QUEEN MARY PHD CONFERENCE
PUSHING LEGAL KNOWLEDGE BOUNDARIES
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ABSTRACTS OF PAPER PRESENTATIONS

Session 1A - Criminal Law

Chair: *Professor Valsamis Mitsilegas, Queen Mary, University of London*

I. 'Regulating Immigration Through Criminal Law: The Case of Immigration Crimes'
Ana Aliverti, University of Oxford

This paper analyses the recent expansion of immigration offences and the reasons for relying on the criminal law and its institutions for immigration enforcement. Particularly, it looks at how the criminal-immigration system works in practice. Interviews conducted with practitioners and policy-makers show that many of the numerous immigration-related crimes in the books are barely enforced (such as overstaying, illegal entry, obstruction or assault of an immigration officer, etc.) and offenders when caught are still often administratively removed rather than criminally prosecuted. Others sources (analysis of court cases and statistics) reveal though that a handful of these offences are prosecuted in certain circumstances and against certain offenders, and that criminalisation is a relatively frequent experience for certain immigrants. This paper explains why and in which cases the criminal law machinery is activated to prosecute immigration offenders. It also shows the practical, legal and institutional problems of criminalising immigration status.

II.'Ethnic Albanian Organised Crime: Myth or Reality', *Fabian Zhilla, King's College London*

There has been a growing concern on the intricacy of Ethnic Albanian organised crime and its influence on the politics both in national and international level. Recent international reports portrait Ethnic Albanian organised crime as ruthless, with strong family ties or clan structures, closely connected with political elite and with a wide spread criminal activity. The domestic typological approach, however, stands quite in the opposite. Many Albanian experts think that there is a limited organised crime in the country and this mythical approach is mostly boosted by internationals. According to Albanian prosecutors there are only few criminal groups, with a very limited criminal activity and that operate in short terms. It appears that there exists a typological confusion between domestic and international experts.
We demonstrate that this contradicted approach comes as a result of four main factors. First, definitions of organised crime in the Albanian criminal system are not genuine but imported either by international conventions or from several western countries in the region. They seem to not reflect the social-cultural aspects of Albanian organised crime.

Second, with the era of globalisation, the typology of Ethnic Albanian organised crime in Europe and in Albania is changing and it is becoming more 'westernised'. This has had a profound influence on the typology of the group. Third, the perception of Albanian experts is highly influenced by Italian mafia-type model of organised crime. Italy shares the sea border with Albania and its legal and cultural influence to Albanian criminal system is significant. Fourth, majority of the criminal activity of Albanian organised crime is mostly conducted outside the country, in the EU states, and Albania is used by them as a residual and an investment setting.
Data collected from the field work shows that the typology of Ethnic Albanian organised crime in Albania and Europe more broadly is not as sophisticated and exotic as it is portrayed by the literature. To support our findings we compare several Ethnic Albanian criminal groups recently convicted by Albanian and UK courts. This study builds upon the field work conducted in Albania and England during summer 2010.

III. 'A Concept of Fair Criminal Evidence in Europe Derived from ECHR and ECHR case law' *Theo Karvounakis, Queen Mary, University of London*

The paper explores the characteristics of a concept of fair criminal evidence in Europe that can be utilised by the EU in its further steps of integration in the area of European Criminal Law. Transnational gathering and use of evidence is one of the areas that currently attract a lot of attention and have given rise to significant controversy within the European Union. The goal of this paper is to show that fairness as a legal concept has a central role in evidence matters and can help as a platform for a more functional transnational cooperation in criminal matters within the EU. Speaking about fairness in Europe, one inevitably thinks of Article 6 of the European Convention on Human Rights, which although written for other purposes and under specific historical circumstances, constitutes a coherent dogmatic approach on the matter. In other words, the Article 6 of the ECHR can be interpreted in terms of evidence law. Moreover, the Court's standing on evidence matters with which Article 6 is directly or indirectly constellated, contributes to the formation of this very concept.

Session 1B – Competition & Corporate Law

Chair: *Prof. Alan Dignam, Queen Mary, University of London*

I.'The Constitution of Carbon Trading' Sabina Manea, London School of Economics and Political Science

Emissions trading has emerged as the regulatory mechanism of choice in addressing the perceived effects of climate change, and has been adopted at EU level in the shape of the EU Emissions Trading System (EU ETS). Participation in emissions trading is not restricted to EU ETS regulated entities; financial institutions for instance can trade for investment purposes. One of the consequences of emissions trading having originated in environmental policy is that the constitutive regulatory instruments have not specified the legal nature of the rights of ownership to which emissions allowances give rise once they are held and traded in the private market. It remains unclear whether they give rise to a fully fledged private property right, a more limited type of property right or a personal right. Defining the nature of the right in emissions allowances would not be of significance if emissions trading as currently embodied in the EU ETS had been designed

as a purely regulatory mechanism of environmental protection. The openness of the emissions market beyond EU ETS regulated entities renders it necessary to know what sort of rights the EU ETS has created in the market instruments, so that market participants can be certain that they can own the instrument, transfer the instrument and enforce this right of ownership against others (including the issuing authority) if challenged. The consequences of defining the right in emissions allowances have potential ramifications in two areas which are particularly important in view of the fact that emissions trading has created a new private market. These areas are contract and commercial law, and the financial regulation of the emissions market. Defining the right in contract and commercial law and articulating the shape of market regulation will depend on which definition and shape achieve the best results in terms of environmental protection.

II.'What caused the rise of Business Corporations? An analysis inspired by the Middle Eastern Experience' *Zubair Abbasi, University of Oxford*

There have been various competing and often conflicting claims behind the rise of business corporations and corporate structures. This paper intends to trace the rise of corporations under English law by comparing the English experience with that of the Middle East, which failed to develop corporations indigenously. This is said to be because Islamic law and legal institutions that were inefficient for the accumulation of resources. The law of inheritance did not allow the accumulation of wealth and the strict prohibition of interest deprived the business from credit finance. The institution of *waqf* (Islamic trust) devoured large resources but it could not develop into a self-organizing institution. Additionally, Islamic law does not recognise the impersonal juristic personality and independent evidentiary value of documents. However, the analysis of the patterns of the development of business organizations in Europe reveals that the joint stock company was a creative response to the peculiar political and economic conditions of Europe. The competitive overseas trade required large resources for longer periods of time and a new form of business was needed to facilitate resource pooling. European governments wanted to generate revenues and expand political influence by issuing charters. Industrial Revolution promoted and facilitated the development of corporations in capital and labour intensive ventures. The Ottoman Empire, on the other hand, did not participate in the overseas trade and exploration. Moreover, it discouraged the formation of business organizations fearing their powers. The stagnant economy did not generate any need for permanent business organizations like modern corporations. This paper provides an alternate explanation of the rise of corporations in Europe by highlighting the role of state and private sector.

III. 'Leniency & Individual Liability: Opening the 'Block Box' of the Cartel' *Florence Thepot, University College London*

The purpose of this article is to examine the interplay between two competition policy enforcement instruments- leniency policy and individual liability, by opening the 'black box' of the cartel, with the analyses of interactions both among the cartel members and within each company. The interplay of these instruments translates into a two-dimension system: the vertical dimension is formed by the cartel members; the vertical one by the interactions within each cartel members. We base our analysis on the theory of the firm, advocating the separation of ownership and control[1], and on the theory of agency[2] that states the principles of inherent moral hazard problems between the principal (owner) and the agent (manager). The reasoning is carried out along economic

and legal literature on collusive agreements, leniency programmes and individual liability[3]. The economic literature also gives key insights on corporate governance issues that are relevant in cartels, through game theoretical approaches. Theoretical insights will help to understand why cartel activity is a matter of agency and governance issues. The subsequent section will be dedicated to the examination of individual liability and corporate leniency policy, in the light of agency issues. Individual leniency policy will be assessed in the last section: individual leniency programmes, never applied for, are nonetheless efficient because affecting both the interactions between cartel members and within companies. We show how opening the 'black box' of the cartel is of primary importance when assessing the efficiency of leniency and individual liability. Agency issues shape the interactions between actors operating in both dimensions of the system under consideration, i.e. between the principals and the agents of the firms of the cartel.

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[1] Berle and Means, The Modern Corporation and Private Property, Chicago, Commerce Clearing House, 1932.
[2] Jensen and Meckling, 'Theory of the firm: Managerial Behavior, Agency Costs and Ownership Structure', (1976) 3 (4), J Financ Econ.
[3] Mainly on the works by Wils, Hammond, Spagnolo, Aubert, Chen.

Session 2A – Intellectual Property Law

Chair: *Prof. Uma Suthersanen, Queen Mary, University of London*

I. 'Between Copyright and Copyleft: Collective Authorship in Wikipedia' *Daniela Simone, University of Oxford*

The *Copyright Designs and Patents Act 1988* provides that copyright subsists in original literary works and that the author of such a work is the owner of the copyright subsisting in it. The paper considers the case of Wikipedia, which poses a unique challenge for copyright law's rules of subsistence. It is disputable (a) whether Wikipedia might be recognised to be an original (collaborative) literary work, and (b) whether its contributors might be recognised as authors, and thus, copyright owners. These two problems originate from the peculiar creative process by which the contributors to Wikipedia operate. Wikipedia is a constant work-in-progress which results from a wide range of contributions, although those contributions which the Wikipedia community consider to be valuable might not necessarily amount to 'authorship' as understood by copyright law. Wikipedia is created by a mass of contributors separated by distance and time making the application of the classical test for joint authorship problematic. Further, typical of Web 2.0 developments – which react to the previous idea of the Web as a static space where producers and users of information have fixed roles – Wikipedia is characterised by an increasing disappearance of the line dividing 'reader' and 'writer'. Contributions to Wikipedia are facilitated by a non-profit culture of sharing which operates within the normative framework provided by copyleft licences and the set of social norms recognised by the Wikipedia community. Interestingly, although copyleft licences are intended to create a copyright-free zone, in fact, they operate on the assumption of the continuing validity of copyright law standards. An idea of collective authorship emerges from this discussion of the core aspects of creation on Wikipedia. The paper aims to offer a critical analysis of the relationship between this idea and the concept of a work of joint authorship in copyright law.

II. 'Current Trends in IP Collateralization and Securitization', *Marilee Owens-Richards, Queen Mary, University of London*

This presentation would focus on the promise of the reality of using Intellectual Property Assets as collateral or in securitization. Traditionally four problems have been viewed by academics as being as a barrier to the use of IP in these debt based financing deals. The first one is the perception that IP valuation is not accurate and poor valuations posed more risk to investors then other more types of assets. The second is the inherent difficulties obtaining a security interest over an IP right, which varies in complexity by jurisdiction. The third is the risk that the IP asset may be destroyed or devalued if the transaction is not structured correctly. The final one is whether an IP asset can be retrieved by the investor upon the insolvency of the owner.
The presentation will examine whether these traditional blocks are still a factor and what the current state of the market really is. Instead it will be suggested that the numbers of IP securitization are down merely because the overall number of securitizations are down. Furthermore the presentation will show that using IP as a security interest has only increased.The final aspect of the presentation will discuss possible reasons the great amount of secrecy around IP collateralizations and securitizations and give possible reasons for it which dismiss the traditional theory that IP is different from any other kind of asset.

III. 'Agrobiotechnology, Global Intellectual Property Laws and Biopolitics', *Mizanur Rahaman, University of Kent*

Profound technological changes in the last few decades unfolded many transformations in the economic, social and political sphere. More specifically, rapid advances in agrobiotechnology and the protection of new inventions through global intellectual property laws have called into question the traditional notions of development, production, invention and creativity. The shifting discourse on technology-led progress signalled toward a changed perception of modern emancipation and its pervasive effect on life, law and economy prompted us to a 'new forms of life'. In this emerging 'forms of life' the existence of the 'biological' no longer remains natural, neutral and unchanging. Rather it is superimposed in the domain of advanced agrobiotechnology. The appropriation of valuable biological resources and farmers' knowledge by global agro-biotech industry, its commodification and control through global intellectual property laws (TRIPs Agreement and UPOV Convention) for further accumulation shows the biopolitical dimension of the global economy. Consequently, a biopolitical norm emerges that depicts the power of global regulation in the service of global capital. Power in this emerging 'forms of life' became increasingly biopolitical (Foucaultian sense) that express itself through exploitation and commodification and accumulates in the hand of global capitalist institutions. In this paper, I argue that the exploitation and commodification of agro-biogenetic materials and farmers' knowledge by advanced agrobiotechnology and its protection and control through global intellectual property laws for further accumulation shows the politics surrounding the 'biological' and threatens the vital existence of life itself.

Session 2B - Banking and Finance
Chair: *Prof. Rosa Lastra, Queen Mary, University of London*

I. 'The Specificity of Banks from a Corporate Governance Perspective',*Andreas Kokkinis, University College London*

Subsequent to the 2007-2009 financial crisis a set of bank-specific corporate governance rules has been introduced in the UK. In this paper, I examine the characteristics of banks which make it necessary to develop a special corporate governance framework for them. These factors include: the paramount importance of banks for any modern economy; their peculiar capital structure and the consequent riskiness of any bank's capital structure; the acute informational asymmetries involved in bank governance including the opaqueness of banks' balance sheets; and the inherent susceptibility of banks to systemic risk. In addition, the heavy regulation of banks (which is both a cause and effect of their specificity) creates the special need to coordinate regulatory and governance mechanisms that are often antagonistic rather than complementary. Furthemore, market forces that ensure the alignment of the interests of shareholders and managers in widely-held corporations are weaker in banks than in most other industries. Product market competition is typically not intense, even less so after the recent crisis, and the managerial labour and capital markets have a less significant disciplinary effect on bank company managers, due to bank opacity. The market for corporate control, moreover, plays a minimal role in bank corporate governance, since for various reasons hostile takeovers are rare in the banking industry. Consequently, the principal-agent problem between shareholders and managers is especially acute in banking. At the same time, there is considerable scope for shareholder opportunism against bank creditors, especially depositors, the cost of which is -under the current regulatory regime- in effect transferred to taxpayers. Finally, bank-specific expertise is essential for banking boards, which creates challenges for their board structure, because expertise, independence and diversity are not easy to combine in a single board.

II. 'Regulation of hedge funds in the aftermath of the financial crisis' , *Ana Maria Fagetan, Queen Mary, University of London*

This paper will analyse the regulation of hedge funds in the United States of America, the United Kingdom and the European Union. These three models will be compared in order to determine the differences and similarities and to asses which is the most effective regulatory model to deal with hedge funds. In addition, the present paper will study the impact on the regulation of hedge funds of the laws introduced in the aftermath of the recent financial crisis the Dodd Frank Act in US and the European Directive on Alternative Investment Managers in Europe. The recent financial crisis has triggered a large amount of regulation either at the national, European and international levels. From this perspective, this paper will also compare the light regulatory burden towards the hedge funds, historically out of the regulatory control and the new discipline introduced by the ahead mentioned laws which require more transparency of the industry and also increased consumer protection. The Author will also discuss whether these changes will be beneficial for the sector or will determine investors to swift their attention towards other investment opportunities in different sectors. The discussed comparison will determine which system is more suitable to deal with the regulation of a

sector that has experienced an enormous growth during the past decade. Some of the conclusions that the present paper will illustrate are also the conclusions that the Author has reached in her doctoral thesis on "Regulation of hedge funds".

III.'Credit Rating Agencies and the Financial Crisis- How did We Get Here?', *Clare Williams, School of Oriental and African Studies*

The power of Credit Rating Agencies (CRAs) over the fortunes of economic actors was brought into sharp question by the recent financial crisis. The natural response of governments to firstly apportion blame and secondly to regulate brought the role of CRAs in the financial sector into focus.As "gatekeepers" of the markets, the reputational capital of CRAs is built on trust, notions of which have suffered setbacks in the wake of the crisis. Moreover, the axiomatic status of sovereign debt ratings in international markets necessitates a reappraisal of the respective roles of the regulators and the regulated. Regulatory reform efforts in both the US and EU have sought to enhance transparency and disclosure requirements. These, conversely, pass the burden of due diligence on to the end investor and leave regulation of the rating agencies overwhelmingly to market function.The paper analyses the reforms both in the US and EU and analyses hidden power structures, asking whether concepts of sovereignty need reappraising. The paper also then looks at the centralized database forthcoming in the EU which will act as a centralized repository for information on the function, assumptions and accuracy of rating agencies, and then uses an economic sociological approach to analyze market reliance on embedded networks of trust as a regulatory mechanism.

Session 2C - EU Law

Chair: Dr. Theodore Konstadinides, Lecturer in European Law, University of Surrey

I. 'Playing Tug-of-War in the European Union after Lisbon? Human Rights Policy, Law-Making and Judicial Interpretation' , *Egle Dagilyte, King's College London*

Since *Van Gend en Loos*[1] and *Costa*,[2] The Court of Justice (CJEU) was many times criticised for being too progressive in interpreting European law by favouring European integration and disregarding national interests of the Member States. However, we must not forget that the task given for the Court is usually more difficult where law is left ambiguous by political and law-making actors (the Member States or the European institutions). This is very likely to happen when a political agreement among the Member States is not easily reached and the adopted Treaty text – or the Charter of Fundamental Rights (the Charter) for that matter – is too vague in order to satisfy the national interests of all. The aim of this article is two-folded. Firstly, to track how the Court's human rights case law affected European law-making; and how the latter affected the former in return. Secondly, to assess by analysing case law whether the Court feels it has been given a stronger mandate for pro-European interpretation with coming into force of the Lisbon Treaty. To this end, the question of progressive interpretation will be raised in

the light of recent human rights cases relating to the general principle of equality (*Kücükdeveci*,[3] *Test-Achats*),[4] rights of custody of children (*McB*),[5] EU citizenship rights that extend to third-country nationals (*Chakroun*,[6]*Zambrano*),[7] the right to privacy (*Schecke*)[8] and the right to effective judicial protection for legal persons (*DEB*).[9] The author hopes to convince the reader that the CJEU does stay within the powers given to it by the recently amended Treaties and does not interfere in Member States' competences in the areas that EU law does not touch upon. These are the sovereignty-sensitive human rights areas, specifically left for the Member States to regulate by the Treaties and the Charter.

1 26/62 Van *Gend en Loos* [1963] ECR 1.
2 6/64 *Costa v ENEL* [1964] ECR 585.
3 C-555/07 *Kücükdeveci v Swedex* [2010] ECR 00000.
4 C-236/09 *Test-Achats* [2011] ECR 00000.
5 C-400/10 PPU *McB* [2010] ECR 00000.
6 C-578/08 *Chakroun* [2010] ECR 00000.
7 C-34/09 *Zambrano* [2011] ECR 0000.
8 C-92/09 and C-93/09 *Schecke* [2010] ECR 0000.
9 C-279/09 *DEB* [2010] ECR 0000.

II. 'Discrimination EU Nations: Transitional Arrangements for Workers in UK', Mantas Kazulis, University of Sheffield

The scale of two recent accessions to EU and differences between old and new Member States (MS) meant significant challenges for integration. Transitional arrangements, which allow MS to postpone the application of certain areas of EU law, are intended to ease the consequences of accessions. The aim of this paper is to explore transitional arrangements adopted in the UK in relation to workers from MS of 2004 and 2007 accessions. While the current transitional arrangements will end by 2013, transitional arrangements will likely be included for current and future candidate countries (Turkey amongst others). Research question is to what extent is the principle of non-discrimination infringed in the UK in relation to the nationals of the recent accessions? Doctrinal approach will be used to assess the legal position of the schemes applicable to the nationals of 2004 (the Worker Registration Scheme ('WRS')) and 2007 (the Worker Authorisation Scheme ('WAS')). The EU's worker rights will be a baseline of comparison for the WRS and the WAS. The principle of non-discrimination will be used to critique unjustified differential treatment. The WRS, which requires the 2004 accession nationals to register their employment within one month, may justifiably achieve the objectives of producing statistical data and allowing monitoring. However, the WRS goes far beyond what is necessary to achieve the objectives by restricting access to social assistance and impeding the rights of family members. Bulgarian and Romanian workers are subject to even more cumbersome requirements of the WAS, which generally requires prior authorisation of work. The main contribution of this paper will be identifying the extent of non-discrimination that workers of 2004 and 2007 accessions has been subject to compared to EU law workers.

III. 'Civil Procedure Harmonisation in the EU: Unravelling the Policy Considerations', *Zampia Vernadaki, University College London*

The present work investigates the role and significance of the right of access to justice in the on-going debate concerning the procedural harmonisation in the EU in the context of cross-border civil litigation. Procedural diversity could affect the creation of a genuine area of justice where individuals and businesses can approach courts in any Member State as easily as in their own, not being prevented or discouraged from exercising their rights by the complexity of the legal systems in the Member States. Unless there are efficient, accurate, and transparent judicial mechanisms accessible at reasonable costs, effective access to justice is not guaranteed. Three important considerations derive from this discussion. Firstly, common procedural rules are not sought because of scholarly considerations or aesthetic symmetry in the EU, but as a tool to enable effective access to justice to be realised. Secondly, such effectiveness will not be world-wide but only regional: both the connection with effective access to justice and its regional rather than global character bear witness to the practical rather than the purely doctrinal nature of the whole exercise. Thirdly, the new Article 81 (2) (e) TFEU contains an explicit provision for the approximation of Member States' civil procedural rules when it comes to securing effective access to justice; combining this provision with Article 47 CFREU on effective legal remedies, a legitimising tool in regulation of cross-border civil justice by the EU will be established with the effect of inducing greater approximation of Member States' civil procedure systems.

Session 4A – Arbitration & Litigation
Chairs: *Prof. Loukas Mistelis and Dr. Stavros Brekoulakis*

I.'Risk Regulation and Regulatory Litigation', *Patrick Luff, University of Oxford*

Since at least the 1960s, when the Congress enacted civil rights statutes that provided for private enforcement, courts have been hotbeds of public policy. Only recently, however, has this phenomenon been recognized for what it is: courts have become essential actors in the regulatory state. What little scholarship there is on the use of courts to achieve regulatory ends is often heavy on rhetoric, but short on theory. While commentators have been quick to criticize the phenomenon of regulatory litigation, they have done little to determine what it actually is. As a result, the young field of regulatory litigation lacks fundamental theoretical discussions necessary for the fruitful development of the field. This article fills the gaps in the theoretical literature in three ways. First, this article presents the theory that regulatory litigation has developed to address the gaps between socially demanded levels of risk regulation and the amount of risk protection actually provided by the state. Second, this article collects and analyzes the scholarship to date that attempts to find the line that divides regulatory from non-regulatory litigation, and explains how and why previous definitions of regulatory litigation have fallen short. Finally, this article presents a theoretical discussion of the nature of regulatory litigation that distinguishes between top-down regulation through statutory promulgation and bottom-up regulation that occurs through the remedial choices made by litigants and judges.

II. ‘Critical Analysis of ‘Proportionality Test’ in Determining Indirect Expropriation in Investment Treaty Arbitration’ *Prabhash Ranjan, King’s College London*

This paper will argue against investor state investment treaty arbitration (ISITA) tribunals using the proportionality test - based on European Court of Human Rights (ECHR) jurisprudence – to decide indirect expropriation claims arising under a bilateral investment treaty (BIT). Proportionality test involves weighing the benefits and costs of two opposing values to determine which value should prevail. The opposition is on three grounds. First, borrowing a test from ECHR jurisprudence and applying it to ISITA (cross regime application) violates the fundamental requirement of treaty interpretation *i.e.* each treaty should be interpreted keeping the ‘context’ in mind. Second, application of proportionality test could result in situations where no expropriation will be found no matter how severe the host states’ measure is provided the tribunal is convinced that this severity is outweighed by the public purpose benefits from the measure adopted. Such a test results in a conceptual difficulty because public purpose is a ground for lawful expropriation and not a ground to determine expropriation. Third, another conceptual difficulty will arise in those BITs that contain a Non Precluded Measure (NPM) provision, which allow host countries to adopt measures necessary to achieve certain regulatory objectives notwithstanding any BIT provision. This is because if the benefits of a regulatory measure are weighed against the adverse effect on investment, as part of the expropriation provision, then the NPM provision will be rendered inutile. In this regard, the paper will argue that the ‘substantial deprivation’ test is better suited to determine indirect expropriation in BITs. Once expropriation is found, then the ISITA tribunal should assess the host state’s defence that such expropriatory measure was nevertheless necessary to achieve a particular regulatory objective given in the NPM provision and thus should be excused. Such analysis should be undertaken as part of the NPM provision and not under expropriation by using the proportionality test.

III. ‘Agreements of State-Owned Entities and Liabilities of States in International Investment Arbitration’Assaduzzaman, *University of Southampton*

Many investment agreements are entered into by the state-owned entities, incorporated under applicable law, organised and controlled by the government either functionally, structurally or through ownership interests. These entities sometimes exercise public functions but they are legally distinct from the state, called state controlled entities, para-statal entities, independent state entities or quasi-governmental institutions. Relating to the subject-matter of this contention, these entities are commercial in nature; they may sue and be sued, enter into contracts and such entities may become parties in ICSID arbitration proceedings instead of or in addition to host state itself. Despite the fact that consent is the main building block of arbitration, under ICSID arbitration proceedings which have been internationally accepted rules for some years that a foreign investor need not have a contractual relationship with a host state to initiate arbitral proceedings. The Centre accommodates arbitration proceedings brought by foreign investors those are the national of a state party to the Convention against the host state under the ICSID jurisdiction in the absence of a direct agreement between the parties.
The reason for acceptance of this unilateral initiation of arbitration facilitated by proliferation of multilateral and bilateral investment treaties and national investment laws promoting the settlement of investment disputes through arbitration. A host state consents to the jurisdiction of the Centre by including a standing offer in its national legislation or in a bilateral or Multilateral Investment Treaty.In a dispute between a state-entities and a foreign investor whether states may incur liability for the conducts of

their independent entities most of the commentators, practitioners suffer the lack of informative and comprehensive academic discussions that provide an answer for the above question. Under the principle of international law, rules of attribution depends on the violation of an international obligation or attribution of wrongfulness of the conduct to the state, even when it is performed by independent state-entities or subordinate organs of the state. This article will discuss and examine the issue whether liability of a state-entity would be attributed to the state under investment arbitration.

Session 4B - Human Rights & Public International Law
Chair: *Dr. Prakash Shah, Queen Mary, University of London*

I. 'Punishing Adult Immigrant Women Who Undergo Female Genital Cutting (FGC): A Violation of Women's Rights or Protection of Human Rights?' *Olugu Ukpai, University of Reading*

Immigrant women face criminal charges in most European countries for carrying out FGC 'even if the victim is an adult who 'consented' to have it done' without similar charges for carrying out cosmetic genital surgery such as vaginal tightening or lifting, reduction of labia that are performed by the so called "civilized women" that are also performed for non-therapeutic reasons. Most of the women prosecuted are poor, Black, and unimpowered migrants. Since it is claimed that Black women experience various forms of oppression, first, the article contends that the punishment of adult immigrant women who choose to carry out FGC on their bodies violates their constitutional rights to control their bodies as fundamental to women's dignity. Second, the punishment violates their constitutional rights to equal protection and privacy regarding their sexual rights and choices. Third, I aver that the punishment violates the equal protection clause because it stems from and perpetuates Black women subordination. Forth, a critique of the liberal negative conception of privacy rooted in freedom from government constraints. The paper concludes that much has not been done to change the "structural causatives" of FGC among immigrant women, a similar fate they suffered in Africa. Women's insecure position in society needs to be changed before fundamental rejection of FGC can be achieved. The paper avers that the EU ideals of human rights that advocated "zero tolerance" and punishes immigrant women has failed to address "structural causative" factors that will empower immigrant women to take independent decisions of their body just like their EU women counterparts (rather than regulating it). The paper concludes by asserting that unless the EU consider a more grass roots approach to empower and respect immigrant women practitioners by directly seeking their opinions, immigrant communities will remain marginalized and discriminated.

II. 'Israel and the United Nations Human Rights Council: More of the same?', *Rosa Freedman, Queen Mary University of London*

The United Nations Human Rights Council was created in 2006 and mandated to universally protect and promote human rights. Failures of the Council's predecessor, the Commission on Human Rights, had been attributed to politicisation and bias which most notably manifested itself in that body's treatment of Israel. The Council was created with idealist expectations that such flaws would be eliminated. Despite the Commission's serious flaws, the new body was mandated to retain its predecessor's 'Special Procedures' system. Special Procedures developed to assist with the protection and promotion of

human rights, and the system was widely viewed as a success. This article examines the Council's use of Special Procedures to deal with country-specific situations, using the example of Israel to explore whether, and to what extent, the Council has overcome its predecessor's failings. Using the case study of Israel, the article focuses on politicisation by states, non-state actors, and mandate holders to demonstrate the problems which have already beset the new body.

III. 'The Use of Foreign Legal Sources As Interpretive Instruments for Incorporation of Human Rights via Domestic Constitutional Cases: A Civil Law Perspective', *Michael Freitas Mohallem, University College London*

This paper discusses the differences between the application of international law and foreign legal sources by domestic constitutional courts and focuses on selected South American jurisdictions to illustrate a particular civil law perspective on the matter. The justification for the regional emphasis are based on the homogeneity of South American legal and political systems, the protagonist initiative of national supreme courts in establishing a regional forum for domestic courts (within the Mercosur structure) and the common adoption of a dual or mixed model for incorporation of international human rights norms to the constitutional level as it allows a traditional dualist incorporation of general international law simultaneously with a monist structure regarding human rights. I argue that the transnational dialog and the shared view giving preeminence to human rights in relation to other international norms are crucial in shaping a legal culture which allows the use of foreign domestic norms and jurisprudence in domestic cases with significant less controversy regarding the legitimacy of the source of the law when compared to states organised under the common law. As a matter of fact, differently than common law systems in which there are multiple sources of law, in civil law jurisdictions the judge interprets the law but does not make it. Therefore, by selectively using decisions from a wide range of constitutional courts, South American constitutional tribunals are gradually, swimmingly and independently from their respective parliaments assimilating international human rights into domestic law through interpretive incorporation, giving content to its own constitutional norms and contributing towards a more homogeneous application of international human rights law.