3, 936 and Hale, n 9,121-2.

[112] 1 ST 51 'He was not brought to answer but condemned without hearing, and for that reason this judgment was reversed as erroneous'. See also Roger Mortimer, ODNB, n 52. 'The sentence was a foregone conclusion. Indeed, Mortimer was given no opportunity to answer the charges; he was declared guilty by the peers on the basis of the common notoriety of his crimes.' [ie. ill fame]. See also McBain, n 48, 818, n 66 and 818, n 218; Stephen, n 19, vol 2, 246; Hume, n 4, vol 2, 184-5; Hale, n 9, 121 (judgment framed by the king, pronounced by special commissioners) and Bellamy, n 53, 54 (he was condemned by reason of his notoriety).

[113] These cases may also be early examples of attainder, where the sovereign and Parliament acted as a court, see Bellamy, n 53, 212. Also, McBain, n 48, 867-9.

[114] These commissioners may have included senior military, or political, figures as well as a common law judge. For an early example of a trial for treason of a military commander by a royal commission see that of Andrew Harclay, 1st Earl of Carlisle (c 1270-1323) on 3 March 1323; see Hale, n 9, 121.

[115] McBain, n 44, 100-3. See also Dobson, (1970), ch 7 and Dunn (2004), ch 7. One of the Commissions granted by Richard II was to Thomas, Earl of Buckingham (youngest uncle to Richard II (1377-99)) and to Tresilian CJ, see Dunn, 168 and Bellamy, n 53, 150. For commissions of martial law in 1398, 1414 & 1471, issued to deal with rebels see Bellamy, n 53, 150.

- In the case of a large riot led by Tom Cheyney (Cheyne) in 1450, a commission headed by the Earl of Wiltshire was sent to Kent to judge the rioters. It is likely that many were also killed extra-judicially;[117]
- Cockburn CJ noted the practice - in the reigns of Henry IV (1399-1413) and Henry VI (1422-71) of executing prisoners just after a battle without any form of trial;[118]
- Other large rebellions - such as those of the Lollards (1411 and 1431), Jack Cade's Rebellion (1450),[119]rioting in Yorkshire (1489), the Cornish Rebellion (1497), the Lincolnshire rebellion (1536), the Pilgrimage of Grace (1536), Kett's rising in East Anglia (1549), Wyatt's Rebellion (1554) and the rising in the North (1569) - were usually treated as rebellions in which banners (standards) were raised against the sovereign. Hence, the rebels were held to have committed treason (in levying war against the sovereign) with the common law courts often trying the main offenders.[120] That said, it is also likely many rebels were also dispatched pursuant to martial law.

In conclusion, it is likely that many civilians caught up in these rebellions - whether in (or near) places of armed resistance or just after the fighting - were summarily executed under martial law, including those executed by *ad hoc* (or drum head) military tribunals. In Tudor times, the picture is clearer. Edward VI (1547-53), Mary (1553-8) and Elizabeth I (1558-1603) all issued proclamations in which martial law was imposed on civilians. Such impositions of martial law were mainly at times of rebellion or with the threat of foreign invasion hanging over the country. However, Elizabeth I had a particular dislike of '*vagabonds*' and '*vagrants*'[121] and she was happy to issue proclamations for their being tried by martial law, as opposed to the normal common law process. A list of these proclamations is as follows:

- Edward VI. A proclamation of Edward VI (1547-53) issued in July 1549, ordered martial law to be applied against those who rioted against enclosures;[122]
- Edward VI. Cockburn CJ in his address to the jury in *R v Brand and Nelson* (1867) refers to a proclamation in 1552 in which the king gave a commission to John, Earl of Bedford to try rioters according to martial law;[123]
- Mary. The historian Hallam maintains that Mary (1553-8) had executed some of those taken in Wyatt's rebellion in 1554 by martial law.[124] In 1558, Mary issued a proclamation imposing martial law on those who imported heretical, or seditious, works;[125]

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[116] Brand & Nelson, n 37, 26 refers to 5 Ric c 6 (1381, rep)(the King's pardon to those who repressed and took revenge of his rebels). See also Tytler, n 30, 49; Finlason, n 19, 76-7 and Capua, n 19, 154-5.

[117] On 26 January 1450, Cheyney and others rebelled, attacking an abbey in Canterbury. Cheyney was later executed for treason. See McBain, n 44, 100-3. Also, Kaufman (2009). For the use of commissions to try persons under martial law in the reign of Henry VII (1485-1509) see Baker, n 56, 216-7.

[118] Brand & Nelson, n 37, 27. Cockburn CJ also refers, 28-9, to the practice of Henry VII (1485-1509) after the battle of Stoke in June 1487 of holding commissions and martial law tribunals in order to execute rebels for treasons but then offering them a way out by fines and ransom, a practice Cockburn CJ called 'utterly illegal'. See also Hume, n 4, vol 3, 19 (Stoke) and 45 (execution of Perkin Warbeck prisoners in July 1495). See also Bellamy, n 53, 215 *re* the military style execution of Richard Woodville, 1st Earl Rivers, Sir Richard Grey (nephew to Earl Rivers) and Sir Thomas Vaughan in 1483, likely on the orders of Richard III (1483-5). See ODNB, n 52 for biographies of these people.

[119] Finlason, n 19, 77 & 83. Also, Lyle (1950). On 1 August 1450, a commission was appointed to try Cade's rebels (at least 8 rebels were condemned and executed). A commission was also given to the Duke of York and there were 41 executions (the so-called Harvest of Heads).

[120] See generally, McBain, n 44, 99. Also, Baker, n 56, 217 (martial law used against rioters in the Lincolnshire rebellion in October 1536 (various ringleaders being hanged) and the condemnation of 74 prisoners without jury trial in 1537). See also Hume, n 4, vol 3, 235-9 and Capua, n 19, 160-7 (as well as texts cited in 163, n 45). For the Lollards, see Bellamy, n 53, 107 & 150. Capua, n 19, 161 thought that some 80 people were executed under martial law in the aftermath of the Pilgrimage of Grace (1536).

[121] OED, n 20. (vagabond) 'One who has no fixed abode or home, and who wanders about from place to place; spec [especially] who does this without regular occupation or obvious means of support; an itinerant beggar, idle loafer, or tramp; a vagrant'. Also, 11 Hen VII (1495) c 2 (vagabonds). See also Capua, n 19, 153 'Beginning in the 1550's…the Crown began to claim the authority to expand the hitherto carefully circumscribed jurisdiction of martial law beyond situations of war or open rebellion and into territory which had been the exclusive domain of the criminal law.'

[122] Hughes & Larkin, n 60, vol 1, 475-6 (authority and order of law martial).

[123] Brand & Nelson, n 37, 34. Cockburn CJ refers to Strype (1822), vol 4, 31, 207, although he was unable to locate the commission as such and it does not appear to have been acted on. The reference is to John Russell, 1st Earl of Bedford (c. 1485-1554/5). See also vol 3, 267 (martial law in 1549 against those who tear down enclosures) also referred to in Brand & Nelson, n 37, 32. See also Hughes & Larkin, n 60, vol 1, 475-6; Hume, n 4, vol 3, 356-7 & vol 4, 347 and Finlason, n 19, 87.

- Elizabeth I – 1558-95. In June 1558, a proclamation of Elizabeth I (1558-1603) imposed martial law on the possessors of heretical, or seditious, books - although this does not seem to have been enforced.[126] In 1569, Maitland refers to a commission appointed after the insurrection of the northern earls, when '*six hundred persons were, it is said, executed by the Earl of Sussex*.'[127] In July 1588 (when there was a threat of invasion from the Spanish Armada), Elizabeth I issued a proclamation declaring those who issued traitorous libels (or papal bulls) against her were to be proceeded against by martial law;[128]
- Elizabeth I – 1595-1603. In November 1589, a proclamation of Elizabeth I placed vagrant soldiers under martial law[129]and, one in November 1591, placed vagrants under martial law.[130] In July 1595, after riots in London, Elizabeth granted a commission to Sir Thomas Wilford to try, and execute, rioters according to martial law - although it seems this was not utilised in practice.[131] In September 1598, London vagabonds were placed under martial law and a provost marshal was appointed. He was empowered to apprehend '*all such as shall not be readily reformed and corrected by the ordinary officers of justice, and them without delay to execute upon the gallows by order of martial law*.'[132]

Maitland refers to commissions issued by James I (1603-25) in 1617, 1620 and 1624 which empowered commissioners to try civilians by martial law - even those who had been guilty of ordinary felonies.[133] It is unclear whether many people were executed pursuant to these commissions. In respect of these, Maitland states:

> There can, I think, be no doubt that, according to the opinion of lawyers of the time, such commissions were illegal. The government may put down force by force – but when there is no open rebellion, or when the rebellion is suppressed, it has no authority to direct the trial of prisoners, except in the ordinary courts and according to the known law of the land. As to what was this 'law called martial law' we know little, and probably there is little to be known; it means an improvised justice executed by soldiers.[134]

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[124] Hallam, n 5, vol 1, 240-1. See also 43 (proclamation of 1557). See generally Loades (2001).For a threat by James I to invoke martial law against poachers in the royal forests, see 170. See also Baker, 56, 217-8.

[125] Brand & Nelson, n 37, 85. See also Hughes & Larkin, n 60, vol 2, 90-1 and Tytler, n 30, 50. Capua did not think it likely there were many executions under this proclamation, see Capua, n 19, 166.

[126] Hughes & Larkin, n 60, vol 2, 90-1. Those finding such books who did not forthwith burn them without showing or reading the same to any other person 'shall in that case be reputed and taken for a rebel, and shall without delay be executed for that offense, according to the order of martial law.' When Peter Burchell (a fanatical puritan) wounded the famous seaman Capt Hawkins (by way of transferred malice, he sought to kill Sir Christopher Hatton), Elizabeth I wanted him executed immediately by way of martial law. She was dissuaded. See Hallam, n 5, vol 1, 241. See also Brand & Nelson, n 37, 85 (*in terrorem*). See also Hume, n 4, vol 4, 347.

[127] Maitland, n 17, 267. See also Hallam, n 5, vol 1, 243, Forsyth, n 5, 555 (600 persons executed between 2-20 January 1569 under Sir George Bower, Provost Marshall) and Hume, n 4, vol 4, 347 (he says 800) . The Earl of Sussex was Thomas Radcliffe (1526/7-83), 3rd Earl, see ODNB, n 52. See also Thornton (2010), 92; Stephen, n 19, 210 and a *Report of the Case of the Queen v Edward John Eyre for High Crimes and Misdemeanours alleged to have been committed by him in his office as Governor of Jamaica* (ed Finlason, 1867) 71, per Blackburn J. For a commission of 1585 to execute according to marshal law, see Bellamy, n 5, 231.

[128] Ibid. See also Hughes & Larkin, n 60, vol 3, 13-7 and Hallam, n 5, vol 1, 241. See also the appointment of the Marquis of Winchester a Lieutenant of the Realm with power to impose martial law, Hughes & Larkin, n 60, vol 2, 86-8.

[129] Hughes & Larkin, n 60, vol 3, 46-8. See also, 32-4 (army deserters).

[130] Ibid, vol 3, 96-7.

[131] Ibid, 143. Hallam, n 5, vol 1, 242 'This peremptory style of superseding the common law was a stretch of prerogative without an adequate parallel, so far as I know, in any former period.' Wilford was appointed provost-martial with authority to seize rebellious persons and, in the presence of the magistrates, to execute them openly on the gallows. His commission was withdrawn in September 1595. See also Archer (1991), 1-2. For Sir Thomas Wilford (c. 1530-1610), see ODNB, n 52. See also Brand & Nelson, n 37, 39-41 ('they were not put to death by martial law; they were brought before the ordinary tribunals of the country; and punished according to the nature of their offences.'). See also Brodie (1866), vol 1, 165; Tytler, n 30, 51-2; Hume, n 4, vol 4, 348 and Finlason, n 19, 87-8. See also Capua, n 19, 170.

[132] Hughes & Larkin, n 60, vol 3, 196-7. See also a proclamation of 15 February, 1601. Ibid, 232-3.

[133] See also Capua, n 19, 171. Maitland, n 17, 267, 279-80, 325-9. See, in particular, 279 (Commission of December 1624). For details of these commissions see Stephen, n 19, vol 1, 208-10 and Forsyth, n 5, 553-4. Also, Brand & Nelson, n 37, 41-2 (Commission to Lord Compton as Lord Lieutenant in Wales) to 'fight all enemies, traitors and rebels from time to time, and them to invade, resist, suppress, subdue, slay, kill and put to execution of death by all ways and means from time to time by your discretion.' Cockburn CJ regarded such a commission as illegal, 43. See also Clode, n 19, vol 1, 422-3 and Finlason, n 19, 86.

[134] Maitland, n 17, 267. For the pre-emptory order of James I (1603-25) to hang a pickpocket taken in the fact without trial (James I was dis-suaded from this), see Hallam, n 5, vol 1, 290. And, for a threat by James I, to invoke martial law against poachers in the royal forests, see 170

Did legal writers in those times have doubts as to the legality of the actions of the Crown in imposing martial (military) law over civilians? Thomas Smith in his *De Republica Anglorum*, written c. 1562-5 expressed his own misgivings:

> In war time, and in the field the prince has also an absolute power, so that his word is a law, he may put to death, or to other bodily punishment, which he shall think so to deserve, without process of law or form of judgment.
>
> *This has been sometime used within the realm before any open war in sudden insurrections and rebellions, but that was not allowed of [i.e. assented to by] wise and grave men, who in that their judgment had consideration of the consequence and example, as much as of the present necessity, especially, when by any means the punishment might have been done by order of law.*
>
> This absolute power is called martial law, and ever was and necessarily must be used in all camps and hosts of men, where the time nor place do suffer the variance of pleading and process, be it never so short, and the important necessity requires speedy execution, that with more awe the soldier might be kept in more straight obedience, without which never no captain can do anything valuable in the wars.[135] (Italics supplied and wording divided for ease of reference).

In conclusion - particularly in Tudor times - the Crown extended the concept of martial law to cover civilians caught up in rebellions. Also, to vagrants and vagabonds. Doubtless, this was an unwarranted extension of a prerogative once limited to the Court of Chivalry and the field of battle. However, it was (see below) the wide ranging commissions of martial law of Charles I (1625-49) which provoked Parliament into making martial law in peacetime illegal pursuant to the Petition of Right 1627.

3.3 Commissions Imposing Martial Law – 1625-7

The Petition of Right 1627, s 7 (still extant) refers to commissions having been issued under the great seal for proceedings according to martial law and people being executed thereunder.[136] These commissions were issued by Charles I (1625-49) in the period 1625-7.[137] The background to this is that, in May 1625, some 8,000 soldiers were levied to be employed in the service of Frederick V - the Elector Palatine (James I's son – in - law) - and to rendezvous at Plymouth on 25 May 1625. A further 2,000 soldiers were levied to rendezvous for service in Hull. The historical commentator Rushworth states:

> The remembrance of the late violence committed by count Mansfield's army in their passage to Dover,[138] occasioned a proclamation to repress and prevent the like attempts of soldiers, as they now passed through the counties to the places of rendezvous, threatening the offenders with the strictest proceedings against them, for an example of terror; and straitly commanding the officers, who have charge of their conduct, for the removing of all occasions and pretences of disorders, to see their companies duly paid, and provided of all necessaries and to be always present with them, and carefully to conduct them from place to place.
>
> In like manner to prevent their outrages, when they should come to Plymouth, or the parts adjoining, *a commission was sent, empowering persons of trust, upon any robbery, felony, mutiny, or other misdemeanours (punishable with death by martial law) committed by the soldiers, or other dissolute persons joined with them, to proceed to the trial and condemnation of all such delinquents, in such summary course and order, as used in armies in time of war, according to the law martial;* and to cause

[135] Smith (1562-5), 85-6. There is no doubt that, in the early Stuart period, under pressure from James I (1603-25) and Charles I (1625-49), the courts allowed an increasingly inflated view of the Crown prerogative. See eg. Holdsworth, n 19, 124 referring to the *Ship Money Case* (1624) 3 ST at 1234 per Finch CJ 'The opinion of the majority of the judges was in favour of allowing to the Crown a power to proclaim martial law whenever the country was in danger; and of the existence of that danger they held that the Crown was the sole judge.'

[136] 3 Cha 1 (1627) '…of late time divers commissions under your majesty's great seal have issued forth, by which certain [persons] have been assigned and appointed commissioners with power and authority to [proceed] within the land according to the justice of martial law against such soldiers or mariners or other dissolute [persons] joining with them as should commit any murder robbery felony mutiny or other outrage or misdemeanor whatsoever, and by such summary course and order as is agreeable to martial law and as is used in armies in time of war to proceed to the trial and condemnation of such offenders, and to cause them to be executed and put to death according to the law martial. By [pretext] whereof some of your majesty's subjects have been by some of the said commissioners put to death….' The wording in brackets was inserted in Halsbury's Statutes, to add clarification.

[137] Charles I (1625-49) clearly followed the commissions of his father. See n 133. See also Clode, n 19, vol 1, 17-9.

[138] Ernst Graf von Mansfield (c. 1580-1626), a German military commander and mercenary during the early years of the 30 years war. See also Hume, n 4, vol 5, 7. In January 1625, Mansfield sailed from Dover with a motley army.

> execution to be done in open view, that others may take warning and be kept in due obedience.[139] (italics supplied and wording divided for ease of reference)

A further commission of martial law was issued in December 1625 when there was a threat of invasion from Spain. Thus, on 28 December 1625, Charles I (1625-49) issued a commission to Lord Wimbleton (lord marshal) and to Sir William St Leger (sergeant major of the Army) empowering them to use martial law against public enemies, traitors *etc.*[140] The commission stated that - Charles I wanting not to disband his soldiers returning from Cadiz and intending to billet them in Plymouth and its surrounds[141] - they would be subject to martial law:

> and to the end that all disorders and outrages, to the disturbance of our peace and the prejudice of our loving subjects, may be timely prevented, we, being more desirous to keep our people from doing mischief than to have cause to punish them for doing the same; have, of the special trust and confidence we have reposed in your approved wisdoms and fidelities, appointed you to be our commissioners, and by this presents do give unto you, or any three or more of you, full power and authority in all places within our said counties of Devon and Cornwall and either of them, as well within the said town of Plymouth or any other town or liberty or place as without, within our said counties of Devon and Cornwall or either of them,
>
> *to proceed according to the justice of marshall laws against such soldiers or other dissolute persons* joining with them or any of them, as during such time that any of our said troops or companies of soldiers shall remain or abide thereabouts, and not be transported thence, shall within any the places or precincts aforesaid at any time after the publication of this our commission, commit any robberies, felonies, or mutinies, or other outrages or misdemeanours, *which by martial law should or ought to be punished with death, and by such summary course and order as is agreeable to marshall law, and is used in armies in time of wars, to proceed to the trial and condemnation of such delinquents and offenders, and them to cause to be executed and put to death according to the law marshall for an example of terror to others, and to keep the rest in due awe and obedience*.[142] (italics supplied and wording divided for ease of reference).

A further Commission was issued on 4 October 1626 after the Forced Loan of 1626 (in which Charles I billeted soldiers on citizens who failed to lend him money).[143] This commission was similar to that of December 1625.[144]

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[139] Rushworth, n 25, vol 1, 168.

[140] Ibid, 'And for the defence of this realm, threatened with a powerful invasion, extraordinary commissions were given to the lords lieutenants of the several counties, to muster the subjects of whatsoever degree or dignity, that were apt for war, and to try and array them, and cause them to armed according to the degrees and faculties, as well men of arms as other horsemen, archers and footmen, and to lead them against *publick enemies, rebels, and traitors, and their adherents*, within the counties of their lieutenancy, to express, slay, and subdue them, and to *execute martial law*, sparing and putting to death according to discretion. And in case of invasions, insurrections, rebellions, and riots, without the limits of their respective counties, to repair to the places of such commissions, and, as need required, to repress them by battle, or any forcible means or otherwise, either by the law of this realm, or the law martial' (spelling modernized and italics supplied). For the text of this Commission see Rymer, n 33, vol 18, 254 and Samuel, n 27, 421. See generally, McBain (2011c) 97. See also Boynton (1964) 255-84 and Boynton (1962), 255-84. Lord Wimbelton (Sir Edward Cecil, 1572-1638) was appointed commander-in-chief of the ill fated expedition to Cadiz, see Rushworth, n 25, 195-7 and ODNB, n 52. See also William St Leger (d. 1642), ODNB, n 52 and Hume, n 4, vol 5, 11.

[141] Ibid. 'Whereas upon the return of our fleet, we have already directed that none of the soldiers employed in that service, and which shall return in any of those ships, shall be disbanded or depart from their colours, but shall continue under the command of those under whom they then served, we having present occasion to use their services again, and yet we shall be enforced for a time to lodge and billet the said soldiers in several places in and about our town of Plymouth and in our counties of Devon and Cornwall, where with most convenience for the soldiers and the least trouble to the country it may best be performed, until we shall have opportunity to employ them, which we intend to do with all expedition…' (spelling modernized).

[142] Ibid.'To which purpose our will and pleasure is that you cause to be erected such gallows and gibbets, and in such places within the said counties or either of them, as you shall think fit, and thereupon to cause the same offenders to be executed in open view, that others may take warning thereby to demean themselves in such due order and obedience as good subjects ought to do, straitly charging and commanding all mayors, sheriffs, justices of peace, constables, bailiffs and other officers, and all other our loving subjects whatsoever, upon their allegiance to us and our crown, to be aiding and assisting to you, or such three or more of you as aforesaid in the due execution of this our royal commandment; and this presents shall be unto you and every of you a sufficient warrant and discharge for the doing and executing, and causing to be done and executed, all and every such act and acts, thing and things, as any three or more of you as aforesaid shall find requisite to be done concerning the premises.' (spelling modernized)

[143] Ibid, 419. 'To the imposition of loan was added, the burden of billeting of soldiers formerly returned from Cadiz, and the moneys to discharge their quarters were for the present levied upon the country, to be repaid out of sums collected upon the general loan. The companies

These commissions provoked the wording in the Petition of Right 1627 which sought to end such Crown attempts to apply martial law to civilians. Section 8 of the Petition stated:

> And that the aforesaid commissions for [proceeding] by martial law may be revoked and annulled. And that hereafter no commissions of like nature may issue forth to any [person] or [persons] whatsoever to be executed as aforesaid, lest by colour of them any of your majesty's subjects may be destroyed or put to death contrary to the laws and franchise of the land. (spelling modernised).[145]

That said, even *after* the Petition of Right 1627, it seems Charles I issued commissions of martial law - in 1637 and 1639.[146] It would not appear that either Charles II (1660-85) or James II (1685-8) issued commissions of martial law (martial law was imposed on the military, however).[147] After the Glorious Revolution, the Mutiny Act 1688 - enacted to punish mutiny and desertion - stated in its Preamble:

> No man may be forejudged of life or limb, or *subjected to any kind of punishment by martial law*, or in any other manner than by the judgment of his peers, and according to the known and established laws of this realm.[148] (italics supplied)

This wording - repeated in later Mutiny Acts with the addition of the words '*in peace*' -[149] re-states Magna Carta, chapter 29[150] as well as confirms the Petition of Right 1627, s 8. As it was, no commissions of martial law were issued by the Crown after 1688 (at the latest). Halsbury notes:

> the issue of commissions of martial law has long been discontinued.[151]

Finally, Lord Halsbury LC in *Ex p Marais* (1902) stated:

> The framers of the Petition of Right knew well what they meant when they made a *condition of peace* the ground of the illegality of unconstitutional procedure.[152] (italics supplied)

In conclusion, any Crown prerogative to impose martial law on civilians in peacetime was made illegal by the Petition of Right 1627, s 8 (still extant). Thus, any abolition of the Crown prerogative to this extent will simply confirm present law.

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were scattered here and there in the bowels of the kingdom, and governed by martial law: the king gave commissions to the lords lieutenant and their deputies, in case of felonies, robberies, murders, outrages, or misdemeanours, committed by mariners, soldiers, or other disorderl;y persons joining with them, to proceed according to certain instructions, to the trial, judgment, and execution of such offenders, as in time of war; and some were executed by those commissions.' (spelling modernised). See also Forsyth, n 5, 193.

[144] Rymer, n 33, vol 18, 763 'to proceed according to the justice of martial law against such soldiers or mariners, or other dissolute persons joining with them or any of them, as within the said county [of Kent] or any part thereof, shall at any time, after the publication of this our commission commit any robbery, felony, mutiny, or other outrage or misdemanour, or which shall withdraw themselves from their places of service or charge as aforesaid, or shall be found within the said county or any part thereof, which by the martial law should or ought to be punished with death, and by such summary course' *etc.* See also Proclamation of 7 October 1626, 765.

[145] The wording in brackets was inserted in Halsbury's Statutes, to add clarification. See also Rushworth, n 25, 569 (speech of Glanvile MP of 23 May 1628 in a full Committee of both Houses of Parliament) 'The fourth and last [provision in the Petition of Right 1627] aimeth at redress touching commissions, to proceed to the trial and condemnation of offenders, and causing them to be executed and put to death by the law martial, in times and places, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might, and by none other ought to be adjudged and executed.' See also 558 and Blackstone, n 12, vol 1, 400 'And the petition of right enacts…that no commission shall issue to proceed within this land according to martial law.' See also Hallam, n 5, vol 1, 389.

[146] Forsyth, n 5, 193, to the Earl of Warwick in 1637 (going with the fleet to the West Indies) and in 1639 (to the Earl of Northumberland). See also one of the Commonwealth of 1653, 194. See also Clode, n 67, 6-8.

[147] See Articles of War governing the military, Clode, n 19, vol 1, 76-7, 475-6 (Monmouth rebellion). For military codes of 1672 & 1686, see Holdsworth, n 55, vol 6, 226. See also Clode, n 67, 15-9.

[148] 1 Will & Mar c 5 (1688). See also Samuel, n 27, 138; Robertson, n 85, 110; Tytler, n 30, 18 and Clode, n 19, vol 1, 143 & 499-500.

[149] *viz*. no man can be forejudged of life and limb, or subjected to any punishment within this realm by martial law, in time of peace.' Stephen, n 19, vol 1, 213 'the words 'in peace' which were not in the first Mutiny Act, probably meant that standing armies and military courts were, in time of peace, illegal, except in so far as they were expressly authorized by Parliament.'

[150] See n 103.

[151] Halsbury, n 13, vol 8(2), para 821, n 1. Also, 'The Crown may not issue commissions in time of peace to try civilians by martial law…'

[152] [1902] AC 109 at 115.

4. Martial Law - Military Law Imposed on Civilians in Time of Great Riots or Rebellion

Halsbury notes that the ambits of the Petition of Right 1627 are obscure and that they can be made to bear a wider interpretation.[153]Thus, it was never clear whether the Petition of Right 1627 was also intended to make it illegal to exercise the Crown prerogative to declare martial law during:

- Internal insurrection - such as in the case of great riots or rebellion; or
- War time.

Thus, Anson (in its 4th edition, in 1935) states:

> The Petition of Right, 1628, negative the legality of such action in peace in undoubted terms, leaving it arguable whether it contemplated such law as valid in the case of war. [154]

The historical position as to riots and rebellion will now be considered. However, the conclusion may be stated at the outset. By 1714 - as a result of the Riot Act 1714 - it was no longer necessary in any case to apply martial law to rioters. Further, in England, after 1688 there were no major rebellions in which martial law was needed (in the Jacobite rebellions of 1715 and 1745, the normal courts dealt with rebels). Martial law *was* still applied, however, in respect of rebellions in various colonies. But, because of the uncertainly as to the lawfulness of exercising such a Crown prerogative, invariably Acts of Indemnity were subsequently passed by Parliament to indemnify the military for their actions. The position is as follows:

4.1 Martial Law: Riots and Rebellions up to 1745

The position of Coke, Hale and Blackstone was clear:

- The Crown had no prerogative to impose martial law - even during great riots and rebellion - while the king's courts remained *open*, since it was for the king's courts to judge, and punish, criminal behaviour;[155]
- In particular, it was contrary to the Petition of Right 1627 to impose martial law on *civilians* while these courts were open.[156] Indeed, these legal writers believed it was murder to execute a civilian on the orders of a military court or tribunal if the courts were open (i.e. during peacetime);[157]

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[153] Halsbury, n 13, vol 8(2), para 821.

[154] Anson, n 20, vol 2, pt 1, 315. Holdsworth, n 55, 576 'The Petition of Right did not however deny that the constable and marshal's court had jurisdiction over soldiers in time of war. It was a declaratory act; and it is clear from the exposition of contemporary lawyers that it was not intended to abolish its legitimate jurisdiction.' Dodd, n 19, p 153 'in the Petition of Right nothing is in express terms either affirmed or denied as to what the king may do in time of war.' Bradley & Ewing, n 16, 632 'the Petition of Rights 1628 contains a prohibition against the issue by the Crown of commissions of martial law giving the army powers over civilians, at least in peacetime, and the meaning of this prohibition is far from clear today.' See also Brand & Nelson, n 37, 66 and a Report, n 127, 73, per Blackburn J 'I think… it would be an exceedingly wrong presumption to say that the Petition of Right, by not condemning martial law in time of war, sanctioned it; still it did not in terms condemn it.' See also Forsyth, n 5, 203 and Phillips & Jackson, 398. Capua, n 19, 172 'The framers of the Petition had no quarrel with martial law being exercised in war time among soldiers in the field, nor in the event of rebellion in England.' Also, 171. See also Clode, n 19, vol 2, 156 (Petition of Right only restrains the Crown in time of peace).

[155] Coke, n 11, vol 2, s 412 'when the courts of justice be open, and the judges and ministers of the same may by law protect men from wrong and violence, and distribute justice to all, it is said to be time of peace. So, when by invasion, insurrection, rebellions, or such like, the peaceable [*probably*, the peace of the] courts of justice is disturbed and stopped, so as the courts of justice be as it were shut up, *et silent leges inter arma*, [and amidst the clash of arms the laws are silent] then it is said to be time of war.' (spelling modernized). Also 'Time of peace is when the Chancery and other King's courts are open, whereby the law may be done to everyone in the usual way' (translated from the latin) and 'Whether a land is at war or not ought naturally to be adjudged by the records of the king and of those who keep and govern the king's courts by the law of the land, but not in any other way.' (translated from the latin). Holdsworth, n 55, vol 1, 576 'It was a time of peace if the central courts were open, and the sheriff could execute the king's writ.' See also Rushworth, n 25, pt 11, vol 2, App 79, 81 and Clode, n 19, vol 2, 158 (quoting Coke 'When the courts are open, martial law cannot be executed.')

[156] Coke, Hale and Blackstone's perception that soldiers were also governed by the general law and that martial law could only apply on the battle field (or, possibly, near it) was against the backdrop of England not having a (legitimate) standing army prior to the Glorious Revolution. It was only in 1688 - with the first Mutiny Act - that the legitimacy of a standing army became recognized (albeit only partly so, since the Mutiny Act had to be renewed annually). With the presence of a standing army, came the acceptance that the armed forces were subject to their own body of law (military law) during war, *and* peace, time.

[157] Brand & Nelson, n 37, 59 per Cockburn CJ, 'It is hardly conceivable that such authors as these, when writing on the laws of England, and carefully enumerating every species of law obtaining within the kingdom, would, when they came to speak of martial law, have been wholly silent as to the power of applying it to the trial and punishment of civilians in times of civil disturbance and insurrection, if any power so

- The fact that - in the past - the Crown had purported to impose martial law on civilians during peacetime – by virtue of commissions and proclamations – was the very reason why these legal writers deprecated martial law and declared it to be '*no law*'.

Thus, to the time of Blackstone at least (ie. 1765) the legal position as to the imposition of martial law, as stated by these legal writers, was clear:

> (i) Martial law only covered civilians on the battlefield (or close to)[158] and not away from it.[159] Only the former was *war time* – whether the war was against a foreign, or an internal, enemy;
>
> (ii) Martial law could not be imposed in *peacetime.* This included all riots and rebellions unless (i) applied (i.e. martial law could be applied against rebels in open armed resistance).

A similar perception in the 19th century was that of Cockburn CJ in *R v Nelson & Brand* (1867).[160] In that case a rebellion in Jamaica (a settled colony) occurred in October 1865 and a British subject and civilian called Gordon - thought to be one of the ringleaders - was apprehended by Governor Eyre. He was later executed for treason by a military court assembled by order of one Colonel Nelson and presided over by one Lieutenant Brand. It was argued that this court had no jurisdiction[161] and that - even if it had - such had been exercised corruptly. In his address to the jury, Cockburn CJ reviewed at length the history of martial law. He was careful to distinguish between cases where rebels (civilians) were put to death on the battlefield as the enemy (effectively, during war time) and where civilians were put to death *not* on the field of battle - which he treated as martial law as such.[162]Even in the case of rebel soldiers, Cockburn CJ noted a practice that prevailed up to Tudor times of executing prisoners *after* a battle was over, which he took to be barbarous and illegal. He concluded:

> if it be true that you can apply martial law for the purpose of suppressing rebellion, it is equally certain that you cannot bring men to trial for treason under martial law, *after* a rebellion has been suppressed.[163] (italics supplied)

Thus, Cockburn CJ clearly limited martial law to the battlefield and all attempts by the Crown to extend it - whether by proclamation or commission - he adjudged (rightly, it is asserted) to be illegal. Cockburn CJ also reviewed many of the commissions for martial law granted by the Crown granted in the reigns of Edward VI (1547-53), Mary (1553-8), Elizabeth (1558-1603) and James (1603-25); he regarded them also as illegal. He also referred to the Petition of Right 1627 and concluded:

> certain it is that from that time [i.e. 1627] martial law has never been attempted to be exercised in the realm of England by virtue of the prerogative.[164]

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applying it had in their opinion existed.' Cockburn CJ also quotes Rolle (later CJ) 'If a subject be taken in rebellion, and be not slain at the time of his rebellion, he is to be tried after by the common law.' See also Rushworth, n 25, vol 3, 79 and Forsyth, n 5, 211. See also *R v Eyre* (n 127), at 74 per Blackburn J.

[158] Forsyth, n 5, 207. At 213 'there is no legal necessity for any form of trial at all when the rebel is met with arms in his hands, *flagrante bello*, for he may be killed on the spot. But if, instead of being killed in open resistance, he were to be arrested, the gravest responsibility would be incurred if he were to be put to death without some form of trial, and analogy would suggest a trial by court martial.'

[159] Hale (1820), 13 'The king may punish his subjects by martial law during such insurrection or rebellion, but not after it is suppressed.' Where a sheriff in Tipperary, Ireland, flogged a man at a time of rebellion in 1798 but there was no pretence that the man had been involved in same, he was liable in damages. See *Wright v Fitzgerald* (1799) 27 ST 765. See also Stephen, n 19, vol 1, 215-6; Bradley & Ewing, n 16, 634-5 and Forsyth, n 5, 560.

[160] Brand & Nelson, n 37. See also Forsyth, n 5, 555-63.

[161] Governor Eyre, with the concurrence of a council of war, proclaimed part of Jamaica to be under martial law on 13 October 1865 but not the capital Kingston, where Gordon was seized after he surrendered himself to military forces on 17 October. Gordon was taken into custody by Governor Eyre on 20th October. He was executed on 23rd October, after a trial on the 21st.The military court comprised Lieutenant Brand RN, (President), Lieutenant Errington RN and Ensign Kelly of the 4th West India Regiment. On 9 November, a local Act of Indemnity was enacted (29 Vict c 1). On 6 February 1867 an information was laid before the Chief Magistrate at Bow Street for the arrest of Nelson on a charge of wilful murder. An indictment against him was presented to the Grand Jury on 16 April 1867. After the charge of Cockburn CJ, the Bill was thrown out. An indictment presented against Governor Eyre on 2 June 1868 was also thrown out by a Grand Jury, after the charge of Blackburn J (see n 127). See also 4 LR (QB) 242 and Clode, n 19, vol 2, 492-7.

[162] Brand & Nelson, n 37, 25 'We are not dealing with the case of rebels killed on the field of battle, or put to death afterwards without any trial at all. A rebel in arms stands in the position of a public enemy, and therefore you may kill him in battle as you might kill a foreign enemy…we must not confound [this] with martial law applied to civilians.'

[163] Ibid, 29 'the only justification of it [trial by martial law after a rebellion was over] is founded on the assumption of an absolute necessity – a necessity paramount to all law, and which, lest the commonwealth should perish, authorizes this arbitrary and despotic mode of proceeding.'

While this was true - as regards England post-1627 (with some exceptions)[165] - martial law was sought to be exercised in some colonies and in Ireland up to 1920, see 5. Cockburn CJ concluded that:

> no such thing as martial law has *ever* been put in force in this country against civilians, for the purpose of putting down rebellion.[166] (italics supplied)

This is a bit of a tall statement. It is only true if one treats as illegal all executions of civilians pursuant to proclamations, commissions *etc* prior to 1688 (ie. prior to the first Mutiny Act 1688) - including the execution of vagrants and vagabonds in the time of Elizabeth.[167] That said, it should also be remembered that, in many of these rebellions where civilians were executed other than on the field of battle, often a civil judge was present and the crime was treason. Therefore, the law being enforced (at least, claimed to be enforced) was legislation – the Treason Act 1351.

- Thus, civilians who were rebelling were hung, drawn and quartered (or, more speedily, hung) on the basis that there were 'traitors *and rebels*'. This point was important since it legitimised the actions of army officers acting under the command of the sovereign or his commander-in-chief.[168] This rationale was preserved during the Civil War (1642-9) - both sides executing '*rebels*' on the basis they had committed treason, a normal criminal offence as opposed to being a specific military one;
- Further, the Treason Act 1351 was expanded by the courts in the period 1517-1710 with a constructive interpretation of '*levying war*' being made to cover great riots.[169] The Act was also constructively expanded so that '*levying war*' not only covered levying war against the sovereign (*le roi*) but also against the State.[170]

As a result, in all these cases, those who administered justice against rebels - whether common law judges, persons appointed by the Crown under commission or military officers - would probably have said:

> 'We are not administering military law as such – we are administering the law of the land, *viz.* the Treason Act 1351.'

Further, by the 17th century, the degree to which martial law was imposed, diminished, since the normal courts soon interposed their jurisdiction. Thus, in the Monmouth rebellion in 1685 the notorious Jefferies CJ judged rebels according to the Treason Act 1351.[171] After 1714, martial law - in any case - did not need to be relied on in England.

- The Riot Act 1714 applied to riots and it enabled rioters to be forcibly dispersed, an hour after the Act had been read:[172]

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[164] Ibid, 45.Stephen, n 19, 210 (referring to the Petition of Right in particular) 'These authorities seem to show that it is illegal for the Crown to resort to martial law as a special mode of punishing rebellion.'

[165] Charles I sought to proclaim martial law affecting civilians in 1637 & 1639, see n 146.

[166] Brand & Nelson, n 37, 47.

[167] See ns 129-32. Cockburn CJ noted that people were put to death without trial after the Monmouth Rebellion in 1685 and the Jacobite Rebellions of 1715 &1745. However, he asserted these people were slaughtered without any pretence of martial law. See also Tytler, n 30, 99-100. Holdsworth, n 55, vol 1, 577 'in 1685, after the suppression of Monmouth's rebellion, [Colonel Percy] Kirke [1649-91, in charge of the forces of James II against Monmouth] was directed to send soldiers guilty of serious crimes to the ordinary courts for trial, as the military code was only in force during the actual rebellion.' This would apply also to civilian rebels (albeit, in practice, it was not likely observed in various instances).

[168] Doubtless, this legitimized, in early times, the execution of persons on the sole command of the sovereign. The execution of persons such as the Earl of Lancaster in 1322 (when caught in open insurrection, see ns 108-11) would doubtless have been legitimized by Edward II (1307-27), who seems principally responsible for condemning the Earl, on the basis that the Earl had committed manifest treason (levying war, treated as treason prior to the Treason Act 1351). Further, Edward II would probably have asserted that the sovereign, as commander-in-chief, had the legal right to order the execution of rebels after battle on his own authority. It may be noted that his father, Edward I (1272-1307), had been a notable exponent of ordering the execution of rebels after battle, with scant or no trial. See Bellamy, n 53, n 44, ch 3, especially 40 (Scots rebellion of 1306).

[169] McBain, n 44, 102-7.

[170] Ibid, 107-15.

[171] For those killed out of hand, Cockburn CJ though this was no law at all and wholly illegal, see n 167.

[172] Under the Act, if 12 or more persons were riotously assembled to the disturbance of the public peace and they failed to disperse after being required to do so by a Justice of the Peace *etc*, this constituted a felony. Further, after having read the Riot Act and an hour having passed, if

- There were no violent rebellions in England post-1745 which required large scale military action;[173]
- In the case of violent demonstrations of people seeking political change on large scale (such as the Chartists who sought the reform of Parliament) the Treason Felony Act 1848 was enacted to deal with them.[174]

In conclusion - after 1627 - there were no major riots or rebellions in England which required the imposition of martial law against civilians (even if legal).[175] *However, martial law was imposed in Ireland and the colonies.*

4.2 Martial Law: Irish Riots and Rebellions: 1795-1833

In Ireland, in 1795, rebellion against the Crown occurred and the civil authorities (it seemed) instituted martial law - exercising an asserted prerogative without proclaiming it as such. Because it was uncertain whether such a prerogative was legal or not, acts committed in suppressing the rebellion were sanctioned by an Irish Act of 25 March, 1799 and an indemnity was provided by an Irish Act of 1801 indemnifying acts from that date.[176]

- In 1798, there were more rebellions in Ireland, with insurrection breaking out in the counties of Kildare and Carlow. On 30 March 1798, Lord Camden (the lieutenant general) issued a proclamation declaring martial law.[177] Many people were executed under it;
- A relevant case is that of *Wolfe Tone* (1798)[178] although he was not executed, but committed suicide. Tone, an Irishman, was captured on board a French ship. Although Tone claimed to be a French officer and was dressed in the uniform of the same, he was sentenced to death for rebellion by a court martial in Ireland. An application was made to the court of King's Bench in Dublin for a *habeus corpus* on the ground he had been sentenced to death by an illegal court martial since the king's courts were still sitting and, thus, their ordinary jurisdiction had not been superceded (also that Tone, being a civilian, was not subject to a military court). A writ of *habeus corpus* was prepared, to prevent his execution. However, Tone committed suicide, dying some days before he could be brought before the court of king's bench.

His case gave rise to further concern about the legitimacy of the Crown to impose martial law when the courts were still open. As Cockburn notes,

> after this it was thought desirable to supersede the proclamation of the lord - lieutenant appointing martial law, and to have statutory authority for its exercise, so as to preclude the intervention of martial law.[179]

This statutory authority was the Irish Rebellion Act 1803 (also called the Suppression of Rebellion Act 1803).[180] Further, it seems clear that legal opinion at the beginning of the 19th century was turning against the legitimacy of civilians being tried by military courts - even in the case of rebellion.

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such riotous persons failed to disperse then they could be seized. If killed or maimed, the persons seizing them were indemnified. See also Dicey, n 16, 290.

[173] In the Jacobite rebellion of 1745, an Act empowered the sovereign (George II) to issue commissions for trying rebels in any county of the kingdom as if treason had been committed in that county. 19 Geo II c 9 (1746). See also McBain, n 44, 101 and Clode, n 19, vol 2, 163-8 (dealing with the 1715 & 1745 rebellions and the Gordon Riots of 1780. In the first two Acts of Indemnity were passed).

[174] McBain (2007a), 812-38.

[175] I exclude the purported application of martial law in limited circumstances, see ns 79-80 & 146. See also Clode, n 19, vol 2, 666-7 (Circular Despatch of 30 January 1867 to Colonial Governors on the Subject of Martial Law). Finlason (1866), (i) n 19 'the Petition of Right abolished martial law in time of peace, and…happily, there has not been in this country, since the Revolution [of 1688] any state of rebellion that could be deemed to amount to war.'

[176] 39 Geo III c 11 (An Act for the Suppression of Rebellion). Section 6 provided that 'nothing in this Act contained shall be construed to take away, abridge or diminish, the acknowledged prerogative of his majesty, for the public safety, to resort to the exercise of martial law against open enemies or traitors.' The Irish Indemnity Act of 1801 was 41 Geo III c 104. See also Anson, n 20, vol 2, pt 1, 316 and Brand & Nelson, n 37, 50-1 & 106. See also 36 Geo III c 6 (Irish Act, 1796 as amended) and 37 Geo III c 104 (Irish Act) (these did not refer to martial law as such). See generally Clode, n 19, vol 2, 168-74. See also Forsyth, n 5, 556.

[177] Forsyth, n 5, p 212 and Plowden (1806), vol 2, 690.Lord Camden was John Jeffreys Pratt, 1st Marquess Camden (1759-1840), see ODNB, n 52. See also Stephen, n 19, 211. Finlason notes, n 19, 128 that, prior to the proclamation, 'The peasants had no arms but clumsy pikes and a few guns in bad order, they were of course easily defeated. All the prisoners taken by the soldiers were hanged without any trial, and there is reason to believe that many shared their fate who had not shared at all in the rebellion…..The cruelties committed by the militia in Wexford provoked an insurrection there, and horrible excesses were committed.' See also Finlason, n 19, 131 and Clode, n 19, vol 2, 169 & 661-2 (proclamations). Also, Forsyth, n 5, 556.

[178] 27 ST 613 at 625. See also Brand & Nelson, n 37, 51-3; Dicey, n 16, 293-4 and Forsyth, n 5, 557.

[179] Brand, n 37, 53.

- In 1798, in Ireland, one Grogan, a commissary general in the army of the rebel United Irishmen was seized by the forces of the Crown when they took Wexford. Tried by court martial, he argued he had committed no overt act but had been forced to take a nominal lead. Found guilty - along with two others - he was executed on 28 June 1798[181] and later attainted for treason by an (Irish) Act of 6 October, 1798.[182] Grogan was executed pursuant to a proclamation of martial law imposed in Wexford in April 1798 - but prior to any Irish Act sanctioning it, which happened in 1799;[183]
- When it came to seeking a repeal of the Act of Attainder against him, the jurist Hargrave, when consulted professionally, indicated that, had he been consulted prior to the Act of Attainder, '*I should have deemed it fully open to me to express at least a doubt, – whether, under martial law, to try persons seized in rebellion, or seized upon suspicion of being rebels, before a court - martial constituted by the king's authority, and to punish them by death or otherwise, at the discretion of the members of such a court, was not an extension of martial law beyond its real object; and being so, was not an infringement of the law of England in a point of the most serious kind;*'[184]
- Hargrave made it clear that he thought such a purported Crown prerogative offended against the Petition of Right 1627.[185] Thus, he was endorsing the opinion of Coke in 1641 that - if a rebel was executed in peacetime (ie. when the courts were still open) pursuant to military law (including pursuant to a trial before a court martial or other military court) - it was murder.[186] The only exception was where Parliament expressly sanctioned the imposition of martial law.[187]

In 1833, when Ireland was again in a disturbed state, the Irish Coercion Act 1833 (also called the Insurrection Act 1833) was passed. It empowered the Lord Lieutenant to proclaim any county (or district) to be in a state or disturbance or insubordination. Also, for the same to order the convening of courts martial with a sergeant at law or barrister of not less than 5 years standing to act as judge advocate.[188] As Cockburn CJ notes:

> These instances of the application of martial law were therefore either under statutory powers, with which no man has, judicially speaking, a right to quarrel, or, when exercised by virtue of the prerogative of the crown, were followed by Acts of Indemnity; which, to say the least of it, sufficiently implies a doubt of the legality of the exercise of the power.[189]

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[180] 43 Geo III c 117 (1803)(rep)(An Act for the Suppression of Rebellion in Ireland). See also Brand & Nelson, n 37, 34; Tytler, n 30, 407-8 and Clode, n 19, vol 2, 173-4. This Act, s 5, declared that 'nothing in this Act contained shall be construed to take away, abridge, or diminish the acknowledged prerogative of his majesty for the public safety, to resort to the exercise of martial law against open enemies or traitors.' See also Finlason, n 19, 132 and Robertson, n 85, 295.

[181] Cornelius Grogan (1738-98), see ODNB, n 52. Grogan was hanged and beheaded, his head placed on the court house and his body thrown in the river Slaney (it was later recovered and buried). See also Hay (1803) and Madden (1857-60).

[182] Also attainted were Lord Edward Fitzgerald (1763-98, a key militarist in the United Irishmen) and Beauchamp Harvey (1762-98, commander in chief of the United Irishmen). For both, see ODNB, n 52.

[183] Opinion of Mr Hargrave in Irish Case Involving Martial Law, see Hargrave (1811), vol 1, 401 cited in Forsyth, n 5, 189. Hargrave stated 'that extremity [execution] was resorted to against him [Grogan], previously [ie. prior] to the Irish statute made in the 39th of his present Majesty [ie. the Act of Indemnity, 39 Geo III c 11, see n 176], for suppression of the rebellion in Ireland.' In Ireland, various Acts saved the right of the Crown 'for the public safety to resort to the exercise of martial law against open enemies and traitors'. See 27 Geo 3 c 15 (1787) (Irish), Suppression of Rebellion in Ireland Act 1803 (rep), Suppression of Disturbances and Associations in Ireland Act 1833 (also called the Irish Coercion Act), s 40 (rep). See also Halsbury, n 13, vol 8(2), para 821, n 12.

[184] Forsyth, n 5, 190. See also Tytler, n 30, 367 (writing in 1806). Only in the case of absolute necessity did Tytler think that the Crown could impose martial law, see 46. In this Tytler is referring to the Crown Prerogative in the case of emergencies, as discussed in **7**.

[185] Ibid, 192. See also Rushworth, n 25, vol 3, App.

[186] See 104. So too in the case of an alien who was not an enemy alien. See Forsyth, n 5, 201.

[187] Comyns, n 15 (title Parliament), 300, 'Martial law cannot be used in England without authority of Parliament.'

[188] 3 & 4 Will IV c 4 (1833)(rep)(An Act for the more effectual suppression of local disturbances and dangerous associations in Ireland). This Act, s 40, enacts that 'nothing in the Act contained shall be construed to take away, abridge, or diminish the…undoubted prerogative of his majesty, for the public safety, to resort to the exercise of martial law against open enemies or traitors.' See also Brand & Nelson, n 37, 55; Forsyth, n 5, 212; Stephen, n 19, 211; Finlason, n 19, 5 and Clode, n 19, vol 2, 174-5.

[189] Brand & Nelson, n 37, 57. Stephen, n 19, 211 (commenting on the Irish Coercion Act 1833) indicates that it cannot be supposed to repeal the Petition of Right 1627. Therefore, 'the words in the Irish Act would mean only that the Crown has an undoubted prerogative to carry on war against an army of rebels as it would against an invading army, and to exercise all such powers as might be necessary to suppress the rebellion and to restore the peace and to permit the common law to take effect.'

After 1838, the need for imposing martial law in Ireland was obviated by the Treason Felony Act 1848. This was sufficient until large scale rebellion broke out prior to the independence of Southern Ireland in 1922.[190] It may be noted that, in the troubles in Northern Ireland which occurred since 1969, martial law was never invoked.[191]

In conclusion, in the period 1798 - 1838, the imposition of martial law in Ireland was supplemented by legislation, due to doubts as to the legality of the exercise by the Crown of its prerogative.

4.3 Riots and Rebellions in the Colonies

Martial law was also imposed by the Crown in various colonies, in order to deal with rebellions.[192]Reference may be made rebellions in:

- Demerara (British Guyana) in 1823. A rebellion of Negro slaves broke out in 1823 and martial law was proclaimed between 18 August 1823 - 15 January 1824;[193]
- Canada in 1837 - 8. In 1837 - 8, Quebec rebels opposed the British colonial government. Martial law was declared by Governor Gosford between 5 December1837 - 27 April 1838;
- South Africa in 1835 - 6, in 1846 - 7 and in 1850 - 3;
- Ceylon in 1848. Martial law was declared by Governor Torrington between 29 July and 10 October 1848 to deal with a Kandyan revolt (the 'Matale' rebellion');[194]
- Jamaica in 1831 - 2 and in 1865 (see 4.1 above). Martial law was proclaimed on 13th October 1865 for four weeks, under the regime of Governor Eyre;[195]
- Cape of Good Hope and Natal in 1901 and 1906 - 8. Martial law was proclaimed in certain districts, in August 1901. It was later extended to the conquered Boer republics in the South African war of 1899 - 1902. Martial law was also resorted to in Natal in 1906 - 8 and, later, in the Union of South Africa;
- Ireland in 1798, 1916 and 1920. For martial law in 1798 (see 4.1 above). There was also rebellions against the British Government in 1916 (Easter Rising) and in 1920 - 1. After the Anglo - Irish treaty of

[190] See McBain, n 174. The problem the British authorities were faced with in Ireland after 1798 was large scale civil unrest - usually designed to remove colonial rule from Ireland. In the case of large scale violence directed to achieving these ends the British government found that invoking the Treason Act 1351 with it especially draconian punishment did not work, since juries would not convict. Nor did the law of sedition, since it did not have enough 'bite'(see McBain, 819, n 66 (sedition was a bailable offence and there was no right of forfeiture, for treason felony there was). Thus, in 1848, the Treason Felony Act was passed to 'catch' largescale acts of violence directed to changing the law or the status of the sovereign. It imposed a lesser penalty than treason (usually transportation). As it was, after 1848, in Ireland most violence against British rule transmuted into smaller acts of sabotage - including the use of explosives. This resulted in the Explosives Act 1885, being enacted. After 1887, violent resistance petered out until the 1st World War (1914-8).

[191] Bradley & Ewing, n 16, 632 'In Northern Ireland since 1969, at no time has the British government invoked the doctrine of martial law as a justification for exempting the actions of the forces from scrutiny in the courts; instead there has been reliance on statutory powers or on the use of common law powers falling far short of a martial law situation.' For legislation enacted to deal with the Troubles, see Phillips & Jackson, n 16, 402-3. See also the Indemnity Act 1920, ibid, 403.

[192] See Clode, n 19, vol 2, 481-511.

[193] See Bryant (1824), Da Costa (1994) and Clode, n 19, vol 2, 482-90. For rebellions in Barbados in 1805 & 1816, Ibid, 481-2.

[194] Mills (1964), ch 10.ACommittee of Enquiry appointed by the House of Commons presented a Report to Parliament in March 1850 (for citations as to the proceedings and evidence, see Mills, 189, n 3). See also Stephen, n 19, vol 1, 213. For allegations as to the inadequacy of the military courts in the rebellion, see Mills, 194-6 (18 rebels were shot, 66 imprisoned and 28 transported). Lord Torrington was George Byng, 7th Viscount Torrington (1812-4), Governor of Ceylon (1847-50), see ODNB, n 52. See also Wikipedia on the Matale rebellion. For an earlier rebellion in Ceylon in 1817-8 against the British, see Mills, 161-3. See also Clode, n 19, vol 2, 501-2. For rebellion on the island of Cephalonia in 1849, see 502-3; in the Cape of Good Hope in 1835, 1846 & 1850, see 503- 9 and on the island of St Vincent in 1862, see 503-11. It may be noted that, by the time of the latter, persons arrested during martial law were tried by civil tribunals (127 were convicted of felony).

[195] Brand & Nelson, n 37, 6. See Clode, n 19, vol 2, 490-7 (for the terms of the proclamation, p 492). This rebellion is particularly problematic since the governor Eyre extended martial law for 30 days when the rebellion had been put down in a couple of days (11-13 October 1865) and it was practical thereafter to try persons in the ordinary courts. Further, while the immediate rebellion killed 20 people, the aftermath resulted in (it is thought) in 439 black Jamaicans being killed by soldiers, 354 later executed (many under martial law) and 600 men and women flogged. Today, the response would be treated as disproportionate to the response. See *R v Eyre* (1867), n 127, p 74. Also, Heuman (1994). Also Wikipedia (Morant Bay rebellion).

> 1921, the Provisional Government of the Irish Free State (in office for ten months) resorted to martial law against the opponents of the treaty.[196]

In respect of a rebellion in Canada in 1837 - 8,[197] reliance was not placed on the right of the Crown prerogative to impose martial law but on an Act of Parliament which authorised the imposition of martial law. This point was made in a Joint Opinion delivered in 1838 by the Attorney General (Sir John Campbell) and the Solicitor General (Sir RM Rolfe) as to the power of the Governor of Canada to proclaim martial law.[198] Noting that - whether a proclamation of martial law was made or not - was irrelevant to the state of affairs,[199] the law officers stated:

> In any district in which, by reason of armed bodies of the inhabitants being engaged in insurrection, the ordinary course of law cannot be maintained, we are of opinion that the Governor may, even without any proclamation, proceed to put down the rebellion by force of arms, as in the case of foreign invasion, and for that purpose may lawfully put to death all persons engaged in the work of resistance; and this, as we conceive, is all that is meant by the language of the statutes referred to in the report of the Attorney and Solicitor General for Lower Canada, when they allude to the 'undoubted prerogative of his Majesty for the public safety to resort to the exercise of martial law against open enemies and traitors.'[200]

They continued by emphasizing that the power of the Crown to so act could now only be conferred by Parliament.

> The right of resorting to such extremity is a right arising from and limited to the necessity of the case – *quod necessitas cogit, defendit*.
>
> *For this reason we are of the opinion that the prerogative does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the ordinary tribunals, it is impossible to deal according to the regular court of justice.*[201]
>
> When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is *not*, as we conceive, any right in the Crown to adopt any other course of proceeding. Such power can only be conferred by the legislature, as was done by the Acts passed in consequence of the Irish rebellions of 1798 and 1803, and also the Irish Coercion Act of 1833.[202] (wording divided for ease of reference)

In conclusion, by 1838, England's law officers (opining on behalf of the Crown) had restricted the application of martial law to rebellions where (i) persons were taken in 'open resistance' and (ii) the courts were not open to enable rebels to be dealt with 'according to the regular court of justice.' This situation was treated as akin to war (see 7).

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[196] Anson, n 20, vol 2, pt 1, 316. In the Easter Rising of 1916, martial law was declared by Lord Wimborne, lord lieutenant on 24 April 1916. The rising lasted from 24-30 April 1916. Apart from those killed in fighting, six civilians were summarily executed on the orders of an army officer at Portobello barracks, Dublin. Fifteen persons were also executed by firing squad after court martial which began to 2 May 1916. For Ivor Churchill Guest, 1st Viscount Wimborne (1873-1939) see ODNB, n 52.

[197] See generally Schull (1971), Greenwood & Wright (2002), Forsyth, n 5, 198-206, Clode, n 19, vol 2, 497-500 and 39 Parliamentary Papers (1837-8).

[198] Forsyth, n 5, 198 -206.

[199] Ibid, 198 'such proclamation confers no power on the Governor which he would not have possessed without it. The object of it can only be to give notice to the inhabitants of the course which the Government is obliged to adopt for the purpose of restoring tranquility.'
In a Legal Opinion of the Attorney General (Sir Robert Henley) and the Solicitor General (Hon Charles Yorke) in respect of an anticipated invasion of Jamaica (a settled colony) in 1757, they indicated that a proclamation of martial law did not stop the execution of legislative authority by the civil authorities. 'Nor do we apprehend that by such proclamation of martial law, the ordinary course of law and justice is suspended or stopped, any further than is absolutely necessary to answer the then military service of the public and the exigencies of the province.' See Forsyth, n 5, 188-9 and Anson, n 20, vol 2, pt 1, 318 'It is clear also that the declaration of martial law makes no real difference to the situation, save that it serves to warn the people of the locality where martial law is proclaimed of the intentions of the government.' See also Bradley & Ewing, n 16, 633.

[200] Ibid.

[201] The Legal Opinion continues, 199, 'the question, how far martial law, when in force, supercedes the ordinary tribunals, can never, in our view of the case, arise. Martial law is stated by Lord Hale to be in truth no law [see n 100], but something rather indulged than allowed as a law, and it can only be tolerated because, by reason of open rebellion, the enforcing of any other law has become impossible. It cannot be said in strictness to *supercede* the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having already been practically superseded. It is hardly necessary for us to add that, in our view of the case, martial law can never be enforced for the ordinary purposes of civil or even criminal justice, except, in the latter, so far as the necessity arising from actual resistance compels its adoption.'

[202] Forsyth, n 5, 198-9. See also Bradley & Ewing, n 16, 633.

4.4 Riots and Rebellions – Position Today

By 1838, at the latest, legal opinion accepted that any Crown prerogative to impose martial law on civilians - even in the case of riots or rebellions (cf. where war prevailed) - was contrary to the Petition of Right 1627.[203] In more modern times Dicey (in 1948) stated:

> Soldiers may suppress a riot…but they have no right under the law to inflict punishment for riot or rebellion... [204]

More explicitly, Holdsworth (writing in 1938) stated:

> Though the military jurisdiction of the court [ie. the court of the constable and marshal] has ceased to exist, the limitations placed upon it by the Petition of Right, and the subsequent development of courts martial exercising jurisdiction over the soldiers of the crown, have had a very permanent constitutional result. *Their joint effect has been to vest jurisdiction over civilians in times of riot and rebellion in the ordinary courts of common law, and not in military courts.*
>
> Civilians are even then governed by the rules and processes of the common law, and not by the rules and processes applicable to the soldier…[the] victory over the constable and marshal's court has left the case of riot or rebellion to the common law, and has caused the 'state of siege' to be practically unknown in England.[205] (italics supplied and wording divided for ease of reference)

This statement, which reflects that of Coke in 1641, applies *a fortiori,* today, for a number of reasons.

- Unlike previous centuries, there is now a permanent, and well-equipped, police force to deal with riots. There is also distinct legislation on the offence of rioting as well as related offences;[206]
- Where the police needed re-enforcements post - 1848, usually special constables were used and not the army; [207]
- Levying war against the sovereign is still treason under the Treason Act 1351; and there is no reason why the courts cannot handle the (highly unlikely) case today of people rebelling, in an attempt to overthrow Elizabeth II;[208]
- The Treason Felony Act 1848 still exists to deal with large crowds who seek to use violence to require Parliament to change laws or to change to the monarchy;
- If the army is required to assist the police in the realm, they (like any other citizen) may use such force (including shooting) as is reasonable in the circumstances;[209]
- The Crown has a separate prerogative to act in the case of emergencies (see 6), such that there is no need in modern times to subject civilians to martial law and to military courts;
- The Civil Contingencies Act 2004 (see 7) empowers the Crown to act in the case of emergencies and to make regulations. These may subject civilians (including rioters and rebels) to special civil courts for criminal offences. Thus, subjecting civilians to military courts is not necessary.

Thus, there is no reason whatsoever to subject civilians to martial law in the case of riots and rebellions today. In any case, imposing martial law would be a *brutum fulmen* in modern times since the whole purpose of subjecting civilians to martial law in past centuries was to impose the death penalty - or harsher military penalties(whipping *etc*) - than were otherwise possible pursuant to the common law. However, in England, the death penalty has been abolished since 1998 for all offences. Harsh military penalties have also long been abolished.

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[203] Also, martial law was treated as being limited (as per Coke) to acts committed in the heat of battle, and not afterwards.

[204] Dicey, n 16, 293.

[205] Holdsworth, n 55, vol 1, 578. It is to be remembered that Hale held that martial law was only allowed 'in cases of necessity, in time of open war.' See n 107.

[206] Public Order Act 1986, s 1 (6). There is also separate legislation dealing with firearms, knives, appearing in military dress *etc*.

[207] Stephen, n 19, vol 1, 206 (writing in 1883), 'Happily the employment of military force for the suppression of a riot is a matter of rare occurrence in this county. When there is reason to fear any tumult with which the common police establishment cannot deal, the course usually taken is to swear in special constables…On one memorable occasion, however (April 10, 1848), the swearing in of a vast number of special constables in London and elsewhere, as an answer to threats of revolutionary disturbance, was of much use, as a proof of demonstration of the fact that the great bulk of the population were at the time opposed to any resort to violence for political objects.'

[208] The attempt would be worthless anyway since…the Bill of Rights 1688 establishes that Parliament can determine who is sovereign. Further, the mere taking of the sovereign into captivity, or declaring her to be deposed *etc*, would not change her status.

[209] See n 250.

In conclusion, the general principle of Coke that civilians cannot be subject to martial law in peacetime still prevails (the same to include riots and rebellions not amounting to open war). This leaves, however, some Irish cases in the 1920's, when opposition to colonial rule led to the formation of the Irish republic. In these - at first - the Crown prerogative to impose martial law was asserted. However, it was soon re-enforced by legislation. These are now considered.

5. Martial Law - Military Law Imposed on Civilians in War Time

Today, any assertion by the Crown of a prerogative to impose martial law on civilians in time of peace (including riots and rebellion) is illegal. However, does the Crown retain such a prerogative in time of *war*? That is, in the case of foreign invasion or civil war? Statements in Halsbury on this are confused because they conflate war with riots and rebellion. They also confuse martial law with quite separate Crown prerogatives to:

- act in the case of emergency;
- keep the peace.

Halsbury states:

> The Crown may not issue commissions in time of peace to try civilians by martial law; but *when there exists a state of actual war,* or of insurrection, riot or rebellion amounting to war, *the Crown and its officers may use the amount of force necessary in the circumstances to restore order*.[210] This use of force is sometimes termed 'martial law'.[211] (italics supplied)

This statement is confused in that '*insurrection, riot or rebellion*' only '*amount'* to war in the case of civil war. Thus, only civil war should be referred to. It is the lack of such definition – and the uncertain meanings of '*insurrection*' and '*rebellion*' in a general context (as well as the fact that they are not legal terms)[212] - which is the source of one of the problems in respect of martial law, and any legal analysis of it. Halsbury also states:

> Once a state of actual war exists the civil courts have no authority to call in question the actions of the military authorities, but it is for the civil courts to decide, if their jurisdiction is invoked, whether a state of war exists which justifies the application of martial law.[213] The powers, such as they are, of the military authorities cease and those of the civil courts are resumed *ipso facto* with the termination of the state of war;[214] and, in the absence of an Act of Indemnity,[215] the civil courts may inquire into the legality of anything done during the state of war.[216]

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[210] *R v Hampden* (1637) 3 ST 826 at 976 (Holbourne's argument) 'the general law of necessity, which is above all laws, for the public good private good doth yield on all parts.' At 1162, per Croke J, 'Royal power, I account, is to be used in cases of necessity, and imminent danger, when ordinary courses will not avail…as in cases of rebellion, sudden invasion, and some other causes, where martial law may be used, and may not stay for legal proceedings. But in time of peace, and no extreme necessity, legal courses must be used and not royal power.' See also Brand & Nelson, n 37, 85; Forsyth, n 5, 198-9 and Clode, n 19, vol 1, 5.

[211] Halsbury, n 13, vol 8(2), para 821. See also Forsyth, n 5, 198-9, 556-7.

[212] OED, n 20 (insurrection) 'The action of rising in arms or open resistance against established authority or governmental restraint; with pl., an instance of this, an armed rising, a revolt; an incipient or limited rebellion.' (rebellion) '1 Organised armed resistance to the ruler or government of one's country; insurrection, revolt. 2. Open or determined defiance of, or resistance to, any authority or controlling power.'

[213] *R (O'Brien) v Military Government of North Dublin Union Military Internment Camp* [1924] 1 IR 32 at 38, 'The court is bound, when its jurisdiction is invoked, to decide whether or not there exists a state of war or armed rebellion; but once it so decides, it has no power to prohibit, control, or interfere with any act of the military forces, whether it is a matter of detention, as in the present case, or the execution of a capital sentence after trial by a so-called military court…or the execution of a person without trial….' *R (Garde) v Strickland* [1921] 2 IR 317, per Molony CJ at 329 'this court has the power and the duty to decide whether a state of war exists which justifies the application of martial law'. *R (Childers) v Adjutant General of the Provisional Forces* [1923] 1 IR 5 (the applicant was arrested and charged with possessing a pistol. On an application for *habeus corpus*, it was held the writ must be refused, as a state of war being proved, the military to whom the duty of repelling force by force was committed, were the sole judges of how it should be exercised). See also Heuston, n 16, 157- 62.

[214] *Wolfe Tone's Case* (1798) 27 ST 613 at 625 (counsel to Tone) 'no court martial could have cognizance of any crime imputed to him, while the court of king's bench sat in the capacity of the great criminal court of the land. In times when war was raging, when man was opposed to man in the field, courts martial might be endured; but every law authority is with me, while I stand upon this sacred and immutable principle of the constitution – that martial law and civil law are incompatible; and that the former must cease with the existence of the latter.' See also Stephen, n 19, 212.

[215] Halsbury, n 13, vol 8(2), para 821, n 12, notes that Acts of Indemnity may be passed, in part, to obviate the uncertainty as to the Crown's prerogative to declare martial law. Heuston, n 16, 162-3 quotes Dicey (2007), 55 'of all the laws which a legislature can pass an Act of Indemnity is the most likely to produce injustice. It is on the face of it the legislation of illegality; the hope of it encourages violations of law and

It is asserted the modern position can be better determined by having separate regard to foreign invasion and internal insurrection. It may be remembered that the Petition of Right 1627 is not clear on the legality of the Crown to declare martial law in the case of war time.[217]

5.1 Foreign Invasion

Halsbury notes there are no English examples. As it is, England has not been invaded by a foreign power since William I (1066-87). Further, during World War I (1914-18) and II (1939-45), the Crown did not declare martial law.[218] In particular, it did not seek to submit civilians to courts martial.[219]

- If there were any prospect (or actuality) of an invasion today, there is no reason why the Crown should need to declare martial law in any case. And, if it were required, emergency legislation could be enacted to so provide (see 7);
- Further, the Crown has a general prerogative to act in an emergency (see 6). This could include the establishment of war zone (or summary) courts to administer criminal justice to civilians. Thus, any Crown prerogative to submit civilians to martial law is unnecessary even in the event of foreign invasion – whether actual or anticipated;
- Finally, even if an invasion was *so* sudden that Parliament was unable to assemble to pass legislation, the Crown has authority to take emergency action act under the Civil Contingencies Act 2004 (see 7).This would include the establishment of courts to deal with criminal acts by civilians. Thus, there is no need to impose martial law (and military courts of whatever nature) on civilians in the event of invasion.[220]

5.2 Internal Insurrection

Riots and rebellions have already been considered in 4. There are, however, instances which Halsbury cites as akin to war. It refers to a notice issued in:

- South Africa in 1902 during the Boer war when it was part of the British Empire;[221]
- Ireland in 1920 when it was part of the British Empire.[222]

There are some important points to note in respect of these precedents:

- These precedents are now nearly (or more than) 100 years old and they will not occur again since South Africa and Southern Ireland are no longer part of the British Empire. Today, the Crown could only apply,

of humanity. The tale of flogging Fitzgerald in Ireland, or the history of governor Eyre in Jamaica [see n 127], is sufficient to remind us of the deeds of lawlessness and cruelty which in a period of civil conflict may be inspired by recklessness or passion, and may be pardoned by the retrospective sympathy or partnership of a terror-stricken or vindictive legislature.'

[216] *Higgins v Willis* [1921] 2 IR 386 (so long as a state of war exists, an action for damages for wrongful destruction of property by military forces in a martial law area cannot be tried; but the plaintiff has a right to have his case proceeded with so soon as a state of war no longer prevails). See also Halsbury, n 13, vol 8(2), para 821.

[217] See n 154.

[218] Halsbury, n 13, vol 8(2), para 821'No state of martial law was declared in the United Kingdom during the two world wars.' Ibid, n 1. Halsbury also notes that, prior to World War II, the Emergency Powers (Defence) Act 1939 (rep) was passed. The making of provision for trial by courts martial of non- military persons was expressly excepted from the power to make defence regulations. Ibid, s 1(5). See also Halsbury, n 13, vol 8(2), para 821, n 1.

[219] The Emergency Powers (Defence) (No 2) Act 1940 gave authority for special war zone courts to exercise criminal jurisdiction if, on account of military action, criminal justice had to be more speedily administered than in the ordinary courts. See also Bradley & Ewing, n 16,632-5 and Halsbury, n 13, vol 8(2), para 821, n 16 and para 820, n 4.

[220] The only point of doing so today, would be to submit civilians to military courts. However, war zone courts presided over by civil judges would be more appropriate. See n 219.

[221] *Ex p Marais* [1902] AC 109. For an older instance of imposing martial law in war time see Forsyth, n 5, 211 (Pursuant to Regulation 10 of 1804, the Governor General of India in Council was empowered to establish martial law in time of war, or during open rebellion, in any part of British territory subject to the government of the presidency of Fort William). See also Finlason, n 19, 6.

[222] *R v Allen* [1921] 2 IR 241 at 261 (Proclamation of 10 December 1920. The lord lieutenant proclaimed certain Irish cities to be under martial law and he called on all loyal and well affected subjects of the Crown to obey and conform to all orders and regulations of the military authority issued by virtue thereof). See also Heuston, n 16, 154-7. For a useful chapter on the caselaw, see Ewing & Gearty (2000) ch 7.

in any case, martial law - besides in the realm - to the British Overseas Territories (formerly called Crown colonies or British Dependent Territories). These are few and far between;[223]

- In the 19th century, the courts were forced to re-look at Coke's definition of war and peace for the purposes of martial law – as to whether the courts were open or shut.[224] This was due to modern warfare giving rise to the situation that the courts might be technically open – but unable to operate due to security concerns or there being unable to cope (in some way) with handling criminal offences committed by civilians of a military nature;[225]
- In *Elphinstone v Bedreechund* (1830)[226] and - more particularly - *Ex p Marais* (1902), it was held that martial law could still be declared even if the courts were not physically shut, provided war was '*raging*'.[227]The effect of this, however, was problematic since there was then no hard and fast line between when civilians could be tried by military courts and when not - something of great import when the life of a man was at stake and when military justice could be summary and haphazard;
- The effect of martial law being held to exist was that the normal courts could not question the acts of military courts - however improper.[228] Thus, citizens could be put to death without a trial - or pursuant to a perfunctory trial (or a biased one);
- In the case of Ireland in the 1920's, special legislation accorded the military powers the right to put down the rebellion. Unlike the Crown prerogative - in the case of this legislation - the courts held they were able to compel the military authorities to act in accordance with its terms, see *Egan v Macready* (1921);[229]

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[223] Anguilla, Bermuda, British Antartic Territory, British Indian Ocean Territory, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn Islands, St Helena, Ascension and Tristan da Cunha, South Georgia and the South Sandwich Islands, Sovereign Base Areas of Akrotiri and Dhekelia, Turks and Caicos Islands. Many of these have tiny populations (see in brackets) and thus the idea of extending war to them would be of little worth.

[224] See n 155.

[225] As Holdsworth puts it, n 55, vol 1, 576, n 3, the issue is whether the courts are sitting in their own right or as licencees of the military. Halsbury states, n 13, vol 8(2), para 821, n 7 'Of course, the fact that the courts need military protection in order to function is evidence of a state of war: see *Childers,* n 213 per O'Connor MR at 15 'Can the [Supreme] Court be said to be freely functioning when it requires the protection of a military guard, when the circuits of the judges are interfered with, and when some of the county court judges dare not enter their districts ? ….The truth is that the courts are just struggling for continued existence in the state of war which is now prevailing. They are not functioning as in times of peace.' See also Phillips & Jackson, n 16, 399.

[226] 1 Knapp's Privy Council Appeal Cases (1829-31), vol 1, 316. Members of the provisional government of a recently conquered country (a territory in India) seized the property of a native of that country. It was held this seizure was in the nature of a hostile seizure and the municipal government had no jurisdiction. Lord Tenterden, 316. 'We think the proper character of the transaction was that of a hostile seizure made, if not *flagrante*, yet *nondum cessante bello*…and consequently, that the municipal court had no jurisdiction to adjudge upon the subject.' See also (1830) 2 STNS 379 and Holdsworth, n 19, 129-30.

[227] *Ex p Marais* (n 221), per Lord Halsbury, pp 114-5 'They [their Lordships] are of opinion that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals…The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging… The truth is that no doubt has ever existed that where war actually prevails the ordinary courts have no jurisdiction over the action of military authorities.' This case was one of appeal from the Supreme Court of the Cape of Good Hope. Martial law had been proclaimed and the appellant had been arrested for contravening Martial Law Regulations of 1 May 1901, part 14 s 2 (dealing with the enemy).See also Bradley & Ewing, n 16, 633.

[228] *A-G for Good Hope v Van Reenen* [1904] AC 114 (the Supreme Court of Good Hope had no jurisdiction to review judgments of martial law courts); *R v Allen* (n 222); *R (Garde) v Strickland* (n 213)(found guilty before a military court of levying war) per Molony CJ at p 332 'once the state of war justifying martial law is established to our satisfaction, we cannot interfere to determine what is or what is not necessary.' *R (Ronayne and Mulchay) v Strickland* [1921] 2 IR 333 (when a state of facts exists which justifies the imposition of martial law, the forces of the Crown, without any proclamation, may be employed in executing it). *Higgins v Willis* (n 216). *R (Childers)* (n 213) (arrested and charged with possessing a pistol. On an application for *habeus corpus*, held that the writ must be refused, since a state of war being proved, the military to whom the duty of repelling force by force was committed, were the sole judges of how it should be exercised, per O'Connor MR at 14-5 'once a state of war arises the civil courts have no jurisdiction over the acts of the military authority during the maintenance of hostilities.' See also *Johnstone v O'Sullivan* [1923] 2 IR 13 per Pim J (there is an inherent right at common law in every government that may be attacked to defend itself, and to form an army for the protection of itself and the people committed to its charge).

[229] [1921] 1 IR 265 (O'Connor MR held that the exercise of martial law was part of the royal prerogative and, as such, regulated by the Restoration of Order in Ireland Act 1920 (rep) with the result that civil courts retained jurisdiction to compel military authorities to act in accordance with the Act, disagreeing with *R v Allen* (n 222). See also Bradley & Ewing, n 16, 634.

- As Anson notes, in all of these colonial cases, the general policy of the Crown was to pass Indemnity Acts *ex post facto*. As a result, this deprived the courts of the opportunity to declare more fully the principles of martial law. Thus, it left many legal issues largely unresolved.[230]

In Ireland, the Restoration of Order in Ireland Act 1920 (passed by the Westminster Parliament) empowered the use of the Crown prerogative to declare martial law.[231] Anson notes:

> In the difficulties of 1920 - 1 the Restoration of Order in Ireland Act, 1920, was held[232] to authorise very drastic measures, but also to restrict the operations of the military to those provided under the Act, as constituting a statutory regulation of the prerogative. But in other cases[233] a much wider view was taken, perhaps more correctly. In the later struggle it was held that there were no statutory limitations.[234]

Today, there is little doubt that - if situations such as in the Boer War or Irish rebellions were to re-occur - legislation would be used to impose any martial law over citizens because of all the uncertainly as to the legality of the Crown prerogative. Be that as it may, in the case where the courts have no power to question military jurisdiction over civilians – including their being judged by military courts - it is debatable whether this can be said to be '*martial law*' at all.

5.2.1 Martial Law is no Law, Military Courts are no Courts

Cockburn CJ in *R v Nelson & Brand* (1867) - following Hale and Blackstone - did not think martial '*law*' could be termed as such. It was a state of no law at all[235] - the application of military force in a legal vacuum - albeit the normal courts might determine the legality of such actions once peace was restored.[236] Endorsing this, Halsbury LC stated in *Tilonko v AG of Natal* (1907) that:

> It is by this time a very familiar observation that what is called 'martial law' is no law at all. The notion that 'martial law' exists by reason of the proclamation…is an entire delusion. The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon whether there is a war or not.[237]

If martial law is no law - as a corollary - military courts do not comprise 'courts'. Halsbury LC also stated:

> It is clear that so called military courts set up under martial law are not really courts at all.[238]

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[230] Anson, n 20, vol 2, pt 1, 317.

[231] See generally Bradley & Ewing, n 16, 634. Also, Campbell (1994) and Jones (1969), vol 3, pt 1.

[232] *Egan v Macready* (n 229).

[233] *R v Allen* (n 222). In December 1920 - although the Restoration of Order in Ireland Act 1920 was in force (providing for civilians to be tried by properly convened courts martial and prescribing the maximum penalties) - martial law was proclaimed in areas in Ireland, (including that in which Allen was) and the general officer commanding the army declared that any unauthorized person found in possession of arms would be subject to the death penalty. The general also established informal military courts for administering summary justice to those alleged to have committed the prohibited acts. The King's Bench division in Ireland refused to intervene in the case of a death sentence imposed by such a military court on Allen for possession of arms. It was immaterial, the court held that Parliament had not imposed the death penalty for such an offence. See also Bradley & Ewing, n 16, 634.

[234] *R (Childers*) (n 213*).*

[235] See Brand & Nelson, n 37, 86. Halsbury, n 13, vol 8(2), para 821 'Probably the correct view to take of martial law itself is that it is no law at all.' See also the observation of the Duke of Wellington in the House of Lords on 1 April 1851 (on the question of the Ceylon rebellion in 1849, see n 194) 'Martial law is neither more nor less than the will of the general who commands the army; in fact, martial law is no law at all.' See also Forsyth, n 5, 211 who quotes Earl Grey on the same occasion 'what is called martial law is no law at all, but merely for the sake of public safety in circumstances of real emergency, setting aside all law, and acting under the military power.' Anson, n 20, vol 2, pt 1, 315 '[Martial law] is also used for the rules enforced in enemy territory under British occupation, the sense in which it is defined by the Duke of Wellington as being no law.' See also Finlason, n 19, 9-10, 140; Halsbury, n 13, vol 8(2), para 821, n 16 and Holdsworth, n 16, 128. See also Clode, n 67, 184-5 and Forsyth, n 5, 558 (Sir Robert Peel, martial law is a rule of necessity).

[236] *R (Ronayne and Mulchay) v Strickland* (n 228) per Molony CJ at 334 'We hold that when a state of things does exist which justifies the 'execution of martial law', and such is proved to our satisfaction, our hands are tied…When the state of war is over, the acts of the military during the war, unless protected by an Act of Indemnity, can be challenged before a jury; and in that event even if the king's command would not be an answer if the jury were satisfied that the acts complained of were not justified by the circumstances then existing and the necessities of the case.'

[237] [1907] AC 93 at 94.

[238] Ibid, per Halsbury LC at p 95 'Such acts of justice are justified by necessity, by the fact of actual war.' Stephen (writing in 1883), n 19, vol 1, 216 'The courts martial, as they are called, by which martial law, in this sense of the word, is administered, are not, properly speaking, courts

5.2.2 Effect of No Law and No Courts

The effect of martial law being no law – and military courts being no courts – produces an unsatisfactory situation where the lives of civilians can be forfeit pursuant to the decisions of extra-legal courts which are wholly unaccountable to anyone at the time - and from which there is no system of appeal. Thus, in *Clifford v O'Sullivan* (1921), a proclamation had been issued by the Lord Lieutenant in Ireland on 10 December 1920 that certain counties (including county Cork) were under martial law. This was followed by another proclamation two days later in which the commander-in-chief in Ireland declared the unauthorised carrying of arms to be punishable by death. He also authorised the general officer commanding Cork to issue orders for the holding of military courts such as might be necessary. In May 1921, the appellants (civilians) were sentenced to death by a military court for the unauthorised carrying of arms. However, since the sentencing body was not a court or judicial tribunal in any legal sense according to the Judicial Committee of the Privy Council, it did not see how it could review any decision it made. Cave LC stated:

> The so-called 'military court'…was not and did not claim to be a court or judicial tribunal in any legal sense of those terms. It was not a court martial, that is to say, a tribunal regularly constituted under military law, but a body of military officers entrusted by the commanding officer with the duty of enquiring into certain alleged breaches of his commands contained in the proclamation, and of advising him as to the manner in which he should deal with the offences, and its 'sentences' if confirmed, will derive their force not from the decisions of the military court, but from the officer commanding his Majesty's forces in the field. Its true position was described by Lord Halsbury in *Tilonko* (see above)…[239]

One would assert that this logic - principally emanating from Lord Halsburyin *Tilonko* - is flawed.

- When civilians are tried by a military court or tribunal for what might rightly be called criminal offences (even if not specifically termed as such) that body *is* purporting to act as a 'court';[240]
- Further, since all criminal courts can only emanate from the Crown or pursuant to legislation – these military courts are purporting to act in a judicial capacity. As such, they should be subject to the oversight of the higher civil courts (for example, decisions of the Court of Chivalry are subject to appeal to the Judicial Committee of the Privy Council). [241]

It should also be noted that, in *Tilonko* (1907), - whether the military court was a court as such (or not) was irrelevant, since legislation provided for the legality of its sentences in any case.[242]The effect of letting military courts do as they like is to effectively annul the general law. Thus, a jurist, Earle Richards, commenting on the *Marais* case (1902) opined:

> To suspend the law in such circumstances is in general to annul it altogether. To refuse to interfere at any rate in the case of a prisoner condemned to death is not suspension of law but abrogation; it is not a postponement of justice but a denial of the only remedy.[243]

One would agree:

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martial or courts at all. They are merely committees formed for the purpose of carrying into execution the discretionary power assumed by the Government.' See also Forsyth, n 5, 560 (not courts, mere committees).

[239] *Clifford v O'Sullivan* [1921] 2 AC 570 at 581. At 583 'it is plain that it is in law not a court or judicial tribunal of any kind.'

[240] Tytler, n 30, 109 refers to a 'Court martial, which is in the highest sense a court of honour, are themselves appointed the sole judges, or rather the legislators: For it is in their breasts to define the crime, as well as to award the punishment.'

[241] *Verbatim Report of the Case in the High Court of Chivalry of the Lord Mayor, Aldermen and Citizens of Manchester v The Manchester Palace of Varieties Limited* on Tuesday, 21 December, 1954 (The Heraldry Society 1955). Goddard CJ suggested that appeal would lie to the Judicial Commitee of the Privy Council, see p 53.See also *Manchester Corp v Manchester Palace of Varietie*s [1955] P 133. Courts martial operating under Crown articles of war were subject to appeal to the king's bench, see Sullivan (writing in 1779), n 94, 37. See also ibid, p 3 'the power of the crown, an unlimited power to create crimes, and annex punishments to them.'

[242] [1907] AC 93 at 95 per Halsbury LC, '*An Act of Parliament has been passed in Natal which in terms enacts the legality of the sentences in question, and provides that they shall be deemed to be sentences passed in the regular and ordinary course of criminal jurisdiction*. This Board has no power to review these sentences, or to inquire into the propriety or impropriety of passing such an Act of Parliament. The only thing for persons who are subject to such an Act of Parliament to do is to obey.' (italics supplied).

[243] Earle Richards, n 19, 40-1. Bradley & Ewing, n 16, 634 commenting on the *Clifford v Sullivan* case [n 239]'The House of Lords regarded the military tribunal in question, which was not a regularly constituted court-martial, as merely an advisory committee of officers to assist the commander in chief; moreover its duties had already been completed…It followed that the army's decision to take the life of a citizen did not become subject to judicial control merely because an informal hearing had been given to the civilian by a military tribunal.'

- The Court of Chivalry, originally, only applied to the execution of men on the actual battle field, because force - not law - there prevailed, as a matter of fact and necessity. This principle of necessity was then illegally extended to the summary trial and execution of prisoners off the battle field;[244]
- More recently, it was extended - in the colonies - to the application of military justice to civilians *after* open resistance had ended. This was resisted by persons such as Cockburn CJ in *R v Brand and Nelson* (1867);
- In the Boer war and in Irish cases in 1902 and 1920, the courts effectively abandoned civilians to military justice - even though the courts were (physically) still open. This was quite wrong and an abdication of responsibility.

However, these cases do establish that – at least by 1920 – martial law can only be applied to civilians by virtue of the Crown prerogative (if at all) *if* there is a state of actual war existing *and* the courts - although open - are not able to handle these matters as normal criminal cases.

In conclusion, today, the Crown prerogative to impose martial law on civilians could only apply in war time (ie. foreign invasion or civil war) and not in the case of riots and rebellion. In the latter case, there is also confusion with two other Crown prerogatives concerning: (i) emergencies; and (ii) maintenance of the peace. This is now considered.

6. Confusion between Martial Law and Crown Prerogatives to Act in an Emergency and to Keep the Peace

There is considerable confusion in legal analysis (especially in the 19th century) between martial law and other Crown prerogatives - notably the right of the Crown to:

- act in an emergency; and
- keep the peace.

This is, perhaps, not that surprising since martial law has not been applied in England since 1627 (with some exceptions). Thus, it is understandable how it might be confused with situations where the military have been called in to deal with large riots and other major social disturbances. Examples of confusion in separating out these distinct prerogatives may be seen in writers such as Dicey and Stephen. Thus, Dicey (in 1948) - likely following Stephen (writing in 1883) – created a new definition of martial law - confusing it with these other prerogatives. Dicey stated:

> Martial law is sometimes employed as a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot, or generally of any violent resistance to the law. [ie. to act in an emergency]. This right, or power, is essential to the very existence of orderly government, and is most assuredly recognised in the most ample manner by the law of England. The Crown has the right to put down breaches of the peace.[245] [ie. to keep the peace].

Today, one would assert the courts would clearly distinguish between these prerogatives and martial law – which only applies where military law is imposed on civilians in war time. Thus, martial law does not occur simply when the military is used to quell riots and civil disturbances. As to these other prerogatives, and why they are different to martial law:

6.1 Crown Prerogative – To Act in Emergencies

Halsbury states:

> The Crown has the same power as a private individual of taking all measures which are absolutely and immediately necessary for the purpose of dealing with an invasion or other emergency.[246] The Crown

[244] See n 118.

[245] Dicey, n 16, 288. Heuston, n 16, 151 '[martial law] means the right to use force against force within the realm in order to suppress civil disorder.' Phillips & Jackson, n 16 refers to one interpretation of martial law being to 'the common right and duty to maintain public order by the exercise of any degree of necessary force in time of invasion, rebellion, insurrection or riot.' See also Gross & Aolain, n 19, 32-3.

[246] Halsbury, vol 8(2), para 820 refers to *R v Hampden* (1637) 3 ST 826 at 975, 1011-3. Also, to the *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions* (HC Paper, 1995-6, no 115). For the exercise of the Crown prerogative in past times, see Bradley & Ewing, n 16, 635-7. For argument whether this is a prerogative or a common law power see Holdsworth, n 55, vol 10, 365.

> further has prerogative power to take action to maintain the peace[247] … the Crown has certain discretionary powers in time of war or emergency, for example the power of requisitioning ships.[248]

Thus, two prerogatives are involved; the first is the right of the Crown to undertake certain extraordinary measures to deal with an emergency. This would include emergencies arising from foreign invasion or major civil disturbance. However, this prerogative is separate to the application of martial law. Nor can it be used to justify the application of martial law in peacetime (including riots and rebellions) since the same is illegal by virtue of the Petition of Right 1627. Bradley and Ewing, in their text on *Constitutional and Administrative Law* (14th ed., 2007) state:

> In the present context, martial law refers to an emergency amounting to a state of war when the military may impose restrictions and regulations on citizens in their own country. In such a situation of civil war or insurrection, the ordinary functioning of the courts gives way before the tasks of the military in restoring the conditions which make normal government possible.
>
> Unlike the use of armed force for restoring order during riots, when the military are subject to direction by the civil authorities and to control by the courts, if excessive force is used, *under martial law the military authorities are (for the time being) the sole judges of the steps that should be taken. These steps might involve taking drastic steps against civilians, for example, the removal of life, liberty or property without due process of law, but possibly accompanied by the creation of military tribunals to administer summary justice*. Such tribunals are not to be confused with the courts - martial which regularly administer military law.[249] (italics supplied and wording divided for ease of reference)

One would agree with the basic tenor of this. However, martial law is best seen as a distinct prerogative, part of a larger Crown prerogative to act in the case of emergency. And the latter, itself, is part of the most basic Crown prerogative of all – the duty to maintain the peace. Thus, Halsbury states, as to the prerogative to act in an emergency:

> Whether this power of using extraordinary measures is really a prerogative of the Crown or whether it is merely an example of the common law right and duty of all, ruler and subject alike, to use the amount of force necessary to suppress disorder, is not quite free from doubt.[250]

6.2 Crown Prerogative – To Maintain the Peace

One would assert that this Crown prerogative to maintain the king's (or queen's) peace is the earliest, and most basic, Crown prerogative of all.[251] However, this prerogative is not martial law, as Cockburn CJ noted in his address to the jury in *R v Nelson and Brand (1867):*

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[247] *Harrison v Bush (*1855) 5 E & B 344 (119 ER 509) at 353 per Lord Campbell CJ (to the Secretary of State of the Home Department belongs the prerogative to maintain the peace in the kingdom, with the superintendence of the administration of justice as far as the royal prerogative is involved in it).

[248] Halsbury, n 13, vol 8(2), para 820.

[249] Bradley & Ewing, n 16, 632.

[250] Halsbury, n 13, vol 8(2), para 821 refers to *R v Pinney* (1832) 3 B & Ad 947 (172 ER 962)(the general rules of law require of magistrates, at the time of a riot, that they should keep the peace, and restrain the rioters, and pursue and take them; and to enable them to do this, they may call on all the king's subjects to assist them). Also, to a *Report of the Committee appointed to Inquire into the Circumstances connected with the Disturbances at Featherstone* on the 7th September 1893 (the Featherston Riots, 1893-94 (Cd 7234, 1893). See also Forsyth, n 5, 214-6 and Scott, n 19, 265-81 (for a useful summary of military involvement in riots in England).Halsbury, vol 8(2), para 821 refers to the Featherstone riots of 7th September, 1893. However, this was not a case where martial law was applied. In this case, 'locked out' miners rioted against a small number of troops (3 officers and 26 men) brought in to restore order. The Riot Act 1714 was read, giving the crowd one hour to disperse. However, the crowd growing ugly, the troops fired on them within the hour, injuring various people, two of whom died. A report of a Committee was issued (Bowen LJ was chairman of the Committee). The Report says, 9 'By the law of this country everyone is bound to aid in the suppression of riotous assemblages. The degree of force, however, which may lawfully be used in their suppression depends on the nature of each riot, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be attained…Officers and soldiers are under no special privileges and subject to no special responsibilities as regards the principle of the law.' The Report felt that the force used by the soldiers was reasonable in the circumstances. It recommended that the law on the suppression of riot should be consolidated and codified. Forsyth, n 5, 196 (quoting a Legal Opinion of 1824) 'If the military, obeying the lawful commands of the magistrate, be so assailed that resistance cannot be effectually made without sacrificing the lives of the rioters, they would in law be justified in so doing. It is obvious, therefore, that each case must depend upon its own circumstances, and that the only rule that can be given is that the force, to be legal and justifiable, must in every instance, as far as the infirmity of human passion will admit, be governed by what the necessity of the particular occasion may require.' See also Holdsworth, n 55, vol 10, 709-13 and n 19, 130.

> It is a right paramount to all law, and which the law of every civilised country recognises – that life may be protected or crime prevented by the immediate application of any amount of force which, under the circumstances, may be necessary.[252]

This most basic prerogative - founded on necessity (*salus populi suprema est lex – the safety of the people is the supreme law)* – originated (at least) from Anglo - Saxon times when all able-bodied men could be summoned by the sovereign to fend off foreign invasion or internal rebellion. It was part of the 'three necessities' (*trinoda necessitas)* imposed on the same.[253]

- The prerogative to act in the case of emergency is a sub-set of this most basic of Crown prerogatives - the right of the Crown to call on its citizens to protect society (the common weal). And, doubtless, one specific aspect of both of these prerogatives is the prerogative of the Crown to impose martial law. However, the former does not necessarily involve the latter - which is why they must be distinguished;
- Even in olden times, in the case of riots or emergencies, martial law was not necessarily imposed. It was only imposed by the Crown (by way of proclamation or commission) in rare situations. Thus, if the Crown prerogative to impose martial law is abolished, this will affect these other prerogatives only to the (very limited) extent they embrace martial law. It will not prevent, for example, the military being called in to quell domestic disturbances; or the right of the Crown to requisition ships *etc.*

Finally, the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR), incorporated into English domestic law by the Human Rights Act 1998, art 2(2)© provides:

> (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) *in action lawfully taken for the purpose of quelling a riot or insurrection*. (italics supplied).

Thus, art 2(c) justifies the use of force (including, where necessary, the deprivation of life) in order to quell riots or insurrections (rebellions) and the ECHR does not treat the same as martial law.

In conclusion, martial law is a sub-set of two wider Crown prerogatives - to take measures to deal with emergencies and to maintain the peace.[254] However, the latter have been (invariably) exercised down the centuries, in most cases, without the need to also invoke martial law - which is restricted to the application of military law to civilians. As it is, the ECHR does not treat the application of force needed to quell riots or rebellions as martial law. Finally, the Crown prerogative to impose martial law has, in modern times, been superceded (it is asserted) by legislation. This is now considered.

7. Martial Law and Emergency Legislation

7.1 Emergency Powers Act 1920 (rep)

In the 20th century, legislation was enacted to deal with emergencies - such as to almost obviate the need to resort to any Crown prerogative to impose martial law in any case. Thus, the Emergency Powers Act 1920, s 1(1) provided that - if it appeared to the sovereign that events of a specified nature had occurred - or were about to occur - he

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[251] Finlason, n 19, 73 'There is no prerogative of the Crown so ancient, so important, and so undoubted, as that of preserving the peace of the realm. It is one of those things which prove themselves, which rest on first principles, and arise out of a manifest and unavoidable necessity. It lies at the very origin of society, and is the main object for which Government exists, and the law was established…It is ...the first and most sacred duty of the Crown, and it was its earliest and most important prerogative, for it involves, as a necessary consequence, the prerogative of levying war, or using armed force, if necessary, for the purpose.'

[252] Brand & Nelson, n 37, 85. See also Forsyth, n 5, p 553 (martial law applied improperly to the right of Crownto repel force with force).

[253] Hallam, n 5, vol 2, 132, 'By the Anglo-Saxon laws, or rather by one of the primary and indispensable conditions of political society, every freeholder, if not every freeman, was bound to defend his country against hostile invasion.' Ibid, 134-5 'In the imminent peril of hostile, in the case of intestine rebellion, there seems to be no room for doubt that the king, who could call on his subjects to bear arms for their country and laws, could oblige them to that necessary discipline and previous training, without which their service would be unavailing.' *Childers* (n 213), at p 14 per O'Connor MR '*Suprema lex, salus populi* must be the guiding principle when the civil law has failed. Force then becomes the only remedy, and those to whom the task is committed must be the sole judges how it should be exercised.'

[254] A good way (one would suggest) to perceive this is to compare these prerogatives to a Russian doll. The largest is the Crown prerogative to maintain the peace. Inside it, is a lesser prerogative to act in the case of emergencies. And inside it, is a prerogative to impose martial law.

might, by proclamation, declare a state of emergency.[255] The events envisaged were those of such a nature as to be calculated - by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion - to deprive the community (or a substantial portion of it) of the essentials of life.[256] Once an emergency had been declared, it had to be communicated to Parliament who must sit.[257]

- Further, the Act provided that, where a proclamation had been made, regulations might also be made[258] which might confer (or impose) on a Secretary of State (or other Government department or any other person in the service of the Crown or acting on behalf of the Crown) such powers and duties as the Crown might deem necessary for, *inter alia*, the preservation of the peace and other purposes essential to the public safety and life of the community.[259] However, such regulations might not impose any form of compulsory service or industrial conscription;[260]
- Regulations might also provide for the trial of civilians by courts of summary jurisdiction. The maximum penalty was imprisonment for 3 months or a fine not exceeding level 5 on the standard scale or both.[261] The Act provided that the existing procedure in criminal cases was not to be altered; nor was there to be any fine or imprisonment without trial.[262]

This legislation – replaced by the Civil Contingencies Act 2004 (see below) - is useful since it indicates that - even in emergencies - the legislative intent, since 1920, has been to use criminal courts of summary jurisdiction - and not military courts or tribunals - to try civilians. Since this Act specifically refers to trying civilians in such courts, it supersedes (to the extent of the application of the Act) any attempt to try civilians in military courts pursuant to the exercise of the Crown prerogative.

7.2 Emergency Powers (Defense) Acts 1939 & 1940

Separate to the above Act, during World War II (1939-45), power was granted under the Emergency Powers (Defence) Acts 1939 and 1940 to establish special civilian courts for the trial of offenders in areas within the UK where - by reason of actual (or apprehended) enemy action - the military situation might be such that criminal justice could not be administered by the ordinary courts. The power was never exercised and it expired on 23 Feb 1946.[263] This legislative power also manifests a clear legislative intent to use special civilian courts to try civilians - even during wartime – obviating any need to resort to a Crown prerogative to invoke martial law in order to submit civilians to military courts.

7.3 Civil Contingencies Act 2004 [264]

This Act covers emergencies. It is wider in ambit that the Act of 1920 (see 7.1 above). It defines an emergency[265] to include war and terrorism.[266] In an emergency, regulations can be made without a state of emergency having to be declared - or Parliament having to agree to the same - although there is an opportunity for Parliament to consider any regulations made thereunder.[267] The ambit of these emergency regulations is extensive[268] and they

[255] Halsbury, n 13, vol 8(2), para 822. See also Phillips & Jackson, n 16, 400-1 and Ewing & Gearty, n 222, chs 2 & 4.

[256] Ibid.

[257] 'Ibid.'Where a proclamation of emergency has been made, the occasion of it must be forthwith communicated to Parliament. If Parliament is at the time separated by such adjournment or prorogation as will not expire within five days, a proclamation must be issued for the meeting of Parliament within five days, and Parliament must meet and sit accordingly.'

[258] Ibid, 'Such regulations must be laid before Parliament as soon as may be after they are made, and are not to continue in force after the expiration of seven days from the time when they are so laid unless a resolution is passed by both Houses providing for their continuance.' See also, Emergency Powers Act 1920, s 2(2).

[259] Ibid.

[260] Ibid. Also, Emergency Powers Act 1920, s 2 (1).

[261] Ibid. Level 5 is £5,000.

[262] Ibid.

[263] Bradley & Ewing, n 16, p 633. In the case of the First World War (1914-18) the Defence of the Realm Act authorized, for a few months, the trial of civilians by court martial for offences against the defence regulations. Ibid. However, this authority was much circumscribed in any case. See Cook (1918), 191-200.See also Phillips & Jackson, n 16, 403. For the Emergency Powers (Defence) Acts, see ibid, 403-4. Also, the Emergency Powers (Defence) (No 2) Act 1940 where civilians could be tried 'by…special courts, not being courts martial.'

[264] See generally, Bradley & Ewing, n 16, 637-9.

[265] Civil Contingencies Act 1920, s 19.

[266] Ibid, ss 1 & 19(1).

[267] Ibid, s 20.

[268] Ibid, s 22.

include the power to confer jurisdiction on a court or tribunal, including one established pursuant to the regulations.[269] The regulations can also create new criminal offences arising from a failure to comply with the regulations. However, s 23(4) of the Act provides that such regulations may *not* create a criminal offence other than one which:

- is of the kind described in section 22(3) (i);[270]
- is triable only before a magistrates' court; or
- is punishable with imprisonment for a period exceeding three months (or a fine exceeding level 5 on the standard scale); or
- will not alter procedure in relation to criminal proceedings.

Further, such offences may not contravene the Human Rights Act 1998 (see below) or require a person (or enable a person) to provide military service. The net effect of all this - it is asserted - is to replace the need to rely on any Crown prerogative to impose military law on civilians in wartime - including subjecting civilians to military courts. This Act has effectively supplanted it, since it specifically covers '*war'* and - more importantly - it provides for civil courts to deal with criminal offences arising out of emergency and war time regulations. Thus, this legislation (like the others discussed) effectively rules out (as well as the need for) military courts judging civilians *even* in war time.

7.4 Human Rights Act 1998

Finally, there are various articles of the ECHR (articles 5-7) which militate against martial law, since the latter is unlikely to satisfy their requirements. Article 5provides, *inter alia:*

> (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) The lawful detention of a person after conviction by a competent court;
>
> (b) The lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on suspicion of a having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (2)…
>
> (3) Everyone arrested or detained in accordance with the provisions of paragraph 1 v of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Article 6 provides:

> (1) In the determination of…any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly…
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty;
>
> (3) Everyone charged with an offence has the minimum rights:

[269] Ibid, s 22(3).

[270] Section 22 (3) provides that emergency regulations may make provision of any kind that could be made by Act of Parliament or by the *exercise of the Royal Prerogative*; in particular, regulations may… (i) create an offence of - (i) failing to comply with a provision of the regulations; (ii) failing to comply with a direction or order given or made under the regulations; (iii) obstructing a person in the performance of a function under or by virtue of the regulations…'. (italics supplied). Even if the Crown, purporting to exercise the Royal Prerogative, sought to impose martial law, it is restricted by the nature of the offences it can create and it can be one other than one which is tribal before a magistrates' court.

> (a) To be informed promptly in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) To have adequate time and facilities for the preparation of his defence;
>
> (c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 provides:

> No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

The trial of a civilian by a military court during peacetime would not likely meet a number of these requirements:

- *Article 5 provides that a person shall not be derived of their liberty unless in respect of the 'lawful arrest or detention of a person…for the purpose of bringing him before the competent legal authority on suspicion of a having committed an offence'. Further, such person must be 'brought promptly before a judge or other officer authorised by law to exercise judicial power'. He must also be tried before 'an independent and impartial tribunal established by law;'*
- A military tribunal will only be a '*competent legal authority'* if the Crown proclaims it as such, pursuant to martial law.[271] So too, the authority of any military personnel to exercise '*judicial power*' since military law does not otherwise provide for the trial of civilians by court martial. However, since martial law is 'no' law and military tribunals summoned under martial law are no 'courts' (as established by cases of high English authority, see 5.2.1 & 5.2.2), it is dubious whether they can be argued to exercise '*judicial*' power. Instead, they are exercising a non-judicial power 'on the field of battle' as it were, where force and not law prevails;
- Article 6 requires '*an independent and impartial tribunal established by law*.' In the case of a military court, military officers - untrained in law and assembled to dispense summary justice – will be unlikely to be '*independent and impartial'*. Indeed, they will be likely judging persons who have perpetrated (or intended to perpetrate) acts of violence against them and, thus, be emotionally involved. Further, it is unlikely that the conditions of Article 6(3) as to the trial process will be met.

In conclusion, it is unlikely the trial of a civilian by a military tribunal under martial law in peacetime would satisfy the above articles of the ECHR. As to war time or great civil commotion, Article 15 provides:

> (1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law;
>
> (2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1), and 7 shall be made under this provision;[272]
>
> (3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Would martial law be '*required by the exigencies of the situation*' in the case of war time or emergency? One would argue not, since the Civil Contingencies Act 2004 (and prior legislation) have made it clear that - even

[271] This would seem to be the only way which the Crown could empower, since commissions are now obsolete.

[272] Article 2(1) provides that everyone's life shall be protected by law and that no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. Article 3 prohibits torture. Article 4 (1) prohibits slavery and forced labour. For Article 7, see text.

during war and emergency - civilians should be tried by civil courts and that new criminal offences can only be created in very limited circumstances (see 7.3).

In conclusion, the Civil Contingencies Act 2004 makes provision for the government to pass emergency regulations in an emergency which includes war. Such regulations include the ability to confer jurisdiction on courts (including ones established under the regulations). However, the ability to alter criminal procedure is limited and new criminal offences must be such as to be triable in the magistrates' court in England and Wales. Thus, the need for the Crown to exercise its prerogative to impose martial law on civilians in war time and to submit them to military courts (which are not proper 'courts' in the general sense of the word) is avoided – effectively making obsolete such a prerogative.

8. Abolishing the Crown Prerogative to Impose Martial Law

Today, martial law can only comprise a reference to *military law*[273] being imposed on *civilians.*[274] The Petition of Right 1627, section 8 prevents martial law being imposed on civilians in peacetime, which includes all riots and civil disturbances. Thus, today, at most, the Crown only has a prerogative to impose martial law on civilians in war time and when the courts are not otherwise open. War time would cover both foreign invasion and civil war. The essential issue, therefore, is whether the Crown should have and/or needs this prerogative. In the past, subjecting civilians to martial law was, principally to enable the Crown:

(a) To impose the death penalty in circumstances not otherwise permitted by the common law. This is no longer relevant since the death penalty has been abolished for all purposes anyway;

(b) To subject civilians to harsher military punishments (whipping *etc*).[275] This is also no longer relevant since they have long ended;

(c) To try civilians in military courts - mainly to enable (a) and (b) to be applied.[276]

Thus, the main purposes of subjecting civilians to martial (military) law in the past no longer apply. Be that as it may, one would assert that such a draconian power has no place in a modern democracy and that - if ever required in the future - it should be applied by Parliament and not by the Crown and unaccountable Crown servants. The following may also be noted:

- Legislation in 1920 and World War II - as well as the Civil Contingencies Act 2004 – envisaged (and envisages) civilians being *tried* in civil courts and not military ones - even in war time situations. The latter, in particular, supplants the application of any Crown prerogative to impose martial law with the intent to subject civilians to military courts;
- The Crown prerogative to impose martial law does not apply where the king's criminal courts are open. Thus, it was not *required* in two World Wars, the courts remaining open. There is no reason to envisage any change in any future wars and - if the courts do have to close because of fighting - Parliament can make provision for military law being extended to civilians if required;
- The history of the implementation of martial law by the Crown down the centuries has been uniformly dreadful since it was grossly extended beyond the general premise that courts (per force) cannot sit on battle fields. Its extension to *permit* the military to try (and execute) rebels off the field of battle – often without trial or a perfunctory trial – was not law but savagery which has no place in modern society. English history provides vivid proof that - where the usual criminal courts abstain or are too scared to protect the rights of civilians and leave them to military personnel - the inexperience of the latter (and, doubtless, a high degree of emotionalism) has resulted in the gross abuses of human rights and no impartial trial.[277]

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[273] Bradley & Ewing, n 16, 632 'In former times martial law included what is now called military law.'

[274] The armed forces are governed by military law both in war, and peace, time.

[275] See n 81.

[276] Earle Richards, n 19, 133 'that species of martial law which consists of trial by military courts, or infliction of penalties without the sanction of a court of law, to which the term is often restricted.' It may be noted that the principle purpose (and result) of the application of martial law in the colonies and in Ireland was to enable alleged rebels to be tried summarily before military personnel assembled as an *ad hoc* court and then executed by hanging or firing squad.

[277] For the Ceylon rebellion of 1848, see Mills, n 194, 194-6. See also Brand & Nelson, n 37, 160-2 (re insurrections in Jamaica) 'if, on martial law being proclaimed, a man can lawfully be thus tried, condemned, and sacrificed, such of things is a scandal and a reproach to the institutions of this great and free country.' Finlason, n 19, 5 (on the Irish rebellion of 1796) 'The rebellion was in Wexford, but Mr Wright was flogged,

In conclusion, there are no good grounds for subjecting civilians to martial law during war time and - if it is ever were required - Parliament, and not the Crown, should impose this. As it is, the right to impose martial law is, ultimately, based on a very flimsy ground, summed up in the maxim said to have been contained in the final paragraph of the Roman Twelve Tables:

> *Et silent leges inter arma* [and amidst the clash of arms the laws are silent] [278]

As with all maxims this is pithy and memorable. However, as with many maxims in the legal context, it is also a *tabula in naufragio* (to use another maxim). Further, it betrays a lie – that the law, must be, in the end, subservient to war. However, as with many maxims one would suggest there is a better - and a greater one - more suitable to modern times. One on which civilised society and democracy has been built. *Fiat Justicia*! Let justice be done! Thus, it is absolutely essential, in a modern democracy, that civilians should be tried fairly and impartially in their own courts – even at personal risk to the lives of criminal judges themselves. The courts should remain open to the last – even when all the other bulwarks of democracy topple and fail. This *should* have happened in Ireland in the 1920's. Mercifully, it did during the Troubles.[279] Otherwise, civilians are exposed to a military justice which history has vividly proved can be wholly arbitrary, summary and unjust. What would be the consequences of abolishing the Crown prerogative to impose martial law? Very few, for the following reasons:

> (a) Martial law is severely restricted in ambit anyway, only applying in war time and when the courts are not open. However, the Civil Contingencies Act 2004 makes provision for the use of civil courts to try civilians even during war. In any case, Parliament could legislate to apply martial law, if so required;
>
> (b) It would only affect the other Crown prerogatives to act in an emergency and to maintain the peace to the extent of (a).[280] This is negligible, in practice, since martial law has not been imposed in England since 1627 (with a few exceptions up to 1688).

Abolition of this Crown prerogative would also clear out a large amount of bad law. And it would make re-dress for the fact that - at various periods in English history - the courts failed to protect the rights of civilians when they most needed their aid.

In conclusion, the Crown prerogative to impose martial law is obsolete and unnecessary. The imposition of military law on civilians is too detrimental to human rights to be left to so uncertain a prerogative. It should be abolished and - if ever required in future - it should be left to Parliament to curtail one of the most fundamental liberties of the individual - the right to be tried in the king's courts by the general laws of the realm.

9. Crown Prerogative to Impress Subjects in the Case of Sudden Invasion or Dangerous Rebellion[281]

Halsbury states:

> The Crown may also demand, and is entitled to, the personal services of every man *capable of bearing arms in case of sudden invasion or* dangerous *rebellion*, but except on such occasions it has no power, unless such a power is conferred by statute, to compel enlistment.(italics supplied) [282]

The authority for this proposition is scant. Further, it is an unwarranted extension of the Crown prerogative to forcibly impress subjects for the navy - which prerogative has never been abolished although it is clearly obsolete. This proposition of Halsbury derives from an observation made by Sir Michael Foster in *Broadfoot* (1743) [283] where he considered the legal basis for the impressments of mariners as sailors. Foster stated:

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without any military authority in Tipperary; Wolf Tone [n 178] was tried in Dublin, where there was no martial law, and the courts were sitting; and with…Mr Grogan [n 181]…if it was after the rebellion was thoroughly quelled, it was therefore illegal.'

[278] See n 155. Cicero in *Pro Milone* '*silent enim leges inter arm*a'. Scott, n 19, 382 'The universal practice of all nations has been to give supremacy to the military commander in all sieges. '*Inter arma silent leges'*, is then a maxim universally admitted. The public safety in that case imperiously requires that the orders of the commander of the troops should be obeyed…' See also *Childers* (n 213), at p 14 per O'Connor MR '*Inter arma silent leges* is a maxim two thousand years old, and has come to use from the Romans.'

[279] It is a great tribute to the personal courage of judges (and judicial personnel) in Northern Ireland that the courts continued to sit throughout the Troubles arising from 1969.

[280] Thus, it would not prevent the Crown using troops to help quell riots and major civil disturbance. The degree of force they can use must be reasonable in the circumstances. Further, in the case of open armed resistance against troops, it is reasonable for them to shoot in self-defence.

[281] See McBain n 1 which considers the Crown prerogative to impress mariners into the royal navy. Also, Butler, n 36.

[282] Halsbury, n 13, vol 8(2), para 819.

[283] *R v Broadfoot* (1743) Foster 154 (168 ER 76). The reference is to Mr Sarjeant Foster, sitting as recorder at the sessions of goal delivery in Bristol. See also *R v Tubbs* (1776) 2 Cowp 517 (98 ER 1215) per Mansfield CJ at 517 'The power of pressing is founded upon immemorial

> I think the Crown hath a right to command the services of these people [ie. to impress mariners into the royal navy], whenever the public safety called for it. *The same right that it hath to require the personal service of every man able to bear arms in the case of a sudden invasion or formidable insurrection.* The right in both cases is founded on one and the same principle, the necessity of the case in order to the preservation of the whole.[284] (italics supplied)

A note to this in the English Reports states:

> This personal service in cases of extreme necessity is a principal branch of the allegiance every subject owes to the Crown.[285]

Thus, to Foster, the rationale for impressing subjects (that is, compulsorily conscripting them into the armed forces) in the case of '*sudden invasion'* or '*formidable insurrection'* (which Halsbury re-translates as '*dangerous rebellion*') was analogous to the right to impress sailors (mariners) into the royal navy. And that both were predicated on the principal of allegiance to the Crown - as well as the need to preserve public safety. Prior to considering whether the Crown still requires such a prerogative, it is important to note that the legal basis for the Crown prerogative to impress mariners into the navy - as well as to impress male *subjects* to become soldiers - is flimsy. As a result, to claim that there is a general right of the Crown to impress *any* British subject who is an '*able bodied man*' (but not woman or child) capable of bearing arms is - quite frankly - dubious. It may have been correct in Anglo - Saxon times, when there was a general obligation of *trinoda necessitas*,[286] but not today - and not after 1688 when the realm had a permanent standing army to deal with invasions and rebellions.

9.1 Impressing Sailors into the Royal Navy[287]

In *Broadfoot* (1753), in respect of the legal right of the Crown to impress mariners into the navy,[288] Foster admitted there was no legislation in force which permitted it[289] nor any case in point.[290] Instead, he based his argument on '*immemorial usage*' at common law – a usage, itself, based on public policy and the defence of the realm. In support of this immemorial usage, Foster referred to mandatory writs and commissions dating from the time of Edward III (1327-77).[291] A previous article has considered in detail the validity of this argument[292] and it is not necessary to re-hearse it in detail. Suffice to say that the impressment of sailors (mariners) for the navy, which was bitterly resented over the centuries, was abandoned after 1814, nearly 200 years ago.[293] Also, as long ago as 1859, a Royal Commission report on the Manning of the Navy stated:

> The evidence of the witnesses, with scarcely an exception, shows that the system of naval impressments, as practised in former wars could not now be successfully enforced.[294]

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usage allowed for ages… the practice is deduced from that trite maxim of the constitutional law of England, 'that private mischief had better be submitted to, than that public detriment and inconvenience should ensue.'

[284] At 158. See also at 159 where Foster refers to 'A general immemorial usage not inconsistent with any statute, especially if it be the result of evident necessity and which tended to the public safety, is, I apprehend, part of the common law of England.'

[285] Reference is then made to three pieces of legislation, long repealed *viz* 11 Hen VII (1495) c 1 (treason); 1 Edw III (1327) st 2 c 5 (military service) and 16 Car 1c 28 (1640)(impressing of soldiers).

[286] See n 253.

[287] See generally, McBain, n 1. Also, Bruce, n 4, 100-1.

[288] Foster made it clear that he was not analyzing the even more uncertain proposition as to whether the Crown had the right to impress non-mariners into the navy. At 157 'We are not at present concerned to inquire, whether persons may be legally pressed into the land service, nor whether landmen may be legally pressed into the sea-service.' See also Butler, n 36, 5 (writing in 1771) 'We do not pretend to consider any right which the Government may claim, to press men into the land service; or its right to press into the sea service, other than seamen.' Also, 7, 'in the advanced state of government, which the British nation has reached, personal service neither is nor ought to be, nor can be, the duty of every citizen.'

[289] At 168 'I know of no statute now in force, which directly and in express terms empowereth the crown to press mariners into the [naval] service…' See also Blackstone, n 19, vol 1, 407 '[N]o statute has expressly declared this power to be in the Crown, though many of them very strongly imply it.'

[290] McBain, n 1, 19.

[291] Ibid, 20. See also Barrington (1766), 209-12.

[292] See McBain, n 1.Impressing in the navy was abused. For example, Charles I (1625-49) impressed common people who refused to pay towards his forced loan of 1626, see Hallam, n 5, vol 1, 383.

[293] Ibid, 19.

[294] Ibid.

Thus, the Crown's chances of successful arguing that it retains a general prerogative to forcibly conscript male civilians - some 200 years after it gave up the attempt to do so in the case of civilian sailors - is remote. If ever required, legislation is appropriate – as was used to conscript civilians into the armed forces in World War I (1914-18) and World War II (1939-45).[295]

9.2 Impressing Subjects into the Army

Whether the Crown ever had the right to press British subjects into the army is dubious. Chitty, writing in 1820, thought not.[296] For his part, in *Broadfoot (*1743), Foster did not specifically deal with the legal basis for impressing subjects into the army.[297]

- Foster did refer to several pieces of legislation of an early date (now repealed) which (he said) referred to the practice of pressing soldiers for foreign service.[298] Also, to the pressing of soldiers for service in Ireland.[299] However, these instances are not relevant to the present case since they were the result of legislation and not the exercise of the Crown prerogative;
- It seems clear Foster was also dubious whether impressment for land service ever existed, due to the system of military tenure which prevailed, at least, since the Norman Conquest in which land was held of the Crown in return for providing military service (see 1). This system ended in 1660;[300]
- This prerogative is far too extensive and nebulous to be legally sustainable. What invasion is '*sudden*' and what not? What rebellion is '*dangerous*' and what not? Thus, the prerogative should be restricted to war – including civil war. However, in the case of the latter, the Crown forcibly conscripting men to fight against their fellow countryman would only likely exacerbate the situation – and there is no precedent. Also, how can the courts determine the legitimacy of this prerogative and whether its terms are satisfied?[301]

As to any Crown right to press in the case of war time or dire necessity, an Act of 1640(repealed) states that:

> Whereas by the laws of this realm none of his majesties subjects ought to be impressed or compelled to go out of his country to serve as a soldier in the wars except in the case of necessity or the sudden coming in of strange enemies into the kingdom or except they be otherwise *bound by the tenure of their lands or possessions*.[302] (italics supplied)

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[295] In World War I, the Military Service Act 1916 provided that single men aged 18-41 (later to age 51) were liable to be conscripted unless widowed with children or ministers of religion. Conscription started on 2 March 1916. The Act was extended to married men on 25th May 1916. It ended in 1919. In World War II, the Military Training Act 1939 (later, National Service (Armed Forces) Act 1939) provided that men aged 18-41, not in reserved occupations, could be conscripted to serve in the armed services (army, navy, air force – they could choose which). In 1941, single women between the ages of 20-30 were conscripted (they did not fight but were placed in reserved occupations). Conscription continued, post war, with the National Service Act 1948 (for men aged 17-21). Conscription ended in 1960. In the British Overseas Territories only Bermuda still has conscription. See also Hawtin (1917-18).

[296] Chitty, n 10, 47 noted that, apart from legislation, 'his majesty has no legal power to force anyone to enlist in his armies.' Cf. Barrington, n 291, 210-1, who refers to 35 Eliz c 4, see n 298.

[297] See n 288.

[298] *R v Broadfoot* (1743) Foster 154 (168 ER 76), at 175 he referred to 1 Edw III (1327) st 2 c 5 'The king wills that no man from henceforth shall be charged to arm himself, otherwise than he was wont in the time of his progenitors kings of England; and that none be compelled to go out of his shire, but [where necessity requireth and sudden coming] of strange enemies into the realm; and then it shall be done as hath been used in times past for the defence of the realm.'Also, to 25 Edw III (1350) st 5 c 8 'no man shall be constrained to find men at arms, hoblers nor archers, other than those which hold by such services [ie. by virtue of military tenure], if it be not by common assent and grant made in Parliament'.See also Clode, n 19, vol 1, 355 which cites 35 Eliz c 4 (1592) which refers to soldiers and mariners 'having been pressed and in pay for her majesty's service [in 1588]'. However, the reference to pressing mostly likely refers to mariners, not to soldiers. See also Hale (1736), vol 1, 679. Hale was dubious about the right of the Crown to impress. In modern times, regulations under the Civil Contingencies Act 2004 cannot be used to impress, see 7.3.

[299] Hallam, n 5, vol 2, 131 refers to 4 & 5 Phil & Mary c 3 (1557) (military service) which, he asserts, 'recognises, as it seems, the right of the Crown to levy men for service in war'. See also Clode, n 19, vol 1, 352-3.

[300] *R v Broadfoot* (1743) Foster 154 (168 ER 76), at 175. See also ns 28-30.

[301] Whether a rebellion is dangerous or not is not really for a judge to decide. It depends on political events and the ability of the police and army to contain the same.

[302] 16 Car I c 28 (1640) (An Act for the better raising and levying of soldiers for the present defence of the kingdoms of England and Ireland). Justices of the Peace and mayors were empowered to raise and impress soldiers by order of the king and both Houses of Parliament. See also Clode, n 19, vol 1, 26; Hallam, n 5, vol 2, 100 and Tytler, n 30, 66-7. For the abolition of pressing by Parliament during the Civil War, see

The words in italics are otiose since military tenure was abolished 1660. Further, in the case of impressment of subjects into the army by virtue of *legislation*, this ended in 1780.[303] So, was there ever a Crown prerogative to impress subjects into the army?

- One would suggest the answer is 'no' - which is why legislation was employed in the few cases this occurred. Therefore, the statement in Halsbury that there is a Crown prerogative to impress any British man capable of bearing arms in the case of '*sudden invasion or dangerous rebellion'*[304] is based on little more than the observation of Foster that this prerogative can be exercised in the case of '*sudden invasion or formidable insurrection'*, itself unsupported save in respect of an Act of 1640 (now repealed) which (it appears from the context) to refer to the obligation of soldiers (not civilians) to serve abroad in the case of '*necessity or the sudden coming of strange enemies into the kingdom'*;
- Further, when there were rebellions within the realm in the past (see 2) there appears to be little, or no, evidence of the Crown forcibly enlisting men (tenure, indenture and commissions of array being relied on).[305] And after, 1689 when there was a standing army, professional soldiers were used to deal with the Jacobite uprisings of 1715 and 1745.

Thus, it is doubted whether the proposition of Halsbury that the Crown has a prerogative to compel the forcible enlistment of civilians in times of sudden foreign invasion, or internal rebellion, holds water. In any case, today, it is unnecessary and would likely be wholly ineffective in practice. For example, if the United Kingdom was suddenly invaded and the military proved ineffective (as well as, one assumes, the police and voluntary enlistees) is it credible that the Crown could force able bodied men to take up arms against their will? One thinks not - not least because the legal right of the Crown to so act is so uncertain.[306] As it was, in two World Wars, legislation provided for conscription and not reliance on any Crown prerogative.

In conclusion, any Crown prerogative to impress male subjects in the case of 'sudden invasion or dangerous rebellion' should be abolished. It is unnecessary and the matter should be left to legislation if ever required.

10. Crown Prerogative to Billet[307]

The word '*billet*' – which derives from the French word meaning a '*note*' - is a military order to the recipient to provide board, and lodging, for military personnel.[308] In early medieval times, it was also common for officials of the king's household and important foreign visitors to be billeted in the homes of citizens in the City of London,

Rushworth, n 25, vol 6, 292. Clode, n 19, vol 2, 8 'The impressment of soldiers by the direct orders and under the sole authority of the Crown, absolutely ceased after the revolution of 1688.'

[303] McBain, n 1, 19. For the recruitment of soldiers prior to this see Clode, n 19, vol 2, ch 15.

[304] The epithets '*sudden*' and '*dangerous*' add nothing. The fact that the invasion is sudden or not, is not a criterion. The fact that the British military would otherwise be overwhelmed, is. Further, '*rebellion*' against what ? If against the sovereign, it would constitute levying war under the Treason Act 1351 (or conspiracy under the Treason Felony Act 1848). If against Parliament in order to force it to change laws, it would be covered by the Treason Felony Act 1848. There is no reason why military courts should determine such things (in the Jacobite rebellions of 1715 and 1745 it was left to the courts). Further, today, the chance of people rebellion against the sovereign is less than remote, since the sovereign no longer has any power.

[305] See ns 28-34.

[306] One would suggest that large numbers of untrained civilians would also be unnecessary in a modern war and would likely be more of a liability than an asset.

[307] See Clode, n 19, vol 1, ch 11.

[308] Halsbury, n 13, vol 2(2), para 126. 'To billet' means to require an occupier of a certain kind of premises to provide accommodation in them as quarters for members of her majesty's forces or their vehicles. OED, n 20, (definition of billet (4)), 'An official order requiring the person to whom it is addressed to provide board and lodging for the soldier bearing it. Hence billet-master, the official whose duty it is to make out billets; billet-money, the cost of quartering soldiers.' See generally, McBain, n 140, 96-8 (it discusses billeting in the context of the Petition of Right 1627).

something much resented.[309] However, by the18th century, with the expansion of inns (hotels) throughout England, billeting tended to be restricted to them – often to their ruin.[310]

- Under Charles I (1625-49), the Crown prerogative to billet was particularly abused by him. The Petition of Right 1627 (still extant in part)stemmed from the attempt of Charles I to raise the Forced Loan of 1626, to re-plenish the depleted royal coffers;[311]
- One tactic employed to make wealthy people pay this forced loan was to billet troops (mainly soldiers returning from Cadiz)[312] on them - an unpleasant experience since these soldiers were often unruly and little, or no, payment was made for their lodging.[313]

Thus, the Petition of Right 1627, which petition was granted, in section 8 of the same (still extant), requests that Charles I:

> would be pleased to remove the said *soldiers and mariners* and that your people may not be so burdened in time to come.[314] (italics supplied)

In short, the Petition enacts that the sovereign will not, in the future, billet '*soldiers and mariners'* on the general public. This was confirmed in a proclamation in January 1688 by William III. [315]However, as Maitland (writing in 1908) has pointed out, the billeting provisions contained in the Petition of Right 1627 were annually suspended. [316] Thus, in more modern times, the Army Act 1881 provided that:

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[309] The marshal of the Royal Household billeted visitors to the coronation of Edward II (1307-27) on London citizens, in their hostels (referring to houses, in this case, as opposed to public inns). See Proclamation of 1308, 'The hostels in the City of London, which were taken by the marshals of our Lord King Edward, son of King Edward, for lodging the great folks, native and foreign, who had come to the coronation of our said Lord the King, on [24 Feb 1308] were, by award of him, our Lord the King, and his council, given up on the Thursday following; it being understood that if the parties occupying them should wish to make any further stay, they were to make recompense to the owner of the house for the same, *etc*'. See Riley (1868), 64-5.

[310] Burn, n 46, 80-1 (in 1779) refers to 2 Geo III c 20 (1763) s 100 (it limited billeting to inns, livery stables, ale houses, victualling houses and liquor houses).

[311] The loan netted about £250,000. See Rushworth, n 25, vol 1, 418-9. At 419 'To the imposition of loan was added, the burden of billeting of soldiers formerly returned from Cadiz, and the moneys to discharge their quarters were for the present levied upon the country, to be repaid out of sums collected upon the general loan.' Samuel, n 27, 49 'Soldiers were billeted in private houses; and under the denomination of loans, large sums were required of the people in the second year of the king's reign, for the assistance of the king of Denmark; and they, who refused to comply with the requisition, were either imprisoned or enrolled for soldiers.'

[312] The Cadiz expedition of 1625, an expedition against the Spanish by the English and the Dutch, and masterminded by the Duke of Buckingham, Lord High Admiral, the favourite of Charles I, was a disaster. Returning troops to England were rebellious and disorderly. See also Manning (2006) and Clode, n 19, vol 1, 19-20.

[313] Petition of Right 1627, s 6 'And whereas of late great companies of soldiers and mariners have been dispersed into divers counties of the realm, and the inhabitants against their wills have been compelled to receive them into their houses, and there to suffer them to sojourn against the laws and customs of this realm and to the great grievance and vexation of the people.' Charles billeted troops in civilian homes mainly in the South East of England. See also Boynton (1959), 23-40. See also Rushworth, n 25, 540-4 (Mr Speaker's petition to the king at the delivery of the petition for billeting of soldiers). Also, 564, 'In our petition of right to the king's majesty. we mention…that no freeman ought to be compelled to suffer soldiers in his house.' Also, 566. Hume, n 4, vol 5, 25 'The soldiers were billeted upon private houses, contrary to custom, which required that, in all ordinary cases, they should be quartered in inns and public houses. Those who had refused or delayed the loan, were sure to be loaded with a great number of these dangerous and disorderly guests.' Also, 37.

[314] See McBain, n 140, 95-100. In the USA, the Quartering (Mutiny) Act of 1765 required the American colonies to supply food and accommodation to British troops. Opposition to it helped spark the American War in Independence. Congress prohibited billeting in the Third Amendment of the Bill of Rights. Constitution, art 3 'No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor in time of war, but in a manner to be prescribed by law.' See also Blackstone, n 11, vol 1, 400 'And the petition of right enacts, that no soldier shall be quartered on the subject without his own consent.' See also 31 Car II c 1 (1679), s 32 'it shall and may be lawful for every…subject and inhabitant to refuse to sojourn or quarter any soldier or soldiers notwithstanding any command order or billeting whatever.' It also states 'by the laws and customs of the inhabitants cannot be compelled against their wills to receive soldiers into their houses and to sojourn them there.'

[315] See Clode, n 19, vol 1, 229-30 (suspended until 20 December 1689). It may be noted that Charles II (1660-85) continued to billet soldiers on private persons. Ibid, vol 1, 452 (billeting order of 6 April 1672). For the non-observance of the prohibition on billeting by James II (1685-8), ibid, 80-1

[316] Maitland, n 16, 452 'Billeting has been found necessary, and year by year the section about it in the Petition of Right is solemnly suspended'. Referring to the Mutiny Act of 1881 he also stated 'But the burden [of that Act] is not, I think, very heavy. Soldiers can only be billeted on those

> During the continuance in force of this Act, so much of any law as prohibits, restricts, or regulates the quartering or billeting of soldiers on any inhabitant of the UK without his consent is hereby suspended so far as such quartering or billeting is authorised by this Act.[317]

The unpleasantness to ordinary citizens of having soldiers billeted on them ended by 1688 since billeting was then restricted to inns *etc*.[318]

- Current legislation, the Army Act 1955, suspends the prohibition in the Petition of Right 1627 - although this is not strictly necessary since the Petition was designed to cover the billeting of '*soldiers*' and '*mariners*' on private citizens and the Army Act 1955 (as well as the Air Force Act 1955) [319] restricts billeting to inns *etc*.[320]Similar powers are available to the naval authorities so long as the billeting provisions of the Army Act 1955 are in operation;[321]
- The provisions in the above Acts are of no effect until it appears to the Secretary of State for Defence that the public interest so requires and he makes an order directing that these provisions are to come into force.[322] The provisions remain in force for only one month. However, they can be extended by a resolution of each House of Parliament that the same is required in the public interest.[323]

Thus, is the Crown prerogative to billet still required? One would argue not, for the following reasons:

- Legislation now covers the billeting of soldiers, sailors and air force personnel. Thus, the Crown prerogative has been superceded in respect of the first two - and it probably never applied to air force personnel in any case (the air force being only established in 1918, long after billeting was no longer utilised in practice);[324]
- The armed forces now occupy extensive military accommodation and so billeting is no longer required. If billeting were ever required in the future, the Secretary of State for Defence can rely on legislation - although it is most unlikely inns and pubs would ever need to be availed of (or be of much use). Doubtless, these legislative provisions could be supplemented by emergency powers legislation, if required.

In conclusion, the Crown prerogative to billet members of the armed forces on the general public should be abolished. This would enable the repeal of the provision in the Petition of Right 1627 which prohibits the billeting of soldiers, or mariners, on citizens.

11. Conclusions

James I (1603-25) told the Commons, in a petition made to him in 1621, that:

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whom, roughly speaking, one may call keepers of public houses – victualing houses is the statutory word. The prices to be paid for accommodation are fixed from time to time by parliament, and the act goes into detail; indeed it chronicles small beer, for not more than two pints thereof need be provided for any soldier *per diem*. So carriages, carts, horses may be impressed for the transport of regimental baggage, all to be practically paid for at parliamentary rates.'

[317] The Army Act 1881 expired in 1956, being replaced by the Army Act 1955.

[318] See n 310. See also Bruce, n 4, 292. The Army Act 1881, s 104(2) 'Provided that an officer or soldier shall not be billeted – (a) in any private house.'

[319] Air Force Act 1955, ss 154-64.

[320] Army Act 1955, s 155(1) 'Billets…may be provided in pursuance of a billeting requisition (a) in any inn or hotel (whether licensed or not) or in any other premises occupied for the purposes of a business consisting of or including the provision of sleeping accommodation for reward; (b) in any building not falling within the last foregoing paragraph being a building to which the public habitually have access, whether on payment or otherwise, or which is wholly or partly provided or maintained out of rates; (c) in any dwelling, outhouse, warehouse, bar or stables; but not in any other premises.'

[321] Halsbury, n 13, vol 2(2), para 126. See also Armed Forces Act 1971, s 67(1). Halsbury notes 'The provisions relating to the billeting of the Royal Marines (who are subject to military law by the Army Act 1955, s 210(3) (as amended)…are also applicable to men of the reserve forces during such time as they attend training or are in permanent service or full-time service under a full-time service commitment. Reserve Forces Act 1996 s 123(1). Provision is also made in connection with the billeting of men of the reserve naval and marine forces: s 123(2).'

[322] Army Act 1955 s 174(1) and Air Force Act 1955, s 174(1). See also Halsbury, n 13, vol 2(2), para 126, n 7.

[323] Army Act 1955, s 174(3), Air Force Act 1955, s 174(3). See also Halsbury, n 13, vol 2(2), para 126, n 9. For the billeting procedure see, para 127, for billeting offences, see para 128 and for the right to payment for billeting, see para 129.

[324] Can the Crown billet air force personnel on householders under the Crown prerogative? The Petition of Right only prohibits such billeting in the case of soldiers and mariners, thus, is it theoretically possible?

In the body of your petition, you usurp upon our royal prerogative, and meddle with things far above your reach.[325]

It is unlikely the Queen would use such words today. Rather, one suspects, like the House of Commons,[326] she would welcome the modernisation of the law on the Crown prerogative as well as the abolition of obsolete ones. In this article the conclusion may be stated simply:

- The Crown prerogative to impose martial (military) law on civilians - whether in peace or war time – should be abolished since: (a) exercise of the same in peacetime is illegal as result of the Petition of Right 1627, s 8 (which section would be interpreted, today, to cover all riots and rebellions not amounting to civil war); (b) the exercise of the same is prohibited in war time unless the criminal courts are not open; (c) legislation now covers the field since - even in the case of (b), the Civil Contingencies Act 2004 (and earlier legislation, now repealed) provides for civil courts to be established to deal with criminal offences, and not military courts; (d) in any case, the purpose of subjecting civilians to military law - to impose the death penalty and harsher punishments - has gone, both having been abolished;
- The Crown prerogative to impress (ie. forcibly conscript) subjects into the army or navy should be abolished for the following reasons: (a) such a prerogative was dubious anyway; (b) impressing in the navy ended after 1814; (c) impressing in the army by virtue of prerogative - even it existed – ended before 1688 (it ended in 1780, when pursuant to legislation); (d) in both World Wars, legislation was used, rather than reliance on any Crown prerogative;
- The Crown prerogative to billet members of the armed forces on the public should be abolished, since legislation now covers the field.

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[325] Rushworth, n 25, vol 1, 47. On another occasion in the same year James I told the Commons, 22 'And the lower house [ie. the House of Commons] is also to petition their king, and acquaint him with their grievances, and not to meddle with their king's prerogative.' See also p 55.

[326] See n 2.

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Globalization, Transnational Corporations and Human Rights – A New Paradigm

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Abstract

The growth in power and influence of the transnational corporation under the forces of globalization has been touted as being one of the most significant developments both domestically and internationally. Changes to economic, political and financial barriers by many developing countries with the hope to attract international investment have seen the move by transnational corporations to exploit these opportunities. There are many who argue that the impact of transnational corporations has been positive, providing employment and income opportunities as well as country wealth. There are however, many who argue that the power and influence of the transnational corporation brings with it the ability to directly impact adversely on human rights and that as the transnational corporation operates outside human rights obligations assumed by each state pursuant to their status under international conventions, there needs to be a new human rights dialogue. This paper addresses the significance of the transnational corporation, the role of the transnational corporation in the context of human rights and concludes that as a result of the global financial crisis that we have lost the focus on traditional concerns for human rights violations and allowed economic and financial sustainability concerns to become paramount.

Keywords: globalization, human rights, transnational corporation, sovereignty, global financial crisis

1. Introduction

The relationship between the processes of globalization and human rights has been the focus of much debate, both within academia and the global human rights community. Much of this debate has focused on the power and influence of transnational corporations. It is clear that the rise in the power and influence of transnational corporations both domestically and internationally, can be attributed to the processes of economic globalization. National economies have over recent years been reducing the political and financial barriers which have limited their ability to engage in trade activities and attract foreign investment. Multinational corporations have been aggressive in exploiting these new opportunities, and have, in doing so, re-written the rules of economic engagement and have challenged the established principles of juridical boundaries and state sovereignty. Accordingly, they are now able to exert considerable influence not only on the markets within which they operate, but also on foreign affairs policy and international relations.

Whilst it cannot be denied that the power and influence of transnational corporations provide employment, income and, and in some instances, country wealth, this increase in power and influence has what has been described as a 'darker side' (Eden & Lenway, 2001; Stiglitz, 2002) – economic devastation, and the ability to operate outside the human rights obligations assumed by each state pursuant to their status as a signatory of various human rights conventions, hence being able to avoid the accountability implications when violations are alleged to have occurred.

As a result of this ability to potentially circumvent human rights obligations, the dialogue as to the responsibilities of transnational corporations has increased, and given the impact of the current global economic crisis, the relationship between transnational corporations and human rights has never been more significant. This paper will contribute to the discussion of the relationship between globalization, transnational corporations and human rights in two ways: firstly, by arguing that whilst transnational corporations have been key beneficiaries of globalization, and often criticised for human rights abuses, they are more strategically placed than ever, as a result of the global financial crisis, to impact directly upon human rights, and: secondly, by arguing that traditional human rights

dialogue has changed as a result of the global financial crisis, as concern for economic and financial welfare within developed countries replaces concern for human rights violations within developing countries.

This paper is divided into four parts: In the first part of this paper, various definitions of globalisation will be discussed and the significance of the similarities in definition will be highlighted. The second part will provide an understanding of the growth and influence of transnational corporations. The third part will provide an analysis of the relationship between globalization, transnational corporations and human rights, and in the final part, the challenges presented by the recent global financial crisis will be discussed in the context of human rights dialogue and the role of the transnational corporation. This article concludes that the global financial crisis has had a direct impact upon our perceptions of human rights and has shifted the focus away from traditional concerns for human rights violations, to more economic and financial sustainability issues.

2. Defining Globalization

There has been much written on the topic of globalization, but there is a common thread throughout the literature, and that is that globalization cannot be stopped, and that it is inevitable. Howard-Hassmann (2005) argues that globalization impels social change which in turn contributes to greater moves towards democracy, the rule of law, and the promotion of civil and political rights.

What then is globalization? It is clear that the term has many meanings (Garcia, 1999) and whilst the lack of an accepted definition can, in certain circumstances, be problematic, it seems that in this instance, there is no specific controversy with its lack of firm meaning. Indeed, when one reviews some of the definitions that have been ascribed to the term, they all have one thing in common – they all identify that the concept of globalization represents a changing world order driven by economic, political, financial and associated factors. According to Sjolander (1996: 604) globalization is *"...an economic, political, social, and ideological phenomenon which carries with it unanticipated, often contradictory, and polarizing consequences."* Robertson (1992:102) carries through the contradictory theme, when he states that globalization is a *"...form of institutionalization of the two-fold process involving the universalisation of particularism and the particularization of universalism."* A more basic definition is provided by MacEwan (1994: 1) when he calls globalization, "*The international spread of capitalist exchange and production relationships",* thus emphasizing the significance of capitalism. This should be compared to a more complex approach taken by Held and McGrew (1993) when they describe the concept of globalization as a universal process transcending states and societies, resulting in interconnectedness or interdependence otherwise known as the modern world community.

Dunning (1998: 15) refers to the global economy which he describes as an economy *"...in which there is a close economic interdependence among the leading nations in trade, investment and cooperative relationships, and where there are relatively few artificial restrictions on cross-border commerce, or discrimination against foreign affiliates".* This interdependence leads to an re-evaluation of domestic macro-organisational strategies as well as the culture of decision-making, so as to optimize the manner in which the modes by which resources and capabilities within the territorial control of that economy, are created, upgraded and efficiently deployed. The International Monetary Fund (1997) has defined globalization as *"...the rapid integration of economies worldwide through trade, financial flows, technology spillovers, information networks, and cross-cultural currents."* Joseph Stiglitz in his work *Globalization and its Discontents* (2002: 9-10) describes globalization as *"...the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the free flow of goods, services, capital, knowledge and (to a lesser extent) people across borders."* He notes that it has been accompanied by the creation of new institutions to work across borders, that it is powerfully driven by international corporations, and has led to renewed interest in the activities of long-established international intergovernmental agencies such as the United Nations. Finally, Seita (1997: 431) encapsulates the varying definitions when he states that globalization *"…is a multifaceted concept encompassing a wide range of seemingly disparate processes, activities and conditions…connected together by one common theme: what is geographically meaningful now transcends national boundaries and is expanding to cover the entire planet. Globalization has led to an awareness that international issues, not just domestic ones, matter."*

Whatever the definition adopted, what is clear is that globalization has largely been seen to be defined in economic terms, whether from a market or a regulatory perspective (Garcia, 1999). This implies that globalization is a positive contributor to the attainment of the economic preconditions for social, economic and cultural human rights by generating wealth, prosperity, and employment on the one hand, and facilitating economic and financial interaction between countries on the other. However, globalization is seen in a much different perspective by the World Commission on the Social Dimension of Globalization (2004) which argues that globalization has created a

morally unacceptable and politically unsustainable global imbalance, with the wealth that globalization has created being unequally shared and the benefits not translating to those who are on the margins of the global economy. In other words, rather than providing the 'market' basis for the provision of economic, social and cultural rights, globalization has generated an 'at risk' environment where such rights have the potential to be traded away when they come into conflict with market forces which drive globalization.

The primary agent (Ostry, 1992; Anderson, 2010) behind the rapid growth of globalization is the transnational corporation, which has, through innovations in transportation and communication, and as a result of the hunger of developing countries for foreign investment, been able to extend operations and take advantage of favourable regulatory and financial environments created by developing countries which seek to attract the investment of such corporations. Two legitimate questions therefore arise: has globalization and the growth of transnational corporations undermined human rights and thus the benefits of social change which globalization was expected to bring in its wake; and, given the recent global financial and economic crises, has the influence and power of transnational corporations increased such that human rights are now more at risk of being traded away for the sake of economic viability.

3. The Influence of Transnational Corporations

According to Ruggie (2007) (Note 1) in 2006 there were seventy-seven thousand transnational firms across the globe, with an estimated 770,000 subsidiaries and millions of suppliers, and operating in more countries than ever before. What then is a transnational corporation? A transnational corporation can be defined as a firm or company that has the power and ability to coordinate and control operations in more than one country, even where actual ownership does not reside in that firm or company (Dicken, 2009). Hedley (1999: 215-216) states that a transnational corporation is *"any enterprise that undertakes foreign direct investment, owns or controls income-gathering assets in more than one country, produces goods or services outside its country of origin, or engages in international production."* The United Nations Centre on Transnational Corporations (1988: s30) states that transnational corporations are:

"...enterprises irrespective of their country of origin and their ownership, including private, public or mixed, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others."

Whatever the definition adopted, the ability of transnational corporations to shape and define the global economy is without dispute, as is their ability to influence the regulatory frameworks within which they operate or seek to operate, given that countries have significant variances in laws regulating economic activity. This capacity to influence cannot be under-estimated, and goes directly to the notion of state sovereignty, which provides that each state has the sovereign right to establish its own laws and regulations, which in turn determine not only the nature of economic activity within that state but also address civil, political and social rights within the borders of that state. Sovereignty as a concept has traditionally relied upon the identification of territorial border lines delineating the area within which a state's sovereignty was paramount and providing the basis upon which challenges to sovereignty from outside could be determined. However, it is arguable that transnational corporations play little heed to territorial boundaries and the concept of sovereignty which they represent, seeking rather to minimise regulation and control by playing one sovereign state off against another in pursuance of a favourable policy environment in which to operate. Stern (2000) reinforces this point when she notes that transnational corporations have the power to be able to compete with the power of sovereign states and that they can hamper their economic sovereignty over natural resources and economic wealth, as well as potentially hampering their political sovereignty. She cites the example of ITT which at the time of its operations in Chile when President Allende was overthrown had an annual turnover higher than the GDP of Chile.

Jochnick (1999) specifically refers to the growth of transnational corporations as a factor which has undermined state sovereignty and limited government prerogatives, especially within developing or host countries. He argues that the impact of this loss of sovereignty is particularly relevant in the area of economic, social and cultural rights. This could be described as governments within developing countries seeking to maximise economic growth by aligning their economic policy environment to be favourable to transnational corporations, whilst leaving the broader economic, social and cultural requirements of the state to lag far behind. As was stated by DaniloTûrk, the Special Rapporteur on Economic, Social and Cultural Rights in a special report in 1992:

The flurry of many States romantically to embrace the market as the ultimate solution to all of society's ills, and the corresponding rush to denationalize and leave economics, politics and social matters to the whims of the private sector, although the theme of the day, will inevitably have an impact upon the full realization of economic, social and cultural rights."

Transnational financial corporations, such as the World Bank, the African Development Bank, the European Bank for Reconstruction and Development, and the International Monetary Fund also require consideration in this context. The common purpose of the development banks is to assist the economic growth of developing countries by financing development projects and programs, and promoting foreign investment. The purposes of the International Monetary Fund as stated in Article 1 of their Articles of Agreement include the promotion of international monetary cooperation, facilitating the expansion and growth of international trade, and the extension of short and medium-term financing to member countries experiencing temporary balance of payment problems. Whilst these transnational financial corporations can be said to be 'apolitical' in their mandated operations, even given the pressure that can be brought to bear on them from the United Nations (Morais, 2000) it is arguable that because any developing country seeking assistance from these financial institutions is required to meet specific structural economic adjustment policies as part of the loan requirements (Krasner, 1999), that these requirements facilitate the violations of human rights by decreasing welfare programs and policy initiatives, whilst at the same time, addressing the policy requirements of transnational corporations which are relied upon to attract and keep essential financial investment, central to the economic development of the country, a point emphasised by Tûrk (1992).

It has also been suggested (Richards, Gelleny & Sacko, 2001) that because developing countries are particularly susceptible to internal shocks such as coups, civil war and terrorism which can result in a massive outflow of investments funds and the operations of transnational corporations, governments are more willing to suppress any threats to internal stability, and will use strategies which include repression and curtailment or denials of civil and political rights for their population.

It is not being suggested here that the financial institutions referred to above have directly facilitated the abuse of human rights. Indeed there is considerable evidence to suggest that such institutions have contributed significantly to the recognition of human rights by clearly indicating that regimes that do not uphold human rights and the rule of law will not be supported by the international community. However, transnational corporations invest in countries which have stable political and economic environments. In order to attract these corporations and investment, governments will do whatever is required to ensure that stability is seen to be evident, thus there is a desire to limit internal conflict and provide a policy environment which is attractive. If the structural requirements attached to foreign aid/official development assistance via the World Bank or the International Monetary Fund, for example, are too rigid for a developing country with a repressive regime, then it is possible that the investment of transnational corporations as an alternative source of assistance will become more attractive, and that the political motives behind encouraging such assistance will impact directly on the meeting of human rights obligations.

There is however one aspect of the operations of the World Bank which does warrant further discussion in this context and that is in relation to the activities of the International Finance Corporation, the private sector arm of the Bank. The International Finance Corporation (IFC) deals directly with businesses seeking funds to implement development projects within developing countries, usually in partnership with the host country. The policy of the IFC is to carry out all its operations in "an environmentally and socially responsible manner", requiring its business clients to comply with its environmental, social and disclosure policies, which cover such issues as the prohibition on child labour, and the rights of indigenous peoples. Any business seeking financing from the IFC is required to sign an investment agreement, and the failure to comply with the policies of the IFC can result in suspension or cancellation of the loan facility. However, whilst there might be the appearance that the IFC is able to ensure the human rights obligations of its business clients, in reality there is evidence which supports the view that not only is the IFC unable to monitor its business clients, but that it has funded development projects which have violated human rights. Kinley and Tadaki (2003-2004) cite the examples of the Chad Cameroon Project, where a number of environmental and social risks were not addressed in the Environmental Impact Statement provided by the project sponsor, the funding of the Yanacocha gold mine in Peru, and the previously mentioned involvement of Royal Dutch Shell in Nigeria, which was the beneficiary of a US$15 million loan from the IFC, and implicated in the arbitrary execution of Ogoni activists in 1995.

Even given the abovementioned qualifications on the effectiveness of the World Bank or the IFC to monitor the activities of transnational corporations which receive funding, and given that equally neither the World Bank nor the IFC have any real influence over the activities of transnational corporations with which they have no contractual relationship, the fact that the Bank and the IFC are able to protect social and environmental human

rights is significant. As Kinley and Tadaki (2003-2004) identify, economic, social and cultural rights are the ones most vulnerable to abuse by transnational corporations, primarily because they are the rights least protected under international human rights law and practice. By setting standards and policies, the Bank and the IFC act by default, as a means through which the behaviour of other transnational corporations can be gauged (Bradlow, 2001-2002).

Bradlow (1996) however implies that transnational financial corporations, such as the World Bank and the IMF, should not just set standards, but that funding should be refused or conditional upon the correction of human rights abuses, or that funding will be forthcoming only when it is satisfied that the operations to be funded will not facilitate the government of the developing country in continuing human rights abuses. Arguably, this would then require the transnational corporations seeking funding for development projects, to ensure that they met the funding obligations directed at the government of the country, so as not be to complicit in facilitating human rights abuses. Whether or not such requirements could be effectively monitored must be considered, and the difficulties of intervening in alleged human rights abuses by governments are well documented. However, these potential problems should not form the basis for a lack of consideration of their applicability.

4. The Relationship between Transnational Corporations and Human Rights

There can be no argument to the proposition that transnational corporations wield enormous power to control international investment, especially in developing countries, thus rendering governments in these countries highly receptive to the terms as presented by the transnational corporations. There are polarizing views as to what impact this means from the perspective of human rights. Monshipouri, Welch and Kennedy (2003) argue that because transnational corporations have a direct impact on the economic, political and social environment of the countries in which they operate, they have the ability to both positively and negatively affect individuals and human rights. This is because these corporations generate large amounts of both income and wealth for their host countries, and also provide high levels of employment in markets which traditionally are notable for their high levels of unemployment, albeit generally at very low levels of income.

Of course, transnational corporations theoretically operate within certain constraints, the main ones being the property rights, and contractual rights and obligations created by a state, which are the minimal pre-requisites for economic activity within its territorial borders. Whilst the state is the guarantor of such civil rights, including the right to enter into private contracts, the right to engage in market activity, and the right to own property, it also has the role as a welfare state, providing social rights, such as the rights to education, health care, and employment. Finally, the state is the guarantor of political participation rights, such as the right to vote and take part in the processes which determine public rules and policies. These combined rights provide stability to society and provide the foundation delineating the dimensions and limits of state intervention in private activities, as well as responsibilities towards the social communities within that state. As is stated in the preamble to the Universal Declaration on Human Rights:

"The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society shall...promote respect for these rights and freedoms."

Transnational corporations are, of course, not governments, and therefore are not expected to have an influence over those human rights responsibilities of the sovereign state. However, globalization has rendered the notion of absolute state sovereignty somewhat anachronistic, and states, especially developing ones, have found that their authority over economic activity is increasingly being 'high-jacked' by the regulatory and policy demands of transnational corporations, and accordingly, other basic social rights are being increasingly left to the vagaries of the market, as determined by the policies designed to meet the requirements of economic activity, thus rendering them subject to the risk of violation. Hedley (1999) argues that it has become increasingly difficult for host states to distinguish between foreign investment costs and foreign investment benefits. If this is so, the risk of violation increases proportionally to the difficulty of distinguishing between costs and benefits.

Jochnick (1999: 62) argues that transnational corporations exert *"... an inordinate influence over local laws and policies and their impact on human rights ranges from a direct role in violations, such as abuses of employees or the environment, to indirect support of governments guilty of widespread repression."* There are clearly documented examples of where the activities of transnational corporations have violated human rights: the Union Carbide chemical leak in Bhopal, India (Stephens, 2002); the Nike, Disney and Levi Strauss sweatshops in such countries as Indonesia (Nazeer, 2011); the Wal-mart factories in China and Honduras (Clade & Weston, 2006) ; the case of Royal Dutch/Shell in Ogoni, Nigeria (Wiwa, 2000); the operations of Unocal Oil Corporation in Myanmar (Chambers, *n.d.*) the policies of British Petroleum in Columbia (Human Rights Watch, 1998); and the actions of Texaco in Ecuador, and Freeport-McMoRan in Indonesia (Ballard, 2001).

Where a transnational corporation invests in a state with a repressive government and or a region where there is political unrest, Stephens (2002) argues that it is impossible for the corporation to operate without becoming complicit in human rights violations, even if it is just on the basis of security concerns as to property and employees. She cites several examples including the high profile Unocal case (Note 2) which was settled by Unocal in 2005 by the payment of compensation to the plaintiffs who had alleged forced labour, rape and murder by the Burmese military.

It should not be implied that transnational corporations seek out repressive regimes in which to maximise corporate profit, but there can be no argument that these corporations seek to minimize production costs by taking advantage of varying costs of labour, capital and raw materials, the most significant factors in this being lower labour costs and reduced environmental scrutiny.

The key human rights issues which are of concern relate to both civil and political rights as well as economic, social and cultural rights and include the prohibition on slavery, the right to rest and leisure, the right to a satisfactory standard of living, the right to a healthy environment, the rights of women and children, and the right to a social and international order to realise the freedoms stated. The realisation of these rights, as it has been previously stated, are the responsibility of the state and as has been argued, non-state actors, such as transnational corporations do not have direct responsibility under international law, to ensure that such rights are met.

However, transnational corporations do have an indirect responsibility, and it can be argued, an increasing indirect responsibility as a result of the contraction in the availability of funds to developing countries as a result of the global financial crisis. The financial liberalization of international markets which preceded the global financial crisis saw the unrivalled growth in the breadth and mobility of foreign direct investment and portfolio investment. Accordingly, investment in developing countries can be used as leverage to gain beneficial tax and labour policies, thus holding policy development of the developing countries hostage to the desires of the 'investor'. The greater the amount of international capital being invested the greater the potential for favourable policy constraint. This environment as been called the "race to the bottom" (Richards, Gelleny & Sacko, 2001: Nandy & Singh, 2009), where tax, labour safety, wage standards and social welfare programs are compromised in order to attract the investment. Richards et al (2001) state that in this environment, transnational corporations extract more money than they invest, that they displace local capital, contribute to unemployment by promoting labour-intensive production, receive substantial tax breaks which erodes the tax base of the developing country and, hinder the redistribution of social benefits.

As Stiglitz (2007: 196) succinctly stated:

"Globalization has compounded the problems arising from the misalignment of incentives to modern corporations. Competition among developing countries to attract investment can result in a race to the bottom, as companies seek a home with the weakest labor and environmental laws."

He also identifies another important consideration which warrants mention in this context. Transnational corporations arguably live by a different moral code in their home environment, as being part of the local community they take some moral responsibility for their conduct, even if that responsibility is not by compulsion of law. He argues that a transnational corporation operating overseas, employs a weaker moral code of responsibility, founded on the belief that the workers are *"...lucky to have jobs, or that overall the country benefits from their investment..."* this is despite the fact that they would not treat their workers or their home environment in the manner which they routinely apply offshore. Even where it is clear that a transnational corporation has breached local laws and regulations, the ability to successfully prosecute the corporation is problematic from two perspectives. Firstly, developing countries need the transnational corporations to bring in the jobs that the economy desperately needs, so there is a clear imbalance of power, which can be exploited by the corporation. Secondly, transnational corporations operate with limited liability with the parent company located in a jurisdiction outside the control of the developing country. In the event that there is a disaster in which the transnational corporation is involved, such as the Bhopal disaster in 1984 involving Union Carbide, the home country of incorporation may well refuse to cooperate in any prosecution. So if the transnational corporations withdraws, the government of the developing country is left not only with the outcome of the disaster which it doubtless is unable to fund to clean up, but it faces the loss of both ongoing and prospective investment, as other transnational corporations will be discouraged from investing in a country willing to take legal action against them for breaching local laws and regulations, or it may demand even more unfavourable terms than the previous corporation in order to engage in that investment.

5. The Impact of the Global Financial Crisis

The onset of the recent global financial crisis and the subsequent global economic crisis has provided a new dimension to the relationship between human rights and transnational corporations. The financial liberalization which is at the heart of globalization, saw many countries including developing countries open their doors not only to transnational corporations, but also saw them open their banking sector to large international banks. Stiglitz (2007) argues that transnational corporations, such as Coca-Cola, IBM and Microsoft prefer to deal with the large international banks rather than local banks, the result being that local banks are unable to compete, see their own sources of funding dry up and are often taken over the by the international banks. If local businesses are unable to meet the funding criteria of the large international banks, they are unable to operate, and the consequence for the local community and the developing country as a whole is significant.

The global financial crisis however created a new set of parameters which arguably have impacted directly upon developing countries. The financial crisis which followed the collapse of the US sub-prime market saw a major contraction in the worldwide availability of funds and an increase in the cost of acquiring funding. Developed economies plunged into recession or near recession, with declining housing prices, increasing unemployment, the failure of banks or their bailout by governments, and the use of stimulus payments pumping large amounts of money into the economies of the developed countries to avoid even worse economic disaster from occurring.

Developing countries are by their very nature, poor, and burdened with debt, leaving many struggling to avoid default. Many developing countries borrow or are lent too much, with terms and conditions which force them to bear most if not all of the risk of increases in interest rates, as the cost of funding increases, fluctuations in exchange rates and, and associated economic factors. Stiglitz (2007) further argues that once a developing country faces the probability of default, and economic collapse, then the country is a hostage to international assistance, and faces a loss of economic sovereignty.

The risk that exists in the post global financial crisis world for developing countries is that in facing insurmountable debt burdens which then, as is the case in Greece at present, require austerity measures to be instituted, programs which directly address human rights are the first to be cut. For example, the austerity measures currently being instituted in Greece include major cuts to pensions, employment, welfare programs and education. Countries subject to austerity measures are required to develop economically so as to generate the funds necessary to repay their debt, but to do so, they must attract investment from transnational corporations. This power imbalance is clear and the consequences obvious. Transnational corporations seek to reduce costs and increase profit, while developing countries seek to provide employment and income. As this paper has discussed, to attract foreign investment, developing countries need to provide a policy environment which will attract that investment, whether it comes by way of infrastructure or by the use of outsourcing. Inevitably there will be a clash between meeting economic demands and human rights obligations. Given that at best, economic, social and cultural rights are to be progressively realised, and that in many developing countries, the acceptance of such rights is ideologically contentious, then the possibility for a policy environment favourable to transnational corporations and unfavourable to the meeting of human rights obligations is real.

6. Conclusions

Transnational corporations are in a position to have an enormous impact upon human rights, and as has been suggested, that impact can be either positive or negative (Anderson, 2000) Many transnational corporations have adopted voluntary codes of conduct, with some enforcing their codes very seriously by imposing strict internal controls in order to deter unethical or illegal behaviour. (Note 3) However, as is well known, codes of conduct, as well-meaning as they may be, are voluntary and until an effective regulatory model (Note 4) for the extraterritorial regulation of transnational corporations with respect to human rights obligations is developed, then transnational corporations will continue to operate with virtual impunity (Kolk, van Tulder & Welters, 1999). Yes, in theory, transnational corporations can legitimately and justifiably be made subject to international human rights obligations by the countries within which they operate. In reality however, a country struggling economically and pressured to meet external debt obligations is unlikely to attempt to impose such obligations. As has been discussed in this paper, transnational corporations seek a positive policy environment in which to operate. The imposition of legally enforceable obligations which specifically address human rights issues may indeed counter that positive policy environment sought by the corporation, and see that corporation move its attention and possible investment to a country which does not seek to regulate in that manner.

Globalization has bought with it some major challenges in international law and transnational corporations focus significantly in the debate over how to regulate the realities of this new world order of a global economy. Whilst we search for the most appropriate international legal frameworks and international courts to ensure the smooth

functioning of this global economy, we should not forgot that at the heart of globalization are people, disadvantaged and desperate merely to sustain a very basic existence. Transnational corporations are neither total villains nor total benefactors. The work of such organisations as Amnesty International and Human Rights Watch and the advent of new technologies such as the internet, have done much to bring to the attention of the world that human rights abuses are occurring, and many transnational corporations have changed their practices to meet the moral outrage that has followed disclosure. However, human rights abuses are still occurring in the form of child labour, environmental damage, unsafe and unhealthy working conditions including exposure to hazardous products, unfair contractual obligations, and inadequate remuneration, to name a few. The risk is that in a post global financial crisis world that these abuses will continue as developing countries struggle with even greater debt burden and poor economic outlook, seeking investment by creating a policy environment which places human rights in its shadow.

Human rights are not just the rights of those in the developed or the developing world. They belong to the international community and it behoves governments and the international community to work more diligently towards a global framework which whilst embracing the good of globalization, protects the vulnerable of developing countries from ongoing human rights abuses.

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Notes

Note 1. The data supplied by Ruggie is from an analysis of the 2006 United Nations Conference on Trade and Development(UNCTAD). The 2011 World Investment Report (available at http://www.unctad-docs.org/files/UNCTAD-WIR2011-Ful-en.pdf) details an extensive breakdown of transnational corporations by categories, including top 100 financial TNC's, top 100 non-financial TNC's, top 100 financial TNCs by Geographic spread, as well as by developing and developed countries, acquisition of foreign assets and other such categories. The inclusion of these figures by Ruggie is to provide an overview of the extensive nature of TNCs. A more detailed discussion of TNC's and their breakdown is the subject of a forthcoming paper by this author.

Note 2. It is interesting to note that subsequent to this litigation, Chevron, which had acquired Unocal, sought to force its insurers to reimburse the company for the compensation it had paid to the plaintiffs in the original action. Unocal's insurers had refused to reimburse Unocal for the settlement and were sued by Unocal. In *Lexington Insurance Company v Union Oil Company of California,* No. BC 30774, 2007, Judge Elizabeth Grimes of the Superior Court of California in Los Angeles dismissed Unocal's claim on the basis that the insurance policy in question excluded coverage for 'military terrorism', one of the claims made by the original plaintiffs in the litigation against Unocal.

Note 3. The Code of Conduct for Chevron contains a clear statement as to the human rights obligations of the Company and its employees. Rio Tinto similarly have a global code of business conduct which addresses human rights obligations. See: http://www.chevron.com/documents/pdf/chevronbusinessconductethicscodes.pdf and http://www.riotinto.com/documents/The_Way_we_work.pdf

Note 4. The United Nations Economic & Social Council, Sub-Commission for the Protection and Promotion of Human Rights in August 2003, drafted and adopted the *Economic Social and Cultural Rights: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* (available at http://ap.org/documents/alldocs.aspx?doc_id=7440) These Norms were favoured by human rights, labour and environmental groups, but were coolly and controversially rejected by the business community which led to their subsequent rejection by the now defunct UN Human Rights Commission , theparent body of the Sub-Commission. The position of Special Representative on Human Rights and Transnational Corporations was appointed in 2005. For a discussion on this issue and to read comments on the view of Special Representative see Duruigbo, E. (2008) 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges' 6, *Northwestern Journal of International Human Rights,* 222.

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International and National Legal Framework for Maritime Environment Protection in the Hellenic Legal Order

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Abstract

It is known that the subjects of maritime pollution, because of its international extensions and extensive environmental damage that this consequences, are regulated by International Conventions and basically by the International Convention MARPOL 1973, which was ratified (with its protocol of 1978) by the law 1269/1982.

However, these regulations were judged in European Union level as insufficient. Thus began from the European Union an effort for creation of a European regulating frame, equipped with effective, deterrent and proportional sanctions, basically penal, for the successful confrontation of pollution problems created by vessels.

In parallel with the international and European legislative frame has been developed also national legal frame in which are forecasted not only penal sanctions but also administrative and ddisciplinary which are imposed in the Hellenic seamen depending the case. All these legal forecasts aim in the protection of sea environment one of the most important for people's existence.

Keywords: maritime environment, international-national legislation, penal-administrative-disciplinary sanctions, prohibition of vessels departure, Hellenic Coast Guard (HCG)

1. Introduction

Environmental pollution due to the technological high progress and the continuously industrial development has assumed dangerous and in many cases, catastrophic dimensions especially for the maritime environment. Pollution of teas is a problem that affects/is affected by many factors and as such phenomenon has global dimension. Global dimension is difficult to be combated not only because of its extension that might have, but mainly because of its liquidity.

The effects of pollution incidents can cause damage in a local or wider level to ecosystems, to economic activities and actions that sometimes cannot be traced to a real economic cost, such as the recreation of the people and the pleasure offered by engaging with it.

Especially maritime pollution has particularly adverse economic consequences in regions where societies or State depend from fishing and/or tourism.

The preservation of the natural environment from pollution and destruction is an intense and crucial economic and sociopolitical problem and employ people and means in order to be prevented the destruction of the natural environment and human living conditions.

In this concise study will be developed the most important legal provisions (International and National) constituting the legal framework which defines the protection of the maritime environment in Hellas, while in each case will be developed and the remedies which can be submitted by anyone who has a legitimate interest. Also it will be developed the concept of vessels prohibition departure, a legal institution which is predicted by the Hellenic legal order, measure which contributes not only to the restoration of the law order but also in the safeguarding of individuals and public interests case by case. Finally, the study will close with the formulation of conclusions.

2. Maritime Environment Protection

2.1 Content of Maritime Environment and Pollution Concept

"Environment" is meant the total of natural and anthropogenic factors and elements that are in interaction and affect the ecological balance, quality of life, health of people, historical and cultural tradition and the aesthetic values.

"Pollution" is meant the presence at sea of any substance that alters the natural condition of the seawater or makes it harmful to human health or to the fauna and flora of sea beds and generally unsuitable for its intended uses (Note 1).

2.2 Violation of National Legislation

Environmental protection is a constitutional requirement (article 24 of Hellenic Constitution) and therefore a State obligation, but also right of any citizen (Note 2).

The Hellenic Coast Guard (HCG) (Note 3) is the main body (Law Enforcement Agency-LEA) responsible for the prevention of seas pollution as also for the protection of Hellenic coastlines, pollutions which can endanger people's interests or of the wider society or to degrade the maritime environment.

In order to combat this problem (Note 4), which in the last years occupies very intensively the whole humanity, and in order to take the necessary preventive measures, in HCG Headquarter has been established a specialized service unit under the name Division of Maritime Environment Protection (DMEP-DPTHP)(Note 5).

The international experience and practice reveals that whatever measures are taken, pollution incidents cannot be eliminated completely, since the time, place and circumstances of an incident cannot be envisaged, while most incidents due to imponderables.

For these reasons, emergency planning consists today in international level the best tool and weapon of the competent authorities, in determining the required level of intervention, depending on the severity of each incident (Note 6).

The most important legislative act concerning the protection of the maritime environment is the Presidential Decree (PD) 55/1998 (A΄58), with which have been consolidated into a single text all the provisions of law 743/1977 (A΄ 319). In this PD in which are incorporated and the most important international provisions, are also contained the penal, disciplinary and administrative penalties for offenders who violate its provisions.

This law is being enforced and after the entry into force of law 1650/1986 (A΄ 160), as is defined in its article 32 paragraph 1 (Note 7).

Against the decision imposing a fine for violation of PD 55/1998 provisions and after the publication of law 2690/1999 (A΄ 45) as was modified by the law 3659/2008 (A΄ 77) and law 2717/1999 (A΄ 97), is allowed initially the submission of remedy or hierarchical appeal to the administrative authority that issued the offended action and the hierarchical to the superior of this. Then follows after the preceding procedure the submission of appeal to the competent Administrative Court (for an amount to 586.94 E to the One Member Administrative Court and up of this amount to the Three Members Administrative Court) within sixty (60) days. The submission of appeal does not suspend the execution and attestation of fine (Note 8).

The fines which are imposed according to articles 13 and 14 of 743/77 (A΄ 319)(Note 9) becomes in Special Fund of Regulatory and City Planning Implementation (ETERPS) (Note 10).

2.3 Violation of Provisions and Regulations of the International Convention "for the Prevention of Sea Pollution by Ships" Marpol 73/78

The above mentioned provision was ratified by the law 1269/1982 (A΄89).According to article 5 of this law, its provisions as also and the provisions of the regulatory acts which will be issued according to its authorization, are implemented in Hellenic ships, in vessels under foreign flag arriving at Hellenic ports and bays or are in Hellenic territorial waters, at installations located in Hellas in which approach ships in order to perform any kind of work and action and finally in ships, machinery, devices and equipment of any kind that is produced in Hellas and is intended for installations or vessels.

As competent authorities for its enforcement (article 6) are defined the Directorate of Vessels Inspection (KEEP) (Note 11), Port Police Authorities and Consular Port Police Authorities.

By reasoned decision issued by the competent authorities (article 6), according to article 9 of this law, to the offenders of its provisions as well as to the offenders (Note 12)of PD and Ministerial Decisions (MD) (Note 13) which will be issued in implementing of it is imposed fine amount to 14.673, 51E (Note 14).

It is possible with the notification of the decision imposing fine to be implemented the measure of vessel departure until the fine to be paid or be deposited a guarantee letter of equal amount.

Against the decision imposing fine can be followed the same legal procedure as have been mentioned before. If the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court since and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

The fines which are imposed according to article 9 of the law 1269/1982 (A΄ 89) and are collected according to the Code of Public Income Collection (COPIC-KEDE) (Note 15) in implementation of article 18, paragraph 1 of PD 55/1998 are income of the Special Fund of Regulatory and City Planning Implementation (ETERPS) (Note 16)

2.4 Violation of provisions and Regulations of other International Conventions (Note 17) and International Protocols

Additionally of the above national and international legal texts, which are referred to the protection of the maritime environment from pollution, also are in force and the following legal texts which have been ratified by Hellas and have been incorporated into the national legal order. These are:

a. Law 314/1976 (A΄ 106),"Ratification of the International Convention on Civil Liability for Oil Pollution Damage1969 signed in Brussels and regulating of related issues", as has been amended and being in force by the law 1638/1986 (A΄108).

Penalties are predicted in article 5, as was amended by the law 2881/2001 (A΄16) and the prohibition of vessel departure is lifted by the deposit of guarantee letter of a Bank which functions legally in Hellas and for equal amount of the fine. As concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court since and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

b. Law 855/1978 (A΄ 235),"Ratification of the International Convention Protection of the Mediterranean Sea against Pollution with the attachment to this annex as also and the protocols "Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and aircrafts" and "Concerning Co - operation in Combating Pollution of the oil and Other Harmful Substances in Cases of Emergency", after attachments in these Annexes signed in Barcelona in 1976" as was amended by the law 3022/2002 (A΄ 144)paragraph(A) 3 of the second article and article third of law 3497/2006 (A΄219).

As competent authorities for the infringements certification according to article 3 paragraph 3 as far concerns the HCG are the Port Police Authorities.

The prohibition of vessel departure is lifted by the deposit of guarantee letter of a Bank which functions legally in Hellas and for equal amount of the fine. Sailing can be permitted without fine to be paid or without to be deposited guarantee letter from Bank, after approval of the Minister for one or more voyages, if imperative transportation or other reasons justifying sailing, or is impossible according to the circumstances the deposit of guarantee Bank letter and according to the discretion of the Minister is offered another adequate guarantee.

Administrative penalties are predicted in the article 5, paragraph 1. b. I and as far as concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court since and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

c. Law 1147/1981 (A΄ 110),"Ratification of the International Convention of Dumping and Wastes and Other Matter 1973 signed in London, Mexico City, Moscow and Washington" as has been amended and being in force.

The prohibition of vessel departure is lifted by the deposit of guarantee letter of a Bank which functions legally in Hellas and for equal amount of the fine. Sailing can be permitted without fine to be paid or without to be deposited guarantee letter from Bank, after approval of the Minister for one or more voyages, if imperative transportation or other reasons justifying sailing, or is impossible according to the circumstances the deposit of

guarantee Bank letter and according to the discretion of the Minister is offered another adequate guarantee.

As competent authorities for the infringements certification according to article 3 paragraph1 as far concerns the HCG are the Port Police Authorities.

The administrative penalties are predicted in article 5, paragraph b. and as far as concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court after and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

d. Law 1634/1986 (A΄ 104), Ratification of the protocols 1980 "For the protection of the Mediterranean Sea against pollution from land-based sources" and 1982 "Protocol Concerning Mediterranean Special Protected Areas".

As competent authorities for the infringements certification according to article 3 paragraph 1 as far concerns the HCG are the Port Police Authorities.

The prohibition of vessel departure is lifted by the deposit of guarantee letter of a Bank which functions legally in Hellas and for equal amount of the fine. Sailing can be permitted without fine to be paid or without to be deposited guarantee letter from Bank, after approval of the Minister for one or more voyages, if imperative transportation or other reasons justifying sailing, or is impossible according to the circumstances the deposit of guarantee Bank letter and according to the discretion of the Minister is offered another adequate guarantee.

The administrative penalties are predicted in article 3 and as far as concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court after and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

e. Law 1638/1986 (A΄ 108),Ratification of the International Convention signed in Brussels in 1971 "On the Establishment of an International Fund for Compensation for Oil Pollution Damage" and regulating of related items.

Penalties are predicted in article 5 of the law and as far as concern as concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court after and in this case will be complied the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this (Note 18).

f. Law 2252/1994 (A΄ 192), Ratification of the International Convention "On Oil Pollution Preparedness, response and cooperation 1990 and other provisions"(Note 19).

As competent authorities for the infringements certification according to article 2 paragraph B are the Port Police Authorities and the Directorate of Vessels Inspection (KEEP) (Note 20). It must be noted that according to article 5 of this specific law National Coordinator for the implementation of the National Emergency Situation Plan was the National Joint Rescue Coordination Center (JRCC –EKSED) of the HCG which was replaced by the HCG Operational Center (Note 21).

The administrative penalties are predicted in article 9 and as far as concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court since and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

It is possible with the notification of the decision imposing a fine to be implemented the measure of vessel departure prohibition until to be paid the fine or to be deposit a guarantee letter of equal amount.

g. Law 3100/2003 (A΄ 20),"Ratification of the Protocol on preparedness, response and cooperation to pollution incidents by hazardous and noxious substances, 2000".

In article 5 of that law, entitled "Extension of law 2252/1994 provisions implementation", is defined that the

articles third, fourth, fifth, sixth, seventh, eighth and ninth of law 2252/1994 as being in force, are implemented and for the "Protocol on preparedness, response and cooperation to pollution incidents by hazardous and noxious substances, 2000".

As competent authorities for the infringements certification according to article 4 paragraph 1 are the Port Police Authorities, the Directorate of Vessels Inspection (KEEP) (Note 22) and the Consular Port Police Authorities.

Administrative penalties are predicted in article 9and as far as concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court since and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

It is possible with the notification of the decision imposing a fine to be implemented the measure of vessel departure prohibition until to be paid the fine or to be deposit a guarantee letter of equal amount.

h. Law 3393/2005 (A΄ 243), "Ratification of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001".

As competent authorities for the infringements certification according to article according to article 6 are the Port Police Authorities and the Consular Port Police Authorities.

Penalties are predicted in article 6and as far as concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court since and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

It is possible with the notification of the decision imposing a fine to be implemented the measure of vessel departure prohibition until to be paid the fine or to be deposit a guarantee letter of equal amount.

i. Law 3394/2005 (A΄ 243), "Ratification of the International Convention on the Control of Harmful Anti-Fowling Systems on Ships, 2001".

In article 6, entitled "Penalties – Appeals" paragraph 1, verse (b) is defined: "in the case of infringements by ships is possible with the notification of the decision imposing a fine to be implemented the measure of vessel prohibition departure until to be paid the fine or to be deposit a guarantee Bank letter of equal amount".

As far as concern as concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court since and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

j. Law 3482/2006 (A΄ 163), "Ratification of the Protocol of 2003 to the International Convention on the establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 and other provisions".

Penalties are predicted in article 4, which provides that the fines are imposed by a reasoned decision of the authority in the jurisdiction of which is situated the installation. As far as concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court since and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

m. Directive with No 2005/35issued by the European Parliament and the Council on September 07, 2005 titled on ship-source pollution and on the introduction of penalties for infringements (OJ L 255, 30-09-2005) (Note 23).

Violations are predicted in article 4, while in article 8 are defined the sanctions. More specifically is defined that Member –States are taking all the necessary measures in order to ensure that violations of article 4 are punishable by effective, proportionate and dissuasive sanctions in which may include penal or administrative penalties. Also, each Member State takes the necessary measures in order to ensure that the penalties of paragraph 1 are enforced to any responsible culpable of violation according to article 4.

As far as concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court since and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

The fines which are imposed are collected according to the Code of Public Income Collection (COPIC-KEDE) in implementation of article 18, paragraph 1 of PD 55/1998 are income of the Special Fund of Regulatory and City Planning Implementation (ETERPS) (Note 24).

If the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court since and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this.

2.5 For Violation of General Port Regulations

According to article 156 of the Legislative Decree (LD) 187/73 (A΄ 163), as has been modified and being in force by the article 10 of law 1940/1991 (A΄40), for the enforcement of Administrative Police competences (Note 25) concerning Port Police Authorities, issue provisions with the type of General and Special Port Regulations. More specifically:

(a) General Port Regulations (GPR), regulate common to all Port Police Authorities items, are issued by the Head of HCG, are approved by the Minister of Shipping and Aegean (MSA), are published in the Official Gazette and are implemented in the areas of responsibility of all Port Police Authorities.

(b) Special Port Regulations (SPR), regulate special features of each port items which are not regulated by the GRP, are issued by the Port Police Authorities (Central Port Police Authorities, Port Police Authorities, Sub Port Police Authorities) and after receiving the opinion of the Prefect are approved by the MSA and are published in the Official Gazette.

The most important GRP reported to this study are as follows:

a. Approval by the MD with No 3131.1/01/99 issued by the Minister of Mercantile Marine (MMM) of GPR «18», titled [Preconditions and security measures for loading or unloading or transfusion work. ……], (B΄ 12).

b. Approval by the MD with No 2122/06/2001 issued by the MMM of GRP«25», titled [replacement and supplement of some provisions ……] (B΄219).

c. Approval by the MD with No 5219/Φ 23/01/02 issued by the MMM of GRP«29», titled [Completion of GPR «18»provisions] (B΄58).

d. Approval by the MD with No. 2122/30/2003 issued by the MMM of GRP«34», titled [Preconditions and security measures……] (B΄ 700) and

e. approval by the MD with No 2122/16/05 issued by the MMM of GRP «40», titled [replacement and completion.....] (B΄1010).

As far as concerns the implementation of legal procedures if the decision imposing a fine is issued by Consular Port Police Authority because the infringement certified in the area of its responsibility, or arrived in its area of jurisdiction vessel, the appeal is submitted to the Piraeus Administrative Court since and in this case will be kept the predicted in the law concerning the submission of remedy or of hierarchical appeal to the administrative authority which has issued the offended action or to the superior of this. Additionally for this specific case implement paragraphs 4 and 5 of the article 156 of the LD 187/1973.

Also relevant with this item is the PD 293/1986 (A΄ 129), “Implementation of Regulation Rules for the safe bunkering of the ships” which regarding penalties is enforced article 45 of LD187/1973 as has been modified and is in force (Note 26).

3. Prohibition of Vessels Departure (Note 27)

3.1 For Violation of National Legislation Provision for Maritime Environment Protection

The most important legal piece of legislation as has been mentioned on the protection of the maritime environment is the PD 55/1998 (A΄58). In this of legislation in which are incorporated and the most important international provisions are included penal, disciplinary and administrative penalties for offenders of its provisions.

This law is implemented and after the entry into force of law 1650/1986, as is defined in its article 32 paragraph 1. Administrative sanctions are imposed according to article 13 B. Concertedly the procedures of infringements ascertain and appeal submission against decisions imposing a fine is defined in article 14. Concretely as far as concerns the procedure of administrative penalties imposition, responsible for infringement ascertain and fine imposition is the nearest to the place of the offence Authority or the Authority of the first port of vessel arrival after the violation.

In particular, except article 4 paragraph 2 of law 743/1977, where the Port Police Authority can prohibit the vessel departure in case that according to article 14 of the same law, the ship does not deliver petroleum mixtures and waste to reception facilities, prohibition of vessels departure can also be imposed from the time of the infringement certification (article 14, paragraph 5 of law 743/77) and until fine payment.

The prohibition of vessel departure is lifted by the deposit of guarantee letter of a Bank which functions legally in Hellas and for equal amount of the fine. Sailing can be permitted without fine to be paid or without to be deposited guarantee letter from Bank, after approval of the Minister for one or more voyages, if imperative transportation or other reasons justifying sailing, or is impossible according to the circumstances the deposit of guarantee Bank letter and according to the discretion of the Minister is offered another adequate guarantee.

The fine is imposed by a reasoned decision issued by the competent authority, after a written summons of the offender, who is called to apology within 24 hours from the noticed of the decision (Note 28). The decision imposing the fine is issued not only to the responsible offender but also against to all the persons mentioned in article 12 and are considered as responsible.

Also according to article 12, paragraph 4 of PD 55/1998 in order to be ensured the costs incurred by the Public (Note 29) and by the Local Self Government Organizations (OTA) in order to prevent or to combat the pollution, is issued by the competent Authority a reasoned decision containing all the expenses against the person who caused the pollution as also and to all the responsible persons according to paragraph 1 of the same article, these are collected in accordance with the provisions of article 18 of the same law and also can be imposed the measure of vessel departure prohibition.

In the case of article 4 paragraphs 2 and 12 paragraphs (4) the Authority has discretion as the law defines “may”, to impose or not the prohibition of vessel departure. But in paragraph 5 of the article 14, prohibition of vessel departure is mandatory, although is provided to the Minister of SA to allow the departure for one or more voyages, if imperative transportation or other reasons justifying sailing, or is impossible according to the circumstances the deposit of guarantee Bank letter and according to the discretion of the Minister is offered another adequate guarantee.

According to my personal opinion without having being completed the process of imposing administrative penalties by the issuing of a decision imposing a fine, at least is “legal exaggeration” to be imposed administrative measures especially since exist and the provisions of law 2690/1999, where is imposed the right of the previous hearing to the person against of who will be issued unfavorable administrative act. Finally for administratively simplicity reasons and time economy, the legislator should have left in the discretion of the Port Police Authority to impose or not the prohibition of vessel departure and not to provide this right to the maximum level of the Ministry, to the Minister.

In any case and since the time that for the certification and revenue of the fine are followed the procedures of Code of Public Income Collection (COPIC-KEDE) I think that should not impose this measure in the case of which this is left to the discretion of the Port Police Authority or to the Minister, but only in cases that the prohibition of vessels departure is related to reasons for violation of main provisions concerning pollution or contamination of the environment (e.g. article 4 paragraph2 of PD55/1998).

3.2 For Violation of Provisions and Regulations of the International Convention “For the Prevention of Pollution from Ships 1973”Marpol 73/78

The above mentioned International Convention was ratified by the law 1269/1982 (A΄89). According to article 5 of this law, its provisions as also the provisions of the regulatory acts which are going to be issued according to its authorization are going to be implemented on Hellenic ships, on vessels under foreign flag arriving at Hellenic ports or in Hellenic territorial waters, at installations located in Hellas and in which are approaching ships in order to perform any kind of works and operations and finally in ships, machines, devices and any kind of equipment which is produced in Hellas and is intended for installations or vessels.

As competent authorities for its implementation (article 6) are defined the Directorate of Vessels Inspection (KEEP) (Note 30) the Port Police Authorities in Hellas and the Consular Port Police Authorities.

In the article 8 titled “Approach prohibition and departure” is defined that “From the date on which will be in force the “Convention” is prohibited the approach to the Hellenic ports or the departure from them by Hellenic or foreign flag ships of States that does or not participate in the “Convention” if these do not conform to this”.

In this case, as Convention is meant the International Convention for the prevention of pollution from ships which was signed in London in 1973 along with the attachments to this annexes I to V, Appendices and Protocols as also and the Protocol which was signed in London in 1978 and is referred to the International Convention with the attached to it annexes and appendices. Additionally is meant and the Protocol of 1997 according to is added to MARPOL annex VI, which was ratified by the law 3104/2003, where with the article 3 is extended the implementation of the provisions of law 1289/1982 and in the Protocol of 1997.

The prohibition of vessels departure in that case is mandatory and includes the Hellenic but also and the ships under foreign flag, independently if the States of their flag have acceded to the Convention or not. The compliance of the Convention terms can be ascertained by inspections, by control of shipping documents and especially from oil books, from any emergency incidents that have been occurred and have been caused maritime accident casualty or pollution etc. It is understandable that until restoration of the ship with the MARPOL conditions and until to be ascertained officially the restoration is not permitted the sailing of the ship.

In the second case and specifically in article 9 of law 1269/1982 in paragraph 3 is predicted that for infringements carried out by ships, with the notification of the decision imposing a fine can be imposed the measure of vessel departure prohibition until to be paid the fine or to be deposited a guarantee letter of equal amount. From the wording of the provision reveals that is left to the discretion of the Authority whether to impose the prohibition of vessel departure or not. According to my personal view from the time that for the certification and revenue of the fine are followed the procedures of Code of Public Income Collection (COPIC-KEDE) I think that should not be imposed this measure except in the case that is ascertained a material violation of provisions requiring rehabilitation, so that in the future the ship to ensure the environment protection.

3.3 For Violation of Provisions and Regulations of Other International Conventions (Note 31) and International Protocols on the Protection of the Maritime Environment

Additionally of the above national and international legal texts, which are referred to the protection of the maritime environment from pollution and is predicted and the prohibition of vessels departure case by case, are existing also the following legal texts which have been ratified by Hellas, have been incorporated into national legal order and also predict the imposition of the administrative measure of vessel departure prohibition. These are:

a. Law 314/1976 (A΄106),“Ratification of the International Convention on Civil Liability for Oil Pollution Damage1969 signed in Brussels and regulating of related issues”, as has been amended and being in force by the law 1638/1986 (A΄108).

Penalties are predicted in article 5 as was modified by the 2881/2001 (A΄16) and the prohibition of vessel departure is lifted by the deposit of guarantee letter of a Bank, functioning legally in Hellas and in an equal amount of the fine.

More specifically in the paragraph 2 of this article is predicted that the Port Police Authority may prohibit the vessel departure in case that the ship tries to sail from a Hellenic port if has violated the content of specific articles. In paragraph 3 of the same article is defined that for fines revenue are followed the procedures of Code of Public Income Collection (COPIC-KEDE)and is prohibited the vessel departure until the fine to be paid or to be deposited at the Port Police Authority which issued the fine, guarantee letter of equal amount issued by a recognized Bank.

From the wording of the provision reveals that is left to the discretion of the Authority whether to impose the prohibition of vessel departure or not. According to my personal view from the time that for the certification and revenue of the fine are followed the procedures of Code of Public Income Collection (COPIC-KEDE) I think that should not be imposed this measure except in the case that is ascertained a material violation of provisions requiring rehabilitation, so that in the future the ship to ensure the environment protection.

b. Law 855/1978 (A΄235),[Ratification of the International Convention Protection of the Mediterranean Sea against Pollution with the attachment to this annex as also and the protocols «Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and aircrafts» and “Concerning Co- operation in Combating Pollution of the oil and Other Harmful Substances in Cases of Emergency”, after attachments in these Annexes signed in Barcelona in 1976] as was amended by the law 3022/2002 (A΄ 144) paragraph(A) 3 of

the second article and article third of law 3497/2006 (A΄219).

According to article 6 paragraph 4 of this law, from the time of drafting the infringement and until the payment of the decision imposing fine which will be issued is prohibited the vessel departure.

The prohibition of vessel departure is lifted by the deposit of guarantee letter of a Bank which functions legally in Hellas and for equal amount of the fine. Sailing can be permitted without fine to be paid or without to be deposited guarantee letter from Bank, after approval of the Minister for one or more voyages, if imperative transportation or other reasons justifying sailing, or is impossible according to the circumstances the deposit of guarantee Bank letter and according to the discretion of the Minister is offered another adequate guarantee.

In this case the prohibition of vessel departure is mandatory for the Port Police Authority.

According to my personal opinion without having completed the process of imposing administrative penalties by the issuing of a decision imposing a fine, at least is "legal exaggeration" to be imposed administrative measures especially since exist and the provisions of law 2690/1999, where is imposed the right of the previous hearing to the person against of who will be issued unfavorable administrative act. Finally for administratively simplicity reasons and time economy, the legislator should have left in the discretion of the Port Police Authority to impose or not the prohibition of vessel departure and not to provide this right to the maximum level of the Ministry, to the Minister.

In any case and since the time that for the certification and revenue of the fine are followed the procedures of Code of Public Income Collection (COPIC-KEDE) I think that should not impose this measure in the case of which this is left to the discretion of the Port Police Authority or to the Minister, but only in cases that the prohibition of vessels departure is related to reasons for violation of main provisions concerning pollution or contamination of the environment.

c. Law 1147/1981 (A΄ 110),"Ratification of the International Convention of Dumping and Wastes and Other Matter 1973 signed in London, Mexico City, Moscow and Washington" as has been amended and being in force.

According to article 6 paragraph 4 of this law, from the time of drafting the infringement and until the payment of the decision imposing fine which will be issued is prohibited the vessel departure.

The prohibition of vessel departure is lifted by the deposit of guarantee letter of a Bank which functions legally in Hellas and for equal amount of the fine. Sailing can be permitted without fine to be paid or without to be deposited guarantee letter from Bank, after approval of the Minister for one or more voyages, if imperative transportation or other reasons justifying sailing, or is impossible according to the circumstances the deposit of guarantee Bank letter and according to the discretion of the Minister is offered another adequate guarantee.

In this case the prohibition of vessel departure is mandatory for the Port Police Authority.

According to my personal opinion without having completed the process of imposing administrative penalties by the issuing of a decision imposing a fine, at least is "legal exaggeration" to be imposed administrative measures especially since exist and the provisions of law 2690/1999, where is imposed the right of the previous hearing to the person against of who will be issued unfavorable administrative act. Finally for administratively simplicity reasons and time economy, the legislature should leave in the discretion of the Port Police Authority to impose or not the prohibition of vessel departure and not to provide this right to the maximum level of the Ministry, to the Minister.

In any case and since the time that for the certification and revenue of the fine are followed the procedures of Code of Public Income Collection (COPIC-KEDE) I think that should not impose this measure in the case of which this is left to the discretion of the Port Police Authority or to the Minister, but only in cases that the prohibition of vessels departure is related to reasons for violation of main provisions concerning pollution or contamination of the environment.

Finally is not defined what is meant by the term "other adequate insurance" leaving it in the absolute discretion of the Minister to integrate various situations according to its discretion into this category.

d. Law 1634/1986 (A΄104),Ratification of the protocols 1980 «For the protection of the Mediterranean Sea against pollution from land-based sources» and 1982 «Protocol Concerning Mediterranean Special Protected Areas».

According to article 6 paragraph of the law 1147/1981 in which refers the third article of law 1634/1986, from the time of drafting the infringement and until the payment of the decision imposing fine which will be issued is prohibited the vessel departure.

The prohibition of vessel departure is lifted by the deposit of guarantee letter of a Bank which functions legally in Hellas and for equal amount of the fine. Sailing can be permitted without fine to be paid or without to be deposited guarantee letter from Bank, after approval of the Minister for one or more voyages, if imperative transportation or other reasons justifying sailing, or is impossible according to the circumstances the deposit of guarantee Bank letter and according to the discretion of the Minister is offered another adequate guarantee.

In this case the prohibition of vessel departure is mandatory for the Port Police Authority.

According to my personal opinion without having completed the process of imposing administrative penalties by the issuing of a decision imposing a fine, at least is "legal exaggeration" to be imposed administrative measures especially since exist and the provisions of law 2690/1999, where is imposed the right of the previous hearing to the person against of who will be issued unfavorable administrative act. Finally for administratively simplicity reasons and time economy, the legislator should have left in the discretion of the Port Police Authority to impose or not the prohibition of vessel departure and not to provide this right to the maximum level of the Ministry, to the Minister.

In any case and since the time that for the certification and revenue of the fine are followed the procedures of Code of Public Income Collection (COPIC-KEDE) I think that should not impose this measure in the case of which this is left to the discretion of the Port Police Authority or to the Minister, but only in cases that the prohibition of vessels departure is related to reasons for violation of main provisions concerning pollution or contamination of the environment.

Finally is not defined what is meant by the term "other adequate insurance" leaving in the absolute discretion of the Minister to integrate various situations according to its discretion into this category.

e. Law 2252/1994 (A΄192), Ratification of the International Convention "On Oil Pollution Preparedness, response and cooperation 1990 and other provisions" (Note 32).

In article 9, paragraph 1, verse 2 is defined that in the case of infringements by ships is possible with the notification of the decision imposing a fine to prohibited the vessels departure until the fine to be paid or o be deposited a guarantee letter of equal amount.

The prohibition of vessel departure is left to the discretion of the Port Police Authority and since the time that for the certification and revenue of the fine are followed the procedures of Code of Public Income Collection (COPIC-KEDE) I think that should not impose this measure in the case of which this is left to the discretion of the Port Police Authority or to the Minister, but only in cases that the prohibition of vessels departure is related to reasons for violation of main provisions concerning pollution or contamination of the environment

f. Law 3100/2003 (A΄20), "Ratification of the Protocol on preparedness, response and cooperation to pollution incidents by hazardous and noxious substances, 2000".

Specifically in article 5 of that law, entitled "Implementation extension of law 2252/1994 provisions", is defined that the articles third, fourth, fifth, sixth, seventh, eighth and ninth of law 2252/1994 as being in force any time are implemented and for the "Protocol on preparedness, response and cooperation to pollution incidents by hazardous and noxious substances, 2000".

Especially in paragraph 1 (b) of article 9 of the law 2252/1994 is defined: «In the case of infringements by ships, is possible with the notification of the decision imposing a fine to be prohibited the vessel departure until the fine to be paid or be deposited a guarantee Bank letter of equal amount».

The prohibition of vessel departure is left to the discretion of the Port Police Authority and since the time that for the certification and revenue of the fine are followed the procedures of Code of Public Income Collection (COPIC-KEDE) I think that should not impose this measure in the case of which this is left to the discretion of the Port Police Authority or to the Minister, but only in cases that the prohibition of vessels departure is related to reasons for violation of main provisions concerning pollution or contamination of the environment

g. Law 3393/2005 (A΄243), "Ratification of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001".

In article 8, entitled "Penalties - Appeals" and concretely in paragraph (b) is defined that: In the case of infringements by ships, is possible with the notification of the decision imposing a fine to be prohibited the vessel departure until the fine to be paid or be deposited a guarantee Bank letter of equal amount.

The prohibition of vessel departure is left to the discretion of the Port Police Authority and since the time that for the certification and revenue of the fine are followed the procedures of Code of Public Income Collection (COPIC-KEDE) I think that should not impose this measure in the case of which this is left to the discretion of

the Port Police Authority or to the Minister, but only in cases that the prohibition of vessels departure is related to reasons for violation of main provisions concerning pollution or contamination of the environment

h. Law 3394/2005 (A΄243), "Ratification of the International Convention on the Control of Harmful Anti-Fowling Systems on Ships, 2001".

In article 6entitled"Penalties - Appeals", paragraph 1, verse (b) is defined: In the case of infringements by ships, is possible with the notification of the decision imposing a fine to be prohibited the vessel departure until the fine to be paid or be deposited a guarantee Bank letter of equal amount.

The prohibition of vessel departure is left to the discretion of the Port Police Authority and since the time that for the certification and revenue of the fine are followed the procedures of Code of Public Income Collection (COPIC-KEDE) I think that should not impose this measure in the case of which this is left to the discretion of the Port Police Authority or to the Minister, but only in cases that the prohibition of vessels departure is related to reasons for violation of main provisions concerning pollution or contamination of the environment

3.2 International Convention on the Law of the Sea law 2321/1995 (A΄136).

In article 217 of the above mentioned International Convention which has been incorporated in the Hellenic legal order is defined:

(1) States shall ensure compliance by vessels flying their flag or of their registry with applicable international rules and standards, established through the competent international organization or general diplomatic conference, and with their laws and regulations adopted in accordance with this Convention for the prevention, reduction and control of pollution of the marine environment from vessels and shall accordingly adopt laws and regulations and take other measures necessary for their implementation. Flag States shall provide for the effective enforcement of such rules, standards, laws and regulations, irrespective of where a violation occurs.

(2) States shall, in particular, take appropriate measures in order to ensure that vessels flying their flag or of their registry are prohibited from sailing, until they can proceed to sea in compliance with the requirements of the international rules and standards referred to in paragraph 1, including requirements in respect of design, construction, equipment and manning of vessels.

In this case, the prohibition of vessels departure for ships which do not keep the international and national rules and regulations relating with environmental protection is mandatory and is permitted the sailing of the ship, when is ascertained competently the correction of deficiencies that had imposed the prohibition of vessels departure.

3.4 For violations of General Ports Regulations

They are in force the defined in article 157 paragraph 3 of LD 187/1973 (A΄261).

Appeals- Suspension of decisions implementation (Note 33)

4. Conclusions

International, European and National legal framework which referred to items of maritime pollution is width and covers all the areas related to this. Also complete is the framework referred to legal remedies submission in the case that has been imposed administrative sanctions including the prohibition of vessels departure, a very important administrative measure.

Prohibition of vessel departure is a measure that acts either preventively or repressively. In the first case is intended to prevent the master and crew of the ship to commit an environmental pollution. In the second case the measure is imposed aiming in collecting the fine. It obvious that in the first case is prevented the pollution when is seeking to be taken concrete measures, while in the second case when the administrative measure is imposed as a mean of requirement ensuring creates problems in the operation of the ship as an economic unit.

The recognition by the legislature that the prohibition of vessel departure creates problems in its smooth functioning is confirmed so by the deposit of a guarantee letter of equal amount of the debtor in order to be the ship enable to continue the voyage, as well as with the possibility offered to the Minister to allow for specific or other reasons the continuation of the ship sailing. It must be mentioned that the Minister has not conveyed the competence to lower existing levels in order to make more flexible the enforcement of administration by Services or Port Police Authorities during its duties implementation.

Prohibition of vessel departure as an administrative measure can be imposed or as a consequential administrative penalty continuously with the imposing administrative penalty payment or alone. In the first case according to the provision that predicts the imposition of administrative penalties will be submitted the predicted case be case

appeal and accordingly will decide on the specific measure the competent administrative or judicial bodies (Regular Administrative Justice) in accordance with the provisions of law 2690/1999 and law 2765/1999 as have been modified and being in force.

In case that has been imposed only the administrative measure concerning the prohibition of vessel departure and in that case must be followed the procedure provided by the provisions of law 2690/1999 and law 2719/1999 as have been modified and being in force and with the submission of the relevant appeals. The provisions of the aforementioned laws cover the issue of vessels departure prohibition as consequential administrative penalty or as self-administrative penalty because as was mentioned before the prohibition of vessel departure is an administrative action. But in any case is demanding special attention for the imposition of this measure in order the HCG personnel not to be engaged in penal, disciplinary and civil proceedings.

I believe that minus the cases in which exists serious reason/s in order to be imposed the prohibition of vessels departure and concretely for infringement of provisions that are related with the vessel safety, load and passengers for which/whom the imposition of the administrative meter will force/the person/s in charge to proceed in the re-establishment of lacks or in the reintroduction in the legality real situation which should be realized before the lifting of the meter from the responsible Central Service or Port Police Authority of HCG, is not needed in the rest cases to be imposed the particular meter.

This statement springs from the fact that from the moment where the income of fines are realized according to the provisions of COPIC the interests of private individuals, institutions or even of State are ensured and do not exist case of loss. This is not in effect in juridical decisions implementation. This measure should be imposed only in case of provisions infringement concerning the protection of the maritime environment, for example, does not bear the prescribed certificates, has not surrendered its remnants to host facilities, etc.

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Notes

Note 1. See article 1 of law 743/1977 as was codified and being in force with PD55/1998 and article 2of law 1650/1986. Also see Tsaltas, G. (2003).*The international regime of the seas and oceans, international policy, international law, international organization, volume second*. Athens, I. Sideris pp. 105 and next (in Hellenic).

Note 2. See Hellenic Constitution. *Hellenic Parliament, January 2005*, pp. 37-39.

Note 3. See article 1, paragraph (d) of law 743/1977 «Authority: Central Port Police Authorities, Port Police Authorities, Sub Port Police Authorities of the country». Additionally for the changes that have been occurred to this institution (HCG) and are related with its mission, role, constitution and subordination seePD 94/2012 (A΄ 149), law 3922/2011 (A΄35), PD 67/2011 (A΄149), PD 127/2010 (A΄214), PD 184/2009 (A΄21),PD 242/1999 (A΄201) as has been modified and being in force.

Note 4. See Korontzis, T. (2007).The meaning of environment risk. *DioikitikiEnimerosi (quarterly survey of administrative science),* issue 44, pp. 85-97 (in Hellenic) and Korontzis, T. (2008). The vulner ability of social groups under environmental status pressure. *Dioikitiki Enimerosi (quarterly survey of administrative science),* issue 45, p.p. 64-70 (in Hellenic).

Note 5. For the competences of this Division see article 25 of PD 67/2011 (A΄149) in conjunction with article 45 of the same PD which is referred to the competences of the Port Police Authorities in Hellas. Concerning the competences of the Consular Port Police Authorities relative are the provisions of MD with Nos 1141.1/39/2002 (B΄929) and 1141.1/11/2005 (B΄729) and the opinion with No 49/1992 issued by the Council of the State. Also see Korontzis, T, (2012c). The Hellenic Ministry of Mercantile Marine, As an Autonomous Administrative Governmental Institution in the Period 1971-2011. A Descriptive and Critical Approach. *International Journal of Business and Social Science*, vol. 3, No. 8, p.p. 61-75.

Note 6. See PD 11/2002 (A΄ 6) titled «National emergency plan for combating pollution incidents by oil and other harmful substances» with which is established the national plan of emergency situation for combating pollution incidents by oil and other harmful substances and is reported as "national plan", as well as the MD with No 2411.1/07/03 issued by the Minister of MSA (B΄850) titled: «Instructions/procedures for combating incidents of ships that are in distress or danger situation according to the requirements of article 20 of Directive 2002/59 – Definition of shelter areas». See Korontzis, T (2009).Protection of maritime environment. The role of the Hellenic Coast Guard. *Dioikitiki Enimerosi (quarterly survey of administrative science),* issue 51, pp. 77-90 (in Hellenic).

Note 7. For a concise analysis concerning the imposed sanctions and a critical approach between the provisions of the two acts see Korontzis, T. (2009), ibid.

Note 8. See Korontzis, T. (2011). PhD dissertation titled *«The stationary role of Hellenic Coast Guard»,* [Public Administration Department, Law Sector], library of Panteion University of Social and Political Sciences. Athens, pp. 112-119 (in Hellenic).

Note 9. A lot of MD and Joint Ministerial Decisions (JMD) have been issued according to the authorization of this law for which are imposed the administrative penalties of article 13. These are: No. 181051/2079/78 (B΄1135), 181051/2078/78 (B΄1135), 18051/2080/78 (B΄1135), 181051/536/1980 (B΄364), 1985/18051/80 (B΄1110), 18051/1090/82 (B΄266) 3221.2/2/89 (B΄435), 3231.8/1/89 (B΄ 573), 3245/4/92 (B΄594), 1218.91/97/97 (B΄951), 3221.2/4/99 (B΄ 1372), 5219/F11/4/23-03-2000 (B΄455), 3418/07/02 (B΄ 712). Finally for the MD with Nos19396/1546/97 (B΄604), 69728/824/96 (B΄358), 01.98012/2001/96 (B΄40) are not enforced the administrative penalties of the law 743/1977, while these MD have not been issued after its authorization. Specifically have been issued after authorization of law 1650/1986 which in its provisions predicts the imposition of penal and administrative sanctions.

Note 10. Special Fund of Regulatory and City Planning Implementation (ETERPS).They are keeping in the special account «Blue Fund» as is predicted in article 18, paragraph 1 of law743/1977. It includes all the offences that are predicted in the legislation on the protection of the marine environment as also and the fines that are imposed for infringements of the provisions of law 2571/2001 (on the beach and ashore as has been modified and is in force) and is followed according to paragraph 23 of article 3 of law 2356/1994 the procedure that is mentioned in article 157 of LD 187/1973 (A΄261).

Note 11. After the publication of PD 127/2010 in conjunction with the provisions of PD 67/2011 is meant the

Division of Vessels nspection [(article 30) of PD 67/2011].

Note 12. Has been issued the PD 400/1996 (A΄268).

Note 13. Has been issued the MD 1218/2/97 (B΄ 534).

Note 14. See paragraph 2 of the one article of PD 86/1997 (A΄72).

Note 15. See law 356/1974 (A΄90).

Note 16. See op. cit. note 10.

Note 17. Concerning the United Nations Convention on the Law of The sea (UNCLOS) which was ratified by the Hellas with the law 2321/1995 is recognized the right for intervention on the high seas only to the State of which the vessel bears the flag. According to article 221 of the above mentioned Convention is introduced variation, stating that Member States can adopt and implement measures in accordance with the customary and conventional international law, beyond the territorial waters, depending on the actual or threatened damage in order to protect the coasts, or their related interests including fishing, from pollution or threat of pollution, due to a maritime accident or from actions that have relation with this accident which may have as result the causing of serious damage.

Note 18. See JMD with No 747/Φ 183507/87 (B΄226).

Note 19. After authorization of this law has been issued the JMD with No1218.91/97 issued on October 15, 1997 (B΄951) and MD with No3221.2/1/99 (B΄76) issued by the Minister of Mercantile Marine for which are implemented the penalties of article 9 of the same law.

Note 20. See note 11.

Note 21. In article 4 of the law 3528/2007 (A΄122) was defined the ΄΄Establishment – Mission of HCG Operations Center΄΄. Specifically in the HCG Headquarter established Operation Center which its mission is the management, monitoring and coordinating of large-scale operations with the use of the infrastructure, the available means and HCG personnel, the monitoring of small-scale operations carried out by the local Port Police Authorities, as well as the provider of the necessary assistance to them except facts or search and rescue operations. Relative is the ΄΄Regulation of organization and function of HCG (KEPIX/HCG)΄΄, with No 09/09 which was ratified by the MD with No7100/02/09 issued on May 21, 2009by the Minister of Mercantile Marine, which was issued on implementation of article 4 of the law 3528/2007 (A΄ 122) and article 126 paragraph3 verse (d) and (e) of law 3079/2002 (A΄ 311).

Note 22. See note 11.

Note 23. It is expected the incorporation in the Hellenic legislation with injunction of the Ministry the Ministry of Justice, Transparency and Human Rights. This specific directive is complemented by detailed rules on criminal offences and other provisions contained in Council framework decision with No 2005/667/JHA issued of July 12, 2005 in order to be strengthen the legislative framework for the enforcement of the law against ship-source pollution.

See Grigoriou, P. (1996). *The harmonization of Community policy on protection of the marine environment with the mutation of the community legal order*. in the collective volume of the Hellenic Centre for European studies, the Aegean Sea and the new Law of the Sea. Athens – Komotini, A. Sakkoulas, pp. 271-290 (in Hellenic).

Note 24. See Asonitis, G. (1995). *The United Nations Convention on the law of the sea*. Papazisis, Athens, pp. 98 and next (in Hellenic).

Note 25. See Korontzis, T. (2006). The enforcement of administrative police by the Hellenic Coasty Guard. The institution process of the procedure for sanctions enforcement concerning the violation of Ports General Regulations. Statistic elaboration of Piraeus Port Police Authority facilitation in the period 1993-2001.*Nautiki Epitheorisi*, issue 557, pp. 87-118 (in Hellenic).

Note 26. See Korontzis, T. (2011), op.cit. note 8, pp.156-157.

Note 27. For conceptual determination see Korontzis, T. (2011), note8, p.p. 171-173.

Note 28. In the provisions of law 2690/99 and more specifically in article 6 titled «previous hearing of the interested» paragraph 2 is determined that the period in which the person has the right to express to the administrative authorities his/her/it opinion/s writing or orally before each action or measure against his/her/its rights or interests is five (05) full days.

In article 157 paragraph 1 of LD 187/1973 (A΄261) is determined period of 24hoursin order the interested to

apologize.

Taking under consideration article 33 of law 2690/1999 and specifically paragraph1 in which is determined:«From the entry into force of the code, if is not otherwise specified, is deleted any general provision which refers in item regulates by it» in conjunction with the fact that a new law in force is regulated an item which was reported in LD 187/1973 (A΄ 261), as also the fact that extends the right of citizen protection dual in time and in material by establishing and other measures for the protection of citizen (article 6 paragraph 3, 24, 25, 27), the provision of article 157 paragraph 1 of LD 187/1973 concerning the period for apology must be considered as abolished.

Note 29. Concerning the cost of the time use for floating,, land and air craft means of HCG, the personnel remuneration that employed as also the cost of other means and materials used or were spent for combating of pollution incidents has issued in implementation of paragraph 4 of article 12 the MD with No. 3221.2/4/99 (B΄1372) issued by the Minister of Mercantile Marine.

Note 30. See op. cit. note 11.

Note 31. Seenote 17.

Note 32. See note 19.

Note 33. Korontzis, T. (2012a). The prohibition of vessels departure for reasons concerning the ensuring of public and private interests in the Hellenic legal order.*International Journal of Humanities and Social Science*, Vol. 2, issue 11, pp. 183-191, Korontzis, T. (2012b).The prohibition of vessels departure for safety navigation reasons in the Hellenic legal order. *International Journal of Asian Social Science*, Vol. 2, issue 5, pp.704-719 and Korontzis, T. (2011). PhD dissertation, op.cit.pp. 171-214 (in Hellenic). Concerning the penal, disciplinary and civil responsibility of HCG personnel see Korontzis, T. (2012d).Penal, disciplinary and civil responsibility of the Hellenic Coast Guard personnel.*International Journal of Humanities and Social Science*, Vol. 2, issue 9, pp.174-185

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Business and Human Rights: Analysing Discursive Articulation of Stakeholder Interests to Explain the Consensus-based Construction of the '*Protect, Respect, Remedy* UN Framework'

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Abstract

The 2008 United Nations (UN) Framework *'Protect, Respect, Remedy'* broke ground by being accepted by the UN's main human rights body, the Human Rights Council, as a first ever authoritative clarification of human rights responsibilities of business enterprises as well as States' duties to protect against human rights violations caused by business organisations. The Human Rights Council's acceptance of the UN Framework stands out because previous efforts to reach agreement on norms for business responsibilities for human rights within a comparable UN setting had failed. As a UN initiative aimed at developing norms that may eventually become international law, the process, which was undertaken by the Special Representative of the Secretary-General ('SRSG'), Professor John Ruggie, also stood out because it applied a multi-stakeholder approach involving representatives of business organisations as potential duty-bearers. Through a discourse analysis this article explores how and why the SRSG process delivered broad-based acceptance of the UN Framework not only with the UN but also with non-state actors. It concludes that consensus came about as a result of strategic usage of language, which addressed the specific interests of particular stakeholders in ways that induced acceptance of emerging normative expectations that business organisations take responsibility for human rights. In combination with the multi-stakeholder approach, which allowed for direct participation of business organisations as prospective duty-holders, consensus emerged leading to institutionalisation of norms on business responsibilities for human rights for States as well as business organisations.

Keywords: business and human rights, CSR normativity, discourse analysis, public-private regulation, 'UN Framework' on business and human rights, UN Secretary-General's Special Representative for Business and Human Rights (SRSG John Ruggie)

1. Introduction

Conventionally, Corporate Social Responsibility (CSR) has been considered to be voluntary and for many practical purposes distinct from law. However, in later years the distinction between CSR and law has become blurred. CSR normativity increasingly draws on international law, particularly on human rights, labour rights, environment and anti-corruption. In addition to business or sector guidelines, law-makers at national and international level have taken to regulate company conduct through hard or soft measures, which concomitantly provide guidance for companies of what is expected of them by society in terms of social responsibility.

In June 2011 the United Nations (UN) Human Rights Council endorsed the UN Guiding Principles on Business and Human Rights, which build on the three-pillared *Protect, Respect, Remedy* UN Framework that was developed for the Human Rights Council between 2005 and 2008. Clarifying the actions which business organisations as well as governments (States) should undertake to avoid business related human rights violations, the UN Framework broke ground in several ways. Perhaps most importantly, it brought clarity to a topic which had been the subject of heated and sometimes antagonistic debate between civil society and business organisations in favour of as well as opposed to the idea that businesses take responsibility for human rights, and even between governments which also harboured widely diverging views on not only the idea of business responsibilities for human rights but the entire idea of formalising corporate social responsibilities. The background to the UN Framework, which was received with a unanimous welcome by the UN Human Rights

Council, was a set of draft UN Norms on Business and Human Rights. The 'draft Norms' had been developed by an expert working group under the Council's predecessor, the UN Commission on Human Rights but were was eventually rejected by the Council due to political reasons. A previous effort to develop a UN Code of Conduct for Multinational Enterprises (MNEs), initiated in the 1970s, had finally faltered in the early 1990s. The UN Framework broke new ground in being the result of an inter-governmentally initiated process to define a specific topic of business responsibilities related to business impact on society. The UN Framework has already formed the foundation of further intergovernmental efforts to define corporate social responsibilities. In particular, the UN Framework forms the basis of the UN Guiding Principles and has influenced the 2011 revision of the Organisation on Economic Cooperation and Development (OECD) Guidelines on Multinational Enterprises. The UN Framework has also influenced the ISO 26000 Social Responsibility Guidance Standard and the EU's 2011 CSR Communication as well as firms' CSR strategies and actions. Thus, although not an established form of international law, the UN Framework has already proven its normative influence and significance.

The broad agreement generated by the process of developing the UN Framework stands in stark contrast not only to past UN efforts in the human rights field, but also to the meagreness of recent years' UN efforts to agree on responsibilities of governments and non-state actors with regard to climate change. Understanding the process that led to agreement on the UN Framework may hold important insights for future intergovernmental as well as public-private efforts to address global sustainability concerns beyond the field of human rights. To bring out that understanding, this article applies a discourse analysis, which approaches the process from the socio-legal perspective of reflexive law and brings forth negotiation dynamics in a context marked by competing interests between participants and constraints of international law and politics.

The article proceeds as follows: First the background to the UN Framework is set forth, followed by an elaboration of the interests at stake in construction of norms on corporate social responsibilities (including human rights responsibilities) under the auspices of an intergovernmental organisation like the UN. Next, the value of discourse analysis in the development of such normativity is explained. This is followed by a case study applying discourse analysis to the development of the UN Framework, considering the process as a reflexive law process and stakeholders as representing particular system-specific interests. Due to space limitations, the analysis mainly considers statements by the individual in charge of the process, Professor John Ruggie who was charged with the mandate as the UN Secretary General's Special Representative ('SRSG') on business and human rights. Finally, the article concludes that consensus on the UN Framework came about as a result of a strategic usage of language that addressed the specific interests of particular stakeholders in ways that induced acceptance of emerging normative expectations that business take responsibility for human rights. In combination with the multi-stakeholder approach that allowed for direct participation of business organisations as prospective duty-holders, consensus emerged leading to institutionalisation in the form of the UN Framework.

2. Background

2.1 Political and International Law Context for the Development of the UN Framework

Much of recent years' theorizing on Corporate Social Responsibilities (CSR) had grappled with what to make of the increasing role which public authorities at national and international level have assumed in the CSR field (Walsh, 2005; Matten and Moon, 2008; Margula and Steurer, 2009; Gjølberg, 2010; Scherer and Palazzo, 2011). Legal scholars have been discussing a number of related developments, which combine public and private law and other modes of regulation across national and national levels (Picciotto, 2008; Buhmann, 2007, 2009; McBarnet, 2007; Backer, 2006; Zerk, 2006). Muchlinski (2012) has suggested that the UN framework's notion of human rights due diligence may lead to the creation of binding legal duties.

The last decade of the 20th century and the first of the 21st century have witnessed an emergence of concern on human rights duties and accountability of transnational corporations and other business enterprises. This has combined with concern with the effectiveness of international human rights law to curtail adverse human rights impact resulting from economic activities and recent decades' development of investment and trade law. While the home state of a corporation has the legal power to regulate the corporation extraterritorially, so far international human rights law has not been generally seen to entail an obligation for States to do so. And although international human rights law recognises limited international legal personality for some non-state actors, especially in terms of rights for individuals, its recognition of obligations for non-state actors is still limited. That is particularly so with regard to legal persons and even more particularly for private non-state actors, such as companies.

Despite – or perhaps because of – this doctrinal state of the art as regards companies' obligations under international human rights law, later years have seen efforts by international organisations, especially the UN,

the International Labour Organisation (ILO) and OECD to introduce social responsibilities for companies through or related to the concept of CSR. Established in 1999-2000 as an initiative of (then) UN Secretary-General Kofi Annan, the UN Global Compact, comprising ten principles on human rights, labour standards, environment and anti-corruption to which business organisations may commit on a voluntary basis. ILO, drawing on its tri-partite structure comprising states, employers' and workers' organisations, has adopted Declarations encouraging Multinational and other companies to observe core labour standards. OECD's Guidelines for Multinational Enterprises are a set of non-binding normative directives on anti-corruption, taxation, competition, environmental sustainability, labour standards and human rights that OECD Member States undertake to recommend to corporations based in those States.

Preceding the SRSG's first mandate, the UN Human Rights Commission had given a 'thumbs down' to a set of draft Norms on Human Rights Responsibilities of Transnational and other Business Enterprises. The draft Norms had been developed between 1998 and 2003 by an expert group under the Human Rights Commission. The Commission (which was in 2006 superseded by the UN Human Rights Council) was a political body within the UN. Composed of government representatives, some of whom had been lobbied by business who saw the draft Norms as a first step towards binding international requirements on business with regard to human rights, the Commission decided not to proceed with the draft Norms (Knox, 2012, Buhmann, 2012, Kinley and Nolan, 2007). As an alternative, the Commission in 2005 drafted the mandate upon which the UN Secretary General later that year appointed John Ruggie as SRSG (Commission on Human Rights, 2005).

The SRSG mandate encompassed the identification and clarification of standards of corporate responsibility and accountability for business with regard to human rights; the elaboration of the role of States in effectively regulating and adjudicating the role of business with regard to human rights, including through international cooperation; research and clarification of the implications for business of concepts such as 'complicity' and 'sphere of influence'; development of materials and methodologies for undertaking human rights impact assessments of the activities of business; and compilation of a compendium of best practices of States and business. Specific instructions from the Commission to the mandate-holder suggest that inclusion of a wide group of stakeholders was hoped to be a way towards an output that could be widely accepted. The resolution requested the mandate-holder "to consult on an ongoing basis with all stakeholders". It listed not only States and intergovernmental organisations but also "transnational corporations and other business enterprises, and civil society, including employers' organizations, workers' organisations, indigenous and other affected communities and non-governmental organizations" among organisations to be consulted (Commission on Human Rights, 2005).

During the 2005-2008 mandate the SRSG met with a number of stakeholders, including human rights NGOs, businesses, academics and other specialists on CSR. By the end of the mandate in June 2008, the SRSG had conducted more than 15 consultations. The recommendations of the SRSG were presented in 2008 in the form of the three-pillared '*Protect, Respect, Remedy'* framework, now referred to as the UN Framework. It set out a normative framework for states to protect against human rights violations by companies, for companies to respect human rights, and for states and companies to provide judicial as well as non-judicial remedies to (alleged) victims of human rights violations by companies.

The UN Framework differs from the other main UN initiative in the field of CSR, such as the Global Compact, by developing quite clear normative guidance for companies and establishing that business responsibilities for human rights encompass both an element of complying with relevant national law and an element of internalising social expectations, including to ensure respect for international human rights law even if the pertinent standards directly address states. The impact of the UN Framework is already significant: In June 2008 the Human Rights Council renewed the mandate of the SRSG for another three years until 2011 in order to allow the SRSG to "operationalise" the recommendations made in his final report from his first mandate 2005-2008 (Human Rights Council, 2008). This led to the UN Guiding Principles, which was endorsed by the Human Rights Council in June 2011. The UN Framework played a major role for the 2011 revision of the OECD Guidelines, including the inclusion of full new human rights chapter and revision of the complaints handling National Contact Points to ensure human rights compatibility. The EU's third and most recent CSR Communication, a type of EU soft law (Senden, 2005), changed the definition of CSR from that which had prevailed since 2002, partly in order to ensure realignment with the UN Framework and the revision of the OECD Guidelines (European Commission, 2011).

2.2 The Construction of CSR Normativity: Interests at Stake

When the SRSG process was launched it was unclear whether it would lead to a conventional international law instrument, such as a treaty, that might set out binding obligations for business with regard to human rights. Some expected the process to lead to simply a reaffirmation of the Global Compact as *the* UN instrument on human rights responsibilities for business as well as other CSR issues. Differences such as these were quite significant for companies, civil society as well as the UN and its member governments. To the extent that development of norms on CSR or its human rights elements were to lead to an institutionalisation of businesses' responsibilities under international law, the implications for companies are potentially very large. Much is also at stake for governments, involved intergovernmental organisations, NGOs, labour organisations are business organisations. Depending on the outcome, we may distinguish between three scenarios: First, a *'hard' institutionalisation* which leads to the formulation of duties for businesses in international law, i.e. for businesses to become duty-bearing subjects under international law. A hard institutionalisation could also result in the establishment of duties for businesses in regional (e.g. EU) law and national law in addition to those that they already have. Second, a *'soft' institutionalisation* in terms of a clearer definition and (a degree of but not necessarily global) consensus on what is understood by business responsibilities for human rights and general social responsibility of businesses. This could also entail a clearer delimitation of the boundaries between state duties and business responsibilities, and a clearer understanding and a measure of consensus on disputed terms (such as became the case with 'spheres of influence' and 'complicity' during the SRSG's 2005-2008 mandate). A soft institutionalisation would mean that businesses are seen to have some social responsibility and responsibility for human rights, but without being subjected to legally binding requirements. Third, *status quo* would mean that processes of attempting to reach either a hard or a soft institutionalisation were unsuccessful. Under *status quo*, companies would be subjected mainly to their own norms and disparate economic and related sanctions, especially from investors and consumers. Of course, nation states may introduce specific legal requirements to be complied with. For reasons of economic competition between states, such measures are, however, likely to be limited.

A 'hard' institutionalisation will mean considerable restrictions in terms of permissible conduct and resource priorities for many businesses around the globe. Consequently it will have potentially severe economic effects on many actors in the private sector, be they TNCs, suppliers or even buyers. As a hard institutionalisation will affect the economies of many companies, at least in the short term and especially for companies that do not engage in strategic CSR (Porter and Kramer, 2006), there may be considerable economic power related to CSR being 'voluntary'. For companies that prefer minimal legal constraints, a construction of international law as not creating obligations for companies is therefore paramount. This also applies to many companies who draw on CSR presented as 'voluntary' action as a business strategy to signal that they go out of their way (of abiding by law) to be good corporate citizens without being legally compelled to do so. Those companies may therefore prefer a construction (and preservation) of international law as not creating obligations for companies. Many such companies will also have interest in connections between CSR normativity and international law norms being limited. That would reduce expectations of companies to respect, for example, labour conditions which correspond to international labour law conventions in countries where national law provides less effective protection for workers than the salient international standard.

From a different perspective, the international labour movement may also see an interest to avoid a specific institutionalisation of CSR under international law as establishment of new legal obligations for businesses in a form other than developed and organised under national or international labour organisations may be a loss of power.

A hard institutionalisation could also advance the interests of some stakeholders. For companies that have already established themselves as socially responsible and as companies which respect human rights, a legal construction of a 'level playing field' in terms of specific standards of conduct may lead to economic benefits, at least in the short to medium term until other businesses catch up with the new legal requirements. Such an institutionalisation may also, arguably, ease the resource burden on many governments with regard to realisation on positive human rights and lead to better conditions for many individuals. In terms of societal economics, these positive pay-offs may be large, for many socially, environmentally and human rights concerned NGOs, there will be an important political message in their being able to demonstrate success of years of claims for businesses to be made to take more responsibility. Through this, NGOs will also be able to make a claim to power to be taken seriously in other future regulatory efforts in relation to globalisation and its effects.

A softer institutionalisation of current social expectations towards more specific expectations of businesses in the form of 'soft', i.e. non-binding responsibilities, would still have significant implications for a large number of

companies globally, be they TNCs, suppliers or even buyers. For companies that are not already socially responsible or live up to human rights expectations, voluntary expectations could be much easier to handle in terms of resources and economic effects than legally binding requirements. A soft institutionalisation would still have the potential of benefiting societies at large, but most likely less than if requirements on companies are made mandatory. For NGOs that have been fighting for a hard institutionalisation of social responsibilities for companies, not being able to demonstrate the political power to successfully influence and take part in inducing a change at the level of international law as well as in some regional and national legal contexts would be considerable.

A status quo situation, assessed from the situation at the time when the SRSG assumed his mandate would mean results somewhat along the lines of the soft institutionalisation scenario but with effects stronger for most stakeholder types. The effects on perceptions of the intergovernmental organisations like the UN as being unable to adapt to changed circumstances and requirements, such as globalisation and its effects on trade, human rights and social conditions in many states, could be considerable. This could significantly affect global confidence in the UN and therefore its political and legal power.

In sum, the interests at stake among businesses and their interest groups, NGOs and civil society, governments and intergovernmental organisations whether favouring an institutionalisation of CSR normativity or not at the outset of the SRSG mandate were considerable. The construction of human rights aspects of CSR or even of specific business responsibilities for human rights has strong implications under each of the scenarios set out, and therefore impact the way in which stakeholders relate to initiatives that may affect their interests through an institutionalisation of business responsibilities for human rights. As the subsequent section shows, socio-legal and related discourse studies of processes of negotiation under international organisations demonstrate that interests play a considerable role, and that some stakeholders have been adept at deploying discursive strategies towards aims that eventually become reflected in international agreements.

3. Negotiating and Protecting Interests in Intergovernmental Processes

Combined legal, international policy and political science studies of non-state actors in international relations have demonstrated that despite their lack of formal role as participants in international law-making, NGOs and private non-state actors engage actively international law-making processes and intergovernmental rule-making in several ways. Reinalda, Northman and Arts (2001) demonstrate that NGOs and business organisations employ a variety of strategies to influence international policy and law-making. These include peaceful means such as advocacy of special interests of public importance, active use of possibilities for speaking and dialogue in consultative capacity, and lobbying or national level pressuring of states to participate in treaty-making efforts. They also include formation of coalitions, mobilisation of and participation in public opinion making, data-gathering to help frame or define a problem in ways that influence the work of intergovernmental conferences, and persuasion in general, as well as less peaceful means such as violent protests.

Studies indicate that NGO and business organisations are either constrained or enabled by other players (such as states and companies) as well as by contextual factors (such as distribution of resources). Arts (1998, 2001) notes that the ability of private non-state actors to exert influence depends primarily on two factors: The quality of their interventions (in particular expert knowledge and skills), and the similarity between their demands and existing related regulatory regimes. The ability to politicise issues and mobilise support among other groups allows NGOs to sometimes compete with powerful business interests. Business organisations gain power from liaising with political elites "as business is the key motor of economic growth on which the political system is so dependent". In other cases, NGOs have successfully used strategies of persuasion to affect changes the positions of states' interests (Deitelhoff, 2009).

Kolk (2001) found that business organisations generally favour voluntary initiatives and self-regulation to public regulation, partly because self-regulation enables the self-regulator to decide for themselves what they want to do. While companies and business organisations often oppose regulation at first, they may change stances and embrace (self-)regulation for strategic reasons. These include perceived opportunities for strategic restyling or potential new markets, following competitors' lead for fear of missing chances for profit, or to avoid financial or publicity risks.

Analysing network based discourse in relation to policy processes on environment and sustainability. Hajer's pivotal study (1995) of discursive construction of sustainability problems indicates that discursive argumentation employed by coalitions that converge on shared interests influences the conceptualisation of problems, solutions and regulatory strategies. Also applying a discourse approach, Conley and Williams's (2005) analysis of theory versus practice in the CSR movement suggests that in particular firms' deployment of linguistic usages is

carefully targeted towards the construction of particular versions of CSR as part of an ongoing construction of the meaning of CSR which involves many actors with varying ideas and objectives.

Perhaps due to public-private regulation of CSR still being somewhat unusual, studies of public private construction of CSR normativity are still limited. Employing discursive institutionalism, Fairbrass (2011) identifies reasons for the discursive construction of CSR in EU policy, exposing why the voluntary mode came to prevail over the regulated approach. Buhmann (2010, 2011) suggests that some business participants in the European construction of CSR were successful in influencing the outcome due to a specific discursive strategy underscoring public sector obligations rather than social responsibilities of firms, and that the construction of the Global Compact was successful in part because the UN organisers did not question the voluntary character of CSR and therefore did not engage firms' in struggling to uphold their preferred voluntary CSR concept. While the UN Framework and its development has been the subject of some research (Backer, 2006; Jerbi, 2009; Knox, 2012), the specific discursive dynamics remain to be analysed.

4. The Value of Discourse Analysis in Research on the Development of CSR Normativity

Discourse theory and analysis provide a way to identify and read texts to understand how their positions and arguments impact on social constructs, such as CSR normativity in general or business responsibilities for human right. In relation to a study of the SRSG process, discourse theory provides a theoretical background for analysis of the argumentative struggles and strategies. Due to its close association with international law and the development of norms within an intergovernmental context, the SRSG process contains elements that resemble some of those for which discourse analysis has been applied by international scholars (Kennedy, 1987; Holdgaard, 2008). The process, however, may also be considered from a more general perspective of power struggles and a quest for hegemony in the construction of CSR normativity, as elaborated below.

Joined by a common concern with power, power relations and their role (and use) to shape society, discourse theory comes in a number of forms and approaches. Some, like the French school some of whose main authors are Michel Foucault, Ernesto Laclau and Chantal Mouffe, are quite abstract theories. Others, such as the Critical Discourse Analysis (CDA) school represented by Norman Fairclough (1992, 2003) and other primarily English or German scholars, are more concretely focused on textual analysis. For the purposes of the case study below, a Fairclough inspired close textual reading is combined with the power oriented analytical focus championed by Laclau and Mouffe (1985) to bring out the significance of underlying power issues and linguistic discourse as a quest for building or preserving power, obtained through hegemony in the discursive construction of particular concepts.

In the discourse theory approach of Laclau, 'democracy' is a 'floating signifier'. The term denotes signifiers without referents, such as a word that doesn't point to an actual object or agreed upon meaning. Floating signifiers are often nodal points in competing discourses or sub-discourses (such as whether businesses responsibilities for human rights should be voluntary or binding, and/or what role should be paid by international human rights law in the substantive normativity of such responsibilities). The discursive battle, therefore, is a battle between discourses for hegemony in deciding the signification ("meaning") of the floating signifier. The normative concept of business responsibilities for human rights was a 'floating signifier' at the outset of the SRSG process. The consensus that emerged around the UN framework meant a clarification of the normative concept and therefore a fixation of the floating character of the previously disputed concept of business responsibilities for human rights.

As explained in detail elsewhere (Buhmann, 2009, forthcoming), the SRSG process may be considered a type of reflexive law. Reflexive law is a process oriented legal theory and regulatory strategy which counts on multi-stakeholder development of norms through exchanges that allow stakeholders to learn about the needs or expectations of other social groups or stakeholders. This learning process which induces internalisation of externalities typically takes place within an actual or virtual dialogue or learning forum organised by authorities. It has also been has demonstrated that power relations influenced the construction of CSR normativity in two other intergovernmentally organised reflexive law forums on CSR, the European Multi-stakeholder Forum on CSR and the UN Global Compact (Fairbrass, 2011; Buhmann, 2010, 2011).

A key point in reflexive law's inducing organisations to internalise of externalities is the theory's basis in the systems theory idea of autopoesis (Teubner, 1984, 1988). Autopoiesis allows social sub-systems such as the political, the economic and the legal system to adapt to changes or expectations in their environment based on 'irritants' from other social sub-systems. 'Irritants' function as perturbance, which leads to internal processes of change. Stakeholders' engagement in a reflexive law process allows social sub-systems to exchange information which causes perturbance inside another social sub-system. In the process of 'digesting' the

perturbance, internal reflection on the sub-system's impact on the environment is strengthened. This may lead to self-regulation to change that impact and, by implication, meet the concerns and needs of other social sub-systems. The process of developing and causing 'irritation' in other social sub-systems entails the use of signals or, in system theory language, of 'binary codes' specific to a system. While a system communicates in its own language, it may mimic the language of another. It may therefore employ signals from another system in order to create perturbance within the latter.

A process of constructing CSR normativity or to define what is to be understood by business responsibilities for human rights involving different social sub-systems seeking to promote and protect their own interests (such as those indicated above) has a discursive element. It involves discursive struggles to influence the construction of the concept that will result from the process. Interaction within a reflexive regulatory forum takes place through discursive exchanges between participants who argue their case to promote and protect their interests in ways intended to lead to the desired adaptation within other participating sub-systems. To cause perturbance, stakeholders will need to apply the system-specific language of the recipient it seeks to influence. In a discourse analysis of the construction of concepts in reflexive law forums, textual reading focusing on linguistic usages, such as usage of system-specific language, connects to the construction of floating signifiers (such as business responsibilities for human rights) and underlying power interests (such as those outlined in the preceding section).

The connection between reflexive law and discourse theory may be illustrated in a simple relational model (*fig. 1*). The model provides a concrete representation, which connects the relatively abstract ideas of floating signifiers and reflexive law-making with the textual analysis and its focus on system-specific language. The model presents the system-specific language dynamic through explicit focus on the context for texts, their production, transmission, consumption and effects.

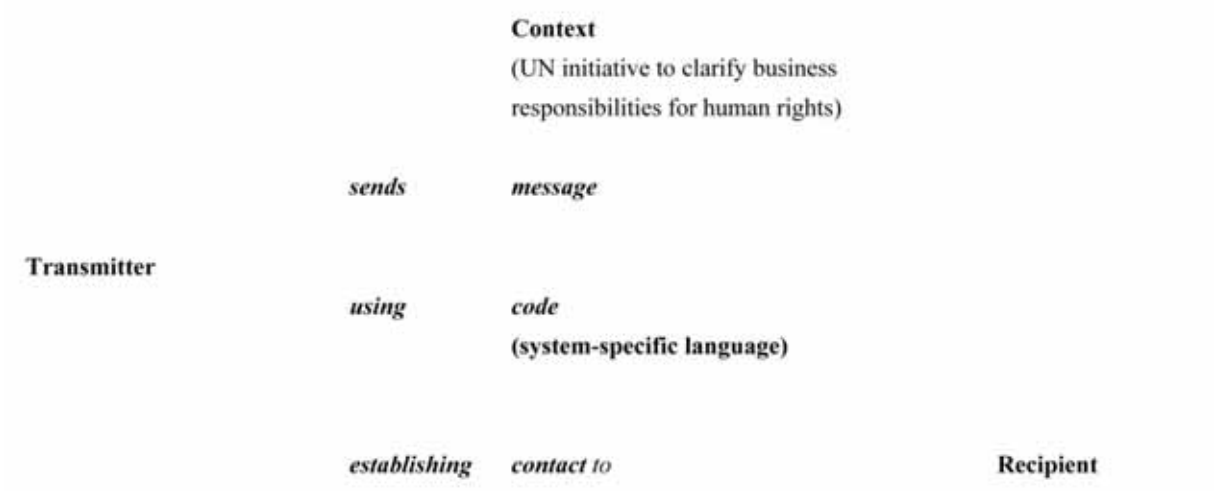

Figure 1. Basic relational model (Adapted from Ditlevsen, M. G., Engberg, J., Kastberg, P., & Nielsen, M. (2007) at 64)

In figure 2 the model is expanded to indicate results of the discursive process with examples to operationalise each of the fields of the model in the current context.

The model indicates the relationship in which the text is sent by the transmitter in the context of a reflexive regulatory forum, which provides for interaction between representatives of different social sub-systems. The transmitter seeks to convey a message to the recipient, typically a representative of another social sub-system, for example activating the economic impact of disregard of social expectations on companies that they will ensure respect for working conditions in the supply chain.

The subsequent analysis of the SRSG process will seek to determine whether and how irritation was made to arise and cause observable results in terms of the reaction, when the transmitter employs a code or system-specific language of the recipient social sub-system. Changes within the system may take the form of self-regulation or acceptance rather than resistance to external demands. The latter may lead to collaboration rather than antagonism. Reactions have an impact on the output of the reflexive regulatory forum. Charged by

the UN with a specific task, John Ruggie in his capacity as SRSG did not himself represent a specific social sub-system but functioned as a medium to deliver an output.

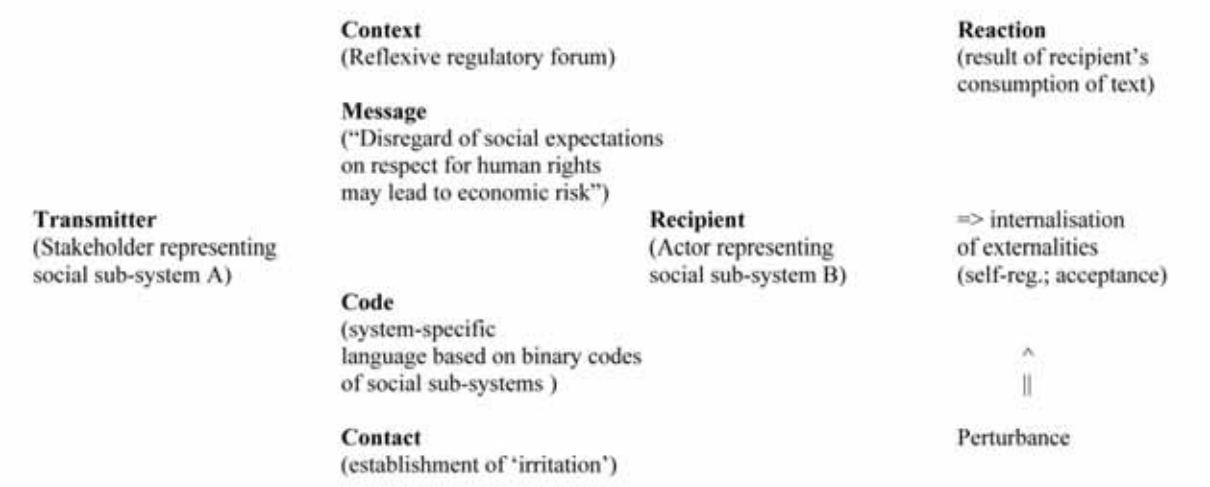

Figure 2. Model for discourse analysis of system-specific language in reflexive law

5. The Construction of the 'UN Framework': Analysing the SRSG's Discursive Course towards Consensus

Recall that the SRSG process was established upon the background of the failure of the draft UN Norms to generate support with Commission on Human Rights. Collaboration between certain governments and business organisations and convergence of arguments against the idea that companies hold human rights responsibilities worked against the Commission's positive reception of the draft Norms. Organisations opposed to the idea of business responsibilities for human rights argued that the draft Norms entailed shifting international obligations from states to corporations. Several arguments referred to classical international law doctrine, according to which international obligations pertain to States, not to private actors such as companies. Others argued that States' lack of implementation of at the national level was a common cause of business related human rights problems, and companies should not suffer from States' disregard of their international obligations (Buhmann, 2012 with references). Many of the arguments which caused the Commission to reject the Norms, including those above, were referred to international law doctrine. As a body under the UN, charged with the drafting and monitoring of international human rights law, international law doctrine was part of the 'code' or language of the Commission. Because these were the arguments that had caused the draft Norms to fail in generating sufficient support, as SRSG John Ruggie was faced with turning his mandate in another direction, while at the same time addressing a plurality of stakeholders with widely diverging interests in the outcome of the process.

In a speech in October 2005, a few months after the inception of the mandate, the SRSG set out his understanding of the institutional framework for the issues to be addressed by the mandate. The main argument was that international law had developed to provide increased protection of the rights of TNCs (especially through international trade law) and that companies had become participants in some areas of "international standards setting". Having thus established that companies had both benefitted from international law and had taken to making rules themselves, the SRSG explained that some types of company action had "generated increased demands for greater corporate accountability". He added that other actors are seeking to build on the global outreach and power of business to "cope with pressing societal problems", such as access to medicines or curbing human rights abuse. Moving from a combined reference to legal and economic system considerations, focusing on firms' interests, the SRSG shifted to legal system related observations on accountability as a counterweight to economic and legal rights of companies. The SRSG proceeded to counter the argument against business responsibilities for human rights, which held that establishing such responsibilities would allow states not to honour their international obligations. He drew on legal system references ("if governments everywhere did what they are supposed to") to remind states as well as other stakeholders that slack state delivery of their obligations contributes to the "urgency" of the need for institutionalising business responsibilities for human rights (Ruggie, 2005a).

In a speech made in December 2005, the SRSG laid out what was to become a main thread of the mandate's work and reporting, that is, the focus on "weak governance zones" as areas that particularly call for business to take responsibility for their impact on human rights. The statement addressed the economic risks that companies may encounter if they disregard human rights ("As companies are discovering at their peril"). Presenting a turn of "prevailing ideas, ideologies and institutional practices" to "catch up with new economic and social forces" as being of benefit to "business and human rights alike", the speech combined divergent interests in a statement that implicitly referred to economic, political and legal system considerations at once ("the alternatives would be bad for business and human rights alike"). The speech built on this to call on "the business and human rights communities" to work on shared interests rather than differences (Ruggie, 2005b). This is significant because it clarified that the SRSG was not on the side of either, but set on assisting towards the development of a shared foundation.

SRSG statements at this time drew on all three system-specific languages. He employed legal system language both to draw attention to the discrepancy between companies' rights under international trade law and their impact on societies, and to states' obligations to implement and enforce their international obligations in national law. Thus, although the SRSG employed international legal system doctrinal arguments, contrary to business he did so with a clear message that human rights matter to both. He employed economic and political system language to strengthen that argument by drawing up implications to companies and states alike of neglecting human rights.

Overall, doctrinal legal system language and arguments dominated in stakeholder statements during the first year of the mandate prior to the SRSG's presentation of his first report. While business persisted in referring to doctrinal international law on international obligations being state obligations, NGOs made connections between national and international law and different aspects of (national) law that protects individuals.

The SRSG's first ('interim') report was kept mainly in political and legal system language. It described how company actions had led to "increased demands for greater corporate responsibility and accountability". Making an economic system reference it built an argument that "good [human rights] practices" may be turned into a "competitive advantage" for companies (SRSG, 2006a). Although the SRSG approached his mandate from what he referred to as a non-doctrinal perspective, doctrinal arguments referring to classic international law were influential for the interim report. Stakeholders who mastered this international law doctrine were successful in influencing the direction which the SRSG set out for the future debate on human rights and business.

Legal doctrine continued to influence the SRSG's arguments, but as the mandate proceeded this entailed increased integration of newer international law doctrine, especially on the state duty to protect against business related human rights violations. The SRSG was increasingly exposed to human rights law experts who appear to have succeeded in explaining that international human rights law recognises that states have obligations to protect, and that these may translate into legal obligations for individuals – including companies – within a state's territory. When addressing companies, the SRSG emphasised the economic issues flowing from this, such as economic risks or losses related to legal liability and reputational damage. When addressing governments, the SRSG emphasised the implications of the state duty to protect in terms of regulating, adjudicating, as well as ensuring 'policy coherence', for example in Export Credit Agencies' funding of business activities in other states.

At a June 2006 at a meeting organised by the Fair Labor Association and the German Network of Business Ethics, the SRSG outlined some key points in his work towards the end of the mandate. Taking its point of departure in company practices and reasons for non-compliance, he combined economic and legal system observations to argue that more emphasis should be given to the part that governments play. He built an argument that human rights problems in the business sector are basically due to government failure to protect human rights (SRSG, 2006b). He met companies on their arguments on states not fulfilling their own obligations, but rather than release companies of human rights responsibilities he proceeded to build an argument during the mandate that companies much respect human rights through compliance with national law and internalising additional social expectations of respecting international human rights standards.

Introducing aspects on the ways in which governments and legislators may draw on the mechanisms of the economic system to induce socially responsible practices in companies, the SRSG opened a new track in his argumentative strategy (SRSG, 2006b). He combined economic and legal system language to build a recommendation for social responsibility as a requirement in government procurement policies. Attention paid to the economic system and its mechanisms as drivers for social responsibility and business self-regulation from the

public as well as the private perspective was to complement other parts of the SRSG's argumentative strategy as the mandate term proceeded.

The shift towards focusing on economic issues, and risks to companies, is apparent also in a speech delivered at a meeting in February 2007 in London. Expanding the line of argument from his previous stance of emphasising obligations for human rights as obligations for nation states, this speech noted that "[n]othing prevents states from imposing international responsibilities directly on companies" (SRSG, 2007a). By putting into such plain words the formal capacity of states to regulate companies' human rights responsibilities under international law the statement brought additional clout to other arguments presented by the SRSG to make clear that respecting human rights is significant to companies, including to preserve their freedom of enterprise with few transnational legal limitations. This speech added a new legal system informed argument the argument on liability risks. Alluding to the powers of states to regulate companies through international law, the speech also played on the incentives for companies to self-regulate rather than to be subjected to formal regulation. As noted, research suggests that companies sometimes prefer to self-regulate in order to pre-empt formal governmental regulation.

The SRSG noted that current international law practice and theory, however, did not "support the claim that companies have direct human rights obligations under international law" and that gaps remain in terms of governance and protection of victims. On that basis, he made a point that was to reappear in some of his later statements, referring to "the courts of public opinion" as complementary to courts of law (2007a). Alluding in this way to the power of media and the market system and its actors – consumers, investors and others – to hold companies to account in reputational and economic terms, the SRSG's speech connected economic and legal systems language to bring forth yet another argument on the significance that human rights observance may hold for companies based on economic system interests. The statement underscores that stakeholders hold companies economically to account for observance of international human rights law, although they are not formally bound by such standards.

The 2007 report (SRSG, 2007b) is a detailed presentation and discussion of a range of issues at the core of the international law relating to business responsibilities for human rights, ranging from the state duty to protect, to corporate responsibility and accountability for international crimes and other human rights violations under international law, to alternative or non-hard regulatory modalities, both in terms of soft law mechanisms and self-regulation. The report takes issue with arguments proposed by both sides of the previous 'doctrinal' debate. In addressing the state duty to protect and corporate responsibility in terms of an analysis of responsibility and accountability for international crimes, the report counters the continued relevance of both the business side's arguments on (sole) state obligations and the civil society side's arguments that dealing with the business and human rights problem can only be solved through the setting of global binding standards. The report presents an understanding of business and human rights that is based on the idea that states do have obligations relevant to business conduct, and that new standards are emerging which impact on legal and social expectations of companies. Establishing this created new common ground for both (or all) sides to consider also the benefits and weaknesses of intergovernmental soft law and of corporate self-regulation. Having established that both warrant merit but also suffer from weaknesses, the report moved on to its conclusion. Only here did the 2007 report revert to the sort of political and economic system language that was prevalent in the 2006 report, arguing implications of the legal findings as they would apply to the states and companies. This was underscored by connecting social expectations on corporate behaviour together with policies and practices that firms adopt voluntarily, and with normative guidance provided by international law on human rights and labour rights. The report suggests that all societal actors have an interest in recognising the connection between human rights and globalisation, and that the political and economic system both have an interest in sustainable globalisation without human rights violations.

During the final mandate year the SRSG tested some ideas and findings for the final report at meetings with stakeholders. The final report (SRSG, 2008a) introduces and elaborates the three-pillared *Protect, Respect and Remedy* framework. In highlighting the state duty to protect first of the three principles, the report adopts a classical international law view of states as duty bearers for international human rights. However, contrary to the arguments by business organisations and some governments opposed to institutionalisation of business responsibilities for human rights during the early part of the mandate and arguing against the UN Norms, the 2008 report adopts the theory of horizontal human rights obligations according to which it is the obligation of states to protect individuals and communities against human rights violations by (other) non-state actors. In addition, the report proposed that states encourage a corporate culture respectful of human rights by requiring sustainability reporting and other measures which support and strengthen market pressures on companies to respect human rights. Also relating to the interface between public and private action, it noted that Export Credit

Agencies represent not only commercial interests but also the broader public interest. They should "require clients to perform adequate due diligence on their potential human rights impacts" (2008, para. 40). Due diligence requirements could help indicate where state support should not proceed or where it should be discontinued, with obvious economic implications for firms.

The second pillar of the Framework, the corporate responsibility to respect human rights is defined essentially as avoiding the infringements of the rights of others and addressing adverse impacts that may occur. This entails acting with "due diligence", i.e. having in place "a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it" (para. 25). The corporate responsibility to respect goes beyond complying with national laws. On this issue the SRSG report leaves the terrain of legal doctrine and established legal institutions, venturing into the field of "social expectations" and "courts of public opinion". Striking this note, the report alludes to economic risk and reputation damage, thus once more striking an economic system cord in his argument addressing companies. Often, as in the area of business' human rights obligations, social expectations are not in accordance with a conventional doctrinal approach, nor would the 'judgments' of the courts of public opinion on terms of consumer or investor decisions necessarily stand in a court of law. But both are facts of modern social and economic life, and both may be as important to a company if not more, in terms of economic consequences, as a fine issued by a court of law.

The third pillar, Access to remedy, is part of both the state duty to protect and the corporate responsibility to respect. Without adequate remedy, the duty to protect could be rendered weak or even meaningless. As part of the corporate responsibility to respect, private grievance mechanisms help identify, mitigate, and possibly resolve grievances before they escalate and greater harm is done. Thus, once more the SRSG addressed audiences in the particular system of their social sub-systems: he reminded governments that other efforts to ensure their duty to protect could be wasted unless they also provided for access to remedy. And he made it clear to companies that company based remedies may reduce economic risks, such as compensation claims, loss of production or customers, or reputational damage.

By a unanimous resolution the Human Rights Council (2008) "welcome[d]" the three-pillared framework. This development marked a significantly different reaction within the Human Rights Council than that which was given to UN Norms by the Commission of Human Rights in 2004. The Council's decision marked the first time a UN human rights body with a political composition (as opposed to the expert composition of treaty bodies and the former Sub-Commission) agreed to the idea that businesses have human rights responsibilities and to a normative constructions of what those responsibilities entail.

Two main findings emerge from the above discourse analysis of the development of the UN Framework based on the usage of system-specific language: First, the SRSG's arguments on economic system effects of business related human rights abuse seem to have caused business stakeholders to accept that they have human rights responsibilities. Second, when the SRSG's approach shifted from political system language to more extensive usage of legal system language, it continuously explicated the economic impact, in particular economic risks that human rights abuse may cause to companies. Combined with other factors that are beyond the focus of this article, this led to broad support among business, civil society and governments for the UN Framework and, as a consequence, a normative foundation for further work to promote business responsibilities for human rights. Whereas the process related to the UN Norms led to a situation of status quo, the SRSG process delivered a soft institutionalisation of business responsibilities for human rights through the normative clarification and guidance on actions that the UN Framework provides. Through this, it also delivered a foundation for further work to develop detailed norms on business responsibilities for human rights, such as that which has already occurred with the 2011 UN Guiding Principles.

6. Conclusion

Through the application of discourse analysis this article has demonstrated how the development of the UN Framework proceeded to generate broad support from stakeholders and deliver a soft institutionalisation of business responsibilities for human rights. The consensus that emerged around the UN framework meant a clarification of the normative concept and therefore a fixation of the floating character of the previously disputed concept of business responsibilities for human rights.

The SRSG process represents an example of public-private regulation of a CSR topic under the auspices of the UN, an international organisation which typically regulates human rights through conventional international law. Working in practice as a reflexive law forum, the SRSG process succeeded in generating consensus on a topic whose predecessor, the draft UN Norms, faltered due to lack of support from business as well as some governments. The discourse analysis indicates that the outcome was due to the SRSG employing an

argumentative strategy, which created understanding and acceptance among business, civil society and (inter-)governmental organisations by appealing to system-specific interests of each of these and mitigating concerns of losing power that might have led some to prefer a different outcome (such as was the case with the 'draft Norms'). Combining language and arguments that bid into the particular power concerns of each of these types of stakeholders, the SRSG convinced business that their taking responsibility for human rights, with human rights normativity based on key UN human rights texts, was conducive to reducing economic risks flowing from business related human rights abuse. However, the SRSG process not only led to clarification of human rights responsibilities pertaining to firms. Addressing governments in terms of public policy objectives and states' legal obligations, the SRSG reminded governments of their duty to protect, that flows from their international human rights obligations. Thus, the constructed understanding did not only impact on demands on business, but also on governments.

The discourse analysis does not give the full picture, including the effect of actively engaging business in the process or general developments since earlier UN efforts to formulate social responsibilities for firms that have taken place in society's expectations of business and the private acceptance of such expectations. Yet the application of discourse analysis based on a combination of textual reading and underlying power interests suggests that the argumentative strategy deployed by the SRSG, appealing to specific interests of particular stakeholders in language close to their system-specific code, was effective in catering consensus on a highly disputed issue. This holds important lessons for future regulation of global sustainability concerns that due to both political opposition and international law constraints on international legal personality are not easily regulated by conventional international law.

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Intellectual Property Rights and the WTO: Innovation Dynamics, Commercial Copyrights and International Governance

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Abstract

In the context of the WTO, intellectual property rights (IPR) are codified in the TRIPS-agreement. While covering all the different types of IPR, landmark cases of the still young history of TRIPS have dealt with commercial copyrights. This paper summarizes the basic economics of the IPR branch commercial copyrights, reviews the TRIPS history and analyses two TRIPS landmark cases – China-IPR and US-copyrights – from an economic perspective. Eventually, the paper outlines new challenges for the international governance of IPR in the WTO context emerging from digital media. Against an economic background, the re-emergence of unilateral strategies to enforce cross-border commercial copyrights is met with skepticism against.

Keywords: intellectual property rights, TRIPS, world trade, commercial copyrights, media economics, innovation

JEL: O34, F02, F13, L82, D02, B52

1. Introduction

International agreements and regulations of intellectual property rights (IPR) are on the agenda of the world economic order since the 19th century. Thus, not only have IPR been viewed to constitute a cross-border economic problem that is closely related to trading goods, actually it has been viewed to represent a relevant problem for international economic governance on its own merits very quickly and early. At the same time, the design and shaping of international rules of IPR have always been very controversial and consensus appeared to be impossible for a long time – and in a way this has not changed to this day. As one of the consequences, a multitude of forums dealing with international cooperation (of differing degrees) on IPR has emerged and partly disappeared again. Often, a new agenda was accompanied by establishing a new forum. Arguably the most powerful international initiative was put forward in the context of founding and establishing the World Trade Organization (WTO) in 1995. One of its – more controversial, however – pillars is the so-called TRIPS-agreement, covering Trade-Related Intellectual Property Rights.

However, the – political as well as academic – debate on IPR has always not only been shaped by different opinions and interests of different players in different countries. In fact, the innovation dynamics of media markets, i.e. markets for information storage and transmission, have generated a dynamic evolution of the economic problems of cross-border IP trade and effects as well. From a focus on written media in the 19th century via the emergence of radio and television during the 20th century until the era of the internet and digitalized information towards the end of the 20th century and during the still young 21st century, the economic forces of dealing with media-codified IP have been subject to constant change, thereby, putting up frequent challenges to existing rules and practices. International governance appropriate to the written era may not fit with over-the-air broadcasting and the worldwide internet with digitalized content may render many of those rules obsolete once again. This is also true for TRIPS, which basically is rooted in the pre-digitalized and pre-internet era.

IP fundamentally is about information and knowledge, which is stored and transmitted via media. Still, the economics of IP differ considerably depending on what kind of IP is analyzed. Technological innovation codified

in patents, for instance, represent different challenges from less-formally codified business secrets or commercial copyrights. Since it is virtually impossible to address all the different dimensions of IPR in such a brief paper and since commercial copyrights are more prone to the challenges of innovation dynamics through digitalization and, at the same time, have triggered some of the core WTO-TRIPS cases so far, this paper focuses on the international governance of commercial copyrights in the context of WTO TRIPS-agreement (sections 3 and 4) as well as new challenges to this governance (section 5). Section 2 starts with summarizing some basic economics of IPR and commercial copyrights, section 6 concludes.

2. Some Basic Economics of Intellectual Property Rights and Commercial Copyrights

Intellectual property rights (IPR) are an institutional construct that serves to create exclusive and individual property rights for defined *creations of mind*, namely intangible assets such as (i) literary, musical and artistic creations, (ii) inventions, as well as (iii and iv) phrases, symbols and designs. Property of these immaterial goods is codified by law into specified rights like (i) copyrights, (ii) patents, (iii) trademarks, and (iv) industrial design (commercial secrets) rights. Although, our review on TRIPS and its current controversies (section 3) touches upon all of these areas, our main analysis (sections 2, 4 and 5) focuses on copyrights. At the end of the day, IPR protection and copyright systems are about institutional arrangements to organize information production and dissemination.

From an economic perspective, individual and exclusive property rights on creations of mind are ambiguous regarding their effects on innovation dynamics (inter alia, *Landes* & *Posne,r* 1989; *Koboldt,* 1995; *Gordon* & *Watt,* 2003; *Watt,* 2004; *Schmidt,* 2010: 86-92; *Belleflamme* & *Peitz,* 2012). On the one hand, strong IPR serve to internalize positive externalities (*Hurt* & *Schuchman,* 1966). Without IPR, all these creations of mind would be free to be used for commercial purposes once they are 'out' without giving the creator any possibility to comprehensively appropriate the commercial benefits her creation brings to numerous 'exploiters'. The important difference to 'ordinary' goods is constituted by the informational character of intellectual property: once information is known by someone, it cannot be taken back anymore and its (commercial) use cannot be prevented anymore in the absence of IPR (Note 1). The economic downside of this positive externality lies in the lack of incentives to engage in intellectual creations. If a creator cannot appropriate her share of commercial benefits resting upon her creation, then the incentive for undertaking the burdens and costs of creating activities are low. Or, more precisely, the economic (monetary) incentives are dysfunctional; it is still possible that creators are motivated by intrinsic incentives that are non-economic and non-monetary by nature. However, as long as the sum of intellectual creations based on economic and intrinsic incentives is deemed to be larger than intellectual creations based on intrinsic incentives only, the conclusion holds that the absence of IPR harms innovation dynamics.

Yet, there is another side to this story. Diffusion of intellectual creations and, thus, dynamics creating innovation by using the intellectual creations as an input are hampered and slowed down by IPR. A regime of imitation liberty creates more innovation dynamics from an initial creation by encouraging follow-on creations (*Watt* 2004). In the economic literature, granting IPR is often viewed to constitute an (artificial) monopoly for the intellectual creation that otherwise would be free to use for everyone (Note 2). As a consequence, solving the underproduction problem due to positive externalities generates an underutilization problem due to the market power of the creator (who is granted a monopoly privilege). The (artificial) monopoly power allows the creator not only to appropriate the revenues of her creation, it furthermore allows her to set prices above marginal costs and to reap monopoly rents. This leads to welfare-reducing rationing (*Yoon*, 2002; *Belleflamme* & *Peitz,* 2012).

However, from an institutional and competition economics-informed perspective, this problem is somewhat more complex. First of all, all property rights are institutional arrangements and as such social constructs. Defining property rights for information goods and creations of the mind by law is *a priori* neither more, nor less artificial or natural as defining property rights for any other type of (material) goods by law. Property rights always require a codified content specification, an utilization specification (including the limits to property rights) as well as commercial laws defining the trade of these goods (conveyance or transfer of property). Furthermore, implementing a court system and police forces in order to enforce the socially defined property rights is fundamental. As such, property rights for intellectual goods do not constitute a special privilege for their owners in the context of a market economy system.

More intriguing, secondly, is the question whether IPR constitute a monopoly as it is predominantly assumed in the economic literature on copyrights (overview: *Belleflamme* & *Peitz,* 2012). It requires a rather abstract definition of a monopoly to come to this conclusion. Only if the absence of an identical product, i.e. a perfect substitute, is viewed to be a sufficient condition to constitute a monopoly, then assigning exclusive intellectual

property rights to creations of the mind automatically and inevitably create a monopoly. The reason is that intellectual products are unique in the sense that they are not perfectly identical to other products, hence no perfect substitute exists. However, there are two relevant problems with this view. First, even if this view was accepted (for the sake of the argument), this – again – would not represent a special characteristic of creations of the mind. Quite in contrast, it would be exactly the same with any other type of good: if the produced good was unique and no perfectly identical other product existed, exclusive property right on it would always create a monopoly. However, secondly, this is not how monopolies are usually defined in competition economics. Uniqueness in the sense of the absence of perfect substitutes (i.e. identical products) must not be confused with the absence of relevant substitutes exerting competitive pressure and thus competitively disciplining the property rights holder. Monopoly power only comes into existence if no effective substitute exists, which explicitly includes *imperfect* substitutes! It is not the fundamental uniqueness of creations of mind that is decisive for the emergence of market power, it is the question whether similar/comparable (but not identical) products exist which serve to satisfy the same desires of the consumers and, consequently, serve as (imperfect) substitutes *in the eyes of the consumers*. Competition and antitrust economics have developed several techniques (including advanced and sophisticated econometric methods) to delineate a relevant market with *heterogeneous* goods (which exist much more widespread than homogenous markets) (inter alia, *Kerber* & *Schwalbe,* 2008: 262-277). Thus, whether IPR create monopolies depends on the existence of (perfect *and* imperfect) substitutes and does not represent an automatism – just like with any 'ordinary' good. For instance, a patent on a new technology or a new active pharmaceutical substance may actually represent a monopoly and allow for monopolistic behavior of the IPR holder. However, a new song by, say, Rihanna (or her songwriters) or a new crime thriller by any popular or not-so-popular author certainly fails any standard, state-of-the-art monopoly test since it stands in direct competition with other new pop songs and other new crime stories, respectively. Even though mainstream pop songs, for instance, are not identical, they obviously represent strong substitutes to pop music consumers (Note 3). From an antitrust point of view, it would be more than strange to define a relevant market to consist of "Ai se eutepego" by Michel Telóand nothing else and, at the same time, to claim that "Heart Skips a Beat" by OllyMurs or "Forgive Forget" by Caligola (taking the top three hits from itunes as these lines are written) constitute other, separate one-product markets (Note 4). This cannot be aligned with any common economic market delineation concept. Instead, any sensible relevant market delineation will include a multitude of songs, records, books, etc. that represent imperfect but close-enough substitutes to exert competitive pressure on each other.

In other words, it requires a case-by-case analysis to conclude whether any given IPR constitutes a monopoly – and in many cases this will not be the case. If a monopoly is constituted, then welfare-reducing exploitation of the related market power by the creator can be expected. Furthermore, IPR may in such cases be used to deter competition in related or neighboring markets and to leverage market power (*Schmidt,* 2010).

In summary, IPR promote creations but may hamper their diffusion (depending on the competitive situation). This trade-off may be alleviated (i) within the system of IPR, for instance

- by the specific design of the protective content of IPR,
- temporary protection rights (like existing patents and copyrights are typically shaped), or
- mandatory licensing of intellectual property (with regulated prices)

or (ii) by adopting some sort of imitation liberty regime and implementing an alternative compensation scheme for creators, like public alimentation (*Koboldt,* 1995: 22).

3. The TRIPS Agreement

3.1 History and Major Content

Coming from such a system of imitation liberty accompanied by an informal system of alimenting creators by local authorities in medieval times, the development of todays widespread IPR regimes only started during the 19th century (despite few earlier predecessors). In many areas of intellectual property, it was quite quickly realized that this area is specifically subject to cross-border effects. Information and information flow is much more difficult to regulate at territorial borders than trade with 'ordinary' goods – and this was true even before the emergence of the worldwide web (internet). Consequently, first attempts to establish international rules on IPR date back to the late 19th century, e.g. *United International Bureaux for the Protection of Intellectual Property* established 1893 in Berne and relocated to Geneva in 1960. The development took an important step in 1967 when the *World Intellectual Property Organization* (WIPO) succeeded the bureau as an agency of the United Nations. See Table 1 on the work and the development of WIPO.

Table 1. History of WIPO

Date	Main happenings
14.07.1967	Signing of the WIPO Convention, which officially establishes WIPO
1970	WIPO comes into force
19.06.1970	Patent Cooperation Treaty Provides the possibility to apply for patent protection in several member countries by filling one international form
24.03.1971	Strasbourg Agreement Establishes the International Patent Classification, an overall system which creates transparency by systemizing the different branches of technology and providing each branch different codes
20.10.1971	Phonogram Convention Provides a protection for phonogram producers in each Contracting State against the unauthorized duplication of phonograms and the importation and distribution of such duplicates.
12.06.1973	Vienna Agreement Establishes a classification of marks, containing figurative elements
21.05.1974	Brussels Convention Provides the obligation for the Contracting Parties to prevent unauthorized distribution transmitted by satellite on or from its territory
17.12.1974	WIPO becomes a specialized agency of the United Nations
28.04.1977	Budapest Treaty Any Contracting State which allows or requires the deposit of microorganisms for patent procedures must recognize this deposit with any "international depositary authority"
26.09.1981	Nairobi Treaty All Contracting States have to protect the Olympic symbol against commercial purposes not authorized by the International Olympic Committee
26.05.1989	Washington Treaty (not yet in force) Gives Contracting Parties the obligation to secure intellectual property protection connected to layout-designs (topographies) throughout their territories
27.06.1989	Protocol relating to the Madrid Agreement The Madrid Agreement (1891) makes it possible to protect a mark in several countries by obtaining an international registration The Protocol aims to make the Agreement more flexible and more compatible with the national legislation of countries who could not accept the Agreement itself
27.10.1994	Trademark Law Treaty Aims to modernize national and regional trademark registration procedures by simplifying and standardizing certain features.
01.01.1996	Cooperation Agreement between WIPO and WTO comes into force
20.12.1996	WIPO Copyright Treaty (entering into force: 06.03.2002) Provides additional copyrights for works which are not protected by the Berne Convention due to the development of technology (computer programs, databases) Deals with wider rights of authors (right of distribution, rental and communication to the public) WIPO Performances and Phonograms Treaty (entered into force 05.02.2002) Grants economic and moral rights to performers and producers of phonograms
01.06.2000	Patent Law Treaty (entered into force: 28.04.2005) Aims to make patent procedures more 'user-friendly' Provides a minimum standard which the Offices of Contracting Parties may apply
27.03.2006	Singapore Treaty on the Law of Trademarks Provides a dynamic international framework for the harmonization of trademark registration procedures Compared to the Trademark Law Treaty it has a wider scope for example in communication technology

(Source: own compilation of information from www.wipo.int)

Shortcomings regarding the binding character of WIPO provisions, the comprehensiveness of intellectual property protection, the territorial reach as well as enforcement mechanisms led to the U.S. as well as many other industrialized countries initiating IPR in the context of GATT/WTO. The Uruguay GATT round adopted the

Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, which became a substantial part of the new-established World Trade Organization (WTO, 1995; see Table 2).

Table 2. History of TRIPS

Date	Main happenings
01.01.1995	TRIPS Agreement officially comes into force (with given transitional periods for the Members)
01.01.1996	TRIPS enters into force for developed countries
9– 3.12.1996 1st WTO Ministerial Conference, Singapore	• Decision about the monitoring of the implementation of the Agreement – developed countries • Decision about the provision of financial and technical cooperation of developed countries with developing and least-developed Members • Decision about a review of the application of the provisions on geographical indications
01.01.2000	TRIPS enters into force for developing countries – with the possibility of prolonging the transitional period with 5 years if the preparation is not ready
9 – 14.11.2001 4th WTO Ministerial Conference, Doha, Qatar	Doha Declaration ▪ Looking for solutions in the question of the exportation of pharmaceuticals produced under compulsory licensing for countries with little or no pharmaceutical manufacturing capacity ▪ Extending the transitional period regarding pharmaceutical patents for least-developed countries until 01.01.2016 ▪ Setting the deadline for the end of negotiations regarding the multilateral registration system for geographical indications of wines and spirits: 5th Ministerial Conference in 2003 ▪ Besides the reviews required by the TRIPS Agreement, further reviews should also look at the relationship between the TRIPS Agreement and the UN Convention on Biodiversity, the protection of traditional knowledge and folklore and other developments ▪ Solution needed to be found for 'non-violation' complaints – in the meantime it is not possible to initiate such complaints under TRIPS
30.08.2003	'Waiver' as a temporary solution for the issue regarding exportation of pharmaceutical products produced under compulsory licensing, making it easier for poorer countries to obtain cheaper generic versions of patented medicines
10 – 14.10.2003 5th WTO Ministerial Conference, Cancún, Mexico	The conference was supposed to be a mid-term evaluation of the Doha Development Agenda, however it ended without any consensus
01.08.2004	The 'July package' agreed, highlighting the need for more intensive negotiations regarding implementation issues related to the extension of the protection of geographical indications to products other than wines and spirits, reporting deadline: May 2005
29.11.2005	The transition period is prolonged for least-developed countries. The new deadline: 01.07.2013
13 – 18.12.2005 6th WTO Ministerial Conference, Hong Kong	• Final decision in the question of patented pharmaceuticals: the 'waiver' of 2003 transformed to a permanent amendment • Agreement that the Doha Work Programme needs to be completed by the end of 2006 ▪ The negotiations regarding the multilateral registration system for geographical indications of wines and spirits need to be finished ▪ Efforts need to be doubled to find solutions for implementation issues, such as the extension of the protection of geographical indications other than wines and spirits and the relationship between the TRIPS Agreement and the UN Convention on Biodiversity. These progresses need to be ready for review by 31.07.2006 ▪ Works regarding the 'non-violation' complaints need to be continued
30.11 – 02.12.2009 7th WTO Ministerial Conference, Geneva	The Members agreed not to bring 'non-violation' complaints to the WTO dispute settlement process until the final decision in the issue
15 – 17.12.2011 8th WTO Ministerial Conference, Geneva	• 'Non-violation' complaints remain excluded from the WTO dispute settlement process until a final decision • Decision about the review of the request of least-developed countries for the extension of their transitional period. Final discussion of the issue: 9th WTO Ministerial Conference, 2013

(Source: own compilation of information fromwww.wto.org)

"The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, the so called TRIPS Agreement, is based on a recognition that increasingly the value of goods and services entering into international trade resides in the know-how and creativity incorporated into them. The TRIPS Agreement provides for minimum international standards of protection for such know-how and creativity in the areas of copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits and undisclosed information. It also contains provisions aimed at the effective enforcement of such intellectual property rights, and provides for multilateral dispute settlement. It gives all WTO Members transitional periods so that they can meet their obligations under it. Developed-country Members have had to comply with all of the provisions of the Agreement since 1 January 1996. For developing countries and certain transition economies, the general transitional period ended on 1 January 2000. For least-developed countries, the transitional period is 11 years (i.e. until 1 January 2006)" (*WTO Annual Report,* 2001).

The agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is often called a *minimum standards' agreement* due to the characteristic that it sets 'only' minimum requirements that the member countries have to meet but it provides space for them to implement laws and regulations which can provide better protection to intellectual property rights. The agreement and all the minimum standards follow three fundamental principles. Firstly, the principle of national treatment requires member countries to treat their own nationals and foreigners equally. Secondly, the most-favored-nation treatment requires equal treatment for the nationals of all WTO members and trading partners. While these first two principles represent the standard WTO principles, the third one is more specific directed to the TRIPS regime stipulating that its provisions should contribute to and encourage technical innovation and technology transfer.

Besides these principles the TRIPS agreement provides regulation by the use of common-ground rules which basically state that member countries have to follow the obligations of the most recent versions of the two most important agreements under the World Intellectual Property Organization (WIPO), namely the Paris Convention for the Protection of Industrial Property (in case of patents, industrial designs, etc.) and the Berne Convention for the Protection of Literary and Artistic Works (for copyrights). In cases where these treaties do not contain any relevant provisions or the ones contained are deemed to be inadequate, the TRIPS agreement provides further standards for all fields of IP protection (see generally on TRIPS, inter alia, *Correa,* 2001; *Abbott,* 2007: *Abbott* & *Correa,* 2007; *Gervais,* 2008; *Gervais,* 2009; *Gervais,* 2011b).

- *Copyrights and related rights*: Members have to follow the regulations of Berne Convention (except for that of moral rights). Computer programs need to be treated as literary works, databases should be protected by copyright (not the data or material itself). Authors of computer programs and films and producers of sound recordings have to be given the right to authorize or prohibit the commercial rental of their works to the public. Performers and producers of sound recordings have to be protected from unauthorized recording and broadcast of live performances for a minimum of 50 years. Broadcasting organizations need to get such protection for 20 years.
- *Trademarks*: Marks able to distinguish goods and service marks must be protected by trademark and the owner must be given exclusive rights to use. Marks which became well-known must enjoy further protection. A registered trade mark must be guaranteed for a period of at least 7 years.
- *Geographical indications*: The highest level of protection must be given to wines and spirits. Members have to prevent the use of misleading indications. Exceptions can be used if a name already became a generic term in a country.
- *Industrial designs*:Industrial designs must be protected for 10 years.
- *Patents*:The provisions of the Paris Convention are valid. Moreover 20 years of patent protection must be available for all inventions in almost all fields of technology with three permissible exceptions: (i) if commercial use is prohibited because of the *ordre public* or morality, (ii) in case of diagnostic, therapeutic and surgical methods for the treatment of humans or animals, as well as (iii) in case of plants and animals other than micro-organisms and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. The applicant for the patent has to provide understandable (for experts) description of the invention and the production of it. Compulsory licensing and government use is allowed without the authorization of the right owner but the rights still need to be protected (for a discussion on contemporary public health issues within TRIPS see, inter alia, *Abbott,* 2011).
- *Layout designs of integrated circuits*: The basic regulation is the Washington Treaty on Intellectual Property in Respect of Integrated Circuits. Moreover protection must be given for at least 10 years. The rights need to be extended to articles incorporating infringing layout designs. Innocent infringers must

be allowed to finish the use or sales of stock in hand which was ordered before knowing about the infringement. Government use is only allowed within strict regulations.

- *Undisclosed information (trade secrets, know-how)*: Must be protected against unfair commercial activities. Materials about pharmaceuticals and agricultural chemicals waiting for marketing approval must also be protected.
- *Control of anticompetitive practices*: If a country finds out that practices for protecting IPRs are anti-competitive it can ask for consultation for the other member.

In contrast to many expectations, the inclusion of the TRIPS agreement into the WTO did not lead to a flood of complaints and cases (*Pauwelyn,* 2010: 5-9). From 1st of January, 1995, and until the 20th of September, 2011, 29 out 427 (= 6.8 per cent) disputes filed under the WTO framework related to TRIPS. From these 29 cases filed, 9 (= 31 per cent) were brought to a panel. Panel decisions were appealed in again 33 per cent of cases, which is considerably below the rate of appeals for panel decisions including all WTO areas (that is about 70 per cent). Furthermore, there is a downward trend in TRIPS disputes: 23 of 29 cases were filed in the period between 1996 and 2001(in the first six years of TRIPS). During the last almost 11 years, there have been only 6 TRIPS cases in total (see also Figure 1). Regarding the parties to the disputes, 9 out of 29 cases have been disputes brought by developed against developing countries, whereas 10 have been between the U.S. and the EU. The latter has been the most popular target (12 out of 29 complaints) so far – and the two most recent disputes saw developing countries bringing a case against developed countries.

From these figures it can be concluded that TRIPS has not been an instrument of developed countries to fight developing ones to this day (*Pauwelyn,* 2010: 8). While it is difficult to conclude anything about the adequacy of the number of cases, at least, it can be cautiously concluded that TRIPS complaints and cases are not that much popular among WTO members.

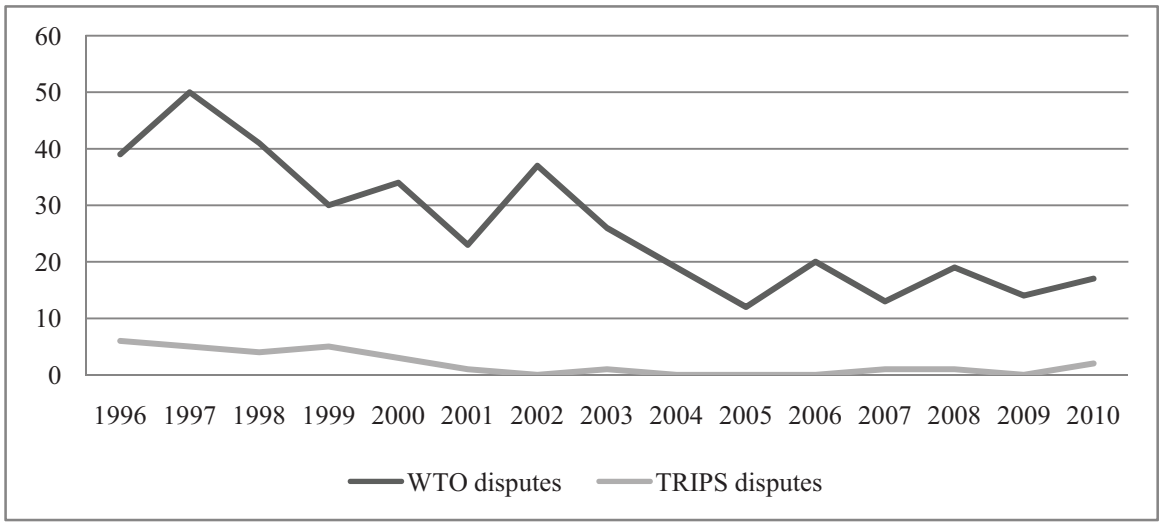

Figure 1. WTO-TRIPS Disputes Filed (1996-2010)

Sources: Pauwelyn (2010: 7) with additional data from http://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26#selected_agreement and http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

3.2 Current Developments

At the moment and in the last couple of years there have been predominantly four main topics under discussion in the area of the TRIPS Agreement (Note 5). These are negotiations regarding (i) geographic indications, (ii) incentives for technology transfer, (iii) 'non-violation' complaints as well as(iv) the protection of biodiversity and traditional knowledge.

3.2.1 Ongoing Negotiations Regarding Geographical Indications

Geographic indications (GIs) are usually names of geographic places which can help to identify certain characteristics of different products. In general, GIs include information for consumers not only about the place

of origin but also contain signaling of quality and reputation standards of a given product (Note 6).In the TRIPS Agreement, Art. 22 man dates all member countries to provide a standard level of protection for all products. This minimum standard must avoid misleading information of products about their GIs towards the public as well as the use of GIs for unfair competition (Note 7). Besides Art. 22, in case of wines and spirits, Art. 23 provides a higher level of protection, meaning that these products have to be protected even if the misuse of GIs would not cause any misleading of consumers or the public. In Art. 24, the agreement provides some exceptions regarding commonly used terms or long-standing practices and traditional names.

In the area of GIs, there are two main issues debated: (i) implementing a multilateral register for wines and spirits and (ii) extending the higher level of protection for wines and spirits to other products as well.

Regarding a multilateral register for wines and spirits, the key questions of the discussion are: what legal effect would a registration of a product have within member countries? To what extent this effect should apply to countries which are not part of the system? What about costs and benefits? The discussion traces back to an EU proposal. The general idea is that if a GI is registered, it establishes a "rebuttable presumption" that the term is to be protected in all WTO countries, unless a country makes a reservation within a specified period to be able to refuse protection. Many member states merely want to accept a voluntary system for the registration which would only be effective for countries opting to participate (*Ahmad,* 2005). Recently, a compromise proposal by Hong Kong and China surfaced that includes registration only on a voluntary basis, but the terms registered would enjoy a limited "presumption".

Regarding an extension of the higher level of protection beyond wines and spirits, the key questions of the debate are: does the Doha Declaration provide mandate for such negotiations? Is it useful at all to extend the higher level of protection? If yes, to what extent? As the main interests in favor of such an extension, countries like Bulgaria, the EU, Guinea, India, Jamaica, Kenya, Madagascar, Mauritius, Morocco, Pakistan, Romania, Sri Lanka, Switzerland, Thailand, Tunisia and Turkey argue that the extension would help them market their products more effectively and also to be able to differentiate them from competitors' goods. In contrast, the opposing countries (Argentina, Australia, Canada, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, New Zealand, Panama, Paraguay, the Philippines, Chinese Taipei and the United States) emphasize that the existing level of protection is sufficient. The extension would be a burden and would cause problems with the existing marketing practices. Basically they argue that the extension of GIs would be very harmful for producers who do not belong to the area which is protected by the GI. In their case, the resulting costs of developing and establishing new marketing strategies would include, inter alia, administration costs due to the name change and all the expenses they would need to spend on promotion (looking for new names, building trust of consumers, .etc.). Moreover, these established products would appear to be 'new' for consumers without having the advantage of possessing innovative characteristics, thus eroding the investment in building up these brands and products and the accompanying reputation (*WTO,* 2005).

At the moment in both issues the Members try to get their interests closer to each other, however there is no agreement in sight yet (*Ilbert* & *Petit,* 2009).

3.2.2 Incentives for Technology Transfer

Technology transfer is regarded by least-developed countries as part of the bargain in which they have agreed to protect intellectual property rights. Thus these countries regularly demand a more effective operation of technology transfer initiatives and incentive schemes. In general, many different articles deal with the question of technology transfer. However, Art. 66 (2) obliges developed countries to provide incentives for technology transfer to enterprises and organizations within their territories. In order to make this system operate more effectively, the Doha Declaration states that developed countries must provide a detailed report by the end of each year which answers several questions regarding the operation of their incentive systems.

As another part of these efforts, the WTO Secretariat has already organized workshops to discuss the issues and questions of technology transfer. Some of the developed-country members were invited to explain their incentive systems in detail. Moreover experts from both sides were able to discuss the operation of the system and how it could be improved. The basic idea behind these workshops was to achieve a broader understanding of the incentives and to provide a place for dialogue between the countries. At the same time other decisions under the TRIPS agreement have raised the question of technology transfer and, additionally, climate change negotiators have also started to discuss this topic.

The major sources of technology transfer (TT) are usually said to be trade, licensing, foreign direct investment, joint ventures, the movement of people, etc. Basically two main types of TT are distinguished (*Foray,* 2009; *WTO,* 2011):

- *packaged form*: the technology is transferred through investments, import of goods or building projects by foreign firms. In these cases, the transferred technology is a joint product or a by-product of another economic activity.
- *unpackaged form*: technology is not transferred through a direct investment or trade but rather through licensing or collaboration contracts, consultancy or joint ventures. In these cases, TT is the primary economic activity and not a 'side-effect'.

Examples for technology transfer under TRIPS include the following two programs (*Foray,* 2009; *WTO,* 2011):

- Collaboration between Switzerland's State Secretariat for Economic Affairs, the UN's Industrial Development Organization and many developing countries.
    - Swiss-supported Cleaner Production Centers (CPC) offer different services and solutions for clean technologies. CPCs are autonomous bodies, with their own boards, representing local industries and services; however, they are supported by a Swiss Reference Center – a distinguished institution in the relevant area.
    - The provided services are, for instance, information on the newest technologies, consultancies and special services, such as eco-audits, project evaluation, introduction to ISO standards, support in the investment projects, training, etc.
    - The CPCs also help local entrepreneurs to find solutions for financing technologies.
- US National Institutes for Health (NIH) support a "Global Research Initiative Program for New Foreign Investigators (GRIP)".
    - The program supports the re-entry of NIH-trained foreign researchers into their home countries by providing partial salaries to these "returning home researchers" and by supporting their research projects.
    - The aim of this program is to enhance the scientific research infrastructure in developing countries, to stimulate research and to widen the efforts for finding solutions to global health issues.

3.2.3 'Non-violation' Complaints

In the WTO and thus also under the TRIPS agreement if a member notices that another country has violated the Agreement or broke a commitment, it can turn to the Dispute Settlement Body (DSB). However the WTO also provides space for other kinds of complaints, namely the 'non-violation' ones when the 'letters of the agreement' do not get violated, however the member can show that it has been deprived of an expected benefit because of another country's decision or action. These 'non-violation' complaints are possible in the case of goods and services in order to keep the balance of benefits. However in case of the TRIPS agreement the picture looks more complicated. Originally, Art. 64 (2) of the TRIPS Agreement contained a five-year long moratorium on this question (meaning until 2000). Since then this moratorium has been extended from one ministerial conference to the following one and there has been no agreement about these kinds of complaints.

The main questions of the controversial negotiations are: should 'non-violation' complaints be allowed in connection to intellectual property rights? If so, to what extent and how could these issues be included in the WTO dispute settlement processes? Up to date there are some (e.g. the U.S. and Switzerland) who are positive towards this question and they would be open to negotiate the details of allowing 'non-violation' complaints under the TRIPS agreement. However until date there has been no consensus on the issue so the moratorium has been extended again until the ministerial conference of 2013.

3.2.4 Protection of Biodiversity and Traditional Knowledge

The negotiations about the protection of biodiversity and traditional knowledge are based on two main topics. Firstly, Art. 27.3(b) of the TRIPS Agreement deals with the patentability of animal and plant inventions and the protection of new plant varieties. Moreover, since the Doha Declaration, the debates also include issues regarding the relationship between the TRIPS agreement and the UN Convention on Biological Diversity (CBD) as well as the protection of traditional knowledge and folklore.

The debate centers on questions like whether and how TRIPS should do more to promote the CDB objective of equally sharing the benefits coming from the use of genetic resources in research and industry. The views of the different groups of members cover a wide range; however the main proposals focus mostly on amending the TRIPS agreement to require patent applicants to disclose the source providing genetic resources and the needed traditional knowledge. Most of the members inject their proposals about a special form of disclosure, either as a TRIPS obligation or through the WIPO (World Intellectual Property Organization) or outside the patent law. There are other members, though, who would rather rely on national legislation, including contracts, than on a

disclosure obligation.

Views and ideas on the topic of the protection of biodiversity and traditional knowledge differ considerably and up to date there is no consensus in sight. However, all members agree that steps need to be taken to avoid erroneous patents and to equally share the benefits.

3.3 TRIPS and the Challenge of Commercial Copyrights

Interestingly, the internally chosen agenda of development and reform projects within TRIPs (as discussed in this section 3) does not refer to the issue of cross-border enforcement of commercial copyrights. This represents an important fact in the light of two recent developments. Firstly, cross-border commercial copyrights have been an important enforcement problem within TRIPS so far (section 4) and, secondly, innovation dynamics in media markets create relevant new challenges for the international governance of this issue (section 5).

4. Selected Cases

Table 3 lists the 9 cases that have been decided before a panel so far under the TRIPS agreement. *Pauwelyn* (2010: 10-12) convincingly argues that most of these cases could also have been dealt with under the other WTO agreements, so that merely a small number of three cases remains that represents the core of TRIPS decisions (grey-shaded in Table 3). Among these cases, two are deemed specifically interesting because they touch on the core of intellectual property rights protection in the WTO framework. According to *Gervais* (2011a), the Google Book Digitalization Settlement may provide scope for another spectacular copyright case under TRIPS.

Table 3. TRIPS Panel Cases

PANEL REPORTS making TRIPS findings	**APPELLATE BODY REPORTS making TRIPS findings**
1. India - Patent (US)	India - Patent (US) *Jan. 1998*
2. Indonesia – Autos (EC, Japan, US) *Jul. 1998*	
3. India - Patent (EC) *Sept. 1998*	
4. Canada - Pharmaceutical Patents (EC) *Apr. 2000*	
5. US – Copyrights (EC) *Jul. 2000*	
6. Canada - Patent Term (US)	Canada - Patent Term (US) *Oct. 2000*
7. US – Havana Club (EC)	US - Havana Club (EC) *Feb. 2002*
8. EC – Trademarks & Geographical Indications (US/Australia) *Apr. 2005*	
9. China – IP Rights *Mar. 2009*	

Source: *Pauwelyn* (2010: 10).

4.1 China – IPR

The first case is the China – Intellectual Property Rights case (WTO Dispute (DS362); *China,* 2007; *Fukunaga,* 2008; *Pauwelyn,* 2010) (Note 8).On the 10th of April, 2007, the United States submitted a complaint to the WTO Dispute Settlement Body which dealt with different aspects of the question of enforcing intellectual property rights in China and asked for consultations. After the submission of the complaint several WTO members joined the consultations and the WTO established a panel which was investigating the issues under debate. After more than one and a half year of consultations the final report was circulated among the members. Regarding some of the complaints the panel found that the Chinese practices did not break the words of the law, however, in other cases rules and practices in China were ruled to be inconsistent with the obligations of the TRIPS agreement.

The complaint submitted by the US was basically built around three main issues of intellectual property rights.

- Firstly, the US asked for consultation on the question of threshold levels which had to be reached in China in case of willful trademark counterfeiting (Note 9) or copyright piracy issues in order to become

subjects to criminal procedures and penalties. Moreover, the US also complained about the respective enforcement activities (or lack of it). In these regards the US accused China's institutions and practices to be inconsistent with Articles 41.1 and 61 of the TRIPS agreement. The arguments focused on the procedural rules in China which stated that willful trademark counterfeiting and piracy were only supposed to be subject to criminal investigations and penalties if the case was 'serious' or 'especially serious' or the scope was 'relatively large' or 'huge'. These terms were not determined by law and with the help of previous judicial interpretations, the US demonstrated that these amounts were usually calculated from the relative prices of the infringing materials compared to the legitimate prices which meant that the lower the price was, the bigger amount the infringer could sell without risking a criminal procedure. Moreover, the US also showed that Chinese regulations only regarded unauthorized reproduction and unauthorized distribution as illegal activities if these were done together, meaning that one of these was accompanied by the other. Following the investigation, the panel rejected the claim of the United States ruling that the complainant did not prove that the threshold levels in China allow for an infringement on a commercial level. Thus, the respective rules and practices in China were ruled to be not inconsistent with the provisions of TRIPS.

- The second point in the complaint focused on the disposal of works confiscated by the Chinese customs authorities due to the infringement of intellectual properties. In this regard the US showed that the Chinese authorities were required to put these goods back to the channels of commerce (for example by auctions) after removing the infringing features. The US argued that such practices were inconsistent with Articles 46 and 59 of the TRIPS agreement. After the consultations and examination, the panel decided to partially agree with the complaint, concluding that the simple removal of the infringing features (e.g. a brand name or symbol) of the confiscated goods before putting them back into commercial channels was not consistent with Article 59 of TRIPS Agreement. Otherwise, however, the panel concluded that the US had not demonstrated the inconsistency of the Chinese practices with the articles of the TRIPS agreement, i.e. it is not per se inconsistent with TRIPS to re-introduce counterfeited good into the channels of commerce once the infringing character of the confiscated goods has been sufficiently removed or altered.
- The third main area of the complaint was concentrating on the censorship processes. China denied copyright protection and other IPR to works and creations which had not yet fully concluded the authorization process. In other words, works that were (still) under inspection with the so-called *content review system* or failed to pass it did not enjoy any copyright (etc.). IP owners whose creations had not been authorized in China were not able to enforce any rights on these works and creations. The US concluded that all these issues were inconsistent with Articles 3.1, 9.1, 14 and 41.1 of the TRIPS agreement. Following the investigation, the decision of the panel was straight and obvious as it upheld the claim and concluded that the existence of the content review system did not provide any justification for denying copyrights and other related rights for any works or creations, including such that failed the authorization procedure. So in this regard the panel concluded that China's laws and practices were inconsistent with several provisions of the TRIPS agreement.

In its final report, the panel recommended China to bring its 'problematic' regulations into conformity with its obligations under the TRIPS agreement. After the final report was published, China informed the Dispute Settlement Body that it intended to make the changes required and that it agreed with the US that the deadline to do so would be the 20th of March, 2010. One day before the deadline China reported that it had completed all procedures to implement the recommendations.

4.2 The US - Copyrights

The second case is the U.S. – Copyrights case (*Pauwelyn,* 2010: 12, 15, 23-26, 38-39; *United States,* 2012 – also for the following) (Note 10). On the 26th of January, 1999, the European Communities requested consultation with the United States in the question of copyrights. They argued that certain exemptions under Section 110(5) of the U.S. Copyright Act were inconsistent with Article 9(1) of the TRIPS agreement which incorporates the obligations that members were required to comply with under the Berne Convention. These exemptions allowed under certain conditions the amplification of music broadcasts in public areas without authorization or the payment of a fee. The European Communities argued that these exemptions were inconsistent with Article 13 of the TRIPS agreement.

Following one and a half year of investigation the panel partially upheld the claim of the European Communities and recommended the U.S. to complete the needed changes in its regulatory system to be consistent with the obligations under the TRIPS agreement.

More detailed, the complaint submitted by the European Communities focused on two exemptions of Section 110(5) of the U.S. Copyright Act:

- Sub-paragraph (A) of the Act dealt with the so-called *homestyle exemption*. This part of the regulation provided the possibility for small restaurants and retail outlets to amplify music broadcasts without the need for any authorization from the right holders or the payment of a fee. However, this exemption was only valid if these public places used so-called *homestyle equipment*, meaning such apparatus which were usually used in private homes. In case of this point the panel conducted the investigation and then found that the *homestyle exemption* was not inconsistent with Art. 13 of the TRIPS Agreement. The panel concluded that the economic impact of the *homestyle exemption* was negligible and, thus, in accordance with TRIPS Art. 13, it could be deemed to be a limited and special case that does not represent a normal exploitation of the work.
- The other area under investigation was the sub-paragraph (B) of the Act, containing the so-called *business exemption* which provided the same possibilities for a much larger scale of food service and drinking establishments and retail establishments. In more details this exemption made it possible for such places to amplify music broadcasts without permission from the owners of the copyrights and related rights and without the payment of a fee if these units did not exceed a certain square footage limit. Moreover establishments larger than this limit could also enjoy the exemption if they met given limitations about the equipment used for music broadcasting. In the case of the *business exemption* the panel finally found that it was not consistent with Art. 13 of the TRIPS agreement. Their reasoning focused on the fact that most of the food service and drinking establishments belonged to the area of this regulation and, thus, it does not qualify to be a limited special case. Instead, the business exemption exempts a practice of normal exploitation of the music rights from IP protection and therefore violates the TRIPS agreement.

Following the investigation, the final report of the panel was circulated among the members on 15 June 2000. In order to implement the recommendations, the United States asked for 15 months as a reasonable period to complete all procedures. However, as the European Communities did not agree with the length of this period, the final timescale was determined by binding arbitration which concluded that the reasonable period for implementation was 12 months, with the deadline of 27 July 2001.On its meeting three days before the end of the reasonable period provided for the U.S., the Dispute Settlement Body and also the European Communities agreed to the proposal to extend the period until the end of 2001 or that of the current session of the US Congress – whichever was earlier. However, on the 7th of January, 2002, the U.S. had still not completed all the implementation requirements so the European Communities requested authorization to suspend concessions pursuant to Article 22.2 of the Dispute Settlement Body. In this regard the European Communities stated that it would fix a certain fee from US nationals in connection with border measures regarding copyright works to make sure that the benefits of the U.S. from the existence of the *business exemption* would not exceed the nullified or impaired benefits of the European Communities (this amount was previously determined by arbitration). A few days later the United States stood against the suspensions suggested by the European Communities and also stated that certain principles and procedures were not followed. On a meeting on 18th of January, 2002, the parties finally agreed on continuing the process with constructive negotiations. Eventually, on the 23rd of June 2003, the United States and the European Communities informed the Dispute Settlement Body that they had made a mutually satisfactory temporary agreement, covering the period until the 20th of December, 2004. This agreement contained the maintenance of the business exemption by the U.S. and the annual payment of an *impairment compensation* for the ongoing violation to the EU. For this three-year-period, the U.S. paid s total of US$ 3.3 million to the EU, calculating against the background of the estimated counterfactual royalties that would have been collected if the business exemption had not existed (differences-in-differences approach). However, since that date, the U.S. has neither paid any impairment compensation nor withdrawn or reformed the business exemption. Meeting-by-meeting, the EU brings the issue up on the agenda of the Dispute Settlement Body and meeting-by-meeting the U.S. submits identically phrased (!) reports, stating that it is working on an implementation of revised rules. The last (85th) such report until date was submitted on the 10th of January, 2012.

5. International Governance of Intellectual Property Rights: The Limits of TRIPS and New Developments

The US - Copyrights case discussed in the preceding section touches upon a viral topic of international IPR protection which is the cross-border enforcement of copyrights, here music copyrights. At the same time, it represents a traditional case in the sense that it is not about internet or piracy, two phenomena that tend to dominate the debate about cross-border copyright enforcement. However, it should not be overlooked that even traditional payment systems for copyright owners in entertainment industries remain problematic. The question

is: how can IPR holders collect their royalties (= enforce their copyrights) abroad, for instance, like in this case, if their music is played in restaurants and bars abroad or used in other business contexts. In this regard, the WTO procedure in U.S. – Copyrights demonstrates two – somewhat contradictory – conclusions: on the one hand, TRIPS is applicable and the panel clearly ruled that U.S. practices à la business exemption, denying foreign copyright holders their royalties, violate the agreement. On the other hand, nothing substantial appears to have happened since the ruling. Instead, the U.S. issues year-by-year exactly the same 'solution delayed' report to the WTO without actually solving the underlying problem. This does not suggest an effective enforcement of the ruling.

However, one should be cautious to underestimate the TRIPS effect on cross-border copyright enforcement. The so-called allofmp3.com case offers an interesting example. The story is about a Russian music downloading platform that was long deemed to be legal under Russian laws despite selling downloads of foreign copyright owners without offering any (adequate) compensation to the IPR holders (*Benko,* 2007). When Russia approached WTO membership, its IPR policy was viewed to be a main obstacle to an agreement (*Katz & Ocheltree,* 2006). And when such an agreement between the WTO and Russia eventually was on the horizon, Russia 'suddenly' changed its policy towards allofmp3.com and its related enterprises and effectively terminated its business. Although the U-turn in policy and law enforcement was not officially put in the context of the upcoming WTO membership, the shadows of TRIPS might well have been a trigger for changing a national copyright policy that most likely would have led to a lost case in front of the TRIPS panel (Note 11). In other words, the pure existence of TRIPS can have a disciplinary effect on members and accession candidates.

The TRIPS agreement represents a multilateral approach to IPR protection and, thus, already a comparatively centralized approach to international IPR governance. However, even though the WTO-TRIPS agreements cover 157 member states and, therefore, the big majority of the world and of world trade, it is still not a truly global regime. And with a view to internet as the medium which appears to be the cornerstone of intellectual property right violations and enforcement, having some *safe-harbors* for server locations outside TRIPS may be sufficient to hamper the regulatory effect of TRIPS. It has to be kept in mind that the nature of the combination of the internet as a truly worldwide transmission channel and digitalized products (with real copy costs tending towards zero without any loss in quality) implies that even small territories outside the scope of WTO/TRIPS may create huge loopholes for cross-border copyright enforcement. Talking about copyrights for music, movies, writings and others, already few servers outside the WTO-TRIPS jurisdiction may be able to flood the common markets of the WTO members with copyright-violating products, thus, de facto eroding any protective effect of TRIPS for digitalized products that are traded via the internet. And this would even be true if cross-border copyright enforcement within the WTO-TRIPS jurisdiction worked perfectly (which represents a heroic assumption as of today). It is the nature of the TRIPS agreement that it cannot develop any extraterritorial effects outside the WTO jurisdiction (possibly except of countries that aspire to a membership).

From an economic perspective, a *de facto* erosion of enforceable commercial copyrights represents a welfare problem. As has been argued in section 2, an erosion of effective IPR harms the incentive to produce new creations in the future and, thus, handicaps and impedes innovation dynamics. Furthermore, the typically discussed trade-off with abuse of market and monopoly power by the IPR owners tends to be considerably less relevant with commercial copyrights, since these types of IPR tend to exist in competitive settings and do not come along with considerable market or even monopoly power (see section 2) (Note 12). Consequently, loopholes in international governance that enable digital piracy and counterfeited products to flood these markets are very likely to be strongly welfare-reducing in their total effects in real-world scenarios. Economic analysis shows that imperfect IPR protection can only have positive welfare effects, if two assumptions hold: (i) IPR owners enjoy a monopoly-like market position (according to a state-of-the-art economic market delineation) and (ii) consumers prefer the original over the (illegal) copy. Only if these two assumptions hold, violations of IPR may (but not necessarily will) have other than negative welfare effects (Note 13). This is hardly the case with commercial copyrights and would require to be thoroughly demonstrated for exceptional cases.

Against the background of the preceding paragraphs, it is not surprising that initiatives to create an extraterritorial power to enforce copyrights in the internet across borders are currently (and controversially) discussed. This goes hand in hand with a re-nationalization – or re-decentralization – of copyright enforcement policies since the TRIPS system is not viewed to offer any avenue to close down on the loopholes of copyright enforcement in the digitalized internet economy. At the same time, this implies that economically justified (or at least justifiable) cross-border copyright enforcement goals can become mixed with other goals regarding internet governance, such as fighting other internet crimes (like child pornography), reducing the anonymity of internet users, limiting privacy for political or commercial reasons, etc. When talking about initiatives like SOPA and

PIPA (U.S.), the issue of cross-border copyright protection and enforcement gets easily thrown into the mix of these other implicit or explicit goals and while protest and resistance by internet lobby groups is widespread and fierce, it is often difficult to disentangle the different elements and to identify whether all goals and elements are actually targeted. In order to round the discussion on this paper, we will focus exclusively on TRIPS-related elements of the new initiatives and not dive into the other issues and goals.

The PROTECT IP Act (Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act, PIPA) is a proposed law in the United States, introduced in May 2011. The basic idea of the Act is to give stronger power into the hands of the US Government and intellectual property right holders. Besides PIPA, a similar House version of the bill also exists, namely the Stop Online Piracy Act (SOPA) which was introduced in October 2011 (Note 14).SOPA and PIPA include TRIPS-relevant provisions insofar as cross-border copyright enforcement is concerned. According to these acts, internet sites which are obviously created in order to infringe IPR, in particular by distributing goods illegally or facilitating it or contributing to it, would fall under US jurisdiction irrespective of their place of origin. Thus, the new regulations would include a direct extraterritorial reach as soon as domestic markets are affected (which in case of the internet is virtually always the case). This approach resembles the effects doctrine as known from antitrust laws and competition policy enforcement (inter alia, *Griffin,* 1999; *Fox,* 2003; *Budzinski,* 2008).

However, more far-reaching effects would have to be expected from an indirect extraterritorial enforcement mechanism incorporated into the acts. All those parties (other websites, service providers, advertising agencies, search engines, etc.) who are either in financial relationship with the infringing site or link to it, would have to stop all activities towards the site and remove links referring to it (in case of internet providers, they would even have to block access to the infringing page) (Note 15). In other words, a joint liability of (i) providers, (ii) intermediates (search engines, archives, data banks, online encyclopedias, etc.), and (iii) commercial partners (e.g. advertisers) would be introduced. Furthermore, instead of 'just' removing connections to infringing sites on request, these three groups would be required to actively search for infringing 'partners' and proactively employ the required sanctions on them. Once again, all these regulations would also be valid for sites which are registered outside the US, creating an indirect extraterritorial enforcement channel.

These unilateral extraterritorial enforcement mechanisms may stand in conflict at least with the idea of TRIPS. On the one hand, this refers to the intended role of providers and intermediates as auxiliary policemen of copyright enforcement. On the other hand, an extraterritorial reach of US copyright protection policy would limit or even erode the national copyright rule-making competence above the TRIPS minimum standards of WTO member states (Note 16). Assuming that the intended enforcement mechanisms would be effective, US copyright rules would prevail worldwide (at least, this appears to be part of the intention), thus, offering no scope for differing national regulations 'on top' of the minimum standards. More precisely, only such national regulations that include the U.S. level and the U.S. way of IP protection (and may even go beyond it) may prevail to exert considerable effects. All types of national regulations that locate "between" the TRIPS minimum standards and the U.S. style, either by providing IP protection above TRIPS but below PIPA or by employing other ways to create copyright protection (for instance, without involving search engines as deputy sheriffs), would be likely to face difficulties in exerting actual effects since they would be likely to get dominated by the U.S. extraterritorial enforcement (claiming jurisdiction according to U.S. standards over most relevant cases due to the cross-border nature of the internet). Effective extraterritorial enforcement always implies that the strictest regulation prevails for cross-border cases – and with the internet, virtually all relevant cases display cross-border effects (or have the potential to do so). Different stages of development but also cultural issues, however, may imply that a diversity of national copyright protection and enforcement on top of the minimum standards would be efficient and beneficial. It is rather doubtful if a one-size-fits-all approach through unilateral extraterritorial enforcement corresponds to individual levels of satisfying commercial copyright protection – in particular when it comes to a strictest-regulation-rules standard (extraterritorial enforcement approach) instead of defining common, worldwide consensual, minimum standards (TRIPS approach) (Note 17).

From an economic perspective, additional disadvantages of recidivism to unilateral strategies to enforce commercial copyrights include negative externalities from unilateral initiatives (seeking to maximize national welfare and not international welfare, thus favoring beggar-my-neighbor strategies), jurisdictional conflicts and disincentives for technology transfer and cross-border IP-related investments.

6. Conclusions

Our review of the hitherto intellectual property rights policy within the WTO framework shows that in particular the problem of the cross-border enforcement of commercial copyrights represents as well as remains a challenge

and plays an important role in landmark TRIPS cases. Even in more traditional media markets the TRIPS provisions and procedures cannot efficiently solve cross-border commercial copyright under-enforcement as the US-Copyrights case demonstrates. At the same time, its reflection in the current discussion topics of the – politically-dominated – TRIPS rounds appears to be surprisingly underrepresented and outshone by political topics with strong political lobby influences like geographic indications, technology transfer or biodiversity (see section 3.2). This represents a problematic development, especially in the light of the current re-emergence of unilateral initiatives to strengthen the cross-border enforcement of commercial copyrights by several nations, including plans to establish extraterritorial enforcement of national copyrights rules. From an economic point of view, turning away from the multilateral approach within the WTO framework (TRIPS) – but also from other multilateral forums like WIPO – represents a problematic tendency that can be expected to be less favorable from a world welfare perspective than reinforcing the commitment to multilateral solutions, reformed and adjusted to the new digital media challenges, even though such a process is guaranteed to be anything else than easy. Potential conflicts of those unilateral initiatives with TRIPS (and WIPO) provisions are likely to cause further problems and complications in the cross-border enforcement of commercial copyrights.

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Notes

Note 1. On theories of trade of information including critical assessments of marginal calculation approaches to information trade Stigler (1961), Streit & Wegner (1989) and Kirzner (1992).

Note 2. This is the dominating approach when it comes to modelling copyrights and their effects. See the excellent literature review by Belleflamme & Peitz (2012).

Note 3. In line with that, songs at discount prices tend to rise in permanently renewed music charts (like itunes or amazon download track charts) as long as they are discounted and some 'official' music charts (like in Germany) even account for this by ordering according to revenues and not 'just' according to quantities.

Note 4. See Schmidt (2010: 88) for a comparable reasoning for detective stories books.

Note 5. See for the following the WTO Annual Reports, different years.

Note 6. For more general discussions of geographical indications as intellectual property see, inter alia, Ilbert & Petit (2009); Mulik & Crespi (2009); Kireeva & O'Connor (2010).

Note 7. In this case, the term 'unfair competition' explicitly relates to the WIPO related Paris Convention (in the 1967 version), where Art. 10bis defines unfair competition as practices 'contrary to honest practices in industrial or commercial matters'. The article exemplarily cites false allegations, discrediting competitors as well as misleading and confusing information about competitors.

Note 8. See also http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm .

Note 9. On the economics of counterfeited goods see the seminal articles by Grossman & Shapiro (1988a, 1988b).

Note 10. See also http://docsonline.wto.org/GEN_highLightParent.asp?qu=%28%40meta%5FSymbol+WT%FCDS160%FC%2A%29&doc=D%3A%2FDDFDOCUMENTS%2FT%2FWT%2FDS%2F160%2D24A85%2EDOC%2EHTM (accessed: 23.01.2012) and http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm

Note 11. Russia eventually became a WTO member state on the 22nd of August, 2012.

Note 12. This might be different with patents, in particular in the pharmaceutical sector. See e.g. Henry & Stiglitz (2010).

Note 13. See again the excellent survey by Belleflamme & Peitz (2012) and their comprehensive references to the literature.

Note 14. Both acts are initiatives in discussion and not yet set into force.

Note 15. Besides these regulations, the new laws would expand the criminal regulations and include the streaming of copyright materials.

Note 16. There may also be a conflict with commitments in the context of the World Intellectual Property Organization (WIPO). Since 1998, the field of intellectual property rights in the US is regulated by the Digital Millennium Copyright Act (DMCA) which came into force in order to fulfil the responsibilities of the US towards two treaties of WIPO, namely the Copyright Treaty and the Performances and Phonograms Treaty.

Note 17. In addition, worries are voiced concerning fundamental principles of the rule of law, the protection of privacy as well as the protection of free speech and diversity of opinions. They are however not discussed in our context.

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The Superiority or Integrity of Natural Law for Our Time

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Abstract

The idea of the two laws, one resting solely on human authority and the other claiming divine or natural origin and therefore entitled to supremacy over mere human law, has a long and chequered history, and still possesses vitality in the 21st century. Human rights infringements by positive law, under the enactments of the *Choice of Pregnancy Act* 92 of 1996 and the *South African Schools Act* 84 of 1996, have led to a revival of natural law thinking. The aim of this paper will be to explore briefly the significance of natural law thinking in the past, to establish the forms in which it manifests itself in the present day, and to attempt to evaluate the contribution it may be capable of making to the problems of law in the modern world. Primarily, a theory of natural law needs to be undertaken to assist the practical reflections of those concerned to act, whether as judges, statesmen, citizens. The principles of natural law are traced out not only in religion, moral philosophy, and/or ethics and "individual" conduct, but also in political philosophy and jurisprudence, in political action, adjudication, and the life of the citizen. They require that authority be exercised, in most circumstances, according to the manner conveniently labelled as the Constitution or the "*rule of law*" and with due respect for human rights which embody the requirements of justice.

Keywords: natural law, positive law, divine commandment, corpus iuriscivilis, divine original

1. Introduction

Natural law is almost as old as philosophy itself. It can be described as a sort of recurring decimal in the history of thought. It had its great moments and its moments of eclipse, its flowering times and barren times, catabolic and anabolic periods. It has been declared dead, never to rise again from its ashes, but it has risen livelier than ever and buried its undertakers. There is, indeed, no doubt of the revival of interest in the natural law in our time. Natural law requires to be new in every age. Natural law should be shown to be sound and relevant in the conditions of our century.

During the 19th century, human rights were stressed. Values like the right to life, dignity of the human person, the importance of personal freedom, toleration and the importance of the common good, were brought to the fore by the natural law theories. Crimes against humanity and against peace have been seen, as have abuses of power and the trappings of legality to the extent that the poverty of positivism (positive law) becomes evident. There must be something beyond the positive law to which an appeal can be made.

2. Divine Characteristics of Natural Law

Natural law betokened God's direct intervention into His creation. It is widely believed that in the oldest cultures it was the gods or God who "gave" law to humankind, by writing it in their hearts or by revealing it in divine scripture (Note 1).

As anthropomorphic images of deities took shape, the concepts of law and justice applying to human society became linked to these gods. Soon certain gods were considered specific guardians of law and judgement – gods who were invoked when it came to the violation of accepted norms (Note 2).

Thomas Aquinas emphasizes that natural law is the dictates imprinted by God in the human heart. According to Jan Schröder, Demosthenes concurs with Thomas Aquinas when he (Demosthenes) says: "Natural law is 'an inspiration and gift of God" (Note 3).

The terms "right" and "just" show law as something approved by the gods or God. The *Sachnsenspiegel* from the 13th century states: "*Gottistselber Recht. Darumistihm Rechtlieb*." (God Himself is law) (Note 4). God is thus the

omnipotent legislator. He is the source and legitimation of law. Natural law separate from God is inconceivable. All earthly judges are themselves ultimately subject to God's Last Judgement (Note 5).

Given that God is the creator and Lord of nature, natural law is in harmony with *iusdivinum* (spiritual law). It is the same everywhere, because it follows the same natural instincts (*quod ubiqueinstinctunaturae... habetur*). Accordingly *iuspositivum* (positive or man-made law) can be corrected and amended to comply with the tenets of *iusnatural* (Note 6).

Because of its divine character, natural law is absolutely binding and overrules all other laws. Whatever has been recognized by usage, or laid down in writing, if it contradicts natural law, must be considered null and void" (Note 7). This statement of Gratian is still further reinforced by his commentator: "it must be considered null and void because the Lord has said *I am the Truth, not I am Custom or Constitution*" (Note 8).

The essence of the doctrine of natural law maintains that there is an ordering of human relations different from positive law. Natural law is higher and absolutely valid and just because it emanates from the will of God. The will of God is-in the natural law doctrine-identical to nature insofar as nature is conceived of as created by God and the law of nature is an expression of God's will (Note 9).

The conviction that there are superior principles of right, or higher laws to which the ordinary civil rules made by man must conform and which necessarily place limits on the operation of such rules, is one of the most persistent ideas in the evolution of legal thought. These higher law concepts give direction to various processes of modern legal adjustments. The best-known and most influential form of the higher law doctrines centre around the term "natural law" or "law of nature" (Note 10).

3. In Search for the Superiority of Natural Law: A Reflection of Sophocles' Play Antigone

As early as the fifth century BCE, in Sophocles' play *Antigone*, the superiority of natural law over positive law (man-made law) seems to be confirmed. Creon, ruler of the city of Thebes, pronounces that Polynices, who has died in an attempt to win the city for himself, shall remain unburied and commends his body as a "dinner for the birds and for the dogs." In so stating, Creon is expressing the case for positive law or legal positivism, which uncompromisingly teaches obedience to the law of the state. Antigone, the sister of Polynices, defies her uncle's command and buries her brother. She says: "Nor did I think your orders were so strong that you, a mortal man, could over-run the gods' unwritten and unfailing laws. Nor now, nor yesterday's, they always live, and no one knows their origin in time. So not through fear of any man's proud spirit would I be likely to neglect these laws, draw on myself the gods' sure punishment" (Note 11). The struggle between Antigone and Creon represents the conflict between a higher moral law (natural law) on the one hand and man-made law (positive law) on the other hand.

Positive laws such as Creon's pronouncements that Polynices's body not to be buried, are not only of a transitory nature, but are the embodiment of the arbitrary power of rulers. This pronouncement or positive law enactment of Creon, is according to Augustine an unjust law and is therefore "no law at all." This reveals the imperfections of man-made laws and emphasises their inferiority (Note 12).

Thomas Aquinas considered a law unjust when it affronts natural law and such laws must never be obeyed, because he says, "we ought to obey God rather than men" (Note 13). In this, he metaphorically associates natural law with God, and positive law with man. The former is higher in value then the latter. Therefore, the law of nature as created by God unquestionably has a divine origin (Note 14). The laws of God (natural law) are superior in their obligatory power to all other laws. Positive laws are of no validity if contrary to them (Note 15).

By virtue of the Divine Original (God), natural law is regarded as superior to positive law.

4. The Adulteration of Natural Law and Its Subsequent Desecration

The concept of positive law has changed after 1650 and come to be construed as an order of a superior, namely a legislator. The order of the legislator no longer has to be rational as had previously been the case with regard to natural law. Law in general is now only "a decree by which a superior obliges a subordinate to act in accordance with his instructions," or "an order of a ruler who obliges his subordinates to adjust their actions to that order" (Note 17). It means the law of nature as divine commandment is regarded as a superfluous subtlety and therefore fits into a general concept of the law as the order of a legislator. Law of nature is therefore regarded as no longer "written in the heart" of man, but can be discerned through reason (Note 18). The author Christian Thomasius viewed natural law in 1705 as the order of a ruler or master. Schröder says about Thomasius, "he now wishes to classify the law of nature more as pieces of advice (consilia), than orders, that is to say no longer as laws in the strict sense" (Note 19).Schröder asserts that Johann Jacob Schmauβ doubts that natural law has the character of lex

law. He cited Schmauβ as the latter is saying: "However, in a state of nature a man will regard God not as a legislator 'but rather as his creator who has given him such a nature'" (Note 20).

Natural law becomes no longer regarded as a divine commandment. Wolff, for example, no longer sees an adequate basis for the law of nature in God but in the essence and in the nature of man and of things. Although he considers God as the author of natural law, he opines that God is not the supreme principle from which it is derived. Other authors, like Vattel, Montesquieu, Claproth, Achenwall, Hőpfner and Nettelbladt concur with Wolff's contention and also eliminate God from the law of nature. Vattel says, "the natural laws are, in particular, those which oblige us by nature or whose basis is to be found in the essence and nature of man and in the essence and nature of things in general" (Note 21). Montesquieu exerts that the law of nature, "are so called because they spring solely and entirely from our character" (Note 22). According to Claproth, "when one perceives them (i.e. laws) from the nature of man and of the other things by which we are surrounded, one refers to them as natural laws" (Note 23).Asch enwall asserts, "a law is a body of rules which express an obligation and 'an obligation which man can discern from philosophical principles is referred to as a natural obligation" (Note 24).Hőpfner alleges that "a natural law is that which expresses a natural obligation" (Note 25). And Nettelbladt believes "a law is a 'rule' and 'if one accepts that this rule is laid down by nature, the law is referred to as natural law'" (Note 26).

In the evaluation on these authors, the idea that the will and commandment of God as the actual basis of the law of nature is rejected. Vattel echoes that any attempt to prove that God's will is the basis of natural law must be attributed to the nature of man and things. Darjes asks the question, God has not revealed the law of nature to us directly and therefore, "how should I know that God so wishes?"(Note 27).

It is evident that these authors want to do away with God as the legislator of the law of nature. Natural law has become a mere product of reason from which God as legislator is eliminated and positive law becomes a mere order or commandment of the legislator which no longer has to be rational.

5. The Imprint of Positive or Man-made Law

In the High and Late Middle Ages the notion of what was "right" was consolidated by invoking God, for example, in 1525 a rebellious peasants after its appealing to local customs, usage and justice had failed has legitimized their acts through divine and natural law (Note 28).

Roman law, legitimized by tradition and theocracy, took hold from the 13th century onwards. In spite of invoking God in the enforcement of the *Corpus Iuris Civilis* (533), Roman law took its legitimation from imperial authority. A need for a worldly legitimation of law was underpinned. It leaded to laws created by humankind (*iuspublicum*, *iusgentium* and *iuscivile*), which deviated from natural law to be legitimized (in the 6th century) by Imperial will that decreed them valid (Note 29).

The reception of Roman law spawned a topos of legitimacy in the will of authorities. This was manifested by jurist popes of the 13th century, who began to rule a world church through the targeted application of *iuspositivum* (positive law). The same development continued with the city authorities. From this concept or idea we can discern a process in which the legitimation of law shifted from the notion of theologically determined truth (*veritas*) to that of secularized will (*voluntas*), wherein natural law is replaced by positive or man-made law (Note 30).

As the foundations of natural law is undermined in the 16th and 17th centuries, so too did modern politics and the rule of law became emancipated from prescribed religious content. God no longer played a role. Natural law was rather based on the behaviour of political powers instead, and there was also an indent of the Christian element of natural law, to such an extent that the invocation of God in preambles of legislation became increasingly formulaic. This spurred a change in the foundations of legitimation in the sense that the state could also ordain something that was unjust and it would nevertheless be law (Note 31). It meant that unjust laws would be valid because it had been decreed valid.

The general direction would be that there has already been a formalistic legal position in the 17th century. Medieval Roman law had already been taken hold and was considered a reasonable system of law. Positive (man-made) law consolidate those in power and had drawn its legitimation from sovereignty. These positive laws were "human" and have established positive norms. Legal norms soon became increasingly secularized until they eventually oriented themselves towards a temporal purpose (Note 32).

The God-given world of heaven and social order fell apart. This meant in principle a turning away from God. In other words although God remained *prima causa*, he could no longer had the "will" to intervene, even if he could. Natural law thus came to be perceived as something that could apply even without God (Note 33).

The legal crisis of the 16th and 17th centuries had crippled religiosity in natural law. The authority of theologians disintegrated and by the end of the 18th century the world was perceived increasingly as pantheistically (Note 34).

The early modern principality which was to become the paradigm of the era permitted the modernization of the medieval legal world. The notion of the "state as machine" now functioning according to the rules of the natural sciences. Even a "godless" tyrant was physically part of nature and of the social order. A natural law that opposed the laws of the state (positive or man-made laws) could become charged with revolutionary sentiment and therefore been rendered unjust (Note 35). For this reason, natural laws required no legitimation. They either held up against experimental attempts at falsification or they did not. Man-made or positive laws, on the other hand, are more dependent than ever on legitimation in a world in which it was no longer enough to invoke God. We got a scenario where the law of nature has disappeared (Note 36).

6. Is There a Possibility of Co-operation between Natural and Positive Law?

Klaus Luig states that Leibniz sought for legal rules that correspond to human nature created by God. The latter implies that these rules are to be transposed into positive law by the legislature. This means that positive or man-made law be based on a theologically founded theory of natural law. Luig opines along Leibniz thought that it was the law of nature that human should obey God's commandment of neighbourly love in order to work for the common weal (Note 37).

According to Luig, Leibniz would have mean that the rule of natural law has to be absolute and that even a judicial rule or law (positive law) has to be thus and not otherwise if everything is to be just and right (Note 38).

According to Luig, Leibniz's would have mean that everything that is in accordance with natural law should also apply in state (positive) law (*Quicquidiurisnaturae ac diviniest, etiamiuriscivilishaberidebet*) (Note 39). It means that natural law may also be complemented and altered by positive law.

What is vague in natural law is concretized, according to Leibniz, through positive law. Leibniz also asserts that the legislator can decree laws that deviate from natural law. This appears in cases where a subject of rights be renounced. In this sense, Leibniz would have professed or instruct that natural law take precedence where state law is lacking or incomplete. But, Leibniz exerts that the norm of natural law can be flexible if this is deemed equitable. In other words, natural law may be changed in the interests of fairness (Note 40).

Leibniz avers there are legal premises that could not be derived from natural law, but only from positive Roman law. This applies, for example, to the rule that, in the case of two persons bound to one another by verbal agreement, it is assumed that when one party is no longer present, the other will take his place. An example, furnished by Luig, arethe will and testament reading: "I bequeath to Titius and Caius a piece of land in equal parts." It means if Titius dies, then Caius receives his share as well. This entails that the ratio of natural law can be approached through the scientific commenting and expounding of positive law. The view is established that natural rules may be developed by scientific means on the basis of statutory provisions (Note 41). This principle applies to the sharing of damages also in a case in which neither the perpetrator nor the victim is to blame. For example, if one man's ox hurt another's that it dies, then heshall sell the live ox, and divide the money of it. They shall divide the dead ox. Leibniz believes this rule will aid the legislature. Luig cited Leibneiz justification of this rule: "If you weigh up the matter with care, then, in order to avoid displeasure and envious looks schehleaugen and inimitable attitudes... it will be just that we share the damage, whereby each shall think that he has unfortunately damaged the other or suffered damage. For if both are free of blame, the other has as much reason to complain that my interests were an obstacle for him as I have to think that he has confounded my interests" (Note 42).

This combinatorial analysis of natural law are valid in all fields of human knowledge and could be placed (or is already active) in the service of law-making in positive law.

7. The Theory of State: The Principle of Obedience

Each state came into being with reliance on the principle *pactasuntservanda*. According to this principle the citizens abdicate their rights in favour of the government who professes to rule over them. The concept is thus: the citizen surrender their rights and the government agree to protect these rights. This principle renders the citizens subject to the power which they have legitimately granted to the government. Van Blerk cites De Groot's passage from Sophocles' *Antigone*: "You must obey him whom the state has placed in power …" (Note 43). She also cites another writer, Hobbes, who states: "No man in any commonwealth whatsoever has the right to resist him or them, on whom they have conferred their power …" (Note 44).

The only sanction for governmental tyranny is that the rulers, instead of enjoying a happy afterlife, will suffer the "pain of eternal death" (Note 45). In congruence to this notion, the *Institutio* of Calvin (which is a comprehensive treatment of civil government and political authority), dating back to 1536, admonishes citizens to obey princes and officials. On those who bear the office of magistrate, it is inculcated that they have a commission from God. Calvin says: "Offices of rule are amongst the gifts of God …" (Note 46) and rulers are the ministers of God "*Dei*

enim minister est" (Note 47). Consequently, civil authority is not only lawful but the most sacred of all stations in mortal life. It, however, implies that the ruler must exercise his office justly, "for if they sin in any respect, not only is injury done to the men whom they wickedly torment, but they also insult God himself" (Note 48).

If authorities and rulers do exercise unrestrained power to the injury and detriment of the subjects, citizens owe reverence toward all rulers, even to the utmost (Note 49). An extremely high premium is put on the obedience of the citizens to positive law, in the sense that even when the citizens are tormented by a savage prince, they must still obey him, because obedience to the positive law is also God's command (Note 50).

The importance of positive law is being stressed: Obedience must be shown to civil rulers because they derive their authority from God. "*Omnis enimpotestas a Domino Deoest*" (Note 51). But kings, to be assured of obedience must rule justly and according to law (Note 52).

8. The Limits of Obedience

But blind obedience to positive law needs to be tested against reason and Gods love and protection for His creation, man and society. It is under this conviction that positive laws such as the *Choice on Termination of Pregnancy Act* 92 of 1996 and *South African Schools Act* 84 of 1996, are deem to be unjust and according to natural law, may under no circumstances be obeyed. These positive law enactments seem to ignore the natural law precepts of "Do not murder or do harm to any man," and thus disregard the common welfare of the citizens.

The state is a condition of our existence, Thomas Aquinas would say, and in some cases disobedience to it, concerning unjust laws, may be a duty. While resistance to the state might sometimes be necessary, there is in his thought no place for revolution against the state (Note 53). However, the other approach is that man is required to obey all superiors whether secular or ecclesiastical. There is no authority but by act of God. For Paul, the authorities are "God's agents" who are "working for your good" (Note 54). 1 Peter 2:13, 14, for example, admonishes obedience to superiors: "Submit yourselves to every human institution for the sake of the Lord …" Earthly rulers receive their powers as a divine concession.

Positive law is to be obeyed also, but to the extent that it is concordant with natural law precepts. Offshoots of positive law such as the *Termination of Pregnancy Act* and the *South African's School Act*, which is contrary to natural law, need not to be obeyed (Note 55). The natural law contains all that makes for the preservation of human life (contrary to *Termination of Pregnancy Act*) (Note 56) and since man has a natural inclination to know the truth about God (religious education in *Christian Education South Africa*) (Note 57), the citizen must obey God (natural law) rather than man (positive or man-made law) (Note 58).

9. Rule of Law

Natural law and (the extension of it) to the positive law, also curtails the power of the state to tamper with a citizen's rights or freedoms. The latter is manifested in the Constitution and *rule of law* (Note 59). The Constitution and the rule of law (man-made laws), as mentioned earlier, must be obeyed, to the extent that it must not be contrary to the natural law. If the state injures the material interests of citizens, it breaches not only the constitution or *rule of law* but also the basic elements of the social contract. The term *rule of law* is to advocate respect for civil and political rights or even social and economic rights. In this regard it has both procedural and substantive components. The procedural component forbids arbitrary decision-making (for example, the admission of the *Act, Termination on Pregnancy*t) and the substantive component dictates that the government must respect the individual's basic rights, such as respect for human dignity, equality, and freedom (Note 60). In this regard, natural law and positive law complement each other.

The goal of natural law must be overall happiness or the "common good." The first and most fundamental principle of natural law is that "good is to be done and evil avoided," for example, do not kill your unborn child (*Termination on Pregnancy Act*) and educate and rear your children in a Christian manner (S*A Schools Act*). Other examples are: "One should not kill one's father;" and "God's precepts are to be obeyed" (Note 61). These principles are buttressed by two important natural law maxims, "*suumcuiquetribuere*" (give to everyone his due) and "*neminemlaedere*" (do not hurt another) (Note 62). The latter maxim entails that we must not hurt or kill the most vulnerable members of our community or state, such as the unborn. This notion is diametrically in opposition to the *Termination of Pregnancy Act* of South Africa. This notion is endorsed by the *South African Constitution*, Act 108 of 1996, in sections 9(1) and (3), 10 and 11. Section 9(1) prescribes that everyone is equal before the law and has the right to equal protection and benefit of the law, and subsection (3) states that the state may not unfairly discriminate directly or indirectly against anyone on the grounds of pregnancy and birth. According to section 10, the *foetus* also has an inherent dignity and the right to have its dignity respected and protected (*Pinchin v Santam Insurance Co Ltd* 1963(2)SA 254 (W)).In terms of section11, the *foetus* has also a right to life.

These precepts of the *Constitution*, in opposition to the statute *Termination of Pregnancy Act* and *SA Schools Act*) are offshoots of positive law, but are congruent with natural law theories and needs to be obeyed by everyone, including the state (the deviser of positive law).

9.1 The Right to Life and Human Dignity

The requirements of moral law, which emanate from natural law, state that one does not do to others that which one does not want done to oneself. The fact that you as an adult were not aborted when you were a *foetus* (embryo) signifies that you should do the same for your unborn baby. The inalienable right to life must be acknowledged and respected by both the state and the courts. Among these inalienable rights is each individual's right to life and physical integrity from the moment of conception until death. As soon as the state (positive law) denies or deprives a certain category of human beings protection, it denies them equality of all before the law, which is guaranteed in terms of Article 9 of the *Constitution of South Africa* 108 of 1996. In terms of Article 9(3) of the Constitution, the state (positive law) will discriminate against the *foetus* if it does not protect its right to life. In this regard, Article 9(3) says that the state would: "… unfairly discriminate directly or indirectly against anyone on one or more grounds, including … age … and birth," if it did not guarantee the *foetus'* right to life in terms of the Constitution. In this regard, the requirements of the *Choice on Termination of Pregnancy Act* 92 of 1996 should not be complied with, since it undermines the moral or natural law principle of the Constitution. Analogically said, Article 2 of the Constitution, which showed a natural tendency, expresses the principle of constitutional supremacy (like natural law enjoying supremacy over positive law). Article 8 of the Constitution also stipulates that the *Bill of Rights* of the Constitution supercedes all legislation (including the *Choice on Termination of Pregnancy Act* and the *South African Schools Act).* This approach is supported by the court case *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995(4) SA 877 (CC), in which it was determined: "Any law or conduct that is not in accordance with the Constitution … will therefore not have the force of law." This is tantamount to the principle, extolled in this paper, that when positive law (enacted by the state, such as *Choice on Termination of Pregnancy Act* and *SA Schools Act*) contradicts natural law (although the Constitution is a form of positive law, it encompasses natural law elements, which strive for the preservation of human life and the practising of religious upbringing, which is the best guarantee for the protection and preservation of individual rights), the Constitution should, in my opinion, declare the *Choice on Termination of Pregnancy Act* unconstitutional. Man is considered to be a divine being on account of his soul (Note 63). The description of the unique value of humans in Psalm 8:5 is striking: "For thou hast made him but little lower than God, and crownest him with glory and honour. Man, as image bearer of God, is therefore endowed with individual rights that must be recognised by all, including the state. The practical implication of the natural law doctrine involves that man must be endowed with fundamental rights, from the *foetal* stage of pregnancy to adulthood. On the basis of this, man may not be deprived of his/her individual rights. By having created the human soul, God clothed humans in godliness. Human life, therefore, has a sacred and inviolable quality. This inviolate quality of human life is guaranteed by the *Constitution of South Africa*. Should there be any violation of this right, it would have far-reaching implications for political civil society.

Christian moral conservatives, such as John Finnis, have campaigned against any sort of right to terminate a pregnancy, at any stage, regardless of the costs to women. They also campaign against a right to withdrawal of life support when it is no longer wanted or needed, and against a right to die (voluntary euthanasia), no matter the suffering entailed in living. They maintain that human freedoms and choices do not extend to personal governance over life itself, because life is of supreme value—a gift from God. It is not ours to meddle with. It must be endured, if God so minded (Note 64).

The human being is "inviolable" and that human life is of infinite worth. The law must respect "the sanctity of human life." The invocation of "human sanctity" is intended to tell us that human beings are innately special. The term "sanctity" is borrowed from religious language and seems to have strong religious connotations. The very notion that human beings are of infinite value, seems rather implicitly religious with natural law undertones than secular (positive law) (Note 65).

9.2 Human Dignity

In modern times religious tolerance is a necessary precondition for political liberty. Section 15 of the *Constitution of South Africa* implies that religious communities should not be denied the right to practise their religion. In *Christian Education SA*, such communities sought an order declaring the provisions of section 10 of the *South African Schools Act* 84 of 1996, to be unconstitutional. Section 10 prohibits the administration of corporal punishment to pupils in a school context, and renders such act an offence which incurs the same sentence as would be imposed for assault (Note 66). The contention was that section 10 offended against the religious and cultural

guarantees provided for in the South African constitution. The communities (appellants) rely on sections 15(1) (Note 67), 29(3) (Note 68), 30 (Note 69) and 31(1) (Note 70). Under sections 15 and 31(1), it was assumed by the applicant in *Christian Education SA* that corporal punishment was not inconsistent with any provision of the *Bill of Rights* as contemplated by section 31(2). It can therefore be asserted that section 10 of the *Schools Act* limits the parents' religious rights both under sections 31 and 15. The schools want to maintain an active Christian ethos and seek to provide for their learners an environment that is in keeping with their Christian faith. They assert that corporal punishment is an integral part of this ethos and that the blanket prohibition of its use in its schools invades their individual, parental, and community rights to freely practise their religion. Section 10 of the *Schools Act* should be declared unconstitutional and invalid in that it interferes with the right to freedom of religion and to cultural life to the extent that it prohibits corporal punishment. This notion is to be inconsistent with article 28 of the *United Nations Convention on the Rights of the Child*, of 20 November 1989. Article 28 of the convention accord recognition to the child and upholds the child's human dignity.

Corporal punishment is understood to be inseparable from their understanding of their Christian faith and an expression of their religion. Corporal punishment is a vital aspect of Christian religion and it is applied in the light of its Biblical context using biblical guidelines which impose a responsibility on parents for the training of their children. The appellant cited the following verses in the Bible as requiring its community members to use "corporal correction." In Proverbs 22:6, "Train up a child in the way it should go and when he is old he will not depart from it. Proverbs 22:15, "Foolishness is bound in the heart of a child, but the rod of correction shall drive it far from him." In Proverbs 19:18, "Chasten thy son while there is hope and let not thy soul spare for his crying." In Proverbs 23:13, 14, "Do not withhold discipline from a child, if you punish him with a rod he will not die. Punish him with a rod and save his soul from death."

These verses contend that corporal punishment is a vital aspect of Christian religion and that it is applied in the light of its Biblical context using Biblical guidelines which impose a responsibility on parents for the training of their children.

In *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 (1) SA 474 (CC), the respondent approached the governing body of the school at which her daughter was a learner for an exemption from its code of conduct to allow her daughter (the learner) to wear a golden nose-stud to school. This is done in keeping with her Indian family tradition and culture. Wearing of a nose-stud is an expression of cultural identity. The governing body refused the respondent's application for exemption. The respondent approached the quality court for relief and was met with a finding that, although the school's conduct was *prima facie* discriminatory, the discrimination was not unfair. On appeal to the High Court it was found that the school's conduct was both discriminatory and unfair. The practice of wearing a nose-stud is a religious and cultural practice.

The school's code of conduct, coupled with the decision to refuse the learner an exemption from the code, was discriminatory on the grounds of both religion and culture in terms of section 6 of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000. Under this Act, failure to take steps to reasonably accommodate the needs of people on the basis of race, gender, or disability amounted to unfair discrimination (Note 71). Reasonable accommodation was an important factor in the determination of the fairness of the discrimination (Note 72). Fairness required reasonable accommodation, and as regards the MEC for Education, the enquiry was subjective and the evidence showed that the wearing of a nose-stud was important to the learner as an expression of her religion and culture (Note 73). There was no evidence or no reason to believe that a learner who was granted an exemption from the provisions of the school's code of conduct would be any less disciplined, or that she would negatively affect the discipline of others. Refusing the learner an exemption therefore did not achieve the intended purpose (Note 74). Allowing the stud would not have imposed an undue burden on the school. A reasonable accommodation would have been achieved by allowing the learner to wear the nose-stud. The High Court's finding of unfair discrimination therefore had to be confirmed.

Now, positive law is enacted on behalf of the mass of men, but does not prohibit every vice from which virtuous men should abstain. Positive law is, therefore, either just or unjust. If just, they draw from the natural law, from which they derive and they are directed to the common welfare. On the other hand, positive laws may be unjust for two reasons. Firstly, when they are detrimental to human welfare as seen in the *South African Schools Act*. It is unjust in the sense that it prohibits a community's religious instruction to their children and that somebody was not permitted to express his or her religion and culture (the wearing of golden nose-stud in *MEC for Education*). It is tantamount to a ruler or state, who or which enacts laws which are burdensome to his/its subjects and which do not make for common prosperity, but are designed better to serve his/its own cupidity and vainglory. Such (positive) laws may be unjust through being contrary to natural law or divine goodness. These tyrannical laws (*Choice on*

Termination of Pregnancy Act and *South African Schools Act*) are under no circumstances to be obeyed for it is said: "*ObedireoportetDeomag is quam hominibus*" (Note 75).

10. Possible Co-operation between Natural and Positive Law

Finnis quotes Kelsen who says: "It is a cardinal point of the historical doctrine of natural law… over two thousand years' that it attempts 'to found positive law upon a natural law delegation'" (Note 76). Finnis agrees with Kelsen who asserts that the legal validity of positive law is derived from its rational connection with natural law. Positive law is, according to them, a mere emanation of natural law.

The law of nature is not the only law which guides man on his way to perfection. Other laws, like the positive laws for example, are necessary. Positive laws must be established to rely on all the conclusions of natural law, and "to restrain evil men from wrongdoing by force and by fear" (Note 77).

The existence of natural law does not render the establishment of positive law superfluous. On the contrary, the necessity of positive law is being stressed (Note 78). Natural law encourages obedience to established rulers by reason of a natural order decreed by God Himself. Argued from a natural law premise, man possesses certain fundamental rights, as discussed above. These fundamental rights depend upon the belief in the existence of natural law in the strict sense and positive law in the broad sense. The United States Constitution (positive law), for example, is essentially a natural law document setting out the fundamental authority of the people under natural law and guaranteeing the natural rights of the citizens. The Constitution indeed carries a large part of the heritage of natural law into the modern world. Because they were embodied in the Constitution, these rights were given a special priority which enable the courts to treat them as superior to and thus prevailing over any legislation or other legal rule which conflicts with them (Note 79).

As for the relation between the natural law and the positive law, Thomas Aquinas argued, that legislation must be compatible with natural law tenets (Note 80). Legislation or statutes (positive law enactments) like *Termination of Pregnancy Act* and the *SA Schools Act* are not congruent with natural law sentiments. Thomas Aquinas looks on positive law as having the function of defining the natural law and providing the temporal sanctions which are otherwise lacking by natural law. For example, if we assume that there is a natural right to own property and that it is wrong to violate another's right, penalties for stealing have to be determined. It does not necessarily follow that every kind of infringement of the positive law should be prohibited and punished by the State. The legislator should have the common good in view, but the common good is not always best served by legal enactments. Thomas Aquinas, therefore, envisages a much closer relationship between natural law and positive legislation, but this does not mean that every moral precept must be made the subject of legislation by the State (Note 81). In Thomas Aquinas' view the interest of the common good constitutes the criterion.

11. Conclusion

It is evident that positive law enactments such as the Choice on Termination of Pregnancy Act and the South African Schools Act are under the context of natural law unjust. These positive law enactments ignore the natural law precepts of "Do not murder or do harm to any man," which is buttressed by the two statutes. The result is that the common welfare of the citizens is being jeopardized.

He paper stresses that positive law is to be obeyed to the extent that it is concordant with natural law precepts. As natural law pertains to all that makes for the preservation of human life, it needs to be supported by positive law. These two realms of law need not to become opposing to each other. Both are from God.

But if the state tampers with the citizen's right, like the right to life (fetus is regarded as human being from the moment of conception), it will become in contrast with natural law precepts. The government must respect the individual's basic rights, such as respect for human dignity. This idea is bolstered by the Constitution of South Africa. Section 9(3) of the South African Constitution entails that the state may not unfairly discriminate against anyone on the grounds of pregnancy and birth. According to section 10, the fetus also has an inherent dignity and the right to have its dignity respected and protected. These precepts or articles/sections of the constitution, which are also offshoots of positive law, are congruent with natural law theories and needs to be obeyed by everyone including the state.

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Note 45. Van Blerk 1996:14.

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Note 63. Rosmini 1999 (vol. 1):123.

Note 64. Naffien 2009:116.

Note 65. Naffien 2009:100.

Note 66. Section 10 of the *South African Schools Act* provides: (1) No person may administer corporal punishment at a school to a learner. (2) Any person who contravenes subsection (1) is guilty of an offence and liable on conviction to a sentence which could be imposed for assault."

Note 67. Section 15(1): Everyone has the right to freedom of conscience, religion, thought, belief and opinion.

Note 68. Section 29(3): Everyone has the right to establish and maintain at their own expense, independent educational institutions.

Note 69. Section 30: Everyone has the right to use the language and to participate in the cultural life of their choice.

Note 70. Section 31(1): Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community- (a) to enjoy their culture, practice their religion and to use their language, and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

Note 71. *MEC for Education,*para 72 at 500A-B.

Note 72. *MEC for Education*, para 77 at 502B.

Note 73. *MEC for Education*, para 88 and 90 at 505B-C and 506B.

Note 74. *MEC for Education*, para 101-102 at 508E-F.

Note 75. *Summa Theologiae* 1-2, q. 96, a. 4. "We must obey God rather than man."

Note 76. John Finnis 1980:27. Kelsen 1949:412

Note 77. D'Entréves 1952:44.

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Absolute and Conditional Application of Jus Sanguinis

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Abstract

Nationality is a political and spiritual relationship in attaching a person to a government. There are two criteria in granting nationality: Jus sanguinis (based on blood or descent) and Jus soli (based on birth place). Jus sanguinis (based on blood or descent) should be clarified; this article aims to clear one aspect of Jus sanguinis. It is focused on granting nationality based on Jus sanguinis from a generation to another which is called absolute application of Jus sanguinis. Although there is conditional application of Jus sanguinis which a part from parent's nationality other factors like domicile place or birth of parents are noticed as well in getting nationality conditional application of Jus sanguinis Maintains nation's correlation with society's norms.

Keywords: nationality, jus sanguinis, absolute, conditional

1. Introduction

Nationality, in political theory, is the qualities of belonging to a nation Personal naming practices exists in all human groups and are far from random. Rather, they continue to reflect social norms and ethno-cultural customs that have developed over generations (Mateos, 2011) in the sense of a group united by various strong ties. Among the usual ties are memberships in the same general community, common customs, culture, tradition, history, and language. (Weis, 1956)

Nationality determines the scope of application of basic rights and obligations of states vis-a`-vis other states and the international community, such as personal jurisdiction, the application of treaties and diplomatic protection. (Baubo¨ck et al., 2006 A)

"Nationality is a relationship that connects and attributes one natural or legal person or one thing to a state" (Ameri, 1988)

"In state based on jus soli, because the territory s a major factor, the intellectuality of nationality is less important than jus sanguinis based states. Therefore we can state that nationality is not completely an intellectual relationship". (Nasiri, 2001)

Citizenship has three principles which have been described in article 15 of the universal declaration of human rights as follows: article 15:

Everyone has the right to a nationality.

No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Citizenship based on how it emerged is divided into two main and acquisitive classes. In the main citizenship (nationality of origin), citizenship is imposed on the person by law from the beginning of birth. Two criteria of blood and soil are two ways to impose citizenship in this way, blood system is a way of imposing citizenship which will be imposed on the child by descent and soil system is a way which citizenship is determined from birthplace of individual.

Acquisitive citizenship (derivative) is a citizenship which a person studies during the life. It should be noted that this citizenship is not always optional and voluntary. They include change of little children citizenship whose parents change their citizenship and change of citizenship because of marriage.

Each of the main citizenship methods (blood and soil) has its own materials and interests including that we can transfer our interest to a country with a blood bond to the child through applying blood principle. But it should be said that none of the criteria of soil and blood have great performance including children of nation less parents

(without nationality) through the blood principle suffer the fate of their parents and here the blood principle comes to help the soil principle.

Put like this, all countries with discretion and considering the interests and requirements of their community apply a system which is composed of two blood and soil principles for imposing citizenship to the child.

2. Conditional and Absolute Application of Jus Sanguinis

As we know the blood principle is one way to impose the main citizenship and in this way, the transmission of citizenship is through descent from parent to child. In this context a state may appear that someone immigrates outside his/her country and spent many years in a foreign country and owns children and grandchildren. With absolute apply of the blood principle it can be said that because the transmission of citizenship is through descent descendants of this individual for their ancestor citizenship will have the citizenship of a country where they not even have a very short period. This method of transmission citizenship through blood principle which is done without imposing any conditions is called absolute applies of blood principle. But the reviews on this topic comes to the conclusion that transmission of citizenship to a citizen for many generations is incorrect and obscene and leads to moving away from the goals and purposes of the blood principle which is assurance of Interest and commitment to the country. Thus the legislature because of some issues including the preservation of national cultural bond with the land in question Limit and bound granting citizenship to future generations of such people by the provisions to reach the desired target namely forming a society with people who have deep and genuine link with the desired community.

So to overcome this shortcoming, the conditional apply f the blood principle is expressed which the citizenship of the mentioned country is granted with terms and provisions to the second or third generation who have migrated from the country.

On this topic the terms of absolute and conditional apply of blood principle and manner of these constraints and conditions on some other legal systems are also expressed.

3. Theory of Legal Scholars about Applying the Blood Principle

The drafters of Harvard university plan said that granting citizenship based on blood principle to children of immigrants, who left their country, should not be unlimited. Based on this, Article 4 of this plan would require:

"A state may not confer its nationality at birth (*jus sanguinis*) upon a person born in the territory of another state, beyond the second generation of persons born and continuously maintaining a habitual residence therein, if such person has the nationality of such other state."(Harvard law review)

As evidenced by Harvard University plan, this plan supports conditional apply of the blood principle and does not grant citizenship to second generation immigrants because the social and cultural bonds no longer exist between government and citizens.

Project designers have interpreted the article as written:

"The nationality laws of most states which are based solely or principally on *jus sanguinis* contain no limitation upon the acquisition of their nationality by descendants of their nationals born abroad. Thus the nationality of such states may be transmitted indefinitely to successive generations of persons born and continuing to reside abroad." (The Harvard Research in international law, 1929)

Indeed by the laws of some states, nationality is conferred on descendants of their nationals without any limit as to the number of generations.

Relate to conditional application of jus sanguinis, can say that:

"This means that if X emigrates from the territory of state A to the territory of State B, X′s child and X′s grandchild may be given A′s nationality *jus sanguinis*, but X′s great-grandchild may not be given A′s nationality *jus sanguinis* if his father and grandfather were born and habitually resided in the territory of B, and if the great-grandchild has the nationality of B at birth." (Ibid)

As described, countries have a different approach because of different legal systems in granting citizenship to the next generations of citizens who have immigrated to other countries.

Austrian nationality

Legislation is based on the principle of jus sanguinis. While birth in Austria does not constitute a claim to the acquisition of citizenship at birth by descendents of immigrants, Austrian nationalities is attributed to children of Austrian nationals living abroad by virtue of descent. With respect to the attribution of nationality jus sanguinis to children born abroad, Austrian nationality legislation does not contain any restrictions, so that Austrian nationality

may be indefinitely attributed to descendents of Austrian emigrants. This intergenerational transmission will only be prevented if parents of Austrian origin have renounced their Austrian nationality before the birth of the child in order to acquire the nationality of their (foreign) country of residence. Since 1999 retaining Austrian nationality has been made easier so that we can expect more jus sanguinis acquisitions abroad as a consequence. If the first generation retains Austrian nationality, then all subsequent generations can pass on their nationality acquired at birth to their own children. (Baubo¨ck et al., 2006 B)

United States of America also uses this apply of the blood principle as follows:

For example, if a child is born outside the United States American citizenship will be paid to the child if the parents before the birth of her children have lived for a time in the United States. This time when the child's parents, both are citizens of America have not been specified and legislator just postulated that at least one of the parents have lived awhile in America before the birth of a child but in the case that one parent of child is American and another one is foreign the American parents are required before a child is born to have lived in the United States at least 5 years Provided that at least 2 years from 5 years is Fourteen years after the birth of the child But this time about the children who were born in America has increased after November 14, 1986 And now they must live 10 years in the United States and at least 5 years of this 10 years must be after the child is 14. (Azizi, 2009)

Before the 1981 Act came into force in UK, there had been various statutory provisions enabling British people with a UK connection to pass on their citizenship to children born outside the UK. These were now replaced by rules intended to limit citizenship by descent mainly to the first generation born abroad. But again there had to be exceptions. The long-standing rule that children born to parents in Crown service abroad would be nationals was preserved: it was therefore possible that a ‘citizen by descent’, born abroad, could pass on citizenship to a child born abroad if he or she was a diplomat or serving in the armed forces. Again, when that child grew up, he or she would be able to pass on citizenship if in Crown service abroad at the time of the birth. The new rules on descent included mothers as well as fathers for the first time. (Baubo¨ck et al., 2006 B)

As some of the dual apply of blood principle was mentioned as conditional and absolute we must say that the absolute apply of blood principle has its own flaws as the use of the blood principle has its own associated Benefits. It should be noted that the drafters of the Harvard plan also admitted to the fact that the rule contained in article 4 of the plan has not become a rule of customary international law but it is offered only as a recommendation to make changes in the laws of countries which send and receive immigrants.

This project will determine that in what situations countries should not grant their citizenships Based on the blood principle to the second-generation immigrants who were born outside the borders of this country.

The Norwegian law of nationality of August 1, 1924, Sec. 9, reads in part as follows (translation):

"A Norwegian man or Norwegian unmarried woman who was born abroad and who has never resided in Norway shall be deemed to have ceased to be a Norwegian subject when becoming 22 years of age. The King, or the person authorized thereto by the King may, however, grant a certificate for the retention of the nationality."

Provisions similar to that last quoted are found in the nationality law of Denmark of April 18, 1925, Section 6, in the law of Finland of June 17, 1926, Section 2, in the law of Iceland of Iceland of June 15, 1926, Section 6, and in the law of Sweden of May 23, 1924, Article 9. (The Harvard Research in international law, 1929)

4. The Absolute Apply of Blood Principle in Iran

With Review of the citizenship laws in Iran that has been studied in Volume II of the Civil Code of Iran, 976 to 991 we reach the conclusion that Iranian legislator has followed absolute apply of the blood principle that is, an Iranian person can pass the citizenship of Iran to the next generation

Article 976: "The following persons are considered to be Iranian subjects: Clause 2: Those born Iran or outside whose fathers are Iranian."

Anyone who has an Iranian father and whether they have been born in Iran or in the State the provisions of this section can be concluded that any Iranian person residing abroad can transfer the citizenship of Iran to future generations. For example a family called X immigrated to America in 1950 and resided there Without leaving Iranian citizenship However, according to the absolute apply of blood principle her children will have Iranian citizenship generation after generation.

Previously, French rules on the granting of citizenship in such cases have no ruling. French law in 1927 granted French citizenship to the children of French parents of a legitimate inside or outside the territory of France (Article I), but this law has a part in granting French nationality in such cases is as follows:

But this policy was changed in 1973 citizenship law according to new regulations, children born abroad from French parents will benefit from the citizenship of this country if they register their child's name with the competent French authorities (including the French consular authorities) (Azizi, 2009)

5. Conclusions

Nationality is an important issue in governments' and their national's international relationships. It is because that the stats define their nationals, rights and obligations and protect them in international domain.

In the absolute apply of blood principle transmission of citizenship is through descent to countless generations of the individual citizen not even the descendants who are born in the country, not even for a short stay where they reside there.

While In the absolute apply of blood principle transmission of citizenship through the blood principle to the second generation of citizens who have migrated is associated with the provisions

Resorted to in clause 2 of Article 976 of Iran's civil law, the blood principle is applied in granting citizenship but the Iranian legal system uses the absolute apply of blood principle and imposes some conditions in this context. France also uses the conditional apply of blood principle follows that France granted French citizenship before the 1973 citizenship law as absolute as to countless generations of citizens but has used from the conditional apply of blood principle Since the passage of the law and the condition is such that parents should register their child's name with the competent French authorities.

Absolute implementation of Jus saguinis in nationality transferring to later generation has undesirable outcomes. One of these undesirable results is that by implementation of Jus sanguinis, persons who have not lived in a country even for a low period of time, are the nationals of that country and some duties and obligations are imposed to them. On the other hand these persons have not any emotional dependence to culture and conjunctions of that country. Therefore this is preferred to nationality transferring to the descents who immigrate to another country will be performed by some limitations.

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Cultural Practices and Traditional Beliefs as Impediments to the Enjoyment of Women's Rights in Nigeria

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Abstract

The article considered the growing interest in human rights as it is affected by cultural practices in relation to women in different communities in Nigeria. It pointed out some of the cultural practices that bedevil the womenfolk, rendering them virtually impossible to realize their full potentials as human beings, in the light of the third millennium. The article analyzed some culture and traditional beliefs such as inheritance of men by their deceased husband's relations, windows succession rights, bride price and dowry, child and forced marriages. The article concluded by making suggestions that would enhance the enjoyment of the rights of women in Nigeria in the third millennium.

Keywords: cultural practices, rights, women's rights, impediments, customary practices

1. Introduction

The growing interest in human rights especially as it is affected by cultural or customary practices in relation to the rights of women in different communities in Nigeria has no doubt increased. Its prevalence has necessitated human rights activists/groups to discuss at various fora why, cultural practices are often cited as justification for denying women a wide range of basic rights and the seemingly way forward. In the words of Higgins (1990: 89), feminists note that the culture and religion relation are often cited as justifications for denying women a wide range of basic right.

According to Ngangah (1998: 7) culture being a way of life of a people is usually difficult but not impossible to change. In Nigeria, it has been observed that women in many communities are discriminated against on a daily basis under the excuse of culture, or custom. Culture prohibits a number of things among certain groups of the society (Omoso, 2009). These are things people claim women should not do, yet these things, if culture allowed them, would have helped a lot of women toward being self-reliant and actualized.

In discussing the impediments to the enjoyment of the rights of women, the discriminatory practices embarked upon by the male dominated society in Nigeria comes to fore. Thus, since there is hardly any talk about the impediments to the rights of men, it follows that the cultural impediments to be discussed hereunder are impediments initiated, supported and enforced mainly by the men folk albeit with support from some women, in enslaving the women.

It is pertinent to note that since the attainment of Nigeria's independence, little or no attention has been paid to the "women" in the laws so far made. The Constitution of Nigeria (1999: as amended, 2011) and the previous constitutions of Nigeria merely make general reference to the people of Nigeria as citizens without singling out the "women". The only provision that recognizes women is the reference to the citizenship of foreigners married to Nigerians. The Criminal Code Act of the Federation of Nigeria is one of the very few laws that recognize the need to specifically protect women's rights as it contains provisions relating to infanticide, indecent assaults on women, brothels, prostitution and unnatural offences.

It appears, therefore, that women are not given adequate protection by Nigerian laws, as the protection available remain minimal compared to those in developed and advanced nations. It should, however, be grasped from the onset that Nigeria is signatory to many international, regional and sub-regional human rights instruments that protect and guarantee the rights of women. This paper seeks to explore same and proffer solutions for the enhancement of the rights of women in Nigeria.

2. Conceptual Clarifications

2.1 Woman

The word "woman," has been defined to mean "an adult female of the human race: a wife, a mistress… the female sex." Woman, in sum, has also been said to be an adult female human being, physically weaker than the man, exhibiting feminine characteristics quite distinctive from the opposite sex that is, man. The Women's Rights Protocol defines "Woman," to mean "persons of female gender, including girls." There is a clear distinction between a woman and a man who is said to be a grown-up human male. Basically, three categories of women, namely, the married, unmarried and the widowed are often discernable in trying to ascertain whether any cultural impediments exist in relation to the enjoyment of their rights.

2.2 Culture/Custom

Culture is said to be the result of cultivation: a type of civilization. Custom on the other hand is defined a usage or practice of the people which by common adoption and acquiescence and by long and unvarying habit has become compulsory and has acquired the force of a law with respect to the place or subject matter to which it relates (Grener, 2009).

Customary or cultural practices are, therefore, rules of conduct established by usage or continuous practice over a long time. Oshorne C. J. in *Lewis v. Bankole* (1969) stated about customary law that one of the most striking features of West African native custom is its flexibility; it appears to have been always subject to motives of expediency and it shows unquestionable adaptability to altered circumstances without entirely losing its character.

Thus, custom is dynamic and not static. It is subject to change, particularly over a long period of time. There exist such customary practices in different parts of Nigeria, some of which have evolved into customary law, and are enforced as such by the existing authorities/ruling bodies. Some of these practices have been written down as laws, but most of them are largely unwritten but have the force of law. They are accepted by the communities concerned and are applied in some cases ruthlessly. Some of them do not even pass the repugnancy test, and as such are contrary to known principles.

2.3 Rights of Women in Nigeria

The constitution of the Federal Republic of Nigeria 1999 recognizes a wide range of rights for Nigerian citizens, be they male or female. Chapter II of the said Constitution spells out the fundamental objectives and directive principle of state policy and thus can be said to contain secondary rights of Nigerian citizens. Section 15(5), states that accordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex shall be prohibited.

According to section 17(2), in furtherance of the social order-(a) every citizen shall have equality of rights, obligations and opportunities before the law. As far as the directive principle of state policy is concerned, there is no difference whatsoever between a man and a woman. Both are to be treated equally as citizens of Nigeria without any discrimination.

The other range of rights principally primary rights, which the women enjoy equally with the men folk under the Constitution, are contained in Chapter IV of the 1999 constitution. They include the following: the right to life; right to dignity of human person; right to personal liberty; right to fair hearing; right to private and family life; right to freedom of though, conscience and religion; right to freedom of expression and the press; right to peaceful assembly and association; right to freedom of movement; right to freedom from discrimination; right to acquire and own immovable property anywhere in Nigeria.

Some ratified Conventions also touch on the rights of women and the child. As regards women generally, for example, there is the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW, 1979), ratified by Nigeria in December 1991. The Universal Declaration of Human Rights (UDHR) adopted in 1948, the African Charter on Human and Peoples Rights in 1986, ratified and domesticated by Nigeria and the Convention on the Rights of the Child adopted in 1989 and ratified by Nigeria in 1992, and most importantly the Protocol to the African Charter on the Rights of Women in Africa, 2003.

As for the African Charter on Human and Peoples Rights, Article 2 thereof states that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present charter without distinction of any kind such as sex. Article 5 provides that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and

degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

It is thus clear from the foregoing that women in Nigeria enjoy the same status as men in Nigeria in the eyes of existing laws. Discriminatory practices are prohibited. However, women do not enjoy in full their rights as spelt out particularly in the 1999 Constitution or in previous Nigerian Constitutions. One of the impediments to the enjoyment of these rights is cultural practices which we now turn to consider.

3. Cultural Practices

3.1 Sex as a Source of Inequality

Many people hold the opinion that women in the family are egalitarian whilst others like Osita E. (1984: 142) feel that they are subservient. In many communities in Nigeria, men often discriminate against women on the flimsy ground that women are merely women by nature. They are often not allowed into the presence of men especially when crucial family or community issues are being discussed. Labour or tasks are usually shared according to sex. Thus, there are certain tasks reserved for men, and women dare not engage in them. Amongst the ufia people of Benue State for instance, it is considered a taboo for women to be palm wine tappers, rubber tappers, hunters or fisher women. These vocations are exclusively for men. It is even a taboo for a woman to be seen climbing trees to pluck fruits, or cut down palm nuts. This practice extends even to the Igbo people of Eastern Nigeria (Olong, 2009).

Cultural discrimination against women merely on the ground on their sex has constituted a grave impediment to the woman's right as foremost a human being that breathes the same air as men, and that has the ability to think and do things as much as the average man can. Women are looked upon in many traditional societies as weak persons who must be protected at all times, and as persons who cannot fend for themselves, without the guidance of men.

These perceptions of women by men have made the average woman particularly in many cultural settings in Nigeria to look upon men as Lords, and have caused them to develop inferiority complexes to their detriment.

3.2 Inheritance of Women by Their Deceased Husbands' Relations

In some communities in Nigeria, the death of a wife of a customary marriage automatically brings the marriage to an end. However, where it is the husband that dies, the marriage does not come to and end, the wife is inherited within the family. Thus, the woman is shared to any of the husband's brothers or relations and is expected to continue to perform her matrimonial roles to him whether she likes it or not. Even though this practice is gradually dying out because of the influence of religion, modernization, and the current scourge of HIV/AIDS, it is still going on in some communities in Nigeria even in the 3rd millennium, Nigeria.

The unjust position of customary law is still being upheld by the courts. The Court of Appeal in the case of *Ogunkoya v. Omo Ogunkoya* (1988: 6) opined that the wives left are regarded as chattel that are inheritance by other members of the family (in Yoruba sense) of the deceased under certain conditions.

Where a widow opts to remain with the husband's family without remarrying anybody, probably to look after her children, should she be pregnant, the issue will be deemed to belong to her late husband. The woman does not have a say whatsoever in the matter, her humanity and feelings are completely ignored. This is of course unfair to both her and the natural father. It is against the principles of natural justice. We are of the view that passing on of a woman by way of inheritance from her late husband to any of her brother-in-laws is not only debasing, but a grave violation of her right to human dignity. In modern times, where emphasis is on the equality of spouses and the dignity of the human being, women should not be items of inheritance as if they are goods or property.

3.3 Widows Succession Rights under Customary Law

There are as many varieties of customary law in relation to succession rights of widows as there are ethnic groups in Nigeria. When a man subject to native law and custom dies intestate without contracting a monogamous marriage under the Marriage Act, his estate is regulated by the customary rules of intestate succession.

One rule of customary law which almost all the traditional Nigerian societies are unanimous about is that the widow has be place in the customary law of intestate succession, in the sense that she can never inherit from her husband if he dies intestate. Times without number, many widows have been driven out of their matrimonial homes with their late husband's properties including furniture and bedding seized by overzealous brothers-in-law and in the process completely disinheriting the widows.

Justice James Ogebe (1988: 12) referred to a sad case that took place in a small village near Zaria. A young woman; Hausa non-Muslim married under customary law, unfortunately her husband died in a motor accident. Her grief was great, but her sorrow increased when her husband's father and two uncles came a week later and took all her husband's father and two uncles came a week later and took all her husband's clothes and the furniture in the husband's house. She and her two children under three years old were left with nothing. A month later, they returned, and took her oldest child leaving her with only the baby who was too young to leave her. She had no means of support and had no protection from the law because she had been married under customary law.

In *Suberu v.Summonu (1957)* Jibowu F. J. stated that it was a well settled rule of native law and custom of the Yoruba people that a wife could not inherit her husband's property since her herself is like a chattel, to be inherited by a relative of her husband". Similarly, in *Sogunro-Davies v. Sogunro-Davies* (1929), Beckley J. was of the view that a wife was deprived of inheritance rights in her deceased husband's estate because in intestacy under the native law and custom, the devolution of property follows the blood. Therefore, a wife or widow, not being of the blood, has no claim to any cause.

In *Niezieanya v. Okagbue (1961)* the woman's husband by name Ephraim died, survived by his wife Mary and a daughter. Mary took possession of his property consisting of a piece of lan and a house. She collected rents without accounting to anyone. Her efforts greatly enhanced the value of the property. On her death she bequeathed his property to certain beneficiaries whose rights were challenged by a relation of Ephraim. In an action brought by the beneficiaries to confirm their rights, Reynold J. was of the view that "this action must fail on the grounds that by native law and custom, possession by a widow of land can never be adverse to the right of her husband's family so as to enable her to acquire an absolute right of possession of it against the family".

The above position was also affirmed in *Oshilaja v. Oshilaja* (1972) where Adesanya J. noted that the customary law that a widow cannot inherit her deceased husband's property has become so notorious by frequent proof in the courts that it has become judicially noticeable.

A widow is, however, not entirely without customary rights in her late husband's estate. She has a legal right to retain the use and possession of the matrimonial home subject to good behavior. She is also entitled to farm in her deceased husband's farmland even if she has no surviving children, or she could be allocated a communal land. Also land may be allocated to widows that have infant sons to hold on their behalf or trust for them.

3.4 Bride Price and Dowry

Bride price is the money; price a man or the groom pays to purchase his bride/wife. The payment is made to the father or guardian of the bride on her account in respect of her traditional marriage to the groom.

As Nwogugu (1990: 224) affirms that bride-price varies from area to area; some are low, while others are high. These days, people seriously object to high bride-price. Bride-price ordinarily affects the dignity of the human person as guaranteed under section 34 of the 1999 Constitution of the Republic of Nigeria. Invariably, a situation where a woman is regarded as an object or article in a commercial transaction does not enhance her right to dignity as a human being.

In some communities, the value of the woman is seen in the light of the quantity of cash and other items paid or given by the man in exchange for his bride. Imo State is known as area where high pride-price is still rampant. Great value is put on girls there, and a man who ventures to marry a girl from there after going through the rigors of being depleted of his financial resources is considered a real man. The resultant effect been that many girls are left unmarried and some of them quickly move into their boyfriends houses and start assuming matrimonial responsibilities pending when they would raise enough money to do the 'proper thing'.

In some communities, the value of woman after bride-price has been paid on her is the production of as many children as possible for her husband. If this does not happen, the woman is tagged a failed woman, and the marriage hardly lasts. The tendency is that the husband may demand the return of his money to him as money paid for a consideration that has failed.

3.5 Divorce

There are two institutionalized marriages in Nigeria that is marriage under customary law and marriage under the Nigerian Marriage Act. The later forbids the taking of another spouse while the first marriage subsists and the Act states rigorous procedure for obtaining a divorce and ancillary reliefs could be granted to either spouse depending on the facts. As for the former, marriage is potentially polygamous for men and so they are not restricted to any number of wives. Obtaining a divorce under customary law is by far easier and less cumbersome especially for the men.

There are two ways in which a customary law marriage can be dissolved. These are the judicial and the non-judicial methods. Despite the existence of courts in most communities in Nigeria, many people do not resort to judicial process for the dissolution of customary law marriage. Abundant evidence indicates that the non-judicial process is mostly patronized.

In situations where a couple married under customary law goes through divorce, the woman is required to refund the bride-price paid on her, she is thus made to make a refund regardless of the number of years she and her husband had been married and the number of children they had have. Even when the woman has been married for forty or more years she would still be required to make the refund.

Again, upon the divorce, the children of the marriage in most cases unless if they are less than three years old, are required to be in the man's custody and those three years and below are required to join the man at say age five. The woman is not entitled to anything, no house, no furniture, no farms, nothing. She is just asked to leave her matrimonial house for wherever.

The customary practice in relation to divorce as practiced by many traditional communities is certainly repugnant to natural justice, equity and good conscience. The man in divorce situations under Native Law and Custom is never asked to leave the home for his wife and children, regardless of whether or not he is the one at fault either by way of having committed adultery, engaged in wife beating, *et cetere*. The woman is the one that bears the brunt of not only being asked to leave, but also to refund bride-price paid many years ago.

The customary practices as above stated are not only discriminatory against the Nigerian woman, but also violates her right as a woman. Her rights to property, to her children, to self-respect and dignity are taken away when she is asked to leave and surrender everything including children in the process.

3.6 The Single Woman

Most traditional societies frown at the single woman phenomenon. It is completely unacceptable to most communities for a lady to remain unmarried. The situation is even worse if the lady in question indicates that she is not ready to marry at all. She would be called all sorts of names (e.g. whore, prostitute) and would be looked upon with disdain by all. The fact that such a lady is prosperous in the work of her hands would be considered inconsequential situations where a woman has a child or children for a man or men and ends up living alone without a man she calls a husband is not different. She would have no place in the community.

The "single woman" is thus not tolerated in many traditional societies, the way "singlemen" are tolerated, but then this intolerance is contrary to the tenets of evolving human rights practices. A woman whether young or old should be free to decide for herself what she wants out of life, whether she wants to marry or not. Her decision to remain unmarried ought not to be a source of concern for the whole community she lives in, in so far as she is not in any way committing any criminal offence against anyone. She should be accepted and due recognition ought to be given to the positive contributions she makes to the community she lives irrespective of the fact that she had decided not to marry.

3.7 Child and Forced Marriage

In some Nigerian societies, particularly in the Northern parts, virginity at marriage is considered as absolutely essential. Girls are, therefore, married off forcefully at extremely young ages under customary law, frequently to men many years older than they are. For instance, a girl of 13 may be given out in marriage to a 56 years old man. These child-wives do not know how to run a home and do not even know how to take care of themselves. In addition, they are often wounded by adult sex with their so called husbands and are forced to bear children before their bodies are fully matured. The common side effect is the damage of their private parts leading to hospitalization for vesico viginal fistula (V.V.F), and damage of their other organs due to prolonged obstructed labour.

On the other hand, some young girls who though are of marriageable age, feel they are not ready for marriage but are sometimes married off without their consent under native law and custom by their parents to much older men or even young boys. The issue that arises in cases of this nature is that the 'consent' of the girl concerned is hardly obtained.

3.8 Polygamy and Sexual Ethics

There is hardly any community in Nigeria where polygamy; the traditional practice of a man marrying more than one wife, is not practiced. Polygamy is still practiced in virtually all parts of Nigeria.

The direct opposite of polygamy is polyandry; the traditional practice of a women marrying more than one husband, whilst there is also the practice of Monogamy; the practice-not traditional-of one man marrying only

one wife, and one woman marrying only one husband. The practice of monogamy is however not borne out of traditional practices unlike the traditional practices of polygamy and polyandry.

In Nigeria, the practice of polyandry is unheard of. It is a taboo for a woman to marry more than one husband at the same time. It is however an accepted norm in many communities for a man to marry more than one wife regardless of the feelings of the first wife. Thus, a man may choose to marry up to twenty-seven women as for example, late Fela Anikulapo Kuti while he was alive married 27 women at a go and was hailed by the society.

In a polygamous setting, the first wife is faced with all kinds of horrors as she is forced to put up with the antics of the other women and children as some women go to long lengths of visiting native doctors, poisoning, *et cetera*. Polygamy infringes on the woman's right to dignity and prohibits her from enjoying her marriage, particularly as she is forced to share her husband and home.

3.9 Pregnancy/Child Bearing

In many cultural settings in Nigeria, when a man marries a woman, the marriage must be blessed with the "fruit of the womb". It is thus unacceptable for a couple to be married for over one year without a child. The woman in such a situation would be blamed irrespective of whether it is the man who has failed to supply the necessary goods to enable her mix the same with her own goods to result in the birth of a baby. She is looked upon as an unproductive person and in some cases called names such as a witch or regarded wrongly as someone who has sold her womb.

Again, in situations where the woman gets pregnant and she later says that she wants an abortion with the excuse that she is unable to cope with keeping the pregnancy, members of the society would frown on such 'flimsy excuse' and decree that she must keep the pregnancy and deliver the child or children, if twins or triplets. Some women are known to have passed on in an attempt to forcefully keep pregnancies they themselves know they cannot cope with.

3.10 Male Child Syndrome

In many instances, after the wife has given birth to many girls-four to eight for example, the husband may insist that the wife should give birth to a baby boy without taking into account the heath implications. Reasons advanced by such men usually have to do with the question of cultural inheritance of his properties and the keeping or preserving of the family name. The girls are seen as chattels to be disposed of other men when they are matured to marry.

Some women who have had several caesarian operations that have resulted in these four to eight girls are made to still go through the agony of taking the risk of going through one more pregnancy and delivery in the vain hope that this time around it would be a boy. This category of men and women, who are advocates of the male child syndrome, need liberation, as they are completely ignorant of the capabilities of the female child. It just does not matter whether a child is male or female, particularly as female children have been known in many cases to keep and preserve the family and its name after their fathers have passed. The concept of the male child as being the pillar of the family is a mere cultural conjecture which must be done away with.

3.11 Female Circumcision

Circumcision is otherwise referred to in relation to women as female genital mutilation. This is a cultural practice which involves the putting off of a woman's clitoris so as to prevent her from having sexual urges. The practice is carried out with the brief that the circumcised woman would not like sex or have a libido and as such would not flirt with other men while married. The age at which circumcision is carried out varies. Depending on the culture of a community concerned, the practice may be carried out on the female during infancy, childhood-as a rite of "passage to womanhood" or during an "initiation ceremony" at the time of marriage or during her first pregnancy.

In some communities in Nigeria circumcision is even performed on dead women. Crying for the dead, in this instance is prohibited until the corpse is circumcised and the usual traditional ceremonies performed. This cultural practice is common amongst some Ibo areas of Eastern Nigeria. Cases abound of women and young girls giving up the ghost post circumcision, particularly, when the operation is done the crude way, under unhygienic conditions using broken bottles, rusted razor blades or knives or any other blunt objects.

Apart from deaths, female circumcision imparts negatively on the psyche of a woman. It leaves her frustrated particularly in her real life even when lawfully married. It leaves her with a deep sense of loss of something which she would never regain as if part of her life has been terminated.

3.12 Violence against Women

Violence against women which is also referred to as domestic violence is the physical assault of one member of the family (usually the woman) by another member of the family usually the man, that is where the victim and the perpetrator have some forms of personal relationship.

Beating of wives by men as a means of correcting them is widespread and common in many Nigerian communities. Reasons adduced to justify wife beating include, provocation resulting from insubordination, denial of sex, inability to take care of the home and the children, et cetera. These days, the younger women appear to be very bitter about incidences of beatings by men to the extent that increasingly it is becoming a regular ground for the dissolution of customary law marriage.

It is an accepted norm traditionally for a man to beat his wife or inflict whatever injuries on her for whatever reason. It is, however, a taboo for a woman to beat her husband, in *ufia land*, she would be brought before the Council of Elders, charged, found guilty and fined. Fines usually take the form of payment of a certain sum of money plus a big he-goat and a bottle of "Hot". In some cases women can be asked to pack out of their matrimonial homes.

Violence of any sort should not have any place in any marriage be it traditional or otherwise. The woman in particular is naturally not as physically strong as the man, and so physical contests should be ruled out of homes. Couples should be counseled on amicable ways of setting their differences whenever they arise.

3.13 Burial/Funeral Rites

In those days, an Oba of Benin or Ibo King or Chief was usually buried with several of his wives who were to minister to his needs in the world beyond. There is hardly nothing on record to show, however, that any man was ever buried along with his dead wife. Queen Amina of Zazzau who was buried with men seems the only known exception. In some of our village communities, whenever a man dies his wife is usually suspected and often accused knowledge of and/or complicity in his death. Such suspicion or accusation is never made when a wife dies.

In some communities, the wife would practically go through "hell" to prove her innocence. In some areas, she would be made to drink water used in washing the corpse of her deceased husband in an attempt to prove her innocence. A refusal to drink the water would be complete proof of her guilt thus many accused women go through the ordeal which may in the end affect their health. While a man dies, the surviving wife of wives are subjected to dehumanizing funeral rites. In some cultures, every hair on her body is clearly shaven, unfortunately by co-women, she is made to wear black clothes and confined to the recesses of an inner chamber and forbidden to see the light of day for some period prescribed by custom. She dares not complain.

On the other hand, when a wife dies, the surviving husband is not subjected to any of these sadistic and dehumanizing experiences. Instead, in some areas, to avoid the perceived fear that the spirit of the dead wife may return at night to share his bed with him, another woman is found to keep him company.

The various customary practices in relation to burial and funeral rites as they affect the rights of bereaved women ought to be stopped through laws and by enlightening the peoples in the various communities of their harmful effects.

3.14 Capacity to Contract and Own Property

The issue discussed here is in relation to the capacity of women to under customary law contract and own property while still married to their husbands. In many communities in Nigeria, the long standing custom that women do not and cannot acquire properties like land, fishing ponds, *et cerera,* in their own right still persists. They are devoid of such contractual capacity. In some areas of Ibo land, the contractual capacity of women is limited to the acquisition of moveable properties. This position has been criticized by Nwabueze (1974: 483) who is of the opinion that women have legal capacity to acquire and dispose of any form of property acquired by them without any restraint.

The issue, however, dies not arise in the Yoruba custom where both the married and unmarried have full capacity to contract, acquire and dispose of all forms of property including land. In Igboland, women lack capacity to negotiate for any allocation of communal/family land for residential, commercial or any other purpose. There are local variations to this law for example in Aba, a widow might be allocated a communal land if she has no male issue. In some other local areas, they are allocated the land for farming purposes alone. Unmarried and divorced women as well as widows whose bribe price has been repaid are not entitled to allocation of communal lands except in some areas.

It is the customary law that a married woman may acquire immovable and moveable property but has no personal right to acquire landed; immovable, property unless through the husband. A married woman also is forbidden from disposing her property whether moveable or immoveable without the consent of her husband.

It is clear from the general customs of people in Nigeria that a man does not require the consent of his wife or wives to acquire property whether moveable or immoveable. The man too does not need her or their consent before he can dispose of any property he acquired while married. It does not make any difference that he acquired such property with her or their help. This same man is also not bound by customary law to pay his wife's debt, even if it is accumulated by her in the course of acquiring the property which she cannot now dispose of without his consent, in order to pay her debt.

3.15 Participation in Public Life and the Decision-making Process

Women, whether married or unmarried, are usually not allowed to participate in any form of deliberations in the village arising from public interest, such matters are considered to be far above their understanding and scope. They are not usually even invited for such public meetings, and their participating in the ensuing debates does not even arise.

In Iboland, the woman's voice is excluded from such gatherings. She may be seen but not heard. Worse still is the position in the far Northern part of Nigeria where the woman must not be seen or heard. She has no say whatsoever in matters relating to the affairs of the community.

Generally, decisions affecting the entire community and even decisions affecting an extended family are taken by the men alone. Whether such decisions are sound or not is immaterial to the men. Women are, therefore, precluded from exercising their right to freedom of speech and association. Again, women cannot meet or hold meetings to decide on issues pertaining to entire community or their extended families. In situation where they do meet and reach decisions, such decisions no matter how sound or far reaching to the benefit of the community extended family are usually considered by the men as null and void.

The culture of excluding women from participating in public life and the decision making process is discriminatory against women and impedes their various rights as co-equals with men as human beings and ought to be discouraged. Some cultures in Nigeria see the woman as a being who is expected to serve the man in every way imaginable, she is thus the slave that cooks for him, washes his clothes, cleans the house, works in the farms, satisfies his sexual urges, etc.

Some other beliefs that are still prevalent include: education and training, mode of dressing and breadwinner status.

4. Traditional Belifes

4.1 Educational and Training

It is generally believed in some communities in Nigeria that money spent on educating or training a girl or woman is money wasted. Thus, emphasis is placed more on the education or training of boys or men. The inherent fear is that if a woman is educated, she ends up overthrowing the man (be it her elder brother, father or husband). She would tend to be more enlightened and have a higher place in the scheme of things. In places like Kano, Sokoto, Borno and some other parts of the Northern parts of Nigeria, education is not the lot of the 'girl' child instead most times they are hurriedly married off at tender ages.

4.2 Mode of Dressing

Culture has developed in almost all communities in Nigeria a dress code for women. They are considered responsible and homely when they tie wrappers and head ties. A smart looking woman in jeans trousers and tee-shirt is seen to be challenging a man whilst a woman in a short mini skirt is a whore and a devil. Meanwhile, the men are free to tie wrappers like the women (in Rivers, Delta States) and wear flowing gowns (in the Northern States) like women and it would not matter at all.

4.3 Bread Winner Status

It is generally believed that the man as the "head of the home" must be the breadwinner. Thus, a situation where a woman earns far more than the husband is unacceptable to many. The fear is that the woman would soon take over and start ruling the home. To this end, many men would do everything possible to deflate their wives moving businesses and discourage them from taking up higher paid employment.

5. Recommendations and Conclusions

There are lots of similarities in the cultural practices among the various ethnic groups in Nigeria. As it is, women in Nigeria are deprived of almost all the rights enshrined in Chapter IV of the 1999 Constitution. There is, therefore, need to put in place structures to implement the enjoyment of these rights by the women in the same measures as enjoyed by the men. Such structures must of necessity include laws to be made by the various Houses of Assembly, the break down the existing cultural impediments.

Some laws in Nigeria seem to acknowledge the impact of culture or customs on women, and makes provisions which seemingly protect women, but in reality take away their rights as human beings. Section 141 of the Criminal Procedure Code is an example of such law and it provides that no court shall take cognizance of any offence falling under Chapter XXI or Chapter XXIII of the Penal Code or under Sections 383 to 386 aggrieved by such offence, but where the person so aggrieved is a woman who according to the customs and manners of the country ought not to be compelled to appear in public or where such person is under the age of eighteen or is and idiot or lunatic or is from sickness or infirmity unable to make a complaint, some other persons may with leave of the court, make a complaint on his or her behalf.

From the foregoing provision, it is crystal that a woman under most customs in Nigeria cannot present a complaint under section. 141 of the Criminal Procedure Code and is treated the same way as idiots, children or lunatics. Again, under section 142 of the Criminal Procedure Code, a woman has no right to make a complaint in relation to offences under section 387, 388 and 389 of the Penal Code. Such complaints must be made either by her husband, father or a male guardian. These therefore impede the rights of women to present complaints in person under S. 141 & 142 of the Criminal Procedure Code, just as men would. A change in cultural practice would necessarily influence a change of the law as it presently is.

Judges on the other hand must be prepared to interpret the Constitution of Nigeria, 1999 and other relevant laws fairly and enter judgments that are fair and in accord with all known rules and principles of natural justice. Male judges in this wise should disabuse themselves of bias against women, and see them as human beings whose rights are in dire need of protection. They should also join in guarding woman rights jealously even if it means changing by precedent outdated customs that do not pass repugnancy tests.

Women too, apart from fighting for women liberation generally, should individually liberate their minds and have a clear vision of their ultimate objective role in the society and seriously work for it attainment. They should not be seen to be aiding the men in further impeding the enjoyment of rights by their fellow women by the use of culture. They should instead help to educate or inform the men folk of the need to do away with several cultural practices, which are discriminatory against women and prevent them from achieving whatever they want to achieve for the good and general wellbeing of the society at large.

Unfortunately, though in the third millennium, Nigeria, women well-being are rather faring worst. In most cases, legislation are yet to be promulgated and schemes put in place to enhance women rights and equal opportunities, even if it means the entrenchment of an affirmative action. Rather part of the legislation being promulgated is the Nudity Bill, which cannot seem to earn enough opprobrium and draw the most appalling derision amongst civilized societies.

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Evidence Gathering: The Exclusionary Rule in China

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Abstract

Using a content analysis strategy, this paper argues against recent skepticism about China's newly revised "exclusionary rule" – a rule that requires evidence to be suppressed if police officers acquired it in violation of standard procedures. Some current studies like those of Lewis (2011) and Heon-Ju Rho (2011) have referred to China's exclusionary rule as "mere symbolism" and "window dressing." Based on studies which explain that it does take considerable time to evaluate the effectiveness of transplanted law, the argument of this paper favors the idea that hasty assessments of a newly passed law should be withheld until a reasonable volume of cases are examined. That is, there has to be sufficient data to assess whether the rule creates an impact positively, negatively, or if no change is envisaged.

This paper thus finds relevance in that (1) it lends support to the revised criminal procedure law that relates to the exclusionary rule adopted in China; (2) it highlights the merits of the spirit and intent of the exclusionary rule, and (3) it calls for restraint in early assessment of the law.

Keywords: China, the exclusionary rule, legal transplants, searches and seizures, evidence collection, exclusionary regulations, capital case regulations

1. Introduction

Hyeon-ju Rho (2011) wrote an insightful article in which she applauds Lewis' (2011) critique of the 2010 Rule of Evidence in China. Of much significance is her analysis of Lewis' inquiry as to whether the exclusionary rule as put forth in the 2010 Rule of Evidence may be "a mere symbolic integrity-enhancing device or, alternatively, actually gain traction and be applied widely in criminal cases." Hueon-ju Rho suggests that based primarily on the application of the 2010 rule, used on a case by case basis, there is no room for optimism.

Of notable interest to this research is the 2012 revision of the Criminal Procedure Rules adopted during China's yearly legislative session which in essence stipulates that evidence collected by police in violation of proper police procedure has to be suppressed in court.

It is to be reckoned that the exclusionary rule is intended to put limitations and restraints on how police officers obtain evidence by not arbitrarily violating citizens' rights. Indeed the prohibition of unreasonable searches and seizures by police officers as the Chinese legislation intends is to promote human rights. How police officers are suppose to do their jobs is emphasized during training; just what type of criminals they will encounter, and how those encounters will transpire cannot for the most part be pre-determined. While the exclusionary rule is "rights-based" in that it is intended to deter police officers from encroaching on people's rights, only such rights as violated by police officers can result in the exclusion of evidence. It follows that when presumed violations of rights occur which are not of the doing of law enforcement officers, or which an initial law enforcement violation has been attenuated by the defendant's own actions, or by an independent source, any evidence in dispute may still be used against the defendant. This paper amplifies the merits of the exclusionary rule; it advocates bridling any early conclusions about the law in China; and it sheds light on some difficulties entailed in adopting foreign laws.

2. Support for China's Exclusionary Rule

The exclusionary rule has received much attention in the literature (Jones, 2012; Campbell, 2011; Thaman, 2011; Chen, 2011; Hyeon-ju, 2011). Without a search whose legality has been challenged there will be no basis to evoke the exclusionary rule. The balance between people's rights and police procedure is found in legislative

enactments. In the United States, the IV Amendment sets forth procedures necessary for a valid search. Officers must have facts that a magistrate deems constitute probable cause for which the issuance of a warrant will be in order. Absent a warrant, and without exceptions to the warrant requirement recognized by courts such as consent to search, exigency, hot pursuit, plain view, etcetera, a person who was searched may challenge the legality of such a search. Remedies for breaches of legislative rights as for instance the IV Amendment right against unreasonable searches and seizures are embedded in judicial rulings.

In China, the Supreme People's Court laid ground works for the exclusionary rule which are subject to judicial interpretation. As Chen (2011, p. 231) indicates, two main legislations govern the exclusionary rule. These legislations include: (1) The Exclusionary Regulations—which put forth guidelines for exclusion of evidence (2) The Capital Case Regulations-- examines rulings relating to evidence in capital cases. Chen further explains that evidence may be excluded following a procurator's discretion and upon the defense's motion for such action to take place. Should the procurator be in disagreement with a court's ruling to exclude evidence, the onus then rests with the procurator to show through "clear facts and reliable, sufficient evidence" (Chen, p. 231), why such evidence should be used against the defendant.

Chen (2011) also makes the point that enacting laws and regulations is one thing, enforcing them is another, and that those charged with the duties of enforcing the laws play an integral role in the success of the exclusionary rule in China. Further, as he asserts giving that this rule is a derivative of western jurisprudence, it is uncertain how this will work out in China.

Hyeon-ju Rho (2011) is more obvious in her skepticism of China's exclusionary rule. Her worries focus on whether the rule is merely a show of good face or whether it is indeed a safeguard of people's rights. Giving that the 2012 revised criminal procedure rules of China reiterate the exclusionary rule, this author argues that restraint be exercised in passing judgment about the efficacy of the rule because the rule itself may not be the problem, and those vested with powers to enforce it have to get acclimated to its mandates. Further, even in the United States where the rule has been in existence for over a century, it still has problems as legal analyzes reveal (see Campbell, 2011; Scharf, 2010; Dickey, 2010). Following Horowitz's (1977) reasoning, Zalman (2008, p. 99) explains that the efficacy of the exclusionary rule can be assessed only when researchers inquire into whether or not "the number and rates of violations increased, decreased, or remained level…."

3. What is the Exclusionary Rule Designed to Do?

As China strives to shake off accusations of human rights violations, it is necessary that it takes steps to promulgate laws that secure the rights of citizens. When the drafters of the United States Constitution included the IVth Amendment, no safeguards were put in place. Even though the Fourth Amendment was ratified in 1791, it was not until the early cases of *Boyd v. U.S.* (1886), and *Weeks v. U.S.* (1914), that remedies for sloppy police work were put forth. While these were federal cases, it was in *Mapp v. Ohio* (1961) when harmony in the application of the remedies of Fourth Amendment of both federal and state cases was established.

The premise of the exclusionary rule is to deter police work that deviates from standard procedure, but not to repair it (see Campbell 2011). The rule is calculated to be a preventative mechanism against overzealous and arbitrary law enforcement. The effect of this rule is to put restraints on how law enforcement officers exercise power and authority in the execution of their jobs regardless of whether the law enforcement encounter is with one accused of a crime or one merely under suspicions of illegal conduct. In essence, the rule's primary purpose is to have a deterrent effect against unlawful law enforcement practices, and only have its secondary effect to advance the objective of preserving the soundness of the legal system. In order to sustain "the rights of the guilty and the innocent alike, and to enable the judiciary to avoid the taint of partnership in official lawlessness" courts should uphold the exclusionary rule (Campbell, 2011, p. 389). Not only should the illegally seized evidence be excluded, but any derivative (fruits of the poisonous tree) should be suppressed as well.

While the exclusionary rule in the U.S. is mainly designed to address Fourth Amendment violations, when the right against self incrimination (Vth Amendment) is violated through coercive interrogation, a confession is excluded in court. In China as Chen (2011, p. 233) explains, "where the Exclusionary Regulations effectively establish different exclusionary rules for illegally obtained oral and physical evidence, the Capital Case Regulations establish new rules of mandatory exclusion for both illegally obtained oral and physical evidence." The exclusionary rule relating to searches and seizures thus conflates with illegally obtained confessions. In China, the need to suppress evidence or confessions that are illegally extracted through torture or other coercive practices is mandated by the laws of Criminal Procedure as well as by international conventions that forbid torture and human degradation (Chen, 2011). See the ruling in *Rochin v. California* (1952) in the United States. For violations that are not deemed to be egregious in China which Chen classes as "minor 'procedural blemish'"

(such as failure to include signatures on documents) discretion is used whether or not to suppress any evidence. In this regard, the court has to introduce remedial solutions. The procurator may either order that the evidence be obtained again, or in the event that the evidence cannot be obtained a second time, the prosecutor has the task to adduce a palpable explanation for why the violation occurred (Chen, 2011).

While one may find it odd that a procurator in China has discretion to exclude or include evidence, one has to realize that this same process happens in the United States. Courts in the United States now and then include evidence when they can establish that the officer acted in good faith, that is, they may decide not to exclude evidence if they deem that the officer acted with the reasonable and honest belief that the officer was acting in pursuance of the law, even though it transpires that somehow an error was detected (see *Leon v. U.S.* (1984); *Massachusetts v. Shepherd* (1984). Each decision relating to the good faith exception is determined only by an officer of the court, "a statute, or official records" (see Zalman, 2008, p. 81).

As well, in the United States, evidence that is derived based on information provided by an independent informant (the independent source exception) may be used to convict a defendant as long as that independent tipster was unconnected to an initial police illegal entry or search of the defendant's premises (see *Segura v. U.S.* (1984)). Further, if it was inevitable that the evidence obtained by police through illegal means would have been found regardless of the illegal procedure of the police (the inevitable discovery exception), courts generally may use the evidence (see *Nix v. William* (1984)). Also, evidence that is obtained through an illegal means may be used in court if somehow by the defendant's own doing he weakens the link between the police illegality and his wrong doing (the attenuation/purged taint exception) to the extent that the courts approve the use of evidence that otherwise would have been suppressed (see *Wong Sun v. United States* (1963))

4. Why Restraint Should be Exercised in Making Hasty Assessments of the Exclusionary Rule in China.

Hyeon-ju Rhu's skepticism of the 2010 exclusionary rule in China which is reiterated in the proposed 2012 revision of the rule is a reflection of Lewis' (2011). Some of the concerns raised by the duo are that, the National Human Rights Action Plan of 2009 in China does not give good guidance in regards to how proper interrogations should be conducted so as to avoid coerced confessions; and that because the section addressing the rights of detainees was issued prior to the 2010 Evidence Rules, it is more of window dressing. As well, they raise concerns about the massive powers that police officers in China have especially since there is no buffer as for example, a magistrate/judge who determines probable cause before issuing warrants as is the case in the United States. Lewis also cites disenchantment of the public to what goes on in China relating to rights violations, and further asserts that China has ratified the United Nations Convention Against Torture and Cruel Inhumane or Degrading Treatment or Punishment (CAT), but not the International Covenant on Civil and Political Rights (ICCPR). She claims that international pressure motivated China to adopt the Evidence Rules of 2010. Further, Lewis discusses the problems evident in measuring deterrence and makes the point that "In China, the concern is not that the government will become a lawbreaker, rather, that the government already is a lawbreaker" (Lewis, 2011, p. 41). Lewis also raises the point that many defendants in China act *pro se*, that is, they self-represent. Without legal knowledge, a defendant may not know when to challenge government's actions. Two other challenges face China in regards to the exclusionary rule according to Lewis. She lists "weak courts" and judges who "avoid exercising the power that they do have" (2011, p. 45). To her credit, Lewis is detailed in her analyzes and enumeration of loopholes and documented violations of people's rights in China.

Despite the problems Lewis and Hyeon-ju Rhu raise and the skepticism that they display, they both nonetheless leave room for optimism. Lewis acknowledges "it is too early to tell whether the 2010 Evidence Rule will remain a mere gloss to enhance the PRC Government's public support or whether tangible changes will take root under the veneer" (2011, p. 49).

Hyeon-ju Rhu is right in explaining that impact of the rule should not only be determined by how it is applied in specific cases, because as in the case of China it may not provide room for optimism. But then, she explains the progress in the use of the rule in Yancheng City in Jiangsu Province. Following such criticisms leveled on China, the legislators seem to be in a precarious state- damn if they legislate "rights based laws," damn if they don't. Baby steps have to be taken for progress to become obvious, a point Lewis concedes, and concludes that even though chips may be taken away from the rigor of the exclusionary rule, the rule is still the dominant way by which people's rights are secured. Hyeon-ju Rhu highlights the many obstacles raised by Lewis that may likely impede the effectiveness of the exclusionary rule in China; but goes on to explain what is being done to curb any misuse or misapplication of the rule. Among the steps being taken in China, Hyeon-ju Rhu discusses the use of cameras to record interrogations, the 2010 Evidence Rules and the Trial Opinion on Several Issues Regarding Standardizing Sentencing Procedure (2010) by the Supreme People's Court (SPC), Ministry of Public Security

(MPS), Ministry of Justice, and Ministry of State Security, which support the presence of counsel for suspects and defendants through the criminal justice process (Hyeon-ju Rhu, 2011, p. 734).

Among the many issues relating to the exclusionary rule that Chen discusses, he thoughtfully makes the point that "laws alone do not implement themselves" (p. 241) and that whether rules:

> can indeed be implemented, and in particular whether they can realize the goals of legal reformers—whether they can help resolve the problems of torture, unlawful gathering of evidence, the reduction of criminal procedure to mere formality, the refusal of investigating personnel to testify at trial—are questions awaiting empirical inquiry and theoretical reflection (p. 241).

Legrand (1997) has warned that doctrines/laws that are rooted from other systems sometimes detract from their original intent when introduced to a new system, as a consequence, he warns that prudence should be exercised in what laws to borrow and how much is expected with regard to success. Blum (2008, p. 2151) endorses Legrand's premise after examining the exclusionary rule's application in Israel, as he maintains that "broader cultural and historical factors have affected [the] application of the exclusionary rule and the goals it seeks to achieve." China's politics, system of justice, and culture is fundamentally different from what obtains in the United States, and a doctrine or rule that is essentially American/English which has had a very short existence in China, cannot be expected to be quite effective overnight.

In his book, *Legal Accents, Legal Borrowing…,* Nolan (2009), advances the theme that culture plays an integral role in the application of borrowed laws, and that without adjustments in the law to suit the realities of an environment, law enforcers and the community they serve are likely to embroil in a chain of events that are diametrically different from what the transplanted law was designed to do.

Singel (2005-2006), for instance, while concentrating on effects of federal and state laws transplanted on tribal laws, delved into explaining why developing countries thought that transplanting western laws will help in their development and modernization, but how the grim reality that " transplanting western laws was not a panacea for developing countries" quickly became evident (p. 364).

Fitch (2011) opines that regardless of how hard police departments try to prevent police misconduct by recruiting those who exhibit healthy moral values, and provide sound training to them, they still cannot prevent abuse of power by some officers. He states that "mitigating the risk for officer misconduct requires a more complete understanding of human behavior and motivation" p. 19. He goes on to offer the following guidelines to limit police misconduct: "reward appropriate conduct and correct inappropriate behavior;" "frequently discuss ethics in the work place;" engage officers in case studies that provide "real-world examples that challenge officers to think critically;" police departments "must closely examine their policies, reward systems, and training to ensure that their agency fosters a culture of firm ethical values" p. 23. Hyeon-ju Rhu and Lewis provide accounts of police misconduct in China, perhaps over time they will trickle down.

As well, the judiciary in China as elsewhere is not immune from criticism. Chen (2011) as discussed above reminds us that personnel help implement laws because laws do not implement themselves. Wu (2011) explains revisions made to the Basic Principles of the Professional Ethics of Judges by the Supreme People's Court of China. That these steps are being taken is suggestive of progress.

5. Conclusion

This study is not intended to examine China's exclusionary rule. It simply advocates restraint in making hasty judgments or assumptions about the rule. Like any new rule or law anywhere, it takes time for people to be acculturated to it. Whether or not a new or revised law is effective, or as Hyeon-ju Rho states a "mere symbolism" or "wide application," cannot be assessed in one to two years. Programs and laws are best evaluated over time. Sporadic and isolated examples of strengths or weaknesses cannot provide an accurate picture of the effectiveness or ineffectiveness of a program.

Too much criticism or skepticism about its success should not be levied too soon to the extent of precluding the positives that the rule is designed to advance. The exclusionary rule by itself is not the panacea for rights violations. As Zalman (2008) notes, civil law suits, injunctions, and even criminal law suits for blatant police violations are "true remedies." In using the expression 'legal irritants' Teuber (1998) alludes to the phenomenon whereby transplanted laws initially do not automatically supplant how prevalent legal terms and practices are construed. The road to a more robust use and positive application of the rule in China may take time. The fact that China once more made revisions in 2012 to its criminal procedures suggests that they cherish and respect human rights.

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