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AA Law Forum

Published by John H. Carey II School of Law

Per Curiam: the AA Law Forum is a joint effort of the faculty, students and graduates of the John H. Carey II School of Law to enhance studies of English law and comparative law at the Anglo-American University in Prague.

Mission Statement

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AA Law Forum
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Editorial

Dear readers,

I am very excited to welcome the 9th edition of *Per Curiam: the AA Law Forum*. My excitement is even greater than usual because this edition is particularly special as it is not only the first edition after our restructuring period, but it came out of the extraordinary 2020 and 2021 pandemic years. The John H. Carey II School of Law is proud to announce the successful continuation of our AA Law Forum tradition under the new title of *Per Curiam: the AA Law Forum*, a name that was primarily crafted by our first Student Board of Editors as part of our restructuring and advancing the AA Law Forum.

A particularly important aspect of *Per Curiam: the AA Law Forum* is the involvement of students as both a Board of Editors, including communicating with authors, revising and formatting articles, and facilitating the publication of the editions, under the leadership and guidance of faculty, and as authors themselves, including researching, writing, and preparing their own articles for publication. *Per Curiam: the AA Law Forum* brings to life the School of Law's commitment to creating a place where all members of our community, including students, instructors, staff, alumni, and friends of AAU, can contribute to the development of law through research and publications. It is a place which fosters an environment of collaboration, integrity, academic and professional growth, cutting edge research, and a commitment to excellence.

Our focus is not only on English law and the common law, but also, and importantly, how these laws and principles interact with civil law legal systems, international law, European law, and the legal systems of the Visegrad countries, in particular. We believe that *Per Curiam: the AA Law Forum* is a unique place to advance the values of the common law and to build a bridge of knowledge and understanding between legal traditions.

I would like to particularly thank our students, many of whom are now alumni, and instructors who have committed their time, energy, and dedication to updating and renewing *Per Curiam: the AA Law Forum*, while keeping its long-standing tradition of excellence at heart:

The first *Per Curiam* Student Board of Editors:

- Natalia Kokesova and Angelina Liverko, Co-Editors in Chief;
- Hanna Ripper, Production Editor; and
- Zina Balkis Abdelkarim, Articles Editor.

I hope to especially extend my appreciation to their work designing a new layout for publication and its outstanding website. This team helped lead the transformation from the AA Law Forum into the new *Per Curiam: the AA Law Forum*. I wish them much success as they embark on their legal careers!

I also extend my congratulations and thanks to Graduate LLB student Samantha Bass for her extraordinary work assisting doc. Jiří Kašný with the reviewing and editing process for the 9th edition of *Per Curiam: the AA Law Forum*, during the 2020-21 academic year.

We are looking forward to welcoming the next Student Board Editors for the 2021-22 academic year!

My strong thanks also goes to our AAU Law instructors who have encouraged and guided our students not only as editors, but also as authors of articles for publication, as well as having shown much patience and grace as they waited to have their own articles published as we were restructuring, particularly: JUDr. Radka MacGregor-Pelikánová, Ph.D., LL.M., M.B.A. and Pietro Andrea Podda, Ph.D.

Last, but certainly not least, I want to thank each of the authors whose articles have been published in this edition: prof. PhDr. Milada Polišenská, CSc. and Pietro Andrea Podda, Ph.D., and especially our students, Isabel Viladegut and Josephine D'Urso.

Thank you and congratulations to all!

We are looking forward to continuing our tradition well into the future, and in particular to opening calls for articles for our 10th Anniversary edition!

Carollann Braum, J.D., LL.M.

Program Chair,
Mediator and Restorative Justice Facilitator

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Prague

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The First Decade of the John H. Carrey II School of Law at Anglo-American University, Prague

Prof. PhDr. Milada Polišenská, CSc.

Introductory note

This article presents a compilation of excerpts and paraphrases related to the study of law at our university during the first decade of its existence, taken from the present author's forthcoming book, *Anglo-American College 1990/91-2000/01: Against All Odds* (2021). The book is based on extensive research in the AAU archives and other sources, especially personal memories; this article does not contain any other research or conclusions beyond the book.

The following wording is recommended for a citation of this article: Polišenská, Milada (2021). First Decade of the John H. Carey II School of Law at the Anglo-American University in Prague. *AA Law Forum*, No. 9 Spring 2021). Commented excerpts and paraphrased text from Polišenská, Milada. *Anglo-American College 1990/91-2000/01: Against All Odds* (monograph manuscript).

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Legal studies were part of our university's curriculum from its very beginning. For many years, the law school was the most prominent and ambitious school and it was listed usually in first place among the other schools in various promotional materials and reports. It was not always named the School of Law, and the Anglo-American University was also named differently in the first decade of its existence.

This article will outline the development of legal studies from 1991 to 2001, from the Department of Law through the School of Legal Studies to the School of Law. This history concludes at the moment when an accreditation as higher education institution was achieved in 2001 and our institution joined the higher education community in the Czech Republic; as we shall see, however, the law program was excluded from this recognition, and legal studies remained at the level of a so-called requalification program.

Jansen Raichl, a Czech who emigrated in 1986 from communist Czechoslovakia to Britain, studied sociology at Blacksmith College, London University. After the collapse of the communist regime in Czechoslovakia, he conceived a plan to establish a college in Prague that would offer Western-style higher education in Central Europe. During the spring of 1990, he consulted this intention with his mother, Vlasta Raichlová, a lawyer. Raichlová then filed for registration of a private company named the Anglo-American College in Prague. The registration was approved on August 15, 1990. Jansen Raichl was then twenty-seven years old.

The academic year 1990/1991 was dedicated to the preparations for the opening of the college in Prague. Raichl was still in London, preparing the concept of the college, its structure, distributing promotional material, and carrying out a range of other work while completing his studies. He was

also searching for instructors who would come with him from London to teach at AAC in Prague.

He became acquinted with two young men, Anthony Hemstad and Edmand Kafanka Wakida. Raichl, Hemstad and Wakida were the trio which laid the academic foundations of the AAC. In London, they prepared the syllabi of the first courses and designed the structure of the departments of the college. Wakida became Chair of the Department of Law and Hemstad of the Department of Politics & History. In addition, Shaminda Takhar and Kate Bewsey joined to chair the Departments of Sociology and English respectively. This group of young enthusiasts moved to Prague for the beginning of the academic year 1991/1992, and the college opened its doors in the rented premises of one of the Prague high schools, in an agreement arranged by Raichl's mother.

The Department of Law was part of the AAC from its very beginning. The chair, Edmand Kafanka Wakida, was the central figure in its early development. According to Raichl, Wakida came from an elite background in his native Uganda and had lived and worked for a time in Canada.[1] Raichl met Wakida in London and offered him a lecturship in law at the Anglo-American College. Wakida enthusiastically accepted, as Raichl recalls.[2]

From the original group of lecturers who came to AAC from London, Wakida stayed the longest – until end of the academic year 1993/1994 as Chair and at least one more semester as adjunct lecturer. It was Wakida, fluent in several languages and always dressed in an immaculate suit, who laid the foundations and solidified the study of law at AAC. Common law has been taught at our institution for 30 years and this remains one of most visible continuities in the university's history.

Anglo-American College started with 51 students enrolled in the first semester; we do not know how many were law students. The Department of Law offered in the the first semester of its existence Introduction to Law, Law of Torts, Law of Contract, Criminal Law, and Constitutional Law – all taught by Wakida.

At that time, the college could not operate as a higher education institution as there was no legal base for state accreditation as a private institution. To secure the status of the educational institution and of the students, Raichl filed a registration with the Ministry of Education as an institution providing one year requalification programs in English designed for a career in law, marketing, management and banking. Anglo-American College received authorization as a requalification institution in February 1992 and functioned as such until 2001. Despite this status, the AAC presented itself as a college, operated as a college, and built its identity as a college throughout this period.

Having gained authorization, the second semester of AAC's existence, the Spring Semester of 1992, began on stronger foundations. At least 15 additional students enrolled at the beginning of this semester, slowly bringing the total number of students at AAC close to 70. Even in that first year,

[1] According to the memories of Jansen Raichl. AAU Archive, Audio/Video Collection.
[2] Raichl's notes in author's documentation.

the student body was surprisingly international. In addition to several Czech students, there were also four Nigerians, two Ethiopians, one student from the United Arab Emirates and another from Lithuania.[3] For Czechoslovaks, the tuition fee was to be 14,000 Czechoslovak Crowns per academic year; for foreigners, it was set to $1,000.

AAC offered these law courses in Spring 1992: Contract Law, Constitutional Law, Law of Torts, Criminal Law. There were also several courses in economics and finance, politics and other, and students had to take several required classes of English language every week.[4]

The faculty also grew. In spring 1992, a young lawyer, John Carey II, started teaching at the Department of Law alongside Wakida, and became his right-hand man. Carey had studied in Hong Kong, London, and San Diego; he had taught at Gonzaga University in Washington D.C. and had worked for the renowned law firm Norton Frickey and Associates. He stayed with the college for many years, reappearing throughout the history of AAC and AAU. We are reminded of him daily, as the John H. Carey II School of Law at Anglo-American University bears his name.

Besides Carey, new law lecturers Morag Patterson, J.D., and Alastair Mennie, LL.B., PhD. joined the AAC, but unlike the former they did not stay with the AAC more than one or two semesters.

AAC tried to increase its offer of various forms of education and particularly in the beginning of its existence was creative and flexible in this search for chances to succeed. For example, AAC offered an eight-week courses in Commercial and Business Administration Law, taught by Wakida and Carey, from April to June 1992. At the same time, however, AAC seriously considered the possibility of a four-year study program which would lead to the Czechoslovak academic title for graduates in law, *JUDr.* It was Wakida's brainchild, claims Raichl.[5] The idea was unrealistic. Nevertheless, *JUDr*. including a program of study leading to it was advertised by AAC for few more years.

Wakida was enterprising in his efforts to strengthen AAC's position. He sent letters of appeal wherever he could, disclosing that the college "humbly [requests] you for all possible financial and material assistance. We welcome any advice, active participation or publicity you may be inclined to offer."[6]

In AAC's second academic year (1992/1993) Wakida continued to serve as Chair of the Department of Law. New lecturers either from fall 1992 or spring 1993 included Glen Gilbert and Robert Johnstone whose wife Thea Selby, a journalist from *Prague Post*, also taught at AAC.

We know nothing of the courses taught during the Fall Semester of 1992. As for the Spring 1993 Semester, a timetable of lectures and seminars that were taught at AAC that semester survived.

[3] Andersen, Mark, Winn, Joan. "Anglo-American College in Prague. The Challenges to Lead in Post-Communist Czech Republic (A)". *Case Research Journal,* 1999, Vol 21, No 1, winter, p. 6.
[4] AAU Archive, JR PhotoCollection, spr01.
[5] Raichl's note in author's documentation.
[6] Edmand_appeal_92, AAU Archive, JR PhotoCollection.

Monday: Contract Law, Comparative Politics, Political Theory, Constitutional Law

Tuesday: Introductory Economics and Finance, Financial and Managerial Economics, Sociology of the 'Active Agent' (possibly the same course as 'Introduction to Sociology: Action, Meaning, and Social Order')

Wednesday: Constitutional Law, Comparative Politics, Political Theory, Law of Torts, Statistics, English, English, Geography alternating with Opinion Surveys

Thursday: Criminal Law, Contract Law, English, English, Sociology II, Industrial Relations

Friday: Law of Torts, Comparative Politics, Political Theory, Criminal Law.

The Prospective Students' Night took place on May 3, 1993 and was held in one of classrooms of the hight school which accomodated the AAC. The desks were pushed together to form a long table in front of the blackboard (underneath a photo of Václav Havel) and the AAC faculty sat behind it: Jansen Raichl, law lecturers Edmand Wakida, Glen Gilbert, John Carey II, Robert Johnstone, and several other lecturers.

In the spring of 1993, an almost unbelievable story began: the Anglo-American College in Uzhgorod [Uzhhorod] in Transkarpathian Ukraine. The initiator of this project and the main driving force was Jansen Raichl. His main motivation was philanthropy and reminence of interwar Czechoslovakia, when Transcathian Ukraine, then called Subcarpathian Rus, was part of Czechoslovakia.

Raichl wanted to open to the young people in this remote and underdeveloped region of Ukraine the Western type of education. He managed to conclude with the rector of Uzhgorod State University [Uzhhorod National University] Y. V. Slivka an agreement on a common venture "Anglo-American College in Uzhgorod" (AACU), which would provide university-level education in law, economics, and humanities. The Uzhgorod State University was to provide premises and accommodation and the AAC was to provide tuition, transportation from Prague to Uzhgorod and back and lecturers' salaries. Study was to be free for local students and the degrees of B.A., B.Sc., and LL.B. were to be awarded.

The possibility of studying at AAC in Uzhgorod sparked immediate interest: 65 students enrolled, out of them 33 students in Economics and 28 in Law. Little enthusiasm was shown for the Humanities. In the end, only one program combining the two preferred fields, Economics and Law, was opened in 1993 as a summer school.

The Economics and Law study program had the following structure:

1. Introductory sequence in Economics: Intro to Microeconomics, Intro to Macroeconomics, Financial and Managerial Economics;
2. Five courses in Economics;
3. Four courses in Business;
4. Three courses in Law;
5. One course from other disciplines: Politics, History, Sociology;

6. Group research project on some aspects of the current changes in the economy of the Carpathian region;
7. Research paper.

In the summer of 1993, AAC lecturers travelled from Prague to Uzhgorod to open the campus and teach the courses. The delegation consisted of Raichl, John Carey II and Robert Johnstone representing the Law Department, and two other lecturers. Although the Uzhgorod project aroused an interest among some American lecturers because they were interested in the situation in Ukraine shortly after the collapse of the Soviet Union and were, like Dean Johnson, involved in Western charities to help Eastern Europe, Raichl was criticized by his colleagues for devoting too much time and energy to this project at the expense of caring for the AAC in Prague. AA College in Uzhgorod eventually discontinued after its first summer semester.

In the fourth year since its foundation and the third year since the start of instruction, the AAC was affected by a deep crisis. So far, Raichl had run the college single-handed. It required an extraordinary effort but a range of problems including securing new premises, financial difficulties, the Uzhhorod project and, above all, a divisive management style, accumulated and became critical. In this situation, Anthony Hemstad left the AAC in the fall of 1993, founding the new American International University in Prague; almost half teachers and students left with him, including law lecturer Robert Johnstone.

Jansen Raichl tried to solve the situation by changing the legal status of the college from a personal business into a foundation with a Board of Trustees and a set of Statues. The transformation was duly effected on December 1, 1993. Although it seemed that the college would not be able to survive the crisis, the opposite happened and the college was given a new lease of life. This began in the spring of 1994, when the Villa Flajšnerka surrounded by a large park was leased as new accommodation. The college finally had a spacious campus with room for offices, classrooms, library and cafeteria, and even for outdoor sports. Despite some drawbacks associated with the relatively remote location and the initially inadequate state of repair of the building, moving to Na Jetelce, as the campus came to be known, was a very significant step forward.

The Na Jetelce campus was officially opened for the beginning of the 1994/95 academic year. By this time an Administrative Director had been appointed, the highest statutary position at the AAC. The first Administrative Director was Stephan Schackwitz. Schackwitz was a twenty-three year old American who, after graduating from George Washington University, came to Prague for an internship in the Foreign Department of the Office of the President of the Republic, Václav Havel, a very prestigious assignment indeed. At the beginning of his career at AAC, he made a positive contribution by negotiating a merger with the American International University in Prague, which had failed to prosper.

How did the study of law develop during this dramatic time? Edmand Wakida did not leave for the American International University in Prague and stayed with the AAC as Chair of the Department of Law. As several fragmented documents suggest, Raichl attempted in spring 1994 or perhaps even earlier to compose the AAC of three autonomous Faculties (in the early years, ‚Faculty' was often used instead of ‚School'). He argued that this arrangement would allow individual accreditation, thus avoiding the problem of one school (especially Legal Studies) hindering the accreditation of another.[7] There is a draft proposal for the establishment of the Faculty of Law as an independent foundation linked to the AAC through a consortium agreement. This draft is undated but the context suggests that it was written in spring 1994. The Governing Board was to consist of Academic Dean Edmand Wakida, John Carey II, Ross Epstein and Jansen Raichl.[8]

At the beginning of Spring Semester 1994, Christopher Roederer, an American, was hired to teach law at the AAC. Then, from the fall of 1994, Edmand Wakida resigned from the position of Chair of the Department of Law; he started his own legal practice in Prague and continued at AAC at least one semester as an adjunct lecturer. Chris Roederer took over the Department of Law as a coordinator. In the first semester in Na Jetelce campus, in fall 1994, the Department of Law offered: Intro to Law, Negotiation and Dispute Resolution, Comparative Law: Freedom of Speech, Business Law I, II, Civil Procedure, Thesis.

The establishment of the present Schools of Study-based structure was the next important step. In January-February 1995, based on the decision of the Board of Trustees, the Departments were transformed into Schools of Study. The Department of Law (it was sometimes called the Department of Legal Studies) was transformed into the School of Legal Studies on February 23, 1995. The other schools were School of Humanities and School of Business & Economics. The School of Legal Studies and the School of Humanities were chaired by coordinators (Christopher Roederer and Linda Caire respectively); only the School of Business & Economics had a Chair (Mark Andersen).

Chris Roederer served as coordinator of his school till the end of this academic year of 1994/1995 when he moved with his Czech wife to the University of Papua-New Guinea. After Roederer's departure, Petr Frischmann of Charles University was appointed Chair of School of Legal Studies and Legal Counsel of AAC from the academic year 1995/1996.

The end of academic year 1994/1995 saw an arrival of a man who impacted the AAC very profoundly and who contributed very much to its consolidation and academic standards. Richard Jones, British husband of a Dutch diplomat who assumed a position at the Embassy of Netherlands in Prague, joined the AAC from the fall of 1995 as Chair of Humanities to replace Linda Caire who left for the United States to pursue PhD studies. However, his academic qualifications as a historian

[7] Raichl's letter to the students of December 1994. AAU Archive, Folder AAC/1994-1995.
[8] Undated document, *ibidem.*

and his work at the Netherlands Institute for International Affairs "Clingendael" triggered his parallel appointment as Academic Director of AAC. Thus, in 1995/1996 academic year, the college was administered by an Administrative Director (Stephan Schackwitz) and Academic Director (Richard Jones) who were of equal seniority.

In Fall 1995, the School of Legal Studies offered Introduction to Law, International Public Law, Constitutional Law, Business Law, Civil Litigation, Law of England and Wales, Management, Legal Transition of the Czech Republic, Court Practice, Legal English.

In Spring Semeter of this academic year, a consolidated Spring 1996 timetable was designed. The consolidation was necessary, as the number of courses, mainly electives, had grown rapidly, and the main focus of study programs had become diluted; in addition, with the large number of electives the cost of teaching had increased. Only a fragment of the list survives so we cannot reconstruct the full list of courses and their teachers; we know that among the courses being offered or under consideration at the School of Legal Studies included Czech Labour Law, Real Estate and Property (Carey), Criminal Law and Roman Law were taught or were considered for teaching.[9]

Petr Frischmann continued to chair the School of Legal Studies for one more semester, so he was chair of this school in 1995/1996 and in Fall semester of 1996/1997. In the beginning of 1997, he left to pursue private legal practice. He is a very successful attorney at law in Prague today. John Carey II, who was in his sixth year at AAC, was appointed new Chair of the School of Legal Studies from Spring semester 1996/1997.

A draft of course offerings for the fall semester of 1996 shows which courses, partially with assigned lecturers, were planned. Many of them have become permanent features of the curriculum of Anglo-American College, now University. In respect of the Legal Studies, there was Introduction to Law, Czech Civil Law, Legal Clinic (Frischmann), Business Law (Carey), Legal Environment of Trade in Czech Republic, History of Common Law, Financial Law, Law of European Union (Asu), and Rights Theory.

The lecturer of Law of European Union Edward Asu merits some discussion as his personal story is part of history of AAU School of Law. Asu was an excellent lecturer and he achieved as a member of the AAC School of Legal Studies a great success in summer 1995 when, under the leadership of John Carey II., the students represented the AAC at the Jessup Moot Court Competition, first in Philadelphia and then in the second round at the UN headquarters in New York finishing first amongst the non-English speaking countries. The documents do not tell us who were the other members of the AAC team, yet we know that this expensive trip was funded by the highly regarded law firm Squires, Sanders & Dempsey (now Squire Patton Boggs).[10] This success opened the way for AAC legal studies graduates to continue in LL.M.

[9] AAU Archive, Handbooks, Catalogs and Prints Collection.

[10] AAU Archive, Folder AAC/1994-1995.

studies at Central European University in Budapest. Edward Asu graduated from the School of Legal Studies in the very first cohort, and thus became the first alumnus to lecture at the AAC. Asu's AAC career was an active one: in addition to teaching he was also a member of the AAC team which competed at the Mixed University Basketball Tournament in Rotterdam. According to a contemporary media article on the competition, there was "Nothing to rival AAC team in cultural diversity".[11]

At that time, a scheme of three and four-year programs and various minors was designed. The majors took three years; the four-year program incoporated a minor drawn from one of the other schools of study. When these offerings were crosslisted, it made for a large variety of options.

It seems complicated, but this variety of options was motivated by the effort to make the most of the courses that were available and to increase student numbers. These opportunities were used mainly by students who transferred from other schools, and this way could also transfer credits. Only 22-23 courses with three U.S. credits per course were required to fulfill graduation requirements in the three-year program of study. However, a standard B.A. degree requires 30 courses which is 90 U.S. credits. Only four-year programs of study met the requirements of a bachelor's degree at that time. Nevertheless, Anglo-American College considered three-year programs to be its basic structure and the college later increased the number of required credits for a B.A. level graduation to 90 U.S. credits.

In May 1996, Stephan Schackwitz resigned from the position of Administrative Director and left the AAC. From the beginning of next academic year 1996/1997, the Executive Committee which existed since the previous year was consolidated and became active and effective. Richard Jones was appointed its Chairman and dropped the position of Chair of Humanities. As Chairman of the Executive Committee, Jones was the top representative of the college for next next academic year 1997/1998. He hesitated to assume this position as he knew that the asssignment of his wife to Prague was about to expire. Duly, in Spring 1998, Jones announced that the present semester at AAC would be his last.

After a quick search, Roger Cole was appointed to lead the College from the beginning of the next academic year 1998/1999. Cole was a sixty-three-year-old linguistics professor from the University of South Florida. He knew Prague from his previous Fulbright scholarship at the Philosophical Faculty of Charles University and he was also familiar with AAC. Cole would be the first to be appointed President of the AAC, yet, on his request, on an interim basis. He tenure as President ended in April 1999.

A decision which marked the development of AAC profoundly was the signing by President Cole of a lease agreement for the Palace of the Knights of Malta in Lázeňská street in the very heart of historical Malá Strana in March 1999. Our university is, since then, a permanent feature of this fascinating location and one of very few institutions

[11] *Prague Post,* March 25, 1998.

of higher learning in this part of Prague. Additionally, under Cole's presidency complicated process of transformation of the legal status of the AAC from a foundation into a public benefit corporation was undertaken – a subject analysed in detail in the forthcoming monograph.

In respect of the School of Legal Studies, an important achievement was the involvement of the School in organizing Legal Continuing Courses for the John Marshall School of Law from Chicago in the Bar Association in October 1998. This project started earlier, under Richard Jones, but was consolidated with considerable success under Cole, and later was cited as evidence of the quality of legal studies at the AAC. At that time, John Carey II served his second year as Chair as well as being General Counsel at the AAC; it was his seventh year at the AAC.

Cole resigned from his position in April and was replaced for a period from May to middle of July 1999 by Rosemary Taugher. It was during this time when the process of moving the college from Villa Flajšnerka to the Palace of Knights of Malta took off. From Taugher's resignation in July 1999 until the appointment of the new President in the middle of November, the AAC was administered by the Executive Committee. During this time, a change in the School of Legal Studies occured. John Carey II left temporarily for the United States. David Brown replaced him as Chair and the position of General Counsel at the AAC was discontinued. Carey later re-joined AAC, but solely in a teaching capacity where his expertise was highly valued. Those who knew him well recall his love of horses and his farm in the beautiful countryside of the Beroun region where he spent his free time. For the present author, Carey was a colleague who was always willing to help and share a joke. After his premature death in 2008, the AAU School of Law honored his memory by has been renaming itself the John Carey II School of Law.[12]

From mid-November 1999, Richard Smith took over as President, also on an interim basis until February 2001. Under Smith, the major part of the move from Villa Flajšnerka to the campus in Malá Strana, and the necessary adaptation of the palace to the purposes of a college, under the strict eye of the Historical Monuments Preservation Institute, took place. After several years of strenuous and at times stressful efforts, the college succeeded in June 2001 in achieving a registration as a public benefit corporation, in Czech *obecně prospěšná společnost* (o.p.s.) O.p.s. status was acquired under the name Anglo-American Institute of Liberal Studies based in Hradec Králové. The difficult path to the status of o.p.s. is described in detail in the present author's forthcoming monograph.

The legal studies program continued to flourish. The Chair of the School of Legal Studies David Brown was involved in the work of o.p.s. registration and also in accreditation. The School of Legal Studies offered a three-year LL.B. or a four-year program with a minor from the other Schools of Study. The courses were structured into foundation, core and electives.

[12] https://obits.gazette.com/obituaries/gazette/obituary.aspx?n=john-harvey-carey&pid=115710577&fhid=6109, accessed August 1, 2020.

Foundation courses were Contracts; Constitutional Law.

Core courses included Torts, Business Organizations, Commercial Law, Criminal Law, Criminal Procedure, Civil Procedure, Administrative Law, Property Law, EU Law, International Law.

Electives included Czech Legal Terminology, Business Law, Real Estate and Property Law, Taxation. Intellectual Property Law, History of Roman Law, Administrative Law, Insurance Law, Internet and the Law.

The School of Legal Studies provided a General College Course Introduction to Law.

In 1998, a new Higher Education Act 111/1998 Coll., was adopted, which allowed the accreditation of private higher education institutions. In February 2000, the AAC submitted an application for accreditation of its programs of study. The Bachelor's legal program of study was part of the accreditation dossier and the good results of this program were used to emphasize the quality of the study of law at the AAC. However, this application for accreditation was withdrawn later in Spring 2000.

Much consideration was given to whether to keep Legal Studies in the accreditation file and finally the intention to accredit the program was dropped, which was reasonable. The college had most likely learned that the accreditation of a law or legal studies program at a private college was not possible in the Czech Republic. The decision to exclude the legal studies from accreditation was painful, as it was AAC's priority program, always listed in the first place.

Mitchell Young, the Interim President of AAU from March 2001, confirmed to the author the decision to remove legal studies from the accreditation:

Yes, we had learned that it was unlikley to be approved and could have threatened the whole application. There was a long debate (over several years) about including or not the legal studies program. In the end it was decided that in the initial application it would not be included so as to reduce our risk as much as possible, but that once the environment was supportive, it would be applied for.[13]

Thus, our university, then a college, entered the community of universities in the Czech Republic as an accredited institution from June 2001, but the legal studies had to remain in the position of a re-accreditation program.

Author

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[13] Young's evidence to the author, e-mail from February 11, 2021.

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Common Law: An Analysis of the English-Origin Body of Law

Isabel Viladegut

Introduction

Common law is the system of law renowned for its use of precedence (Barnes & Richards, 2012, p. 12; Crilly, 2020a, p. 13; Shughart, 2018, p. 2010; Wacks, 2008, p. 11; Watson, 1994, p. 11). Depending on past outcomes of similar cases found in court, current cases are judged accordingly based upon previous findings of judges and lawyers, thus the common law system can be referred to as "found law" (Barnes & Richards, 2012, p. 12; Crilly, 2020a, p. 33; Crilly, 2020b, p. 3; Ladner, 1975, p. 199; Wacks, 2012, p. 11.). This ability to apply the law on the basis of precedence allows for cases to be treated fairly and with respect to the moral basis that has shaped society over time.

Three terms are used to refer to common law: common law and statute law, common law and equity and common law and civil law (Crilly, 2020a, pp. 13 & 14). These terms refer to the following: "...the law found in the decisions of the courts…;" "...law reflecting principles of 'conscience…;" courts in terms of jurisdiction of case (Crilly, 2020a, pp. 13 & 14). All terms of common law are used in the justice system. The main common law term that is focused upon is common law in reference to court decisions; this term refers to the system itself used in the United Kingdom and its previously occupied states (Crilly, 2020a, p. 13).

Due to this system's common use and relevance, it is important to turn attention towards the UK in order to accurately describe its scope and power. Despite the fact that common law systems in other nations have adapted to fit the needs of their own societies, the UK still maintains merit in precedence over this law system due to its age and usage. The UK was the first to have recorded and used precedence as a system to maintain order of an entire region, therefore the law that was created maintains a basehood for further application. It has gained a reputation due to its ability to interpret law freely in a free-spoken manner that allows for discourse and change of the law to fit modern thinking (Wacks, 2008, pp. 13 & 14).

However, it is not the only system in common use. It is commonly compared to the civil law system due to its own long-held regard; these two systems which have long-standing presence in society aid in majority decision-making for the purpose of modern-day law processes (Crilly, 2020a, p. 15). It is for this reason that the comparison of both aid in the understanding of the current English system and its scope of power today.

The English legal system was not purposely created to uphold this particular common law system but has been adapted to fit the needs of the society as they have risen. It was only due to public support of a "nationalist" system and one that maintains what could justifiably be considered an independent system free of opinion or politics that

the common law system was upheld and continues to be (Greene, 2016, p. 112). The common law system has since worked as a system adaptational as the state, consistently evolving to fit the modern democracy phenomenon of the time period which will be discussed further.

It goes without saying that the creation of a democracy has since increased the power of the state. Thus, the power of the judicial system has increased as well. The system itself has spread in its ability to judge and has become applied independently in the courts without monarchical or public influence (Crilly, 2020a, pp. 35 & 135). It is because of this that national courts are disputed to have too much power and thus do not adhere to legislative standards (Crilly, 2020a, p. 135). Depending on the situation at hand, members of government may believe the national courts to have too much power through the common law system or too little (Greene, 2016, p. 113). This has been shown in particular in the UK as international court disputes have become commonplace and judgement has been notably scrutinized as being too outlandish (Greene, 2016, pp. 112-133).

As of now this issue has been of importance in a scene which has never before occurred in regards to binding precedent. The judiciary has been disputed to hold a bias towards the idea of a more conservative system that upholds law in a more nationalist standpoint than what is considered correct (Doyle, 2018, pp. 1-16; Greene, 2016, pp. 112-124). This system is seen to have benefited Westminster parliament in particular due to the judiciary justifying the leave of the UK from the EU (Doyle, 2018, pp. 1-16). Parliament supremacy, ergo nationalist supremacy has won in the courts which has raised the question of fairness as well the power of the binding of judicial precedent.

The current system as of now is in an unprecedented time of history in which the scope of power in the courts as well as the individual court powers are under question. There is a need to uphold a more modern system that would correlate with the current times but there is also necessity in adhering to its roots. Common law has survived due to its elasticity as well as robust tenacity as a strong and well-regarded system which can last through time despite societal advancements. Its relevance in the modern world as a system will surely never be lost as it holds massive support worldwide and is recognized as a basis for international precedence in the UK sphere. For this reason, it is important to take a look as to how the scope of precedence will change.

This research paper will analyze as to how common law has been shaped over time and developed into what it is today as well as the future of precedence in the up coming political state of UK affairs. Critical and comparative content analysis was made in order to conclude these findings and open the topic of discussion which should be taken into consideration when referring to current world climate. The common law system is a system which upholds a factor in worldwide law proceedings, therefore the focus on the UK is warranted.

Common Law and Its History of Origin

Law was not always centralized by a leadership which the citizens were required to follow. Originally, law was localized and differed greatly by region, adhering towards previous beliefs and ways of life that were introduced through conquering of leaders through suppression of those beliefs previously held; through Christian, administrative and accidental influence, customs were formed that became early law; that law was never written but upheld as the general rules of an area which were required to be followed by all who lived there (Milsom, 1969, p. 1). Law however drastically changed from the conquering of England by the Normans through centralization which was made possible by the introduction of written precedence throughout the kingdom (Barnes & Richards, 2012, p. 12; Crilly, 2020a, p. 33; Milsom, 1969, p. 1).

By the 11th century, William the Conqueror of Normandy had laid claim to the English throne; in order to suppress a potential revolt and guide the country efficiently, he appointed close friends from his military to judge disputes of the people under the law known to them that they believed to be universal (Barnes & Richards, 2012, p. 12; Crilly, 2020a, p. 33). The appointed judges then decided cases and thus created precedents which would act as a guideline for future cases (Barnes & Richards, 2012, p. 12; Crilly, 2020a, p. 33). Through the use of such a procedure, precedents were put in practice as a determination of individual cases in accordance with the law (Barnes & Richards, 2012, p. 12; Crilly, 2020a, p. 33).

The judicial system itself was popularized and grew of notoriety as the judgement system of the England was utilized by Henry II as a way to increase royal revenue as stated by Maitland & Montague (1915) (as cited by Shughart, 2018, p. 213). Justices were institutionalized as traveling law-keepers to enforce the “king’s peace” (Shughart, 2018, p. 213; Milsom, 1969, p. 15). This system was upheld and formalized with writs that would inform the people of what types of cases could be heard before a judge (Wacks, 2008, p. 13).

However, as the system advanced, it was found that there were many types of cases that could not be heard and formally judged due to such writs not applying towards the disputes and in desperation, the people would meet before the king for a solution (Crilly, 2020a, p. 34). Overtime, this became more common and to ease the burden of state, the king appointed the title of Lord Chancellor to become head of court which would judge under the authority of the monarch in ruling; the decision of the Lord Chancellor would therefore be the same as the decision of the ruling monarch (Crilly, 2020a, p. 35). As time went on, judges and the Lord Chancellor in particular became more and more independent, commonly acting in disregard of the monarchy in favor of court decisions and thus leading to conflict between the court and monarch; eventually, the monarchy decreased in power, and in 1474, the judicial system became independent from the Crown (Crilly, 2020a, p. 35).

A Comparison of Common and Civil Law

Civil law distinctly differs from common law in both terminology and practice. The law system uses statutes which follow specific law set for individual cases in order to justifiably determine their verdict (Crilly, 2020a, p. 33). The civil law court refers to a court system in relation to English citizens and their disputes between one another (Crilly, 2020a, p. 14; Jenks, 1916, p. 1). In addition, aspects of civil law itself have integrated and contained persuasive precedent for common law evolution. The *Corpus Iuris Civilis* for example had inspired similar enactments for the purpose of declaring that all had to obey the law no matter class standing or power; the Magna Carta and various important legal documents and amendments have been inspired by civil law made in the past and continue to do so (Ladner, 1975, p. 200). It is not always made apparent due to the clear line made between both common and civil law but both have similarities in structure and understanding if one were to look closely.

It is important to note that the civil law of today drastically differs from that of its origin. While it does originate from Roman law, the law itself was adapted from what was found from ruins of the Roman civilization in Northern Italy; the law does not reflect true Roman law; it only acts as the basis of what was considered to be justified for medieval use (Crilly, 2020a, p. 33; Hammer, 1957, p. 1; Wacks, 2008, p. 7). Roman law thus refers to the law of Rome according to Hammer (1957) "from XII Tables to the fall of the Empire" [sic] [and] "civil law" or "modern Roman law" -the *usus modernus pandectarum*- i.e., the jurisprudence of those European countries where the heritage of the Roman law (in the first sense) has held sway" (p. 1). In that regard, the documentation found by medieval lawyers was adapted as a main source for their new law system.

There were many texts found which gained merit in the hedonistic revival of the civil law system, including but not limited to *Leges Barbarorum*, the *Digest*, the *Breviarium Alaricianum,* and once again the *Corpus Iuris Civilis*, also known as *Corpus Juris Civilis* in an interchangeable fashion (Hammer, 1957, pp. 2-7; Ladner, 1975, pp. 191-201). Most well-regarded Roman texts of today were ordered by Emperor Justinian in the 6th century in order to converge Roman law to fit one consensus (Hammer, 1957, p. 2; Ladner, 1975, p. 191; Watson, 1994, p. 6). It was for this reason that the applicability of Roman law fit the growing need for an era of revival and "taking to one's roots" due to the convenience and overall agreement of usage of a mostly unified system of texts.

Lawyers found merit in the legal techniques of the glossators and their successors mentioned in Roman law texts which in their opinion built and systemized the law to fit the needs for legal change (Hammer, 1957, p. 2). This finding of meritable information and texts thus created a resounding sway in the legal community in which these texts were found to be fashionable and necessary to learn from; these lawyers after learning such then returned to their respective kingdoms in order to teach adequate law (Hammer, 1957, pp. 1&6; Wacks, 2008, p. 7); the law system founded from

such teachings was thus named juristic law in reference to the teachings and studies of academics in the legal field at the time which agreed upon the common necessary characteristics of that law (Hammer, 1957, p. 2).

The law was changed further however to meet more modern requirements. Rulers had much to say about Roman law principles. The ideas entailing lesser monarchical power were dangerous to their regimes, therefore any such ideas were quashed for the foreseeable future (Hammer, 1957, p.6). The jurist system was founded upon the idea of working for "higher powers" which were their monarchical leaders in order to maintain order and a just system of law.

There was also necessity in structuring such a system to meet the needs of a governmental structure. It was for this reason that Roman law principles were "liberalized" by the *ius gentium* and *ius in re aliena (*Hammer, 1957, pp. 7 & 10). The distinction of public and private law and ownership and possession were made apparent (Hammer, 1957, p. 11). Law was adapted to fit every circumstance which benefitted emerging countries based upon their own individual issues and values (Hammer, 1957, pp. 6-13). It is for this reason that the practice of civil law has continued since, now prominent in Europe, South America, and other areas of the world (Wacks, 2008, p. 10).

The main differences between civil and common law lie in the source of law and role of the courts. Civil law uses a codified system which aids in applying procedure and conviction for each individual crime; the role of the judges is to establish the facts and then apply said facts to the corresponding code; the conviction's decision is henceforth less consequential towards shaping law (Crilly, 2020a, p. 12). Said decisions will at times refer to past decisions, but those decisions have no precedence and therefore are not a formal source of law compared to common law (Crilly, 2020a, p. 26). It is for this reason that the English law system rejected civil law use in that it was considered "forced and defective" as said by Sir William Blackstone and stated by Watson (1984) (as cited in Watson, 1994, p. 12).

The civil law system creates universal rules that could be applicable to any case (Crilly, 2020a, p. 33). These codes are specifically written on constitutions made by legislative enactments considered binding for all (Ladner, 1975, p. 200); only constitutional courts can nullify their laws thereby creating a new binding (Crilly, 2020a, p. 13). As for the courts themselves, they act through 'inquisitorial' procedures in which judges are responsible for acting as cross-examiner, uncovering the facts of the case and deciding which witnesses will be called to the stand (Crilly, 2020a, p. 15). Legislation may be responsible for codifying law which will be specifically used on a case-by-case basis, but judges are responsible for carrying out procedure which will determine the conviction in accordance to the law.

In contrast, the 'adversarial' approach must seem quite daunting to the civil law judicial system. In common law, the parties are responsible for the cases themselves from preparation to collecting evidence; the judge will remain in a more spectator

position, ensuring that the procedure is maintained properly, but otherwise allowing for the parties to present in a more active environment where there is freedom of interpretation of the case to gain leeway towards an argument in their favor (Crilly, 2020a, p. 15). The civil law approach would deem this approach to be “erratic” and “unsystematic” in that the use of binding precedent allows for significant variance in similar legal questions; the purpose of the civil law system is to put all laws on one written document for easy accessibility, therefore non-binding precedence is preferred to ensure following of law in a strict and efficient manner (Crilly, 2020a, pp. 26 & 49; Watson, 1994, p. 12).

Both approaches have important implications in regards to modern law. Despite the ever-present differences, both systems of law have an impactful standing on rule of law. Both can be considered to be reformative as the law has changed overtime to fit the needs of the judicial system; common law adapted towards a relatively spontaneous and free-thinking approach which has benefited in creating precedence in regards to modern problems and striking it down when it no longer applies to current thinking; civil law is considered to be reform law in that legislation is thought to create law which benefits current issues yet “embodies timeless principles” (Ladner, 1975, pp. 199 & 200).

Increasing Authority of the Courts

Through the independence of the court from the Crown, the judicial system made leeway in furthering applicability to everyday life. As the government system adjusted to a non-monarchical structure, law was created which was interpreted and applied to define the freedoms of its citizens while maintaining order (Crilly, 2020, p. 40). In the ever-growing rapid course of vibrant technology and human awareness, measures have to be taken into account to apply to new overwhelming viewpoints of influence (Crilly, 2020, p. 12).

The problem with a growing society is that court decisions must adhere to these changes and act accordingly without cause for scrutiny and resentment amongst society and the government bodies. The judicial system may be independent from the other branches, but may receive backlash from creating precedent that may not reflect what the law had intended or may be seen as presiding over the higher courts of law, whether national or international which will be explained at a later point. As stated by Wacks (2008):

“Globalization, rapid advances in technology, and the growth of administrative regulation place increasing strain on the law. Domestic legal systems are expected to respond to, and even anticipate, these changes, while many look to international law to settle disputes between states, punish malevolent dictators, and create a better world.” (p. 2).

The job of the judge thus is to uphold the previous precedent in order to “keep the peace” or to create precedence in the rare case which would lead to no choice in the matter, more often than not in a conservative manner that would appease Parliament and judicial bodies as being fair and upholding the moral high ground. (Crilly, 2020, p. 64). Parliament supremacy reigns as a check upon

the judicial system, prompting the judiciary to "act wisely" in case decisions (Dainow, 1966, p. 426; Eeckhout, 2018, p. 166).

The judicial system has already been "checked" before throughout the ages as worry of indispensable power has risen. Originally, the Lord Chancellor held power considered overarching; the role originally prevailed as significant in power in the legislative, executive and judicial branch (Crilly, 2020a, p. 39). In 2005, the Constitutional Reform Act (CRA) (2005) was initiated, prompting the role of Lord Chancellor to solely be for assuring independence of the judicial branch (Crilly, 2020a, p. 39); the Lord Chief Justice would replace the Lord Chancellor as head of the England and Wales judiciary system (Crilly, 2020a, p. 41). Members of the judiciary system were provisioned to uphold judicial independence and were for the first time given statutory protection under Section 3 of the CRA (Crilly, 2020a, p. 45). It had also created a new UK Supreme Court (UKSC) to assure a more defined separation of powers (Crilly, 2020a, p. 39).

Thus, judgements have been carefully construed in order to abide by parliamentary standards. The reluctance of judges to appear radical or far-left and progressive has led towards overall assent between judges in regards to judgement in the eyes of the law due to the belief that the less overstepping, the better (Crilly, 2020, 64). However not all judges agreed upon such customs. In some cases, there has been opposition in the current high-held belief. Lord Denning in particular had laid claim as to how judgements should be taken, thereby creating discussion in the rights of the judicial body in "progressing" and "preserving" the current system of law.

Lord Denning believed that the power in the courts was more so than what was originally implemented by Barron Parke's "golden rule" in that Parliament's words were more "ambiguous" and the court could therefore interpret as seen fit (Montrose, 1959, pp. 89-90). As stated in *Seaford Estates v Asher* [1949] 2 KB 481, "The English Language is not an instrument of mathematical precision." Therefore, "the principles applicable to the interpretation of statues ... are stated rather widely;" ambiguity in law created by Parliament is what allows for judicial interpretation and the practice of finding "necessary implication" according to the *Rule in Heydon's Case;* this allowing for a looser interpretation through statue in the social context given (as cited in Montrose, 1959, pp. 90-91). Such as could be said from *Paisner v Goodrich* [1955] 2 All ER 3321 which interpreted *ex facto non orbiter juris*, thus implying interpretation on the doctrine being viable to later court precedents; it is in that regard that support for true interpretation from *Shell Mex and B.P Ltd. v Holyoak* [1959] 1 All ER 401C should be used as a rule of law (Montrose, 1959, pp. 103-105). *Paisner v Goodrich* has no applicability as a rule of law due to vagueness of "fact;" interpretation can be made through precedence of a similar case, but has to be made in relation to statutory words (Montrose, 1959, p. 107).

Furthermore, Denning raised the issue of horizontal precedence through the Appellate Courts; he believed that the Appellate Court should have the ability to stray from previous precedents made in

the court in order to ensure a more modern decision that would reflect common belief of the time (Crilly, 2020a, p. 66). Before campaigning for the departure from the Court of Appeal officially in 1966, he aided in the ability to depart from precedent in the case of the Appellate Tribunal as stated in *BP Refinery Ltd. v Walker* [1957] 1 ER 715F (Crilly, 2020a, p. 66; Montrose, 1959, p. 108) Denning (1959) stated:

[there is] "considerable area where two reasonable men, each of whom properly understood the statute, could come to different conclusions. In such cases the mere fact that the tribunal comes to a different conclusion from that to which some of the members of the court might come does not mean that the tribunal falls into error in point of law. The question is then one of degree in which the tribunal of fact is supreme so long as it does not step outside the bounds of reasonableness" (p. 88).

In doing so, he raised the "two glosses" of the general doctrine in process of categorization and establishment of facts and limitation on discretion of first instance by the tribunal; in confining to "the bounds of reasonableness," the tribunal establishes the ability to reverse categorization of fact due to action of judiciary being unlawful if doing so and the necessity of proper direction and conclusion from the primary facts (Montrose, 1959, pp. 109-110).

Upon "Lord Denning's Crusade" in 1966, the ability of the appellate court to reverse "primary" fact in circumstances of significant social change and "keep-up" of law jurisdiction was considered unsatisfactory and maintained the campaign for looser interpretation of horizontal precedence (Crilly, 2020, pp. 62 & 66; Montrose, 1959, p. 109). In the case of *Gallie v Lee* [1969] 1 All ER 1062 Denning argued that the Court of Appeal should not be bound by previous cases of the court; if error or errors are found by a previous case decision and has made way into a newer case, the *Young v Bristol Aeroplane* [1946] 1 AC 163 rule would apply as a binding precedent to unfair ruling unless the House of Lords overturns the decision (Crilly, 2020a, pp. 66-67). The decision made in regards to such in *Davis v Johnson* [1978] 1 All ER 1132 after the House of Lords repealed the decision based on *B v B* [1978] Fam 26 and *Cantliff v Jenkins* [1978] Fam 47 from the 'full' court of five judges organized by Lord Denning himself; failing to abide by horizontal precedence was considered slanderous and the necessity of abiding by *Young v Bristol Aeroplane* in the Court of Appeal was held (Crilly, 2020a, p. 67).

The binding of horizontal precedence in the Court of Appeal is still under debate as to whether it should be liable. Despite the case being "closed" by the House of Lords in *Davis v Johnson*, the attention towards this particular precedent by Lord Denning offers incite into the true powers of the court and in particular, lord justices in the ability to change them. Until this crusade, no one had dared to make such a ruckus in regards to judicial custom. It can be said by such lively dissent that Lord Denning has created a pathway towards a more proactive approach in law interpretation. That is not to say that this precedence will ever change, but that for now the Court of Appeal will have no such authority on primary fact.

UK Authority in Jeopardy and How it Applies to the Future of Common Law

After WWII, nations organized to create bodies of international understandings in order to prevent atrocious crimes in their nations that would go against morals considered universal; in particular Europe had made strides to create a system of cooperation and unity for the purpose of preventing war crimes from happening again in their continent especially (Crilly, 2020a, p. 20). The Council of Europe and the European Union (EU) were therefore created to uphold what was deemed international human rights (Eckes, 2013, p. 256). International courts were established to uphold these rights and judge countries accordingly, most notably was the European Court of Human Rights (ECtHR) (also known as Strasbourg court) which fundamentalized human rights and was signed in 1953 by the UK and other European countries (Crilly, 2020a, p. 22). It was from then on, that human rights were protected as "fundamental to the rule of law" worldwide (Crilly, 2020a, p. 22).

Citizens of those countries in agreement with European Convention on Human Rights (ECHR) that believed their country had acted against international human rights could appeal their case to the ECHR in order to prosecute a case against their country and appeal for damages (Crilly, 2020a, p. 22). It is duly noted that over time the UK court system in particular was thoroughly diminished in power from checks made by the ECHR (Eeckhout, 2018, p. 171). The fundamental law from human rights would from then on affect UK power upon decisions considered vital to the happenings of the state in regards to citizen affairs and rights.

Despite the creation of the EU in 1953, the UK only joined in 1973 after much debate and scrutiny (Eeckhout, 2018, p. 171). Many countries did not believe that the UK could join the EU, most notably concerns were raised by the Prime Minister of France, Charles de Gaulle; when voting to allow the UK to join the EU, de Gaulle vetoed the accession, referring to the UK as a "Trojan horse" (Lord, 2018, p. 53). Even the UK government itself was hesitant to join as there was strong belief in the country needing to uphold its own authority; integration into the EU would be decided only by terms acceptable that allow for process control from within as stated by the UK Government in 1971 (as cited by Lord, 2018, p. 147).

By the joining of the EU, international hold upon the UK had strengthened, duly noted by the increasing influence of the international sphere. According to Giliker (2015):

"In 1973, the United Kingdom joined the European Union (then the European Economic Community) and, by virtue of the European Communities Act 1972, European law is given [*sic*] legal effect within the national legal system. On this basis, national courts are required to apply EU law, subject to review by the CJEU itself. Provisions of EU law that are directly applicable or have direct effect are automatically enforceable in the UK without the need for any further enactment. The doctrine of indirect effect further requires that national courts should interpret existing legislation in line with EU law." (p. 243)

The ECHR hence has brought their hold upon the UK as a functioning influence of law, thereby creating crossroads between international law and Parliament supremacy as stated by Elliot (2001) (as cited by Greene, 2016, p. 114; Lord, 2018, p. 48).

The UK was further tied to European law ordinances through the incorporation of the Human Rights Act of 1998 (HRA 1998); the ECHR became one of four principal sources of law in the UK (Crilly, 2020a, p. 19; Eckes, 2013, p. 275; Eeckhout, 2018, p. 171) through automatic integration through the UK's dualist system (Whitehead, 2018, pp. 7-8). Due to particular sections of the HRA according to Giliker (2015):

"Section 3(1) provides that 'so far as it is possible to do so', the courts should interpret primary and subordinate legislation in a Convention-complaint way. This will apply to legislation in the area of private law and section 3 has been used by the courts to construe [*sic*] legislation purposively [*sic*] to reach a convention-compliant result. This gives the UK courts a 'constitutional' role in examining the Convention-compatibility of legislation. Further, section 2(1) of the Act requires the court, in determining a question which has arisen in connection with a Convention right, to 'take into account' judgements of the ECtHR. Section 6(1) also provides that it is unlawful for a public authority to act in a non-Convention-compliant way and section 7 and 8 provide a cause of action by which victims seek a remedy. Individual litigants may thus bring an action against a public authority which has violated Convention rights contained in Schedule 1 of the Act." (p. 247)

These requirements under law have since caused issues on the international scale. The pressures since 1973 have been in action in order to influence UK decisions yet such action had not always been taken. What supposedly assured compliance was the requirement of *inter alia*, 'taking into account' but in reality, had only caused more issues than solved any tensions between the UK and international law (Giliker, 2015, p. 238). Serious clashes between UK and European courts had since occurred after 2000 which will be discussed further below.

In contrast to the majority conservative approach towards creation of previously upheld precedence, the UK courts have shifted towards a more flexible approach on Strasbourg precedence; the "Mirror Principle'' has since been more commonly in effect to do "no more but certainly no less" in regards to Strasbourg's decisions as stated by Lewis (2007) (as cited by Greene, 2016, p. 113) in regards to *Ullah v Special Adjudicator* (2004) AC 323 stated by Lord Bingham (Greene, 2016, p. 115). It was therefore assumed that Strasbourg decisions should be followed unless there was good reason to omit (Greene, 2016, p. 115).

Most notably, *R v Secretary for Transport, ex parte Factortame (No. 2)* [1991] 1 AC 603, 659 and *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC, 5, [65], [121] raised some issues in regards to UK power in their own courts; *Factortame* according to Lord Bridge deemed that the European Communities Act of

1972 would not hold precedence on domestic statue, but because of *Miller*, the UK was subject to European law and could leave the EU if wished to do so to escape international precedence (De Mars et al., 2018, p. 120).

The UK at this point in time felt as if their hold on power in their state was insufficient and in June 23, 2016, a referendum was held on whether the UK should succeed the EU and the majority voted yes (Crilly, 2020a, p. 16). The European Union Withdrawal Agreement (ECWA) 2020 will be law on January 23, 2020 (Crilly, 2020a, p. 16). EU law will continue to be implemented into English law until the agreement is in effect (Crilly, 2020a, p. 16). After Withdrawal Agreement 2020 is in effect, most EU law will be converted into domestic law, but as for the details of what this would entail, it is unknown (Crilly, 2020a, p. 16). Due to Brexit, the foundations of UK law such as EU law being a principal source of law (Crilly, 2020a, p. 19) and EU law having precedence over Parliament are subject to change (Crilly, 2020a, p. 19). However, due to integration of the ECHR in UK law and the fact that the ECHR is separate from the EU, the UK will still be bound by such laws in place (Crilly, 2020a, p. 22).

Until Brexit is finalized and the UK succeeds from the EU, international precedence of EU law lords over Parliament decisions. ECHR will still be bound to UK law, but in terms of impact due to complete international law overhaul, the power of international law in the future is unclear for the UK. Parliamentary supremacy is a focus in the new government system and English-made law may become more important than international law overall in UK jurisdiction. As to how exactly decisioning will play out, until the country officially diverges from the EU and negotiations take part, anything can happen in terms of impact.

The Future of Precedence

It is uncertain what exactly Brexit will entail for the populace and the EU itself. According to Eeckhout:

“All the Supreme Court in the end established was that an Act of Parliament was needed to notify the EU of the UK’s intention to withdraw. Nothing else was said about the process of withdrawal, or about Parliament’s role in the Brexit negotiations, or indeed its role at the end of the process, when the withdrawal agreement [sic] will need to be ratified, and may be incorporated in UK domestic law.” (p. 168).

“Brexit is the outcome of a referendum, but there is no constitutional law framing such referendums…” (Eeckhout, 2018, pp. 169-170). Parliament has free reign as to how to frame their exit. The issue is in regards to the ability of this exit in place and how it will affect EU relations as well as the countries tied to English jurisdiction: Scotland and Northern Ireland (De Mars et al., 2018, pp. 115-150). How it will affect border lines, how governments will be able to act, and the issue of international agreements in place, in particular, the Good Friday Agreement are the main areas of concern (De Mars et al., 2018, pp. 115-150).

There is also an issue as to how rights will be made and applied. Parliament will have the ability to pick and choose as to how they will create and apply

rights to the new laws made; while past agreements have merit as a basis for law, as long as the agreement is written, there is no issue; the entirety of a law can be changed as seen fit (De Mars et al., 2018, pp. 129-130). Due to the dualist system as well, the rights given from international agreements are only activated once the UK has given law which would activate them; Parliament has the ability to withhold the rights given by international agreements and in the process of Brexit, there is concern as to if these agreements will be activated in their entirety (Whitehead, 2018, pp. 7-8). The issue of Parliament supremacy is thought to have won in regards to what can be applied to state law, issuing an era of a more UK conservative stance to precedence (Jenks, 1916, p. 16).

There is however the reassuring argument that "...as long as the CJEU (Court Justice of the European Union) can rule that EU law is superior to UK statues that conflict with it, this established account of the UK sovereign Parliament has been toppled." according to Wade (1996) (as cited in De Mars et al., 2018, p. 119). Some rights are still protected by the Human Rights Act no matter what is argued in discourse of Brexit finalization and as to how the UK will change its precedence (Eeckhout, 2018, p. 171). The UK may have some ability in influencing their law to meet a more nationalist approach, but EU law will still be integrated through ECtHR which is separate from the EU (Crilly, 2020a, p. 22).

Conclusion

The common law system like its predecessor is undergoing monumental changes in regards to its jurisdiction and scope of power. It has expanded in interpretation in order to meet demands of the system that had taken place in accordance to the necessity of modernizing nations. Unlike its predecessor however, civil law has never had to adapt to fit an additional international system which has been created. EU law is in itself more of a civil system and be that as it may, precedence of power in a nationalist standpoint cannot be maintained such as in the case of UK law, its foundation being to uphold parliamentary supremacy and the moral standings of the public. EU law does not uphold public standings but rather civil universal standings which in turn cause issues in the judicial front as to how to interpret law. International courts and the UK courts as well have clashed to the point where there is no return for negotiation and thus the system is attempting to separate from the EU in order to maintain a parliamentary supremacy basis for law.

The UK itself is conservative in its decision-making process, trying to maintain and uphold this hierarchical system of a monarchical democracy with customs and ordinances required in order for any process and conclusion to be made. It is for this reason that judicial processes are careful of this national system sans in cases in which there is international involvement. There is a give and take process and this wish to maintain a system of history and merit in which changes are made only

in dire situations and the basis of precedence is protected at all costs.

Common law has differed greatly across nations but unfortunately has never been able to stray over the status quo in the case of the UK. There is the push for nationalist supremacy of law and the ability to make decisions more in the bounds of public opinion, but the system itself has a long way to go before it is at the same point of maturity as civil law. Common law has the freedom of expression and opinion which one would assume would make it so much harder to control but because of the culture and the established governmental structure is in reality much restrained. Brexit will allow for opportunities for the country to uphold their own moral basis for decisions while of course being mindful of EU law due to pre-established restaurants. However, this change of power should open opportunities in the discussion of doctrine of judicial precedent and what exactly it entails in the scope of power between not only parliament and judiciary but the inner levels of judiciary itself. The UK common law system upholds a persuasive precedence even in today's world that will influence future law of other nations. It is only natural to take the opportunity of leaving the EU, an action of tremendous effect and controversy, in favor of improving a system that at times does not want to be improved.

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Investigating the Dworkin-Finnis Debate on Euthanasia Through the Case Study of R (Conway) v Secretary of State for Justice [2018]

Josephine D'Urso

Introduction

The aim of this paper is to elucidate the debate on euthanasia, and more specifically assisted suicide, by arguing a recent case from the United Kingdom's Court of Appeal according to two prominent modern jurists whose greatly differing opinions on the matter are representative of the schools of thought from which they respectively operate. Of the many jurists who have lent their voices to the debate on euthanasia, or more broadly the principle of the sanctity of life, the two whose ideas will be explicated in this paper are John Finnis and Ronald Dworkin. The choice to argue the case using Dworkin and Finnis' respective conceptions of jurisprudence strives to illuminate the subject of debate by contrasting the highly nuanced view of Dworkin with the more traditionalist view of Finnis that builds on a long history of natural law theory.

The paper will begin with a brief of the central case which will present the basic judicial questions at hand, the laws on which the ruling rests, and the core principles that are in conflict. The case brief lays the foundation for the argumentation which follows it, as it establishes core ideas that are to be interpreted differently according to each theorist. The structure of the paper follows three points of contention between Dworkin and Finnis which underscore their reasoning for and against, respectively, an alternate ruling in the case of R (Conway) v Secretary of State for Justice. The organization follows the core thesis of the paper which holds that according to Dworkin's ideas, the ruling in the case would be a mistaken one because of the judge's prioritization of policy over principle, a misunderstanding of the principle of the sanctity of life, and a disregard for the integrity of law and individuals' lives. This view of the ruling is contrasted with the modern natural law theory of John Finnis which identifies policy and principle as one, conceives of the principle of the sanctity of life differently from Dworkin, and contends that the first principle of morality and practical reasonableness are far more important than integrity. Thus, the first two paragraphs address Dworkin and Finnis' disagreement regarding the role of policy and principle. The second two paragraphs develop the two jurists' ideas about the sanctity or inviolability of life. The fifth and sixth paragraphs discuss the ways in which the broad themes of Dworkin's and Finnis' legal theories influence their beliefs about a just ruling in the Conway case. The final paragraph concludes by assessing the merits of each argumentative scheme.

With the debate around euthanasia and assisted suicide touching on deeply-held beliefs about the meaning of life and death and morality at large, exploring the subject according to the analytical

claims of two respected philosophers can shed a light of reason on the emotional controversy and help individuals and scholars alike to refine their arguments for or against legalizing or decriminalizing assisted suicide.

Case Brief: R (on the application of Conway) v Secretary of State for Justice[1]

The case of R (on the application of Conway) v Secretary of State for Justice (*hereinafter "Conway v SoS"*) concerns the appeal of Mr. Noel Conway (*hereinafter "Mr. Conway"*) to the Court of Appeal after his case was dismissed by the Divisional Court. Mr. Conway suffers from motor neuron disease which has progressively caused the deterioration of his health and quality of life. Mr. Conway wished to end his own life with dignity at the time of his choosing but would not be able to do so without assistance. Although Parliament decriminalized suicide at one's own hand, the prohibition of assisting or encouraging another person's suicide remains in section 2(1) of the Suicide Act 1961 (*hereinafter "the Suicide Act"*). Mr. Conway's basic claim is that under section 4 of the Human Rights Act 1998 the prohibition on assisted suicide in section 2(1) constitutes an infringement on his right to respect for his private life per Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (*hereinafter "Article 8"*). The conflict in the case lies between the principle of self-determination and the principle of the sanctity of human life. Other considerations being weighed are the role of Parliament versus the role of the judiciary and the influence on Mr. Conway's individual life and the lives of individuals like him versus the wider-scale implications for the public. The Court of Appeal ultimately upheld the decision by the Divisional Court that Mr. Conway's rights were not infringed upon because section 2(1) of the Suicide Act constitutes a permissible infringement on his Article 8 rights per Article 8 section 2, which stipulates an exception that the right to private life may be interfered upon when it is necessary for a democratic society and the protection of rights and freedoms of the general public. The Court of Appeal held that Section 2(1) of the Suicide Act fulfills the requirements outlined by Article 8 section 2 in that it promotes "protection of the weak and vulnerable," the principle of "the sanctity of life[,] and promotion of trust between patient and doctor in the care relationship".[2] In doing so, the Court of Appeal made clear that they believed the role of formulating policy on such a controversial and complex subject matter, which requires abundant research and inquiry that the Court is unable to pursue, to be outside the scope of their judicial responsibilities and to fall to the elected legislative body of Parliament.

Arguing the Conway Case According to Ronald Dworkin and John Finnis

Dworkin believed that rules and principles ought to have a complementary relationship but in situations where there is a conflict between principles and

[1] *R (on the application of Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431.

[2] *R (on the application of Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431 [61].

rules the principle ought to prevail.[3] Dworkin also stressed the importance of judges deciding only on rights, not policies, yet in the case of Conway v SoS the Court of Appeal's decision rested on and repeatedly referred to an act of policy, the "protection of the weak and vulnerable".[4] Here the importance of constructive interpretation in Dworkin's legal theory comes into play; Dworkin's Judge Hercules is the exemplar of this approach as he is a theoretical figure who possesses a deep knowledge of all legal rules and principles and is always able to constructively interpret the right answer to hard cases. This right answer in the case of Conway v SoS would consist of a ruling in Mr. Conway's favor which upholds the principle of equality, proclaiming that Mr. Conway's rights should not be infringed upon in favor of other people's rights, and performing the state's duty to protect personal autonomy.[5] Dworkin would likely agree with the legal reasoning of Mr. Conway's representation, Ms. Lieven, that the Divisional Court failed in its judicial duty by refusing to make an appropriate ruling due to the claim that Parliament was a more appropriate setting for deliberation on the social issue;[6] while Dworkin would agree that it is not within the realm of the Court to make policy he would posit that it is nonetheless within their responsibility to adjudicate in relation to the rights of the individual before the Court and uphold core principles such as equality, autonomy, and self-determination.[7]

Finnis, opposing Dworkin and operating within a distinctly natural law conception of justice, would suggest that policy and principle are one in that they both pursue the common good. Finnis and other natural lawyers conceive of law as an instrument for creating and maintaining a flourishing community, therefore the distinction between the domain of policy and the domain of law is blurred.[8] It is necessary to recognize Finnis' Thomistic influence because Aquinas' identification of law as "always something directed to the common good," would be fundamental to Finnis' judgement on the Conway v SoS case.[9] Aquinas himself references Saint Isidore considerably when considering law's relationship to the common good.[10] Isidore identified furthering the common good as a crucial characteristic of the nature of law,[11] and Aquinas makes very clear that only that which is directed to the common good can be considered law.[12] In the case of Conway v SoS, Aquinas and Finnis would surely contend that Mr. Conway's Article 8 rights were rightfully infringed upon in pursuit of the common good and the

[3] Jiří Kašný, 'Dworkin - Finnis - Hart' (Prague, Czech Republic, Anglo-American University, 1 December 2020); MDA Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet and Maxwell 2008) 718.
[4] *R (on the application of Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431.
[5] Mohsen Al Attar, *To Obey (or Not to Obey) the Law - Positivism Meets Natural Law* (2013) <https://www.youtube.com/watch?v=S1frSMlzlyA> accessed 6 December 2020.
[6] *R (on the application of Conway) v Secretary of State for Justice* [2018] EWCA Civ 1431 [78–85].
[7] Ronald Dworkin, 'Taking Rights Seriously' in MDA Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell 2008) 734–737.
[8] Freeman (n 3) 132.
[9] Thomas Aquinas, *Thomas Aquinas' Treatise on Law: (Summa Theologica, Questions 90-97); with an Introduction* (H Regnery 1969) 5–7.
[10] ibid.
[11] ibid 80–83.
[12] ibid 5–115.

prevention of the harmful effects on society at large.

At first glance, the case seems to present a conflict between two principles, the sanctity of life and self-determination but Dworkin proposes an alternative view on the principle of the sanctity of life which includes and is intrinsically linked with an individual's right to make choices about their life and its end. Dworkin's conception of the sanctity of life suggests that the principle may be more of an argument *for* assisted suicide rather than against it.[13] This understanding rests on what Dworkin terms "critical interests" and their distinction from "experiential interests".[14] Experiential interests are those activities, choices, and events in one's life which one enjoys doing for the experience of doing them, while critical interests are individual's convictions about what constitutes a good life.[15] Critical interests are integral to understanding Dworkin's unique conception of the sanctity of life, which is one that identifies the choices that one has made throughout their life regarding one's belief about what it means to lead a good life as something whose integrity ought to be preserved even in one's death.[16] Thus, to uphold the principle of the sanctity of life in the Conway v SoS case would not entail a conflict with the principle of self-determination in Dworkin's theory; Judge Hercules would adjudicate with both principles in mind that the sanctity of Mr. Conway's life rests on the continuity of Mr. Conway's beliefs and choices about how he wants to live his life and how he wants it to end.

Finnis takes a different attitude towards the sanctity of life, although he derides that lexical choice,[17] and focuses on the irrationality of any act which is contrary to the basic goods, one of which is life, as well as the implications of condoning killing in any way. Undergirding Finnis' thoughts on individuals making choices that are contrary to the basic goods is Finnis' concept of the first principle of morality which directs towards integral human fulfilment and entails a deep respect for all of the basic goods.[18] Also critical for understanding Finnis' conception of human choice is the sixth basic good, practical reasonableness, which can be described as the intrinsic human ability to make choices using reasoning skills.[19] Both Finnis' first principle of morality and practical reasonableness can be connected to Aquinas' idea of reason as the "first principal [*sic*] of human acts".[20] Reason plays an important role in Aquinas' and Finnis' natural law theories because reason is the method through which humans can identify and deduce moral principles from the natural world; thus, morality and reasonableness go hand in hand.

[13] Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (EPUB, Vintage Books 1994) ch 7.
[14] ibid.
[15] ibid.
[16] ibid 8.

[17] John Finnis, 'Euthanasia, Morality, and Law' (1998) 31 Loyola of Los Angeles Law Review 1130 <https://scholarship.law.nd.edu/law_faculty_scholarship/516>
[18] John Finnis, James Boyle and Germain Grisez, 'The First Moral Principle' in MDA Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet and Maxwell 2008) 188–190.
[19] John Finnis, 'A Philosophical Case Against Euthanasia' in John Keown (ed), Daniel Callahan, *Euthanasia Examined* (1st edn, Cambridge University Press 1995) 171 <https://www.cambridge.org/core/product/identifier/CBO9780511663444A011/type/book_part> accessed 6 December 2020.
[20] Aquinas (n 9) 4.

A critical concept for Finnis is that the basic goods are not to be measured or compared with one another; they are intrinsically plural and humans are naturally directed to pursue them all according to the first principle of morality. Finnis is at pains to eschew the utilitarian understanding of pursuing good and avoiding evil according to a proportional scheme[21] which makes it difficult to assess how Finnis would approach the conflict of principles in the Conway v SoS case. However, Finnis outlines the way in which any choice which violates a basic good, in a situation when not making said choice would uphold a basic good, can never be reasonable nor moral.[22] In Conway v SoS, Finnis would believe it immoral and unreasonable to grant any legal weight to Mr. Conway's irrational desire that conflicts with the basic good of life.

Dworkin locates the power of law in human integrity, which rests upon the dual principles of freedom and responsibility, and Dworkin's conception of human integrity is one which includes an individual's right to decide the way in which they would like to die, including when.[23] Dworkin's belief in integrity as a fundamental political and adjudicative principle also underscores the importance, for him, of the legislature and judiciary applying policy and law, respectively, in an equal way.[24] Thus for Dworkin, human personal life's integrity must be sought after as well as integrity of human political/societal life, and the Court of Appeal's ruling in the Conway v SoS case went against both these ideals. By not allowing Mr. Conway to end his life in a way consistent with how he lived, according to his critical interests, the judgement betrays the ideal of integrity in an individual's life. The issuance of a ruling which limits Mr. Conway's right to end his own life, yet which still allows others with more physical mobility to do so, also fails to uphold law as integrity because the law is being applied unequally. If Judge Hercules were to make a ruling on this case he would find that a ruling in Mr. Conway's favor constructively interprets justice per the principles of integrity, equality, autonomy, self-determination, and even the sanctity of life.

With both Finnis and Dworkin set in their convictions that their theories are the best for their respective aims, promoting common good and an orderly community and promoting the ideal of integrity, respectively, it can be difficult to determine whose approach is most apt for deciding on the Conway v SoS case. Ultimately, it comes down to the distinction between practice and theory. Dworkin, through his own experience practicing law, presents a conception rooted in logic which delineates clearly the differing roles of the judiciary and the legislature and identifies the procedure for constructively interpreting law in the pursuit of integrity, justice, and fairness. Finnis, on the other hand, made a career out of theory, meaning that his uncompromising ideals about the pursuit of common good over individual good were never infringed upon by the demands of real legal practice. While Finnis upholds reason and morality as motives for preventing assisted suicide, Dworkin

[21] John Finnis and Germain Grisez, 'The Basic Principles of Natural Law: A Reply to Ralph McInerny' (1981) 26 American Journal of Jurisprudence 28.
[22] Finnis (n 19) 29.
[23] Dworkin (n 13) ch 7.
[24] Freeman (n 3) 724–727.

uses the same concepts to make an argument for the legality of assisted suicide in certain cases. Thus, the debate between the two theorists rests not on diametrically opposed conceptions of law, but, rather, on variations in their conceptions of moral principles and the precise role of those principles in legal decisions.

Conclusion

By identifying the relevant ideas from Dworkin and Finnis' theories of law, analyzing them with a critical eye, and applying them to the case of Conway v SoS, this paper has shown that Dworkin's legal theory can enhance public and judicial understanding of the euthanasia question. Contrasting Dworkin and Finnis' ideas, as this paper has done, demonstrates the utility of Dworkin's unique conception of the sanctity of life which provides immeasurable value to the debate on euthanasia. Many members of the public, elected legislators, and even appointed members of the judiciary connect with the question of assisted suicide from an intuitive emotional place because of the discussion's personal implications; however, Dworkin's proposition invites people to grasp that respecting the sanctity of life does not solely mean keeping someone alive, but rather ensuring that their life and death are experienced cohesively according to their personal principles.

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The legality of migrant quotas and the pronouncement of the Court of Justice of the European Union on Migrant Quotas after the action for annulment of Slovakia and Hungary. Does an EU Member State have its own obligations to respect EU Law and also the right to defend Public Order and Financial Stability?

Pietro Andrea Podda, Ph.D.

Abstract

This paper discusses the legality of migrant quotas, moving from an analysis of the judicial decision of the Court of Justice of the European Union C-643/15/ of the 6th September 2017, which has rejected the action launched by Hungary and Slovakia. This action was aiming at obtaining an annulment of the Decision EU 2015/1601 which has introduced a redistribution of migrants according to national quotas across EU. Our study covers the legal basis for the challenges presented by the claimants, reviews the relevant legislation and analyzes the judicial pronouncement of the highest EU legislative body. The paper also speculates on likely developments of the migrant quotas system and concludes that any State, even when bound by EU and International Law, has the right to defend, reasonably, the safety and welfare of its own population.

Introduction

This paper studies the legal rationale for migrant quotas. The paper moves from the judicial pronouncement of the Court of Justice of the European Union of the 6th September 2017 regarding the validity of the EU Decision EU 2015/1601 (hereafter "the Decision"). The legal case has been started by a claim presented by two EU States, namely Hungary and Slovakia. These two countries, on the basis of the Article 263 TFEU, have asked for the Annulment of the Decision which has imposed the redistribution of 150,000 migrants from Italy, Greece (and originally also from Hungary, this country has been cancelled from the list of beneficiaries of the relocation process on its own demand and has consequently been included in the list of the recipient countries) to the rest of the European Union members. This Decision overcomes the letter of the Dublin Regulation III, which states that the first State where asylum-seekers enter is also responsible for the examination of the application and, in case of acceptance, must take the asylum-seeker on its own territory.

The aims of this paper are twofold:

1) Describing and discussing the legal rationale underpinning the judicial pronouncement of the Court of Justice of the European Union

2) Discussing the possible consequences of the introduction of migrant quotas on a permanent

basis and the right of a State to defend public order and financial stability.

The study will be undertaken through the analysis of the EU Decision as well as of the pronouncement of the Court of Justice and the right of any State to defend its own public order and financial stability. The paper will be divided into three parts. The first will present the general background of the Decision 2015/1601, the wave of migration which has affected Europe in 2015. The second part will discuss the action taken by the two claimants and the response of the Court of Justice of the European Union. The third part will highlight possible future consequences in case the distribution of migrants across EU becomes the new standard rules. Conclusion and reference will follow.

Section 1: the background of the Decision 2015/1601

Immigration is a constant factor which has characterized the development of European history and civilization (Blocker, 2011; Hicks, 2009; Ullen and Markon, 2016). Waves of migrants have existed already at the time of the Ancient Jews, Greeks, Romans. The composition of our contemporary society is the result of a constant mix of ethnicities. For example, the Czech Republic is currently populated by a population of Slavic origin (Cornej and Pokorny, 2003). Nonetheless, the territories which form the Czech Republic (a country issued in 1993 from the split-up of Czechoslovakia) have been inhabited by Celtic and German tribes already in ancient times. Movement of people is a process which has continued during the Middle Age and the Renaissance, the 19th as well as the 20th century. Hence, the flow of immigrants cannot be considered as a new phenomenon which has never been experienced in our (European) societies.

Nonetheless, the development of technology and the diffusion of information has created more favorable conditions for persons wishing to move to another country. There has been progress in the reliability, efficiency and rapidity of transporting means (i.e., planes). In addition, the higher exposure to information provided by media has facilitated the circulation of ideas and the awareness of existence of higher living standards in certain countries. Moreover, certain regional associations (i.e., European Union) have created a legal framework allowing movement of citizens and workers from countries belonging to the specific regional association (DeBurqa and Craig, 2015).

Migration is a process which, on the one side, may bring benefits to those countries which receive immigrants. It is generally considered that cultural crossings may open new perspectives, enrich the various persons involved. Moreover, immigrants may take jobs for which there is particular demand but not sufficient supply (this latter point is nonetheless controversial, as the inflow of immigrants ready to take unattractive jobs may drive salaries down in the local economy). On the other side, a massive inflow of migrants may also cause serious cultural clashes (Mosalakatane et.al., 2012). This may generate resentment from both sides. At the moment, many European societies are experiencing high exposure to

migration flows from Africa and Asia. The phenomenon is historical, however these last years are seeing a continuation of arrivals of migrants to European Union countries. These inflows of persons from other Continents have generated different reactions. Some commentators, political parties, NGOs highlight the humanitarian side of the migration waves. Migrants are often escaping wars, extreme poverty and violence in their domestic countries. There are various international legal provisions (Article 14 of the Universal Declaration of Human Rights, Convention on the Status of Refugees, 1951, Optional Protocol Related to the Status of Refugees, 1967) as well as constitutional rules aimed at granting protection of migrants risking death or inhumane treatment in their own country (i.e., Article 10 of the Italian Constitution). On the other side, other commentators and political parties warn against the serious implications of a massive inflow of migrants. The main arguments are that cultural differences may render integration not manageable in practice, a certain percentage of migrants tend to commit crime, resources for preventing crimes and sanctioning criminals are limited, many asylum applicants are in reality not fleeing war, States incur into considerable financial costs when supporting migrants, many migrants are not qualified to find a stable job in Europe, there are potential terrorists hidden among migrants. The debate has been going on for some time and it has taken a political stance.

At EU level, there is the Regulation known as the Dublin Regulation (Hoover, 2012). A crucial aspect of this Regulation is the provision according to which the State responsible for examining any asylum request and, eventually, offer protection is normally the State where any applicant has entered the EU territory for the first time. Logically, this provision leaves those EU border countries (Italy, Spain, Greece, Hungary) particularly exposed to inflows. Those EU countries without an external border may legitimately send any applicant back to the country where he/she entered the EU territory first.

However, in 2015, the EU has moved to reconsider the rule according to which the country where the asylum applicants have first entered the EU space is responsible for the examination of the request and for the granting of the protection. This shift has come because those countries with external borders were basically imposed a heavy burden, in view of the massive increase of arrivals. Consequently, the idea has been to distribute migrants across the whole territory of the European Union.

A proposal has been presented at the Council and agreed upon by qualified majority on the 22nd September 2015, originating the Decision 2015/1601. This is possible on the basis of the Article 78 TFEU. In particular, Article 78 (3) reads: ”In the event of one or more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.” Decisions are taken on the basis of the Ordinary

Legislative Procedure, which allows for qualified majority, whereas prior to this instrument, decisions on immigration and asylum polices had to be taken by unanimity. At the time of the voting, only Czech Republic, Hungary, Slovakia and Romania had voted against, Finland abstained. The decision to vote by qualified majority has been considered controversial. Traditionally, Member States had avoided opting for this procedure when dissenting States where invoking concerns related to national security and fundamental national interests (Craig and De Burqa, 2015). Nonetheless, the EU authorities have decided to pursue an avenue which was controversial and likely to create tensions from the very onset. According to the redistribution plan, 150 000 refugees from Syria, Iraq and Afghanistan, already considered in need of international protection, should have been relocated from Italy and Greece to the remaining countries of the European Union.

The plan has found a tough resistance and, two years after its entry into force, the EU states involved are far from having fulfilled their quotas. This fact has led the EU Commission to consider an action of infringement on the basis of the Article 258 of the TFEU. On the other side, there are also countries which have started an action before the Court of Justice on the basis of Article 263 of TEU (Action for Annulment, possible in case of infringement of essential procedural requirements, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers). This is a procedure that can be used (also) by a Member State(s) which consider a legal act of the European Union as being not valid. The countries which have brought the action are Slovakia and Hungary and their action has been supported by Poland. The Council is the defendant, and it has received support from Belgium, Germany, Greece, Italy, Luxembourg, Sweden and the European Commission. The decision of the Court was taken, as said, on the 6th September 2017 and it is presented in the next section.

Section 2: The judicial decision of the Court of Justice of the European Union regarding the validity of the Decision 2015/1601

The European Court of Justice has dismissed the action for Annulment (the judicial decision C 643/15). All the points raised by the claimants have been considered as not admissible. Hence the validity of the Decision 2015/1601 has found confirmation. On the basis of this, all countries of the EU seem to be under the legal obligation of accepting their quotas of those 150 000 refugees which has been allocated to them. The grounds for invoking the Annulment of the Decision, as well as the rationale for dismissing the Annulment action, represent a complex bundle that cannot be discussed in its entirety in this paper. However, the present research will review the crucial points of the judicial decision C-643/15. Before moving into this task, it appears of importance to highlight some key points related to the very Decision 2015/1601. These are

- The Decision is conceived as a temporary measure thought to alleviate the sudden burden imposed on Italy and Greece occurred in 2015 (Hungary had been originally been included within the beneficiaries but has asked and

obtained to be deleted from the list). Relocations were thought to happen in the two years following the entry into force of the Decision, with possible extensions.

- The Decision does not represent a permanent amendment to the Dublin III Regulation. In other words, the system of relocation is not permanent and there is not a rule according to which more refugees than those 150 000 listed (or any other type of migrants) will be relocated in the future. Hence, the provision according to which the country where refugees have entered the EU are responsible for assessing the application and eventually offering protection is still the valid legal standard.

- Currently, there are proposals and discussions in order to render the relocation of migrants in general (not only refugees) permanent. However, these discussions and proposal have not resulted in any valid legal act.

- A country has the right to refuse the relocation of specific persons when there are reasonable grounds for regarding him or her as a danger to their national security or public order.

The points above are stated in order to avoid misunderstandings regarding the actual provisions introduced by the Decision 2015/1601. Hence, the Decision does not declare that relocations are the new standard rule. Quite the opposite, as the relocations are only intended as temporary measures thought to alleviate the burden of Italy and Greece as for the sudden inflow of refugees during 2015. Moreover, the persons which can be relocated are persons whose status of "persons in need of international protection" has already been recognised. Hence, economic migrants (migrants who move in order to obtain better living conditions abroad) are not going to be redistributed across the territory of the European Union.

Slovakia and Hungary have advanced some claims because, in their view, the Decision is not valid. It must be specified that the European Court of Justice does not have any authority for questioning the political rationale of any legal act issued by the EU legislative authorities. Moreover, the Court of Justice is bound to respect the discretional power vested on the mentioned authorities. Indeed, the Court can declare a given act not valid only "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers." (Article 263 TFEU, see also Horspool et.al., 2018). Here below, is a synthesis of the claims presented by Slovakia and Hungary and of the grounds for dismissal of their claims by the Court of Justice.

1) The adoption of the decision, as maintained by the claimants, would be vitiated by procedural errors and by the choice of an inappropriate legal basis. The main points are that the legal basis (Article 78(3)) was wrong, because a legislative procedure should have been followed (whereas the Decision has been approved as a non-legislative binding act, as the Decision has been passed following the Article 78 (3)). In addition, the claimants have contested the adoption of the Act using a qualified majority, whereas the European

Council had urged the Member States to proceed on the basis of consensus. The answer of the Court has been that the Article 78 (3) is an appropriate legal basis, as it explicitly allows the Council to adopt provisional measures for the benefit of a Member State confronted with a sudden inflow of national of third countries. This is exactly the reason which has moved the action of the Council. The Article 78(3) does not explicitly mention any legislative procedure to follow, hence the Act was legitimately passed as a non-legislative Act. As for the decision not having taken following a consensus, the Court has highlighted that the Decision has been taken in order to find a temporary solution to an urgent problem which would not have been solvable by consensus. Furthemore, the conclusions of the European Council inviting the States to agree by consensus referred to a different relocation plan.

2) The Decision of the Council amends specific aspects of the proposal of the Commission (specifically the insertion of Hungary among the recipient States). This, according to the claimants, can be only done through following the principle of unanimity among Member States. The amendments have not been approved by unanimity. Nonetheless, the Court has concluded that the Commission itself had legitimately changed its proposal before the Council could vote on it. Hence the Council has not amended any proposal.

3) The national Parliament have not been involved in the Decision and the discussion has not been held in public. Nonetheless, the Court has decided that the involvement of the Parliament and a discussion open to the public are not necessary when the Act is not a legislative Act.

4) The two claimants question the proportionality of the Decision and its suitability to solve the burdens accruing to Greece and Italy in view of the sudden and massive inflow of migrants, among them of refugees. The Court, indeed, has found that the relocation Decision is not a measure manifestly inappropriate as a temporary and complementary solution to release the Italian and Hellenic Republic of part of the burdens related to a massive inflow of nationals of Third Countries. The temporal benchmark for assessing any eventual manifest unsuitability is the period when the very Decision was taken, any factual evidence arisen after that period cannot be taken into consideration. The Court has stressed that the Council has not acted in an evident unreasonable way, staying within the limits of its discretion. Moreover, the relocation plan does not impose disproportionate burdens on recipient States in comparison with the aim of providing temporary release to those countries highly exposed to the arrivals.

5) The claimants stress the threat that relocating these persons can bring to their public order. The Court has replied that the recipient States retain the right to refuse an applicant when this person can reasonably be considered a threat to national security or public order.

Section 3: What can happen if migrant quotas become the standard rule? Can these be imposed on recalcitrant States?

The Court of Justice of the European Union has rejected all the claims presented by the two countries which had questioned the legal validity of the Decision; however, it has not solved, nor it was expected to solve, the political consequences of the heavy division of European States regarding the way to manage the massive inflows of migrants. On the one side, there are proposals aiming at changing the rules of the Dublin III Regulation and make the redistribution of migrants a standard rule (proposals coming from, for example, the Italian Government). The supporters of this idea argue that it is not reasonable that all burdens accrue to those member States (Italy, Greece, eventually also Spain) which are particularly exposed in view of their geographical position. On the other side, there are governments (especially those of the Visegrad countries, namely the Czech Republic, Slovakia, Poland and Hungary) which are strongly against any system of redistribution or reallocation.

The Article 78 TFEU legitimizes EU action in the field of refugee policies. On the basis of this Article, the EU has competence for amending the Dublin Regulation and establish, via the Ordinary Legislative Procedure (which requests a qualified majority of Member States in the Council) that migrant quotas and redistribution become the usual standard (Craig, 2013). As said before, there are already forces and proposals pushing towards this direction. In principle, it is possible that those Visegrad countries are outvoted and a new Regulation is passed according to which the relocation of migrants (not only of refugees) become compulsory in the whole territory of the European Union and not just on a temporary basis like the Decision EU 2015/1601 has established two years ago. This possibility is realistic, even if it is not possible to express the probability of an effective approval of such a hypothetical Regulation. Should this happen, and there are political forces at national and EU level which are working in order this can really happen, then there would be a legal obligation imposed on those Member States still recalcitrant towards the idea of accepting quotas. Moving from this hypothetical and realistic scenario, the pages below will discuss whether there are any strategies that those States not willing to accept quotas but still outvoted in the Council could follow in order to avoid being forced to accept migrant quotas.

An eventual amendment of the Dublin Regulation aiming at establishing mandatory quotas on a (semi)permanent basis could be challenged again before the Court of Justice of the European Union. The ground for the challenge could still be given by some of those substantial claims presented at the time of the Decision 2015/1601 discussed in the previous section. The discussion of this present section will not highlight the importance of an eventual infringement of essential procedures. The Court could even establish that an eventual new Regulation or Decision has actually been adopted without respecting fundamental procedural mechanisms and the Court could consequently invalidate the very eventual Regulation. However, procedural deficiencies are curable and the EU authorities, if determined to establish migrant quotas again, would probably manage to issue another legal act without incurring into procedural fallacies. Nonetheless, there could be substantial

challenges which could be taken more seriously by the EU jurisdictional bodies.

It would be difficult for the EU authorities to continue with presenting the relocating measures as a temporary solution to an emergency. Claiming countries (realistically some of the Visegrad group) would be able to provide reasonable evidence suggesting how a massive inflow of migrants is now becoming a constant phenomenon, rather than an exceptional emergency. The Court of Justice, in its decision presented in the previous section, has referred to the temporary and exceptional nature of the relocating measure of the Decision Decision 2015/1601 to justify the rejection of various claims presented by the two countries (Hungary, Slovakia) acting to obtain the Annulment of the very Decision. The Council might reasonably prolong and renew the redistribution schema and still present it as an exceptional measure only for a limited number of times.

Indeed, should the EU authorities decide to opt for a (semi)permanent system of relocation, then invoking the infringement of proportionality (which is a substantial requirement that the EU authorities are bound to respect) before the Court of Justice as a reason for annulment would unlikely succeed. The criterion of proportionality suggests that "the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties" (Article 5 TEU). The Court would reasonably continue to consider that an equal division of migrants among Member States operated in the name of intra-EU solidarity is consistent with EU objectives. Hence, the burden imposed on the receiving States would be considered proportionate, as long as the criteria for the reallocation respects the size, GDP and unemployment of the receiving country (which was already the case with the Decision EU 2015/1601). A challenge based on this point would be even harder in view of the fact that the Council and the Parliament, namely the legislative bodies, are allowed a space for discretion as for the operationalisation of the criteria to follow in order to determine the specific numerical quotas per country.

Indeed, it is clear that an eventual EU legally binding act imposing mandatory quotas on a permanent basis could be legally challenged. Nevertheless, opposing States should bring valid arguments to justify their stance. The main arguments underpinning the refusal of migrant quotas is the fear of a potential devastating impact on public order, public security and on the financial balance of the State, in view of the costs that offering support to the arriving third country nationals would entail. A state refusing to take even a minimal number of migrants would unlikely be able to invoke any serious threat to justify its absolute rejection of migrants. In this hypothetical case, the response of the jurisdictional authorities would probably and reasonably be that the State should be able to manage any threat that a minimal inflow of migrants could bring to the public order and financial stability of State.

Indeed, the action of States against quotas could be taken more seriously in case the inflow becomes massive, for example with numbers

comparable, proportionately, to the inflows to Greece, Germany and Italy. States opposing quotas should still bring convincing evidence regarding the dangers that an eventual strong inflow would bring. This could be done in two ways:

1) As for the impact on financial stability, claiming States should be able to calculate the costs (net of EU contribution) that accepting the allocated quota of migrants would entail, also in proportion to their GDP and State resources. These States could also consider the impact that eventual costs related to the arrivals of migrants could have on their plans to increase pensions, welfare benefits for their citizens and the salaries of employees of their public administration. These pensions and salaries in the Visegrad countries are currently still lower than the average correspondent ones in Western countries. As, according to the Preamble of the Treaty on European Union, the EU is "DETERMINED to promote economic and social progress for their peoples," then those States opposing migrant quotas could argue that the financial costs involved with accepting quotas would jeopardise the effective increase in the living standards of a part of their population and the achievement of the aim of reducing the gap existing with the Western part of the EU population. This would represent an obstacle to the reduction of regional disparities, which the EU seeks to achieve.

2) The Treaty on the European Union at Article 4 (2) states that: "national security remains the sole responsibility of each Member State". The eventually claiming States could argue, and should provide reasonable evidence, that the allocated quota of migrants still represent a threat for their national security. As for the alleged threat to public order, the claiming State should be able to provide adequate statistical data on the crimes of various types committed by persons qualified as "migrants"and on their involvement in criminal cases. Moreover, the claiming States should be able to demonstrate serious difficulties regarding 1) the capacity of the police authorities to effectively monitor the behaviour of migrants (many of them are likely to behave according to law, others are not likely to respect law), 2) the limited capacity of those authorities competent for providing legal or linguistic assistance in case of involvement in criminal cases of migrants needing legal or linguistic assistance. Furthermore, the display of eventual documented constraints on the limitations of the accommodating capacity of correctional centres and the practical difficulties in building new centres could also become evidence supporting the rejection of an excessive flow of national from third countries.

The issue with public order had been mentioned already by the Slovak and Hungarian Governments as a justification for invoking the invalidation of the Decision EU 2015/1601. The Court has found that the Decision itself allows any State to refuse any particular applicant "where there are reasonable grounds for regarding him or her as a danger to their national security or public order". This would mean that the refusing State should eventually be able to run a case-by-case screening of the identities of the applicants and eventually turn back those who, on the basis of their record, are considered as a threat to public order. This

presupposes that there is information available regarding the record of the applicant and his/her eventual background. This conclusion may make some sense exactly within the scope of the Decision, which is intended to relocate a limited number of applicants (150 000 over 24 countries), as a temporary and urgent measure devised to offer some relief to overburdened EU Member States, namely Italy and Greece. In this case, one may even argue that the hosting authorities would not be overburdened by an excessive inflow while continuing to guarantee the public order and staying within the limits of the financial stability of the public budget. Hence, in this case, the pronouncement of the EU Court seems having been grounded. However, the whole picture could dramatically change in case the current state of emergency (with a massive inflow of migrants) continues to follow similar trends. Should the EU be confronted in the next years with (dozens of) millions of arrivals and should the redistribution of migrants be voted by qualified majority, then dissenting States would have a stronger basis for claiming a threat to their financial stability as well as to public order. The reconstruction of the record of the various applicants would become hardly realistic. Furthermore, the task of preventing crimes entails also the capacity to avoid situations which could lead persons to commit crimes. An exaggerate inflow of migrants would probably create social ghettos, with a high probability of social deviance.

A serious threat to the financial stability and the public order of those States rejecting quotas could/should, if seriously documented, be taken seriously by the Court of Justice. In this case, the Court of Justice would be expected to find a balance between the duty of States to respect 1) those international conventions on refugees and any EU Law on quotas and 2) the legitimate intention of any State to protect and guarantee public order and financial stability within its own borders.

At the moment, the international and EU laws are structured in order to put the needs of the migrant (and eventually asylum-seeker) at the forefront of the process of migration. The historical, political, humanitarian and ideological grounds for this are discussed in the literature (Kisel, 2016). European States feel to offer protection to persons who are persecuted because of their political orientation or personal conditions. Hence, those various legal provisions introduced to regulate the inflow of refugees (inspired by the Universal Declaration of Human Rights) at an EU national or supra-national level set protection standards which appear to be directed towards guaranteeing a safe staying in Europe to third country nationals in apparent danger of persecution in their home country. Nonetheless, these various provisions hardly consider the impact that a massive inflow of migrants may have on the economic and social stability of those societies which are taking a considerable number of foreign nationals, often without sufficient education to find steady jobs. The experience of the recent decade, at least, has suggested that even the most affluent EU states do not have infinite resources available to guarantee decent living standards to the weakest segments of their own population. Consequently, they could find

hard to go on with supporting a growing or in any case hardly sustainable number of migrants who would need to be supported before, eventually, being able to find steady jobs. Moreover, various political parties, with a growing share of votes, denounce the dangers that a strong inflow of persons deprived of education, alien to European culture, eventually angered by harsh living conditions at home, not able to find ideal living conditions in Europe, can actually pose to the security of the citizens of those EU states supposed to offer them asylum.The threat to public security cannot be circumscribed only to terrorist attacks (despite specific prevention is already absorbing resources in many EU countries). Indeed, part of the existing political forces report also how a certain percentage of migrants is constantly involved in petty crime, drug smuggling, burglaries and various types of harassment. Should these political forces be able to provide data, then it might be concluded that a proper prevention and effective sanctions may become unmanageable tasks when the number of arrivals exceed the capacity of existing police and correctional resources (see above).

As said, existing international legal provisions on migrants and refugees hardly account for the serious challenges to financial and public order that a strong inflow of nationals of third countries creates. This is considered as a limitation, in view of the fact that any national authority has the right and the duty to promote, let alone guarantee, security and decent living standards to its own population. A mechanical application of existing international provisions could likely expose at least a part of the nationals of targeted countries to new threats. As said, the EU and any national Governments are responsible for promoting safety and improvement of living standards of their population. The achievement of such an aim would be in jeopardy, should the number of migrants exceed the effective capacity of the various authorities to prevent and sanction crime as well as offering acceptable living standards to the various segments of their populations.

The relationship between any State and its citizens are regulated by the so-called Social Contract, which is the basis of any Constitution. Any State has gained the right to pass law and impose its law to anybody living within its territory (leaving aside the possibility to govern also certain behaviours occurring outside of the State's own territory, see the US Foreign Corrupt Practice Act). On the other side, according to the Social Contract doctrine, the State has conversely the duty to promote security, safety and welfare of its citizens. Specifically, any State seriously failing on its task of preventing and sanctioning crime, of guaranteeing decent living standards to its citizens would fail to perform its task and its very legitimacy of imposing laws would be put into question.

Following the point above, the Court of Justice could be asked to solve a serious legal conundrum should States refusing probable next-to-be permanent quotas challenge the validity of a new Decision. Claiming States shall be able to provide reasonable and serious evidence justifying how the allocated number of migrants would impair their capacity to guarantee security and living standards

of their own populations. Should they be able to comply with this task, then the Court of Justice would be in need of finding a serious balance between the need of protecting asylum-seekers and the legitimacy of refusing an unsustainable number of migrants.

A possible solution could be set at a political level: establishing a reasonable limit to the number of persons allowed to enter Europe and making sure this limit is respected. Nonetheless, the imposition of a limit to the number of migrants would request the capacity to effectively protect not just the terrestrial but also the maritime borders of the EU. This plan may entail a military action and eventually all EU countries may legitimately and reasonably be asked to contribute. The EU, in such a case, may be forced to operate a trade-off: full respect of the international principle on non-refoulement or establishing a limit to the number of migrants. This limit, if set, could/should eventually defended with the use of force, in order to protect public order and financial stability (hence living standards) of EU citizens. The choice is political. Nonetheless, those States insisting on their refusal of an excessive inflow of migrants, and able to substantiate their action with serious evidence of a threat to their financial stability and public order, have a strong legal basis for protecting the safety and the welfare of their own populations. The European authorities cannot take decisions forcing a State to act in a way that threaten the respect of these principles.

Conclusion

This paper's conclusion can be presented in points:

1) The judicial decision of the Court of Justice of the European Union is grounded and sound, as it has established the legitimacy of migrant quotas as a temporary measure in view of an emergency.

2) The EU has the legal competence of establishing migrant quotas on a permanent basis through the Ordinary Legislative Procedure (based on qualified majority).

3) Those States refusing quotas on the basis of a threat to public order and financial stability must provide real evidence of the existence of a serious threat. This would unlikely happen if the number of allocated migrants is not such as to lead to major burdens for receiving States.

4) Should, indeed, the number of migrants become sufficiently high as to impair the capacity of the local authorities to prevent and sanction crime and guarantee decent welfare standards to their own populations, then the States refusing an excessive inflow of migrants and eventually outvoted in the Council would have a legal ground to oppose quotas.

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Re-Thinking the Pervasiveness of Corruption in Western Countries

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Abstract

This paper studies the pervasiveness of Corruption in Western societies. Corruption has often been presented as higher in developing or (former) transitional economies than in the North-West part of the world (Western Europe, North America). Internationally used ranking of countries classified by the level of Corruption (i.e., Transparency International, World Bank) show that most of Western countries are on the safest side. Nonetheless, there are studies (Johnston, 2005; Shaxson, 2011) highlighting that corruption is very diffused also in these areas of the world, even if the available international rankings do not necessarily show Western countries as particularly tainted by corruption. This apparent incongruent result may be due to the forms that corruption takes in Western societies. Though administrative corruption or blatant extortion by public officials may be less diffused than in other areas of the planet, state capture and/or grand corruption (these two sub-phenomena are often equivalent) are present and may take more sophisticated (and less visible) forms. This paper investigates the mechanisms of Corruption in the West, rather than measuring it numerically, through case-studies. The case-study method is useful to research specific mechanisms and to shed light on relatively under-researched phenomena (Bryman, 2016).

Keywords: Western countries, Corruption. State Capture, Grand Corruption, Administrative Corruption

Introduction

This paper studies the pervasiveness of corruption in Western societies, giving special discussion to the patterns of corruption in countries that are generally perceived to be “semi-immune” from the constraint that corruption creates or that are in any case considered to offer an environment where corruption is kept under control. An investigation of such patterns appears to be of importance, considering two inter-related trends. The first trend is that most of the studies of corruption are mainly focused on developing or (former) transitional economies (Jain and Lehrer, 2003; Jannicky and Wunnava, 2003; Grosse and Trevino, 2005; Rijkers et. al., 2014). The second is that there are still concerns related to the incidence of this phenomenon in countries which are nonetheless often portrayed as presenting a transparent environment. Hence, this paper attempts to shed some light on this latter perspective.

This research aims at studying and highlighting patterns and placing them within a theoretical framework. Our approach is qualitative and is informed by the perspective taken by Johnston (2005). Specifically, this paper does not attempt to measure corruption, but to identify and reveal some

of its mechanisms and forms. This represents a complementary perspective in comparison with the one taken by studies that have attempted to quantify corruption and its effects. Both methodologies present strengths as well as shortcomings (in particular see Grogan and Moers, 2001 for a detailed discussion of the limitations embedded in quantifying corruption) and some authors have maintained that any attempt to quantify corruption is constrained in view of the secrecy characterizing specific transactions. Also, corruption may take different forms and patterns and follow different mechanisms which are difficult to capture using quantitative indicators. This is the underpinning of our qualitative approach which, in general, attempts to expose those patterns and mechanisms.

The first section of this paper will present the theoretical basis of the study, and the second will discuss the research methodology in some detail by using two case studies. The third section will discuss the case-studies in relation to the theoretical background presented. Finally, we will present our conclusions and the relevant references.

Theoretical background

This section will be divided into two sub-sections. The first (1.1.) will discuss corruption in general, whereas the second (1.2.) will expound upon particular characteristics of corruption in affluent Western societies.

1.1. Corruption in general

Corruption is defined by Transparency International as Abuse of Entrusted Power for personal gain. There are various definitions of Corruption, nonetheless the one commonly used by Transparency International is endorsed in this paper. Corruption pre-supposes an abuser who is exercising his/her power in a way not consistent with the very rationale underpinning the conferral of this power upon him/her (Rose Ackermann, 2007). Yet, the other side of the transaction (characterized as embedding corruption) may or may not necessarily be a victim of the abuser. It may indeed be that the abuser imposes an obligation on the other party in order to avoid inflicting an unfair sanction or in order to provide a service due in any case (win-lose situation within a game-theory context). Or, it is possible that both the abuser as well as the other player(s) are on the benefiting side (win-win situation), when the abuser is bending rules in favour of the other party or eventually providing a service not contemplated or even forbidden by official regulations. Corruption of the win-win type is hard to curb, as all parties directly involved have an incentive to continue with their game and to keep the illicit side of their interaction hidden.

Corruption may involve only private agents, only public agents, or both types. This paper will delimit the discussion to only those cases witnessing the presence of a private agent who benefits from illegal actions taken by a public official in exchange for illegal compensations or is threatened by a public official in case the private agent refuses to

pay any sort of compensation. This compensation may take the form of money or gifts but may also consist of more sophisticated forms of reward (i.e., appointment to prestigious boards).

The literature distinguishes various types of corruption, though it is possible to identify two macro-categories: Administrative Corruption (Petty Corruption that involves, for example, small transactions with small amounts of money) and *State Capture* (Hellman et.al, 2000; Kaufmann et.al, 2005; Kaufmann et.al., 2007). The former refers to cases when the private agents could be common citizens (or companies) interacting with public officials in their daily activities (i.e., policepersons, clerical employees of local authorities, teachers). Here the private agent bribes in order to obtain a favour or in order to avoid an unjustified sanction (which would make the private agent a victim).

The latter category encompasses illegal transactions occurring between top decision-makers and private agents (affluent individuals and companies) able to purchase their votes or in any case able to exercise a strong influence on the behaviours of the top decision-makers. In such cases the decision makers cease to act according to the perceived public interest, opting instead to operate according to the interest of the capturing side. In this case, politics becomes a privatized activity and the people's top representatives betray their own mandate by transforming themselves into the voice of the capturer. In a worst case the foundation of democracy could then falter as official acts would in reality reflect the preferences of the winners of the capturing side of the game. This game is most commonly played in secret behind closed doors, with negotiations and agreements largely invisible. The capturers may themselves compete with one another to obtain the services of various decision-makers, or may cooperate to create an oligopolistic situation of demand of services, thus resembling the behavior of market players.

Administrative Corruption is usually manifested by agents participating in illegal activities of this type and risking prosecution, even if many settings (countries) are characterized by a certain level of tolerance towards this phenomenon (though prosecutions may occur in order to sanction insubordination or undesirability of the corrupted/corrupting parties in other contexts, hence leading to a sporadic and arbitrary enforcement of law). A win-lose situation occurs when the private agent is threatened with the imposition of arbitrary and unjustified fines (i.e. the police patrol extorting money from drivers who are actually respecting rules) or when the public agent refuses to render a service which is due (i.e. a clerical employee refusing to stamp a document unless a gift is offered). In "win-lose" transactions, as noted earlier, the losing side has an interest in refusing to play or even reporting the winner, and is thus perceived as an inimical counter-party. Nonetheless, there are indeed situations when both parties benefit from the transaction (win-win situations, Von Neumann and Morgestern, 1944). A typical example could be a police patrol who omits to fine a driver who was is actually violating valid rules in exchange for a bribe which represent a

fraction of the potential fine. In such cases parties have an interest in transacting, as both sides benefit from the game. The reward for the public official is normally in the form of cash or a monetizable gift (i.e., a watch, a bottle of wine). Still there are other forms of compensation, eventually less visible, when the bribing agent offers personal favours that help the public agent in solving problems arising in his personal life (such as using the contact network of the private agent).

Apart from the examples provided above, which clearly indicate an abuse of power for personal gain, there are also situations when the connotation is less clear. For example, a public official may eventually bend unfair rules or rules whose application to the specific case would result in an unfair outcome. The party which receives the aid is eventually manifesting his gratitude in various forms (such as proportionate gifts, favours, etc.). This form of corruption is not necessarily unethical or is maybe not really representative of a case of Abuse of Power. It can be defined as *humanitarian corruption* (author's italics), even if such a term has not been used in the previous literature.

In general, State Capture takes more sophisticated forms in comparison with Administrative Corruption. Negotiations occur at high levels, in prestigious circles and are eventually supported by well elaborated requests. The party attempting to capture the decision-maker(s) may actually come with refined studies and technical arguments in favour of his request. The compensation for the availability of the decision-makers to please the interest of the capturing party may manifest itself after the former leaves the office, such as the offering of prestigious working opportunities. The main reasons that help to explain why the curbing such phenomena is difficult are:

a) Distinguishing between an illicit reward given to a captured public agent from what could otherwise be the legitimate acceptance of a normal position (or acceptance of an appointment after, or even well after, a political mandate has terminated) can be challenging. One may be reminded of the cases involving former German Chancellor Schroeder and of the former President of the EU Commission Barroso (https://www.theguardian.com/business/2006/mar/31/russia.germany; https://www.theguardian.com/business/2016/jul/08/jose-manuel-barroso-to-become-next-head-of-goldman-sachs-international). Both of these gentlemen were awarded top positions in the private sector after the termination of their respective mandates (almost 2 years elapsed in the case of Barroso). This type of appointment may raise concerns regarding the integrity of the particular persons involved. Yet, one could be cognizant of the right of the former public agent to continue to have a professional life after the conclusion of his/her public mandate.

b) A further characteristic of State Capture is the particular form of payment which occurs when transactions are accompanied by an actual transfer of money. Above and beyond the sums evident in Administrative/Petty Corruption, money is often sent through international bank transfers. Clearly, the payer and the beneficiary will not appear in the documents in their own names. A web of anonymous bank accounts and companies whose

ownerships are not disclosed are examples of effective vehicles for transferring huge sums of money with reduced attention. Bank accounts and companies can be held in tax havens or in countries where money laundering occurs on a regular basis. Some of these countries (or independent territories) are known to be less-than-cooperative with investigative authorities. This particular phenomenon has been described by Shaxson (2011), and is one widely considered to be largely unaddressed by those official public representatives whose mandates should require them to curb it.

As stated by Johnston (2005), some of the processes of influence used by private agents on top decision makers has been legalized. Lobbying is a legitimate and regulated activity in many countries. Certainly, there are no known provisions to openly allow State Capture, and top decision makers pressured to be bound to an allegiance to their constituents' interests and to the public interest in general. Nonetheless, private agents/companies (through their representatives) are allowed to present their self-serving points of view, studies, and arguments to top decision-makers. Both sides openly interact, meet at social events, or at other venues of various types. Thus, communication between public decision-makers and a private company's representative, for instance, cannot be eliminated, nor should it be according to those who hold that such representation can also work to the benefit of society as a whole. It can be argued that the general public could be ill-served if their officials were deprived of the possibility of having contact with, and information from, representatives of the various economic sectors. Nevertheless, one may easily imagine how these contacts and their frequency may facilitate illicit arrangements. Existing regulations imposing transparency (Lobbying Disclosure Act, 1995) are certainly appropriate but their successful enforcement depends also, and in great measure, upon these very parties involved in a State Capture scenario.

State Capture is a win-win game in that both sides benefit from it. Hence, only a possibly damaged third party (i.e., representatives from a sector not benefiting from the process) would have an interest in interrupting the game. But, and on the other hand, these other parties, instead of complaining, may tend to cooperate in the process of State Captures and allocate "market quotas", with mechanisms that resemble *cartels* in the business sector.

The last point discussed in this sub-section (which discusses corruption in general) is that corruption is actually measured by various organisations such as Transparency International, World Bank and Heritage Foundation. Countries are ranked on the basis of the assessed level of corruption, as defined in various ways. The methodology for measuring Corruption has been criticized by some authors (Thompson and Shah, 2005; Feige,1998, 2012,2015). Nonetheless, the various ranking positions of the countries tend to be significantly correlated, which reinforces the usefulness of the ranks themselves (Podda, 2010).

1.2. Corruption in affluent Western Societies

Western Countries are defined here as North-American countries and those European Countries which were not associated with the Socialist block during the Cold War. This latter category is basically composed by the pre-2004 enlargement of the 15 members of the European Union, plus Norway and Switzerland. These countries have been considered as a block of developed market economies in the literature, traditionally considered to belong to a different category if compared with (former) transitional and developing economies. Moreover, these countries have normally (in general and traditionally) be placed among those less affected by Corruption in comparison with the others present in the rankings mentioned above.

The validity of the rankings of Western countries offered here may be questioned. For example, Italy's ranking is shown to be below other former transitional economies in the most recent ranking of corruption. The Czech Republic is nowadays a full market economy, classified as a developed economy by the World Bank and, thus, one may legitimately maintain that it also belongs to the group of Western countries. While accepting these potential criticisms, the categories presented seem to be still worthy of consideration. Western societies, as defined here, have been considered as a unitary category in the most recent generation of economic studies, especially in view of the fact that they have been organized as long-term democracies and have been led by market economies for the last 70 years. According to those international agencies that measure corruption, the standards of transparency in these countries have traditionally been higher than in former transitional economies. Moreover, Corruption is path-dependent (North, 1990,1997, 2003, 2005) and is embedded in the cultural and historical roots of any society. These latter are resistant to change, especially if one considers the patterns that Corruption takes rather than focusing on a quantitative measure of it. This is actually the scope of the present paper, on the basis of a model developed by Johnston (2005) which will be presented in this sub-section and which will serve to reinforce the validity of the present classification of countries.

As previously noted, Western societies present, in general and on historical average, a perception of a higher level of Transparency or, equivalently, lower standards of Corruption than do developing and former transitional economies. For this reason, they are often portrayed as settings where corruption is kept under control, does not have a strong incidence, and does not distort economic and social dynamics and equilibria. Nonetheless, this favourable picture would clash with the conclusion emerging in various studies. Petrillo (2010) highlighted the incidence of lobbying as a *precursor* of State Capture, whereas Shaxson (2011) describes at length the mechanisms of State Capture in some of the countries (i.e., Switzerland, Luxembourg, USA, UK) which top the ranks of Transparency. The governments of the countries under the observation of Shaxson (2011) have reportedly built a web of connections, to include legalized tax evasion and money laundering. The picture evident from these studies is quite bleak

and does not fully correspond to the favourable portrait offered by Trasparency International and other organisations measuring Corruption across the world. This discrepancy may appear puzzling.

An explanation can be found in the work of Johnston (2005) who had already addressed the problem earlier than did Shaxson (2011). Johnston expounds upon the limitations of those methodologies extant to measure corruption. Corruption is often invisible and can hardly be measured directly, as noted by other authors such as (Grogan and Moers, 2001). For example, the amount of money paid in bribes is not recorded and estimations cannot, by lack of commonly accepted definition, be precise. In addition, the compensation for the bribed agent is, as said in the preceding sub-section, not necessarily expressed by a sum of money. A more direct measure of corruption may be given, for example, by the number of convictions in the various countries observed. However, this would be a poor indicator because corruption, when pervasive, permeates also the behaviours of judicial operators. Thus, a higher number of convictions may, paradoxically, indicate a comparatively low incidence of Corruption. Some surveys (i.e., BEEPS, 1999, 2003, 2005, 2007) have attempted to capture direct measures of perceived (author's italics) corruption (i.e., the amount of money paid or incidence of the phenomenon using a Likert scale). Nevertheless, respondents are tempted to offer the „Socially acceptable answer" in such studies (i.e., Bernard, 2000) even when the interviewer pretends he is asking about the general trend in the sector and not about the direct experience of the respondent. The case is rested here but there would be other reasons for defending the idea of limitations on the validity and reliability of direct measures of Corruption.

As a consequence, Corruption is often measured indirectly, for example on the basis of the perceptions held by people living in a given country, as done by Transparency International. Nonetheless, perceptions may not be a valid representation of reality. In particular:

a) Different communities may manifest a more or less optimistic/pessimistic attitude towards vis-a-vis estimating the pervasiveness of corruption because of cultural factors.

b) State Capture is less visible than Administrative Corruption and Petty Corruption. The former happens in corridors and actors are the few people in position of power, whereas the latter involves the majority of citizens as direct actors. Hence the measure may be biased in favour of those countries where State Capture is more pervasive and Petty Corruption is rare. Those places described as tax havens are often corresponding to the State Capture category.

c) Importantly, however, common citizens tend to see corruption as defined as a direct payment of a bribe to a public official. The general public may not perceive, then, the complexities of State Capture as a representation of real (author's italics) corruption, especially when certain activities (i.e., lobbying), which in practical terms have been legalized. State Capture is a win-win game, whereas Administrative Corruption may also be a

win-lose game. Hence, in the latter case, there are more incentives to bring cases to the fore.

Moving from the ideas discussed above, Johnston (2005) proposes to study corruption more in terms of patterns and mechanisms (qualitatively) than in quantitative terms. This perspective represents a complementary approach to understand and appraise the phenomenon. Quantitative and qualitative approaches are considered to be complementary by the literature on research methods (quote here). Johnston (2005) identifies four types of corruption:

1. Influence- political decision makers strongly responsive to the requests presented by private individuals or groups. This is what has been termed State Capture. Influence represents the prevalent form of Corruption in those Western countries (USA, UK, Germany, France but also Japan) which are considered most developed in terms of institutions, and occupy favourable positions in the rankings of corruption. This type of corruption is actually often legalized. Those societies characterized by an influence type of corruption tend to experience lower levels of Administrative Corruption.

2. Elite Cartel- „corruption occurs among, and helps sustain, networks of political, economic, military, bureaucratic, or ethnic and communal elites, depending upon the society in question" (Johnston, 2005 page 3). Examples are Italy, South Korea and the Czech Republic

3. Oligarch and Clan- "corruption takes place in a risky, and sometimes violent, setting of rapidly expanding economic and political opportunities and weak institutions. It is dominated by figures who may be government officials or business entrepreneurs, but whose power is personal and attracts extensive followings". Examples are Russia, Mexico and Philippines.

4. Official Moguls- "are government officials, or their proteges', who plunder an economy with impunity. Governmental institutions and political competition are weakest in these categories, and economic opportunities are often scarce and bitterly contested. A statistical analysis in chapter 3 uses measures of participation and institutions to assign about one hundred countries to these four categories."

Consistent with the scope of this paper, the next section will concentrate on the mechanisms of Corruption in some of those countries affected by the Influence (author's italics) form. The bulk of these countries is represented by those Western economies which tend to score quite favourably in the ranks mentioned in the previous parts of this paper.

Case-studies

This section is divided into two parts. The first (2.1.) recaps some general characteristics of the case study as a method of research and explains the suitability of this method in the current study. The second section (2.2.) presents the two cases that will be explored in this paper.

2.1. The Case Study as a method of research and why it was selected as the method of the study herein

The Case Study is a method used to shed light into specific phenomena happening in a circumscribed context (Denzin and Lincoln, 2000; De Vaus, 2002; Remenyi et.al., 2015; Bryman, 2016). Case studies are used to reconstruct stories, identify mechanisms and patterns of interaction, decisions, and the application of standards. A case study should not be expected to generalize (as case studies are qualitative and not a quantitative method of research). Indeed, expecting generalization would reveal fundamental misunderstandings regarding the scope and aims of research based on a case-study. Actually, case studies are used as a basis for clarifying relationships emergent following a quantitatively – based study or, alternatively, can be used within a strategy of exploratory research perspectives; the emergent patterns can then be operationalised into statistical variables and used in further quantitative studies to help promote the generalization of results. Our paper makes use of case studies in view of highlighting the mechanisms of the decision-making processes, not to imply any form of generalization to the processes noted. The information outlined in the case studies presented herein was obtained exclusively from open media reports. The sources used were not academic in nature. However, the information reported herein is considered to reflect the reasonable, extractive veracity of any reporting to the public as a whole. Moreover, the collective reportage was reported to stem largely from the persons directly involved and is, thus, thought to be persuasive to large segments of the popular rank-and-file.

2.2. Two case studies: the "Affaire Fillon" and the "Flint Case"

(Author's Note: This section contains information obtained from open sources and reflect the opinions of the publishers, as well as the perspectives that are believed to be reasonably drawn by the readerships of the sources cited.)

The first case occurred in France and involved the Prime Minister and presidential candidate Francois Fillon (www.lefigaro.fr; www.lepoint.fr). The French publication Canard Enchaine', earlier in 2017, reported that the wife and children of the candidate were employed directly by him as assistants to a member of parliament, and by a magazine sympathetic to Fillon. Though they received exorbitant salaries (partly paid through the use of state resources) they allegedly did not perform genuine work, as would be expected. The source magazine insisted that the director of the publication employing Mrs. Fillon received a state honour directly from the French president following an endorsement from Mr Fillon. Mr. Fillon maintained that all of the members of his family contributed to the organization of his political activities and were selected because of the trusting relationship existing between them. Mr. Fillon further maintained that that he did not violate any law extant, further claiming that the case against him had been organized by his political opponents, and especially those competing against him for the election of the next French president. He went so far as to question the professionalism of the media

involved in investigating the case. Canard Enchaine' then admitted having exaggerated (bona fide) the amount of compensation received by the family members of the presidential candidate and also finally stated that their employment by Fillon and by the publication in question were not necessarily illegal acts. There was still, they noted, significant cause to doubt the morality of the actions of all the persons involved, including Francois Fillon himself. Citing that Mrs. Fillon had long denied having ever worked for her husband, and that the director of the publication employing her had declared her actual contribution to the magazine (inconsistent with the work load that would have been expected) to have been only symbolic and, hence, the salary paid to her would have hardly been justifiable. Comments from other French politicians tended to be either favourable or unfavourable, depending upon their relative support of Mr. Fillon, politically. Another presidential candidate, Marine Le Pen, invited Mr. Fillon to withdraw from the presidential campaign, but this came amidst strong allegations of corruption and nepotism having occurred within her own party. Mr. Fillon himself had blocked a legislative proposal that aimed to increase transparency regarding the behavior of members of parliament, but a formal investigation has been opened nevertheless into the possible embezzlement of public funds and abuse of power.

Given the preceding points, it could be presumed reasonable to induce some opinions from the case:

- A high-profile political representative employed his family members, paying them through state resources
- A private employer of Mrs. Fillon, who paid her significant monetary sums for an admittedly symbolic workload, received a state honour after the endorsement of Mr. Fillon
- Mrs. Fillon has long denied having ever worked with/for her husband, though such practices seem to go unimpeded in France; this is possibly more significant, taking into account that Mr. Fillon had earlier blocked a legislative proposal aimed at increasing transparency in government.

Another reported corruption case example occurred in Flint, Michigan in the USA. Here the state's governor, Mr. Rick Snyder, implemented policies that were very controversial to most observers. First of all, he appointed an Emergency Manager accountable to himself alone, de facto bypassing elected assemblies in the name of the urgent need to rapidly stabilize the precarious financial and social environment he had inherited (https://www.nytimes.com/2016/01/23/us/anger-in-michigan-over-appointing-emergency-managers.html). Secondly, he offered significant tax breaks to wealthy individuals and companies, and he also cut benefits for the poorest segment of the population (https://www.forbes.com/sites/erikkain/2011/03/15/michigan-governor-to-cut-taxes-for-corporations-while-cutting-services-for-the-poor-and-middle-class/#28ebc2c41a0b). Thirdly, in 2014 he approved that the city of Flint would stop sourcing water from Lake Huron and would instead

source the water from a local river (https://edition.cnn.com/2016/03/04/us/flint-water-crisis-fast-facts/index.html). This choice was stated to have been motivated on the basis of cost-savings. However, the savings seem to have been, at best, minimal, whereas the quality of the water from the local river was reported to be very much in question. The water was known to be polluted from the discharge of local companies which themselves, however, were allowed to continue sourcing from Lake Huron (the cleaner water that was now denied the residents of Flint). Not surprisingly, diseases spread among residents and researchers at the nearby Hurley Children's Hospital identified a rise in blood lead levels of children less than 5 years old living within two Flint Zip codes since the city began sourcing drinking water from the Flint River (The Detroit News, 15 November 2017). It is not only lead poisoning that has come out of this crisis. The number of cases in Flint of Legionnaires Disease increased tenfold since the switch to the river water and at least twelve people died as a result (Huffington Post, 15 June 2017). The change in water supply had a catastrophic impact on the city of Flint, leaving its residents looking for answers" (Huffington Post). Snyders did not deny the evidence, however he maintained that he had not been informed of the poor quality and un-healthfulness of the water from the local river. Observers noted that his statement was hardly believable, considering that the situation was a major topic in media reports as well as a rampant discussion point among the general public. It was also reported that top collaborators of Snyder were well aware of the problem from the very beginning of the scandal (https://www.theguardian.com/us-news/2016/jan/21/flint-water-crisis-emails-reveal-governor-snyder-informed-of-problems-a-year-ago). Snyder himself had allowed General Motors, who operates a plant in the area, to source its water from Lake Huron, following a complaint from the company according to which the water from the local river was corrosive (https://www.acs.org/content/acs/en/education/resources/highschool/chemmatters/past-issues/2016-2017/december-2016/flint-water-crisis.html).

Of significance were other developments negative to Governor Snyder that influenced the public perception of the Flint case: In November 2016, Governor Snyder himself was sued under the RICO Federal Racketeering statute (usually used against gangsters) (https://www.theguardian.com/us-news/2016/apr/06/flint-water-crisis-racketeering-lawsuit-governor-rick-snyder; https://www.esquire.com/news-politics/politics/news/a43742/lawsuit-flint-rick-snyder/), and five Snyder-connected officials were charged with involuntary manslaughter in the wake of the Flint case (https://www.washingtonpost.com/news/energy-environment/wp/2017/06/14/top-michigan-health-official-charged-with-manslaughter-in-flint-water-crisis/?utm_term=.282410fde352).

A discussion of the case-studies

The cases presented herein contain some similarities and, even if adopting a favourable attitude towards the decision makers involved, there seem to be conflicts of interest at the very

least. Fillon had been entrusted with the power to select his own collaborators in order to choose those that would better serve him directly and, indirectly, the general interest he was supposed to defend. Furthermore, public honours should be conferred upon persons who have served the state and/or community, excelled in a particular area, or served as a positive example for others to follow, or eventually performing an extraordinary action of series of actions. Fillon, as member of parliament and Head of Government, had been entrusted with the power to select those assistants who were particularly suitable to help in his service to the public interest (presumably due to their competence to do so). Moreover, he was entrusted with the authority to propose a person to be awarded a honour when he genuinely felt that this person met the corresponding requirements. The appointments of close family members and the proposal of honours for close acquaintances who had also employed and generously remunerated his spouse of the very proposing agent are questionable acts from the point of view of transparency, and leaves legitimate cause for suspicions (using the "beyond any reasonable doubt" criterion) that this political agent had not respected the criteria he was expected to follow. Indeed, there is a suspicion, logically bordering on presupposition, that Fillon exercised his power in order to reach goals different from those with which he had been entrusted (i.e., the satisfaction of his family members and compensating the employer of his wife). It is also reasonable to infer that the financial benefits realized by his family members had been co-used also by Fillon himself. Hence, appointments and honours proposals became means to increment the personal income of the very agent elected to serve the State at the highest levels. The financial payments that accrued to the Fillon family were obtained from public funds and also from private funds, presumably paid in exchange of favours such as the conferral of a state honour. As for the case of Flint, the governor was reported to be manifestly in a position of conflict of interest when he allowed a multi-national company that was presumed to have been financing his political activities in order to obtain its water—water that was filtered and distributed through state resources – from a source unavailable to the general public. An abuse of power was suspected, as well as further issues associated with the concept of Corporate Social Responsibility on the part of the company involved. It is further noted that the official rationale for changing the source of water was the need to save costs in view of the precarious balance of in local financial resources. However, this balance reportedly worsened because of the tax-cuts (benefiting the wealthier tax payers and companies) that were introduced by Snyder (https://www.forbes.com/sites/erikkain/2011/03/15/michigan-governor-to-cut-taxes-for-corporations-while-cutting-services-for-the-poor-and-middle-class/#28ebc2c41a0b).

As for the specific features emergent from the case reviewed herein, there are some points of notice:

First, there is much anecdotal evidence suggesting that these types of manipulations or abuse of power are not uncommon in the countries where

they have occurred. (https://www.theguardian.com/world/2001/may/10/jonhenley; http://www.thejournal.ie/le-pen-aide-3253815-Feb2017/; Grossman, 2003).

As noted previously, case studies do not readily support generalization, nor are they intended for this purpose; they are intended to provide information regarding the patterns and mechanisms of a given phenomenon. Thus, case studies complement statistical measurements, which are not themselves given to the investigation of patterns and mechanisms. Nonetheless, the revelations with regard to repetitive cases of abuse of power at the top political levels in Western societies reinforce the idea that the two episodes described in the previous chapter are far from representing deviations from a presumed ethical norm.

Moreover, the behaviours of the persons involved in the affaire Fillon seem to be indicative of a clear case of blatant nepotism and cronyism. On the basis of this, the pervasiveness of cronyism, which traditional literature sources tend to associate with the environments of developing countries (Jain, 2001; Jain and Lehrer, 2003), emerges in worrisome dimension also in a country like France (which is ranked quite favourably by the more competent international organisations measuring Corruption).

With regard to the second case, the behaviour of Mr Snyder, as reported, indicates how State Capture can lead to choices that can even threaten the health of an official's constituents. The political decision-maker can go even further than simply introducing laws favourable to the capturing agent (as suggested by Johnston [2005]). Indeed, the behaviour of Snyder seems to guarantee privileges to the capturing agents at the cost of jeopardizing the presumed rights of his constituents.

Though it appears that both Fillon and Snyder may have acted within the letter of the law, questions continue; clearly, the moral illegitimacy of their behaviours is far from established. Fillon is, to be sure, entitled to appoint his assistants among persons of his choice (to include family members) and he is also entitled to propose the conferral of honours to any person deemed worthy of it. Equivalently, Governor Snyder may not have violated any law, while ostensibly to save costs by finding an alternative source of water (but at the same time guaranteeing an exception to a supportive company). However, the thrust of the message herein is that top political leaders appear to abuse the accepted norms of behaviour and to use the discretion entrusted to them in order to satisfy their personal interests and those of their close acquaintances or sponsors. This is done, without question, at the expense of the honest representation of the interests of the people who gave them their trust. In some cases, political agents seem to act in accordance with the habits and practices normally attributed to developing countries, not the "developed" (author's quotes) world.

This picture creates special concerns because of the difficulty to reconstruct cases like the two described herein, and to prosecute the actors. State Capture and nepotism could be easily seen

to be diffused among the whole spectrum of political parties, thus creating an oligopolistic market with a tacit agreement of the parties concerned. Information does leak out from time to time, however, sometimes due to the plans devised by political opponents, interested in shedding a negative light on their rivals (as exampled by cases of law enforcement in the Soviet and post-Soviet satellite countries [Fiege, 1998]).

The whole discussion raises points which shed a less benevolent light on some countries normally considered to be resistant to corruption. It may be that corruption of the petty type is little diffused in the West. However, it would appear that the top hierarchical levels of public administration are more permeated with practices similar to those existing in developing countries that was originally thought. The public may not directly feel the extent of malpractices within the highest levels of the Public Administration, exactly because it is not a direct witness of them and do not easily notice a direct burden in their daily lives. Moreover, the actors involved operate within a win-win context and have consequently no incentive in reporting the episodes. Therefore, the overall Perception about Corruption may not reflect its actual pervasiveness at the highest administrative levels and provide the wrong impression of Transparency as a common characteristic of the developed Western countries. This combination of factors may explain the relatively favourable position occupied by North-American and European Western countries in the ranks of Perception of Corruption developed by Transparency International and the World Bank. The large majority of citizens is unaware of the particulars associated with the illicit machinations happening at the higher levels of political and economic power. Indeed, they are less likely to be confronted with requests for bribes from those low-to-middle-level public officials than persons living in developing and transitional countries are (petite administrative corruption). This is perhaps the reason why the several Western countries are generally presumed to be relatively transparent, especially when compared with former Socialist and developing countries. Indeed, the two case studies topically outlined herein indicate how behaviours that could be interpreted to be corrupt (author's italics) can also occur in presumed transparent (author's italics) countries, even among those persons elevated to exercise the highest level of diligence and responsibility to protect the welfare of their citizens. Political or administrative actors of this type of sometimes misbehave in apparent disregard for ethical principles. Sometimes this occurs within the letter (author's italics) of the laws extant, but certainly not within the spirits thereof.

Conclusion

Our paper topically explored certain mechanisms of corruption in two affluent Western countries. The results indicate that political decision-makers sometimes behave in ways incompatible with the interests of the people they are supposed to represent, which constitute abuses of power. The overall picture emerging is a bleak one, represented in the typology developed by Johnston (2005), in which corruption in Western societies is depicted as a sophisticated form of State Capture.

Indeed, the practices are quite worrisome, presenting challenges to the representation of Western societies as being able to control corruption. Complicating the issue is that most misconduct happens outside the view of the public, with the principal actors having an interest in not reporting one another (win-win), and with the activity even occurring many times within the bounds of legality (author's italics).

Certainly, more exploration should be undertaken in this area. The use of qualitative as well as quantitative research methods could broaden the perspective in order to help obtain a complementary and comprehensive overview of the phenomenon.

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