Standing on the Shoulders of Giants
Legal research excellence and knowledge sharing at Queen Mary, University of London
Volume I

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This publication contains a collection of papers, which were presented at the Queen Mary School of Law Legal Research Conference in March 2010 in the Institute of Advanced Legal Studies. The conference was initiated and organised by the editors along with our friends and colleagues Martin A. Kuppers and Gaetano Dimita, and all current Ph.D. students of the School of Law. The famous quote by Sir Isaac Newton was used as the headline of the conference to highlight the concept of the conference – that all new knowledge is based on the efforts and work of earlier research.

The whole day event consisted of four sessions on different fields of law, which were chaired by leading academics from the School of Law. On the day each presenter was given 20 minutes to present their paper, which was followed, by comments, feedback and recommendations by their allotted panellists. The session continued with questions from the chairing academic and the floor. The conference attracted wide interest among students, academics and practitioners with 80 people attending and was concluded with a drinks reception.

The conference is the first stage of a wider project that aims to improve and foster the collaboration and the sharing of knowledge among the Ph.D. and Master of Research student community at the School of Law. The call for conference papers was aimed at junior researchers whom have recently commenced their research. This attracted wide interest and the selection committee has carefully chosen the papers for the conference and then sought for senior researchers in the particular field of law. Their role was to review the papers in order to sit as panellists at the conference. The presenters and panellists liaised prior to the conference to discuss the paper.

The event proved to be a wonderful success and it once again highlighted the legal research excellence at Queen Mary University of London. Apart from creating a platform for the entire PhD community to gather and discuss, the core element of the event was the interaction between researchers in the same field of law. This is aimed at launching further cooperation and friendship.

This publication highlights the second stage of the project and comprises an edited collection of articles by the presenters at the conference. The contributors were given the opportunity to get accustomed to putting their research in writing. The panellists and some other leading scholars in their field acted as peer reviewers and have again provided their guidance and commented on the paper. We thank all contributors for supplying papers and offer sincere thanks to the many hard-working reviewers who so generously gave their time.

Last but not least, we would like to express our gratitude to the School of Law and hereby especially to Professor Spyros Maniatis, Director of the Centre for Commercial Law Studies. Without his support the project would have been impossible.

Building upon each other’s knowledge is exactly what Newton intended when he said he can see further and reach new heights because he stands on the shoulders of giants. The main idea of this project was so long as we stand on our colleague’s shoulders, no matter how short or how tall he is, we will be able to see further. If we allow others to stand on our shoulders, they will also be able to see further.

We hope that you enjoy the papers in this publication. It is our hope that this will start a new tradition at the School of Law, which will continue for years to come.

Burcu Kılıç & Marc Mimler
Intellectual property and information technology law

Comparing the history of South African and British patentability standards – Celucolo Dludlu*

Introduction
In both developing and advanced economies, it is trite law that for inventions to be patentable they have to be new, inventive, capable of industrial application or utility and be of non-excluded subject matter.¹ The reality, however, is that the application of the law has historically developed in starkly contrasted fashions between advanced and emerging economies, notably the UK and it former colonies. This is confounding given that most of the laws were introduced in colonial times. This confusion is compounded by the fact that even after independence, patentability laws more or less continued to follow UK statutory developments. Moreover, policy claims are made in both camps that the patentability requirements are designed to attain the similar goal of enhanced innovation and technological development, on the one hand, and protecting those inventions on the other. The overarching principle is that developed and developing countries put differing emphasis on these standards, yet a consensus point must be reached for the system to function efficiently in reality.

Using South Africa as a typical example and representative of developing former colonies of the UK, the aim of this paper is to examine the differences and similarities in the application of patentability standards and establish how those standards could be reconciled with the principles and policies that underpin technological development and innovation. The patentability standards have proven difficult to apply in practice in the respective jurisdictions, which has resulted in numerous patent disputes and policy debates on the future of the appropriate patentability standards. The main assertion in this paper is that emerging economies must strive to attain the delicate balance of a globally competitive patentability standard that is at the same time suited to local conditions. It is this standard that will determine if the patent system is not burdened with low quality patents that under scrutiny have little to offer as an improvement in the state of the art.

This paper analyses the legal tests, and the historical doctrines upon which they are based, which would ultimately be used by the courts or other tribunals in assessing whether or not an invention is indeed patentable. An in-depth knowledge of the patentability decision-making process enhances the certainty of the outcome in patent validity and infringement proceedings. This to the industrialist is critical, for the initial decision to use patents revolves around this. The accompanying high costs and complexity of registration, maintenance and litigation renders the analysis worthwhile. This also becomes more important in light of statistics that more than half of disputed patents are invalidated on patentability grounds.² This paper therefore intends to simplify the judging of whether an innovative idea will meet patentability standards in order to allow industry players to be able to determine these themselves before they seek legal counsel. The perception by the inventors plays an important role, as they are the ones to be encouraged to innovate through the system and be convinced that the system will indeed protect their inventions.

A focus on pharmaceutical inventions is particularly important, as it is the pinnacle of divergent thinking in terms of patent policy and pragmatic application between advanced and emerging economies. This is because of its implications for public health, human rights and other sensitive areas of public interest. This choice is further inspired by the need to establish and consolidate a sustainable pharmaceutical industry that serves the needs of developing nations.³ Based on the interests of the general public, stringent safety studies alone, for potential drugs, can take more than three years and it typically takes ten to fifteen years to invent and develop a new marketable drug, resulting in high research and development investment and associated risks. As it is a multifaceted and inter-disciplinary industry, it is unsurprising that although some patentability concepts developed for this industry are unique to it, some are generally applicable to other industries.

* Gratitude to Burcu Klic and Marc Milmer for their insightful comments that informed the research direction for this paper
⁺ Culminated in the Agreement on Trade-Related Aspects of Intellectual Property Rights, Art 27.1

¹ According to Harms, Deputy President, Supreme Court of Appeal of South Africa Harms L.T.C. “The role of the judiciary in the enforcement of intellectual property rights: intellectual property litigation under the common law system with special emphasis on the experience in South Africa” [2004] European International Property Review, pp483-492
² Disproportionately eighty-eight percent of pharmaceuticals in 2003 were consumed in US, Europe and Japan, yet the world’s population is larger in developing countries, Callahan D. and Wasunna A. A. Medicine and the market: Equity v. choice (2006) Baltimore: The John Hopkins University Press, at p167
Comparative patent law
The globalization and integration of technology spanning more than one jurisdiction, has necessitated advances in comparative law, which in essence is a technique for investigating the legal rules, norms and procedures for multiple jurisdictions. The comparative method could be ‘historical, desiring to establish a universal history, which may sometimes be obscure, predicting the development of legal institutions; and the jurisprudential, seeking to establish ‘the common trunk on which on which present national doctrines of law are destined to graft themselves as a result of both the development of the study of law as a social science, and of the awakening of an international legal consciousness.’ The objective of the comparative element in patent law is to carefully carve out the landscape of the patent system in what has become knowledge and global economies, as pharmaceutical inventions mostly have to be protected cross-jurisdictionally if protection is to be effective. The equivalent effect of those patentability rules in practice is central to this quest, as the mere existence of the rules in statute books is of little help in formulating the ideal standard.

Commentators have said that “[p]erhaps the most obvious issue that has promoted historical comparisons is the link between the protection of intellectual property and development.” With the advent of upward harmonization of patentability, linked with trade needs, there are observations that developing countries are often pressurised into adopting contemporary international patentability standards without regard to lessons to be learnt from history. Therefore, developing countries are warned to tread carefully in adapting and developing local patentability standards. That implies that it is not always desirable to simply eliminate the differences between the legal systems of different jurisdictions, as sometimes it is of no value, if not detrimental, to have similarity of law that adds no value to the jurisdictions in comparison.

In multilateral settings there is usually arbitrary comparison of laws, without a proper comparison of their historical and jurisprudential contexts, which must be avoided. And such comparison is usually only of the major actors. The South African judiciary, cautioning on haphazard historical comparisons has put it thus: “it may be useful… to trace the history and wording of the corresponding and related sections of previous legislative measures passed in this country as well as in England, and to consider judicial interpretation … thereof in both countries.” The consequence of an unbalanced comparative interpretation is a creation and adoption of patentability models that have difficulties in their application into the different stakeholder jurisdictions.

The plurality of history
Historical justifications for the patenting system are valuable in the attainment of a system that will result in balanced contemporary patentability standards. These justifications are that patents are rewards by monopolies, incentives to innovate and invent and inducement to public disclosure of technical information essential for technological development. These rationales exerted different influences in the conception and evolution of the patent system. A careful evaluation of the historical rationale underlying the patent system and extraction of principles influential in patentability development, contributes to the attainment of an optimal patentability standard. A synergistic approach towards patentability standards between advanced and emerging economies is the ideal way a functional global patent system would continue to exist and be refined.

Hence, it is prudent for IP policy-makers, and practitioners alike, to reflect on the history of the patentability requirements and extract the principles and justifications that made the patent system subsist, so as to predict and continually improve the system. At the same time, there should be an analysis of the weaknesses of the patent system, exposed in its history, in order avoid perpetuating unsupported or less

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7 UK Secretary of State for International Development urged developing countries to carefully consider the impact of international on patentability issues on their localities; Hansard written answers 24 May 2006, column 1782W.
beneficial patent norms and customs, in principles deducible from the historical study. It is submitted that there are some aspects in the development of patents unique to South Africa and, when considered, are instructive to the notion that a blanket emulatation of patentability standard of advanced nations is to be discouraged if deemed to be of no beneficial interest to developing countries. Without a revisionist look at patent development, it could be suspected that historical accounts from the viewpoints of historians in advanced nations would, needlessly, tend to be contextually-deficient on undesirable past moments in colonial patent development; a patriotic inclination of sorts. 10 For a more balanced and objective historical perspective, there is the need to engage the views of legal historians acquainted with the patent systems that were on the receiving end of a non-ideal colonial legal order.

The postulation that history is authoritarian to future ideal patent law developments is not absolute. Certainly, commentators have observed that empirical analysis of originally efficient laws that are then prescribed for emerging jurisdictions suggests that sometimes there is no significant correlation between the legal protection afforded by prescribed statutes and the effectiveness of enforcement of those statutes. 1 This is due to the ‘transplant effect,’ whereby countries inherit model laws developed in another jurisdiction, which are unsuited to their environment. 11 It is for this reason that observers 12 are supported in their assertion that the developing countries should carefully choose only the elements that are helpful to them when they study the development of advanced nations’ patent systems. As a result of history’s predictive limitations, there is preference for considered policy formulation from historical events 14 that can be applied to current and future patentability issues as allowed by international obligations.

It is largely agreed that the patent system is a catalyst for innovation and technological development. 15 However, much of the historical justification of the system is based on the economic rationale that was different, if not absent, at the birth of the system. That illustrates the ambivalence of patentability concepts that can result from the cursory interpretation of the history of patent system upon which contemporary improvements are based. For instance, analysis of the history of the British patent history reveals that, then, the phraseology to invent also meant to be the first to bring into use, so the statutes’ first to invent included mere importers of the arts. ‘The invention, i.e. the exercise of the inventive faculty; was not an essential qualification - institution of the manufacture, from whatever source derived, was a valid consideration of the patent grant under the statute.’ 16 Thus the first and true inventor here is not referring exclusively to inventive activities, but also included and complemented those who were the first to commercialise the invention within the local jurisdiction. That is to say, patentability did nothing to protect foreign inventors or their creations if they were not to be directly used in Britain. Contrary, in South Africa “the object of the patent laws (was) to benefit the first inventor and only the first inventor.” 17

Ambivalence of history also extends to cases where the laws were similar, but supported by different policies. A South African patent provision copied from the UK, prevented a patent being granted or if granted it could be revoked if “the invention was not new, i.e. it was already published or applied in the State before the insurance setting.” 18 A writer 19 illustrates an instance where in 1862, the British Governor in one of the local jurisdiction. That is to say, patentability did nothing to protect foreign inventors or their creations if they were not to be directly used in Britain. Contrary, in South Africa “the object of the patent laws (was) to benefit the first inventor and only the first inventor.” 17

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17 Veasey v Denver Rockdrill and Machinery Co. Ltd. 1930 AD 243, at p270
18 Section 29 (c) of Law No. 6, 1867 of Transvaal, similar to Orange Free State Patent Act of 1891, Section 29 (c)
Therefore, to achieve this, the tests must be clear, simple, and comprehensible. The inventors and those willing to invest in the commercialisation of those inventions, beyond the specialised practitioner, must be able to understand precisely how those inventions will be assessed for patentability and make informed decisions as to whether the patent regime is the viable option in view of other viable protection mechanisms. Critically in this regard, the protection offered by the system competes with the public interest of disclosure of technical information, which would not be disclosed otherwise.

Applying patentability tests should also be consistent and uniform, arriving at the same result with increased precision. Certainty of result in the application of law to facts of each case is important. To establish and maintain a robust evaluation, a structured approach is favourable. This is helpful in that the method of assessment is less dependent on the assessor and more on the quality of the invention being assessed. Such an approach stimulates a constant consideration of prior art with regard to the inventive concept and the precise factors one has to take into consideration. An implication for this would be that patented inventions from developing countries would be globally competitive to be able to stand to valid challenges in advanced economies.

Subjectivity is lessened if the methods prevent hindsight bias. This imparts certainty of validity, or lack thereof, in disputed inventions. Ex post, some genuine inventions may seem uninventive, which may also trigger the public perception that the system does not promote the advancement of the state of the art. The making clear of how evidence is taken into account to eliminate inconsistencies in the handling of prior art and the inventive concept in identical cases is an essential component to optimal patentability assessment methods. In the end, the method used for assessment must be reconcilable with the inventive policies adopted by each of the stakeholder states.

Therefore, the Controller-General the cost of official novelty searches and administrative problems prevented any similar legislation in the colonies from being approved by Britain.

A significant lesson is that these historical principles have to be applied in a globalised world where, hitherto, it is more complex to favour the local inventor per se than it is to create a supportive environment conducive to the local inventor. Policymakers need to study the multi-layered historical experience in formulating the appropriate contemporary standard. Developing countries must be punctilious in implementing provisions, which do not turn out to be the antithesis of their innovative intentions.

The requisite optimal patentability standard
There are concerted efforts to revise, reinterpret, or supplement IP standards at the international arena. It is from the study and formulation of balanced and optimal patentability standards that developing countries, at continually expanding IP lawmaking forums, can bring proposals that maximize their desired policy outcomes. The patentability standards transposed from the study of local historical conditions would impart a higher understanding of the operation of the patentability system and would also ease the implementation and interpretation of those rules back into local settings.

Applying the standards in the local setting has to occur without compromising the integers of what constitutes optimal patentability standards. There are some critical elements that have to be safeguarded in assessments methods, regardless of the status of a state. The basis for making the assessment is that the protection of inventions should be the promotion of technological invention and transfer and dissemination of technology. The question is also whether the patent discloses the invention in a sufficiently clear and complete way for the invention to be carried out by the person skilled in the art, whether in the UK or South Africa.

Conclusion
The pro-active setting of the local inventive policy is encouraged, so that each jurisdiction can have meaningful inputs in international patentability norm-setting forums. This leads to instruments that are identified and implemented with some understanding of the goals and objectives thereof. It also becomes easier to structure other complementary mechanisms to the patentability standards.

The success of patentability standards could be measured against their compatibility with and maximization of the desired policy outcomes. These policy outcomes must not only be forward looking, but must also reflect on the history to eliminate the re-use of concepts that have proven to be unhelpful. Patentability evaluations methods that are riddled with absurd results or have outcomes counter to the inventive policy are undesirable.

Bibliography
Access to Essential Medicines: The Doha Declaration Safeguards on Public Health and the Regional Pharmaceutical Compounding Program in Africa – Thaddeus Manu

Introduction

Strengthening of intellectual property protection within the international trading system has significantly hampered access to medicines in developing countries. The Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) imposes an obligation on members of the World Trade Organisation (WTO) to adhere to strict compliance of patents. This presupposes that developing countries will struggle to protect their public health system due to inadvertently lack of capacity to produce.

Whilst in the developed countries tighter regulations exist to protect intellectual property rights (IPRs) to encourage research and development; there are weaker laws and institutions to enforce IPRs in developing countries. Despite growth observed in the world’s medicines production, such increase is concentrated within the developed countries; Africa’s shares of the world’s medicine production continue to decline notwithstanding many endemic diseases.

With a view to strengthening regional local production capacity to fight endemic diseases plaguing Africa, this article will examine the opportunities captioned in the Doha Declaration safeguards on public health for the introduction of regional and sub-regional public pharmaceutical compounding and dispensing centres in Africa to mitigate the impact of shortage and high cost of essential medicines. Institutional reforms and legal provision requirements will be a precondition for reservation right to solicit and use pharmaceutical patent pool data for non-commercial exploitation within the principle of public research exemption for pharmaceutical active ingredients and compounds to produce essential vaccines and medicines.

The barriers and the consequences on access to medicine in Africa

The constantly changing socio-economic conditions and the initiation of global patent regime have derailed the pursuit of developing countries to meet public health objectives. One of the obstacles that impinge on the supply of affordable medicines is Article 27.1 of WTO/TRIPS agreement. Patent granted by the TRIPS agreement for advances in medical therapy to encourage research, innovation and development has been the subject of critical monopolistic pricing.

Secondly, one barrier that interrupts the search for affordable drugs supply is the data protection legal provision WTO/TRIPS Article 39(2)(3). Imposition of such reasonable obligation to protect secret commercial data from unfair competitions creates problems for developing countries that do not have industrial research capability. Again, economic imbalance and weaker industrial policy elements resulting from entrenchment of poverty translate into low level research and innovation activities exacerbating the shortage and high cost of essential drugs in Africa.

I hereby acknowledge the numerous commentaries given on this article, especially the contributions made by the following:

* Burcu Kilic, Queen Mary University of London
* Cecile Ogurel, Queen Mary University of London
* Dr. Gail Evans, Queen Mary University of London
* Dr. Hutar, Queen Mary University of London
* Reichman J (2000) TRIPS Agreement Comes of Age: Conflict or Cooperation with the Developing Countries, Case Western Reserve Journal of International Law, volume 32, issue 3, pp. 441-471
* World Medicine situation, WHO 2004: the report on pharmaceutical medicine production says that medicine production is highly concentrated in the industrialized countries, where just five countries - the USA, Japan, Germany, France and the UK - account for two-thirds of the value of all medicines produced. See also: Kaplan W & Laing R, local production of pharmaceuticals: industrial policy and access to medicine, Washington DC: World Bank, 2005.
Moreover, lack of commercial incentives in Africa resulting in little investment from the pharmaceutical sector\textsuperscript{35}, along with the over-reliance on aid in Africa, have together frightened prospective pharmaceutical investors\textsuperscript{36} since no investor would invest huge substantial amounts of money for drugs discovery for no profit.

The absence of essential medicines has long been a major setback to the realisation of public health in Africa. Over two billion people worldwide lack access to effective medicine including, HIV/AIDS, tuberculosis, and malaria.\textsuperscript{37} WHO estimates that about 10 million people mostly in Africa die mercilessly due to a lack of access to essential drugs and vaccines.\textsuperscript{38} The spread of disease in Africa has placed huge demand for any kind medicines perpetuating counterfeit drugs supply.\textsuperscript{39}

The current supply of essential medicines in Africa

Many poverty and disease endemic countries in Africa have not utilised the safeguards catalogued under the Doha Declaration on public health, whilst other developing countries outside Africa have profited from the same safeguards.\textsuperscript{40} The assessment of the current supply of essential medicines in Africa casts doubts on the commitment of African leaders to lessen suffering.\textsuperscript{41}

The current supply of essential medicines is meaningless considering the galloping rate at which diseases spread. The only positive appreciable increase in medicine in Africa is the HIV/AIDS antiviral. Unconvincingly, tuberculosis and malaria have attracted little attention. 56% of global funding initiatives have gone towards AIDS projects, 31% have gone into malaria and 13% towards tuberculosis.\textsuperscript{42} Emphatically, HIV/AIDS is receiving attention from the west due to the disease being prevalent in the west. If HIV/AIDS has remained tropical it would have been partly neglected.\textsuperscript{43}

Why have African countries not utilized the Doha Declaration safeguards?

Firstly, the existing safeguards are only effective against diseases that have medicines available, i.e. HIV/AIDS antiviral. Legitimately, it is impossible for African governments to use compulsory licensing\textsuperscript{44} against tropical diseases that have been neglected.\textsuperscript{45}

Again, leadership failure for benchmark policy oriented growth reforms for effective use of the safeguards present some challenges.\textsuperscript{46} Again, scepticism and uncertainty about reforms being pressed by the west are viewed with suspicion\textsuperscript{47} due to the Structural Adjustment Program introduced by World Bank and IMF in 1980s orchestrating a turning point for Africa’s development woes.\textsuperscript{48}

The current model for essential medicines supply is not sufficient in Africa

Despite the appreciable increase in generic drugs on the continent, the trend is still not enough to mitigate the problem. There is no doubt that virtual drug discovery through public-private-partnership can overcome the challenges of lack of medicines in Africa.\textsuperscript{49} The current supply of essential medicines being touted as the only possible solution under the current public-private-partnership\textsuperscript{50} is not an answer to regional self-sufficiency, since it has failed to make drugs accessible to the poor. Patients who require a life-long medication to survive cannot afford the cost of drugs within the current public-private-partnership enterprise due to poverty where the majority of people live on 1 dollar a day.\textsuperscript{51} Currently, generic drugs companies are scaling down drugs manufacturing in Africa due to lack of profit maximisation.


\textsuperscript{46}Ismail, F (2006) how can least developed countries and other small, weak and vulnerable economies also gain from the Doha development agenda on the road to Hong Kong? World trade, volume 40, no.1, pp. 37-68


\textsuperscript{49}Nwaka, S (2005) Drug discovery and beyond: the role of public-private partnerships in improving access to new malaria medicines, Transactions of the Royal Society of Tropical Medicine and Hygiene, volume 99, supplement 1, pp. 20-29


Africa requires a new framework for sustainable supply of essential drugs

The problem of access to medicines is worse now after many failed strategies, predominantly due to lack of cutting edge funding, imposition of plans by the west coupled with failed promises. If the current system has failed to supply enough medicines, then a new model is eminently justifiable to insulate Africa against the spread of disease. Indisputably, generic drugs hold an indispensable key in the fight against some diseases; however, can Africa rely on generic drugs manufacturing against the re-emergence of diseases that cannot be fought with generic drugs?

The way forward: welcoming African Public Pharmaceutical Compounding Program

The African Public Pharmaceutical Compounding framework is a novel model to establish regional and sub regional public pharmacies where pharmaceutical active ingredients sought from multinational pharmaceutical companies are mixed with locally produced compounds to produce essential drugs for dispensing to participating countries on a non profit basis. The premise of the African Public Pharmaceutical Compounding Program framework is built on making essential medicines accessible to the poor. The program will depend partly on the commitment of some multinational pharmaceutical companies to significantly make available some patent pool of some tropical diseases.

The right to health and the concept of IPRs

The concepts related to the right to health and the conceptual underpinnings of Intellectual Property Rights have practical implications for understanding the justification for Africa Public Pharmaceutical Compounding Program. The right to health in the Universal Declaration on Human Rights & International Covenant on Economic, Social and Cultural Rights and the right to protect inventions are recognised and embedded within the Universal Declaration on Human Rights and the International Covenant on Economic, Social and Cultural Rights. Against this backdrop is the need to put these two rights into context and examine their relationship towards the right to health and access to medicines for all.

The normative framework

The right to health is also recognised in African Human Rights instrument and the preamble of WHO Constitution. The concept also incorporates the determinants or the underlying preconditions elements of right which are availability, accessibility, acceptability and adaptability. The focus of this study is apparently on the economic accessibility which presupposes the principle of equity demanding where the poor must not be disproportionately burdened with health expenses that substantively undermine the fundamental right to health and access to medicines for all.

Rationale for the African Public Pharmaceutical Compounding Program

Harmonisation of regional essential drug policy

No country is immune from the access to medicines problem in Sub-Saharan Africa. This necessitates for collective action to harmonise individual national essential medicines programs into a single regional framework. African countries are fighting the problem individually achieving nothing, while a concerted collective fight can be a break-through.

51 An attempt to revamp research into tropical diseases must involve public universities for pharmaceutical technology enhancement. 52


56 The CEO of GSK, Andrew Witty outlined GSK access to medicine strategy and announced a number of new initiatives which is reported in the CR Report. In a speech at Harvard Medical School in February 2009, and in January 2010 in a speech at the Council on Foreign Relations (CFR) in New York, the CEO reiterated the commitment of the pharmaceutical giant in making publicly available the information on more than 13,500 compounds from the company’s compound library. Available at http://www.gsk.com/responsibility/access/index.htm (accessed on 10/4/2010)


60 The Constitution was adopted by the International Health Conference held in New York from 19 June to 22 July 1946, signed on 22 July 1946 by the representatives of 61 States and entered into force on 7 April 1948.


To save lives and reduce the cost of drugs burden on individual African countries
Six countries in Africa account for 50% of worldwide deaths in children younger than 5 years whilst developing countries account for 84% of the world’s population and 93% disease burden yet, they account for only 18% of global income and 11% of global health spending.64 The program can augment to avoid the individual spending burden of almost half of their national income on essential drugs.65

To ensure drug quality assurance and management through dispensing
Due to high rate of counterfeit drugs circulation, many people no longer trust the supply of drugs in Africa, which exacerbates the consumer’s health situation from bad to worse.66 The program can instil crucial confidence in medicines through the choice of therapeutically quality proven compounds to conform to safety standard. One way of solving HIV/AIDS is through a voluntary testing67 however, many have rejected the free testing program because they will be denied drugs after voluntary testing. The program will integrate an agenda for effective drugs management through dispensing to patients to serve as an incentive for people to be tested.

Benchmark for regional resources mobilisation for research into neglected diseases
Despite major advances in drugs development very few exist for diseases of the poor.68 Out of 1,556 new drugs approved between 1975 and 2004 only 21 (1.3%) were for tropical diseases.69 Recognising the emergence of diseases, the program will be a good ground for resources mobilisation to partner other research institutions for research into tropical diseases.

65 Schieber, G & Maeda, A (1999) Health care financing and delivery in developing countries, Health Affairs, volume 18, issue 3, pp. 193-205

Political commitment for a resolution and permanent secretariat
Political commitment constraints in Africa affect integration at the regional level, seemingly explaining why little progress has been made so far in achieving a considerable economic integration in Africa.70 The program will work efficiently when there is adequate degree of practical political resolution and support for the permanent secretariat to run the administration of the program.

Capacity building through technical assistance and compounds donations
The program will work effectively if promises made by some pharmaceutical companies are fulfilled to make some essential medicine accessible to the poor71 and also make available some tropical pharmaceutical compounds for the program.72 Again, the program will only be a success if technical assistance and capacity building in the training of pharmacists, engineers’ custom officers and re-equipping African Custom Union73 to prevent drugs produced under such program do not leave the continent.

A reservation clause within the World Trade Organisation
In order to advance the program to hold vaccines as regional medical store for rapid epidemic response, negotiation for a reservation right74 is needed, to use pharmaceutical patent pool data for non-commercial exploitation within the principle of public research exemption to use patent protected pharmaceutical active ingredients and compounds to produce essential vaccines and medicines for public health protection.

72 Founded in 1958, the Merck Medical Outreach Program (MMOP) is the primary mechanism through which Merck donates our pharmaceuticals and vaccines. The MMOP is one of the ways Merck helps to expand access to medicines and vaccines in developing countries. See also: Merck MECTIZAN® Donation Program. Established more than 20 years ago, the MECTIZAN Donation Program is longest-running disease-specific drug donation program in the world. Available at http://www.merck.com (assessed on 27/05/2010)
74 Evans G (2008) Strategic Patent Licensing for Public Research Organizations: Deploying Restriction and Reservation Clauses to Promote Medical R&D in Developing Countries, American Journal of Law & Medicine, volume 34, issue pp. 175-223

The component for African Public Pharmaceutical Compounding Program

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Political commitment constraints in Africa affect integration at the regional level, seemingly explaining why little progress has been made so far in achieving a considerable economic integration in Africa. The program will work efficiently when there is adequate degree of practical political resolution and support for the permanent secretariat to run the administration of the program.

Capacity building through technical assistance and compounds donations
The program will work effectively if promises made by some pharmaceutical companies are fulfilled to make some essential medicine accessible to the poor and also make available some tropical pharmaceutical compounds for the program. Again, the program will only be a success if technical assistance and capacity building in the training of pharmacists, engineers’ custom officers and re-equipping African Custom Union to prevent drugs produced under such program do not leave the continent.

A reservation clause within the World Trade Organisation
In order to advance the program to hold vaccines as regional medical store for rapid epidemic response, negotiation for a reservation right is needed, to use pharmaceutical patent pool data for non-commercial exploitation within the principle of public research exemption to use patent protected pharmaceutical active ingredients and compounds to produce essential vaccines and medicines for public health protection.
Formation of an international monitoring taskforce
In principle the program will work under the support of the international community that will require constant monitoring. An international monitoring taskforce is needed to periodically carry out forensic audit reports, which may comprise of the World Health Organisation, United Nations Development Programme, African Union, World Trade Organisation, International Federation of Pharmaceutical Manufacturers Association, International Generic Pharmaceutical Association, World Bank, European Union, etc.

Funding of the African Public Pharmaceutical Compounding Program
Most access to medicines programs did not work due to the over reliance on foreign aid. The program will require sustainable long term internal funding to offset the risk in relying on foreign cash in case there is economic pressure on donors to cut back donations. Budgetary allocation in terms of Gross Domestic Product (GDP) contribution from participating countries will be used. In addition, the program will welcome external contributions from many international organisations, international development agencies, and other organisations currently funding similar human development projects in Africa.

Conclusion
The phrase “united we stand divided we fall” illustrates the need for Africa to introduce a new framework to collectively tackle regional issues after years of experiments in vain. This time a regional resolution is critical to support the success of the program. The Indian pharmaceutical industry is successful partly due to the Indian Patents Acts 1970 which supports scientists’ ability to build up cost-effective industrialized processes for molecules formulated and patented in the developed countries.

The market failure on research into tropical diseases calls for a comprehensive means of using the available limited resources to incentivise public research centres as well as small private research institutions to instigate research into tropical diseases. Failure to utilise the Doha Declaration on public health in Africa makes it imperative for the African Union and sub regional economic development organisations to play a pivotal role in protecting public health by implementing the program to save lives. There is virtually no motivation within the African Union system to attract extensive research into tropical diseases and this is where Africa needs to be proactive in it legal provisions to inspire a few companies who want to take the risk of researching tropical diseases.

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Mastering The Virtual World: Does Virtual Property Exist? – Michela Stikova

Overview
The scope of this article is to introduce the nature, meanings and theories behind the idea of property in the context of virtual environments. Property is a social institution possessing significant historical variety and flexibility. Irrespective of the form it takes, property is linked to themes central to human life – freedom, prosperity, security, and self-expression. Property defines our personal space, our rights and responsibilities, which can be said in both the real and virtual situation. Virtual worlds already have features, which might be treated by the law as property – land, goods etc – even though they are purely information constructs which are not currently property under the law.

The Central Questions
There is no legally described and acknowledged definition of property within the virtual space, but a general notion of property is emerging from the existing networks of social contracts and transactions. Virtual environments and social platforms are designed around a property system. In some cases an in-built property model is introduced from the start, while other environments develop such a model later. The majority of them have a system of formal or informal rules regulating exchange of goods through contract. There is an enormous variety of virtual environments; they differ in their levels of complexity, global or regional reach, technical, linguistic, and cultural parameters. Nevertheless, this article sets out to explore the strong claim that these property systems conform to the idea that property is an intrinsic element of society, and is a natural outcome of human relationships and interactions.

Should those virtual items that are traded in secondary markets (excluding virtual currencies) be treated as property by the law? Several questions need to be addressed prior to analysing the central issue. Why should anything be regarded as property at all? Why are some things treated as property, while others are not, and some are treated as property only under certain circumstances? What is the nature of property in general? Only then specific incidents in virtual environments pointing to the existence of ‘virtual property’ can be properly identified.

No Place for Utopia
There is a natural tension between what is and what ought to be; between reality, any description of that reality, and the ideal it aims to reach. With the rise of the Internet and virtual environments, it was (at least technically) possible to build an ideal world, the utopian vision of society, which for example Barlow foresaw. Yet, there is no utopian virtual society to be found. Although the majority of virtual environments are based on some fantasy or sci-fi theme, they consist of the same fabric as the real world – human relationships and social interactions – resulting in the familiar features of human nature forming the new virtual territory. Moreover, the environments are generally characterized by scarcity of resources; a factor omnipresent in the real world. Scarcity-related constraints users have to face are one of the factors that make virtual environments so popular. The process of developing a virtual identity mirrors the risk and reward structure of personal development in real life. Originally intended to provide an escape from reality, Cyberspace and virtual environments in particular gradually evolved to be a continuum of the real world.

For instance, Facebook started as a pure communication space that has gradually developed and integrated a concept of property in several forms. Users create their personal profile and customise the private space that is allocated to them using the Wall feature. This unique personal sphere can be used for publishing and distributing pictures, videos, or comments by themselves or their friends. The Wall gives each user control over the interaction with other users by providing a sticky location for whatever messages they wish to share with their community. Although they do not own the actual ‘notice board’, they exercise certain rights over the content – right to use, control, and exclude others.

Virtual worlds, like Second Life of World of Warcraft, are typically designed around a property model. Early experiments in video gaming industry prove that there is a lack of motivation for users to participate in property-free virtual environments. The majority of virtual worlds today allow in-world property models, and tend to implicitly state the existence of virtual property in EULA and ToS provisions on

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83 I would like to thank Prof. Chris Reed for his guidance and Gaetano Dimita for his editorial work on this article.


ownership. Users are encouraged to believe that a purchase of virtual land and other items can result in acquiring ownership. This strategy is supported by banning mods\textsuperscript{86} and cheats which could eventually undermine the equilibrium of the in-world property system and impact on the overall quality of the environment\textsuperscript{87}.

This example demonstrates how information technology helps to facilitate new forms of communication and interactions that take place in the virtual sphere. Although Cyberspace exists entirely within a computer space accessible via complex networks, it is still a continuum of the real, physical world. The real and virtual space may differ in their substance, but they are inter-connected and inter-dependent. It is not the technical parameters that are relevant in this context, but human behaviour and the social setting where it is being manifested. Social interactions between individuals result in the rise of a network of relationships and transactions. The characteristic feature of human nature is to create social bonds and exploit their benefits. When the relationships reach a certain level of complexity, it is a necessary requirement to develop a property system in order to use and distribute available resources. Property systems are implemented for the purposes of managing and controlling products of the external world, real or virtual.

### On the Human Nature

Evolutionary biology is a multidisciplinary field concerned with the origin of species, their development, and diversity over the time. One of the key elements of evolution is the principle of sexual selection\textsuperscript{88}. Matt Ridley\textsuperscript{89} uses the findings of evolutionary biology and arrives to some interesting conclusions regarding the role of sex, sexual preferences and human nature. By comparing human species and other animals he extracts set of behavioural rules intrinsic to human social life. Amongst others, he elucidates the motivation behind the need to amass, accumulate, and control things, the need for property, power, and social status. This suggests there will be a strong desire among users to acquire virtual property. Users are allowed to capture things and hold them via the code in ways, and to an extent, that they cannot do in the physical world. Driven by the natural instinct to master the external world, they are attracted to environments where this can be fully satisfied.

Ridley believes that only from the perspective of evolution it is possible to understand certain features of animal and human social life. Experiments have shown that human communities tend to invent a hierarchy and atomize into possessive sexual bonds. There will spontaneously develop a system of common/private ownership to manage available resources and procedures for dispute resolution. This is yet another theory to support the view that the notion of property is an intrinsic element to human society, which will develop in various forms under any circumstances. Property is the bedrock of social foundations irrespective of the location – New York City, Amazonian forests, or virtual environments.

### The Nature of Property

Some authors reject the idea that there can be a single interpretation of property. Even amidst natural law theorists there exists a multitude of explanations and justifications of property systems. The variety of origins ranges from Divine will, nature, and social order through to the force of market. For example, Davies proposes a more pluralistic and cultural approach to understanding of property. She depicts it as a “multi-faceted, sometimes self-contradictory and internally irreconcilable notion, which is variously manifested in plural (though inseparable) cultural discourses – economic, ethical, legal, popular, religious, and so forth.”\textsuperscript{90}

Property is the bedrock of social foundations. It is a social construction, which has become a phenomenon created, institutionalized, and made into tradition by society. There is no motivation for an individual living in solitude and isolation to introduce property rights, unlike society, which simply requires a property system in order to allocate available resources to eligible members. Legitimate origins of social institutions, such as state, money, or property, are explained by virtue of social contract. There are various theories of how this mutual agreement came into existence and what the main purpose behind it may be. Despite the differences, all the accounts see property as the basic and major social institution that sets standards for defining and distributing fundamental rights and duties. Through the process of socialisation property has become a part of human identity.

\textsuperscript{86} Mod or modification can be created either by users or developers and can include new items, weapons, storylines, levels, etc. Mods can create new additional content can become even popular than the original unmodified game, but can also be used to circumvent the rules of the game.

\textsuperscript{87} For example, Second Life has banned the use of ‘Copy-Bot’. This is software that allows users to make copies of objects without the permission of their creators.

\textsuperscript{88} This theory was introduced by Charles Darwin, who is one of the founding fathers of modern evolutionary biology. Darwin, C. 1871, ‘The Descent of Man, and Selection in Relation to Sex’, London: John Murray.


Rights, needs, labouring capacities, divine injunction, efficiency, harmony, liberty and justice – however understood by particular authors – have been subjects to political theory, and the continuing political issue of property is its compatibility with values like these. The capacity of a property system to exhibit great variety causes difficulties for a political theorist when trying to specify the content, formal characteristics of property, historical development, and especially when investigating the connection between property and values like liberty or labour. The central motifs of a political account of property are the distinction between private and public, the ‘possessive individual’, and property as a protection against the state.

Economic theory examines the key elements of the historical account of property. It identifies changes in economic systems, and the technology these systems employ. The economic approach mainly concentrates on access, use and management of available resources. Especially the focus is on the methods of appropriate distribution. The marketplace, a universal forum for exchange, plays a crucial role in the economic account. The market facilitates trade and enables the distribution and allocation of resources in a society. Stability in a property system is essential for effective and efficient interactions. Whether the market develops spontaneously or is deliberately established by society, a property system is introduced eventually to back up the network of transactions and contracts. From this point of view, anything of value can become tradable, which may lead to extensive commoditisation of resources. Many contemporary authors point out it is necessary to find a balance between private control and public enjoyment.

The concept of property is expressed through a system of rules – formal or informal – and sanctions for breaking those rules. These rules can originate from various agents, laying down criteria for distinction between natural and positive law tradition. The view of natural law theory is that certain rights and obligations exist independently from positive law and are common to all humankind. Evolutionary biology may identify that the human mind has simply evolved a special instinct for social exchange that enables humans to reap the benefits of co-operation, ostracise those who break the social contract and avoid the trap of being ‘rational fools’. This may be the material foundation for law. Schools of thought, such as legal positivism, attempt to conceptually separate any moral or ethical values from law. Legal positivism perceives law as a system of rules legitimately introduced by the legislative power and enforced by sanctions. To define property from the standpoint of positive law is simple: property is what the law establishes it is. In common law countries property is a bundle of rights. It refers to a specific relationship between persons in respect to objects, whereas in the civil law tradition property refers to a class of objects.

The theory of property has been focused for the last century on the economic, social and distributional consequences of different concepts of property. This exercise demonstrates it is not possible to consider such a complex institution separately and in isolation from the other relevant categories, as they are all closely interconnected.

In the course of this article, property has been introduced as the bedrock of social foundations. From the view of evolution, a property system is present in any situation of cohabitation and cooperation among humans. The main purpose for imposing such measures is to regulate access, use, and control of available resources. Principles of distributive justice are present in a wide range of political and economic traditions; they are no longer believed to be fixed by God or nature. Governments continuously make and change laws affecting the distribution of economic benefits and burdens in their societies. Their policies combine different sets of distributive principles in order to achieve the desired result. Almost all regulation, from the tax and property laws through to contract law, has some distributive effect, and, as a result, different societies have different distributions. Using these normative principles as guidance, societies can pursue intended policies, which are put into effect by virtue of a property system, amongst others. The main goal of a property system is just distribution of resources and this particular dimension of justice is carried out through the concept of property.


*For example, Davies advocates for more balanced and responsible approach to ownership in respect to material and intellectual resources. She mentions so called ‘infogopolies’ or ‘biogopolis’, which gain substantial power over specific resources, in this case software and media or pharmaceutical products, and demand disproportionate fees. Davies, M. 2007, ‘Property: Meanings, Histories, Theories’, Routledge-Cavendish, p. 60.


I would like to thank Dr. Prakash Shah for his insightful comments on this paper.
**Conclusion**

Users worldwide are ‘mastering the virtual worlds’, yet there is no legally defined and acknowledged concept of property within the virtual space that would regulate this activity. Despite the lack of regulation, a notion of property is emerging from the existing network of social contracts and transactions. The characteristic feature of human nature is to create social bonds and exploit their benefits. When the relationships reach a certain level of complexity, it is a necessary requirement to develop a property system in order to use and distribute available resources. Property systems are implemented for the purposes of managing and controlling products of the external world, real or virtual. Property is an intrinsic element of society, and a natural outcome of human relationships and interactions. Cyberspace and virtual environments in particular gradually evolved to be a continuum of the real world. Therefore they consist of the same matrix as the real world – human relationships and interactions. In the course of this article, property has been introduced as the bedrock of social foundations. From the view of biologic, social, political, economic, or legal evolution, property system is present in any form of cohabitation and cooperation among humans.

Currently, trading virtual goods and the concept of virtual property is governed by implicit social conventions in virtual environments. With the growing importance of virtual economies, it is crucial that players’ legitimate expectations about the alienability, value and inviolability of virtual goods are translated into reality and backed up by formal legal recognition.

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Public law and human rights issues

Who Needs Enemies When You’ve Got Friends?

Gender, Culture and Human Rights: Reclaiming Universalism
by Siobhan Mullally.

A Book Review & Beyond. – Kimberley Brayson

Introduction

If difference feminists are the friends of the feminist project, then human rights they say, are the “active enemy of women’s progress”\(^9\). Indeed, as Mullally states, albeit not in such absolute terms, with friends like difference feminists, the feminist project could well do without the \(\textit{bona fide}\) enemy of Kantian universalism in the form of human rights discourse. Constructing binary oppositions is a convenient way to polarise discourse and find a point of departure for critical theory. Elements of this dualistic conceptualisation are to be found in the legal debate surrounding human rights that sets difference feminists against Kantian universalism. This dualism extends throughout the Western philosophical tradition stemming back to the Cartesian separation of body and mind. The context in which the issues discussed herein are framed, is undoubtedly that of the Western philosophical tradition. No question is neutral for every question conditions its possible answers\(^9\) and to that end the question of whether feminists should reclaim universalism to protect their interests will inevitably be answered by means of the Western discourse of human rights, coupled with the European history which gave birth to this discourse. This being said, the ideas put forward in this paper attempt to move beyond the paradigm of Western Modern philosophy by borrowing from theorists operating outside of this paradigm.

Mullally describes how feminism has come to be defined in opposition to universalism and Enlightenment philosophy. Such binary approaches may be truly subversive in their effect on feminism, a result of which can be that the “friends” of the feminist project paradoxically end up working in opposition to their own aims. In drawing such distinctions, the fact of difference between women and men is negatively reinforced in an alternate, exclusory fashion as opposed to the holistic, inclusive way that must surely be the goal of the feminist project properly understood. A comprehensive understanding of the feminist agenda must surely seek a shift from the egocentric, masculine reason of Modernity to reason arrived at through a process of communication.\(^9\)

Have feminists then, erred in their target of criticism? It would appear so. As such, Mullally insists that we need a universal framework from which to work.

“To the extent that difference feminists are suggesting a move away from human rights discourse and the commitment to universality that underpins it, their claims are flawed”\(^9\).

Without this universal framework feminism loses its critical potential. On the other hand, deconstruction theories support the difference feminist project and thus encourage a rejection of universal structures and their implicit hierarchies. Derrida terms such structures “phallogocentric”. He warns that “before any feminist politicization, it is important to recognize this strong phallogocentric underpinning that conditions just about all of our cultural heritage”\(^9\). This is undoubtedly so and this legacy is traceable through Modern philosophy.

However, is such a post-structural approach helpful for feminism? “No one can speak out of nowhere”\(^9\); one needs a framework upon which to build. Therefore, Mullally’s argument goes, it is not the existing universal structure that should be jettisoned, but rather the accepted definitions of universal human rights and their content. Or as Otto recognises: “Eurocentric hegemonies posing as universalism”\(^9\)

Universalism redefined

One cannot escape the “His” story of modern philosophy. Descartes established the independent thinking ego which was undoubtedly male and educated. This process liberated the individual from the church. Theology and philosophy became two separate disciplines. Mullally terms this process decoupling and points out that this process has not yet taken place in Islam. The establishment of the independent ego is not something which feminists should reject even if this independent ego has been sculpted in a masculine form. To do so would put the feminist agenda on an even more unequal footing as religion is then brought back into the equation. This double hurdle...
effect is clear to see when Muslim women seek to assert their rights in both European and predominantly Islamic states.

An alternative interpretation of Modernity[102] put forward by Stephen Toulmin finds its roots in sixteenth century Renaissance humanist writers such as Michel Montaigne who emphasised “life experience”, “timeliness” and “the local”. This is termed the first phase of Modernity. However, faced with the atrocities and seemingly never ending turbulence of the thirty years war, writers such as Descartes and Hobbes felt compelled to produce principles which transcended the differing religious sways of the Reformists and Counter-Reformists in order to achieve peace. This resulted in the Cartesian “cogito ergo sum” from which stems modern individualism and the Hobbesian translation of human experience into a science. By means of nominalistic empirical epistemology, Hobbes constructs human reason (as he admits that man is not disposed of this naturally) which results in a knowledge of all human experience and thus successfully develops this human experience into a science. Hence the legacy of accepted “Modernity” is the complete separation of human reason and human experience. This is what Toulmin terms the second phase of Modernity. He sees the third phase of Modernity as that in which we are entering into now. Instead of totally rejecting Modernity one is advised “to reform, and even reclaim, our inherited modernity, by humanizing it”[103], in this way we can carry on the “practical modesty” of Montaigne and work towards a “cosmopolis that gives a comprehensive account of the world” in all its manifestations. This approach, it is suggested may go far in providing the reclamation of universalism with a solid philosophical underpinning and accords with practical reform measures to be discussed below.

Despite moving forward in this manner, the innate universal nature of human rights should not be rejected, as this may well be their best selling point. It is submitted that the claim of universalism is one ‘metaphysical illusion’ from the Enlightenment period that we should hold on to. The very fact that human rights are supposed to be universal and thus apply to everyone gives them an epistemologically “natural” basis which makes them easier for people to believe or have faith in, although the religious parlance sits somewhat uncomfortably in this context. Feminists should be embracing this and working towards a concept of human rights that is truly universal in the sense that everyone has these inalienable rights. The difference will be that these rights mean different things to different people. The value of universalism is that it gives these rights a reference point so that rights do not just become, in the wake of post-structuralist, difference feminist and relativist claims, random “rights” which can be justified by cultural and religious divergences on a whimsical basis. As Mullally tells us, this is where Rawls falls down in his re-articulation of his theory of justice. We need the universal in order to be able to articulate the local.

Mullally uncovers a paradox in feminist legal theory by which legal feminists are denouncing universalism on a superficial level to the detriment of their own aims. Feminist legal scholars, it is suggested, may have more success if they redirected their criticism away from the concepts and towards the content of human rights. Moreover, the way in which human rights are inescapably tied up with democracy[104] means that the feminist project should be concentrating on engaging in discourse on a political level. Through participation on a political level, they would become involved in defining the content of our human rights and thus make them truly universal - rights that are tolerant and accommodating of difference based on a concept of equality that really does include everyone. Indeed a criticism that is oft levelled at human rights is that they are egocentric and highly individual. However is it not paradoxical that if human rights apply to everyone, each individual, this is something that we all have in common, thus creating a sense, even in its weakest manifestation, of unity?

The problem may well be that until now, human rights have been defined by those dominant in power to serve and protect their own interests. Men have been the dominant political elite. Institutions and the structures of these institutions have been concerned with the public sphere and the protection of rights within this public sphere, as they have been pertinent to the male political elite. Many of the top down structures which have been implemented to accommodate norms and in this case, human rights[105] are incapable of accommodating the relational aspect of human relationships which, it is argued, more readily fits the female experience of reality. Thus, Mullally posits, we should be looking to discourse ethics to engage in communication. Communication not only between men and women, but between the public and the private spheres, the civico-political and the socio-economic.

103 Toulmin:180
105 Arguably more so in the civil law systems than in the common law.
106 Rabinder Singh, Equality: the neglected virtue, [2004] 2 EHRLR 141
107 Contemporary German Social Thought
Beyond discourse
To take Mullally’s claims one step further, it may be helpful to employ what Raimon Panikkar terms the dialogical dialogue.108 This entails transcending of the different logics at play to arrive as closely as possible at a true understanding of one another. This is not limited to binary relationships but instead seeks to articulate the complex web of social relationships that intersect to define our experience. In this way, the content of human rights can be redefined through a process of communication between networks of social relationships. Not just between men and women, but between different religious groups, ethnic groups and so on. Thus the universal claim is retained and provides an anchor within the legal and political systems but the content of that concept becomes much more fluid and dynamic. It has the ability to be able to accommodate difference in an inclusive rather than exclusive manner and to adapt to social change which is an inevitable trait of society. It has been suggested that shifts in Western society have tended to move from the ‘mythical Gemeinschaft’109 to the rational, contractual, ‘Gesellschaft’110, as opposed to Eastern societies which concentrate on community and shared experiences. Indeed, rights in the West based on the notion of social contract may well fit the individualist, self-interested paradigm of “Gesellschaft”. However, universal human rights which are the point of discussion here, in their very nature of being based upon our shared humanity, find their root in community, caring and welfare which cannot be said to be absent from Western society. As such, universal human rights and the characteristics which shape them, are more in line with the notion of Gemeinschaft. Admittedly, the way in which the abstract notion of human rights has been articulated by white, middle class male elites concentrates on the individualist civil and political rights of the public sphere leaving social and economic rights and the provision of community care that these imply on the periphery of protection at best. Thus the shift advocated here is a shift within the legal definition of human rights discourse to include the Gemeinschaft. On a concrete level the community spirit which this concept encapsulates is and has long been present in Western society.

This model brings us closer to a true participatory democracy where those being governed are taking part in the process of defining the way in which they are governed and the rights that they have. This also fills a gap in feminist legal theory that is highlighted by Mullally, the lack of reform.

Filling the void - judicial reform
Recent reform has been witnessed in the House of Lords in cases such as EM (Lebanon) (FC) v Secretary of State for the Home Department.111, where the Judges have been involved in a process not dissimilar to that outlined above. Human rights have been redefined to protect the interests of those not formerly recognised by universal human rights. This, it is argued, is a move that should be welcomed in the absence of any other mechanism to ensure recognition and protection of such rights of marginalised groups. However, two problems arise. One is that the discourse-taking place is that between judges. The interests of groups such as women and Muslims are being brought to the judicial fore as interpreted by our white, middle class, predominantly male, judiciary. Although this is undoubtedly a step in the right direction, it must be asked: is this sufficient? Do the judiciary understand the groups whose interests they are seeking to protect sufficiently? The answer must be no. Discourse between judges can never be a substitute for discourse, which is inclusive of marginalised groups themselves. The second problem lies in the fact that these interests are being dealt with in a judicial context and thus lack political legitimacy. Gearty highlights this problem in the form of his concern that the unelected judiciary should not be defining the delimitations of our human rights.112 Is this something that should be actively concerning the judiciary?

The judges at Strasbourg seem to think not. They are playing a major part in redefining the way in which we conceptualise human rights. Judge Francoise Tulkens in particular describes more original ways of tackling human rights.113 Traditionally a balancing act is employed by both supranational and domestic courts when considering the conflict of rights in particular cases. This is said to facilitate the triumph of one right over another. It inevitably results in a choice being made and a hierarchy of rights being put into place much like the one we see in practice at the European Court of Human Rights today.

Against this backdrop, Judge Tulkens speaks of a “practical concordance” or “practical compromise” approach. Borrowing from the German constitutional lawyer K. Hesse114, this approach aims “to avoid, to the fullest extent possible, sacrificing one

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108 Raimon Panikkar, Is the notion of Human Rights a Western Concept?, Diogenes 120 (1982): 95
110 Raimon Panikker, Crosscultural Economics, Text of a symposium held at Monchanin Cross-Cultural Center on March 21st, 1981.
111 [2008] UKHL 64; [2008] 3 WLR 931.
112 Conor Gearty, JUSTICE / Tom Sargant memorial annual lecture 2007, Are judges now out of their depth?
114 See on this ‘Prinzip der praktischen Konkordanz’, Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland (20th ed.), para. 172 (Heidelberg; C.F. Muller, 1995), in Tulkens and De Schutter supra n 19.
right against the other.” It thus eschews a hierarchy of rights in favour of accommodating the interests of all parties involved. In this way, space is made for recognition of rights outside those traditionally understood to be pertinent. In the current context, this approach provides the opportunity for rights discourse to be opened up beyond the scope of the civil and political interests of the white, Christian, male elite, to articulate the interests of women, religious and ethnic minorities, children and other marginalised groups. The idea of practical compromise echoes the claims of Panikkar’s dialogical dialogue in that the former aims to accommodate more than one right and the latter more than one logic. Practical compromise seeks alterity and in doing so pushes past an ontological dualism into a complexity that allows human rights discourse to articulate the experience of more than one person at the same time.

This is indeed an epistemological shift. Knowledge of human rights in this context becomes a more labyrinthine matter. However, can it be argued that this more complex epistemology could be wholeheartedly embraced in an attempt to facilitate a more all encompassing notion of equality? The appropriate response must be affirmative. This plural equality is capable of being defined and redefined by the subjects themselves. In this way, all factions of society have an opportunity to have their experience translated into the parlance of the law. This approach does not disregard one experience in favour of another, but rather seeks to accommodate both in a constant process of communication between civil society and the legal world. Unlike systems theory, these are not autopoeitic systems closed off from one another but rather interactive communities that learn from and inform one another. To speak in the tongue of Panikkar, they transcend one another’s logic to come up with a more complicated but more satisfactory answer to the question: what are human rights?

115 See Öllinger v. Austria ECHR 29 June 2006 for the practical compromise approach in action

Conclusion

The epistemological shift advocated above sits well within Mullally’s crusade to retain the tag of universalism. Human rights thus become characterised by a more dynamic communicative epistemology, which is reined in and anchored by the universal framework, which is established and crystallised in instruments such as the European Convention on Human Rights. To re-write rights would be a futile task. Finding agreement on where to start with this would stall the process indefinitely. Better to be creative with the human rights tools at our disposal to achieve a legal construction of the world, which better represents our experience.

As such Mullally surely lays the foundations for a universal theory of human rights which has the potential to be dynamic and all inclusive without falling back on the claims of cultural and religious relativism. She provides a basis upon which to more concretely build, attacking the content of human rights without completely destroying their form. It has been herein advocated that much can be gained for the reclamation of universalism by going further than the idea of discourse between logics and attempting to transcend the different logics at play. The overriding factor to be taken from Mullally’s analysis is that this process should be effected without discarding the tag of universalism. This is surely the greatest weapon at feminists’ disposal. To redefine the very thing that was once oppressing them.
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The historical evolution of the law relating to the apportionment of responsibility for International Crimes – Narissa Ramsundar

Whereas international law has identified the state as the subject of the law, international criminal law, since Nuremberg, has treated the individual as the subject for many reasons. As such, though some writers identify that there is a case to be made for state responsibility for international crimes, thus far, responsibility for international crimes is attributed to the individual.

This article aims to show the evolution of the ideas for the attribution of responsibility to the individual in international criminal law. It investigates the development of forms of international responsibility, from the early ideas of individual responsibility, followed by the consideration of group responsibility and state responsibility to the recent consideration towards the mutual use of state and individual responsibility for mass atrocities.

**Historical antecedents**

*Individual responsibility through the Laws of War*

International criminal law and the attribution of responsibility on the individual emerged out of the laws relating to the violations of the laws of war. Initially these violations were penalised domestically. After the emergence of ad hoc tribunals set up by victors of war, offenders were tried on a wider international or regional forum.

There is a substantial body of law dating as far back as c.450 B.C which imposed individual criminal responsibility for breaches of duties which arose in the course of warfare.

There is evidence of restraint imposed upon warfare across many cultures. Sanctions obtained in the Egyptian, Babylonian, and Assyrian and Hittian empires as well as in the China and India. Iriye writes that in fifth century China a theory of War Crimes was recorded in the Chinese Classics. This was seen in Sun Tzu, in his work the “Art of War” which prescribed a number of limitations on the conduct of hostilities. Similarly, examples exist in the Maharabata and the Code of Manu from India dating around 200 BC which identified clear rules for the conduct of war. In c. 450 BC consequences for breach of the laws of war appeared in the writings of Xenophon where there was penalisation of soldiers for breach of the laws of war.

In the period leading up to the Middle Ages, there was evidence of the establishment of further restraints on war. During this period individual liability developed for the commission of crimes particularly for breach of duties relating to command. Examples of this are evident in many cultures during this period. For instance there are examples in the Koran and also in the use of penitential orders and decrees in Northern Europe.

The later thirteenth and fourteenth centuries improved on this by imposing penal sanctions for violations of the laws of war, including the “first documented prosecution for initiating an unjust war”. Prince Von Hohenstaufen was tried by Charles of Anjou for waging an unjust war. Eleven years later the law in England amplified the duties imposed upon leaders in warfare ascribing primary liability for excesses or unjust aggression. Evidence of this was in The Statute of Westminster of 1279, which authorised the Crown to punish soldiers. It was used to convict William Wallace of Scotland, for “excesses in war.

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118 I have tried to use historical sources from as many geographical regions as possible, but there is strong use of referencing to European sources which is unavoidable.

In sum, the laws of chivalry were important turning points in the law in that it located criminal responsibility in the form of individual liability and went further to begin creating a hierarchy of responsibility.

Within the period governed by the chivalric law in European states, the most significant trial was that of Von Hagenbach. Peter Von Hagenbach was the Governor of Breisach on the Upper Rhine. Von Hagenbach was tried before an ad hoc tribunal consisting of twenty eight judges from the victorious allied states.\(^{129}\) Whereas the trial has been criticised as an example of victor’s justice, it was a dramatic example of the law moving towards not only the attribution of responsibility on the individual, but the early creation of an international accountability.

**Codes and rules of war**

Military codes, which identified the limitations of the conduct of war and prescribed penalties for their violations started to appear with increasing frequency during the latter part of the eighteenth century and throughout the nineteenth century.\(^{130}\) Through these codes, a law of nations governing international criminal responsibility of individuals began to mature.

Of significance was General Order 100, popularly known as the Lieber Code.\(^{131}\) The Lieber Code has been considered one of the most important instruments for defining the criminal responsibility that result from violations of war. The Code itemised the rules regulating the conduct of hostilities and also prescribed punishment for violations either on the part of the US or its opposing forces in the Civil War. Under Articles 44 and 47 of the Code the penalties were provided for “crimes punishable by all penal codes.”\(^ {132}\) In doing this it indicated the development at this stage of a supra-national law that existed over and above a single nation in that it allowed the prosecution or trial of individuals from different jurisdictions.

\(^{129}\) T. Mc Cormack and G Simpson supra at note 5 at 37-38
\(^{130}\) T.Mc Cormack and G Simpson supra at note 5 at 40
\(^{131}\) “Instructions for the Governments of Armies of the United States in the Field”
\(^{132}\) T. Mc Cormack and G Simpson supra at note 5 at 41

The later Hague Conventions which were adopted in 1899 and 1907 respectively in the period after the Lieber Code codified to a large extent what had come to be accepted over the years as the correct course of conduct in hostilities and a regulation of the means and methods of warfare.

Though responsibility was clearly stated to be on the individual, the situation became even more complex as there were new considerations as to the form the responsibility should take.

**World War 1**

Several years before the onset of World War 1, the notion of individual criminal responsibility began to manifest itself in a different form - that of the group as opposed to the individual in the context of the joint Declaration to the Ottoman Empire.

In the early phases of World War 1 the widespread killing of Armenians by the Turks increased and by 1915 there was a systematic deportation of Armenians into Northern Syria in pursuit of a Turkish nationalist goal. Acting on the Russian initiative France, Russia and The United Kingdom issued a joint Declaration to the Ottoman Empire in May of 1915. It issued a warning that ascribed responsibility on the Ottoman Government and its agents who would be held personally responsible for crimes against humanity. The declaration read that

“in view of these crimes Turkey against humanity and civilisation, the Allied Governments announce publicly that they will hold personally Responsible [for] these crimes all members of the Ottoman Government and those of their Agents who are implicated in such massacres.”\(^ {133}\)

It was almost a hybrid form of responsibility. It affixed liability on the individual members of the government in both their individual capacities and as part of a group, or membership within a group, thereby showing a normative shift towards the group rather than the individual.

\(^{133}\) T. Mc Cormack and G Simpson supra at note 5 at 45
Post war, this idea of group responsibility initially lay dormant. Instead there were domestic trials of German nationals conducted by Allied states. The form of responsibility centred on the individual. The crimes charged were not systematic crimes in that they needed the joint cooperation of many parties to be perpetrated. Thus without the suggestion of the involvement of other parties the idea of individual responsibility, was maintained.

Commission on Responsibility for the war and Proposals for an International Court

After World War I the Allies convened at the Paris Peace Conference on the 18th of January, 1919. Subsequently, they set up the Commission on the Responsibility of the Authors of the War and on the Enforcement of the Penalties (“the Commission”). The Commission found in the end of March 1919 that the War was the fault of the Central Powers134.

Whilst the issue of fault was allocated in this manner, a further question remained: was the War the fault of the state of Germany or of its individual leader the Kaiser? With the public arraignment of Wilhelm II for the supreme offence against international morality and the sanctity of treaties, it appeared that a state’s leader could be held culpable for aggression. Kelsen viewed the Kaiser as the main author of the war and that his resort to the war was his crime.135 In this way aggression could be seen as a crime of leadership thereby ascribing responsibility on individual in this case the Kaiser.

However, a contrary interpretation of responsibility is suggested by Jorgensen who saw the indictment of the Kaiser as an indictment of the state in the person of its titular head. In dealing with aggression as a crime of leadership it was an attempt, according to Jorgensen, to “convict a state”.136 Conviction of a state would mean modelling international criminal culpability upon state rather than individual responsibility. The issue never resolved. Though the Kaiser was arraigned under article 227 of the Treaty of Versailles, he was not prosecuted because he was never handed over to face trials by the Netherlands. Nonetheless there were subsequent trials which were conducted at Leipzig. All of the trials were commenced against individuals as opposed to groups and there was no further talk of using state responsibility as a form of accountability.

As well, the Advisory Committee of Jurists which was appointed by the Council of the League of Nations to draft the statute for the Permanent Court of Justice recommended that consideration also be given to the creation of a High Court of International Justice.137 In refusing this establishment, it was argued that the individual was not a subject of international law and therefore could not be prosecuted before a tribunal that applied international law.

The Rapporteur of the Third Committee also saw no notion of international crimes in international law. He did not see the need for a separate court in any event; he felt that a special chamber within the Permanent Court of International Justice was sufficient but that the discussion of that was premature.138 Implicit in these statements was the belief that only states were proper subjects of international law, and as such there seemed to be the argument that it was not possible to attribute responsibility on an individual basis.

Soon after this the world plunged into another brutal war.

World War II

In attempting to deal with issues of accountability for atrocities, the form of responsibility continued to centre on the individual. The statute of the International Military Tribunal at Nuremberg (IMT) attributed responsibility to individuals and for the first time, to groups.

134 Commission on the responsibility of the authors of the War and on enforcement of penalties 14 Am J Int L (1920) 114
136 N. Jorgensen supra at note 2 at 7
137 T. Mccormack Supra at note 5 at 51
138 Q. Wright, “War Criminals” (1949) 39 AJIL, 262-65
Accordingly, twenty four individuals were arraigned before the tribunal. Three of the defendants were acquitted and nineteen convicted. Therefore, a clear movement to hold persons individually accountable for international crimes beyond domestic law was seen. While this settled the law on forms of responsibility to some extent, responsibility was also accorded to groups for the first time. There was criminal indictment of six organisations and prosecutions of three, the Gestapo, the SS and the Leadership Corps of the Nazi party.


The question of how to prosecute such systematic atrocities proved a challenge. Due to the collective nature of the participation in the crimes, a method had to be devised to deal with the "organised criminality which had been carried out by the German state apparatus and numerous willing participants… taking care not to condemn the German people as a whole."141

The American solution to this was in the s Bernays doctrine, so named after its architect Colonel Murray Bernays. His suggestion was a two part plan based on the imputation of guilt on the basis of membership in the criminalised group. Under the first phase an International Tribunal would be set up to establish the guilt of the Nazi government, its party and other agencies such as the Gestapo, the SS and the SA for all manner of violent crimes. Under the second phase every member of the organisation would be found guilty, as guilt could be imputed to the individual based on the membership in the criminal organisation. This suggestion was rejected as illegitimate and attempts were made to find a method that would meet with the requirements of a fair trial as opposed to collective guilt.

A draft recommendation was prepared by the Legal Committee to the UN War Crimes Commission which suggested that all members of these organisations be interned and membership be declared a crime. The French delegate endorsed this by saying that the principle of individual guilt could not be applied to the mass criminality demonstrated by the war, and that new procedures had to be developed to ensure that war criminals could not escape punishment, because individual guilt could not be proven. The French recalled the slaughter in the Village of Lidice and noted that all the inhabitants were massacred. There were no witnesses left and it would be impossible thus to mount a case on a strictly evidentiary basis. Should the international community let the crime go unpunished because individual liability could not be proven?140

The French proposal was based on an old French notion of the association de malfeiteurs, whereby individuals could be held responsible for being part of an association. There would be a reversal of the onus of guilt. The accused would be presumed guilty and have to prove his own innocence.141

The recommendation was not taken. The United Nations War Crimes Commission looked at these proposals and came out with the following proposal,

"a) to seek out the leading criminals responsible for the organisation of criminal enterprises including systematic terrorism, planned looting and the general policy of atrocities against the peoples of the occupied states in order to punish all the organizers of such crimes;

b) to commit for trial, either jointly or individually all those who, as members of these criminal gangs, have taken part in any way in the carrying out of crimes committed collectively by groups, formations or units."142

The later Nuremberg charter sought to further develop the issue.

Articles 9-11 of the IMT Charter specifically provide for the attribution of responsibility based on membership within a group. Under article 9 the tribunal could make a declaration that the organisation is criminal pursuant to an application from the prosecution. Under article 10 the declaration is final and unchallengeable and it will allow the prosecution of individuals. Under article 11 an individual can be prosecuted for not only a crime committed in his individual capacity, but also for a crime committed as part of a group.

The prosecution argued that the theory was legitimate on three bases.

The prosecution argued that the notion of a group is non technical; it is simply the aggregation of a group. The aims of the group must be criminal in that the group performed the acts denounced in article 6 of the Charter. Membership must have been voluntary and of such a character that the membership could properly be charged with knowledge of it.143 The prosecution argued that the theory was legitimate on three bases.

140Supra


Firstly, the idea of group criminality was not new in that there were historical examples of collective bodies being declared criminal. That being so the finding of guilt against a group would be declaratory and so sentences would not be passed on the group but on individuals within it. The legal effect of this declaration would thereby create a rebuttable presumption of guilt on the members with a reversal of the burden on proof on them.\footnote{For instance the US Smith Act of 1940, UK British India Act of 1836, the German Penal Code of 1871}

It was with this that the defence took several objections. It was argued that the attribution of responsibility has always been upon the individual and to allow a tribunal to make a declaration of illegality flew in the face of natural justice. Moreover, a declaration would affect thousands of people and could well convict the innocent without adequate standards of evidentiary proof.\footnote{N. Jorgensen supra at note 2 at 63} The tribunal attempted to clarify the matter to some extent and held that it retained a discretionary power to make these declarations. It went on further to state that:

\begin{quote}
...a criminal organisation is analogous to a criminal conspiracy, in that the essence of both is cooperation for criminal purposes [however] that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisations and those who were drafted by the state for membership, unless they were personally implicated in the commission of acts declared criminal by article 6…… Membership alone is not enough.\footnote{Trial of German War Criminals Supra at note 26 at 46}
\end{quote}

With the application of a knowledge test, the burden remained on the prosecution to prove that the member was complicit in the guilt of the organisation. In short, responsibility is attributed to an individual for not merely being a member of a group but for being complicit in the crimes committed by the group. In this way, responsibility remained on the individual.

The possibility of attributing responsibility to states as opposed to individuals was considered but not accepted. According to the tribunal “Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”\footnote{Judgement of the IMT for the trial of the German Major War Criminal supra at note 26 at Nuremberg, at 223} The state was an abstract entity. Could there be state responsibility for international crimes?

At the sixth committee discussions the possible criminality of the state was debated.\footnote{N Jorgensen supra note 1 at 23} However, the concept was rejected because it was considered that a state could only be held responsible in a civil or administrative sense.\footnote{Supra} It will only be in the later Bosnian Genocide cases of 2007 and the work leading to the International Law Commission’s Draft Articles on State Responsibility that the concept would be considered in great detail. The subsequent work for the creation of The International Criminal tribunals for Yugoslavia and Rwanda concentrated on the individual attribution of responsibility.

**Yugoslavia and Rwanda**

Questions on responsibility again became relevant in the context of the severe violations of human rights in the territories of the former Yugoslavia that occurred in 1992 and later in Rwanda in 1994. In both areas, deep seated ethnic tensions led to grave atrocities and severe loss of life through the systematic commission of acts ranging from rape to torture to genocide.

It is against this history that the International Criminal Tribunal for Yugoslavia (“ICTY”) and the International Criminal Tribunal of Rwanda (“ICTR”) were established. The Nuremberg tribunals decided to attribute criminal responsibility to the individuals, rather than states, and the ICTY and ICTR continued this tradition. The Secretary General suggested, “The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the court irrespective of membership in groups.”\footnote{Letter dated 24 May 1993 from the Secretary General to the President of the Security Council, UN DOC S/1993/674}
Unwilling to reintroduce the ideas of group criminality for fear that it would be difficult to convey juridical status to an organisation, the ad hoc tribunal focused on individual criminality. This was, perhaps, motivated by a concern that it would be difficult to comply with due process requirements or alternatively may have been prompted by the fear that creating collective responsibility would penalise the innocent along with the guilty. The end product was that the ad hoc tribunals focussed on individual responsibility. In an effort to deal with this the domestic courts of Gacacca became flooded with the foot soldiers and primary perpetrators of the atrocities, leaving the tribunals to call to account those who were considered most responsible: the architects and planners of the crimes. The question of prioritisation of guilt occupied the creation of the tribunals.

So too following the Reports of Special Rapporteur Taedus Mazowiecki, the ICTY considered the prioritisation of guilt. Mazowiecki ascribed the responsibility of the atrocities to the Yugoslav army and the political leadership of the Republic of Serbia, and also named the Bosnian Muslims as the primary victims. Despite attributing responsibility to the Serbian leadership, the resolution steered away from group responsibility for the reasons identified by the Secretary General namely a reluctance to treat an organisation as a juridical entity. The Tribunal maintained the Nuremberg principles that “criminal guilt is individual and mass punishment should be avoided.”

Shortly after the receipt of this report and pursuant to Resolution 808, the Security Council passed resolution 827 whereby the Statute of the International Tribunal for Yugoslavia was accepted and this was followed, though some time later, by Security Resolution 955 which provided for the establishment of the ICTR. Both statutes contained provisions solely directed at responsibility of individuals.

The International Criminal Court

In the words of the General Assembly “the Rome Statute provides for the creation of an international criminal court with power to try and punish individuals for the most serious violations of human rights in cases when national justice systems fail at the task.”

The prosecution strategy as announced by Luis Moreno- Ocampo targets prosecution for those who are most responsible. Since the International Criminal Court (ICC) will not take primacy in prosecutions, in contrast with the ad hoc tribunals, and instead rely on the principle of complementarity, the bulk of the work of the ICC will focus on the most serious offenders and leave the lower ranking individuals for the local courts to try.

Initial prosecutions against individuals within Uganda, the DRC and Sudan target individuals. In accordance with Articles 13(a) and 14 Uganda referred its complaint to the court on the 16th of December, 2003. On the 6th of May in 2005, five warrants were issued in accordance with art 58 of the Rome Statute. The application for the indictment included several allegations against five individual leaders of the Lords Resistance Army. Thus, the practical application of international criminal accountability in an individualised form is confirmed but new possibilities exist.

Article 25 of the statute of the ICC further supports the contention that the ICC prioritises responsibility and punishment of the most blameworthy. Responsibility is triggered when “an individual commits a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible.”

156 It constitutes a benchmark with the progressive development of international human rights, whose beginning dates back more than fifty years, to the Adoption on 10th December, 1948 of the Universal Declaration of Human Rights by the Third Session of the United Nations General Assembly. “See Morris and Scharf on this supra at note 122 on this generally

157 Problematically the death penalty does not obtain in the Statute of the ICC it does still occur in some domestic courts thus raising the issue as to whether the administration of criminal justice will operate fairly at the international level and afford legitimacy to the system.

158 Situation in Uganda(ICC-2/04-6), Decision on the of exercise functions by the Full Chamber in Relation to an Application by the Prosecutor under Article 58, 18 May, 2005.

159 ICC Statute art 25(3)(a)
Article 25 is also important because it states “no provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.” As a result, the two forms of international responsibility, individual criminal and state responsibility, will operate in parallel with each other, governed by the ICC and the ILC Articles on State Responsibility respectively. Therefore, state-to-state action for breach of the International treaties will still operate. A recent example is the Bosnian Genocide Case from 2007 where there was a breach by Serbia for failure to prevent genocide under the Genocide convention.

However, state responsibility is a distinct form of responsibility, which it does not seek to deal with criminal wrongs committed by one individual against another. The remedies are different focusing on international condemnation, reparation and damages. It does not call to account the individual for his personal actions reflected in the notion of individual criminal responsibility. Thus, Article 25(4) is an important provision because it attempts to develop the law of individual accountability while still acknowledging that the situations that will trigger different responsibility for states. It is submitted that Article 25 recognises individual and state responsibility as mutually supportive, rather than exclusive, forms of international responsibility for international crimes. This view was supported in the 2007 decision on the Bosnia v Serbia cases.

Bosnia in its first set of pleadings before the ICJ, stated that this case “is not aimed at the individual citizens of Serbia and Montenegro, let alone individual citizens” and that “The case supersedes the level of individual responsibility….”

This view was upheld in the pleadings filed on behalf of Serbia. According to Serbia, the ICJ was only given competence to decide on matters of state responsibility in contempt of the fact that another international organ as designated by the International Law Commission would bring persons to trial that are charged with genocide. Professor Brownlie expanded on this in his submissions; “the Convention on Genocide is essentially and primarily directed towards the punishment of persons committing genocide or genocidal acts and the prevention of the commission of such crimes by individuals.” He continued that it was only at the last stage of negotiations that the idea of state responsibility for genocidal acts was included. This was so because prior to the Bosnia Cases, The International law commission spent nearly a decade wrestling with the question of punishment of state crimes, until the provisions relating to state crimes were finally excised from the 2001 draft article.

Against this the judgment of the majority of the court in the case was that acts of genocide can only be attributable to the respondent state if the offending acts were committed by individuals who were either de jure or de facto organs of the state or who were acting in complete dependence on the state or separately that the individuals were acting under the effective control and direction of the state.

The finding thus supports the view that international criminal responsibility as it has evolved is primarily focussed on the attribution of responsibility to the individual. To have the mutual use of state and individual responsibility still leaves the issues of criminality to be decided on an individual basis with the state becoming vicariously liable in a civil or delictual sense for the acts of its agents.

In sum the idea of individual criminal responsibility is well settled as the presentation of the concept in this article has aimed to show. The law as it stands has devolved responsibility upon the individual, with the more critical issues now being how to prioritise or diminish responsibility.

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160 ICC Statute Article 25(4)
162 Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide( Bosnia and Herzegovina v Serbia and Montenegro) CR 2006/2 at p2 per Mr Softie
163 Supra
164 Supra CR 2006/5 11 per Mr Franck
165 In the 1996 review of the issue, Arangio Ruiz divided state responsibility into two degrees: responsibility for the commission of a delict and responsibility for the commission of serious crimes such as would create an aggravated form of responsibility.
166 Though there was support for the distinction, there were a number of reservations. Governments could not settle on the precise nature of the consequences. Later, Rapporteur Crawford stated that there was doubt as to how to define state responsibility for a crime “especially … [since] international law had developed the notion of criminal responsibility of individuals to such an extent.”
Introduction
The 13th Directive on Takeovers was adopted in 2004 with a deadline of implementation by 2006. As part of the Financial Services Action Plan in Europe, it has been one of the key steps taken towards achieving the single market and has played an important role in the creation of the modern regulatory framework for European corporate law. Due to the political controversies and the substantial divergence that exist between different socio-economic and political models in Europe though, the final version of the Directive represents a significant compromise; particularly for the flexibility it affords Member States in adopting its two key provisions, namely the board neutrality and “breakthrough” rules. The specific aims of the Directive are the creation of a level playing field between EU Member States and the facilitation of the benefits that takeovers as external corporate governance mechanisms can provide. These benefits mainly refer to the disciplining of underperforming management, enhancing corporate performance and allowing for economic growth within the EU by relocating the company’s resources to more productive uses in an attempt to maximise the overall value of the corporation. As national divergence in the area of company law continues to remain current, adopting mandatory rules to meet the Commission’s objectives of furthering European competitiveness and creating a European market for corporate control remains a non-viable option.

The paper will address the EU Takeover Directive from a corporate governance perspective and identify the reasons that lie behind its unsuccessful implementation. It will begin by providing a historical overview of the Directive and explain why the “one size fits all” approach is not an option. Following, it will refer to the ambiguous nature of takeovers as a corporate governance tool, focus on the Directive’s relative deficiencies and finally propose a possible way of going ahead.

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Q. Wright, “War Criminals” (1949) 39 AJIL
Historical Overview

The first proposal for a European Directive on takeovers was presented by the Commission in 1989. The proposal was then viewed upon as unnecessary and over detailed, and could not for this latter reason obtain the necessary majority to pass. In 2001 a revised version, in which the detailed provisions were replaced with general principles, was presented to the European Parliament. Despite high hopes, the lack of one single vote from the opposing German parties led to the proposal being rejected. The 2000 Vodafone versus Mannesmann takeover was the first hostile takeover to take place in Germany, understandably making the German members not especially keen on facilitating takeover activity within the EU. Bad timing in introducing the proposal was not the only issue at hand though. As explained by the Commission, the voting scheme represented the concerns of most EU Member States about certain provisions. The fact that target boards would need shareholder approval in order to thwart an unwanted bid would make national companies vulnerable to takeover bids from US companies or other Member States, whereas most Member States had a straightforward policy in retaining control of certain economically strategic companies based in their own jurisdiction. Following this unexpected setback, the Commission decided to appoint a High Level Group of Corporate Law Experts with an agenda of proposing possible solutions, the product of which was the 2002 Winter Report. The introduction of an opt-out facility for two of the most controversial provisions of the Directive, namely the board neutrality and “breakthrough” rules, led to it finally being adopted in 2004. Despite high hopes though, the board neutrality rule, as implemented by Member States, held back the European market for corporate control rather than facilitating it. The Commission thus guaranteed to closely monitor the manner in which the Directive’s rules are applied by the revision date in May 2011, and analyse the reasons Member States have been unwilling to support the fundamental provisions it encompasses.

Following the financial crisis, impediments to takeover activity have increased, the most important being the de-listing of companies and governments blocking acquisitions from foreign acquirers. As publicly listed companies are moving into safer forms of conducting business, the role of the Directive as a regulatory instrument whose aim is to open the market for corporate control to all companies in Europe is being questioned. But its failure to provide regulatory solutions has lain more in its own deficiencies rather than the environment in which it comes to stand in. In the following section this paper will focus on the board neutrality rule and breakthrough rules, explaining why political and legal controversies surrounding these provisions have led to the failure of reaching a uniform regulation of takeovers within the EU.

The Takeover Directive’s deficiencies

The Board Neutrality Rule & the Breakthrough Rule

The two basic legal approaches that would secure the success of the Commission’s objective to create a European market for corporate control are according to the Winter Report, the board neutrality rule, found in art. 9 of the Directive and the proportionality between risk-bearing capital and control, also known as the “breakthrough” rule, found in art. 11. These provisions have not been adopted by all Member States in the same way and in this respect the Directive has not only failed to overcome certain obstacles to takeovers permitted under the national laws of Member States, but has also created barriers where none previously existed. While the optionality arrangements and the reciprocity rule found in article 12 were the means to achieve a political consensus on the adoption of the Directive, simultaneously they constitute the impediment to creating the desired market for corporate control. As Matteo Gatti explains: “…. since companies can nevertheless opt into any of the two regimes and such decisions can always be reversed by their shareholders, the number of possible combinations and, hence, of possible regimes increases”.

The board neutrality rule equates that target management cannot take any sort of action to frustrate a bid without prior shareholder approval, once a bid has become imminent. Proponents of the board neutrality rule consider this rule beneficial to the
overall economic system, since it provides a mechanism through which managers are challenged to work efficiently in order to keep stock prices high, and can be effectively replaced should they fail to do so.\(^\text{186}\) The conflict of interests/interests’ argument attached to this school of thought suggests that directors are not in a position to decide objectively on the merits of a takeover and promote shareholders’ welfare, since a decision in favour could potentially cost them their position.\(^\text{187}\) On the other hand, those opposed to the rule argue that by giving all the decisional rights to shareholders, the focus of the Directive is narrowed down to shareholders interests, and does not allow for broader stakeholder interests to be taken into account.\(^\text{188}\) It has also been suggested that the rule places strong pressure on management, which can lead to a narrow focus on the share price and short-term management of the company.\(^\text{189}\) Implementing a board neutrality rule can also result in promoting anti-takeover reactions from firms that want to operate in safe mode via implementing pre-bid defences, as well as encouraging national resistance to cross-border takeovers of firms that are vital to the Member State’s economy.\(^\text{190}\)

The Breakthrough Rule is intended to neutralise certain pre-bid defences, by imposing restrictions such as share transfers, multiple voting rights and other provisions that distribute control rights disproportionate to cash flow rights, allowing thus the hostile acquirer to gain control.\(^\text{191}\) Disproportionately is important for takeover facilitation, since allowing the existence of multi-class rights equates that one shareholder will be able to maintain control over that firm without paying for the cash-flow rights which he would have to pay in a one share-one vote situation.\(^\text{192}\) A strict provision that does not allow the predominant shareholder to maintain control is practically ineffective, since European firms can easily evade its application by shifting their state of incorporation outside the EU or by issuing non-voting shares.\(^\text{193}\)

The breakthrough rule can also lead to a lower instead of a higher probability of takeovers occurring depending on the afforded quality of the corporate law regime in which the target company is incorporated.\(^\text{194}\) Sjåjfell contends that mandating the breakthrough rule is not a wise solution altogether, since as she evidences in her paper certain anti-takeover structures are economically justified whilst others are not.\(^\text{195}\)

Article 12 encompasses 3 options for the national legislator to choose from, namely that Member States can first of all, refuse to adopt either the board neutrality rule or breakthrough rule, or both on the condition that they still allow corporations to spontaneously comply with these provisions; secondly, adopt either the board neutrality rule or the breakthrough rule, or both, but subject their application to reciprocity; and finally, adopt the board neutrality rule or breakthrough rule, or both, without any reciprocity condition.\(^\text{196}\) Whilst assessing the optionality arrangements, the Commission finds that the reciprocity rule contained in art.12 (3) gives the target management additional powers to take frustrating action against a bid, and in fact makes it easier for companies to avoid implementing the board neutrality and breakthrough rule altogether.\(^\text{197}\) The rule of reciprocity is likely to encourage protectionism, which has indeed proven to be the case in particular with cross-border hostile takeovers targeting EU corporations since the financial crisis erupted.\(^\text{198}\) Clarke questions the balance that the Directive strikes between harmonisation and diversity through the optionality arrangements and suggests that the light regulatory touch of the Directive may have well jeopardised the goals of creating an efficient takeover regime.\(^\text{199}\) Conversely, McCahey and Vermeulen focus on the benefits that the opt-out regime offers and contrast it to the high costs and adverse outcomes that would stem from a mandatory regulatory framework.\(^\text{200}\) Debate on the effectiveness of these

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\(^{189}\) Sjåjfell (2010), p. 16

\(^{190}\) Sjåjfell (2010), p.31

\(^{191}\) Gattti (2005), p. 107-108


\(^{194}\) Sjåjfell (2010), p.54

\(^{195}\) Gatti(2005), p. 107-108

\(^{196}\) Sjåjfell (2010), p. 57


provisions was certain to arise, since the optionality arrangements were introduced as a compromise to solve a crisis and not as a regulatory plan that meets the Commission’s objectives. 204 The following section will address the reasons that did not allow the Commission to put forward a mandatory regulatory framework.

“One size fits all” approach
Harmonisation in the field of EU takeovers has been difficult to achieve due to socio-economic and political differences between Member States, as well as due to variances marked between companies’ constitutions, the way in which companies are being financed and the markets on which companies trade.205 Uniform takeover regulation would guarantee the creation of a level playing field for all companies within the EU, meaning that all shareholders within the Community would be afforded equal opportunities in trading their shares and takeovers would occur with the same frequency in all Member States.206 One of the most important variables affecting the Community’s ability to adopt a uniform legal framework is the continuous battle between the Anglo-Saxon and Continental European social economic models. The former gives priority to shareholders’ welfare based on the notion of ownership rights, whilst the latter aims to balance out broader interests within the company and affords special attention to employee rights and their participating in the company’s decision-making process.207 Concentrated and dispersed investor ownership structures in certain countries also affect the stance taken towards an open market for corporate control. UK company law for example has been drafted in such a way, so as to reflect the challenges that companies with dispersed share ownership structures are faced with, namely aligning management’s and shareholders interests.208 It follows that in such an environment the threat of a takeover plays a key role in aligning these divergent sets of interests and therefore facilitating an open market for corporate control is important. In Germany on the other hand, a significant investor will control a large proportion of stock and exert a dominant influence on the board receiving considerable private control benefits, and principle-agent issues will not arise.209

The recommendations found in the Winter Report aim to combat the problems holding back the creation of the so-called “level playing field” within Europe. According to the Report, mandating the board neutrality rule would not only increase the frequency of takeovers or the prospects of their success, but in practical terms it would facilitate the takeover’s disciplining effect.210 It has been argued though, that the disciplining effect that a takeover possesses is only related to concerns that UK and US companies face and not companies in Continental Europe with concentrated ownership.211 Sjåjfell is of the view that the Commission needs to explore the pros and cons of the existing corporate governance systems in Europe before facilitating the Anglo-Saxon model shareholder structure in the Takeover Directive212. Providing the Anglo-Saxon rules as the solution, also disregards the problems the system as such is perceived to have.213 However, socio-political concerns are not the only issue at hand; the following section will address the ambiguity surrounding the effectiveness of a takeover as a mechanism itself.

Practical Matters on Takeovers
The Facilitation of Takeovers: Why?
Takeovers result in the facilitation of “differential managerial ability”, which is an important aspect of operating efficiencies stemming from synergy gains that occur after a takeover.214 This phenomenon suggests that the managers of the acquiring firm, having an excess of managerial competence, can efficiently manage the larger amount of resources that the firm being acquired possesses, in which the management team was unable for the opposite reasons of inefficiency to manage the assets it controlled.215 The function of takeovers is based on the market efficiency theory, which purports that stock markets behave rationally and thus shares are priced so as to reflect the company’s performance and prospects. In case of lowered share prices, management of the particular company will be replaced through a takeover performed by another company usually conducting similar business to the target, having as an ultimate goal to utilise the target’s assets more effectively and make it profitable. Takeovers also work as an external corporate governance mechanism, as they ensure that directors will be more accountable to the company’s shareholders in their every day business,

199 J.A. McCahery and E.P.M. Vermeulen (2010), p. 11-12
201 Clarke (2009), p. 175

204 Waddington(2004) p.11
206 Sjåjfell(2010), p.30
208 L. Saigol, ‘Cable seeks stricter takeover rules’ Financial Times; article dated 1 June 2010
209 Romano(1992), p.126
when fearing that their position may be overturned as a consequence of the company underperforming in the market. The ‘disciplining effects’ suggests that the mere threat of their occurring aligns management’s interests with those of shareholders and deals with the principal-agent problems that arise between shareholders and managers reducing agency costs accordingly. The overall effectiveness of the market for corporate control depends on markets being truly efficient, supposing that the share price does in fact represent the current value and prospects of the company. The positive effects of this process are impossible to quantify, since where the threat works effectively, there would not be high incidents of takeovers. In large corporations with dispersed ownership structures, mainly in jurisdictions such as the U.S. and the U.K., the takeover process plays an important part in monitoring management’s and directors’ performance. United shareholder action problems, especially with regard to cross border deals, make shareholder passivity inevitable. Directors are likely to fail in exercising their duties of monitoring management effectively, meaning that the takeover may be the sole effective mechanism left for monitoring.

**Links to the Directive: Scholars’ reviews**

Stark differences between the various Member States with regard to their policies and regulation have not been the only challenge that legislators had to face when drafting and reviewing the Takeover Directive. At the same time the positive effects of takeovers as an external corporate governance device are being questioned. Different schools of thought on the nature and purpose of takeovers may lead to a different result when constructing a framework that determines how contestable control in EU corporations should actually be. Irrespective of what national corporate law rules state, Wachtler suggests that the debate on director versus shareholder primacy on a takeover bid is ultimately a debate on whether financial capital markets are truly efficient or not. If one considers that the markets are not truly efficient, then unsolicited offers are likely to occur and in this case the positive effects stemming from the shareholder primacy default rule are weakened. When decisional rights are given solely to shareholders it is difficult to defend the company against unwanted bidders in an effective and timely manner. Questioning the monitoring efficiency theory also affects the stance taken towards the disciplining effect that takeovers are assumed to have. If markets are not truly efficient this would entail that the market price is not a true indication of whether managers are underperforming. Clarke adds to the debate by concluding that the monitoring effect of takeovers suffers from a reliance on a number of disputable assumptions and ambiguous empirical support. Bratton and Wachtler have also highlighted why the model of shareholder empowerment is problematic and base their claims on the new economics that have emerged from the financial crisis. They do not oust the shareholder model altogether, but insist that regulation focused strictly around shareholder primacy is problematic in view of there being significant imperfections in market pricing, whilst at the same time encouraging the role that the independent director should play in interpreting price signals correctly instead. Clarke on the other hand shifts the debate towards a different aspect of corporate governance suggesting that the director primacy rule during a takeover can be effectively applied, only if safeguards such as reinforcing the role of the non-executive independent director are set in place.

These controversies led Enriques to recommend that a neutral approach be adopted, meaning that EU policymakers should enact rules that neither hamper nor promote takeovers. His proposition is based on the claim that takeovers can be value-creating as well as value-decreasing and that there is no way to tell beforehand whether they are the former or the latter. At the same time he supports that the EC should enact menu rules that allow individual companies to deviate from the legally defined and in some countries legally mandated degree of control of contestability.

Stark differences between EU Member States with regard to their socio-economic policies, the financing of their companies, their corporate governance structures, the development of their markets, as well as the ambiguity surrounding the way in which markets operate and the nature of takeovers per se, all suggest that a single rule determining the contestability of all EU companies is unattainable. Due to these facts, the following section will introduce certain empirical studies and make

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211 Romano(1992), p. 126
212 Parkinson (1993), p. 119-120
214 Parkinson(1993), p. 119
215 Parkinson(1993), p. 156
216 Bratton and Wachter(2009), p. 58
217 Clarke(2009), p. 189
218 Clarke(2009), p. 181
220 Clarke(2009), p. 15
221 Clarke(2009), p. 189
recommendations based on a neutral variable, which neither discriminates between different types of companies, nor between the policies of different Member States.

Shareholder Identity based Takeover Regulation

In amongst relevant literature on the performance of various types of companies from different jurisdictions within the EU, certain empirical studies focus on the link that exists between the identity of shareholders and firm performance. Ø. Behren, R. Priestley and B. A. Ødegaard study how investor short-termism interacts with the value of the firm and focus on the impact of ownership duration and investor type on corporate performance. 223 Investor types examined in this study are individuals, industrial owners, financial institutions and foreign investors. It is found that investors with indirect ownership, such as industrial owners and financial institutions, aim for short-term profits and lead managers in destroying firm value, whilst the referred to negative impact increases the longer this type of investor stays on in the company. 224 Conversely, personal investors with extended ownership duration in the firm, aim for long-term profits and have the adverse effect on firm performance. 225 Thomson and Pedersen 226 also link the identity of owners to economic performance of various large corporations in Europe in two of their studies and explain how this variable of owner identity has been overlooked in past research. 227 The assumption made in one of the studies is that the type of shareholder has an impact on the way in which managers exercise their power and determine the company’s objectives. Setting the data collected from 100 of the largest non-financial companies in 1990 of each of 12 European nations within a framework of equations of economic variables that can measure company performance, the authors find that changes in ownership structure and identity affect company performance. A distinction is made between institutional investors, banks, corporations and governments as shareholders of a listed company and it is explained that it is a constant that institutional investors will be concerned with shareholder value, while other types of investor may have other business expectations from the investment in the company. 228 Dignam also examines the relationship between the type of shareholder and the incentives, which that shareholder creates for managers, as it is established that different types of investor will have different expectations of their investment. 229 The author differentiates between founder shareholders, institutional investors, corporations with cross-shareholdings and shareholders who are at the same time creditors of the company. 230 Excessive risk taking and expectations on immediate financial returns are not concerns that are shared by all types of shareholders. 231 In another study, Thomson and Pedersen focus on four types of investor types, namely financial institutions, companies, families and governments found in the largest non-financial companies in Continental Europe over the period 1991-1997. 232 The study tests various assumptions that examine the extent to which the level of market valuation of a company influences the decision of the particular type of investor to invest in that company and the impact that the type of existing ownership has on the market valuation of the company. 233 Conclusive remarks find that investors such as financial institutions and non-financial corporations exert a positive influence on market valuation, whereas family ownership, as well as government ownership has an insignificant and low market valuation over the company respectively. 234

Corporate governance principles evolve around the notion that large share stakeholders have sufficient incentives to monitor the company; whilst companies with dispersed ownership need rely on the market for corporate control as a means of monitoring corporate performance. 235 Institutional investors have been called to exercise their voting power and monitor their company’s strategies, but on the contrary many fund managers have remained passive relying on the market for corporate control to assess the company’s performance. 236 Present literature evidences that shareholder activism is limited and cannot be relied upon as a corporate governance mechanism for large corporations. 237 The market for corporate control has also been criticised for not working effectively amidst the financial crisis, as markets

226 ibid
229 Dignam and Galanis (2009), p. 70
230 Id.
231 Id.
provided no indications for bad risk management and underperforming boards prior to the collapse of various financial and non-financial institutions. It is within this context that empirical research on corporate performance, corporate monitoring and corporate objectives becomes relevant. It is proposed that the data collected from the studies focusing on shareholder identity in relation to firm value and corporate governance outcomes are a criterion upon which the Takeover Directive can be revised. It is argued that takeovers are essential only to certain types of companies in Europe; namely those that need be subject to monitoring through the market for corporate control, leaving other corporate forms to rely on different corporate governance constraints that are in the circumstances effective. As stated by Thomson and Pedersen:

“...the inclusion of owner identity is crucial to the understanding of European corporate governance; perhaps more so than in the United States because of the higher level of ownership concentration in Europe. In particular, owner identity may contribute to the understanding equilibrium performance differences which are sustained over periods of time even though they imply that the owners could gain by restructuring. ... Although all owners will generally benefit from higher share prices they differ in the priority in which they attach to shareholder value vis-à-vis other goals such as control (families), network relations (business groups), social goals (governments), and credit risk (banks).”

McCahey and Vermeulen state that proponents of the Takeover Directive revision in 2011 support the idea of mandating the core rules that form the basis of the Directive, as well as introducing new provisions that overall weaken directors' control over the company. It remains to be seen whether the Commission will retain the Directive's opt out facility or propose to mandate its core provisions. Mandating the Directive's provisions is unlikely, not only because political consensus on this matter is hard to achieve, but because the notion of opening up the market for corporate control to all publically listed companies in Europe is still being questioned. On the other hand, the opt out facility of the Directive, as implemented by member States, hinders the creation of a level playing field and the benefits that takeovers as external corporate governance mechanisms are perceived to achieve. A neutral approach taken towards the Takeover Directive proposed by Enriques is considered the way to move forward. Empirical evidence suggests that the identity of shareholders within a company defines the company's objectives, monitoring and the company's market value; this could be the criterion upon which takeover regulation may be revised. Mandatory rules would apply to companies that need be subject to the market for corporate control, while leaving others untouched. The board neutrality rule and the "breakthrough" rule can apply to companies with owners that favour shareholder value and whose low ownership share usually weakens their ability to monitor managers, such as institutional investors. This option could possibly bypass the problems that arise through the optionality provisions found at present within the Directive and perhaps constitute a neutral option able to achieve a political consensus from all Member States.

Conclusion
The paper has addressed the EU Takeover Directive from a corporate governance point of view and identified the Directive’s deficiencies, as well as associated reasons that hold back the creation of a market for corporate control in Europe. Particular attention was afforded to the board neutrality rule of article 9, the "breakthrough" rule of article 11 and the optionality arrangements found in article 12. As the “one size fits all” approach is not an option, it is proposed that a neutral variable need determine the level of contestability of control of certain corporations based within the EU. The disciplining effect that the market has over managers can be utilised in companies where monitoring through the market for corporate control is the only means by which managers can be controlled. Other companies with different corporate objectives may effectively have managers' and shareholders' interests already aligned or make use of other effective governance monitoring mechanisms, such as internal committees or the non-executive director. Revision of the Takeover Directive in 2011 is encouraged; references to studies linking the identity of owners to company objectives and performance aim to provide innovative information that will help the Commission reform takeover regulation with respect to the diversity that exists between various corporate governance systems in Europe.

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Substantive appraisal of joint ventures Under EU Competition Law – Kadır Baş

Introduction
Joint ventures (“JVs”) have played an increasingly important role in the world’s economy particularly since the late 1970s. This role raises the importance of their analysis under competition law. Therefore, it is crucial to establish an antitrust framework for JVs that will be conducive for JV operations while eliminating restriction of competition by them. However, the formation of such a framework is not simple. Indeed, approaches towards the competition analysis of JVs in the EU and the US have been subject to some important reforms in the course of time. In 2005, in the Dagher case, the US Supreme Court considerably changed its old approach with respect to the antitrust analysis of JVs set out in its previous decisions. This decision has been criticised by some commentators who assert that it is a long away from providing guidance for the assessment of the conduct of JVs. Accordingly, the antitrust analysis of JVs still continues to be a controversial issue in the US, particularly with respect to determining whether a certain conduct of a JV constitutes a single or multiple entity conduct.

In the EU, significant reform was carried out by Regulation 1310/97 in 1997. By this reform, the distinction of a concentrative-cooperative JV that was used to determine which procedure and substantive test would apply was replaced by that of a full-
This article aims to examine the EU regime for the antitrust analysis of JVs. It does not include the US approach, which is considerably different from that of the EU and can independently constitute the subject of another article. This article consists of six sections including this introduction. In the second section, the concept of “joint venture” is discussed, while the third section covers the assessment of both pro- and anti-competitive effects of JVs. The fourth section provides a brief explanation concerning the analysis of JVs under EU competition law. This section focuses on the assessment of full-function JVs; thus, the analysis of partial function JVs is not discussed elaborately therein. The subsequent section includes some criticism about the current framework of the EU for JVs. The final section presents a conclusion for the article.

The Concept of “Joint Venture”
Defining the term “joint venture” plays a key role in setting up a framework for the competition analysis of JVs by distinguishing them from other types of interfirm arrangements such as cartels and mergers. In fact, there is a lack of a single universally agreeable definition for that concept. It has been defined in a variety of ways by different disciplines and by different commentators. However, for the purpose of antitrust analysis, the term “joint venture” may be defined as a jointly controlled entity which is separate from its parents and to which the parents contribute significantly in terms of asset, capital and staff. 250 This definition refers to the characteristics of JVs that make them distinctive for antitrust analysis. The element of significant contribution by the parent firms provided in the definition refers to the structural aspect of JVs. As in mergers, firms combine their assets in JVs as well. Nonetheless, unlike mergers, JVs result in a partial integration limited only to business functions allocated to them by the parents. Such integration distinguishes them from naked cartel agreements in which competitors collaborate on price or other competitive policies, and other cooperative agreements including distribution and licence agreements that require very loose integration among the participant firms. In general, this integration creates certain efficiencies that are essential for approaching JVs more permissively under competition law. 251

The element of joint control, on the other hand, refers to the behavioural aspect of JVs that draws a line between them and mergers and acquisitions. Unlike mergers and acquisitions, JVs are controlled jointly by at least two independent firms. This feature of JVs makes them more risky in terms of competition analysis than the former, since it may give rise to a risk of coordination of the competitive behaviours of the parents.

Impacts of JVs on competition
JVs can have various positive effects. For example, JVs may provide a combination of complementary assets that may result in cheaper, new or more qualified products. Furthermore, they may give rise to dissemination of technologies, achievement of economies of scale and new entries to the market. Most of these efficiencies result from the integration of assets of the parents so that they may be created by mergers as well. However, the formation of a JV grants firms an opportunity to obtain these efficiencies by integrating only operations necessary for the achievement of a particular objective. This enables firms to continue to operate independently in the areas the joint operation does not cover.

Despite these pro-competitive effects, JVs may jeopardise effective competition in the market. In general, JVs may create four possible anti-competitive effects. The first is lessening actual competition in the JV’s market. This anti-competitive effect may arise if the parent firms are actual competitors in the market of the JV. There are two possible scenarios related to this effect. In the first scenario, parent firms combine their operations in a JV and withdraw from the market. In this case, the number of

250 According to this categorisation, concentrative JVs were accepted as concentration and were subject to the Merger Regulation. To be deemed concentrative, a JV (i) had to be jointly controlled; (ii) had to be full-function, and (iii) had to not give rise to coordination of the competitive behaviour of its parents. JVs that did not satisfy any of these conditions were considered cooperative and were examined under Articles 101 (previously Article 81) of the Treaty on the Functioning of the European Union (“TFEU”).

independent firms in the market will decrease and this may make the market more concentrated. If the parent firms collectively hold substantial market power, such a JV may give rise to a considerable restriction of competition in the market. Antitrust analysis in this scenario is same as that of horizontal mergers.

The second scenario arises if both parents continue to be active in the market after the formation of the JV. In this case, there will be no decrease in the number of independent firms in the market. However, it may result in a high risk of coordination between the parents operating independently in that market. In most cases, the rational strategy for each parent will be to follow the same pricing strategy with the JV and the other parents. This is the case because if the parents determine higher or lower prices than that of the JV, they may be deprived of the revenue generated from either their individual operations or the JV’s operation.252 In these situations, the JV may eliminate actual competition between the parents substantially.

JVs may also create a loss of potential competition in the markets where they operate. If both parent firms were not active in the market of the JV and two of them would enter the market in absence of the JV, there would be two new entries to the market in the future. However, the formation of the JV eliminates one of these two prospective entries. In practice, it is extremely difficult to determine whether the parent firms would independently enter the market if they had not established the JV. In this analysis, the intensity of the competition constraint created by the possibility of an entry from the parents as a potential competitor may be taken into account as determining criteria to examine the level of negative effects of the JV on competition. Potential competition has secondary importance in comparison with actual competition. Thus, it is unlikely that a JV is prohibited because it restricts potential competition in the market other than in exceptional cases.

Another anti-competitive effect of JVs is foreclosure. This situation may occur in particular if there is an exclusive buyer-seller relationship between the parents and the JV. In such a situation, the firms operating on the same business level of the parents and the JV will be prevented from entering into a vertical relationship with them. If the parents or the JV hold a dominant position in the downstream or upstream market, such exclusivity may foreclose the market to actual and potential competitors.

These three effects may also exist in the context of mergers. Unlike mergers, JVs may give rise to another anticompetitive effect called spillover effects. This effect refers to the situation that the JV contributes to collusion between the parent firms in the markets other than that of the JV. JVs may give rise to spillover effects in various ways. For instance, because the parent firms come together regularly in the decision-making bodies of the JV, it may enable them to exchange information related to price and other competitive policies in the markets where they are competitors.253 JVs may also make the implementation of the cartel between the parents easier by enabling them to monitor other firm’s behaviour and to punish it by blocking operations of the JV.254

In some cases the parents may not have an explicit mutual consent to use the JV as a tool of establishing and maintaining a cartel in other markets. However, their relationship as to the JV may grant each one an opportunity to obtain the other’s competitive information individually255. For example, in the context of production JVs, each parent will know the other’s production costs and output and thus, may regulate their individual output and price according to those of the other. Furthermore, JVs require continued cooperation between the parents so that each parent may refrain from pursuing an aggressive competing policy against the other to maintain the continuation of the JV. In particular, if the revenue generated from the JV constitutes an important part of the total revenue of a parent firm, it may not be rational for that firm to conduct such an aggressive policy256.

The EU Framework for the Antitrust Analysis of JVs

In EU Competition law, JVs are divided into two categories namely full-function and partial function. This distinction is used to determine which substantive tests and procedures will apply to the competition analysis of JVs. The concept of full-functionality is defined in Article 3.4 of the Merger Regulation as “performing on a lasting basis all the functions of an autonomous economic entity”. In the Consolidated Jurisdictional Notice258, the EU Commission explains in great detail what this definition means. Accordingly, this definition has two main elements. The first is independence

256 Brodley, p.1530
257 Kitch, p.962; Rabkin, p.84
that requires satisfying three conditions. According to the first condition, the JV must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets.\footnote{Commission Consolidated Jurisdictional Notice (EU) under Council Regulation (EU) No 139/2004 on the control of concentrations between undertakings [2008] OJ C95/1} Secondly, the JV must not carry out only one specific function for the business activities of the parents such as research and development or production.\footnote{The Consolidated Jurisdictional Notice par.94} Thirdly, there must not be an exclusive buyer-seller relationship between the JV and the parent firms.\footnote{The Consolidated Jurisdictional Notice par.95-96}

The second element of the definition of full-functionality is permanence. Pursuant to this element, the term of the JV must be indefinite or at least long enough to create a permanent change in the structure of firms concerned.\footnote{The Consolidated Jurisdictional Notice par.102} If the condition of independence is met, in most cases the JV is viewed as permanent unless it is established for a short time.\footnote{The Consolidated Jurisdictional Notice par.103-105}

JVs which do not meet any of those conditions are considered partial function and all of their competitive effects are analysed with reference to the test of Article 101 TFEU under the procedure of Regulation 1/2003.\footnote{In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a period of three years insufficient to be deemed full function.} This analysis is generally the same as that of other agreements.\footnote{Council Regulation (EU) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1}

Full-function JVs are treated to be a concentration, and they are subject to the substantive test of the Merger Regulation. Article 2.3 of the Merger Regulation prohibits concentrations, which would significantly impede effective competition in the common market particularly as a result of the creation or strengthening of a dominant position. The structural effects of full-function JVs, including the lessening of actual and potential competition and foreclosure effects, are analysed in accordance with this test. There is no major difference between full-function JVs and mergers in terms of analysis under that test. Accordingly, if a JV creates or strengthens a dominant position in the market or creates a highly concentrated market structure, it may be considered to be significantly impeding competition and may be prohibited.

Article 2.4 of the Merger Regulation stipulates that the risk of coordination between the parents arising from JVs shall be appraised in accordance with the test of Article 101 TFEU. Analysis of such coordination effects makes the appraisal of JVs different from that of mergers. The Commission examines the risk of coordination between the parents according to some different situations.

The first situation concerns the risk of coordination in the JV’s market. In the case that both parents continue to operate independently in the JV’s market, the coordination risk will be very high because a mutual relationship within the JV will push rational parents to collaborate on price or other competitive policies. The Commission generally considers such JVs as partial function because they cannot satisfy the independence condition of full-functionality. In contrast, in some situations there is no risk of coordination between the parents. This would be the case if one or both parents are not present or withdraw from the market of the JV and they are not competitors in another market.

In the event that the parents are active in a downstream or upstream market with respect to the JV, there may be a considerable risk of coordination between the parents. This is due to the fact that it would be easier for the parents to regulate their prices and output in accordance with those of the other party. This will be the case particularly where the parents are the main suppliers or clients of the JV.\footnote{In Case COMP/M.3858 Lehman Brothers/Starwood/Le Meridien of 20 July 2005, the Commission considered a period of three years insufficient to be deemed full function.} In the case that the parents are competitors in another product or geographic market, the Commission accepts that the coordination issue may arise. This risk may increase particularly where the activities of the JV have great importance in comparison with that of the parents in another market and there is an interaction between these two markets.\footnote{Indeed, the parents may refrain from conducting an aggressive competition against each other to maintain the revenue generated from the JV.}
Some Comments on the EU Framework for JVs

It is possible to find some deficiencies in this approach of the EU for the competition assessment of JVs. The condition of full-functionality that requires absence of an exclusive buyer-seller relationship between the parent firms and the JV may be considered one of them. Full-function JVs are treated to be a concentration because it is generally accepted that they give rise to a structural change in the market. However, the existence of such an exclusive buyer-seller relationship is related mainly to a change in the competitive behavioural patterns of firms rather than to a structural change in the market. Therefore, in some cases, this condition may not be suitable to differentiate JVs according to whether they create a structural change. For instance, two competing firms that distributed their products independently set up a JV company to integrate their distribution operations in a way that it will be highly costly for them to exit from it. This JV will only sell the products of its parents. By the formation of the JV, competition between the parents with regard to price, other terms of business and the quality of the service will be eliminated, and as in the Dagher case, the buyers will lose one source to obtain the product in question. By considering the intensity of the integration between the parents, it may be difficult to distinguish this JV from mergers or full-function JVs in terms of their impact on competition.

Moreover, it is uncertain how the Commission will act if an exclusive buyer-seller relationship exists between the parent firms and the newly incorporated JV after it was deemed a full-function JV and was analysed under the test of the Merger Regulation. In such cases, the Commission might accept that the JV has lost its full-functionality and it will constitute merely an agreement between the parents, which restart to operate independently in the market. Alternatively, the Commission might accept that the JV will maintain its full-function character and such exclusivity may be prohibited if it restricts competition, for example, as constituting an abuse of dominant position.

Such a condition may also give rise to some uncertainties when analysing activities of partial function JVs with respect to its relations with third parties. For instance, if two competitors established a JV that produced a new product and sold it exclusively to its parents, this JV will be viewed to be partial function because of such exclusivity. Nevertheless, it may create a problem if competitors of the parents need access to these products to operate in the market, and the JV, as a dominant firm, refuses to supply. Since the JV is considered as just an agreement, there may be confusion about which competition rules apply to the refusal to supply in this case. If the JV is deemed a single entity in terms of performing this conduct, the test of abuse of dominant position may apply to it. However, if it is accepted that such conduct is carried out collectively by the parents because the JV is an agreement that cannot constitute a single entity in accordance with competition law, then the competition rules governing cartels may be applied.

The application of Article 101.3 TFEU to the spillover effects of JVs may also be problematic. In individual exemption analysis, the Commission normally assesses whether positive effects of an agreement in a market would balance its negative effects in the same market, and if there were a balance, the Commission would grant an individual exemption to the agreement. However, in certain situations, this analysis may be difficult in the case of spillover effects. This is the case particularly when both pro-competitive and anti-competitive effects of JV arise in different markets and consumers who will benefit from the JV differ from those who are adversely affected by it. For example, A and B operate in the same product market in both the UK and Germany. They establish a JV to combine their operations in the UK. This JV may result in the creation of a new entry, new or cheaper products in the UK. However, it may also give rise to a high risk of coordination between the parents with regard to price, other terms of business and the quality of the service will be eliminated, and as in the Dagher case, the buyers will lose one source to obtain the product in question. By considering the intensity of the integration between the parents, it may be difficult to distinguish this JV from mergers or full-function JVs in terms of their impact on competition.

Moreover, it is uncertain how the Commission will act if an exclusive buyer-seller relationship exists between the parent firms and the newly incorporated JV after it was deemed a full-function JV and was analysed under the test of the Merger Regulation. In such cases, the Commission might accept that the JV has lost its full-functionality and it will constitute merely an agreement between the parents, which restart to operate independently in the market. Alternatively, the Commission might accept that the JV will maintain its full-function character and such exclusivity may be prohibited if it restricts competition, for example, as constituting an abuse of dominant position.

368 Briones/Folgueras/Font/Navarro pp.58-59
369 In recital 20 of the Merger Regulation, the concept of concentration is defined as to cover operations causing a lasting change in the structure of the market.
Conclusion
In conclusion, the analysis of JVs is one of the most intricate areas in competition law because they have both structural and behavioural aspects, whilst cartels and mergers have only one of them. The EU framework for this analysis has shown progress over time. Nonetheless the understanding of the hybrid nature of JVs is still problematic. In fact, in practice, only a few JVs raise important competition concerns, since firms usually comply with the approach of the Commission when forming a JV. Therefore, such an approach does not appear to have been questioned seriously until now. However, a divergent JV that creates the above mentioned problems might trigger significant debates on the suitability of this framework of the EU in the future.

Bibliography
5. European Council, Regulation No 1310/97 of 30 June 1997 amending Regulation No 4064/89 on the control of concentrations between undertakings, OJ L180/2

See supra note 1