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BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *BRICS Law Journal* is the first peer-reviewed academic legal journal on BRICS cooperation. It is a platform for relevant comparative research and legal development not only in and between the BRICS countries themselves but also between those countries and others. The Journal is an open forum for legal scholars and practitioners to reflect on issues that are relevant to the BRICS and internationally significant. Prospective authors who are involved in relevant legal research, legal writing and legal development are, therefore, the main source of potential contributions.

It is published in English and appears two times per year. All articles are subject to professional editing by native English speaking legal scholars.

Notes for Contributors

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and submitted in English. BRICS LJ doesn't accept translations of original articles prepared not in English. The BRICS LJ welcomes qualified scholars, but also accepts serious works of Ph.D. students and practicing lawyers.

Manuscripts should be submitted electronically via the website *www.bricslawjournal.com*. Articles will be subjected to a process of peer review. Contributors will be notified of the results of the initial review process within a period of two months.

Citations must conform to the *Bluebook: A Uniform System of Citation*.

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CHIEF EDITOR'S NOTE ON LEGAL EDUCATION IN BRICS COUNTRIES

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Education is one of the most conservative spheres of life. It carries out not only its direct functions, but also acts as an element of any public contract. Sharp changes can affect the balance of public relations. Legal education in this context is of particular importance. Through most of world's political and public leaders it has a direct bearing on society, state, law, legal and other social regulators.

Strangely enough, these problems are typical not only of Russia. Talk of crisis in legal education resounds in many countries, editorials with significant headings like 'Legal Education in Crisis' appear both in Europe, and in America (*e.g.*, N.Y. Times, Nov. 26, 2011, at A18). Moreover, it is not only the Russian President who deals with all problems 'hands on,' including the problems of legal education. Two years ago, Barack Obama personally offered such radical measures that it almost turned the whole legal academic community in the USA against him (N.Y. Times, Sep. 20, 2013, at A16).

Teachers and students around the world feel changes, the active reform and revision of traditions and the settled techniques. Former approaches do not meet the current requirements, and now a transformation is under way. It shows the state of transition of the higher law school, a search for its new mission, place and role in a changing world. In different countries this process occurs differently.

It is important to consider domestic problems while taking into account universal changes. It is obviously wrong to deny the Russian origin and character of many problems, so the proposed measures for solving those problems also have to consider national features. A universal model for the improvement of the educational system is unlikely to exist.

In this situation, the cooperation prospects in the field of legal education in BRICS countries seem to be interesting. The economic and political *rapprochement*

of the BRICS countries can inevitably lead to cooperation in the fields of culture and education. In recent years, some events have attested to the beginning of a new stage of *rapprochement* of the BRICS countries in the field of education. Firstly, some declarations on cooperation in the field of education were adopted. It is necessary to allocate separately the Fortaleza Declaration (Brazil, July 15, 2014). Secondly, there is a movement arising from desires, from needs. In particular, the ratings of the BRICS countries' universities (*e.g.*, QS University Rankings) are remarkable. It is not the ranking of universities itself that is important, but the fact that the international academic community is starting to take the educational integration of the BRICS countries seriously. It testifies that it is not simply a random group of states, but that these states are connected by common features, including the ones in education.

Despite a considerable desire, both on a political and on an academic level, to establish closer connections in the field of education in BRICS countries, there are some problems which complicate it.

First of all, the language. It is obvious that cooperation in the BRICS countries can be effective only in English, as it is the language of international cooperation at the moment. The problem is that this language is an official language only in India and in the Republic of South Africa, as well as in part of China, in the territory of Hong Kong. Legal higher education institutions of these states carry out educational activities in English. However, in other BRICS countries it can cause difficulties due to the non-prevalence of English. At the moment, the only decision in this regard seems to be the development of educational programs in English in Russia, Brazil and China.

Second, there is the geographical remoteness. Although in the era of online communications it is not a key problem, nevertheless, this situation complicates cooperation in certain cases. The only decision here seems to be the development of remote forms of cooperation.

Third, there is a commitment to various educational models. Whereas Brazil, Russia and part of China (Continental China) favor the European continental educational model, the Republic of South Africa and India favor the Anglo-Saxon model. In relation to law, it means that in Brazil, Russia and Continental China, a five-year form of education has taken place historically, while in the Republic of South Africa and India – 3+2. Of course, now there is a rapprochement of both educational models, and the model 3+2 (or 4+2) works everywhere, nevertheless the 'historical memory' of the academic community still persists.

Fourth, there is a variety of legal models and systems in the BRICS countries. When the legal systems are essentially different, some forms of cooperation are difficult. For example, the issuing of 'double' diplomas is almost impossible due to the difference in the legislation. But it should not be a reason to restrict cooperation, which is necessary in the sphere of scientific research, as much as in other forms of educational activity.

Despite the existence of certain potential obstacles, cooperation in the sphere of legal education between the BRICS countries has a high development potential. However, the main problem now lies not at the interstate level where such cooperation has been given the 'green' light, but at the interuniversity level where such cooperation is minimal. The existing interstate declarations and agreements are not realized to their fullest. It is necessary to fulfill them with real cooperation between concrete higher education institutions. There is huge cooperation between the Russian and Chinese universities. However such contacts have a 'pre-BRICS' history (*e.g.*, the agreement between Lomonosov Moscow State University and Beijing University). The Forum of Rectors of the Russian and Chinese universities takes place periodically. A rather large number of Chinese students gets legal education in Russia. But such cooperation between other countries is minimal. It is important to develop both the academic mobility and traditional forms of cooperation, such as summer schools, double diplomas and so forth. Joint scientific projects, project groups and such like are necessary. By the way, the *BRICS Law Journal* is one of the similar projects uniting the legal professorate. It is focused on the implementation of joint projects, on the rapprochement of legal positions. In some countries, BRICS educational centers are being created now (*e.g.*, at Fudan University (China) and Lomonosov Moscow State University (Russia)). There are interstate universities. An example of these is the Russian-Chinese University, which is currently being established. The foundation of a BRICS University seems expedient.

In general, the solution of two key problems in the sphere of cooperation in the field of legal education is currently required: 1) to move on from bilateral to multilateral cooperation, to involve all BRICS countries; 2) to move on from declarations to real cooperation, from interstate interaction to interuniversity contacts.

ARTICLES

SYSTEMATIZATION OF LAW: THE BRICS CONTEXT AND BEYOND

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The present paper deals with the theoretical question of how can be warranted unity of legal system in the perspective of building up a new legal order of the BRICS. The author draws on the contemporary theories considering various aspects of explanation and construction of law as of a logically united system. Among such aspects are logical unity of legal propositions, epistemological unity of the phenomena unified under the term 'law,' factual unity of societal regulation, axiological unity of a hierarchy of legal values, procedural unity of legal reasoning, synergetic unison. It is asserted that the idea of unity of law is not something conceptually monolithic and allows for different readings, none of which can claim to be exhaustive. The author suggests that the BRICS does not need follow the track of systematization of the legislation of the Member States and that creating agglomerations of legal texts from different legal orders of the Member States is an issue not for politician but rather for legal scholars who can construct and reconstruct legal texts, jointing and disjointing them in the view of practical needs of amelioration of legal technique.

Keywords: systematization; unity of law; coherence; legal system; legal order; the BRICS; legal reasoning.

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The new geopolitical union of the BRICS is in the process of formation, and along with economical and political integration this union also faces a possibility of integration of the legal systems of member countries. This integration can follow very different paths, from the creation of a supranational legal order (similar to that which is currently forming in the European Union, so-called European law) to the simple

harmonization of legal texts that is carried out in many contemporary international organisations. We cannot predict for sure, which path will be taken by the BRICS and, given this variability of developments, some general remarks shall be made about how law can be organized in such international pools as the BRICS.

Putatively, we have two paradigmatic variants of the organisation of law in regional unions which are represented, correspondingly, by the political and legal integration within the EU and by such economic communities as the ACEAN, the MERCOSUR or the Eurasian Economic Union. These two variants lead to different results with regard to the systematization of the law. In the first case, we have a new legal system whose relationship with the systems of the Member States suggests an analogy with the relations between the federal and regional law in federal states such as the USA or Brazil. This analogy is only reinforced due to the insistence of the EU structures that constantly remind the national states of the supremacy of European law, even if leaving a loophole for maintaining partial autonomy – margin of appreciation. Loose models of legal integration in economic unions, on the contrary, do not generally require any systematization of legal texts or instruments, and suggest, at best, only the harmonization of legislation of Member States without any pretension to build an integral and coherent body of legal acts and regulations.

The first model seems not to be apt for the BRICS from the perspective of the great cultural and political differences between the member-countries that, at least currently, are insurmountable.[1] The second model does not allow the realization of the ambitious goals of this geopolitical union that explicitly claims to be something more than an economical community. In this second aspect, it is sometimes claimed that the laws of the BRICS countries shall be systemized and that a new system of legal regulation needs to be established, partly supplanting the existing international (the WTO, *etc.*) and national regulations.[2] In the following lines, we will deal with the question which is posed in an abstract and in a purely theoretical way but nonetheless has practical implications as far as it concerns the discussions about further legal integration of the BRICS. Our enterprise here is based on the methodology elaborated by the two prominent Argentinean authors, Carlos Alchourrón and Eugenio Bulygin, which is also symbolic in the light of the possible adhesion of Argentina to the BRICS.

By systematicity of law one can understand the tendency, in legal reasoning and legal parlance, to describe law as a whole. This tendency seems to be omnipresent in legal thinking. The question of the congruence between this image of the wholeness of law and the degree of coherence of the social practices we call law is a special issue

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[1] Michele Carducci & Anna S. Bruno, *The BRICS Countries As a Legal Dynamic Network and the Multilevel 'Hard' EU Regional Structure – a Comparative Survey*, 4(1) Int'l J. Pub. L. & Pol'y (2014), available at <http://www.inderscienceonline.com/doi/pdf/10.1504/IJPLAP.2014.057882> (accessed Aug. 5, 2015). doi:10.1504/IJPLAP.2014.057882

[2] William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56(1) Harv. Int'l L.J. (2015); Eduardo A. Baistrocchi, *The International Tax Regime and the BRIC World: Elements for a Theory*, 33(4) Oxford J. Legal Stud. (2013). doi:10.1093/ojls/gqt012

which can be considered from different standpoints (different truth theories). The naturalist inclination to see world and society as a whole played an important role in various philosophical doctrines (from antiquity to modernity and postmodern), and this inclination was, and still is, also one of the major incentives of legal thinking. For the purposes of this analysis, 'unity of law' will be referred to as coextensive with such terms as 'coherence,' 'systematicity,' or 'integrity' of law. At the same time, this term should be differentiated from the term 'order' which, according to Kelsen, denotes a chain of competences or a recursive description of the validity of law.[3] The connection between the validity of law and its axiological unity was quite often drawn by legal philosophers (to recall Plato or Aquinas), but this connection is not necessary. A rule of law can be a valid norm only if it is a part of a valid legal order, but its validity is not affected in the case where a norm collides with other norms of this legal order.

In any case, the idea of the unity of law is not something conceptually monolithic and allows for different readings. In the history of legal and social philosophy, it used to convey various thoughts and inspirations: the logical unity of legal propositions,[4] the epistemological unity of the phenomena unified under the term 'law,'[5] the factual unity of societal regulation,[6] the axiological unity of a hierarchy of legal values,[7] the procedural unity of legal reasoning,[8] synergetic unison, *etc.* Law as an institutionalized entity does not necessarily appear as a monolithic unity but might be better thought of as complex interweaving layers of social and intellectual realities and practices. A fundamental problem lies in how to identify unifying elements that would make it possible to speak of a legal order or of a legal system. The classical reply according to which they are delimited by the state or by another source of validity of legal rules (anything is a part of the system if it stems from the will of state, from the precepts of practical reason, and so on) turns out to be circular, as legal is defined through legal. Considering that state and law in certain doctrines like that of Kelsen can be thought of as interdefinable, and this is true also for non-positivist doctrine where law is finally defined through natural, reasonable, just law.

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[3] Another criterion (of 'momentary' legal systems and 'non-momentary' legal order) was proposed by Alchourrón-Bulygin (*see, e.g.,* Eugenio Bulygin, *Time and Validity*, in: 2 Deontic Logic, Computational Linguistics and Legal Information Systems 65 (Antonio A. Martino, ed.) (Elsevier Science Ltd. 1982)).

[4] Carlos E. Alchourrón & Eugenio Bulygin, Normative Systems (Springer 1971); The Logic of Legal Requirements: Essays on Defeasibility (Jordi F. Beltrán & Giovanni B. Ratti, eds.) (Oxford University Press 2012).

[5] *See, e.g.,* Gunter Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23(5) Law & Soc'y Rev. (1989), available at <http://papers.ssrn.com/abstract_id=896502> (accessed Aug. 5, 2015).

[6] *See, e.g.,* Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 Hastings L.J. 805 (1987), available at <http://www.soc.ucsb.edu/ct/pages/JWM/Syllabi/Bourdieu/ForceofLaw.pdf> (accessed Aug. 5, 2015).

[7] *See, e.g.,* Edward J. Furton, *Restoring the Hierarchy of Values to Thomistic Natural Law*, in: 39(1) Am. J. Juris. (1994), available at <http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1195&context=ajj> (accessed Aug. 5, 2015).

[8] Julius Stone, Legal System and Lawyers' Reasonings (Stanford University Press 1964).

The argument of coherence (system or community are defined by coherence of regulation, discourse, law-enforcement, *etc.*) is also circular, as coherence itself should be redefined. Epistemic, constitutive and other types of coherence can be based on different criteria, which can eventually conflict with one another. There can be nothing unexpected if the epistemic coherence of the system can be confronted with the narrative coherence (MacCormick), and so on. In any case, 'coherence' is just a softer version of 'unity' and does not change anything analytically when dealing with the question 'What is law as a whole?' The term of systematicity is not successful as even its proponent, Jeremy Waldron characterizes it as 'a barbaric term' which finally 'refers to the fact that an operation performed on one member of the set will have an impact on other members too, and on their relations with one another.'[9] In this light, one had better use the term of interdependence and rather avoid ambiguity when explaining the integrity of law: referring to the famous example of Jerome Frank, there can be an impact of what the judge ate for breakfast on what he adjudicated later in the morning, but a breakfast, a judge's stomach and judicial decisions should hardly be described as parts of the same system.

As a starting point for the analysis, we can accept the hypothesis that a mass of legal norms (sentences, propositions, principles . . .) is not united or coordinated *per se*. In order to conceive it as if it were united, coordinated, balanced, one has to postulate an organism (a being, a mechanism . . .) capable of making a system out of this mass. It can be the notorious will of state, nature or any other supreme being which cannot be thought of in the terms of positive science. Seemingly, law does not appear as a function of someone's will – it can, in certain regards, be true for particular (general or individual) norms but not for all the norms (propositions, principles and other elements) which constitute a legal order, as far as no legal order consists of only one actor capable of producing, by his will, all the norms and especially all the sequences from these norms. It can be argued that law is a function of the wills of several actors; this argumentation sounds better but is not suitable to justify coherence, as a multitude of particular wills does not constitute unity, a system . . .

Another approach is that of the unity of cognition, or of epistemic coherence. This approach faces the same obstacles as the unity of will. If there is no such being capable of objective perception and thus of construction of legal reality as a whole, then we have a multitude of rational beings, each of which perceives law independently. We cannot exclude that these beings can reach conventions, to agree on how to perceive law and to explain it. This is what lawyers are, in fact, doing in each legal order. But none of them can pretend to look at law from the point of view of God's Eye (if referring to the idea of Hillary Putnam that we are unable to survey the world from the vantage point of an all-knowing supreme being).[10] Even if we imagine a being able to construct a consistent and faultless system of law, this system will represent the unity of his cognition, but not of law. Anyhow, few would argue that law is a matter only of

[9] Jeremy Waldron, *'Transcendental Nonsense' and System in the Law*, 100 Colum. L. Rev. 16, 19 (fn. 14), available at <http://emoglen.law.columbia.edu/persp/waldron-cohen.pdf> (accessed Aug. 5, 2015).

[10] Hilary Putnam, Reason, Truth and History 41 ff. (Cambridge University Press 1981).

cognition: in this way or another, legal rules are imposed by human (superhuman, in natural-law doctrines) will on other human wills, so that a coherent explanation of law through cognition cannot be reduced only to analysis of pure reason and inevitably leads to practical reason combining both will and reason. In this perspective, the idea of law as a mental unity (integrity of practical reason) can be considered in the same vein as the arguments about the unity of law as a function of will.

One can try to find the sources of the presumed unity in certain characteristics which are common to all legislative rules and norms and which can be discovered also in the principles, values, and ideas implicitly present in law (such as human rights, equity, and so on). It could be justice, as in the traditional natural-law philosophy, or societal cohesion, or discursive unity of legal argumentation. To describe this dimension of law, lawyers sometimes use the term 'system' and speak of the 'systematicity' of law. It is suggested by some authors (Dworkin, Fuller, Alexy and others) that possible defects in law (inconsistent, redundant, ambiguous norms, gaps in law) do not refute the systematicity of law, as there are policies or principles deductible from the idea of law (to wit: some kind of objective ethical values underpinning the legal regulation). Particularly for Dworkin, it meant that there are no gaps in law which is an entire block of moral reasoning which a judge is entitled to rely on when deciding a case – this block being labelled as the empire of law.[11] Thus, law is backed by the social practice of law as a whole, which constitutes the original being interpreted in the best light.[12] This presumption implies that law is based on the common good, on the will of a divinity, or on other transcendental sources of its integrity; that law is a 'system' corresponds to the thesis of unity of the Universe (law as a part of the world order retranslates all the properties of this world order, including systematicity) which was referred to by Plato and other ancient thinkers to substantiate unity of law. In the last resort, various arguments about 'one right answer,' 'correctness,' 'moral coherence' are interconnected with this 'systematic' view of law.[13]

Without any doubt, most legal actors (judges, lawyers, lawmakers, *etc.*) believe in the unity of law – otherwise their attempts to fill in the gaps in law, to introduce new norms, to eliminate inconsistencies from law would be devoid of sense. At the same time, positivists, generally, consider law as a field of experience, as a variety of diverse practices loosely arranged by certain societal authorities. As a means of

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[11] Ronald Dworkin, Law's Empire (Harvard University Press 1986), available at <http://www.filosoficas.unam.mx/~cruzparc/empire.pdf> (accessed Aug. 5, 2015).

[12] *Id.* at 87–88. In the same vein, one can cite his idea of 'law as integrity' which is designed to 'instruct judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified . . .' (*id.* at 225).

[13] Remarkably, MacCormick stresses that coherence in law is a function of the unity of principles: the coherence of a set of legal norms consists in the fact that they are the realization of some common values or the fulfilling of some common principles (Neil MacCormick, *Coherence in Legal Justification*, in Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science, Lund, Sweden, December 11–14, 1983 (= 176 Synthese Library) 235 (Alexander Peczenik et al., eds.) (D. Reidel Pub. Co. 1984)). A similar point was made also by Raz (Joseph Raz, *The Relevance of Coherence*, in: Joseph Raz, Ethics in Public Domain: Essays in the Morality of Law and Politics (Clarendon Press 1994) doi:10.1093/acprof:oso/9780198260691.003.0013).

adjustment to ever changing political conditions, these practices are contingent and likely to be transient and inconsistent. A lawyer's job is to subject these practices to systematic organization within the framework of rationally ordered, unified normative knowledge.[14] In this regard, one could suggest, along with Kripke, that our interpretations are correct insomuch as they agree with the interpretations given by other members of this interpretative community (lawyers and their doctrine in this case).[15] This motive was, in a certain sense, central for Kelsen who believed that a science of law constructs law as its own object. Hart's conception, along with some important sociological elements, translates the same idea: the task of legal philosophy is to organize its object (law) around some pivotal axes (rules of recognition, change, adjudication, *etc.*). Nonetheless, it is possible to reconcile the empirical reality of intellectual attitudes with the factual diversity and heterogeneity of this reality. As Alchourrón and Bulygin wisely suggest: 'There is nothing paradoxical about a consistent description of an inconsistent normative system.'[16]

There are at least two insights that must be preserved and articulated among the various approaches to law. The first is that law is an intentional entity, or, to put it differently, an intellectual artefact. The second is this: the social and institutional aspects of law resist a purely mental account of it. A satisfying picture of the nature of law cannot drop either of the two.

We are no longer to attribute to law another meaning of the term 'system' which usually refers to something which is consistent, full, gapless, and irredundant. As follows from Gödel's first theorem, any consistent effective formal system is incomplete. Adopting this point of view, there is nothing contradictory about thinking of a set of norms as of a 'system,' stripping this term of the properties usually attributed to it (such as completeness, consistency . . .).[17] We then have a 'system(s) of law' which is (are) only relatively integrated and identified.[18] This could be a point of tangency where legal theory and logic can effectively work together. This approach seems to be quite reconcilable with the basic idea of 'Normative Systems' by Bulygin-Alchourrón – the idea that all the normative sets can be imagined as independent entities which are united solely by (more or less) logical reasoning by judges, law-enforcement officers and law professors, and that there can be as many such normative systems as

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[14] As, *e.g.*, stressed Peczenik who claimed that the main goal of the activity of legal scholars ('legal dogmatics') is to establish and justify the unity of a legal system (Alexander Peczenik, *Law, Morality, Coherence and Truth*, 7(2) Ratio Juris (1994) doi:10.1111/j.1467-9337.1994.tb00174.x).

[15] Saul A. Kripke, Naming and Necessity (Harvard University Press 1982).

[16] Alchourrón & Bulygin, *supra* n. 4, at 123.

[17] Eugenio Bulygin, *On Legal Interpretation*, in 4 Rechtssystem und praktische Vernunft / Legal System and Practical Reason: Verhandlungen des XV. Weltkongresses für Rechts- und Sozialphilosophie (IVR), Göttingen, 18. bis 24. August 1991 (= 53 Archiv für Rechts- und Sozialphilosophie – Beihefte (ARSP-B)) (Hans-Joachim Koch & Ulfrid Neumann, eds.) 11, 20–22 (Franz Steiner Verlag 1993).

[18] Joseph Raz, *The Identity of Legal Systems*, in Joseph Raz, The Authority of Law: Essays on Law and Morality 78 (Clarendon Press 1979). doi:10.1093/acprof:oso/9780198253457.003.0005

there are actors reasoning about the law and systematizing legal propositions (and consequently, the norms contained in these propositions).[19]

Our purpose here is not to find a definite solution to the philosophical question about the unity of law but rather to stress the necessity to escape the principal intellectual lures which apparently give an easy reply, but instead bring ambiguity into the strictly formalist account of the law lawyers used to refer to, and still do. At the same time, we can believe in the systematicity of law and still be aware that the unity / integrity of the law is only a product of our intellect, of our beliefs and paradigms. Other approaches to the unity issue lead to naturalism, which implies that law somehow mirrors the structure of reality (be it conceived of as physical, social, psychological, or metaphysical). What matters here is that this belief is rational and not based on an irrational faith in a pre-established harmony of law and its fictive congruence with reality. That is why we can assert that the BRICS does not need to follow the path of the systematization of the legislation of the Member States, and that creating agglomerations of legal texts from the different legal orders of the Member States is an issue not for politicians but rather for legal scholars who can construct and reconstruct legal texts, jointing and disjointing them in view of the practical needs of amelioration of legal technique.

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[19] *See also* Joseph Raz, From Normativity to Responsibility (Oxford University Press 2011). doi:10.1093/acprof:oso/9780199693818.001.0001

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PROCEDURAL AND SUBSTANTIVE JUDICIAL REVIEW OF THE RIGHT TO HEALTH IN BRAZIL [1]

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This text seeks to identify the objective and subjective aspects of rights to an existential minimum in health care, based on international parameters which, because they are restricted to the internal scope of a nation, depend on a constitutional basis and on comprehensible facts, the demonstration of which should be the responsibility of the national administrative authority. Regarding the judicial review of the minimum right to healthcare, this paper points out that it is a serious mistake to try to handle public health conflicts according to the typical judicial principles governing conflicts under private law, because that distorts the public health system, with judicial orders that depart from the universal access to health care and that are often impossible to comply with. The article concludes that the judicial review of administrative authorities in matters involving the right to health necessarily requires simultaneous judicial review of the corresponding administrative procedures.

Keywords: right to health; effective judicial protection; judicial review of healthcare policy; enforcement of judicial decisions against administrative authorities.

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[1] Derived from the following events: 'Judicialização da Saúde' ('Judicial Review of Health Care Policies'), 4th Brazilian Medical Law Conference in Brasília, Federal District, on August 28, 2013; 'Direito a Saúde e judicialização' ('Right to Health and Judicial Review'), Conference on the 25th Anniversary of the Citizens' Constitution in Niterói on October 2013; 'Judicial Review of Health Care Policies,' 3rd Brazilian Conference of the Humanities in Medicine of the Federal Medical Council, Salvador, on October 24, 2013; 'New Perspectives on Judicial Review of the Health Care Policies in Light of Law No. 12.401,' Bahian Conference on Judicial Review of Health Care Policies by the Court of Justice of Bahia, Salvador, on October 31, 2013.

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1. Scope of the Expression 'Judicial Review of Health Care' on the Contemporary Scene

The phenomenon of judicial review of health care, as it has become known in Brazil, is continuing to grow geometrically.[2] It has specific characteristics that are worth pointing out by way of an introduction. The judicial claims commonly asserted in this context are not claims for compensation for damages; in most cases, they are complaints against a public authority's acts related to the supplying of medicines or other health goods and services.[3] They are basically limited to conflicts originating from acts of the health care authorities or of individuals in the exercise of such public powers.[4] They are essentially public-law conflicts, however,[5] which cannot be resolved without constantly weighing public *versus* private interests.

Recent examples of judicial review of health care show that numerous doubts persist about how to respond effectively to judicial conflicts involving the right to health *vis-à-vis* the public authorities.

One such example can be found in the notice published on the website *Consultor Jurídico* on June 8, 2013:

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[2] A preliminary report developed by the *CNJ* (*Conselho Nacional de Justiça* (National Justice Council)) points out that there were 240,980 judicial actions related to public health rights in 2011 in the Brazilian state and federal courts (preliminary data on health care assistance data in the courts).

[3] *See* Ricardo Perlingeiro, *O princípio da isonomia na tutela judicial individual e coletiva, e em outros meios de solução de conflitos, junto ao SUS e aos planos privados de saúde*, 5(10) R. Proc.-Geral Mun. Belo Horizonte (RPGMBH) (2012), available at <http://ssrn.com/abstract=2241142> (accessed Aug. 5, 2015).

[4] *See* Ricardo Perlingeiro, *A tutela judicial do direito público à saúde no Brasil*, 2012(41) Direito, Estado e Sociedade, available at <http://ssrn.com/abstract=2250121> (accessed Aug. 5, 2015).

[5] Regarding the concept of public law based on acts of authority (*hoheitliche Gewalt*), *see* Hartmut Maurer, Derecho administrativo alemán (= 637 Doctrina Jurídica) 52 (Universidad Nacional Autónoma de México 2012).

> At an executive board meeting of the Regional Medical Council of Rio de Janeiro, doctors of the vacancy control centres of the state and municipal public hospital network reported situations of abuse of authority by judicial officials. Representatives of the Court of Justice of Rio de Janeiro are using court orders to force doctors to find vacancies for patients even when no such vacancy is available in the hospitals in the network. Professionals also complain of being pressured into transferring patients in serious condition to the beds of an intensive care unit. They claim that they are being coerced because they can be arrested if they don't carry out the order. Two doctors of the vacancy control centres of the state hospitals are faced with criminal prosecution for failing to comply with a court order.[6]

Here is another noteworthy report published on the website of the Regional Medical Council of Espírito Santo on July 31, 2013:

> Today, 31 July, the Regional Medical Council of Espírito Santo (*Conselho Regional de Medicina do Espírito Santo* (*CRM-ES*)) filed a public civil action against the Emergency Care Unit of Guarapari for the poor conditions of the unit and, as the principal complaint, for having delivered babies in the facility. According to Aloízio Faria de Souza, the Chairman of the *CRM-ES*, the Emergency Care Unit is not supposed to deliver babies or perform surgery. The lawsuit has been docketed by the Federal Civil Court of Vitória. Tomorrow, 1 August, the *CRM-ES* will file another public civil action, likewise at the Federal Civil Court of Vitória, against Hospital São Lucas. 'The conditions at the hospital are atrocious, with patients in serious condition "hospitalized" in the hallways. We hope that the Judiciary will require the State Government to make resources available to solve this serious problem. Avoidable deaths are part of the daily routine. It is necessary to put a stop to this situation, it's like being in a war zone,' complained the Chairman of the *CRM-ES*.[7]

2. New Approaches to the Proviso of the Possible and the Existential Minimum in Health Care Cases

According to Law No. 12.401 of April 28, 2011,[8] recasting Law No. 8.080 of September 19, 1990, comprehensive health care assistance consists of dispensing

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[6] *Judicialização da saúde: Médicos denunciam abusos da Justiça do RJ*, Consultor Jurídico (Jun. 8, 2013), <http://www.conjur.com.br/2013-jun-08/medicos-regulam-vagas-leitos-denunciam-abuso-justica-rj> (accessed Aug. 5, 2015).

[7] *Ação Civil Pública contra PA de Guarapari e Hospital São Lucas*, Conselho regional de medicina do estado do Espírito Santo (CRM-ES) (Jul. 31, 2013), <http://www.crmes.org.br/index.php?option=com_content&view=article&id=21021> (accessed Aug. 5, 2015).

[8] Lei N° 12.401, de 28 de abril de 2011, D.O.U. de 29.04.2011, at <http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2011/Lei/L12401.htm> (accessed Aug. 5, 2015) (regulating therapeutic assistance and

medicines and health products prescribed by the therapeutic guidelines defined in the clinical protocol for the disease or health problem to be treated and falling within the range of therapies for home care, outpatient or hospital treatment that are included in the tables drawn up by the federal director of the *SUS*, and performed in Brazil at one of the *SUS*'s own health facilities or at others affiliated with the *SUS* or under contract.[9]

It is therefore apparent that the Law No. 12.401/2011 is general and delegates to the administrative authorities the task of defining the limits of the comprehensive right to health by stipulating that comprehensive health care assistance consists in such medicines, products and therapies as are indicated in the administrative regulations.[10] The lawmakers should be less generous in that respect, however: the administrative authorities should not have such a broad authorization to decide which health services are obligatory, especially in the case of non-essential services, because it creates a risk of violating not only the prerogative of the drafters of the budgetary laws to allocate the public budget[11] but also the very principle of the supremacy of the Rule of Law.[12] Declaring social services to be obligatory should be the result of a prior democratic decision-making process expressed by society itself through legislators. An interpretation more consistent with the principle of the Rule of Law and with the proportionality requirement would be that the Law No. 12.401/2011 authorizes the administrative authority to declare as obligatory only such health services as are essential to a dignified existence.[13]

That does not mean, however, that any judicial claim that goes beyond the right to a minimum should be rejected. It is firmly established in Brazil that the right to

the incorporation of technologies into health care within the scope of the Brazilian Unified Public Health System (*Sistema Único de Saúde*) [hereinafter *SUS*]).

9 Article 19-M of Law No. 8.080 of September 19, 1990 (as formulated in Law No. 12.401/2011).

10 According to Art. 19-Q of Law No. 8.080/1990, '[t]he incorporation, exclusion or modification by the *SUS* of new medicines, products and procedures, as well as the formation or modification of the clinical protocol or therapeutic guidelines are powers assigned to the Ministry of Health with the advice of the National Commission of Incorporation of Technologies into the *SUS*.'

11 According to Maurer, *supra* n. 5, at 121, it is not fully compatible with the principle of parliamentary democracy to allow administrative authorities to allocate the budget in such a way as to determine social rights without specifying the beneficiaries, the service, *etc.*

12 For more about the principle of the supremacy of the Rule of Law applicable to social rights, *see* Maurer, *supra* n. 5, at 114–28.

13 The right to the existential minimum should be anchored in law (*see* Federal Constitutional Court of Germany (*Bundesverfassungsgericht* (*BVerfG*)), Judgment of February 9, 2010 (BVerfGE 125, 175 (Rn. 136, 138), at <http://www.bundesverfassungsgericht.de/entscheidungen/ls20100209_1bvl000109.html> (accessed Aug. 5, 2015))). Although the ideal would be more detailed analysis by the legislators, it is a fact that claims for the essential health care could easily fall into the exceptions to the principle of the Rule of Law (*see* Maurer, *supra* n. 5, at 122), so long as it is justifiable, for example as may happen with unexpected increases in claims caused by an epidemic or with technological innovations capable of curing a serious illness that was formerly incurable.

health is a fundamental right, meaning that it is based on the Constitution,[14] on the International Covenant on Economic, Social and Cultural Rights[15] [hereinafter ICESCR] and on the Additional Protocol of San Salvador to the Inter-American Human Rights Convention (IHRC).[16] With that in mind, since the fundamental right to health protection is broader than the right to a minimum of health care, the constitutional jurisdiction is available for claims for services beyond the limits of the authorization granted to the administrative authorities by Law No. 12.401/2011; in the case of a right to an essential health service, the claim will depend on judicial review of the abusive action or omission of the administrative authority, also known as 'administrative jurisdiction.'

At this point, it would helpful for us to review the concepts of the 'proviso of the possible' ('Vorbehalt des Möglichen') and of the 'existential minimum' ('Existenzminimum') which have been enshrined in Brazilian legal doctrine and case law under the acknowledged influence of the judicial precedents of the German Federal Constitutional Court.[17]

The proviso of the possible does not refer to a shortage of material or financial resources, nor should it be confused with a simple lack of public budget allocations. In fact, the proviso of the possible is intrinsically related to the legislator's prerogative to choose which social benefits will be considered a priority for funding, without implying any limitation or restrictions or existing enforceable subjective rights. The proviso of the possible is therefore inconceivable in cases involving the *existential minimum* or established statutory rights. In such cases, the margin of discretion of the legislators, including the drafters of budget laws, is zero, since to admit otherwise would be an offence to the principle of the Rule of Law. In fact, the proviso of the

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[14] Article 196 of the Constitution of the Federal Republic of Brazil of October 5, 1988 (Constituição da República Federativa do Brasil de 5 de outubro de 1988, D.O.U. 191-A de 05.10.1988), at <https://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm> (accessed Aug. 5, 2015)) [hereinafter Constitution].

[15] International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, Art. 12, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3, 6 I.L.M. 360 (1967), at <http://www.ohchr. org/en/professionalinterest/pages/cescr.aspx> (accessed Mar. 7, 2015) (ratified by Brazil on January 24, 1992 (Decreto Nº 591, de 6 de julho de 1992, D.O.U. de 07.7.1992, at <http://www.planalto.gov.br/ccivil_03/decreto/1990-1994/D0591.htm> (accessed Aug. 5, 2015))); *see also General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., 22nd Sess., U.N. Doc. E/C.12/2000/4 (2000), at <http://www.refworld.org/docid/4538838d0.html> (accessed Aug. 5, 2015).

[16] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), Nov. 17, 1988, Art. 10, O.A.S.T.S. No. 69, 28 I.L.M. 156 (1989), at <http://www.oas.org/juridico/english/treaties/a-52.html> (accessed Aug. 5, 2015).

[17] *See* Ricardo Perlingeiro, *È a reserva do possível um limite à intervenção jurisdicional nas políticas públicas sociais? / Does the Vorbehalt des Möglichen (the Proviso of the Possible) Limit Judicial Intervention in Social Public Policies?*, 1(2) Revista de Direito Administrativo Contemporâneo (ReDAC) (2013), available at <http://ssrn.com/abstract=2343965> (accessed Aug. 5, 2015) [hereinafter Perlingeiro, *È a reserva do possível um limite*].

possible can only be used to deny such rights as exceed a claim for the existential minimum and are not yet anchored in a law that provides for their enforcement in court.[18]

It is no easy task to reach a proper understanding of the existential minimum, which may be associated with the weighing of subjective *versus* objective factors.

According to a recent precedent of the German Federal Constitutional Court in 2010, citizens have the right to demand the material prerequisites indispensable to their physical existence (food, clothing, household articles, housing, heating, sanitation and health) and at least a minimum of participation in social, cultural and political life, because human beings, as such, are necessarily integrated into social relationships. Thus, according to that same judicial decision, the minimum should be adapted to the level of development of the community in question and its current lifestyle, subject to constant updating, which constitutes the only room for manoeuvring provided by law.[19]

As far as the objective content of the existential minimum is concerned, the instrumental and substantive aspects of the rights are invoked.[20]

Procedural rights are intended to ensure the practical realization of substantive rights; the same approach has been known to be applied with respect to fundamental rights, where the juncture between fundamental rights, organization and procedure is known as *due process* of fundamental rights, which is often considered the only way of producing results in compliance with such fundamental rights.[21] From the standpoint of administrative law, effective judicial protection and administrative procedure are the citizen's main defences against the administrative authorities; public policies may be inserted into the same context. Regarding the prior assertion of a procedural right as a prerequisite for enforcing a substantive right against the

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18 Perlingeiro, *È a reserva do possível um limite, supra* n. 17.

19 *See* BVerfGE 125, 175, *supra* n. 13.

20 *See* Ricardo Perlingeiro, *Os cuidados de saúde dos idosos entre as limitações orçamentárias e o direito a um mínimo existencial / Health Care for the Elderly: Between the Budget Constraints and the Right to an Existential Minimum*, 15(1) R. Dir. sanit. (2014), available at <http://www.revistas.usp.br/rdisan/article/view/82808/85763> (accessed Aug. 5, 2015) doi:10.11606/issn.2316-9044.v15i1p83-118 [hereinafter Perlingeiro, *Os cuidados de saúde dos idosos*].

21 *See* Robert Alexy, Teoria dos direitos fundamentais 470 (Virgílio A. da Silva, trans.) (Malheiros 2008) (citing: Peter Häberle, *Grundrechte im Leistungsstaat*, in Wolfgang Martens et al., Grundrechte im Leistungsstaat. Die Dogmatik des Verwaltungsrechts vor den Gegenwartsaufgaben der Verwaltung. Berichte und Diskussionen auf der Tagung der Vereinigung der Deutschen Staatsrechtslehrer in Regensburg vom 29. September bis 2. Oktober 1971 (= 30 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL)) 43, 49 ff. (De Gruyter 1972), available at <http://www.degruyter.com/viewbooktoc/product/56448> (accessed Aug. 5, 2015); Konrad Hesse, *Bestand und Bedeutung der Grundrechte in der Bundesrepublik Deutschland*, 5 Europäische Grundrechte-Zeitschrift (EuGRZ) 427 (1978)). Alexy refers to 'fundamental rights as procedural guarantees,' associating them with reproduction and conceptualization of a development found in the precedents of the Federal Constitutional Court (*id.* at 472).

public authorities, legal scholars point out that 'material rights must enter into procedure, and fundamental rights must be enforced through procedure.'[22]

Internationally, it can be inferred that countries have certain minimum duties with respect to both procedural rights and substantive rights to health. Regarding procedural rights, I am referring to essential health policies; the substantive rights concern the essential medicines and health goods and services.[23]

According to the Committee on Economic, Social and Cultural Rights [hereinafter CESCR], Art. 12 of the ICESCR requires States to adopt appropriate legislative, administrative, budgetary, judicial or other steps to ensure the full realization of the right to health. If, on the one hand, each State has a margin of discretion to determine which measures are best suited to dealing with specific circumstances, on the other, the ICESCR clearly imposes an obligation on each State to take steps that are necessary in order to ensure that everyone has access to health facilities, goods and services and can attain the highest possible standard of physical and mental health.[24]

The following elements are considered indispensable for the minimum international standard of access to health care procedures:

a) *availability*. Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party;

b) *accessibility*. Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party;

(i) non-discrimination: health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds;

(ii) physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS;

(iii) economic accessibility (affordability): health facilities, goods and services must be affordable for all;

(iv) information accessibility: accessibility includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality;

c) *acceptability*. All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, *i.e.* respectful of the culture of individuals,

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[22] *See* Hans J. Wolff et al., 1 Direito administrativo 255, 490 (António F. de Sousa, trans.) (Fundação Calouste Gulbenkian 2006); *see also* Maurer, *supra* n. 5, at 479.

[23] *See* Perlingeiro, *Os cuidados de saúde dos idosos*, *supra* n. 20.

[24] *See General Comment No. 14*, *supra* n. 15.

minorities, peoples and communities, sensitive to gender and life-cycle requirements, as well as being designed to respect confidentiality and improve the health status of those concerned;

d) *quality*. As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality.[25]

Regarding substantive rights to health, according to the CESCR, despite any restrictions on resources, certain obligations have an immediate effect, such as the duty to guarantee at least a minimum level of access to the essential material elements of the right to health, like supplying essential medicines as well as child and maternal health services.[26]

The above-cited General Comment No. 14 of the CESCR is particularly relevant to access to essential medicines. On that subject, the CESCR declares that the medical services referred to in Art. 12(2)(d) of the ICESCR include the supplying of essential drugs 'as defined by the WHO Action Programme on Essential Drugs.' According to the WHO's latest definition, '[e]ssential medicines are those that satisfy the priority health care needs of the population. Essential medicines are selected with due regard to disease prevalence, evidence on efficacy and safety, and comparative cost-effectiveness.'[27]

The objective minimum international parameters should therefore be taken as the point of reference when deciding whether or not to allow restrictions or extensions of the guarantees to the right to health on the national level, depending on the possibilities of the State and the needs of the individual, *i.e.* the subject side of the existential minimum. In any case, restrictions to adjust the existential minimum to the actual situation in the country in question should be accompanied by a clear statement of justifications by the public authority, which is responsible for the task of explaining the other public expenditures transparently and, above all, understandably, using a reliable and consistent method of calculation.[28]

3. Judicial Review of the Right to an Existential Minimum

Judicial claims to receive medicines or health services (substantive rights) are generally paid for out of the financial resources allocated to the appropriate

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[25] *General Comment No. 14*, *supra* n. 15.

[26] *Id.*

[27] *See Essential Medicines*, World Health Organization (WHO), <http://www.who.int/medicines/services/essmedicines_def/en/> (accessed Aug. 5, 2015).

[28] Regarding the need for the public authority to provide clear justifications and understandable criteria of calculation, *see* BVerfGE 125, 175, *supra* n. 13; *see also* Karl-Peter Sommermann, *Soziale Rechte in Stufen: Überwindung einer alten Debatte?*, in Rechtsstaatlichkeit, Freiheit und soziale Rechte in der Europäischen Union: Deidesheimer Kolloquium 2012 zu Ehren von Detlef Merten anlässlich seines 75. Geburtstages (= 80 Wissenschaftliche Abhandlungen und Reden zur Philosophie, Politik und Geistesgeschichte) 107 (Christian Calliess et al., eds.) (Duncker & Humblot 2014).

heading of the general public health service budget (procedural rights). Thus, since an individual judicial action of this type affects a number of users of the same public health service, it means that granting the corresponding claim should be conditional on the administrative authority's prior restructuring of the distribution of available resources to the successive requests presented to that authority extrajudicially.[29]

That is why the *'justiciability'* of rights to health care requires advance or even, when necessary, simultaneous judicial review,[30] of the corresponding procedural right. The court needs to review not only the material claims to the medicine, health product or service in question but, primarily, the claim to be eligible for the administrative procedure or guarantees for obtaining the health product or service (even if only incidentally), in such a way as to confer greater magnitude and power on the judicial protection. That will enable the court to ensure equality among all users of the public health service.[31]

Regarding the incorporation of new technologies provided for in Law No. 12.401/2011 (Arts. 19-M(I) and (II)), a health product or service can fall within the scope of the concept of comprehensive care until it has undergone the specific administrative procedure of being incorporated into the *SUS*. That clearly means that the right to a new medicine, health product or service is linked to a procedural right. Moreover, since the above-mentioned process of incorporation into the *SUS* falls within the area of authority of a federal administrative authority, the National Committee of Incorporation of Technologies (*Comissão Nacional de Incorporação de Tecnologias* (*CONITEC*)), the authority to decide a related court case would belong to the Federal Justice System;[32] and the same can be said of the medicines, health products or services subject to registration with the National Health Surveillance Agency (*Agência Nacional de Vigilância Sanitária* (*ANVISA*)).

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[29] *See* Perlingeiro, *Os cuidados de saúde dos idosos*, *supra* n. 20.

[30] 'However, despite the obvious importance of prior procedural structuring of the administrative authorities, such as, among other things, the necessity of equality among all concerned, whether judicial claimants or not, the fact is that such organization is an obligation *interna corporis* of the administrative authority and must not, *per se*, undermine the substantive right itself or effective judicial protection, particularly where the right to the existential minimum is concerned' (Perlingeiro, *È a reserva do possível um limite*, *supra* n. 17, at 182–83).

[31] *See* Perlingeiro, *Os cuidados de saúde dos idosos*, *supra* n. 20. In a lawsuit in which it was alleged that the medicines Alpha-2a or Alpha-2b Pegylated Interferon and Ribavirine were necessary for the treatment of chronic hepatitis C, one of the judges of the Superior Court of Justice (*Superior Tribunal de Justiça*) held that '[a]ccording to democratic principles . . . the State does not have a duty to provide an individual service unless it would be viable to give the same treatment to all the individuals in the same situation under conditions of equality' (Opinion of Judge Teori Albino Zavascki in the Writ of Mandamus Proceeding (STJ, Recurso em Mandado de Segurança, RMS No. 24.197 – PR (2007/0112500-5), Relator: Min. Luiz Fux, 04.05.2010, at <http://stj.jusbrasil.com.br/jurisprudencia/16825941/recurso-ordinario-em-mandado-de-seguranca-rms-24197-pr-2007-0112500-5/inteiro-teor-16825942> (accessed Aug. 5, 2015))).

[32] *See* Art. 109(I) of the Constitution.

However, even if the substantive rights are accepted as subordinate to procedural rights, that fact alone is insufficient to minimize the conflicts involving the *'justiciability'* (eligibility for judicial review) of rights to health care, especially in the case of conflicts based on the insufficient financial resources of the government.[33] It is easy to imagine that an administrative authority, despite having complied with the rules of procedure, including the budgetary rules, might end up without sufficient financial resources to meet the multiple, unexpected and urgent demands.

Consequently, from the financial point of view, the conflicts involving the rights to health care that are winding up in court can be examined from two different perspectives: one, as originating in the lack of sufficient budget resources, and the other originating in mismanagement by the administrative authority itself.

In the first case, if the right to an *existential minimum* and, in general, the rights to health care created by law were not sufficiently well anchored in the budget,[34] which in and of itself would amount to a violation of the Rule of Law, that would provide an opportunity for judicial intervention through urgent judicial measures of enforcement of the judgements.

As already mentioned, the public budget is a decisive factor in ensuring a judicial system that is democratic in the distribution of social benefits, but only with respect to rights which, despite originating in the Constitution, depend on the law for enforcement. In fact, the public budget is not capable of nullifying the right to an existential minimum or social rights enshrined by law.[35]

In the second case, from the financial standpoint, the conflict may result from the conduct of the administrative authority, which, despite being allocated the budgetary resources, claims that it does not really have financial resources to meet the health care demands. Such situations of *de facto* depletion of resources also amount to a violation of the Rule of Law, which also calls for effective judicial protection against the public administrative authorities.[36]

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33 *See* Perlingeiro, *Os cuidados de saúde dos idosos*, *supra* n. 20.

34 'A country's difficult financial situation does NOT absolve it from having to take action to realize the right to health' (The Right to Health: Fact Sheet No. 31, at 5 (Office of the United Nations High Commissioner for Human Rights (OHCHR); World Health Organization (WHO) 2008), available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf> (accessed Aug. 5, 2015).

35 Alexy affirms that 'the principle of the legislators' authority over the budget is not unlimited. It is not an absolute principle. Individual rights may have greater weight than political-financial reasons' (Alexy, *supra* n. 21, at 512–13) and 'even the minimal fundamental social rights have an enormous impact, especially when many people need to exercise them. Yet that fact alone, considered in isolation, does not justify the conclusion that such minimal rights do not exist' (*id.* at 512). The German Federal Constitutional Court ruled that economic aspects cannot be taken into consideration in order to deny reimbursement to the insured of expenses on new medical treatments necessary to cure a life-threatening illness (BVerfGE 115, 25, at <http://www.bverfg.de/entscheidungen/rs20051206_1bvr034798.html> (accessed Aug. 5, 2015)).

36 *See* Perlingeiro, *Os cuidados de saúde dos idosos*, *supra* n. 20.

Thus, theoretically, the lack of budget resources is no obstacle to the judicial review of health care rights.[37] However, since administrative authorities are bound to respect the letter of the law and have no independent means of direct interpretation and application of such laws to the Constitution, the lack of budget allocations may serve as a justification for failing to provide social services, which inevitably leads to judicial review. Besides that, given the lack of budget allocations and resources, enforcement of decisions would be difficult, because the expropriation of public assets and financial resources, in principle, is conditional on not doing harm to any public interest or essential service, which means that the court's jurisdiction over such cases is limited.[38]

For example, an individual judicial claim for hospitalization for treatment of a curable disease was presented to the public health system, which does not have sufficient funds to make up for the shortage of beds and doctors; unfortunately, that is a very common example in our country.[39] It is unquestionable that the court should acknowledge the right in question; however, it would not make sense to enforce a judicial decision in favour of one claimant at the expense of another hospitalized patient with the same needs. The enforcement would require calling upon third parties, as by contracting for private beds, but even that depends on the availability of public financial resources available that are *not* earmarked for other essential services.[40]

In the enforcement of judicial decisions concerning the right to health against administrative authorities, the judicial expropriation of public assets is possible, in principle, under the following circumstances: a) public property that is not assigned a specific purpose, such as unused land, or public assets in general that have not been assigned a specific purpose, such as funds available from the collection of tax revenue; b) assets and financial resources allocated to a non-essential, accessory public service

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[37] Regarding the enforcement of judicial decisions against administrative authorities, *see generally L'exécution des décisions des jurisdictions administratives: VIII[ème] congrès de l'Association internationale des hautes juridictions administratives (Madrid, 2004)*, <http://www.aihja.org/images/users/1/files/2004__Congres_de_Madrid__Rapport_VIII_congres_VIII_vf.pdf?PHPSESSID=f83dg63dqj61vokoep4kk44fu1> (accessed Aug. 5, 2015).

[38] In Brazil, the enforcement of judicial decisions against administrative authorities is generally permitted, except when contrary to the public interest (Law No. 12.016/2009, Art. 15; Law No. 8.437/1992, Art. 4, introductory paragraph and § 1; Law No. 9.494/1997, Art. 1). Especially in the case of judgements against the administrative authorities to pay a certain sum, it is inappropriate to satisfy the claim by attaching assets available to the public administrative authority (Law No. 5.869/1973 (Code of Civil Procedure), Arts. 730 f.), except in the case of minor debts (Law No. 10.259/2001, Art. 17(2); and Law No. 12.153/2009, Art. 13(1)). Nevertheless, recent precedents have authorized the enforcement of debts of any amount (STF, STA No. 36-8, Relator: Min. Nelson Jobim, D.J.U. 27.09.2005, p. 6). For more on that issue, *see* STF, ARE No. 665707, Relator: Min. Luiz Fux, 19.11.2012, at <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=224106> (accessed Aug. 5, 2015).

[39] *See supra* n. 6 and 7.

[40] *See* Perlingeiro, *Os cuidados de saúde dos idosos*, *supra* n. 20.

of a type that is typically private, such as the costs of government media campaigns or the purchase of luxury cars for official purposes;[41] c) assets and financial resources earmarked for repayment of past debts, provided that they are not capable, in and of themselves, of disrupting the continuity of an essential public service.

4. Misunderstanding of the Distinction between Public Law and Private Law and Its Judicial Repercussions

It is not always easy to identify a conflict that is governed by public law and therefore allows for proper application of the corresponding principles.[42] In Germany, for example, the responsibility for illegal administrative acts by the public authorities still falls under the jurisdiction of the ordinary courts, whereas the revocation of those same acts falls under the administrative jurisdiction.[43] Such misunderstandings are particularly common in Brazil, where legal doctrine and jurisprudence have many reasons to distinguish public law from private law because of the unified jurisdiction (monist system of jurisdiction) and the laws of civil procedure applicable to public-law cases (except in certain passages, such as the doubled time allowance for enforcement of judgments, in which the criterion for application is the involvement of the administrative authorities rather than the nature of the conflict).[44]

In fact, there are various theories that indicate the difference between public law and private law; that distinction is debatable and controversial.[45] It is no longer appropriate to invoke the difference based exclusively on the subject: it is affirmed that private law regulates relationships between private citizens whereas public law is concerned with the State. That concept, the theory of the subject, has been modified by Hans Wolff's attribution theory (theory of imputation, theory of the excessive right).[46] According to Wolff's theory, norms that can be attributed only to

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41 *See generally*: *Juiz suspende publicidade oficial e concede dinheiro à saúde*, Conversa Afiada (Jul. 31, 2013), <http://www.conversaafiada.com.br/pig/2013/07/31/juiz-suspende-publicidade-oficial-e-da-dinheiro-a-saude/> (accessed Aug. 5, 2015); *MPF/RR pede sequestro e bloqueio das contas do Estado de Roraima caso ordem judicial seja descumprida*, Ministério Público Federal / Procuradoria da Republica em Roraima (Apr. 4, 2013), <http://www.prrr.mpf.mp.br/noticias/04-04-13-mpf-rr-pede-sequestro-e-bloqueio-das-contas-do-estado-de-roraima-caso-nao-seja-comprovado-o-cumprimento-de-ordem-judicial/> (accessed Aug. 5, 2015).

42 Wolff et al., *supra* n. 22, at 263–64.

43 *See* Jacques Ziller, *Modelli di responsabilità dell'amministrazione in alcuni ordinamenti europei*, 2009(2) Dir. e soc.; *see also* Wolff et al., *supra* n. 22, at 264.

44 The Anglo-American legal system is not based on the distinction between public law and private law (Wolff et al., *supra* n. 22, at 267; Peter Cane, Administrative Law 4 (5th ed., Oxford University Press 2011)) legal system from which the Brazilian monist judicial system originated.

45 *See*: Maurer, *supra* n. 5, at 50–52; Wolff et al., *supra* n. 22, at 264–67; Cane, *supra* n. 44, at 4–9; Jean Rivero & Jean Waline, Droit administratif 1–5 (21st ed., Dalloz 2006).

46 Wolff et al., *supra* n. 22, at 267–86.

the State or to another subject invested with authority (*i.e.* norms that are directed exclusively at the State or other subject invested with authority) belong to public law. In contrast, norms that correspond to any other subject are matters of private law. That is the theory that should prevail because it is connected with the various functions of public law and private law.[47]

In the administrative jurisdiction, the object of which is resolve public-law conflicts, a citizen seeks to enforce an individual interest through acts of a public authority; such acts fall into the category of administrative procedures, acts and decisions. In fact, the 'administrative' judge, in the sphere of public law, should not enforce a material interest without first taking such administrative acts into account; such judges are entitled to impose an obligation of the public administrative authorities that did not previously exist in the extrajudicial sphere; in other words, judicial review does not absolve the administrative authorities from the obligation to enforce claims solely through the existing procedures, especially in the case of social services (rights of participation).

A judicial claim for enforcement of a substantive right, *vis-à-vis* the public administrative authorities in a typical public-law situation, necessarily presupposes that there were errors or omissions in an administrative act: errors of form or of content, errors of law or of fact. In the specific case of errors of content of an administrative decision, the court brings about, indirectly, the materialization or realization of a substantive right or interest; in public law, this amounts to saying 'the realization of administrative decisions through material behaviours of the administrative authorities.'[48]

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[47] According to attribution theory, the public / private law distinction may be exemplified by different cases of driving: public law is said to govern a case of official driving of a civil-defence or police car or even a first-aid or public service vehicle (*e.g.*, ambulance, electrical utility repair vehicle), whereas private law would govern cases of driving an official vehicle in a normal situation for the transportation of public property (Maurer, *supra* n. 5, at 54). Another example of public law is the obligation to ensure access to health and provide health care, establishing health policies, administrative procedures for supplying health products and services; private law, on the other hand, is applicable to medical / hospital treatment *per se*, to the supplying of medicine with no connection with corresponding administrative procedures (on the difference between access to the public service and performance of the public service based on the effects of public law and private law, *see* Maurer, *supra* n. 5, at 57–58). Public law relates to any exclusive activity of the public administrative authorities or of an individual in the exercise of a public power; an activity that is not replacable by any individual. On the contrary, private law pertains to any activity capable of being exercised by an individual who is not invested with public authority. The simple supplying of a medicine or surgical procedure without relation to the prior administrative procedures that authorized them (provided access) is a question of private law; the liability for damages caused by a defective drug or surgical error, *i.e.* by an act that is not connected in terms of cause and effect with any act by an authority would be a question of private law that must be based on intentional misconduct or negligence. However, if the absence of the drug or medical procedure is directly related to administrative behaviours, such as a budget shortage or deficiencies in the selection procedure, then the case is governed by public law. For more about the two-phase theory (first chapter of public law, second chapter of private law), *see* Wolff et al., *supra* n. 22, at 282.

[48] Material administrative behaviours are those aimed at a factual rather than legal result; they are not administrative acts, decisions or procedures (Maurer, *supra* n. 5, at 406).

In this context, judicial decisions on public law cases either establish a legal fact or condemn the act of an authority; the realization of the interests acknowledged in such a decision is a logical corollary but enforcement is not necessary for the supplying of the corresponding asset or financial resources, which, in that respect, do not go beyond the mere factual materialization of judicially declared administrative behaviours; thus, a judicial order to the public administrative authorities would suffice with respect to the acknowledged behaviour.[49] In fact, the whole structure regarding the enforcement of judicial decisions against public administrative authorities, expropriating the available public property, is inherent in conflicts involving legal relationships under private law, which are therefore eligible for a typical ordinary jurisdiction compatible with the principles of private law.[50] In such cases, the dispute itself does not involve public-law solutions, for example, when compensation for damages does not require prior administrative procedures. The public authorities, to the extent involved in the private domain, do not necessarily act by means of procedures, and the judicial claims may be direct or narrowly focused; in that respect, judicial enforcement is proportionate and capable of expropriating public property, merely being limited to the public interest.

In a public-law conflict, a difficulty might arise when the judge finds an error on the part of the public administrative authorities and rules in favour of the claimant but the public authorities fail to obey the court and do not supply the goods in question. When faced with such a defiant administrative omission, the natural approach would be, in the executive jurisdiction, to 'prosecute' by reviewing the administrative procedure leading up to the supplying of the relevant goods (administrative norm, budget, *etc.*).[51] Since it is not possible to wait indefinitely, however, a viable alternative would be execution proceedings against the public administrative authorities on the model of a judicial resolution of a private-law conflict, while remaining aware of it limitations, which are disadvantageous to the claimant.

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[49] In Italy, in parallel with enforcement against the administrative authorities by an ordinary (civil) judge, it is worth mentioning the 'giudizio di ottemperanza,' within the scope of the administrative jurisdiction, inherent in the enforcement of judicial decisions regarding administrative behaviours, which may even result in orders to pay compensation for damages (Giuseppina Mari, *Il giudizio di ottemperanza*, in 2 Il nuovo processo amministrativo 457 (Maria A. Sandulli, ed.) (Giuffrè 2013)). The enforcement of judgements against the administrative authorities delivered by civil judges only in exceptional cases adopts the form of the 'giudizio di ottemperanza,' when there are questions of public law in the enforcement phase (Marcello Clarich, *XIV. L'esecuzione*, Diritto processuale amministrativo (= 7 Corso di diritto amministrativo diretto da Sabino Cassese) 297, 302–03 (Aldo Sandulli, ed.) (2nd ed., Giuffrè 2013)).

[50] Regarding the relationship between enforcement of judicial decisions against the public administrative authorities and their responsibility for public assets, *see* Alberto R. Ojeda, La ejecucion de creditos pecuniarios contra entes publicos 21 (Civitas 1993).

[51] According to Ada Pellegrini Grinover, the judge would order the public administrative authorities to adapt the public budget in such a way as to pay its debt (*see* Ada Pellegrini Grinover, *O controle jurisdicional de políticas públicas*, in O controle jurisdicional de políticas públicas 138 (Ada Pellegrini Grinover & Kazuo Watanabe, eds.) (2nd ed., Forense 2013)).

Similarly to relationships under private law, in which the enforcement of judgements against an individual cannot reach the inalienable goods of the debtor, in enforcement against public authorities it is not possible to expropriate public assets allocated to an essential activity; in other words, the public assets that are available are limited and finite. In public law, on the contrary, the creation of resources is theoretically admissible; the State is never considered to be insolvent. From that point of view, the individual would be protected by asserting his rights through the channels of public law, which is the only jurisdiction that could achieve the full realization of his claims. The ordinary jurisdiction (of private law) might prove detrimental to the individual because it treats him equally in relation to the public administrative authorities, ignoring the need to weigh private *versus* public interests.

In fact, it is inappropriate to try to resolve a public law conflict according to private law principles and *vice versa*;[52] it would be inconsistent to make judicial claims for services of the State that are typical of public law based on the reasoning of private law. The unconditional search for the realization of an interest (in this case, protection of one's health), on the level of public law, must not flout the principles that govern the public administrative authorities, which include equal access to public goods and services.

In extreme cases, as when there is an imminent threat to the claimant's dignified existence, it is undoubtedly admissible to 'attach' public assets in order to satisfy the claimant (forced hospitalization, supplying of medicines or money to buy medicines) in the name of effective judicial protection of the Rule of Law. That will always be an imperfect and limited solution, however, because not all public assets can be expropriated (the line is drawn where it is necessary to protect the public interest and ensure the continuity of an essential social service). It would also be a partial solution because it benefits only the claimants and therefore violates the principle of equality. In public law, enforcement is therefore a solution that should be adopted only when strictly necessary (urgent judicial measures, danger in delay involving non-pecuniary rights).

In fact, it appears to be unavoidable for judicial review to examine administrative procedures (administrative norms, budgetary laws), even if only incidentally, which is a condition *sine qua non* for judicial review of the rights to health service *vis-à-vis* the public authorities, when the service essentially arises from a legal relationship under public law. The reluctance of public administrative authorities to comply with court orders in public-law cases, however, is symptomatic of a serious institutional imbalance, indicator of a weakened Rule of Law, which might have to be resolved on the political level.

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[52] *See*: Maurer, *supra* n. 5, at 53; Cane, *supra* n. 44, at 9.

5. Final Considerations

Essential rights to health, from the standpoint of substantive and procedural rights, including public policies, should comply with the objective international baselines which, because they are reduced to the national level, should take the level of development of the relevant society into account, as well as the existing standard of living and actual needs of the individual in the specific case at issue.

The principle of effective judicial protection extends to urgent court measures and judicial enforcement, including *vis-à-vis* administrative authorities in healthcare. To admit otherwise, would be a serious departure from the Rule of Law.

On the one hand, the shortage of budgetary resources and funding is no obstacle to the enforceability of the right to health (which is not affected by the proviso of the possible). On the other hand, the enforcement of judgements against the public authorities must comply with the public interest (the need for continuity in essential social services), which often leaves the impression of a deficient judiciary, with widespread frustration concerning the effectiveness of social rights, which is blamed on the Judiciary, even though completely outside its control. In fact, the judicial expropriation of available public goods to satisfy individual claims is typical of jurisdiction over private law conflicts involving the public authorities and, in the field of public law, it is a solution that is not only inadequate but also imperfect because the available resources are finite and not all claims manage to satisfy their claims.

Exaggerated judicial review is a consequence of an insufficient public health system but, paradoxically, it has exacerbated that deficiency by fuelling the growing inequality among the judicial claimants *versus* non-claimants. This is so because, in most cases, judicial review of healthcare is treated as a private-law conflict, without paying proper attention to the administrative procedures, which are mainly intended to ensure universal access to the healthcare.

In fact, claims for medicine and healthcare goods and services should generally be exercised exclusively through the administrative procedures, although, in urgent cases, those claims and procedures are reviewed by the courts simultaneously or, at most, procedural parameters are considered purely incidentally.

In this context, it is also necessary to think about reinforcing the structure of such procedures through a *de facto*, independent and qualified extrajudicial system of administrative dispute resolution, with the primary objective of defending fundamental rights. Such a system, which would salvage the credibility of the healthcare authorities, is the only realistic way of reducing the conflicts inherent in the judicial review of healthcare.

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A COMPARISON OF THE CLASS ACTION FOR DAMAGES IN THE AMERICAN JUDICIAL SYSTEM TO THE BRAZILIAN CLASS ACTION: THE REQUIREMENTS OF ADMISSIBILITY

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After describing the class action for damages in the American judicial system, with the requisites of 'prevalence' and 'superiority,' the study passes to the examiner of the requirements of the admissibility of the Brazilian class action for damages, concluding on the existence of the same requisites, even in a civil law system.

Keywords: common law and civil law; class action for damages; American system of class action for damages; prevalence and superiority; Brazilian class actions for damages; same requisites.

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Table of Contents

1. Introduction

It is known that the great novelty of the Brazilian Consumer Protection Code (*Código Brasileiro de Defesa do Consumidor*) [hereinafter *CDC*], in terms of jurisdictional protection, was the creation of the category of individual homogeneous interests or rights, which are really traditional subjective rights that are still subject today to individual procedural treatment but also, now, group treatment, by reason of their homogeneity and common origin.

Among the public civil actions in defense of homogeneous individual rights, the action provided for in Arts. 91–100 of the *CDC*, intended to be used for reparation of damages individually incurred, was called 'Brazilian class action,' because its precedent was found in the 'class action for damages' of the American system. But the United States has 34 years of experience with such actions, while in Brazil the compensatory action of Art. 91 ff. of the *CDC* has not progressed beyond being a general conviction, with practical application of the regulations occurring only in the process of paying damages to victims or their unknown successors, especially in the area of losses deriving from product defects.

Therefore, it was with great pleasure that I accepted the invitation of Dr. Michael Socarras, *Shook, Hardy & Bacon* Law Firm (Kansas City, Missouri), to meet, in the United States, with Professor Linda Mullenix, University of Texas, one of the greatest and most esteemed specialists in 'class actions' in that country. Being able to find out about the American experience up close, with personal explanations from experts about legal norms and especially jurisprudence, was a unique opportunity for this studious foreigner.

Therefore, I thank Professor Mullenix for her valuable contribution to a better understanding of Rule 23 of the Federal Rules of Civil Procedure [hereinafter FRCP], notably sec. (b)(3), which deals with 'class actions for damages,' and for the understanding of the difficulties encountered by the American courts in deciding on the admissibility (certification) of 'mass tort cases.' And I am grateful for the intelligent assistance of Dr. Socarras, a sharp observer of the similarities and differences between the US and Brazilian systems. My thanks also go to both of these individuals and to their assistants for the interest they showed with respect to the

legislative and doctrinal treatment of Brazilian actions in defense of diffuse, group, and homogeneous individual interests.

The inspiration for this study of comparative law was born in the days spent working together in New York and Miami.

2. Rule 23 of the Federal Rules of Civil Procedure

The institution in American law known as the 'class action,' based upon equity and rooted in the Bill of Peace of the 17th century, has been expanded so that it has acquired somewhat of a central role in law. Rule 23 of the FCRP of 1938 establishes the following basic rules: a) the 'class action' will be admissible when it is impossible to bring all of the members of the class together; b) control over *adequate representation* is a matter incumbent upon the court; c) the court will also be responsible for verifying the existence of *commonality of interests* among the members of the class. And, moreover, from the 1938 FCRP comes the systemization of the degree of commonality of interests, which, in turn, results in a classification of the 'class actions' into the categories '*true*, *hybrid*, and *spurious*,' depending on the nature of the rights of the subject dispute (*joint*, *common*, or *secondary*, or even *several*), with various procedural consequences.[1]

The practical difficulties regarding the exact configuration of each category of class action, with its own procedure, led the American specialists (Advisory Committee) to modify the regulation of the matter in the FRCP of 1966, giving a new shape to the former *spurious class action*, precisely that intended for cases in which the members of the class are holders of various and different rights, but dependent on a common question of fact or law, and therefore a single-purpose jurisdictional measure is possible for all of them. That is the origin of the Brazilian category of homogeneous individual interests.

Rule 23 of the FRCP of 1966, which has a pragmatic and functional nature, embodies four prior considerations (prerequisites) and establishes three categories of class actions, two of them being mandatory and one non-mandatory.

The prerequisites for any class action are as follows:

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

[1] For a detailed analysis of the 1938 FRCP and the jurisprudential development of the subject, *see* Michele Taruffo, *I limiti soggetivi del giudicato e le class actions*, 1969 Riv. dir. proc. 609, 619–28.

and
(4) the representative parties will fairly and adequately protect the interests of the class.

It is a question of threshold requisites.

Section (b), which follows, gives the requisites for prosecuting the class action, which in truth create three categories of class actions:

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:
(1) prosecuting separate actions by or against individual class members would create a risk of:
(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
(3) the court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
(A) the class members' interests in individually controlling the prosecution or defense of separate actions;
(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
and
(D) the likely difficulties in managing a class action (emphasis added).

3. Specific Requisites of the Class Action for Damages in the American Judicial System: The 'Prevalence' of Common Questions and the 'Superiority' of Group Protection

A warning is appropriate at this point: secs. (b)(1)(A) and (B), as well as sec. (b)(2), focus on the mandatory class action, which in Brazilian nomenclature corresponds to

actions in defense of diverse and group interests. The present study will not concern itself with these, but it is nonetheless worthwhile to observe that sec. (b)(1)(A) signifies that if the class action is not brought, the individuals would be prejudiced, whereas sec. (b)(1)(B) indicates that the absence of the class action would prejudice the defendant. In turn, sec. (b)(2) deals – also with respect to the mandatory class action – with cases of obligations to seek or not to seek *injunctions* or declaratory judgments, still in the category that in Brazil corresponds to actions in defense of diverse and group interests.

But, it is in sec. (b)(3) where one encounters the legal system or structure known as the 'class action for damages,' which is not mandatory, in that it allows one to opt out.[2] It therefore corresponds to the Brazilian action in defense of homogeneous individual interests, precisely of the kind known as recovery for damages individually incurred.

The aforementioned sec. (b)(3), applicable specifically to 'class actions for damages,' did not exist in the FRCP of 1938, and therefore can be considered the great innovation of the FRCP of 1966.

In accordance with this rule, the 'class action for damages' (subject to the prerequisites of sec. (a)) must adhere to an additional two requisites:

1) the *prevalence* of the questions of common fact and law over questions of individual fact or law; and

2) the *superiority* of group protection over individual protection, in terms of justice and efficacy of the court decision.

Deriving from these two requisites set forth in sec. (b)(3) are the following specifications, secs. (b)(3)(A)–(D), which represent indicators that have to be taken into account for determining prevalence and superiority.

The general spirit of the rule derives from the principle of access to justice, which in the American system is broken down into two parts: first, facilitation of the procedural treatment of fragmented cases that would be very small taken individually, and second, achieving the greatest efficacy possible in the legal decisions made. Also, it attempts to adhere to the objectives of reducing time spent, effort, and expenses, and to ensure consistent decisions.

The requisite of *prevalence* of common over individual aspects indicates that, without this, there would be disintegration of the individual elements; and the requisite of *superiority* takes into account the need to avoid class action treatment in those cases where the class action can lead to insurmountable problems, with respect to the advantage, in the specific case, of not fragmenting the decisions.

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[2] With respect to the *opt out* technique in American class actions, *see* Ada Pellegrini Grinover et al., Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto 765–66 (5th ed., Forense Universitária 1997).

4. Some Examples of American Rulings

The American courts have rigorously observed the requisites of prevalence and superiority in ruling upon the admissibility of an action as being a class action (*certification*).

An analysis of the most representative legal decisions made in the area of 'class actions for damages' shows that the existence of the aforementioned requisites has been recognized, in fact readily, in areas other than damages caused by product defects, such as environmental disasters, airplane accidents, collapse of structures, and injury of workers. There are many class actions for reparation of individual damages where there was certification.

It is worth noting, among others, the recent decision of *Mullen v. Treasure Chest Casino, LLC*, which concerns certification of a class of employees damaged by a defective ventilation system.[3] The court recognized the prevalence of common issues, mainly those involving causality, damages, and negligence, such that individual issues did not predominate as occurred in the *Amchen* and *Castano* cases.[4] The court affirmed the lower court's finding of superiority based on the fact that the dispute in the case would not present the handling problems found in the *Castano* case, and, on the contrary, made it possible to save procedural time and avoid multiplication of cases that might result in contradictory decisions.

Before this case, *certification* had been granted in actions for reparation for damages caused by coal dust (*Biechele v. Norfolk & Western Railway Co.*) and by the discharge of chemical matter into the Chesapeake Bay (*Pruitt v. Allied Chemical Corp.*), as well as 'agent orange,' for the benefit of soldiers that fought in Vietnam.[5]

But there have been more problems with recognition of prevalence and superiority with respect to 'class actions for damages' in the area of reparation for damages to consumers that have occurred due to a product defect.

As a result, in the 34 years in which the FRCP of 1966 have been applied, there have been few instances of *certification* for 'damage class actions' in this area. We can point out, among others, the case of damages caused by consumption of the pharmaceutical product (Bendectin) in which the 'mass tort case' was certified, although in the second phase the class action was rejected based on merit.[6] There are also earlier cases in which the issue had to do with the warranty on the product purchased, as in the

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3 *Mullen v. Treasure Chest Casino*, *LLC*, 186 F.3d 620 (5th Cir. 1999).

4 *See infra* secs. A and F, nn. 8, 16, and 17.

5 *See* José R. Cruz e Tucci, 'Class action' e mandado de segurança coletivo: diversificações conceptuais 29–30 (1990).

6 Telephone Interview with Linda Mullenix, Professor of Law at the University of Texas School of Law, Austin, Texas (Jan. 27, 2000). *See also In re Bendectin Products Liability Litigation*, 749 F.2d 300 (6th Cir. 1984).

Magnuson-Moss Warranty – Federal Trade Commission Improvement Act of 1975 (*Feinstein v. Firestone Tire & Rubber Co.* (on the manufacture of imperfect and unsafe tires); *Mullins v. Ford Motor Co.* (for unfitness of the automobile lubrication system); and *Skelton v. General Motors Corp.* (for the installation of defective gears)).[7]

It should be noted, however, that despite the few instances of *certification* in the area of damages caused by product defects, this does not mean that the institution has failed, because 90% of the cases decided have been resolved by settlement, through alternative dispute resolution (ADR) in the multi-district jurisdictions in which the class actions were brought.

Now let us look at the most significant decisions in the area of damages from consumption of defective or harmful products, which were not allowed as 'damage class actions' because the requisites of prevalence and superiority were not met.

A. The *Castano* case,[8] involved reparation for damages caused by dependence on nicotine, based on the allegedly fraudulent suppression of information on the manipulation of the level of nicotine in cigarettes to increase the level of dependence.

The court decertified the class on appeal because of the lack of prevalence of common issues and because the class failed the superiority requirement of Rule 23(b)(3). The court found that after the group proceeding, the individual class members would still have to demonstrate reliance in individual proceedings. Thus, common issues were only a small part of the decision.

With respect to superiority, the court observed that certification of the class action would lead to insurmountable pressures on the defendants to settle, *i.e.* 'judicial blackmail,' it being true that group treatment could have an affect on the destiny of an entire industry. The decision refers to the precedent of Judge Posner[9] on the analysis of superiority. On the other hand, the court pointed out that each claimant could receive compensation in the millions of dollars, it not being a waste to bring these claims to justice individually. It further observed that the parties would spend years in litigation, because reliance predominated over the common issues.

B. The *Allison* case,[10] involved allegations of racial discrimination at a company with regard to its hiring, promotions and compensation, and training policies. The purpose of the action was to establish the parameters of liability, if any, and reparation for damages. Here we will examine only the *damage* aspects of the *class action*, in which the court refers to the precedents of the *Castano*[11] and *Amchen*.[12]

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7 *See* Cruz e Tucci, *supra* n. 5.

8 *Dianne Castano et al. v. The American Tobacco Co. et al.*, 84 F.3d 734 (5th Cir. 1996).

9 *See infra* sec. D, n. 14.

10 *James E. Allison et al. v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

11 *See supra* sec. A, n. 8.

12 *See infra* sec. F, nn. 16 and 17.

Prevalence was not recognized on appeal because the liability for reparation for damages could only be determined through examination of the personal circumstances of each claimant. It was deemed that the individual issues predominated over the common issues, the following individualities being noted: what kind of discrimination there was; how it affected each plaintiff emotionally and physically, both at work and at home; what type of medical treatment each claimant received; and the cost involved in the treatment, *inter alia*.

Moreover, the appellate court found a lack of superiority noting that the problems of group treatment would be exacerbated because there were more than one thousand individual claimants and the high value of the individual claims removed the barriers to individual actions.

C. The *Vorhis* case,[13] also known as the *Suhrheinich* case (name of the judge), involved liability for a product (artificial penis) that had required a number of prosthesis replacements, injuries, pain, and discomfort.

The court found a lack of prevalence in that case because issues of fact and law differed 'dramatically' from individual to individual, without a common cause of damage. The court observed that generally, with respect to product defects, the individual issues can numerically exceed the common issues. However, in this specific case, there was no proximate cause applicable to each potential class member. The defense (such as not following directions, acceptance of risk, concurrent negligence, and the level of limitation) could depend on facts specific to each claimant. Moreover, the products were different, each claimant had a different complaint, and each received different information and expectations (*assurances*) from their doctor.

With regard to superiority, the court found that the specific problem of each claimant would lead to insurmountable problems in a class action, keeping in mind that the individual disputes differed depending on the model of the prostheses, which were made over a 22-year period. The court noted that the individual actions, on the other hand, would be relatively simple, since they were based on a claim regarding a specific model or on the statements of a particular urologist.

D. The *Posner* case[14] (from the name of the judge), involved allegations of negligence by a group of hemophiliacs who were infected with the AIDS virus because of contaminated blood.

The main argument against superiority in this case was the risk of bankruptcy with respect to companies that might not have been legally liable. In fact, Judge Posner was particularly concerned that one jury hearing a single class action case could determine the destiny of an entire industry. He emphasized that there were, individually, varying degrees of liability, in part because of the various state standards of negligence.

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13 *In re American Medical Systems, Inc., et al.*, 75 F.3d 1069 (6th Cir. 1996).

14 *In re Rhone-Poulenc Rorer, Inc., et al.*, 51 F.3d 1293 (7th Cir. 1995).

E. The *Cimino* case,[15] involved reparation for damages caused by asbestos. The case was already in the third phase; in the first phase, many defendants had made an agreement and many had gone bankrupt, so only five of them remained. In the first phase, the court found that the defendants knew or should have known that their asbestos insulation caused a risk of illness in plaintiffs. In the next phase (sampling), the court decided if there were exposure to the product between the years 1942 and 1982, if the exposure took place for sufficient time and intensity to cause lung damage, and if the asbestos were present in the product, in some cases it would have been the cause of illness. The compensation was calculated for each claimant, based on the type of disease (mesothelioma, lung cancer, other type of cancer, asbestosis, pleural illnesses).

The decision was reversed on appeal, invalidating the proceeding from the last phase (sampling) forward, including the agreement plan (*parties' settlement plan*) and the application proceedings (*extrapolation cases*). The grounds for reversal were the absence of prevalence, in that it could not be determined that the product had been the cause of the illnesses, this being a case of a judgment for damages in which the individual issues predominated over the common issues.

F. The *Amchen* case, also addresses damages caused by asbestos.

On appeal,[16] prevalence was not recognized because, although there was a common issue (the ability of asbestos to cause physical injury), the members of the class were subjected to different products containing asbestos for different periods of time, in different ways. Some members were not ill or had only asymptomatic diseases, while others suffered from lung cancer, asbestosis or mesotheliomas. Each claimant had a different history with respect to smoking, and treatment expenses had also varied. The court recognized that they had little in common, which meant there was an absence of prevalence.

Additionally, the court affirmed that in asbestos class action cases, the absence of predominance of common issues was a typical problem because of a large number of significant individual issues.

Moreover, the court noted a lack of superiority which raised problems with respect to the efficiency and the fairness of the decision, due to the existence of too many uncommon issues and an excessive number of class members, which barred certification as a class action. On the other hand, the court noted that each claimant had a significant interest in maintaining control over his or her individual claim and that, moreover, the damages were relevant. Therefore, the court found that it was inappropriate for each claimant to be bound by a group judgment.

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15 *Cimino et al. v. Raymark Industries, Inc., et al.*,151 F.3d 297 (5th Cir. 1998).

16 *Georgine et al. v. Amchen Products, Inc., et al.*, 83 F.3d 610 (3d Cir. 1996).

The *Amchen* case reached the Supreme Court of the United States,[17] which invalidated the global settlement agreement signed by the parties in the first instance because the class could not satisfy the requirements of common issues, predominance, and adequacy of representation. And, referring to the arguments of the appeals court, which were transcribed in the decision, it decided it was not enough that the claimants had the shared experience of exposure to asbestos, given the large number of issues peculiar to each category and the significance of the non-common issues.

5. The Protection Requisites of Homogeneous Individual Interests: Common Origin and Homogeneity

The requisites of Brazilian law for jurisdictional protection of homogeneous individual interests are well-known. Section III of the Sole Paragraph of Art. 81 of the *CDC* (applicable to a public civil action by operation of Art. 21 of Law No. 7.347 of July 24, 1985, introduced by Art. 117 of the *CDC*) conceives of 'homogeneous individual' rights or interests as 'those deriving from a common origin,' thus permitting protection thereof by the group.

Homogeneity and *common origin* are therefore the requisites for group treatment of individual rights.

Let us begin with common origin. Common origin may be *de facto* or *de jure*, and as noted by Kazuo Watanabe, the term

> does not necessarily signify a factual and temporal unit. The victims of repeated deceptive advertising in the media of a product injurious to health that was acquired by various consumers over a long space of time in diverse regions have, as a cause of their damages, homogeneous facts such as to give a 'common origin' to all of them.[18]

But it is also essential to note that common origin (cause) may be proximate or remote. Proximate or immediate, as in the case of an airplane crash, in which a number of people are the victims; or remote, mediated, as in the case of injury to health attributed to a potentially injurious product, which may have had as proximate cause personal conditions or improper product use. The more remote the cause, the less homogeneous the rights will be.

Regarding homogeneity, little has been said. Perhaps the very wording of the law leads one to believe that 'homogeneity through common origin' may be

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[17] *Amchen Products, Inc., et al. v. Windsor et al.*, 521 U.S. 591, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997).

[18] Kazuo Watanabe, Código Brasileiro de Defesa do Consumidor: comentado pelos autores do anteprojeto (6th ed., Forense Universitária 1999).

a unique requisite. Rights would be homogeneous provided that they had a common origin.

Nevertheless, it is evident that common origin – above all if it is remote – may not be sufficient to achieve homogeneity. In the consumption of a potentially injurious product, there will be no homogeneity of rights between one consumer who was exclusively victimized through the consumption of that product and another consumer, whose personal health condition caused him or her physical injury independently of the use of the product or one who improperly used the product. There is no homogeneity between situations of fact or law in which the personal characteristics of each consumer behave in a completely different manner.

6. Homogeneity and Prevalence of Common Interests. The Legal Potentialities of the Petition

Now then, consideration must be given to the criteria of *prevalence of the group dimension over the individual* as embodied in Rule 23 of the FRCP, so that one can determine from a practical point of view whether or not the individual rights are, in fact, homogeneous because of their common origin.

If the prevalence of the group aspects is nonexistent, it is my belief that the rights are heterogeneous, even though they may have a common origin. In theory, one can likewise state that this common origin (or cause) will be remote and not proximate. In this case, if homogeneous rights are not involved, group protection cannot be admitted because of the absence of the legal potentialities of the petition.

If jurisdictional protection of individual rights through a group action is circumscribed within the Brazilian system to *homogeneous* rights, the absence of this characteristic must lead to inadmissibility of the class action in defense of homogeneous rights. If heterogeneous rights are involved, the petition for group protection will have no 'legal possibility,' a condition of admissibility in civil law.

Using this route, the conclusion arrived at is that the *prevalence of common questions over individual ones*, which is a condition of admissibility (*certification*) in the American system of 'class actions for damages,' is also a condition in Brazilian law, which allows group protection of individual rights only when they are *homogeneous*. With the individual questions prevailing over the commonality questions, the individual rights will be heterogeneous and the petition for group protection will become legally impossible.

7. Superiority (*rectius*, Efficacy) of Group Protection and Interest in Acting. Evidence of the Causal Connection

The requisite of *superiority* for group protection, with respect to the individual, in terms of justice and efficacy of the court's decision, can be approached in Brazilian

law from two aspects: that of the interest to act (another condition of admissibility in civil law) and that of the effectiveness of the proceeding.

However, it is first essential to note that, instead of requiring superiority (appropriate to a legal system that, according to some,[19] gives preference to individual procedural protection over group procedural protection), under the Brazilian system one would more properly speak about the need for the *efficacy of group protection*.

Note that the interest to act under the provisions of civil law is the condition of action that demands, for the exercise thereof, the need and usefulness or expediency of the jurisdictional measure invoked, in addition to its appropriateness for protecting the right claimed. This is to say that one can only seek judicial channels when necessary, *i.e.* when the forces of substantive law are shown to be insufficient for resolving the dispute, and the usefulness or expediency corresponds to verifying specifically that the legal action invoked will be useful or expedient for ensuring the well-being claimed by the principal. The requisites of need and expediency are placed on the plane of procedural economics because the jurisdictional measure, which demands an expenditure of energy, can be activated only when it is necessary and useful.

In turn, the adequacy requirement means that the legal action measure invoked must be adequately adjusted for protecting substantive law; this principle is responsible for choosing the procedural channel established by law that is best suited to protect a specific interest.

Thus, it is not difficult to establish the correlation between the *superiority* requirement of the class action, with respect to other means for resolving disputes (proper to common law), and the interest-expediency and interest-appropriateness of civil law. If the jurisdictional measure resulting from the public civil action in defense of homogeneous individual rights is not as effective as when it derives from individual actions, the group action will not show itself to be expedient for the protection of the aforementioned interests. And moreover, it will not be characterized as an adequate channel for protection thereof.

The explanation: the public civil action in liability for damages individually incurred, as is well-known, leads to a generic condemnatory decision that recognizes the liability of the defendant for the damages caused, and orders said defendant to make reparations to the victims or their successors, even though these successors may not be yet identified (Art. 95 of the *CDC*). What follows is an execution of the verdict or judgment, on an individual basis, in which it will be necessary to evidence

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[19] This is the position, for example, of Professor Linda Mullenix who arrives at this understanding from Rule 23 and from the considerations of the Advisory Committee, stating that the prevalence of common issues is not *per se* sufficient to justify a sub (b)(3) class action, in that another method of handling the lawsuits may be more advantageous. *See* Fed. R. Civ. P. 23(b)(3) commentary at 123 (1999) (amended in 1966).

to those who qualify the personal injury and the causal connection between the latter and the general damage recognized by the verdict, in addition to quantifying the losses.[20]

Now then, proof of the causal connection can be so complex, in the specific case, that it will render the generic judgment in favor of plaintiffs under Art. 95 practically ineffective, which only recognizes the existence of general damages. In that case, the victim or his or her successors will have to face an executionary proceeding as complicated as an individual condemnatory action, because there the defendant must be assured of the guarantees of legal due process, and notably the right of cross-examination and ample defense. And the route of group action will have been inadequate for obtaining the protection sought.

The same difficulty will be encountered in all public civil actions in defense of homogeneous individual rights. Think about a petition for the restitution of an unconstitutional tax on a class of taxpayers, or the refunding of overpaid monthly school tuition, or moreover the payment of a difference due by the Social Welfare Fund or by banks when implementing monetary indexing rules. In these cases and in many others, the recognition of general damage will be extremely useful and adequate for executions that will demand sufficient simple proof.

The problem is found specifically in the area of damages caused by product defects, and is restricted to actions for recovery of losses individually incurred (the so-called 'Brazilian class action'), *i.e.* precisely the action provided for in Arts. 91–100 of the *CDC*, which corresponds to the class action for damages under the American system.

Even with respect to these class actions, proof of a causal connection can be simple: in an airplane crash, in an accident caused by the collapse of a building, in a factory explosion, in the injuries to consumers because of difference in weight of the product sold, the usefulness of the group sentence will be unquestionable. But in other cases, everything will still have to be proven in the settlement proceeding, making the generic guilty verdict a fallacy.

Some examples will give dimensionality to this statement: first, let us look at some appropriate cases from the American experience, regarding reparation for damages caused by tobacco, racial discrimination, a penal prosthesis, blood contamination and asbestos.[21]

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[20] I previously noted that the Presidential veto under the Sole Paragraph of Art. 97 of the *CDC* ('The execution of the judgment, which will be by articles, may be carried out in the domicile of the executing party, with only the connection of causality, the damage, and the amount thereof having to be evidenced') was harmless. Leaving aside the matter of jurisdiction – which motivated the veto and which must be resolved on the basis of Art. 101(I) of the *CDC* – it is the very nature of the condemnatory sentence under Art. 95 that the execution must be carried out by articles, with proof being demanded of individual damages and causal connection, as well as quantification of the losses. *See* Pellegrini Grinover et al., *supra* n. 2, at 788.

[21] *See supra* Ch. 4, secs. A–F.

The considerations of the United States courts, including the Supreme Court, make obvious the problems that class actions of this type present, which are insurmountable barriers to the efficacy and fairness of the group decision.

One example taken from Brazilian class actions can be the petition for indemnification, consisting of compensation of smokers for damages caused by tobacco. In this case, one can opine that the group ruling, even if favorable, simply affirms that smoking *can cause* injury to health, ordering the indemnification of those who have, in fact, suffered damages, provided that the causal connection between their illness and the use of tobacco is proven. All such proof must be forthcoming in the execution proceeding, and would be precisely the same as that produced in each individual discovery action. The group judgment will not have had any practical expediency. And, even though it is admitted that the group ruling affirms (foolhardily) that smoking *causes* damage to health, the defendant will be entitled in each specific case to undertake a cross-examination of the personal conditions of the person entitled to indemnification, alleging or proving personal knowledge of the risk of the product, preexisting illnesses, the course that the illness would have taken even without the use of tobacco, the possible causes of death, *etc.* In truth, in this very case, proof of the causal connection would be so complex as to render the generic ruling useless.

It seems possible, therefore, to establish a correlation between the requirement of prevalence of the commonality aspects and the superiority (or efficacy) of protection through class actions. The more the individual aspects prevail over the common ones, the more group protection will be inferior to individual protection, in terms of the efficacy of the decision. In the language of the *CDC*, the more heterogeneous the individual rights, the less useful the generic sentence under Art. 95 and inadequate the route of public civil action for recovery of individual damages is. Thus, in our legal system, the absence of legal feasibility of the petition[22] will frequently increase the lack of interest to act (interest-usefulness and interest-appropriateness).

8. Procedural Technique and Effectiveness of the Proceeding: Efficacy and Justice of the Decisions

In Chs. 6 and 7 *supra*, we examined the requisites for prevalence of common issues and for superiority (or efficacy) of the group decision based on the category of the conditions of the action. But the procedural technique is at the service of the process, so that the latter can achieve not only its legal purposes (resolution of disputes of substantive law) but also its social (to appease with justice) and political (participation, including that of the adversary) purposes. And it is through the procedural technique that the final purposes of jurisdiction are ensured. Therefore,

[22] *See supra* Ch. 6.

procedural technique must be regularly revisited, in order to ensure the efficacy of the judgment.

The interpretation given in Ch. 7 *supra* on the interest-utility and the interest-appropriateness for admissibility of a group reparatory action for damages individually incurred is in accordance with the social and political purposes of the proceeding.

This means that the requisite of superiority of group protection, in terms of 'justice and efficacy of the decision' (Rule 23(b)(3) of the FRCP of 1966), must also be examined with respect to the need for the social function of the process, understood as an instrument that effectively leads to fair appeasement.

We are now entering upon one of the topics held most dear by modern Brazilian procedural specialists, that of the effectiveness of the proceeding and of its material instrumentality, to transform it into an instrument that is in accordance with the underlying social reality, and is suited for the effective resolution of disputes of substantive law.

A generic ruling that is not suitable for bringing pacification with justice and a group proceeding incapable of resolving the substantive law dispute cannot find shelter in modern procedural law, such as that of Brazil. The procedural technique must then be used for avoiding and correcting any possible detouring of a proceeding, which must always adhere to social realities.

Thus, the need is reinforced to avail oneself of the procedural technique, with institutions and conditions of action, in order to avoid having the proceeding result in something ineffective (in terms of usefulness of decision), inadequate (in terms of correlation between the claim for substantive law and the protection sought), or unfair (in terms of limiting the cross-examination). Or to correct its bearing or direction at any time, since it is known that there is no preclusion about the conditions of the action or about the guarantees of legal due process, which must be broadly ensured to the defendant in the settlement proceeding.

In those cases where the generic ruling of Art. 95 of the *CDC* is of such little use, to the point of being inadequate to resolve a dispute fairly, the verification of the interest-utility and the interest-appropriateness will transcend the scope of the procedural technique and become inscribed as a requirement of the effectiveness of the proceeding.

Nor should it be forgotten that a jurisdictional measure absent practical usefulness lowers the prestige of the process and constitutes a smokescreen before the broad vision of access to justice. Access to justice cannot be an empty process. Facilitating such access through the intermediary of collective or group actions is a major advancement, assimilated by Brazilian procedural law. Permitting public civil actions which are unsuitable for effectively managing useful legal procedures only discredits the legal procedure, all to the frustration of the consumers, to say nothing of lowering the prestige of the judicial branch.

9. Conclusion: Applicability of the Requisites of 'Prevalence' and 'Superiority' (or 'Efficacy') to the Brazilian Public Civil Action for Reparation of Damages Individually Incurred

Comparative law has irrefutable usefulness in all legal disciplines. By comparing foreign and domestic institutions, with a very clear view of their differences and their similarities, we can obtain a better understanding of domestic law and derive the inspiration to continue making improvements to it.

It is obvious that foreign solutions cannot be mechanically imported, since each system has its own peculiarities and social, political, and economic realities can vary a great deal from one country to another. But the foreign experience in confronting and seeking solutions to common problems must not be disregarded.

The United States of America has a long tradition of collective legal actions. The American courts have been working for 33 years in the area of class actions for damages and with the new regulations of the FRCP of 1966. Brazil cannot simply ignore this experience.

This is not about an unconditional acceptance of the particularities of foreign institutions. When the *CDC* introduced the group action into Brazilian law in 1990 in defense of homogeneous individual interests,[23] it was without doubt inspired by the American institution of class actions; however, Brazil adopted an original discipline, as can be seen for example from the nonexistence of the *opt out*, from the different treatment of *fluid recovery*, from the adoption of a *res judicata erga omnes*, but only for benefitting the holders of individual rights, which still can drive their personal actions following the dismissal of the group legal action.[24]

But, if the factual reality is the same, if the practical questions are similar, if there is a commonality of general principles (access to justice, effectiveness of the process, justice from the decisions, legal due process), certainly the foreign experience can offer parameters of undeniable usefulness.

Thus, it is with the requirements of prevalence of the common aspects over the individual aspects, and the superiority of group protection in terms of justice and efficacy of the decision, insofar as concerns class action for damages, to which the Brazilian public civil action for recovery of damages individually incurred corresponds.

The sole difference insofar as concerns 'superiority' is that this is required in a body of law – but not Brazilian – in which the individual aspects have preference over the social. For this reason, preference is given in the United States to the individual action

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[23] Previous to Law No. 7913 of September 7, 1989, a form of class action was instituted for protection of the interests of investors in the securities market, but it restricted the Public Prosecutor's legitimacy to act, and provided the matter with a treatment very much different from that adopted by the *CDC*.

[24] Regarding the peculiarities of the Brazilian class action in comparison to the American class action, *see* Pellegrini Grinover et al., *supra* n. 2, at 766–69, 793–94, 803–09, *etc.*

over the group action where the efficacy is equal for both processes. In Brazil it is different: the trend is to move more and more from an individualized process to a social process, with substantive law trends accompanying this.

But even in Brazil, preference cannot be given to collective actions if these actions are absent efficacy at least equal to what one can attain in individual actions. If a group verdict does not serve for facilitating access to justice, if the individuals are obligated to exercise – in an execution proceeding – the same procedural activities or actions that they would have to exercise in an individual condemnatory action, the jurisdictional measure would be ineffective, representing absolutely no gains for the people.

With these observations, it seems to me that the requisites of prevalence of the common aspects over the individual aspects and requisites of superiority (*rectius*, efficacy) of group protection over individual protection are fully applicable to the public civil action for recovery of damages individually incurred. They must be demanded in the corresponding admissibility proceeding, in order to preserve the effectiveness of the proceeding.

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CONSTITUTIONAL TRANSPLANT IN THE PEOPLE'S REPUBLIC OF CHINA: THE INFLUENCE OF THE SOVIET MODEL AND CHALLENGES IN THE GLOBALIZATION ERA

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In this essay, I mainly focus on the constitutional transplantation in the People's Republic of China. Firstly, I briefly present the Chinese constitution-making process from the Qing dynasty to the Republic of China to show that both regimes had transplanted more or less liberal constitutional principles, rules and institutions into their domestic constitutional document. Then, because China and the Former Soviet Union shared the Marxism-Leninism, China's 1954 Constitution borrowed almost all the constitutional articles to various extents from the 1936 Soviet constitutional code. Though few articles of the 1977 Soviet Constitution have been imported into China's present 1982 Constitution, China's Constitution is still influenced by the Soviet model of constitution in many aspects related to the political and legal reform in the post-Mao era. Globalization brings many challenges to present-day China's Soviet-featured constitutional system. With China's accession to the WTO, a qualified judicial review mechanism is required to be established by the other Member States. However, China seems not to satisfy this obligation under the framework of the present legal system. In addition, a constitutional review mechanism is still absent in China. Besides, the modern Chinese legal system keeps silent on the domestic implementation of the UN international human rights treaties in view of the fact that Chinese international law theory was molded by Soviet's which took highly concerned on protection of its state sovereignty. Chinese authorities, on the other hand, take a vague attitude to universal human rights standards. They sometimes prefer to observe them, while in other cases, they are not willing to follow them. Besides that, the domestic effects of international law also depend on the outcomes of the struggle and compromise between the reformist and Chinese Marxist conservative.

Keywords: constitutional transplant; the evolution of China's constitutional system; the envisioned China's constitutional court; judicial review; China's human rights legislation.

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1. A Brief Introduction of Chinese Constitutional History Prior to the People's Republic of China

The Chinese constitutionalist process began in the Qing dynasty. In 1898, Qing's Emperor Guangxu adopted the proposition presented by two influential intellectuals – Kang Youwei and Liang Qichao – who had proposed that the Qing regime should immediately start the political reform replacing the absolutist monarchic state with a constitutional state ruled by monarchy. However, the reform lasted just over 100 days after being cracked down on by the powerful conservative bureaucratic class who later detained the Emperor Guangxu in the Forbidden City until his death. Few years later, a more radical voice echoed from the Chinese radical intellectuals advocating the overthrow of the Qing's monarchical regime and calling for the founding a new Americanized republicanism.[1] Under the long pressures imposed by revolutionaries, as well as by those foreign governments who required

[1] *See* T. Cheng, *On the Refined Democratic Regime for Chinese Political Reform*, in The Selected Works of Xinhai Revolution in the Primary Ten Years 120 (S. Zhang & R. Wang, eds.) (2nd ed., 1963). Cheng Tianhua argued that 'the French writer Montesquieu has demonstrated to us the theory of separation of the power and attributed good governance to republicanism. It was widely seen as an ideal model by the state leaders and comparative politics scholars all of whom recognized the advantage of republicanism.' *See also* R. Zhou, *Revolutionary Army*, in The Compilation of Chinese Modern History 1840–1949, at 649 (Y. Dai, ed.) (1997). Zhou Rong claimed that for the establishment of a new state, China, should follow the United States constitutional model in all aspects.

that the Qing regime should reform its old-fashioned cruel feudal legal system into a modern civilized one, the conservative leader – the Empress Dowager – contritely acknowledged the inability of the old politics to meet the demands of the new condition. In the decree issued in the name of Emperor Guangxu, the Dowager claimed that 'we should correct our shortcomings by adopting the best method and systems obtained in foreign countries, basing our future conduct upon a wise recognition of past errors.'[2] China drafted its first constitutional document in 1908 – '*The Outline of Imperial-Made Constitution*'[3] – where the Japanese Meiji constitutional model was adopted by Chinese authorities[4] inspired by the fact that Meiji Japan was the first oriental state that had successfully adopted the western model of government structure. Though the Outline of the Constitution was widely regarded as a quasi-constitutional document that mainly reflected the monarchy's willingness to maintain absolutist monarchic rulings as well as to limit the constitutional rights of subjects, some liberal constitutional principles can still be perceived there.[5] For instance, the constitutional provision on separation of powers between the legislature and the judiciary was one of its impressive achievements: the national parliament has the exclusive power of law-making, while the judiciary had the capacity to determine cases according to laws approved by the members of parliament. Moreover, the Outline incorporated a series of basic constitutional rights: the liberty of freedom of speech, right to property, the right to a fair trial and the rights to liberty, *etc.*[6]

The effort to build a constitutionalist state ruled by monarchy, however, was in vain because the conservative Manchus were not willing to reform the Qing's regime into a more liberal state to satisfy the needs of the Revolutionary Party and showed pale resistance to the political interference imposed by western imperialist states. The radical advocacy for terminating feudal monarchy ruling by force proposed by the Revolutionary Party gradually became the dominant consensus among Chinese liberals.[7] The leader of the revolutionaries, Sun Yatsen, called for China to become a state modeled on the United States after the end of the Qing dynasty.[8] The Qing's regime came to an end in 1911 when Qing's Former Military General Yuan Shikai peacefully forced the last Emperor of the Qing Dynasty, Pu Yi, to abdicate.[9] On January 1,

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2 Payson J. Treat, *Constitution Making in China*, 2 J. Race Dev. 147, 148 (1911).

3 Treat, *supra* n. 2, at 151. 'The Outline imperial-made constitution' was not equal to a constitution with binding power, but it was merely progressive guide outline for Qing's governmental operation.

4 Z. Xie, The Legislative History of Republic of China 34 (2000); Y. Yang, The Summary of Chinese Political System History 323–25 (2001).

5 Chongde Xu, The Constitutional History of People's Republic of China 7 (Fujian Remin Press 2005).

6 Xu, *supra* n. 5, at 7.

7 Albert P. Blaustein, *The Influence of United States Constitution Abroad*, 12 Okla. City U.L. Rev. 435, 440 (1987).

8 *See* Y. Sun, *Talking in Paris (from November 21 to 23, 1911)*, in The Complete Works of Sun Yatsen 563 (Y. Sun, ed.) (1981).

9 Y. Ma, *From Constitutional Monarchy to Democracy Republican System*, 3 Anhui History Study 22, 27 (2011).

1912, the interim Government of the Republic of China was founded in Nanjing. Though heavily influenced by the US constitutional model,[10] the newborn regime did not completely adopt the Americanized presidential model in which the president of the Republic is granted abundant powers. In contrast, *The Interim Constitution of the Republic of China*, promulgated in 1912, adopted the cabinet system of the French model[11] with the prospective purpose of constraining the power of the future President Yuan Shikai who was a warlord but otherwise a well-recognized figure among western imperialists in possession of the capacity to maintain the stability of China in the post-Qing era. *The Interim Constitution* was partly inspired by the theory of Jean-Jacques Rousseau – sovereignty of the populace – in Art. 2 where it set forth that 'the state sovereignty belongs to all citizens.' From Art. 3 to Art. 6, it provided for the competences of the Senate, President of the Republic, State Council and Court. The senators were elected directly by the citizens. The President of the Republic would be elected by the approval of $^{2}/_{3}$ of the senators, provided that a minimum of $^{3}/_{4}$ of the members voted. The judges in the courts had the obligation of adjudicating litigations according to the positive law. Moreover, it assumed the constitutional principle of equality in Art. 5 that 'all the people in the Republic of China are equal, without any distinction of race, social class or religion.' From Art. 6 to Art. 15, the Interim Constitution followed the liberal constitutionalist model enshrining a series of liberal rights: freedom of speech, writing, association and assembly, the rights of privacy in correspondence, the freedom of migration, the freedom of religion, the rights of property and freedom of setting up private enterprise, *habeas corpus*, the rights to petition to the parliament or administrative officials and the rights to remedies from the court or other supervisory bodies. These new constitutional achievements had reflected the unrealistic desire of the Chinese republicans to build a new nation via the making and fulfilling of constitutionalism. However, the fate of the Interim Constitution inevitably came to an end when Yuan Shikai dissolved the Congress in 1914.

In the next 37 years, China fell into endless warfare. Two World Wars and an endless civil war, combined with continuous social chaos, caused the state regime frequent changes. Correspondingly, each regime similarly sought to claim legitimacy through

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[10] Z. Nie, *One Constitution and Cne Era – Introduction of US Constitution in Late Qing Dynasty and Early Republic of China and Its Influence on Chinese Constitution-Making in Early Republic of China*, 5 Tribune of Political Science and Law 109, 109–25 (2005). Professor Nie claims that Interim Constitution of Republic of China was influenced by the 1787 US Constitution in five aspects: 1) similar with US constitutional principles, Interim Constitution stated that 'the state sovereignty belongs to all the people;' 2) actually, the constitutional rights embodied in the Ch. II were a series of concrete reflections of the abstract ideas of 'natural rights' and 'social contract;' 3) Interim Constitution borrowed the separation of power and constitutional rules on how construct a centralized government in federal level; 4) protection of private property; 5) followed the US model in the aspect of amending constitution in a rigid way for consolidating the stability of the Interim Constitution.

[11] Hungdah Chiu, *Constitutional Development and Reform in the Republic of China on Taiwan (with documents)*, 1993(2) Occasional Papers / Reprints Series in Contemporary Asian Studies 5, available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1114&context=mscas> (accessed Aug. 9, 2015).

the adoption and promulgation of a new constitution. From 1912 to 1946, there were, in total, five constitutions drafted by each central government. After 1949, the Chinese communists, as the winners of the civil war, joined the other left-wing democratic political parties forming the CCP-dominated National Political Consultative Conference [hereinafter NPCC]. This state body acted as the supreme political and legislative organ at the time. In order to comfort those non-communist elites who were the crucial figures for saving China from the economic crisis, the NPCC promulgated the constitutional statute '*The Common Program of Chinese Political Consultative Conference*' providing a large amount of basic liberal constitutional rights and a specific provision on the protection of property rights.[12] However, the Common Program was only an ideological political declaration without enforceable normative legal status. Article 1 provided the doctrines of the dictatorship of the proletariat and democratic centralism to show the newborn regime's communist identity. In order to stress its distinguishing features from the previous bourgeois regime, Art. 7 provided that the PRC would suppress 'all counter-revolutionary activities, severely punish KMT counter-revolutionary war criminals and other leading incorrigible counter revolutionary elements who collaborated with imperialism, committed treason against the fatherland and opposed the cause of the people's democracy.' Only 'members of the people' were afforded rights under law. 'People,' in a socialist context, was used to define those individuals who were in favor of the CCP's leadership, whereas feudal landlords, bureaucratic capitalists and reactionary elements were categorized as the 'people's enemies' who belonged to the category of 'citizens' only being imposed obligations under law. The late premier Zhou Enlai confirmed the above statement in '*The Report on the Process of Drafting of Common Program and Its Characteristic*:'

> 'People' and 'citizens' have distinct meanings. The former is a group comprising working class people, peasantry, petty bourgeois and national bourgeois, also including those patriots who have abandoned their the reactionary identities. The PRC government will expropriate the properties

[12] *See* Z. Mao, *On Coalition Government*, in 2 Selected Works of Mao Zedong 1056–57 (Z. Mao, ed.) (2nd ed., 1991). Mao demonstrated his theory of New Democracy in his essay 'On Coalition Government;' he wrote: 'Some people suspected that the Chinese Communists are opposed to the development of individual initiatives, the growth of private capitals and the protection of private property, but they are mistaken. It is foreign oppression and feudal oppression that cruelly fetter the development of the individual initiative of the Chinese people . . . It is the very task of the New Democracy we advocate to remove these fetters and stop this destruction, to guarantee that the people can freely develop their individuality within the framework of society and freely develop such private capitalist economy as will benefit and not 'dominate the livelihood of the people,' and to protect all appropriate forms of private property.' He continued to refer to the necessity of the existence of the private economy in the next paragraph: 'In accordance with Dr. Sun's principles and the experience of the Chinese revolution, China's national economy at the present stage should be composed of the state sector, the private sector and the co-operative sector. But the state here must certainly not be one 'privately owned by the few,' but a new-democratic state 'shared by all the common people' under the leadership of the proletariat.' The English version is available at <https://www.marxists.org/reference/archive/mao/selected-works/volume-3/mswv3_25.htm> (accessed Aug. 9, 2015).

> of bureaucratic capitalists and the privately-owned land of feudal landlords. The government will classify them into two categories: 1) those reactionary elements who refuse to accept new policies will be oppressed severely; 2) those who actively cooperate with our work will be forced to labor in order to reform themselves and become socialist members. That is the people's democratic dictatorship.[13]

While the Common Program announced that the PRC was embedded in the principle of people's democracy, only several liberal rights were embodied in this document: the right to vote (Art. 4), freedom of speech, writing, assembly, and association (Art. 5), freedom of correspondence (Art. 5), freedom of domicile and freedom to change domicile (Art. 5), the freedom of religious belief (Art. 5), the right to demonstration (Art. 5), and equal rights of men and women in economic and social spheres (Art. 6). Unlike the constitutional rights provided by the European socialist constitutions, few social rights were embodied in the Common Program, and even the boundary of these fundamental liberal rights was hardly drawn up by lawyers because the language of the provisions was not normative, but a series of political declarations.

Before the adoption of the Constitution in 1954, the Common Program had performed a provisional constitutional role in the PRC political system[14] in view of the fact that it had incorporated the fundamental rules on organs of state power (Ch. II), the military system (Ch. III), economic policy (Ch. IV), cultural and educational policy (Ch. V), policy towards nationalities (Ch. VI) and foreign policy (Ch. VII). The later process of drawing up China's Communist Constitution had been pre-designed in Art. 12 which determined that 'All-China People's Congress shall be the supreme organ for exercising state power.' Though it was not normative, the Common Program actually created a harmonized relationship among non-Socialist elites, democratic political parties and intellectuals who were treated well under the earlier ruling of the Chinese Communist Party [hereinafter CCP]. The document consolidated the legitimacy of the CCP, as well as being favored by intellectuals. Regarding its exceptional effects, Mao had even intended to terminate the constitution-making plan.[15] However, Stalin's interference finally forced Mao to give up his ideas. In 1952, the CCP's Central Committees proposed that the NPCC require the Chinese Administrative Committee to start the constitution-making process.[16]

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13 Xu, *supra* n. 5, at 57–58.

14 Mauro Mazza, *La Cina*, in Diritto costituzionale comparato 616, 617 (Paolo Carrozza et al., eds.) (Laterza 2009). Mauro Mazza stated: 'Il Programma commune . . . è considerabile alla stregua di una Costituzione provvisoria soltanto di fatto, nel senso che ebbe la funzione di Carta constituzionale pur non avendone il corrispondente valore giuridico-formale.'

15 X. Xia & F. Ding, *Reference and Transplantation: Constitutional Culture's Influence of the Soviet Union on New China*, 2012(6) Journal of Hunan University of Science & Technology (Social Science Edition) 48.

16 Xu, *supra* n. 5, at 107.

2. The Genealogical Relationship between the Soviet Constitution and China's Constitution

The term 'genealogical' is first used by Professor Choudhry for describing the phenomenon of 'the birth of one constitutional order from the other.'[17] The Soviet governance model rapidly migrated to emerging socialist states in Asia, Africa, East Europe and Latin America since the Soviet model of socialism had displayed its influential ideological power, as well as great achievements in economic recovery and establishments of social infrastructure. The Soviet model had some unique characteristics in the fields of constitutional principles, state bodies' structure and constitutional rights theory. Under the interference of Soviet Chauvinism in the Stalin Era, the Soviet model became prestigious for the constitutional drafters in almost all the emerging socialist states after World War II.

The Soviet model of constitution had both substantive and formal impact on China's constitution-making. Sharing ideologies was the main reason for China borrowing Soviet constitutional rules and institutions in view of the fact that China's ruling elites staunchly believed that the Soviet model was the only route to reach the ultimate communist heaven. In this sense, ideology acted as a mainstream force that was used to 'persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.'[18] Thus, constitution-making guided by the Soviet model in 1950[5] China could not simply be regarded as the transplantation of needs, nor merely as having the sole purpose of following the prestigious Soviet model on paper, but also as the pursuit of a common socialist goal of building a human communist paradise.[19]

2.1. Close Relations between the 1954 PRC Constitution and the 1936 Soviet Constitution

The Soviet constitutional model was not compatible with the liberal principle of the separation of powers, according to liberal doctrine in which the government is not merely divided into several divisions, but also the competence of each division has to be constrained by the other governmental branches. No supreme state organ thereby could be empowered into omnipotence. In contrast, the Soviet constitutional model was embedded in the dictatorship of the proletariat essentially repelling all the liberal constitutional theories based on the doctrine of the separation of powers. In the 1936 Soviet Constitution, the National Supreme Soviet was the

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17 Sujit Choudhry, *Globalization in Search of Justification: Towards a Theory of a Comparative Constitutional Interpretation*, 74 Ind. L.J. 819, 838 (1999), available at <http://papers.ssrn.com/abstract_id=1624070> (accessed Aug. 9, 2015).

18 Robert W. Gordon, *Critical Legal History*, 36 Stan. L. Rev. 57, 108 (1984), available at <http://digital-commons.law.yale.edu/cgi/viewcontent.cgi?article=2361&context=fss_papers> (accessed Aug. 9, 2015).

19 Dingjian Cai, History and Revolution – the Process of Legal Order Construction in New China 256–59 (China University of Political Science & Law Press 1999).

supreme state organ having been empowered into an omnipotent body. The chief members of other state bodies – the premiers of the Soviet Union, the Chief Justice of the Supreme Court and the General Attorney of the national Procuracy – were elected, appointed, dismissed or impeached directly by the representative of the supreme state organ. All the state bodies accountable to the Supreme Soviet had their constitutional obligations supervised by the Supreme Soviet through the submission of an annual report presented during the plenary session every year. With the purpose of guaranteeing a proletarian regime that was absolutely controlled by the will of the Supreme Soviet, it acted as the authority holding exclusive legislative power within the Soviet constitutional order. Since Chinese ruling elites favored the Soviet constitutional model and China's legal education was completely oriented towards Soviet ideology, it was not surprising to find a number of provisions in China's constitutional code similar to those found in Soviet constitutional texts.[20] Mao Zedong, chairman of the constitution-drafting committee, had even reminded constitution-making committee members to carry out an in-depth study of the 1936 Soviet Constitution,[21] Soviet legal theories were also accepted as orthodox in Chinese legal education. The college textbooks on constitutional law that were widely used by students in law departments were directly translated from Russian, and some selected Russian professors were even sent to China to teach constitutional law courses at Renmin University.[22] Legal journals and books published in China were filled with translated works on the Soviet legal system.[23]

China's 1954 Constitution practically designed its state apparatus structures, as well as state bodies' competence, modelled on the Soviet Constitution.[24] Articles 22 and 23 provided that the National People's Congress [hereinafter NPC] had exclusive competence to handle legislation, whereas local governments were unable to share the same competence with the NPC. Article 27 provided that the Prime Premier of the State Council, the Chief Justice of the Supreme Court and Chief Prosecutor were elected or appointed by NPS, as well as that these state bodies were subject to NPC supervision. Socialist constitutional principles written in Soviet constitutional texts were copied from the 1936 Soviet Constitution. Influenced by the doctrine of dictatorship of the proletariat written in Art. 1 of the 1936 Constitution, Art. 1

[20] There were 44 constitutional articles partially or wholly borrowed from the 1936 USSR Constitution.

[21] Q. He, Legal Transplantation 191 (2008).

[22] C. Liu, *The Effect of Soviet Union's Constitutional Theories on China's Constitutional Theories*, 2012(4) North Law Journal 37.

[23] H. Yu, *Thought about the Transplantation of Jurisprudence Education from Soviet in PRC – the Relationship between the Jurisprudence Education Transplantation and the Legal System Modernization*, 2004(3) Journal of Yili Education College 17; Liu, *supra* n. 22, at 34. From June 1949 to November 1956, there were 51 Russian works translated into Chinese, with 80% of works being on constitutional science.

[24] X. Li, *The Analysis of The Constitution Transplantation of 1954 China's Constitution from 1936 Soviet Constitution*, in The Seminar Works of 'Soviet Legal Model Impact on China' (2001).

declared that China's socialist regime was founded by the working class in alliance with peasants. Meanwhile, Art. 2 stated that all the state bodies would adhere to a 'democratic centralized principle' which was commonly recognized as the basic constitutional principle among socialist states.

In order to lead the country into a socialist state, the ownership of productive materials was the focal point in China's constitution-making process. Under the influence of ownership categories established by the Soviet Constitution, Art. 5 clarified that state-owned and cooperative society-owned productive materials were two main constitutionally recognized categories. Moreover, Art. 6(2), copied from the Art. 5 of the Soviet Constitution, claimed that mineral and water resources, forests and desert lands were state-owned. Both constitutions similarly claimed that the state promoted the planned economy, protected property rights to labor incomes, savings and personal objects in daily usage and safeguarded the rights to inheritance.

The Soviet judiciary model had substantively influenced China's judicial system. The people's jurors' institution that was embodied in Art. 75 was borrowed directly from Art. 103 of the Soviet Constitution in order to ensure ordinary citizens had rights to participate in the hearing of cases and were afforded exactly the same competence as professional judges. Both socialist regimes had declared adherence to the principle of judicial independence in constitutional texts. Moreover, the procuracy system was one of the only socialist judicial mechanisms found within all communist states. The system was designed by Lenin who perceived that an independent body which was manipulated by the Central Party Committees responsible for supervising the governmental organs was a crucial body to formulate unified legal order and consolidate proletariat rulings within a nation state having a vast territory, diverse local custom and culture.[25] Lenin articulately stated the competence and function of procuratorates in compliance with his blueprint: 'the only power of the procuratorate is to file the case before the court' and 'they must guarantee the unification of the legal order regardless of diverse local customs.' Even in the hierarchical relations within the procuracy system, Lenin stressed that 'the local procuratorates have to be accountable to the central procuratorial bodies, but independent of local administrative and judicial authorities.'[26] Inspired by Lenin's blueprint and Art. 117 of the Soviet Constitution, Art. 83 of China's Constitution, maintaining relative independence without being subjected to the external interference, proclaimed that the 'local procuratorial systems independently exercise their power without interference by the other state organs.'

Influenced by the Soviet constitutional model, China's 1954 Constitution provided abundant constitutional rights and obligations which were placed in Ch. III, after Ch. II embodied the structure, mandates, and competences of the various state bodies

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[25] H. Zheng, A Study of Transplanting Prosecutorial System into People's Republic of China from Former Soviet Union: LL.M. Thesis 18 (Tianjin University of Commerce 2011).

[26] Vladimir I. Lenin, Lenin's Selected Works [Chinese edition] 702–05 (1972).

in constitutional sequence, which symbolized that both socialist states were highly centralized politically. The operation of state apparatus for the consolidation of proletariat rule was considered far more important than the guarantee of fundamental rights.[27] The 1954 PRC Constitution impressively incorporated not merely liberal rights, but also a bundle of social rights aimed at demonstrating its socialist identity. However, China's Constitution drafters rejected Soviet social rights standards in view of the fact that the nation's finances in the 1950[s] meant that China was unable to ensure people enjoyed social rights of equivalent standards to those enjoyed in the Soviet Union.[28] On the other hand, the Soviet political and civil rights model was completely borrowed into China's constitutional rights system. For instance, the texts Art. 86(1)[29] concerning rights to vote was also literally copied in a 'cut-and-paste' fashion from Soviet Arts. 135(1)[30] and 137.[31] In the liberal rights categories, freedom of expression (Art. 87), the rights of liberty (Art. 89), the rights of privacy of correspondence, and the rights of inviolability of the homes of citizens were similar to Soviet constitutional Articles 125, 127, and 128.[32] Though someone might claim that these liberal rights were not something new and that they could easily be found in several constitutional documents promulgated in the Qing and Republic of China eras, socialist characteristics of these liberal rights were apparently perceived in the written rules. For instance, China's constitutional provision of freedom of expression did not merely prescribe on paper that citizens were able to express their opinion in various ways, but also inspired by the Soviet model, established as a State burden the responsibility to provide the material assistance to citizens to fulfill their liberal rights. The definition of liberal rights in a socialist context was no longer confined to negative rights but rather the State's positive obligation was the cornerstone for the full realization of liberal rights.

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27 X. Zhu, Inspection on the Transplant of China 1954 Constitution from the Former Soviet Union 1936 Constitution: LL.M. Thesis 13–14 (Xingtan University 2011).

28 Jizeng Fan, *Constitutional Transplant in PRC: The Communism Russian Legacy and Globalized Era Challenge*, 2014(20) *Federalismi.it* 9, <http://federalismi.it/document/28102014120404.pdf> (accessed Aug. 9, 2015).

29 All the citizens of PRC, who have reached the age of eighteen, have the rights to vote and stand for election, irrespective of their nationality, race, sex, occupation, property status, and length of residence, except insane person and person deprived by law of rights to vote and stand for election. Women have the same rights to stand for election.

30 All citizens of the USSR, who have reached the age of eighteen, irrespective of race or nationality, religion, educational and residential qualification, social origin, property status, and past activities, have the right to vote in the election of deputies and to be elected, with the exception of insane persons and persons who have been convicted by a court of law and whose sentence includes the deprivation of electoral rights.

31 Women have rights to elect and to be elected on equal terms with all other citizens.

32 D. Han, *Foreign Constitution's Influence on the Process of 1954 Constitution-Making*, Journal of Comparative Law, 2014(4) 57–58.

2.2. The 1977 Soviet Constitution and China's 1982 Constitution: Sharing the Commonality on the Route to Socialist Legality

One of the distinguishing features of constitutions in communist states was the phenomenon of constant rewriting, accompanied by the changes in the balance of class forces. Osakwe correctly stated with regard to this phenomenon that

> the life expectancy of a socialist constitution is very short in comparison to that of its western counterpart, and each new constitution seeks to consolidate the past gains as well as lay out the path for the future growth and thus serves as an effective link between past, present and future.[33]

Post-Stalin rulers, despite still adhering to the principles of the 1936 Soviet Constitution, silently started a process of political exorcism with the intention of purging inappropriate relics of the cult of Stalin's personality which had remained in the Soviet 1936 Constitution.[34] Similarly, China's new ruling elites in post-Cultural Revolution sought to eliminate the guideline of class struggle which was a ruling style favored by Mao Zedong, while trying to recover the economy and consolidate the party rule under the Four Cardinal Principles emerged as the main goals in the short term.[35]

Though few scholars had ever agreed that many developments were achieved compared with the Stalin Constitution,[36] some progress could more or less be perceived from the new constitutional texts. Due to the defrosting of bilateral relations between the two superpowers and the effect of the 1975 Final Helsinki Accord, Soviet leaders considered partially importing the western ideas of 'rule

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[33] Chris Osakwe, *The Common Law of Constitutions of the Communism-Party State*, 3 Rev. Socialist L. 155, 159.

[34] Christopher Osakwe, *The Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution*, 127 U. Pa. L. Rev. 1350, 1352 (1979), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4875&context=penn_law_review> (accessed Aug. 9, 2015).

[35] Randall Peerenboom, China's Long Match toward Rule of Law 55 (Cambridge University Press 2002). The Preamble of 1982 Chinese Constitution requires the adherence of all of the nation's people to the four cardinal principles: upholding the fundamental principle of the socialist road, of the dictatorship of proletariats, of the leadership of the communist party, and of the Marxist-Leninist and Maoist thought.

[36] Bernard A. Ramundo, *The Brezhnev Constitution: A New Approach to the Constitutionalism*, 13 J. Int'l L. & Econ. 41, 53–55 (1978–79). Ramundo argued that the 1977 USSR Constitution 'creates no meaningful expectations in the mind of new ordinary Soviet citizens, it fails to promulgate a new developmental policy for soviet society;''[t]he impact of citizens' involvement (in the drafting process) is questionable;' '[a]s it turned out, the 1977 Constitution is more noteworthy for what it did not do than for what it did;''[t]o the dismay of many constitutionalists, the new constitution does not significantly alter the political structure of the government. It does not confer upon the USSR Supreme Court the power of constitutional review of federal and state legislation, it does not grant to the court the authority to render an advisory opinion, either *sua sponte* or at the request of the USSR Supreme Soviet or Presidium, on a bill pending before legislature.'

of law' and 'constitutionalism.'[37] Unlike the 1936 Soviet Constitution, the Brezhnev Constitution was entitled to build the State embedded in advanced socialist legality. Article 4 stipulated that the Soviet state and all its bodies ensure, on the basis of socialist law, the maintenance of legal order and safeguard the interests of society and the rights and freedoms of the citizens. Article 173 affirmed that, as the Constitution acted as the supreme legal document within Soviet legal order, all laws and other acts of the state bodies should be promulgated in conformity with it. Consequently, all the state bodies should observe constitutional orders, even if some party leaders claimed that some of constitutional rules hindered their political rulings, these contested rules could not be revised except through a rigid legal procedure in which at least the proposition would be approved by no less than $^{2}/_{3}$ of all the deputies of each chamber.

Compared with the silence on the role of the Communist Party of the Soviet Union [hereinafter CPSU] in the 1936 Soviet constitutional order, the 1977 Constitution defined the role of the CPSU as the vanguard of all the people in the Preamble. Article 6, functioning as the mirror of Brezhnev's argument that the 'Party will have a growing role to play in the building effort and that direction is toward the increase of power for the Party,'[38] articulately confirmed that the Soviet Union was a party-state where all the state bodies or political policies must be handled or monitored by the CPSU. As a 'leading and guiding force of Soviet society' and the 'nucleus of the political system, and of all state organization and public organization,' the CPSU 'determines the general perspective of the development of the society and the course of home policy, directs the great constructive work of the soviet people and imparts a planned, systematic and theoretically substantiated character to their struggle for the victory of communism.' The 1936 Soviet Constitution ignored the constitutional status of the CPSU. It was hard to gauge the exact constitutional role the CPSU took from the constitutional texts, but only to know it was the 'vanguard for building the communism that is the nucleus of all organization and state bodies.' In contrast, Art. 6(3) of the 1977 Constitution seemed to put the CPSU's power under the limitation of socialist legality where 'all the party organization shall function within the framework of the Constitution of the USSR,' indicating that even the ruling party's activities should be accountable within the framework of the Soviet Constitution. Despite the fact that this provision could

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[37] Paolo Carrozza, *Il diritto socialista*, in Diritto costituzionale comparato, *supra* n. 14, at 583, 592; Ramundo, *supra* n. 36, at 43. Brezhnev suggested that the possibility that a new dedication to the constitutionalism may be evolving in the Soviet Union. In the closing speech to the Supreme Soviet, Brezhnev declared his dedication to the fulfillment of all the parts of the Soviet Constitution: '[T]he adoption means that every article and provision of the Constitution must be fully inserted into the living practice of the day-to-day activities of all the state organs, all persons in the office, and all Soviet citizens everywhere, we have not created a constitution as a stage prop. It has to be fulfilled, and will be fulfilled in all its parts. It has to become and will become a powerful instrument in the further development and deepening socialist democracy.'

[38] Ramundo, *supra* n. 36, at 47.

be viewed as a starting point for Soviet walking into a constitutional state where the Soviet leaders seemed to sincerely observe the constitution as a measure to limit the CPSU's omnipotence, their true expectation was simply that the new constitution would eradicate a phenomenon of no power separation between CPSU's organs and state bodies that often occurred in the Stalin era.[39]

One of the impressive characteristics of the 1977 Soviet Constitution was the provision declaring that the Soviet Union had entered into a mature construction of socialism which 'ensures the enlargement of rights and freedom of citizens and continuous improvement of their living standards as social, economic, and cultural development programs are fulfiled.' Indeed, the 1977 Soviet Constitution enlarged the number of both liberal and social rights. In order to emphasize the privileged status of constitutional rights in the new Soviet Constitution, the bill of rights was put into Ch. VII before the provisions on state bodies. This constitution was influenced by the Helsinki Final Act of 1975 and UN human rights treaties.[40] Some new liberal rights were added into the new constitutional text,[41] including the rights to citizenship (Art. 33), the rights to association (Art. 51), the rights to lodge a complaint against the actions of officials, public and state organs (Art. 58), the rights to protection by the court against the encroachment on honor and reputation, life and health, dignity and property (Art. 57) and the rights to compensation for damage (Art. 58) were written for the first time into the constitution code. However, we have to bear in mind that the consequence of adding several new liberal rights to the constitution was a compromise between the Soviet and liberal states in the Helsinki Accords.[42] The new constitution was criticized largely for having little effect on the respect for

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39 Ramundo, *supra* n. 36, at 47.

40 *Id*. at 61. Article 27 in Ch. IV which concerns that 'the USSR relationship with other states is based on the following observance: respect for human rights and fundamental freedom . . . and fulfillment in good faith of obligation arising from the generally recognized principles and rules of international law, and from the international treaty signed by the USSR' essentially restate the fundamental principles contained in the Basket One of the Final Act of the Conference on the Security and Cooperation in Europe, called 'Helsinki Final Act.' This included the 'respect for human rights and fundamental freedoms.' The incorporation of principles of the Helsinki Final Act and expansion of the coverage of economic, social and civil rights reflected the influence of the review of compliance with the Final Act which began preliminarily in Belgrade on June 1977. The public debate on the drafting and adoption of the USSR Constitution were fully in swing from the beginning to the end. The substantive review commenced on October 4, 1977, the same day when Brezhnev addressed his speech to Supreme Soviet urging the adoption of the new constitution. His speech was full of preoccupation with the foreign criticism of the human rights situation in the Soviet Union, a key review of the Helsinki Final Act, and the expectation that the new constitution would demonstrate that 'social, economic and political rights and freedom of citizens could be broader, clearer and fuller than before and anywhere else.'

41 Carrozza, *supra* n. 37, at 592.

42 Constance Coughlin, *Monitoring of Helsinki Accords: 1977 Belgrade*, 10 Case W. Res. J. Int'l L. 511, 516 (1978). Soviet delegate Vorontsov declared in a conference that '[t]he New Soviet Constitution just adopted embodied all basic principles of the Helsinki principles.'

individual rights under the Soviet totalitarian collectivism guideline.[43] Dissidents who were a group of intellectuals expressing and asserting opposing political opinions still suffered severely consistent suppression by criminal penalties,[44] extrajudicial forced disappearance or forced psychological treatment.[45]

Two new social rights – the right to housing and the right to enjoy cultural benefits – were borrowed from the International Covenant on Economic, Social and Cultural Rights [hereinafter ICESCR] into the 1977 Constitution. Some constitutional social rights had expanded their scope of meanings keeping in pace with the domestic economic growth and with purpose of guaranteeing the interests of the working class. The rights to work (Art. 40) covered the rights to one's occupation, trade or job in keeping with one's inclination, abilities, occupational training and education, and with 'due account of the needs of society.' The right to support in old age extended to the protection of those citizens who had lost their breadwinners. The subjects of social security had been extended to those members of collective farms. The state had the obligation to promote the employment of handicapped and elderly citizens. The right to education (Art. 45) was expanded to 'all forms of free education' in which the State had responsibility of popularizing secondary school education in the whole Union and supplying free textbooks to compulsory school students. Those entitled to free medical services, the aged, sick and disabled could, under the 1936 Constitution, enjoy the rights to protection with a range of services: 'free and qualified medical care,' 'measures to improve the environment,' and 'research to prevent and reduce the incidence of the disease and ensure the citizens a long and active life.'

Though Brezhnev promoted some progressive constitutional reform since the 1970[5], Soviet constitutionalism was still largely divergent from the liberal models due to the differentiated ideas on the nature of a constitution. The 1977 Soviet Constitution, though recognized as a supreme legal order within the domestic legal system, had no commitment to the nature of a constitution as being fundamental and inviolable. Rights and freedom of the citizens could be limited arbitrarily in the

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[43] Yuri Andropov wrote that '[t]he socialist system makes the exercise of collective rights and the duty of working people the mainspring of social progress. At the same time, the interest of Individuals is by no means ignored. The Soviet Constitution grants Soviet citizens broad rights and freedom and at the same time emphasizes the priority of public interest, serving which is the supreme expression of civic awareness.'

[44] Two criminal legal provisions were often cited for prosecuting dissidents' activities: 1) Art. 70 of the RSFSR Criminal Code set forth that '[a]gitation and propaganda carried out with the purpose of subverting and weakening the Soviet regime or in order to commit a particular dangerous crime against the State, the dissemination of said purpose of slanderous invention defamatory to the Soviet political and social system, as well as the dissemination and production or the harboring the said purpose of literature of similar content;' 2) Art. 190(1) provided that '[t]he systematic dissemination in oral form of deliberately and false invention, deliberately discrediting the Soviet political and social system, as well as the production and dissemination in written, printed and other forms of works of similar content, shall be punished by the deprivation of freedom for a term not exceeding one year or by a fine of not more than one hundred roubles.'

[45] Albert Szymanski, Human Rights in Soviet Union 282–84 (Zed Books 1984).

name of collective and national interests, whilst constitutional rights were defined as a tool guarding the Soviet socialist regime, rather than human beings' natural inherent necessities.[46] Thus, the Soviet regime's interests, rather than individual rights, were considered the ultimate interest of a Soviet citizen's life.[47] Meanwhile, social and economic constitutional rights could not be realized by a judicial decision considering that the violation of these categories of rights can hardly be remedied by court judgments, relying rather on the distribution of resources as well as on economic growth dominated by the State.[48]

The 1977 Soviet Constitution actually has some substantive inspiration on China's new ruling elites in the post-Mao era who purported to completely reject the extreme leftist ideology generated by the Cultural Revolution and wished to return to the 'good old days of the 1950s'[49] though no Chinese scholar has, until now, even noticed or argued about the influence of the Soviet Constitution on China's 1982 constitution-making. In the Sixth Plenary Session of the Eleventh Central Committee of the CCP, Central Committee members approved the 'Resolution for Several Historical Issues of the Party since the Establishment of the PRC', stating:

> A the fundamental task of the socialist revolution is to gradually establish a highly democratic socialist political system. Inadequate attention was paid to this matter after the founding of the People's Republic of China, and this was one of the major factors contributing to the initiation of the 'cultural revolution' . . . We must turn the socialist legal system into a powerful instrument for

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[46] Ramundo, *supra* n. 36, at 49. Brezhnev addressed his speech on the drafting of the constitution in May 1977: 'It goes without saying, comrades, that the draft constitution proceeds from the assumption that the rights and freedoms of the citizens cannot and must not be used against our socialism system, to the detriment of the interests of Soviet people. The draft, therefore, plainly states, for example, that the exercise by the citizens of their rights and freedom should in no way damage the interests of the society and the state or infringe on the rights of other citizens, and that political freedom is granted in keeping with the interests of the working people and for the purpose of consolidating the socialist systems.' In his later passage in the same speech, he referred to the function of rights and freedom under the framework of socialism legality: 'We want the citizens of the USSR to have a sound knowledge of their rights and freedoms and of the ways and means for exercising them, we want them to be able to apply these rights and freedom in the interests of communist construction, and to have a clear understanding of the close connection with honest fulfillment of their civic duties.'

[47] Thomas E. Towe, *Fundamental Rights in the Soviet Union: A Comparative Approach*, 115 U. Pa. L. Rev. 1251, 1264 (1967), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=6224&context=penn_law_review> (accessed Aug. 9, 2015). Soviet professor Malinsky stated: 'The capitalist law is based on the abstract "natural rights" of an individual; it places the individual in the center of the world, surrounds him with a cult and therefore establishes the limits on the government … However, the proletariat state sets limits not to itself but to its citizens. A collective body called the state, rather than the individual citizens, is at the center of proletariat law.'

[48] David Lane, *Human Rights under State Socialism*, 32 Political Studies 349, 353–55. doi:10.1111/j.1467-9248.1984.tb01531.x

[49] William C. Jones, *The Constitution of the People's Republic of China*, 63 Wash. U. L.Q. 707, 712 (1985), available at <http://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=2203&context=law_lawreview> (accessed Aug. 9, 2015).

> protecting the rights of the people, ensuring order in production, work and other activities . . . The kind of chaotic situation that was obtained in the 'cultural revolution' must never be allowed to happen again in any sphere.

Several days later, the NPC made a final decision to start the preparations for constitution-making. Ye Jianying, the chairman of the constitution drafting committee, stressed: '[We] might draw some experience of constitution-making from the other advanced states, particularly borrowing some from new socialist constitutions.'[50]

Article 6 of 1982 China's Constitution was obviously inspired by Art. 4(2)[51] and Art. 173[52] of the Soviet Constitution, which provides that '[n]o laws, administrative action or local regulation may contravene the Constitution. All state organs, political parties, social and enterprise institutions and armed forces abide by the Constitution and other laws. No organization or individual is privileged beyond the Constitution,' indicating that Art. 6 itself has constituted China's constitutionalism order under socialist legality in two aspects: 1) the constitution takes the role of the supreme order with which all the other statutes should be in compliance; 2) the activities of the ruling party should observe the constitutional order. It significantly means that China's ruling elites would like to follow the 1977 Soviet model to construct their own socialist legal system on the basis of the constitution as well as avoid replacing the decision of state and local bodies with the resolution or decision made by the ruling parties on any occasion. However, unlike the Soviet Union's 1977 Constitution, China's 1982 Constitution has neither articulately displayed the concrete political role of the Chinese Communist Party [hereinafter CCP] nor did it demonstrate the mandates of the CCP within the constitutional order. The constitution solely poses an abstract citizens' obligation in the Preamble 'adherence to the leadership of the CCP' being the foundational cornerstone of China's socialist regime. Indeed, the CCP's constitutional role is an unwritten rule which can actually determine the activities of all Chinese state and public bodies. Followed implicitly, Soviet Article 6(2), a non-substantial constitutional provision could constrain CCP interference with national or local state bodies' affairs, whereas nearly all the chief-leaders in national or public organs are party members appointed by the relevant party committee. It is by no means a case of the CCP having the competence to rule the people directly, but rather that the will of the party has to be endowed with legitimacy through the processing of NPC approval. The relationship has also been confirmed by an interview with a Chinese professor who has quoted the original statement of Peng

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[50] Xu, *supra* n. 5, at 354.

[51] State organization, public organization and officials shall observe the Constitution of the USSR and Soviet Law.

[52] The Constitution of the USSR shall have supreme legal force. All laws and other acts of state bodies shall be promulgated in compliance with it.

Chen, the former Chief of the Committee of the NPC, concerning the relationship between the CCP and the NPC, stating:

> According to the Constitution, people handle and exercise their power through the People's Congress. However, adherence to the leadership of the Party does not contradict the fact that all the powers belong to the people since the Party's leadership focuses on political direction. Any political determination of the Party cannot be imposed on the people directly because it has no binding power. It has binding power only when the will of party has been transformed into will of people through the National People's Congress.[53]

Considering the actual dominant status of the CCP in relation to the NPC, as well as the number of high posts in the NPC occupied by communist elites and more than 70% of representatives being CCP's members, a proposal submitted by the CCP could hardly be blocked. The NPC was thereby widely viewed as an ironical 'rubber stamp' by western observers.[54]

Following the new Soviet constitutional model, the section of rights of citizens is located before the section of state bodies showing the legitimacy of a socialist state based on respect for human rights, in sharp contrast with the socialist style of ruling during the Cultural Revolution period.[55] Apart from that, some new constitutional rights can trace their origins to the 1977 Soviet Constitution. The rights to remedy embodied in Art. 41 of China's Constitution is inspired on Art. 51 of the Soviet Constitution providing that if a citizen's rights are to be harmed by any state or public authorities or their agents, the citizen can pursue the remedies from the court by filing lawsuits. However, Chinese victims were not able to gain access to judicial remedy immediately after the adoption of the new constitution, but can only resort to the specific petition bodies (*xin fang*) which are capable of negotiating with state organs regarding the remedy before the Administrative Litigation Law (ALL) came into effect in 1989. The right to dignity (Art. 38) is the other distinguishing example borrowed from Art. 57 of the Soviet Constitution[56] for comforting people with painful memories from the decade of the Cultural Revolution when innocent

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53 *See Yang Jingyu's Memories to the 1982 Constitution-Making: The Debate on Whether Incorporation of Four Cardinal Principles into 1982 Constitution*, Chinanews (Sep. 11, 2014), <http://www.chinanews.com/gn/2014/09-11/6579284.shtml> (accessed Aug. 9, 2015).

54 *See The Biggest Rubber Stamp – the National People's Congress of China*, Guardian (Mar. 3, 2007), <http://chinaview.wordpress.com/2007/03/04/the-biggest-rubber-stamp-the-national-peoples-congress-of-china/> (accessed Aug. 9, 2015).

55 Hungdah Chiu, *The 1982 Chinese Constitution and Rule of Law*, 1985(4) Occasional Paper / Reprints Series in Contemporary Asian Studies 6, available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1068&context=mscas> (accessed Aug. 9, 2015) .

56 *Id*.

individuals were oppressed or tortured by cruel and inhumane punishment beyond what was established by law.[57] The right to dignity, however, has not gained special normative status like in Basic German Law, it only takes a declarative constitutional role implying that Deng's socialist regime would thoroughly break the connection with Mao's ruling style featured by endless class struggle.

In Soviet constitutional rights theory, rights cannot be realized separately from the performance of duties. The law encourages the citizens' observance of social duties. Performance of obligations and duties guaranteed the fulfillment of rights as Art. 59 of the Soviet Constitution provided that '[c]itizens' exercise of their rights and freedom is inseparable from the performance of their duties and obligations.' Article 59 which was a crucial source of understanding interactive relationship between 'rights and duties' clarified articulately that Soviet citizens could enjoy the full rights and freedoms contained in the Constitution on the condition that '[e]njoyment of citizens of these rights and freedom must not be to the detriment of the interest of society or the state, or infringe on the rights of other citizens.'[58] Inspired by the Soviet duty-based rights theory, China's Constitution has incorporated the new doctrine of 'the inseparability of rights and duties' into Art. 51[59] which provides that '[t]he citizens of the People's Republic of China, in exercising their freedom and rights, may not infringe upon the interests of the state, of the society or of the collective or upon the lawful freedoms and rights of other citizens.' Actually, the predominant influence of the Soviet 'duty-based' model lasted no more than a decade and disappeared with the end of the Soviet Union.[60] Legal theorists, under the impacts of liberalist legal thought, began to favor a new 'rights-based' theory proposed by Zhang Wenxian who asserts that rights are the cornerstone of the justification of legal systems *erga omnes*, as well as that the fulfillment of rights is the goal of the performance of duties.[61] The 'rights-based' theory proposed by Chinese scholars has little or nothing in common with the any of the varied concepts of the 'rights-based' theory rooted in western legal philosophy, but is rather a type of neo-Marxism in which individual interests or rights

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57 Roberta Cohen, *People's Republic of China: The Human Rights Exception*, 9 Hum. Rts. Q. 447, 448–49 (1987), reprinted in 1988(3) Occasional Paper / Reprints Series in Contemporary Asian Studies, available at <http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1085&context=mscas> (accessed Aug. 9, 2015). The author cited from the hearing in the US congress that '[t]he Chinese press reported that many of the verdicts on the 1.13 million people convicted between 1966 and 1976 had been unjustified, and that many individuals had been "persecuted to death" . . . It was estimated that altogether 100 million people had suffered political persecution.'

58 Ramundo, *supra* n. 36, at 48.

59 Xu, *supra* n. 5, at 391.

60 Jizeng Fan & Xiaojun Mu, *A Reflection on China's Development of Human Rights in the Last 30 Years*, 9(4) China Human Rights Magazine (China Society for Human Rights Studies) (2010), available at <http://www.chinahumanrights.org/CSHRS/Magazine/Text/t20100803_631256_4.htm> (accessed Aug. 9, 2015).

61 W. Zhang, *Analysis of Context and Concept of 'Rights-Based' Theory – Socialist Law Is a New Type of 'Rights-Based' Category*, 1990(4) China Legal Science 28–29.

have to harmonize with collective and state rights.[62] As a result, individual rights still lack for dominant legal status in relation to collective or state rights.

It is worth mentioning that during the process of drafting the Constitution, some drafters proposed following the Soviet bicameral system for reconstructing the structure of the NCP. Wang Shuwen, the director of the Law Institute of the Social Science Academy, had suggested that the NPC could be composed of two chambers: the chamber of nationalities and the chamber of professions.[63] Unfortunately, this proposal, though supported by many constitutional experts who believed that the imagined model could better check the centralized power of the NPC, failed to be adopted in the final draft due to the disapproval of Deng Xiaoping.[64]

3. Challenge to China's Constitutionalist Regime in a Globalized Era

With the snowball effect of the democratization that spread from Poland to East Germany where the people called for the building of efficient liberal states overthrowing long-time totalitarian regimes,[65] the communist regime in Eastern Europe failed to survive the crisis of legitimacy.[66] The constitutional order reconstructed in the post-communist states recovered those liberal constitutional principles, such as the separation of powers, judicial independence, and a multi-party political system, which are shared in all western constitutional models.[67] As a strategic response to the crisis of legitimacy in Russian communist rule, Gorbachev proposed a package of political reforms with the purpose of transforming totalitarian regime into a semi-totalitarian communist regime under the banner of '*perestroika*' ('reconstruction') and '*glasnost*' ('transparency'),[68] including strengthening the constitutional effect on limiting CPSU's activities and supervising the legitimacy of administration as well as respecting human rights.[69] Gorbachev pushed political reform toward building

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62 W. Zhang, The Scope of Legal Philosophy Study 24 (2001).

63 Xu, *supra* n. 5, at 357–58.

64 X. Deng, 3 Selected Works of Deng Xiaoping 290 (2nd ed., 1993).

65 Andrew G. Walder, *The Decline of Communist Power: Element of a Theory of Institutional Change*, 23 Theory and Society 297 (1994), available at <https://sociology.stanford.edu/sites/default/files/publications/walder-ts_1994.pdf> (accessed Aug. 9, 2015).

66 Marek M. Kamiński, *How Communism Could Have Been Saved: Formal Analysis of Electoral Bargaining of Poland in 1989*, 98 Public Choice 83, 83 (1999).

67 Laura Montanari, *Le nuove democrazie dell'Europa centro-orientale*, in Diritto costituzionale comparato, *supra* n. 14, at 519.

68 *See* Russell Bova, *Political Dynamics of the Post-Communist Transition: A Comparative Perspective*, 44 World Politics 113, 114 (1991) doi:10.2307/2010425; *see also* Jerry F. Hough, Russia and West: Gorbachev and Political Reform 209–12 (Simon & Schuster 1988).

69 Bova, *supra* n. 68, at 118. Actually, the 'glasnost era' came to represent a large package of liberalizing reforms that included greater protection of individuals from the coercive power of state, expanded freedom of expression and association, easing some restriction on travel and emigration, and a new tolerance towards religious activities.

political democratic institutions with the help of the grass-roots class.[70] Abolishing the one-party dictatorship regime and holding the Soviet presidential election and referendum brought him great international reputation in the year of 1990. However, the consistency of the reform was interrupted by the other high-ranking conservative CPSU's figures who initiated a *coup d'état* at the moment Gorbachev was on vacation far away from the Kremlin. Though the conspiracy failed, Gorbachev had to resign his post of General Secretary of the CPSU after returned to Moscow, admitting that he was not capable of conducting the advancement of this semi-authoritarian state regime along the planned course of his blueprint, when Russian Federation president Yeltsin, who decreed the suspension of the Russian Communist Party on the grounds that it was involved in the *coup d'état*, which had violated the law of Russia and the Soviet Union, gained far more actual powers and popular support than Gorbachev, who lost credibility among his party colleagues. In addition, with the independence of and the rising nationalism in Union Republics, the consequence was that Gorbachev was reluctant to mobilize the army to suppress the tendency of separatism in the republics finally caused communism to lose its legitimate power in the whole USSR.

China's communist regime successfully overcame the political crisis in 1989 by using military force. In fear that the CCP would lose ruling power, Deng Xiaoping, the then boss of the CCP, limited his reforms merely to the economic realm.[71] According to Deng, the CCP's legitimacy derives from economic growth and social wealth which could naturally bring happiness to individuals who would then be in favor of the CCP's ruling insofar as their material requirements could be satisfied.[72] He then exerted his personal influence to drive a profound economic reform, building a market capitalist economy to involve China in the global economic competition. On the other hand, he took a very prudent attitude towards China's democratization and political reform. He afforded no tolerance to those who held opinions against the leadership of the CCP and disregarded the international interference in human

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70 Bova, *supra* n. 68, at 120. During the course of the February 1989 visit to Ukraine, he appealed to his public supporters to help fight enemies of reform.

71 *See* David Shambaugh, *Deng Xiaoping: Politician*, 1993(135) The China Quarterly 457–58. doi:10.1017/S0305741000013874

Zhao Ziyang, the former General Secretary of the Chinese Communist Party, addressed the Thirteenth National Conference of the CCP in 1987 declaring that 'all the colleagues should stick to "one central task, two basic points:" one central task means our socialist construction should be based on economic construction in order to enhance the level of material life of the people; the two basic points are the adherence to four cardinal principles and the policy of reform and openness.'

72 Deng Xiaoping delivered his speech during his inspection in the South of China in 1992, stating: 'If we did not adhere to socialism, implement the policy of reform, or open to the outside world, we would find ourselves in a blind alley . . . That is the only way to win the trust and support of the people . . . Why was it that our country could remain stable after the June 4th incident? It was precisely because we carried out reform and implemented the opening up policy, thereby promoting economic growth and raising the living standard.'

rights records. Generally, Deng carried out a completely new neo-authoritarian route in China that is a mix of a semi-liberal economy with political authoritarianism.[73]

Deng's neo-authoritarian reform brought China obvious development in terms of economic growth.[74] In this model, central and local state bodies were able to consistently promote or reform economic policy relying on their unchallenged power. However, individual interests and freedom were accordingly violated or ignored because the local authorities were exclusively concerned with GDP achievements which might have brought the officials a chance of promotion to the higher posts in the Chinese party-state bureaucracy.[75] Some critics correctly predicted that the development based on the present neo-authoritarian model must be unsustainable since China's authorities focus exclusively on the economic growth and consolidation of its state regime at the cost of individual rights. Therefore, some intellectuals required that the Chinese government adapt their developmental policy to sustainable ways in compliance with the model of the rule of law in order to constrain the administrative bodies' activities and subject local party activities to accountability.[76] In addition, given that China has had an active role in international affairs, liberal states required that the Chinese government should respect human rights, observe the common WTO rules preventing unfair competition and protect intellectual rights in compliance with international standards.[77] Thus, China's party-state government had to think over the measures to transform a party-dominant constitutional system, influenced by the former soviet constitutional model, into a new refined order which would be both compatible with socialist legality and capable of adapting to universal values in the globalization era. In this section, I focus my research on two areas: judicial (constitutional) review reform and implementation of UN human rights treaties.

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[73] Raviprasad Narayanan, *The Politics of Reform in China: Deng, Jiang and Hu*, 30(2) Strategic Analysis 332–35 (2006), available at <http://idsa.in/system/files/strategicanalysis_rnarayanan_0606.pdf> (accessed Aug. 9, 2015).

[74] John Wong, *The Economics of the Nanxun*, in The *Nanxun* Legacy and China's Development in the Post-Deng Era 35, 35 (John Wong & Yongnian Zheng, eds.) (Singapore University Press 2001).

[75] *See* Canfa Wang, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 Vt. J. Envtl. L. 159, 171, available at <http://vjel.vermontlaw.edu/files/2013/07/Chinese-Environmental-Law-Enforcement.pdf> (accessed Aug. 9, 2015). *See also* Abigail R. Jahiel, *The Organization of Environmental Protection in China*, 1998(156) The China's Quarterly 757 doi:10.1017/S030574100005133X. Jahiel argues in this essay that the high-growth, resource-intensive development strategy China has pursued, coupled with norms and institutional relationships designed for economic decentralization has given officials at provincial level, and lower, the means and incentives to develop their economies. The pervasive emphasis on development, consumerism and profits in government proclamation and throughout society has further provided local government with justification to intervene against regulation – such as environmental protection – deemed unfavorable to growth.

[76] Z. Zi, *The Chinese Model of Economic Growth is Unsustainable*, Sina China (Dec. 18, 2011), <http://business.sohu.com/20111218/n329387175.shtml> (accessed Aug. 9, 2015).

[77] Peerenboom, *supra* n. 35, at 492.

3.1. The Way to Build a Chinese Judicial and Constitutional Review Mechanism

3.1.1. Judicial Review in WTO Affairs within China's Legal Order

Being a member of World Trade Organization, Chinese authorities have no choice but to observe to the universal rules of the WTO. Having a judicial review mechanism for administrative acts is one of the basic requirements for every member state to join the WTO, according to Art. X(3)(*b*) of the GATT:

> Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters.

Similarly, the amended Agreement on the Implementation of Article VI of GATT, in Art. 13 on judicial review provides:

> Each member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review of administrative actions relating to final determinations and reviews within the meaning of Article 11. Such tribunals or procedures should be independent of the authorities responsible for the determination or review in question.

The amendment of the WTO rules obviously requires Member States to establish a qualified review tribunal, independent of the authorities responsible for the determination or review in question, which conflicts with China's current constitutional system modeled on Soviet theories,[78] as a Chinese court's competence, according to Art. 127 of 1982 Constitution, is limited to the determination of the case pursuant to positive statutes without having an active mandate to examine the constitutionality and legality of administrative regulations.[79] Consequently, the United States and other members scrutinized the legal documents submitted with China's application to join the WTO because an earlier report confirmed that China did not have a qualified judicial review institution. China's government replied to them rapidly stating that China agrees to establish, among the other things, tribunals for prompt review of certain WTO-administrative actions.[80] Under Art. 2(D)(1) of the

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[78] M. Ulric Killion, *'Building up' China's Constitution: Culture, Marxism, and the WTO Rules*, 41 Loy. L.A. L. Rev. 563, 572 (2008), available at <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=2617&context=llr> (accessed Aug. 9, 2015).

[79] Peerenboom, *supra* n. 35, at 317.

[80] Veron M.-Y. Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 Am. J. Comp. L. 77, 78 (2004), available at <http://carnegieendowment.org/files/AJCL1.pdf> (accessed Aug. 9, 2015).

Protocol on Accession of the People's Republic of China, China's government promised those tribunals 'shall be impartial and independent of the agency entrusted with administrative enforcement . . .'

However, according to Art. 67 of the 1982 Chinese Constitution, the National People's Congress Standing Committee [hereinafter NPCSC] is the only state body empowered with competences of judicial (constitutional) review and interpretation, including:

1) the interpretation and enforcement of the Constitution;

2) the interpretation of legislation;

3) the annulment of administrative regulations, decisions and orders of State Council that contravene the Constitution and the law;

4) the annulment of those local regulations or decisions of the organs of state power of provinces, autonomous regions and municipalities directly under the central government that contravene the Constitution, the law and administrative regulations.

In contrast, according to the Administrative Litigation Law of the People's Republic of China [hereinafter ALL] adopted in 1989, the judiciary bodies have competence to change the administrative act, only in cases where the administrative authority has infringed the principle of proportionality, by changing the amount of the fine imposed by said authority. Article 12 limits the competence of administrative courts: the judiciary cannot adjudicate the administrative litigations below:

1) those concerned with disputes on the legality of administrative rules and regulations, or decision and orders with general binding force formulated and announced by administrative bodies;

2) specific administrative acts that shall, provided by law, be finally decided by the administrative bodies.

In order to adapt the Chinese administrative legal system to WTO standards, in August 2002, the Supreme People's Court [hereinafter SPC] promulgated a judicial interpretation requiring the judicial review of WTO-related administrative actions according to ALL.[81] In November 2002, the SPC promulgated two other judicial interpretations to prescribe that first-instance anti-dumping and countervailing ALL cases should be tried by the provincial highest court where the defendant administration bodies were located, or by any intermediate court appointed by the SPC.[82] Though some legal rules concerning the judicial review of administrative acts have been incorporated into the Chinese legal system through judicial interpretation,

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[81] Supreme People's Court Rules Concerning the Several Questions about the Adjudication of Administrative Cases Relating to the International Trade, at <http://adr.ccpit.org/typeinfo2.aspx?t1=20&t2=59&t3=0&id=332> (accessed Aug. 9, 2015).

[82] Supreme People's Court Rules Concerning the Several Questions about Application of Law in Adjudicating Anti-Dumping Administrative Cases, at <http://www.customs.gov.cn/Default.aspx?TabID=20149&InfoID=110978&ctl=InfoDetail&mid=51150&ContainerSrc=%5BG%5Dnotitle> (accessed Aug. 9, 2015); Supreme People's Court Rules Concerning the Several Questions about Application of Law Adjudicating Countervailing Administrative Cases, at <http://dcj.mofcom.gov.cn/article/zcfb/cn/200504/20050400072112.shtml> (accessed Aug. 9, 2015).

deficiencies still remain, leaving the Chinese judicial review mechanism below the required standards. The relevant competent courts are able to merely review and invalidate the concrete administrative activity in WTO litigation, having neither the competence to annul the abstract administrative act nor the local and central administrative regulations that are in contrast with WTO rules. The Central government, however, has claimed that all laws and regulations inconsistent with WTO legal systems were repealed or amended before China acceded to the WTO. The relevant ministries, departments and specific commissions reported to the State Council that they have engaged in the review of over 2300 laws and regulations according to WTO legal standard, after which they identified 830 of them in need of repeal and 325 of them in need of revision.[83] It is noted that the identification of inconsistencies is sometimes easy, whereas sometimes it is hard and 'takes a high level of expertise and a full hearing by a dispute settlement panel in the context of a particular set of facts.'[84] It is a reasonable doubt that some laws and regulations that do not comply with WTO rules still remain in the Chinese legal system. After China's accession to the WTO, a flood of new regulations regarding the implementation of WTO rules were adopted. However, there were no related formal judicial or administrative mechanisms provided for scrutinizing them with WTO standards. Although two newly-founded offices – the Department of WTO affairs and China WTO Notification and Enquiry Center – could supposedly be assumed as the competent administrative tribunals for picking out those abstract administrative acts and other legal documents non-compliant with WTO rules, as well as being able to provide the fair and prompt administrative remedies, it is still uncertain whether these offices are able to maintain their independence and efficiency when they are subjected to the Commercial Department which is a sub-division of the State Council.

Besides, China is not a typical state, centralizing the legislative competence in the NPC or State Council after Legislative Law was adopted in 2000. Significantly, local governments handle extensive legislative powers[85] other than those powers exclusively reserved to national authority as set forth in Art. 8. In this case, the local governments have competence to make local decrees and regulations regarding international trade affairs. There is no question that the legitimacy of local decrees and administrative regulations derive from the law in higher hierarchical statutes. If in contravention of higher hierarchy, local statutes are to be declared invalid by the relevant authorities. However, the local administrative regulation comes into effect on

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83 Donald C. Clarke, *China's Legal System and the WTO: Prospects for Compliance*, 2 Wash. U. Global Stud. L. Rev. 97, 104 (2003), available at <http://papers.ssrn.com/abstract_id=366200> (accessed Aug. 9, 2015).

84 Clarke, *supra* n. 83, at 105.

85 Law is narrowly defined in China's legal system as 'made and promulgated by the NPC and NPCSC.' Legal documents which are 'made and promulgated by the provincial people's congress, municipalities' people's congress and people's congress of major cities approved by State Council' are named as 'decrees.'

the day of promulgation without needing to wait for confirmation by the State Council. In fact, there is no formal mechanism applied by the State Council to effectively and efficiently supervise the legality of these regulations promulgated at regional levels other than that local governments are imposed a legal obligation to send those newly-made local regulations to the Central government for filing. Hence, considering the modern supervisory system and the fact that China has suffered many years of internal barriers within their trans-regional markets and central governments have not had the capacity to remove them for a long time, the other WTO Member States therefore have reason to worry that local regulations would intentionally protect the local business at the cost of free and fair competition with imported goods and services. The local courts, reliant on the local finances to survive, were reluctant to adjudicate litigations concerning commercial trade in opposition to the local administration in the cases that local authorities have an immediate interest in these legal disputes, not to mention the limited resources of the local judicial system that lacked qualified judges, had heavy workloads, faced corruption and had limited powers.[86]

Influenced by the dualist legal system modeled on the Soviet Union, international treaties within China's legal system cannot be applied by the domestic court unless the specific provision in legislation allows it. Two ways of transforming international treaties into domestic legal systems with binding power have been recognized by experts:

1) legislative transformation: the relevant authority can transform the international rule into a domestic system through a domestic law-making procedure. The new law could commonly be regarded as a domestic creation rather than an international treaty;

2) intermediate incorporation: the international treaties can be incorporated through specific reference in domestic legislation.

Can Chinese tribunals apply the WTO treaties directly to examine the conventionality of domestic regulation or expand review power to domestic legislation? The reply from China is essentially negative. Chinese delegates argued that transformation or incorporation is the specifically obligatory legal procedure for empowering international treaties, particularly since Chinese representatives in the meeting of WTO Working Party claimed that China will commit to WTO rules by 'revising existing laws and enacting new ones in full compliance with the WTO agreements.'[87]

The deficiency of Chinese tribunals on the protection of WTO rules within China's legal system is no less than a concrete example that reflects the realities of the weak judicial review mechanism and China's limited court mandate. According to Art. 126, the competence of local courts is limited to adjudicating the case according to the law. Judges have to keep silent as to the validity of local decrees, or lack thereof, in case they contravene superior ones. According to Legislative Law, modeled on the

[86] Clarke, *supra* n. 83, at 107.

[87] *Id*. at 100.

Soviet Union, the capacity to review the legalities of local decrees belongs exclusively to the NPCSC. One decade ago, a local judge in Henan Province, who intended to challenge this legal order, declared the invalidity of a local decree given that it had contravened the national legislation enacted by the NPC. She was subsequently dismissed for 'making a mistake.'[88]

3.1.2. Building up a Constitutional Review Model Compatible with China's Constitutional Framework?

Some Chinese legal experts assert that it is more pressing to build an effective constitutional review mechanism than an ordinary judicial review mechanism considering that the former could forcefully supervise all the political organs, including the CCP, and guarantee the implementation of constitutional rights.[89] The call to establish a constitutional review mechanism within the Chinese legal system as a channel to human rights protection has been intensified since China's constitutional amendment added 'state respect and guarantee of human rights' into Art. 35(2) in 2004. Legal scholars and human rights advocators consistently advise Chinese authorities to fulfill their promise of human rights protection as provided in Art. 35 by the implementation of the Constitution by courts as well as to interpose an independent *ad hoc* judicial body specifically in charge of supervising the constitutionality of legislation and other statutes.[90] However, China's 1982 Constitution, following the Soviet model, shaped China's legal system on the basis of the doctrine of the dictatorship of the proletariat, in which the NPCSC has exclusive competence to interpret legislation and constitutional provisions as well as guarantee the constitutional order. Unfortunately, none of the constitutional acts provide us with any guidance or guarantee that China's constitutional order will be supervised by the NPCSC, nor does any constitutional provision explicitly authorize the NPCSC to examine the constitutionality of a legislative act approved by itself or by the NPC. The absence of the latter institution might lead to the assumption that the NPCSC might have turned the constitutional review mechanism into a 'dead law' if it were reluctant to carry out constitutional review on the legislation approved by the NPCSC itself. Even if the NPCSC could interpret the Constitution through a proceeding, no constitutional procedure mechanism could prevent its members from abusing their power, namely,

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88 *The Judge of Luoyang in Heinan Province Declared the Invalidity of Local Decree*, <http://jpck.zju.edu.cn/eln/201003011515410031/page.jsp?cosid=1614&JSPFILE=page&LISTFILE=list&CHAPFILE=listchapter&PATH=201003011515410031&ROOTID=9331&NODEID=9641&COUNT=2&DOCID=0> (accessed Aug. 9, 2015).

89 H. Li & J. Liu, *The Discussion on Chinese Model of Constitutional Review*, 2011(2) Journal of the Party University of Shijiazhuang City Committee of CPC 16.

90 *See* W. Zhang, Implementation of Constitution and Establishment of Commission on Constitutional Review, 21ccom.net (Dec. 9, 2012), <http://www.21ccom.net/plus/view.php?aid=72705> (accessed Aug. 9, 2015); *see also* Surya Deva, *The Constitution of China: What Purpose Does It (Not) Serve?*, 2(2) Jindal Global L. Rev. 76, available at <http://papers.ssrn.com/abstract_id=1918793> (accessed Aug. 9, 2015).

they might distort the reasonable meaning of the Constitution to suit their intention in order not to invalidate their approved legislation. Despite the absence of an explicit constitutional mechanism to review the constitutionality of legislation, the State and Administrative Law Division [hereinafter SALD] under the Legal Affairs Committee of the NPCSC might be covertly in charge of the work of examining the constitutionality and legality of local decrees and administrative regulations. The internal workings of SALD are unfamiliar to the public which certainly raises our doubts as to the constitutionality of the constitutional review procedure manipulated by SALD. The main concern is the absence of transparency of the internal working regulations having prevented people from knowing its working procedures. People have no way of accessing information on the official website of the SALD or manage to look up information regarding its working procedure in the yearbook compiled by the NPC. Moreover, the principle of due process could be potentially undermined. The staff members of the SALD, usually composed by some qualified legal experts, could review the constitutionality of local decrees in the absence of the local delegates concerned, so the constitutional provisions would be interpreted not by public discursive hearing proceedings nor published in legal documents. Meanwhile, the legitimacy of this covert competence of the SALD could be questioned given the fact that though China's Constitution merely confers the competence to interpret the Constitution to the NPCSC, no legislation or other statutes, until now, explicitly provided that the mandate of constitutional interpretation could be transferred to an affiliated division to the NPCSC. Therefore, if the SALD is really involved in this covert constitutional review, it must be a constitutional review devoid of constitutionality.

Resorting to comparative research might inspire us to find a model compatible with China's constitutional order. Anglo-American judicial review is based on the decentralized common law tradition where both federal and state judges may hear cases related to constitutional disputes. Constitutional litigation does not have any special status in relation to other kinds of litigation. The constitutionality of statutes can be examined only on the condition that the litigant parties request it or if the disputes are related to constitutional issues. The court will not make any abstract decision concerning the constitutionality of specific statutes. Only SPC's interpretations generate decisions that are binding on all the other lower courts.[91] Federal judges cannot nullify the legislative statutes even if they are determined unconstitutional.[92] The European model of constitutional review, derived from Hans Kelsen's theory[93], posits that the creation of a distinct organ outside the ordinary court system – the

[91] Gustavo F. de Andrade, *Comparative Constitutional Law: Judicial Review*, 3 U. Pa. J. Const. L. 977, 979 (2014), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1436&context=jcl> (accessed Aug. 9, 2015).

[92] Mario Comba, *Gli Stati Uniti d'America*, in Diritto costituzionale comparato, *supra* n. 14, at 127, 151.

[93] Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*, 4 J.L. & Pol. 183, 183 (1942).

constitutional court – that merges the institutional forms and behavior of judicial institutions, with the limited political task of interpreting the constitution generally and the legitimacy of actions by other state organs (including judiciary organs) and private parties. Due to the fact that continental judicial review is to some extent associated with parliamentary supremacy and does not trust ordinary judges' capacity to set aside the lawful statute, the ordinary or administrative judges in continental law countries cannot nullify any legislation during the process of adjudication, only the judges in constitutional courts have the power to do so.[94] It is impossible for the PRC to borrow either the German or US constitutional models due to the fact that both of them are incompatible with China's centralized judiciary system. Meanwhile, the doctrine of dictatorship of the proletariat embraced by the CCP would be incompatible with the US constitutional mechanism embedded in the doctrine of check and balance. The Soviet model of constitutional provisions can neither be interpreted nor applied by the judiciary bodies. In 1955, a specific Reply to Xinjiang Higher Court issued by the SPC, inspired by Soviet constitutional theory, clarified that 'it is inappropriate for the Constitution to be used as the legal basis for conviction and punishment in a criminal judgment.' Although this Reply did not refer to the inappropriateness of citing the Constitution as an authoritative legal source for determining the criminal case, it later became an unwritten rule that Chinese judges were not permitted to cite constitutional rules in case determination until 2001.[95] Huang Songyou, a former Vice-Chief Justice of the SPC, even sought to bring US Supreme Court doctrine, as in *Marbury v. Madison,* into the *Qi Yuling* case in order to take the competence of constitutional interpretation away from the NPCSC, as well as to establish constitutional precedence on the direct judicial application of constitutional rights within the Chinese legal system. Huang replied to the Shandong Highest Court in 2001 with a bold statement that

> upon analysis, we hold, on the basis of the facts of this case, that Chen Xiaoqi and others have violated Qi Yuling's fundamental rights to receive education in accordance with the provision of the Constitution relative to violations committed with involving a person's identity. Because this violation has resulted in actual damage, commensurate civil liability . . .

Besides the wording of Justice Huang's Reply, he is a high-profile advocate of building Chinese constitutional mechanisms based on the US model, in which local courts are able to apply the Constitution directly in the adjudication of cases.[96]

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[94] Comparative Constitutional Law 461 (Vicki C. Jackson & Mark Tushnet, eds.) (Foundation Press 1999).

[95] Jerry Z. Li & Sanzhuan Guo, *6. China*, in International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion 158, 162 (Dinah Shelton, ed.) (Oxford University Press 2011).

[96] Guobin Zhu, *The Norm and Concept of China's Constitutional Rights: Inheritance, Evolution, and Prospective*, in Constitutional Rights and Constitutionalism: Studies of Constitutional Problems in Contemporary China 1, 38 (Hualing Fu & Guobin Zhu, eds.) (University of Hong Kong Press 2012).

However, his effort was in vain as in 2007 when the SPC annulled Huang's Reply without substantive reason. Professor Tong has argued that the very reason was that Huang's Reply itself was unconstitutional, without political basis, since Huang's intention to extend the judicial powers as much as US Supreme Court Justice did in the *Marbury* case undermined China's constitutional order embedded in the doctrine of dictatorship of the proletariat.[97] Two years later, new '*Rules Concerning the Citation of Law and Regulation in the Judgment*' were promulgated implicitly ruling out the legitimacy of the citation of constitutional provisions in case determination and judgment drafting. On the other hand, a continental constitutional court under the German model can hardly be compatible with China's present legal system too. Having a specific independent court that lies independent from the ordinary judiciary system, as well as from the other legislative and administrative systems, acting as a supervisor to guarantee constitutional order might conflict with the NPC authority where the will of the NPC directly derived from the 'people,' is the ultimate. No external authorities could legitimately limit or annul legislation approved by the NPC within the socialist legality.

To some extent, the French or former Soviet constitutional review mechanisms might be partially useful to Chinese legal scholars as two inspired models compatible with the Chinese constitutional order. The French Constitutional Council (*Conseil Constitutionnel*) is an independent political council composed of nine members appointed respectively by the President of the Republic, and the Presidents of the Senate and the National Assembly. The appointed members cannot be ministers or members of parliament. Before their promulgation, acts of parliament have to be referred to the constitutional council for constitutional review. The decision to declare the unconstitutionality of bills of law by the constitutional council could deprive their chances of potential validity, in a model where the constitutional council guarantees the French legal culture that any valid law should be maintained its binding power after promulgation.[98] Though the Chinese constitutional system is not compatible with any independent judicial and constitutional review body, the French model inspires us, in the aspect of its functions 'enshrine and control political reality.'[99] The Soviet Union did not have a constitutional court until Gorbachev's regime when the Supreme Soviet adopted the constitutional amendment to build a new Committee of Constitutional Supervision [hereinafter CCS] under the structure of the National Congress of Deputies.[100] The CCS members were elected by the Congress for a term of

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97 Z. Tong, *Constitutional Application Should Follow the Road Stipulated by the Constitutional Itself*, 2008(6) China Legal Science 38.

98 Enrico Grosso, *La Francia*, in Diritto costituzionale comparato, *supra* n. 14, at 158, 186.

99 John Bell et al., The Principles of French Law 139 (Oxford University Press 1998).

100 Herbert Hausmaninger, *The Committee of the Constitutional Supervision of USSR*, 32 Cornell Int'l L.J. 287, 287–91 (1990), available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1240&context=cilj> (accessed Aug. 9, 2015) [hereinafter Hausmaninger, *The Committee*].

10 years from among the 'specialists in the field of politics and law' and consisted of a chairman, a deputy chairman, and 21 members, including one representative from each republic. Under the Soviet Constitution (Art. 126) and the Law on Constitutional Supervision in the USSR, the CCS could, at the request of the other high authorities or on its own initiative, examine the constitutionality of laws and legality of certain normative acts. In the case of violation of a non-human rights provision of the Soviet Constitution by a federal statute, a presidential decree or a government ordinance, the CCS could only issue a finding of unconstitutionality and illegality which could suspend the legal effect of the legislative and administrative act. The CCS could appeal to respected organs to revise the normative acts within 30 days. Between its first official announcement in May 1990 and the decision to dissolve it, on December 23, 1991, the CCS produced fewer than two dozen findings. Most of these findings nullified the human rights violation by federal legislative and executive authorities. In many human rights cases, the CCS often examined the domestic legal federal and some republics' legal documents with the standards embodied in the international human rights treaties since it insisted on their supremacy over Soviet law.[101]

Preventive examination of the constitutionality of the law in order to guarantee the unification of constitutional order and respect for fundamental rights are the impressive functions shared by both constitutional review models. Given the members' relationship with high up political party figures, the functions of both models are not merely devoted to the review of the constitutionality of statutes, but also act as the forum forming the consensus on constitutional rules among the different political parties as well as political organizations and associations. In my view, China needs a highly political constitutional court to avoid the political clash between the diverse interest groups during the transitional period if the Chinese elite determine to walk towards democratization. However, the French Constitutional Council, though established in a highly political manner, has several obvious French characteristics which would be difficult to import into Chinese legal system. It was described as 'a canon aimed at parliament,' protecting the executive branch from the encroachment of the statute voted by the parliament. In contrast, the supreme power of the NPC essentially rejects any forms of external supervision by other state bodies. The French model could, nevertheless, be altered within the Chinese constitutional order into a consultative organ composed by the legal experts properly elected or appointed. Those elected members could be given the competence to examine the constitutionality of statutes before their promulgation, and offer advice to the NPC on legal or constitutional amendments in case that statute is inferior in contrast with the constitution or constitutional rights which has provided a lower standard of protection than UN human rights treaties. However, their conclusions would have

[101] Herbert Hausmaninger, *From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court*, 25 Cornell Int'l L.J. 305, 310–11 (1992), available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1285&context=cilj> (accessed Aug. 9, 2015).

no binding powers on state organs because the NPC or NPCSC, having the final say, could choose to adopt the suggestions or not.

The former Soviet model, which has been strongly proposed by some Chinese scholars,[102] is potentially the most adaptable to the Chinese constitutional order given the ideology shared more than two decades ago. A relatively independent constitutional court, established under the framework of the National Congress of Deputies, was composed by legal and political experts with broad powers to review the constitutionality of various legal documents in compliance with the constitution and international human rights treaties. Indeed, this model could protect human rights abstractly through the nullification of statutes which were determined to violate the constitution and international human rights treaties, but the CCS could by no means touch the constitutionality of the CPSU's concrete policy related to national affairs. The debate on the legality of the establishment of this institution never stopped, because Art. 121(4) of the 1977 Soviet Constitution delegated the power of constitutional interpretation and supervision of the implementation of the constitution only to the Presidium of the Supreme Soviet[103] which has a similar constitutional status to the NPCSC, rather than any independent constitutional court, not to mention that the existence of this model only lasted less than one year. Regarding the legitimate crisis of the Soviet CCS, China's constitutional court might be settled within the framework of the NPCSC reviewing the final draft before promulgation as the French Constitutional Council did.

Indeed, several scholars who have been, to a greater or lesser extent, influenced both by the French model and former Soviet model proposed that a new constitutional committee can be established within the framework of the NPCSC[104] in which the members are afforded extensive competence to examine the constitutionality of the contested legal document. I partly agree with this argument simply because it is compatible with China's constitutional order. Meanwhile, the selection of committee members should be compatible with our political circumstance. In the French model, the candidates are respectively nominated by several state leaders who usually come from different political parties. Correspondingly, the NPCC, who has traditionally acted as a consultative political body and whose representatives are composed of the CCP and remaining democratic parties, religious or non-political party members, could nominate the candidate list of China's envisioned constitutional court.

In the long term, the NPCC was widely regarded as a vase displaying the CCP's hypocritical democracy serving its 'united front' strategy with the CCP financing the activities of democratic political parties, as well as providing them benefits, in

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[102] W. Liu, *Several Question on the Establishment of Constitutional Examination System*, 2003(6) Jiangsu Social Sciences 122

[103] Hausmaninger, *The Committee*, *supra* n. 100, at 287.

[104] X. Zhou, The Research on the Several Question of China's Constitutional Review: LL.M. Thesis 44 (Nanjing Normal University 2011).

exchange for their political support to the CCP as the eternal ruling party. However, democratic political parties would be reluctant to compromise with the ruling party at the cost of sacrificing their political identities forever. As political parties, they endeavour to exert their own influence on state policy as much as they can. The CCP has to deal very prudently with the political opinion of democratic political parties as well as other non-communist NPCC representatives, as the former CCP General Secretary Hu Jintao stated:

> We should uphold and improve the system of the People's Congress, the system of multiparty cooperation and political consultation under the People's Congress . . . All these will promote the continuous self-improvement and development of the socialist political system.[105]

Hence the CCP's willingness to spare more space for democratic parties engaging in political activities, otherwise suspicions would be raised that NPCC functioned merely as a political vehicle to support the CCP's rule. Consequently, it is possible to organize a new constitutional committee within the NPCSC, whose members could be elected by the NPC from a candidate list proposed by NPCC representatives. All eight democratic parties respectively reserve at least one nominee as member in the final list. These judges, as representatives of state sovereignty, would be entitled to the independent mandate of interpreting the constitution and examining the constitutionality of national legislation, in a centralized manner, before its promulgation and controlling central administrative regulation, as well as local decrees after their promulgation under the framework of the NPCSC. Consequently, the advantage of this envisioned model could effectively guarantee the unification of the constitutional order and the protection of fundamental rights without being undermined by the lower statute. Moreover, this constitutional review compatible with China's constitutional theory could ensure constitutional interpretation based on political consensus rather than only on the will of the communist party.

3.2. Human Rights: UN Human Rights Treaty Impacts on China's Human Rights Legislation

Though the Soviet Union was a historical concept more than two decades ago, the legacy of Soviet rights theory still exerts a strong influence on China's human rights affairs, including guiding human rights legislation and sometimes shaping China's human rights jurisprudence significantly. The ruling elites and some scholars, even to this day, still limit human rights education to Soviet theory as the main

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[105] Jintao Hu, *Hold High the Great Banner of Socialism with Chinese Characteristics and Strive for New Victories in Building a Moderately Prosperous Society in All Respects: Report to the 17th National Congress of CCP (Oct. 15 2007)*, <http://news.xinhuanet.com/english/2007-10/24/content_6938749.htm> (accessed Aug. 9, 2015).

measure to defend the dominant status of Marxist ideology. One of the CPP-backed scholars even asserted, after the 1989 Tiananmen incident:

> We are therefore facing the urgent task of coming to grips with the theory of this issue and educating the broad masses, in particular young students, on how to utilize a Marxist perspective to achieve a thorough and correct understanding of human rights.[106]

It revealed that the Chinese ruling elites still confine 'human rights' to a discourse with the highly political and ideological sense of the early 1990s. However, the NPC, on the other hand, has ratified six out of nine UN core human rights treaties as well as two Protocols. Moreover, the Chinese State Council ratified the International Covenant on Civil and Political Rights [hereinafter ICCPR] in 1998. Despite the fact that these UN treaties could be directly applied by the domestic courts, they have a potential effect on legislative reform related to human rights legislation, particularly in the field of social and economic rights. In this subsection, more attention should be paid to the influence of UN human rights treaties on Chinese legislative reform.

Influenced by the traditional Soviet concept of international law, China's Constitution keeps silent on the domestic judicial application of international human rights treaties. Individuals, according to orthodox Chinese academic opinion, are not eligible subjects of international law. Wang Tieya, the most influential international law professor in contemporary China, has argued in a textbook that

> though international human rights treaties have granted numerous rights to individuals, the contracting state, rather than the individuals, is the object of the these international treaties whose binding power derives from the agreement among sovereign states. Hence, individuals are direct beneficiaries rather than the subjects within the international human rights framework.[107]

Wang's theory corresponds to Soviet Professor Kozhevnikov's point of view in the 1950s having argued that 'the very essence of international law . . . whose purpose is to regulate the relations between the states on the basis of their sovereign equality.'[108] International law in this sense is incapable of being a source of law respectively claimed and applied by individuals and courts, though it has binding power on the State, unless permitted by specific domestic legal provisions. This theory clarifies

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106 Edward Wu, *Human Rights: China's Historical Perspective in Context*, 4 Journal of the History of International Law / Revue d'histoire du droit international 335, 356 (2002), available at <http://papers.ssrn.com/abstract_id=1716779> (accessed Aug. 9, 2015).

107 Tieya Wang, Textbook on International Law 77 (Law Press 1995).

108 Международное право: Учебник [Mezhdunarodnoe pravo: Uchebnik [International Law: Textbook]] 7 (Fyodor I. Kozhevnikov, ed.) (Gosyurizdat 1957).

the reason why Chinese UN delegate Zhang Kening has declared that international human rights treaties come into effect immediately after ratification by the National Congress,[109] but actually Chinese courts have, to date, no record of any case adjudicated through the direct application of rules provided by UN human rights treaties.[110] China's Legislative Law does not provide guidance for the application of UN human rights treaties, while the SPC's Rules Concerning Citation have created a stumbling block to directly apply the UN treaties on the grounds that all citations should be confined to domestic law. As a result, the transformation of international human rights treaties through a legislative approach has become possibly the most effective measure for the incorporation of UN human rights standard into the domestic legal system.[111]

Chinese delegates always declare reservations if some specific provisions could not be fully realized in the Chinese legal system. For instance, Chinese delegates have explained the reason for their reservation with regard to Art. 8 of ICESCR on its initial State Report to the UN Committee on Economic, Social and Cultural Rights [hereinafter UN CESCR], with these words:

> [It] is a developing country, in view of constrains relating to the level of the country's economic and social development, even though the Covenant comes into force in China, not all its articles have been fully realized. The degree of enjoyment of certain rights does not yet reach the requirement of the Covenant.[112]

Otherwise, China would have the obligation, under the Convention, to transform those non-reserved provisions into domestic law through the legislative approach. Since there is no specific human rights act in China, the NPC usually transforms the UN standards on human rights into domestic human rights legislation. In order to ascertain what exact role the UN human rights treaties take in China's legislative process, it is necessary to focus on the comparative research on the interaction between UN treaties and Chinese human rights legislation with the help of government reports, as well as

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[109] China's delegate replied to the questions how China could prevent suspects or defendant from torture in the condition that there is no definition of 'torture' in Chinese system with these words: 'When China acceded to any convention, it became binding as soon as it entered into force. China then fulfill its obligation, and it was not necessary to draft special law ensure the conformity.'

[110] H. Zuo, *The Studies on Treaties' Direct Application*, 2008(3) Legal Studies 93.

[111] Björn Ahl, *Statements of the Chinese Government before Human Rights Treaty Bodies: Doctrine and Practice of Treaty Implementation*, 12(1) Australian Journal of Asian Law (2010), available at <http://www.cesl.edu.cn/eng/upload/201106214057582.pdf> (accessed Aug. 9, 2015). Ahl agrees with the opinion that with regard to human rights treaties impossibly applying in domestic courts, 'current Chinese practice indicates that obligation under human rights treaties are implemented indirectly by way of transformation . . .'

[112] Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 Chinese Journal of International Law 445, 450 (2007). doi:10.1093/chinesejil/jmm015

the lectures or papers of drafters. Unfortunately, very few academic works or legislative materials refer to the issue. According to the *Introduction of the Chinese Legislative Process* published in the NPC official website, comparative research on the legislation or practice of foreign countries or regions is the compulsory work of the experts' panel in the process of drafting preparation.[113] International treaties' norms, even those ratified by the Chinese government, seem not be a compulsory source of consideration because the expert panel is not explicitly required to consider international treaties. However, UN human rights treaties have been actually taken into account by the drafters in the drafting process regardless of whether those treaties are ratified by the NPC or not. Ms. Xin Chunying, the Vice-Chairperson of the Legislative Affairs Committee in charge of a legislative project on women's rights, admitted in one of her lectures that the equal rights of men and women to enjoy social welfare, and the rights to enjoy social security during the period of pregnancy and breastfeeding, enshrined in 1992 China's Law on Protection of Women's Rights and Interests, were directly borrowed from the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[114] Evidence concerning the comparative role of UN human rights treaties in the process of domestic legislative work could also be perceived from some Instructive Reports on Drafts to the Law Commission in the NPC. For instance, Zhu Mingshan, the Vice-Chairman of the Internal and Judicial Affairs Committee in charge of revising Law on the Protection of Minors, delivered the Instructive Report on the Law on Protection of Minors with reference to the UN human rights treaties, stating that

> given that China has acceded to the Convention of Children Rights and the UN Standard of Minimum Rules for the Administration of Justice for Juvenile Delinquency, in both of which the principles of the 'best interests of children' and 'maximum protection of children' are embodied, some revised provisions manifesting the spirit of the two aforementioned international treaties have been incorporated into the given draft bill.[115]

Apart from this evidence, even the drafters of the new revised Law on the Protection of Women's Rights and Interests have broadly taken the comparative approach in the drafting process, they have not only confined their studies to the UN documents on women's rights but have also studied the successful experience of the protection of women's rights in foreign countries.[116]

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113 *The Introduction of Basic Legislative Process in Our Nation*, <http://www.npc.gov.cn/npc/sjb/2013-02/19/content_1755104.htm> (accessed Aug. 9, 2015).

114 C. Xin, *Building the Institution of Social Security with Chinese Characteristic*, *KeXue Shibao* (Jan. 20, 1999), <https://www.iolaw.org.cn/showArticle.aspx?id=1213> (accessed Aug. 9, 2015).

115 M. Zhu, *Instructive Report on the Draft Bill of Law on Protection of Minors (Revised Draft Bill)*, <http://www.npc.gov.cn/npc/oldarchives/zht/zgrdw/common/zw.jsp@label=wxzlk&id=357674&pdmc=1524.htm> (accessed Aug. 9, 2015).

116 The Writing Group, *The Interpretation of 'Law on the Protection of Women Rights and Interests'* 2 (2005).

Some Instructive Reports failed to refer to the relevant UN human rights treaties, but this does not indicate that drafters have not thought over international human rights treaties. On the contrary, they might be inspired by some UN treaties which were inappropriately publicly announced as explicit sources of inspiration at the time, given that China was not yet an official contracting state. For instance, the Instructive Report on the Law on the Protection of Disabled Citizens kept silent on the role of the Convention on the Rights of Persons with Disabilities [hereinafter CRPD] in several draft bills,[117] while supplementary material on the draft preparation revealed the evidence that drafters had been actually influenced by the CRPD in some aspects. For instance, 'accessibility' is a basic CRPD's requirement for states to ensure disable persons' access to social facilities and services, which is one of the fundamental reasons for China's new legislation adding various concrete measures to ensure the realization of rights of persons with disabilities in daily life.[118]

Moreover, drafters involved in legislative reforms concerning highly sensitive or controversial issues were reluctant to refer the UN human rights treaties in order not to give the impression that the new legislation was a result of concessions to external pressure. Abolishing capital punishment as a universal dynamic consensus is a consistently sensitive issue in China. The exact number of executions per year is well-recognized as China's state secret. The NPCSC consistently approved two Criminal Law Amendments in 2011 and 2014 in order to reduce the number of crimes eligible for capital punishment. Though scholars[119] and state-controlled media[120] commonly admitted that the ICCPR and the international tendency to abolish capital punishment are two relevant factors leading China's ruling elites to that amendment, Li Shishi, one of the vice-chairpersons of the Legislative Affairs Committee in charge of the criminal law reform, did not refer to UN human rights treaties or to this international dynamic tendency in his Instructive Reports on No. 8 Amendment of the Criminal Law Code.[121] Besides, Re-education through Labor System, an institution of administrative detention borrowed from the Soviet Union, was abolished by the NPC's Decision adopted by the NPCSC in 2013. China's court had no capacity to hear cases concerning

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117 X. Li, *Instructive Report on the Draft Bill of Law on the Protection of Persons with Disabilities*, <http://www.npc.gov.cn/npc/zt/2008-06/03/content_1494743.htm> (accessed Aug. 10, 2015).

118 *The Brief Introduction of Accessibility*, <http://www.npc.gov.cn/npc/zt/2008-02/27/content_1400282.htm> (accessed Aug. 10, 2015).

119 R. Liu, *Criminal Law Scholar: Why China's Capital Punishment is Concerned Too Much*, *Zhongguo Qingnian Bao* (Nov. 25, 2014), <http://news.china.com.cn/2014-11/25/content_34142434.htm> (accessed Aug. 10, 2015).

120 *Consistently Reducing the Number of Crimes Eligible to Capital Punishment Is the Crucial Step towards Civilization of Rule of Law*, <http://opinion.people.com.cn/n/2014/1028/c159301-25925678.html> (accessed Aug. 10, 2015).

121 S. Li, *Instructive Report on the Draft Bill of No. 8 Amendment of the Criminal Law Code*, <http://www.npc.gov.cn/huiyi/lfzt/xfxza8/2011-05/10/content_1666058.htm> (accessed Aug. 10, 2015).

the sentence of re-education through labor because the Public Security Bureau made decisions and carried out the detention on those 'minor' infringements that were crimes. The maximum duration of the detention was as long as four years, which was far more than the minimum duration of the fixed-term of imprisonment according to the Chinese Criminal Law Code. The System obviously violated Art. 9(4) ICCPR, which provides '[a]nyone who is deprived of his liberty by arrest or detention shall be entitle to take proceedings before a court, so that the court may decide without delay on the lawfulness of his detention . . .' The fact of the violation was also admitted by the scholars with an official background.[122] However, all the proposals by representatives to abolish Re-education through Labor System were submitted on the grounds that the System itself had contravened the Constitution, the Criminal Law Code, the Criminal Procedural Law as well as the Legislative Law. Unfortunately, no proposals mentioned that the System violated Art. 9(4) ICCPR.

Unlike the western legal system embedded in the concepts of 'rule of law' and 'human rights' which are rooted in natural justice, the party's will is still the guideline of Chinese legislation. Thus, the Chinese legal system is the instrument handled by the ruling party for serving and defending the stability of the socialist regime. The incorporation of UN human rights standards into its legislation could be accepted only if they add positively to the consolidation of party rulings or guarantee the stability of society, otherwise the Chinese ruling elites might not observe these UN standards. For instance, as it is known to all human rights scholars that most liberal rights provided in UN human rights treaties could be limited only by law, according to which doctrine, peaceful political dissidents' rights to express their political opinions could not be deprived unless their activities are in conflict with public order or morals in democratic societies. This UN concept of liberal rights could hardly be accepted by China's ruling elites even after China's future accession to the ICCPR. The ruling elites fear that UN human rights standards would arm dissidents and undermine the consolidation of China's socialist legality. The judgment of the *Liu Xiaobo* case was a good example of this argument. The *Liu* decision violated rights of expression provided by Art. 19 ICCPR on the grounds that the Chinese court did not follow the UN's doctrine on the limitation of the rights stating:

> When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.[123]

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122 Jiao Wu, *New Law to Abolish Laojiao System*, China Daily (Mar. 1, 2007), <http://www.chinadaily.com.cn/china/2007-03/01/content_816358.htm> (accessed Aug. 10, 2015).

123 *General Comment No. 34: Article 19: Freedom of Opinion and Expression*, U.N. GAOR, Hum. Rts. Comm., 102nd Sess., ¶ 35, U.N. Doc. CCPR/C/GC/34 (2011), at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (accessed Aug. 9, 2015) (citing *Hak-Chul Shin v. Republic of Korea, Communication*

Without any consideration for the UN human rights treaties and interpretation of the Human Rights Committee, the Chinese Court, through the unconditional application of Art. 105 of the Chinese Criminal Code, determined in haste that Liu's articles were published in foreign states' websites having revealed his intention to subvert the socialist regime, according to which his activities constituted the crime of 'inciting to subvert the state regime.' The Chief Judge in this case should not be the only person blamed, given the circumstance that he and law are both instruments controlled by the party's will. Article 105 of China's Criminal Code itself seems too vague to draw any possible boundary between freedom of speech and inciting the subversion of the socialist state regime, nor was peaceful and rational political speech given special status for not convicting. These inherent deficiencies already constitute a violation of UN human rights treaties. However, China's ruling elites are not planning to do any legislative reform in this field, as confirmed by China's spokesperson from the Diplomatic Department when she stressed that the judgment of the *Liu* case was a matter of 'internal affairs' and warned western states 'not to interfere with Chinese judicial sovereignty,' without referring to UN human rights treaties.

The *Shuanggui* system is another example of something that will not be abolished by the CCP in the near future though it has violated the ICCPR and the contemporary Chinese legal system. *Shuanggui* detention is an internal disciplinary process, conducted by the CCP's Disciplinary Inspection Committee, having powers to start the investigation of the suspects, who are often relatively high up CCP figures accused of violating the CCP's discipline or the Criminal Law.[124] Suspects are usually confined to comfortable quarters but deprived of personal liberties, of rights of access to information and the rights to correspondence. Suspects' family members might not be informed by the Disciplinary Inspection Committee, neither can their family members employ lawyers to engage in the investigation because party discipline rejects any external interference in the highly secret investigation. Therefore, *Shuanggui* detention actually violates Art. 9(1) ICCPR which requires that the deprivation of personal liberty should be in accordance with the procedure established by law given the fact that no legislation has ever intended to limit the CCP's power. A few bold professors advised the CCP to regulate the *Shuanggui* system through a legislative approach for making the System itself accountable and transparent, in conformity with standards set in Chinese legislation and UN human rights treaties.[125] The ruling elites seem unwilling

No. 926/2000, U.N. GAOR, Hum. Rts. Comm., 80th Sess., U.N. Doc. CCPR/C/80/D/926/2000 (2004), at <http://www1.umn.edu/humanrts/undocs/html/926-2000.html> (accessed Aug. 10, 2015)).

124 Jerome A. Cohen, *Human Rights and the Rule of Law in China: Prepared Testimony before the Congressional-Executive Commission on China*, Council on Foreign Relations (Sep. 20, 2006), <http://www.cfr.org/china/human-rights-rule-law-china/p11521> (accessed Aug. 10, 2015).

125 Keith Zhai, *Communist Party Seeks to Reform Its 'Shuanggui' Anti-Corruption Investigations*, South China Morning Post (Nov. 22, 2013), <http://www.scmp.com/news/china/article/1361851/communist-party-seeks-reform-anti-corruption-investigations> (accessed Aug. 10, 2015).

to adopt this sound suggestion which would legally limit the ruling CCP's power. According to Chinese Legislative Law, the NPC – the only national body – has non-transferable powers to make legislation concerning the deprivation or limitation of personal liberties, so *Shuanggui* detention is an extrajudicial investigation conducted by the ruling party's body. If the NPC was permitted by the CCP to regulate *Shuanggui* detention, it would appear that the activities of the specific ruling party were the object of regulation by national legislation. Not to mention that ruling elites hate to see their power limited by law, which might potentially result in the CCP losing more authority and resources in the future. *Shuanggui* detention itself acts as a deterrent, as suspects easily confess the facts in fear of prosecution and torture during this secret interrogation. It effectively assists the leaders of the CCP to combat corruption as well as eliminate political opponents.[126]

China's government tolerates the commencement, by its agencies and bodies, of legislative reform that is to some extend in conformity with UN human rights standards, on the precondition that they do not conflict with the party's core interests, even though said standards were for a long time deemed to be anti-Marxist. The presumption of innocence is the fundamentally unalienable principle of criminal proceedings enshrined in Art. 14(2) ICCPR that '[e]veryone charged with a criminal offense shall have the right to be presumed innocent until proved guilty according to law.' However, Chinese Marxist legal scholars have long considered the presumption of innocence as a bourgeois theory. In the 1957 Anti-Rightist Campaign, the review published in an official newspaper accused 'rightist' elites of using 'presumption of innocence' and 'benefit to defendant' to help counter-revolutionaries and criminals escape criminal responsibilities. This principle was depicted as having caused widespread harm to the 'struggle against crime' that was the prime objective of the socialist legal system.[127] China's 1979 Criminal Procedure Code, similarly to the Soviet Union's, contained no specific provision on the presumption of innocence. Marxist scholars argued that this bourgeois theory could not be compatible with Chinese legal reality, which according to the socialist order of criminal procedure should be based on the principle of 'taking facts as the basis and the law as the yardstick.'[128] Though not regarded as compatible with Marxist-Leninist ideology, the principle causes no harm to the interests of the communist ruling elites. Thus, the presumption of innocence was partially incorporated into Art. 12 of China's new

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126 Andrew Jacobs, *Accused Chinese Party Members Face Harsh Discipline*, N.Y. Times (Jun. 14, 2012), <http://www.nytimes.com/2012/06/15/world/asia/accused-chinese-party-members-face-harsh-discipline.html?_r=0> (accessed Aug. 10, 2015).

127 Timothy A. Gelatt, *The People's Republic of China and the Presumption of Innocence*, 73 J. Crim. L. & Criminology 259, 275 (1982), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=6296&context=jclc> (accessed Aug. 10, 2015).

128 H. Xiao, *The Principle of Presumption of Innocence Could Not Be Compatible with Our Criminal Proceeding Order*, 1980(4) Legal Studies 62–63.

Criminal Procedure Code promulgated in 1996, which provides that 'no one shall be guilty of a crime, unless proven guilty by a court of law.' The Procuratorate within the new criminal procedure order discharges the burden proof. The defendant cannot be presumed guilty if he or she fails to prove his or her own innocence, unless public officials are convicted of a crime such as holding a huge amount of property acquired with unidentified resource. If there is no probable cause to prosecute or insufficient evidence to convict after initial or additional discovery, the prosecutor must drop the charges. During the trial proceedings, the people's court must rule in favor of the defendant and set him / her free due to lack of evidence in a case where the evidence does not satisfy the 'beyond reasonable doubt' requirement.[129] Actually, the newly revised provision is the outcome of a compromise between reformists and socialists in the text of Art. 12 where the 'defendants' or 'suspects' were not completely granted the rights of presumption of innocence before proven guilt by the court but simply clarified a fact that only a court can prove the guilt of defendants or not,[130] from where the rights to presumption of innocence can be indirectly derived on one hand, while the principle of 'taking facts as the basis and law as the yardstick,' on the other hand, remain the basic principle in new criminal procedure order.

Meanwhile, the process of the incorporation of rights to the prohibition of self-incrimination, which is a fundamental right embodied in Art. 14 ICCPR, could also mean the outcome of the incorporation of the UN human rights standard relied on the extent of the compromise between the reformists and conservatives and on the assumption of the party's permission. The new Amendment of the Chinese Criminal Procedure Code has literally imported the rights into Art. 50, which provides: 'The People's court, the People's Procuratorate, and public securities . . . are prohibited to force the defendants' or suspects' self-incrimination.' Due to the presumption that the rights to the prohibition of self-incrimination sharply increase the difficulties for authorities in ascertaining the facts of crimes, the new rule on the prohibition of self-incrimination is no stronger than a fragile vase easily shattered by the suspects' obligation, as provided in Art. 118, stating that criminal suspects must answer the investigator's questions relevant to the criminal investigation truthfully during the interrogation of said suspects. Thus, the criminal obligation of suspects must be offset by the new rights borrowed from UN human rights treaties.

Communist regimes usually stress the development of social and economic rights to defend its human rights records and show great achievements under the leadership of the Communist Party. Under the guideline of socialist ideology, the Chinese government proposes that rights to subsistence and rights to development are two

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[129] Jinwen Xia, *New Development in 2001 Chinese Criminal Procedure Law*, 7 Ann. Surv. Int'l & Comp. L. 1, 2 (2001), available at <http://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1056&context=annlsurvey> (accessed Aug. 10, 2015).

[130] R. Chen, *Reflection and Reconstruction of Theoretical Foundation of Evidence Law*, The Papers Book of Evidence Law 360, 369 (2005).

supreme collective rights in China's rights hierarchy in that economic development presumably guarantees the realization of the rights in all categories. This strategy could not only satisfy people's need but also consolidate the legitimacy of the party's ruling. In view of the fact that economic rights are unenforceable by the courts but, rather, realizable through the economic growth and fair distribution of resources, China could not possibly be accused of the violation of economic and social rights, but rather be widely praised for its effort to eradicate poverty, build infrastructure and public services as well as promote the employment rate as the largest developing country. In the recent State Report to the UN CESCR, China's delegate stated that the Chinese government attributed great importance to the concluding observation presented by the Committee and, in the course of formulating and implementing the Eleventh Five-Year Plan for National Economy and Social Developments (2006–10), had given full consideration to the requirements of the Covenant and to the reasonable recommendations of the Committee, making every effort to transform them into policy measures that suit the national scenario.[131] The Chinese government continuously guarantees social and economic rights through the perfecting of the legal system, making national policy and formulating specific Human Rights Action Plans, having attained the remarkable achievements. Although the ICESCR came into effect in China, the Chinese government confessed that not all ICESCR articles have been realized in their entirety, and the enjoyment of certain rights still cannot meet the ICESCR's requirement.[132]

The attainment of great achievements does not imply that China's government has already perfectly eliminated discriminatory social institutions. For instance, the *Hukou* System is the administration of Chinese household registration, inspired by the Soviet's *propiska* (passing port) system, with the purpose of limiting urban migration by the rural population, and which has formally differentiated residential groups and shaped state development priorities.[133] The System, with obvious discrimination, has caused great concern in the UN CESCR,[134] and is consistently subject to public

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131 *Implementation of the International Covenant on Economic, Social and Cultural Rights: Second Periodic Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: China*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., ¶ 4, at 3, U.N. Doc. E/C.12/CHN/2 (2012), at <http://www.refworld.org/publisher,CESCR,,CHN,52ca7ff64,0.html> (accessed Aug. 10, 2015).

132 *Id.* at 11.

133 Tiejun Cheng & Mark Selden, *The Origins and Social Consequence of China's Hukou System*, 1994(139) The China Quarterly 644. doi:10.1017/S0305741000043083

134 UN Committee on Economic, Social and Cultural Rights in the recent concluding observation (*Concluding Observations on the Second Periodic Report of China, Including Hong Kong, China, and Macao, China*, U.N. ESCOR, Comm. on Econ., Soc. & Cult. Rts., U.N. Doc. E/C12/CHN/CO/2 (2014), at <http://www.refworld.org/docid/53c77e524.html> (accessed Aug. 10, 2015)) to China's State Report called upon China again to strengthen its effort to abolish its *Hukou S*ystem and to ensure that all rural-to-urban migrants are able to enjoy work opportunities, as well as social security, housing, health, and education benefits, enjoyed by the residents in urban areas. The Committee also urged China to take all necessary effective family-support measures to avoid the separation of children from family environment and to ensure that children could, particularly those from the rural areas, be raised by their parents.

denouncement by Chinese scholars,[135] as well as by representatives in the NPC,[136] in the sense that a residence with a rural registration would, by law, get greatly unequal treatment to residences with an urban registration, in terms of the enjoyment of social and economic rights as well as civil and political rights. A case adjudicated by a court in Beijing in 2006 aroused people's worries in that the principle of individuals' lives having equal value had been directly undermined by the *Hukou* System. Two men were killed in a car accident. The judges determined that the successors of the deceased from an urban residence be awarded compensation of as much as 400,000 RMB, while the relatives of the rural victim would be compensated only 160,000 RMB according to a specific SPC's Interpretation, having clarified that the criterion, used to explain the different compensation values for death in a car accident, was the rural or urban status of the accident victims.[137] These institutional inequalities range broadly from college entrance rates[138] to coverage of social medical insurance.[139] Dating back to the 1950^{s}, food rationing in the mid-1950^{s}, the planned economy era, had an important corollary with the *Hukou* System, in its effort to control migration and assure the supply of food to priority sectors, specifically to the growing ranks of the working class, cities and the military.[140] Rationing policy sharply differentiated between urban and rural residences. The subsistence of urban residences was guaranteed by the State, whereas rural residences were responsible for feeding themselves. The systematic discrimination between rural and urban citizens was established then. In order to bridge the gaps between rural an urban areas, the Chinese government has consistently promoted various reforms to accelerate orderly urbanization and made efforts to achieve full basic public service coverage for persons living in the cities and towns. In November 2013, the Chinese Central government once again clearly proposed, for purposes of population management,

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135 Lijiang Zhu, *The Hukou System of the People's Republic of China: A Critical Appraisal under International Standards of Internal Movement and Residence*, 2 Chinese Journal of International Law 519 (2003), available at <http://chinesejil.oxfordjournals.org/content/2/2/519.full.pdf> (accessed Aug. 10, 2015). Zhu criticized the negative impact of *Hukou* System into the freedom of internal movement under the legal framework of the ICCPR and into the actual inequalities in social life.

136 *Chongqing's National Representative Proposes to Abolish the Different Types of Hukou between Rural and Urban*, <http://news.sohu.com/20090304/n262594828.shtml> (accessed Aug. 10, 2015).

137 *Difference in Hukou Type Means Difference in Lives Value*, <http://news.sohu.com/20060415/n242818192.shtml> (accessed Aug. 10, 2015).

138 A statistic surveyed by Peking University that only 14.2% freshmen come from rural areas in 2013. The rate of freshmen from rural areas keeps decreasing in the recent seven years in Chinese top universities because the advantaged finance and staff resource are gradually centralizing in metropolitan or capital of provinces. Consequently, the gap between the resource directly leads to different opportunities young generation can enjoy. *See* <http://edu.china.com.cn/henan/2013-10/16/content_30308642.htm> (accessed Aug. 10, 2015).

139 X. Zhang, *Education and Health Inequality in China*, 2(2) China Economic Quarterly (2003).

140 Lynn T. White, Careers in Shanghai: The Social Guidance of Personal Energies in a Developing Chinese City 1949–66, at 162 (University of California Press 1978).

the full release from restrictions of settlement in towns and small cities and the orderly authorization of settlement in medium-sized cities. However, the Chinese government is not likely to abolish the System in the near future given that it has effectively blocked people originating from the rural areas, who endure inadequate living standards, flooding into metropolitan areas rapidly, which might bring high crime rates, resource constraints, inconvenient access to social facilities and traffic. Unlike the negative state obligations in the fulfillment of liberal and political rights, the Chinese government must prudently distribute the available resources to the rural migrants, and scientifically estimate the impact of migration on resource in order to adjust its *Hukou* policy gradually, rather than abolish it immediately as required by the UN CESCR.

4. Conclusion

Before the foundation of the People's Republic of China in 1949, China's Constitution drafters were often inspired by Japanese or western state models. Inspiration obtained from the western liberal constitutional model was eliminated at the time when the communist elites won the civil war in 1949. China's ruling elites came to regard Stalin's Soviet Constitution as the most prestigious model on which to build China's socialist economic and political regime as they shared the same Marxist-Leninist ideology. Though few scholars have noticed the similarity between the 1977 Brezhnev Constitution and China's current 1982 Constitution, some clues could convince us that China's drafters borrowed some new constitutional theories that occurred in the 1977 Soviet Constitution texts. Even when China was diplomatically allied with the US against the Soviet Union from the 1970^{s} to the 1980^{s}, borrowing was possible, and reasonable, due not only to the shared ideology, but also because Brezhnev and Deng Xiaoping pursued the common purpose of eliminating the worship of Mao or Stalin written in the Constitution, as well as changing the socialist state into a normalized country embedded in socialist legality.

However, present China's Constitution, based on the Soviet model, which stresses the dictatorship of the proletariat, exposes many deficiencies when adapting to a common globalized market, considering that the judiciary has very limited competence to adjudicate litigation. All the member states are obligatorily required, within the WTO framework, to establish a qualified review mechanism of administrative acts related to WTO affairs. This requirement has failed to be implemented well within in the Chinese legal system due to the fact that courts only act as the 'mouth of the law' within China's legal system, moulded in accordance with Soviet constitutional theory. This means that courts are not given more extensive competence to review administrative regulations or abstract administrative act, whilst judicial independence might potentially be interfered with by the local administrative leaders considering that local courts are financed by local administrative bodies who are usually involved

in local commercial protectionism to bar the entry of products originating abroad or from other regions. The deficiency of judicial review in China is only one example that demonstrates the negative influence of the Soviet constitutional model on China's integration into modern global constitutionalism. The problem of building an effective constitutional review mechanism compatible with China's constitutional order still haunts Chinese legal experts and human rights advocators. Neither the US common law model nor the German continental model would be easily imported considering that SPC negated the US model in 2007 with the implicit reason that it was not compatible with the Chinese constitutional order, while the latter model would not be compatible with the doctrine of dictatorship of proletariat where only the NPC, as the supreme state organ, has the power to interpret the Constitution and review the constitutionality of a statute promulgated by the administrative or local organs. The highly political model invented by France and the Soviet Union, in my view, could, more or less, provide us inspiration. The French model is based on the balance of diverse political forces where the Constitutional Council acts as the forum to reconcile different political opinions in order to reach a consensus. The process of reviewing constitutionality before the promulgation of the legal act might be borrowed by China as a strategic measure to guarantee the stability of Chinese legal order. The Soviet CCS did not last very long. However, it provided us with a constitutional review model compatible with the Marxist-Leninist state on the condition that this specific committee was established under the Soviet Congress of Deputies. China's constitutional review mechanism could mix the features of the these two models combined with the engagement of the NPCC, which is a political consultative organization containing representatives of eight Chinese democratic parties as well as religious leaders and intellectuals without political party identities. The NPCC could propose the candidate list of the envisioned Constitutional Court composed by experts in law and political science, and then the final members would be elected from the said candidate list by the NPC representatives. The new envisioned Constitutional Court will be a specific organ, under the framework of the NPCSC, that will independently and publicly review the constitutionality of final legislative drafts before sending them to the NPC or NPCSC for approval, like the French Constitutional Council does, and have the competence to review administrative regulations or local decrees in discursive measures, before or after the promulgation of these statutes, like the former Soviet CCS did.

China's present constitutional order also blocked Chinese courts that effectively applied UN universal standards of human rights in their case determination. UN international human rights treaties have some limited but potential influence on China's human rights legislation as well as human rights protection. China has acceded to five out of nine core UN international human rights Conventions and signed the ICCPR, but none of them could be directly applied by domestic courts because the Chinese legal system insists that individuals are not the eligible subjects

of international law. In this situation, UN human rights standards, if pursuing to be observed by Chinese, have to be transferred into the Chinese legal system through the legislative approach. The NPC often prefers to adopt a new law or approve some amendments rather than transfer them directly through *ad hoc* human rights acts. Though very few materials prove that UN human rights treaties are treated as the authoritative source during the preparation of drafts, some evidence can convince us that, to some extent, drafters took due notice of these UN documents. Some Instructive Reports on the drafts have announced, explicitly or implicitly, that UN human rights treaties are some of the fundamental guidelines of China's human rights legislation or legislative reforms. Some drafters who work in the panel of experts, the Legislative Affairs Committee or the Law Commission have a lot of learning and teaching experience in international human rights law. As a result, it is possible for them to turn their attention to UN standards during the drafting process. However, besides all well-known hindrances arising from the interests of the ruling party, for China's legislative reform to be in conformity with UN human rights standards, it will have to go through strong resistance imposed by leftists, most of whom are conservatives advocating the Soviet model. In these circumstances, the extent of legislative reform depends on the compromise and struggle between the reformists and conservatives.

UN human rights committees seem more critical of China's human rights records than Western States governments engaging in bilateral human rights dialogue with China but paying more attention to their economic benefits. The issues of the treatment of political dissidents, detainees subjected to torture, and discriminatory institutions are the committees' greatest concerns. China's UN delegates have to reply to questions, posed by various UN human rights committees, on behalf of the Chinese government. During the process of interrogation, Chinese delegates have to show their respect to these UN authorities to demonstrate what a civilized state should do on the international floor, and they sometimes have to confess the deficiency of human rights protection or admit the government has abused its power after the submission of convincing evidence regarding human rights violations presented by the NGOs' Shadow Reports. However, the ruling party and the Chinese government will not make any concession of their core interests, implying that the ruling elites would consolidate their power or maintain the communist regime's safety and social stability with measures that are not in conformity with the minimum standards of UN human rights. *Shuanggui* detention as an effective extrajudicial disciplinary instrument against corruption could not be constrained by law though actually it violates the ICCPR and Chinese Legislative Law, while the notorious *Hukou* System, acting as a valve to prevent rural migration from flooding into urban areas will not be abolished in the near future since it has a preventive effect on the maintenance of public security and relief of resource-constraints.

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COMMENTS

WRONGFUL TRADING: COMPARATIVE APPROACH (ENGLAND AND WALES, RUSSIA AND THE USA)

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This paper is designed to discover legal rules addressing insolvency trading in three jurisdictions: England and Wales, Russia and the USA. Originally it was a master's dissertation written under supervision of Ms. Sarah Paterson, who was extremely helpful and patient. The key jurisdiction for the research is England and Wales, whose wrongful trading provision apparently was the very first insolvency regulation in the field. Here, we will give particular attention to the factual circumstances of insolvency trading and research how the concept of wrongful trading addresses them. The next question will be how the American concept of deepening insolvency and the Russian concept of subsidiary liability are comparable with wrongful trading. Later, we will focus on the functions that should be performed by the regulations. Also, the effectiveness of wrongful trading and similar overseas provisions will be examined. Finally, this paper attempts to find obstacles to the wide application of wrongful trading provision.

Keywords: wrongful trading; deepening insolvency; subsidiary liability; liability of directors.

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1. Introduction

When an insolvent company continues trading, it tends to be harmful for creditors, other businesses and public in general. Insolvent trading was recognized as a problem many years ago, but there is still no effective legal mechanism to deal

therewith. In 1926, the Greene Committee offered a new concept which would make directors liable if they fraudulently carried on business of an insolvent company;[1] but this concept, which was called 'fraudulent trading,' never became an effective tool of insolvency law mainly due to the fact that it combined a criminal offence and a civil cause of action.[2] The development of the concept was introduced by Sir K. Cork,[3] who offered to remove the criminal burden of prooof and allow the court to make a monetary order against directors on petition of creditors or the liquidator. Also Sir K. Cork offered to name the new concept 'wrongful trading.' The idea of wrongful trading has been accepted by sec. 214 of the Insolvency Act 1986; under this section the court can oblige directors to pay a contribution to the company if they knew that the company was near insolvency and did not make the reasonable steps to protect creditors. But, in contrast to Cork's idea, the petition can be made only by the liquidator. The wrongful trading provision was met enthusiastically by scholars,[4] but for some years the concept was obviously labelled as a 'paper tiger.'[5]

This paper is designed to discover why wrongful trading is not widely used in the UK. To do that we will try to compare the wrongful trading law and approaches to liability of directors for the insolvent trading used in two other jurisdictions: the USA and Russia. These jurisdictions have been chosen because their approaches are different from each other, but both have something common with the English one. The USA is another common law jurisdiction, and undoubtedly it is much closer to English law overall. But American bankruptcy legislation does not have a concept which would be similar to wrongful trading; directors might be liable there for insolvency trading under a tortious concept instead. At the same time, Russia is a continental civil law country, but there is a cause of action which, as we will see, functionally is very close to wrongful trading.

The mentioned jurisdictions will be analyzed in the first chapter. We will start with the English concept of wrongful trading and focus on four hypothetical scenarios of insolvency trading. It is important here to find out which particular parties are harmed by wrongful trading more than others; it is obvious that they should be protected more, and it is crucial to allow them to use wrongful trading provision directly as they would apply it more than anyone else. We argue that the creditors trading with the insolvent company through its tough time always suffer from insolvency trading; however, they are not protected by wrongful trading provision.

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1 Kenneth Cork, Insolvency Law and Practice: Report of Review Committee 29 (Her Majesty's Stationery Office 1982).

2 *Id.* at 388.

3 *Id.* at 390.

4 Andrew Hicks, *Advising on Wrongful Trading: Part 1*, 14 Company Lawyer 16 (1993).

5 Carol Cook, *Wrongful Trading: Is It a Real Threat to Directors or a Paper Tiger?*, 1999 Insolvency Lawyer 99.

At the same time, the creditors as whole, who are protected by the provision, might even benefit from insolvency trading.

Then the discussion will move on to the American 'deepening insolvency' which originally was a part of tort law; the main question here is whether this concept addresses the same situations as wrongful trading does. American experience is crucial for us because it is another common law jurisdiction and legal solutions found there might be workable in the UK. Particular attention will be paid to the negligent behaviour of directors in deepening insolvency. Finally, we will look at the subsidiary liability concept which is used in Russia and compare it with the English concept. The similarities and differences between these two jurisdictions are important as both countries use similar concepts which are stated in the legislation and expected to perform the same function. As both concepts are not really effective, it is possible to check which particular rules are shared by them and might cause the difficulties in making directors liable for the insolvent trading.

The second chapter develops the idea about a proper function of wrongful trading. Here, we will investigate how wrongful trading performs compensatory or punitive functions. In our view finding the particular function, which wrongful trading should perform, should be done before discussing effectiveness of the concept. Once we have found what the wrongful trading should achieve, it is possible to decide whether it does achieve this goal or not. This question seems to be quite obvious, but in reality it is complicated. It seems that the American deepening insolvency and the Russian subsidiary liability are compensatory, not punitive; but the English wrongful trading is neither really compensatory nor punitive.

This discussion will be developed in the fourth chapter, which is about effectiveness of wrongful trading provision as well as the similar provisions in the USA and Russia. In the first part of the chapter some figures will be shown; special attention will be paid to the number of wrongful trading cases and other insolvency misconduct cases.

Finally, the possible ways to improve the current situation will be discussed in the fifth chapter. The specific question here is how American and Russian insolvency laws could contribute to the English concept of wrongful trading.

2. Wrongful Trading and Alternatives

In this chapter we will cover mechanisms which might be used against directors whose misconduct before the insolvency caused damages to the company and creditors. While analyzing the English concept of wrongful trading, we will look at four possible situations when insolvent trading appears; the criterion used is how the company's assets are affected by such trading. In the next part we will describe the American concept of deepening insolvency as a part of the American tort law and as an independent cause of action; then it will be compared with the wrongful trading

concept, especially in the cases when deepening insolvency includes negligent behaviour of directors. Finally, the Russian concept of subsidiary responsibility will be analyzed through similarities and differences with wrongful trading; specific attention will be given to performance of compensatory and punitive functions and possible plaintiffs for such claims.

2.1. England and Wales

Creditors in this jurisdiction are protected by a wide range of mechanisms, but only wrongful trading protects them exactly against continuing trading of the insolvent company. The creditors trading with an insolvent company are the only parties who always suffers damages; however, they do not have the right to sue directors directly.

In the UK creditors are protected by common law duties of directors raised before the insolvency, directors' disqualification provisions, concepts of fraudulent and wrongful trading;[6] but only the latter specifically addresses continuing trading of the insolvent companies. Under sec. 214 of the Insolvency Act 1986 the court on the application of the liquidator may declare that that a director of the company in liquidation is to be liable to make such contribution to the company's assets as the court thinks proper if at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. The director avoids responsibility if he / she took every step to minimize the losses of the creditors.

The only plaintiff for a wrongful trading claim is the liquidator and only remedy is a contribution to the company's common pool; therefore, the wrongful trading provision protects only the company's creditors as whole. A. Keay argues that only unsecured creditors are protected by the provision.[7]

But in our view, it is not clear who should be protected by this regulation. Initially, Sir K. Cork mentioned the wide range of parties who could be concerned about wrongful trading and expected to have the right to sue directors on this ground.[8] Even though the legislature did not follow K. Cork on this matter, there are many parties which might be affected by the wrongful trading. The first are the businesses who were trading with the company through the tough times. They enter into transactions which were necessarily harmful for them as the insolvent company was not able to pay; these losses have been caused by directors of the insolvent

[6] Prof. D. Kershaw underlines that directors' common law duties appeared prior insolvency and wrongful trading provisions are only mechanisms require directors to have regards to creditors' interest (David Kershaw, Company Law in Context: Text and Materials 788 (2nd ed., Oxford University Press 2012)).

[7] Andrew Keay, *Wrongful Trading: Problems and Proposals*, 65 N. Ir. Legal Q. 63 (2014), available at <http://eprints.whiterose.ac.uk/78501/> (accessed Aug. 11, 2015) [hereinafter Keay, *Wrongful Trading*].

[8] Cork, *supra* n. 1, at. 399.

company who continued trading after being informed about company's insolvency. At the same time, company's creditors as whole do not always suffer losses from wrongful trading itself.

What is more, the original idea was protecting new creditors of the insolvent company. Sir K. Cork, when discussing reasons to implement wrongful and fraudulent trading, cited the Greene Committee, who developed the idea of fraudulent trading.[9] The Greene's idea addressed a situation when the floating charge holder controlling the company obtained the credit to buy goods and 'fill up' the company assets. Thereby new creditors of the company were harmed and needed the protection, which finally was given by the fraudulent trading provision. The Cork's recommendation was that wrongful trading had to address the same situation as fraudulent trading, but would not need the proof of dishonesty and would not require the criminal standard of proof.[10] Thus, initially both concepts were aimed to protect new creditors, not those who were creditors before the insolvency.

To demonstrate how wrongful trading might harm creditors of both types we will look at four possible scenarios.[11] In the first situation a company buys some goods for price £100, the seller becomes a company's creditor for £100, but company owns the goods which market price is £100. Assuming that the liquidator is able to realize these goods for their real price, the common pool of the company has not changed. So, finally no prior creditors are affected by trading. But the seller has exchanged his goods for the status of a creditor of the insolvent company instead of getting £100 which he considered. Ironically, in this situation creditors as whole benefit from the insolvent trading. The counterparty of the insolvent company becomes a creditor with the demand of £100, but it will get return only *pro rata*. The common pool available for distribution to all creditors increases by £100 received. And the less a company pays to the counterparty outside the insolvency proceeding, more other creditors benefit.

In the second situation, which is quite obvious, the company is not able to pay all debts and pays, for example, only 80% of the debts instead. Again, the common pool wins. The assets available for distribution to all creditors increase by £20 (£100 received minus £80 paid). The real cases, when the wrongful trading provision was applied, prove this position. For example, in *Roberts v. Frohlich & Anor.*[12] directors were found liable for trading wrongfully when they were using credit extended by suppliers to trade. It is quite clear that the described action cannot be harmful for the previous creditors of the company, but causes losses for suppliers. In *Re*

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9 Cork, *supra* n. 1, at 29.

10 *Id.* at 399.

11 It is assumed that goods received by the company will be realized through liquidation for their market price. If it is not, it cannot be a concern for wrongful trading at all. Efficiency of insolvency liquidation definitely is not a subject of wrongful trading; directors should not pay for the wasteful liquidation.

12 [2011] EWHC 257 (Ch.).

Kudos Business Solutions Ltd.[13] directors paid away sums received from customers as advanced payments what constituted wrongful trading. The payments were harmful only for these particular creditors listed by the court, but not for creditors of the company as whole. However, creditors, who suffered losses, in the described situation are not recognized by law as parties who need protection. The only way they benefit from wrongful trading provision is from a part of directors' contribution to the common pool which they will get *pro rata* and along with other creditors, who have already benefited from wrongful trading.

The third situation covers cases where the company pays for the goods more than their market price; the result is a loss for the company and the common pool. If the company has bought some goods for £100 which cost £80 on the market, all creditors will get return from the common pool which is £20 less. The most obvious reason why the company comes to such transactions is fraud; but fraudulent trading is a competing cause of action, both fraudulent and wrongful trading hardly can be applied together. Also such transaction might be undervalued or preferable; it is possible to base claims on the wrongful trading and such transactions at the same time. But in this case remedy is limited to the price of the transaction; wrongful trading as a part of the claim creates additional burden of proof, but the same compensation might be received by the claim based only on an undervalued or preferable transaction. The only advantage is that the wrongful trading claim allows adding the director as a defendant. The alternative version of this situation is when the company pays its debts to some particular creditors while other creditors cannot get anything.[14]

The fourth situation covers cases when the company and creditors suffer losses from the continuing trading itself. For example, a company with assets equal to £10,000 was trading for three months after its insolvency became foreseeable. Even through the business was obvious, after these three months company's assets cost only £9,000 due to a purely economic problem with the company's profitability. These losses were caused by trading itself, not directors' misfeasance. Everybody is harmed, but in practice the wrongful trading provision is not applied in this scenario. There are no cases where the court found wrongful trading without any other wrongdoings and there are very few cases where the court articulated continuing business as a misfeasance which made wrongful trading.[15] What is more, A. Keay very recently noted that courts applying wrongful trading in fact 'consider issues of blameworthiness in determining liability.'[16] This idea is not based on law, but articulates the logic which is factually used by the courts. In other words, the courts

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13 [2011] EWHC 1436 (Ch.); [2012] 2 B.C.L.C. 65.

14 *Re DKG Contractors Ltd.*, [1990] B.C.C. 903.

15 *See, e.g., Re Continental Assurance Co. of London plc*, [2007] 2 B.C.L.C. 287; [2001] All. E.R. (D) 229.

16 Keay, *Wrongful Trading*, *supra* n. 7, at 70.

are very reluctant to challenge behaviour of directors who did not file insolvency petition only, and had not done anything wrong apart it.

The other party which could be concerned about wrongful trading is the public. First, wrongful trading is misconduct which always damages the social well-being. Secondly, it damages the economy as whole, especially in the cases when the insolvent company has many creditors such as local entrepreneurs for whom the insolvent business might be only contra-party. But the current regulation of wrongful trading does not address interest of the public; the liquidator does not have any real duty to protect public interests. In view of that, the public interests are protected by wrongful trading only indirectly by discouraging directors from such misbehaviour.

Hence, so far wrongful trading gives protection only to creditors of the company as whole; however, the specific creditors, who were counterparties of the company through insolvency, are likely to suffer losses much more than creditors who became them before. It is noticeable that this idea was initially implied into both wrongful and fraudulent trading, but later was changed by legislature and courts to the form which exists now.

2.2. The USA

In the USA there is no federal legislation which would prohibit continuing trading of the insolvent companies; the closest to the wrongful trading functionally is a common law concept of deepening insolvency, which initially was based on tort law. However, this concept addresses more the situation of fraudulent than wrongful trading; only in the very rare cases, when the courts assume that deepening insolvency includes negligent behaviour, does it perform a function similar to wrongful trading.

P. Rubin defined deepening insolvency as 'an injury to the corporate property from the fraudulent expansion of corporate debt and prolongation of corporate life.'[17] This concept is functionally comparable with the UK wrongful trading,[18] even though in the USA there are other instruments which make directors liable for the misconduct beyond insolvency, such as common law duties regulated by the business judgement rule, duties on sale and duties on Tit. 11 of the US Code. Deepening insolvency is based on any misconduct prior to insolvency and hence has wider application than wrongful trading. This concept is a development of tort law and originally covered only fraudulent behaviour of directors which made it more similar to fraudulent trading. However, nowadays courts apply deepening insolvency against negligent directors;[19] so, it covers the wrongful trading situation as well.

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[17] Paul Rubin, *New Liability under 'Deepening Insolvency:' The Search for Deep Pocket*, 23 Am. Bankr. Inst. J. 50 (2004), available at <http://www.herrick.com/siteFiles/Publications/805D53435768CE5436A02FF829D497C8.pdf> (accessed Aug. 11, 2015).

[18] *See., e.g.,* Michael Schillig, *'Deepening Insolvency' – Liability for Wrongful Trading in the United States?*, 30 Company Lawyer 298 (2009).

[19] *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1005 (9th Cir. 2005); *Gourian Holdings, Inc. v. DeSantis, Prinzi, Springer, Keifer & Shall (In re Gourian Holdings, Inc.)*, 165 B.R. 104, 107 (E.D.N.Y. 1994).

Deepening insolvency has two applications in the USA.[20] First, it might be a measure for the separate tort action. Initially deepening insolvency was a corollary to an independent tort and was designed to measure the damages caused to the company by continuing trading;[21] it keeps playing this role. Secondly, it might be a separate cause of action, but in this case activities of defendants should be fraudulent[22] or, arguably, negligent (*Smith v. Arthur Andersen LLP*; *Gourian Holdings, Inc. v. DeSantis*). As we said above, only in the latter case deepening insolvency addresses the same situation as wrongful trading does. But the liability for negligent deepening insolvency seems to contradict[23] the business judgement rule[24] which protects directors against legal liability for their business activities. We assume that business judgement rule is not applied in such cases simply because a cause of actions gives specific regulation which should be applied instead of a general rule; but the uncertainty is still here.[25] In 2006 William A. Brandt and Catherine E. Vance in their comparative analysis mentioned that it was difficult to say whether deepening insolvency and wrongful trading were 'headed toward or away from each other in their development.'[26] Nowadays in the USA there is a clear distinction between fraudulent and negligent deepening insolvency, and it is possible to make a conclusion. Deepening insolvency may serve the same function as wrongful trading, but only if we do not follow the mainstream logic that it should contain fraud (*Lafferty*), and do not apply the business judgement rule. But even in this case, to make directors liable the plaintiff should prove that their behaviour was negligent to the extent that it constitutes a breach of their fiduciary duties owed to the company or creditors (*Smith v. Arthur*), which requires a burden of proof harder than for wrongful trading.

The tortious origin makes deepening insolvency different from wrongful trading. It is possible to use the American concept only when there is damage for to company.[27] This damage is not simply a sum of trading, it should be an actual

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[20] John Tully, Plumbing the Depth of Corporate Litigation: Reforming the Deeping Insolvency Theory, 2013 U. Ill. L. Rev. 2087, available at <http://www.illinoislawreview.org/wp-content/ilr-content/articles/2013/5/Tully.pdf> (accessed Aug. 11, 2015).

[21] Sara E. Apel, *In Too Deep: Why the Federal Courts Should Not Recognize Deepening Insolvency as a Cause of Action*, 24 Emory Bankr. Dev. J. 85, 86 (2008).

[22] *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340 (3d Cir. 2001); *Dixon v. Am. Cmty. Bank & Trust (In re Gluth Bros. Constr., Inc.)*, 424 B.R. 379, 390 (Bankr. N.D. Ill. 2009).

[23] J. Tully argues that when deepening insolvency is applying for the negligent behaviour, it contradicts with the business judgement rule which is a presumption that business decisions of directors cannot be challenged if they are made in good faith, on well informed basis, without conflict of interests and with the care of the ordinary prudent person (Tully, *supra* n. 20, at 2108).

[24] *See, e.g., Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

[25] *In re P.S.E. & G. Shareholder Litigation*, 315 N.J. Super. 323, 327 (Ch. Div.1998).

[26] William A. Brandt, Jr., & Catherine E. Vance, *Deepening Insolvency and the United Kingdom's Wrongful Trading Statute: A Comparative Discussion*, 19 Insolvency Intelligence 156, 158 (2006).

[27] *See, e.g., Schacht v. Brown*, 711 F.2d 1343, 1357 (7th Cir. 1983).

loss experienced by the company or creditors. So, for example, in the hypothetical situation described above, while discussing the wrongful trading, directors probably would not be liable under deepening insolvency; or, at least, it would be very difficult for creditors to prove that the new company's debts are their actual damage.

The other consequence of the nature of deepening insolvency is that this concept does not limit possible plaintiffs and defendants. For example, creditors are able to sue directors or third parties, such as auditors, on the grounds of deepening insolvency. In our view, it is an advantage of the concept. Eventually, creditors are the only parties who are really interested in such suits; when they have the right to sue directors, they do it much more actively and successfully than the liquidator. This idea is also supported by the fact that the vast majority of American cases discussed in this chapter are started by creditors.

Therefore, technically both wrongful trading and deepening insolvency address the same situation, but with the very different approach. The biggest difference is that the English concept is made by the legislature while the American one is made by common law[28] and continues developing. On the other hand, deepening insolvency, unlike wrongful trading, is based on tort law which is a traditional part of the common law. American courts applying this concept do not face with any new or unusual obstacles such as English courts do when they try to apply the artificial wrongful trading. But both English and American courts struggle with measurement of damages caused by insolvency trading.[29]

It is also important to remember that in these countries there are different policies regarding liability of directors. In the USA the default rule is that directors cannot be liable for the business decisions unless they have violated the very specific business judgement rule; what is more, the whole American corporate law might be described as manager-oriented.[30] To the contrary, in England directors duties are stated in the Companies Act 2006 and their breach is followed by their liability. Overall, American corporate law is considered to give directors much more freedom in their business activities. Probably, a rule working as the wrongful trading provision would look very antagonistic there.

In conclusion, deepening insolvency is still developing and sometimes functionally works as wrongful trading. The American experience proves that

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[28] Look Chan Ho, *On Deepening Insolvency and Wrongful Trading*, 20 Journal of International Banking Law & Regulation 426 (2005), available at <http://papers.ssrn.com/abstract_id=741024> (accessed Aug. 11, 2015).

[29] Schillig, *supra* n. 18, at 300.

[30] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law* (Yale Law School, Program for Studies in Law, Economics, and Public Policy, Law and Economics Working Paper No. 235; New York University, Center for Law and Business, Law and Economics Working Paper No. 013; Harvard Law School, John M. Olin Center for Law, Economics, and Business Discussion Paper No. 280; Yale School of Management, International Center for Finance Working Paper No. 00-09, January 2000), <http://papers.ssrn.com/abstract_id=204528> (accessed Aug. 11, 2015).

creditors tend to submit more claims based on the insolvency trading. At the same time, it is possible to have a working concept which requires even a harder burden of prove that wrongful trading does.

2.3. Russia

Subsidiary liability is an instrument of the continental law which makes directors liable for company's debts acquired through insolvency on petition of the liquidator or a creditor; functionally this concept is quite similar to wrongful trading.

Russia is a continental law country and uses a different approach to the regulation of directors' behaviour. Unlike common law jurisdictions, in Russia the legislation contains rules which regulate almost every aspect of corporate life and do not allow directors too much space for decision making. Directors owe fiduciary duties to the company, but a breach of the rules cannot be an independent cause of action; a broad concept of damages should be applied instead. At the same time, law sets out a number of specific causes of actions which are to be used in the specific situations.

One of such causes of actions is subsidiary liability[31] of directors listed in Art. 10(2) of the Federal Law No. 127-FZ of October 26, 2002, 'On Insolvency (Bankruptcy)' [hereinafter Federal Law on insolvency]. Under Federal Law on insolvency, directors, who did not file the insolvency petition when obligated, are liable as subsidiaries for the new company debts on the petition of the liquidator or a creditor. The duty to file an insolvency petition arises when the company is not able to pay its debts or does not have enough assets to pay the debts or if the payment to one creditor could make impossible payments to other creditors (Art. 9 of the Federal Law on insolvency). However, nonfulfillment of insolvency petition is not the only ground for subsidiary responsibility; the same legal consequences follow the intentional insolvency and in the case where the insolvent company has not transferred documentation to the liquidator.

Surprisingly, subsidiary responsibility is quite close to wrongful trading; these concepts even share some problems and features. The main reason is that wrongful trading and subsidiary responsibility were established artificially as the specific mechanisms of insolvency law while deepening insolvency is a development of tort law.

First, under both concepts if directors continue trading when the company is approaching insolvency, they might be liable for paying a contribution to the company's common pool.

Secondly, in both jurisdictions directors pay contribution to the company's common pool and these contributions finally are to be distributed to all creditors. In contrast, in the USA damages are paid to the plaintiff who might be a creditor.

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[31] The very similar concept of German law called '*Insolvenzverschleppungshaftung*.' *See, e.g.*, Thomas Bechner, *Wrongful Trading – A New European Model for Creditor Protection?*, 5 European Business Organization Law Review (EBOR) 293 (2004).

Thirdly, under both Russian and English concepts contribution from directors is directly connected to the size of company's debts while in the USA the remedy is to compensate for the actual damage which to creditors or the company suffered. Fourthly, the administrative procedure in Russia is also more frequently used[32] than subsidiary responsibility.

It is also noticeable that Russian courts have made subsidiary responsibility even more similar to deepening insolvency. In both Russia and England the fruits of the claims cannot be assigned; in both countries the courts emphasize that such claims belong the creditors, not the liquidator, even though he / she is the only possible plaintiff.[33] Russian courts also apply the concept only in the insolvent liquidation and make liable not only *de jure* directors, but *de facto* and shadow directors as well.[34] Russian courts also tend to check whether directors actually knew about approaching insolvency.[35]

However, there are some differences. The main one is that unlike wrongful trading, liability of directors in Russia is possible only if, in the insolvency proceedings, it appears that the company's assets are not enough to pay all creditors. But it is quite obvious that in the insolvency liquidation assets are not sufficient to pay all creditors. It might be said that this rule is no more than a way to measure director's contribution to the common pool. Such a measure does not reflect the damage to the company and creditors or how wrong director's behaviour was. But it gives judges a clear formula to determine the director's contribution to the company, which is clearly necessary for continental law judges. Such a rule improves certainty, but decreases flexibility. The other downside is that such remedy might be applied only when the general distribution to creditors has finished.

Also Russian legislation formally does not require proof of knowledge by directors about the poor financial condition of the company. In our view, Russian legislature had two rationales for this rule. First, presumably directors should be aware about company's inability to pay debts; if they do not, they do not perform their duties properly. Secondly, it makes plaintiff's burden of prove much easier. Proving

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[32] *See, e.g.,* <http://www.klerk.ru/inspection/359569/> (accessed Aug. 11, 2015).

[33] *See., e.g.*: Ruling of the Federal Commercial Court of the Moscow District of October 29, 2009. Case No. A40-22082/08-123-70, at <http://kad.arbitr.ru/PdfDocument/9699218e-a764-45f5-87ff-d559d4497a2a/A40-22082-2008_20091029_Reshenija%20i%20postanovlenija.pdf>; *Re Oasis Merchandising Services Ltd.*, [1998] Ch. 170; [1997] 2 W.L.R. 765.

[34] *Курбатов А.* Субсидиарная ответственность руководителей при несостоятельности (банкротстве) возглавляемых ими кредитных организаций // Хозяйство и право. 2007. № 7 [Kurbatov A. *Subsidiarnaya otvetsvennost' rukovoditelei pri nesostoyatel'nosti (bankrotstve) vosglavlyaemykh imi kreditnykh organisatsii // Khozyaistvo i pravo.* 2007. No. 7 [Aleksey Kurbatov, *The Subsidiary Liability of the Directors for Insolvency of the Companies*, 2007(7) Economy and Law]].

[35] Ruling of the Federal Commercial Court of the Moscow District of March 14, 2014. Case No. A40-24703/2009, at <http://kad.arbitr.ru/PdfDocument/2f1edd33-0fe6-48a0-be5b-2a3913fb3f4b/A40-24703-2009_20140314_Reshenija%20i%20postanovlenija.pdf> (accessed Aug. 11, 2015).

knowledge of directors about company's insolvency is a significant obstacle even for the common law courts;[36] in the continental courts knowledge can be proved only in the very exceptional circumstances. As the Federal Law on insolvency does not ask for knowledge of directors about this fact, they might be liable if they did not know and even could not know that they had to file insolvency petition. But, as we mentioned above, in the very recent ruling the Federal Commercial Court of the Moscow District stated that an innocent director cannot be subsidiarily liable for the company's debt (case No. A40-24703/2009).

Overall, the Russian concept is very similar to wrongful trading, but creditors in Russia are entitled to file such claims, and there is a formula for calculation of the remedy. In the next chapter it will be shown that Russian subsidiary liability is used more often than wrongful trading and the majority of such claims are filed by creditors. The burden of proof for subsidiary liability and wrongful trading are stated in the Russian and the English laws differently, but the courts tend to ask for the same evidence in both countries.

3. Functions of Wrongful Trading

There are two basic functions which could be performed by wrongful trading: compensation and punishment. However, wrongful trading is badly-equipped to perform either of them.

K. Cork mentioned explicitly only the compensatory function of wrongful trading; in his words, the offence should be reserved for fraudulent trading while compensation of losses is the aim of wrongful trading.[37] On the contrary, V. Finch[38] analysed Cork's position that insolvency law should provide the investigative process[39] and concluded that punishment for the misfeasance of directors is a function of wrongful trading. We will follow the same logic.

A contribution to the common pool is deemed by the law as the remedy for wrongful trading; even though it is not necessarily equal to the losses caused by insolvency trading, it is supposed to be a recovery of loss. Hence, originally wrongful trading was expected to be compensatory.

But a punitive or, at least, a deterrent element might be still here. It could even be said that wrongful trading cannot be really compensatory. The directors, who allow

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[36] Andrew Keay, *Wrongful Trading and the Liability of Company Directors: A Theoretical Perspective*, 25 Legal Stud. 431, 439 (2005) doi:10.1111/j.1748-121X.2005.tb00678.x [hereinafter Keay, *Wrongful Trading and the Liability*].

[37] Cork, *supra* n. 1, at 399.

[38] Vanessa Finch, Corporate Insolvency Law: Perspectives and Principles 678 (2nd ed., Cambridge University Press 2009).

[39] Cork, *supra* n. 1, at 63.

the insolvent company to continue operating, do not get any personal benefits from that; so, compensation, or, more precisely, vindication is not possible here. Historically punitive remedies were used for negligent torts, where it was not possible to restore both injured and injuring parties to the prior economic position.[40] The US Supreme Court in *Cooper v. Leatherman* analyzed the contemporary and historic punitive damages in the USA and said that such damages were initially aimed to compensate losses caused by negligent behavior, which could not be counted as actual losses; but nowadays they are punitive because they exceed actual losses as much as they deter parties from tortious behavior.[41] Under the same logic, remedies for wrongful trading are punitive, but perform compensatory function as they just technically replace the actual losses. At the same time, it would be a simplification to say that directors do not consider prospective liability under wrongful trading provision; at least, the business advisors actively offer them solutions in the field.[42]

But in the USA punitive damages are not applied in deepening insolvency claims;[43] therefore the concept is compensatory. On the other hand, its tortious nature might eventually allow using punitive damages as well.

In Russia there is another view of law's functions. There is a clear distinction between functions which are realized by the state and by the private parties.[44] Punishment cannot be enforced by anyone, but only by the state. As subsidiary liability is brought only by the private parties, this concept must be consided compensatory.

This paper tries to look at the wrongful trading provision from perspective of both possible functions.

3.1. Wrongful Trading as a Compensatory Instrument

Compensation mean

> recompense, or satisfaction to the plaintiff, for an injury actually received by him from the defendant . . . the result of the injury alleged and proved, and

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40 *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 121 S. Ct. 1678, 149 L.Ed.2d 674 (2001).

41 Dan Markel, *How Should Punitive Damages Work?*, 157 U. Pa. L. Rev. 1383, 1392 (2012), available at <https://www.law.upenn.edu/live/files/90-markel157upalrev13832009pdf> (accessed Aug. 11, 2015).

42 Mike Smith, *What is Wrongful Trading and How Can I Avoid Getting Myself into Trouble with Creditors such as HMRC?*, <http://www.companydebt.com/directors-support/what-is-wrongful-trading> (accessed Aug. 11, 2015); Jonathan Munnery, *What Is Insolvent Trading and Wrongful Trading in Business?*, <http://www.realbusinessrescue.co.uk/business-insolvency/wrongful-trading> (accessed Aug. 11, 2015).

43 Schillig, *supra* n. 18, at 300.

44 *Абрамов А.И.* Понятие функций права // Журнал российского права. 2006. № 2 [Abramov A.I. *Ponyatie funktsii prava // Zhurnal rossiiskogo prava.* 2006. No. 2 [Andrey I. Abramov, *The Notion of Law Functions*, 2006(2) Journal of Russian Law]].

> that the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less, whether the injury be to the person or estate of the complaining party.[45]

Therefore, to be compensatory wrongful trading should give the full satisfaction to a party suffered loss.

Wrongful trading does not give full compensation to creditors, who were trading with the company through insolvency. The remedy for wrongful trading is a contribution to the company's assets. For the creditors, who were counterparties of the insolvent company, it means that they cannot get compensation in the size of sums traded; instead they are allowed to get a distribution from company's assets *pro rata* as any other creditors. They also do not have a right to sue directors directly; the claim might be brought only by the liquidator on behalf of creditors as whole. However, the liquidator does not owe any direct duties to particular creditors; he / she acts on behalf of all creditors.

Wrongful trading is not necessarily compensatory for company's creditors as whole either; the remedy for wrongful trading is a contribution to the company which court thinks proper. Here we should analyze three possible remedies. The first is based on other instruments applied such as undervalued transactions (sec. 238 of the Insolvency Act 1986) and transactions with preferences (sec. 239 of the Insolvency Act 1986). Unlike wrongful trading, the remedy for them is 'restoring the position to what it would have been if the company had not given that preference' which means these mechanisms are truly compensatory. When wrongful trading and undervalued transactions or transactions with preferences are applied together, the remedy cannot exceed the remedy for undervalued or preferential transactions. In practice it means that the wrongful trading claims are frequently accompanied by the undervalued or preferential transaction claims, but wrongful trading does not have an independent remedy.

Secondly, courts very often order directors to pay sums equal to sums traded.[46] Such a remedy could be compensatory if was paid to creditors with whom the company was trading. But as the contribution is paid to the company, it is not compensatory. The sums traded cannot be losses of the company because the company suffers losses from continuing business as whole, not from the particular transactions. The only exception is the undervalued transactions and the transactions with preferences, which were discussed above.

Thirdly, a remedy might be calculated as the debt which company cannot pay due to insolvency and which appeared through wrongful trading. In *Re Continental*

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[45] *Birdsall v. Coolidge*, 93 U.S. 64, 64 (1876).

[46] *Re Bangla Television Ltd. (in liquidation)*, [2009] EWHC 1632 (Ch.); *Re Transocean Equipment Manufacturing and Trading Ltd.*, [2005] EWHC 2603 (Ch.); *Re Purpoint Ltd.*, [1991] B.C.C. 121; *Re Produce Marketing Consortium Ltd. (in liquidation) (No. 2)*, [1989] 5 B.C.C. 569.

Assurance Co. of London plc[47] court ordered directors to pay 'the increase in net deficiency between the relevant dates.' We believe that this approach is the closest to compensation of losses for company's creditors as whole.

But the net deficiency test has two problems. The first problem is that under wrongful trading provisions directors should pay for their concrete actions through the insolvency trading, but not for delay of the insolvency petition's submission. This remedy makes wrongful trading a simplified rule which states that directors should file an insolvency petition when needed, and if they fail to do that, they should compensate the net loss. In fact, it is exactly the continental subsidiary liability concept with the only exception being that in the continental law the contribution to the company is limited to the unpaid debt of the company.

The second problem is how to calculate net deficiency.[48] The simplest method would be based on company's books. But assets might be under-priced in the books and books themselves might be falsified.[49] For example, if the assets were bought for £100 while their market price was £80, company's books still consider them to cost £100. Hence, in this situation net deficiency is useless if based on company's books.

The other option is realizing the assets and using the price received in calculation of net deficiency. But it gives only the price of a company's assets after wrongful trading; the initial price could not be found by this way. The other downside is that if we use this methodology, the wrongful trading claim would be possible only after realization of all assets or, in other words, in some years. For example, in *Official Receiver v. Doshi*[50] the court accepted this test for calculation of remedies and said that it is not possible to make an order until the liquidator has finished all payments to creditors. As we know from the Russian experience, such delay discourages the liquidator from submitting the claim. On the other hand, wrongful trading claim should be filed in the proper time. For example, in *Re Farmizer (Products) Ltd.*[51] the Court of Appeal held that there is the limitation period of six years for the wrongful trading claims; it seems that this limit is easily exceeded if there is a need to sale company's assets. Thus, even the net deficiency test is helpful to measure of losses, it is not the ideal solution.

3.2. Wrongful Trading as a Punitive Instrument

If sums paid to the plaintiffs cannot be compensatory, they have to perform other functions, such as deterrence and punishment. A wrongdoer can be liable only

47 The same logic in *Re Idessa (UK) Ltd. (in liquidation)*, [2011] EWHC 804 (Ch.).

48 This problem was a reason to dismiss the wrongful trading claim in *Liquidator of Marini Ltd. v. Dickenson & Ors.*, [2004] B.C.C. 172.

49 *Re Produce Marketing*, *supra* n. 46.

50 *Official Receiver & Anor. v. Doshi*, [2001] 2 B.C.L.C. 235.

51 *Re Farmizer (Products) Ltd.*, [1997] B.C.C. 655.

for damages foreseeable for him,[52] so if directors through wrongful trading do not see damages they cause and, what is more, cannot predict which particular sums they might pay, the remedy is punitive for them. The directors are hardly able to understand economic consequences of wrongful trading for creditors unless such consequences are limited to the sums traded; net deficiency of company simply cannot be even calculated before liquidation. Thus, the remedy for wrongful trading for directors might be considered to be punitive by directors.

But wrongful trading is not really punitive. First, a punitive function cannot be performed without compensation; the punitive damages are a supplement to the compensatory damages (*Birdsall v. Coolidge*) as a defendant should firstly pay or, in other words, compensate, caused loss; only sums which exceed the actual damages might be punitive. As it was discussed above, the courts are reluctant to order payments which exceed the overall sums traded (*Re DKG Contractors Ltd.*).

Secondly, to be punitive a remedy should be calculated as the multiplied harm;[53] the directors would be punished only if they are forced to pay much more than the damage caused, but directors have never been ordered to pay punitive damages for wrongful trading. Directors cannot be punished by paying just the exact sum of the loss and, of course, they cannot be punished by paying a sum which is smaller than the loss. English courts do not order directors to pay sums exceed the sums which were traded wrongfully; thus, at least, in practice wrongful trading is not punitive.

Thirdly, punitive compensation for wrongful trading, even if applied, would be limited by the size of the company's debt. Theoretically, the courts are free to award a punitive contribution. But if they did so, another problem would arise. As directors pay contribution to the company's common pool, such contribution cannot be higher than the overall debt of the company; otherwise, directors would be responsible not only to creditors, but to the company's shareholders as well. It would make wrongful trading to be the same as the continental subsidiary liability.

Fourthly, it is questionable whether the liquidator could be the plaintiff for a claim which has a punitive nature. Under sec. 143(1) of the Insolvency Act 1986 the liquidator should 'secure that the assets of the company are got in, realised and distributed to the company's creditors,' he / she is not directed to do anything extra. But if the liquidator claims for a punitive contribution, he / she is not collecting assets anymore as the sums requested have never been a part of company's assets.

As we can see, wrongful trading is not able to perform either the compensatory nor the punitive function. If this suggestion is right, nobody would be interested in application of the wrongful trading provision. The number of cases based on wrongful trading will be addressed in the next chapter.

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[52] Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29, 42 (1972), available at <http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=3089&context=journal_articles> (accessed Aug. 11, 2015).

[53] Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 Tex. L. Rev. 105 (2005), available at <http://ssrn.com/abstract=705281> (accessed Aug. 11, 2015).

4. Effectiveness

The wrongful trading provision is rarely applied against directors who misconducted prior insolvency, even there are a lot of such directors. Therefore, this law is almost ineffective.

4.1. The Quantitative Analysis

To measure the effectiveness of wrongful trading it is necessary to know two figures. The first is how often directors engage in misconduct after insolvency or, in other words, how they have been deterred by the existing regulations. The second figure has to do with how many directors were found liable for the wrongful trading.

Every year in the UK about 16,000 companies are declared insolvent (*e.g.,* 14,982 in 2013,[54] 16,138 in 2012, 16,871 in 2011). About 1,000 directors are disqualified every year in the UK (*e.g.,* 969 in 2012 and 1,100 in 2011[55]); this mechanism is used against directors more frequently than any others. So, every year approximately 6% of insolvent company's directors are penalized for the misconduct before insolvency; it is not always insolvency trading, but quite often it is.[56]

But very few directors have faced with the wrongful trading claims. Both Westlaw[57] and LexisNexis[58] report one wrongful trading case in 2012 and three such cases in 2011. Thus, in 2012 wrongful trading was applied against 0.006% of insolvent companies' directors and only against 0.1% of disqualified directors; in 2011 against 0.001 and 0.27% of directors respectively. So, there is a significant number of misconduct incidents prior to insolvency, but wrongful trading sanctions are applied rarely. In the other words, directors are not discouraged from misfeasance before insolvency; wrongful trading definitely is not effective.

In the USA deepening insolvency is applied more frequently; there are hundreds of such cases.[59] As it was discussed above, only in the very rare cases does it address the same situations as wrongful trading does. Only liability for negligent actions through deepening insolvency might be compared with wrongful trading, but this

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54 *Statistics Release: Insolvencies in the Fourth Quarter 2013*, The Insolvency Service (Feb. 7, 2014), <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/287909/pressnotables.pdf> (accessed Aug. 11, 2015).

55 *Director Disqualification Statistics*, <https://www.whatdotheyknow.com/request/director_disqualification_statis_2> (accessed Aug. 11, 2015).

56 *Secretary of State for Trade and Industry v. Walker*, [2003] EWHC 175 (Ch.); *Secretary of State for Trade and Industry v. Blackwood*, [2005] B.C.C. 366; *Official Receiver v. Zwirn*, [2002] B.C.C. 760.

57 <www.westlaw.co.uk>

58 <www.lexisnexis.com>

59 Kathy B. Phelps, *Deepening Insolvency as a Cause of Action and as a Theory of Damages*, <http://www.dgdk.com/tasks/sites/dgdk/assets/image/AIRIDeepeningInsolvencyFinal.pdf> (accessed Aug. 11, 2015).

sort of deepening insolvency is questionable; there are very few cases of this sort. But if we assume that deepening insolvency covers both wrongful and fraudulent trading, it is more effective than two English concepts; at least, overall deepening insolvency is applied more often than wrongful and fraudulent trading in England.

In Russia subsidiary responsibility is not frequently used, but is not dead either. The regional statistics shows that in each Russian region there are about 10 cases annually,[60] which actually means that overall some hundred cases are heard nationally. The Russian courts do not publish the separate figures about subsidiary liability for insolvency trading, but approximately 30% of subsidiary liability cases are based on the insolvent trading. There are about 13,000 insolvency liquidations[61] in Russia every year; so, subsidiary liability claims are filed approximately in 5–10% of insolvency cases. Most of such claims are submitted by creditors;[62] the liquidators try to avoid such claims because of competing remedies which are more effective and quicker than subsidiary liability.

4.2. Obstacles to Applying Wrongful Trading and the Similar Provisions

A lot has been already written on the problems of wrongful trading,[63] but no researches called this concept effective. Obviously a difficult burden of proof,[64] funding[65] and restriction of possible plaintiffs[66] are blamed as the main obstacles to the wide application of wrongful trading.

The burden of proof is the same for the plaintiffs in Russia and England and is more difficult in the USA. As we see from figures above, the Russian and the American concepts are applied, but English is not. At the same time, in English law the similar

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[60] *Карлова И.С.* Обобщение судебной практики рассмотрения заявлений о привлечении к субсидиарной ответственности в рамках дел о банкротстве за 2011 год и первый квартал 2012 года [Karlova I.S. *Obobshchenie sudebnoi praktiki rassmotreniya zayavlenii o privlechenii k subsidiarnoi otvetstvennosti v ramkakh del o bankrotstve za 2011 god i pervyi kvartal 2012 goda* [Inna S. Karlova, *The Summon Court Practice (2011 – 1st quarter of 2012)*]], at <http://orel.arbitr.ru/process/obobschenija_sudebnoj_praktiki> (accessed Aug. 11, 2015).

[61] <http://www.arbitr.ru/_upimg/A0397A1AFD76C6B4E3082E213B98BB5D_11.pdf> (accessed Aug. 11, 2015).

[62] *See, e.g.*: Ruling of the Federal Commercial Court of the Moscow District of April 29, 2010. Case No. A50-20763/09, at <http://kad.arbitr.ru/Card/751e4441-b406-43bb-a462-2a0685b87091> (accessed Aug. 11, 2015); Decision of the Moscow City Commercial Court of July 22, 2013. Case No. A40-77172/09, at <http://kad.arbitr.ru/PdfDocument/62100164-8e66-4f16-9389-2e660041a0de/A40-77172-2009_20130722_Opredelenie.pdf> (accessed Aug. 11, 2015).

[63] Keay, *Wrongful Trading*, *supra* n. 7; Rainer Werdnik, *Wrongful Trading Provision – Is It Efficient?*, 25 Insolvency Intelligence 81 (2012); Richard Schulte, *Wrongful Trading: An Impotent Remedy?*, 4 Journal of Financial Crime 38 (1996). doi:10.1108/eb025753

[64] Keay, *Wrongful Trading*, *supra* n. 7, at 71; Werdnik, *supra* n. 63, at 85.

[65] Keay, *Wrongful Trading*, *supra* n. 7, at 72; Werdnik, *supra* n. 63, at 84.

[66] Keay, *Wrongful Trading*, *supra* n. 7, at 75.

burden of proof exists, for example, for the claims based on breach of directors' duties under sec. 174 of the Companies Act 2006. Therefore, it cannot be a major obstacle to application of wrongful trading.

Funding is a problem for English wrongful trading, but is not so crucial for the claims in Russia and the USA. American academics have more concern about overly aggressive plaintiffs[67] who are bringing too many tort claims; so, the problem is the opposite of too little funding as in England. In Russia funding is much easier for the subsidiary claims because of two reasons. First, litigation in Russia is much cheaper in view of continental law traditions, a non-regulated legal profession, *etc*. Under the quantitative study made by University of Oxford, the price of litigation for the similar case in Russia might be cheaper than in England by 10 times.[68] Secondly, such claims in Russia are brought mainly by creditors who solve their funding problem independently.

Undoubtedly, all these reasons are important for the effectiveness of a wrongful trading remedy; however, some of them seem to be technical. There are some other challenges. For example, in all mentioned jurisdictions it is necessary to know when the company became insolvent in order to hold directors liable under subsidiary responsibility or wrongful trading.[69] In all three countries there are discussions about whether cash flow or balance sheet test should be used.[70] Russian legal researchers are concerned about the shadow directors and their responsibility for actions beyond insolvency,[71] which is a traditional issue for English corporate law scholars. In Russia and England the liquidators cannot assign the fruit of such claims.

But there are, at least, two other problems which are specific for England. The first one is the inability of wrongful trading to perform either a compensatory or punitive

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67 *See, e.g.*: Todd Zywicki, *Public Choice and Tort Reform* (George Mason University School of Law, Law and Economics Working Paper No. 00-36, October 2000), <http://papers.ssrn.com/abstract_id=244658> (accessed Aug. 11, 2015); Frank B. Cross, *Tort Law and the American Economy*, 96 Minn. L. Rev. 28 (2011), available at <http://www.minnesotalawreview.org/wp-content/uploads/2012/01/Cross_MLR.pdf> (accessed Aug. 11, 2015).

68 <http://www.csls.ox.ac.uk/COSTOFLITIGATIONDOCUMENTSANDREPORTS.php> (accessed Aug. 11, 2015).

69 Finch, *supra* n. 38, at 699.

70 *Rubin v. Gunner*, [2004] EWHC 316 (Ch.); Royston M. Goode, *Wrongful Trading and the Balance Sheet Test of Insolvency*, 1989 J. Bus. L. 436; *Мирошников В.А.* Банкротство кредитных организаций – проблемы правоприменительной практики [Miroshnikov V.A. *Bankrotstvo kreditnykh organizatsii – problemy pravoprimenitel'noi praktiki* [Valery A. Miroshnikov, *Insolvency of Banks: Questions of Practice*]], *Agenstvo po strakhovaniyu vkladov* (Feb. 18, 2008), <http://asv.org.ru/agency/appearance/286768/?sphrase_id=747589> (accessed Aug. 11, 2015).

71 *Спирина Т.А.* «Снятие корпоративной вуали» через механизм привлечения к субсидиарной ответственности в рамках дела о банкротстве // Вестник Пермского университета: Серия «Юридические науки». 2014. № 1 [Spirina T.A. *'Snyatie korporativnoi vuali' cherez mekhanizm privlecheniya k subsidiarnoi otvetstvennosti v ramkakh dela o bankrotstve // Vetsnik Permskogo universiteta: Seriya 'Yuridicheskie nauki'.* 2014. No. 1 [Tatiana A. Spirina, *'Piercing the Corporate Veil' through Subsidiary Liability in Bankruptcy Case*, 2014(1) Bulletin of Perm University: Law]]; Louis G. Doyle, *Anomalies in the Wrongful Trading Provisions*, 13 Company Law 96 (1992).

function; this problem has been discussed in the previous chapter in the details. As the result, the wrongful trading remedy is useless and nobody is encouraged to apply it.

The second problem is the rule stating that the liquidator is the only plaintiff for the wrongful trading claim. This rule creates a situation when the party, who is interested in such claim, does not have a right to file it whilst a party, which can file the claim, is not interested in it.

The liquidator is the only plaintiff for wrongful trading claims, but obviously he / she is discouraged from submitting them. He / she acts on behalf of creditors as whole; but they do not always suffer losses from insolvency trading. The burden of proof for such claim is still difficult; the claim is expensive[72] and there are always problems with funding. The wrongful trading claims are not always successful,[73] but even when they are, it is not predictable which remedy will be applied.[74] At the same time, the liquidator has some other options to challenge company's transactions, for example, as undervalued or preferable; such claims tend to be much more successful, demand a lower burden of proof and have a more certain remedy. Finally, even if the liquidator overcomes all these problems, he / she is not able to assign the fruit of the wrongful trading claim (in *Re Oasis Merchandising Services Ltd.*).

On the other hand, the creditors, who might be interested in bringing the claims, are not allowed to do so. A. Keay wrote that a party injured by wrongful trading should have the right to bring the claim to protect itself.[75] In our view, wrongful trading might be workable only if the injured party has the right to bring such claim and ask for a remedy which would recover the loss. It is crucial because only the party which suffered a loss is really interested in its compensation.

But the situation is different if wrongful trading should perform a punitive function. In American tort law the punitive remedy is requested by a private party, but it is considered to be punitive if the remedy is much higher than the actual loss. In Russia no concept can be punitive unless the State has the right to bring the claim. Following the same logic, in England wrongful trading might be punitive if the remedy has significantly increased or if the State has received the right to bring the claim. In the former case the private parties would be encouraged to bring wrongful trading claim even when there is a very little chance of success. In the latter case the State would almost always bring the claim and directors could be punished by a civil remedy and the disqualification order. The only question is how it would fit with the spirit of English law as in this case the civil claim is brought by the State on behalf of the private parties.

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72 *Lewis v. Inland Revenue Commissioners*, [2002] B.C.C. 198.

73 *Liquidator of Marini Ltd.*, *supra* n. 48; *Re Hawkes Hill Publishing Co. Ltd. (in liquidation)*, [2007] B.C.C. 937.

74 It is enough to compare remedies applied in *Re Bangla Television Ltd.*, *supra* n. 46, and in *Re Continental Assurance Co. of London plc*, *supra* n. 15.

75 Keay, *Wrongful Trading and the Liability*, *supra* n. 36.

5. Some Ideas about Possible Ways to Make Wrongful Trading Effective

In our view, wrongful trading should be defined in a way which would refer to a particular function; identification of such function by the legislature is the preliminary goal.

Ideally all interested parties should be protected by the concept of wrongful trading and the remedy for this misconduct should provide them with the full recovery of losses. To achieve that, the creditors should have the right to bring the wrongful claims as the liquidator is not able to protect all of them. The remedy should be reformed as well; the different remedies which are applied now are not fully compensatory and create the legal uncertainty. In our view, if wrongful trading is expected to be compensatory, the actual damages should be rewarded for such claims. As we discussed above, different creditors suffer different losses from insolvency trading, so the remedy should be flexible enough to meet needs of all creditors. For example, creditors who were counterparties of the insolvent company through wrongful trading can be satisfied by sums traded, but the net deficiency test is needed for creditors who were damaged just by decreasing the common pool.

The punitive function, if recognized, can be more effective using the wrongful trading remedy even in its current version; but only if the courts start ordering the remedy which would significantly exceed the losses caused by wrongful trading. As it was discussed above, while the remedy is equal to the actual losses, it is compensatory, not punitive. The court theoretically can order defendants to pay more than the sums traded or losses suffered; so, in this part the law does not have to be reformed. However, the liquidator and the creditors as whole are not interested in punitive damages; thus, for fulfillment of this function the creditors should also have the right to file the claim.

A separate question is whether the Secretary of State should be a plaintiff for wrongful trading claims;[76] in our view it should not. The Secretary of State is an administrative body which is responsible for the state's participation in the various business areas, including directors' disqualification. In the last case the Secretary of State files the petition and is quite successful in this.[77] Unlike the liquidators, who file only a couple of wrongful trading petitions per year, the Secretary of State files more than 1,000 disqualification petitions annually. It is clear that if the Secretary of State filed wrongful trading claims, it could bring them together with the disqualification petitions and in such case the number of wrongful trading claims would increase dramatically. But disqualification of directors is an entirely administrative procedure,

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[76] *See, e.g.,* Andrew Keay, Company Directors' Responsibilities to Creditors (Routledge-Cavendish 2007).

[77] David Milman, *Disqualification of Directors: An Evaluation of Current Law, Policy and Practice in the UK*, 2013(331) Company Law Newsletter 1.

which is made on behalf of public and finished by an order prohibiting directors from performing director's functions for some time in the future. It fits with the functions and responsibilities of Secretary of State. Wrongful trading, in the contrast, is designed to protect the company, its creditors and other private parties against insolvency trading by giving them an opportunity to get a monetary remedy against the directors. It seems that if the Secretary of State had a right for such claims, it would be departing from its statutory functions[78] and would be a direct participation of the State in business disputes. In this case the question of remedy would increase again. Wrongful trading gives the monetary remedy; so, if the Secretary of State would file a petition on behalf of a private party, the State would decide which compensation a private party might receive. At the same time, the Secretary of State, being a part of the government, would decide whether there are grounds for directors' liability before the court did that.

It is noticeable that Sir K. Cork also wrote that different parties should be allowed to bring the wrongful trading claim and mentioned that the concept should be compensatory. In his report there was no extended discussion about remedies, but this problem appeared later in the court practice. Thus, wrongful trading is an ineffective remedy mainly because the legislature did not incorporate in the law all ideas of the concept's creator.

6. Conclusion

Even though the different jurisdictions have some tools for protection against insolvency trading, none of them can be called really effective.

English insolvency law contains a wrongful trading provision which imposes liabilities on directors of insolvent companies if they knowingly continued trading and did not make any reasonable steps to minimise creditors' loss; however, this mechanism is applied rarely. In our view, it happens mainly because this concept is badly-equipped to perform either compensatory or punitive functions. The key is the remedy which is applied by courts very differently. The most progressive courts use the so-called net deficiency test, but application of this test also varies, partly due to its complexity. Part of the problem, is that the law does not give protection to the creditors who suffer losses through the insolvency trading itself, but previously were not company's creditors.

The USA legislation does not have a similar provision, but creditors in the same situation sue directors under the common law concept of deepening insolvency. However, this concept covers mainly fraudulent activities of directors; negligent behaviour is recognized as a ground for deepening insolvency claim only by very

[78] <https://www.gov.uk/government/ministers/secretary-of-state-for-business-innovation-and-skills#policies> (accessed Aug. 11, 2015).

few courts. At the same time, it is necessary to notice that American law overall is very reluctant in challenging directors' actions; it is a question of the policy.

Russian insolvency law contains a subsidiary liability provision which makes directors liable for unpaid company's debt if they did not file the insolvency petition on time. It is not used very frequently either, but there are some hundreds of such cases annually. The main obstacles to wider application of the concept are the high burden of proof and the factual requirement to file the claim at the very late stage of the insolvency procedure.

The further development of wrongful trading could overcome the mentioned problems; but it would be very difficult to do so while there is no clear understanding of wrongful trading's functions. In our view, the ideal remedy would depend on the concept's function. To be compensatory, the remedy should recover traded sums for creditors who were trading with the company through insolvency and compensate net deficiency for all other creditors. To be qualified as punitive, the remedy should be much higher than losses which were suffered by the particular creditors or the common pool. However, to perform any function the concept should give creditors right to bring the claim. Ironically, the wrongful trading remedy has to be reformed in the way originally suggested by Sir K. Cork.

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DISCLOSURE OF EVIDENCE IN CARTEL LITIGATIONS IN THE EU: IS BALANCE OF VICTIMS' RIGHTS AND PUBLIC INTERESTS POSSIBLE?

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The research focus is an assessment of disclosure rules in the European Union and a perspective for implementation of the US discovery rules to improve European private enforcement. For these purposes the EU disclosure rules are compared with the US discovery rules; the influence of tension between disclosure of evidence and leniency programme on the effectiveness of protection of information is analyzed in order to propose areas for improvement and solutions to find a balance between some inconsistencies of the EU disclosure rules with interests of European plaintiffs in cartel litigations.

The research method is not limited to a doctrinal approach to the EU and US legislation, but includes case law, and secondary sources. This paper does not deal with particular types of evidence and generic issues of disclosure unrelated to the cartel cases.

The author contends that the American model of discovery in cartel cases cannot be transferred to the European context completely, even though disclosure of evidence in the EU is rather inefficient, and new rules are unlikely to protect consumers' interests. In terms of consumers' interests, protection facilitating follow-on actions looks more relevant on the EU level. Practically, the design of the US disclosure rules and priority of consumers' rights effectively allow victims from the EU to sue in the US and obtain all necessary documents in the US proceeding. In this context convergence of the US and EU positions on disclosure of leniency materials could bring more certainty both to plaintiffs and defendants in cartel litigations.

Keywords: cartels; litigations; damages; disclosure of evidence; leniency.

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1. Introduction

The purpose of this article is to evaluate the effectiveness of disclosure rules in the European Union in comparison with the discovery of evidence in the US as a jurisdiction with effective private enforcement[1] and to determine to what extent the US approach can be implemented to improve European private enforcement.

The impact of disclosure rules on cartel private enforcement is invaluable. Disclosure of evidence directly affects the number of compensated victims; increases the accuracy of fact-finding, damage assessment and probability of the victim's winning at trial;[2] facilitate victims in suing for damages[3] and decreases litigation costs.[4] Consequently, weakness of disclosure rules results in a lack of private enforcement in the EU despite a universal legal basis for compensation claims.[5] According to some estimates, private enforcement in the European Union barely reaches 10%[6] mainly due to the following-on actions while in the US private actions, including high percentage of stand-alone actions, constitute up to 90% of the total number of cases against cartels. Only very little credible data on stand-alone claims can be found in the UK but the number of such claims has been relatively limited.[7] Altogether, disclosure of evidence contributes to cartel deterrence by improving private enforcement. For example, in the US private antitrust enforcement probably deters more anticompetitive conduct than the Department of Justice's anti-cartel programme.[8] Therefore, adequate disclosure rules not only increase accessibility of

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1 *Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios: Report for the European Commission*, Contract DG COMP/2006/A3/012, at 11 (December 21, 2007), at <http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> (accessed Aug. 11, 2015).

2 *Id.* at 17.

3 *Id.* at 19.

4 *Id.* at 345.

5 *The Impact of Cartels on the Poor*, U.N. Conference on Trade and Development, Trade and Development Board, Trade and Development Commission, Intergovernmental Group of Experts on Competition Law and Policy, 13th Sess., Item 3(a) of the Provisional Agenda: Consultations and Discussions Regarding Peer Reviews on Competition Law and Policy, Review of the Model Law on Competition, and Studies Related to the Provisions of the Set of Principles and Rules, ¶ 39, U.N. Doc. TD/B/C.I/CLP/24/Rev.1 (2013), at <http://unctad.org/meetings/en/SessionalDocuments/ciclpd24rev1_en.pdf> (accessed Aug. 11, 2015).

6 Clifford A. Jones, Private Enforcement of Antitrust Law in the EU, UK and USA 16 (Oxford University Press 1999); Andreas Heinemann, *Private Enforcement in Europe*, in The Development of Competition Law: Global Perspectives 302 (Roger Zäch et al., eds.) (Edward Elgar Pub. 2010). doi:10.4337/9781849803571.00019

7 Marc Israel et al., *United Kingdom: Private Antitrust Litigation*, in The European Antitrust Review 2014, at 306, at <http://www.macfarlanes.com/media/1606/uk-private-antitrust-litigation.pdf> (accessed Aug. 11, 2015).

8 Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2014 BYU L. Rev. 315, available at <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2591&context=lawreview> (accessed Aug. 11, 2015).

justice in cartel cases, which is essential for the deterrence of infringements but also free up resources of the competition authorities for other purposes.

Access to evidence in private actions, designed to correct the harm caused to consumers, is of particular value for the poorest groups of individuals and small or medium-sized enterprises which are the most affected by anti-competitive agreements among competitors.[9] These groups of victims, seeking to obtain evidence in private litigations, are the most vulnerable to an obvious structural information asymmetry,[10] when courts expect direct evidence of an anti-competitive agreement from victims of cartel, but a substantial part of the documents explaining the operation of a cartel is held by the cartelists. Thus, disclosure rules to facilitate evidence gathering are the main challenge to cartel private enforcement[11] especially in original actions when there is no prior decision from a competition authority establishing the infringement.

Evolution of disclosure in the EU and its controversial nature have been reflected in academic literature, official reports and legislation in the last decade. The Ashurst Report identified the difficulty of proving the various elements of liability as a serious obstacle to damages actions and compared disclosure rules in a number of Member States.[12] The Green Paper investigated whether there should be special rules on disclosure for damage actions and which form such disclosure should take.[13] The White Paper compared civil law and common law disclosure rules and their impact on private enforcement in the EU.[14] The provisions of these documents, rejecting the US model of discovery, have caused heated debate in various jurisdictions.[15] Representatives of the American Bar Association evaluated the European disclosure as 'a relatively little'[16] and proposed principles of US discovery as an ideal

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9 *The Impact of Cartels on the Poor*, *supra* n. 5, ¶ 6.

10 *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2008) 165 final, para. 2.2, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0165:FIN:EN:PDF> (accessed Aug. 11, 2015) [hereinafter White Paper].

11 Denis Waelbroeck et al., *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules: Comparative Report* 11 (Ashurst, August 31, 2004), <http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf> (accessed Aug. 11, 2015) [hereinafter Ashurst Report].

12 *Id.*

13 *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2005) 672 final, at <http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2005)0672_/com_com(2005)0672_en.pdf> (accessed Aug. 11, 2015) [hereinafter Green Paper].

14 White Paper, *supra* n. 10.

15 Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 Vand. L. Rev. 675 (2010), available at <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1129&context=articles> (accessed Aug. 11, 2015).

16 *Comments of the ABA Sections of Antitrust Law and International Law on the European Commission's Draft Guidance Paper on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union (October 7, 2011)*, <http://ec.europa.eu/competition/consultations/2011_actions_damages/aba_en.pdf> (accessed Aug. 11, 2015).

model.[17] Contrariwise, some authors assume that European rules have to be even more limited in favour of 'a complete protection of the leniency applications.'[18] The long-waited Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, which retains a cautious approach to disclosure of evidence, barely gives incentives to harmonize procedural law of Member States, but does not give effective remedies to obtain evidence. Although the reasons for differences in private enforcement of competition law in the EU and the US[19] and ideas of borrowing from the US discovery have been discussed by European and American academics and practitioners,[20] it is still an open question whether American style discovery in cartel cases would work in the European Union. Another unsolved issue is a proper balance between interests of victims in disclosure of evidence and interests of whistleblower applied for leniency, which results in the practical question whether victims of cartels can use differences between the EU disclosure and US discovery to protect their interests. The interaction of leniency programmes and disclosure in actions for damages remains uncertain area on the global level.[21]

The main method is doctrinal research of the EU and US legislation, case law, and secondary sources including academic literature and experts' opinions. This research does not deal with particular types of evidence (such as e-mail correspondence and other digital evidence, testimony, *etc.*) and generic issues of disclosure unrelated to the cartel cases.

In order to identify areas of weakness in the EU disclosure and weigh probability of borrowing from US discovery, Ch. 2 compares the EU disclosure rules with the US discovery rules and examines the relation of disclosure to legal traditions. Chapter 3, firstly, investigates the tension of two main remedies to deter cartels – disclosure of evidence and leniency programme – among the obstacles to extend the European

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17 *Comments of the ABA, supra* n. 16, at 4.

18 Alex Petrasincu, *Discovery Revisited: The Impact of the US Discovery Rules on the European Commission's Leniency Programme*, 32 European Competition Law Review (ECLR) 356, 367 (2011).

19 Jones, *supra* n. 6.

20 Crane, *supra* n. 15; *Comments of the ABA*, *supra* n. 16.

21 Caroline Cauffman, *The Interaction of Leniency Programmes and Actions for Damages*, 7 Competition Law Review 181 (2011), available at <http://www.clasf.org/CompLRev/Issues/Vol7Issue2Art1Cauffman.pdf> (accessed ug. 11, 2015); Samuel R. Miller et al., *U.S. Discovery of European Union and U.S. Leniency Applications and Other Confidential Investigatory Materials*, 2010(1) The CPI Antitrust Journal 2, available at <http://www.sidley.com/~/media/files/publications/2010/03/us-discovery-of-european-union-and-us-leniency-a__/files/view-article/fileattachment/2010-03-14--competition-policy-international--no__.pdf> (accessed Aug. 11, 2015); Frédéric Louis, *It Is Always Darkest Before the Dawn: Litigating Access to Cartel Leniency Documents in The EU*, in The International Comparative Legal Guide to: Competition Litigation 2013, at 11 (5th ed., Global Legal Group 2012), available at <https://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/CL13_Chapter-2_WilmerHale.pdf> (accessed Aug. 11, 2015).

rules, and, secondly, evaluates effect of these restrictions on protection of declared values. Chapter 4 provides solutions to balance some inconsistence of the EU disclosure in order to protect interests of European plaintiffs in cartel litigation. Finally, the Conclusion (Ch. 5) estimates disclosure rules in the EU; contends that the American model of discovery in cartel cases cannot be transferred to the European context completely and evaluates some aspects which can be harmonized in order to facilitate disclosure of evidence.

2. In Which Aspects Are Disclosure Rules in the EU Weaker Than the US Discovery?

This Chapter outlines aspects in which the EU disclosure is less efficient than the US discovery and attempts to find their interrelations with specificity of legal systems.

2.1. Disclosure v. Discovery

Disclosure of evidence is designed 'to reveal relevant facts that the parties analyze to develop their respective claims or defenses and eventually present them to the judge or jury at trial'[22] when relevant evidence is not publicly available and is held by the alleged infringer or by third parties.[23] In the EU the term 'disclosure' is used in the same sense as 'discovery' in the US, however, the scope of disclosure varies between countries that follow a civil law tradition (the majority of the EU members) and countries that follow a common law tradition (such as the US, the UK, Ireland and Cyprus).

In the EU many efforts of plaintiffs injured by cartels to redress their damages have been frustrated by strictness of disclosure rules.[24] Effectively, the plaintiff in cartel litigation, applying for disclosure of evidence in the majority of EU Member States, has to gather an initial amount of information, which is very close to the documentary evidence needed to ultimately win the case.[25] Another serious obstacle is the requirement to have evidence in hand prior to filing lawsuits. These limits usually are justified by probability of requests for more information than defendants are ready to provide; that can increase the business risks and risks of unfair competition (*e.g.*, the requested information may be used in bad faith for commercial benefit rather than for protection of the violated rights). However, the restrictions have led to the lack of private enforcement[26] in the EU. In contrast, in the

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22 *Comments of the ABA*, *supra* n. 16, at 2.

23 *Making Antitrust Damages Actions More Effective in the EU*, *supra* n. 1, at 345.

24 *Comments of the ABA*, *supra* n. 16, at 2.

25 *Making Antitrust Damages Actions More Effective in the EU*, *supra* n. 1, at 671.

26 Ashurst Report, *supra* n. 11, at 11.

US, where plaintiffs can file a lawsuit virtually with no evidence at hand,[27] private enforcement prevails over public enforcement. The vivifying effect of disclosure rules on antitrust private enforcement is also confirmed by popularity of the UK jurisdiction for bringing private antitrust actions,[28] where the disclosure is more like discovery rules in the US.

The EU position that the plaintiff has pleaded facts plausibly showing the existence of an antitrust violation does not differ from that of the US[29] because recently, the United States shifted away from the notice-based exceptionalism when a claimant was required to provide just 'fair notice of what the plaintiff's claim is and the grounds upon which it rests'[30] without details, toward a fact-based model which is the global norm in the rest of the world.[31]

2.2. Differences of Disclosure Rules in Cartel Cases in the EU and the US

2.2.1. Nature of Collection of Evidence

Discovery procedure in common law is more adversarial and allows the plaintiff almost immediate access to the opponent's information on the pre-trial phase whilst in civil law countries relevant evidence becomes available to the parties gradually only after court permission during the trial. In the UK and the US, parties exchange the information upon the filing of a complaint and before the judge is called to assess whether the case has merit.[32] The pre-trial phase often brings parties' position closer and consequently leads to a voluntary settlement amongst the parties. However, the scope of documents subject to mandatory disclosure in the UK proceedings is more limited than the discovery allowed under the broader and more general US standard.[33]

In the US, plaintiffs in cartel cases obtain the necessary evidence from both parties and third parties without specification of evidence unless the scope of discovery is limited by court order if it 'is relevant to any party's claim or defense – including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who

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27 S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?*, 88 Notre Dame L. Rev. 899, 949, 950 (2012), available at <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=1361&context=facpubs> (accessed Aug. 11, 2015) [hereinafter Strong, *Regulatory Litigation*].

28 Israel et al., *supra* n. 7.

29 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. Int'l & Comp. L. Rev. 1 (2011), available at <http://lawdigitalcommons.bc.edu/iclr/vol34/iss1/2> (accessed Aug. 11, 2015).

30 *Conley v. Gibson*, 355 U.S. 41, 47, 48 (1957).

31 Dodson & Klebba, *supra* n. 29.

32 Fed. R. Civ. P. 26(c); Civil Procedure Rules 2013 [hereinafter CPR], Rule 31.5(3).

33 S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 Wash. & Lee L. Rev. 489, 501, 522 (2010), available at <http://papers.ssrn.com/abstract_id=1474026> (accessed Aug. 11, 2015).

know of any discoverable matter.'[34] This generous rule covers matters inadmissible as evidence if they 'lead to the discovery of . . . evidence' in order to assist a party 'in the preparation or presentation of his case.'[35] In the UK, a party is only required to disclose documents that adversely affect its own case, or that support or adversely affect another party's case. However, plaintiffs in the UK can obtain documents from a subsidiary company located in another state if a defendant has a UK parent company because the obligation to disclose documents extends to those that are within a party's possession, control or right to inspect.[36]

In the majority of the EU Member States, as civil law countries, the collection of evidence in private litigation normally starts during the proceeding, after the filing of the claim under the direct supervision of the judge. For example, the German Code of Civil Procedure[37] (Sec. 142) requires that parties produce their own evidence and documents that they intend to use themselves in a case and set limited disclosure rules. Firstly, litigants in cartel cases in Germany must obtain court approval to engage in discovery. Secondly, the court will permit the taking of evidence only if the discovery sought is (a) relevant to the outcome of the case, and (b) necessary to clarify disputed facts. Moreover, under Sec. 142 *ZPO*[38] it is not enough to plead that such a document 'usually exists' – a party must refer to the actual document in one of its pleadings.

2.2.2. Regime of Information

Evidence in private cartel litigations usually contains sensitive business information related to infringement of the law, causality between anticompetitive behaviour and damages or the amount of damages arising from anticompetitive conduct. The common law system allows disclosure of trade secrets, other confidential research, development, or commercial information with some exceptions including the right for a protective order[39] while in civil law countries this information is generally secret.[40]

Parties in US private antitrust actions typically obtain internal correspondence, transactional data, price lists, other price information, supply information, business plans and projections, market share information, conspiratorial communications with competitors, documents produced pursuant to subpoena to the government, grand

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[34] Fed. R. Civ. P. 26(b)(1).

[35] Notes of Advisory Committee on Rules – 1946 Amendment, subdivison (b), at <https://www.law.cornell.edu/rules/frcp/rule_26> (accessed Aug. 12, 2015) (citing: *Engl v. Aetna Life Ins. Co.*, C.C.A.2, 1943, 139 F.2d 469; *Mahler v. Pennsylvania R. Co.*, E.D.N.Y.1945, 8 Fed. Rules Serv. 33.351, Case 1).

[36] CPR, Rule 31.8.

[37] *Zivilprozessordnung* [hereinafter *ZPO*]. English version is available at <http://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html> (accessed Aug. 12, 2015).

[38] *Id.*

[39] Fed. R. Civ. P. 26(c)(1)(G).

[40] *Making Antitrust Damages Actions More Effective in the EU*, *supra* n. 1, at 348.

jury materials, and materials submitted as part of leniency applications relating to the anticompetitive conduct at issue and source materials of formal submissions which participants of cartel have made to the authorities.[41] Disclosure in the UK context is also considerably broader than across most legal systems in continental Europe,[42] although some limits are set in *Hutchison 3G UK Ltd. v. O2 (UK) Ltd.*, particularly, 'the need for a highly focused application.'[43]

In the EU, the confidentiality of business secrets or other confidential information is considered a necessary limit on disclosure[44] and evidence is classified as the 'black' list (evidence which may never be disclosed including leniency documents), the 'grey' list (information prepared by a neutral or legal person specifically for the proceedings of a competition authority, such as the parties' responses to statements of objections and information requests, which may be disclosed after a competition authority has closed its proceedings) and the 'white' list (evidence which may be disclosed at any time). It is noteworthy that, under no circumstances can evidence from the black or grey lists be used in a private action even if a party obtains them through access to the file of a competition authority during the course of proceedings. Effectively, this means that the EU disclosure rules are removed back from the *Pfleiderer* judgment of the ECJ,[45] which held that leniency material could be disclosed and the strictest approaches of the EU Member States are unlikely to be changed. For example, German courts refuse disclosure of leniency documents following a broad interpretation of the concept investigation, which covers the overall activity of competition authorities in detecting cartels[46] and refuse to grant the disclosure because the purpose of the investigations could be jeopardized.[47] The role of secret materials in the calculation of the quantum of the damage and the availability of alternative elements to prove the existence of damage are supposed to be less important than role leniency programmes, which contribute indirectly to the

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41 Sebastian Jungermann & Terri A. Mazur, *How to Obtain and Use US Discovery in European Private Antitrust Actions*, IFLR Magazine (Jan. 21, 2013), <http://www.iflr.com/Article/3144115/How-to-obtain-and-use-US-discovery-in-European-private-antitrust-actions.html> (accessed Aug. 12, 2015).

42 Barry J. Rodger, *Competition Law Litigation in the UK Courts: A Study of All Cases 2005–08 – Part II*, 2009 Global Competition Litigation Review 136, 144, available at <http://strathprints.strath.ac.uk/28605/1/GCLR_article_part_2.pdf> (accessed Aug. 12, 2015).

43 [2008] EWHC 55 (Comm.), paras. 38–40.

44 Green Paper, *supra* n. 13, at 6.

45 Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, 2011 E.C.R. I-5161, at <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-360/09> (accessed Aug. 22, 2015).

46 The German Code of Criminal Procedure (*Strafprozeßordnung* (*StPO*)), Sec. 406e(2). English version is available at <http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html> (accessed Aug. 12, 2015).

47 Pablo G. de Zárate Catón, *Disclosure of Leniency Materials: A Bridge between Public and Private Enforcement of Antitrust Law* para. 4.2.1 (College of Europe, Department of European Legal Studies, Research Papers in Law 08/2013), <http://aei.pitt.edu/47511/1/researchpaper_8_2013_gonzalezdezaratecaton.pdf> (accessed Aug. 12, 2015).

success of cartel damage actions due to binding effect of the German competition authorities before the national court.[48]

2.2.3. Judicial Involvement

In common law states, obligations to disclose evidence are set by the law, and do not require any *ad hoc* disclosure order by the court. The parties are under two general obligations during the pre-trial phase: the disclosure obligation and the duty to fulfill discovery requests.[49] In civil law states, only the court may issue an order requesting the opponent or a third party to disclose a specific document.[50] Although the conditions to be fulfilled to obtain a disclosure order vary widely across Member States, a need to apply for a court order certainly does not facilitate disclosure process. In addition, in civil law jurisdictions courts are involved in a preliminary assessment of the robustness of the case which is independent and conditional to the proof of some facts.[51] Often parties have to prove specific and substantiated reasons why they cannot produce the documentary evidence, and to specify the relevant categories of evidence as precisely as can reasonably be expected.

However, the wider the judge's right to supplement the plaintiff's request for disclosure, the fewer restrictions for specification of documents are imposed on the requesting party: France, Czech Republic, Denmark, Latvia, Luxembourg, Malta, the Netherlands, Poland and Sweden provide more powers to the court regarding integration of evidentiary requests by parties and set less strict requirements to a disclosure order. In France, for example, the party is not required to name the exact document, but must at least specify what kind of document they want to be produced.[52] In contrast, in Austria, Belgium, Estonia, Finland, Germany, Greece, Italy, Lithuania, Portugal, Slovak Republic, Slovenia and Spain parties have to specify the document required, its content, its location, the relevance for the case and the reason why they are not able to produce it directly in the trial.[53] The Directive keeps both types of court interventions[54] and obliges judges to assess the disclosure requests for relevance, necessity, and proportionality.[55]

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48 Zárate Catón, *supra* n. 47, para. 4.2 (citing AG Bonn, 18.01.2012 – 51 Gs 53/09, NJW 2012, 947).

49 Fed. R. Civ. P. 26(c); CPR, Rule 31.5(3).

50 *ZPO*, Sec. 142.

51 *Making Antitrust Damages Actions More Effective in the EU*, *supra* n. 1, at 348.

52 Ashurst Report, *supra* n. 11, at 65.

53 *Id.* at 64.

54 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, Art. 5, 2014 O.J. (L 349) 1, 12–13, at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN> (accessed Aug. 12, 2015) [hereinafter Directive].

55 White Paper, *supra* n. 10, at 5; Directive, *supra* n. 54, Art. 5(3).

2.3. Legal Traditions as Foundation of Differences between US Discovery and EU Disclosure

The outlined similarities of disclosure in the UK and discovery in the US raise the question of the correlation of availability of evidence and disclosure limits within the law family and, consequently, of prevailing types of enforcement. Indeed, the procedure in civil law countries is more inquisitorial than in the common law countries including the UK and the US.[56] Then, the US system for enforcement of antitrust law follows the paradigm of private antitrust enforcement[57] which has widely used cartel deterrence through the private plaintiffs' lawsuits; public enforcement by the US Department of Justice [hereinafter DoJ] and Federal Trade Commission (FTC) was added only at a later stage.[58] Collective or so-called class actions can also promote the development of discovery of evidence in common law states.[59] Similar processes, including generous disclosure rules, made the UK courts the popular 'forum of choice' in private antitrust actions.[60] In contrast, even private damages actions for breach of competition law have been in doubt till the middle of the 1990[s] in the EU.[61] The dominance of public interests over compensation of damages in protection of whistleblowers from disclosure also indicates a greater role of public enforcement in civil law countries.

These fundamental differences increase costs of any convergence of disclosure rules. For example, shift toward common law style disclosure, when parties have to provide opponents with a list of all relevant documents in their possession unless the court decides that the disclosure requests are disproportionate, in all the EU Member States would entail very high harmonization costs, since all civil law countries would be forced to adapt their legislation to introduce a completely different procedural structure, similar (but not exactly comparable) to the one currently adopted in the UK.[62] Such harmonization would require not only the specification of a new set of rules for antitrust claims, but also training costs for both judges and lawyers everywhere in the EU except the UK, Ireland and Cyprus.[63] For this reason harmonization costs have been considered to be highest for this option.

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56 John T. Lang, *Foreword*, in Jones, *supra* n. 6, at viii.

57 Jones, *supra* n. 19, at 3.

58 Jungermann & Mazur, *supra* n. 41; Jones, *supra* n. 19.

59 Strong, *Regulatory Litigation*, *supra* n. 27.

60 *EU Parliament Backs Cartel Evidence Release Proposals But Leniency Corporate Statements to Remain Confidential*, Out-Law.com (Apr. 23, 2014), <http://www.out-law.com/en/articles/2014/april/eu-parliament-backs-cartel-evidence-release-proposals--but-leniency-corporate-statements-to-remain-confidential/> (accessed Aug. 12, 2014).

61 Jones, *supra* n. 19, at 70–75 (citing: Joined Cases C-6/90 and C-9/90, *Francovich v. Italian Republic*, 1991 E.C.R. I-5357; Case C-128/92, *H.J. Banks & Co. Ltd. v. British Coal Corporation*, 1994 E.C.R. I-01209).

62 *Making Antitrust Damages Actions More Effective in the EU*, *supra* n. 1, at 372.

63 *Id.* at 383.

Complexity of the system of priorities of EU competition law also entails limits in disclosure rules in antitrust litigations. Although consumer welfare, the promotion of small and medium-sized business and single market integration have all been announced as the objectives of EU competition law,[64] 'the basic sin in Europe is not so much restricting competition but creating an obstacle for integration.'[65] The objective of US antitrust law is more specific: the US antitrust laws have had protection of the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up as the basic objective.[66] Thus, the broader scope and plurality of objectives of EU competition law made the procedure more complicated.[67]

To sum up, disclosure in the EU is more complicated for plaintiffs because it is court-ordered (rather than party-initiated, as in the United States); applicants have to convince the court that they cannot reasonably obtain the facts except through the procedure and specify the precise categories of information to be disclosed in spite of informational asymmetry. However, considering that the majority of the EU members belong to the civil law system, the European plaintiffs are unlikely to have the same opportunity to obtain evidence as their US fellows, not only because both the White Paper and following Directive[68] reject the US model of discovery,[69] but also because there are no necessary system elements for implementation of the US model and transferred rules would not work effectively in the existing European system. The next chapter examines the main obstacle to extension of the current scope of disclosure in the EU in order to find a way to make disclosure of evidence in cartel cases more efficient.

3. Obstacles to Extend Disclosure in the EU

Chapter 2 has concluded that borrowing the US discovery rules would be inefficient due to characteristics of the civil law system; however, since disclosure in the EU is limited, options for its expansion and objections should be considered. Protection of confidential information is one of objections against wide disclosure, especially in antitrust litigation when parties' requests can invade business secrets or leniency documentation and disclosure of evidence not only to consumers but

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64 *First Report on Competition Policy*, European Commission (April 1972), at <http://ec.europa.eu/competition/publications/annual_report/ar_1971_en.pdf> (accessed Aug. 12, 2015).

65 Jones, *supra* n. 6, at 26.

66 *Guide to Antitrust Laws*, Federal Trade Commission, <http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (accessed Aug. 12, 2015).

67 Jones, *supra* n. 19, at 27.

68 *Supra* n. 54.

69 Crane, *supra* n. 15, at 676.

also to competitors can result in unfair competition. Chapter 3 assesses protection of information as the main reason for restrictions of disclosure and effectiveness of these restrictions in order to set forth areas for improvement.

3.1. Access to Trade Secrets and Disclosure

Interestingly, objections relating to the protection of trade secrets do not create a special obstacle for disclosure of evidence in cartel cases in spite that nature of valuable information regarding products, prices, companies' strategies and market data in this context is similar to leniency documentation. Indeed, limits on disclosure of business secrets are more procedural than substantive and aimed to exclude 'fishing expeditions,' *i.e.* using the disclosure to find out information beyond the fair scope of the lawsuit.[70] Both EU and US jurisdictions allow disclosure of business secrets with appropriate protection by such special measures as the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the circle of persons entitled to see the evidence, and instruction of experts to produce summaries of the information in an aggregated or otherwise non-confidential form[71] or by moving for a protective order.[72] In the UK, courts, among other measures, consider whether there are other ways of obtaining the information which is sought.[73] Therefore, since disclosure of business secrets primarily protects victims' interests and only secondarily – business secrets of parties, the rules protecting business secrets and other confidential information seem unlikely to impede the exercise of the right to compensation more than other procedural rules. Disclosure of leniency documentation has much more ambiguous status.

3.2. Disclosure of Evidence and Leniency Programme: Seeking a Priority

Tensions of disclosure with leniency programmes are the most fundamental reason explaining the restrictiveness of disclosure in private antitrust litigation in Europe. On the one hand, both disclosure rules and leniency programmes constitute the remedy to detect and deter cartels, but, on the other hand, disclosure of leniency statement decreases the attractiveness of leniency programmes for business significantly: news that the European Commission or the US DoJ's Antitrust Division is conducting an investigation often prompts the filing of civil class action suits in the United States and requests for discovery of materials submitted by defendants to competition authorities.[74]

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[70] Duhaime's Law Dictionary, <http://www.duhaime.org/LegalDictionary/F/FishingExpedition.aspx> (accessed Aug. 21, 2015); Macmillan Dictionary, <http://www.macmillandictionary.com/dictionary/british/fishing-expedition> (accessed Aug. 21, 2015).

[71] Directive, *supra* n. 54, Preamble, para. 18.

[72] Fed. R. Civ. P. 26(c)(1)(G).

[73] Paul Matthews & Hodge M. Malek, Disclosure 436 (4th ed., Sweet & Maxwell; Thomson Reuters 2012).

[74] Miller et al., *supra* n. 21, at 2.

3.2.1. The EU: Evolution from Case-by-Case Basis to Direct Prohibition

The EU position on disclosure of leniency statements has evolved from neutral permission to solve this issue in national courts of Member States in accordance with national rules in the landmark judgement in *Pfleiderer*[75] to direct prohibition in the Directive. In *Pfleiderer* a customer of German decorative paper producers sought to obtain access to the competition authorities' (*Bundeskartellamt*) documentation to strengthen its damages claim against the producers who participated in the cartel agreement. The *Bundeskartellamt* refused access to all leniency documents. Upon appeal by Pfleiderer as a plaintiff, the *Amtsgericht Bonn* disagreed with the *Bundeskartellamt* and decided that Pfleiderer was entitled to access under German rules, but agreed to refer preliminary questions to the Court of Justice 'to weigh and balance the possibly diverging interests of ensuring the efficacy of leniency programmes . . . with the right of any individual to claim damages for harm suffered as a result of . . . cartels.'[76] Among arguments 'pro' disclosure of leniency material in this case was the fact that the *Bundeskartellamt*'s investigation into the decorative paper cartel was over, so access to the leniency documents could not harm the investigation in that particular case.[77] The opponents argued, that in that case the disclosure 'could seriously undermine the attractiveness and thus the effectiveness of that authority's leniency programme,' leniency applicants 'will find themselves in a less favourable position in actions for civil damages, due to the self-incriminating statements and evidence which they are required to present to the authority, than the other cartel members' and, consequently, potential applicants will 'abstain from applying for leniency altogether or alternatively be less forthcoming with a competition authority during the leniency procedure.'[78] In addition, the Advocate General indirectly set the priority of public enforcement over private enforcement: '[T]he role of the Commission and national competition authorities is . . . of far greater importance than private actions for damages'[79] and highlighted that victims of cartels also benefit from effective leniency programmes.[80] Nevertheless, the Court ruled that applicable national disclosure rules should not make obtaining of compensation practically impossible or excessively difficult for plaintiffs and confirmed the right of national courts 'to weigh the respective interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the applicant for leniency'[81] on the case-by-case basis for balancing interests exercise.

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75 *Pfleiderer*, *supra* n. 45.

76 *Pfleiderer*, *supra* n. 45, Opinion of AG Mazák ¶ 2.

77 *Id*. ¶¶ 19–20.

78 *Id.* ¶ 38.

79 *Id.* ¶ 47.

80 *Id.* ¶¶ 41–46.

81 *Pfleiderer*, *supra* n. 45, Judgment ¶ 30.

The *Pfleiderer* judgement has been criticized for several reasons. Firstly, because 'most civil liability systems in the EU are purely compensatory in nature and do not allow any "punitive" element in a damages award . . .'[82] Secondly, the necessity of additional monetary awards against cartel defendants for deterrence purposes has been questioned due to success of administrative fines for anticompetitive conduct to ensure deterrence. Finally, those actions have not helped to uncover cartel activity because 'all cartel damages actions to date have been so-called "follow-on" actions, *i.e.* actions that were only started following on the announcement that a public enforcement investigation had been initiated . . .'[83]

After *Pfleiderer*, positions of national courts on disclosure of leniency materials have been varied in the EU Member States: the judgments of the German and the United Kingdom courts on this issue were completely polar.[84] For example, *Amtsgericht Bonn*[85] decided that, under German law, it would not be in the public interest to disclose any leniency document to Pfleiderer because disclosing the leniency documents would prejudice the success of the *Bundeskartellamt*'s leniency programme, which is a primary tool in fighting cartels,[86] and, in addition, the leniency documents were not necessary for Pfleiderer to bring its damages claim and that failure to disclose these documents did not make the claim practically impossible or excessively difficult.[87] Similarly, according to the *Oberlandesgericht Düsseldorf*, access to leniency documents has relatively little value for the claimant in comparison with the cartel authority's finding of infringement and these documents would not necessarily assist a court's assessment of causation and damages. Therefore, in Germany the claimant's interest in accessing the leniency material did not outweigh the leniency applicant's interest in maintaining confidentiality.[88]

The opposite position on disclosure of leniency documentation can be found in *National Grid*.[89] When the plaintiff sought access to confidential pleadings of ABB, Areva, and Siemens in leniency applications, the High Court considered that, firstly,

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82 Louis, *supra* n. 21, at 12.

83 *Id.*

84 Michael Sanders et al., *Disclosure of Leniency Materials in Follow-on Damages Actions: Striking 'the Right Balance' between the Interests of Leniency Applicants and Private Claimants?*, 34 European Competition Law Review (ECLR) 174, 175 (2013).

85 AG Bonn, *supra* n. 48. The English press release (dated January 30, 2012) is available at <http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/30_01_2012_Pfleiderer.html> (accessed Aug. 22, 2015).

86 *Louis*, *supra* n. 21, at 12 (citing AG Bonn, *supra* n. 48, ¶¶ 28–30).

87 *Id.* at 12 (citing AG Bonn, *supra* n. 48, ¶¶ 36–37).

88 Sanders et al., *supra* n. 84 (citing OLG Düsseldorf, 22.08.2012 – V-4 Kart 5/11 (OWi), V-4 Kart 6/11 (OWi), BB 2012, 2459).

89 *National Grid Electricity Transmission plc v. ABB Ltd. & Ors.*, [2012] EWHC 869 (Ch.).

risks to the Commission's leniency programme could not justify a wholesale refusal of disclosure of leniency materials.[90] Then, the High Court identified a new standard of assessment of public interest in protecting the Commission's leniency programme through the proportionality review inherent in applying the UK rules on discovery, in particular through checking '(a) whether the information is available from other sources and (b) the relevance of the leniency materials to the issues in this case.'[91] Unfortunately, this attitude to the disclosure of leniency materials has not been developed and the issues of standards in leniency disclosure have infrequently arisen in other cases.[92]

Eventually, the Directive[93] rejected compromising models of disclosure of leniency materials and now it explicitly mirrors the opinion of the Advocate General in *Pfleiderer*. Justifying the exclusion of leniency documentation from disclosure, the Note from General Secretariat of the Council highlights the importance of leniency programmes and settlement procedures for the public enforcement of Union competition law, particularly for the detection, the efficient prosecution and the imposition of penalties for the most serious competition law infringements.[94] Following this message, the Directive, explaining exclusion of leniency documents from disclosure, underlines the key role of undertakings which cooperate with competition authorities under a leniency programme in detecting secret cartel and assumes that the harm which could have been caused had the infringement continued is mitigated.[95] Therefore, there is a new challenge for the UK approach to disclosure of leniency materials which has had an intermediate position between nearly absolute discovery in the USA and conditional disclosure prescribed in *Pfleiderer*. For example, a Consultation on Options for Reform[96] proposed balanced (and fair) scope of disclosure of leniency documents: to protect from disclosure

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90 *National Grid, supra* n. 89, para. 36.

91 *Id.* para. 39.

92 Sanders et al., *supra* n. 84, at 177 (citing: Case T-2/03, *Verein für Konsumenteninformation v. Commission*, 2005 E.C.R. II-01121; Case T-237/05, *Éditions Jacob v. Commission*, 2010 E.C.R. II-02245; Case T-344/08, *EnBW Energie Baden-Württemberg v. Commission*, 2012 E.C.R. I-0000).

93 *Supra* n. 54.

94 *Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union – Analysis of the Final Compromise Text with a View to Agreement: Note to the Permanent Representatives Committee*, General Secretariat of the Council, RC 6 JUSTCIV 76 CODEC 885 2014, at 26 (recital 21a), at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%20 8088%202014%20INIT> (accessed Aug. 21, 2015).

95 Directive, *supra* n. 54, Preamble, para. 26.

96 *Private Actions in Competition Law: A Consultation on Options for Reform* para. 7.4, Department for Business Innovations and Skills (April 2012), at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf> (accessed Aug. 21, 2015).

only documents which are directly involved in the leniency application and which would not have been created if the company had not been seeking leniency.[97] The UK government in its Response to options for reforming the private antitrust actions regime, decided that the issue of the protection of leniency materials from disclosure would not be addressed in legislation in the UK.[98]

To sum up, conflict of disclosure and leniency programmes in detecting and deterring cartels in the EU results in the priority of protection of whistleblowers over compensation for consumers. Whilst a step back from *Pfleiderer* and narrowing of disclosure is unlikely to be noticed in the majority of Member States, it brings uncertainty to plaintiffs in the UK.

3.2.2. The US: Case-by-Case Analysis

In the US, the conflicts between the liberal scope of US discovery and sovereign promises that certain information or evidence would remain confidential are solved on a case-by-case analysis because there is no explicit countervailing statute or procedural rule that would clearly protect information provided by leniency applicants, whereas Fed. R. Civ. P. 26(b) provides just a general presumption of broad discoverability. The case-by-case basis does not bring certainty to litigants and states. For example, in *Flat Glass*[99] the District Court had compelled discovery of amnesty-related documents which created a direct threat to the US government's leniency program.[100] Later, in *Intel Corp. v. Advanced Micro Devices*[101] the US Supreme Court determined that the materials did not need to be independently discoverable in either US or foreign proceedings and non-privileged confidential materials (potentially including US and EU leniency applications and associated investigative documents) may be subject to discovery.[102] However, in *Micron Technology*[103] the court agreed with the DoJ's position that the discovery would damage the leniency programmes, current and future investigations and used the law enforcement privilege to protect leniency materials from disclosure.[104] A paperless process of application under the US DoJ antitrust leniency programme[105] has been designed to reduce risks of uncertainty for whistleblowers but it is unlikely to help to solve issues of disclosure of the EU leniency materials.

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97 *Private Actions in Competition Law, supra* n. 96, para. 7.6

98 Israel et al., *supra* n. 7.

99 *In re Flat Glass Antitrust (I)*, MDL No. 98-0550 (W.D. Pa. 1998).

100 Miller et al., *supra* n. 21, at 8.

101 *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 260-63 (2004).

102 Miller et al., *supra* n. 21, at 9.

103 *In re Micron Technology, Inc. Securities Litigation*, No. 09-mc-00609 (Doc. No. 17) (D.D.C. Feb. 1, 2010).

104 Miller et al., *supra* n. 21, at 10.

105 Louis, *supra* n. 21, at 13.

Leniency materials of the European Commission are also under threat of discovery in the US because, despite a paperless leniency process, EU cartel proceedings are essentially conducted in writing and information extracted from leniency statements is incorporated in Commission Statements of Objections (SO) and in the ultimate fining decisions. However, in most cases,[106] except the *Vitamins* litigation,[107] the Commission managed to prevent the disclosure of leniency documents through the use of US pre-trial discovery by 'writing to or intervening as *amicus curiae* before US courts to oppose plaintiffs' motions to compel discovery of leniency documents.'[108]

3.3. Discovery in the US and European Taboo: Does It Make Sense to Exclude Leniency Materials from Disclosure?

The broad scope of discovery in the US raises a question of the relation between the US discovery rules and the European Commission's leniency programme because the US procedural rules do not protect information provided by European leniency applicants from discovery. On the one hand, immunity from discovery can be given to a foreign sovereign's amnesty programme pursuant comity agreement in cases when those documents are granted immunity from civil litigations by a foreign sovereign like, *e.g.*, in *Rubber Chemicals*,[109] when the court denied discovery of communications with the European Commission regarding corporate leniency programme due to a forceful comity analysis. On the other hand, this immunity is not guaranteed: in the *Vitamins*[110] case the Commission's interests were recognized as 'not more important as the interests of the United States in open discovery and enforcement of the antitrust laws.'[111] So plaintiffs in civil litigations against cartels in the United States may obtain leniency materials from European Commission rather than from Antitrust Division in criminal investigations, because the Antitrust Division is unlikely to request documents in the possession of foreign companies in other states. A formal procedure for an oral leniency application has been introduced to avoid the problems associated with US discovery but it is unlikely that this method of application can totally prevent discoverability of leniency materials in the US[112]

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106 Louis, *supra* n. 21, at 11 (citing: *In re Methionine Antitrust Litigation*, No. 00-1311, 2003 WL 22048232 (N.D. Cal. Jun. 17, 2002); *In re Rubber Chemicals Antitrust Litigation*, 486 F. Supp. 2d 1078 (N.D. Cal. 2007); *In re Flat Glass Antitrust Litigation (II)*, No. 08-180, 2009 WL 331361 (W.D. Pa. Feb. 11, 2009); *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07-1827 SI, 2011 WL 560593 (N.D. Cal. Feb. 15, 2011); *In re Air Cargo Shipping Services Antitrust Litigation*, No. 06-MD-1775, 2010 WL 1189341 (E.D.N.Y. Mar. 29, 2010).

107 *In re Vitamins Antitrust Litigation*, 209 F.R.D. 251 (D.D.C. 2002).

108 Louis, *supra* n. 82, at 13.

109 *Supra* n. 106.

110 *In re Vitamins Antitrust Litigation*, No. 99-197, 2002 WL 34499542, at *10 (D.D.C. Dec. 18, 2002).

111 *Id.* at *82.

112 Petrasincu, *supra* n. 18, at 356.

since the rest of leniency materials is still in paper. The risk that leniency materials of companies considering co-operation with the Commission can be used in the US civil proceeding as evidence against them still exists. It is argued, that this risk can significantly reduce the effectiveness of the Commission's leniency programme.[113] Specific threats must be examined in order to assess the reality of harm to the EU leniency programme.

3.3.1. Are Rights of European Defendants Well Protected?

Leniency applications of the EU defendants are at risk of discovery[114] since plaintiffs in the US can directly require the defendants to provide the written leniency applications they have submitted to the European Commission. Several privileges can be used to limit discovery in this case albeit their success is also questionable. For example, in the overwhelming majority of cases, the attorney-client privilege would be waived by producing documents to government authorities and, consequently, a leniency application to the European Commission would not be protected by this privilege.[115] Similarly, work-product immunity which is defined as a qualified immunity of an attorney's work-product from discovery in order to protect the litigation strategy devised by the attorney[116] can be waived if the document is disclosed to an adversary;[117] since any governmental authorities can be adversaries in that sense,[118] then any leniency applications to the European Commission would not be protected by the this privilege. Law-enforcement investigatory privilege could be useful if the European Commission can invoke this privilege.

3.3.2. How to Resist 'Fishing Expedition?'

A wide-spread 'fishing expedition' fear, based on knowledge of the existence of a leniency application in Europe, is groundless due to the successful prevention by the US federal courts, following the Supreme Court's *Twombly*[119] decision. The case concerned a putative class action against major telecommunications providers, suspected of engagement, firstly, in parallel conduct to inhibit the growth of upstart competitive local exchange carriers by unfair agreements preventing access of new competitors to the networks, and, secondly, in agreements not to compete with

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113 Petrasincu, *supra* n. 18, at 361.

114 *Id.* at 363.

115 *In re Vitamins Antitrust Litigation*, No. 99-197, 2002 U.S. Dist. LEXIS 26490, at **94, 96 (fn. 50), 101–03.

116 *Hickman v. Taylor*, 329 U.S. 495, 509–12 (1947); *Holmgren v. State Farm Mutual Automobile Insurance Co.*, 976 F.2d 573, 576 (9th Cir. 1992); *In re Syncor Erisa Litigation*, 229 F.R.D. 636, 644 (C.D. Cal. 2005).

117 *United States v. Massachusetts Institute of Technology*, 129 F.3d 681, 687 (1st Cir. 1997); *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1429 (3rd Cir. 1991).

118 *Westinghouse*, *supra* n. 117, at 1428; *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984).

119 *Supra* n. 29.

each other. In support of this claim, the complaint pointed to the defendant's failure to meaningfully pursue attractive business opportunities. The District Court had dismissed the complaint for failure to state a claim, the Court of Appeals reversed, the Supreme Court reversed arguing that defendant seeking to defend against the allegations would have almost no idea where exactly to begin because plaintiffs had no any assumption of a specific time, place, or person involved in the alleged conspiracy.[120] At the beginning, the Court underlined that a showing of parallel behaviour is admissible as circumstantial evidence from which an agreement may be inferred, but that parallel behaviour in itself does not conclusively establish an agreement.[121] Then, in order to suggest that an agreement was made, enough factual matter has to be included in a claim under the Sherman Act (Sec. 1) to comply with pleading standard.[122] Moreover, a probability requirement at the pleading stage is not imposed simply by asking for plausible grounds to infer an agreement; it means that enough facts are required to raise a reasonable expectation that evidence of an agreement in violation of the Sherman Act will be revealed by discovery. It is noteworthy that in regard of discovery the Court emphasized the 'potentially enormous expense of discovery' and the pressure this might exert on defendants to settle cases early-on even without reasonable 'hope that the [discovery] process will reveal relevant evidence.'[123] Therefore, the Supreme Court effectively cancelled the threat of its earlier holding in *Conley v. Gibson* when 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'[124] Findings from *Twombly* have been confirmed in a number of cases[125] and improved in the case *Ashcroft v. Iqbal* where the Court emphasized that plausibility is not deemed to introduce a probability requirement, but it requires more than the mere possibility, and considered that the probability requirement is not met if the plaintiff pleads facts that are merely consistent with the liability of the defendant.[126]

The criteria of discoverability following the Supreme Court's *Twombly* decision can be articulated as follows: both direct or circumstantial evidence can be used for alleging a violation of the Sherman Act (Sec. 1) but the plaintiff must demonstrate

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120 *Twombly*, *supra* n. 29, at 565 (fn. 10).

121 *Id.* at 553; *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540–41 (1954).

122 *Twombly*, *supra* n. 29, at 556.

123 *Id.* at 559.

124 *Supra* n. 30, at 45–46.

125 *In re Elevator Antitrust Litigation*, 502 F.3d 47, 50 (2d Cir. 2007); *In re Air Cargo Shipping Services Antitrust Litigation*, 2008 U.S. Dist. LEXIS 107882, at *79 (E.D.N.Y. Sep. 26, 2008); *In re Graphics Processing Units Antitrust Litigation*, 527 F. Supp. 2d 1011, 1023–25 (N.D. Cal. 2007).

126 129 S. Ct. 1937, 1949 (2009).

enough factual matter to suggest plausible grounds to infer an agreement; otherwise the allegation that defendants entered into an agreement is not sufficient to meet the pleading standard. The direct allegation of an agreement must include specific dates, places and persons involved[127] and a defendant's activities.[128] Therefore, plaintiffs have to postulate specific allegations, not just allegations that anyone could postulate without knowing any facts of the alleged agreement whatsoever.[129] This attitude to discovery reminds the idea of UK Consultations on Private Actions in Competition Law to protect from disclosure only documents which would not have been created if the company had not been seeking leniency[130] and could be used as guidance for disclosure of leniency materials instead of totally hiding them from plaintiffs especially in view of the intensive courts' role in disclosure of evidence in European traditions.

Consequently, although priority of public enforcement resulted in prohibition of disclosure of all leniency materials in the EU, this prohibition is nearly meaningless since plaintiffs can seek discovery under the US law, and, as US case law indicates, interests of plaintiffs and defendants can be balanced by setting clear criteria for courts rather than by absolute exclusion of leniency documentation from disclosure. Furthermore, as the degree of discovery development in the US allows representatives of European plaintiffs to fill the gaps of European disclosure, the next chapter seeks to explain how European plaintiffs as plaintiffs can exercise their rights if EU disclosure does not facilitate their actions for damages.

4. Solutions for International Legal Practitioners

Nowadays plaintiffs from around the world have vigorously begun to use the opportunities provided by the US discovery system to supplement for the lack of transparent and efficient disclosure rules in Europe. To date, only a quarter of Europe's antitrust infringement decisions led to claimants suing for compensation[131] although almost all of them have been so-called 'follow-on' actions, *i.e.* actions that were only started following on from the announcement that a public enforcement investigation had been initiated.[132] Only a very limited number of stand-alone claims before the

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127 *In re LTL Shipping Services Antitrust Litigation*, 2009 U.S. Dist. LEXIS 14276, at **45–48 (N.D. Ga. Jan. 28, 2009).

128 *In re Elevator*, *supra* n. 125, at 50–51.

129 *Id.* at 50–52; *In re Air Cargo Shipping*, *supra* n. 125, at *81.

130 *Supra* n. 96, para. 7.6.

131 Alex Barker, *Hurdles to Cartel Damages Suits Lifted by Brussels*, Financial Times (Jun. 11, 2013), <http://www.ft.com/cms/s/0/46435c38-d28a-11e2-aac2-00144feab7de.html#axzz2zbf3X3jo> (accessed Aug. 21, 2015).

132 Louis, *supra* n. 82, at 13.

High Court in the UK have been reported.[133] Follow-on actions are hardly conductive to the deterrence of cartels and depend on the success of public enforcement even if they start following just the announcement that a public enforcement investigation had been initiated and not based on a leniency application. In addition, experts and litigators confirm that, access to evidence pursuant to a court order is hardly possible is civil law countries despite existence of procedural rules in national legislation.[134] Thus, ironically, the imperfect disclosure in the European Union motivates plaintiffs to seek alternatives in other jurisdictions.

4.1. Discovery in the US for Private Actions in Other Countries

Paradoxically, plaintiffs from the EU have more chances to discover information in civil litigations against cartels in the US, than in the EU. Section 1782(a) of Tit. 28 of the U.S.C. provides European antitrust litigants with a traditional but effective tool for discovery in foreign private antitrust litigation. Although this right for discovery cannot be automatically executed and a US district court must grant permission to conduct discovery under § 1782, private antitrust litigants in foreign proceedings in the US can take full advantage of the comparatively liberal discovery rules in the US under certain conditions. Pursuant to § 1782(a), the discovery covers the production of documents, electronic discovery, other tangible evidence, as well as sworn deposition testimony of witnesses.[135] The process of discovery under § 1782(a) of the U.S.C. is transparent: the court has to apply a two-step test.[136] The first step examines mandatory factors to determine whether certain elements required on the face of the statute have been satisfied, the second one – additional discretionary factors for exercising the courts' discretion to permit § 1782 discovery.[137]

All four mandatory factors are explicitly established in § 1782(a). First, a request must be made 'by a foreign or international tribunal' or by 'any interested person,' including a party to the foreign proceeding, a foreign sovereign, or a designated agent of a foreign sovereign or any other person possessing reasonable interest in obtaining judicial assistance. Second, a request must seek evidence in the form of the testimony or statement of a person or the production of documents or other thing. Requests for evidence in the form of depositions and / or document requests are the most common in the US antitrust practice.[138] Third, the aim of discovery must be exactly 'for use in a proceeding in a foreign or international

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133 Israel et al., *supra* n. 7.

134 Ashurst Report, *supra* n. 11, at 61.

135 Jungermann & Mazur, *supra* n. 41.

136 *Intel*, *supra* n. 101.

137 *Id.* at 264–65.

138 Jungermann & Mazur, *supra* n. 41.

tribunal, including criminal investigations conducted before formal accusation.' Courts and intergovernmental arbitral bodies are the relevant examples of 'foreign or international tribunal' because under the US Supreme Court's decision in *Intel*, the relevant inquiry is whether the foreign body acts as a first-instance decision maker, rendering a dispositive ruling responsive to a complaint and reviewable in court.[139] Fourth, the interested person must 'reside' or just be 'found' in the district of the US district court in which the application for § 1782 discovery is brought. Consequently, even physical presence in a US district where an applicant submits a request is enough to meet this condition.

Although the US district court is not obliged to permit § 1782 discovery even when all mandatory factors are confirmed, its discretion is rather predictable because four guiding factors are set by the Supreme Court in the 2004 *Intel* decision. First, it is the inaccessibility of the documents or testimony within the foreign tribunal's jurisdiction.[140] For example, 'when the person from whom discovery is sought is a participant in the foreign proceeding . . . the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad.'[141] Second, 'the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to US federal-court judicial assistance'[142] is taken into account. Third, the US courts consider whether the § 1782 application 'conceals an attempt to circumvent foreign proof gathering restrictions or other policies of a foreign country or the United States'[143] and, finally, whether it contains 'unduly intrusive or burdensome requests.'[144] The district court may deny the § 1782 application because of undue burden when 'suspects that the discovery is being sought for the purposes of harassment'[145] or limit the scope of the discovery. Therefore, a district court's discretion is transparent in accordance with § 1782 which sets that '[d]istrict courts must exercise their discretion under § 1782 in light of the twin aims of the statute: "providing efficient means of assistance to participants in international litigation in [US] federal courts and encouraging foreign countries by example to provide similar means of assistance to [US] courts . . ."'[146]

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139 *Intel*, *supra* n. 101, at 257–58.

140 *Id.* at 264.

141 *Schmitz v. Bernstein, Liebhard & Lifshitz, LLP*, 376 F.3d 79, 85 (2d Cir. 2004).

142 *Intel*, *supra* n. 101, at 264.

143 *Id.* at 265.

144 *Id.*

145 *Brandi-Dohrn v. IKB Deutsche Industriebank AG*, 673 F.3d 76, 81 (2d Cir. 2012).

146 *Metallgesellschaft AG v. Siegfried HODAPP*, 121 F.3d 77, 79 (2d Cir. 1997) (quoting *Malev Hungarian Airlines v. United Technologies International Inc., Pratt & Whitney Commercial Engine Business*, 964 F.2d 97, 100).

Other statements of US courts confirm flexibility and efficiency of § 1782 rules for European plaintiffs. For example, there is no 'foreign-discoverability' requirement[147] under § 1782, *i.e.* it does not matter whether evidence sought in the US under § 1782 is discoverable or undiscoverable under the laws of the foreign country where the underlying action will be considered because 'a district court could condition relief upon that person's reciprocal exchange of information' and 'the foreign tribunal can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate.'[148] Also there is no requirement that the foreign proceeding be 'ending' or 'imminent,' it should be only 'within reasonable contemplation.' Whilst some US courts take into account the actions an applicant has taken in the foreign jurisdiction to obtain the discovery, generally § 1782 discovery cannot be refused if a foreign tribunal has not yet considered the discovery request. Moreover, the scope of discovery that foreign litigants may seek in the US under § 1782 has been expanded in a recent decision of the US Court of Appeals for the Second Circuit, which held that a district court may issue a subpoena under § 1782, even if the evidence sought would not be admissible in the foreign proceeding because there was no statutory basis for any admissibility requirement.[149]

A plaintiff can obtain evidence from subsidiaries all over the world if a parent company is incorporated in the US or can be found in the district of the US court in which the § 1782 application is made.[150] Therefore, discovery obligations can be imposed on US entities in response to requests from foreign litigants even if evidence in question is located abroad the US so long as evidence is within the possession, custody, or control of a person located in the US.

Interestingly, German courts and German litigants are amongst the most frequent users of § 1782: there are at least 28 US judicial decisions in German-related matters involving applications under § 1782.[151] One of the reasons for high demand for discovery among German plaintiffs is that documents may be requested in any format including category of documents or communications concerning 'bases or rationales.'[152] Access to testimony of executives and corporate representatives

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147 *Intel*, *supra* n. 101, at 262.

148 *Id.*

149 *Brandi-Dohrn*, *supra* n. 145.

150 Lawrence S. Schaner & Brian S. Scarbrough, *Obtaining Discovery in the USA for Use in German Legal Proceedings. A Powerful Tool: 28 U.S.C. § 1782*, 2012(4) Anwaltsblatt (AnwBl) 324, available at <https://jenner.com/system/assets/publications/9165/original/AnwBl_2012_320.pdf?1334951861> (accessed Aug. 21, 2015) (citing: *In re Iwasaki Electric Co.*, No. M19-82, 2005 WL 1251787, at **2–3 (S.D.N.Y. May 26, 2005) ; *In re Application of Gemeinschaftspraxis Dr. Med Schottdorf*, No. Civ. M19-88 (BSJ), 2006 WL 3844464 (S.D.N.Y. Dec. 29, 2006); *Minatec Finance S.A.R.L. v. SI Group Inc.*, No. 1:08-CV-269 (LEK/RFT), 2008 WL 3884374, at *4 (fn. 8) (N.D.N.Y. Aug.18, 2008); *In re Application of Schmitz*, 259 F. Supp. 2d 294 (S.D.N.Y. 2003); *Schmitz*, *supra* n. 141, at 85 (fn. 6)).

151 Schaner & Scarbrough, *supra* n. 150, at 322.

152 *In re Application of Gemeinschaftspraxis Dr. Med Schottdorf*, *supra* n. 150, at *3 (fn. 9).

through depositions, which also can be obtained under § 1782,[153] contributes to proof in cartel litigations.

Though courts tend to limit discovery rather than deny it completely, discovery under § 1782 is not endless. Except the cases where the requirements for mandatory and discretion factors are not met, courts can deny § 1782 discovery if such discovery can jeopardize another State's sovereign rights and circumvent criminal procedure,[154] where the discovery violated the Fed. R. Civ. P., for example, the applicant sought privileged and / or confidential information[155] or the discovery requests were vague and overbroad,[156] duplicative, vexatious, or unreasonably cumulative[157] or irrelevant.[158]

The application procedure is quite simple: an interested person has to submit an application in the US district court for the district wherein the person from whom discovery is sought resides or can be found.[159] A typical application consists of: (i) an application with some background to the foreign proceeding and justification for the need for the discovery including explanation of how the mandatory statutory elements and the discretionary factors are met; (ii) a supporting affidavit or declaration from a person who is familiar with the foreign proceeding, including counsel of applicant; (iii) a draft of the proposed discovery; and (iv) a proposed order that the district court can sign granting discovery.[160] Prior notice to the person from whom discovery is sought or the adverse party before the foreign tribunal is not required but the person from whom discovery is sought can object and seek US court redress.

To summarize, the design of § 1782 allows a plaintiff to request evidence in the US for the cartel private enforcement in the European Union if evidence to prove damage by anticompetitive behaviour or causality between the infringement and the damage are located in the US or a person or a company that are able to provide testimony, documents, or electronic evidence can be found in the US and

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153 *Minatec*, *supra* n. 150; *Cryolife, Inc. v. Tenaxis Medical, Inc.*, No. C08-05124 HRL, 2009 WL 88348 (N.D. Cal. Jan. 13, 2009).

154 *Schmitz*, *supra* n. 141; *In re Application of Schmitz*, *supra* n. 150.

155 Schaner & Scarbrough, *supra* n. 150, at 323 (citing: *In re Heraeus Kulzer GmbH*, No. 09-MC-00017, 2009 WL 2981921 (E.D. Pa. Sep. 11, 2009) (no showing of substantial need for confidential information); *In re Application of Heraeus Kulzer*, No. 09-CV-183 RM, 2009 WL 2058718 (N.D. Ind. Jul. 9, 2009); *In re Letters Rogatory from 9th Criminal Division, Regional Court, Mannheim, Federal Republic of Germany*, 448 F. Supp. 786 (S.D. Fla. 1978)).

156 *In re Application of Heraeus Kulzer*, *supra* n. 155, at **2–3.

157 *Bayer AG v. Betachem, Inc.*, 173 F.3d 188 (3d Cir 1999).

158 Schaner & Scarbrough, *supra* n. 150, at 323 (citing *Kang v. Noro-Moseley Partners*, No. 07-10310, 2007 WL 2478579 (11th Cir. Sep. 4, 2007)).

159 *Id.* at 321.

160 *Id.*

applications meet the set of mandatory and discretional facts. Recent judgements of the US courts can boost application of § 1782 in foreign antitrust actions. For example, even the strictest rules of disclosure in Germany do not create any obstacle for courts to accept evidence obtained pursuant to § 1782 and in some cases German lawyers prefer to apply for discovery in the US instead of home jurisdiction.[161]

4.2. The 'Forum of Choice' for Cartel Private Actions

The choice of jurisdiction for filing claims for damages for breach of competition law also simplifies disclosure of evidence and, consequently, enhances chances to win. The UK is reported to remain the 'forum of choice' for private actions due to generous disclosure rules and the courts' rapidly growing experience in considering the complex economic, legal and procedural issues.[162] The recent developments and practice in antitrust litigation in England and Wales become increasingly interesting by the use of 'anchor defendants' and the disclosure of leniency materials in the context of follow-on cartel damages claims. Establishment of the Competition Appeal Tribunal (CAT) where private antitrust damages actions can be brought on a par with the High Court[163] also significantly strengthen the attractiveness of the UK courts in antitrust disputes.[164]

The English court's jurisdiction to hear an antitrust damages claim is determined by the Brussels Regulation.[165] Pursuant to Art. 6(1) in relation to claims involving multiple defendants in a number of EU Member States, claimants can bring a claim in the courts of the Member State where any one of the defendants is domiciled if the claims are 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.' In tort claims (which include antitrust claims), a defendant domiciled in an EU Member State can be sued in the courts of 'the place where the harmful event occurred.'[166] Therefore, the jurisdiction of the UK courts is established if a defendant domiciled in the UK.

Furthermore, the UK courts accept jurisdiction against defendants domiciled in other EU Member States if claimants have used UK-domiciled subsidiaries as 'anchor defendants' (which may not have been subject to the EC infringement decision) rather than their foreign parent companies to which the infringement decision had

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161 Schaner & Scarbrough, *supra* n. 150, at 323.

162 *EU Parliament Backs Cartel Evidence Release Proposals But Leniency Corporate Statements to Remain Confidential*, *supra* n. 60.

163 Competition Act, 1998, c. 41 (Eng.), Chs. I and II.

164 Israel et al., *supra* n. 7.

165 Council Regulation (EC) No. 44/2001 of 22 December 2000 on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001R0044&from=EN> (accessed Aug. 21, 2015).

166 *Id.* Art. 5(3).

been addressed.[167] For example, in *Provimi*[168] the High Court accepted jurisdiction to hear an EU-wide cartel claim brought against the UK subsidiaries of foreign parent companies, notwithstanding that, unlike their foreign parents, the UK subsidiaries were not addressees of the EC's infringement decision because 'the legal entities that are part of the one undertaking . . . have no independence of mind or action or will,' so '[t]here is no question of having to "impute" the knowledge or will of one entity to another, because they are one and the same.'[169] Later this conclusion has been repeated in *Cooper Tire*[170] in which the claimants (tyre manufacturers who had bought synthetic rubber in Europe) sought to establish jurisdiction through three UK anchor defendants (subsidiaries of foreign companies who were addressees of the EC's decision) on the basis that they had implemented the cartel by selling products at cartel prices. In 2011, the High Court in *Toshiba Carrier* confirmed that the claims against the UK anchor defendants were properly constituted (with 'knowledge' of the cartel on the part of the UK-domiciled defendants, on the same basis as *Cooper Tire*).[171] Therefore, claimant-friendly approach to establishing jurisdiction taken by the High Court motivates plaintiffs to bring their private antitrust claims in the UK.[172]

Practically, availability of evidence and choice of jurisdiction are inseparably linked. The US courts are often chosen by European plaintiffs due to widely used effective doctrine, which means that any State may impose liabilities for conduct outside its borders if consequences of an act are within its borders: Sherman Act 1890 can be applied to conduct involving trade with foreign nations if such conduct has a direct, substantial and foreseeable effect on trade or commerce in the US.[173] For instance, Nokia stand-alone action against LCD cartel in the US[174] has been settled in the US because there was no government action specific to Nokia purchases and plaintiffs had to prove their case themselves; in the US they immediately got access to millions of pages of documents. In that case, discovery determined the result of litigation.[175]

Thus, while the European disclosure does not contribute to the development of cartel private enforcement, in some cases the European plaintiffs have a chance to exercise their right for compensation for damages, if they turn their gaze upon

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167 Israel et al., *supra* n. 7.

168 *Provimi Ltd. v. Aventis Animal Nutrition SA & Ors.*, [2003] EWHC 961 (Comm.).

169 *Id.* para. 31.

170 *Cooper Tire & Rubber Co. Europe Ltd. & Ors. v. Dow Deutschland, Inc. & Ors.*, [2010] EWCA Civ. 864.

171 *Toshiba Carrier UK Ltd. & Ors. v. KME Yorkshire Ltd. & Ors.*, [2011] EWHC 2665 (Ch.), para. 45.

172 Israel et al., *supra* n. 7.

173 Sherman Act, 15 U.S.C. §§ 1–7 (1890), Sec. 6a, at <http://www.linfo.org/sherman_txt.html> (accessed Aug. 21, 2015).

174 *Nokia Corp. et al. v. AU Optronics Corp. et al.*, No. 3:09-cv-05609 (N.D. Cal.).

175 E-mail from Valarie Williams to Natalya Mosunova (Aug. 5, 2014).

other jurisdictions. First, the evidence may be requested through the use of § 1728 U.S.C. in the US. Second, plaintiffs can choose the friendliest jurisdiction in the case of litigation against cartels which have affected the economy of several states. However, practically these effective and proven facilities are available only to a limited number of plaintiffs who have corporate budgets for the high fees of international law firms. Consequently, information asymmetry, *i.e.* inability to obtain evidence to protect victims' interests, is preserved for individuals and small businesses. The Conclusion will present possible measures to promote the availability of evidence after analysis of findings of the study.

5. Conclusion

The research shows that disclosure of evidence in the EU is inefficient and does not facilitate cartel private enforcement, but the US discovery cannot be directly transferred to the European jurisdictions and that the follow-on actions are the only effective tool to promote cartel private enforcement in the EU.

In spite of all efforts carried out in the last decade, the Directive[176] provides a very strict regime of disclosure when plaintiffs effectively will not only have to get court approval for gathering documents from defendants, but also specify documents very precisely and prove that this evidence is relevant and necessary in the litigation. Therefore, these rules are unlikely to protect consumers' interests and, in fact, they suppress any attempts to sue for damages. Considering the obvious superiority of cartels' forces over victims' resources, it is little wonder that the vast majority of European plaintiffs give up attempts to obtain compensation for damages at this stage.

The findings of the second research question regarding potential operability of the US discovery in the EU demonstrate inapplicability of the US rules in the EU regardless of their effectiveness for cartel private enforcement in the US. Indeed, the remaining weaknesses of disclosure in cartel cases are not a consequence of the Directive. The main obstacle to making disclosure rules in the EU more victim-friendly and access to evidence easier is that the majority of the Members States employ civil law systems. The fundamental differences between civil law and common law families would entail highest costs of borrowing of the US discovery rules for the EU.

Facilitating follow-on actions could neutralize the pitfalls of disclosure in the EU. Consequently, efforts of competition authorities in the EU to promote the private cartel enforcement could be shifted more to follow-on actions than to stand-alone actions because the dependence of parties on the court's discretion without transparent criteria, the parties' obligation to provide a lot of evidence at the very early stage and paradoxical demands to indicate the exact type of documents out of their possession make stand-alone actions in the EU hardly possible. This

[176] *Supra* n. 54.

approach would be reinforced by the European competition law priorities which are designed to provide single market integration rather than to compensate consumers' damages.

The ambiguous attitude to disclosure of leniency materials could be clarified for promotion of follow-on action in Europe too. The ideas set forth in *Pfleiderer* to delegate to the national courts the decision on whether or not leniency documents are subject to disclosure have not been used in Member States and have been rejected in the Directive. The leniency programme of the EU, considering weakness of private enforcement, remains the main tool to detect and deter cartels in Europe and in this context the confidence of whistleblowers is worth protecting. However strict and uncompromising, European restrictions on disclosure of leniency documents become illusory because the design of the US disclosure rules and priority of consumers' rights effectively allow victims from the EU to sue in the US and obtain all necessary documents in the US proceeding when it is impossible in the courts of the EU Member States.

That is why convergence of the US and EU positions on disclosure of leniency materials could bring more certainty both to plaintiffs and defendants in cartel litigations and, consequently, facilitate the development of the European cartel private enforcement in terms of follow-on actions. In this regard, the findings in *National Grid*[177] provide transparent criteria for leniency material disclosure: unavailability of information from other sources and relevance to the issue in question. A more detailed test for discoverability follows from the *Twombly*[178] decision that a request to disclose must contain specific allegation of facts rather than assumptions. Well-articulated principles of disclosure of leniency materials would prevent 'fishing expeditions' and increase the number of compensated victims in follow-on actions. Therefore, interrelation between the two main remedies for detecting and deterring cartels – disclosure of evidence and leniency programme – provide the basis for further research.

Nowadays, the proposed solutions are rather practical. Victims of cartels can seek protection of their rights in other jurisdictions either by obtaining evidence in the United States for use in the European courts,[179] or by their choice of jurisdiction for their actions. Despite some concerns on protection of confidentiality, the case law and statistics on the number of European applicants in the US courts show the attractiveness and safety of discovery in the US.

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177 *Supra* n. 89.

178 *Supra* n. 29.

179 28 U.S.C. § 1782(a) (2000).

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BOOK REVIEW NOTES

CIVIL LITIGATION IN CHINA AND EUROPE[1]

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The powers of the judge in civil proceedings had, for a long time, been considered only before the distorting mirror of ideological approaches: the choice in favour of a more or less active role of the judge was considered as a mere implication of the general policy of a particular State and a means, among others, to enforce such policy. As many know, in the last decades the scholars in procedural law have chosen a more realistic approach. The so-called 'case management' is more and more often looked at as the point of balance between the search for efficient procedures and the need for a quality decision.

The thread running through *Civil Litigation in China and Europe* is exploring how and why, with a few exceptions, the modern reforms of civil procedure in the world tend to increase the procedural efficiency providing for enough judicial 'managerial' powers, even though with the constant worry to avoid harming the fundamental principles of party disposition and of the impartiality of the judge. The second, though not less important, goal of this collection of essays is to provide both Chinese and European scholars with information on each other's procedural system in the English language, thus facilitating research that is often rendered nearly impossible by language barriers. As the two editors Remco van Rhee and Fu Yulin explain in the first introductory chapter, the book is also intended for the law reformers who want to explore the multiple ways of improving judicial case management in their own countries.

The book is divided into seven parts, belonging to the original research project, sponsored by the European Union and the People's Republic of China, which deal with I – China: Mainland, II – China: Hong Kong, III – Austria & Germany, IV – Croatia,

[1] Reviewed book: Civil Litigation in China and Europe: Essays on the Role of the Judge and the Parties (= 31 Ius Gentium: Comparative Perspectives on Law and Justice) (C.H. (Remco) van Rhee & Fu Yulin, eds.) (Springer 2014).

V – Italy, VI – The Netherlands, and VII – Romania, respectively. An annex (Pt. VIII) on case management in England and Wales and in France concludes the book. Each of the first seven sections includes a national report which describes the main features of the jurisdiction under consideration, focusing on judicial case management. Many of them also include further (and shorter) essays on specific issues, in most cases on ADR techniques. This collective research project has an interesting approach, also to ADR, and especially mediation, which are mainly considered from the point of view of case management. Therefore, the authors put a special emphasis on court-suggested and court-annexed mediation, as tools that can, at the same time, help both in reducing the backlogs and in re-establishing good relationships between the parties. Furthermore, all national reports end with useful charts of facts and figures on the judicial organization of the country at stake.

In Ch. 2, the first one of the Chinese (Mainland) section (Pt. I), the authors Wang Yaxin and Fu Yulin immediately impress the European reader describing the extraordinary speed of Chinese civil litigation, where first instance proceedings last no more than six months, a time that is halved in appellate proceedings. Efficiency is one of the best known qualities of Chinese people and it can also be attributed to the Chinese judiciary, which is organized in order to dispose of all cases in a very short time. While, in the last 30 years, China has been moving from a totally judge-centered system towards a new rule, where the principles of party disposition and burden of proof are almost recognized, judges still maintain a very strong position in Chinese civil litigation. At the same time, as also explained in a more detailed way in Chs. 3, by Cai Yanmin, and 4, by Wang Fuhua, the term 'trial management' in China is mainly intended to define the organizational structure of the courts, that appears to be strongly based on hierarchy and, as the authors highlight, put forward the efficiency at the possible cost of judicial independence and quality of the decisions: senior judges are not only authorized to assign specific affairs to junior colleagues and assess their performance, based on fixed efficiency indexes. Senior judges are also requested to direct their work in the most complex cases, including also the decision on the merits. As far as mediation is concerned, the authors avoid reviving the old adage according to which Confucius taught Chinese people to prefer a settlement to litigation, which has had great (and probably undeserved) success in Europe. Instead, the authors focus on the great pressure put on Chinese judges to induce the parties to settle cases, which often turns into a quasi-mandated settlement that may leave the parties unsatisfied. Not only should the Chinese contributions be appreciated for their clarity, but they also follow a realistic approach, presenting the reader with the pros and cons of that judicial system, thus proving to be really useful for a non-Chinese reader.

Part II of the book is focused on the legal order of Hong Kong. In Ch. 5, Peter C.H. Chan, David Chan, and Chen Lei introduce the reader to a model that presents all the main features of English and Welsh jurisdictions. The authors explain how, after the handover to China, Hong Kong maintained the current system of adjudication, instead of adopting the (really different) Chinese one and cherry-picked the Lord

Woolf reform with the Civil Justice Reform (CJR), which came into effect on April 2, 2009. This way, judicial case management was improved, though without expressly providing for the application of the principle of proportionality as an 'overriding objective.' In Ch. 6, Christopher To analyzes the impact of the CJR on ADR. Also in this field, an English-like approach emerges. While Hong Kong is and remains an arbitration-friendly jurisdiction, it prefers the English approach to mediation, strongly based on voluntariness, even though judges have now started to encourage parties to mediate when they feel it appropriate for the case at stake.

Part III is dedicated to Austria and Germany, presented as very similar and comparable systems. In Ch. 7, Andrea Wall jointly analyzes, with an optimistic approach, the history of procedural reforms in Austria and Germany, which, according to the view of the author, produced two really efficient systems. Both the managerial powers of the judge and cooperation with the parties are key ingredients of the recipe of Austrian and German procedural efficiency. The Austrian cooperative model is the subject of Ch. 8, by Irmgard Griss, who reports the experience of a judge whose 'work and understanding of civil procedure have been shaped by the ideas of Franz Klein.' In Ch. 9, Burkhard Hess offers a vivid insight of the German model of court-annexed mediation, held by 'mediation judges,' including not only the legal issues, but also the political debates that surrounded this interesting institution.

In Ch. 10, the sparkling style of Alan Uzelac opens Pt. IV, devoted to the Croatian legal order. The author describes a system that is still in transition: after the Austrian influence, the socialist regime significantly increased judicial powers, though not in a managerial view, but as 'an instrument of paternalistic control.' A path of modernization in still under way and the reader is faced with an example of a system where inefficiency issues are still present notwithstanding (and, perhaps, also due to) extensive judicial powers. In Ch. 11, Mario Vukelić explains how Croatian lawmakers are trying to attract business to that country by improving commercial courts (an old Croatian institution) and also with the simplification of substantive law.

Part V is devoted to Italy and includes Ch. 12, where Elisabetta Silvestri describes the ingredients of the toxic cocktail which has poisoned Italian civil justice for decades: outdated rules, the huge differences between the law in books and the law in action, and the inconsistency of procedural reforms. In spite of the (outward) continuous attempts made by Italian lawmakers to improve the situation of civil justice, the author is quite pessimistic as far as concrete results are concerned, even though, considering that the bottom is very near, she hopes 'that the ascent will begin soon.'

In Pt. VI, the Dutch authors depict an opposite scenario, where judicious reforms turned the rather inefficient and totally party-controlled civil judicial system of the Netherlands into a swift and well organized one. Remco van Rhee and Remme Verkerk (with a contribution by Rob Jagtenberg on mediation) explain how it happened in Ch. 13, from both the points of view of procedural rules and of judicial organization. Chapter 14, where Rob Jagtenberg discusses mediation as a case management tool, is of particular interest to the reader. Indeed, despite being in the Dutch section, it deals with

mediation not only in the Netherlands, but also from a general European point of view, and is helpful to understand the reasons of European Union policies on mediation.

In Pt. VII, Serban S. Vacarelu and Adela O. Ognean outline the Romanian judicial system throughout Ch. 15. The authors criticize the continuous reform process that is under way in Romania, where the new Procedural Code came into force in 2013 but where lawmakers amend the rules 'almost every year.' Even though they conclude that their system is rather efficient, if compared with other European systems, they still find room for improvement.

As mentioned before, Pt. VII is a useful annex to the original research project, focusing on English / Welsh and French jurisdictions. In Ch. 16, Neil Andrews depicts the fundamental role of case management in English and Welsh civil procedure after the Lord Woolf reform and its relationship with the compliance to procedural rules by the parties. In Ch. 16, Emmanuel Jeuland explains the evolution of case management in France, especially after the major reform of the Code of Civil Procedure that came into force in 1976. Several interesting considerations deal with case management by way of agreements between the judge and the parties.

In the end, it could easily be said that the book meets and probably exceeds its goals. The analysis of case management systems throughout China and Europe shows, both by means of theoretical explanations and practical examples, that providing the judge with 'managerial' powers works like a good medicine to improve the efficiency of civil litigation without neglecting the quality of the decisions. However, like any other medicine, it has to be taken in the appropriate way and in the correct dose, otherwise it could prove to be a poison. Some examples of the good and bad use of judicial case management, found in this book, may be of help both to the scholars and to the law reformers who are in search of the best use of this powerful treatment. On the other hand, this comparative research proves once again the utmost importance of judicial organization as far as efficiency and quality of adjudication are concerned. The best procedural rules (even supposing, for the sake of argument, that there is one best set of procedural rules) are of no avail to this purposes when one has to deal with an inefficient or otherwise unsatisfactory judiciary. Last but not least, this book is of help also as a source of information on several civil litigation systems, overcoming the language barriers. In this respect, the reader will appreciate the careful choice of the national reporters: as the list of authors shows, almost every one of them is a recognized academic expert in his / her own country and this is an assurance of the thoroughness of the information provided.

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