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TRENTO STUDENT LAW REVIEW

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Prefazione

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Direttrice

Gli ultimi mesi hanno posto la Trento Student Law Review davanti ad un interrogativo essenziale, ossia: "qual è il senso di questo progetto?". Si è trattato di un quesito non trascurabile, impossibile da liquidare con superficialità, perché dalla relativa risposta dipendeva, di fatto, la sopravvivenza stessa di questa Redazione. Solo recuperando il significato ultimo del nostro lavoro di *editors* e, ancor prima, del nostro essere studenti ed aspiranti giuristi, avremmo potuto adoperarci per garantire continuità e stabilità a questa giovane realtà editoriale.

Il valore di quest'esperienza è riassumibile in una parola: Formazione.

La Formazione ha in sé l'idea di "Forma", etimologicamente legata ai concetti di *portare, sostenere, tenere fermo*. Di conseguenza, la Formazione consiste nell'atto di dare forma alle cose, di plasmarle, disporle, costituirle. Con riguardo agli individui, la Formazione si declina in modo duplice: da un lato, il primario significato passivo trasmette l'immagine di un soggetto proiettato verso il proprio personale perfezionamento seguendo il flusso di forze esteriori che agiscono insieme su di lui e per lui; dall'altro, intesa in senso attivo, la Formazione diventa il percorso di crescita interiore che il singolo affronta, confrontandosi con se stesso, riconoscendo i propri limiti e provando a superarli.

L'esperienza di una rivista scientifica gestita da studenti permette alla Formazione di esplicarsi in entrambe le sue accezioni, attiva e passiva, a partire proprio dall'attività caratterizzante il lavoro di una Law Review: il confronto diretto con la ricerca, con la produzione scientifica e con le sue plurime declinazioni. Il testo di un articolo s'impone, infatti, con le sue forme ed i suoi contenuti, chiamando il giovane editor a confrontarsi con essi, a metterli in discussione e, laddove necessario, anche a correggerli. In questo modo, lo studente

non solo acquisisce una tecnica che si rivela utile a livello professionale, ma, soprattutto, sviluppa anche una propria sensibilità rispetto alla produzione scientifica, grazie ad un più consapevole esercizio del pensiero critico e ad un'attenzione rivolta principalmente al riconoscimento della qualità.

Essere un *editor* permette di instaurare un rapporto privilegiato con la ricerca, una relazione intimamente dialettica che impartisce una lezione importante: tutto può essere messo in discussione, per questo non ci si può mai fermare alla superficie di un testo. È sempre necessario intrufolarsi negli spazi bianchi tra le parole, valutandone il reale significato e saggiandone l'autorevolezza. Dopotutto, si tratta di una questione di metodo: l'editing deve essere svolto in modo rigoroso, tanto dal lato sostanziale quanto dal lato formale, applicando una tecnica che solo il tempo e l'esperienza possono consolidare. Sarà poi proprio questa tecnica a permettere di valutare criticamente ed autonomamente la ricerca che ha condotto all'esposizione di quei risultati su cui l'*editing* viene operato.

Diventare parte di una *Law Review* implica, quindi, l'idea di un vero e proprio percorso formativo, naturalmente pluriennale, affine e complementare a quello intrapreso con gli studi giuridici universitari. Lavorando in una redazione di questo tipo, la Formazione dell'aspirante giurista si arricchisce di un sapere dinamico, trasversale, multidisciplinare, ed insieme metodologicamente rigoroso e strutturato.

Credendo fermamente nel valore di questa attività, in virtù di quel processo di Formazione attiva e passiva che riguarda non solo i singoli membri della Redazione ma pure la Rivista nella sua globalità, la *Trento Student Law Review* ha potuto riaffermare ancor più chiaramente le sue finalità. Se ciò è stato possibile, lo si deve soprattutto alla nostra Facoltà di Giurisprudenza e, più in generale, all'Università di Trento, le quali ci hanno dimostrato supporto, fiducia e condivisione di una medesima progettualità: di tutto questo siamo profondamente riconoscenti.

Un ringraziamento ulteriore, sincero e doveroso, va all'intera squadra della TSLR.

Negli ultimi tre anni ho assistito alla crescita costante di questa Redazione, vedendo restituito il vero significato del lavoro di squadra: nessuna reale Formazione sarebbe possibile se non a partire dall'aperta

condivisione dell'esperienza, delle conoscenze e dei traguardi raggiunti, in un'opera di arricchimento costante e reciproco. Senza il prezioso contributo di ogni singolo membro della Redazione, niente di questo lavoro sarebbe possibile.

Un sentito grazie voglio infine rivolgerlo al mio amico e collega Vicedirettore Matteo Maurizi Enrici, da sempre mio compagno d'armi nelle schiere della *Trento Student Law Review*, costantemente in prima linea per difendere insieme un progetto e un ideale condivisi. Giunta ormai al termine del mio mandato quale Direttrice, a lui passo il testimone, certa che, con il nuovo *Managing Board* e la Redazione tutta, guiderà la Rivista verso ancor più importanti risultati.

Ad maiora!

Preface

Maria Grazia Torresi
Editor-in-Chief

The last few months have put the Trento Student Law Review in front of a fundamental question: "what is the aim of this project?". It was a non-negligible instance, to which it could not have been superficially replied, because the survival of this Board depended on the answer that we would have been able to find. Only by rediscovering the ultimate meaning of our job as editors and, before that, of our being students and aspiring jurists, we could have tried to assure continuity and stability to this young publishing activity.

The inherent value of this project may be conveyed in only one word: Formation, meant both as Education and Development of the individual.

The word "Formation" implies the idea of "Form", whose etymology links to the concepts of *bearing, affirming, maintaining*. Therefore, in its general meaning, Formation consists in giving shape to things, modelling them, organizing and establishing them. With regard to individuals, Formation is declined in two ways: on the one hand, the primary passive meaning transmits the image of a subject projected towards his own personal improvement, following the flow of external forces that act together on him and for him; on the other hand, Formation, if considered in an active sense, becomes the path of inner growth faced by the individual who confronts his limits and try to overcome them.

The experience of a student run scientific journal allows Formation to display its two proper meanings, active and passive, starting from the characterizing activity of a Law Review: the direct comparison with research and scientific production in all their different dimensions. The text of an article imposes forms and contents, calling the young editor to deal with them, to question them and, where necessary, also to correct them. In this way, the student not only acquires

a technique that proves useful on a professional level, but, above all, he also develops his own sensitivity towards scientific production, thanks to a more conscious exercise of critical thinking and attention to quality acknowledgment.

Being an editor consents to establish a peculiar relationship with the research, an inherently dialectical bond which teaches an important lesson: everything can be call into question, for this reason we must never stop at the surface of a text. It is always necessary to sneak into the white spaces between words, evaluating their real meaning and testing their authority. After all, it is a matter of method: editing must be done rigorously, both from the substantial and the formal side, applying a technique that only time and experience can consolidate. It will be precisely this kind of work to allow a critical and independent evaluation of that research on whose results the editing is operated.

Joining a Law Review means to start a real educational path, naturally multi-year, akin and complementary to the one which has been undertaken enrolling in a Law School. Working for such an editorial board, an aspiring jurist's Formation is enriched by a dynamic, wide, multidisciplinary, as well as methodologically rigorous and structured knowledge.

Firmly believing in the value of this project, by virtue of that active and passive Formation which concerns not only the single editors, but also the journal as a whole, the Trento Student Law Review has been able to reaffirm its aims even more clearly. If this was possible, it is above all due to our Law School and, more generally, to the University of Trento, since they have shown us all the needed support and trust, sharing with us the same future perspectives: for all this, we are deeply grateful.

Many further, sincere, and well-deserved thanks go to the entire TSLR Team. During the last three years I have been witness of the steady growth of this Board, learning the real meaning of teamwork: no Formation would be possible without an open sharing of experiences, knowledge, and achievements, without a constant engage in mutual enrichment. Nothing would be possible without the invaluable contribution of every single Board member.

Finally, I would like to extend a heartfelt thanks to my friend and colleague Vice Editor-in-Chief Matteo Maurizi Enrici, who has always been my comrade in arms in the Trento Student Law Review

ranks, constantly at the forefront to defend together a shared project and an ideal. Since my term as Editor-in-Chief has come to an end, I pass the baton to him, certain that, with the new Managing Board and the entire editorial team, he will lead this Law Review to even more important results.

Ad maiora!

The Heir to All the Ages: The Past, Present, and Future of Double Jeopardy

Isaac Amon*

Abstract: The legal doctrine of double jeopardy is one of the most august and long-standing principles in criminal procedure, yet the Magna Carta, the intellectual pantheon of liberties in western legal consciousness, noticeably does not mention the principle. This comparative examination of the history of double jeopardy shows that, while the doctrine arose in foreign legal traditions, it came – via medieval canon law – to influence the development of Common Law. This was manifested in the 12th century struggle for power between King Henry II (the progenitor of a law common throughout the English realm) and Thomas à Becket, the Archbishop of Canterbury, who in defending his clergy appealed to canon law, which included a prohibition on trying a man twice for the same offense. In contrast with most other legal traditions, even its Continental counterpart which arose within the same Western tradition, the Common Law developed a particularly unique interpretation of this doctrine. In the United States, this exceptional understanding was exhibited by the societal reverence for verdicts, particularly acquittals pronounced by a jury. These became, similar to ancient Roman law, so sacrosanct that judges could not overturn them, no matter how erroneous they may have been. More importantly, the state became unable to appeal an acquittal, despite some protestations to the contrary. In the 21st century, this doctrine has been modified by common law countries, including the United Kingdom, while the legal kulturkampf within the western tradition found its greatest apogee in the Amanda Knox saga. U.S. criminal procedure should reform this doctrine in extraordinary situations – for victims, society, and the rule of law.

Keywords: Common Law; Criminal Procedure; Jury Acquittal; Double Jeopardy; Amanda Knox

1. Introduction

The prohibition of subjecting a criminal suspect to double jeopardy has a long heritage. Considered a fundamental right around the globe today, its exact historical provenance remains unclear. This article analyses the ancient legal doctrine from multiple perspectives – history, text, tradition, rationale – while specifically examining the American conception, which is distinguished not only from non-western legal traditions, but also from the other western branch, as typified by continental Europe. Today, the United States stands alone in its exalted conception, even from the United Kingdom (the birthplace of the common law), due to notions of individualism, excessive distrust of centralized authority, and emphasis (at least in theory) upon the sacrosanct authority of trial by jury. Once a jury has acquitted a defendant in a criminal case, the government is barred from appealing, despite mistakes or new evidence which may later emerge.

This article is divided into four sections. Part One provides a historical background of double jeopardy within global legal traditions, while Part Two briefly examines the story of Amanda Knox, the most famous case study in modern times. Part Three discusses rationales for this prohibition, particularly those advanced for the atypical conception in the United States, and Part Four gives concluding remarks. This article recommends that the U.S. criminal justice system modifies the long-standing doctrine, as other common law countries have done, to permit prosecutorial appeal of acquittals in extraordinary situations.

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2. Historical Origins

Over a century ago, the Supreme Court of Oklahoma asserted that the doctrine of double jeopardy has forever been known to the Common Law and embedded in every system of jurisprudence[1]. Yet, in grave contrast to this "steady state" theory of eternal existence, the U.S. Supreme Court refused to apply the procedural protections of this doctrine to the states in 1937[2]. In *Palko*, although the defendant was charged with first-degree murder, he was convicted of second-degree murder. The State of Connecticut appealed and won a new trial, whereupon Palko was convicted of the initial charge and eventually executed. Justice Benjamin Cardozo, writing on behalf of the U.S. Supreme Court, upheld this ruling, noting that

> right-minded men could reasonably believe that, in espousing that conclusion, they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances, if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other[3].

Indeed, the Supreme Court did not fully incorporate double jeopardy to the States until three decades later, in 1969[4]. As noted by Justice

1. *Stout v. State*, 36 Okla 744, 756 (1913) ("It is impossible to trace the doctrine to any distinct origin. It seems to have been always embedded in the common law of England, as well as in the Roman law, and doubtless in every other system of jurisprudence, and, instead of having a specific origin, it simply always existed"). See also Jay A. Sigler, *A history of Double Jeopardy*, 7 Am J Legal Hist 283 (1963).
2. *Palko v. Connecticut*, 302 U.S. 319 (1937).
3. *Id.* at 323.
4. *Benton v. Maryland*, 395 U.S. 784 (1969) (The United States Supreme Court announced this decision within the context of incorporating numerous procedural protections laid out in the Bill of Rights to state governments throughout the 1960s, as part of the Warren Court Revolution. As Justice Thurgood Marshall, who wrote the decision in *Benton*, phrased it, "Our recent cases have thoroughly rejected the Palko notion that basic constitutional rights can be denied by the States as long as

Hugo Black, a 34-year member of the United States Supreme Court, a version of this principle was recognized in the days of classical antiquity[5]. The idea appears to have been so well known in Ancient Athens that the famed orator Demosthenes declared that "the laws forbid the same man to be tried twice on the same issue, be it a civil action, a scrutiny, a contested claim, or anything else of the sort"[6]. Yet, practice did not always follow theory. As Robert J. Bonner observed:

> A man could not be tried twice for the same offense. But the prosecutor of Euxitheus, a client of Antiphon, charged with murdering Herodes, contrived to expose him to the danger of being twice put in jeopardy of his life. Euxitheus protested vigorously at being tried as a 'malefactor' when the charge should have been murder – a strange protest, one might think. But the prosecutors, it was claimed, sought an advantage in bringing the lesser charge. They and their witnesses escaped the solemn oath required of all prosecutors and witnesses in homicide cases. The penalty for a 'malefactor' was assessable by the jury so the prosecutor could ask for capital punishment. Moreover, while a man charged with homicide was not incarcerated pending trial, the defendant indicted as a malefactor might be held in confinement and seriously hampered in his defense. If acquitted he would still be liable to be tried for murder [...] it is

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the totality of the circumstances does not disclose a denial of 'fundamental fairness.' Once it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments. *Palko*'s roots had thus been cut away years ago. We today only recognize the inevitable" (*Benton*, 395 U.S. at 795)). See also *Fong Foo v. United States*, 369 U.S. 141 (1962) (where the Supreme Court ruled that even if an acquittal had been erroneously directed by the trial judge, it was not reviewable as that would constitute a violation of double jeopardy.)

5. *Bartkus v. Illinois*, 359 U.S. 121, 151-52 (1959) ("Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. Its roots run deep into Greek and Roman times". (Black, J., dissenting)); See also Peter Westen and Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 S Ct Rev 81 (1978).

6. Demosthenes, *Olynthiacs Philippics; Minor public speeches; Speech against Leptines: I-XVII, XX*, § 147 at 589 (Harvard Univ. Press, 2d ed. 1998 [1st ed.1930]), cited in David S. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy*, 14 William & Mary Bill of Rights Journal, 193, 198 (2005).

> clear that [the prosecutor] exhibited [...] skill in achieving his purpose[7].

Furthermore, Ancient Rome – both in its republican and imperial phases – also provided for some legal protection against double jeopardy. Indeed, so engrained was this principle in Roman tradition that the historian Tacitus recorded that even the Emperor Tiberius was unable to overturn an acquittal rendered by a jury[8]. This example demonstrates how widespread the existing Roman cultural and legal *ethos* was that once a verdict of finality was pronounced, the accused could not be tried again for the same offense[9]. In other words, "if a jury court swerved to the right hand or to the left, there was no machinery by which it could easily be recalled to the narrow path of official orthodoxy [...] there was no appeal and no chance of reviewing the verdict of the jury"[10]. Notwithstanding these classical conceptions, debate over the doctrine's history, reach, and interpretation endures across great expanses of time and space.

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7. Robert J. Bonner, *Lawyers and Litigants In Ancient Athens: The Genesis of the Legal Profession* at 95 (The University of Chicago Press, 1st ed. 1927).

8. See Tac., *Annales* 3.38.2. See also James L. Strachan-Davidson, 2 *Problems of the Roman Criminal Law* at 157 (Cornell University Library, 1st ed. 1912) (noting that the inability of the Emperor Tiberius to overturn the jury verdict "fitted in ill with the imperial system, as it grew more and more arbitrary and despotic; and so the rulers lost no time in providing substitutes for trial by jury").

9. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 199 (cited in note 6), referring to Max Radin, *Handbook of Roman Law* at 475 (West Publishing Co., 1st ed. 1927). See also Sigler, *A history of Double Jeopardy* at 283 (cited in note 1) (observing that: "[t]his principle found final expression in the *Digest of Justinian* as the precept that 'the governor should not permit the same person to be again accused of a crime of which he had been acquitted'". In footnote 4, Sigler cites to D. 48.2.7 translated in Samuel P. Scott, *The Civil Law: including the Twelve tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo,* § 17 (Central Trust Co. 1st ed. 1932) (this historical code of laws became the foundation for the development of the doctrine in the roman-canon law in Western Europe).

10. Strachan-Davidson, 2 *Problems of the Roman Criminal Law* at 155 (cited in note 8).

2.1. The Common Law

In the beginning, it is imperative for scholars to examine the emergence of this doctrine in days of old for "[i]t is ancient common law that the state cannot twice put a man in jeopardy for the same offense"[11]. This categorical viewpoint is grounded within the larger myth of an unbroken continuity of the common law with the remote past[12]. Although classical antiquity knew of this doctrine, the modern incarnation does not extend as far back into the remote beginnings of the common law's origins as Coke and others constructed it through the ages[13]. The avowal that the origins of the double jeopardy doctrine lay within the mists of antiquity can be disproven by the simple fact that reference to it does not appear in several famous promulgations of rights; indeed, it does not appear even once in the Magna Carta

11. Comment, *Twice in Jeopardy*, 75 Yale L J 262 (1965).

12. John G.A. Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* at 37 (Cambridge University Press, 2d ed. 1987 [1st ed. 1957]) ("[B]y Coke's time the increasing activity of a nearly sovereign monarchy had made it seem to most common lawyers that if a right was to be rooted in custom [...] it must be shown to be immemorial in the full sense of 'traceable to no original act of foundation.' The idea of the immemorial therefore [...] ceased to be a convenient fiction and was heatedly asserted as literal historical truth; and the more that came to be known about remote ages, the more vigorously it was insisted that the law was before Abraham").

13. Ian Williams, *The Tudor Genesis of Edward Coke's Immemoral Common Law* 43 The Sixteenth Century Journal 103, 116-17 (2012) ("The order in which Coke and other common lawyers read their material is important. As a matter of chronology, Coke read backwards. He read the most recent material first and then moved farther into the past. Such an approach is unsurprising for a working lawyer whose first criterion for selecting reading material was probably its perceived utility in legal argument. Reading the texts in this order may have generated, or reinforced, a perception of continuity. Even in the nineteenth century, Maitland could explain that if read only the works written 'by lawyers for lawyers,' then 'we may read our way backwards [...] until we are in the reign of Henry of Anjou, and yet shall perceive that we are always reading of one and the same body of law'."). See also Roscoe Pound, *Interpretations of Legal History* at 8-9 (The MacMillan Company 1st ed. 1923) ("Coke's Second Institute is a history of public law in which he seeks to make the case of the common-law courts against the Stuart kings by setting forth the immemorial common-law rights of Englishmen, possessed by their forefathers from the beginning and declared by Magna Carta, by a long succession of statutes, and by a long and continuous succession of judicial decisions...The purpose is not to find a basis for authority but to identify authority").

of 1215, which is considered the most famous repository of liberties in the annals of the common law[14] Considered "a symbol, a battle cry against oppression"[15], the longstanding doctrine of double jeopardy in the intellectual pantheon of the common law is conspicuously absent from this Great Charter of Liberties.

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14. See Sigler, *A History of Double Jeopardy* at 284-85. (observing that "[o]ther parts of the Bill of Rights [...] show a clearer historical development than does the double jeopardy clause. Trial by jury was mentioned in the Assize of Clarendon of 1166 and, according to an eighteenth century commentator, 'this great Jewel of liberty [...] (had) no less than fifty-eight times since the Norman Conquest, been established and confirmed by the legislative power. Bail and habeas corpus were mentioned specifically in early statutes, most notably in the Bill of Rights of 1689. Yet, double jeopardy is not mentioned in English statute law before its adoption into the American Constitution"). See also Dan Jones, *Magna Carta: The Birth of Liberty* at 4-5 (Viking 1st ed. 2015) ("From surprisingly early in the thirteenth century the document's legend had begun to outgrow its terms, and that process has continued to the present day. The Magna Carta played an important role in the English Civil War and the Glorious Revolution of 1688. It provided a constitutional first principle for the rebellious colonists of New England who became the founding fathers of the United States and it informed the drafting of the Constitution. Its words are echoed in the clauses of the U.S. Bill of Rights and the United Nations' Universal Declaration of Human Rights, and it was cited by Nelson Mandela in his famous Rivonia speech in 1964. Three of the Magna Carta's sixty-three clauses remain law in England today, but as one constitutional scholar [...] noted, it has been quoted in constitutional debates more frequently than any other text except for the Bible"). See also Nicholas Vincent, *Magna Carta: The Foundation of Freedom, 1215-2015* at 13 (Third Millenium Pub, 1st ed. 2014); See also Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 210 (cited in note 6) ("The earliest treatise on the common law, purportedly written by Ranulf de Glanville in the last part of the twelfth century, does not mention any protection against double jeopardy, nor is it included in the Magna Carta, which was originally issued by King John in 1215 and reaffirmed by King Edward I in 1297").

15. Mary D. Stenton, *Magna Carta* (Encyclopedia Britannica, August 31, 2021), available at: https://www.britannica.com/topic/Magna-Carta (last visited November 20, 2021) ("Whenever liberty seemed in danger, men spoke of the charter as their defense. It follows that the great and beneficent influence of Magna Carta in England and in every land across the sea in which Englishmen have settled has come not from the detailed expression of the feudal relationship between lord and man but from the more general clauses in which every generation could see its own protection. In England the Petition of Right in 1628 [in which Edward Coke played a role] and the Habeas Corpus act of 1679 look directly back to clause 39 of the 1215 charter. When in 17th-century America individual states were shaping their own fundamental laws, the very words of Magna Carta were worked into them. The fundamental rights of man embodied in the federal constitution of 1787 have echoes of the charter. Even as late as 1868 the 14th amendment can trace its ancestry to Magna Carta").

Yet, notwithstanding its exact historical provenance, the most important aspect of the doctrine is the finality of the verdict or judicial decision, as that is when jeopardy traditionally attached. "This requirement of finality was implicit in the four recognized special pleas in bar [as Coke categorized them] – *autrefois acquit*, *autrefois convict*, *autrefois attaint*, and former pardon".[16] *Autrefois acquit* is tantamount to a plea of a former acquittal[17], *autrefois convict* is a plea of prior conviction, whereas *autrefois attaint* is quite similar to that claim (a plea of having already been charged and thus "attainted" by a felony)[18] and, a former pardon is readily understandable. Importantly, the attainder was a plea that effectively argued "the party is dead in law by the first attainder, and hath forfeited all that he can forfeit"[19], though exceptions existed for this category[20]. William Hawkins distinguished between attainder and conviction by acknowledging that while "every attainder includes a conviction"[21], the reverse was not necessarily true. It was thus up to every individual judge to decide whether attainder applied in each case.

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16. Note, *Double Jeopardy: The Reprosecution Problem*, 77 Harv L Rev 1272, 1273 (1964). See also Sigler, *A History of Double Jeopardy* at 296-97 (cited in note 1) ("The contemporary categories of double jeopardy are contained in Coke's three pleas of *autrefois acquit*, *autrefois convict*, and former pardon [...]. To a considerable degree, Coke improvised the law of double jeopardy. He admitted that in his *Institutes* he had set down his own opinion [...] Coke may have strengthened the double jeopardy protection in his desire to ameliorate harsh English criminal penalties while weakening the king's power").

17. William Hawkins, 2 *Serjeant at Law, A Treatise of the Pleas of the Crown Or, A System of the Principal Matters Relating to that Subject, Digested Under Proper Heads "Of Courts of Criminal Jurisdiction and the Modes of Proceeding Therein",* at 515-16 (Law Booksellers and Publishers, 8th ed. 1824 [1st ed. 1716]): ("The plea of *autrefoits acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence, more than once. From whence it is generally taken, by all the books, as an undoubted consequence, that where a man is once found 'not guilty' on an indictment or appeal free from error, and well commenced before any court which hath jurisdiction of the cause, he may, by the common law, in all cases whatsoever plead such acquittal in bar of any subsequent indictment or appeal for the same crime").

18. *Id.* at 524.

19. *Ibid.*

20. *Id.* at 525-26.

21. *Id.* at 526-27.

In 1201, the annals of history recorded the first "mention in English law of an individual raising a plea of a former acquittal to bar a prosecution for the same offense"[22]. Goscelin, the son of Walter, brought a private lawsuit (known as an "appeal") against Adam de Rupe for having slain his brother, Ailnoth. "Adam claimed that 'on another occasion' Ailnoth's wife brought an appeal against him for the same killing and that 'withdrew quit therein by judgment of the lord king's court'"[23]. The court rejected the appeal, ruling "'the appealed has withdrawn quit therein"[24], thus recognizing the plea[25].

Most tantalizingly, this case appeared in English law prior to the proclamation of the Magna Carta. This perhaps helps to answer the question as to why double jeopardy is not referenced in that document – for though it occurred nearly a decade and a half before Magna Charta – this case was the first legal usage in English history. A most vivid example of double jeopardy comes down to us from the days of William "Rufus" II, who succeeded his father to the Throne of England twenty years after the Norman Conquest. Fifty men were forced to undergo the ordeal of hot iron[26]. Every man passed. Notwithstanding this "acquittal", the King "declared he would try them again by the judgment of his court, and would not abide by the pretended judgment of God"[27]. This sentiment was similarly expressed by Henry II,

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22. Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 202 (cited in note 6).

23. *Id*. at 203.

24. *Id*. at 199

25. *Id*. at 203-05 (observing that "[o]ver the next five hundred years, the guarantee against double jeopardy became firmly entrenched in the common law in the form of the pleas of *autrefois acquit* (a former acquittal), *autrefois convict* (a former conviction), and pardon"). For an alternative perspective, however, see Sigler, *A History of Double Jeopardy* at 290 (cited in note 1) ("Although it may be tempting to declare this [a similar case in 1203] a double jeopardy plea, it must be recalled that this is not even a criminal case. The state merely provided a forum for what was essentially a civil suit with criminal overtones, resolved as a claim in contract by the doctrine of accord and satisfaction...It is submitted that these cases are not strictly criminal matters, and thus do not involve the double jeopardy concept").

26. For more information on use of ordeals, see Isaac Amon, *The Timeless Quest for Truth in a World of Doubt: Re-Examining Modes of Proof in the Medieval Era*, 11 *Przegląd Prawniczy Uniwersytetu Im. Adama Mickiewicza* 141 (2020).

27. See John Reeve, 1 *History of the English Law* at 234 (Reeves & Turner 1st ed. 1869) as cited in Sigler, *A History of Double Jeopardy* at 286 (cited in note 1). See also

the progenitor of the common law, who "would not allow an acquittal awarded on the basis of trial by ordeal to prevent the possibility of a second trial"[28]. As Pollock and Maitland observed, "Henry II had declared when an indicted man came clean from the water, he was none the less to abjure the realm, if his repute among his neighbours was of the worst"[29]. Although English law knew of the doctrine, it was not always practiced[30].

In the future United States, the doctrine of double jeopardy appears to have first been recognized in 1641. The Massachusetts Body of Liberties, one of the earliest constitutional documents in American history and "the first legal code established by European colonists in

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Frederick Pollock and Frederic W. Maitland, 2 *The History of English Law: Before the Time of Edward I* at 599 (Cambridge University Press, 2d ed. 1968 [1st ed.1898]) ("Of fifty men sent to the ordeal of iron all had escaped. This certainly looks as if some bishop or clerk had preferred his own judgment to the judgment of God, and the king did well to be angry").

28. See 6 *The Laws of King Ethelred III* translated in Commissioners of the Public Records of the Kingdom, *Ancient Laws and Institutes of England* (1840) as cited in Sigler, *A History of Double Jeopardy* at 286.

29. Pollock and Maitland, 2 *The History of English Law: Before the Time of Edward I* at 599 (cited in note 27).

30. See Sigler, *A History of Double Jeopardy* at 289 (cited in note 1) ("There is some evidence of a plea somewhat similar to double jeopardy as early as the fourteenth century. The context in which the need arose was in the transition from the older procedure to the indictment. It was settled that an acquittal on an appeal after a trial by jury was a bar to a prosecution for the same offense by subsequent indictment. Conversely, an acquittal on an indictment was held a bar to the suit of the injured party seeking an appeal, but this was altered by the Statute of 1487. [...] After the statute, neither a conviction nor an acquittal on an indictment acted as a bar to a prosecution by way of appeal, for the same offense, if the appeal was brought within a year and a day. As late as 1709 it was possible for Chief Justice Holt to order an appeal on the same offense for which a man had been acquitted, against the evidence, on a prior indictment for murder"). See also John Baker, *R v Saunders and Archer (1573)*, in Philip Handler, Henry Mares and Ian Williams (eds.), *Landmark Cases in Criminal Law* at 37-39 (Hart Publishing 1st ed. 2017) (referring to the *Vaux*'s Case, where the defendant, indicted for murder, pleaded a previous acquittal as he had already been tried. Circumventing any question of twice placing him in jeopardy, judges held the original indictment to be defective). See also *Vaux's* Case, 76 English Report 992 (K.B. 1591) ("Since the defect rendered his trial a nullity, there was no bar to his being tried again. He was evidently then tried and convicted"). See also Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U Miami L Rev 306, 307 (1963).

New England"[31], declared that "No man shall be twise [sic] sentenced by Civill [sic] Justice for one and the same Crime, offence or Trespass"[32]. The doctrine of double jeopardy cannot be separated from the coercive power of the state[33], its historical development[34], nor the role of the jury[35]. Roman law's absolute bar thus foreshadowed current U.S. law which underpins the utter finality of the jury's verdict. As Richard Lippke has written:

> The extent to which legal doctrine in the United States pays deference to the verdicts of juries in criminal cases, especially when they are acquittals, is nothing short of remarkable. Juries are [...] [not] required [...] to explain how they arrived at their verdicts, or to provide reasons for them. Their verdicts are left standing when they are blatantly inconsistent. Though

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31. *Massachusetts Body of Liberties* (State Library of Massachusetts, available at https://www.mass.gov/service-details/massachusetts-body-of-liberties (last visited November 20, 2021).

32. See Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights* at 307 (cited in note 30). See also *1641: Massachusetts Body of Liberties*, § 42 (Online Library of Liberty), available at https://oll.libertyfund.org/pages/1641-massachusetts-body-of-liberties (last visited November 20, 2021).

33. See Sigler, *A History of Double Jeopardy* at 288 (cited in note 1) ("Since double jeopardy involves a limitation upon the power of the state to bring suit, criminal procedure must have developed to a point where the state has the power to conduct criminal actions at its discretion. This state of affairs did not obtain in England until quite late in its legal history").

34. *Id.* at 294 ("The fifteenth century double jeopardy concept was still not the same as that found in later English or American law. For example, attachment of jeopardy occurs, according to the American rule, at the time of the opening of the prosecution's case. The English rule requires a final verdict before jeopardy can be said to begin. But English double jeopardy in 1482 attached at the time of the plea of not guilty, since [...] [t]he defendant has pleaded a plea 'not guilty' by which he has put his life in jeopardy[...]. By 1676, the rule required an acquittal or conviction to constitute a prior jeopardy, the modern English rule. The period of the development of double jeopardy paralleled the rise of the modern state").

35. Akhil R. Amar and Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum L Rev 1, 56-57 (1995) ("The Double Jeopardy Clause in America has always, in important respects, piggybacked onto the right of jury trial in criminal cases. The two ideas work in tandem [...] [as] the absolute finality of jury acquittals ultimately draws its strength from certain historical and structural ideas about the constitutional role of juries [...]. (This is why pro-defendant decisions by judges are not as final in double jeopardy case law as pro-defendant decisions by juries).").

> defendants who are convicted can appeal to have their verdicts overturned [...] the state is granted no comparable right of appeal. Acquittals cannot be overturned even if [...] judges made [...] errors [...] [and] even when it is clear that juries ruled 'against the evidence'[36].

While the genesis of this doctrine was thus not clearly known in the annals of the common law, it was developed over time and came to be seen as an integral part of English legal history, venerated as a custom since time immemorial[37]. The colonists who crossed the Atlantic took these ideas with them and this legal principle was adopted by the governing framework of the nascent American Republic, which constitutionalized the double jeopardy doctrine in the 1791 Bill of Rights[38]. The 5th Amendment, which declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb"[39], has been the subject of extensive judicial and academic debate. In *Gamble v. United States*, issued in June 2019, the United States Supreme Court announced its most recent opinion on double jeopardy[40]. The majority upheld the long-standing principle of "dual sovereignty" in our constitutional scheme, re-affirming that the constitutional protection

36. Richard L. Lippke, *Modifying Double Jeopardy*, 15 New Criminal Law Review 511, 511-512 (2012).

37. Roscoe Pound, *Interpretations of Legal History* at 8 (cited in note 13) ("English legal history-writing prior to the nineteenth century...ha[d] an immediate practical purpose of setting up a historical sketch as a basis for the legal order. Fortescue writes a historical sketch to show that England had always been governed by the same customs from pre-Roman Britain. He could not claim the authority of Justinian nor of any other sovereign law-giver for the unwritten common law of England. But the 'written law' laid down that immemorial custom had authority as well as, and in the absence of, written laws, and the common law of England was shown by history to be the body of rules by which Englishmen had always been wont to adjudge controversies and to guide their conduct").

38. See Sigler, *A History of Double Jeopardy* at 285 (cited in note 1) ("[D]ouble jeopardy is not mentioned in English statute law before its adoption into the American Constitution. From this it may be concluded that either it was not so fundamental a privilege, or that it was obvious and well-established before the great writs of English history. Both propositions are tenable, but the former is much more probable than the latter in view of the development of English criminal law itself").

39. US Const Amend V, cl. 2.

40. *Gamble v. United States*, 139 S Ct 1960 (2019)

does not apply to successive prosecution of the same individual for the same criminal conduct by state and federal governments[41]. In dissent, two justices vigorously contended that the majority's ruling "diminish[es] the individual rights shielded by the Double Jeopardy Clause"[42] and that "the separate sovereigns exception was wrong when it was invented, and it remains wrong today"[43].

2.2. The Continental Law

Traditional Roman law had articulated a well-established antecedent of this doctrine[44], known today by the maxim "*ne bis in idem*". Upon Western Europe's rediscovery of the "Digest of Justinian" in the eleventh and twelfth centuries, and the subsequent teaching of this sixth-century work, the medieval Catholic Church and canonists looked to this code of laws as an additional legal source to help explicate its canonical rules[45]. Medieval scholars and canonists found biblical

41. *Ibid*.

42. *Id*. at 1996 (Ginsburg dissenting).

43. *Id*. at 2009 (Gorsuch dissenting).

44. In Roman law, the so called "*ne bis in idem*" principle was relevant both in civil and criminal procedure. On the one hand, in civil procedure - in the "*per formulas*" trial - the effects of the principle unfolded during the "*litis contestatio*" phase, during which the parties accepted the "*iudicium*" - the terms established by the magistrate on the basis of which the private judge would have decided on the merits of the controversy. Because of the *litis contestatio*, the *actio* (lawsuit) could have not been proposed again, regardless of the outcome of the process. So, the "*ne bis in idem*" in civil procedure determined a foreclosure, linked to the extinction of the right inferred in court. On the other hand, in criminal procedure there was not the *litis contestatio*, but the foreclosure effects were however produced, as it is remarked in Ulp., 7 *de off. procons*., D. 48.2.7.2. ("*Isdem criminibus, quibus quis liberatus est, non debet praeses pati eundem accusari, et ita divus Pius Salvio Valenti rescripsit: sed hoc, utrum ab eodem an nec ab alio accusari possit, videndum est. et putem, quoniam res inter alios iudicatae alii non praeiudicant, si is, qui nunc accusator exstitit, suum dolorem persequatur doceatque ignorasse se accusationem ab alio institutam, magna ex causa admitti eum ad accusationem debere*"); C. 9.2.9-pr. ("*Qui de crimine publico in accusationem deductus est, ab alio super eodem crimine deferri non potest*").

45. See Peter De Cruz, *Comparative Law in a Changing World* at 56-57 (Routledge, 1st ed. 2007) ("Over the eleventh and twelfth centuries, in keeping with the Renaissance in philosophy, canon law and theology, Roman law studies also experienced a rebirth and revival [...] it is difficult to assign a single reason for this event, but some writers place central importance on the lectures given in the late eleventh century by

support for the claim that no individual could be twice judged for the same offense[46]. For example, the Book of Nahum states that "God does not judge twice in the same matter"[47], which was then included into Gratian's *Decretum*[48] and in canonist procedural literature[49].

Connected with the principle of double jeopardy was that of presumption of innocence. Even more powerful support for the proposition that divine law provided this presumption was found in the Book of Genesis. The biblical narrative of the primordial couple, and their struggles with the wily serpent– culminating in humanity's expulsion from their "birthplace" in the primordial Garden of Eden – at least provided a silver lining. Upon having disobeyed the divine command by eating from the Tree of Knowledge of Good and Evil, Adam and Eve "realized that they were naked"[50]. Whereupon, "God called out to the man and said to him, 'where are you?'"[51]. Hence, the biblical narrative concludes with a dialogue between man and the omniscient,

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Irnerius (c 1055-1130), who gave the first university lectures on the *Digest* at Bologna, the first modern European university where law was a major subject [...] Irnerius' lectures at Bologna heralded the study of the *Corpus Juris* in Western Europe as a coherent, systematic body of law. By the middle of the twelfth century, there were about 10,000 students in Bologna. The Italian universities became the centre of learning for scholars all over Europe, from whence it spread.").

46. Heikki Pihlajamaki & Mia Korpiola, *Medieval Canon Law: The Origins of Modern Criminal Law*, in Markus D. Dubber et al. (eds.), *The Oxford Handbook of Criminal Law* at 215 (Oxford University Press 1st ed. 2014).

47. *Tanakh*, *Book of Nahum*, § 1 at 9 (Chabad), available at https://www.chabad.org/library/bible_cdo/aid/16194/jewish/Chapter-1.htm (last visited, November 20, 2021).

48. See C. 23, q. 5 c. 6.

49. Pihlajamaki and Korpiola, *Medieval Canon Law: The Origins of Modern Criminal Law* at 215 (cited in note 46). One of the most influential lay jurists, Bartolus de Saxoferrato, recognized the doctrine, for example, in *In secundam Digesti novi partem commentaria*, Venice, 1585, l. *Si cui*, § *Iisdem*, tit. *De accusationibus*, n. 1 ("*Absolutus non potest de eodem crimine accusari ad eodem vel ab alio, nisi fuerit ingnorans et suam iniuriam persequatur*") and, again, in *ibidem*, l. *Divus Adrianus*, tit. *De custodia et exhibitione reorum*, n.11, where the principle is affirmed to be valid for the *accusatio* as well as for the *inquisitio* ("*Finaliter credo idem iuris esse sive quis absolvitur super denunciatione, sive super accusatione, sive super inquisitione*").

50. *Genesis* at 3.7, in Nosson Scherman, *The Chumash : the Torah : Haftaros and five Megillos with a commentary anthologized from the Rabbinic writings* at 17 (Mesorah Publications 7th ed. 1997).

51. *Genesis* at 3.9 in Scherman, *The Chumash : the Torah : Haftaros and five Megillos with a commentary anthologized from the Rabbinic writings* at 17 (cited in note 49).

omnipotent, and omnipresent Creator. The significance of this extended dialogue is that the Creator offered man a chance to explain himself before pronouncing judgment and sentence[52]. Thus, how much more so did man have to presume innocence when sitting in judgment upon fellow men.

Medieval canonists – by finding divine origins in legal presumption of innocence in criminal cases –combined heavenly imprimatur with the evolution through the medieval era of the doctrine of double jeopardy. These ranged from the Thirteenth century writings of William Durand, who observed that "particularly of those who are accused that they cannot be accused of the same crime by anyone if they are absolved" – to the "writings of leading Sixteenth-century jurists such as Prospero Farinacci (1554-1618) and Julius Clarus (1525-1575)"[53]. Hence, it appears this amalgamation of traditional Roman law and medieval canon law collectively crystallized into the continental law conception of double jeopardy[54]. This doctrine evolved around the same time in both common and continental law. Indeed, the *Fuero Real* of 1255 – produced during the reign of the famous King Alfonso X of Castile and Leon – proclaimed that

> After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offence... Several years later, *Las Sietas Partidas*, also promulgated by Alfonso X, was completed. It proclaimed: 'Where a man has been acquitted, by a valid judgment, of some offense of which he was accused, no one can afterwards charge him with the

52. See Kenneth Pennington, *Innocent unitl proven guilty: the origins of a legal maxim,* 63 Jurist: Studies in Church Law & Ministry 106, 113 (2003).

53. Pihlajamaki and Korpiola, *Mediaval Canon Law: The Origins of Modern Criminal Law* at 215 (cited in note 46).

54. *Ibid.* See also Theodor Mommsen, 1 *The History of Rome* at 188 (Macmillan Co. 1st ed 1908) (although canonists did not develop double jeopardy in all its details, it influenced later development. History thus permits later generations to "acquire some idea of the breadth of the gulf which separates our modes of thinking and feeling from those of the civilized nations of antiquity. Tradition, with its confused mass of national names and its dim legends, resembles withered leaves which with difficulty we recognize to have once been green").

> same offense [except when he colluded in bringing the original charge and suppressed evidence...][55].

While it is not exactly clear whether Roman law directly influenced English law or if the latter evolved independently, at least one scholar has advanced the proposition that English law was influenced, in stark contrast to Sir Edward Coke (and his devotees') contention that the common law remained impervious to outside influence, following the Norman Conquest of the English Realm[56]. Yet, even if the common law was influenced by foreign law and tradition, double jeopardy appears not to have been appealed to as a defense in the Realm until the early Thirteenth Century[57]. Coke's forceful assertion that the common law – with its attendant doctrines, including double jeopardy – dated unchanged to time immemorial thus does not pass muster[58]. An alternative perspective which has been advanced is that double jeopardy originated in the common law due to the bitter fight between Archbishop Thomas à Becket and King Henry II in the late twelfth century, a microcosm of the larger medieval power struggle between church and state[59].

The Constitution of Clarendon– convened by Henry II in 1164 – promulgated "a formal statement embodying the previous customs concerning the jurisdiction of the Church in certain matters"[60]. This statement attempted to restrict ecclesiastical privilege, including a canonical version of double jeopardy[61]. The Church had traditionally been permitted to try clergymen in their own ecclesiastical courts

55. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 213 (cited in note 6), quoting Robert I. Burns, 5 *Las Siete Partidas* at 1309 (University of Pennsylvania Press, 1st ed 2001) (Samuel Parsons trans).

56. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 205 (cited in note 6).

57. An example is represented by the case of Adam de Rupe, as discussed above in this article at § 2.1.

58. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 213-14 (cited in note 6).

59. *Id.* at 205.

60. *Id.* at 206.

61. *Id.* at 207.

and punish them in accordance with canon law[62]. This ecclesiastical prerogative severely undermined secular power, and Henry II was determined to assert royal supremacy[63]. Therefore, in cases where clergymen were accused of secular crimes, the king declared that they were to first be tried in the royal courts, and "from there be sent to the church court, where they were to be tried, unfrocked after conviction in the presence of a royal officer, and then sent back under guard to the king's court to be punished as laymen"[64]. Their property or goods would subsequently be attainted and would accordingly be confiscated by the Crown[65].

Becket vigorously protested, arguing that "clerics could be tried and punished only in an ecclesiastical court and that a cleric convicted in such a court and deposed from his orders could not subsequently be brought to the royal court for punishment"[66]. He reasoned that this edict would be tantamount to punishing the same individual twice for the same offense, violating the longstanding ecclesiastical (and thus divine) prohibition; "*nec enim Deus iudicat bis in idipsum*"[67]. For this repeated defiance, the Archbishop was slain by knights loyal to Henry on 29 December 1170[68]. His assassination elevated him to sainthood

62. *Id*. at 205; see also Newman F. Baker, *Benefit of Clergy - A Legal Anomaly* 15 Ky L J 85 (1927).

63. See John Guy, *Thomas Becket: Warrior, Priest, reel; A Nine-Hundred-Year-Old Story Retold* at 93 (Penguin 1st ed. 2012) ("Henry's intention was to win control of both the opening and closing stages of every trial and to make unfrocking and delivery of criminous clerks to the secular power for capital punishment or mutilation the automatic and invariable sentence, so that the royal judges should not be handicapped by the church in any way. What had...been allowed in highly exceptional cases was now to be turned into a general rule. From the church's viewpoint, this was not a compromise but a rout").

64. *Id.* at 192-93.

65. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 207 (cited in note 6).

66. *Ibid*.

67. *Ibid*. See also Pollock and Maintland, *1 The History of English Law: Before the Time of Edward I* at 448 (cited in note 26).

68. See Winston S. Churchill, 1 *A History of the English- Speaking People*s at 166 (Cassell 1st ed. 1956) ("The scene and the tragedy are famous. He confronted [the four knights] with Cross and mitre, fearless and resolute in warlike action, a master of the histrionic arts. After haggard parleys they fell upon him, cut him down with their swords, and left him bleeding like Julius Caesar, with a score of wounds to cry for vengeance").

and won him, and his Church, a posthumous victory in this contest for supremacy[69]. Becket's view of ecclesiastical superiority prevailed for several centuries until the rise of increased skepticism. "Until the Reformation the Church retained the system of ecclesiastical courts independent of the royal authority, and the right of appeal to Rome, two of the major points upon which Becket had defied the king"[70].

Most importantly, Becket's appeal to canon law in his dispute with Henry II was historic for two reasons. First, while "a maxim may be little more than a slogan, concealing rather than revealing a meaning"[71], his dramatic invocation of canon law – a mere century after the Norman Conquest – confirms that Roman-canon law influenced the development of the double jeopardy doctrine. Second, Becket's defense appeared more than four decades before the first recorded use of the plea of *autrefois acquit*, in the case of Adam de Rupe. Indeed, his appeal could well be the first time that an argument of double jeopardy had been invoked in the Realm, directly predicated upon a long-standing legal maxim of the Church.

Perhaps just as significantly, this clash between Thomas à Becket and Henry II places the development of criminal procedure in a vastly different context. It truly evokes a different past, one at odds with the traditional narrative of the common law. Their clash stands not just as one between two men, or even between church and state, but between the development of a law common to the realm (the "common law') and the more-established roman-canon legal tradition. The common law had just begun to be developed; it was around this time that "[a] new mode of proof was penetrating and dislocating [the ordeals], namely, the proof given by the verdict of a sworn inquest of

69. *Ibid.*

70. *Id.* at 167. See also Baker, *Benefit of Clergy - A Legal Anomaly* at 94 (cited in note 61) ("[Following Becket's murder] Henry was forced to admit the right of the Church to the privilege of benefit of clergy...in 1176, an agreement on the subject was made between Henry and the Papal Legate Hugo. This agreement provided that in criminal cases in the future, no clerk should be tried in person before a secular judge [...]. Thus, we find benefit of clergy firmly established and respected by civil authorities largely because of the martyrdom of Archbishop Becket").

71. See Sigler, *A History of Double Jeopardy* at 298 (cited in note 1).

neighbours"[72]. Trial by jury thus began at Clarendon in 1166[73], which temporally pre-empted the introduction of the continental inquest into common law[74].

In the end, the power struggle between Henry II and Thomas à Becket will remain indispensable to the annals of western legal history, for it irrevocably altered the story of criminal procedure[75], and strongly shows an intimate link between the development of the common and continental systems of criminal law[76].

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72. Pollock and Maintland, 2 *The History of English Law: Before the Time of Edward I* at 604 (cited in note 26).

73. See John H. Baker, *An Introduction to English Legal History* at 73 (Oxford University Press, 4th ed. 2007 [1st ed. 1990]).

74. See Pollock and Maintland, 2 *The History of English Law: Before the Time of Edward I* at 604 (cited in note 26). See also Peter De Cruz, *Comparative Law in a Changing World* at 59 (cited in note 45) ("The common law of Europe that eventually emerged towards the end of the Middle Ages was, therefore, a mixture of local statutes and customs, and a form of Roman law as interpreted by the various schools of thought and canon law. The unity achieved by the reception of Roman law into the civil law was further reinforced by canon law, which had become the universal law of the Western Church and which remained in use even in the darkest days of Roman law. English courts, on the other hand, never received Roman law at all, despite the fact that it was known and taught, due to centralisation of courts at an early stage, powerful monarchs and the pragmatic character of early English law).

75. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 209 (cited in note 6) ("[T]he origin of the protection against double jeopardy in English law 'is, and undoubtedly will remain, a matter of speculation,' because 'much of Western law derives from a common fund of shared judicial concepts'").

76. See David J. Seipp, *The Reception of Canon Law and Civil Law in the Common Law Courts before 1600*, 13(3) Oxford J Legal Stud 388, 392 (1993) ("Over the period from 1400 to 1600, common lawyers came to invoke these other bodies of law in more and different circumstances. Common lawyers also came into more and more frequent contact with the exponents of those other laws, the doctors of civil law and canon law. This increasing interest in the bodies of law shared with continental Europe is one sign that the community of English common lawyers gradually adopted a more sophisticated, cosmopolitan outlook. Their growing acquaintance with the other laws led English common lawyers to engage in more reflective and comparative study of their own law").

2.3. Jewish Law

The panoply of procedural protections that *Halacha* (Jewish law) afforded to the defendant are noteworthy[77]. Especially in capital cases, *Halacha* recognized and strictly enforced the doctrine of double jeopardy. Indeed, so similar is the *Halacha* to the categorical rule in the American criminal justice system today (in stark contrast to European law and even modern English law, as will be seen) that "in capital cases, an acquittal may not be reversed"[78]. In Tractate Sanhedrin of the Babylonian Talmud[79], the rabbis, as interpreters of the Law, developed the categorical rule that, in capital cases, only convictions could be reversed, as they ruled that "they are not reversed in favor of conviction"[80].

Indeed, the rabbis had advanced the principle that the absolute bar on double jeopardy – like canon law – was of divine origin. They identified it, however, in a different location than the canonists deriving it

77. See Irene Merker Rosenberg and Yale L. Rosenberg, *Comparative American and Talmudic Criminal Law* 2016 University of Houston Law Center, Public Law and Legal Theory Research Paper Series at 1, 11-13 (2016): ("The rabbinic legal system itself is sui generis and so extreme in protecting both the innocent and the guilty that some the safeguards afforded the defendants in criminal cases were merely idealistic and pedagogical, and were never actually implemented...[Nonetheless] it is undisputed that the rules constraining the rabbinic courts in criminal cases constitute normative Jewish law. The various evidentiary, procedural, and substantive barriers to imposition of punishment by the rabbinic courts amount a supercharged Bill of Rights [...] it is clear that normative Jewish law operative in the rabbinic courts would make that judicial system a criminal defense attorney's dream tribunal and a prosecutor's worst nightmare").

78. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 197 (cited in note 6).

79. ee Nathan Ausubel, *The Work of Jewish Knowledge: An Encyclopedia of Judaism and the Jewish People, Covering All Elements of Jewish Life from Biblical Times to the Present* at 442-43 (Crown Publishers, 1st ed. 1964) ("The Talmud...is not just one work – as is commonly taken for granted – but a collection of many works...It is, in fact, a virtual library of treatises which dwell on the Rabbinic laws and regulations, traditions, customs, rites and ceremonies, and civil and criminal laws...[It] contains opinions, discussions and debates, and moralistic aphorisms and biographic exempla of the Rabbinic sages...").

80. *Babylonian Talmud: Tractate Sanhedrin* at 33a-33b (Halakhah), available at: https://halakhah.com/sanhedrin/sanhedrin_33.html (last accessed, November 20, 2021).

from the Book of Exodus (23:7): "Distance yourself from a false word; do not execute the innocent or the righteous, for I shall not exonerate the wicked"[81]. The influential rabbinic commentator Rashi, who lived in France during the Norman Conquest, explained the implications of this biblical verse:

> How do we know that if one leaves the court convicted and sentenced to death, and someone says, 'I am able to argue in his favor and prove his innocence,' that they return him to the courtroom and renew their deliberations? The Torah says, 'Do not kill one who is innocent,' even though he is not 'righteous,' in that he was not vindicated by the court; nonetheless, he is free from the death penalty because you have grounds to acquit him if his would-be defender has legitimate proof of his innocence. And how do we know that one who leaves the court acquitted, and someone says, 'I am able to argue against him and prove his guilt,' that they do not return him to the courtroom to retry him? The Torah says, 'Do not kill someone who is righteous,' and this one is righteous, for he has been vindicated[82].

Rashi therefore concluded that divine action would be taken, if necessary, against the individual[83]. David S. Rudstein identifies numerous references throughout the Babylonian Talmud that declare in no uncertain terms an absolute bar on double jeopardy. For example, he references the opinion of Rabbi Akiva – one of the most famous Jewish sages – in Tractate Makkoth (13b) that an individual who is liable for the death penalty is not permitted to be flogged, for he would then be tried twice for the same offense, which would constitute a violation of the divine law, as detailed in the Book of Deuteronomy[84]. A

81. *Genesis* 23:7 in Scherman, *The Chumash : the Torah : Haftaros and five Megillos with a commentary anthologized from the Rabbinic writings* at 435 (cited in note 49).

82. Yisrael Herczeg, 1 *Saperstein Edition: The Torah With Rashi's Commentary Translated, Annotated, and Elucidated, Book of Exodus* at 299 (Mesorah Publications 1st ed. 1995).

83. *Ibid*.

84. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 197 (cited in note 6), quoting Isidore Epstein, *Babylonian Talmud, Tractate Makkoth 13b*, (Soncino Press, 1935) (H.M. Lazarus, trans). See also *Deuteronomy* at 25:2, in Scherman, *The Chumash : the Torah : Haftaros and five Megillos with a commentary*

further Talmudic source is Tractate Kethuboth 32b, where Rabbi Johanan argues "that a man who engaged in forcible sexual intercourse with his maiden sister would be liable only for the lashes", and not for a monetary fine in addition to it, on the ground of the same biblical verse used by Rabbi Akiva. Another biblical source that is strongly indicative of an explicit antecedent to the doctrine of double jeopardy relates back to whence medieval canonists located the doctrine: the Book of Genesis. After condemning Cain to perpetual exile for the horrific crime of fratricide, God subsequently decreed that no additional punishment, including the slaying of Cain, would be divinely countenanced.[85] Ultimately, this absolute bar in Jewish law on reversing acquittals appears peculiar amongst religious traditions and approximates current legal practice in the U.S.[86].

2.4. Islamic Law

Islamic law does not appear to explicitly prohibit double jeopardy, but this doctrine has been derived by scholars from general principles

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anthologized from the Rabbinic writings at 1063 (cited in note 49) ("[I]t will be that if the wicked one is liable to lashes, the judge shall cast him down and strike him, before him, according to his wickedness, by a count". Rabbi Akiva apparently derived from this biblical verse that "'you make [the guilty man] liable to punishment for one misdeed, but you cannot hold him liable [...] for two misdeeds [...] [i.e., death and lashes]'").

85. See Rudstein, *A Brief History of the Fifth Amendment Guarantee Against Double Jeopardy* at 197-98 (cited in note 6). See also generally *Genesis* 4:13-15 in Scherman, *The Chumash : the Torah : Haftaros and five Megillos with a commentary anthologized from the Rabbinic writings* at 21. See also *Ex Parte Lange*, 85 US 163, 168 (1873) ("If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence").

86. See Rosenberg and Rosenberg, *Comparative American and Talmudic Criminal Law* at 24 (cited in note 76) ("Indeed, Jewish law is a fundamental building block of Western civilization. Consciously or not, the United States has adopted basic concepts of Jewish criminal procedure, such as double jeopardy, the privilege against self-incrimination, notice, and the ex post facto prohibition. Moreover, the Supreme Court itself has referred to Jewish law in support of some of its most important rulings. Finally, notwithstanding their differences, both systems address the core concern of dealing properly with those accused of crime, and both set up rules limiting and canalizing the criminalization process".)

of the *Shari'a*. As Farhad Malekian has noted[87], the Quran stresses intent, as far as it recognizes that:

> God will not burden any soul beyond its power. It shall enjoy the good which it hath acquired, and shall bear the evil for the acquirement of which it laboured. O our Lord! punish us not if we forget, or fall into sin [...] and lay not on us a load like that which thou hast laid on those who have been before us [...] and lay not on us that for which we have not strength: but blot out our sins and forgive us, and have pity on us[88].

Islam thus highlights the divine role of mercy and emphasizes an unbending insistence upon the administration of justice as one of the first principles of the faith[89]. However, there is no clear prohibition in Islamic law[90]. Thus, Islamic countries in the modern world have often incorporated various aspects of the *Shari'a* along with western legal concepts. Accordingly, the doctrine of double jeopardy appears to be the result of this respective amalgamation[91]. This mélange is best

87. See Farhad Malekian, *Corpus Juris of Islamic International Criminal Justice* at 231 (Cambridge Scholars Publishing 1st ed. 2017).

88. *The Koran* at 2:286 (W&N 1st ed. 2001) (Alan Jones ed, J.M. Rodwell trans).

89. See Malekian, *Corpus Juris of Islamic International Criminal Justice* at 231 (cited in note 86). See also Silvia Tellenbach, *Islamic Criminal Law*, in Dubber et al. (eds.), *The Oxford Handbook of Criminal Law* at 253 (cited in note 46) ("God is omnipotent and merciful; therefore, he does not need to insist upon the punishment of crimes against claims. This is why it is nevertheless, in many cases, possible to avoid a hadd punishment").

90. See Richard J. Terrill, *World Criminal Justice Systems: A Comparative Survey* at 569 (Routledge 9th ed. 2016) ("The Quran consists of 114 chapters or surats (surah, singular) and 6,342 verses or ayas (ayah, singular) [...] [many of the legal verses] are concerned with religious duties, such as prayer and fasting [...]. Some were revealed with the aim of repealing objectionable customs such as infanticide, usury, gambling and unlimited polygamy. Others laid down penalties with which to enforce the reforms that the Quran had introduced. But on the whole, the Quran confirmed and upheld the existing customs and institutions of Arab society and only introduced changes that were deemed necessary. It was further estimated that approximately 30 verses dealt with crimes and corresponding sanctions, while another 30 pertained to matters of justice, equality, and rights and obligations of people").

91. See Tellenbach, *Islamic Criminal Law* at 266 (cited in note 88) ("In the category of crimes punished with ta'zir punishments – a category that in practice comprises far more than 90% of crimes even in states such as Iran and Pakistan – Islamic

exemplified by the Arab Charter on Human Rights. Promulgated in Cairo in 1994 by member states of the Arab League, this document intended to bridge the cultural *ethos* of both East and West. "Being proud of the humanitarian values and principles for which it firmly established in the course of its long history"[92] declares the Preamble, the Arab World is accordingly an ideal "international focal point for seekers of knowledge, culture and wisdom"[93]. Article 16(1) explicitly protects against double jeopardy, affirming that "No one shall be tried twice for the same offence"[94]. Although the pleas of *autrefois acquit* or *autrefois convict*, or its functional Latin equivalent, *ne bis in idem*, are not explicitly stated, Article 16(2) permits an individual who suffers a double jeopardy violation to demand their release[95], and declares that "they shall be entitled to compensation"[96].

Islamic law scholars have described the doctrine of double jeopardy as "the most decisive axiom among the international human rights law instruments and is regarded as an obligatory norm in international criminal law instruments"[97]. However, not every Islamic country follows it as strictly as it has been construed in the Western legal tradition. For example, the Iranian Criminal Code, promulgated after the 1979 Islamic Revolution, "does not apply the *ne bis in idem* rule [...] in cases in which a perpetrator has been judged and punished abroad before being brought before an Iranian court"[98]. The potential imposition of a second punishment in this case can be traced to a clash between differing legal traditions, or perhaps as importantly, as

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criminal law exhibits a very high degree of flexibility. As a result, states that apply Islamic law can still adopt [...] portions of Western criminal codes or [...] use Western law as a model").

92. Arab Charter on Human Rights, Preamble (League of Arab States, March 22, 2014) available at https://www.refworld.org/docid/3ae6b38540.html (last visited November 20, 2021).

93. *Ibid*.

94. Arab Charter on Human Rights, Art 16, cl 1 (cited in note 91).

95. Arab Charter on Human Rights, Art 16, cl 2 (cited in note 91).

96. Arab Charter on Human Rights, Art 16, cl 3 (cited in note 91).

97. Mansour Rahmdel, *The 'Ne bis in idem" rule in Iranian criminal law,* 11 Journal of Financial Crime 277, 280 (2004).

98. See Tellenbach, *Islamic Criminal Law* at 322 (cited in note 89). See also *Islamic Penal Code of Iran*, Art. 7 (20 November 1991) available at: https://www.refworld.org/docid/518a19404.html (last visited November 20, 2021).

an Islamic country refusing to recognize a judgment by a non-Islamic court[99].

A similar case study is that of Pakistan, which gained independence as a secular state in 1947 under the leadership of Muhammad Ali Jinnah. The legal system was heavily influenced by British law during their long occupation of the Indian subcontinent; it has retained several common law features. This includes, *inter alia*, Article 13(a) of the 1973 Constitution, last revised in 2012, which proclaims that "No person shall be prosecuted or punished for the same offence more than once"[100]. After General Zia-ul Haq became President in 1979 – the same year as the Iranian Revolution – the criminal justice system began to be "islamized," so that by the early 1980s, *hadd* offenses (any offence specifically stated in the Quran or Sunna, the traditions of the Prophet) were formally incorporated into the criminal law.[101] Although these divinely mandated punishments have been the subject of some scholarly interpretation, "[t]he most well-known text

99. See Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* at 3 (2009) ("In the absence of treaty commitments, countries are under no obligation to recognize and/or enforce foreign judgments. Although nearly all countries now do so regularly, this State practice is not considered specific enough to create actual rules of customary international law"; *Id.* at 7: "[A]ll legal systems and virtually all more recent conventions allow States to deny recognition to foreign judgments that violate the enforcing State's public policy. For example, the Middle Eastern conventions from 1983 and 1995 (see para. 19) allow Member States to refuse recognition to foreign judgments that are contrary to Islamic Law; this can, if read literally, become a broad restriction").

100. *The Constitution of the Islamic Republic of Pakistan*, Article 13(a) (modified 2012), available at http://na.gov.pk/uploads/documents/1333523681_951.pdf (last visited November 20, 2021).

101. Martin Lau, *Twenty-Five Years of Hudood Ordinances – A Review*, 64 Wash & Lee L Rev 1291, 1292 (2007) ("The ordinances introduced into the legal system of Pakistan were ostensibly Islamic criminal laws. As a result, theft, consumption of intoxicants including alcohol, extra-marital sex including rape, and making false allegations of adultery were all governed by Islamic criminal law. Until 1979 these offenses had been governed by the purely secular Pakistani Penal Code – legislation enacted in 1860 by the British colonial government and later adopted in Pakistan at the time of independence in 1947").

[of a hadd] is [...] 'As for the thief, both male and female, cut off their hands'"[102].

The significant aspect of this "islamization" of criminal offenses was that it "created not only the entirely new criminal offenses of adultery and fornication, behavior that had not been treated as criminal under the provisions of the Pakistan Penal Code, but also the new punishments of whipping and stoning to death"[103]. While this period of rapid islamization thus modernized remnants of British law that had remained legally binding, use of these strengthened blasphemy laws over the period 1987-2015 resulted in 1,500 allegations against Muslims, Hindus, Christians, and Ahmadis[104].

Created in the 1980s, the Federal Shariat Court ("FSC") "was to be composed of eight Muslim judges who were qualified to sit as High Court judges"[105]. Importantly, its jurisdiction exceeds that of the High Court, as the former "can, either on its own or in response to a citizen's petition, review any provision of Pakistani law to determine"[106] whether it truly violates the *Shari'a*. "If it finds the law repugnant, the FSC can declare the law invalid and force the legislature either to amend it or to let it lapse"[107]. Most significantly, after examining a criminal case decided under the *Hadd* laws, the Federal Shariat Court can "change any finding or sentence...includ[ing] the ability to change an acquittal to a conviction"[108].

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102. H. Patrick Glenn, Legal Traditions of the World at 197 (Oxford University Press 4th ed. 2010).

103. Lau, *Twenty-Five Years of Hudood Ordinances* at 1296 (cited in note 100).

104. BBC, *What are Pakistan's blasphemy laws?* (BBC News, May 8, 2019), available at: https://www.bbc.com/news/world-asia-48204815 (last visited November 20, 2021).

105. Dorothy Q. Thomas, *Double Jeopardy: Police Abuse of Women In Pakistan* at 48 (Human Rights Watch 1st ed. 2012).

106. *Ibid.*

107. *Ibid.*

108. *Ibid.* See also *Asia Bibi v. The State, Criminal Appeal* (Supreme Court of Pakistan, 2015) at 9-10, available at: https://www.supremecourt.gov.pk/downloads_judgements/Crl.A._39_L_2015.pdf (last visited November 20, 2021) (holding:"[a]s per this provision, the act of blasphemy was made culpable and the sentence provided was either death or imprisonment for life along with a fine. The validity of this provision was considered by the Federal Shariat Court in the case *Muhammad Ismail Qureshi v. Pakistan through Secretary, Law and Parliamentary Affairs* (Supreme Court of Pakistan, 2010) wherein the Court ruled that Section 295-C of PPC was repugnant to the

This judicial power perhaps finds its greatest expression in the Zina Ordinance. Most challengingly, this law has resulted in many women being convicted of adultery after claiming they had been raped, for under the *Shari'a*, four witnesses must have been present for the act, which is exceedingly unlikely to occur in practice[109]. If a woman alleges rape, without this necessary number of witnesses, the allegation can be directed against her, as she can be accused of adultery or extra-marital sex[110]. Yet, similar to the Iranian Penal Code, this special authority may also express an Islamic court's refusal to acknowledge a secular ruling, particularly if committed – in the eyes of the FSC – against the *Shari'a*. The most intriguing aspect of this clash between two legal traditions is that it occurs within the same country's justice system[111].

2.5 Confucianism

East Asia is comprised of different legal traditions and societies, though the region has been heavily influenced by Chinese tradition, due to its sheer geographical size and the immense Confucian legacy. Traditional dynasties in Chinese history – notably the Sui, Tang, and Ming – all compiled detailed written penal codes, centuries before their counterparts in the western legal tradition (the continental model) imitated this practice[112]. In general, it can thus reasonably be

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fundamental principles of Islam to the extent that it provided for the punishment of life imprisonment which acted as an alternative to a death sentence. It was held that the penalty for contempt of the Holy Prophet (صلى الله عليه وسلم is death. It was further held that if the President of the Islamic Republic of Pakistan did not take any action to amend the law before 30th April, 1991, then Section 295-C would stand amended by the said ruling'").

109. Lau, *Twenty-Five Years of Hudood Ordinances* at 1297 (cited in note 100).

110. *Id.* ("Described as "double jeopardy," the criminalization of any sexual intercourse outside a valid marriage, irrespective of consent, turned the offense of rape on its head by exposing the victim to the risk of punishment for adultery".)

111. Peter G. Strasser, *The Evolving Pakistani Criminal Justice System: A Study of the Raymond David Matter*, 23 Tulane Journal of International & Comparative Law 139 (2014) n. 51 ("Created by General Zia-ul-Haq, the Federal Shariat Court theoretically falls within the purview of the Supreme Court but amounts to a parallel Islamic judicial system").

112. Geoffrey MacCormack and W. Feng-Xin,*The Tang Code: Early Chinese Law*, 18 Irish Jurist 132 (1983) ("In itself the T'ang legal code represents a great intellectual

said that tradition in East Asia is heavily predicated upon immense respect for ancestral memories, practices, and customs[113].

Descriptive terms for this general legal culture are the "*parental*" model that Karl Llewellyn originally applied to Native American tribes[114], the "*benevolent paternalism*" model that Daniel Foote has used to describe the Japanese criminal justice system,[115] or even the "*family*" model as advanced by John Griffiths[116]. Not surprisingly, the common denominator among all these descriptions of the "criminal justice system" is the inner essence of all legal traditions: inquisitorialism. The core objective of the Confucian *ethos* consisted of inquiring into criminal behavior followed by emphasis upon the subsequent rehabilitation and reintegration of defendants into their communities, through confession, penance, and personal responsibility[117]. The individual was not seen as possessing agency or autonomy; instead, they

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achievement and it is not due to Chinese conservatism alone that a number of its rules and distinctions still appear many centuries later in the code of the [Q]ing dynasty which formed the basis of Chinese law until 1911. Its merits secured its adoption in other countries of south-east Asia, Vietnam, Korea and Japan. Generally in Asia it has had an influence comparable to that of the French and German codes in the West [...]. [I]n 581 A.D. a new [Sui] code was drawn up and applied to the whole empire , and it was this code which formed the basis of the code adopted by the early T'ang emperors in the succeeding century").

113. R. Dalton, et al., *Authority Orientations and Democratic Attitudes: A Test of the 'Asian Values' Hypothesis*, 6 Japanese Journal of Political Science 212-13 (2005): "According to 'Asian values' proponents, because of Confucian traditions, East Asian societies are paternalistic, accept hierarchic society, and are community-oriented-characteristics that promote order and consensus...Perhaps the strongest statement comes from Yung-Myung Kim who states, 'Confucian ideas are antithetical to Anglo-American democracy'." While there are opponents, this view is deeply rooted in societal consciousness.

114. Karl N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* at 439 (The University of Chicago Press 1st ed. 1962).

115. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 Cal L Rev 317 (1992).

116. John Griffiths, *Ideology in Criminal Procedure or a Third 'Model' of the Criminal Process*, 79 Yale L J 359 (1970).

117. hi-Yu Cheng, *The Chinese Theory of Criminal Law*, 39 J Crim L. & Crimin 461 (1949).

were identified via contextual relationships with other individuals in society via their status or occupation[118].

Thus, the development of the principle of double jeopardy, as understood by the modern concept, was historically unknown in East Asia, yet the possible argument that a similar principle existed stems from the intense cultural emphasis upon confession in the Confucian legal tradition[119]. Once a suspect confessed, traditional codes of criminal procedure could be quite lenient in their treatment of the offender. If the individual confessed and accepted full responsibility – prior to arrest and interrogation – traditional Chinese law would forswear a formal punishment, which appears to have made this practice rather exclusive:

> Nor is it surprising that police and judicial authorities the world over, in a natural desire to see their actions and decisions neatly supported by confessions, have tended to grant some degree of leniency toward those who would cooperate. However, the Chinese have been somewhat unique in writing into their law... provisions for the reduction or remission of punishment for offenders who voluntarily surrender and confess before their offense has been discovered. This particular type of confession is technically known as *tzu-shou* and is distinguished from *tzu-pai*...an ordinary confession...made after...discovery of an offense[120].

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118. Daniel K. Gardner, *Confucianism: A Very Short Introduction* at 10 (Oxford University Press 1st ed. 2014). See also Keith N. Knapp, *Three Fundamental Bonds and Five Constant Virtues*, in Linsun Cheng (ed.), 5 *Berkshire Encyclopedia of China* at 2252 ss. (Berkshire Publishing Group 1st ed. 2009). See also Glenn, *Legal traditions of the world* at 336 (cited in note 101) ("There is proclamation of the primacy of communities and relations within which individuals can easily recognize themselves, while individual worth and aspiration are recognized and praised in the maintenance and prospering of these communities and relations. The individual is not meant to be left out of this reasoning, but rather swept up in it. It is all part of the inseparable, interdependent world. You can no more separate individuals from the relations in which they exist than you can separate day from night, yet this in no way denigrates day or night, or individual people").

119. Pei-Yi Wu, *Self-Examination and Confession of Sins in Traditional China*, 39(1) Harvard Journal of Asiatic Studies 5 at 6 ss. (1979).

120. W. Allyn Rickett, *Voluntary Surrender and Confession in Chinese Law: The Problem of Continuity*, 30 The Journal of Asian Studies 797 (1971).

Accordingly, within this context, as the suspect already confessed to a criminal offense and the state exercised its sovereign authority, the individual could not be punished for that same offense again[121].

2.6. Global Perspective

A bar on successive prosecution – upon a final verdict of acquittal or conviction – has been recognized in Article 14(7) of the International Covenant on Civil and Political Rights[122], Optional Protocol 7 to the European Convention of Human Rights[123], Article 8(4) of

121. See Rosenberg and Rosenberg, *Comparative Criminal Law* at 239 (cited in note 76) (This particular approach stands in contrast to the Jewish perspective. "Offenses warranting capital punishment or flogging generally had to be viewed as more serious. In such cases, therefore, purification of the offender required more severe means than those used in connection with violations punishable by fine. To assure expiation, punishment was prescribed notwithstanding the defendant's confession and contrition. Moreover, as a practical matter, to allow confessing defendants in criminal cases to be immunized, even though there was independent evidence sufficient to establish guilt, would have undercut the deterrent effect of sanctions. Malefactors might then commit crimes in the hope that their later insincere confessions would be deemed genuine acts of penitence precluding punishment").

122. International Covenant on Civil and Political Rights, Art.14(7), available at: https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (last visited November 20, 2021) ("No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country").

123. Dinah Shelton, *International Human Rights Law: Principled, Double, or Absent Standards*, 25 Minnesota Journal of Law & Inequalities 467, 480 n 70 (2007): ("The Council of Europe has adopted fourteen protocols to the ECHR, expanding the list of guaranteed civil and political right [...]. See also Protocol No. 7 to the European Convention on Human Rights (November 22, 1984) 117 Eur Treaty Ser §86, available at https://www.echr.coe.int/Documents/Convention_ENG.pdf (last visited November 20, 2021) (according aliens various due process safeguards [...] [including] "*protection against double jeopardy* [...]" (Emphasis Added). Article 4; "Right not to be tried or punished twice:" 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State. 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. 3. No derogation from this Article shall be made under Article 15 of the Convention).

the American Convention on Human Rights[124], and Article 16(1) of the Arab Charter on Human Rights[125]. The American and Jewish approaches to double jeopardy appear to be unique in the annals of legal history as alternative models of criminal procedure – across the spectrum of inquisitorialism – have not embraced as broad a definition. With the latter having ceased to exercise jurisdiction over criminal cases two millennia ago, the American criminal justice system now stands alone, a testament to its perception of its exceptionalism. And, while doctrinal reforms have occurred – after court cases – in common law countries such as Australia, New Zealand, and the United Kingdom[126], the future of this doctrine can only be imagined by gazing back into its long past.

3. Brief Case Study: the Amanda Knox Saga

The trial (and initial appeal) of Amanda Knox, which lasted 1, 427 days[127], remains well-known throughout Western public opinion. It captured the attention of the world and showcased the differences between the continental and common law criminal justice systems, which arose from the same tradition.

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124. American Convention on Human Rights, Art 8(4), available at https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm (last visited November 20, 2021) ("An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause".

125. Arab Charter on Human Rights, Art 16(1) (cited in note 91) ("No one can be tried twice for the same crime." However, this right does not appear to be referenced in either the African Charter on Human and People's Rights or the Universal Declaration of Human Rights. see African Charter on Human and Peoples' Rights, available at https://www.achpr.org/legalinstruments/detail?id=49 (last visited November 20, 2021) and The Universal Declaration of Human Rights, available at http://www.un.org/en/universal-declaration-human-rights/ (last visited November 20, 2021)).

126. Ann Black, *Double Jeopardy Revisited: Why Several Common Law Countries Are Tinkering with One of the Law's Most Treasured Principles*, 1 NJA Law Journal 142 (2007) ("[T]he single greatest catalyst for a reviewing the rule against double jeopardy came directly from court cases: murder cases whose outcomes were seen as unpalatable in the eyes of the public. Each case was quite distinctive and different in the dimension of the rule against double jeopardy it exposed as flawed and unjust").

127. Danielle Lenth, *Life, Liberty, and the Pursuit of Justice: A Comparative Legal Study of the Amanda Knox Case*, 45 McGeorge Law Review 347, 349 (2013).

Knox, a young woman from Seattle, studied abroad in Perugia, Italy in 2007. On November 2 of that year, the bloodied body of her British roommate Meredith Kercher was found lying in their shared apartment[128]. Suspicion immediately fell upon Knox as well as her then Italian boyfriend, Raffaele Sollecito[129]. While journalists around the world extensively covered the proceedings, "many American legal scholars, including some very prominent ones, fueled the media assault on the Italian system"[130]. In contrast to their perceptions, which mostly derided the case as "a scandal of the first order"[131] and the system as "not among Europe's most distinguished"[132], Italy's modern criminal justice system is not purely inquisitorial[133]. Revised in 1989, it is a hybrid system of adversarial procedures imposed upon an inquisitorial foundation[134]. This significantly includes joining of civil and criminal cases on one hand, and judges who are involved in deliberations with lay juries, who must write an opinion justifying the verdict[135].

In December 2009, the Criminal Trial Court of Perugia convicted both Knox and Sollecito and sentenced them to roughly a quarter of a century behind bars.[136] The defense appealed the conviction to the

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128. *Meredith Kercher Timeline*, (The Guardian, December 9, 2009), available at: https://www.theguardian.com/world/2009/dec/04/meredith-kercher-murder-timeline (last visited November 20, 2021).

129. Barbie Latza Nadeau, Amanda Knox decision explained by Italian court (CNN News, September 8, 2015) available at: https://www.cnn.com/2015/09/08/europe/italy-court-amanda-knox/index.html (last visited November 20, 2021).

130. Michael Vitiello, *Bargained-for-Justice: Lessons from the Italians?*, 48 University of the Pacific Law Review 247, 249 (2017).

131. *Id.* at 250.

132. *Ibid.*

133. Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 University of Pacific Law Review 506, 569 (1973)) ("[In the eyes of many Americans] the only alternative to some lofty conceptions of Due Process is a lapse into the horrors of a procedural system where charges are not specific, the accused is not afforded the benefit of doubt, his confession is coerced, his detention before trial is unlimited, he has no right to counsel, and is not advised of his constitutional rights").

134. Julia Grace Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure Through The Amanda Knox Trial*, 30 BU Intl L J 229, 232 (2012).

135. See Vitiello, *Bargained-for-Justice* at 251-252 (cited in note 126).

136. See Corte d'Assise di Perugia, March 4, 2010 no. 7/2009 ("[T]he Court [...] declares Knox Amanda [...] and Sollecito Raffaele guilty of the crimes attributed to them [...] and sentences Knox to 26 years of imprisonment and Sollectio to 25 years of

Appellate Court, *Corte d'Assise d'Appello*. In October 2011, the Appellate Court, reviewing trial verdicts *de novo*, reversed the trial verdict.[137] In Italy, "when [...] cases are appealed, the criminal appellate court... reviews both findings of law and fact, allowing 'supervision of the trial fact-finder's evidentiary material, the rationality of his enquiry into the facts, and whether the data that his judgment is based on are complete'. Thus, Knox's criminal trial was in no way her last chance to provide or contest the evidence against her; the case was not over as it might have been in the American adversarial system"[138].

The Supreme Court of Cassation – Italy's Supreme Court – subsequently reversed the Appellate Court's acquittal and ordered a retrial before the Criminal Trial Court of Florence[139]. Reversal of acquittal – no matter how erroneous it may have been – is unconceivable in the U.S. criminal justice system for it is believed to be a fundamental violation of procedural due process. The Trial Court of Florence found

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imprisonment" (orig. "[L]a Corte [...] dichiara Knox Amanda [...] e Sollecito Raffaele colpevoli dei reati loro ascritti [...] e li condanna alla pena di anni 26 di reclusione la Knox e alla pena di anni 25 di reclusione il Sollecito"). available at https://archiviodpc.dirittopenaleuomo.org/upload/ASSISE%20PERUGIA%20KNOX%20SOLLECITO.pdf (last visited November 20, 2021). See also *Amanda Knox guilty of Meredith Kercher murder* (BBC News December 5, 2009), available at http://news.bbc.co.uk/1/hi/8394750.stm (last visited November 20, 2021).

137. See Corte d'Assise d'Appello di Perugia, December 15, 2011, no 4/2011 at 143 ("The Court [...] acquits both defendants [from the crime of murder] for not having committed the fact" (orig. "La Corte [...] assolve entrambi gli imputati [dal reato di omicidio] per non aver commesso il fatto"), available at: https://archiviodpc.dirittopenaleuomo.org/upload/sent%204%20%2011%20CAA%20knox.PDF (last visited November 20, 2021). See also Elisabetta Povoledo, *Amanda Knox Freed After Appeal in Italian Court* (The New York Times, October 3, 2011) available at: https://www.nytimes.com/2011/10/04/world/europe/amanda-knox-defends-herself-in-italian-court.html (last visited November 20, 2021).

138. See Mirabella, *Scales of Justice* at 253 (cited in note 133).

139. See Cassazione penale, March 26, 2013 no 26455 at 74 ("[The Court] cancels the contested sentence [...] and refers to the Court of Assizes of Appeal of Florence for a new judgment" (orig. "[La Corte] annulla la sentenza impugnata limitatamente ai reati di cui ai capi A (in esso assorbito il capo C), B, D, E ed all'aggravante di cui all'art. 61 c.p., n. 2 contestata in relazione al capo F) e rinvia per nuovo giudizio alla Corte d'assise d'Appello di Firenze"), available at: https://archiviodpc.dirittopenaleuomo.org/upload/1371656014PROVVISORIO%20Cassazione%20omicidio%20Perugia.pdf (last visited November 20, 2021). See also *Meredith Kercher murder: Amanda Knox retrial opens* (BBC News, September 30, 2013) available at: https://www.bbc.co.uk/news/world-europe-24327338 (last visited November 20, 2021).

Knox and Sollecito guilty once more[140]. They appealed once more to the Court of Cassation, which fully acquitted them[141]. The Court of Cassation excoriated the prosecutorial rush to judgment, its "sensational failures" in the investigational phase, and "culpable omissions" by the lower courts[142]. Thus, "[t]he appellate process is one of the features

140. Corte d'Assise di Firenze, April 29, 2014 at 400, available at https://archiviopenale.it/prove--corte-d-ass-d-app-firenze-29-aprile-2014-(ud-30-gennaio-2014)-knox-e-altro/contenuti/3119#:~:text=%C2%A0Sentenza%20(parte%20IV (last visited November 20, 2021). See also Johnny Brayson, *Why Were Amanda Knox & Raffaele Sollecito Convicted Twice? Italy's Legal system is Complicated* (Bustle, September 30, 2016), available at https://www.bustle.com/articles/186353-why-were-amanda-knox-raffaele-sollecito-convicted-twice-italys-legal-system-is-complicated (last visited November 20, 2021).

141. Cass. Pen., 27 March 2015 n. 36080 p. 52 available at: https://www.giurisprudenzapenale.com/wp-content/uploads/2015/09/cass-pen-2015-36080.pdf ("The Court [...] cancels without retrial the contested sentence [...] for the applicants have not committed the fact") (orig. "La Corte [...] annulla senza rinvio la sentenza impugnata per non avere i ricorrenti commesso il fatto"). See also Stephanie Kirchgaessner, *Amanda Knox acquitted because of 'stunning flaws' in investigation* (The Guardian, September 7, 2015), available at: https://www.theguardian.com/us-news/2015/sep/07/amanda-knox-acquitted-because-of-stunning-flaws-in-investigation (last visited November 20, 2021).

142. See Cass. Pen. 27 March 2015 n. 36080 p. 23 ("It is evident that the history of this process is characterized by a troubled and intrinsically contradictory path [...] [It has been a]n objectively wavering process, whose fluctuations are, however, also the result of sensational investigative defaillances or "amnesia" and culpable omissions of investigative activities, which, if carried out properly, would, in all likelihood, have allowed, immediately, to outline a picture, if not of certainty, at least of tranquilizing reliability, in the perspective of either the guilt or the innocence of today's applicants. Such a scenario, intrinsically contradictory, constitutes, in itself, a first, eloquent, signal of an evidential ensemble that is anything but marked by evidence beyond reasonable doubt".)(orig. "Non può, intanto, sfuggire, in questa prima approssimazione d'assieme, che la storia di questo processo è caratterizzata da un percorso travagliato ed intrinsecamente contraddittorio [...]. Un iter obiettivamente ondivago, le cui oscillazioni sono, però, la risultante anche di clamorose defaillances o "amnesie" investigative e di colpevoli omissioni di attività d'indagine, che, ove poste in essere, avrebbero, con ogni probabilità, consentito, sin da subito, di delineare un quadro, se non di certezza, quanto meno di tranquillante affidabilità, nella prospettiva vuoi della colpevolezza vuoi dell'estraneità degli odierni ricorrenti. Un siffatto scenario, intrinsecamente contraddittorio, costituisce, già in sé, un primo, eloquente, segnale di un insieme probatorio tutt'altro che contrassegnato da evidenza oltre il ragionevole dubbio." See also Tim Stelloh and Alex Johnson, *'Stunning Weakness,' 'Glaring Errors' Cited in Amanda Knox Acquittal* (NBC News, September 8, 2015), available at: https://www.nbcnews.com/news/world/

that sets continental justice most sharply apart from the common law. The common law permits only extremely limited appellate review in criminal matters. In a tradition stretching far back into the Middle Ages (indeed into early medieval trial by combat), the common law does not ordinarily permit the state to appeal acquittals, and of course there is never de novo review"[143]. This saga exacerbated the *ethos* of "anti-inquisitorialism" which pervades American jurisprudence"[144]. Paradoxically, this *de novo* appellate review of facts, which ultimately exonerated Knox, does not exist in the United States[145], for "[i]n adversarial systems, efforts to prevent insufficiently probative evidence and provide fair processes creates an assumption that 'whenever fair rules have been applied in the trial contest [...] the result is necessarily just'. As a result, trials in the United States can only be appealed on narrow questions of law, not fact, and claims of innocence are not considered constitutional questions"[146]. Yet, this inconvenient truth matters not to critics of the continental legal tradition for "the clear message was that the United States system has it right and that failing to adhere to the same rules is likely to produce unjust results"[147]. This modern-day *kulturkampf* best represents the clash between differing legal, cultural, and historical *ethos*, centered around dueling conceptions of double jeopardy within the western tradition and *weltanschauung*.

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top-italian-court-throws-out-amanda-knox-murder-conviction-n423006 (last visited November 20, 2021).

143. James Q. Whitman, *Presumption of Innocence or Presumption of Mercy? Weighing Two Western Modes of Justice*, 94 Texas L. Rev. 987-88 (2016).

144. David Alan Sklansky, *Anti-Inquisitorialism*, 122 Harv. L. Rev. 1634, 1668 (2009). See also Whitman, *Presumption of Innocence or Presumption of Mercy?* at 942 (cited in note 142) (as Whitman noted, "from the American point of view, the law of continental Europe does look [...] at times perilously supine in the face of state investigative and prosecutorial power").

145. See Danielle Lenth, *Life, Liberty, and the Pursuit of Justice: A Comparative Legal Study of the Amanda Knox Case*, 45 McGeorge L. Rev. 347 (2013) at 349.

146. Mirabella, *Scales of Justice* at 253 (cited in note 133).

147. Vitiello, *Bargained-for-Justice* at 250 (cited in note 126).

5. Rationales

There does not appear to be a single clear justification for the double jeopardy doctrine[148] although possible reasons have been proffered over the centuries. Foremost among them appears to be "protection against wrongful convictions and [the preservation of] the moral integrity of the criminal justice process"[149]. Another strong reason is the defendant's core interest in having finality attached to the criminal proceedings, which further "plays a role in upholding public confidence in the justice system and respect for judicial proceedings, with the additional practical benefit of conserving judicial resources"[150]. As articulated by Justice Hugo Black over six decades ago, an end to criminal proceedings is necessary for the victim, their family, society, and most of all, for the defendant:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of

148. See *Twice in Jeopardy*, 75 Yale Law Journal 262, 266 (1965) ("The courts understand these rules as expressions of self-evident moral principles: it is wrong to retry a man for a crime of which he previously has been found innocent, wrong to harass him with vexatious prosecution, and wrong to punish him twice for the same crime. Inquiry usually stops here. We are rarely told why it is wrong to retry for the same crime or punish twice. We never learn precisely what constitutes harassment, nor when it will bar reprosecution. The judiciary is content to apply the double jeopardy prohibition with a reverent nod to its policies"), available at: https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=9210&context=ylj (last visited November 20, 2021).

149. Andrew L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* at 17 (Oxford University Press 2nd ed. 2008); Gavin Dingwall, *Prosecutorial Policy Double Jeopardy and the Public Interest*, 63 The Modern Law Review 268 (2000).

150. Lorraine Finley, *Does the International Criminal Court Protect Against Double Jeopardy: An Analysis of Article 20 of the Rome* Statute, U.C. Davis Journal of International Law & Policy 221, 223 (2009).

> anxiety and insecurity; as well as enhancing the possibility that even though innocent he may be found guilty[151].

Westen and Drubel identify a fourth factor in the defendant's "valued right to have his trial completed by a particular tribunal"[152]. Lippke, a modern critic of the absolute bar on overturning acquittals in American jurisprudence, concedes "that the state will usually have an advantage in the resources it can muster for trials".[153] His critique of the absolute prohibition on even reviewing acquittals is formidable.

> Suppose that subsequent to a defendant's acquittal on a serious criminal charge, persuasive new evidence emerges that more or less conclusively demonstrates his guilt. To anyone not already convinced of the merits on the ban on double jeopardy, it will seem puzzling why we should prohibit the state from going after the defendant again. His acquittal appears mistaken; if his crime was grave, the failure to punish him justly and, if he has continuing criminal proclivities [...] must surely exert some pull on our consciences[154].

Indeed, an answer for the question 'how has justice been done in this particular case?' is needed. The defendant should certainly not have the constant pressure of the state repeatedly charging them for the same offense, but this mindset at its core evinces a deep-seated mistrust of government. Moreover, an absolute bar is necessary, proponents argue, "[not because] the state will retry a defendant intentionally to manipulate or harass, but that retrial will inevitably have those effects...of both enabling the prosecution to improve upon its case and burdening the defendant with the onus and anxiety of

151. *Green v. United States*, 355 U.S. 184, 187-88 (1957); Peter Westen and Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 The Supreme Court Review 81, 86 (1978).

152. Westen and Drubel, *Toward a General Theory of Double Jeopardy* citing Wade v. Hunter, 336 U.S. 684, 689 (1949).

153. Richard Lippke, *Modifying Double Jeopardy*, 15 New Criminal Law Review 511, 515 (2012).

154. *Id*. at 513.

further proceedings"[155]. Indeed, if new evidence emerges after an acquittal has been rendered that proves the defendant committed the crime (for example, murder or rape, as a crime of this magnitude compels even supporters of an absolute ban to rethink their deep-seated opposition), why should the state be prohibited from retrying them? And, at that point, "why exactly should we care that the state's persistence in attempting to punish her causes repeated embarrassment and expense or wears her down?"[156]. While the principle of finality is important in the criminal justice system, it should not provide the defendant complete immunity, for "the greater weight that is accorded the finality value, the greater the frequency that factually guilty defendants will go free"[157].

The emphasis upon finality and an end to repeated harassment of the defendant begs a further question: at what point does jeopardy attach? "Suppose, for example, that a prosecutor subjects the defendant to repeated and burdensome pretrial proceedings – such as repeated bail or probable-cause hearings – solely for the purpose of causing him embarrassment, anxiety, and expense"[158]. Is this sufficient for jeopardy to have attached? After all, the defendant could prove the very concerns – at this early stage of the pretrial proceedings – that supposedly underpin the very foundation of the doctrine of double jeopardy within the American criminal justice system. Current American law is unique because alone of the world's legal traditions and modern criminal justice systems, jeopardy formally attaches prior to final verdict[159].

This is in stark contrast to the practice of other countries – even those who share the same common pot of intellectual and judicial ideas. For example, English law traditionally deemed jeopardy to have

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155. Peter K. Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 Michigan Law Review 1001, 1007 (1980).

156. Lippke, *Modifying Double Jeopardy* at 513 (cited in note 153).

157. Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences* at 1010 (cited in note 155).

158. Westen and Drubel, *Toward a General Theory of Double Jeopardy* at 97 (cited in note 151).

159. See *Double Jeopardy: The Reprosecution Problem*, 77 Harvard Law Review 1272, 1275 (1964) ("In contrast to the English practice of conditioning jeopardy upon entry of a verdict of acquittal or conviction, jeopardy attaches in the federal courts when the jury has been impaneled and sworn, or when the court in a nonjury trial has begun to hear evidence").

attached when a final verdict, acquittal or conviction, was issued. Modification came in 1993, however, when Stephen Lawrence, a black teenager, was brutally slain[160]. Five men, including Gary Dobson, were charged with the crime; Dobson was acquitted. Such a verdict was attended with public outrage and led to the commission of an official Inquiry ("MacPherson Report"), which recommended considering empowering the Court of Appeal to permit prosecution after acquittal where fresh and viable is presented.[161] In 2003, as a result of this case and its aftermath, the British Parliament adopted the Criminal Justice Act, which modified the common law doctrine of double jeopardy, shifting it closer to a more overt inquisitorial approach. Accordingly, as Section 76(1) makes clear, "[a] prosecutor may appeal to the Court of Appeal for an order – (a) quashing a person's acquittal in proceedings within section 75(1), and (b) ordering him to be retried for the qualifying offence"[162].

Following this legislative change, and in light of new evidence which had appeared since the initial verdict, the appellate court quashed the acquittal and ordered a retrial in May 2011[163]. In 2012, Gary Dobson was retried, convicted and sentenced to life in prison for the slaying of Stephen Lawrence[164]. It is this perfect storm - a crime of this magnitude, an acquittal, and the emergence of new evidence – which would arguably shock even the conscience of "that omnipresent hypothetical 'reasonable man' who rules our legal theory"[165], (to utilize the

160. *Q&A: Stephen Lawrence murder, BBC news* (May 5, 2004), available at http://news.bbc.co.uk/2/hi/uk_news/3685733.stm (last visited November 20, 2021).

161. *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William MacPherson of Cluny, Recommendation 38*, 379 (February 1999), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf (last visited November 20, 2021).

162. *Criminal Justice Act 2003, Section 76(1), Part 10*, available at: https://www.legislation.gov.uk/ukpga/2003/44/part/10/crossheading/application-for-retrial (last visited January 10, 2021).

163. Joshua Rozenberg, *Change in double jeopardy law led to Gary Dobson's retrial, The Guardian* (January 3, 2012), available at https://www.theguardian.com/law/2012/jan/03/double-jeopardy-change-law-retrial (last visited January 10, 2021).

164. Guy Birchall, *Where is Gary Dobson now and why did he kill Stephen Lawrence? The Sun* (August 11, 2020) available at https://www.thesun.co.uk/news/6047523/gary-dobson-stephen-lawrence-murder-family/ (last visited January 10, 2021).

165. K. N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* at 33 (Oceana Publications 1951).

20th century legal scholar Karl Llewellyn's metaphor) if the state had no right to appeal an adverse ruling in this extraordinary situation.

At its core, the underlying foundation behind this doctrine, particularly as expressed in American law, is the array of procedural obstacles as part of a systemic trade-off; the value the law places upon the guilty being set free is subordinated to the value of ensuring that an innocent person is not convicted. As articulated six centuries before Blackstone by the illustrious medieval Jewish philosopher Maimonides:

> If we do not inflict punishment even when the offense is most probable, the worst that can happen is that someone who is really guilty will be exonerated. But if punishment is given based on estimation and circumstantial evidence, it is possible that someday an innocent person will be executed. It is better that even a thousand guilty people be exonerated than to someday execute even one innocent person[166].

It is asserted that this robust insistence on defending the guilty – even the devil – ultimately prevents the conviction of the innocent and consequently protects the general society[167]. We must not forget the immense importance that society has in ensuring the guilty are not set free. Thus, "[w]hile overemphasis of this factor may lead to abuse and a deprivation of the rights of the accused, in circumstances where the risk of harassment is slight and that of improper acquittal is great

166. Maimonides, *Sefer HaMitzvot*, Negative Commandment 290, as quoted in *Crime and Consequence* at 67 (2018).

167. Robert Bolt, *A Man for All Seasons*, Act I, Scene VII: ("As Sir Thomas More said to his son-in-law, "And when the last law was down, and the Devil turned around on you--where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast--man's laws, not God's--and if you cut them down [...] do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake"). See also *Twice in Jeopardy* at 267 (cited in note 148) ("[Double jeopardy rules] prevent prosecutors and courts from prosecuting and punishing arbitrarily, without legitimate justification").

the state's interest in securing convictions should be given considerable weight"[168]. That is the approach taken by several other countries[169].

In contrast to this absolute bar on reversing or the state even appealing an acquittal in U.S. law, legal changes developed at different stages coalesced into a different approach to double jeopardy, as remains the case in other countries. First, the defendant was not placed in jeopardy until a final verdict had been obtained: U.S. criminal procedure remains exceptionally unique in this regard[170]. In 1904, two years after being appointed to the U.S. Supreme Court by Theodore Roosevelt, Oliver Wendell Holmes, Jr., advocated this approach, though it did not carry the day, then or now[171].

Second – as a corollary of the first principle – the prosecution could appeal an acquittal. This was not considered a violation of double jeopardy, for the case had not yet concluded; without a final verdict, jeopardy has yet to attach. This is the practice throughout a multitude of distinct legal traditions around the globe[172]. Indeed, the well-known

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168. *Double Jeopardy: The Reprosecution Problem* at 1274 (cited in note 159).

169. Common law countries that modified this doctrine include the United Kingdom, Australia, and New Zealand. See Ann Black, *Double Jeopardy Revisited: Why Several Common Law Countries Are Tinkering with One of the Law's Most Treasured Principles*, 1 *National Judicial Academy Law Journal* 142 (2007): ("[T]he single greatest catalyst for reviewing the rule against double jeopardy came directly from [...] murder cases whose outcomes were seen as unpalatable in the eyes of the public. Each case was quite distinctive and different in the dimension of the rule against double jeopardy it exposed as flawed and unjust").

170. *Double Jeopardy: The Reprosecution Problem* at 1275 ("In contrast to the English practice of conditioning jeopardy upon entry of a verdict of acquittal or conviction, jeopardy attaches in the federal courts when the jury has been impaneled and sworn, or when the court in a nonjury trial has begun to hear evidence").

171. *Kepner v. U.S.*, 195 U.S. 100, 135 (1904) (Justice Holmes dissenting) ("At the present time in this country, there is more danger that criminals will escape justice than that they will be subjected to tyranny [...]. It is more pertinent to observe that it seems to me that, logically and rationally, a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle, in its origin, was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case"). See also *Double jeopardy: The Reprosecution Problem* at 1285 (cited in note 159).

172. See *Twice in Jeopardy,* 8 Harvard Law Review 354 (1895) (In 1895 Connecticut, a defendant was acquitted at trial for having caused the death of another

recognition that the double jeopardy doctrine "reflects not only our demand for speedy justice, but all of our civilized caution about [...] our aversion to needless punishment, our distinction between prosecution and persecution"[173], is universally recognized.

Third, even if the general rule is that acquittals in criminal cases cannot be overturned, certain extraordinary situations (such as the Stephen Lawrence case) demand that exceptions be made. For this reason, even English law has modified this aspect of the doctrine. In the United States, the claim has been repeatedly advanced – similar to the idea that prosecutors select individuals to prosecute before discovering a crime[174] - that once individuals have been charged, law enforcement and prosecutors "employ dubious tactics to secure convictions that, more often than we would like to admit, distort the search for the truth"[175]. Nonetheless, this potential fear of prosecutorial tyranny seems excessive to absolutely bar the appeal of an acquittal when new evidence has emerged or the defendant has formally confessed to the crime[176].

This end point is the unique feature of the American criminal justice system, that is the jury[177]. To permit an appeal by the state once a

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individual. He was subjected to a second trial, pursuant to a decision of the Connecticut Supreme Court. Did this constitute a double jeopardy violation? As the late 19th century Harvard Law Review article confessed, "[a]s a matter of justice, it is difficult to see why the State should not have a new trial if there has been error in the proceedings. Why the rule forbidding a second jeopardy should apply here [...] is not very plain as a matter of abstract justice [...]. For, until within a comparatively recent time, carrying a criminal case up has generally been regarded a further means of defence [...]. Has not the time come to put the State on the same footing as the prisoner with regard to all means of modifying or reversing a judgment and obtaining a new trial?").

173. *Twice in Jeopardy* at 278 (cited in note 148).

174. Harvey Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (Encounter Books 1st ed. 2011).

175. See Lippke, *Modifying Double Jeopardy* at 519 (cited in note 153); Keith A. Findley and Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2 Wisconsin Law Review 291 (2006).

176. See Lippke, *Modifying Double Jeopardy* at 519 (cited in note 153): "But that seems a flimsy basis on which to erect a legal doctrine that categorically bans the quashing of acquittals, no matter how likely the guilt of those who have won them, while permitting endless retrials of individuals unfortunate enough to have been wrongly convicted at their initial trials".

177. Westen and Drubel, *Toward a General Theory of Double Jeopardy* at 131 (cited in note 151): "It suffices to say that at some level, at least, nullification is implicit in the

jury has pronounced innocence would effectively mean to nullify the verdict of the people, as expressed through the jury[178]. The absolute finality of the jury's verdict, like other procedural niceties of American law, stems from a similar fear of potential tyranny[179]. "Jury acquittal on criminal charges might be the last line of defense a defendant has against over-reaching by state officials or the unfairness of application of a general rule to the facts of her case"[180]. As Westen and Drubel note, this finality "allows the jury to exercise its constitutional function as the conscience of the community in applying the law: to soften, and in the extreme case, to nullify the application of the law in order to avoid unjust judgements"[181]. Richard Lippke proposed to modify the double jeopardy doctrine to grant the State the right to appeal an acquittal of extremely grave crimes, if the State could "demonstrate to an appropriate tribunal that it has fresh, reliable, and compelling evidence of the individual's guilt"[182]. If the tribunal were to grant it, then a re-prosecution of the acquitted individual could occur[183]. This legal model should be considered, if not adopted, by U.S. legislators, judges, and policy-makers.

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constitutional notion of trial by jury, because nothing else explains why a criminal defendant has a right to resist a directed verdict of conviction".

178. Lippke, *Modifying Double Jeopardy* at 520 (cited in note 153): ("To quash verdicts would be to effectively deprive juries of the power to decide that though defendants appear guilty beyond a reasonable doubt, they should be acquitted for some reason...Yet jury nullification is a pretty insecure peg on which to hang the ban on double jeopardy. The power of juries to acquit against the evidence can be exercised on behalf of noble causes, but it can equally be exercised on behalf of ignominious ones").

179. *Id*. at 521: ("It will be argued that juries acquit against the evidence for other, more respectable reasons. They do so because they believe that police or prosecutors are engaged in some kind of objectionable harassment of the defendant, or because they believe that enforcement of the law in question would, given the facts of the case before them, produce an injustice of some kind". See also Westen and Drubel, *Toward a General Theory of Double Jeopardy* at 129 (cited in note 151): "There remains a persuasive rationale for the finality of verdicts of acquittal, namely, that a defendant may not be retried following an erroneous acquittal because the acquittal may be a product of the jury's legitimate authority to acquit against the evidence").

180. Lippke, *Modifying Double Jeopardy* at 521 (cited in note 153).

181. Westen and Drubel, *Toward a General Theory of Double Jeopardy* at 130 (cited in note 151).

182. Lippke, *Modifying Double Jeopardy* at 523 (cited in note 153).

183. *Ibid*.

The potential apprehension that prosecutorial persecution of innocent defendants will occur "is, if not sheer fantasy, at least a bit unrealistic"[184]. And while Lippke concludes his proposed reforms by asserting that "[l]imited substantive corrections of this procedural hegemony will hardly turn our legal system into an inquisitorial one"[185], that assertion is arguably inaccurate. After all, the common law is already an inquisitorial system – albeit one that is extremely decentralized, less actively inquisitorial (at trial which has all but disappeared in favor of alternatives, especially plea bargaining), and preoccupied with guarding against the potential injustice of convicting the innocent[186].

The remaining chink in the procedural armor of the double jeopardy doctrine is that of "dual sovereignty"[187], whereby both the federal government and state governments may prosecute the same individual for the same offense[188]. The rationale is that the "guarantee against double jeopardy applie[s] only to the situation where one government, that is, the federal government, tries a defendant twice, not where two governments each try him once"[189]. If American law is to revise the doctrine of double jeopardy, this ambiguity should be eliminated. As the *Gamble* dissenters emphasized, while this exception may have once played an important role, it affords government a loophole (however rarely employed) to prosecute an individual more than once for effectively the same conduct, which is forbidden in other cases.

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184. *Id*. at 531.

185. *Id*. at 537.

186. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 Cornell Law Review 1181 (2005).

187. *United States v. Lanza*, 260 U.S. 377 (1922); *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959).

188. Harlan R. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 Miami Law Review 306, 312 (1963) at fns. 36-38, referencing Supreme Court's decisions in *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); and *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852).

189. Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights* at 314 (cited in note 188); Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 Washington University Law Review 769 (2009); see also *Gamble v. U.S.*, 139 S. Ct. 1960 (2019), where the U.S. Supreme Court was asked to overrule this doctrine. As aforementioned, the Court upheld the existence of this "separate sovereignties" exception.

7. Conclusion

By recognizing that distinct legal traditions are interrelated, our procedures, laws, and criminal justice system will break the shackles of chronological and legal isolationism. Learning from the jurisprudential development of other nations and legal systems does not diminish our national experiences but situates them all as respective contributions to the global community of nations[190]. It will also show that the quest for justice is common to all societies, best exemplified by the Amanda Knox saga, where legal conceptions on either side of the Atlantic disagreed with one another[191]. While the U.S. Supreme Court's interpretation of the Fifth Amendment's double jeopardy clause undoubtedly helps to prevent the conviction of the innocent (though additional issues are present in the American model), guilty individuals can be, and are, set free to the detriment of society. As developed by the continental legal model, advanced by early 20th century U.S. Supreme Court Justice Oliver Wendell Holmes, Jr., and later adopted by common law countries, double jeopardy has evolved over time. It now means that erroneous acquittals can be overturned in extraordinary situations, without fear of a defendant suffering repeated

190. Amartya Sen, *The Argumentative Indian: Writings on Indian History, Culture, and Identity* at 85 (Allen Lane 1st ed. 2005): "Even though contemporary attacks on intellectual globalization tend to come not only from traditional isolationists but also from modern separatists, we have to recognize that our global civilization is a world heritage – not just a collection of disparate local cultures". See also:Thomas Bingham, *Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law* at 5 (Cambridge University Press 1st ed. 2010)("Those who see, and would wish to see, the law [...] as an 'island, entire of itself'[...] may care to think of our law as a pure-bred, home-grown product of our national genius, the truth is otherwise. It is a mongrel, gaining in vigour and intelligence what it has lost in purity of pedigree").

191. Julia Grace Mirabella, *Scales of Justice: Assessing Italian Criminal Procedure Through the Amanda Knox Trial*, 30 Boston University International Law Journal 230, 259-260 (2012) ("The Amanda Knox case and the resulting criticism of Italian criminal procedure have led scholars to question the entire Italian criminal system. Before engaging in a hasty denouement [...] [we must] recognize the biases we bring to bear when engaging in comparison [...] [and bearing that in mind] despite the media frenzy and flood of opinions on the Knox trial, the procedures of the court and the opinion accompanying the verdict did not represent either an invidious criminal procedure, or a country out to convict an innocent. Instead, the differences in procedure from the American trial process represent choices by a country with different procedural foundations but with a similar goal, justice").

harassment by the State in a malevolent effort to convict them[192]. This model should be implemented in the U.S. today.

As this analysis has shown, the idea of double jeopardy was known in the days of classical antiquity, formed a key part of roman-canonical law and tradition, and appeared in the Jewish and Islamic religious traditions. The Common Law, far from creating the doctrine, was indelibly influenced by canon law's prohibition on trying a man twice for the same offense, manifested most powerfully by Archbishop Thomas à Becket's appeal to it in his disagreement with King Henry II. The medieval era witnessed the emergence of sanctified principles of criminal procedure, which did not emerge from the Common Law. This verity lies in contrast to "[c]laims about the maxim's Anglo-Saxon roots [which] are sometimes quite stirring and display a peculiarly British capacity to create intellectual Camelots – on their side of the Channel"[193].

Historical re-examination of double jeopardy compels adoption of the belief that the United States should modify its atypical conception, as other common law countries have done, for the benefit of victims, society, and the rule of law. Comparative analysis rejects the common law's declared chronological and legal isolationism, through recognizing the enduring contributions of foreign law, history, and traditions. In the end, periodic re-evaluation of sacred ideas, even those which arose in antiquity, empowers all the generations across the ages to make their own contribution to this ongoing dialectic[194],

192. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice* at 950 (cited in note 143) ("For if we overcome our shock and acquire a better appreciation of the values of continental justice, we will also acquire a healthy sense of the dangers in our own approach – dangers that are too grave, growing, and too easily neglected by Americans too attached to the idea that the most urgent danger we face is the danger that a malevolent out-of-control state will target citizens who are in fact innocent").

193. Scherman, *The Stone Edition of the Chumash: The Torah, Haftaros and Five Megillos with a Commentary Anthologized from the Rabbinic Writings* at *Genesis* 3:9 (cited in note 51)

194. Clarence Day, *The story of the Yale University Press told by a friend* at 7 (New Haven: At the Earl Trumbull Williams Memorial 1st ed. 1920) ("The world of books is the most remarkable creation of man. Nothing else that he builds ever lasts. Monuments fall, nations perish, civilizations grow old and die out, and after an era new races build others. But in the world of books are volumes that have seen this happen

and in this process, to "catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law"[195].

again and again and yet live on, still young, still as fresh as the day they were written, still telling men's hearts of the hearts of men centuries dead").

195. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harvard Law Review 457, 478 (1897).

Hydrogen development in the European Union and in Italy Legislative barriers and potential solutions

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Abstract: Climate change is a touchable phenomenon and hydrogen has become an attractive solution for experts and for policymakers. However, in order to understand the environmental impact of an energy vector, it is necessary to consider its entire value chain and not simply the end uses. Hydrogen is really "clean" when produced by the exploitation of renewable sources (so-called "green hydrogen") or (at most) when produced by fossil fuels using technologies able to impede the release of greenhouse gases emissions in the atmosphere (so-called "blue hydrogen"). The major potential of hydrogen consists into the increase of renewable sources' integration into the energy system, addressing two major challenges of renewable energy: intermittency and non-programmability. Hydrogen produced by RES can be transported over long distances, injected into the natural gas grid, stored and reconverted into electricity as needed, so that the Hard-To-Abate sector gets electrified. Nevertheless, the need for timely review of regulation strongly emerges from legislative gaps concerning both the energy vector and the existing regulation, which imply barriers that can actively interfere with the development of the hydrogen supply chain. As the European Union has seen a great intrinsic potential in hydrogen development, also Italy is trying to bring to action the European pathways together with their customization. This article analyses some of the barriers and gaps of the current legislation, namely: the need for a Guarantee of Origin system; on the goal of sector coupling, which consists in the realization of an integrated energy system based on the exploitation of green energy; on one of the cleanest hydrogen production technology, the "power-to-gas", and its role inside the integrated energy system. The analysis starts from the European Union and then deepens the Italian context with the purpose of understanding peculiarities and possibilities.

Keywords: Hydrogen; Energy Transition; Energy regulation; Sector Coupling; Power-to-gas.

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1. Introduction

The idea of utilizing hydrogen as a clean energy vector is not new, but it was neither ever considered as a feasible option. However, today hydrogen is living an important momentum, since technology has known severe improvement and it is no longer immature, costly, and inefficient for implementing new energy solutions.

Nowadays, the hydrogen sector is just waiting for concrete and coherent initiatives to develop its usage on a large scale. Even green hydrogen, if still not competitive, recently has seen a great cost reduction[1]. Globally, the political will seems to aim at creating the so-called

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"hydrogen economy"[2], which means that hydrogen will be used to transport energy over long distances and to store it in large amounts[3], finding many different applications in lots of economic sectors (e.g. industry, transport, buildings).

Moreover, the current energy and climate policies (both at the European and at the national level) are promoting the use of electricity from renewable sources, though these are intermittent and non-programmable. Therefore, new storage solutions are needed and hydrogen may represent one: overproduction from renewable electricity generation could be used to produce hydrogen that can be stored and then re-converted into electricity on demand. In this way, renewable electricity would generate the so-called "green hydrogen", through the electrolysis process and the electricity would be used to separate water into hydrogen and oxygen: the latter would be the only element released in the atmosphere (if not stored for other uses), while hydrogen would be stored for later use (Figure 1)[4].

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1. Thijs Van de Graaf, et al, *The new oil? The geopolitics and international governance of hydrogen*, 70 Energy Research & Social Science, at 2-4 (2020).

2. Donald Zillman, et al, *Innovation in Energy Law and Technology: Dynamic Solutions for Energy Transitions* at 137 (Oxford University Press 2018).

3. John O. Bockris, *Environmental Chemistry,* in Bockris J.O. (eds), *Environmental Chemistry* at 1-18 (Springer, Boston, MA 1977).

4. Ruven Fleming, *Clean or renewable - hydrogen and power-to-gas in EU energy law*, 39 Journal of Energy & Natural Resources Law 43 at 4 (2021). See also Hydrogen Council, *Path to Hydrogen Competitiveness: A cost perspective* at 20 (2020), available at https://hydrogencouncil.com/wp-content/uploads/2020/01/Path-to-Hydrogen-Competitiveness_Full-Study-1.pdf (last visited November 20, 2021). For a general explication on hydrogen, see SNAM, *L'idrogeno* (September 22, 2020), available at https://www.snam.it/it/transizione_energetica/idrogeno/idrogeno/ (last visited November 20, 2021).

Therefore, renewable energy would always be available for periods of demand peaks, ensuring flexibility and resilience to the entire electric network[5].

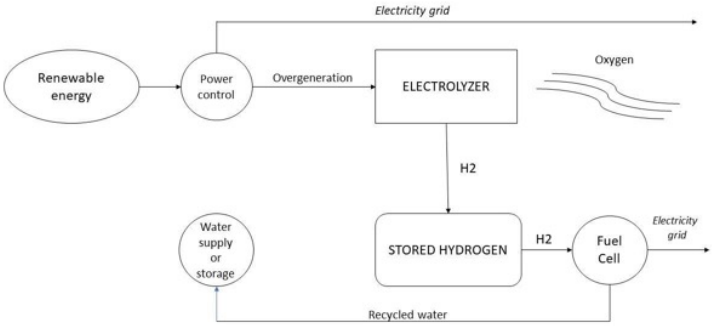

Figure 1 - Hydrogen production from renewable electricity overgeneration. *Author*: Simona Capozza

Furthermore, hydrogen could help renewable electricity to reach all the economic sectors, among which there are the so-called

5. Fuel Cells and Hydrogen Energy Association, *Road Map to a US Hydrogen Economy: Reducing emissions and driving growth across the nation* (2020), available at http://www.fchea.org/us-hydrogen-study (last visited November 20, 2021). See also Marco Alverà, *Rivoluzione Idrogeno: La piccola molecola che può salvare il mondo* at 86-88 (Mondadori Electa 2020).

"hard-to-abate" ones[6] (e.g. steelworks[7], refineries[8], aviation[9]) since they cannot be electrified, as well as distant consumers.

For these reasons, the interest in hydrogen has grown exponentially, considering the objectives both of decarbonizing economy and society, and of the energy transition towards an interconnected and sustainable energy system. Indeed, the decarbonization process aims at reducing the carbon intensity of the power sector that supports the economy and, consequently, the entire society[10] to realize an energy sustainable transition.

This article will identify some of the most critical legislative issues concerning hydrogen production, namely: the development of a Guarantee of Origin (GO) system and the regulative barriers that impede the deployment of Power-To-Gas (P2G) technology on a large scale. Particular attention will be paid to the need for a clear vision regarding hydrogen transportation and the hydrogen role in the creation of sector coupling (SC).

These are essential issues that need to be addressed to ensure clean hydrogen access to energy markets and, consequently, to foster the creation of an energy system which is free from fossil fuels' exploitation.

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6. See SNAM, The European House - Ambrosetti, *H2 Italy 2050: Una filiera nazionale dell'idrogeno per la crescita e la decarbonizzazione dell'Italia* at 112-115, 117, 120, 122, 125, 146-150, 172-189 (2020), available at https://www.snam.it/export/sites/snam-rp/repository/file/Media/news_eventi/2020/H2_Italy_2020_ITA.pdf (last visited November 20, 2021).

7. See Fuel Cells and Hydrogen Energy Association, *Road Map to a US Hydrogen Economy* at 9 (cited in note 5).

8. See International Energy Agency, *Decarbonizing Industry with Green Hydrogen* (November 17, 2020), available at https://www.iea.org/articles/decarbonising-industry-with-green-hydrogen (last visited November 20, 2021).

9. See AIRBUS, *Hydrogen in Aviation: How Close is it? Understanding the challenges to widespread hydrogen adoption* (October 8, 2020), available at https://www.airbus.com/en/newsroom/stories/2020-10-hydrogen-in-aviation-how-close-is-it (last visited November 20, 2021).

10. The London School of Economics and Political Science, *What is "decarbonization" of the power sector? Why do we need to decarbonize the power sector in the UK?*, (January 29, 2020), available at https://www.lse.ac.uk/granthaminstitute/explainers/what-is-decarbonisation-of-the-power-sector-why-do-we-need-to-decarbonise-the-power-sector-in-the-uk/ (last visited November 20, 2021).

2. The need of a Guarantee of Origin scheme

2.1. The functionality and relevance of a GO scheme

A Guarantee of Origin, hereafter GO, consists in «an electronic document which has the sole function of providing evidence to a final consumer that a given share or quantity of energy was produced from renewable sources»[11]. In other words, a GO permits a renewable energy producer to monetize the energy value towards a consumer who is willing to pay a premium for that energy.

Energy vectors, such as hydrogen, need complex infrastructures to be transported and it is difficult to create specific ones that can properly value all their characteristics (as it is for renewable vectors). Considering this, GOs have been created, so they can be exchanged separately from the physical energy vector (which is exchanged using the traditional infrastructure) and ensure the renewable origin of it.

In general, a GO system has three essential elements: (i) there is a public or private authority authorized to release the GOs to producers and which has the task to monitor them, through their punctual registration; (ii) every time a final consumer affirms that he has consumed all the certified energy, the GO he has must be cancelled; (iii) every exchange of GOs must be noted in the respective registry until they are cancelled.

Currently, there is not a binding GO scheme for hydrogen, neither at the Italian level, nor at the European or international one. Nevertheless, the boost to create an energy sector able to host green hydrogen in Italy is a crucial issue to address. In this regard, particular attention should be paid to the impellent necessity of incrementing public awareness about hydrogen potential. To this respect, a non-binding certification system has been developed by private initiative, which is the CertyfHy Guarantee of Origin Scheme[12].

11. Art. 2, para 2 (12), EU Dir 11 December 2018, no 2001.

12. See CertifHy, *Recommendations on the establishment of a well-functioning EU hydrogen GoO system* at 5, 10-11, 20-22, 25-27, 33-36 (January 31, 2016), available at https://www.certifhy.eu/images/project/reports/D3.3_Recommendations_on_the_establishment_of_a_well_functioning_EU_hydrogen_GO_system.pdf (last visited November 20, 2021).

2.2. The vision of the European Union

The European Union has explicitly invited Members to consider systems ensuring the origin of gases, including hydrogen, as it has already been done for renewable electricity[13].

To foster the creation of a system certifying the origin, the Directive charges the European Standard Organizations, the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC)[14] to revise the EN 16325 standard[15] (the standard regarding the renewable electricity GO scheme), with the aim of defining a European common system for the certification of hydrogen.

More specifically, the CertifHy Guarantee of Origin Scheme has been considered as a guideline in the reviewing process[16]. The CertifHy Project has been promoted by the Fuel Cells and Hydrogen Joint Undertaking in order to elaborate an origin certification system dedicated to hydrogen.

This scheme provides a GO system for hydrogen, consenting its labelling and traceability. The CertifHy includes also the possibility of certifying hydrogen produced using fossil fuels with carbon capture, usage and storage (CCUS) technologies (so-called "blue hydrogen"). More precisely, considering emissions at the production point (and not considering subsequent emissions), hydrogen can be labelled as "CertifHy Green Hydrogen", when produced using renewable energy and meeting the sustainability criteria stated by the RED II[17]; or as "CertifHy Low-greenhouse gas (GHG) Hydrogen", when emissions are lower than the threshold defined by the CertifHy

13. See Art. 19, para (7) (b), EU Dir. 11 December 2018, no. 2001.

14. More information about CEN and CENELEC are available at https://www.cencenelec.eu/ (last visited November 20, 2021).

15. See European Standard CEN - EN 16325 Guarantees of Origin related to energy - Guarantees of Origin for Electricity, (Engineering360, Standards Library), available at https://standards.globalspec.com/std/9969735/EN%2016325 (last visited October 27, 2021).

16. See CertifHy, Fuel *Cells and Hydrogen Joint Undertaking*, available at https://www.certifhy.eu/ (last visited November 20, 2021).

17. See European Commission, *Sustainability Criteria* (March 16, 2020), available at https://ec.europa.eu/energy/topics/renewable-energy/biofuels/sustainability-criteria_en (last visited November 20, 2021).

low-GHG-emissions and it is produced in a facility where the average intensity of emissions from the production of non-CertifHy Low-GHG hydrogen does not exceed the intensity of the emissions of the reference process[18].

Furthermore, in 2021, the European Commission should propose an adjustment of the Emission Trading System (ETS): due to the latest policies in favor of hydrogen development, a new great part of industry could be subjected to the ETS. Particularly, lots of these industries are potential consumers of clean hydrogen and, consequently, their subjection to the ETS would increase the demand for the renewable gas. Green and blue hydrogen could substitute gray hydrogen as a feedstock while reducing GHG emissions from the industrial sector.

To summarize, there is the need for an instrument that can recognize the value of clean hydrogen and that can be used to demonstrate the meeting of the allowances released: GOs show the potential to become such an instrument. Obviously, to do so GOs should also report the information about GHG content[19].

3. Sector Coupling and the role of hydrogen

3.1. What it is and why it is relevant

Aiming at the energy transition, it is essential to look at the energy system as a whole and not to consider all the different sectors as independent. The decarbonization of the energy system requires a comprehensive solution that makes it possible to replace traditional fossil fuels with renewable energy.

The coordination of all the energy sectors in one interconnected energy system goes under the name of "sector coupling" (SC). The SC aims at getting together different energy sectors such as production, transportation, and final uses, to increase the growing share of

18. See CertifHy, *Technical Report on the Definition of"CertifHy Green Hydrogen* at 5, para 1.3 (26 October 2015).

19. See Andris Piebalgs and Christopher Jones, *A proposal for a Regulatory Framework for Hydrogen Guarantees of Origin*, 37 Robert Schuman Centre - Policy Brief 5 (2020).

renewable energy sources in the energy system[20]. Therefore, an energy conversion process takes place, through which the energy can be preserved outside of the electricity network (e.g. hydrogen storage), consumed in other sectors, and transported (when transportation outside the network is more convenient)[21].

Hence, hydrogen could be one of the instruments the energy system needs to allow the increasing integration of renewables inside a system which results from the coupling of networks (Figure 2).

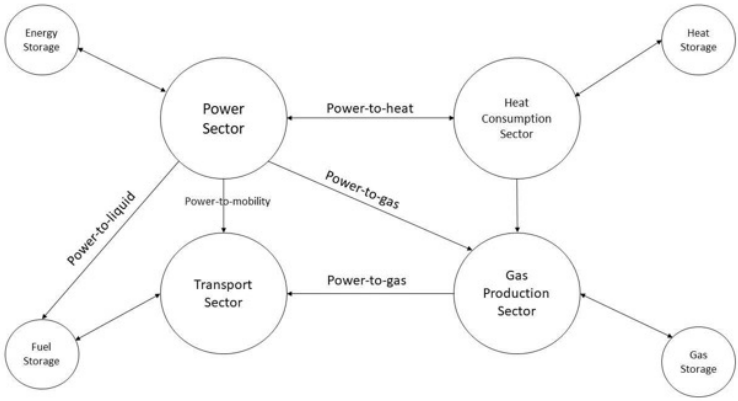

Figure 2 - The Sector Coupling. *Author*: Simona Capozza

Article 20 of the RED II states that Member States should address the issue of the infrastructure extension to help the integration of renewable gases inside the energy system. Also, the Transmission System Operators (T.S.O.s) should support the national regulatory authorities in the elaboration of common Network Development Plans showing all the infrastructure goals set for the short and long-term.

20. See IRENA, *Global Energy Transformation: A Roadmap to 2050* at 70 (2018), available at https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2018/Apr/IRENA_Report_GET_2018.pdf (last visited November 20, 2021).

21. See ETIP SNET, *Sector Coupling: Concepts, State-of-the-art and Perspectives* at 12, 33, 39, 42-43 (January 2020), available at https://www.etip-snet.eu/wp-content/uploads/2020/02/ETIP-SNEP-Sector-Coupling-Concepts-state-of-the-art-and-perspectives-WG1.pdf (last visited November 20, 2021).

Various options able to give flexibility to the energy system should be considered: Power to Gas (P2G) systems, injection at the distribution level, hydrogen blending, demand response strategies, etc. In this regard, guidelines from policymakers and regulators are needed[22] for the T.S.O.s to guarantee an adequate environment for operation.

In accordance with all these considerations, a GO scheme appears to be crucial, since it is ideal to use only green (and blue) hydrogen, enabling also its storage for later use[23]. This can be further validated by looking at the goals stated by the European Green New Deal (which states the achievement of climate neutrality by 2050), since they can be pursued only with the maximum integration of renewables inside the entire energy system.

Multiple options are available for infrastructure to transport hydrogen; however, one of the most suitable seems to be the use of pipelines. The transport could be carried out through the existing pipelines for natural gas (NG) that could be used to transport a mixture of NG and hydrogen, or, alternatively, through new pipelines, purposely built for hydrogen.

At the moment, both at the European and Italian level, there is no regulation that contemplates in a harmonized and complete way how to treat hydrogen for its injection into the gas network.

3.2. The role of power-to-gas (P2G) in the energy transition and in the sector coupling

The technology able to permit the deployment of hydrogen use on a large scale together with the maximum integration of renewables in the energy system is P2G (Power-To-Gas): using the electrolysis of water, the surplus of clean electricity could be used to produce green hydrogen (Figure 3) depending by the electricity source.

22. See European Commission, *Impact of the use of the biomethane and hydrogen potential on trans-European infrastructure* at 16-18 (April 2020), available at https://op.europa.eu/en/publication-detail/-/publication/10e93b15-8b56-11ea-812f-01aa75ed71a1/language-en?WT.mc_id=Searchresult&WT.ria_c=37085&WT.ria_f=3608&WT.ria_ev=search (last visited November 20, 2021).

23. See Alverà, *Rivoluzione Idrogeno* at 86-88 (cited in note 5).

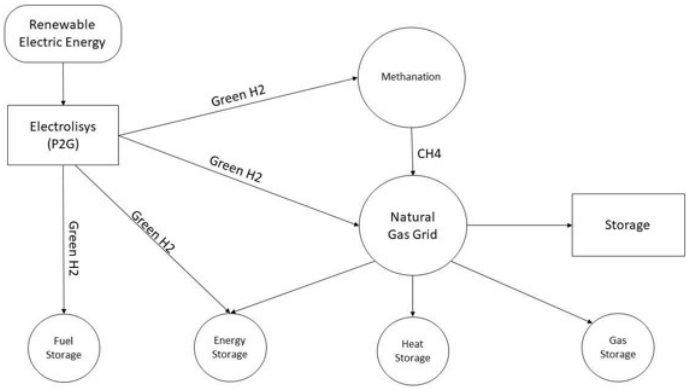

Figure 3 - The potential role of power-to-gas in an integrated energy system. *Author*: Simona Capozza

This procedure responds to the Italian, European and international climate targets of incrementing the renewable energy share but, nevertheless, the continuous growing share of renewables may make the energy system very unstable and unreliable.

P2G could ensure flexibility to the energy system as a whole, being able to store clean energy in the long term to decarbonize the final uses of gas, as well as supply it to the grid in times of need. This would represent a remedy to seasonal variations in renewable energy production.

Power-to-gas systems can be used on- and off-grid, to provide network adaptability and quality services, to avoid curtailments to renewable electricity production, and to allow renewable energy to be used also in new applications for which (clean) gas is preferred. In these cases, we can talk about not only the versatility of hydrogen, but also of its being "synergistic", because of its ability of making hydrogen supporting the demand and supply peaks' management[24]. Several demonstration projects for the P2G system are in progress, supporting the decarbonization pathway of the hard-to-abate industry (refinery,

24. See NAM, The European House - Ambrosetti, *H2 Italy 2050* at 76 (cited in note 6).

chemical feedstock synthesis, etc.) in conjunction with renewable sources of energy, at big scale (hundreds of MW)[25].

4. Legislative barriers to the development of the hydrogen production chain

The aim of this part is to address some of the most critical legislative barriers to the development of a functional hydrogen production chain, which has a multilevel impact on the energy system. Firstly, the GO's still undefined aspects will be esaminated, then the research will take into consideration the SC and P2G European regulatory gaps and barriers that still impede the development of a hydrogen value chain.

4.1. Guarantee of Origin

To design a GO system, it is necessary to define in a clear and transparent way all the information regarding the hydrogen to be certified and its relationship with CO2 emissions. In particular, there is the need for a definition of green hydrogen: some States focus more on reducing GHG emissions than on promoting renewable energy. In cases like this, the green hydrogen definition tends to be wider, including hydrogen produced by fossil fuels with CCUS technologies. Contrary, if States prefer to foster renewables increasing, the definition of green hydrogen would be stricter and limited only to hydrogen produced from renewable energy[26]. Therefore, it is crucial to consider and understand all the political contexts (present and future) that could involve green hydrogen.

4.1.1. How to define green hydrogen

Currently, there is no European definition for green hydrogen: article 2 (1) RED II defines "energy from renewable sources" as energy

25. For an overview of funded projects on this topic (LC-GD-2-2-2020) visit https://ec.europa.eu/info/funding-tenders/opportunities/portal/screen/opportunities/topic-details/lc-gd-2-2-2020 (last visited November 20, 2020).

26. Anthony Velazquez Abad, Paul E. Dodds, *Green Hydrogen characterisation initiatives: Definitions, standards, guarantees of origin, and challenge*, 138 Energy Policy 1, 2-7, 9-12 (2020).

produced by sources that are not fossil, but it does not mention hydrogen. Indeed, hydrogen is considered only as "other renewable gases" when talking about GOs (art. 19(7)(b) Directive 2018/2001/EU). This regulation shows the need for a common taxonomy, specifically regarding the hydrogen sector. In order to define green hydrogen, there are two most effective approaches: the first one consists in establishing a minimum share of renewable energy or of feedstock to be used, while the second one considers GHG emissions released during the entire life cycle of hydrogen and establishes an acceptable maximum threshold[27].

Defining a threshold for GHG emissions seems to be one of the most difficult point: Velazquez Abad[28] shows that labelling hydrogen as "green" or "not green" would not be enough, because the producer would be focused on finding the right way to meet the threshold by any means[29], and not on converting his/her technology in the cleanest one. Maybe a compromise could be found in gradually reducing the threshold until the complete elimination of GHG, while incentivizing producers to move to newer and cleaner technology.

4.1.2.Critical issues in the definition of a GO scheme and proposed solutions

Various issues need to be addressed for defining a GO scheme for hydrogen.

As already mentioned, GOs must be exchangeable between producers. Consequently, there is a consistent risk of dissociation between the GO and the physical energy flow. In fact, inside open and uncontrolled systems, a hydrogen from fossil fuels producer could buy a guarantee by a renewable hydrogen producer, thus pretending that the hydrogen is renewable, so controlling and monitoring

27. See CertifHy, *Structured list of requirements for green hydrogen* at 7 (July 27, 2015).

28. See Velazquez Abad, Dodds, *Green Hydrogen characterisation initiative* at 2-7, 9-12 (cited in note 26).

29. See ECOS, *Success Guaranteed? The Challenges of Guarantees of Origin for Certified Renewable Hydrogen* at 5 (March 18, 2020), available at https://ecostandard.org/publications/success-guaranteed-the-challenges-of-guarantees-of-origin-for-certified-renewable-hydrogen/ (last visited November 20, 2021).

systems become essential. For example, a solution could be allowing the exchange of GOs only inside closed systems, that are easier to control[30]. Another element to consider is the transnational exchange: harmonized rules are needed to keep the exchange valid and secure. Then, it is crucial to ensure that no GO is used more than once. This is the "double counting" issue that could be avoided if, every time 1 MWh of energy is consumed, the GO is removed from the registry (so-called "cancellation")[31].

According to the Directive 2008/71/EC, every electricity supplier must inform the final consumer about the energy mix he/she is supplying: there is a disclosure obligation of the energy mix supplied, including the information about the environmental impact of the mix (e.g. CO2 emissions). However, Member States have often implemented disclosure systems that differ from one another (e.g. in terms of standards), thus limiting transnational exchange of GOs.

To ensure an ideal disclosure, every supplier could use the guarantees to estimate the share of clean energy supplied, rather than the so-called "residual mix" that would represent the rest of the energy mix. Moreover, according to CertifHy experts, a solution could consist in registering all the energy produced, including the one produced from fossil fuels, thus making the GO system the instrument to fulfill the disclosure obligation concerning all energy sources[32]. It would also be optimal to keep track of everything that happens to GOs[33]. However, this is a complex issue to solve: some people argue that labelling different energy sources from green hydrogen would compromise the aim of a certification scheme. The question to answer is whether the aim of a GO system for hydrogen is to support the optimal fulfillment of the disclosure obligation or to promote the deployment of clean energy on a large scale. In the first case, all energy sources should be certificated; in the latter, only green hydrogen[34].

30. See *ibid.*
31. See *ibid.*
32. See CertifHy, *Recommendations on the establishment of a well-functioning EU hydrogen GoO system* at 20-22 (cited in note 12).
33. See *ibid.*
34. See *ibid.*

Another relevant issue to be considered is additionality, which describes renewable energy production that is "truly new"[35]. Indeed, the common thinking is that a certification system can guarantee an automatic increase of green energy capacity produced, but there is no certainty that the producers will increase their renewable production by buying GOs.

A solution could be to limit the use of profits earned thanks to the premium added to hydrogen price. As a matter of fact, the producers will have to raise their energy prices, since they would be sustaining not only the cost of making their hydrogen compatible with the certification requirements, but also the administrative costs related to the operation of the GO scheme[36].

However, even if final consumers will be willing to pay higher prices, there is no legal guarantee that producers will re-invest the major gain to increase their green capacity[37]. That is why someone suggests limiting the access to the system only to new capacity or to plants that do not receive other types of incentives[38]. This is a transversal aspect to be aware of while designing a GO scheme, since measures pushing producers to add new green energy capacity to their production become needed to foster the decarbonization process.

One last fundamental issue regards the interaction between GO systems[39]. This topic becomes particularly relevant when a conversion from an energy vector to another one makes the two systems interact between each other.

A reliable, precise, free from fraudulent conducts certification scheme must foresee all these possibilities and the ideal solution is to define a harmonized regulation for the different GO systems. Firstly, it is necessary to remove all the barriers related to the unnecessary administrative costs concerning conversion: common rules regarding

35. See Schneider Electric, *What You Need To Know About Additionality* (September 10, 2018), available at https://perspectives.se.com/renewable-energy/what-you-need-to-know-about-additionality (last visited November 20, 2021).

36. See Velazquez Abad, Dodds, *Green Hydrogen characterisation initiative* at 2-7, 9-12 (cited in note 26).

37. See ECOS, *Success Guaranteed? The Challenges of Guarantees of Origin for Certified Renewable Hydrogen* at 5 (cited in note 29).

38. See *ibid.*

39. See CertifHy, *Recommendations on the establishment of a well-functioning EU hydrogen GoO system* at 33-36 (cited in note 12).

conversions and the simplification of the administrative procedures could be a first efficient solution[40]. Then, in order to increase the system's credibility, attract the final consumer and avoid double counting, a punctual monitoring mechanism must ensure the immediate cancellation of consumed GOs. Lastly, to prevent illegal conversions of GOs (i.e. when the conversion of the guarantee is not followed by the conversion of the physical energy flow, thus causing a lack of GOs in the disclosure system of the original vector), it is central to implement a transparent control mechanism by the authority in charge of GOs registration and monitoring[41].

The lack of harmonized rules and of a shared system causes lots of deficiencies in the system's efficiency, also at the national level. The existence of many national schemes can easily lead to losing information regarding the GOs content[42]. About that, it is interesting to cite the activity of the Association of Issuing Body (AIB) (of which Italy is a member), that works to ensure the reliability of the European energy certification systems and to support Members during legislative changes periods. The organization aims at promoting a standardized certification system for all energy vectors: the European Energy Certificate System (EECS). The EECS wants to guarantee that international certification systems work in a credible and reliable way, according to standards of non-discrimination, objectivity, transparency, and economic efficiency. Even though it is not a binding system, the CertifHy experts have pointed out that careful consideration should be given to the EECS rules and general principles, during the definition of the details for a hydrogen GO system[43].

In conclusion, it is worth considering the possible interactions between the GO systems, especially if considering the conversion of renewable electricity into hydrogen. This regard highlights the need for a subject competent in GOs conversion. Indeed, the transfer from one register to another must be ensured in a way that prevents double counting cases. Furthermore, there is the necessity of a conversion

40. See *ibid.*

41. See *ibid.*

42. See Akos Hamburger, *Is guarantee of origin really an effective energy policy tool in Europe? A critical approach*, 41 Society and Economy 487, 494-495 (2019).

43. See CertifHy, *Recommendations on the establishment of a well-functioning EU hydrogen GoO system* at 5 (cited in note 12).

process that guarantees the correct transfer of information, since different guarantees bring different information specifically selected for the certified vector.

4.2. Barriers to Sector Coupling: the unbundling principle and the regulatory gap concerning pure hydrogen

The barriers to SC are not only economical and technical. In order to realize the integration of all the energy sector's components, the adoption of coherent norms is necessary, as well as change of perspective. Currently, the electricity and the gas sectors are regulated by different legal acts that need integration in the framework of SC.

One of the main challenges is posed by the unbundling principle, which consists in the separation of generation and supply activities from grid management and operation activities. This regime has been established by the European Union after the liberalization process of the gas and electricity markets, to avoid competition distortions. If the same undertaking was responsible for both generation/supply of energy and for its transmission, it could profit from its position impeding other producers to access the grid. The unbundling regime then, was established to guarantee the same conditions of access to all the suppliers, avoiding conflicts of interests and discriminatory conducts.

There are different types of unbundling and every Member State can opt for one of those: the Ownership Unbundling (O.U.), that implies for all vertically integrated companies the entire transfer of their networks, since they must not interfere with the activity of the T.S.O.; the Independent System Operator (I.S.O.), who manages and operates the network, even though the company maintains formal property of it; the Independent Transmission System Operator (I.T.O.), where the energy company possesses and operates the network under the supervision of the I.T.O., who decides the most relevant issues.

According to the EU regulation, every T.S.O. must be authorized to operate by a certification released by the competent national authority. This authority must ensure that the T.S.O. respects all the rules imposed to guarantee the right functioning of competitive markets: that is why there are rules ensuring the independence of the authority.

As stated by the Directive 2009/73/EC (the Gas Directive), the O.U. is the most effective and efficient unbundling system: only by

completely removing the risk of conflicts of interests, it is possible to obtain a non-discriminatory access to the grid, that attracts investments for network infrastructure, and that guarantees transparency[44]. At the same time, it is also the most difficult one to implement (since it often involves companies' renovation) and more time is given to governments that choose it[45].

In Italy, the Gas Directive was transposed with the D. Lgs. n. 93 of 2011 with which the government chose to implement the I.T.O. model, functionally dividing ENI S.p.A. (a multinational energy company) from Snam S.p.A.[46]. Afterward, in 2012, the "Decreto Liberalizzazione" entered into force and the government adopted the O.U. system[47] . According to article 15 of the law it was then issued the DPCM 25th May 2012, that clarifies the concrete modalities to separate Snam and ENI, to implement the O.U.

The T.S.O.s have a key role for the development and the management of the gas and the electricity networks, since they are the entities investing the most and, based on experience, it is probable that also the hydrogen transport network will be subjected to the unbundling principle. Nowadays, the NG transmission system is operated by Snam Rete Gas for the 94%, meanwhile the electricity transmission system is operated by Terna S.p.A. for the 98,3%[48].

It would be possible for the T.S.O.s to invest in adjusting the NG infrastructure to give access at least to blending of gas and hydrogen. However, this kind of actions strictly depended on the political will since economical support by the government is needed. Then, once technologies are mature enough, the regulator must be ready to promptly review the regulation that becomes obsolete.

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44. See Para (8), EC Dir 13 July 2009, no 73.

45. See *Id.* at para (11).

46. See Clifford Chance, *Unbundling: la separazione proprietaria della gestione della rete nazionale di trasporto del gas in Italia* at 2 (June, 2012), available at https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2012/06/unbundling-la-separazione-proprietaria-della-gestione-della-rete-nazionale-di-trasporto-del-gas-in-italia.pdf (last visited November 20, 2021).

47. See Art 15, co. 1, L. 24 March 2012, n. 27.

48. See Flavia Masci, *Chi è il gestore della rete elettrica e del gas metano?* (September 29, 2020), available at https://luce-gas.it/guida/mercato/gestore-rete (last visited November 20, 2021).

Some experts sustain that hydrogen transport should be regulated as NG, since they are similar elements[49]. Usually, regulation is used as an instrument to prevent market failure situations and that is why it is important to analyze the possible evolution of an energy market hosting hydrogen. If pipelines become the primary means of hydrogen transportation, the birth of a natural monopoly needing regulation would be very likely. Nonetheless, regulation must be used carefully, since a too strict one could have undesirable drawbacks, such as discouraging participation in the market.

Currently, the Gas Directive allows hydrogen to be injected into the gas grid if blended with NG: article 1(2) states the non-discriminatory principle according to which the Directive must be applied to "other types of gas" that can be safely injected into the grid. However, it is not clear if the Directive is applicable to hydrogen even when its quantity exceeds the NG, and nothing is told about the possibility to operate a grid made for pure hydrogen[50], a still not considered aspect by the European legislation.

According to the Gas Directive the unbundling regime would not be valid for a pure hydrogen network, meaning that nothing prevents a T.S.O., which already manages the gas network, to manage a hydrogen network as well[51]. There may be many reasons to do so: it may use the hydrogen network aiming at using the blending of hydrogen and NG; or it may want to run both the networks separately and at the same time (so-called "combined network operator"); or it may want to convert the NG network it is in charge of into a pure hydrogen network (so-called "solitary hydrogen network operator")[52]. Indeed, in these three cases, the operator would be considered as a horizontal integrated company (and not as vertically integrated)[53]. Also, since the

49. See Anneke Francois, "*The Regulation of Hydrogen Infrastructure: New Wine in Old Bottles?*", Florence School of Regulation, available at https://www.youtube.com/watch?v=isfM5WFrSlM (last visited November 20, 2021).

50. See GEODE, *Towards the New Age of Gas Networks. Proposal on the Regulation of a European Hydrogen Infrastructure* at 2, 9-13, 17-18 (May 2020), available at https://www.geode-eu.org/wp-content/uploads/2020/05/20200518-GEODE-PAPER-HYDROGEN.pdf (last visited November 13, 2021).

51. See European Commission, *Impact of the use of the biomethane and hydrogen potential on trans-European infrastructure* at 94-95 (cited in note 22).

52. See GEODE, *Towards the New Age of Gas Networks* at 9-13 (cited in note 50).

53. See Art 21, EC Dir 13 July 2009, no 73.

regulation does not apply to pure hydrogen, the operator could run the network without any authorization by the national authority.

Another inconsistency derives from the regulative gap. In fact, the T.S.O. could autonomously decide to expand the infrastructure without being dependent from hydrogen demand[54]. The issue needs to be addressed by regulators together with technical experts: to boost the development of a (green) hydrogen market, availability of energy supply is necessary and, therefore, infrastructure development is a priority.

Furthermore, another matter emerges: according to article 41 (6) (a) of the Gas Directive, tariffs must be defined also considering the investment needed to guarantee the good functioning of the NG grid. Paradoxically, this would mean that the gain obtained from hydrogen tariffs concerning the hydrogen network could only be used to invest in the NG network[55].

Of course, all these considerations must be read carefully, acknowledging that there are still technical barriers that impede the development of a pure hydrogen network, such as the ones related to the final uses. Also, the realization of infrastructures entirely dedicated to hydrogen is not feasible today, since the European regulation imposes that infrastructure development and expansion must proportionally depend on the demand for the transmission[56] and distribution[57] of that gas.

Due to the international, European and national policy background, we can expect a change of direction soon. Production technologies and final use appliances are becoming more mature and competitive every day and a regulation that permits hydrogen demand to grow and develop is crucial. When this moment will come, it is probable that the unbundling regime will be extended to hydrogen infrastructure too, to prevent conflicts of interests and to ensure competitiveness, access to the grid and equal conditions to all energy suppliers.

54. See GEODE, *Towards the New Age of Gas Networks* at 9-13 (cited in note 50).
55. See *id.* at 9-13 and at 17-18.
56. See Art. 13, para. (1) (a), EC Dir. 13 July 2009, no. 73.
57. See *id* at art. 25, para. (1).

4.3. The need for interaction between GO schemes

When hydrogen goes across multiple energy networks it has to bring a certification attesting its renewable origin. The reflection on the need for coordination between the many GO systems[58] (e.g. renewable electricity, renewable methane, energy efficiency, and renewable heat) has great importance in this process. This issue needs to be taken into consideration because if the ultimate goal is the realization of a hybrid integrated energy system, we can expect that energy conversion will be on the daily agenda soon. It is inevitable that the different GO systems will interact with each other due to the necessary conversion of guarantees. The entire system must be regulated to ensure a credible, predictable, and reliable certification system.

Hydrogen is highly versatile from the point of view of its applications and its certification system should take into consideration all the possible energy vectors in which hydrogen could be converted (e.g. electricity, methane, heat). Therefore, the new hydrogen certification system must be defined and monitored in such a way that does not interfere with the credibility of the other certification schemes[59].

Aiming at the energy vector conversion on a large scale, the priority remains to define harmonized rules at the administrative level, at least for all Member States. This could lead to a reduction of costs and, consequently, to the increase of subjects interested in accessing the certification system. Then, costs related to the purchase of guarantees should be addressed, because the regulative coordination of the multiple GO systems is crucial to avoid unnecessary expenses.

As noted by some experts[60], the ideal solution may consist in creating one single certification system for all energy vectors, which is harmonized at the EU level, in order to have standard rules for the conversion of energy vectors. However, such a system would require

58. See CertifHy, *The interaction between existing certification systems and a new hydrogen GoO system* at 5, 13-14 (October 31, 2015), available at https://www.certifhy.eu/images/project/reports/D3.2_GoO_Interactions-final.pdf (last visited November 20, 2021).

59. See CertifHy, *Recommendations on the establishment of a well-functioning EU hydrogen GoO system* at 33-36 (cited in note 12).

60. See CertifHy, *The interaction between existing certification systems and a new hydrogen GoO system* at 5, 13-14 (cited in note 58).

large economic availability due to the high administrative costs necessary for a well-functioning scheme: there is the need for a compromise between the administrative costs and the necessity to guarantee a credible, reliable, and transparent GO system[61].

The major obstacles that need to be overcome by more scrupulous rules consist in the punctual exchange of information contained in the GO (that tends to change from vector to vector) and the punctual cancellation/registration of converted GOs.

5. The uncertain legal status of P2G technology

The exploitation of the entire potential of hydrogen needs a large-scale deployment of production technologies. Speaking of green hydrogen, this kind of technology is power-to-gas. Still, the market seems not ready to host this technology, which needs more investments to become competitive and mature enough. So, wondering if it is worth investing in power-to-gas, also in consideration of the services that it can offer to the energy system, seems legit. However, various pilot projects regarding power-to-gas and electrolysis have shown contradictory results[62] and there is no real experience that can confirm their reliability. It is not possible to make certain considerations about the cost-benefit ratio of energy conversion through electrolysis[63].

Not so far from these issues, a general trend seems to be in favor of hydrogen development and power-to-gas deployment, even if there are regulative barriers that strongly limit the development and deployment of this technology.

61. See *ibid*.

62. See Carlo Cambini, et al, 143 *Energy System Integration: Implications for public policy* at 5 (Energy Policy 2020).

63. See H2IT - Associazione Italiana Idrogeno e Celle a Combustibile, *Report H2IT Strumenti di Supporto al Settore Idrogeno - Fase 1, Priorità per lo Sviluppo della Filiera Idrogeno in Italia, Capitolo 1 - Produzione* at 19-22 (November 2020), available at https://www.h2it.it/wp-content/uploads/2021/01/H2IT_REPORT_Priorita-per-lo-sviluppo-della-filiera-idrogeno-in-Italia.pdf (last visited November 20, 2021).

First of all, there is not a defined, common legal status of power-to-gas, which causes a lot of confusion from many different points of view (e.g. for the understanding of who can own and operate them[64]).

The article 2(59) of the Directive 2019/944/EU (the so-called Recast Electricity Directive) defines P2G as "energy storage", referring also to P2G which is used with the only scope of producing hydrogen[65].

The gas regulation changes significantly from the electricity one and the interaction between the two regulations shows the need for a legislative review. It was already mentioned that the Gas Directive can be extended to hydrogen according to the non-discriminatory principle stated by article 1(2). However, this is true only if hydrogen is blended with NG.

About P2G, there are many differences from the Recast Electricity Directive and there is not an article that mirrors article 2(59). An option could be to classify the P2G as a "gas storage facility", according to article 2(9)[66]. This could be justified by the non-discrimination principle: if the storage system is part of the natural gas system, article 1(2) imposes the extension of the Directive to that facility too. In this way, the Directive could be applied also to hydrogen storage facilities if connected to the NG grid[67]. However, it could be objected that P2G cannot be considered a "gas storage facility". With regard to this, two considerations can be done: firstly, since the scope of NG storage systems is to guarantee flexibility to the grid through the withdrawal and the injection of the gas into the grid, hydrogen storage systems can only withdraw gas from the grid[68]. Secondly, it can be affirmed that the P2G performs a function that is more similar to NG generation than to its storage.

At the national level[69], power-to-gas is considered as a final consumer. This leads to its subjection to all the relative charges, both for the dispatch and for the transport of the energy used for hydrogen production. Obviously, this has consequences also on the final cost of

64. See ETIP SNET, *Sector Coupling* at 12, 33, 39, 42-43 (cited in note 21).
65. See Fleming, *Clean or renewable* at 7-9 (cited in note 6).
66. See *id.* at 12-13.
67. See *ibid.*
68. See *id.* at 15-17.
69. See H2IT - Associazione Italiana Idrogeno e Celle a Combustibile, *Report H2IT Strumenti di Supporto al Settore Idrogeno* at 19-22 (cited in note 63).

hydrogen generated from electrolysis. This double taxation happens especially when there is not a local renewable energy production plant and, therefore, there is the need to withdraw energy from the electricity grid.

In order to find a solution to all these complex issues is desirable a dialogue between all the national entities involved in the balancing services' sector, meaning Terna, the GSE, and Snam for the Italian case. Moreover, incentivizing measures are needed specifically to promote power-to-gas technologies and all the services that they can offer to the energy system, without being subjected to the same identical conditions of a final consumer.

In view of all this, it can be expected that, thanks to the transposition of the Electricity Directive, also at the national level the P2G will be classified as a generator and/or as a hydrogen storage facility and that it will be subjected to fair conditions that mirror its peculiarities. Anyhow, there is still the need for a review of the Gas Directive, which is becoming obsolete and limiting.

5.1. The P2G and the unbundling principle (and the role of T.S.O.s/D.S.O.s)

The Gas Directive imposes the unbundling regime to separate gas storage systems from the transmission (and distribution) activities. The question that is left is whether the same rules can be applied to power-to-gas, since its legal status is still ambiguous[70].

Currently, the Gas Directive leaves a wide gray area about P2G regulation, which represents a big obstacle to their implementation.

For example, is it possible that an energy company builds and operates a P2G system? To answer this question, it is important to understand if the P2G is a gas or an electricity storage system. In fact, while the Gas Directive states the explicit prohibition for the combination of the two activities (the owning and the operating of gas storage facilities), there is no such statement in the Recast Electricity Directive. Therefore, it could be supposed that only P2G intended as electricity storage could be operated by its owner.

70. See European Commission, *Impact of the use of the biomethane and hydrogen potential on trans-European infrastructure* at 94-95 (cited in note 22).

Also, the role of T.S.O.s (and Distribution System Operators - D.S.O.s) is doubtful. For this reason, system operators should be the first to solicit the adjustment of regulation, so as to define their role for these technologies at the national level too[71].

First of all, it is necessary to solve the regulative imbalance regarding the system operators of the two networks, which currently allows only electricity operators to own and operate storage systems. Furthermore, shared mechanisms for communication and for information exchange between gas and electricity operators should be established, to better manage imbalances between supply and demand[72].

At least initially, it is possible that Members decide to exclude projects about P2G from the unbundling, since the system operator could effectively support the large-scale deployment of P2G. They could give the possibility to system operators to build P2G systems with demonstrative scopes or as industrial units, and to operate them as services to supply to the various market parties[73]. This exception can be made if all the requirements set by articles 36(2) and 54(2) of Directive 2019/944/EU are met: there must not be third parties interested in owning, developing, managing and operating the P2G system (in the respect of the non-discrimination principle); the P2G system must ensure safety, efficiency and reliability; it must not be used to sell electric energy to the market; it must be approved by the competent national authority.

Summarizing, in a first moment at least, the systems operators could be the ones who own, develop, operate, and manage P2G systems to ensure economically efficient conversion services and equal treatment to all participants.

71. See *ibid*. at 100-102.

72. See GIE, *Sector Coupling and policy recommendations, GIE Position Paper* at 2, 4, 12-16 (March 19, 2019), available at https://ec.europa.eu/info/sites/default/files/gie_-_position_paper_-_sector_coupling_p2g.pdf (last visited November 20, 2021).

73. See European Commission, *Impact of the use of the biomethane and hydrogen potential on trans-European infrastructure* at 86-89, 100-101 (cited in note 22).

6. The Italian case

The EU Strategy for Energy System Integration shows how it is utopic to think that the total elimination of carbon dioxide (CO2) emissions can happen, because it could not, even with the complete integration of the energy networks[74]. That is why the European Commission has adopted a neutral approach from the technology point of view, emphasizing the fundamental role that CCUS technologies will have for the energy transition[75].

The Commission also shows to be aware of the differences between Members, since every State has its own peculiar energy situation and it is crucial to recognize the diverse starting points. In consideration of the possibility of injecting hydrogen into the gas network, the regulation must pay attention to the actual situations of the Members, while trying to issue policies that ensure the most enhancement of renewables[76].

By looking at the national possibilities for the hydrogen value chain development, North Africa may be a a perfect site to produce renewable energy because it is rich of natural resources. The Italian NG network reaches these African territories, this connection could be a turning key for the hydrogen European hub: Italy could be the main Mediterranean hub for green hydrogen transport in all Europe[77] if the EU decides to install P2G units close to generation plants, to produce green hydrogen to be transported through the Italian hub. This could be not only an opportunity to functionally exploit unused

74. See European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, COM (2020) 299 final, *Powering a climate-neutral economy: An EU Strategy for Energy System Integration* at 15 (July 8, 2020), available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:-52020DC0299&from=EN (last visited November 20, 2021).

75. See *id.* at 13-21.

76. See European Commission, *Impact of the use of the biomethane and hydrogen potential on trans-European infrastructure* at 16-18, 86-89, 95, 100-101 (cited in note 22).

77. See SNAM, The European House - Ambrosetti, *Una filiera nazionale dell'idrogeno per la crescita e la decarbonizzazione dell'Italia* at 112-115, 117, 120, 122, 125, 146-150, 172-189 (cited in note 6).

territories, but also to boost the participation of the African States to the decarbonization process[78].

Nevertheless, there is the need for a more flexible normative context, which opens access to research funds and which can attract private investments. A crucial aspect is competitiveness: the vector itself must become cheaper, in order to be competitive with traditional fuels if we want to accomplish the creation of an energy market that can host green hydrogen. For example, investing heavily in Research & Development & Innovation (R&D&I) is a turning point to be addressed for the achievement of these goals.

The Italian regulation lacks in consideration of hydrogen transport from the gas network: only the Gas Grid Code by Snam[79], one of world's major energy infrastructure society, allows hydrogen injection into the gas grid, but only in the form of biomethane and with a maximum concentration of 1% in volume[80]. However, it is worth mentioning that on the 16th of December 2019, Snam led an experimentation at Contursi Terme (Salerno, IT) to inject 10% vol. of hydrogen into the gas grid, empowering a pasta factory and a bottling industry.

The Italian Ministerial Decree of 18th May 2018 does not mention a mixture of NG with hydrogen for its grid injection. Furthermore, there is no regulation allowing the realization of specific pipelines for hydrogen transportation.

It must be noted that the regulation of this topic is difficult: firstly, a percentage of hydrogen superior to 2% in volume could damage the pipelines in a way that compromises its durability and integrity; secondly, the final consumer appliances and their characteristics must be considered to understand if they can work with that kind of gas mixture[81].

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78. See Alverà, *Rivoluzione Idrogeno* at 86-88 (cited in note 5).

79. See SNAM, Codice di Rete V5 (Gas Grid Code), *Specifiche tecniche sulle caratteristiche chimico-fisiche e sulla presenza di altri componenti nel gas naturale* at 139-140, available at https://www.snam.it/export/sites/snam-rp/repository-srg/file/en/business-services/network-code-tariffs/Network_Code_ITG/Archivio_codice_rete/ITG_Codice_di_rete_xvers_Vx_ITA.pdf (last visited November 20, 2021).

80. See SNAM, *Snam: Immissione sperimentale di idrogeno a Contursi raddoppiata al 10%* (January 8, 2020), available at https://www.snam.it/it/media/news_eventi/2020/Snam_immissione_sperimentale_idrogeno_Contursi_raddoppiata.html (last visited November 20, 2021).

81. See Fleming, *Clean or renewable* at 59 (cited in note 6).

As far as SC is concerned, in 2019 the Italian government adopted new measures to finance the R&D regarding the realization of a hybrid energy system, trying to optimize the integration of renewables and to increase the flexibility and the reliability of the entire system. Concurrently, some storage plants were electrified, realizing the interconnection of the gas and electricity networks, the increasing of energy efficiency, and the reduction of GHG emissions[82].

For instance, some Italian storage and compression facilities have been electrified and now are dual fuel (gas-electric). These adjustments have led to emissions decreasing, to a better performance, and to the interconnection of the two networks. Moreover, collaboration between the operators have been strengthened with regard to their common interests, such as the utilization of non-programmable renewable energy, the infrastructure monitoring and analysis, and the joint optimization of the gas and electricity grids.

The European scenario and the Italian framework introduced here, point out the need for the adjustment of obsolete regulation.

After the economic crises caused by the Coronavirus global pandemic, some institutions have seen the opportunity to use the recovery phase as a start over for the energy system: during 2020, many Member States have reviewed their energy regulation and have issued national hydrogen strategies. This unique period, since the Covid-19 pandemic, has stressed out the limit of national economies and has brought the need for recovery planning. The Commission defined the Next Generation EU, an investment program of € 750 billion[83], to support the recovery of Members' economies. As it is further explained, Italy and other Members plan to dedicate a consistent part of their national Recovery Plans to the energy transition and to hydrogen.

82. See Ministero dello Sviluppo Economico, Ministero dell'Ambiente e della Tutela del Territorio e del Mare, Ministero delle Infrastrutture e dei Trasporti, *Piano Nazionale Integrato per l'Energia e il Clima* at 85 (2020), available at https://www.mise.gov.it/images/stories/documenti/PNIEC_finale_17012020.pdf (last visited November 20, 2021).

83. See European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, COM (2020) 442 final, *The EU Budget Powering the Recovery Plan for Europe* at 14 (May 27, 2020), available at https://eur-lex.europa.eu/resource.html?uri=cellar:4524c01c-a0e6-11ea-9d2d-01aa75ed71a1.0003.02/DOC_1&format=PDF (last visited November 20, 2021).

Also, the EU is trying to exploit this moment to review its legislative background and Italy could have a preeminent role inside the hydrogen development process. For example, the green hydrogen production from electrolysis exploits mainly overgeneration from renewable sources, which is something that happens especially in Southern Italy. So, Italy should push on development plans for big integrated plants at the EU level and on improving the electricity transport system in order to better connect the South and the North of the Country[84].

6.1. The Integrated National Plan for Energy and Climate (PNIEC) and the Hydrogen Strategy

As regard of the Italian State of Art, there are two main acts that it is worth analyzing: the National Integrated Plan for Energy and Climate (PNIEC)[85] and the draft of the Italian Hydrogen Strategy.

The last version of the PNIEC was presented to the European Commission on 21st of January 2019. The Plan defines national goals to be reached by 2030 relative to CO2 emission reduction, energy efficiency, implementation of renewable energy sources, energy safety, energy interconnections, internal energy market, sustainable mobility and development.

The PNIEC was issued following the guidelines set by the Green New Deal, which asks all Members to define a national plan with goals by 2030 and personalized measures to reach them.

This Plan focuses on five main intervention points: (i) decarbonization; (ii) energy efficiency for all sectors; (iii) energy safety; (iv) development of an internal energy market; (v) research, innovation, and competitiveness. The purpose is to accelerate the energy transition to 2030 by incrementing the renewable of 30% on gross final energy consumption contrary to the EU goal which is 32%. This 30% is divided between the different sectors of consumption which are more than 55% to electrical consumptions, 33,9% to thermic consumptions, and 22% to mobility.

84. See H2IT - Associazione Italiana Idrogeno e Celle a Combustibile, *Report H2IT "Strumenti di Supporto al Settore Idrogeno"* at 19-22 (cited in note 63).

85. See Ministero dello Sviluppo Economico, Ministero dell'Ambiente e della Tutela del Territorio e del Mare, Ministero delle Infrastrutture e dei Trasporti, *Piano Nazionale Integrato per l'Energia e il Clima* at 85 (cited in note 82).

Even though the priority set by the Plan is direct electrification, hydrogen is considered only for its direct utilization in the mobility sector, relative to the non-electrifiable sections, and for its injection into the methane grid. On one hand, the key role of NG is taken into consideration to accomplish energy transition by gradually substituting the most polluting fossil fuels. On the other hand, the hydrogen produced by fossil fuels with CCUS technologies will probably be essential for the decarbonization process, since it is foreseen that, even when green hydrogen will become competitive, blue hydrogen will still be cheaper. At the same time, the increase of renewable sources inside the energy mix will help the reduction of gas demand, mostly in sectors such as industry and building.

The PNIEC also addresses the topic of SC, aspiring at a synergic pathway for both the electricity and the gas sectors, where the final goal is to realize their integration. Fostering this purpose, it highlighted the primary role of the R&D sector and it is suggested to carry on pilot projects concerning the development of technologies such as power-to-gas, power-to-hydrogen, and gas-to-power. The focus should be on the optimization of performances and on competitiveness of hydrogen technologies.

Despite all the positive aspects of the Plan, it has been developed on a too short-term basis (i.e. 2030) and there will be a review by the regulator, because more long-term and comprehensive goals must be set.

In Italy, after the definition of the Recovery Plan, new perspectives will be taken into consideration. As mentioned before, the European Commission has approved the Next Generation EU, due to the economic crises caused by the spread of Coronavirus. Each Member who wants to access the bond must submit a Recovery Plan that establishes how the money will be used. This decision will probably imply the need for reviewing the Italian PNIEC.

One of the most evident review reasons will be the definition of an Italian Hydrogen Strategy.

Today, the only source available is the national guidelines for the Strategy[86] and it must comply with the PNIEC, with the EU Hydrogen

86. See Ministero dello Sviluppo Economico, *Strategia Nazionale Idrogeno Linee Guida Preliminari* (2020), available at https://www.mise.gov.it/images/stories/

Strategy and with the entire European environmental agenda. The main goals are the penetration of approximately 2% of hydrogen in the final energy consumption by 2030 and up to 20% of hydrogen in the final energy consumption by 2050, but they can be met only with the consistent increase of hydrogen demand; this will be the main line over which defining the Strategy.

About hydrogen production, the focus is on green hydrogen and on three types of production: firstly, entirely local generation, where the electricity and hydrogen production happen close to the consumption point. Secondly, local generation with electricity transportation, where renewable electricity is generated in territories reach of natural resources, but far from the hydrogen production and consumption site. Lastly, centralized generation with hydrogen transport, where electricity and hydrogen generation plants are in the same site, but far from the consumption sites, for this last reason hydrogen transport is needed.

The PNIEC enhances the challenges of intermittency and non-programmability of renewables, and this is an opportunity to exploit overgeneration to produce green hydrogen. Consequently, the combination of renewable energy overgeneration with hydrogen production is seen as pursuing the SC goal. Currently, the first step defined in the strategy guidelines is the installation of 5W of electrolysis capacity by 2030[87], while the European Union's targets are of 6GW by 2024 and of 40GW by 2030[88].

Moreover, the possibility to create a GO system is considered to support hydrogen demand together with incentivizing schemes and simplification of the regulation. Nevertheless, there is still a lack of real interest by the hydrogen guidelines.

In conclusion, the Italian regulatory background is completed by the National Recovery and Resilience Plan (PNRR), which contains

documenti/Strategia_Nazionale_Idrogeno_Linee_guida_preliminari_nov20.pdf (last visited November 20, 2021).

87. See *ibid.*

88. See European Commission, Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions, COM (2020) 301 final, *A hydrogen strategy for a climate- neutral Europe* at 5-7 (July 8, 2020), available at https://ec.europa.eu/energy/sites/ener/files/hydrogen_strategy.pdf (last visited November 20, 2021).

the Italian investment plan regarding the use of Next Generation EU funds while defining four challenges for Italy, through which also the pursuing of the green transition. Among the many goals set by the plan, hydrogen development is highly considered, especially if talking about the R&D sector[89]. Following the European Green Deal, the PNRR will define a decarbonization path to reduce GHG emissions by reforming urban plans to foster renewable energy integration, by transforming the mobility sector and by increasing energy efficiency[90].

7. Conclusions

The proposed analysis shows the necessity for regulation review, both at the Italian and European level. This step should be accompanied by support for the R&D sector to make hydrogen technologies more competitive and appetible. In particular, the lack of a business case for CCUS and electrolyzers performances strongly limits hydrogen investments. Actually, public investment is not sufficient and private actors need to be involved, for example implementing an incentivizing regulation. It is also important to redefine the economic, social and environmental priorities, and this is of primary competence of policymakers, who must take a firm position about the role of hydrogen inside the macro-objectives planned for the energy system.

About the need for a GO system, there is still the lack of a precise political and legislative willingness to promote hydrogen production through the creation of a certification scheme. As already said, the existence of a GO system could also help industries reaching the emission cap stated by the ETS and its future adjustments.

Concerning the SC goal, Italy should intervene promptly on regulation. The potential for hydrogen transport is great, but the actual legislation only allows to inject 1% in volume of hydrogen in the natural gas transport system, and only if the hydrogen is in the form of biomethane. These rules limit the possibilities to experiment higher

89. See Governo Italiano, *Piano Nazionale di Ripresa e Resilienza* at 125-128, 134-138 (2021), available at https://www.governo.it/sites/governo.it/files/PNRR.pdf (last visited November 20, 2021).

90. See *ibid.*

concentrations of hydrogen and to increase hydrogen value chain development chances in Italy.

The main goal, of course, is to produce low-emission hydrogen and so incentives to green hydrogen production and to R&D sector to scale-up production technologies are strongly needed. However, green hydrogen production results to be very costly, mostly because of high costs of renewable energy[91]. That is why incentivizing programs are needed (both at the public and private levels) and hydrogen produced by fossil fuels with CCUS technologies represents a necessary transition point.

A new approach is essential for policymakers to define a coherent pathway able to allow hydrogen development while not interfering with other environmental policies that have been already implemented. For this purpose, experts of different sectors (legislative, economic, technic, sociological) must support policy-makers during the decision process. In this perspective, pre-regulative activities supporting research entities, industries, and experimentations should be put in place providing all the data needed for an ideal legislative process[92].

In consideration of all this, the best option for the new Italian Ministry of Ecological Transition[93] is to treasure all the knowledge coming from the experts of every field involved in this great pathway in order to make balanced and accurate decisions[94].

91. See H2IT - Associazione Italiana Idrogeno e Celle a Combustibile, *Report H2IT Strumenti di Supporto al Settore Idrogeno* at 19-22 (cited in note 63).

92. See *ibid.*

93. For more information about the Ministry of Ecological Transition visit the website https://www.minambiente.it/ (last visited November 20, 2021).

94. This research did not receive any specific grant from funding agencies in the public, commercial, or not-for-profit sectors.

Border Carbon Adjustment mechanisms and their (in)compatibility with WTO law

Giulia Petrachi*

Abstract: The paper focuses on Border Carbon Adjustment (BCA) measures and their legality vis-à-vis the World Trade Organization (WTO) law. As measures limiting international trade, border carbon adjustments can conflict with WTO law, either representing a discriminatory trade measure or a quantitative or qualitative restriction. Nonetheless, mitigation of climate change is becoming increasingly warranted, making scholars more and more concerned with solutions that allow to harmonize carbon reduction measures and international trade, being also beneficial to the international market. The paper analyses the role of BCA measures in the multilateral trade relations among states, examining which provisions of the General Agreement of Tariffs and Trade (GATT) may be incompatible with them. It also focuses on the anatomy of those incompatibilities, to investigate whether and how BCA measures could be framed in compliance with WTO law, analyzing the role of WTO case law and GATT's exceptions on the matter.

Keywords: Border Carbon Adjustments; WTO; GATT; Emissions; Climate change.

1. Introduction

The increasing concerns related to climate change are driving most countries to pursue rigorous domestic action to address and mitigate climate change. These actions tend to revolve around the imposition of stricter norms on the production of goods and provision of services, regulating the emissions deriving from these activities. Nonetheless, it has proven to be a difficult process, since every measure has a potential effect on the production and marketability of domestic goods and services.

Furthermore, regulations on carbon emissions have a strong impact on a country's position in international trade, especially considering the current divergence among the provisions governments adopt regarding climate change mitigation strategies. Due to asymmetry in carbon emissions regulation, a country implementing higher carbon emissions standards could potentially find itself to be cut off from the international market. This would happen as a result of its market conditions being inconvenient for exporters, with damage to its own economy and overall negative or net zero impact for the environment.

Border carbon adjustments have repeatedly been argued as an efficient solution to handle the challenge of creating a balance between those divergent interests, effectively providing climate change mitigation.

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The adjustments amount to a set of trade measures that would redress the balance between domestic producers facing costly emissions reduction policies and foreign producers facing comparatively lower carbon emissions standards. BCA measures inevitably affect international economic relations; therefore, they must be compatible with WTO law and not represent an obstacle to international trade. The compatibility (or incompatibility) of border carbon adjustments with WTO has represented a major topic among scholars in the past, in an attempt to reach a conclusive compromise or, perhaps, a design for adjustment measures that allowed the harmonization of two apparently contrasting interests.

The paper analyses the theory behind BCA measures, with the purpose of understanding why they could be beneficial in the current environmental circumstances. It also compares the measures with the evolution of the WTO and the way it deals with environmental concerns. Through the analysis of GATT's articles and WTO case law, the paper examines whether WTO law is truly incompatible with carbon adjustments, and evaluates if the recent evolutions in WTO case law could better allow for the institution of border carbon adjustments.

2. Border Carbon Adjustments

Through the last decades, the global community has witnessed the progressive growth of the international climate regime, recently culminating with the drafting and signing of the Paris Agreement, which imposes climate change mitigation in the form of an individualized set of obligations[1]. The doctrine of common but differentiated responsibilities[2] and the withdrawal of the United States of America have inevitably fragmented the international climate regime, which now comes with an expectation that different countries will be using different mitigation strategies, either because of their recognized

1. See Michael A. Mehling, et al., *Designing Border Carbon Adjustments for Enhanced Climate Action,* 113(3) American Journal of International Law, 433 (2019).

2. The principle of common but differentiated responsibilities (CBDR), encompassed in the majority of the international climate treaties, the Paris Agreement in particular, holds that states all have the same responsibility to protect the environment

economic and technological disadvantages or in reason of not being part to any international climate agreement[3].

While unevenness in mitigation strategies is inevitable, when asymmetric regulations interact on the international market, investments could be affected in a manner that is somehow negative for the environment: assets migrate to areas in which carbon emission standards are less burdensome, creating a progressive increase of carbon-intensive production[4]. It is clear that such an outcome is damaging both for the international economy and for the environment, potentially nullifying the effects of mitigation policies.

The term Border Carbon Adjustments (BCAs) defines a set of measures employed by a country's government to stabilize the costs incurred by domestic producers, who in general are subject to stricter national carbon pricing policies, with the comparative lower expenses of foreign producers, subject to lower carbon emissions standards[5].

BCAs may be framed in different species of measures. The most discussed design that a BCA measure could have is that of a border carbon tariff, actualized as a fee of a fixed amount on import imposed on products at the border, in order to cover the equivalent of the carbon tax imposed on domestically manufactured products, balancing the costs of foreign and internal production[6]. Another form of BCA measures is the establishment of an emission trading system, having importers acquire emissions allowances to participate in the domestic emissions market. Once introduced in the emissions allowances scheme, either the importer would have to purchase allowances in

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and participate in mitigation of climate change, but because of different social, economic, and ecological conditions, states undertake different responsibilities.

3. See Davidson Ladly, *Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities*, 12 International Environmental Agreements: Politics, Law and Economics, 63 (2011).

4. See Frédéric Branger and Philippe Quirion, *Climate policy and the 'carbon haven' effect*, 5(1) WIREs Climate Change, 54 (2014).

5. See Sarah Davidson Ladly, *Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities* at 65 (cited in note 3).

6. See Mehling, et al., *Designing Border Carbon Adjustments for Enhanced Climate Action* at 432 (cited in note 1).

the existing domestic market, or a separate marketplace for importers would be set up[7].

In their balancing role, BCAs are usually conceived to address three main matters: competitiveness, leakage, and leverage.

7. See Sofia Persson, *Practical Aspects of Border Carbon Adjustment Measures: Using a Trade Facilitation Perspective to Assess Trade Costs*, International Centre for Trade and Sustainable Development (2010) at 2, available at https://ictsd.iisd.org/themes/climate-and-energy/research/practical-aspects-of-border-carbon-adjustment-measures-using-a (last visited November 19, 2021).

2.1. Competitiveness

All measures employed to reduce carbon emissions affect the costs of production to a certain degree. Industries operating in a country that imposes strict carbon-reducing measures could find their expenses to be increasing either because of levies imposed by the domestic government over their production, or by the ulterior investments necessary to reduce their carbon emissions in the production process[8]. The internalization of the investment to protect the environment from production damage could be burdensome for the industries subject to carbon reduction emissions. Consequently, a country's imposition of carbon reduction measures over domestic industries could damage the competitiveness of domestic firms on the international market, that face a lighter burden in terms of taxation and carbon reduction[9].

The purpose of BCAs regarding competitiveness would be to redress the balance between domestic and foreign products, either by encouraging consumption of domestic products, made more convenient because of the increased price of imported goods, or by capitalizing through the fees on imports, that effectively represents a new form of revenue for the country's economy[10].

2.2. Carbon leakage

The term carbon leakage indicates the rise in carbon emissions that can be observed in a country with low carbon standards as a result of other countries adopting strict carbon regulations[11]. The phenomenon is caused by the loss in competitiveness of the industries in countries imposing higher carbon standards, which propels a relocation of investments and industries towards regions with more convenient

8. See Davidson Ladly, *Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities* at 65 (cited in note 3).

9. See Peter Holmes, Tom Reilly and Jim Rollo, *Border carbon adjustments and the potential for protectionism,* 11(2) Climate Policy, 886 (2011).

10. See Aaron Cosbey, *Border Carbon Adjustment* (IISD 2008) available at https://www.iisd.org/system/files/publications/cph_trade_climate_border_carbon.pdf (last visited November 19, 2021).

11. See Davidson Ladly, *Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities* at 65 (cited in note 3).

carbon emissions measures, the so-called "carbon havens"[12]. The relocation results in increased production in the areas with lower carbon standards, finally causing a spike in universal carbon emissions[13].

The effect of carbon leakage is a net zero positive for the environment and the climate, with carbon emissions possibly reaching on the long term a higher level, compared to the one before the enactment of carbon reduction policies[14].

To effectively address carbon leakage, BCAs should be preventing delocalization of companies by offsetting the benefits of moving industries to "carbon havens", improving instead the positives of investing in industries settled in countries implementing high carbon standards, alongside with increasing the interests of domestic investors in domestic production[15].

2.3. Leverage

BCAs measures could serve as a leverage to compel countries with lower carbon standards to pursue stronger emissions reduction policies[16]. If the BCA provided advantageous market conditions for producers generating elevated carbon emissions, in a manner that excluded producers from countries with lower carbon emissions standards, it would be persuasive for producers to pursue lower carbon emissions in the manufacturing of the products and for governments to include stricter carbon standards in their domestic policies[17].

12. See Branger and Quirion, *Climate policy and the 'carbon haven' effect* at 54 (cited in note 4).

13. See Davidson Ladly, *Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities* at 66 (cited in note 3).

14. See Cosbey, *Border Carbon Adjustment* (cited in note 10).

15. See Davidson Ladly, *Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities* at 66 (cited in note 3).

16. See *Ibid.*

17. See Cosbey, *Border Carbon Adjustment* (cited in note 10).

3. WTO incompatibility

As a measure influencing trade, BCA mechanisms have been argued to be potentially incompatible, or even in breach of WTO law[18]. In particular, scholarly opinion most often investigates the relation

18. See Davidson Ladly, *Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities* at 75 (cited in note 3).

that could arise between BCA measures and Article I[19], Article III[20], and Article XI[21] of the GATT[22].

19. General Agreement on Tariffs and Trade (GATT) (1947), 55 UNTS 194 (1947), Art. 1 para. 1: "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties".

20. GATT (1947), Art. 3 paras. 1, 2 and 4 ("1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production. 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1. [...] 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product").

21. GATT (1947), Art. 11, para. 1 ("No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party").

22. See Madison Condon and Ada Ignaciuk, *Border Carbon Adjustment and International Trade: A Literature Review*, OECD Trade and Environment Working Papers, 19 (2013), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2693236 (last visited November 19, 2021).

3.1. Article I of the GATT

The first Article of the GATT sets out to eliminate border taxes or any other kind of advantages and favors that could discriminate among imports from WTO members' economies[23]. Such obligation seeks to avoid like products to be taxed in importation in a discriminatory manner[24].

For what concerns the relationship between this Article and BCA mechanisms, there exists a potential incompatibility, in that BCA measures could appear in the form of tariffs and charges on foreign products, which, by design, are imposed on foreign countries' imports and not on local products. The reason for this disparity lies in the necessity, for these charges or tariffs, to level the playing field between local products, implementing higher carbon standards, and foreign products, implementing lower carbon standards and therefore being introduced to the market with more favorable prices. While the disparity appears perfectly reasonable from the economic point of view, it cannot hold to the test of Article I, which explicitly requires non-discrimination[25].

Perhaps the concept of discrimination could be debated in terms of complessive consequent expenses considering that when a foreign importer implementing lower carbon standards presents a product on a State's market, the manufacturing of the product costed x and is therefore sold at price y, while the like product presented to the same market by manufacturers enforcing the higher carbon standards of their own State had cost of production x + c and is thus sold at price y + c, with c representing the costs of production with higher carbon standards. Consequently, the product manufactured in States with lower carbon standards has a lower price and is more palatable to buyers. On this basis, it could be argued that the discrimination is already in place prior to the tariffs imposed by BCA and the BCA serves as an equalizer, rather than a discriminatory measure.

23. GATT (1947), Art. 1 para. 1.

24. See Cosbey, *Border Carbon Adjustment* (cited in note 10).

25. See Davidson Ladly, *Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities* at 65 (cited in note 3).

3.2. Article III of the GATT

Article III of the GATT regards national treatment on internal taxation and regulation, and the principle of non-discrimination[26].

Nonetheless, a conflict between BCA and Article III would only arise if the measures were to be found to discriminate among different importers, which should not be necessarily the case, for instance, if such measures were implemented equally on all the importers working with the same kind of good and enacting the same breaches or respecting the same compliances[27]. As a consequence, if the same BCA provision was applied on all like products and to all the States exporting like products to a third State, arguably the mechanism could not be considered in breach of Article III, since it would not possibly amount to a discriminatory measure[28].

3.3. Article XI of the GATT

Article XI covers the obligation to eliminate quantitative restrictions which in fact claims that parties to the Agreement should not institute prohibitions or restrictions other than duties, taxes, or other charges on the importation of any product coming from any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party[29]. BCA measures could result in breach of this Article if they were perceived as a prohibition on imports other than taxes or charges, therefore, it could be argued that BCA measures falling under the category of taxes or charges could not be deemed to be in breach of the Article[30].

3.4. Article XX and environmental exceptions

Article XX of the GATT regards exceptions and comprises a list of possible circumstances in which a measure, that has been determined

26. GATT (1947), Art. 3.
27. See Cosbey, *Border Carbon Adjustment* (cited in note 10).
28. See *Id.*
29. GATT (1947), Art. 11.
30. See Cosbey, *Border Carbon Adjustment* at 3 (cited in note 10).

to be in breach of any of the other articles of the agreement, could still be found legal[31].

BCA measures could find justification in the so-called "environmental concerns arguments", the clause providing exception for measures necessary to protect human, animal or plant life, or health[32], and paragraph g, regarding trade measures related to the conservation of exhaustible natural resources and are made effective in conjunction with restrictions on domestic production or consumption[33], which have been growing through recent case law and is encompassed by paragraph b. The two paragraphs have thus represented the launch pad for all the jurists seeking to enhance environmental protection in trade areas, or to conceal issues with environmental protection measures that were perhaps mis-implemented or ineffectively enforced.

The WTO Dispute Settlement Body expanded, on the applicability of the environmental concern arguments, for cases regarding breach of Article I and III with justifications related to environmental concerns[34]. Through the case law, it is possible to assess that the WTO bodies have progressively embraced the environmental arguments and oftentimes favored environmental justifications against the imposition of trade limiting measures. Appreciating this shift in mentality allows us to understand which interpretation would shape the application of BCA measures in the current judicial scenario.

The judgments that are the most useful for the observation and understanding of the process are those given during the Tuna-Dolphin saga and in the Shrimp-Turtle case.

3.4.1. Tuna-Dolphin I case

The first case in the Tuna-Dolphin saga[35] was initiated by the challenging of the US Marine Mammal Protection Act. The provision was

31. See Davidson Ladly, *Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities* at 13 (cited in note 3).

32. GATT (1947), Art. 20 (b).

33. GATT (1947), Art. 20 (g).

34. See Davidson Ladly, *Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities* at 13 (cited in note 3).

35. WTO Panel Report, *United States - Restrictions on Import of Tuna* (US-Tuna Dolphin I), WTO Doc. DS21/R - 39S/155 (September 3, 1991).

aimed at reducing the dolphin mortality rate, though, among other measures, the ban on all imports of fish from countries unable to prove to US authorities met a set of dolphin protection standards. The standards, as required in the act itself, posed on the importers the responsibility of maintaining the incidental killing of marine mammals below a determined number[36].

In addition, the Act contained a provision imposing an embargo of tuna products not simply over countries that were not in compliance with US standards, but on intermediary nations as well[37].

Mexico, alongside with other countries, had suffered the embargo from the US and therefore challenged the provision under the GATT, claiming that the US provision violated Article I, III, XI, and XIII of the GATT, and amounted to a discriminatory measure unrightfully limiting international trade[38].

In the first place, the Panel established by the WTO Dispute Settlement Body ruled that rather than breaching Article III, the US provision was in breach of Article XI and amounted to a quantitative restriction to import[39]. The argument then moved to examine whether the exceptions in Article XX applied on the breach, in particular paragraphs b and g.

The Panel formulated what became known as the "reasonableness argument", arguing that if the exceptions of Article XX could be used to allow a country to unilaterally impose its own environmental norms on another country through trade measures, then the GATT would stop being a multilateral trade agreement altogether, since only countries with the same regulations would be able to enter mutual trade, and that allowing such unilateral imposition would have represented a violation of the territorial sovereignty of a country[40].

The Panel also pointed out that, even if the US could invoke the exceptions for unilateral measures, the measures could only go insofar as they were necessary to achieve the determined aim. The term "necessary" was consequently defined in the judgment as "notwithstanding

36. See *Id.*

37. See Vanda Jakir, *The New WTO Tuna Dolphin Decision: Reconciling Trade and Environment?,* 9(1) Croatian Yearbook of European Law and Policy 143 (2013) at 145.

38. See US-Tuna Dolphin I (1991) (cited in note 35).

39. See *Id.*

40. See Jakir, *The New WTO Tuna Dolphin Decision* at 147 (cited in note 37).

the possibility to employ any alternative measures approved by the GATT"[41].

Based on what has been stated, the Panel ended with an initial tendency not to apply the exception clause based on the environmental concern argument, and a disposition to pursue primacy of freedom of multilateral trade and territorial sovereignty over exceptions for environmental protection.

3.4.2. Tuna-Dolphin II case

In 1992 the European Economic Community and the Netherlands brought complaints against the US on similar basis to the first Tuna-Dolphin case, challenging the imposition by the US Government of embargo measures on intermediary nations in the import of tuna products[42]. The argument of the Netherlands and the EEC was that holding intermediary nations to a high burden of proof in exporting a product they were importing themselves amounted to a quantitative restriction, and therefore was a violation of Article XI and Article III. The US Government appealed once again to the exceptions contained in Article XX (b) and (g)[43].

The Panel established by the WTO Dispute Settlement Body ruled that the embargo measures represented a breach of Article III and XI, and it concluded that the exception in Article XX (g) could not be applied, since the provision employed by the US on importation did not practically alter the status of dolphins' conservation[44]. Nonetheless, the court remarkably recognized that dolphins did amount to an exhaustible natural resource according to the definition of Article XX (g). The exception of Article XX (b) was determined inapplicable as well, based on the interpretation of the word "necessary" that had already been employed during the first Tuna-Dolphin case[45].

41. See US-Tuna Dolphin I (1991) (cited in note 35).

42. WTO Panel Report, *United States - Restrictions on Import of Tuna* (US-Tuna Dolphin II), WTO Doc. WT/DS29/P/R/ (June 16, 1994).

43. See Jakir, *The New WTO Tuna Dolphin Decision* at 148 (cited in note 37).

44. See US-Tuna Dolphin II (1994) (cited in note 42).

45. *Id.*

In conclusion, the Panel determined that other policy means should have been employed to ensure the protection of dolphins, however, provisions of this kind fell outside of the scope of the GATT[46].

3.4.3.US-Tuna II (Mexico) (Tuna-Dolphin III case)

The third and last case of the Tuna-Dolphin saga saw the resurgence of the dispute between the US and Mexico[47]. Following the Tuna-Dolphin I case, the Agreement on the International Dolphin Conservation Program (hereafter, AIDCP) entered into force in 1999, a legally binding multilateral agreement that regulates the protection of dolphins during tuna fishery. Among other provisions, the AIDCP set out a "dolphin-friendly" labelling scheme for all the products that could prove that they had not been obtained causing significant adverse impact on dolphin mortality[48]. Mexico brought a complaint against the dolphin friendly labelling scheme laid down by the AIDCP, claiming it created unnecessary obstacles to international trade and represented a breach of Article I and III (4) of the GATT[49].

The Panel seemed inclined to push the reasonableness argument in its judgment for the third time, but finally the decision turned in favor of the environmental concern argument[50]. The final reasoning of the Panel recognized that some asymmetry in environmental regulations was inevitable between trading states and that protection of the environment was one of the objectives of the GATT that was clearly asserted in the exceptions of Article XX[51].

46. *Id.*

47. WTO Appellate Body Report, U*nited States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (US-Tuna II (Mexico)), WTO Doc. WT/DS381/AB/R/ (November 20, 2015).

48. See Elizabeth Trujillo, *The Tuna-Dolphin Encore: WTO Rules on Environmental Labelling,* (ASIL March 7, 2012) available at https://www.asil.org/insights/volume/16/issue/7/tuna-dolphin-encore-wto-rules-environmental-labeling (last visited November 19, 2021).

49. See US-Tuna II (Mexico) (2015) (cited in note 47).

50. *Id.*

51. See Jakir, *The New WTO Tuna Dolphin Decision* at 143 (cited in note 37).

3.4.4. Shrimp-Turtle case

In 1997, India, Malaysia, Pakistan, and Thailand carried a complaint against the US, that had imposed a ban on the import of specific shrimp, with the objective of protecting some species of turtle that had been listed as endangered species in the US Endangered Species Act[52]. The act required shrimp trawlers to use turtle excluding devices. Furthermore, in 1989 the US Government had passed a provision[53] that banned those shrimps harvested with a technology potentially harmful for turtles to be imported in the US unless the country had in place a regulatory programme and an incidental take-rate comparable to that of the US[54]. As a consequence of these measures by the US, the complainant States saw their biggest buyer suddenly exclude them from its market on the basis of turtle related concerns that, on the face of it, appeared preposterous and disproportionately damaging for the four countries economies[55].

After a first resolution of the WTO panel, that found the ban from the US to be incompatible both with Article XI and the exception of Article XX, the WTO Appellate Body clarified that member countries had, in consistency with Article XX (g), the right to take trade action if they had the purpose of protecting the environment[56]. The declaration of the WTO Appellate Body in the case openly clarified that environmental protection was naturally embedded in the norms of the GATT, and that exception from GATT's provision with the aim of protecting the environment was the prescribed path and not a deviation. While the decision was distancing the Appellate Body from the past "reasonableness" argument, it was cautious in reiterating the importance of the two parties undergoing negotiation before one could legitimately impose on the other unilateral environmental policies[57].

52. See United States Endangered Species Act (ESA), 16 U.S.C. §1531 et seq. (1973)

53. See United States An Act § 609 (Shrimp Imports), Pub L No 101–102, 103 Stat 988 (1989).

54. WTO Appellate Body Report, *United States Import Prohibition of Certain Shrimp and Shrimp Products* (US-Shrimp), WTO Doc. WT/DS58/AB/R/ (October 12, 1998).

55. US-Shrimp (1998) (cited in note 54).

56. See Jakir, *The New WTO Tuna Dolphin Decision* at 162 (cited in note 37).

57. See Jakir, *The New WTO Tuna Dolphin Decision* at 162 (cited in note 37).

In conclusion, the Appellate Body found the provisions aimed at protecting turtles to fall under the exception of Article XX, if they were applied without discrimination, in accordance with the requirements for provisional justification contained in the chapeau to Article XX[58].

The Tuna-Dolphin Saga ultimately resulted in the growing importance of the environment in the adjudication of the WTO bodies. What we can infer by the culmination in the decision of the Shrimp-Turtle case is that, despite the orientation of the WTO notoriously being towards trade interests, protection of the environment is inevitably gaining ground in the WTO agenda. This disciplinary attitude allows a different interpretative reading of the articles of the GATT, which assume now a new role in the international legal world: a more inclusive and encompassing position, in which the interests of the environment have larger consideration vis-à-vis other interests[59].

4. The exceptions applied to BCA

If BCA measures were to be found in breach of Article I, III, or XI of the GATT as observed in the previous chapters, they could still eventually be considered in compliance with WTO law by availing of the exceptions in Article XX. In particular, a good defence argument could be formulated in terms of the environmental concern rationale.[60].

4.1. Article XX (b)

For the exception of Article XX (b) to apply, the measure under scrutiny should be necessary to protect human, animal, or plant life or health[61].

The interpretation of the term "necessary" contained in Article XX (b) has been discussed by the WTO Appellate Body in several

58. See US-Shrimp (1998) (cited in note 54).
59. See Jakir, *The New WTO Tuna Dolphin Decision* at 162 (cited in note 37).
60. See US-Shrimp (1998) (cited in note 54).
61. GATT (1947), Art. 20 (b).

cases, chiefly in China-Publications and Audiovisual Products[62] and Brazil-Retreaded Tyres[63]. According to these judgments, in determining whether a measure was necessary a process of weighing and balancing of the benefits and disadvantages should occur, and the court should analyze a number of distinct factors relating both to the measure sought to be justified as "necessary" and to possible alternative measures that may be reasonably available to the responding member state to achieve its desired objective[64]. This criterion for interpretation should serve as a guideline during the design of a BCA measure, prescribing that the measure should be employed in a manner that does not impose excessive burden on imports in comparison with the benefits it brings to domestic production. Moreover, this interpretation of the definition "necessary" suggests lawmakers to cautiously weigh the instruments that could be employed to serve the desired objective.

In the US-Gambling case[65] the WTO Appellate Body declared that the process of weighing, and balancing should start with an assessment of the "relative importance" of the interests or values furthered by the challenged measures[66]. Supposing that BCA measures are imposed in an effective and proportioned manner, their aim should be that of mitigating carbon leakage, a phenomenon that has a strong impact on the environment. Mitigation of carbon leakage could be considered a purpose with high relative importance, since recent scientific studies have proven that its effects could be serious enough to outweigh the benefits of climate action[67]. Furthermore, if limitation of carbon leakage was considered to be a purpose with sufficiently high importance,

62. WTO Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* (China-Publications and Audiovisual Products), WTO Doc. WT/DS363/AB/R/ (January 19, 2010).

63. WTO Appellate Body Report, *Brazil-Measures Affecting Imports of Retreaded Tyres* (Brazil-Retreaded Tyres), WTO Doc. WT/DS332/AB/R/ (December 17, 2007).

64. *Id.,* para. 156.

65. WTO Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (US-Gambling), WTO Doc. WT/DS285/AB/R/ (April 7, 2005).

66. WTO (2020), P. 49.

67. See Mehling, et al., *Designing Border Carbon Adjustments for Enhanced Climate Action* at 444 (cited in note 1).

it should still be proven a sufficient relation between the measure imposed and the aimed purpose.

4.2. Article XX (g)

Paragraph g of Article XX holds an exception for measures relating to the conservation of exhaustible natural resources that are made effective in conjunction with restrictions on domestic production or consumption[68].

To contextualize BCA measures in relation to WTO case law, a relevant interpretation can be found in the China-Rare Earths case[69]. In the judgement of the case, the Appellate Body decided that, for a measure to avail of the exception in Article XX (g), it is necessary to make a holistic assessment of the measure's component elements. A measure should pass the Article XX (g) test when it is demonstrated to have a close and genuine relationship of ends and means to the conservation of exhaustible natural resources and when it works together with restrictions on domestic production or consumption, which operate to conserve an exhaustible natural resource[70].

Furthermore, the Appellate Body stressed that the test should be applied on a case-by-case basis, through scrutiny of the factual and legal context of the given dispute, and that the assessment of the factual relation between the measure and conservation of natural resources should be made through an apposite panel of the Appellate Body. The panel has to analyze beyond the text of the measure and into its practical impact, alongside with the conditions of the market in which it operates[71]. However, the Appellate Body was careful to clarify throughout the China-Rare Earths case[72] that, differently from what already stated in the judgement of the US-Gasoline case[73], the

68. GATT (1947), Art. 20 (g).

69. WTO Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (China- Rare Earths), WTO Docs.WT/DS431/AB/R/, WT/DS432/AB/R/ and WT/DS433/AB/R/ (August 29, 2014).

70. *Id.*

71. WTO (2020), P. 50.

72. See China-Rare Earths (2014) (cited in note 69).

73. WTO Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* (US – Gasoline), WTO Doc. WT/DS2/AB/R/ (May 20, 1996).

decision should not revolve excessively around the predictable effects of the measure[74].

For what concerned the words "relating to", as phrased in the Article, the Appellate Body clearly stated in the US-Gasoline case that the words should be taken as synonymous of "primarily aimed at"[75]. Moreover, in the Shrimp-Turtle case the Body suggested the necessity for an analysis of the "means and ends relationship" existing between the measure and the policy of natural resource conservation. The Shrimp-Turtle case also clarified the meaning of the term "exhaustible natural resources", stating that the definition should be interpreted according to contemporary concerns of the community of nations about the protection and conservation of the environment, stressing that the term should not be considered static, but rather evolutionary[76]. The Tuna-Dolphin II case also was extremely relevant as for the interpretation of "exhaustible natural resources", qualifying dolphins as such and thus clarifying that living creatures could as well be grouped under the definition[77], an aspect that could relate to BCA measures when considering the impact that climate change can have on biodiversity.

Furthermore, in the US-Gasoline case it was explicated that for a measure to be considered to have been made effective in conjunction with another measure with domestic effect, the interpretative key should be that of looking for something levelling the playing field, a sort of even-handedness in the imposition of trade restrictive measures[78]. Nonetheless, it must be remarked that this even-handedness should not be found in the equality of treatments, but rather in the intended aim of policy measures, and in the equal distribution of the burden of conservation[79].

Since adjustments measures are imposed in order to avoid the phenomenon of carbon leakage, this could work to represent a genuine connection between BCA measures and environmental protection,

74. WTO (2020), P. 50.

75. See US-Gasoline (1996) (cited in note 73).

76. See US-Shrimp (1998) (cited in note 54).US v. India, Malaysia, Pakistan, Thailand (1998).

77. US V. EEC and the Netherlands (1999).

78. See US-Gasoline (1996) (cited in note 73).

79. WTO (2020), P. 50.

once assessed that mitigation of climate change is a practice related to protection of exhaustible resources. The "exhaustible natural resources" definition could easily apply to BCA measures, since the evolutionary interpretation of the term proves stringent in the contemporary historical context, in which a progressive sensitization to the topic of climate change is occurring, alongside with the growing impact of climate change.

Furthermore, the interpretation of the Appellate Body in the China-Rare Earth case could be particularly applicable. Indeed, while the textual reading of a BCA measure cannot show an immediate relation to protection of natural resources, the practical application of said measure and its relation to the market in which it is applied appears to achieve that purpose, by way of imposing stricter environmental standards on trade measures.

The fact that the relevance of the predictable effect of the measure should be considered less important to the final adjudication could be detrimental to the argument for BCA measures, but for the most part that could represent a minor damage, if the BCA measures were designed to meet the other requirements.

Finally, among the purposes of BCA measures there should be levelling the playing field between domestic and foreign carbon policies, therefore, it could be assumed that the measures would satisfy the requirement for even-handedness in paragraph (g) and be deemed measures applied in conjunction with domestic restrictions to production and consumption. Arguably, paragraph (g) and BCA measures appear to have the same balancing aim for what concerns the relation between domestic and foreign products.

4.3. The chapeau to Article XX

The majority of the final adjudications in WTO case law relating to exceptions based on the environmental argument is strongly dependent on the chapeau to Article XX.

The requirements in the chapeau are considered to relate particularly to the manner in which a measure is applied, rather than to its formulation. Concurrently, the chapeau's role is to prevent a country

from imposing its rights on another state, according to the doctrine of *abuse de droit*.[80]

For an exception to apply, measures should not be enforced in a manner which would constitute either arbitrary or unjustifiable discrimination between countries with the same prevailing conditions, or a disguised restriction on international trade.

To analyze whether a BCA measure could be found in compliance with the chapeau, it is necessary to employ the test devised by the Appellate Body in the Shrimp-Turtle case[81]. In the first place, BCA measures should not amount to discrimination. To avoid that, the measures should be applied evenly on all the importers, and they should not be favoring domestic products over foreign products. The latter point could be justified by domestic producers having to face a higher burden during production, in comparison with foreign producers that had to comply with lower carbon standards, therefore proving domestic and foreign producers to be operating under similar conditions. Nonetheless, it is possible that designing a market condition in which importers from countries with more carbon restrictive policies are forced to face different charges than importers from countries with looser carbon standards, could be considered discrimination, depending on the interpretation of the remaining components of the chapeau.

Secondly, discrimination, if present, could be categorized as either arbitrary or unjustifiable as found by the WTO Dispute Settlement Body in the Tuna-Dolphin case after observation of the causes of said discrimination, and of the rationale put forward to explain its existence[82]. Accordingly, the rationale for a BCA measure should be that of reducing carbon leakage and enhancing competitiveness of domestic products, while it could be considered that the rationale of holding a leverage against other states imposing different carbon standards would arguably be in breach of the Tuna-Dolphin I test and finally have the measure be deemed illegitimate.

On the other hand, even BCA measures applied according to the principle of common but differentiated responsibilities, which would

80. WTO (2020), P. 69.
81. See US-Shrimp (1998) (cited in note 54).
82. See US-Tuna Dolphin I (1991) (cited in note 35).

purposefully act in a discriminatory manner, could be explained by the presence of different prevailing conditions[83].

Moreover, the potential difference of prevailing conditions should be assessed, according to the Appellate Body's adjudication in the EC-Seal Products case[84], by reference to the applicable subparagraph of Article XX under which the measure was provisionally justified and the substantive obligations under the GATT 1994 with which a violation had been found.

Finally, in US-Gasoline, the Appellate Body held that the concepts of "arbitrary or unjustifiable discrimination" and "disguised restriction on international trade" were related concepts which imparted meaning to one another[85]. Which measures would amount to disguised restriction on international trade is something to be interpreted in accordance with the objective of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX. Nonetheless, the provision does not seem to apply to the case of BCA measures as long as the BCA measures are proportionate to serving their purpose of climate change mitigation.

5. Potential ways forward

The pressing reality of climate change makes it paramount for governments around the globe to impose norms for mitigation, adaptation, and emissions reduction. Consequently, potential incompatibilities between climate change norms and international trade laws should be eased as much as possible, and, when necessary, designed and accommodated into mutual compatibility, in order to make the international market resilient to all the alterations caused by climate change.

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83. See Joost Pauwelyn, *Trade Related Aspects of a Carbon Border Adjustment Mechanism: A Legal Assessment* (European Parliament Think Tank April 14, 2020) at 11, available at https://www.europarl.europa.eu/thinktank/en/document.html?reference=EXPO_BRI(2020)603502 (last visited November 19, 2021).

84. WTO Appellate Body Report, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products* (EC – Seal Products), WTO Docs. WT/DS400/AB/R/ and WT/DS401/AB/R/ (June 18, 2014).

85. See US-Gasoline (1996) (cited in note 73).

BCA measures are instrumental in balancing mitigation of climate change and the economic interests of the states implementing emissions reduction laws. Indeed, it is important that states pursuing provisions for emissions reduction do not suffer an economic damage due to it, since it would make climate change mitigation provisions less palatable for countries all over the world. While scientific studies have proven that the benefits of accepting lower carbon standards are only short term, the possibility that the effort could be made useless due to carbon leakage is tangible[86].

Arguably, the line of reasoning of the Appellate Body in the third Tuna-Dolphin case encapsulates the issue perfectly. However, compared with the climate change regulations scenario, the reasoning applies in the opposite direction it was supposed to. In that case, the Body argued that international environmental regulations can be effective in protecting the planet only if they are enforced uniformly by all states involved in international trade.[87] Considering the specifics, it is clear that while local action was indeed the only effective solution in instance of biodiversity protection analyzed in the Tuna-Dolphin saga, the needed solution is completely different when addressing climate change, which is a global concern with a global impact, even when it comes from a local process. Therefore, the argument of the Body works in favor of promoting an international climate change mitigation regime, rather than in dismissing the singular individual attempts of countries in pursuing emissions reduction, or in delegitimizing the latter vis-à-vis WTO law.

Furthermore, the progressive inclusion and adaptation of the principle of common but differentiated responsibilities in recent climate change treaties demonstrates that regulating at the international level mitigation of climate change must be necessarily discriminatory to a certain extent. In this context, it is easier to understand why recent WTO rulings have repeatedly and harshly punished measures that could have a coercive effect on foreign governments' policies, especially for what concerns climate change policies vis-à-vis countries

86. See Mehling, et al., *Designing Border Carbon Adjustments for Enhanced Climate Action* at 49 (cited in note 1).

87. See US-Tuna II (Mexico) (2015) (cited in note 47).

that are not part of the Paris Agreement[88]. Apparently, this judicial tendency could collide with the leveraging function of BCA measures, which aims at impelling countries to pursue higher emissions standards. Nonetheless, through further consideration, BCA measures imposed by a country or set of countries should not be considered to constitute a punitive measure on the entire production of a good, but simply on the percentage of it that gets traded with countries that have higher carbon standards. Therefore, the fact that BCA measures could result in market conditions that are more convenient for countries implementing higher carbon standards is only a positive by-product, rather than a punitive measure on countries implementing lower carbon standards.

For what concerns the competitiveness argument, it becomes clear that both the WTO and BCA measures pursue the effectiveness of international trade. The similarity of purposes appears to make WTO law and BCA measures inevitably compatible and possibly even complementary. It similarly seems logical to consider the intended purposes of the three Articles that supposedly are incompatible with BCA measures, i.e. Article I on the most-favored nation principle, Article III on internal taxation, and Article XI on quantitative restrictions. Upon observation of said provisions, it appears that the provisions aim in particular at improving trade conditions for importing countries, especially for what concerns domestic products vis-à-vis imported products. This is diametrically opposed to the purpose of BCA measures, which intend to balance the conditions of domestic products in comparison with imported products. Furthermore, WTO law is inconsistent for what concerns balancing with border levies the costs of production of a service. For instance, it would appear form Article VIII that the costs of rendering a service could be considered in the imposition of a border fee[89]. Nonetheless, the judgments in the cases Tuna-Dolphin I and III insist that the process of production of a good should not be accounted for in determining the "likeness" of two products.

88. See Pauwelyn, *Trade Related Aspects of a Carbon Border Adjustment Mechanism* at 11 (cited in note 83).

89. GATT (1947), Art. 8, para. 1(a).

Furthermore, Article XXXVIII on joint action stresses that contracting parties shall collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regulations and through technical and commercial standards affecting production, transportation, and marketing[90]. The provision appears to encourage parties to implement measures to the effects of BCA measures, which fundamentally amount to an attempt at international harmonization of standards affecting production, all in the name of reconciling international multilateral trade.

The growing tendency of WTO case law to recognize environmental protection as a valid argument when in potential contrast with international trade could represent a starting point for the increasing acceptance of BCA measures, which would finally result in the measure being progressively less necessary due to their leveraging and balancing function[91].

6. Conclusions

International climate change agreements are progressively growing and becoming more comprehensive, propelling states to be more cooperative in their pursuit of climate change mitigation regulations. While this increasing cooperation projects an optimistic scenario in the future, it must be appreciated that the current situation is characterized by diverse efforts, with some states pursuing higher standards than others. This diversity impacts the international market, causing some states to lose their competitiveness in comparison with others pursuing lower emissions standards[92]. This phenomenon encourages delocalization given that the states with higher standards become less affordable for investors, but more so for importers, who could sell to higher standards countries products that have a remarkably lower

90. GATT (1947), Art. 38.

91. See Mehling, et al., *Designing Border Carbon Adjustments for Enhanced Climate Action* at 49 (cited in note 1).

92. See Davidson Ladly, *Border carbon adjustments, WTO-law and the principle of common but differentiated responsibilities* at 65 (cited in note 3).

production price in comparison with domestic products, that simply cannot compete.

Furthermore, it has been proved that the incidence of carbon leakage, a side effect of heterogeneous emissions standards, eliminates the benefits achieved by climate change mitigation regulations, causing the emissions to disproportionately migrate towards countries with lower emissions standards, where the production is more competitive.

All the regulatory unevenness can eventually lead to a race to the bottom that has no positive effect on the environment. In this context, BCA measures could become excellent instruments to avoid negative impacts on the environment and local economies.

Considering that BCA measures are trade restrictive measures, they have been criticized and scrutinized over their potential incompatibility with WTO law. This paper analyzed closely the text of the GATT, in order to review which Articles could be incompatible with the enactment of BCA measures at the international level, and which provisions of WTO law could instead justify their existence. From this analysis, it appeared clear that if BCA measures aspire to legitimately occupy a place in international trade law, they should be designed to not be discriminatory according to the definition of the most-favored nation principle, and they should be designed to be more closely related to their purpose of protecting the environment.

Conclusively, this paper appreciated the recent tendency of the WTO adjudicating bodies to accept the environmental protection argument in their case law and reckoned that this progressive trend could prove to be an asset in building reciprocal compatibility between WTO law and BCA measures.

The India-Bangladesh Treaty of 1996: sharing waters at Farakka An international water law perspective

Arianna Crosera*

Abstract: This paper examines the 1996 Treaty between the Republic of India and the Government of the People's Republic of Bangladesh on sharing of the Ganga waters at Farakka, by putting it in relation and in comparison with the three main principles of international water law: the principle of limited territorial sovereignty, the principle of prevention of significant harm and the duty to cooperate in sharing international watercourses. Hence, the considerations will focus on whether the 1996 India-Bangladesh Treaty reflects the developments of international water law and its principles and what an assessment of the treaty in the light of these principles can reveal, not only on its compliance with international law, but also on its efficacy and long-term perspectives. The analysis will singularly tackle each of the three principles and their correspondences - or lack thereof- in the 1996 Treaty.

Keywords: International water law; Equitable and reasonable utilizations; Prevention of significant harm; Duty to cooperate; GMB; India-Bangladesh

1. Introduction

The main subject of this study is the 1996 Treaty on the sharing of the Ganga Waters at Farakka (hereinafter "1996 Treaty"). The treaty was the final act of a long series of events which presented India and Bangladesh with the necessity to agree on a formal document in order to manage their shared waters. The first of such events was the building, in the 1960s, of a much-contested barrage in Farakka - nearby the Bangladeshi border - aimed at diverting the Ganga's waters to save Kolkata's port from slit[1]. When, in 1974, the Indian barrage's exacerbation of water scarcity and climate change effects in the downstream state of Bangladesh became evident[2], so did the necessity of concluding an agreement addressing the sharing of the waters. After a series of attempts[3], the 1996 Treaty was signed to the end of settling the matter for a period of thirty years[4].

This study explores whether the 1996 India-Bangladesh Treaty reflects the developments of international water law and its principles and what an assessment of the treaty in the light of these principles can reveal, not only on its compliance with international law, but also

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1. See Mark Hect, *Will the Ganges River Be a Source of Regional Conflict Between India and Bangladesh?* in M.Troy Burnett (ed.), *Natural Resource Conflicts: From Blood Diamonds to Rainforest Destruction* 383, 384 (ABC-CLIO 1st ed. 2016).

2. See generally Climate Diplomacy, *India and Bangladesh Conflict Over the Ganges River*, available at https://climate-diplomacy.org/case-studies/india-and-bangladesh-conflict-over-ganges-river (last visited September 30, 2021).

3. See generally ibid.

4. See Article 12, *Agreement on sharing of the Ganges waters at Farakka* 1977, 1066 UNTS 3, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201066/v1066.pdf (last visited November 21, 2021).

on its efficacy and long-term perspectives. The analysis will singularly tackle each of the three principles and their correspondences - or lack thereof - in the 1996 Treaty. To this end, Chapter I introduces the principles and gives a general background on the Ganges' case study, to then analyze the extent to which the single principles are included in the 1996 Treaty in Chapters II, III and IV. Chapter V resumes the previous instances and provides some points of reflection for future scenarios.

2. The River and the Treaty: an International Water Law Perspective

At the core of the 1996 Treaty is the Ganga: sacred, polluted and transboundary, it flows for 2,525 kilometers, from the Himalayas in Nepal to India and Bangladesh, where it becomes River Padma, united with the Brahmaputra - the lower part of which is renamed *Jamuna* - and River Meghna[5]. These rivers form the GMB (Ganga-Meghna-Brahmaputra) basin, which supports approximately 10% of the world population as it crosses Bangladesh, Bhutan, China, India and Nepal[6]. Even though all these countries play a significant role in the life cycle of this river, the scope of this paper will be limited to the factors relevant to the relationship between India and Bangladesh, as the two countries whose management has the most controversial and direct effects on the river itself, and to their efforts towards bilateral cooperation in sharing their most important common natural resource.

It is important to point out that a long set of events precedes the 1996 Treaty at the center of this analysis, thus constituting the pillars for the India and Bangladesh's current relationship. Although these historical events are not the main subject of our inquiry, they still play a relevant role in the hearts and minds of those drafting, signing and implementing the document at issue, on both sides of the river[7]. As a

5. Nafis Ahmad and Deryck Lodrick, *Ganges River* in *Encyclopedia Britannica* (January 28, 2021) available at https://www.britannica.com/place/Ganges-River (last visited September 30, 2021).

6. See Golaum Rasul, *Why Eastern Himalayan countries should cooperate in transboundary water resource* management, 16 Water Policy 19, 20 (2014).

7. See Edward Jackiewicz, *Ganges river as the source of regional conflict between India and Bangladesh* in M. Troy Burnett (ed.), *Natural Resource Conflicts* 383, 386

matter of fact, not only was the treaty arranged in a regional context that presents various inherent challenges[8], but its conclusion temporally coincided with a broader tendency, namely the crystallization of the key principles of international water law through the drafting of the two main conventions in this field: the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes[9] of 1992 and the UN Convention on the Law of Non-Navigational Uses of International Watercourses[10] of 1997. It should be noted that, even though neither India nor Bangladesh are parts of the UNECE Water Convention[11] and the UN Watercourses Convention[12], the principles have gained general acceptance at the international law level[13] and are therefore to be taken into strong consideration within the field. Indeed, the two conventions present the three main substantive and procedural rules of international water law: the principle of limited territorial sovereignty, the principle of prevention of significant harm, and the duty to cooperate in cases of transboundary watercourses[14], principles which – as it's this paper's aim – will be analyzed in subsequent paragraphs with particular reference to the 1996 Treaty.

(cited in note 1).

8. See Nitya Nanda, Abu Saleh Khan and Krishna Dwivedi, *Hydro-Politics in GBM Basin: The Case of Bangladesh-India Water Relations* at 7 (The Energy and Resources Institute 1st ed. 2015).

9. See generally *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* 1992, 1936 UNTS 269, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201936/v1936.pdf.(last visited November 21, 2021).

10. See the *Convention on the Law of the Non–Navigational Uses of International Watercourses* 1997, 2999 UNTS 77, available at https://treaties.un.org/doc/Publication/UNTS/Volume%202999/v2999.pdf (last visited November 21, 2021).

11. The list of the signing parties is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no
=XXVII-5&chapter=27&clang=_en (last visited November 21, 2021).

12. The list of the signing parties is available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-12&chapter=27&clang=_en (last visited November 21, 2021).

13. See Attila Tanzi, *The inter-relationship between no harm, equitable and reasonable utilisation and cooperation under international water law,* 20 International Environmental Agreements: Politics, Law and Economics 619, 620 (2020).

14. See Owen McIntyre, *Substantive Rules of International Law*, in Alistair Rieu-Clarke, Andrew Allan and Sarah Hendry (eds.), *Routledge Handbook of Water Law and Policy* 234, 235 (Taylor & Francis Group 1st ed. 2017).

3. The Principle of Limited Territorial Sovereignty and Equitable and Reasonable Utilization

As previously mentioned, limited territorial sovereignty is one of the main principles of contemporary international water law and it is traditionally said to derive from a trade-off between the theory of absolute territorial sovereignty and the theory of absolute territorial integrity[15]. The former theory stems from the so-called "Harmon Doctrine", originating at the end of the 19th century from the dispute between the United States and Mexico over the management of the Rio Grande, shared between the two countries[16]. Since then, the theory was adopted by upstream states and essentially expresses the idea that "a co-basin state may freely utilize waters within its territory"[17]. By contrast, the theory of absolute territorial integrity was adopted by downstream states, who demanded the "continuation of the full flow of waters of natural quality from another (upper) co-basin state"[18]. These two doctrines, which clearly saw downstream and upstream states at completely opposite poles, were mediated to reach the limited territorial sovereignty approach, according to which one state's territory must not be used to significantly harm co-basin states[19]. Our specific case study is particularly related to this doctrine and its development: India, as an upstream state, and Bangladesh, as a downstream state, reflect the power struggle that often derives from sharing international watercourses. But fully applying such a doctrine means to put an accent on its sub-principles and, as McIntyre affirms, "this approach is usually articulated in normative terms as the principle of ''equitable and reasonable utilization'', which entitles each co-basin state to an equitable and reasonable use of transboundary waters flowing through its territory"[20]. In this perspective, the doctrine bases itself on two main concepts, which contribute to its normative formulation:

15. See McIntyre, *Substantive Rules of International Law* at 236 (cited in note 11).
16. See Stephen C. McCaffrey, *The harmon doctrine one hundred years later: Buried, not praise,* 36 Natural Resources Journal 965, 966 (1996), available at https://digitalrepository.unm.edu/nrj/vol36/iss4/13 (last visited November 18, 2021).
17. See McIntyre, *Substantive Rules of International Law* at 236 (cited in note 11).
18. See ibid.
19. See ibid.
20. See id at 237.

first, it derives from the evident fact that sovereignty is not absolute and has always been limited by rules of international law and, secondly, it does not only confine itself to the implied rule of not causing harm to other states, but it also includes issues related to quantitative allocation[21]. With regards to the normative formulation of the principle, the 1996 Treaty includes the principles of equitable and reasonable utilization and thus the theory of limited territorial sovereignty, mainly in its Articles 9 and 10[22].

The next question to address is how the Treaty exactly does so. Article 9 provides for "the principles of equity, fairness and no harm to either party"[23] to be respected when concluding agreements between the two countries in the future, and Article 10 states that the same principles must be respected when reviewing the 1996 Treaty[24]. Such a formulation corresponds to the one of the doctrine previously described, even though it may be stated that some of its further "more operational" features are missing. Indeed, although a certain normative indeterminacy and flexibility pertain to the principle of equitable and reasonable utilization[25], it does nevertheless have a certain substantive content that enables the principle itself to be put into operation. For an account of the content at issue, we may refer to Articles 5 and 6 of the UN Watercourses Convention, as they both contribute to determining what factors and circumstances have to be taken into account when deciding what counts as equitable and reasonable use. Article 5(1), with reference to international watercourses "optimal and sustainable utilization thereof and benefits therefrom", where, according to Calfish and his analysis of the Travaux Préparatoires of the Convention, "optimal utilization and benefits [...] does mean attaining maximum possible benefits for all watercourse states and achieving the greatest possible satisfaction of all their needs, while minimizing

21. See Stephen McCaffrey, *The Law of International Watercourses* at 126 (Oxford University Press 3rd ed. 2019) [2001].

22. See Muhammad Mizanur Rahaman, *Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis,* 25 Water Resources Development 159, 167 (2009), available at https://www.internationalwaterlaw.org/bibliography/articles/general/Rahaman-Ganges-Water_Res_Devel.pdf (last visited November 11, 2021).

23. See ibid.

24. See ibid.

25. See McIntyre, *Substantive Rules of International Law* at 237 (cited in note 11).

the detriment to, or unmet needs of, each"[26]. Thus, the substantial meaning of the equitable and reasonable utilization principle in light of Article 5 of the Convention seems to be strongly related to the second principle of international water law initially mentioned in this analysis: the prevention of significant harm. However, before going through the characteristics of the latter principle, it is fundamental to remind that Article 6 of the UN Convention lists "factors relevant to equitable and reasonable utilization"[27] in an attempt to further contribute to the operationalization of the principle. With regards to said factors, Article 10 clarifies that none of them enjoys inherent priority, although, in the event of conflicts, special regard shall be paid to vital human needs[28]. The 1996 Treaty does not mention such a priority, which is probably one of its most significant shortcomings, together with a certain degree of indeterminacy on what equitable and reasonable uses consist of.

In this regard, the discourse on water flow is a central one, as "practical application of the equitable and reasonable utilization principle to resolve a water allocation dispute is a significant challenge"[29] and the Ganga's situation is not exempt from these difficulties. Indeed, even though the 1996 Treaty establishes water allocation between Bangladesh and India in its Article 2 by adopting indicative schedules on water flow shares included in Annex I and Annex II, this system of water allocation presents two main drawbacks. First of all, the 1996 Treaty does not provide for a clear account of India's commitments to Bangladesh in case of a substantial reduction of flow from upstream and, even though Article 2(2) states that "every effort would be made by the upper riparian to protect flows of water at Farakka", it does not further expand on the concept of "every effort", a concept which is

26. See Lucius Caflisch, *Equitable and Reasonable Utilization and Factors Relevant to Determining Such Utilization (Articles 5 and 6)* in Boisson de Chazournes et al. (eds.), *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: A Commentary* 77, 83 *(*Oxford 1st ed 2018).

27. See Article 6, *Convention on the Law of the Non–Navigational Uses of International Watercourses* (cited in note 10).

28. See *id.* at Article 10.

29. See Abby Muricho Onencan, Bartel Van de Walle, *Equitable and Reasonable Utilization: Reconstructing the Nile Basin Water Allocation Dialogue,* 10 Water 707, 708 (2018), available at https://doi.org/10.3390/w10060707 (last visited November 18, 2021).

instead decisive[30]. Secondly, the 1996 Treaty does not provide for any allocation shares in the event that the flow falls below 50 000 cusecs in any 10-day period, and Article 2(3) only mentions immediate consultations between the two countries if such water scarcity occurs, without specifying any precise time frame for these talks and their eventual outcome[31]. Such an omission cannot be completely addressed through a constructive interpretation of the relevant 1996 Treaty's provisions mentioned above in light of the principles of limited territorial sovereignty and equitable and reasonable utilization, but would require more extensive amendments to the 1996 Treaty itself. Nevertheless, on a positive note regarding the same issue of water flow protection, Article 3 states that "waters released to Bangladesh at Farakka [...] shall not be reduced below Farakka except for reasonable uses of waters, not exceeding 200 cusecs" and thus, even though it does not expand on the concept of reasonable uses, it nevertheless establishes a quantitative limit to the water consumption of these uses.

4. The Principle of Prevention of Significant Harm

As examined in the previous paragraph, the principle of equitable and reasonable utilization, derived from limited territorial sovereignty, is, to a great extent, linked with the principle of prevention of significant harm. Therefore, it is important to analyze how such principles are interconnected. According to Tanzi's account, the two principles should work together within the "community of interests" framework[32] meaning that, just as downstream states do not have any veto rights over potentially damaging activities of upstream states, in the light of equitable and reasonable utilization, upstream states have the duty to consider their neighbors when planning for measures that

30. See Muhammad Mizanur Rahaman, *The Ganges Water Conflict: a comparative analysis of 1977 Agreement and 1996 Treaty,* 1 Asteriskos: Journal of International and Peace Studies 195, 205 (2006), available at https://www.internationalwaterlaw.org/bibliography/articles/general/Rahaman-Ganges-Asteriskos.pdf (last visited November 18, 2021).

31. See *ibid.*

32. See Tanzi, *The inter-relationship between no harm, equitable and reasonable utilisation and cooperation under international water law* at 621 (cited in note 14).

may have adverse effects on other states[33]. The principle does not consist of an obligation not to harm but of a due diligence obligation[34] to "take all appropriate measures to prevent the causing of significant harm"[35].

It is important to state that an interpretation of the no-harm principle of such kind makes it highly dependent on the next principle at issue, that is the states' duty to cooperate when sharing transboundary watercourses. Just as the principle of equitable and reasonable utilization, the prevention of significant harm is included in Articles 9 and 10 of the 1996 Treaty in relation to future agreements and reviews of the treaty. However, the document does not provide for any further clarification on how to interpret the concept of "no-harm", and leaves out several issues that are often related to the principle itself, such as prevention of harmful effects, the protection of water quality, and the application of clean technologies[36] which are instead included in other international law agreements of a similar nature (such as the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin of the 5th of April 1995[37], the 1996 Mahakali Treaty between India and Nepal and others[38]). It immediately becomes clear after a brief analysis that the 1996 Treaty's focus is on water quantity rather than water quality, even though the latter is one of the most pressing issues that the population - and especially those living downstream of the Ganga - face. In this regard, Nitya Nanda states that "owing to its location at the mouth of a 1560 miles (2510 km) river basin settled by over 350 million people, Bangladesh has surface water

33. See id at 622.

34. See McIntyre, *Substantive Rules of International Law* at 241(cited in note 11).

35. See Article 7, *Convention on the Law of the Non–Navigational Uses of International Watercourses* (cited in note 10).

36. See Owen McIntyre, *Environmental Protection of International Watercourses under International Law* at 88 (Taylor & Francis 1st ed 2007).

37. See Article 3, *Agreement on the cooperation for the sustainable development of the Mekong River Basin* 1995, 2069 UNTS 3, available at https://treaties.un.org/doc/Publication/UNTS/Volume%202069/v2069.pdf (last visited November 21, 2021).

38. See Kazi Saidur Rahman,et al., *A critical review of the Ganges Water Sharing arrangement*, 21 Water Policy 259, 273 (2019), available at https://iwaponline.com/wp/article/21/2/259/66094/A-critical-review-of-the-Ganges-Water-Sharing?searchresult=1 (last visited November 17, 2021).

that is teeming with harmful microorganisms and other pollutants"[39]. Moreover, besides there being no agreement in the Treaty with regards to the effects of scarce water quality on human uses, the text does also not include any regard to environmental protection of the river, its fauna and its ecosystem. In international water law, however, this is not unusual[40] as opinions vary on whether environmental harm should be considered a particular kind of harm, to be differently balanced on the scale of the due diligence obligation of the no-harm principle and inherently unreasonable and inequitable, or whether it simply is, as any other harm, permitted under certain conditions[41].

5. The Duty to cooperate

Besides water allocation, one of the main achievements of the 1996 Treaty may be considered its establishment of a stable bilateral cooperation channel between the two countries, headed by the Joint Committee. The Committee includes "representatives of both member states in equal numbers"[42] and decides its own method of operating[43]. Moreover, it has data-sharing functions since it is responsible for the setting up of teams to "observe and record" daily flow at the river's crucial points[44] and for submitting all the collected data in a yearly report to their respective governments[45]. It is also important to note that the Joint Committee adds up to the pre-existing structure of the Joint Rivers Commission which, since 1972, leads the "differing interests

39. See Nanda, Khan and Dwivedi, *Hydro-Politics in GBM Basin* at 13 (cited in note 8).

40. See Rahman, et al., *A critical review of the Ganges Water Sharing arrangement* at 273 (cited in note 38).

41. See McIntyre, *Environmental Protection of International Watercourses under International Law* at 359 (cited in note 36).

42. See Article 4, *Agreement on sharing of the Ganges waters at Farakka* (cited in note 4).

43. See *id.* at Article 5.

44. See *id.* at Article 4.

45. See *id.* at Article 6.

and strategies for the development of the Ganges water resources"[46] of the two countries.

However, despite being added to an already functioning landscape of cooperation instruments such as the Commission and diplomacy, it is arguable that the Joint Committee's presence does not extensively strengthen the Treaty in its scope of enforcing the protection of water flow, as it does not provide for a particularly structured dispute-resolution mechanism[47]. In this regard, Article 7 states that every dispute arising from matters related to the Farakka Barrage shall be first referred to the Joint Committee which, if it does not manage to solve the dispute itself, then shall bring it before the Joint River Commission and, as the last instance, may convene meetings between the two governments[48]. Not even in this instance, a specific time framework is provided for these meetings despite them being defined as 'urgent' by Article 7. With regards to effectiveness, it is also important to point out that the Treaty leaves a consistent amount of procedural freedom to the Joint Committee which, as already mentioned, can decide upon its own procedure and method of functioning.

However, if it is true that disputes may always arise, it is also fair to say that the duty to cooperate and therefore share information and notify of possible planned measures is, in international water law, aimed at avoiding those disputes through a preventive process of continuous confrontation and exchange[49] which seems to be provided for by the 1996 Treaty through the Joint Committee. This process of mutual exchange might improve the bilateral relationship between the two states, but such strong cooperation is not fully achieved at the present

46. See Ishtiaq Hossain, *Bangladesh-India Relations: The Ganges Water-Sharing Treaty and Beyond,* 25 Asian Affairs: An American Review 131, 134 (1998).

47. See Rahaman, *The Ganges Water Conflict* at 205 (cited in note 30).

48. See Article 7, *Agreement on sharing of the Ganges waters at Farakka* (cited in note 4).

49. See generally *Case Concerning the Pulp Mills on the River Uruguay (Argentina v. Uruguay)* 2010 ICJ 14 for an example of such a "participative process" that involves the principle of equitable and reasonable utilisation, the duty of prevention of transboundary harm and the duty to cooperate, as reported by Owen McIntyre, *The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay,* 4 Water Alternatives 124, 143 (2011).

time, as "river data are a classified subject in India"[50] and, therefore, public perception of such a cooperation is still limited and not fully transparent. Moreover, the lack of a properly structured enforcement method led India, in the past, to often take unilateral initiatives regarding projects of water management (such as the Farakka Barrage itself[51]) in its territory, without any prior notification to Bangladesh[52]. In more recent times, however, the emergence of a positive trend of cooperation, - which the two countries committed to in Article 9[53] of the 1996 Treaty - has been noticed[54]. In particular, cooperation has interestingly evolved through channels such as the Water Resources Management Joint Working Group (JWG), set up in 2013 to enhance cooperation between Bangladesh, Bhutan, India, and Nepal[55] and recent news confirm that further cooperation under the Joint Rivers Commission to conclude an agreement on the Tista River is on the way[56].

6. Conclusions and Future Scenarios

Throughout this paper, the three cardinal principles of international water law and their correspondences and operation in the 1996 Treaty between India and Bangladesh on the sharing of the Ganga's waters have been analyzed. From what has been explained in previous

50. See Punam Pandey, *Bangladesh, India, and Fifteen Years of Peace: Future Directions of the Ganges Treaty,* 54 Asian Survey 651, 656 (2014).

51. See Muhammad Mizanur Rahaman, *Principles of Transboundary Water Resources Management and Ganges Treaties* at 169 (cited in note 22).

52. See Lei Xie, Muhammad Mizanur Rahaman and Wei Shen, *When do institutions work? A comparison of two water disputes over the Ganges, Brahmaputra and Meghna river basins,* 20 Water Policy 308, 316 (2018).

53. See Article 9, *Agreement on sharing of the Ganges waters at Farakka* (cited in note 4).

54. See Xie, Rahaman and Shen, *When do institutions work?* at 317 (cited in note 53).

55. See ibid.

56. Dipanjan Roy Chaudhury, *India & Bangladesh agree to expand co-operation in water resources* (The Economic Times March 17, 2021), available online at https://economictimes.indiatimes.com/news/politics-and-nation/india-assures-bangladesh-of-its-commitment-to-teesta-water-sharing-deal/articleshow/81536944.cms?from=mdr (last visited September 30, 2021).

paragraphs, we are now able to state that all three principles are included in the 1996 Treaty and that this is certainly symptomatic of their importance and reach as customary international water law. However, we may also draw the conclusion that these principles are most often included as vague complements to the text, rather than as fully-fledged guiding doctrines. This last point may be considered as the *fil rouge* connecting the dots of our analysis from principle to principle, through the main drawbacks of the 1996 Treaty itself. For instance, with regards to the theory of limited territorial sovereignty and its link to equitable and reasonable utilization, it has been observed that the 1996 Treaty leaves the issue of what constitutes reasonable and equitable use completely open, even though it quantitatively limits the amount of water these uses can have access to. This has significant impacts on how the issue of water flow is dealt with and is reflected in India's open commitment to make "every effort [...] to protect flows of water at Farakka"[57]. Looking at prevention of significant harm, we find the same uncertainty regarding the scope and meaning of the concept of 'harm' itself, even though it is arguable that the principle is here conceived - in correspondence with international water law - as a due diligence obligation and not as an absolute prohibition. This may be confirmed by what has been described in the previous paragraphs as an absence of any provision further operationalizing the no-harm principle, especially in terms of environmental protection. Intertwined with the two former principles, the duty to cooperate is the one which is most extensively included in the 1996 Treaty and entrusted to the operation of the Joint Committee. However, from the elements we have briefly provided such as the Committee's extensive procedural freedom, it seems that the latter does not establish a fully-fledged forum for cooperation as in a union of (different) interests, but only an initial stage to what is instead a confrontation between two governments "on opposite sides of the table".

As it often happens in international law, the lack of clarity we have just observed in regards to these principles is inherent to a treaty that represents a compromise, one that has, as some affirm[58], provided for

57. Article 2(2), *Agreement on sharing of the Ganges waters at Farakka* (cited in note 4).

58. See Pandey, *Bangladesh, India, and Fifteen Years of Peace* at 651 (cited in note 51).

several years of peace between two countries. On the other hand, it is also arguable that the importance of compromises lies in the foundations they manage to build and that, when referring to the sharing of vital resources such as water, these foundations have to be firm. The question, therefore, at the end of this brief analysis, is whether these foundations are strong enough to take this compromise further, after the 1996 Treaty expires five years from now. In these merits, the above paragraphs describe how, at the present moment and in a future perspective, there are challenging points that need to be addressed within the Treaty framework, and that a closer look at the fundamental principles of international water law and their operationalization may be of help in addressing these challenges and in bringing the treaty closer to the rapidly evolving practice in this field. Moreover, in light of the principle of cooperation, one of the possible paths for a way forward consists in a whole-basin approach that was suggested - but not achieved - during negotiations for the 1996 Treaty[59]. In this sense, the inclusion of Nepal, as advocated for instance by Bangladesh[60], would perhaps favor a more interlocutory dynamic that could provide for a new take on the power struggle on resources between the two countries.

Such an interlocutory approach together with a strengthening of the treaty's enforcement[61] would be beneficial in what will surely be a long process constituted by a delicate balancing of the states' interests in human rights, sustainable development and the protection of the river *per se,* a river that is so fundamental for all of the parties concerned, to the point that courts have previously recognized it as a "living entity" in virtue of its fundamental ecosystem services[62].

59. See Nanda, Khan and Dwivedi, *Hydro-Politics in GBM Basin* at 11 (cited in note 8).

60. See ibid.

61. See, for example, Rahaman, *The Ganges Water Conflict* at 207 (cited in note 30).

62. See *Mohammed Salim v State of Uttarakhand*, WPPIL 126/2014 11, 18 (High Court of Uttarakhand 2017) cited in Erin L. O'Donnel, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India*, 30 Journal of Environmental Law 135, 135 (2018).

The Exploitation of Children in the Orinoco Mining Arc as a Testimony of the Violation of Human Rights and International Commitments Signed by Venezuela

Ángel Carmelo Prince Torres*

Abstract: This article addresses the problem of the exploitation of children in the Orinoco Mining Arc, a mining area located in the Bolivarian Republic of Venezuela. The article is prepared under a documentary research scheme – which is based on both legal texts and journalistic sources – and with a qualitative approach. In particular, this research explores whether it is possible to attribute responsibility for the occurrence of the events of the Orinoco Mining Arc to the Government of Venezuela, especially, taking into account the international commitments for the protection of human rights which Venezuela has undertaken. The analysis reveals that the government of Venezuela can be found guilty – both for its action and omission – for the violation of children's rights in the Orinoco Mining Arc. Venezuela has indeed failed to guarantee the respect of fundamental human rights, such as the right to life and to physical and mental integrity, and this way it has violated it has contravened the obligations of international documents such as the Universal Declaration of Human Rights. For this reason, Venezuela must develop new public policies to tackle the serious violations of fundamental human rights and restore its national respect for fellowship among people.

Keywords: Exploitation; Children; Mining; Venezuela; Human Rights.

Table of contents: 1. Methodology. – 2. Introduction. – 3. The Situation of Children in the Orinoco Mining Arc. – 4. About Children's Human Rights. – 5. Results and Discussion. – 6. Conclusions.

1. Methodology

This study was structured as a qualitative investigation, which "is based on evidence that is more oriented towards a deep description of the phenomenon in order to understand and explain it"[1]. The information collected was based on the investigation and examination of the situation of exploitation of children within the Orinoco Mining Arc and its consequences on their human rights.

To achieve the objective of this analysis, a documentary study based on texts from different databases was carried out. In this sense, journalistic information in recognized and verified media, articles from scientific journals, books, web pages, and legal texts, among others, were used. The information was analysed using hermeneutics as a form of exegesis of law, critical analysis and analytical summary. Some techniques were also applied to breakdown documentary information sources such as in-depth reading, preparation of summaries and underlining. Hence, the research has been carried out on the basis of three different focus areas: on contextualizing facts involving of the Orinoco Mining Arc, on Child protection referring to some legal texts, which support the protection of children, on State responsibility,

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1. See Fabio Sánchez, *Epistemic Fundamentals of Qualitative and Quantitative Research: Consensus and Dissensus (Fundamentos Epistémicos de la Investigación Cualitativa y Cuantitativa: Consensos y Disensos),* in *Revista Digital Investigación y Docencia,* 13(1), 2019, available at https://tinyurl.com/y3chvtby (last visited November 20, 2021).

considering implications of the State's duties in terms of the protection of human rights in accordance with its commitments.

Subsequently, the above-mentioned categories supported the construction of the scheme for this investigation. Finally, the conclusions were reached after the discussion on the compiled material.

2. *Introduction*

The Orinoco Mining Arc constitutes a geographical area within the Bolivian Republic of Venezuela, which has been delimited by the Venezuelan government since 2016 to alleviate the reduction in oil rent, encompassing Amazonian territories within its competence. Since the implementation of the delimitation, there have been reports of uncontrolled exploitation of minerals, forced mobilization of 198 indigenous groups, mercurial contamination of river bodies, deforestation in the range of 1,058 kilometres, the rise of organized crime and the promotion of illegal mining, alteration of the ecosystem and emergence of different diseases such as malaria[2].

The Orinoco Mining Arc is located in southern Venezuela, specifically in the Bolivar State, and covers approximately 114,000 km[3]. Thus, precisely because of this wide territorial extension, it is not surprising to witness such a colossal environmental catastrophe which also has consequences on humans.

The exploitation of different minerals takes place within the area of the Orinoco Mining Arc as a natural consequence of it being strategically located south of the Orinoco River, in the extreme north of the Bolivar State, and southern part of the Delta Amacuro State, which is why it has four (4) mining areas and a special block for the use of iron, diamonds, coltan, gold, bauxite and copper. It is also necessary to

2. See Gladys Velásquez, Maritza Padrón-Nieves, Elizabeth Piña, Isis Nézer de Landaeta, Pedro Lizarraga, Sylvia Silva and María Antonia Lombardi, *Venezuela Case: Reflections from Bioethics*, in *Revista Latinoamericana de Bioética*, 19(37-2), 2019, available at https://doi.org/10.18359/rlbi.4705 (last visited November 20, 2021).

3. See *What you should know about the Mining Arc of the Orinoco in Venezuela (Lo que Debe Saber del Arco Minero del Orinoco en Venezuela)*, 26 August 2021, available at https://www.telesurtv.net/telesuragenda/Arco-Minero-del-Orinoco-en-Venezuela-20160826-0056.html (last visited November 20, 2021).

highlight that the arch areas under special administration regime (forest reserves, national parks, natural monuments) were compromised, and the same fate has befallen on indigenous communities (such as Warao, Sanema, Akawaio, E´ñapa, Pumé, Kariña, Pemón, Piaroa, Arawak, Ye´kwana, Yoti, Jiviy), freshwater bodies and a diversity of Venezuelan flora and fauna[4]. However, on the basis of the rise of the gold rush that can be found within this territory, there have been different phenomena with legal implications on environmental, economic and other fundamental rights.

It is widely documented that up to 85% of the illegal mining points in the Amazon could be found within the Orinoco Mining Arc, and almost 1,781 mining points have been established as a consequence of the worldwide increase in the price of gold, caused by the rivalry between the United States and the People's Republic of China as well as by the Venezuelan economic debacle. The situation is so serious that almost 80 points of illegal mineral extraction have been reported within national parks, especially in Canaima, Yacapama, at the head of the Caura River and in the Upper Orinoco-Casiquiare Biosphere Reserve (a *tepuy*[5] 1300 meters high)[6]. Such seriousness is connected with the already mentioned locations, because they represent a vast territory full of ecological resources, and those resources are being destroyed due to the mining activities. Thus, several documents report that:

> The region, located south of the Orinoco River, is reportedly rich with the world's most wanted ores, but is also plagued by conflict, fueled by the military, local armed gangs and Colombian guerrilla groups — all seeking control of an estimated, but uncertified, $100 billion in hidden minerals [...] President Maduro's Arco Minero decree not only violates the

4. See Julimar Mora and Fidel Rodríguez, *The Amazon in Dispute: Political Agencies and Indigenous Organizations of the Venezuelan Amazon against the Orinoco Mining Arc*, in *Polis Revista Latinoamericana*, 52, 2019, available at https://dx.doi.org/10.32735/s0718-6568/2019-n52-1367 (last visited November 20, 2021).

5. A "tepuy" is a mountainous formation of the area with a flattened top.

6. See Florantonia Signer, *La Fiebre del Oro Arrasa la Amazonia Venezolana*, 9 September 2019, available at https://elpais.com/internacional/2019/09/01/actualidad/1567289913_017377.html (last visited November 20, 2021).

> country's constitution, but also other national legislation and international regulations designed to protect the environment and indigenous peoples[7].

However, the aforementioned is only an indication of facts that can be studied from different legal points of view. This article privileges the lenses of human rights law to study the events in question.

Already in 2020, the United Nations High Commissioner for Human Rights, Michelle Bachelet, revealed the explosion of violence and labour abuse among workers in the mines. These workers are the victims of the State inaction, specifically, State's ineffectiveness regarding investigations of violations of fundamental rights, although the area has a large presence of public security forces. And these statements are worrying considering that the people living in the region are often poisoned with mercury, apart from suffering deficiencies of fresh water or electricity, and another group of people is also the victim of sexual exploitation. Ms. Bachelet considered that "authorities should take immediate steps to end labour and sexual exploitation, child labour and human trafficking, and should dismantle criminal groups controlling mining activities"[8]. The High Commissioner informed that 149 human beings have died as a result of the violence and documented abuses[9]. This research shows how the government's

7. See Bram Ebus, *Militarization and Mining a Dangerous Mix in Venezuelan Amazon,* 7 December 2017, available at https://news.mongabay.com/2017/12/militarization-and-mining-a-dangerous-mix-in-venezuelan-amazon/ (last visited November 20, 2021).

8. See United Nations High Commissioner for Human Rights, *Venezuela: UN Releases Report on Criminal Control of Mining Area and Wider Justice Issues,* 15 July 2020, available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26096&LangID=E (last visited November 20, 2021); United Nations, *Report Highlights Criminal Control of Mining Area, and Wider Justice Concerns,* 15 July 2020, available at https://news.un.org/en/story/2020/07/1068391 (last visited November 20, 2021).

9. See *UN on Alert: Bachelet Denounces Exploitation and Abuses in the Venezuelan Mining Arc (ONU En Alerta: Bachelet Denuncia Explotación y Abusos en el Arco Minero de Venezuela)*, 15 July 2020, available at https://www.elmostrador.cl/dia/2020/07/15/onu-en-alerta-bachelet-denuncia-explotacion-y-abusos-en-el-arco-minero-de-venezuela/ (last visited November 20, 2021).

negligence in the events of the Orinoco Mining Arc represents an example of State responsibility for the execution of structural violence[10].

In this context, the previous information shows that one of the groups whose rights have been violated by the exposed situation is that of children, who are considered to be legally weak par excellence at the international level[11]. This is affirmed because different entities (for example, the Centre of Human Rights of the Andrés Bello Catholic University) have publicly pointed out that in the Orinoco Mining Arc child exploitation is evident, not only based on the employment rate on children in the mines, but also because girls up to 12 years of age who reach the Bolivar State are associated with slavery and human rights violations, including sexual abuses and prostitution. Regarding the latter, Mayerlin Vergara, an activist for children's rights in the Renacer Foundation, reports listening to little girls saying that they don't want to live anymore, they don't want to open their eyes in the morning because their life is senseless as a consequence of the abuses they suffered; such feelings detonate suicide attempts, posttraumatic stress and depression[12]. All of this occur in the face of what is a picture of complicity with the Venezuelan State, given that, to reach the area, there are at least 17 points of control with security agents, who in many cases are silent about the irregular groups that operate in the area[13].

From the legal point of view, it is, therefore, relevant to study the situation regarding the inadequate treatment of children in the Orinoco Mining Arc and the failure of the Venezuelan State to comply

10. For these purposes, structural violence will be taken as a notion referring to ways of doing harm through the State's operating apparatus in terms of the lack of fulfilment of its duties to guarantee the common good of the population, which is considered as one of the supreme state goals. See generally Reinaldo Chalbaud Zerpa, *Estado y Política*, Universidad de Los Andes, Consejo de Publicaciones, Facultad de Derecho, Centro de Investigaciones Jurídicas, 1978.

11. See José Francisco Juárez Pérez, *La Familia Formadora de Ciudadanos: VII Jornadas de Educación en Valores,* Universidad Católica Andrés Bello, 2008.

12. See Centro de Derechos Humanos of the Universidad Católica Andrés Bello, *Formas Contemporáneas de Esclavitud en el Estado Bolívar: una Perspectiva de G*énero *Sensitiva*, 2020, available at https://drive.google.com/file/d/1bl3iECgTE3qELtemS3tHNFZEr6SjqrWp/view?usp=sharing (last visited November 20, 2021).

13. See Rosiris Urbaneja, *Arco Minero del Orinoco Es una Bomba de Violencia contra la Mujer*, 20 May 2021, available at http://guayanaweb.ucab.edu.ve/noticias-reader-guayana-actual/items/arco-minero-del-orinoco-es-una-bomba-de-violencia-contra-la-mujer-1949.html (last visited November 20, 2021).

with its obligations on this matter, deriving not only from its Constitution but also from the commitments undertaken through the ratification of several instruments of International Human Rights Law. For this reason, this article aims at analysing the violations of human rights and, in particular, children's rights, committed by Venezuela as a consequence of their exploitation within the Orinoco Mining Arc.

For this purpose, Section 3 of this Article describes the situation of the children in the Orinoco Mining Arc. Then, Section 4 explains the framework of the children's human rights and Section 5 presents and discusses the results of the analysis. Finally, Section 6 provides the necessary conclusions.

3. The Situation of Children in the Orinoco Mining Arc

There is ample evidence of numerous incidents resulting from the extraction of minerals in the Orinoco Mining Arc. A Human Rights Watch's report describes the following irregularities in that territorial space[14]:

a) Control of armed groups irregularly supervising the area without being stopped or detained by the government. Among them, there are Venezuelan organizations called "trade unions" and the Colombian National Liberation Army, apart from at least one group made up of dissidents from the Revolutionary Armed Forces of Colombia (FARC) who operate in Venezuelan territory;
b) Strong exercise of control of the population by the unions. The trade unions establish terrible working conditions and disproportionately punish those accused of theft. Punishments go as far as publicly dismembering and murdering workers who, according to the union, violate the rules (using chainsaws, machetes, or axes), amputating the hands of persons accused of theft. In particular, there is a specific testimony of gunshots on the hands of

14. See Human Rights Watch, *Venezuela: Violent Abuses in Illegal Gold Mines: Credible Allegations of Government Involvement, Acquiescence*, 4 February 2020, available at: https://www.hrw.org/news/2020/02/04/venezuela-violent-abuses-illegal-gold-mines (last visited November 20, 2021).

a 17-year-old boy accused of robbery (this was apparently done by one of the members of a trade union);
c) Exposure of workers to conditions of poor sanitation that leads to diseases such as malaria, apart from high contamination with mercury;
d) Evidence about the presence of the Venezuelan authorities in the area in question. This indicates that national authorities are aware of the situation. However, officials are reported to solicit bribes at the mining sites;
e) Degeneration and toxicity of the immune, digestive and nervous system, lungs, eyes, skin and kidneys due to exposure to mercury in women and children;
f) Children up to ten years of age working with adults in the mines, with working shifts up to twelve hours[15];
g) Lack of medical care for malaria patients as a consequence of the collapse of Venezuelan health facilities;
h) Lack of public information about investigations against government officials to determine their criminal responsibility for these human rights violations;
i) Trafficking of gold through smuggling;
j) Very high homicide rates that made El Callao (Venezuela's mining capital), In 2018, El Callao was the municipality with the most violence, with a rate of 620 homicides per 100,000 inhabitants;
k) Testimonies of confrontations between state agents and trade unions or with Colombian armed groups to control the area. Dozens of people were reported killed or wounded in such clashes, including women and children;
l) Disappearance of persons.

These are just some examples of the situations to which people who live in the Orinoco Mining Arc are subjected. As noted, there are children who have been victims of various illegal situations. That is why in 2021 different complaints have been made about the exploitation of children in that area. In this sense, Venezuelan deputies have

15. In Venezuela, the maximum (and normal) number of working hours per day is eight. Article 173, *Ley Orgánica del Trabajo, los Trabajadores y las Trabajadoras* (*Organic Labour Law for Male and Female Workers*), no. 6.076, 7 May 2012.

reported that children and women are subjected to forced labour inside the Venezuelan mines being compelled by members of the armed groups that operate in the area which offer their protection in exchange for this form of slavery. The former Venezuelan Deputy, Miguel Pizarro, has revealed that the majority of these victims belong to indigenous groups[16].

In addition, it is highlighted in documents signed by the UN High Commissioner for Human Rights, Michelle Bachelet, that since 2016 there has been an increase in female prostitution in the area[17]. This phenomenon exposes females to the risk of contracting sexually transmitted infections. Indeed, contraceptives are not allowed during sexual intercourses in such a context. Further, if a woman is infected with HIV, she is punished by being quartered, according to testimonies collected by a report prepared by the Andrés Bello Catholic University[18]. Ms. Bachelet confirms that children, even under ten years of age, are working in the mines, and this can be observed in places like La Culebra, a gold mine in El Callao[19].

A report by the Andrés Bello Catholic University named "From Labor to Sexuality" also argues that girls belonging to indigenous people have been victims of sale for sexual use, quoting testimonies about children up to 12 years of age having been exchanged for a few grams of gold. The report also affirms that children and adolescents are used

16. See *Oposición Venezolana Denuncia que Niños Son Forzados a Trabajar en la Minería*, 16 April 2021, available at https://www.swissinfo.ch/spa/venezuela-esclavitud-infantil_oposici%C3%B3n-venezolana-denuncia-que-ni%C3%B1os-son-forzados-a-trabajar-en-la-miner%C3%ADa/46541320 (last visited November 20, 2021).

17. See United Nations High Commissioner for Human Rights, *Venezuela: UN Releases Report on Criminal Control of Mining Area and Wider Justice Issues* (cited in note 8); United Nations, *Report Highlights Criminal Control of Mining Area, and Wider Justice Concerns* (cited in note 8).

18. See Centro de Derechos Humanos of the Universidad Católica Andrés Bello, *Formas Contemporáneas de Esclavitud en el Estado Bolívar: una Perspectiva de Género Sensitiva* (cited in note 12).

19. See United Nations High Commissioner for Human Rights, *Venezuela: UN Releases Report on Criminal Control of Mining Area and Wider Justice Issues* (cited in note 8); United Nations, *Report Highlights Criminal Control of Mining Area, and Wider Justice Concerns* (cited in note 8); *La ONU Denuncia Explotación y Abusos en el Arco Minero de Venezuela*, 15 July 2020, available at https://www.dw.com/es/la-onu-denuncia-explotación-y-abusos-en-el-arco-minero-de-venezuela/a-54185782 (last visited November 20, 2021).

for heavy and dangerous work. For example, they are tasked with supporting excavators of the routes to access the gold; exercising this task, children descend to several meters below the surface without the necessary security measures and equipment. Children are also used to operate extractors of gold, gases and electric hammers that are set in motion with makeshift electrical connections. Therefore, the Andrés Bello Catholic University generically indicates that the state must implement public policies to prevent these new forms of slavery in the country, including training public officials to fight these practices[20].

The events described above are evidently harmful for human integrity. Since children are as well heavily relied upon in the mining activities, it is appropriate to give an overview of the scope of the legal protection afforded to children's fundamental rights.

4. About Children's Human Rights

Regarding the recognition of human rights, children enjoy the same general prerogatives of this fundamental nature as adults. However, as the child population is especially vulnerable to abuse, a legal catalogue called *children's rights* was created. In relation to these rights, the *Convention on the Rights of the Child*[21] is the international legal instrument that guards their rights. The United Nations Children's Fund (UNICEF) indeed affirms that:

> The Convention on the Rights of the Child establishes the rights that must be turned into reality so that children can develop their full potential.

20. See Daniel Gómez, *Esclavitud, Trata Sexual y Explotación Infantil: Así Es el Infierno de los Venezolanos en el Arco Minero del Orinoco*, 10 February 2021, available at https://alnavio.es/esclavitud-trata-sexual-y-explotacion-infantil-asi-es-el-infierno-de-los-venezolanos-en-el-arco-minero-del-orinoco/ (last visited November 20, 2021).

21. See Article 1, United Nations General Assembly ("GA"), Res. 44/25, *Convention on the Rights of the Child*, 20 November 1989.

> The Convention offers a vision of the child as an individual and as a member of a family and a community, with rights and responsibilities appropriate to their age and stage of development. By recognizing the rights of the child in this way, the Convention conceives the child as an integral being.

> The Convention recognizes the fundamental human dignity of all children and the urgent need to ensure their well-being and development. It makes clear the idea that all children should have the right to a basic quality of life, instead of being a privilege that few enjoy[22].

In other words, the Convention assumes that the child is an individual who has special needs since, being in a developmental stage, he or she requires special attention. However, this does not mean that children cease to enjoy the benefits of other human rights instruments of universal or regional nature[23] such as the Universal Declaration of Human Rights[24], the International Covenant on Civil and Political Rights[25], the International Covenant on Economic, Social and Cultural Rights[26]. Girls also enjoy the protection of the Convention on the Elimination of all Forms of Discrimination Against Women[27]. Regarding international agreements of a regional nature, in the case of Venezuela, infants also enjoy the protection granted by the American

22. See UNICEF, *Child Rights and Why They Matter,* 2021, available at https://www.unicef.org/child-rights-convention/child-rights-why-they-matter (last visited November 20, 2021).

23. See Valentín Bou Franch, *Derechos Humanos: Selección B*ásica *de Textos Internacionales*, Tirant Lo Blanch, 2003.

24. See GA, Res. 217 A (III), *Universal Declaration of Human Rights,* 10 December 1948.

25. See GA, Res. 2200 A (XXI), *International Covenant on Civil and Political Rights,* 16 December 1966.

26. See GA, Res. 2200 A (XXI), *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966.

27. See GA, Res. 34/180, *Convention on the Elimination of All Forms of Discrimination against Women,* 18 December 1979.

Declaration of the Rights and Duties of Man[28] and the American Convention on Human Rights[29].

Article 2 of the Convention on the Rights of the Child reads as follows:

> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members[30].

Within the framework of the Convention of the Rights of the Child, human beings under the age of eighteen are considered children, in accordance with its article 1 which states: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier"[31]. Because of this, the UNICEF explains that there are several aspects that should be highlighted when talking about children's rights[32]. Among them, the most relevant are the following:

28. See Inter-American Commission on Human Rights ("IACHR"), *American Declaration of the Rights and Duties of Man*, 1948.

29. See Organization of American States ("OAS"), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 1969.

30. See Art. 49, *Convention on the Rights of the Child* (cited in note 21).

31. See *id.*

32. See UNICEF, *Child Rights and Why They Matter* (cited in note 22).

a) Children are people and that is why they do not constitute an asset of others; they cannot be considered as adults in formation, and they are equal to the other members of humanity.
b) Children are dependent on adults, and therefore they must be given the care they require, so when an adult cannot provide it, it is the responsibility of the state to guarantee the best interests of the child;
c) The lack of protective measures for children by governments affects them especially because the action of the state is involved in all the processes of their development;
d) The opinion of children must be heard, even to build political processes where they do not participate or vote;
e) Elements such as family structure, globalization, climate change, digitization, migration, employment rules and the weakening of social welfare networks, have a considerable and usually negative impact on children;
f) The positive and healthy development of children is essential for social evolution, so an optimal quality of life must be ensured to them, including, and especially, adequate services and permanent care;
g) Social research has determined that early experiences affect the future of children, so any failure to support them has negative consequences for communities.

Based on this, it can be claimed that in the Mining Arc of the Orinoco there has been a series of violations of the human rights of children. Taking note of that series of violations, it must be discussed the scope of the lack of compliance with the duty of protection towards these people.

5. Results and Discussion

As a result of the information gathering process carried out, there is sufficient evidence to affirm that there is still a violation of children's rights in the area under study. In fact, we found that in the Orinoco Mining Arc, sexual and labor exploitation and structural violence factors involving children are manifested. On the one hand,

the structural violence emerges from the lack of adequate services for the population such as potable water, electricity or security, and on the other hand, it is related to the government's inaction to improve these shortcomings. Notwithstanding this inaction, it must be noted that there are international legal instruments that establish a special protection for children, particularly because any injury to them has significant negative consequences for the society as a whole. Indeed, there are sufficient hard law provisions that oblige Venezuela to structure public policies aimed at the protection of children, so it cannot be genuinely supported that said that the state is not required to fulfil its international and national commitments on this matter.

In the reports analyzed above, a framework of responsibility can be observed in connection with both action and omission of the state in the fulfilment of the duty to protect the best interests of children. This is due to the complicity of some of its officials in the human rights violations or due to the silence in front of these atrocities. The responsibility under international law of the Venezuelan state for those facts can be also affirmed pursuant to the International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts. Draft Article 2 indeed states: "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State"[33]. In the case at hand, the failure by Venezuela to meet its obligations under international law is evident[34], and that is why the situation of the Orinoco Mining Arc was studied formally by Ms. Michelle Bachelet according to the information in this investigation. It was also found that the violation of human rights in the Orinoco Mining Arc also includes children of indigenous peoples.

Now, the responsibility of Venezuela for the breach of its duties to protect children derives from the thesis that the responsibility of the State for violation of fundamental rights may stem also from its failure to draft norms that restrict or suppress human rights, and from

33. See United Nations International Law Commission ("ILC"), *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in *Report of the International Law Commission on the Work of Its Fifty-four Session*, Supplement No. 10, at 43, 2001, UN Doc. A/56/10, 2001.

34. See *supra*, notes 26-30.

it acting in violation of the Constitution[35]. The breach of the obligation to protect children is especially noteworthy because, as shown by several reports concerning the situation at hands, the government's inaction is serious. Indeed, these reports constitute a notorious proof of Venezuela's breach of its international and domestic obligations to protect fundamental human rights. Further, as acknowledged by Venezuelan jurisprudence, a "notorious proof" exists when: a) it concerns a fact and not an opinion or testimony, b) it's widespread as a result of its dissemination through various channels of written, radio or audiovisual communication, c) there is no doubt about the fact, nor can it is subject to rectification or presumption of falsehood and d) the fact is contemporary with the execution, process or communication of the decision[36]. In the situation of the Orinoco Mining Arc, the exploitation of children has been repeatedly disclosed by the media, scientific reports, and reports by the United Nations, and, according to the journalistic investigations carried out, continues to arise in 2021.

The responsibility of the State can also be claimed because the government itself has repeatedly failed to meet the standard of minimum protection established by the Universal Declaration of Human Rights for the rights to life; to economic satisfaction, social and cultural rights; to a dignified life with a guarantee of well-being and health; to education (because children are forced to work, missing their studies). In addition, the right to establish a social order is violated even though the Declaration guarantees it[37].

With respect to the International Covenant on Civil and Political Rights, the infringement of the following rights can be argued: right to life, to family protection, protection of children, protection for equality before the law and without discrimination, and non-submission to inhuman treatments[38]. These rights, according to the scholarly

35. See Patricio Maraniello, *Los Derechos Humanos y la Responsabilidad del Estado*, Criterio Jurídico, 13(127), 2014, available at https://dialnet.unirioja.es/servlet/articulo?codigo=7294613 (last visited November 20, 2021).

36. See Tribunal Supremo de Justicia, *Coronel O.S.H. v. Tribunal Instructor de la Corte Marcial*, 2000, available at http://historico.tsj.gob.ve/decisiones/scon/marzo/98-150300-0146.HTM.

37. See Art. 3, 22, 23, 25, 26.1 and 28, GA, *Universal Declaration of Human Rights* (cited in note 24).

38. See Art. 6.1, 23, 24, 26 and 27, GA, *International Covenant on Civil and Political Rights* (cited in note 25).

writings, are those that have repercussions against the nature of humanity, its dignity, and its integrity[39]. These rights are also those affected by the exploitation of children. It should also be mentioned that in the situation under investigation there is as well a violation of the government duty to maintain high standards of mental and physical health for its people, ensuring measures to prevent diseases; a duty that is included in the International Covenant on Economic, Social and Cultural Rights[40].

In addition, Venezuela's responsibility expands to the violations of several relevant provisions included in regional human rights instruments. This holds true in particular with reference to rights such as: life, health maintenance and health systems, among others[41] and even to physical, moral and mental integrity, which is eroded when the necessary care is not provided to those who require it[42].

In a more specific context, it is necessary to mention that the Convention on the Rights of the Child stipulates at Article 6 the right of children to life. The same convention, at its Article 11, also establishes that the illegal trafficking of children is prohibited. Accordingly, it is terrible that these human beings are subjected to the living conditions reported within the Orinoco Mining Arc and children are even used for the purposes of sexual exploitation and sale in exchange for gold, for which there is also a liability for non-compliance in the safeguarding of the best interests of the child established in the convention[43]. It is also stipulated in the Convention on the Elimination of all Forms of Discrimination Against Women, that women should not be subjected to practices that in any way are capable of reducing their possibility to exercise their rights, and, above all, it establishes the duty of States to guarantee measures to prevent their trafficking and prostitution,

39. See Narciso Martínez, *Trato Inhumano o Degradante, in Enciclopedia de Bioderecho y Bioética,* 2011, available at https://tinyurl.com/y3cx8qmy (last visited November 20, 2021).

40. See Art. 12.2 and 13, GA, *International Covenant on Economic, Social and Cultural Rights* (cited in note 26).

41. See Art. 1 and 11, IACHR, *American Declaration of the Rights and Duties of Man* (cited in note 28).

42. See Art. 4 and 5, OAS, *American Convention on Human Rights, "Pact of San Jose", Costa Rica* (cited in note 29).

43. See GA, *Convention on the Rights of the Child* (cited in note 21).

which is why it is inadmissible to allow the sexual exploitation and sale of girls and adolescents in the Venezuelan area[44].

All these standards of protection are, at least formally, also contemplated in the Constitution of the Bolivarian Republic of Venezuela when it develops its section dedicated to human rights, which includes some articles dedicated to the safeguard of indigenous peoples (who are also affected when their children are injured in any way)[45]. The Organic Act for the Protection of Children and Adolescents is another domestic legal instrument relevant for the protection of children[46]. However, domestic provisions seem to be a dead letter regarding this daunting problem.

For what has already been said, state responsibility is generated by both action and omission. Hopefully, in the future there will be the possibility of activating the internal and external legal remedies that are relevant to address the situation described, such as the constitutional protection (*amparo constitucional*). The normative documents mentioned are not exclusive, but rather represent examples of rules and commitments that are not fully complied with and that may be concatenated with other provisions to make the fight against child exploitation more efficient in the area of the Venezuelan Amazon.

6. Conclusions

According to the investigation carried out, it can be concluded that part of the Venezuelan child population – the one living in the Orinoco Mining Arc – experiences a situation of serious vulnerability as regards to the exercise of its fundamental human rights. Also, there are various internal and external legal instruments that could be used

44. See GA, *Convention on the Elimination of All Forms of Discrimination against Women* (cited in note 27).

45. See Title III, *Constitución de la República Bolivariana de Venezuela*, no. 5.453, 24 March 2000. Title III focuses on human rights and their guarantees and on the correspondent duties because there is a framework protecting civil, political, social and familiar, environmental, cultural, educational, economic and indigenous rights. Article 78 states that children must be protected by the law and the judicial branches of the country, providing absolute care and an integral protective system. Art. 78, *id*.

46. See *Ley Orgánica para la Protección de Niños, Niñas y Adolescentes,* no. 6.185, 8 June 2015.

to protect this vulnerable population, so it shall be for the social actors to try to promote them in order to eradicate this social plague.

The Venezuelan State is directly responsible for the breach of the international commitments it has signed to protect children, so it must take the appropriate measures to resolve this situation that at present seems uncontrollable. This is the reason why it is necessary to prepare more reports to make this situation visible. This way, it will be guaranteed that the issue will not be forgotten and will be, instead, considered fundamental for the development of the Venezuelan society.

Following this line of action, more scientific studies could be carried out aimed at gathering statistics on the effects of exploitation on children in the Orinoco Mining Arc, with the purpose of generating proposals to structure public policies that are appropriate for this case. Studies could also be conducted on specific categories of children, such as those belonging to indigenous peoples who are affected by the situation as well.

Although it may seem a *cliché*, the phrase "children are the future" is not far from reality, so it is necessary to provide them with a protection framework that really guarantees them, at least, a decent life so that they can progressively participate actively in society. Within the Orinoco Mining Arc, economic interests seem to prevail over human ones, but it is the duty of the government and of the society as a whole to stop this scourge and to advance a spirit of brotherhood in the development of the nation.

Furthermore, if a state does not comply with its international legal commitments, it also means that it is at enormous risk of being considered a failed state. Taking into account that "failed states are usually defined as those that are unable effectively to control their territory and comply with their international obligations"[47], one may argue that this is exactly the situation of Venezuela. This emerges from the consideration of the facts occurring at the Orinoco Mining Arc as described in this article, including the control of the irregular groups in the area, the lack of capacity to protect and cover the needs of the citizens, and the fact that the gold obtained (in part because of

47. See Derek Fraser, *Failed States: Why They Matter and What We Should do About Them,* in *Journal of Conflict Studies*, 28, 2008, available at https://journals.lib.unb.ca/index.php/jcs/article/view/11243/13412 (last visited November 20, 2021).

the exploitation of children) is used to maintain the *status quo* of the government through the corruption of the whole military system in the country[48].

Finally, it should be noted that if the integrity of children is not preserved, little will remain for humanity, since it must be remembered that children will be the men and women who in the future will lead our society and will perpetuate good practices at the service of the constitution of fair and balanced communities.

48. See Vasco Cotovio, Isa Soares and William Bonnet, *A Trail of "Bloody Gold" Leads to Venezuela's Government* (CNN, 23 August 2019), available at https://edition.cnn.com/2019/08/20/americas/venezuela-gold-mining-intl/index.html (last visited November 20, 2021).

Clear but Unconvincing: Revisiting *Addington v. Texas*

Rachel Anne Rein

Abstract: This article revisits the United States Supreme Court case, Addington v. Texas, in which the Court held that the Fourteenth Amendment requires a "clear and convincing" standard for indefinite involuntary civil commitment to a state mental hospital. The Court should have applied a reasonable-doubt standard to involuntary civil commitments, not a "clear and convincing" standard, violating patients' liberty interests. Moreover, a "clear and convincing" standard misuses states' parent and police powers, as it hurts patients' health and subverts public safety. Last, the Court should leave the problem of the unreliability of professional psychiatric opinions to experts and the legislature. Given that COVID-19 swept the nation, disproportionately harming psychiatric patients, it is critical to revisit Addington v. Texas to protect some of the most vulnerable people.

Keywords: Due process; Standards of review; Mental health; Psychiatry; Civil.

1. Introduction

1.1. Background to Addington v. Texas

Involuntarily committed patients face a somber fate: deprivation of their liberty[1]. Unlike patients who enter psychiatric hospitals on a voluntary basis[2], involuntarily committed patients lose the right to choose whether they will be hospitalized[3]. They have equally little choice as to when they leave[4]. Unsurprisingly, forcibly committed

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1. See *Addington v. Texas*, 441 U.S. 418, 425–26 (1979).

2. See Dan A. Lewis et al., *The Negotiation of Involuntary Civil Commitment*, 18 Law & Soc'y Rev. 629, 630 (1984).

3. See John A. Menninger, *Involuntary Treatment: Hospitalization and Medications*, Brown U., available at https://www.brown.edu/Courses/BI_278/Other/Clerkship/Didactics/Readings/INVOLUNTARY%20TREATMENT.pdf (last visited November 17, 2021).

4. See *id.*

patients have clamored for courts to either justify their detention or free them[5].

So, in the late twentieth century, courts across the nation wrestled with the question, under what circumstances can a court civilly commit a person against his will[6]? For example, in the 1975 Supreme Court case *O'Connor v. Donaldson*, the Court held that a person must have a mental disability as a result of which the person is dangerous to himself or others, with no less restrictive alternative available, before a court can involuntarily civilly commit him[7].

Around the same time, courts asked *when* they could civilly commit a person, they also began to ask what they needed to do so[8]. In other words, what burden of proof must the State meet to prove a person mentally ill or dangerous to himself or others?

Three burdens of proof developed from decades of common law apply to the discussion: a "preponderance of the evidence," "clear and convincing" evidence, and evidence "beyond a reasonable doubt"[9]. First, a "preponderance of the evidence" standard requires a party to present evidence that more likely than not proves the issue at hand[10]. Next, a "clear and convincing" burden requires greater proof; it requires the evidence to be highly and substantially more probable to be true than not[11]. Even more exacting, a reasonable-doubt standard forces evidence to inspire near-certainty[12]. Though some courts have hesitated to apply the reasonable-doubt standard to civil cases, other

5. See, for example, *Vitek v. Jones*, 445 U.S. 480 (1980); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972); *Matter of Anonymous ("Billie Boggs") v. NYC HHC*, 522 NYS 2d 407 (NY Co. 1987).

6. See *id.*

7. See *O'Connor*, 422 U.S. at 563 (cited in note 5).

8. See, for example, *Lessard*, 349 F. Supp. at 1078 (cited in note 5); *Superintendent of Worcester State Hosp. v. Hagberg*, 372 N.E.2d 242 (Mass. 1978) (requiring proof beyond a reasonable-doubt in a civil commitment case); *Andrews, petitioner*, 334 N.E.2d 15 (Mass. 1975) (requiring proof beyond a reasonable- doubt for committing sexually dangerous persons).

9. See generally Charlene Sabini, *Burden of Proof: An Essay of Definition*, Nals.org (April 19, 2018), available at https://www.nals.org/blogpost/1359892/300369/Burden-of-Proof-An-Essay-of-Definition (last visited November 17, 2021).

10. See *Preponderance of the Evidence*, Black's Law Dictionary, ed. X, 2014.

11. See *Clear and Convincing Evidence*, Black's Law Dictionary, ed. X, 2014.

12. See *Reasonable Doubt*, Black's Law Dictionary, ed. X, 2014.

courts have done so[13]. For example, in Massachusetts, matters require proof beyond a reasonable doubt when a person "receives a stigma at least as great as that flowing from a criminal conviction" and "faces a potential loss of liberty"[14]. And some courts have applied the reasonable-doubt standard to civil commitments, noting either the stigma of mental illness or the loss of liberty from commitment[15].

1.2. Addington v. Texas

The following patient's case warrants similar considerations of stigma and freedom. Frank Addington was no stranger to civil commitment. Suffering from delusions, he had been civilly committed seven times between 1969 and 1975 for mental and emotional disorders[16]. He had threatened his parents and damaged property at his and his parents' homes in Texas[17]. When hospitalized, he had been involved in assaultive episodes[18].

On December 18, 1975, Mr. Addington was arrested for a threat against his mother, who petitioned for his indefinite commitment to a state institution[19]. Afterward, a county psychiatric examiner interviewed Mr. Addington and opined that he was mentally ill and needed hospitalization in a mental hospital[20].

Like other courts considering whether to involuntarily commit a patient, the Texas trial court asked the jury to decide the case based on two questions involving evidentiary standards. First, the court asked whether Mr. Addington was mentally ill based on "clear, unequivocal [,] and convincing evidence"[21]. Then, the court inquired whether, under the same standard, Mr. Addington required hospitalization for

13. See, for example, *Doe v. Doe*, 385 N.E.2d 995 (Mass. 1979); *Fazio v. Fazio*, 378 N.E.2d 951 (Mass. 1978); *Hagberg*, 372 N.E.2d at 242 (cited in note 8).

14. See *In re Guardianship of Roe,* 383 Mass. 415, 423, 421 N.E.2d 40 (1980).

15. See *Lessard*, 349 F. Supp. 1078 (cited in note 5); *Hagberg,* 372 N.E.2d at 245 (cited in note 8); *Andrews, petitioner,* 334 N.E.2d at 15 (cited in note 8).

16. See *Addington*, 441 U.S. at 420 (cited in note 1).

17. See *ibidem*.

18. See *Addington*, 441 U.S. at 421 (cited in note 1).

19. See *id* at 420.

20. See *ibidem.*

21. See *Addington*, 441 U.S. at 421 (cited in note 1).

his own welfare and protection or to protect others[22]. The jury found Mr. Addington mentally ill and found that he required hospitalization[23]. Mr. Addington objected on multiple grounds, including the court's refusal to use a reasonable-doubt standard of proof instead of the "clear, unequivocal, and convincing" standard it employed[24].

Upon appeal, the Texas Court of Civil Appeals reversed, agreeing with Mr. Addington that his commitment required a reasonable-doubt standard[25]. But then, the Texas Supreme Court reinstated the trial court's decision[26]. The Texas Supreme Court relied primarily on *State v. Turner*[27] where the Texas Supreme Court had previously held that the "preponderance" standard satisfied due process in civil commitment cases[28].

Mr. Addington appealed that decision to the United States Supreme Court, with some success. In *Addington v. Texas*, the Supreme Court adopted a more stringent standard than the Texas Supreme Court, holding that the Fourteenth Amendment requires a "clear and convincing" standard for indefinite involuntary civil commitment to a state mental hospital[29]. The Court found the Texas Supreme Court's "preponderance of the evidence" standard too lenient to meet due process guarantees[30], considering the loss of liberty the patient Mr. Addington faced. However, the Court declined to raise the constitutional minimum to "beyond a reasonable doubt," as Mr. Addington had urged[31].

The Court's decision reflected its wariness of applying a reasonable-doubt standard "too broadly or casually" in noncriminal cases[32]. Initially, the Court emphasized that it had repeatedly recognized the

22. See *ibidem.*
23. See *ibidem.*
24. See *ibidem.*
25. See *Addington*, 441 U.S. at 422 (cited in note 1).
26. See *id.* at 418.
27. See *ibidem.*
28. See *State v. Turner*, 556 S.W.2d 563 (Tex. 1977).
29. See *Addington*, 441 U.S. at 418 (cited in note 1).
30. See *id.* at 432.
31. See *id.* at 419.
32. See *id.* at 428.

severe loss of liberty that committed patients suffer[33]. Moreover, the Court admitted that patients' adverse social consequences from civil commitment were "indisputable"[34]. The Court cautioned that these consequences could have a "very significant impact" on a person[35]. However, the Court also sought to avoid treading upon the unique place the criminal justice system holds in the legal system[36]. Furthermore, the Court reasoned that because psychiatric diagnosis is often uncertain, the State may never be able to meet a reasonable-doubt standard[37]. Accordingly, the Court justified a standard in the middle: "clear and convincing" evidence[38].

1.3. Why Does Addington Matter?

This article addresses whether the Supreme Court rightly decided *Addington*, in which it held that the Fourteenth Amendment requires a "clear and convincing" standard for indefinite involuntary civil commitment to a state mental hospital.

The Supreme Court failed to go far enough in *Addington* when it adopted a "clear and convincing" burden of proof for involuntary civil commitment. Instead of a "clear and convincing" standard, the Court should have applied a reasonable-doubt standard to involuntary civil commitments.

First, in adopting a "clear and convincing" standard, the Court treads upon involuntarily committed patients' liberty interests. Next, a "clear and convincing" standard fails to protect states' parent and police powers, as the standard hurts patients' health and subverts public safety. Finally, the Court should leave the problem of the unreliability of professional psychiatric opinions to experts and the legislature.

33. See *Addington*, 441 U.S. at 425 (cited in note 1) (citing *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady,* 405 U.S. 504 (1972); *In re Gault,* 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967).

34. See *Addington*, 441 U.S. at 425 (cited in note 1).

35. See *id.* at 426.

36. See *id.* at 423.

37. See *id.* at 432.

38. See *Addington*, 441 U.S. at 433 (cited in note 1).

This issue is timely because the COVID-19 exacerbated psychiatric health issues across the nation[39], and subpar institutional living conditions further abrogated the rights of involuntarily institutionalized patients[40]. Patients confined to close quarters found themselves at heightened risk of coronavirus[41]. As the pandemic continues, it is critical we revisit *Addington* to ensure patients receive their due rights under the law.

2. Analysis

2.1. The Court Treads Upon Involuntarily Committed Patients' Liberty Interests

Courts must weigh states parent and police powers against individuals' liberty interests[42], but the Supreme Court's balancing exercise in *Addington* falls short of fairly protecting patients' freedoms. Under the Fourteenth Amendment's Due Process Clause, the Court has recognized a person's right to privacy[43]. Also, lower courts have defined the constitutional right to privacy as "an expression of the sanctity of

39. See Allison Abbott, *COVID's Mental-health Toll: How Scientists are Tracking a Surge in Depression*, Nature.com (February 3, 2021), available at https://www.nature.com/articles/d41586-021-00175-z (showing an increase in reported symptoms of anxiety or depression from 11% in 2019 to 42% in December 2020) (last visited November, 17 2021).

40. See Ermal Bojdani et al., *COVID-19 Pandemic: Impact on Psychiatric Care in the United States*, Psychiatry Research, May 2020, at 3–4 (listing lack of beds, of face to face interaction, of in-person programming, of communal dining, and of visitors' policies as harmful to psychiatric patients' health during the COVID-19 pandemic); see also Muhammad Rahman et al., *Mental Distress and Human Rights Violations During COVID-19: A Rapid Review of the Evidence Informing Rights, Mental Health Needs, and Public Policy Around Vulnerable Populations,* 11 Front Psychiatry, January 2021, at 1 and at 11.

41. See also Bojdani et al., *COVID-19 Pandemic* at 2 (cited in note 40) (indicating that it can be difficult to get psychotic patients to wear masks, that some patients have difficulty maintaining personal hygiene, and that psychiatric staff are not trained in infectious disease protocols, increasing the risk of coronavirus to staff and patients).

42. See *Youngberg v. Romeo*, 457 U.S. 307, 327 (1982).

43. See *Roe v. Wade*, 410 U.S. 113 (1973). See also *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

individual free choice and self-determination as fundamental constituents of life"[44].

The *Addington* Court posited that civilly committed patients lose less liberty than prisoners[45]. Consequently, patients do not need a reasonable-doubt standard to protect them. However, this differentiation does not hold up to scrutiny. Institutionalization robs patients of their privacy[46] much like incarceration does[47], possibly even more so[48]. Institutionalization denies patients their individuality, restricts their movement, and forbids them from exercising their autonomy[49]: involuntarily committed patients live under lock and key like prisoners[50]. They are told when to eat and where to sleep by "techs"[51], people who assume a role akin to a jail's guards. Institutionalized patients are stripped of their clothing[52] and sometimes given uniforms to wear, like

44. See *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 426 (Mass. 1977).

45. See *Addington*, 441 U.S. at 423, 428 (cited in note 1).

46. See Stephen J. Morse, *A Preference for Liberty: The Case Against Involuntary Commitment of the Mentally Disordered*, 70 Cal. l. Rev. 54, 55 (1982) ("The balance between individual liberty and autonomy on the one hand, and the state's paternalistic right to confine and treat persons involuntarily on the other, has clearly shifted to a preference for liberty").

47. See Zachary Groendyk, Note, *"It Takes a Lot to Get Into Bellevue": A Pro-Rights Critique of New York's Involuntary Commitment Law*, 40 Fordham Urb. L.J. 549 (2012). See also Ketema Ross, *I Spent Seven Years Locked in a Human Warehouse*, Politico (April 16, 2015), available at https://www.politico.com/magazine/story/2015/04/mental-institution-mental-health-policy-117061 (noting that patients were forbidden from visiting each other's rooms, from sharing food, from taking walks on hospital grounds, from leaving, even from working out using a pillow stuffed with books as a weight) (last visited November 17, 2021).

48. See Ross, *I Spent Seven Years Locked in a Human Warehouse* (cited in note 47) ("Many people with mental illness would love to have the rights that are given to convicted criminals").

49. See *id.*

50. See Margaret Parish, *Preventing Suicide in Locked vs. Unlocked Psychiatric Units*, Austen Riggs (August 3, 2016), available at https://www.austenriggs.org/blog-post/preventing-suicide-locked-vs-unlocked-psychiatricunits (last visited November 17, 2021).

51. See Letter from Anonymous, *When We Don't Value Psychiatric Care*, Atlantic (December 20, 2016), available at https://www.theatlantic.com/notes/2017/01/ect/512102/ (last visited November 17, 2021).

52. See Dinah Miller & Annette Hanson, *Violent Behavior and Involuntary Commitment: Ethical and Clinical Considerations*, Psychiatric Times (February 28, 2020),

how prisoners are given jumpsuits. Similar to how one former prisoner said that prison guards treat incarcerated people as "subhuman"[53], one former psychiatric patient said that the "cold, sterile" environment of a mental ward guts one's identity and humanity[54].

Indeed, as with prisoners, patients' deprivation of freedom extends beyond their release from the hospital and even a "short detention" in a mental hospital can affect a person's ability to function in the outside world[55]. For example, learned passivity and the stigma attached to mental illnesses may prevent former patients from gaining employment, forming relationships, and pursuing other goals[56]. For the reasons just exposed, without proper resources upon release from mental hospitals, former patients may fail to reach their full potential[57].

According to the Court in its earlier case In re Winship, requiring the government to meet a reasonable-doubt burden "establish[es] the moral force of the law" when the law "deprive[s] an individual of his liberty" [58]. Thus, considering that commitment crushes patients' free choice and self-determination – the foundation of liberty and privacy

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available at https://www.psychiatrictimes.com/view/violent-behavior-and-involuntary-commitment-ethical-and-clinical-considerations (last visited November 17, 2021).

53. See Nicole Lewis, *How We Survived COVID-19 in Prison*, The Marshall Project (April 22, 2021), available at https://www.themarshallproject.org/2021/04/23/how-we-survived-covid-19-in-prison (last visited November 17, 2021).

54. See Ross, *I Spent Seven Years Locked in a Human Warehouse* (cited in note 47).

55. See *Lessard*, 349 F. Supp. 1078, 1091 (cited in note 5); see also *Youngberg v. Romeo*, 457 U.S. 307, 327 (1982) (Blackmun, J. et al., concurring) (It is argued that due process guaranteed patients training necessary to prevent them from losing the skills, like basic self-care, that they entered commitment with).

56. See Brian K. Ahmedani, *Mental Health Stigma: Society, Individuals, and the Profession*, 8 J. Soc. Work Values & Ethics 1, 5 (2011) (noting that the stigma of mental illness may impact mentally ill people's employment and relationships, and noting how a mental illness label may lead to status loss and discrimination); see also H. Richard Lamb & Leona L. Bachrach, *Some Perspectives on Deinstitutionalization*, Psychiatric Online (August 1, 2001), available at https://ps.psychiatryonline.org/doi/10.1176/appi.ps.52.8.1039 (indicating that adequate community resources must be provided for patients with learned passivity from long hospitalizations, so patients can realize their social and vocational potential) (last visited November 17, 2021).

57. See Lamb & Bachrach, *Some Perspectives on Deinstitutionalization* (cited in note 56).

58. See *In re Winship*, 397 U.S. 358, 364 (1970).

– similarly to criminal law, the Court in Addington should have employed a reasonable-doubt burden.

2.2. A "Clear and Convincing" Standard Fails to Protect States' Parent and Police Powers

A "clear and convincing" standard fails to secure personal freedoms. It also fails to protect individual and public health and safety. In civil commitment, states' parent power protects mentally ill people from themselves, and states' police power protects the public from dangerous patients[59]. *Addington,* therefore, avoided providing federally for patients, leaving the matter under powers traditionally within autonomous states' purview[60]. In other words, the Court leaves the states free to enact stronger burden of proof[61].

The Court's lenient "clear and convincing" standard impinges upon states' interests by inviting undue commitment[62], which threatens patients and the public. When patients first arrive, long waits in emergency rooms escalate patients' aggression and irritation[63]. Then, during patients' stays, doctors may medicate them with medications that carry severe risks, including robbing patients of their independence. In fact, medications deemed "chemical straightjackets" for their unique ability to subdue patients for prolonged periods of time, are no longer used sparingly by doctors for their original purpose to treat

59. See *Addington*, 441 U.S. at 426 (cited in note 1).

60. See *id.* at 430.

61. See *ibidem.*

62. See, for example, Lonnie R. Snowden et al., *Overrepresentation of Black Americans in Psychiatric Inpatient Care*, 60 Psychiatric Servs. 779 (2009) (showing that Black Americans have a higher chance of being civilly committed during their lifetime than white Americans, even when controlling for any lifetime mental disorder, lifetime receipt of psychotherapy or counseling, income, employment, marital status, age, education, and gender); Christie Thompson, *When Going to the Hospital Is Just as Bad as Jail*, Marshall Project (November 8, 2020), available at https://www.themarshallproject.org/2020/11/08/when-going-to-the-hospital-is-just-as-bad-as-jail (noting high involuntary detention rates for Black Americans, partly because first responders are too quick to hospitalize) (last visited November 17, 2021).

63. See Miller & Hanson, *Violent Behavior and Involuntary Commitment* (cited in note 52).

acute psychosis[64]. Instead, they are now used to quite aggressive or disruptive patients, even when these patients are completely lucid[65]. Beyond their intended uses (whether justifiable or not), medications that doctors prescribe to psychiatric patients can also cause undesired side effects that take away basic skills, like patients' ability to drive[66]. It results clear how restrictive civil commitment is on one's liberty.

But this is not all. Patients' autonomy may be further violated through physical and sexual assaults, occurring in mental health hospitals and other facilities[67]. Patients are often neither safe with staff nor with their peers, as both staff and other patients perpetrate these assaults[68]. One source even estimates that almost one in ten patients inside a mental health facility will experience sexual coercion, misconduct, or assault there[69]. It also happens that some patients lose the greatest liberty of all: their lives. For example, just two years ago, at Aurora Las Encinas Mental Health Hospital in Pasadena, California, a patient stopped breathing after five staff members restrained him on the ground[70] and the patient died. State investigators later found that the staff had not been trained how to properly restrain a patient[71]. Upon release, hospitals funnel traumatized patients[72], now suffering

64. See Joanna Moncrieff, *Story of Antipsychotics is One of Myth and Misrepresentation,* The Conversation (September 20, 2013), available at https://theconversation.com/story-of-antipsychotics-is-one-of-myth-and-misrepresentation-18306 (last visited November 17, 2021).

65. See *id.*

66. See Chuck Weller, *Forced Administration of Antipsychotic Drugs to Civilly Committed Mental Patients in Nevada: A Remedy Without a Clear Statutory Authorization,* 11 Nev. L. J. 759, 759–60 (2011) (noting that antipsychotics prescribed to patients have side effects and can cause tardive dyskinesia, a condition that takes away basic skills, like the ability to drive).

67. See B. Christopher Frueh et al., *Patients' Reports of Traumatic or Harmful Experiences Within the Psychiatric Setting,* 56 Psychiatrice Servs. 1123 (2005).

68. See Brian Barnett, Addressing Sexual Violence in Psychiatric Facilities, 71 Psychiatric Servs., 959, 959 (2020).

69. See *id.*

70. See Soumya Karlamangla, *Their Kids Died on the Psych Ward. They Were Far from Alone, a Times Investigation Found,* LA Times (December 1, 2019), available at https://www.latimes.com/california/story/2019-12-01/psychiatric-hospital-deaths-california (last visited November 17, 2021).

71. See *id.*

72. See Thompson, *When Going to the Hospital Is Just as Bad as Jail* (cited in note 62) ("Many who have endured a short-term hospital stay say the experience of being

from more severe symptoms[73], back into the public[74]. Many of these patients, without long-term care, subsequently commit crimes, though crime data specifically referring to patients released from mental health hospitals is lacking[75]. Instead of protecting the public, the State creates a revolving door of treatment that puts the public at risk[76].

Some scholars fear that the more restrictive the standard for hospitalization, the more psychiatric patients will become a burden for jails or the streets[77]. However, state courts may still choose whether to employ a dangerousness standard (a patient must be a danger to himself or others) or a welfare standard (commitment must be necessary for the patient's wellbeing)[78]. Moreover, in the unlikely case that hospitals

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held against their will in a psychiatric ward was as traumatizing as being arrested").

73. See *Lessard*, 349 F. Supp. at 1087, n.18 (cited in note 5) ("[There is] substantial evidence that any lengthy hospitalization, particularly where it is involuntary, may greatly increase the symptoms of mental illness and make adjustment to society more difficult [...] The effects may not be limited to those resulting from prejudice [...] Although 7 days may not appear to some to be a very long time, experience has indicated that any kind of forcible detention of a person in an alien environment may seriously affect him in the first few days of detention, leading to all sorts of acute traumatic and iatrogenic symptoms and troubles [...] things that are caused by the very act of hospitalization which is supposed to be therapeutic; in other words, the hospitalization process itself causes the disturbance rather than the disturbance requiring hospitalization").

74. See Miller & Hanson, *Violent Behavior and Involuntary Commitment* (cited in note 52).

75. See Sara Gordon, *The Danger Zone: How the Dangerousness Standard in Civil Commitment Proceedings Harms People with Serious Mental Illness*, 66 Case W. Rsrv. L. Rev. 657, 660–61 (2016).

76. See Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequences*, 15 Am. Med. Ass'n J. Ethics 886, 889 (2013) ("Patients [with mental illnesses] who are violent, have criminal histories [...] have history of damage to property [...] cannot be easily placed. They are often discharged back to the streets where they started").

77. See Lamb & Bachrach, *Some Perspectives on Deinstitutionalization* (cited in note 56) ("The two American Psychiatric Association task forces on the homeless mentally ill concluded that this problem is the result not of deinstitutionalization per se, but of the way it has been implemented. [...] There has been much concern since the 1970s about the numbers of mentally ill persons in our jails and prisons").

78. See R. Levinson et al., *The Impact of a Change in Commitment Procedures on the Character of Involuntary Psychiatric Patients*, 29 J. Forensic Sci. 566, 566 (1984) ("The statutory requirements for involuntary civil psychiatric confinement have become

under-commit patients[79], states would still have the choice to aggressively invest in community mental health resources and pursue less restrictive alternatives for patients, such as community care[80].

Because civil commitment is risky to the public, and even potentially fatal to patients, the Court should ensure that the only patients that courts involuntarily commit are those who the State can prove belong there beyond a shadow of a doubt.

2.3. The Court Falters from the Uncertainty of Professional Psychiatric Opinions

Finally, the Court gives short shrift to the subjectivity of professional opinions in involuntary civil commitment proceedings. In *Addington*, the Court said that because professional mental health opinions are fallible, the State may always fail to meet a reasonable doubt standard[81]. So, the Court reasoned, a standard that the State can meet with current psychiatric expert opinions, a "clear and convincing" standard, is more appropriate for involuntary psychiatric hospitalization. The subjectivity of psychiatric diagnosis is indeed problematic[82]. However, the Court should leave this puzzle for doctors and researchers, instead of letting it dictate a more lenient burden of proof.

Psychiatrists and psychologists often disagree about patients' conditions[83]. For example, in the famous "Billie Boggs" case, doctors

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increasingly restrictive. [...] A newly elected judge instituted changes requiring affiants to claim the subject was "dangerous" to self or others"); see N.Y. State Office of Mental Health, *Mental Hygiene Law – Admissions Process*, available at https://omh.ny.gov/omhweb/forensic/manual/html/mhl_admissions.htm (last visited November 17, 2021) (providing an example of New York State's mental hygiene commitment laws).

79. See J. Ray Hays, *The Role of Addington v. Texas on Involuntary Civil Commitment*, 65 Psych Reps. 1211, 1213 (1989).

80. See Olmstead v. L. C., 527 U.S. 581 (1999) (holding that the State is responsible for providing community-based treatment to qualified persons with disabilities and requiring states to stop segregating people with disabilities unnecessarily).

81. See *Addington*, 441 U.S. at 429 (cited in note 1).

82. See Shivani Nishar, *The Legacy Of "Deinstitutionalization"*, Mental Health Am. (July 29, 2020), available at https://www.mhanational.org/blog/legacy-deinstitutionalization (last visited November 17, 2021).

83. See Stijn Vanheule et al., *Reliability in Psychiatric Diagnosis with the DSM: Old Wine in New Barrels*, 83 Psychoter. & Psychosom 313, 313–14 (2014) (indicating

interpreted Joyce Brown's actions and words, including running into traffic and yelling epithets, in vastly different ways from irrational, psychotic, and suicidal to rational and self-protective[84]. Some doctors believed Ms. Brown was trying to end her own life and acted violently due to mental imbalance. At least one doctor, however, believed Ms. Brown's actions were a conscious, pained reaction to passerby treating her as less than human. More recently, in the Jodi Arias criminal murder trial, mental health experts disagreed on whether Ms. Arias suffered from Posttraumatic Stress Disorder or Borderline Personality Disorder[85]. While some theorized that Ms. Arias's obsessive and erratic behavior stemmed from trauma from her partner Travis's alleged abuse, others thought that Ms. Arias's actions and feelings were in line with long-standing personality characteristics. Even more worrisome, doctors consistently overpredict prospective patients' dangerousness to others[86]. Furthermore, marginalized groups suffer the most: for example, doctors disproportionately misdiagnose Black children with conduct disorders that are "often conflated with violent criminality"[87].

Given that states now mainly use a dangerousness standard[88], it is even more critical that psychiatric experts' testimony must surpass strong constitutional protections. If current psychiatric testimony cannot overcome a reasonable-doubt standard, researchers should instead develop more reliable and predictive ways for doctors to assess

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psychiatric diagnostic reliability in 2013 was no better than in the 1970's); Dale A. Albers et al., *Involuntary Hospitalization and Psychiatric Testimony: The Fallibility of the Doctrine of Immaculate Perception*, 6 Cap. U. L. Rev. 11, 16 (1976).

84. See Luis R. Marcos, *Taking the Mentally Ill Off the Streets: The Case of Joyce Brown*, 20 Int'l. Mental Health 7, 10–13 (1991); Judith L. Failer, *Who qualifies for Rights?* 11–28 (1st ed. 2002).

85. See Alexis Shaw, *Jodi Arias Defense Team Rests After 38 Days of Testimony*, ABC News. (April 16, 2013), available at https://abcnews.go.com/US/jodi-arias-defense-team-rests-38-days-testimony/story?id=18971855 (last visited November 17, 2021); Erin Fuchs, *Here's What We Know About Jodi Arias, who Finally Got Life in Prison for Killing her Ex-boyfriend*, Business Insider (April 13, 2015), available at https://www.businessinsider.com/jodi-arias-profile-2015-4 (last visited November 17, 2021).

86. See *Letter from Art Kobler to Affiliate & Nat'l Bd. Members*, ACLU (February 10, 1980).

87. See Nishar, *The Legacy Of "Deinstitutionalization"* (cited in note 82).

88. See Gordon, *The Danger Zone* at 660 (cited in note 75).

patients[89]. For example, experts could rely more heavily on suicide[90] and homicide risk scales, when assessing the patient's harm to himself or to others, instead of a patient's presentation. State legislatures could pass a consensus requirement, where agreement between a certain number of mental health experts about a person's mental illness and dangerousness would be a prerequisite to commitment. The Court should leave the issue of how to remedy varied diagnoses to legislators, who by nature of their role, are better equipped to inquire into the facts surrounding psychiatric expertise, diagnostic criteria, and relevant statistics.

Alternatively, the Court errs in *Addington* when it posits that the reasonable-doubt standard in criminal law applies to "specific, knowable facts," while psychiatric diagnoses are merely "filtered through the experience of the diagnostician"[91]. On the contrary, in criminal trials, which use a reasonable-doubt standard[92], doctors and other experts also come to conclusions colored by their own experiences[93]. Furthermore, experts in criminal trials have historically relied on unreliable science, like voice identification, bite mark forensics, and burn analysis[94]. If courts consider a jury well-equipped to use a reasonable-doubt standard for burn patterns, a jury should be equally well-equipped to use the same standard for psychiatric testimony.

So, adopting a reasonable-doubt standard protects patients from impressionistic psychiatric opinions and encourages research into more reliable expert testimony. Insufficiency of evidence is a reason

89. See Albers et al., *Involuntary Hospitalization and Psychiatric Testimony* at 13–15 (cited in note 83) (indicating that definitions of mental illness are vague, and experts must create clear definitions for psychiatric illness that they should then apply uniformly).

90. See Parvin Ghasemi et al., *Measurement Scales of Suicidal Ideation and Attitudes: A Systematic Review Article*, 5 Health Promotion Persp, 156 (2015) (providing an example of research on validating suicide risk scales).

91. See *Addington,* 441 U.S. at 430 (cited in note 1).

92. See *id.* at 421.

93. See Brandon L. Garret & Chris Fabricant, *The Myth of the Reliability Test*, 86 Fordham L. Rev. 1559, 1563 (2018).

94. See National Research Council, *Strengthening Forensic Science in the Science in the United States: A Path Forward* at 1, 42, 47, 173 (The National Academic Press, 2009), available at https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf (last visited November 17, 2021).

to improve assessment, not to promote a lower burden of proof. The legislature should encourage better assessment, and the Court should still use a heightened burden of proof for psychiatric patients.

3. Conclusion

The Supreme Court's decision in *Addington* to adopt a "clear and convincing" burden of proof for involuntary psychiatric hospitalizations offered flimsy protection against civil commitment's severe curtailment of liberty.

Instead of a "clear and convincing" standard, the Court thus should have implemented a reasonable-doubt standard. First, a reasonable-doubt standard protects patients' freedoms. Second, it still allows states to exercise their parent and police powers. Finally, a reasonable-doubt standard accounts for unreliable psychiatric opinions.

At its core, the reasonable-doubt standard is a signaling mechanism. It flags the unique place involuntary civil commitment occupies in the law: a place where the State, relying solely on professional predictions, may withhold freedoms from a person who has committed no crime, and force his seclusion from the rest of the world. Given the gravity of such a situation, the reasonable-doubt standard reminds judges that they wield immense power and must use it wisely.

Though unreliable psychiatric assessments post a vexing problem, this problem is one for Congress, not the Court. In sum, judges must forcibly commit people who need the help – but only with proper proof.

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