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***The Impact of Health on Labour Productivity in Nigeria from 1970 to 2012,  
Applying the Standard Neo-Classical Growth Framework***

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**Abstract**

This study estimates the impact of health on labour productivity in Nigeria from 1970 to 2012, applying the standard neo-classical growth framework. Using ordinary Least Square (OLS) technique, Cointegration and Granger Causality test procedures, the Unit root test result shows that five of the variables, PERCAPITA, LABFORCE, EDUCATIO, AGRICULT and HEALTH are not stationary at level (order zero) except INVEST, indicating no propensity for the variables to move together towards equilibrium. The cointegration test procedures conducted indicates at most three cointegrating equations. The causality test result conducted indicates a unilateral causality from LABFORCE to PERCAPITA, PERCAPITA to HEALTH, PERCAPITA to EDUCATIO and PERCAPITA to AGRICULT. The result table also shows no direction of causality between PERCAPITA and INVEST. The OLS test result shows that the empirical evidence strongly indicates that healthy labour force is one factor that determines productivity. Statistically, the  $R^2$  result shows that the independent variables explain the dependent variable to the tune of 90%. The t-value of the variables, LABFORCE, EDUCATIO and AGRICULT are statistically significant while others are not. The stability and residual diagnostic tests results indicates that the CUSUM and CUSUMQ test results reveal satisfactory plot of the recursive residuals at 95 percent significance level. The study therefore recommends that the Federal Government as well as the authorities in every state of the country must focus on the improvement of labour productivity in order to raise the standard of living of the people in Nigeria

JEL CLASSIFICATION: C12, C51, J24.I12, N3, N37

Keywords: Health, Labour Productivity, Granger Causality, Cointegration, OLS, Nigeria

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## **Introduction**

The importance of health as a form of human capital cannot be overemphasised. A healthy workforce is one of the most important asset a nation could possess. Lillard and Weiss(1997) were of the view that health is one of the most important asset a person has as it permits to fully develop our capacities. Ajani and Ugwu(2008)assert that good health and productive workforce are important in any economy especially in the fight against poverty. Health is important for economic agents as it directly contributes to the wellbeing of individuals, besides constituting part of the human capital stock which determines the productivity and income levels reached (Alves and Andrade, 2002). A country's capability to improve its national output growth over time depends almost entirely on the size of its labour force. This in turn propels the country's productive capacity and hence raises productivity (Qaiser and Foreman-Peck, 2007).

The link between health and both income and labour productivity has been long studied by economists and development experts. The significance and positive correlation that observers clearly see between measures of health status and of income and work performance has motivated much of the research (McNamara, Ulinwengu and Leonard, 2010). The authors were of the view that the strong association between good health and economic prosperity is easily appreciated and appears in the context of agricultural productivity as well as in context such as income, wages and other wealth measures. Strauss and Thomas (1998) stated that there is a positive relationship between health and productivity of skilled and unskilled labour. Good health according to the authors, as related to labour output or better production organisation can enhance farmers/household income and economic growth. Healthier workers are physically and mentally more energetic and robust, so they are less likely to miss work due to illness, either of themselves or their families (The World Health Organisation, 2002).

The economic effect of health related problems like malaria, musculoskeletal disorders, HIV/AIDS, farm injuries, yellow fever, typhoid fever, schistosomiasis, onchocerciasis, diarrhoea will be felt first by individuals and their families, then ripple outwards to firms and business and the macroeconomy (Nwaorgu, Bollinger and Stover, 1999). According to the authors, the household impacts begin as soon as a member of the household starts to suffer from these related illness which include,

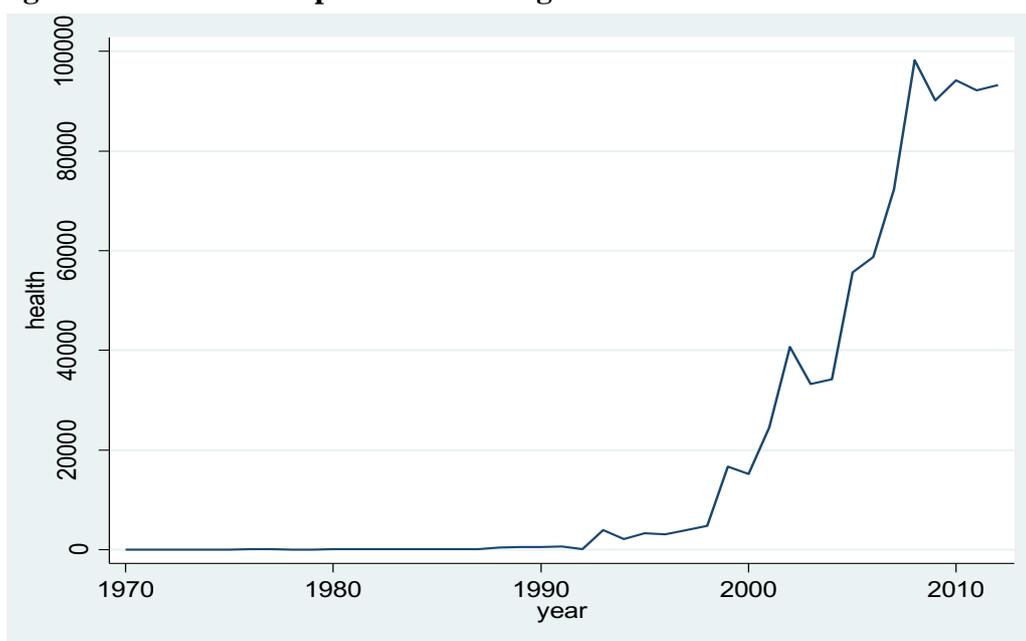
- (a) Loss of income of the patients (who as bread winner)
- (b) Household expenditures for medical expenses may increase substantially
- (c) Other members of the household usually daughters and wives may miss school or work less in order to care for the sick person
- (d) Death results in: a permanent loss of income from the less labour on the farm or from lower remittances; funeral and mourning cost and the removal of children from school in order to save on educational and increase household labour resulting in a server loss of future earning potentials.

## **Health expenditure outcomes in Nigeria**

In Nigeria, the Federal Government's percentage growth in health expenditure lagged behind their normal counterpart all through from 1978 till 2003. For example while the sum of N452.6 million in nominal terms was spent in 1989; this amount was only

worth N62.69 million in real terms during the same year. In 2003, approximately N396.86 million was the nominal amount spent by the Federal Government in Nigeria, this amount in 2000 real terms is worth N272.96 million. This is not significantly different from the N257.01 million spent in 1977 in real terms. However, in recent times, the Federal Government expenditure has been on the increase. The figure 1 below shows the total of Federal Government expenditures on health in Nigeria from 1970 -2012:

**Figure 1: The health expenditures of Nigeria from 1970 -2012.**



**Source: author's computation**

From the graph, it could be seen that the health expenditure of the Nigeria government took a positive dive. For example, in the year 1991 a total amount of N755million was spent; this rose nominally to N63171.2 million in 2002. Considering changes in price level, this amount spent in 2002 reduced to a mere N495.42 million in 2009 (CBN,2009). In 2013, the Federal Government allocated a total of N279.23 billion to health care and N81.41 billion to agricultural sector. The top three expenditures for the country in 2013 were education, defence and police formations and commands. The increase in the education allocation of N493.5 billion is commendable when compared to the 2012 but still it is considered insufficient considering the level of deterioration in public education at all levels in the country. The labour force population based on the 2011 estimate indicates that the country has a total of 51.53 active labour force (CIA World factbook, 2014). Based on the 2011 report, the population of the country's labour force by occupation that agriculture dominates the population of labour force participation with 70 %, industry 10 % and services 20%. The CIA World fact book report (2014) noted that 23.9 % of the country's active population are unemployed. The figure indicates an astronomical increase in unemployment rate from 4.9% estimate in 2007. Among the sub-Saharan African countries, Nigeria ranked first with the highest number of labour with a total of 52.64 million based on the 2011 estimate (CIA World factbook, 2014).

## **Statement of the problem**

In recognising health as a fundamental basic need for development purpose, Yesufu(2000) affirms that development comes through the abilities and work of those members of the population who are fit, healthy and capable of productivity. Dauda(2007)stated that attaining high level of economic development by a nation with a population crippled by pervasive illness of its workforce, high infant and material mortality and low life expectancy will be an illusion. Alaba and Alaba (2002) in a study of health situation in the Nigerian economy noted that sickness at the household level affects productivity and income level. Equally, the prevention and treatment of illness consume scarce household resources including productive time. Karen, Sara, Michelle, Alice and Alyssa (2005) stated that when people are unable to worker drop out of workforce because of serious health problems or disability, they do not generate economic output, pay taxes on earning or help raise the nation's standard of living. The United Nation's (2008) report on AIDS epidemic in Nigeria noted that around 3.1% of adults between ages of 15-49 are living with HIV and AIDS. According to the report, although the HIV prevalence is much lower in Nigeria than in other African countries, the size of the population (around 148 million) meant that by the end of 2007, there were an estimated 2,600,000 people infected with HIV. Despite various declarations by African governments in the 1990s and complementary effort promised in the main content of the Roll back malaria declaration in Abuja in 2000, malaria remains a major health challenge facing Nigeria and entire continent. About 107 countries and territories involving about 3.2 billion people are still at risk of malaria attack as at 2004(The World Health Organisation (WHO), 2005).

These has presented a serious implication for labour productivity and household welfare. Prevalence of redundant labour, low income growth, lack of training, low level of technology, low capacity utilisation, low investment expenditures and poor performing infrastructure are critical factors, amongst others that are responsible for low productivity of labour in Africa (Mordi and Mmieh, 2008). A dramatic reduction in life expectancy has equally affected the Nigerian labour force and hence productivity in addition to allied potential lasting adverse effect on growth within the economy (Umoru and Yaqub,2013). This study therefore seeks to answer the following question: Do health status affect labour productivity in Nigeria? What is the direction of causality between health and labour productivity in Nigeria?

## **Objective of the study**

The broad objective of this study is to estimate the impact of health on labour productivity in Nigeria. The specific objectives are:

- (1) To ascertain the direction of causality between health and labour productivity in Nigeria .
- (2) To proffer policy measures that would enhance labour productivity in Nigeria

## **Research hypothesis**

The research hypotheses employed in this study are stated as follows:

$H_0$ : Health does not affect labour productivity in Nigeria

$H_0$  : There is no direction of causality between health and Labour productivity in Nigeria

### **Scope of the study**

The study covers the period from 1970-2012. The period was chosen as it gives a chance for a comprehensive and accurate data estimate.

### **Significance of the study**

An examination of the impact of health on labour productivity in Nigeria would reveal that among the traditional factor inputs, land, labour and capital (human and materials), labour are to a large extent most affected by health. This study would therefore bring to knowledge of governments at all levels, the economic need to invest in the health of workers by providing them with adequate health facilities at reduced or subsidised cost; since adverse health reduces productivity of the nation's workforce. Given that poverty, food security and economic growth continues to maintain priorities in government policies in most African countries, the efficiency of health capital as indispensable production input cannot be over emphasized.

### **Literature review**

The literature relating health to labour market outcomes according to Campolieti and Krashinsky(2006), originates with Becker's (1964) discussion of human capital and health capital, in which he argues that motivation for investment in general human capital, such as education is similar to the rational for investing in health capital. According to the authors, Grossman (1972) formalised this idea with a model in which health directly affects consumption and labour market outcome. Mankiw, Romer and Weil(1992) extended the Solow growth model by adding human capital, specifying that this variable has significant impact on economic growth. According to Galleg(2000), following a Ramsey scheme, Baro (1996) develops a growth model including physical capital and quantity of hours worked. The author noted that by obtaining first order conditions, Baro finds that increase in health indicators raises the incentives to invest in education and a raise health capital lowers the rate of depreciation of health; adding that there are diminishing marginal return to investment in health.

Aguayo-Rico,Guera,Iris and Ricardo(2005) in their study noted that Grossman (1972) developed a model that allow health capital formation seen as capital good, to be able to work ,to earn money and to produce domestic goods. He showed that an increase in the quantity of health capital reduces the time loss of being sick. The assumes people are born with initial endowment of health which depreciate with age and grow with investment in health (Aguayo-Rico et.al, 2005). In their study, Bloom and Canning (2000) described how healthy population tends to have higher productivity due to their greatest physical energy and mental clearness. Also Strauss and Thomas (1998) reviewed the empirical evidence of the relationship between health and productivity, establishing correlations between physical productivity and some health indicators especially those related to nutrition or specific disease.

In health economics, the endogenous causality between health and income has been the topic of several studies whose purpose is to establish the direction of the causality. Luft(1978) gives an informal explanation of this causality, according to the author, a lot of people who otherwise wouldn't be poor are, simply because they are sick; few people who otherwise would be healthy are sick because they are poor. In explanation of the direction of causality of the impact of health over income, Smith (1999) uses life cycle models which links health condition with future income, consumption and welfare. Bloom and Canning (2000) noted that healthy people live more and higher incentives to invest in their abilities since the present value of the human capital formation is higher.

### **Empirical literature**

Umoru and Yaqub(2013) analyse the labour productivity effects of health capital in Nigeria using Generalised Method of Moment (GMM) methodology. The result indicate that health capital investment enhances productivity of the labour force.

Chansarn (2010) calculates the growth rates of labour productivity of 30 countries categorised into four groups ,including G7 countries, Western developed countries; Eastern developed countries and eastern developing countries during 1981-2005. The result reveals that growth rates of labour productivity of every country, except the Philippines were greater than four percent per annum during 1981-2005.he notes that eastern developed countries had the highest average annual growth rate of labour productivity.

Ugwu(2009) examines the impact of HIV/AIDS on farm women in Nigeria with particular reference to Enugu State using Multi-Stage and purposeful sampling methodologies in the selection of farm families /households including (women) persons living with HIV/AIDS for the study. The result shows that the impact HIV/AIDS on the farm women and their households were significance

Ajani and Ugwu( 2008) examine the impact of adverse health on productivity of famers in Kainji Labke Basinin the North central Nigeria. The study use Stochastic Frontier Production model. The result indicate that technical efficiency of farmers fall in the range of 0.28-0.99 with mean of 0.85.

### **Research Methodology**

Under the Standard Neo-Classical growth framework conditional convergence studies assumes that a country with higher initial human capital among others, performs better. The growth implication of health which is another component of capital to education have not been investigated thoroughly within the optimum growth framework (Muysken, Yetkiner and Ziesmer, 1999). The aim of this study is to show rigorously the positive association between labour productivity proxies with percapita income and health status of an economy; and thereby provide a theoretical background for using health variables in conditional convergence analysis. The positive relationship between health and percapita output is first shown in the standard neo-classical growth framework where the health status is exogenously given.

In the human capital development theory, the more educated and healthy are more productive. This imply that productivity of country's labour force is driven by her status of health capital and education (Kalemli-Ozcan,Harl and Weil,2009).

According to the authors, a healthy and educated workforce is expected to contribute positively to the effectiveness and hence productivity of a nation.

Based on these assertion, we can express percapita equation as:

$$PERCAPITA_t = K_t^\zeta H_t^\eta E_t^\lambda L_t^{1-\zeta-\eta-\lambda} A_{it} \dots\dots\dots(1)$$

where (H) health and education (E) are two components of human capital and assumption of constant returns to scale (CRTS), the augmented aggregate productivity function could express as:

$$(PERCAPITA) = \left(\frac{K_t}{L_t}\right)^{\frac{\zeta}{1-\zeta-\eta-\lambda}} \left(\frac{H_t}{L_t}\right)^{\frac{\eta}{1-\zeta-\eta-\lambda}} \left(\frac{E_t}{L_t}\right)^{\frac{\lambda}{1-\zeta-\eta-\lambda}} A_{it}^T \dots\dots\dots(2)$$

The expression of relation in equation (2), labour productivity measured by worker's output is a function of physical, health and education capitals per unit of labour services. For example:

$$(K / L) = k^{\frac{\zeta}{1-\zeta-\eta-\lambda}}, (H / L) = h^{\frac{\eta}{1-\zeta-\eta-\lambda}} \text{ and } (E / L) = e^{\frac{\lambda}{1-\zeta-\eta-\lambda}}, \text{ respectively}$$

A total factor productivity is measured by the technological index of the country  $A_{it}^T$  therefore taking the log of equation (2) yields:

$$\ln(PERCAPITA) = \frac{\zeta}{1-\zeta-\eta-\lambda} \ln k + \frac{\eta}{1-\zeta-\eta-\lambda} \ln h + \frac{\lambda}{1-\zeta-\eta-\lambda} \ln e + \ln A_{it}^T \dots\dots\dots(3)$$

In line with the technological diffusion of Bloom, Canning and Sevilla (2001) in a model of a country's aggregate productivity index  $A_{it}^T$ , we have that:

$$\Delta \ln(A_{it}^T) = \phi \ln(A_{it}^* - A_{it}^T) + \varepsilon_{\zeta t} \dots\dots\dots(4)$$

where  $\varepsilon_{\zeta t}$  represents a random shock; Nigeria has a ceiling level of TFP given by  $A_{it}^*$ , the country's TFP adjusts towards this ceiling at a rate  $\phi$

the ceiling specific level of a country's productivity is determined by worldwide technological frontier, proxy by GDP ratio and sets of country specific variables that affects productivity. We therefore specify as follows:

$$\ln(A_{it}^*) = \theta \ln(W_{it}^T) + \ln(WWT) \dots\dots\dots(5)$$

It noted that technology gaps are not observed directly, we utilised the fact that lagged productivity level can be derived from equation (4) so we specify the equation as:

$$\ln(A_{it}^T) = \omega \ln\{s(k)\}_{t-1} + \xi \ln\{s(h)\}_{t-1} + \xi \ln\{s(e)\}_{t-1} - \gamma \ln[n + g + \delta]_{t-1} - (\ln PERCAPITA)_t - 1 \dots\dots\dots(6)$$

Differencing the equation (6) yields

$$\Delta \ln(PERCAPITA) = \omega \Delta \ln\{s(k)\} + \xi \Delta \ln\{s(e)\} - \gamma \Delta \ln[n + g + \delta] \Delta \ln A_{it}^T \dots\dots\dots(7)$$

Substituting  $\Delta \ln(A_{it}^T)$  using equation (4) and (5) gives the following labour productivity function:

$$\Delta \ln(PERCAPITA) = \omega \Delta \ln\{s(k)\} + \xi \Delta \ln\{s(h)\} + \xi \Delta \ln\{s(e)\} - \gamma \Delta \ln[n + g + \delta] + \phi \left[ \begin{array}{l} \ln(WWT) + \theta \ln(W_{it}^T) + \omega \ln \omega \ln\{s(k)\}_{t-1} \\ + \xi \Delta \ln\{s(h)\}_{t-1} + [\xi \Delta \ln\{s(e)\}]_{t-1} \\ - \gamma \Delta \ln[n + g + \delta]_{t-1} - \ln(PERCAPITA)_{t-1} \end{array} \right] + \varepsilon_{\zeta} \dots\dots\dots(8)$$

We envisage in this study that healthy-labour force (LABFORCE), government's expenditure in agriculture (AGRICULT), government's investment in health (HEALTH) and in education (EDUCATIO<sup>E</sup><sub>t</sub>), influence labour productivity. Thus, our labour function becomes:

$$\Delta \ln(\text{PERCAPITA}) = \omega \Delta \ln \{s(k)\} + \xi \ln \{HEALTH\} + \xi \ln \{EDUCATIO_t^E\} - \gamma \Delta \ln [n + g + \delta] + \lambda \ln [LABFORCE] + \varpi \ln [AGRICULT] + \phi \left[ \begin{array}{l} \ln(WWT) + \theta \ln(W_{it}^T) + \omega \ln \omega \ln \{s(k)\}_{t-1} \\ + \xi \ln \{s(h)\}_{t-1} + [\xi \ln \{s(e)\}]_{t-1} \\ - \gamma \ln [n + g + \delta]_{t-1} - \ln(\text{PERCAPITA})_{t-1} \end{array} \right] + \varepsilon_t \quad \dots(9)$$

However, this modelling approach encompasses the estimation of the labour productivity function in first differences as advocated by Lee, (1982) and Umoru and Yaqub (2013).

**Model Specification:**

Assuming a linear relationship between our dependent variable and independent variables, our equation using the multiple regression analysis can be shown as follows:

$$\text{PERCAPITA} = F(\text{LABFORCE}, \text{HEALTH}, \text{EDUCATIO}, \text{AGRICULT}, \text{INVEST}) \dots; \dots(10)$$

We introduced INVEST (Private investment) variable in the linear equation to ascertain impact of private investment on labour productivity. Econometrically, the equation could be stated as follows:

$$\text{PERCAPITA} = \beta_0 + \beta_1 \text{LABFORCE} + \beta_2 \text{HEALTH} + \beta_3 \text{EDUCATIO} + \beta_4 \text{AGRICULT} + \beta_5 \text{INVEST} + \mu_t \quad \dots(11)$$

Given that the estimation is a time series analysis, we incorporate the time factor thus;

$$\text{PERCAPITA}_t = \beta_0 + \beta_1 \text{LABFORCE}_t + \beta_2 \text{HEALTH}_t + \beta_3 \text{EDUCATIO}_t + \beta_4 \text{AGRICULT}_t + \beta_5 \text{INVEST}_t + \mu_t \quad \dots(12)$$

where PERCAPITA is the output proxied with labour productivity, LABFORCE is the Labour force, HEALTH government expenditures on health, and EDUCATIO is the expenditures of government on education, AGRICULT for government expenditure on agriculture and INVEST for private investment.

**Estimation Procedure**

**Unit root test**

To test for stationarity or the absence of unit roots, this test is done using the Augmented Dickey Fuller test (ADF) with the hypothesis which states as follows: If the absolute value of the Augmented Dickey Fuller (ADF) test is greater than the critical value either at the 1% , 5% ,or 10% level of significance , then the variables are stationary either at order zero, one ,or two. The Augmented Dicky Fuller test

equation is specified below as follows:

$$\Delta u_t = \beta u_{t-1} + \sum_{i=1}^k \Delta u_{t-i} + \varepsilon_t \dots\dots\dots(13)$$

**Cointegration test procedure**

In time series analysis, we often encounter situations where we wish to model one non-stationary time series ( $Y_t$ ) as a linear combination of other non-stationary time series ( $X_{1,t}, X_{2,t}, \dots\dots\dots X_{k,t}$ ). In other words:

$$Y_t = \beta_0 + \beta_1 X_{1,t} + \beta_2 X_{2,t} + \dots\dots\dots \beta_k X_{k,t} + \varepsilon_t \dots\dots\dots(14)$$

In general, a regression model for non-stationary time series variables gives spurious (nonsense) results. The only exception is if the linear combination of the (dependent and explanatory) variables eliminates the stochastic trend and produces stationary residuals.

$$Y_t + \gamma_1 X_{1,t} + \gamma_2 X_{2,t} + \dots\dots\dots + \gamma_k X_{k,t} + 1(0) \dots\dots\dots(15)$$

In this case, we refer to the set of variables as cointegrated. It is only in this case that we can look at regression as a reasonable and reliable model. Cointegration means that, while many developments can cause permanent changes in the individual variable (*i.e.*  $X_{i,t}$ ), there is some long-run equilibrium relation tying the individual variables together, represented by some linear combination of them.

The presence of unit root econometrically promotes the investigation for a long run relationship among the variables. Co-integration tests are therefore meant to ascertain the existence of co-integration between the dependent and explanatory variables. The co-integration specification is given as:

$$\left[ \eta_m \log Y_t = \alpha_0 + \sum_{i=1}^p \alpha_i \eta_m Z_i - \left[ \eta_m \log Y_t - \sum_{i=1}^p \beta X_{t-i} + v_{1t} \right] \right] \dots\dots\dots(16)$$

where  $\left[ \eta_m \log Y_t - \sum_{i=1}^p \beta X_{t-i} \right]$  is the linear combination of the co-integrated vectors,

X is a vector of the co-integrated variables.

This is necessary as the Granger Representation theorem notes that cointegrated variables are related through an error correction mechanism.

The equation is specified as follows”

$$\Delta y_t = \text{Lagged}(\Delta y_t, \Delta x_t) - \lambda u_{t-1} + \varepsilon_t \dots\dots\dots(17)$$

where

$u_{t-1}$  = the disequilibrium error

$$y_t = \beta_0 + \beta_1 x_t + u_t$$

$\lambda$  = the short adjustment parameter

The Johansen maximum likelihood procedure begins by expressing a process of N I (1) variables in an Nx1 vector x as an unrestricted auto regression:

$$X_t = \lambda_1 + X_{t-1} + \lambda_2 X_{t-2} + \dots\dots\dots + \lambda_k X_{t-k} + \mu_t$$

with  $t = 1, 2, \dots, T$  and  $\mu_t$  being the random error term. The long-run static equilibrium is given by  $\prod_x = 0$ , where the long run coefficient matrix  $\Pi$  is defined as:

$$\prod = I - \prod_1 - \prod_2 - \dots - \prod_k$$

where  $I$  is the identity matrix and  $\Pi$  is an  $n \times n$  matrix whose rank determines the number of distinct cointegrating vectors which exist between the variables in  $x$ . Define two  $n \times r$  matrices  $\alpha$  and  $\beta$ , such that:

$$\prod = \alpha\beta'$$

with the rows of  $\beta'$  to form the  $r$  distinct cointegrating vectors. The likelihood ratio statistic (LR) or trace test for the hypothesis that there are at most  $r$  cointegrating

vectors is: LR or TRACE =  $-T \sum_{i=r+1}^n \ln(1-\lambda_i)$

where  $\lambda_1, \dots, \lambda_n$  are  $n-r$  the smallest squared canonical correlations between the residuals of  $x_{t-k}$  and  $\Delta x_t$  series, corrected for the effect of the lagged differences of the  $x$  process. Additionally, the likelihood ratio statistic for testing at most  $r$  cointegrating vectors against the alternative of  $r + 1$  cointegrating vectors, namely, the maximum eigenvalue statistic, is given as:  $\lambda_{MAX} = T \ln(1 - \lambda_{r+1})$

Both statistics have non-standard distributions under the null hypothesis, although approximate critical values have been generated by Monte Carlo methods and tabulated by Johansen and Juselius (1990) procedure.

### Granger causality test procedure

In order to ascertain the significance of the second objective which is to determine the direction of causality between the health and labour productivity in Nigeria, a granger causality test is carried out. The procedure adopted in this study for testing statistical causality is the ‘‘Granger-causality’’ test developed by C.W.J. Granger in 1969. The Granger causality tests determine the predictive content of one variable beyond that inherent in the explanatory variable itself.

The study uses two most common choices of information criteria: Akaike Information Criterion (AIC) and Schwarz Information Criterion (SIC) to ascertain significance of the results estimates.

Granger causality test rely on two basic equations:

$$X_t = \gamma_0 + \sum_{i=1}^{k_3} \gamma_i H_{t-1} + \sum_{i=1}^{k_4} \lambda_i X_{t-1} + \omega_t \dots \dots \dots (18)$$

$$H_t = \alpha_0 + \sum_{i=1}^{k_1} \alpha_i H_{t-1} + \sum_{i=1}^{k_2} \beta_i X_{t-1} + \sum_t \dots \dots \dots (19)$$

where :

X = an indicator of PERCAPITA,

H = an indicator of HEALTH

t = current values

t-1 lagged values

### Source of data

Data for this study were from secondary sources. The estimation period is from 1970-2012. The data used in this study are from the statistical bulletin of the CBN (2012), CBN Annual Report and Statement of Account for various years.

## **Econometrics software**

The E-view econometrics packages was utilized in analyzing the data while excel worksheet was used in imputing the data.

## **Results**

### **Unit root test**

The Unit root test result shows that five of the variables, PERCAPITA, LABFORCE EDUCATIO, AGRICULT and HEALTH are not stationary at level (order zero) as they all drift far apart from equilibrium in the short-run. Only one variable, INVEST is stationary at level. In effect, it shows that there is no propensity for the variables to move together towards equilibrium. However, on application of the tests to the first differences of the series, the tests indicate that the variables under consideration, PERCAPITA, HEALTH, EDUCATIO, AGRICULT and INVEST are stationary and integrated of order one I(1) at 5% level of significance in the ADF statistic; only the LABFORCE variable is not stationary. Having established the order of integration of the series, we employed both the Johansen's and Juselius' Maximum Likelihood (LM) co-integrating techniques under the trace and maximum Eigen value test statistics to explore the possibility of long-run equilibrium between the variables under study.

### **Cointegration Test**

To establish whether long-run relationship exists among the variables or not, cointegration tests are conducted by using the multivariate procedure developed by Johansen (1988) and Johansen and Juselius (1990). The cointegration tests include: PERCAPITA, LABFORCE, HEALTH, EDUCATIO, AGRICULT, INVEST, which includes one lag in the VAR. The results of the conducted Johansen tests for cointegration among the variables are specified in table below: The results indicate that there are at most three cointegrating vectors

Using the trace likelihood ratio, the results point out that the null hypothesis of no cointegration among the variables is rejected in favour of the alternative hypothesis up to two cointegrating equations at 5% significant level because their values exceed the critical values. This means there are at most three cointegrating equations, which implies that a unique long-run relationship exists among the variables and the coefficients of estimated regression can be taken as equilibrium values.

### **Causality test**

The result indicates a unilateral causality between LABFORCE to PERCAPITA expenditure. The result also shows that unilateral causality exist between PERCAPITA and HEALTH variable. The result also indicates a unilateral causality existing between PERCAPITA and EDUCATIO variable. There is unilateral causality existing between PERCAPITA and AGRICULT variable. The unidirectional causality means that the PERCAPITA has to grow first before the effect reflects on the Health, EDUCATIO, and AGRICULT variables. From the result table, no causality direction exists between PERCAPITA to INVEST.

### Analysis of regression estimates

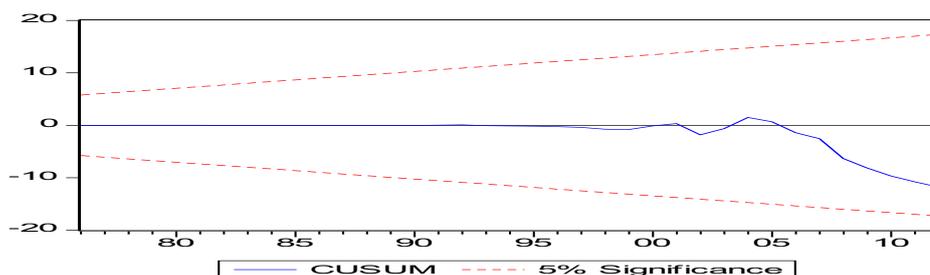
The regression estimates shows some robust significance of HEALTH, EDUCATIO AND LABFORCE interactive terms. Thus, the labour productivity effect of healthy-labour and educated labour is highly remarkable. The empirical evidence therefore strongly indicates that an educated, healthy-labour force is among the key determinants of labour productivity in Nigeria. Accordingly, the results indicate that healthy-labour force is one factor that determines productivity. The estimated coefficient of HEALTH is estimated with a negative and insignificant value even at the 5 % level of significance. The coefficient of EDUCATIO variable shows a positive sign indicating that during the period under review, the government expenditure on education improved upon labour productivity proxied by percapita income in Nigeria during the period under review. It also indicates that that a unit increase government expenditures in education increases productivity by 0.7percent. The result also shows that AGRICULT variable exhibit negative sign. It implies that a unit increase in expenditures on agriculture declines productivity by 3 percent. The result above equally indicates that private investment INVEST exerts negative influence on percapita income proxy as productivity growth in Nigeria between a decade after independence and 2012 fiscal year and this effects do not conform with the theoretical expectations. This implies that for a unit increase in private investment INVEST will elastically decline productivity by -2173.901 units.

Statistically, the  $R^2(0.908222) = 0.90\%$  shows that the independent variables explain the dependent variable to the tune of 90 %. From the regression results, the t-values of the variables under-consideration are as follows: From the result, it shows that the t-values of variables, LABFORCE, EDUCATIO and AGRICULT are statistically significant while others are not. The F-values obtained are as follows:  $F(5, 42) = 71.25055$  while tabulated value is given as follows  $F(5, 42) = 2.45$  Decision: Since the F –calculated is greater than the F- tabulated, we reject  $H_0$  and conclude that the overall estimate of the regression is adequate statistically. The DW = 1.653179 which is greater than the adjusted  $R^2 = 0.90\%$  shows that the entire regression is statistically significant. So we accept the null hypothesis of no autocorrelation.

### Stability and Residual Diagnostic Tests Results

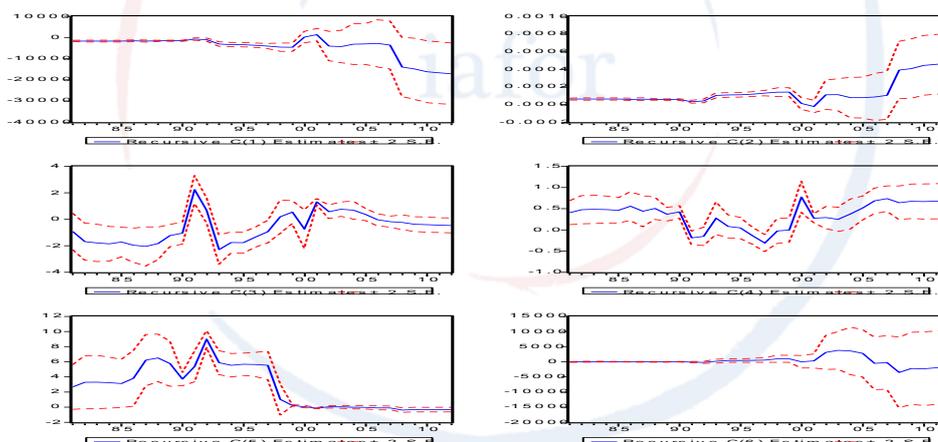
Further, a plot of the sample autocorrelation function (AC) against different lags yielded the correlogram of the regression residuals. The correlogram portrays an explicit representation of stationary residuals adjudged on the ground that the autocorrelations at various lags drift around zero, that is, the zero axis as indicated by the solid vertical line. The CUSUM and CUSUMSQ test results reveals satisfactory plot of the recursive residuals at the 95% significance level. Remarkably, cumulative sum of square residuals reveals that none of the parameters falls outside the critically dotted lines. This empirically dismisses any trace of inconsistent parameter estimates. The results of the CUSUM tests are provided in the graph below:

**Figure2: CUSUM test result**



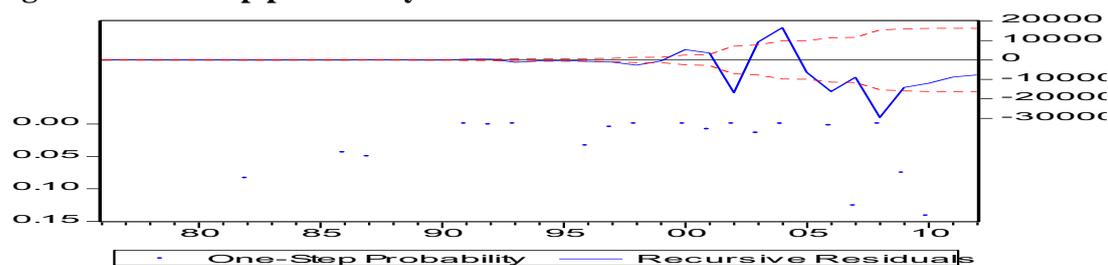
Evidently, stability hypothesis is validated for the period under analysis. The validity of stability of the regression relationships over time further enhances the standard significance of the conventional test statistic(s) without trace of nuisance parameters obtained in the study. Model stability is further established in this study given the empirical evidence that the recursive residuals in the regressions persistently drift within the error bounds [-2 and +2]. This facilitated the adaptive configuration of the cusum test parameters thereby correcting any trace of endogeneity and or simultaneity bias and serial correlation. Thus, the recursive residuals are the *expost* prediction error for all regressands in the study. This is because estimation utilized only the first  $t-1$  observations. the graph below depicts recursive estimates results:

**Figure3: Recursive test result**



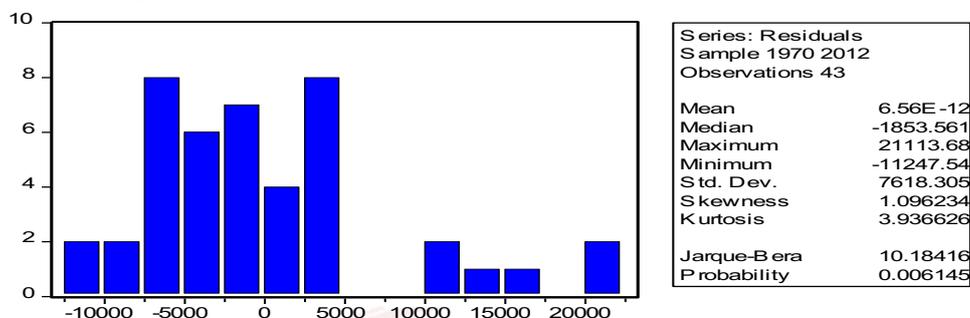
Given that the recursive estimation is computed for subsequent observations beyond the sample period, it therefore portrays the one-step prediction error graphically depicted as one-step probability recursive residuals as shown in the graph below:

**Figure 4: One-step probability recursive test result**



The adequacy of the specification was therefore established on the basis of the satisfactorily robust test statistic(s) obtained from the diagnostic tests conducted on the regression residuals. However, the empirical distribution test for model residuals also provides evidence of non-normality of the variables with a Jarque-Bera test statistic of 10.18416. The graph below depicts the non-normality of the distribution.

**Figure5: Jarque-Bera test statistic**



## Conclusion

In this study, we estimated the impact of health on labour productivity in Nigeria applying the standard neo-classical growth framework. The data was estimated using annual time series data from 1970 to 2012. The OLS test result undertaken shows that the empirical evidence strongly indicates that the results indicate that healthy-labour force is one factor that determines productivity. Based on the findings of this study, the following recommendations are therefore made for policy considerations: The influence of health on labour productivity growth should be re-investigated to confirm the results obtained. The Federal Governments as well as the authorities in every states of the country must focus on the improvement of labour productivity if they wish to raise the standard of living of people in Nigeria

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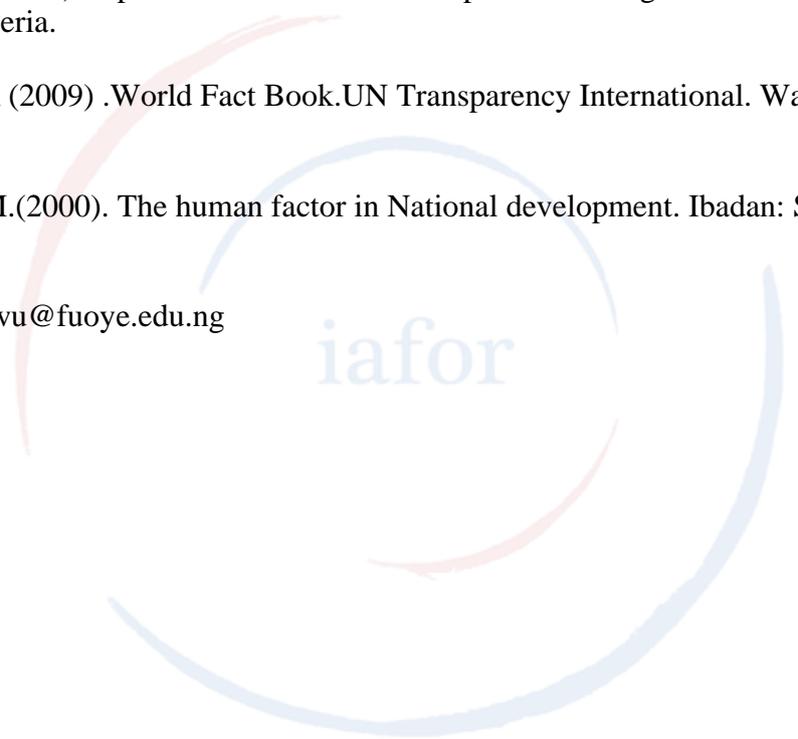
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The logo for the International Association for Frontiers of Research (iafor) is centered on the page. It features the word "iafor" in a light blue, lowercase, sans-serif font. The text is enclosed within a circular graphic composed of two overlapping, semi-transparent arcs: a larger light blue arc and a smaller, slightly offset pinkish-red arc, creating a sense of depth and movement.

## Appendix

### Augmented Dickey-Fuller Test Equation, for the model

ADF TEST				
VARIABLE	ORDER ZERO	PROBABILITY	ORDER ONE	PROBABILITY
PERCAPITA	0.649497	0.5198	-4.465192	0.0001
HEALTH	2.111422	0.0412	-3.596858	0.0009
EDUCATIO	2.364256	0.0231	-4.195933	0.0002
AGRICULT	-0.941206	0.3524	-7.298729	0.0000
INVEST	-2.777445	0.0084	-7.397786	0.0000
LABFORCE	1.727920	0.0919	-0.823451	0.4154

### Cointegration test

Series: PERCAPITA LABFORCE HEALTH EDUCATIO AGRICULT INVEST					
Lags interval: 1 to 1					
	Hypothesized No. of CE(s)	1 Percent Critical Value	5 Percent Critical Value	Likelihood Ratio	Eigenvalue
None **		90.45	82.49	200.4562	0.839750
At most 1 **		66.52	59.46	125.3845	0.828591
At most 2 **		45.58	39.89	53.07264	0.486381
At most 3 *		29.75	24.31	25.75539	0.296838
At most 4		16.31	12.53	11.31652	0.240846
At most 5		6.51	3.84	0.018926	0.000462

\*(\*\*) denotes rejection of the hypothesis at 5% (1%) significant levels

### Granger Causality Tests

Pairwise Granger Causality Tests				
Date: 09/10/14 Time: 06:29				
Sample: 1970 2012				
Lags: 2				
Probability	F-Statistic	Obs	Null Hypothesis:	
0.08763	2.60695	41	LABFORCE does not Granger Cause PERCAPITA	
0.86424	0.14650	41	PERCAPITA does not Granger Cause LABFORCE	
0.80192	0.22210	41	HEALTH does not Granger Cause PERCAPITA	

0.00026	10.4772	PERCAPITA does not Granger Cause HEALTH
0.53721	0.63222	41 EDUCATIO does not Granger Cause PERCAPITA
0.01119	5.10272	PERCAPITA does not Granger Cause EDUCATIO
0.49323	0.72083	41 AGRICULT does not Granger Cause PERCAPITA
0.05385	3.17207	PERCAPITA does not Granger Cause AGRICULT
0.84467	0.16961	41 INVEST does not Granger Cause PERCAPITA
0.85778	0.15406	PERCAPITA does not Granger Cause INVEST

### Regression result

Dependent Variable: PERCAPITA			
Method: Least Squares			
Date: 09/10/14 Time: 06:15			
Sample(adjusted): 1971 2012			
Included observations: 42 after adjusting endpoints			
Prob.	t-Statistic	Std. Error	Coefficient Variable
0.0956	-1.711669	2978.909	-5098.905 C
0.0026	3.234786	0.002080	0.006729 D(LABFORCE)
0.1219	-1.584199	0.274148	-0.434305 HEALTH
0.0001	4.363776	0.182180	0.794995 EDUCATIO
0.0285	-2.282458	0.150221	-0.342874 AGRICULT
0.7178	-0.364301	5967.312	-2173.901 INVEST
18713.78	Mean dependent var	0.908222	R-squared
24597.36	S.D. dependent var	0.895476	Adjusted R-squared
20.93189	Akaike info criterion	7952.385	S.E. of regression
21.18013	Schwarz criterion	2.28E+09	Sum squared resid
71.25055	F-statistic	-433.5698	Log likelihood
0.000000	Prob(F-statistic)	1.653179	Durbin-Watson stat

### The t-statistics of the regression result

Variable	t-Statistic	Prob
LABFORCE	3.234786	0.0026
HEALTH	-1.584199	0.274148
EDUCATIO	4.363776	0.9243
AGRICULT	-2.282458	0.0001
INVEST	-0.364301	0.0285
		0.7178

### Autocorrelation result

Date: 09/10/14 Time: 06:34						
Sample: 1970 2012						
Included observations: 43						
Prob	Q-Stat	PAC	AC		Partial Correlation	Autocorrelation
0.000	40.270	0.935	0.935	1	. *****	. *****
0.000	75.566	-	0.865	2	.* .	. *****
		0.074				
0.000	106.47	0.001	0.799	3	. .	. *****
0.000	132.33	-	0.722	4	.* .	. *****
		0.135				
0.000	152.65	-	0.632	5	.* .	. *****
		0.139				
0.000	167.21	-	0.528	6	.* .	. ****
		0.174				
0.000	178.17	0.171	0.452	7	. * .	. ***
0.000	185.32	-	0.360	8	** .	. ***
		0.201				
0.000	188.73	-	0.245	9	** .	. **
		0.210				
0.000	190.20	0.146	0.158	10	. * .	. * .
0.000	190.66	0.034	0.087	11	. .	. * .
0.000	190.67	-	0.013	12	.* .	. .
		0.118				
0.000	190.86	0.089	-	13	. * .	. .
		0.055				
0.000	191.59	0.016	-	14	. .	.* .
		0.105				
0.000	192.67	0.076	-	15	. * .	.* .
		0.125				
0.000	194.18	0.049	-	16	. .	.* .
		0.145				
0.000	196.22	-	-	17	. .	.* .
		0.041	0.166			
0.000	198.89	-	-	18	** .	.* .
		0.240	0.186			
0.000	202.28	-	-	19	. .	** .
		0.027	0.205			
0.000	206.54	-	-	20	. .	** .
		0.031	0.225			

*A Comparative Study on Political Responses to Issues of Insurgencies and Counterinsurgencies between the United States and Nigeria*

Basil Chuka Okoli, Federal University, Nigeria

The European Conference on Politics, Economics and Law 2015  
Official Conference Proceedings

**Abstract**

The insurgency today is a global issue that has and is still stalling the socio-economic development of many nations all over the world. Many scholars would argue that the Nigerian experience in this regard is relatively new when compared to nations like the United States and most Middle Eastern countries. Still these Nations have adopted certain strategic approaches towards curbing or at least containing issues of insurgencies. The diverse ethnic and religious climate and unique political disposition of the Boko Haram insurgency in Nigeria lends to the complexity of the country's failed attempt to address it. The analytical approach adopted in this research is deliberate and strategic; a comparative study with a well evaluated prognosis of the respective situations of the two countries in this study will increase the prospects of developing fresh erstwhile unconsidered insights towards the resolution of the Boko Haram insurgency in Nigeria.

Keywords: Boko Haram, Insurgencies, Counterinsurgencies, Terrorism.

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## Introduction

The arrival of the twenty-first century has been greeted by surges of terrorist activities in different parts of the world. As such a great wave of insecurity has hounded many nations across the world. Wilson's (2010: 58-78) observation and assessment of the impact of terrorism on humanity in this age is particularly disturbing, when he states that:

According to UNICEF, 80% of victims of such oppression in the recent years have been civilians, mainly women and children. Looking back at the last century, despite all its valuable accomplishments, the 20<sup>th</sup> century has turned out the bloodiest century in human history. It is estimated that more than 60 million people were killed by fellow human, more than all the previous centuries of human history, the century ended with about 21 million refugees around the globe, including about 6 million internally displaced people and more than 300,000 child soldiers (under the age of 18, girls as well as boys engage in armed conflict).

One of the primary intent of insurgency is the use of force and violence for not only political purposes but also to compel the opponent or perceived enemy to carry out ones will. Steven Metz and Raymond Millen are of the view that:

Insurgency is a strategy adopted by groups which cannot attain their political objectives through conventional means or by a quick seizure of power. It is used by those too weak to do otherwise. Insurgency is characterized by protracted, asymmetric violence, ambiguity, the use of complex terrain (jungles, mountains, and urban areas), psychological warfare, and political mobilization all designed to protect the insurgents and eventually alter the balance of power in their favour. (Metz S., Millen R., 2014)

Although there are diverse reasons for the upsurge of insurgencies and other terrorist activities, its current rise has been enigmatic. Among some of the notable speculations about its instigation and propagation is religion. This particular perspective is mostly proffered by the West, especially since aftermath of the September 11 attack in 2001. However, liberal scholars consent to other possible causes like socio-political exigencies, the kind that encourages authoritarianism as seen in most radical Islamic sects. When the radical Islamic group, Al-Qaeda attacked the United States, specifically striking targets in New York City and Washington DC, they were attempting to establish a significant point. Both the twin towers of the World Trade Centre and the Pentagon were not only the heartland of America; they were also the nation's symbol's of economic and military power. The casualty reports and estimated cost of damage were devastating, about three thousand people, mostly civilians were killed and properties running into billions of dollars were destroyed. Yet despite all this America, with George Bush as the then president, responded in a peculiar yet strategic way. Jermalavicius (n.d) aptly articulates it in this manner:

The scale and ambition of the U.S. response are equally formidable. President George W. Bush declared a war which came to be known as the "global war on terrorism": the enemy was identified, the allies were mobilized, hesitant parties were warned, ideological parameters were established, police, and surveillance functions of the state were strengthened, the defence budget was substantially increased and military action was launched.

In the aspect of reshaping the political and state structure, insofar as nation building in the modern context is concerned, much that has been benefited from insurgencies, as well as the use of guerilla and terrorist tactics, especially since the onset of political governance (Young et al, 2011). Of course, this does not come without its own downside. Despite the fact that many regions across the globe have and still take advantage of them, their rather crude and life threatening modus operandi has become a scourge to the international community.

The situations that have triggered the excuse for insurgency in Nigeria may seem like ones rooted in religion on the surface. This is evident in the fact that in recent attacks by the Boko haram sect, both Christian and Muslim deaths were recorded among the casualty reports. Even the Hausa term used by the insurgency group, Boko Haram, etymologically has a religious origin. It is a combination of two words *Boko* and *haram*. The former, *Boko*, means book, especially western books, while the latter *haram* refers to that which is sinful or ungodly. In essence, *Boko haram* literally means "western education is sinful" (Adesoji, 2010, p. 100). This implies that the sect advocates that western education is a sacrilege, ungodly and should be forbidden. It also highlights the quest of the sect, also known as *Ahlis Sunna Lidda'awati wal-Jihad* (people committed to the propagation of the prophet's teachings and Jihad) to make Nigeria an Islamic state by whatever means possible and at whatever human cost. The members of the Boko haram were trained by Al-Qaeda in Islamic Maghreb (AQIM) group in combat, handling of weapons and handling of Improvised Explosive Devices (IEDS). According to Dearn (2011), these trainings have enabled the Boko Haram members to effectively use weapons and even produce 'dirty bombs'.

However, religious activism is not exactly a new concept in the Northern part of Nigeria. On the contrary, right from the exploits of uthman Dan Fodio's Jihad in the early 16<sup>th</sup> century till date, there have been historical manifestations of this. The crux of the matter is that for some apparent reasons obviously associated with the inability of the ruling elite to extricate religion from politics, religion has always been employed as a political weapon for self-preservation, mass mobilization, perpetuation in office and diversion of attention from their ineptitude, corruption and incompetence (Ajayi, 2012, pp. 103-107). Furthermore, the issue of segregating politics from religion is actually an issue that is plaguing both the Northern and Southern part of the country, albeit in different ways. Both employ religion as a way of manipulating the populace in order to achieve their respective selfish political ambitions (Ibid.). Even the just concluded national election that brought incumbent president Buhari to power was partly based on religion and tribal sentiments this, explains for the 68% votes cast for the president coming from the north

geo-political zones. In the same vain over 95% votes cast for former president Goodluck Jonathan came from south south and south east geo-political zones of Nigeria.

Diverse instances of violent regime change and concession capitulation have been exploited by insurgencies. Thus, it is imperative that a vivid understanding of insurgencies, as well as guerrilla tactics and the dynamics of terrorism will not only provide useful leads that will increase prospects of international cooperation and effective counterinsurgency response, it will also increase their effectiveness in political discourse. This study will attempt to examine the most effective ways through which the issues of insurgencies can be effectively addressed by reviewing and evaluating the political strategies country like the United States adopted in an attempt to successfully resolve such cases. A qualitative research design will be employed in this regard.

### **Insurgency and Counterinsurgency: A Contextual Delineation of Key Concepts**

As earlier stated, insurgencies have been vital and a necessary evil in the aspect of nation building. To further buttress this, it is necessary to discuss some of the existing definitions and implications of the term.

Bard O'Neill supports the advantages of insurgency when he notes that, "insurgency has probably been the most prevalent type of armed conflict since the creation of organized political communities" (O'Neill, 2005: 1). Bard O'Neill from his book *Insurgency and Terrorism*, defines it as: "a struggle between a non ruling group and the ruling authorities in which the non ruling group consciously uses political resources (e.g., organizational expertise, propaganda, and demonstrations) and violence to destroy, reformulate, or sustain the basis of one or more aspects of politics." (O'Neill, 1990, p.13).

He also describes it as a type of internal war, especially in terms of its association with politics as, stating that it is: "a general overarching concept that refers to a conflict between a government and an out group or opponent in which the latter uses both political resources and violence to change, reformulate, or uphold the legitimacy of one or more of four key aspects of politics" (O'Neill, 2002, as cited in Taber, 2002: viii). O'Neill explicitly identifies these aspect of politics as: "(1) the integrity of the borders and composition of the nation state, (2) the political system, (3), the authorities in power, and (4) the policies that determine who gets what in societies" (Ibid.).

Also, lending further insight to this perspective, another definition of insurgency activity describes it as a form of "movement - a political effort with a specific aim," (Terrorism Research, 2009). The political aim of insurgencies thrives in situations where "societal divisions were cumulative and were combined with economic and political disparities" (O'Neill, 2005: 4).

It is clear from the definitions provided thus far that religion is basically the least considered factor that instigating social unrest that develops into insurgent activities. The more identified exoteric appeals are usually associated with specifically political and economic disparages like "the unsatisfactory increase in unemployment, unequal distribution of wealth, inadequate distribution of essential goods, elitist control of the

political structure, and corrupt leadership all are highly involved factors leading to popular dissatisfaction, opening the door to insurgent action and guerilla warfare” (Ibid., 2011).

O’Neill (2005: 101), in addressing how these effect both the intelligentsia and the masses, explains that it leads to “unemployment which can lead not only to inadequate supply of material necessities, but also to psychological dissatisfaction”. However, Almond (1966) argues that it is the masses that are “are only capable of registering their grievances; they cannot grasp the shape and form of the historical process in which those grievances are merely incidents” (as cited in O’Neill, 2005: 101).

The ripple effect on this is actually what provides the opportunity, especially in the Nigerian context, for manipulation and extensive exploitation to incite popular support by various movements like the Sharia indoctrination in many regions in the Northern part of the country towards the ills of the Christianity and all that is supposedly associated with it, and creating the unstable atmosphere for possible insurgent action against political leadership of the country. In fact, in recent times insurgencies have evolved from early political failures (Young, 2011).

However, the influences and impacts of popular insurrections, which have been involved in movements since the early political forms, have been negligible. This is because, according to Taber (2002:13), they have “failed, or in any case have produced only limited victories, because the techniques they can exploit today were then irrelevant to the historical situation” (Taber, 2002: 13). When compared to the political climate of the middle ages, one would observe that its diminished existence was birthed by not only the inability of the affected majority to gain weaponry, but also from their ability to influence the economic or political conditions in which they labored. Taber supports this when he reports that “Economically, they were manageable because they lived too close to the level of bare subsistence to be otherwise” (Ibid., p.14).

This to a large extent reduced the impact of the proletariat movement on the entire system, since their removal from the system and “and their ability to diminish their labors were directly responsible for exacerbating their meager existence” (Young, 2011). The consequence of this was deplorable. Taber (2002:14) articulates it this way: “If they starved, or rebelled and were slaughtered, there was no one to care, no economically or politically potent class to whom it would make the slightest difference”. The resultant effect was that such societies turned against itself with nonchalance to the loss of life and instead favoring political elitism and economic centrality. It is also important to note here that most of the successful insurgent action came not from the proletariat, but from the bourgeois class as internal elitist struggles forced the change of regime in favor of the victors. It was however, events such as the rapid expansion of colonialism and the race for world economic and territorial superiority by Western Europe that instigated a domino effect of insurgent actions, and acted as a precursor for the violent exchange as witnessed in many regions of the world today.

## **Validating the Adoption of a Comparative Political Analysis with Regards to Counterinsurgency Approaches**

The great French interpreter of American democracy, Alexis de Tocqueville, believed that the only way one can fully comprehend their own political system is by comparing it with others.

When such comparisons are affected, the possibility of a deeper understanding of ones politics as well as a conscious investigation of a wider range of options and alternatives is invariably affected. Also, there is an illumination of the virtues and short comings of that particular country's political disposition. This is because comparative analysis expands our awareness of both the advantages and disadvantages of politics, enabling us to perceive beyond familiar arrangements and perceptions. This agrees with Tocqueville that "Without comparisons to make, the mind does not know how to proceed." (Ibid.). In other words, Tocqueville was stating that comparison is fundamental to all human thought. Methodologically, it is the core to the humanistic and scientific methods, including the scientific study of politics.

Secondly, Comparative analysis ensures the development and test explanations and theories of how political processes work or when political change occurs. This is because the political scientists and physicist somewhat share the same goals in terms of the comparative methods they both share, although political scientists cannot design experiments like physicist, which is very crucial to arriving at viable results in the natural sciences. This is because they (that is, the political scientist), cannot always control and manipulate political arrangements and observe the consequences. As such, the political scientist is limited to addressing the large-scale events that drastically affect many people. It would be absurd, for example, to initiate a war or an insurrection simply because one as a political scientist wants to embark on a study to determine its effects.

### **A Brief Overview of the Political Structures of Nigeria and the United States**

Different governments are usually involved in many things. Most of these include establishing and operating school systems, to maintaining public order, to fighting wars. In the bid to accomplish these, it is necessary for these governments to have specialized structures or institutions such as parliaments, bureaucracies, administrative agencies, and courts. The purpose of these structures is to perform functions, which in turn enable the government to formulate, implement, and enforce its policies. In effect the policies reflect the goals; while the agencies provide the means to achieve them. There are basically types of political structures—political parties, interest groups, legislatures, executives, bureaucracies, and courts—within the political system.

An appropriate place to begin when initiating a comparative analysis of the political responses to insurgency between the United States and Nigeria is to discuss the nature of their respective political structures. Political structure is study of institutions or groups in terms of their relationships with each other. It also refers to their patterns of interaction within political systems, as well as political regulations, laws and the forms present in political systems in such a way that they constitute the political landscape of the political

entity (“political structure”, 2014). In other words, it basically refers to the way in which government is being run.

There are also five major political systems in the world, and they include; democracy, republic, monarchy, communism and dictatorship. Although it is safe to state that the political systems adopted by any nation is dynamic and not static. Also the political system in use is associated with the nature of the nation-state. In discussing both terminologies “nation” and “state”, Harcourt(n.d.),states thus:

The political system in use depends upon the nation-state. A nation is a people with common customs, origin, history, or language. A state, on the other hand, is a political entity with legitimate claim to monopolize use of force through police, military, and so forth. The term nation-state refers to a political entity with the legitimate claim to monopolize use of force over a people with common customs, origin, history, or language. Sociologists and political scientists prefer the term nation-state to “country” because it is more precise

Nevertheless, Harcourt identified three major political structures that stand out from the different types in the world, and they include: totalitarianism, authoritarianism, and democracy (Ibid.).

When the political development of nations is considered from the historical perspective, one would discover that most of them have embraced one or two or most times all of these systems. Nigeria and America share a common trait in that regard. Both the United States and Nigeria are Federal republics, a type of republican political structure that is somewhat similar to the Representative Democratic political system, in that the government is subject to the people and leaders can be recalled. In a representative democracy, citizens are responsible for electing the leaders of their choice who will make the laws for them. The only difference between the two nations is the approach they embrace in electing their leaders, in the sense that America adopts the electoral college system, especially when it comes to electing major officials in significant positions like the presidency, which Nigeria does not.

The challenges that confront political development in the United States and Nigeria differ and mostly depend on different factor. While the American political system is predominantly confronted with challenges such as racism, gender and sexual orientation, that of Nigeria, on the other hand, is confronted with issues such as ethnicity, gender and religion. The reason for this is that while America is a federation with citizens that ail form different national and racial backgrounds, Nigeria is basically made up of persons from divergent ethnic and religious backgrounds.

## **Examining insurgency resolution attempts between the United States and Nigeria: Challenges**

Nigeria has been pioneering international peacekeeping campaigns by single handedly initiating (the ECOWAS Monitoring Group) in places like Liberia and Sierra Leone in the past, only surpassed by countries like Pakistan, Bangladesh and India. However, in recent times such operations are now deteriorating, In fact the military itself is now a shadow of what it used to be. Probably because the military government has had a reputation of overthrowing civilian governments, it is not surprising that the civilian government in turn is reluctant to properly fund it since it came into power in 1999. Even the number of men in the army has dropped, from the 350,000 man army to roughly 78000 malnourished men, although during the Jonathan administration they have had a relatively beefed up budget.

The fact remains that this is a war 'terrorism' that is quite alien to them, one that requires unique principle, new sets of skills, tactic and equipment. Right now the Nigerian military is losing its best officers because of internal sabotage.

In the aftermath of the September 11 attacks, America was able to embark on a successful counterattack on terrorism because they were able to arouse the sympathy of the international community. Nigeria so far has been able to achieve that, especially after the abduction of close to 300 hundred school girls in Chibok a community in Borno states by the insurgents. However, the reason why we were unable to take advantage of that was based on a number of factors not unrelated to the complicated nature of the Nigerian Army, which had sympathizers of the Insurgent groups among them. Other issues also came into foreplay; some of which include the fact that western countries like the United States were reluctant to provide or sell their sophisticated weapons to the Nigerian Army based on the previously stated fact. Their involvement in the issue was conditional and not whole hearted as they proclaimed, politicization of the Nigerian Army. There were a lot of factors to be considered.

### **Towards initiating an effective national counterinsurgency response**

One of the major dilemmas of the Boko Haram crisis is in terms of determining whether or not they are a terrorist or insurgent groups until recently when it was designated a terrorist group . It is obvious that even before its current status (terrorist group) its methods are basically terrorist in nature, no thanks to the fact that both their arsenal and training are strongly linked to major terrorist organisations like the Al-Qaeda. Furthermore, their source of funding has been associated with dictators like the late Muammar Gaddafi, who was of the view that Nigeria should be divided into a Christian South and a Muslim North, that is before he was killed by the United states and its Western allies. Of course the consequence of this is the unleashing of radical Islamic groups in North Africa, including the Al Qaeda in the Islamic Maghreb, now armed with Gaddafi's cache of sophisticated weapons. These groups moved down the Sahel from Libya through Algeria into Mali and Nigeria, where they have found kindred spirits in Nigeria's inchoate Boko Haram (Aribisala, 2014).

In attempting to compare the nature of the counterinsurgency operations both countries have been engaged in, it is important to note that the nature of the insurgencies must be put into consideration and its proper perspective. While most of the cases America has tackled are basically terrorist organisations with clearly defined motives and operations, the case in Nigeria is quite complicated. Firstly, it is hard to fully comprehend the objectives of the Boko haram. Their principles and objectives are riddled with a lot of contradictions. For instance, one wonders why they are enamoured with western weaponry and bomb making techniques and even employ the Social Media to broadcast their activities when they claim to be opposed to western education. Again, if their quest is to initiate some sort of Jihad by driving away Christians from the North, then why equally attack both Christians and muslims? Even the fact that it is the poor that are killed negates the assumption that they are opposed to social inequalities in Nigeria. There has never been a case where the posh homes or business centres of the Northern elites were attacked. Rather places like markets and local schools, mosques and churches have been the major targets of their strike. It is in the face of all these inconsistencies that the suspicion of the political undertone of the insurgency in Nigeria becomes reinforced.

It is in this regard that the proper approach to address this situation becomes problematic, even though the fact that it is clearly defined places it is a more advantageous perspective. Addressing it from a purely democratic angle has its challenges which are basically focused on one fact: the presidency. The issue is that the Boko haram evolved to its terrorist capacity and inclinations right from the point when a president ensued from the south- south part of Nigeria. It also heightened when he was re-elected. The Northern leaders were grossly against the fact that he has governed the nation in six years and should drop the mantle so to speak. Former administration has not fared well in terms of contending the insurgents, he treaded on delicate grounds in an attempt to appease the interest of both the north and south in his efforts at resolving the issue.

A review of some of the reactions towards the former president's efforts so far will illustrate this. For instance, he was accused of genocide by his Northern opponents when he declared emergency rule and decided a more forceful action against the insurgents in the North. However, he was equally accused of incompetence and being too weak when he decided to embark on a diplomatic approach. It is noteworthy that the three states, Adamawa, Yobe and Borno, where these insurgency attacks are at their peaks are all governed by the former opposition party, APC.

Therefore, appropriate recommendations for an effective counterinsurgency response will entail first of all addressing it at its root. The Nigerian federal government has to fully reject any form of political strategy that encourages partisan politics or aims to appease religious and ethnic sentiments in order to be successful in any of counterinsurgency campaigns. Military officers to be allocated to such areas must be selected based on the level of their commitment to the army, without any political or ethnic consideration whatsoever. It is even more advantageous if majority of the soldiers, especially the major officers are from the Southern part of the country. Furthermore, Nigeria is yet to explore the prospect of adapting surveillance technology in its effort against insurgency. Since the issue of the Watergate scandal that prompted the resignation of President Nixon in the United States, America's fight against corruption among the highest office has been declining. A situation where we have that kind of technology or federal agency equipped

with it, many of the corrupt activities occurring in the government would have dropped considerably. By now those in the federal offices that have had any association with the insurgency groups would have been identified and executed.

## **Conclusion**

In order to address the insurgency challenges and the failure of counterinsurgency attempts in the country, the paper employed a comparative analysis of the approaches adopted by Nigeria and the United States. In the course of this analysis it was observed that the basic aspects of the relative success of the United States in this regard is related to a number of factors, which include the nature of their counterinsurgent strategies, as well as the fact that theirs is not as complicated as that of Nigeria, which is politically motivated. However, there are basic principles in counterinsurgency that would at least contain and eventually eradicate the stigma in due time. Some of them include the presence of a legitimate government, a united effort between government and non-governmental bodies in confronting the issue. Also, ensuring that operations are carefully considered, and are based on viable intelligence gathering and analysis at the lowest possible levels and disseminated and distributed throughout the force, in addition to the government's initiation and commitment towards a long term counterinsurgency plan, It is also imperative that the military be equipped with an array of counter-insurgency units with world class equipment at their disposal.

In addition, a special unit, aside from the military and the Joint task Force, whose primary objective is to address insurgency and terrorism be initiated and given all the government and legal backing it requires. Also, these must be sent from time to time for training courses in by the US counterterrorist bureau. This unit should have a healthy collaboration with other federal units or parastatals in the federal government aside from the military.

Finally, the Nigerian government should device a long term plan that would restructure the nation's political system as well as change the orientation of the citizens towards it. An effective check system that would monitor the expenditures and earnings of government officials, as well as their investments before, during and after their tenure should be put in place. The current relocation of military command headquarters to Borno state may not provide the much desired result. Since the new government came on board few weeks ago, over thirty suicide bomb attacks have been recorded with several hundred deaths mainly innocent civilians as victims.

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***Legal Nature of Resolutions Issued by the Bodies of the Self - Government of  
Legal Advisors - EU Perspective***

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**Abstract**

The research topic concerns the self-governing regulatory bodies of the legal profession in EU Member States and the resolutions passed by those bodies (specially issued by National Council of Legal Advisors or District Councils of Legal Advisors). The legal character of these regulations is differentiated, and, as such, generate different effects with respect to the rights and duties of the members of the self-government and to third parties. It is therefore important to classify and to analyse the nature of such resolutions, also because of the influence this may have, taking into account the possible way of filing claims or petitions with the competent court. The research conducted should answer which resolutions refer to the so called administrative matters, and, by extension, have the nature of administrative decisions (ex. the entry in the register of legal advisors); which are acts of the internal management which fall within the terms of reference of self-government (ex. resolutions exempting legal advisor trainees from paying the annual fee in part or in full, deferring due dates for the payment thereof, and on payments on instalments); and which have the nature of civil law regulations (ex. membership fee). The sources of research work include the provisions of universally binding legal provisions and internal laws, and internal provisions that regulate the laws on self-government in particular.

Keywords: advocates, legal nature, resolution, self - governing bodies

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## Introduction

Pursuant to the provisions of Article 40.1 of the Act of 6 July 1982 on Legal Advisors<sup>1</sup> [Pol.: *radca prawny*], and in connection with Article 17 of the Act of 2 April 1997 – Constitution of the Republic of Poland, the self-government within the profession of legal advisors and trainees, is independent in executing its tasks, and, as such, is subject exclusively to the provisions of the law. The Self-government for Legal Advisors acts through its bodies of authority which take decisions in the form of resolutions, as referred to in Article 45 of the Act on Legal Advisors. The research conducted aim is to determine the legal nature of resolutions issued by the statutory bodies of authority of the Self-government for Legal Advisors, i.e. the National Convention of Legal Advisors, the National Council of Legal Advisors, the Council of the District Chamber of Legal Advisors.

The bodies of authority of the professional self-government take decisions in the form of resolutions which, in terms of their legal character, are not uniform, and, as such, generate different effects with respect to the rights and duties of the members of the self-government and to third parties. It is therefore important to classify and to analyse the nature of such resolutions. As regards the subject matter of the study, the Act of 6 July 1982 on Legal Advisors/Solicitors (uniform text published in *Dziennik Ustaw* of 2014, item 637; hereinafter referred to as the “Act on Legal Advisors”) lays down the fundamentals of the system. This is a *lex specialis* as referred to in Article 17.1 of the Polish Constitution which provides that by means of a statute, self-governments may be created within a profession in which the public repose confidence, and such self-governments shall concern themselves with the proper practice of such professions in accordance with, and for the purpose of protecting, the public interest.

In view of the above, and with due consideration for the subject matter of the study, there is a need to clearly separate the scope of work of the professional self-government that falls within the terms of reference of public tasks whose execution is vested with the self-government where, subject to the provisions of the Act on Legal Advisors, the provisions of the Act of 14 June 1960 – Code of Administrative Proceedings apply (uniform text published in *Dziennik Ustaw* of 2013, item 267, as amended), and the Act of 30 August 2002 on Proceedings before Administrative

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<sup>1</sup> Translated verbatim, *radca prawny* (in Polish) is a legal advisor; however, pursuant to the provisions of the Act of 5 July 2002 on Rendering Legal Services in Poland by Foreign Lawyers (uniform text published in *Dziennik Ustaw* of 2014, item 134), Annex I provides a list of professional titles in Member States of the European Union that are equivalent in meaning to the profession of advocate or legal advisor. These are:

- in Belgium - Avocat/Advocaat/Rechtsanwalt,
- in Finland - Asianajaja/Advocat,
- in Germany - Rechtsanwalt,
- in Italy – Avvocato,
- in the UK - Advocate/Barrister/Solicitor.

Consequently, the term „legal advisor” in the context of this research project and its translation into English and should be understood as Advocate/Barrister/Solicitor.

Courts (uniform text published in Dziennik Ustaw of 2012, item 270, as amended) from the execution of tasks typical of corporate bodies whose decisions are not subject to judicial and administrative control.

In view of the issues presented, the research conducted should answer which resolutions taken by the bodies of authority of the Self-government for Legal Advisors refer to the so called administrative matters, and, by extension, have the nature of administrative decisions; which are acts of the internal management which fall within the terms of reference of self-government; and which have the nature of civil law regulations (such as, for example, decisions concerning contributions paid by the members of the Self-government for Legal Advisors or decisions relating to waiving fees for legal advisor's traineeship (Pol. aplikacja radcowska).

The classification of scopes of matters, as outlined above, has given rise to considerable doubts, which triggered lack of uniformity in decisions made by Voivodship Administrative Courts and by the Supreme Administrative Court. The purpose of this article is not to exhaust the topic entirely, but to underline the key elements of that subject. The aforementioned may facilitate to remove some doubts and to indicate possible directions of legal construction, which, in the opinion of the researcher, should facilitate uniformity in the subject matter in question.

The studies conducted aim to eliminating doubts in the practical application of the legal provisions analysed, indicating possible directions of legal construction which are relevant and proper in the opinion of the researcher. It is assumed that this will make the analyses conducted more comprehensive in nature, and, consequently, lead to a greater degree of uniformity in the operations of the self-government for legal advisors. Furthermore, the research will be conducive to formulating *de lege ferenda* requirements in the area discussed.

**Legal nature of resolutions of District Councils of Chambers of Legal Advisors concerning applications fined under Resolution No. 43/VIII/2011 of 21 May 2011 on the principles of exempting legal advisor trainees from paying the annual fee in part or in full, deferring due dates for the payment thereof, and on payments on instalments**

The case has appeared under the application of the resolution issued by the National Council of Legal Advisors under the provisions of Article 60.11a in connection with Article 32<sup>1.4</sup> of the Act on Legal Advisors, which constitutes the basis on which to draw conclusions concerning the legal nature of such decisions and consequences thereof within the terms of reference of procedural law. It may be indicated that the resolution of District Council of Chamber of Legal Advisors on the subject mentioned, is not an administrative matter – therefore, the cognition of the Voivodship Administrative Court is exempted. What is more, the resolution of District Councils of Chambers of Legal Advisors concerning annual fees is a resolution of internal nature and its legal nature is even a civil one (not administrative). The legal nature of such fees should be analysed – these fees constitute a autonomous buget of the District Councils of Chambers of Legal Advisors (therefore, National Council of Legal Advisors, or courts, or other supervisory bodies – Minister of Justice, cannot issue a reversal decision with respect to the annulment of resolutions passed by the Council of the District Chamber of

Legal Advisors). The aforementioned is crucial as far as the scope of admissible control of legality by administrative courts of all deeds issued by the bodies of authority of the Self-government for Legal Advisors under the provisions of Article 3.3 of the Act of 30 August 2002 on Proceedings before Administrative Courts (Dziennik Ustaw of 2012, item 270, as amended), is analysed. Taking into consideration the legal nature of such resolutions, the control of legality by administrative courts is exempted.

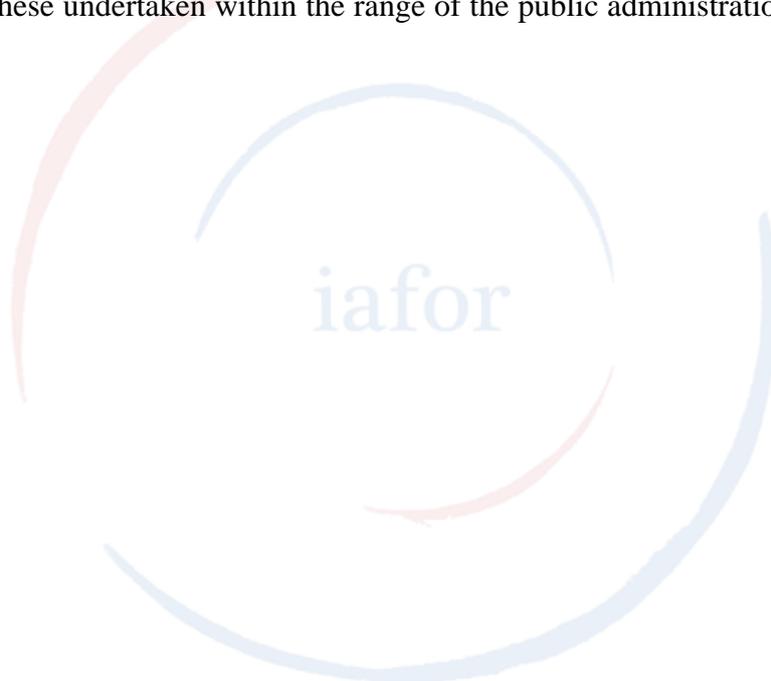
### **The scope of supervisory powers of the Minister of Justice (Article 47 in connection with Article 5 of the Act on Legal Advisors)**

The problem has arisen in the context of the wording of Article 28.4 through 28.7 of the Act on Legal Advisors (the resolution on suspending the licence to practise as a legal advisor) and Article 31.2 through 31.3 of the Act (the resolution by the Council of the District Chamber of Legal Advisors on the entries in the register of legal advisors), which is applied to legal advisor trainees under the provisions of Article 37.3 of the Act on Legal Advisors (the resolution on striking out a legal advisor trainee from the register of legal advisor trainees). This has given rise to a legal issue whether the Minister of Justice, acting within the terms of reference of his supervisory powers, may issue a reversal decision with respect to the annulment of resolutions passed by the Council of the District Chamber of Legal Advisors and the Presidium of the National Council of Legal Advisors and order the entry in the register of legal advisors. The matter in question required analysing the type and scope of supervision of the Minister of Justice within the limits defined in the Act on Legal Advisors. Taking into consideration the above, the autonomy of the self – governing bodies should be respected – the only competent body that is entitled to do the entries in the register of legal advisors, or strike out a legal advisor /legal advisor trainee from the register, is the District Chamber of Legal Advisors. The independence of the self-government bodies of authority, in the scope of the organization of legal practice structure, is strictly connected with the fact that the state narrows down, to some extent, its regulatory competence (which is strictly characteristic of state administrative bodies) and transfers it to the bodies said. It should be underlined that the state retains some scope of supervisory powers, but the strict construction of such provisions shall be made (Stahl, 2011: 509).

### **Conclusion**

The actions undertaken under the scope of public administration range from the internal management actions shall be strictly separated. As an example, the resolution on the entries in the register of legal advisors or striking out a legal advisor from the register, may be analysed. Undoubtedly, the resolution mentioned, concerns an administrative matter. The nature of the resolution said is an individual one, and the bodies of authority of the self – government of legal advisors act under the statutory regulation. The District Chamber of Legal Advisors is a collegial body that acts in the way of issuing resolutions. The mentioned, are the way the competent body makes a statement, delivers opinions etc. As it has been presented, the body of authority deals with the matters of the individual nature. That is to evoke the individual, specific legal effect. In this manner, the resolution is the ground on which the individual may exercise rights and obey the duties (Adamiak, Borkowski, 2012: 394).

Nevertheless, an administrative act is not the only legal form the body of authority may undertake. As the legal doctrine indicates, a lot of matters of crucial significance, are dealt with the form of technical activities. An administrative act and technical activity of the body should be differentiated. The necessity for the proper differentiation is needed. Consequently, the legal nature of the resolution on the transfer of the entries in the register of legal advisors, may be determined. The mentioned is not an administrative matter, but a technical activity of the body of authority. What is more, the body of the self – government of legal advisors has no legitimacy under the provisions of the statutory act, but only of the act of internal range. Therefore, it may be posed that the resolution on the transfer of the entry in the register, is the act of the internal management legal nature, issued inside the corporal structure of the self – government of legal advisors (not within the scope of the public administration). As it is mentioned, resolutions that have legal character like the mentioned, may be described as “legal non-normative acts”. Under no circumstances these two scopes of the activity of the bodies of the self – government of legal advisors – the scope of activities undertaken within the internal structure of the legal person and these undertaken within the range of the public administration – should be mixed.



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## *Cosmopolitanism as Biopower: Creating and Targeting Cultural Others*

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### **Abstract**

The paper analyses cosmopolitanism from the lens of biopower. The central argument is that the actual and prospective actions undertaken in the name of upholding the cosmopolitan ideals perpetuates biopower. Cosmopolitan ideals here imply the tendency to transcend territorial boundedness. The smokescreen of justice serves to legitimate the narrow self-interest of few powerful countries. Borrowing the notion of 'bare life' and 'docile bodies', the paper presents the argument that the selective exclusion of certain social and cultural communities transcends domestic polity. It is no longer the case that a sovereign authority in a domestic polity controls and regulates populations. Though there is no sovereign power at the international level, the hegemonic stature achieved by the liberal capitalist model is seen analogous. The contemporary drives toward fighting with justifications that are rooted in cosmopolitan ideals clearly exemplify such a construction of enemy by 'othering'. Such actions do not always proceed towards a spatially defined target but are often directed towards a culturally specific racial other. The contemporary drive for cosmopolitan wars allude to such a reduction of constructed others and perpetuation of ideational hegemony. Organisations like the NATO, though claim to work under the authorisation of the Security Council resolutions, the ultimate outcomes clearly demonstrate a hegemonic aspiration. A certain model of governance – US-style liberal democracy is this case – is seen to be more appropriate than the existing model or other alternate models. The paper, through empirical evidence, confirms the hypothesis that cosmopolitanism helps sustaining a model based on biopower.

Keywords: cosmopolitanism, biopower, othering, bare life, docile bodies, hegemony, justice

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## Introduction

The central argument of the paper is that the practice of cosmopolitanism is an exercise of biopower. The paper argues that the actual and prospective actions undertaken in the name of upholding the cosmopolitan ideals perpetuates biopower. The uncritical acceptance of any model of governance is problematic. The paper, thus, engages with the notions of cosmopolitanism and biopower and tries to uncover the inherent problems. Following a post-structural analysis of contemporary world, the paper argues against hegemonic nature of liberal universalism and posits that the dominant stature achieved by the 'liberal' community of states is an expression of the perpetuation of biopower. The practice of cosmopolitanism, especially those of cosmopolitan wars allow the narrow, self-interested motives of powerful nations to be camouflaged as just and altruistic.

## *Cosmopolitanism*

Cosmopolitanism is the theoretical premise for the notion of global justice. Put simply, it implies the tendency to transcend territorial boundedness. Cosmopolitanism could be defined as a moral ideal that emphasises tolerance towards differences and envisages the possibility of a more just world order. The idea is that the duties of human being towards fellow human beings should not be limited to compatriots. Equal moral worth of individuals irrespective of their citizenship remains the central concern. The normative argument is that one's duty towards fellow human beings does not stop at national boundaries. Several scholars have emphasised the idea that territorial boundaries, which used to matter the most in recent history, no longer holds such unquestioned sanctity (Beitz, 1975, 1979; Cabrera, 2004; Caney 2005; Dower 2009; Held, 2010, 2011; Pogge, 1992, 2002, 2007). These scholars differ in their degree and prescriptions. Some focus more on legality, some on morality. Some advocate cosmopolitanism with stronger degree, some are content with a weak notion of it. However, three elements are shared by all cosmopolitan positions. First, *individualism*: the ultimate units of concern are human beings or persons. Communities, nations or states may be units of concern only indirectly, through their individual members or citizens. Second, *universality*: the status of ultimate unit of concern is attached to every living human being equally. Third, *generality*: persons are ultimate units of concern for everyone and not only for their compatriots or fellow religionists (Brock, 2009; Pogge, 2007, 2011).

Scholars have discussed two variants of cosmopolitanism – 'interactional' and 'institutional' cosmopolitanism (Cabrera, 2004). Interactional cosmopolitanism assigns direct responsibility for fulfilment of human rights to other agents, while institutional cosmopolitanism assigns such responsibility to institutional schemes. On the interactional view, human rights impose constraints on conduct, while on the institutional view they impose constraints upon shared practices (Cabrera, 2004; Pogge, 1992). In the context of an analysis through the lens of biopower, the institutional variant of cosmopolitanism is of more interest. The constraints imposed on shared practices are clearly not inclusive. The exclusion created at the level norm creation at institutional level perpetuates hegemony and thereby leads to further marginalisation.

## ***Bipower***

Bipower can be defined as a form of power that has its focus on 'human life at the level of populations' (Neal, 2009). Foucault focuses on the forms, locations and practices of modern power in its plurality. He is concerned with the ways in which such a modern power organises and shapes human populations. Foucault extends his study of disciplinary power, with its focus on the normalization of the productive individual, to biopower. The shift, for Foucault, occurs from power/knowledge that was concerned with 'training an individual within the walls of an institution', to that of power/knowledge that is concerned with 'promoting human life generally' (Foucault, 1976, 1984, 2000; Neal, 2009; Reid, 2008). The mass public programmes of the nineteenth century are expression of such biopower. Such programmes aimed at reshaping the 'living conditions of populations' through proper sanitation, creation of transportation and communication networks and mass of mass immunisation for eradicating several diseases (Neal, 2009).

Biopower, as power over life, takes two main forms. First, it disciplines the body. This process implies that the human body is treated like a machine and looked at in terms of productivity and economic efficiency. The examples the exercise of such biopower is seen by Foucault in the military, education and workplace whereby it seeks to create disciplined population that would be more effective. Second, it regulates the population. This process implies that the reproductive capacity of the human body is emphasised. This form of bio-power appears in demography, wealth analysis, and ideology, and seeks to control the population on a statistical level (Neal, 2009; Reid, 2008).

Foucault argues about the move from a singular and centred power that threatens death to such forms of power that are plural and decentred and that promote life. 'Sovereignty took life and let live. And now we have the emergence of a power that... consists in making live and letting die' (Foucault, 2002: 247). Death remains an outcome of modern practices of power. However, once it is considered statistically at the level of populations, selective policy choices about where to allocate funds or withhold them often result in 'letting die' rather than directly causing to die. Examples might include the concrete numbers of lives saved by increasing funding for road safety, or not allocating more resources to tackling the AIDS pandemic.

## **The Theory of Othering: Foucault and Agamben**

The poststructuralist critique of liberal governmentality based on modernity in general and that of cosmopolitanism in particular rests on the assumption that modernity leads to the creation of certain conceptions as normal. This normalisation implies that certain forms of knowledge are considered more worthy than some other forms of knowledge. This sort of divide between what forms part of discourse and what remains excluded is the basis of creating a regime of truth that does not include multiple voices. This in turn leads to the creation of 'others' as the paper argues. Some notions are considered unworthy of being part of an idea of the so-called global good and this allows the formation of cultural others that is at the root of the problem in modern global polity (Choudhary, 2014).

### ***Foucault and Othering***

Foucault (1978) argues that the concepts that considered being natural are in fact not based on something 'objectively definable'. Using this argument, it could be ascertained that the discourse on justice, for instance, is not based on the existence of an object called justice. The concept of justice is rather defined by the collection of statements that are accepted as being about justice and those that are not. The question that Foucault raised was how and why certain statements emerge and get associated with the certain discourse, while others either do not emerge or are not accepted as part of the discourse. Foucault calls such conditions of existence, maintenance, modification, and disappearance the as the 'rules of formation' of a discourse (Foucault, 1972: 38). There are three aspects that are essential with respect to the rules of formation: the 'field of initial differentiation' wherein the discourse defines its object and differentiates itself from other discourses; the 'authorities of delimitation' who are assigned the authority and command legitimacy to make truth statements about the object; and the 'grids of specification', according to which the various parts of the discourse are 'divided, contested, related, regrouped, classified, derived from one another' (Foucault, 1972: 41-2).

Foucault (1978), presenting the relation of war to the society, addresses as to how the emergence of 'biopower' – concerned with exerting control over life – has led to a proliferation and intensification of the problem of war between societies (Foucault 1978). Regimes as perpetrators of violence and undertaking holocaust on their own population can be seen as a result of the emergence of such a biopower (Foucault, 1978; Reid, 2008). Foucault (1978) further engages with the paradox of 'political modernity' and argues that the reason for the increased tendency among the modern societies toward 'barbarous forms of war' can be attributed to the shift where power is oriented towards the exertion of control over life (Foucault, 1978). Wars, thus, are now seen to be waged on behalf of the existence of entire populations that gets mobilised for the purpose of 'wholesale slaughter' making massacres a vital phenomenon and normalised for 'life necessity' (Foucault, 1978; Reid, 2008). In the traditional view, war was perceived as a means to resolve disputes that arose between sovereigns – with clear distinction between the sovereigns and the corresponding subjects with respect to the location of power. In a biopolitical context, however, the exercise of power occurs at the 'level of the life of populations' and thereby war 'occurs in the form of a struggle between populations' (Dillon, 2008; Foucault, 1978; Reid, 2008).

### ***Agamben and Othering***

Agamben (1998) presents the ideas of 'bare life' that he deduces from the relation between 'politics, life and sovereign power'. The basic thrust of the argument is that by selective exclusion of certain forms of lives that are considered to be unworthy of living, the sovereign power reduces them to 'expendable form of life' or the 'bare life' (Agamben, 1998). The bare life, further, is banned from political and legal institutions. Furthermore, he presents the idea of 'inclusive exclusion' that posits the argument that the biological life is an integral part of the political life by the virtue of this very exclusion. It is in this 'zone of indistinction' between the biological and political life that sovereign power is able to produce bare life (Agamben, 1998: 7). In Agamben's view, modern life 'tends toward biopolitics' and reduces the individual to

'bare life' (Agamben, 1998). Human beings completely become the 'subject to rules and regulations and subject to exclusion' (Agamben, 1998). For Agamben, the notion of 'exception' is inherent in democracies. This exception starts to spread as the executive is given more space by the legislature as 'sovereignty occurs when a decision must be made' and it is the sovereign who has the final say in deciding on the exception and as to when the rules could be suspended (Agamben, 1998). This exception is characterised by 'unlimited authority' and the possibility of suspending 'the entire existing order' (Agamben, 1998; Hegarty, 2010; Jabri 2007; Vaughan-Williams 2009). It is this propensity to reduce the individuals to the form of bare that Agamben emphasises upon and this, in turn, creates a clear distinction between those who have the right to live and those who can be killed – being segregated as the others. The cosmopolitan wars clearly manifest this distinction wherein those, who support the order – as envisaged by the sovereign authority as desirable – are seen as adhering to the idea of achieving greater good.

Foucault's concept of 'docile bodies' is close to the idea of 'bare life' that Agamben presents (Agamben, 1998; Foucault, 1978). The difference, however, lies in the fact that while Foucault views the shift from politics to biopolitics as a 'historical transformation', Agamben considers the political realm itself as 'originally biopolitical' (Agamben, 1998; Vaughan-Williams, 2009). By this, it is asserted that instead of understanding the process of change in the nature of politics, Agamben makes a stronger statement that politics, by its very nature, is biopolitical. The Biopolitical nature of politics is sustained through the practice of othering. Individuals are normalised through the techniques of governmentality like 'statistics, population studies, health and family policies, and welfare policies' (Foucault, 2007).

### **The Practice of Othering**

The contemporary drives toward fighting with justifications that are rooted in cosmopolitan ideals clearly exemplify such a construction of enemy by 'othering'. Such actions do not always proceed towards a spatially defined target but are often directed towards a culturally specific racial other. The contemporary drive for cosmopolitan wars allude to such a reduction of constructed others and perpetuation of ideational hegemony. Organisations like the NATO claim to work under the authorisation of the Security Council resolutions but the ultimate outcomes clearly demonstrated a hegemonic aspiration. A certain model of governance – US-style liberal democracy in this case – is seen to be more appropriate than the existing model. Cosmopolitanism, based on liberalism, provides the necessary legitimacy owing to the fact that it appeals through the garb of justice.

Construction of enemy undertaken by selectively picking up particular individuals and viewing their presence itself as a threat, defeats the very 'idea of equal citizenship before the law' (Jabri, 2006, 2007). The contemporary drive towards fighting with justifications that is rooted in cosmopolitan ideals clearly exemplify such a construction of enemy. It is to be noted that such actions do not always proceed towards a spatially defined target but are often directed towards a culturally specific racial other. The contemporary drive for cosmopolitan wars allude to such a reduction of constructed others and ideological hegemony can be seen at play. In this regard, the 2011 case of Libya and the role of the NATO (North Atlantic Treaty Organization) does provide for an illustration (Rabkin, 2011). Though the NATO forces claimed to

work under the authorisation of the Security Council resolution 1973, the ultimate outcome clearly demonstrated a hegemonic aspiration. A certain model of governance – US-style liberal democracy in this case – is seen to be more appropriate than the existing model. The garb of humanitarian motive is used to perpetrate violence and undertake a sort of cosmopolitan war, which does convey the move towards ideational hegemony.

Jabri uses these concepts of Agamben and Foucault and applies it to the transformed global polity. She outlines the dangers that the ‘liberal democratic polity’ faces when it institutionalises the practices that are meant to ‘target the cultural and racial other’ by drawing ‘violent racial boundaries’ (Jabri, 2007). Here, she uses Agamben’s ideas arguing that such a reduction of the citizen as ‘racial other’ leads to what Agamben refers to as ‘bare life’ – a life that is purposely made ‘devoid of rights, of history and of the capacity to speak’ (Agamben, 1998; Jabri, 2007). For Jabri (2007), the transformed global polity practices ‘othering’ through cosmopolitan wars. She provides an analysis of wars in the transformed global polity from the critical-theoretical viewpoint. Using the ideas of Foucault and Agamben, Jabri (2007) applies it to the domain of global politics.

It is important to take into account the situational variations between the west and the rest. Ayoob (2002) presents an argument from the subaltern realist perspective about a certain trade off between order and justice when he argues that the while ‘the North’, which includes the developed nations, is interested in justice within the boundaries of the states and order among the territorially sovereign states, ‘the South’, consisting of the so-called developing and underdeveloped nations, is primarily concerned about maintenance of order within the states and calls for justice among the territorially sovereign states (Ayoob, 2002). It is thus important to understand that by trying to impose a model that is typical of western civilization, the West is culpable of undermining the demand of the so-called global south.

The hegemonic aspirations of the existing power wielders clearly demonstrate the existence of non-altruistic motives garbed in humanitarian cloaks. The process of creating racial others and then attributing on to them the ‘right to die’ by reducing them to the level of ‘bare life’ and ‘docile bodies’ is what the actual scenario demonstrates (Agamben, 1998; Foucault, 1978; Jabri, 2007). The global war on terror and the selective othering of muslim population in a case that exemplifies this argument. Post September 11, muslims have been seen with an eye of distrust. The notion of bringing justice has infact led to a creation of ‘others’ who are tried, detained and tortured are no mystery. Regarding the situation post 9/11, Smith (2004) has argued that universal rationality has achieved undue significance.

The problem is further amplified when a secular country like India also tries to emulate the western notion of justice based on othering. Application of draconian laws like the Unlawful Activities (Prevention) Amendment Act of 2004 demonstrates the inability of the state to deal with dissent and discontent through dialogue. In the name of effective law and order to fight separatism and terrorism, the state is culpable of major atrocities on innocent people. Under the UAPA and other draconian laws, Indian government has arrested Maoist leaders and also allegedly arrested young Muslim men as preventive measure (Chakrabarty, 2012). Such acts by the government stand opposed to the very ideal democracy where every one is guaranteed

equality before law. By targeting particular communities, the security policies have in fact become modes of perpetrating insecurity. A recent instance pertains to the acquittal of 17 young Muslim men who were arrested 2008 for allegedly having links with terrorist organisations (Press Trust of India, 2015).

For Dillon and Reid (2009), the way liberal polities fight war is more about biopolitics than geopolitics. The demarcation between 'good life' and 'bad life' is what creates the 'foreclosure of avenues of emancipation' (Beardsworth, 2011; Dillon and Reid, 2009). Innocent lives being lost at the hands of drones in Afghanistan, Pakistan and Iraq clearly demonstrate the policy of the west based on 'bare life'. Some lives are too unimportant to be seen beyond statistics. The argument is not that terrorism should not be fought. However, the othering of entire populations and killing people based merely on suspicion of having terrorist links is clearly not humanitarian. The predator drones strikes are carried out just on vague data available about potential terrorists and have claimed more civilian casualties than its actual purpose of targeted killing (Zenko, 2012). It is for these reasons that even the perpetuation of international terrorism is seen as a 'resistance' to the 'global regime of life' (Beardsworth, 2011; Dillon and Reid, 2009).

The process of othering is an exercise of biopolitics that is legitimised in the name of upholding cosmopolitan ideals. The episodes of intervention in the name of protecting the people when their own governments fail to do so does not really uphold justice. These exercises, legitimised through the terminology of 'Responsibility to Protect', claim to uphold human rights (Badescu, 2011). However, through the reduction of certain cultural groups as bare life and selectively targeting them, they do not in fact pursue an altruistic measure. The dominance of the 'liberal' west, instead, gets concretised. While biopower is a concept that has been used mostly in context of domestic polities that have a government, the present scenario clearly demonstrates the existence of such a power over life at the global stage.

## **Conclusion**

The smokescreen of justice serves to legitimate the narrow self-interest of few powerful countries. Borrowing the notion of 'bare life' from Agamben and 'docile bodies' from Foucault, the paper presented the argument that the selective exclusion of certain social and cultural communities transcends domestic polity. It is no longer the case that a sovereign authority in a domestic polity has exclusive control over populations and regulates it. It is asserted here that even though there is no sovereign power at the international level, the hegemonic stature achieved by the liberal capitalist model is seen analogous. The pursuance of war in the name of upholding cosmopolitan ideals unsettles the foundation of morality itself. On one hand, the argument goes for supporting the notion of cosmopolitan citizen based on cosmopolitan morality and transcending the boundaries to converge the compatriot versus non-compatriot barrier. On the other hand, the pursuit to paint the world in a single colour by forcibly installing a certain preferred government model takes place. Those do not comply to such ideals are thereby relegated as non-compliant to the idea of a 'global good' (Choudhary, 2014). The paper, thus, confirms the hypothesis that cosmopolitanism helps sustaining a model based on biopower.

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***The Fight against Impunity for Grand Corruption – Prosecuting Kleptocracy as an International Crime***

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**Abstract**

Corruption constitutes one of the most serious problems the world is facing today. The large-scale looting of public treasuries and resources by heads of state and their allies has devastating consequences for social, economic and political structures, leading to gross human rights violations, distorting markets and allowing organized crime to flourish. Efforts to curb corruption have gained momentum in the last 20 years, leading to the adoption of numerous international legal instruments.

Nevertheless, the perpetrators of grand corruption usually escape any form of criminal liability. Strong arguments speak in favour of including grand corruption on the agenda of international criminal justice. Although there is no specific mention of corruption in the Rome Statute of the International Criminal Court, kleptocracy could be classified as “other inhumane act” within the category of crimes against humanity. It is arguable that legitimately prosecuting corruption requires an amendment of the Statute which is lacking political support in the near future.

Notwithstanding, the mandate given to the ICC is meant to address a reality that is constantly presenting new challenges. The Court’s impact on the rule of law and its deterrent effect is strong in spite of all limitations and criticism. Where corrupt acts fulfill all statutory requirements of crimes against humanity, the ICC should prosecute them. Such efforts have to be complemented on a national and regional level, in particular where corruption does not qualify as a crime against humanity as such. Recent developments raise hopes that impunity for grand corruption can be successfully fought.

Keywords: grand corruption, kleptocracy, impunity, international crime, International Criminal Court

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## Introduction

Nowadays it is widely acknowledged that corruption is detrimental to a society's development and economic growth.<sup>1</sup> Corruption undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish. This phenomenon is found in all countries but it is in the developing world that its effects are most destructive.<sup>2</sup> It has been estimated that USD1 trillion is paid in bribes annually and the cost of all forms of corruption is more than 5% of global GDP.<sup>3</sup> As the need for tackling corruption and its devastating consequences became evident, a wide range of international and regional treaties applicable to various corrupt practices have been adopted during the last 20 years. However, none of these treaties provides a comprehensive definition of corruption and the main objective of these legal instruments is fighting corruption at the national level through criminalisation and prevention as well as international cooperation.

Notwithstanding, systemic corruption taking place at the highest level of the state has never been defined as an international crime nor been prosecuted and adjudicated by any international criminal tribunal. It is argued that so-called kleptocracy should be treated as a crime against humanity under customary law and under the Rome Statute of the International Criminal Court *de lege lata*. While there are legal and practical arguments countering this approach, there are strong reasons to advocate for the prosecution of grand corruption. This does not imply that other alternatives such as an anti-corruption court, *ad hoc* mixed courts or specialised mechanisms within international organisations should not be explored. All the contrary, defining grand corruption as an international crime and establishing mechanisms to prosecute and adjudicate it are fundamental to effectively curb the most harmful forms of corruption. In the light of the political hurdles for such developments, making use of the existing system of the ICC could be a powerful means to condemn corruption, create awareness and help the anti-corruption efforts gain momentum.

## Definition and cases of grand corruption

Recognising kleptocracy as a crime under international law requires a clear definition of the phenomenon that constitutes grand corruption. Civil society organizations have described grand corruption as taking place at high levels of the political system, when politicians and state agents entitled to make and enforce the laws in the name of the people, are misusing this authority to sustain their power, status and wealth<sup>4</sup> and as the abuse of power from high ranked public officials, involving considerable amounts of money, high negative social impact, and systematic abuse which authorities are unable or unwilling to sanction.<sup>5</sup> Academics have described it as large-scale

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<sup>1</sup> Council of Europe, Recommendation Rec(4) 2003 on common rules against corruption in the funding political parties and electoral campaigns, p.1.

<sup>2</sup> Kofi A. Annan, Secretary-General, Foreword to United Nations Convention Against Corruption, adopted in 2003 and entered into force on 24 December 2005.

<sup>3</sup> International Chamber of Commerce et al., Clean Business is Good Business 2, 2008, <http://www.weforum.org/pdf/paci/BusinessCaseAgainstCorruption.pdf>; see also The Costs of Corruption, World Bank, 8 April 2004, <http://go.worldbank.org/LJA29GHA80>.

<sup>4</sup> U4: The Anti-Corruption Resource Centre, The Basics of Anti-Corruption, 2013.

<sup>5</sup> José Ugaz, Contribution to panel discussion "Ways Forward in Prosecuting Grand Corruption" at the Fifth Conference of States Parties to the United Nations Convention Against Corruption, 25-29 November 2013, Panama City.

ransacking of public treasuries and resources by heads of state and their families and associates,<sup>6</sup> as abuse of state power<sup>7</sup> and the large-scale and systematic abuse of public authority.<sup>8</sup> Chile Eboe-Osuji uses the notion kleptocracy, meaning to dishonestly misappropriate public wealth or property with the intention of permanently depriving the public of such wealth or property.<sup>9</sup> Ndiva Kofele-Kale calls the phenomenon indigenous spoliation – the illegal act of depredation committed for private ends by constitutionally responsible rulers, public officials or private individuals<sup>10</sup> or the deliberate and systematic plunder of the wealth and resources of a nation by officials in positions of public trust in violation of their fiduciary obligations to the larger community. These definitions of grand corruption include different types of corruption whereas the most important forms are the stealing, privatising and the misappropriation, that is the embezzlement or misuse, of public funds.<sup>11</sup>

There are numerous examples of large-scale corruption often linked to massive human rights violations. During his *de facto* presidency in Nigeria from 1993-1998, Sani Abacha embezzled some USD 4 billion of public funds, while millions lived in poverty.<sup>12</sup> In the Democratic Republic of Congo, the legacy of Mobuto Sese Seko remains unaddressed, including the estimated USD 12 billion in funds he embezzled.<sup>13</sup> Indonesia's Suharto died without being convicted of any crime involving corruption that allowed his family to amass an estimated USD 9 billion. Such impunity is exemplary of most cases of grand corruption.

### **Kleptocracy as a crime under international law**

Strong arguments speak in favour of using international criminal law to tackle grand corruption. While the UN Convention Against Corruption contains broad prohibitions on government-side corruption, it fundamentally lacks the necessary enforcement mechanisms to secure compliance.<sup>14</sup> As a result, application of the international current legal regime has not effectively curtailed grand corruption.<sup>15</sup> Domestic legislation may not contain the provisions necessary to hold perpetrators accountable. And even if there is appropriate legislation on the books, most often it will not be

<sup>6</sup> Sonja Starr, Extraordinary Crimes at Ordinary Times: International Justice beyond Crisis Situations, Harvard Public Law Working Paper No. 133. Harvard Law School. <http://ssrn.com/abstract=934470>, p.27.

<sup>7</sup> Paul Ocheje, Refocusing International Law on the Quest for Accountability in Africa: The Case Against the „Other“ Impunity, 15 LJIL 749-779 (2002), p. 777.

<sup>8</sup> Claudio Kirch-Heim, Grand Corruption – A New Crime under International Law? *Bucerius Law Journal Heft 1/2009*, 35-40, p.36.

<sup>9</sup> Chile Eboe-Osuji, Kleptocracy: A Desired Subject of International Criminal Law That is in Dire Need of Prosecution by Universal Jurisdiction, in: E. Ankumah/E. Kwakwa, *African Perspectives on International Criminal Justice*, 121-132 (2005).

<sup>10</sup> Ndiva Kofele-Kale, The International Law of Responsibility for Economic Crimes, 9 (2nd ed. 2006); Patrimonicide: The International Economic Crime of Indigenous Spoliation, 28 Vand. J. Transnat'l L. 45, 58 (1995).

<sup>11</sup> For a non-exhaustive list of types of corruption see Wounters, Jan; Ryngaert, Cedric; Cloots, Ann Sofie, The Fight Against Corruption in International Law, Working Paper No. 94 – July 2012, Leuven Centre for Global Governance Studies, p.35.

<sup>12</sup> Ruben Carranza, Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes? *The International Journal of Transitional Justice*, Vol. 2, 2008, 310–330, p.312.

<sup>13</sup> Tim Daniel, Repatriation of Looted State Assets: Selected Case Studies and the UN Convention Against Corruption, in *Global Corruption Report 2004* (Berlin: Transparency International, 2004).

<sup>14</sup> United Nations Convention Against Corruption, G.A. Res.58/4, U.N. Doc. A/RES/58/4 (Oct. 31, 2003), encouraging, but not mandating, the criminalization of domestic corruption.

<sup>15</sup> Philippa Webb, The United Nations Convention against Corruption: Global Achievement or Missed Opportunity? *Journal of International Economic Law*, 8, (2005), 191-229, pp. 193–204, 218–222, explaining the shortcomings of the implementation mechanisms in the current international anticorruption regime.

enforced effectively against heads of state or high-ranking public officials.<sup>16</sup> Some anti-corruption advocates have not only called for grand corruption being classified an international crime, but being considered a crime against humanity.<sup>17</sup> It is argued that compelling a person to live in inhumane or degrading conditions amounts to inhumane treatment that may reach the level of a crime against humanity under customary and conventional law.<sup>18</sup> Going beyond the classification of kleptocracy as crime against humanity, some have even argued in favour of prosecuting grand corruption as a crime against humanity at the International Criminal Court.<sup>19</sup>

### **Corruption as an “other inhumane act” pursuant to Article 7 Rome Statute?**

Although corruption is not listed among the crimes contained in the Rome Statute of the ICC, there are strong legal arguments to subsume grand corruption under the catch-all crime of Article 7(1)(k) which criminalizes “other inhumane acts of a similar character”. This article requires that the perpetrator commit “other inhumane acts of a similar character” which cause “great suffering, or serious injury to body or to mental or physical health”. Only an act that attains the same degree of severity is “similar” to the other individual crimes. In this spirit, the ICC Elements of Crimes make clear that the necessary conduct must be comparable in “nature and severity” with the other acts listed in Article 7(1). In 2008, the Pre-Trial Chamber I defined inhumane acts as “serious violations of international customary law and the basic rights pertaining to human beings, drawn from the norms of international human rights law, which are of a similar nature and gravity to the acts referred to in article 7(1)”.<sup>20</sup>

Acts of grand corruption share significant similarities with other listed acts such as murder and extermination as they kill people, often in large numbers. Like deportation, forcible transfer, and economic persecution, they inflict severe deprivation affecting the fundamental conditions of life.<sup>21</sup> In regards to the requirement to inflict great suffering or serious injury to body or to mental or physical health, corrupt acts can meet this standard. In the case of embezzlement of funds or goods (e.g. food or medicines), this can immediately cause such consequences.<sup>22</sup> As rightly pointed out by Starr, there is no requirement that the suffering or injury be an immediate consequence of the crime, with no intervening causes, as in an act of

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<sup>16</sup> Kirch-Heim, see supra, pp. 35-36.

<sup>17</sup> See Seoul Findings, 11th International Anti-Corruption Conference, Seoul, May 2003, [http://www.11iacc.org/download/finish/11IACC SeoulFindings.doc](http://www.11iacc.org/download/finish/11IACC%20SeoulFindings.doc); Nairobi Declaration, adopted at the Regional Conference on the Human Rights Dimensions of Corruption convened by the Kenya National Commission of Human Rights (KNCHR), March 2006; Ilias Bantekas, Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies, *Journal of International Criminal Justice* 4(3) (2006): 1.

<sup>18</sup> Elias Davidsson, Economic Oppression as an International Wrong or as a Crime against Humanity. *Netherlands Quarterly of Human Rights*, 23 (2005), 173-212, pp. 196-198.

<sup>19</sup> Davidsson, see supra, pp. 196-198; the NGO SERAP Nigeria petitioned the ICC Prosecutor in 2008 to request the Court to use its position and powers to examine and investigate whether grand corruption in Nigeria amounts to a crime against humanity, [www.serap-nigeria.org/cases-in-court](http://www.serap-nigeria.org/cases-in-court); Ben Bloom, Criminalizing Kleptocracy? The ICC as a Viable Tool in the Fight Against Grand Corruption, *American University International Law Review* Volume 29, Issue 3 (2014), pp. 627-671.

<sup>20</sup> *Prosecutor v. Katanga and Ngudjolo Chui*, PTC I, Decision on the Confirmation of Charges, 30 September 2008, ICC-01/04-01/07-717, para. 448.

<sup>21</sup> Starr, see supra, p. 49.

<sup>22</sup> Martine Boersma, Corruption: A Violation of Human Rights and a Crime Under International Law?, Cambridge: Intersentia (2012), p.336.

violence.<sup>23</sup> It is therefore legitimate to conclude that acts of grand corruption can meet the *actus reus* requirements of Art. 7(1)(k).

The inhumane act must further fulfil the chapeau elements of crimes against humanity, that is it must be part of a widespread or systematic attack directed against any civilian population.<sup>24</sup> As regards the nature of the attack, the Elements set out that the acts need not constitute a military attack.<sup>25</sup> Rather, Article 7(2) specifically defines it as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.” The requirement for involvement of multiple acts will typically be fulfilled in cases of kleptocracy where a specific corrupt act will always be part of a broader pattern of corrupt acts. More problematic seems the policy requirement which has been much interpreted divergently by judges at the ICC, which requires that the state or organization actively promote or encourage such an attack. Notwithstanding, in the case of a true kleptocracy, as the term implies, corruption is part of the system, the state institutions and in particular the government. It is a prototypical example of abuse of “governmental institutions, structures, resources, and personnel”—the essence of state policy.<sup>26</sup> In regards to the additional requirements of a widespread or systematic attack, these legal elements are met by cases of grand corruption, as by its definition, kleptocracy consists of widespread and systematic practices. Moreover, the involvement of high-level government officials in carrying out state policy to serve private interests confirms the widespread and systematic nature of grand corruption.

In the light of the above, grand corruption may fulfil the *actus reus* of inhumane acts constituting a crime against humanity. Far more problematic is the mental element which consists of both the knowledge of the contextual element and the *mens rea* required for the specific criminal act. In relation to the first element, the accused must understand that his actions are connected to the attack against a civilian population. As the author of a multitude of corrupt acts committed at the highest level of state, the perpetrator of such acts necessarily knows of the nexus between his acts and the broader context of his actions. To establish the *mens rea* for an “other inhumane act”, the perpetrator must act “intentionally” (Article 7(1)(k)) for which Article 30 applies.<sup>27</sup> Intent relates to both conduct and consequence. Intent in relation to conduct signifies that the person means to engage in the conduct, i.e. the perpetrator must act voluntary and with some degree of knowledge. This proves unproblematic when considering grand corruption cases where the perpetrator is orchestrating a scheme of corrupt acts. As for the consequence, intent is present when the person means to cause that consequence or is aware that it will occur in the ordinary course of events. If a population is sufficiently vulnerable and a diversion of funds sufficiently large relative to the total amount available to serve that population’s needs, it is clear that great suffering or health injury will follow from the diversion in the ordinary course of events. A perpetrator can see the consequences of his crimes unfold even as he continues to commit them. However, the suffering of the population will usually be a

<sup>23</sup> Starr, see supra, p.49.

<sup>24</sup> As stated in the chapeau of Article 7(1) and further elaborated upon in Article 7(2)(a) and in the Elements of Crimes, Introduction to Article 7.

<sup>25</sup> Elements of Crimes, Article 7 Introduction §3.

<sup>26</sup> M. Cherif Bassiouni, Crimes Against Humanity in International Criminal Law, 2<sup>nd</sup> ed. 1999, The Hague, at 249.

<sup>27</sup> Article 30(1): Unless otherwise provided, a person shall be criminally responsible and liable for punishment of a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

side-effect of the corrupt scheme, which was not intended as such, but of which the perpetrator is fully aware and accepts as one of the consequences of the corrupt practice.

It is crucial to determine which level of awareness is required by Article 30, more specifically, if it only includes *dolus directus* in the first and second degree or also allows for *dolus eventualis*. *Dolus directus* in the first degree entails that the perpetrator knows of, and wants to achieve, the consequence of the criminal act, which in cases of grand corruption is highly unlikely. *Dolus directus* in the second degree signifies that the perpetrator is aware of the inevitability of the consequence of the criminal action. It is arguable that this might be the case in corruption cases when life-saving means are taken from the population by a kleptocrat. However, such a scenario does not match the cases of such inevitability. Rather, grand corruption cases will typically be characterised by the presence of *dolus eventualis*. In that case, a person, who is going to do something that will cause an event, is fully aware of the possible outcome as a side-effect to such behaviour, but nevertheless decides to continue with the conduct, recognizing and approving the result as a possible cost of attaining the aimed goal.<sup>28</sup>

There have been divergent interpretations at the ICC as to Article 30.<sup>29</sup> In the Lubanga Confirmation of Charges Decision, Pre-Trial Chamber I considered *dolus eventualis* as encompassed by Article 30.<sup>30</sup> In the Confirmation of Charges decision in the Katanga & Ngudjolo case, the majority also endorsed this finding but did not have to rule on it in the present case.<sup>31</sup> In contrast, in the confirmation of charges decisions by Pre-Trial Chamber II in Bemba, Muthaura, Kenyatta & Ali and The Prosecutor v. Ruto, Kosgey and Sang, Article 30 did not encompass *dolus eventualis*.<sup>32</sup> Both Pre-Trial Chamber I and Trial Chamber I subsequently reiterated this holding in the Banda & Jerbo Confirmation of Charges Decision and the Lubanga Trial Judgement, respectively.<sup>33</sup>

Behind this backdrop of a lacking *mens rea*, it is arguable that grand corruption cannot and should not be conceptualised as an other inhumane act pursuant to Article 7. However, the ICC Appeals Chamber has not ruled on the in- or exclusion of *dolus eventualis* yet. Furthermore, under customary international law, which constitutes one source of law under the Statute,<sup>34</sup> it suffices that the perpetrator was reckless in that regard. This is also in line with the *ad hoc* Tribunals' established jurisprudence.<sup>35</sup> Future cases might therefore produce different findings and include *dolus eventualis*.

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<sup>28</sup> Alberto de Martino, *Dolus Eventualis*, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford: Oxford University Press, 2009), pp. 302-304, at p.302.

<sup>29</sup> Women's Initiatives for Gender Justice, *Expert Paper Modes of Liability – A review of the International Criminal Court's current jurisprudence and practice*, November 2013, p.9.

<sup>30</sup> *Lubanga Confirmation of Charges*, PTC I, 29 January 2007, ICC-01/04-01/06-803, para 353.

<sup>31</sup> *Katanga & Ngudjolo Confirmation of Charges, Dissenting Opinion of Judge Ušacka*, PTC I, 30 September 2008, ICC-01/04-01/07-717, FN 10.

<sup>32</sup> *Prosecutor v. Bemba*, PTC II, ICC-01/05-01/08-424, 15 June 2009, para. 360; *Muthaura, Kenyatta & Ali Confirmation of Charges*, PTC II, ICC-01/09-02/11-382, 23 January 2012, para. 411.

<sup>33</sup> *Banda & Jerbo Confirmation of Charges*, PTC I, ICC-02/05-03/09-121, para. 156; *Lubanga Trial Judgement*, TC I, ICC-01/04-01/06-2842, para. 1011.

<sup>34</sup> Article 21

<sup>35</sup> See examples on p. 387 in Fn 360 as quoted by G.Werle/ F.Jessberger, *Principles of International Criminal Law*, Oxford, 3<sup>rd</sup> edition, 2014.

## Options and challenges for the ICC Prosecutor

In light of the findings above, should the ICC Prosecutor prosecute and indict cases of grand corruption? To answer this question the chances and obstacles have to be weighed. Such a decision has to be in line with the overall prosecutorial strategy with sets priorities in particular having in mind the realities of the Court, the lessons learned from past cases and the resource constraints the Office of the Prosecutor faces in light of a growing number of cases.<sup>36</sup> For the time being, the best option is to focus on explicit cases of corruption where victimization is high and preferably where inhumane acts can be charged in addition to other crimes committed by a perpetrator. The Prosecution is likely to face many hurdles in its investigations into grand corruption cases, partly due to the general difficulty of such investigations, partly due to the dependence on state cooperation and the potential lack thereof. Most likely, the Prosecution will face criticism that it is overstretching the provisions of the Rome Statute in contravention of the intention of the drafters of the Statute by including a new crime.

However, it should be taken into account that the concept of crimes against humanity is still evolving and needs to be defined<sup>37</sup> and the historical origins cannot properly serve as a comprehensive guide to its current application. Rather, it is a residual category encompassing the commission of other widespread or systematic atrocities committed in times of peace or during war. This means that successful prosecutions for crimes against humanity will be critical if the ICC is to fulfill its mandate to punish the perpetrators of atrocity crimes and the possibility of such convictions will be critical if it is to fulfill its mandate to prevent.<sup>38</sup> The reason that corruption was not included in the Statute was also due to the fact, that the awareness of the devastating impact and the global efforts to combat it only developed recently and were not at the centre-stage at the time of the negotiations of the ICC Statute.

Furthermore, the Office of the Prosecutor conducts financial investigations in all its cases to gain a comprehensive understanding of the case on the one hand and with the objective to trace, freeze and seize assets of the accused on the other hand. As a result, ICC investigators might be well-equipped to address grand corruption cases. Although the recovery of assets is as challenging as for national prosecutors, the OTP should endeavour to retract embezzled and misappropriated money in particular in light of the victims. It should be noted that the ICC offers the unique option for victims of crimes to participate in the proceedings with the possibility to receive reparations.

Prosecuting grand corruption cases would also constitute an influential advocacy for the fight against impunity for kleptocrats as it would shed a light on the circumstances and impact of such crimes, in particular on the connection to gross human rights abuses. Such proceedings might have a strong deterrent effect. Even if such a

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<sup>36</sup> See OTP Strategic Plan 2012-2015, [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/OTP%20Strategic%20Plan.pdf](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Documents/OTP%20Strategic%20Plan.pdf)

<sup>37</sup> Charles Jalloh, What Makes Crimes Against Humanity Crimes Against Humanity? Working Paper No. 2013-03. Legal Studies Research Paper Series. University of Pittsburgh. <http://ssrn.com/abstract=2210480>

<sup>38</sup> Leila Nadya Sadat, Crimes Against Humanity in the Modern Age. *The American Journal of International Law*, Vol. 107 (2013), 334-377, p.377.

deterrent effect cannot be established, the collection of evidence in corruption cases is a powerful means to trigger national proceedings. This is perfectly in line with the mandate and concept of the ICC which complements national efforts to fight impunity and serves as a last resort only if states are unwilling or unable to investigate.<sup>39</sup>

Finally, prosecuting corruption cases would also respond to increasingly voiced claims to hold the accomplices of human rights abuses such as companies and banks situated mostly in developed countries accountable. This could in return counter the allegations that the ICC exclusively targets African countries.

### **Alternative solutions to fight grand corruption**

Charging cases of grand corruption at the ICC is a good starting point, but it will not suffice to fully address the problem. As Starr argues, if corruption is judged by the standards of crimes against humanity, liability will necessarily depend on the population's level of vulnerability.<sup>40</sup> A public official who misappropriates large amounts of money in a poor country may commit a crime against humanity. But if a public official steals the same amount of money in a rich country that can easily absorb the loss, there is no basis for such liability. Furthermore, an ideal solution would be to treat grand corruption as a separately defined crime against humanity or even recognize it as an international crime on its own.<sup>41</sup>

For this purpose, the Rome Statute would have to be amended or a new international treaty be adopted establishing a separate anti-corruption tribunal. Alternatively, *ad hoc* mixed tribunals could be established to deal with specific cases of kleptocracy.<sup>42</sup> However, neither option seems feasible at present due to the lack of political will.<sup>42</sup> Other proposals suggest employing existing regional courts in Africa, Europe, and Latin America to prosecute grand corruption arguing that regional courts tend to enjoy greater credibility and standing in their subscribing states than do global institutions.<sup>43</sup> Lastly, advocating for the expansion of universal jurisdiction over grand corruption applied by national courts has been discussed.<sup>44</sup>

### **Conclusion**

Fighting impunity for grand corruption is extremely challenging and complex. There is no doubt that holding perpetrators of grand corruption accountable for their crimes is essential to combat and prevent such systemic corruption. At present, in light of the lack of other mechanisms, the existing legal framework of the International Criminal Court offers the possibility to investigate and prosecute specific cases of grand corruption as an "other inhumane act" constituting a crime against humanity. Such proceedings, although likely to face numerous hurdles, would contribute to the development and advancement of international anti-corruption mechanisms. Moreover, the moral condemnation of corruption through prosecution at the ICC would constitute a powerful disincentive for kleptocrats.

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<sup>39</sup> Principle of complementarity of the Rome Statute.

<sup>40</sup> Starr, see supra, p. 52.

<sup>41</sup> Kirch-Heim, see supra, p. 38.

<sup>42</sup> Abdul Tejan-Cole, Don't bank on prosecuting grand corruption as an international crime, p.36.

<sup>43</sup> Global Organisation of Parliamentarians Against Corruption (GOPAC), Prosecuting Grand Corruption as an International Crime. Discussion Paper 1 November 2013, [www.gopacnetwork.org](http://www.gopacnetwork.org).

<sup>44</sup> *Ibid.*

Using the ICC framework is only the first step and does not replace or make void other solutions to tackle grand corruption. Most importantly, a multifaceted solution must involve domestic, regional and international legal tools. Notwithstanding, the ICC is stronger than alleged by many critics. To end on a positive note, as pointed out by former ICC President Sang-Hyun Song: “In spite of all the obstacles, limitations and challenges, the ICC has made a strong impact in the direction of peace, stability, human rights and the rule of law ... Through law we can change the world!”<sup>45</sup>



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<sup>45</sup> Lionel Barber, Lunch with the FT: Sang-Hyun Song, Financial Times, 13 March 2015.

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*Counterbalancing the ECJ's Dominion on Fundamental Rights: Is The  
Fundamental Rights Agency of the EU the Solution?*

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**Abstract**

The lack of any reference to human rights within the constitutive treaties of the European Community has offered the opportunity to the ECJ for being the main actor of their definition. The ECJ gradually has become the guardian and the interpreter of fundamental rights, so gaining power and importance within the main institution of the EU. However alongside the entry into force of the Treaty of Maastricht and then of the Treaty of Amsterdam, human rights have started to be incorporated within the constitutional framework of the EU. Until then only the ECJ had the power to define the set of fundamental rights of the European Union. On the other hand, the EU relevant institutions had not been able to trigger a consistent system of policies and laws in the area of fundamental rights, leaving a large margin of manoeuvre to the ECJ. Could the judiciary power of the ECJ being the principal actor of the protection and interpretation of fundamental rights within the EU? In 2007 has been established the Fundamental Rights Agency of the EU. Such institution has been conceived as a monitoring body in the field of fundamental rights able to offer reliable data and information on fundamental rights to the EU institutions. Could the Agency have been able to trigger a new wave of policies and legislation focused on fundamental rights issues and thus to counterbalance the growing power of the ECJ? The proposed paper intends to find some possible answers to these questions.

**Keywords:**

human rights, fundamental rights agency, ECJ, European Union

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## **Introduction**

The title of this paper mentions the idea of balance and the idea of dominion of a specific institutional actor over other political and institutional actors. The use of the word “dominion” is certainly strong and provoking and it well fits with the idea of power as a commodity that has a proper equilibrium. Where such equilibrium collapses it becomes dominion. This is not certainly the case of the Court of Justice of the European Union (hereinafter ECJ), but we can equally say that the European Union is based of a unique multilevel and multi-centered system of powers (Fabbrini & others, 2011) whose balance is continuously challenged by the different actors who compose it (Möllers, 2013). In particular, with regard to the EU system of protection of fundamental rights, since the year 2000 the EU started to adopt a series of initiatives, among which stands out the creation of an independent monitoring Agency committed with fundamental rights. The Agency was conceived as an opportunity for the EU relevant institutions to achieve a more coherent and positive system of policies and legislation committed with fundamental rights. Until then, the ECJ has been the only actor able to fill the lack of a fundamental rights discourse within the EU constitutional system. The present paper, throughout a presentation of the role and the function of the Agency, will try to answer to the question: has been the Agency an important key for counterbalancing a negative integration of fundamental rights and promoting a positive integration?

It will be argued that even though the Agency is an important player within the institutional process of implementation of human rights policies, its role is strongly limited, leaving other institutions, as for instance the ECJ, being the main actor in the field of EU fundamental rights discourse.

## **In search for the right balance**

The purpose of this paper is not to offer an analytical account of how a post-national organization, as the European Union, has fleshed out the classic doctrine of the separation of powers. It is sufficient to say that the European Union is based on a sophisticated balance of powers distributed at horizontal and vertical level. Here the conventional division of powers becomes something peculiar or in other words “a unique system of checks and balances” (Witte, Muir, & Dawson, 2013). Indeed, in addition to the traditional tripartite form of distribution of powers (legislative, executive and judicial), the Union is supplemented with another kind of division of powers where supranational and intergovernmental actors balance each other within the single branches of government. This assumption is certainly true with regard to the executive and legislative branch of the governmental system of the European Union where its multilevel system finds its equilibrium within the balance between supranational and intergovernmental institutions. But with regard to the judiciary branch there are no internal “institutionally established counterbalancing mechanisms” (Witte et al., 2013). The lack of an intergovernmental counter-actor created the conditions for the ECJ to become a powerful court. According to Shapiro, the Court had, indeed, the sufficient room to play a significant role in constitutionalizing the treaties, shaping the division of powers and individual rights jurisdiction of the European Union (Shapiro, 1998).

In particular, what is worth noting for the present inquiry is that the division of powers or the distribution of competences is also connected with human rights. Samantha Besson in regard points out Alexander Hamilton warning against the adoption of a federal bill of rights (Kofler, Maduro, Pistone, Besson, & Group for Research on European International Taxation, 2011, Chapter 1). Hamilton has stated in the *Federalist*:

“I go further, and affirm that a bill of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than we granted”. (Hamilton, Madison, Jay, & Ball, 2003)

As a matter of fact, the US congress started to extend its competences in areas pertaining constitutional and international human rights and also the US Court took the opportunity to widen its judicial review power.

With regard to the European Union, the gradual incorporation of a human rights discourse within its constitutional framework began a process of development of new competences that Member States have always seen as problematic and concerning. As it is well known, the EU founding treaties (ECSC and EECT adopted in 1950s) have not references to human rights and to international human rights duties. The treaties only mention the four economic freedoms and also according to the same rationale the principle of non-discrimination and equality between men and women.

However, the European Court of Justice started to develop fundamental rights as general principles of EU law as a response to Member States' fear of the possible effects of the primacy of EU law (Alston, Bustelo, & Heenan, 1999, Chapter 27). De Burca explains that the reason for such an activism of the Court “is widely accepted to be its concern to maintain the autonomy and supremacy of the EC law, and to avoid claims that Community law must be subordinate to national constitutional rights” (Craig & De Búrca, 2011). To a large extent as a consequence of the German Constitutional Court reluctance to accept the idea that Community law might have prevailed over national constitutions, the ECJ has gradually recognized the existence of an unwritten “Community Bill of Rights” and has made itself a “creative law-maker” (Alston et al., 1999, Chapter 27). Such an activism of the Court is also easily explained given the “marked inequality of the other central organs” that at the time of the founding treaties consisted in “a very strong Council, a very weak Parliament and an uncertain relationship between the Council and the Commission” (Shapiro, 1998). In a nutshell, the Court started to define fundamental rights as general principle of EU law (Stauder 1969). In the *Internationale Heandelsgesellschaft* (1970) and in *Nold* (1974) case, the Court also added that in shaping the general principle of Community law it would have drawn inspiration from the common constitutional doctrines and international human rights. Then, from the late '80s on, through leading cases as *Wachauf* and *Elleniki Radiophonia*, the ECJ started to extend its jurisdiction to Member States acts performed within the sphere of Community law.

Despite the increasing jurisdiction of the ECJ, since the '90s, we has assisted to relevant institutional changes: in 1992 the Maastricht Treaty gave a formal recognition to human rights as part of EU law (see art. F of the Treaty now art. 6

TEU); the Amsterdam Treaty (1997) introduced important new provisions (art. 6 was reinforced; it was introduced article 7, a procedural mechanism dealing with member states in breach of Art. 6, and art. 46 that empowered the ECJ to decide whether the institutions have failed to respect fundamental human rights); the Treaty of Nice reinforced art. 7 sanctioning mechanism and the EU Charter of Fundamental Rights and Freedoms was proclaimed (2000). Whilst eminent scholars (Alston & Weiler, 1998) have recognised the value of these institutional arrangements, which had certainly triggered a new range of human rights policies and legislation, they also have agreed that such policies lack of coherence and uniformity. According to those scholars, "...too much faith is placed by the Community in the power of legal prohibitions and judicial enforcement. The gap between the political rhetoric of commitment to human rights and the unwillingness to provide the Union with the means to make the rhetoric a living reality has only served to underscore the inadequacy of the excessively judicially-focused strategy of negative integration in relation to human rights" (Alston & Weiler, 1998, p. 668).

Among other reasons, Weiler and Alston identified a partial explanation of the inconsistency of the approach of the Union to human rights in a "knowledge and monitoring gap"(Alston & Weiler, 1998). The Community has no comprehensive information base able to assist the relevant institutions in carrying out their legislative and policy work and in the allocation of administrative and budgetary resources in the field of human rights. Therefore, a model of negative integration of human rights mainly based on prohibition of their violations, whose main actor is the ECJ, needs to be supplemented with arrangements able to trigger a proactive integration along with the consolidated *ex post* approach. To this purpose and in light of the above mentioned "knowledge and monitoring gap", Weiler and Alston envisage, among other reforms, the institution of an agency monitoring human rights extending the role and the scope of the exiting European Monitoring Centre on racism and xenophobia in Vienna. The Agency should offer systematic and reliable data on human rights to the relevant institutions and should play a strategic role as coordinator of a network of civil society organizations in the field of human rights. In 2007 the EU Fundamental Rights Agency (hereinafter FRA) was finally established. Since then, has been the Agency able to fill the "knowledge and monitoring gap" of the EU relevant institutions?

### **A special Agency monitoring human rights: an overview of its establishment process**

In order to understand the role of the Agency as significant tool able to trigger a much more virtuous process of human rights concern within the work of the EU relevant institutions, it must be clarified, which are the components and the features of such a tool. In particular, we have to know how the Agency structure and functions were shaped in order to understand the efficiency and the limits of its work. To this purpose we have to go back in time and consider the institutional debate that led to its establishment.

If the idea of an Agency entrusted with monitoring functions in the field of fundamental rights has entered to be part of the scholarship and political debate since the publication of Philip Alston's and Joseph Weiler's article in the late '90s, it is worth noting that the Agency had to wait until 2007 to be established. The main

obstacles to the instantiation of such proposal were the Member States (Slovak Republic, Ireland, the United Kingdom, Germany and the Netherlands) and the Council of Europe.

On one hand, the Member States saw the creation of a body committed with monitoring activities in the field of human rights within the Union as a possible threat to their constitutional rights. The Agency was seen as a supranational surveillance body able to interfere and so weaken the domestic system of protection of rights (Blom & Carraro, 2014).

On the other hand, the Council of Europe showed its concern over the creation of an institution whose mandate overlaps the activities and the tasks of institutions already existing and functional, and in particular those who duplicate its work in the human rights area. In the view of the Parliamentary Assembly of the Council of Europe, instituting a duplicate mechanism of human rights protection would jeopardize the ideal of a European system without dividing lines, especially in the area of human rights. It is particularly this area that demands, "Europe should be united by the same common standards and values" (PACE, Resolution 1427 (2005) on 18 March 2005).

On the side of the institutional debate, the European Parliament and the Commission supported the idea of a body able to offer them the information and data on human rights that they need to reinforce their work. Therefore, it is possible to identify two different approaches to the creation of the Agency: the supranational institutions (the Parliament and the Commission) positively received the idea of a new agency committed with human rights, while the inter-governmental body (Council of the European Union) expresses the concerns of the Member States.

Furthermore, it has to be taken into account that at the time of the establishment of the Agency the constitutional framework did not properly work in favour of its creation. Under the Nice treaty the Council of the European Union still had a stronger power in relation to the Parliament, even though they were both part of the co-decision procedure. Secondly, as most of the regulatory agencies (now "decentralized agencies") established in that period, the legal basis of the Fundamental Rights Agency was identified in art. 308 TEC (now art. 352 TFEU) also called "flexibility clause". It is, indeed, well known that Article 5 of the Treaty establishing the European Community (the EC Treaty) required the Community to act within the limits of the powers conferred on it, and of the objectives assigned to it, by the Treaty. Where there is not a specific legal base for some of the Community's objectives Article 308 of the EC Treaty may fill the gap. In order to give an effect to the objectives of the Community the article requests the unanimity of votes of the Council of the European Union on a proposal from the Commission and after consulting the European Parliament.

The use of art. 308 TEC as legal basis of the Agency brings into light two difficulties: first, the procedure to adopt secondary legislation acts requests the unanimity of votes at the Council of EU. This means that the adoption of a proposal of secondary legislation is more complex because it requests the approval of each member state and thus is much longer in terms of time. Second, as it has been pointed out, especially by the legal service of the Council of Europe and several Member States (for instance France, UK, Czech Republic), it was not clear how fundamental rights were part of

the objectives of the Treaty. At the time of the Treaty of Nice, among the objectives of the Community (art 2 TEC), the only reference to fundamental rights could have been found in relation to equality between man and woman. Protection of fundamental rights was rather included as one of the objectives of the Union, that is to say that it involves an intergovernmental decision-making process, which largely relies on unanimity. However, according to some scholar, it is true that Opinion 2/94 of the European Court of Justice on Community accession to the European Convention on Human Rights, clarified the limits of the use of art. 308 TEC (former art. 235 TEC) and affirmed the impossibility of basing the accession to the ECHR on that provision, but it also determines three conditions on which art. 308 TEC cannot be used as legal base. As Weiler and Alston pointed out, these three conditions are the followings: article 308 TEC cannot be used, 1) if it entails the entry of the Community into a distinct international institutional system; 2) if it modifies the material content of human rights within the Community legal order 3) and if it has fundamental institutional implications. This would mean that a possible ground for an inclusion of fundamental rights within the Community objectives could be found in the European Court of Justice jurisprudence. According to the Court, indeed, fundamental rights are part of the general principles of Community law and thus compliance with fundamental rights is a condition of "lawfulness of Community acts" (Alston & Weiler, 1998).

Several concerns were also raised over the internal competences of the Agency. The Communication of the European Commission (COM(2005) 280 final) presented two proposals: a *proposal for a Founding Regulation establishing the European Union Agency for Fundamental Rights* and a *proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union*. According to these two documents the Agency should have a quite broad mandate. The Agency should be empowered of competences with respect to art. 7 TEU. In other words, the Council of the European Union may have the possibility to exploit the expertise of the Agency during the procedure under art. 7 TEU (recital n. 12 and art. 4(e)) in cases of a serious breach of the general principles of the European Union (art 6 TEU). The Agency would also be endowed to carry out its monitoring activity with regard to matters under the third pillar (Police and Judicial Co-operation in Criminal Matters). Interestingly, both of these competences were rejected and do not appear in the final funding regulation of the Agency. Once again, the Member States and the Council of Europe express their disagreement about such a broad monitoring activity that may be seen interfere within an area of competence subjected to the inter-governmental decision-making process.

With specific regard to the Council of Europe, the Parliamentary Assembly stated that the Agency should be an "independent institution for the promotion and the protection of human rights within the legal order of the EU" and should have "a well defined, focused and complementary role" (PACE, Resolution 1427 (2005) on 18 March 2005). In other words, the Agency should not be allowed to deal with fundamental rights in general but only when the Member States implement the EU/EC law. Second, the Agency should not assess general human rights situations in specific countries. Its work should be focused on specific thematic areas involving fundamental rights and having a special connection with EC/EU policies. Finally, the

Agency should address its thematic reports only to the relevant institutions of the EU (Commission, Council and Parliament) and not to the Member States.

Despite these difficulties a final compromise was achieved and in 2007 the Council of the European Union adopted the Founding regulation of the Agency. However, the result of this five years debate was the creation of an institution with a quite narrow mandate.

The Agency carries out its tasks within the competences laid down in the Treaty establishing the European Community (First Pillar). The Agency shall also carry out its activities within the limits of its Multiannual Framework (hereinafter MAF ) that is organized in nine thematic areas specially connected with the EC policies with a special attention on issues related to non discrimination, racism and minority rights. Despite its name, indeed, the Agency is not a monitoring body committed with the whole range of rights included in the EU Charter of Fundamental Rights. Only the European Parliament, the European Commission and the Council of the European Union can request the expertise of the Agency in relation to areas of competences outside the limits of the MAF and with the aim to scrutinize the upcoming legislation. Furthermore, with regard to the Member States, the Agency shall carry out its monitoring activity only when they are implementing Community law. Therefore, in light of such limitations, it is fair to ask how the real impact of such institution on the work of the EU relevant institutions might be.

### **Impact of the Agency on the EU relevant institutions.**

In light of what we know about the framework of the Agency, we should try now to reflect on what is the impact of its activities on the legislative and policy making work of the EU relevant institutions. To this purpose we will analyse its main products, reports and opinions, in two different periods: the period before the entry into force of the Lisbon Treaty and the period after the Lisbon Treaty became legally binding.

#### **Pre-Lisbon Treaty Period**

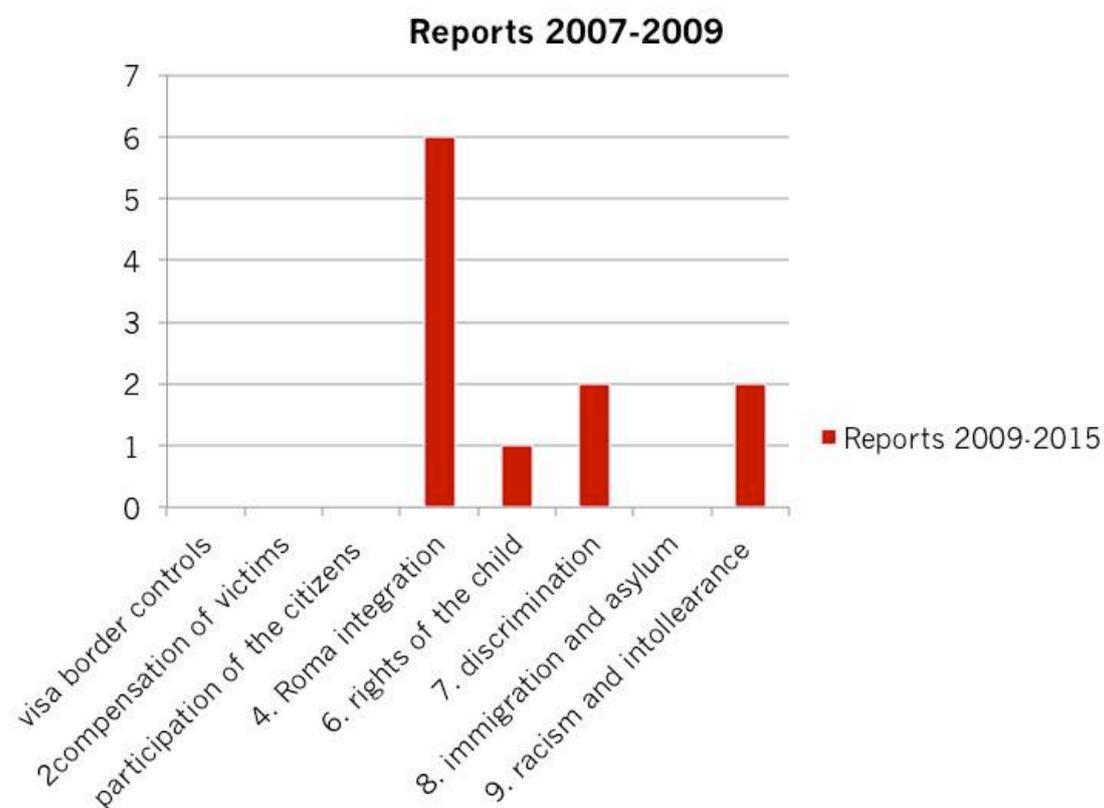
From 2007 to 2009, the Agency delivered 5 opinions and produced 15 reports. During this initial period of activity, the Agency had a quite limited number of requests on behalf of the EU relevant institutions and thus focused its activity on areas of research within its competences. Only the Council of the European Union in 2008 requested an opinion on a proposal for a Council Framework decision on the use of Passenger Name Record data for law enforcement purposes (see Chart 1 and Chart 4).

With regard to the reports, in 2007 and in 2008, the European Parliament requested a comparative report and a comprehensive report, focused on homophobia and discrimination on the ground of sexual orientation. In 2009, the Agency issued another comparative report upon request of the European Commission on Child trafficking. The other 12 reports are initiated by the FRA and are mainly focused on discrimination issues, with special attention to the situation of Roma within the EU (see Chart 2).

Chart 1

Opinions from 2007-2009	FRA	European Parliament	European Commission	Council of the EU
01/04/2007 FRA opinion on the Framework Decision on Combating Racism and Xenophobia	■			
20/11/2007 Progress made in equal opportunities and non-discrimination in the European Union	■			
28/10/2008 FRA opinion on proposal for a Council Framework decision on the use of Passenger Name Record (PNR) data for law enforcement purposes				■
29/07/2009 FRA opinion on the Stockholm Programme	■			
03/11/2009 FRA comments on the Presidency Draft Stockholm Programme	■			

Chart 2



### *After Lisbon Treaty*

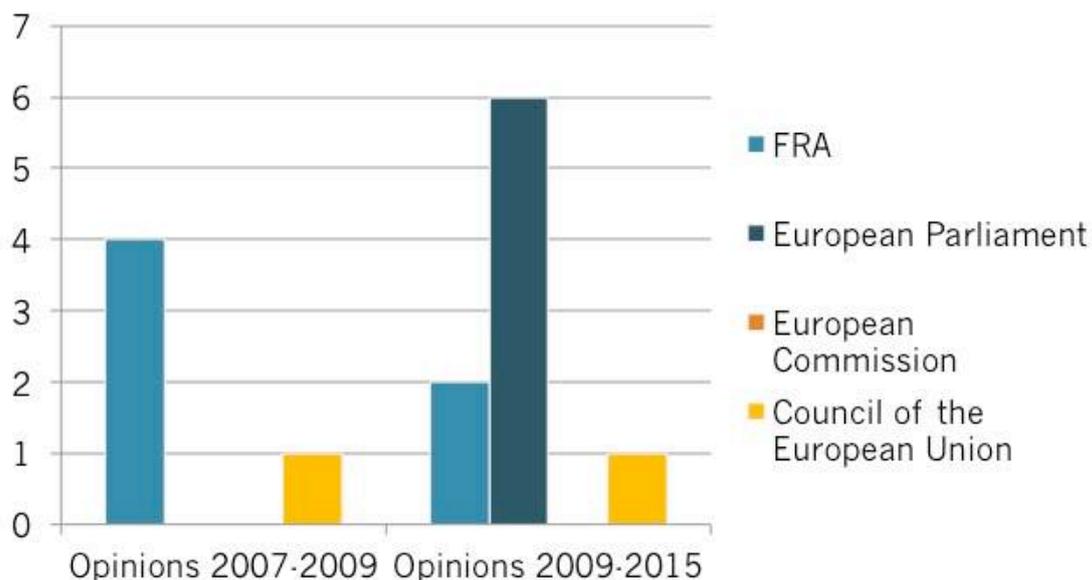
In 2009 the Treaty of Lisbon became legally binding along with the EU Charter of Fundamental Rights. With the entry into force of the Treaty of Lisbon, the Constitutional Framework of the EU was finally reformed. The three pillars system was finally merged in one legal personality, the Union, equipped with a different system of competences. Most importantly the European Parliament gained more powers. In particular, the Treaty extends the co-decision procedure over new areas as for instance the area of Freedom Justice and Security.

From 2009 to 2015 the Agency produced 9 opinions and more than 50 reports. Interestingly, most of the opinions were requested by the European Parliament and some of them were related to the new area of competence of the co-decision procedure (see Chart 3 and Chart 4).

**Chart 3**

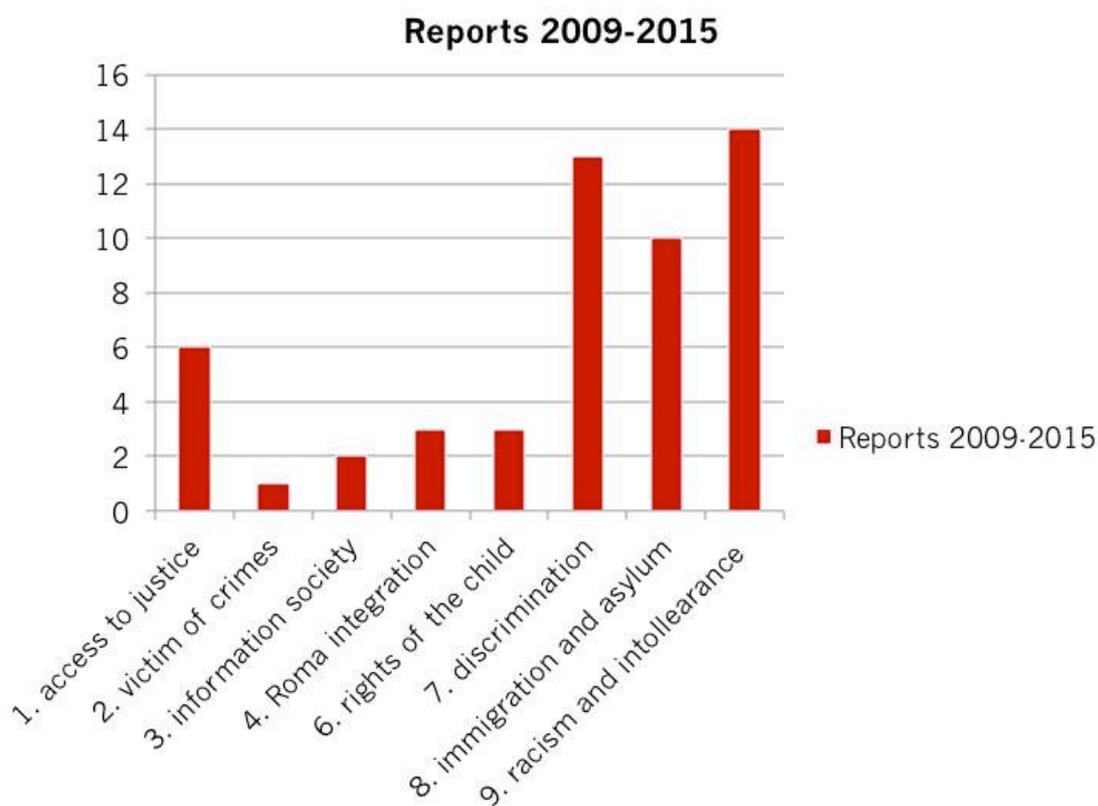
Opinions from 2009-2015	FRA	European Parliament	European Commission	Council of the EU
27/07/2010 The use of body scanners: 10 questions and answers				
23/02/2011 FRA opinion on the draft directive regarding the European Investigation Order (EIO)				
15/06/2011 FRA opinion on the proposal for a Passenger Name Record (PNR) Directive				
11/06/2012 FRA opinion on proposed EU regulation on property consequences of registered partnerships				
09/10/2012 FRA opinion on proposed EU data protection reform package				
04/12/2012 FRA opinion on the confiscation of proceeds of crime				
01/10/2013 FRA Opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives				
15/10/2013 FRA Opinion on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime				
06/02/2014 FRA Opinion on a proposal to establish a European Public Prosecutor's Office				

Chart 4



With regard to the reports, they are generally initiated by the Agency according to its competences. Most of the reports are mainly focused on the thematic areas of discrimination, immigration, integration of migrants and asylum, and xenophobia and related intolerance. To a small extent, the reports are also focused on access to justice, victim crimes, information society and data protection, Roma integration and the right of the child (see Chart 5).

Chart 5



Furthermore, in 2012 the Agency published a report on the impact of the Racial Equality Directive (2000/43/EC) in the EU Member States. The report intends to be one of a number of publications of the Agency in accordance to what art 17 of the Racial Equality Directive requires. As a matter of fact, art. 17 of the Racial Equality Directive requires the European Commission to report to the European Parliament and the Council on its application and, in doing so, to take into account the views of the European Monitoring Centre on Racism and Xenophobia. The FRA took over the monitoring activity of the Centre and extended its mandate. It is therefore interesting to point out how the expertise of the Agency can be request also by an act of secondary legislation but for the moment it remains the only example of such practice.

### **In conclusion: positive or negative integration? Who wins?**

These data show the amount of work that the Agency has carried out, in particular in the main field of discrimination, discrimination and asylum and racism and related intolerance. With the entry into force of the Lisbon Treaty and of the EU Charter of Fundamental Rights, institutions like the European Parliament, trough its LIBE committee, have certainly increase their collaboration with the Agency. However, its activity remains quite restrained and its potential as key tool of a positive human rights integration remains unexplored.

We can identify three fundamental reasons for that:

First, the FRA cannot deal of its own initiative with matters covered by the former third pillar, which include a number of important human rights issues. Before the Lisbon Treaty was legally binding this limitation of the FRA's mandate was due to the three pillars system of competences. But even after the entry into force of the Lisbon Treaty the Agency's mandate remained untouched.

Second, the full range of rights present in the Charter does not find its full expression within the MAF. This approach can be explained by the fact that the Charter was only a political instrument before the entry into force of the Lisbon Treaty, leaving to the EU institutions, in particular to the European Council, the autonomy to set up the structure of the MAF in accordance with the priorities of the EC. However, after the Charter was legally binding the MAF was not subject to any particular change.

Third, as most important, the Agency is an "untapped resources"(Ramboll (2012)) with regards to the EU legislative process. The FRA can only deal with EU legislative drafts upon request of the EU institutions thus strongly limiting the role of the Agency as a body scrutinizing the upcoming legislation.

Certainly a possible solution to the difficulties mentioned above could be amending both the FRA's Founding Regulation and the MAF. However, since both these legal documents are based on art. 352 TFEU (ex. Art. 308 TEC), the adoption of every amendment of little account would request the unanimity of votes at the European Council. This state of affairs leads to the fact that the FRA cannot be easily emendable and thus is subjected to the strict limitation of its internal legal framework.

Another constraint to the FRA activity is the exclusion from the current founding regulation of the provision providing the FRA's advisory expertise in cases of serious

breach of the EU values (art.7 TEU), upon request from the European Council. Undoubtedly, the Agency indirectly contributes to a preventive monitoring of the Member States' performance through the publication of its annual reports, which are useful tools in the hand of the relevant EU institutions. However, the FRA could undeniably play an important role offering its expertise within the warning procedure of art. 7. (Closa, Kochenov, & Weiler, 2014).

Filling these gaps would allow the FRA to convey the entire framework of its potentialities and to be an important counter actor of a negative integration. Not filling this gap would leave the FRA unprepared to tackle future challenges as the controversial accession to the European Convention of Human Rights system.



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***The Impacts of the Family Allowance Program (Programa Bolsa Família) on the Development of the UN Millennium Development Goal 1 – Eradication of Hunger and Poverty made by Brazil between 2000-2015***

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**Abstract**

This paper addresses the fulfilment of the UN Millennium Goals by the Brazilian state, with special emphasis on the Millennium Development Goal number 1 (MDG 1), regarding the eradication of hunger and poverty. The timeframe utilized in the study is 2000-2015, in accordance to the UN Development Committee. Brazil in the XXI century still struggles with the most basic problems of the developing countries: a huge equality gap which tends to maintain a significance portion of the population under minimum life and dignity standards. This historical aspect is detailed in point 1 of the paper, explaining the actual public policy regarding the confrontation of hunger and misery situations: first with the Zero Hunger Program, advancing to the introduction of the Bolsa Família Program (the main objective of analysis of this research) and now with the Brazil Without Poverty program. Then it focused on the UN Millennium Goals and MDG 1, with all its institutional criteria of commitment: hunger levels, inequality indicators, employment rates, parity of purchasing power, equality related to men / women in income and parliamentary representation, etc. Regarding MDG 1, the study deepens on its sub-tasks, verifying the impact of the Bolsa Família program in the implementation of the goal. In its final considerations, the article sums up the undeniable progress made in the country on the period scrutinized in order to propose improvements in its operation and identify new challenges and goals for the new UN Sustainable Goals.

Keywords: Development; Public policies; Fundamental rights; Bolsa Família; UN Millennium Goals

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## **Introduction**

In 2000, there was an unprecedented consensus in the UN General Assembly and all of its members focused on one common goal: the development of nations. The date was auspicious, the crises that would follow the meeting had not yet begun, the world seemed ready for a turn towards peace, after a century marked by war, cold or hot, declared or virtual. In this chaos emerged the Millennium Development Goals; a series of goals to be met by countries in order to put them on route to sustainable development, raising its citizens to new standards of life.

A wide arrange of critical areas has been evaluated, varying from the eradication of hunger, through the need for continued study of children, to the global fight on certain diseases. In the extremely short time of 15 years, the world should become more equal, educated, healthy, and less hungry. What changed in Brazil during the period? How was it possible to have enough impetus for change, especially in a country with so much inequality? What were the responsible institutions, the rights and wrongs? The main scope of this article is to address those questions, analyzing how the Brazilian government has dealt with these myriad of issues, trough the Bolsa Família program, designed specifically to deal with the MDG 1, the fight of hunger and poverty.

Therefore, data from various sectors (employment, income, education) and sources (IBGE, IPEA, UNDP), will be compared and contrasted, in the light of the economic analysis of law, specially the New Institutional Economy authors, such as Williamson (1985) and North (2003). Institutions matter, as shown by the international framework outlined by the UN, in creating huge goals in an interactional statement, seeking the empowerment of every citizen on the globe (Sen, 2012).

Thus the structure of the article has four points: the introduction, where are presented the methodology and the theoretical framework utilized; followed by a historical overview of what are the Millennium Development Goals; reaching the heart of the matter proposed the analysis of the family allowance program (PBF – Programa Bolsa Família, in Portuguese) in compliance with MDG 1 - the eradication of hunger and poverty. At the end, in the final considerations, the article glimpses on the possible new steps to be taken at the international level in the next decades.

## **History of the UN Millennium Development Goals (MDGs) and the MDG 1 – the eradication of hunger and poverty**

In the new millennium daybreak, precisely between 6 and 8 September 2000 in the city of New York, 191 countries and nearly 150 heads of state and government, gathered for the largest international meeting of world history. There was finally adopted the Millennium Declaration, after months of negotiations and several Regional Forums, where thousands of people could be heard. This statement gave a whole new look and meaning to the United Nations (UN), which for the next 15 years (2000-2015) began to monitor, encourage and assist in many different ways (since sending food and funds, through the constitution of international arms from its offices within individual member countries), the compliance with the 8 core objectives defined in the Declaration.

The first issue addressed by the Declaration is the issue of globalization, and the concern that this “becomes a positive force for all the world’s people. For while globalization offers great opportunities, at present its benefits are very unevenly shared, while its costs are unevenly distributed” recognizing that “developing countries and countries with economies in transition face special difficulties in responding to this central challenge” (UN, 2000, p.2) as it was, and still is, the Brazilian situation, as well narrated by SANTOS (2000). So leaders considered that “only through broad and sustained efforts to create a shared future, based upon our common humanity in all its diversity, can globalization be made fully inclusive and equitable” (UN, 2000, p. 2), allowing human beings to reach their eternal search for better and more dignified conditions (SCHMIDT and REINERT, 2015, p. 207). Globalization, in its multiple effects (economical, political, social), creates winners and losers, the rich countries “with poor people” as Stiglitz (2007) puts.

The Declaration reiterates the core principles that should govern international relations in the twenty-first century: freedom, equality, solidarity (the world's problems must be tackled together and so “those who suffer or who benefit least deserve help from those who benefit more “(UN, 2000, p. 3), tolerance, respect for nature and shared responsibility. This principled range is that delineate the eight Millennium Development Goals to be met by all signatory countries within 15 years.

The year 2015 is the culmination of the Declaration, when all countries should report their results and progress in various forums of thematic work. It is noticed that the option of making a declaration (soft law, using the definition of MENDONÇA, 2012. p.81) and not of a treaty (legally binding international agreement, *pacta sunt servanda*, in the words of PIOVESAN, 2009 , p.43), was, clearly, to raise the maximum number of ratifications, giving visibility and international recognition to this new UN joint work plan, seeking to revive the concept of international society<sup>1</sup> (MIALHE, 2008). Moreover, in recent sentences, the Inter-American Court of Human Rights, based on the jurisprudence of other international courts (especially the European Court of Human Rights), has “converted quasi-legal international instruments [soft law] in legally binding regional instruments [hard law]” (Killander, 2010, p. 157), obliterating the distinctions traditionally made between the types of instrument in order to extend human rights protection scope<sup>2</sup>. Therefore, the Millennium Development Goals cannot - and were not in fact - be seen only as general recommendations. This perception led countries like Brazil to invest heavy on social programs for compliance, such as the creation of the Brazil Without Poverty Program, which the Bolsa Família Program (family allowance program), to be detailed in the following, is part of.

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<sup>1</sup> To Mialhe 'The international society can be understood as a' group of independent political communities 'that far from forming a single system of behavior, looking through the' [...] dialogue and consensus rules and institutions ', organize '[...] their relations, in view of the interest that connect around certain agreements, pacts and principles' in the pursuit of their common interests. It differs from the international community 'is a natural and spontaneous unity, while society appears as a drive is somewhat artificial.' In the community prevailing 'converging values, ethical, common; in society, competing values, striving legislation, a convention, normalizing'(2008, p. 206).

<sup>2</sup> On the subject see SCHMIDT and LAPA (2014).

The UN directive proposes eight main goals to be achieved by this year's end:

- a) Eradicate extreme poverty and hunger;
- b) Achieve universal primary education;
- c) Promote gender equality and autonomy to women;
- d) Reduce child mortality;
- e) Improve maternal health;
- f) Combat HIV / AIDS, malaria and other diseases;
- g) Ensure environmental sustainability;
- h) Develop a global partnership for development. (UN, 2015)

As indicated, the goals are very broad and encompass various aspects of human development in the world, merging health issues, education, eradication of hunger, income redistribution and international cooperation in objective, measurable targets, with a clear way to summarize the declaration and its principles into something achievable. This concern in changing the rhetoric into an action plan has been a constant in the UN in recent years - especially with the creation of the campaign "2015: time for global action for people and the planet" (UNDP, 2015) which contains millions of followers and is shared across the world.

Brazil, despite all their tribulations in the 90s (especially in macro-economic area, with the reflections of the great economic and financial belt tightening in the 80s and heavy stabilization of the Real Plan, then the neo-developments years of Lula (PEREIRA, 2015)), is walking towards the achievement of all the established goals. As noted by Piovesan (2015, p. 10), "the risk of political and moral embarrassment violator of the State (the power of embarrassment or the power of shame) in the international public forum can serve as a significant factor for the protection [and expansion] human rights". Facing the possibility of being internationally criticized by the media, exploring the human rights violations perpetrated by the States or the non-compliance with the international order, the States find themselves forced to justify their practices or seek to improve their general internal conditions.

That is one the reasons why the Bolsa Família Program has been so widely diffused worldwide: the diminishment of hunger and poverty were, by the far, the most notorious accomplishments made by the country in the XXI century. According to the UN, MDG 1 is divided into three central themes:

1. Halve, between 1990 and 2015, the proportion of people living on less than 1.25 dollars (purchasing power parity) per day;
2. Achieve full and productive employment and decent work for all, including women and young people
3. Halve, between 1990 and 2015, the proportion of people who suffer from hunger (UN, 2015)

It appears that the eradication of poverty and hunger is guided by the question of raising the population's income, especially through paid work. According to the UNDP, Brazil was "one of the countries which contributed the most to the overall achievement of the MDG 1, reducing extreme poverty and hunger not only by half or one quarter, but to less than one-seventh of the level of 1990, from 25.5 % to 3.5 % in 2012. This means that considering the indicators chosen by the UN to monitor the MDG 1, Brazil has reached both the international and national goals" (UNDP, 2015). How was this possible? What are the legal and institutional routes chosen

(Williamson, 1985) and taken by the country to fulfill with such distinction the goal, shifting from a position of being one of the most violators of the UN Hunger Map, to a situation of almost residual hunger (below 3%<sup>3</sup>), in just over 25 years? These are aspects directly linked to the creation of the family allowance in the early 2000s and will be discussed further.

### **The entwining of the Family Allowance Program and the MDG 1**

The Family Allowance Program, was officially established in Brazil by Law 10.836 of 2004, which converted the Provisional Measure 132, of the previous year, in a legal program, ushering in a new phase in Brazilian social policies. The PBF was responsible for the unification of procedures for the management and implementation of cash transfer actions of the Federal Government, especially the scholarships, the National Access to Food Program, Food and Aid Gas Exchange, all associated with the Single Register – (CadÚnico), thereby facilitating access to low-income families and to more stringent control by the Government.

The program was formed as one of the Zero Hunger lines of action (MDS, 2014), gestated in 2002, and had its continuation and expansion to the guidelines of Brazil Without Poverty, from 2011. Its coordination is under the Ministry of Social Development and Fight Against Hunger (MDS), the agency also responsible for the consolidation of all data related to the program.

According to article published by the World Bank, entitled “A quiet revolution”, it is the biggest income transfer program in the world, which benefits families in poverty and extreme poverty across the whole country. The program helps families with total income per capita below R\$ 77 monthly<sup>4</sup> (according to the latest 2008 adjustment), trying to guarantee them a minimum income for further productive inclusion and access to public services.

Its governance structure is divided into three main areas: a) the direct transfer of income to promote the immediate relief of chronic hunger; b) conditions to stay in the program, counterparts provided by the beneficiaries, also in order to increase access to basic social rights in the areas of education, health and social care; c) the complementary programs and governmental actions aim in the development of families, so that the beneficiaries can pass through vulnerable situations (MDS, 2014).

In terms of the public served and total budget, according to retrospective treated by Lima e Silva (2014), when it was created (2003) more than 3.6 million families benefited, with an R\$ 4.3 billion budget. In just one year, the number of families almost doubled to 6.6 million with a US \$ 5.3 billion budget. In 2004, the program began to serve 99.5 % of the Brazilian municipalities (totaling 5,533 attended). In 2005, the program extended to reach all 5,570 municipalities, with R\$ 6.5 billion budget, covering more than 8 million households.

In 2013 (the last year with a consolidated budget available), the government invested more than R\$ 25 billion in the program (almost 0.5 percent of the Brazilian GDP),

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<sup>3</sup> According to the criterion of the World Bank (2015)

<sup>4</sup> One real (R\$) equals three dollars (US\$)

which exceeded the mark of 14 million families served. According to the MDS data, taking into account an average of 3.97 of people per household in the country, about 56.4 million people were directly benefiting from transfers. These figures show a significant amount of citizens directly dependent from the benefit to have a minimum income able to keep their homes and, a fortiori, the long path of job and income generation which Brazil still need to develop, in order to include all of its citizens in the formal economy and enjoyment of minimum social rights.

The benefits paid by the program, according to Article 2 of its constituting law, are divided into four distinct categories: a) a basic benefit, aimed at households which are in extreme poverty; b) a variable benefit for families in poverty and that have pregnant women, nursing mothers, children and adolescents up to 15 years, within the limits of up to 5 variable benefits per family; c) a variable benefit related to adolescents 16 to 17 years, up to the limit of 2 per family, in order that they remain in school; d) a benefit to overcome extreme poverty, only one per family, for families which have cumulatively: children and adolescents up to 15 years of age and present a total sum of the monthly family income and financial benefits received in 'a', 'b' and 'c' equal to or less than R\$ 70.00 per capita.

The description on the law can construct the following table:

Benefício	Valor	Regra	Valor máximo por família
Básico	R\$77,00	Transferido a famílias em situação de extrema pobreza, com ou sem crianças ou jovens.	R\$77,00
Variável de 0 a 15 anos	R\$35,00 por criança	Transferido a famílias com crianças ou adolescentes de 0 a 15 anos.	R\$175,00
Variável a adolescentes	R\$42,00 por adolescente	Transferido a famílias com adolescentes de 16 ou 17 anos.	R\$84,00
Variável de gestante	R\$35,00 por gestante	Concedido a famílias com gestantes.	-
Variável de nutriz	R\$35,00 por nutriz	Transferido até o fim da gravidez. Transferido a famílias com bebês de 0 a 6 meses. Concedido por 6 meses.	-
Superação da extrema pobreza	Não há valor fixo	Transferido a famílias que, mesmo com o recebimento do PBF, seguem em situação de extrema pobreza. O benefício independe da composição familiar	-

Fonte: Ministério do Desenvolvimento Social.

Table 2. Values paid to BF beneficiaries (MDS, 2015).

The law points out (Article 3) only two counterparts to receive the benefit: in the health area, the necessity to perform a nutritional and health accompaniment, especially in the case of children and pregnant; in education, the fulfillment of 85% of school attendance in a regular educational institution for children and adolescents aged 6 to 15 or 75%, for teenagers from 16 to 17 years.

It is seen that the compensatory measures needed to receive the stipend depend directly upon the provision of other basic public services by the State - health posts and schools have to be ensured for all, in order for the beneficiary to claim the money.

The conditions are therefore a two-way street, because it forces Brazil to develop minimum social rights in accordance with its Federal Constitution. The beneficiaries will surely demand more rights from the government, especially when they could be penalized by the State inaction if they cannot fulfill their part of the bargain by exclusive fault of the government. With this intricate structure, one could recognize that the family allowance program today is one of the central pillars of the promotion of social assistance from the Federal Government, growing in budget, ministries and families served. Considering only its number of beneficiaries - more than a quarter of the Brazilian population – the PBF is similar to other universal public policies, along with the health, education and social security, forming the “backbone”(ALVES, 2014) of the Brazilian social policy outlined in the Constitution. Its budget, despite representing a small share of GDP (0,5%), is in the billions of real and there are strong indications that many municipalities depend on their lending to remain functioning (as demonstrated by LANDIM JR, 2015).

The program completed, in 2014, its first decade of legal and institutional existence. In a comprehensive timeline, it could be said that it has started as a part of the Zero Hunger program, advancing to the Brazil Without Poverty program in a clear improvement over the mere eradication of hunger. Recently, in another huge leap forward, Brazil is finally working to the eradication of poverty as a whole, not only hunger. The years that this new form of social assistance from the Federal Government has acted are evenly matched over the years provided by the Declaration of the Millennium Goals for compliance, which will allow us to compare data of the 90’s (1990-2000) – the threshold analyzed by the MDG targets - with the post-implementation data of all this new social policy in Brazil, portrayed in the family allowance program with greater emphasis. To that end, and reminiscing about the central axis of the MDG 1 detailed in the last part of part 2, we will now analyze the 3 key points previously listed with the intersection of the following indices: HDI - Human Development Index and the UN Hunger Map; Gini index (measurement of inequality); Poverty rates; employment and income.

### HDI broken down

The Human Development Index, developed by the UNDP and economists Amartya Sen (2012) and Mahbub ul Haq, combines three distinct dimensions of minimum standards of life which a person needs to have to live with dignity (or to lead a “life that is worth living” in the words of Dworkin, 2009): a long and healthy life (reflected in life expectancy at birth); access to human knowledge (average years of schooling and expected years of schooling); and a decent economic level (GDP per capita). The evolution of the Brazilian HDI over the past 30 years can be followed below:

	Expectativa de vida no nascimento	Expectativa de anos de escolaridade	Média de anos de escolaridade	RNB per capita (PPPS 2005)	Valor do IDH
1980	62,5	14,1	2,6	7.306	0,549
1985	64,4	14,1	3,2	6.732	0,575
1990	66,3	14,1	3,8	6.978	0,600
1995	68,3	14,1	4,6	7.610	0,634
2000	70,1	14,5	5,6	7.698	0,665
2005	71,6	14,2	6,6	8.260	0,692
2010	73,1	13,8	7,2	9.812	0,715
2011	73,5	13,8	7,2	10.162	0,718

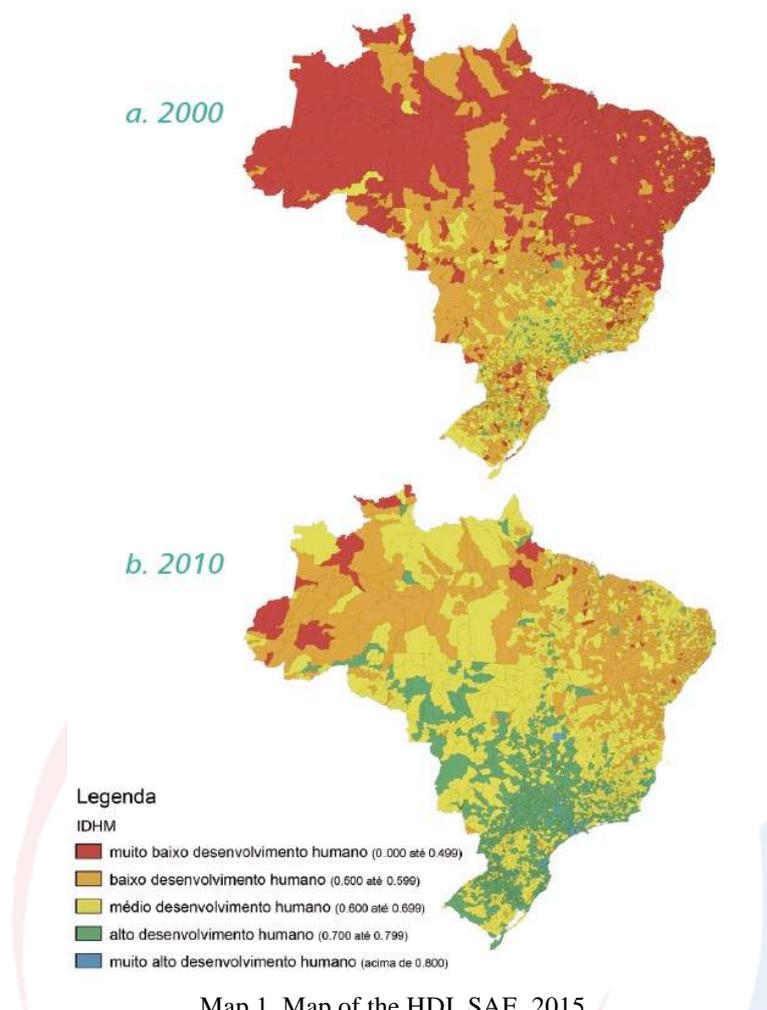
Table 3. Evolution of the HDI. UNDP, 2015.

The above table shows that the biggest problem in Brazil remains a poor distribution of wealth, followed by an educational deficit. Life expectancy has increased more than 10 years in one generation, but the study year's numbers are in decline in recent years. While the total GDP of Brazil jumped from just over R\$ 731 billion in 1995 to almost R\$ 5 trillion in 2013 (an increase of almost 650%), making it the seventh largest economy in the world, per capita income practically stagnated in the period (growing just 33%).

The family allowance act precisely in these two crucial points: keep children and adolescents in school by the conditions of payment, and increase the purchasing power of the poorest families. The rates presented denotes that there was, after the program's inception, a drop in the expected years of schooling, which tends to show that heavier restrictions need to be imposed on the beneficiaries or that the supervision of school attendance is not being performed in a satisfactory way or is being somehow circumvented.

When analyzing the expansion of HDI since the implementation of the new social policies it grows almost 0.5 point in a decade (2000-2010), a rhythm that has remained constant since 1980, with minor percentage changes, depending on the macroeconomic situation. At the other end, when analyzing the national HDI map one can see that in the early 2000s (before the PBF) there was a massive concentration of very low HDI municipalities (0.000 to 0.499) in the North and Northeast regions. Ten years later, not only almost all the municipalities in these regions reached a plateau of average HDI (0.600 to 0.699) - with some exceptions in the forest border areas - as there was an unprecedented development in the regions Midwest, Southeast and South, covered by rates of over 0,700 and reaching the significant milestone of more than 40 municipalities with HDI 0.800 (very high Human Development).

The family allowance thus acted as a catalyst to lever the poorest and most underdeveloped municipalities, which now have a minimum income provided by the Federal Government. In addition, this growth has reflected positively throughout the country, which, in a visible way on the maps below, came out of a hot "red zone" of underdevelopment for a much more yellow-green zone of development:



Map 1. Map of the HDI. SAE, 2015.

This also led the country to a major victory internationally: in 2013, Brazil was officially removed from the UN Hunger Map, which outlines all global locations where people go hungry on a recurring basis and has problems of malnutrition and its associated illness. This issue can be accompanied in the next figure:

## SUBALIMENTAÇÃO

Porcentual entre 1990 e 2013, no Brasil

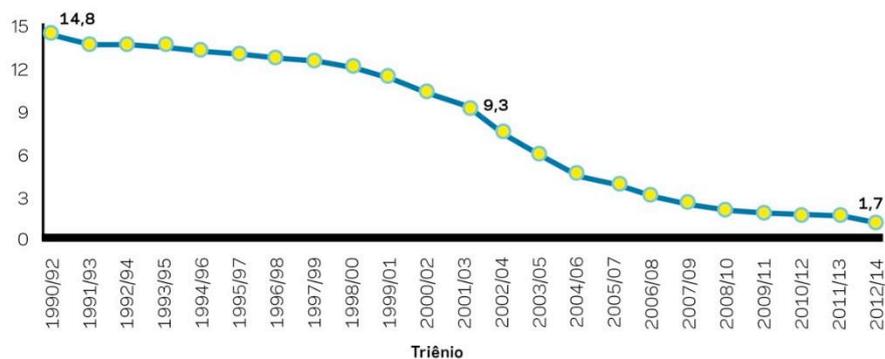


Figure 1. Malnutrition. Source: CAPITAL LETTER, 2015 to UN data (2015).

The Brazilian situation in the beginning of the UN analysis was not good in the “hunger” item for almost 15% of the population (over 20 million people at the time) had some degree of hunger. In 2012 Brazil reached a comfortable 1.7% of undernourished index (3.4 million), taking in just over 20 years (and without discounting the natural population growth), over 17 million people out of the poverty line. It is important to Rate, the graph, two moments: the 2000s, when the ratification of the MDGs, at which time the fight against hunger becomes a priority and several efforts began; and 2003, when the chart declines more sharply, which marks the beginning of the implementation of the Family allowance program.

When analyzing the graph curvature and the maintenance of such low undernourished index, it appears that the family allowance played an important role in the diet of Brazilian families and its payment in all Brazilian municipalities (ROCHA, 2014) can perpetuate the food security situation because households now have an income to ensure the minimum supply of its members. Clearly the mere provision of food for the population is not enough from a welfare state point of view (other public policies with global objectives - such as fostering formal employment – should also be in place). Nevertheless, with an extremely low budget, the program has, in an unprecedented way, ensured the exit of Brazil from the Hunger Map and reduced overall inequality in the country, stopping, for the first time, its ascending projection. This decrease is the subject of the next topic.

### **GINI Index**

Brazil is not yet a “Country of everyone” despite the motto and the efforts made by the Government. In an unequal level perspective ranging from 0 to 1 - where 0 would be the perfect income equality among people - the country is at the point 0.526. That is, only 10% of the population earns the equivalent to more than 42% of its income<sup>5</sup>. This mentioning only an economic indicator, one small side of which is the search for development (GONÇALVES, 2013), because the index takes into account just the concentration of the gross income, not other indicators<sup>6</sup>.

In the graph below one can see a sharp increase in inequality in Brazil until the 1990s, when it falls abruptly with the attempted financial stabilization of the Summer Plan, followed by a rise and the return to the average standard of the 80s. Exactly in 2000, with the specification of the MDGs and the gestation of the new social programs in Brazil, it starts to fall and since the implementation of the family allowance (2003), it shows a sharp drop to unprecedented standards of income equality in the country.

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<sup>5</sup> According to the IBGE, 2012

<sup>6</sup> Criticism by Thomaz Piketty (2014) to formulation of the index



Figure 2. Change in Gini index from 1976 to 2012. SAE, 2015.

Today only seven Brazilian States (Paraná, Rio Grande do Norte, Maranhão, Distrito Federal, Bahia, Sergipe and Piauí<sup>7</sup>) have rates above 0.5. The northern region, once one of the most problematic in income distribution has already achieved an equal level similar to that of the southern states of Brazil. Rondônia and Acre, for instance, today figures in 2nd and 3rd place overall, behind only Santa Catarina, the champion in equalization of income (index 0.436).

Certainly, this is not a coincidence, but the results of a well-targeted policy, active precisely in the most critical points of inequalities in the country, according to the research of Lima e Silva (2014). The family allowance seems not only to fulfill its main objective of eradicating hunger by providing a minimum income for feeding people, but also has a redistributive nature, helping Brazil, albeit indirectly, in achieving more ambitious goals such as ceasing to be one of the most unequal countries in the world (IBGE, 2015). As logical consequence of the massive redistribution of income perpetrated by the program, it has also a very significant impact in the reduction/eradication of extreme poverty, as will be seen in the following part.

## Poverty

Brazil, according to the UNDP, was one of the countries that contributed the most to the global achievement of the goal of the MDG 1, reducing extreme poverty and hunger not only half or one quarter, but less than one-seventh of the level of 1990. In percentages, the decline was 25.5% to 3.5%, tending to achieve at the end of 2015 the level of residual poverty (3%) of the World Bank. This decrease can be seen in the chart below:

<sup>7</sup> IBGE, 2015

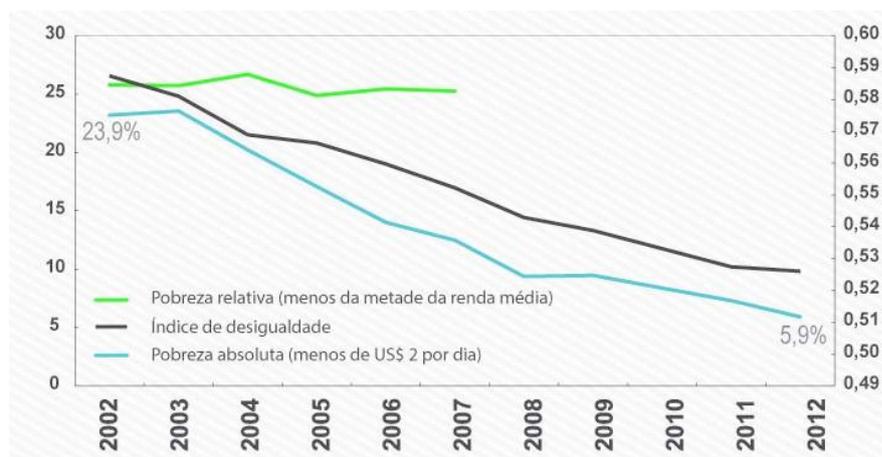


Figure 3. Poverty in Brazil. OECD, 2015.

Once again, the clear reflections of the implementation of family allowance can be seen. Until 2003 there was a growing trend of absolute poverty (people living on less than US\$1.25/day) in the country, which was reversed after the implementation of the program. In less than 10 years the absolute poverty index has fallen almost 20%, with a similar decreasing impact in the inequality index, as seen in the previous section. Besides the positive effects, the program may need to be even more incisive, because the relative poverty indicators (evaluating people living on less than half the national average income), remained stable in the period. This is due, to some extent, to the low amounts paid to the beneficiaries, which has greatly improved at first, but then remains in the same low-income bracket. This suggests that the program may encounter an inflection point soon: or to increase the amount paid to the benefit, or add new conditions that forces the recipients to seek other higher income sources, such as formal work or higher education.

### Final considerations

The theme, despite its apparent closure with the presentation of the MDGs reports by this year's end, remains not only open, but also lacking further study. The real work will begin with the final report of the Brazilian government when the points of vulnerabilities of the social policy development will finally emerge. A new array of objectives will have to be designed and the matter will be no longer just to meet the UN MDGs, but rather to overcome them. They were the beginning of a much broader path - no more goals at the turn of the millennium, but for the new millennium.

The most basic issues, such as the eradication of hunger, were successfully overcome. Nevertheless, it is just that: basic. An accomplishment to be celebrated, certainly, but as only a small step that was completed, towards a more equally distributed economic and social development. Brazil managed to raise as an exponent on several fronts of the MDGs: prevention of breast cancer, eradication of hunger, maintenance of jobs. And as a poor educator and a discriminating country of the gender equality in parliament. Those are just some of the new (and old) contradictions that need to be addressed in the new millennium.

The family allowance (and the federal eradicating poverty programs as a whole) has emerged as the world's largest income redistribution program and certainly shines in the Brazilian final report to the UN. It has its reasons to be praised: Brazil was finally

cut off from the UN Hunger Map. Undoubtedly, a huge stain was removed from the national curriculum - after all the 7th largest economy in the world could not, paradoxically, also be one of the places where its citizens die, literally, of hunger. Clearly, the program has many flaws, especially regarding the permanence of children and adolescents in school, but its structural and institutional merits are undeniable: reducing inequality and transferring huge sums of income to the poorest and historically backward regions was no small feat. Again, this should be seen as a fresh start, a turning point, not an ideal situation.

The PBF has only a decade of effective operation; there is still time and room for improvement of all kinds, including its mutation in a minimum income program and not just focused on eradicating hunger, goal already achieved. It is possible to aim and go further. Finally presenting the reports to the international community, we will be able to start talking of a new kind of power, instead of the power of embarrassment: the power of pride, feeling truly proud to present an overview better than the previous millennium to the world. It would be a change for the very form of work and motivation of the United Nations in the development of the Sustainable Development Goals, successor and magnifier for 2030 of the MDGs.

The logo for iafor (International Association for Financial Officers) is centered on the page. It features the lowercase letters "iafor" in a light blue, sans-serif font. The text is surrounded by several overlapping, semi-transparent circular arcs in shades of light blue and pink, creating a dynamic, swirling effect.

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The logo for the International Association for Business and Economics (IABE) is centered on the page. It consists of the lowercase letters "iafor" in a light blue, sans-serif font. The text is enclosed within a circular graphic composed of two overlapping, semi-transparent arcs: a light blue one in the foreground and a light red one behind it, creating a sense of depth and movement.

***Change of Circumstances and Judicial Power:  
A European Perspective of Contract Law***

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**Abstract**

An obligation should always be performed even when performance has become more onerous. However, if performance of a contractual obligation becomes extremely onerous because of an exceptional change of circumstances, the answer must be different. There are two traditional “schools of thought” and, consequently, two visions of court intervention in case of hardship: the first one proposes the execution or the termination of contract; the second one establishes instead a duty for the parties to renegotiate the original contract.

The European “soft law” approach drafts a “third way”: the parties are encouraged to reach an agreement to amend the original contract, but, if the parties fail, the court may (1) adapt the contract in order to make it reasonable and equitable or (2) terminate definitively the original contract. On the one hand, the choice between variation and termination of contract is a fascinating perspective to protect the position of the debtor (and, eventually, to preserve the contract). On the other hand, the combination of the two remedies – placed on the same level – may impose an undue sacrifice on the advantaged party, who would be forced, solely in light of the choice of the other, to either terminate an obligation worthy of being maintained or to bear an excessive economic burden aimed to adapt a contract which would otherwise be terminate. In this new context, emerged also a doctrinal debate in order to understand how the criteria of judicial intervention – based on general clauses and indeterminate notions – can operate in practice.

Keywords: change of circumstances; hardship; renegotiation; judicial power; termination; adaptation

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## 1. Introduction

The need to meet long-term interests increasingly causes economic actors to enter into long-term contracts that span an extended time for performance (Macneil, 1980; Joskow, 1985; Joskow, 1990; Ghestin, J., Jamin, C., Billiau, M., 2001, 355 ff.; Sacco, R., & De Nova, G., 2004, 693 ff.; Macario, 1996, 24 ff.).

Clearly, the longer a contract runs, the higher the risk that unforeseen events may occur in the exercise of the contract, altering the original equilibrium agreed upon by the parties, e.g. in case of hardship.

A well-known legal problem arises as to which of the two parties should bear the risk connected to a change of circumstances during the performance of the contract (Ridder, & Weller, 2014; Hondius, 2015; Dastis, 2015; Philippe, 2015; Lequette, 2015; Cerchia, 2015; Murga Fernández, 2015; Momberg, 2015).

In recent years, a significant international debate has emerged between two contending “schools of thoughts” (Schanze, 1997, p. 156)<sup>1</sup>: the first one – more sensitive to the protection of the original terms of the agreement and, ultimately, of the principle of party autonomy – recommends the execution or the termination of the original contract (Schwartz, 1992; Craswell, 1996; Martinek, 1998; Terré, Simler, & Lequette, 2013, 515 ff.); the second one – by emphasizing the changed equilibrium of the contract and, at the same time, the need to continue the relationship – proposes a *duty for the parties to renegotiate the original contract* (Fontaine, 1976; Schmitthoff, 1980; Horn, 1981; Lüttringhaus, 2013; for an overview of the two schools of thought, Nystén-Haarala, 1998; Momberg, 2011).

This paper examines the doctrine of hardship within the soft law instruments of E.U. harmonisation, by identifying their strengths and weaknesses, to ultimately assess whether the *Principles of European Contract Law* (P.E.C.L.)<sup>2</sup> and the *Draft Common Frame of Reference* (D.C.F.R.)<sup>3</sup> represent a real third “school of thought”<sup>4</sup>.

## 2. Hardship under the P.E.C.L.

Article 6:111 of the P.E.C.L. lays down the general principle that “a party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it

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<sup>1</sup> In particular, Schanze expressly describes “two schools of thought”, corresponding to “two fundamental doctrinal reactions to the visible divergence between a relatively stiff “legal” treatment of discharge by court intervention and the relatively liberal treatment of re-negotiation in contracting practice” (Schanze, 1997, p. 156).

<sup>2</sup> The official version of the P.E.C.L., in English and French, has been published in: Lando, & Beale (Eds.) (2000).

<sup>3</sup> For the full text of the D.C.F.R. and the official notes, cf. von Bar, Clive, Schulte-Nölke, Beale, Herre, Huet, Storme, Swann, Varul, Veneziano, & Zoll (Eds.) (2009).

<sup>4</sup> The analysis presented in this paper does not consider: the “UNIDROIT Principles”, which are not aimed to harmonise EU contract law but, more generally, international commercial contracts; the “Acquis Principles”, which are now substantially integrated in the D.C.F.R.; the *Common European Sales Law* (C.E.S.L.), which is limited to contracts of sale and few other types of contracts (e.g. “digital” contracts), without regulating all other long-term relationships. On the recent transfusion of part of the previous “soft law” projects into the “reductive” and “short-sighted” proposal of the C.E.S.L., cf. Castronovo, 2015, 283 ff.; Castronovo, 2013.

receives has diminished”. However, in case of hardship as a result of a change of circumstances, the parties *are bound to enter into negotiations with a view to adapting the contract or terminating it*, if: 1. the change of circumstances occurred after the conclusion of the contract; 2. the change of circumstances could not have been reasonably foreseen at the time of conclusion of the contract, and; 3. the risk of this change would go beyond what can reasonably be expected to be borne by the contracting parties.

Following renegotiation, if the parties reach an agreement to amend the original contract, the problem of hardship is finally overcome.

Conversely, if the parties fail to reach agreement within a reasonable period, the P.E.C.L. provide for the possibility for the court to: 1. *terminate* the contract and determine timelines and terms; 2. *adapt* the original contract to distribute in a just and equitable manner the losses and gains due to the supervening events.

In either case, together with the termination or adaptation of the original contract, the court may award *damages* to be borne by the party that has not fulfilled the duty to renegotiate, by either refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

## **2.1. The duty to renegotiate**

In regulating changes of circumstances, Article 6:111 P.E.C.L. recalls conditions well known to most European legal systems, outlining, at the same time, a particularly complex system of remedies.<sup>5</sup>

In fact, the conditions of hardship, unforeseeability of events at the conclusion of the contract, change of circumstances after the conclusion of the contract and exceedance of a certain threshold of contractual risk are not new, for example, to the Italian, Dutch or German lawyer.

By contrast, the complex remedial system deserves more attention.

In particular, the P.E.C.L. appear to establish a two-level remedial system.

The first level introduces a real *duty for the parties to renegotiate* in order to reach an agreement for either the termination or adaptation of the contract.

Two specific cases of unfulfillment of this obligation are provided: *refusal to negotiate* and *unjustified rupture of negotiations*. In this view, under Article 6:111, c.

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<sup>5</sup> The majority of the EU legal systems knows the same conditions of Article 6:111 PECL (e.g., Paragraph 313 of the German Civil Code, Article 6:258 of the Dutch Civil Code, Article 1467 of the Italian Civil Code, Article 388 of the Greek Civil Code, Article 437 of the Portuguese Civil Code, Paragraphs 936, 1052, 1170a of the Austrian Civil Code and Article 3571 of the Polish Civil Code). Conversely, no specific norm on hardship is provided for in the English, Scottish, Irish, French, Belgian, Czech and Slovak legal systems.

3, P.E.C.L., the party who refuses to negotiate or breaks off negotiations abusively is liable for damages due to the loss suffered by the other<sup>6</sup>.

## 2.2. The powers of the court under the P.E.C.L.

If the parties fail to reach an agreement within a reasonable time, starts the second-level remedy: upon request of the parties, the court may *adapt* or *terminate* the original contract, determining each time the terms of the adaptation or termination of the contractual relationship<sup>7</sup>.

The court is thus vested with *very broad powers* to be exercised under *general criteria*.

Given the overall attempt to continue the contract – as confirmed by the duty to renegotiate –, the adaptation criteria should be considered first.

Specifically, the P.E.C.L. provide that the court may “adapt the contract in order to distribute between the parties in a *just* and *equitable* manner the losses and gains resulting from the change of circumstances”.

The formulation, based on general clauses, allows the court to evaluate all the circumstances of the *specific case* and to distribute each time differently the losses and gains between the parties.

Furthermore, an interesting doctrinal debate emerged about what could be considered “*just and equitable*” *ex art. 6:111 P.E.C.L.*: on the one hand, this expression draws criticism from *common lawyers*, who do not admit any external review of the contractual terms originally agreed upon by the parties (Teubner, 1998; McKendrick, 1999)<sup>8</sup>; on the other hand, the wording used causes the reaction of *civil lawyers*, always ready – especially in recent years – to adapt the contractual agreement by resorting to external factors other than the will of the parties (the so-called “hetero-integration”), e.g. the European common market or the principles of equality, solidarity and other fundamental rights recognized under the Treaty on European Union, the Charter of Nice or the Treaty of Lisbon (M. Barcellona, 2002; M. Barcellona, 2006, 124 ff., 253 ff.; Navarretta, 2005)<sup>9</sup>.

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<sup>6</sup> Art. 6:111 P.E.C.L. is considered, in this sense, as a part of the second “school of thought” (cf. *supra* § 1): see, among others, Schanze, 1997; M. Barcellona, 2006, 209 ff.

<sup>7</sup> According to Mazeaud, 2007, p. 2693, the court’s power to adapt the original contract in the light of supervening circumstances demonstrates that “pour le «législateur européen» le contrat n’est pas seulement la chose des parties, soumis en tant que tel à leur volonté autonome, seule habilitée et apte à anticiper et aménager les risques susceptibles d’intervenir au cours de l’exécution du contrat”.

<sup>8</sup> The concerns of the English lawyers in permitting an external control on the adaptation of the contract other than the will originally expressed by the parties were also recently confirmed by the observations of the Law Society of England and Wales with reference to the doctrine of hardship under the new proposal of the C.E.S.L.: “*The starting point should always be that if a party has undertaken to perform, it should do so. That party has accepted the risk that it may be impeded in its performance. Just because circumstances have changed should not excuse performance. We therefore consider that Article 89 (C.E.S.L.) should be deleted. It is productive of uncertainty and unpredictability of outcome*” (Law Society of England and Wales, 2012, 50, § 284).

<sup>9</sup> For the purposes of this paper, two different methods are combined here for purely expository reasons: one seems to outline an external control *ex fide bona* on the contractual settlement to take account of market values in the contract; the other seems to resort to values such as equality, solidarity

An intermediate position seems to be proposed by those who interpret the norm in the light of the good faith and seek to reach an implicit settlement of the interests based on what the parties themselves, faced with the change of circumstances unforeseen by contract, should have done (the so-called “auto-integration”). In this context, the equitable power of the court to distribute between the parties the consequences of the supervening circumstances must be exercised in compliance with the projection in good faith of the contractual *equilibrium* already reached by the parties on the situation yet to be settled. This position thus seeks to combine the principle of the will of the parties (and, therefore, of party autonomy), highly appreciated by “common lawyers”, and court intervention aimed at adapting the original contract, as favoured by “civil lawyers” (Castronovo, 2001a; Castronovo, 2001b).

Similar considerations (and distinctions) can be made with reference to the other option provided for in Article 6:111 P.E.C.L., i.e. termination of the contract “at a date and on terms to be determined by the court”. In this case, the court is only entrusted with the power to determine the conditions for the termination of the contract without predetermined criteria.

### **3. The evolution of the E.U. “soft law” approach: hardship under the D.C.F.R.**

Article III-1:110 D.C.F.R. opens by stating that “an obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished”.

However, after confirming the general principle on the performance of the obligations, the D.C.F.R. addresses the problem of hardship by granting broad powers to the court.

To cope with the occurrence of hardship as a result of exceptional and unforeseeable events, Article III-1:110 D.C.F.R. provides that, after attempting to reach an agreement in good faith to amend the original contract, the debtor may request the court to either: 1. adapt the contract in order to make the obligation “reasonable” and “equitable” in the light of the supervening circumstances, or 2. terminate the original contract, fixing the date and terms of termination.

#### **3.1. From the duty to renegotiate to renegotiation as a precondition for judicial proceedings**

The most significant innovation introduced by Article III-1:110 D.C.F.R. as compared to Article 6:111 P.E.C.L. undoubtedly relates to renegotiation of the original contract between the parties<sup>10</sup>.

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and fundamental rights (recognised at E.U. level by the Treaty on European Union, the Nice Charter and the Treaty of Lisbon) in the adapted contract. On the former, cf. M. Barcellona, 2002 (and now in M. Barcellona, 2006, 124 ff., 253 ff.). On the latter, cf. Navarretta, 2005.

Similarly, it should be noted that the distinction proposed between common lawyers and civil lawyers is made especially for the sake of exposition, without any pretension to drawing an absolute (and Manichaeian) separation of the representatives of the different legal traditions of the western world. On this, cf. Brownsword, 2006, 53 ff., 69, 111 ff.; Whittaker, Zimmermann, 2000, 15 ff.

<sup>10</sup> As outlined above, the conditions for the application of the rules of the D.C.F.R. basically coincide with those of the P.E.C.L. The only (minor) difference between these two “soft law” instruments has

In particular, it rejects the “first level” of remedies provided for by the P.E.C.L., by removing the obligation for the parties to renegotiate.

Even the editors of the D.C.F.R., in their official notes, emphasize that “*the present Article [...] does not impose an obligation to renegotiate but makes it a requirement for a remedy under the Article that the debtor should have attempted in good faith to achieve a reasonable and equitable adjustment by negotiation*”. In this respect, “*there is no question of anyone being forced to negotiate or being held liable in damages for failing to negotiate*” (von Bar, Clive, Schulte-Nölke, Beale, Herre, Huet, Storme, Swann, Varul, Veneziano, & Zoll, Eds., 2009, p. 713)<sup>11</sup>.

The position of the D.C.F.R. therefore differs from the remedial provisions of the P.E.C.L., as it renders the attempt in good faith to adapt the contract a mere precondition for court proceedings, without providing either a real *general duty to renegotiate* or *special remedies in case of unfulfillment of the obligation*<sup>12</sup>.

### 3.2. The powers of the court under the D.C.F.R.

The provisions of the D.C.F.R. thus mark the transition from a complex two-level system of remedies to a single level.

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been identified in the explicitation of a precondition under Article III-1:110 D.C.F.R. which was already deemed necessary, though implicitly, in Article 6:111 P.E.C.L.: more specifically, it provides that “the change of circumstances must be *exceptional*” (von Bar, Clive, Schulte-Nölke, Beale, Herre, Huet, Storme, Swann, Varul, Veneziano, & Zoll, Eds., 2009, p. 713). The intention was probably to limit the scope of applicability of the norm and, consequently, the power of the court in modifying the contract originally agreed upon by the parties.

<sup>11</sup> In the official notes, with reference to the Unidroit Principles, it is added that: “*The Unidroit Principles (art. 6.2.3.) adopt a similar basic approach but use a slightly different drafting technique. They provide that in case of hardship the disadvantaged party is entitled to request renegotiations and that only if there is a failure to reach an agreement within a reasonable time may the party resort to the court. However, as a matter of drafting there seems to be no need to provide that a party is entitled to request renegotiations. A party to a contract is entitled to request renegotiations at any time*” (von Bar, Clive, Schulte-Nölke, Beale, Herre, Huet, Storme, Swann, Varul, Veneziano, & Zoll, Eds., 2009, p. 713).

<sup>12</sup> In the opposite direction appears to be Article 89 of the recent proposal for a C.E.S.L., which would introduce a duty to renegotiate in case of hardship: “*1. A party must perform its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished. Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract. 2. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may: (a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or (b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court. 3. Paragraphs 1 and 2 apply only if: (a) the change of circumstances occurred after the time when the contract was concluded; (b) the party relying on the change of circumstances did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and (c) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances. 4. For the purpose of paragraphs 2 and 3 a 'court' includes an arbitral tribunal*”. The proposal, which would only apply to few contracts to be performed over a period of time (cf. *supra* § 1, fn. 5), has been heavily criticized, as we already mentioned here (cf. *supra* § 2.2., fn. 9), also by the Law Society of England and Wales.

Nevertheless, while differing with respect to renegotiation of the original contract, both the D.C.F.R. and the P.E.C.L. appear to show a strong continuity in entrusting the court with broad powers in case of hardship.

Like in Article 6:111 P.E.C.L., Article III-1:110 D.C.F.R. enables the court to *adapt* or *terminate* the original contract in case of hardship. However, the inevitable considerations already raised with reference to the P.E.C.L. are applicable here, because, once again, the broad powers granted to the court do not seem to be paralleled by specific criteria for adaptation and termination of the contract.

In particular, Article III-1:110 D.C.F.R. enables the court to amend the contract “in order to make it *reasonable* and *equitable* in the new circumstances”. Worded in a similar way to Article 6:111 P.E.C.L. (“in order to distribute between the parties in a *just* and *equitable* manner the losses and gains resulting from the change of circumstances”), the text of the Article III-1:110 D.C.F.R. substantially recalls the three hypotheses outlined above with reference to the adaptation criteria under the P.E.C.L. (on a position favourable to integrate the original contract with external values other than the parties’ will, Navarretta, 2012; Hesselink, 2008; differently, Eidenmüller, Faust, Grigoleit, Jansen, Wagner, & Zimmermann, 2008; McKendrick, 2013)

Similarly, the criteria for the termination of the contract provided for under the D.C.F.R. make reference – in this case, literally – to the formulation already used in the P.E.C.L. (“at a date and on terms to be determined by the court”); hence, the different cases outlined above with reference to the powers of the court to amend the contract can also apply here.

#### **4. Conclusions**

The analysis of the Article 6:111 P.E.C.L. and of the Article III-1:110 D.C.F.R. seems to suggest a third option in the context of hardship.

The new model represents the expression of a real third school of thought, which differs from both the first, only providing for execution or termination of the contract, and the second, imposing a legal duty for the parties to renegotiate. While encouraging the parties to reach an agreement to amend the originally agreed upon contract, the European “soft law” approach entrusts the court with the power not only to terminate, but also to adapt the contract<sup>13</sup>.

As a result, *very broad judicial powers* are recognised in terms of termination and adaptation of the contract, ensuring greater protection of the debtor who may always choose between termination or adaptation of the contract.

Nevertheless, the combination of the two remedies, placed on the same level, may lead to serious inconsistencies because, by removing any hierarchy and typological distinction in the treatment of contracts with prolonged or deferred performance, it eventually places the onus on the debtor to choose between termination and

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<sup>13</sup> In fact, a precursor of the “third way” of European “soft law” seems to be Article 6:258 of the Dutch Civil Code (1992), which also granted the court, in case of hardship, not only the power to terminate but also to adapt the original contract (Hartkamp, 1992).

adaptation of the contract. An undue sacrifice may thus be imposed on the advantaged party, who would be forced, solely in light of the choice of the other, to either terminate an obligation worthy of being maintained or to bear an excessive economic burden aimed to adapt a contract which would otherwise be terminated<sup>14</sup>.

Finally, as outlined in this paper, both the *Principles of European Contract Law* and the *Draft Common Frame of Reference* propose criteria – based on general clauses and indeterminate notions (such as “equity”/“reasonableness”) – for adaptation and termination of the original contract: a rather lively debate is going on among European lawyers in an attempt to find an interpretative solution able to ensure clear rules for judicial intervention on the originally agreed contract<sup>15</sup>.



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<sup>14</sup> In this perspective, the solution outlined in paragraph 313 of the B.G.B. appears more acceptable. While it allows for the possibility to either terminate or adapt the contract, the paragraph 313 B.G.B. sets up a “hierarchy of contractual remedies” whereby the debtor may only choose to terminate the original contract if an adaptation is not possible or cannot be requested by either party.

<sup>15</sup> In general, on the use – and abuse – of general clauses and undetermined notions in the European contract law and in the E.U. projects for harmonisation, cf., among others, Troiano, 2005; Troiano, 2009; Troiano, 2013; S. Patti, 2012a (also published in S. Patti, 2012b); S. Patti, 2013; Collins, 1994; Piraino, 2014; Piraino, 2015; Hesselink, 2004; Eidenmüller, Faust, Grigoleit, Jansen, Wagner, & Zimmermann, 2008; Busnelli, 2001.

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## *Whaling in the Antarctic and the Power of Public International Law*

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### **Abstract**

The International Convention for the Regulation of Whaling and the associated recent litigation before the International Court of Justice reveal a great deal about the status and power of international law in the 21st Century. Japan's infamous JARPA II whaling programme has been widely criticised as disguised commercial whaling, contrary to the international moratorium on commercial whaling. The ICJ ruled last year that the JARPA II programme was indeed unlawful because the whaling licences involved had not been granted for purposes of scientific research, as demanded by the Convention. The extensive JARPA II programme therefore shows the continued power of local cultural traditions to obstruct the demands of international law. The ICJ judgment, conversely, shows the intensity of review to which the ICJ feels willing to go in deciding whether a specific State has violated its obligations under public international law. The Court engaged in detailed, factually nuanced analysis of the nature of Japan's JARPA II programme in concluding that it was not being undertaken for scientific purposes. The litigation is also testament to the determination of governments and NGOs to ensure the rules of public international law are enforced. Nonetheless, however laudable the aims of the ICJ, there may be grounds to conclude that its interpretation of the Convention was legally flawed and amounted to an improper expansion of the investigative power of international judicial bodies.

Keywords: Conservation, environmental law, Japan, whaling

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## Introduction

“Towards thee I roll, thou all-destroying but unconquering whale;  
to the last I grapple with thee; from hell’s heart I stab at thee; for  
hate’s sake I spit my last breath at thee.”

(The last words of Captain Ahab)

Herman Melville, *Moby-Dick; or, The Whale* (1851)

Admirers of Herman Melville’s *magnum opus* will readily recall the unyielding obsession with which Captain Ahab pursued his vendetta against the titular Whale. The world – and its attitude to cetaceans – has been transformed since the days of men like Ahab, when the oceans crawled with whaling vessels like Melville’s ill-fated *Pequod* and the trade in whale oil played a crucial role in the developed economies. Only a handful of nations now maintain extensive whaling fleets. Japan is one of them. Its allegedly scientific Japanese Whale Research Program under Special Permit in the Antarctic Phase II (JARPA II) has attracted international criticism for many years, and after prolonged litigation the International Court of Justice (ICJ) recently declared it unlawful in light of Japan’s obligations under the International Convention for the Regulation of Whaling (ICRW).

Of course, no-one suggested that Japan’s extensive whaling in the Antarctic was motivated by an Ahabian hatred for cetaceans. But many suspected that the Japanese Government’s long-standing commitment to whaling was (and is) uncompromising and inherently ideological, and in that sense is not so unlike Ahab’s own. The suspicion was that Japan, moved by economic considerations and a belief in its importance to Japanese cultural identity, was ideologically committed to the perpetuation of whaling, and had refused to subordinate this commitment to its obligations under international law.

To talk with precision about the ‘power’ of something as complex, multi-faceted and continuously evolving as public international law is difficult. Even though its power can be felt in many areas of life, answering deep conceptual questions about it is problematic. What is the nature of that power? What is its extent? On whom does it act, and how is it to be justified normatively? It is much easier to give examples of the power of public international law at work than to arrive at any precise and universally agreeable formulations about its nature or impact. Consequently this short paper will limit itself to identifying and reflecting on a few aspects of the power of public international law to which the *Whaling in the Antarctic* case draws our attention.

## The legislative background

Five international treaties could be seen as directly relevant to Japan’s whaling activities in the Antarctic: the United Nations Convention on the Law of the Sea (UNCLOS), the Convention on International Trade in Endangered Species (CITES), the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), the Convention on Biodiversity (CBD) and, most crucially, the International Convention on the Regulation of Whaling itself.<sup>1</sup> In the *Whaling in the Antarctic* litigation, Australia had alleged that Japan was breaching the CBD (specifically Articles 3, 5 and 10(b)) but did not give much in the way of specific facts

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<sup>1</sup> For a broad discussion of the applicability of these several international instruments, see Koyano (2013), 201.

to support these allegations and the ICJ judgment devotes reasoned analysis only to the issue of JARPA II's compliance with the ICRW.

The ICRW came into being in 1946, entering force for Japan in 1951. It created a body – the International Whaling Commission (IWC) – empowered to enact rules for the regulation of the whaling industry which would be appended to the Convention's Schedule and become binding on all States Parties, except those entering formal objections to a specific new regulation. Over time the IWC adopted various prohibitions, such as restrictions on the use of factory whaling vessels, whaling in certain geographic areas (most relevantly in the Southern Ocean Sanctuary) and restrictions on the taking of animals from certain whale species. Ultimately the regulatory framework culminated in the moratorium on all commercial whaling adopted by the IWC in 1982 as Paragraph 10(e) of the ICRW Schedule. Some States Parties objected to the moratorium. Japan too objected but eventually capitulated under strong international pressure, especially from the United States. In 1988 Japan stopped commercial whaling operations, and promptly began an extensive programme of “scientific” whaling, involving the grant of special licences from the Japanese government purporting to authorise the taking of whales for research purposes. Japan has maintained that such licences are permitted under the ICRW by virtue of Article VIII, the first paragraph of which provides that “Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research...”. However, Japan's now infamous JARPA II whaling programme has been widely derided as disguised commercial whaling, outside the scope of Article VIII and therefore contrary to several rules now contained in the Schedule, most crucially the international moratorium on commercial whaling. The ICJ ruled last year that the JARPA II programme was indeed unlawful because the whaling licences involved had not been granted for purposes of scientific research, as demanded by the Convention. The ICRW and the associated recent litigation before the ICJ reveal a great deal about the status and power of international law in the 21st Century.

### **The popular power of public international law**

The *Whaling in the Antarctic* litigation – and the civic action which heralded it – is testament to the determination of people and governments to ensure the rules of public international law are enforced. Despite the high number of important inter-State disputes to which an instrument of international law might be relevant, it remains comparatively rare for one State to seek legal redress against another before the ICJ. Since only very weighty or high-profile issues tend to be litigated in the leading international fora, every case that eventually finds itself before tribunals such as the ICJ is replete with useful lessons about the way international law can be used to resolve States' disputes and regulate international conduct. *Whaling in the Antarctic* is part of a new trend in the international case law, particularly the jurisprudence of the ICJ. The traditional kind of dispute before the ICJ involves a defendant State having allegedly breached international obligations owed specifically to the plaintiff State. Such obligations are generally owed on the basis of reciprocity – a model conceptually aligned to a private law contract, in which two parties are linked by a voluntarily entered web of bilateral rights and obligations. Alternatively, States sometimes allege that another has acted contrary to international law in a way which has caused direct harm to the complainant State or its interests. The *Whaling in the*

*Antarctic* scenario is of another kind. Here, Australia and New Zealand alleged that Japan was failing to live up to the responsibilities it had undertaken as part of a global regulatory framework. It is hard to conclude that Japan had breached public international legal duties *to Australia*, or that Australia (particularly) had been wronged by Japan's actions. In the litigation, Japan did not try to argue that Australia – not being an injured State – had no standing to litigate the whaling issue before the ICJ. All parties seem to have assumed that Australia had standing to bring the complaint that Japan had breached an international legal obligation, even though Australia was not particularly affected by Japan's actions.

The case is therefore part of a previously identified trend towards a more communitarian understanding of the enforcement of certain international legal obligations. This is a move away from a contractarian theory towards a conception of international legal norms as a universally binding nexus of rules, and the recognition of an international public interest in allowing States freely to police each other's duties in the international courts. States like Australia seem to be assuming a new role of enforcing international legal duties even when not directly harmed by their violation. The strength of that commitment is demonstrated by Australia's sustained evidence-gathering missions concerning Japan's actions in the Antarctic. The Australian government engaged in lengthy observation of the whaling programmes using its customs vessels, specifically in order to gather evidence for eventual use in international litigation. The newer conception looks less like the private law of contract and more like public regulatory law, akin to the way governments domestically regulate all manner of industries like banking, internet commerce or private sector railways. It amounts to an intensification of the publicness of public international law, resonating more closely with domestic criminal or administrative law, breach of which is modelled as a wrong against the community at large.

The facts surrounding JARPA II and preceding the litigation reveals the power of public international law to enter the popular consciousness and spur to action private citizens – mostly acting through NGOs – in an effort to bring about compliance with those international legal norms. The JARPA and JARPA II programmes led to concerted NGO action for many years. Some groups undertook traditional forms of protest (awareness-raising, lobbying, organising boycotts, etc.) in an attempt to encourage adherence to the existing legal rules in ways undoubtedly legal.<sup>2</sup> Other groups went significantly further. Most famously, the Sea Shepherd Conservation Society began a campaign of disruption to the whaling operations, in a series of acts which has been described as “either borderline- or blatantly illegal”.<sup>3</sup> The Sea Shepherds' more extreme tactics included the ramming of whaling vessels, sabotaging propellers, and using lasers (temporarily) to blind whaling crew members. Such acts may well constitute international piracy,<sup>4</sup> or at least breach certain other international legal rules.<sup>5</sup>

Despite the success of the peaceful lobbying in raising global awareness of the issue, it was the vigilante approach which first led to a major – if impermanent – victory for the conservationist cause. The Sea Shepherds' sabotage operations famously thwarted

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<sup>2</sup> Moffa (2012), 207.

<sup>3</sup> *Ibid* at 203.

<sup>4</sup> The United Nations Convention on the Law of the Sea (UNCLOS), Article 101 defines as piracy “any illegal acts of violence...committed for private ends by the crew...of a private ship...and directed on the high seas, against another ship...”.

<sup>5</sup> For example, Article 1(b) of the United Nations Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

the JARPA II fleet's operations in 2011, when the Japanese Minister for Agriculture ordered it home, still well short of catch quotas. It has correctly been noted that using tactics which are themselves in probable breach of international legal rules to enforce the norms of public international law when a private non-State actor believes they have been violated has a curious relationship with the project of promoting adherence to international law.<sup>6</sup>

### **The ICRW in popular consciousness**

The Preamble of the ICRW notes that it has been agreed by the represented governments in order to “[safeguard] for future generations the great natural resources represented by the whale stocks”, believing that “increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources” and that the new international regulatory framework would “provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”. The litigation exposed how instruments of public international law can evolve in the consciousness of the global public and of their States Parties, taking on in the popular imagination meanings unintended by the original signatories. Japan has correctly identified an ideological divide between those who aspire to sustainable commercial whaling and those who oppose it and see the moratorium as having effectively brought it to a permanent end, regardless of eventual recoveries in whale populations.

### **The limitations in harmonising global norms: cultural resistance**

The extensive JARPA II programme shows the continued power of local cultural traditions to obstruct the demands of international law. Although Japan lost the case before the ICJ, the fact that such litigation was necessary at all reveals the difficulty in creating and enforcing globally accepted uniform norms (which is, after all, the fundamental *raison d'être* of public international law). The Japanese government's attitude to its post-moratorium whaling projects, and the litigation in question, has been characterised by recalcitrance and a seemingly genuine belief that the whole dispute is caused by foreign cultural imperialism.

Despite the shortcomings in the reasoning of the ICJ, it is difficult to have much sympathy for what some might see as the Japanese government's victim-complex. The notion that the crux of the dispute is cultural is only true in a remote sense. Although the decision to adopt and maintain the commercial whaling moratorium obviously has a moral and cultural dimension, the crux of the criticism directed at Japan over its JARPA and JARPA II programmes has always been its alleged attempts cynically to circumvent its positive international legal obligations. The desirability of whaling and its cultural worth is a distinct question, logically prior to the debate about whether to ban it under international law. Japan cannot feasibly agree to an international regulatory framework which involves a moratorium on commercial whaling and then complain that to be held to that obligation is due to disagreement about the moral worth of whaling. The dispute is not “is JARPA II moral?” (although it is clear that its international opponents think it very immoral indeed), but “is JARPA II lawful?”.

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<sup>6</sup> *Supra*, n 3 at 209.

## The legal power of public international law

Perhaps most importantly, the ICJ judgment shows the intensity of review to which the ICJ may be willing to go in deciding whether a specific State has violated its obligations under public international law. The ICJ engaged in detailed, factually nuanced analysis of the specific features of Japan's JARPA II programme in concluding that it was not being undertaken for scientific purposes. The reasoning process by which the ICJ reached this conclusion was somewhat convoluted and deserves close analysis.

The ICJ held that the question of whether JARPA II constituted “scientific research” and the question of whether the licences on which the programme depended were granted “for purposes” of scientific research were separable and cumulative questions. It ultimately held that JARPA II did involve objectives and activities that could broadly be considered scientific research, but nonetheless the licences were not granted “for purposes of scientific research” within the meaning of Article VIII, ICRW.

However desirable the cessation of Japan's whaling operations in the Antarctic, the reasoning of the ICJ should be rejected. Its interpretation of the ICRW was unduly complex and improperly expanded the reviewing power of the ICJ. The ICJ's detailed analysis of the specifics of JARPA II was invited by its approach to the meaning of “for purposes of scientific research”. There are broadly two rival meanings which the ICJ could have adopted. These can be termed *purpose-as-motive* and *purpose-as-conduciveness*.

Purpose-as-motive would involve a subjective test, examining the internal subjective goals of the Japanese government in awarding the JARPA II licences, and the reasons which in fact moved them to such action. It is in this sense that the child uses the term “purpose”, when she protests to her parents that she did not break their favourite vase “on purpose”. So too the easily misunderstood academic when he reminds his audience that it is “not his purpose” morally to defend the conduct of the Japanese government (merely to critique the reasoning on which it was judged illegal). On this approach, the only grounds for impugning the grant of the JARPA II licences would be bad faith, involving a finding that the Japanese government's stated motive (scientific research) did not match its true motive (commercial whaling). This would be the least juridically inventive ground on which to declare the JARPA II licences unlawful. It is uncontentious that States are bound by customary international law to abide by Treaty obligations in good faith, a duty now codified in Article 26 of the Vienna Convention on the Law of Treaties (1969). Australia had in fact argued that Japan was acting in bad faith. Japan considered this tantamount to an allegation that “Japan has lied...systematically, as a matter of State policy for almost 30 years”.<sup>7</sup> This is indeed a serious allegation for one State to levy against another (although many in the international community believe it to be true). As Judge Owada made clear in his dissenting opinion, an allegation of bad faith must be proved as a fact by the party making it using legally admissible and compelling evidence. The bad faith must also be shown to be attributable to the State of Japan itself, rather than merely to specific private actors. In any case, the ICJ did not decide the case on bad faith grounds,

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<sup>7</sup> Submissions on behalf of Japan, per Professor Payam Akhavan.

rejecting the purpose-as-motive approach and accepting as a fact that Japan was genuinely awarding the JARPA II licences in order to promote scientific research.

In sharp contrast to purpose-as-motive stands what can be termed purpose-as-conduciveness. It is in this sense that we speak of “all-purpose flour”, or a “multi-purpose gymnasium”. It was this reading that the ICJ adopted, holding that “whether the killing...of whales...is for purposes of scientific research cannot depend simply on [Japan's] perception.”<sup>8</sup> Rather, the ICJ held that an objective test was necessary.

Judicial review of executive determinations such as the grant of JARPA II licences can take a variety of approaches, depending on the intensity of review appropriate in the circumstances. Some conventionally recognised approaches include checking only the quality of the government's decision-making process (including checking that the proper factors were considered and any improper ones were excluded). The ICJ judgment leaves it unclear which degree of intensiveness the ICJ favoured. At one stage, the majority held that Japan had acted unreasonably in failing to take into consideration the suitability of non-lethal alternatives for collecting data.<sup>9</sup> It is clear, however, that the ICJ did not confine itself to this kind of decision-making procedural review. Nor was it content with assessing whether the decision to award the licences was one a rational and competent government could make (so-called “rationality review”). Instead the ICJ delved into the substance of JARPA II and decided for itself whether JARPA II's “design and implementation are *reasonable* in relation to achieving its stated objectives.”<sup>10</sup> The ICJ found against Japan on this question, on examining areas such as the stated sample sizes for various whale species.

Once the ICJ rejected the purpose-as-motive approach and opted for a conduciveness understanding of “purpose”, *Whaling in the Antarctic* necessarily became a case about who gets to decide whether a specific national programme is reasonably conducive to the scientific research it purports to promote. New Zealand had complained that “Japan has sought to...accord for itself the right to decide whether a programme of whaling is for [purposes of scientific research]”.<sup>11</sup> According to Japan, such a complaint “implicitly requests the Court to substitute its own judgment...as to the character of the special permits”. In Japan's submission, “[t]he Court does not have that power”.<sup>12</sup> The ICJ did not agree, ruling that the ICJ could reject Japan's view of JARPA II's suitability for its research goals and decide the issue for itself anew.

The decision has been applauded from many directions for striking a wise balance between policing States' conduct and deferring to national discretion in areas of scientific judgment.<sup>13</sup> However, whilst the ICJ repeatedly insisted it would not engage with the issue of scientific merit, a close reading of the majority judgment suggests the ICJ did not stick to the strict division it claims to have respected between legal and scientific questions. The ICJ declined the invitation conclusively to define “scientific research”,<sup>14</sup> and expressed no stance on the value of JARPA II's research goals. Nonetheless, in deciding whether the JARPA II licences were for purposes of scientific research, the ICJ essentially vetted the scientific quality of the programme's

<sup>8</sup> Judgment of the International Court of Justice at [61].

<sup>9</sup> *Ibid* at [137-144].

<sup>10</sup> *Ibid* at [67] (emphasis added).

<sup>11</sup> *Ibid* at [29].

<sup>12</sup> *Ibid* at [27].

<sup>13</sup> Plant (2015), 43.

<sup>14</sup> *Supra*, n 8 at [73-86].

design. The enquiries in which the ICJ engaged would be hard to distinguish from an enquiry into whether JARPA II constituted “good science”. According to the ICJ, its manifold shortcomings did not merely make JARPA II a bad scientific programme, it made it a programme that could not claim to be “for purposes of” scientific research at all.

The ICJ’s separation of the Article VIII language into two distinct and cumulative stages of enquiry (whether there was “scientific research” and whether the permits were granted “for the purposes” of scientific research) is curiously convoluted, introducing an artificial complexity into the ordinary meaning of the language. It is tempting to see this as a cunning interpretive technique, yielding a convenient way of declaring JARPA II unlawful without directly ruling Japan to have been acting in bad faith and lying about its true subjective motivations to the international community.

## Conclusion

The government of Japan has expressed disappointment that the ICJ held the JARPA II licences to be outside the scope of Article VIII.<sup>15</sup> Nonetheless it has agreed to “abide by the Judgment...as a State that places a great importance on the international legal order”.<sup>16</sup> That does not, however, mean Japan has relinquished its designs on the cetacean inhabitants of the Southern Ocean. Instead Japan will “consider [its] concrete future course of actions carefully, upon studying what is stated in the Judgment.”<sup>17</sup> In essence, Japan plans to redesign its whaling programme to satisfy the deficiencies which the ICJ concluded disqualified its permits from being for purposes of scientific research.

Public international law is powerful, and that power may well be growing. It is also overwhelmingly a force for good in the world today. Nonetheless we must ensure we keep its power in the right place, namely in the treaties which are agreed between sovereign States after extensive negotiation and compromise. When the language of the treaties is faithfully applied and not stretched to provide a counter-intuitively high level of judicial oversight, there will be times when cynical or suspect actions by States slip through the regulatory net. Nonetheless, there is a realistic prospect that such slippage will lead eventually to a tightening of that easily-penetrated net, prompted perhaps by the large-scale lobbying and awareness-raising done by concerned citizens' groups and NGOs. If such changes are brought about by proper amendment of the actual language of the treaties, power will be kept in the hands of States and not in the hands of judges with little accountability to the global citizenry.<sup>18</sup>

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<sup>15</sup> *Statement of the Chief Cabinet Secretary of the Government of Japan*, March 31 2014.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Some of the arguments put forward in their embryonic state in this short paper will be presented in their mature form in a full-length journal article in the near future. The author will be happy to receive any comments or criticisms in response to this short preliminary work. A contact email address follows the list of references overleaf.

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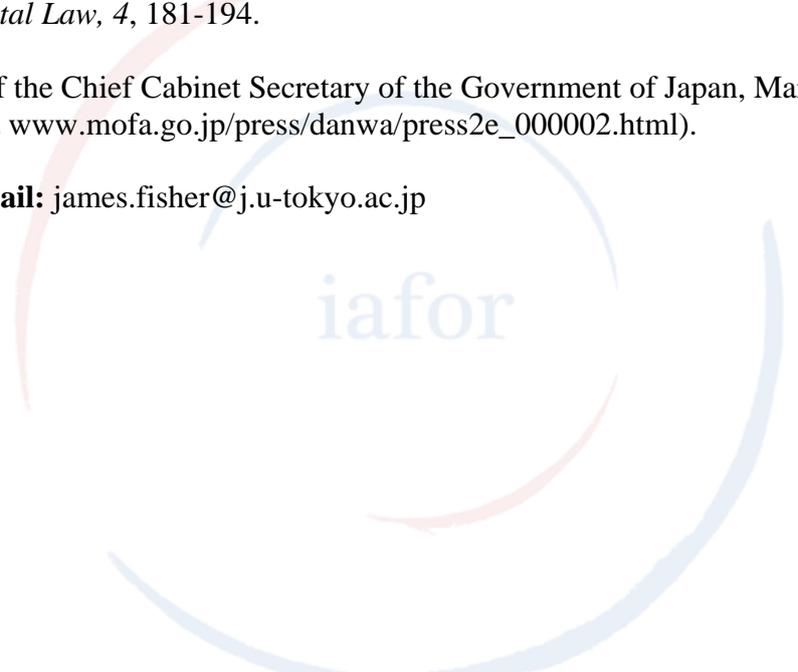
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