TRENTO STUDENT LAW REVIEW

Vol. 4, No. 2 | November 2022

Published by the Trento Student Law Review Association, an independent student organization at the Faculty of Law of the University of Trento.

Address Trento Student Law Review Association
c/o University of Trento, Faculty of Law
Via Verdi 53
38122 Trento (Italy)
Email trentostudentlawreview@unitn.it
Website https://teseo.unitn.it/tslr

Submissions The *Trento Student Law Review* welcomes submissions of articles, essays, and book reviews. Manuscripts considered for publication are subjected to double-blind peer review. Contributors are invited to submit their pieces via online form. Please visit our website for further information.

Layout Lucrezia Di Renzo
Cover Associazione Acropoli

www.acropolitrento.com

TRENTO STUDENT LAW REVIEW

VOL. 4 NOVEMBER 2022 NO. 2

Contents

Prefazione

Matteo Maurizi Enrici
Direttore

È con grande soddisfazione che scrivo queste parole in prefazione al Volume 4 Numero 2 della *Trento Student Law Review*. Si tratta della soddisfazione per un lavoro ben fatto, della gratitudine per una squadra coesa e preparata e per dei contributi che sono - ciascuno nel proprio settore giuridico-disciplinare - di grande attualità.

Ecco che la *Trento Student Law Review* ambisce a dare un'altra volta un umile contributo al dibattito dottrinale, portando all'attenzione dei nostri lettori tematiche affrontate con taglio critico.

In apertura di questo volume un articolo che si focalizza su uno dei punti caldi della geopolitica attuale - lo stretto di Taiwan - e sugli strumenti legislativi impiegati dalla Repubblica popolare cinese nel contrasto sull'indipendenza e sovranità taiwanese. *The one China principle and its legal consequences, domestically and abroad: the disputed control over Taiwan and the anti-secession law. Much Ado about Nothing?* indaga dunque i principi di diritto internazionale in materia di sovranità statale e il dibattito tanto pubblico quanto accademico circa l'esistenza della Republic of China (Taiwan).

In *The encryption paradox: fostering security by threatening security* centrale sarà la tensione tra criptazione come strumento a presidio della libera informazione e del diritto alla riservatezza nelle comunicazioni digitali da un lato, e esigenze di pubblica sicurezza e sicurezza nazionale dall'altra, andando ad analizzare anche ulteriori fattori che sono incisi dall'evoluzione tecnologica. L'autore esplora dunque il bilanciamento degli interessi e le vie percorribili nella soluzione del contrasto.

Un altro punto di frizione, questa volta tra principi cardine del diritto penale e tecniche investigative di polizia, è esplorato nel contributo *Sting operations and entrapment defense in corruption behaviors. A systematic analysis between Italy, Europe, and the United States*. Il confronto comparatisctico dell'attività di polizia giudiziaria dell'agente provocatore - tipicamente statunitense - da un lato e l'ordinamento penale italiano e i principi della carta europea dei diritti dell'uomo dall'altro è arricchita da un analisi storica e un approfondimento giurisprudenziale della materia.

Sempre in materia penalistica, affrontata in ottica comparata tra sistemi giuridici differenti, un altro bilanciamento d'interessi problematico. *Christian sermons and the law of defamation in Cameroon: A common Law approach* va ad indagare il diritto di manifestare il pensiero e di professare liberamente una fede religiosa allorché entrino in tensione con al diritto individuale di non vedere lesa la propria dignità o reputazione. Gli istituti penalistici di diritto camerunense a presidio dell'onore sono letti attraverso il prisma della comparazione rispetto a precedenti giurisprudenziali di common law.

Quale momento migliore poi per riflettere sulla nozione e sugli strumenti della giustizia di transizione, se non quando una guerra divisiva e lacerante tra due nazioni e due popoli insanguina le frontiere dell'Europa? Ecco che in *Are Top-down Approaches of Transitional Justice Enough to Deliver Justice?* viene rappresentata una prospettiva differente da quella tradizionale di giustizia di transizione: una prospettiva ove la transizione sia promossa dal basso.

È così che la nostra realtà editoriale s'inserisce nel panorama della letteratura giuridica, al contempo consentendo a noi giovani giuristi di affinare competenze nella redazione di testi giuridici, testi giuridici che trattino tematiche di frontiera. Un connubio che ci consente di mettere individualmente alla prova le nostre competenze e la cura per il dettaglio, così incidendo direttamente sulla crescita ed evoluzione continua del nostro lavoro editoriale.

In conclusione, doverosa è una menzione di gratitudine al Professor Fulvio Cortese, a cui manifestiamo stima e ammirazione per il servizio reso come Preside, ma anche e sopratutto per il costante aiuto e sostegno che mai ha fatto mancare a questa pubblicazione nel corso del suo mandato. Vogliamo inoltre augurare ogni successo al Professor Paolo Carta, che dal professor Cortese ha ricevuto il testimone come vertice della nostra Facoltà di Giurisprudenza: *ad maiora*!

Infine, desidero ringraziare la mia Vicedirettrice, Emma Castelin, per avermi pazientemente sostenuto in questo ciclo di lavori, nonché tutto il team della *Trento Student Law Review* senza il cui fondamentale lavoro questo volume non sarebbe stato possibile.

Preface

Matteo Maurizi Enrici
Editor-in-Chief

It is with great pride that I write these words to introduce Volume 4 Number 2 of the *Trento Student Law Review*. It is satisfaction for a job well done, gratitude for a cohesive and prepared team, and for articles that are - each in its own area of legal scholarship - of great actuality.

Hence, the *Trento Student Law Review* aspires, once again, to make a modest contribution to the academic debate, bringing issues approached with a critical perspective to the attention of our readers.

Opening this volume is an article that focuses on one of the current geopolitical hotspots - the Taiwan Strait - and the legislative tools employed by the People's Republic of China in the fight over Taiwanese independence and sovereignty. *The one China principle and its legal consequences, domestically and abroad: the disputed control over Taiwan and the anti-secession law. Much Ado about Nothing?* investigates international law principles of state sovereignty and both the debates, public and academic, around the existence of the Republic of China (Taiwan).

In *The encryption paradox: fostering security by threatening security* the focus will be on the tension between encryption as a tool to safeguard free information and the right to privacy in digital communications on the one hand, and public safety and national security requirements on the other. The author will examine how other fields are impacted by encryption: possible balancing of interests and viable solutions to resolve the contrast are presented.

Another source of friction, this time between cornerstone principles of criminal law and police investigative techniques, is explored in the article *Sting operations and entrapment defense in corruption behaviors. A systematic analysis between Italy, Europe, and the United States*. This article develops a transnational comparison of the law enforcement activity of the agent provocateur - characteristically a U.S. phenomenon - and the Italian criminal justice system, while the relevant principles of the European Charter of Human Rights are enriched by a historical and in-depth jurisprudential analysis of the subject.

Also in the field of criminal law, approaching different legal systems from a comparative perspective, is another balancing of interests. *Christian sermons and the law of defamation in Cameroon: A common law approach* sets out to investigate freedom of speech and religious freedom when they come into tension with the individual right not to harm one's dignity or reputation. Cameroonian criminal law protecting honor and common law judicial precedents are read through a comparative prism.

What better time to reflect on the notion and tools of transitional justice than at a time when a divisive and wrenching war between two nations and two peoples is shedding blood on the borders of Europe? Thus in *Are Top-down Approaches of Transitional Justice Enough to Deliver Justice?* a perspective different from the traditional one on transitional justice is depicted: one where transition is promoted from below.

This is how our editorial operation engages with the legal literature panorama, while at the same time allowing us young jurists to hone skills in editing legal texts, legal texts which deal with frontier issues. A combination that allows us to individually challenge our skills and attention to detail, directly shaping the continued growth and evolution of the editorial work of this Law Review.

In conclusion, we owe a mention of gratitude to Professor Fulvio Cortese, to whom we express our high regard and admiration for his service as Dean, but also for the constant help and support he has always given to this publication during his tenure. We would also like to wish every success to Professor Paolo Carta, who took up the baton from Professor Cortese at the helm of our Law School: *ad maiora*!

Finally, I would like to thank my Vice Editor-in-Chief, Emma Castellin, for patiently supporting me in this round of proceedings, and to the *Trento Student Law Review* team, without whose vital work this volume would not have been possible..

The one China principle and its legal consequences, domestically and abroad: the disputed control over Taiwan and the anti-secession law. Much Ado about Nothing?

Andrea Spinella*

Abstract: The article explores two of the fundamental characteristics of the one China principle: from an international perspective, and from a domestic one. The first paragraph, which analyses international law relevant to the matter, deals with the disputed sovereignty of the Republic of China, commonly named Taiwan. The second one explores the hidden meaning and the preparatory works of a domestic Chinese (People's Republic of China) statute: the anti-secession law. Because of this contested sovereignty, it is debated if people in Taiwan would be protected by the UN Charter in case of armed aggression. The first part of these pages will be consequently dedicated to demonstrating how the island of Formosa falls under UN jurisdiction and specifically that Taiwan meets all the criteria for statehood. As for the second chapter, it will be argued that the anti-secession law, despite an aggressive attitude, did not increase the chances for armed aggression against the Republic of China, as it was passed to appease the increasing nationalist public opinion.

Keywords: Law; China; Taiwan; sovereignty; anti-secession

1. *Introduction*

Following the rapid and apparently relentless economic rise of the People's Republic of China, the Taiwan Strait has become the cornerstone for the global competition between Beijing and Washington. The former is firmly decided to symbolically terminate the century of humiliation with the annexation of Formosa, while the latter is committed to squashing any opposing claim, as the island is the core of the American thalassocracy in the region, the pivot for the aero naval containment in the Indo-Pacific. Over the last decades, scholars have wondered if the Republic of China (ROC), commonly named Taiwan, might be considered a sovereign state, and therefore, if armed aggression against it would constitute a breach of international law: all the evidence so far gathered suggests so. Over the question of Taiwanese sovereignty, several issues have been raised in the last seventy years, since the People's Republic of China has never accepted the independence of this small island from the mainland, and, under the principle of one China, refuses to recognize it as a sovereign state.

In this article, it will be argued that Taiwan must be considered a sovereign country under international law, and therefore - even though the Island is not a member of the UN - unprovoked and armed aggression against it would constitute a breach of the United Nations Charter, and generally, of customary international law. The first paragraph will move on to consider Taiwanese history and the evolution of the interpretation of the Charter. A more detailed account of Chinese domestic legislation towards this small island is given in the second paragraph, as it will be focused on the anti-secession law passed by the National People's Congress in 2005, which shows the influence of nationalism and pragmatism in modern Chinese legislation. That is why this part takes into account the preparatory works and the text of what will be argued is just a symbolic statute. To understand this ongoing quarrel, it may be useful to look firstly at the history (specifically from a constitutional and political perspective) of the 150 km Strait.

2. *The Taiwanese Sovereignty*

2.1. *Is Taiwan an Independent and Sovereign Nation?*

According to Taipei, there was no central ruling prior to the 1600s, when Portuguese explorers named the place *Ilha Formosa* "beautiful island". Then a group of Dutch sailors founded the harbor of Taoyuan "terraced bay" which attracted several Chinese immigrants from the province of Fujian, who were escaping the chaos caused by the fall of the Ming dynasty (1644), until in 1683 the Qing emperor Kangxi conquered the entire Island[1]. Imperial China ruled Taiwan for almost two centuries, up to 1895 when it ceded Taiwan to Japan under the Treaty of Shimonoseki "in perpetuity"[2]. Japanese rulers reduced the Chinese cultural influence among the population, governing the island *manu militari*. Scholars such as Chen argue that the cession of the island was invalid because mainland China, officially "The People's Republic of China" (PRC), would later repudiate the Treaty of Shimonoseki as having been unequal[3], but there are no precedents in international law for unequal conditions being sufficient grounds to invalidate an international treaty[4]. In the 1943 Cairo Declaration, the Allies expressed the intention to give Taiwan back to China (which had become a Republic in 1912), but as a declaration of intent, it had no legal effects[5]. In 1949, after a bloody civil war against the communist party, the

---

* Andrea Spinella is a last-year law student at the faculty of law of the University of Trento, Italy. In 2021 under the Erasmus program, he studied at Newcastle University School of law (UK), focusing on counter-terrorism law and achieving the certificate of Arbitrator in commercial law. In 2022 he studied patent law, international law, and Chinese law and politics at the Queen's University of Belfast School of Law (UK).

1. See John Robert Shepherd, *Statecraft and political economy on the Taiwan frontier, 1600-1800* at 2-5 (Stanford University Press 1993).

2. Treaty of Peace China-Japan, Art II (April 17, 1895), reprinted in John V.A. MacMurray, *Treaties and agreements with and concerning China 1894-1919* at 18-19 (Howard Fertig 1973).

3. Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan*, 15 American University International Law Review 1101, 1105-1109 (2000).

4. Anthony Aust, *Unequal Treaties: a response* at 81, 83 in Matthew C. R. Craven and Malgosia Fitzmaurice (ed.), *Interrogating the treaty: essays in the contemporary law of treaties* (Wolf Legal Publisher 2005).

5. See James Crawford, *The creation of States in international law* at 207-209 (Oxford University Press 2nd ed 2006).

Chinese nationalist party, the Kuomintang, fled to Formosa founding the Republic of China (ROC). Meanwhile, in the San Francisco Treaty, Japan had renounced "all right, title and claim to Formosa and the Pescadores" but the treaty did not specify to which state the territory would now belong[6]. The Communist Party was eventually recognized as the rightful successor government of the state of China in 1972 when UN Resolution 2758 expelled the ROC from the United Nations and named PRC China's sole representative[7]. Kuomintang ruled the island through martial law for 38 years under an extreme right-wing dictatorship until 1987, when it was lifted by a Presidential order promulgated by President Chiang Ching-kuo[8]. From that moment onward, the island became a full parliamentary democracy, based on free elections: a completely different path from the one followed by the PRC.

Since 1949, the ROC's government has ruled over Taiwan, the Quemoy archipelago, and the Matsu Islands according to the *uti possidetis* principle (i.e., as you possess, you shall continue to possess)[9]. When nothing is in fact stipulated regarding conquered territory (in the case of Taiwan "freed territory" looks more appropriate, as the majority of the population was actually Chinese), it remains in the hands of the possessor, who is free to annex it. This is a principle well known in international law: the Italian - Turkish treaty of 1912 did not provide for the transfer of Libya to Italy, but no one raised any question when Italy announced its annexation[10]. Similarly, D.P. O'Conell argued that after the Japanese renunciation of the island, the newly formed government in Taiwan appropriated the *terra derelicta* (i.e., abandoned land) by converting belligerent occupation into definite sovereignty[11]. Furthermore, the independent government of

6. Treaty of Peace with Japan Art. 2, 136 U.N.T.S. 45 (September 8, 1951).

7. Lung-Chu Chen, *The U.S.- Taiwan-China relationship in International law and policy* at 74-75 (Oxford University Press 2016).

8. Han Chueng, *Taiwan in Time: The precursor to total control* (Taipei Times, 15 May 2016), available at https://www.taipeitimes.com/News/feat/archives/2016/05/15/2003646284 (last visited November 4, 2022).

9. See Lassa Oppenheim, *International law, Volume 2* at 611 (Longman Green 7th ed 1952).

10. See *id.* at 611-612.

11. Daniel Patrick O'Connel, *The status of Formosa and the Chinese recognition problem*, 50(2) The American Journal of International Law 405, 415 (1956).

Taiwan has been undisturbed for more than 70 years, a de facto exercise of uninterrupted governmental authority, labeled as principle of prescription, that leaves no doubts about the legitimacy of the ROC government[12]. In the case in question, no cession or purchase was required: for customary international law, nationalist China may have acquired legal title to Formosa by occupation or subjugation[13]. This has been settled in the case *Legal status of eastern Greenland*, discussed before the Permanent Court of International Justice in 1933: "acquisition of title by occupation involves the intention and will to act as sovereign and some actual exercise of such authority"[14]; as *terrae nullius* (i.e , lands belonging to no one) can be acquired by occupation, and since the Taiwanese government has been acting as a sovereign one, it can be said that Taiwan is a sovereign nation.

On the other side of the Strait, the People's Republic of China claims Taiwan as a mere Chinese province denying its existence as a sovereign state. But the principles of international law do not support the PRC's claims to Taiwan for several reasons. Firstly, the PRC cannot invoke the 1952 ROC-Japan treaty (with which Japan had renounced the island) to support its claim that Taiwan is part of China. Indeed, the PRC denies the right of the ROC government to conclude any treaty in the name of China and has rejected the validity of the San Francisco Treaty, hence cannot invoke it to its advantage[15]. Consequently, the prescription and occupation principles are not applicable to the PRC because they presuppose the validity of the two peace treaties by which Japan renounced its claims to Taiwan making it *terra nullius*. Even considering the Japanese renunciation as a unilateral act (which would not need the recognition of the PRC) communist China could not acquire title over Taiwan since it had

12. See Frank P. Morello and Paul K. T. Sih, *The international legal status of Formosa* at 92 (Springer 2012).

13. Arthur H. Dean, *International law and current problems in the Far East*, 49 Proceedings of the American society of international law at its annual meeting 29th April 1955 86, 95-97 (Cambridge University Press 2017).

14. *Legal Status of Eastern Greenland* (Denmark v. Norway), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53 (April 5).

15. Hsinhua News Agency, *Daily News Release, n. 777, Beijing*, as quoted in Hungdah Chiu, *The principle of one China and the legal status of Taiwan*, 7(2) American Journal of Chinese Studies 177, 183 (2000).

no physical control over the island[16]. Scholars such as Shao Chin-Fu consider the island as Chinese province because Taiwan was originally Chinese territory, hence a treaty to transfer it back would not be necessary[17]. But international practice does not support this view, as it does not appear to be any precedent supporting this position. Furthermore, Chin-Fu's idea has aberrant practical consequences: any velleity around the world, such as the annexation of New York to a newly formed British Empire, would be authorized just because of ancient territorial claims. Lastly, the principle of self-determination overrules any historical claim[18].

The Taiwanese people has in fact developed its own characteristics, which differentiate it from the continental one: 96.5% of the population consists of Ethnic Chinese Han, including Hoklo from Fujian, Hakka from Guangdong (who fled the continent during the Qing dynasty), and other ethnic groups originating from mainland China who followed Chiang Kai-shek in 1949. The remaining 3.5% is formed by Austronesian indigenous, although differently from continental China, 70% of the whole population claims indigenous ancestry. More than 80% of the population speaks mandarin (in the traditional form) along with Hokkien and Hoklo dialects[19]. Therefore, it is unsurprising that a sense of distinct Taiwanese identity has grown among the population: just 3.5% of it identifies itself as Chinese, 33% as a "mixed ethnicity", and the majority exclusively as Taiwanese[20]. This growing feeling among the local population, and the evidence presented thus far support the idea that the Taiwanese People has the right to self-determine their own form of government and to resist armed aggression.

16. See *id.* at 183.

17. See Shao Chin-Fu, *The absurd theory of "Two Chinas", and Principles of International law*, 2 Journal of International studies 7, 14 ("Kuo-chi wen- t'i yen-chiu, 1959).

18. Huangdah Chiu, *The principle of one China and the legal status of Taiwan* at 186 (cited in note 15). For a comprehensive approach, see at 4-5 of this essay.

19. National Bureau of Statistics of China, *China Population and Housing Census 2010*, available at https://ghdx.healthdata.org/record/china-population-and-housing-census-2010#:~:text=The%202010%20census%20measured%20a,annual%20growth%20rate%20was%200.57%25 (last visited November 7, 2022).

20. See Election Study Center - National Chengchi University, available at https://esc.nccu.edu.tw/eng/PageFront (last visited November 3, 2022).

2.2. *Does Taiwan fall under the Protection of the UN?*

Having defined that the ROC government is legitimate, I will now move on to discuss if Taiwan is a sovereign nation and if it falls under the protection of the UN Charter. The small island has in fact no seat in this international organization. The criteria for statehood, accepted as customary law[21], are encoded in the Montevideo Convention[22]. According to art. 1: "State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) the capacity to enter into relations with other States." As regards the first three criteria, no one can deny they are all met by Taiwan (a characteristic and enduring population that lives in an area of 35,808 square kilometers, under a democratic central government in Taipei). But according to the constitutive theory[23], Taiwan could not be considered a sovereign state, as it is recognized just by a group of nineteen small states and the Holy See. Consequently, it would not meet criterion (d) of the Montevideo Convention. However, a serious weakness of this argument is that art. 3 of the Convention clearly states that "the political existence of the State is independent of recognition by the other States." A reasonable interpretation of articles 1 and 3 would seem to suggest that "the fourth Montevideo criterion is not a question of whether the entity is recognized by other states such that they have established state-to-state relations, but whether the entity has the capacity to conduct relations on an international plane"[24]. The capacity of Taiwan to conduct international relations is demonstrated by the seventy-eight missions that Taipei has abroad, called "Taipei Economic and Cultural Representative Offices"[25], and by the fact that the ROC conducts international re-

21. Cedric Ryngaert and Sven Sobrie, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 Leiden Journal of International Law 467, 470 (2011).

22. See Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (December 26, 1933).

23. James Crawford, *The creation of States in international law* at 4 (cited in note 5).

24. See Vaughan Lowe, *International law* at 157-158 (Oxford University Press 2007).

25. The list of these missions is available at Republic of China Embassies & Missions Abroad, Bureau Consular affairs, Ministry of Foreign Affairs, Republic China

lations not subject to the legal authority of the PRC[26]. In any case, Shen and Crawford polemically insisted that Taiwan cannot be considered a state, even though it meets the Montevideo requirements, because it has never declared the will to become an independent state[27]. This assertion has been challenged by Brad Roth, who wisely pointed out that a self-declaration of independence is not a criterion of statehood, otherwise just former colonies would be considered sovereign nations, while countries such as the UK, France, or continental China itself, which have never needed a self-declaration, would not be considered sovereign countries[28]. Moreover, Taiwan has made its aspirations for statehood clear enough on many occasions[29].

As was pointed out in this paper, for customary international law the Republic of China (or Taiwan -independently from its official name) shall be considered an independent and sovereign nation. Nonetheless, it is a matter of fact that Taipei is not a member of the United Nations (UN), thus the UN Charter (particularly according to article 2(4): "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations") seems incapable of protecting people in Taiwan in case of an armed conflict. Moreover, Randelzhofer and Dörr stated that the prohibition on the use of force in the UN Charter was understood to apply only to inter-state relations, while states preserved absolute sovereignty over their domestic affairs (such as the protection of people). So, the fact that Taiwan

(Taiwan), available at https://www.boca.gov.tw/sp-foof-countrylp-01-2.html (last visited November 9, 2022).

26. Anne Hsiu-an Hsiao, *Is China's Policy to Use Force Against Taiwan a Violation of the Principle of Non-Use of Force Under International Law?*, New England Law Review 715, 737-738 (1998).

27. Jianming Shen, *Sovereignty, Statehood, Self-Determination, and the Issue of Taiwan* at 1134 (cited in note 3); James Crawford, *The creation of States in international law* at 219 (cited in note 5).

28. Brad Roth, *The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 East Asia Law Review 91, 101-102 (2009).

29. See *id.* at 101-103.

is an internal Chinese affair should be ignored by international law academics[30]. Scholars from the "Westphalian model"[31] (or at least those who consider Taiwan a rebel Chinese province) believe that there is no customary practice to support the applicability of article 2(4) beyond state-to-state interactions[32], as customary international law forbids states from interfering in each other's domestic affairs[33]. This all-or-nothing conception supports the self-determination of peoples, but at the same time acquiesces to the use of force by states in order to quell secession attempts[34], considering as an example the UN's inaction during the Russian use of force to put down Chechnya's secession attempt in the early 1990s, or in the Katanga - Congo crisis[35].

Nevertheless, the Westphalian model of international relations is fading, as contested states and peoples can be rights-holders under international law[36]. The customary practice has eroded *de facto* the traditional understanding of international law that accords rights only to states[37]. Indeed, an emerging body of UN precedents, rooted in the primacy of the human right of self-determination, has been focusing on the protection of distinct "peoples" from use of force by states. Currently, nations that repress their populations may be

30. See Albrecht Randelzhofer and Oliver Dörr, *Chapter 1 - Purposes and Principles*, *Article 2(4)*, in Bruno Simma, Daniel-Erasmus Khan, Georg Nolte, Andreas Paulus and Nikolai Wessendorf (ed.), *The Charter of the United Nations: A commentary* at 29, 32 (3rd ed 2012).

31. See John J. Mearsheimer, *The tragedy of great power politics* at 31 (WW Norton & Co 2001).

32. See Oliver Corten and Bruno Simma, *The law against war: the prohibition on the use of force in contemporary international law* at 159 (Bloomsbury publishing 2010); Jonte van Essen, *De Facto Regimes in International Law*, 28(74) Merkourios-Utrecht Journal of International and European Law 31, 37 (2012).

33. Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78(3) The American Journal of International Law 645, 648 (1984).

34. Crawford, *The creation of States in international law* at 389-390 (cited in note 5).

35. Gail Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23 International Security 5, 41-42 (1998).

36. See Jonathan I. Charney and John R. V. Prescott, *Resolving Cross-Strait Relations Between China and Taiwan*, 94(3) The American Journal of International Law 453, 465-466 (2000).

37. See *ibid*.

subject to humanitarian intervention from the international community[38], a demonstration of how the rise of human rights has recentred international legal protections on individuals, not (only) on states[39]. In the case of Taiwan, the principle of self-determination, defined by Sterio as "people's right to exercise their political, cultural, linguistic, and religious rights within a state", grants to the Taiwanese people a minimum level of protection against armed invasions[40]. As ruled in article 1(2) of the UN Charter, developing "friendly relations among nations based on respect for the principle of self-determination of peoples" is one of the UN's main purposes[41]. The self-determination principle is also incorporated into both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), whose first article states that "all peoples have the right of self-determination [...] and by its virtue, they freely determine their political status"[42]. Moreover, under the International Court of Justice's jurisprudence, these covenants conferred self-determination as the character of fundamental human rights[43]. Having defined self-determination as a principle that underlines the UN Charter, denying people their political autonomy through the use of force would constitute a breach of Article 2(4). States shall in fact "refrain from the use of force [...] in any other manner inconsistent with the Purposes of the United Nations"[44]. Hence it is possible to read a prohibition on using force against people, as respecting self-determination is one of the United Nations' main purposes under article 1 of the UN Charter[45]. The extent to which the

38. See Martti Koskenniemi, *The Future of Statehood*, 32(2) Harvard International Law Journal 397, 397-401 (1991).

39. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law* 84(4) American Journal of International Law 866, 866-868 (1990).

40. Milena Sterio, *The right to self-determination under international law* (Routledge 2013).

41. Charter of the United Nations, Art. 1 (1945).

42. International Covenant on Economic, Social and Cultural Rights, Art. 1(1), 993 U.N.T.S. 3 (December 16, 1966); International Covenant on Civil and Political Rights, Art. 1(1), 999 U.N.T.S. 171 (December 19, 1966).

43. Daniel Thürer and Thomas Burri, *Self-Determination* at 8 (Max Planck Encyclopedia of Public International Law 2012).

44. Charter of the United Nations, Art. 2(4) (1945).

45. *Id*., Art. 1(2).

principle of respect for self-determination in article 1(2) creates legal rights for peoples within states, is enhanced by the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States (1970 Declaration). It affirms that "every State has the duty to refrain from any forcible action which deprives peoples [...] of their right to self-determination"[46]. This declaration was adopted without a vote, signaling that it represented a consensus, a common understanding among UN members, which binds them to respect the principle of self-determination[47]. The 1970 Declaration had been previously supported by the General Assembly Resolution 2160 (XXI) from 1966, which states that "any forcible action, direct or indirect, which deprives peoples under foreign domination of their right to self-determination and freedom and independence and of their right to determine freely their political status [...] constitutes a violation of the Charter of the United Nations"[48]. This is a vivid example of how international law and the UN Charter accord rights to people in Taiwan. Further support is given from the Additional Protocol I (1977) to the General Conventions on the law relating to the protection of victims of international armed conflicts, which expressly includes conflicts in which peoples are fighting "in the exercise of their right of self-determination"[49].

A second challenge to the Westphalian approach comes from the drafting of Article 2(4) since several governments had proposed to extend the rule to all territorial entities, rather than just states[50]. Thus, even if Taiwan was not considered a sovereign nation, state practice would suggest that nations have to respect the borders of *de facto* regimes and that states consider it illegal to change the status of a *de facto*

46. Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States In Accordance With The Charter Of The United Nations, UN General Assembly (October 24, 1970) A/RES/2625(XXV).

47. See Helen Keller, *Friendly Relations Declaration (1970)* at 1 (Max Planck Encyclopedia of Public International Law 2021).

48. Resolution 2160 (XXI), UN General Assembly (November 30, 1966) A/RES/2160(XXI).

49. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 1 and 4, 1125 U.N.T.S. 3 (June 8, 1977).

50. Essen, *De Facto Regimes in International Law* at 37 (cited in note 32).

regime by force[51]. The broadening of Article 2(4) is certainly true in the cases of North Vietnam before reunification, the German Democratic Republic before 1972, North Cyprus, Abkhazia, and South Ossetia[52]. The final argument that Taiwan falls under the protection of the UN Charter derives from article 33: "The parties to any dispute [...] shall, first of all, seek a solution by negotiation [...] or other peaceful means of their own choice..."[53]. Unlike article 2, this provision uses the term "parties" and not "states", suggesting that the article could apply to disputes between a member state of the UN (which is bound by article 33) and a contested state to which it laid claim[54]. Besides, there is state practice to support the idea that "threats to international peace"[55] need not occur between states. The Security Council has several times intervened in response to threats that have arisen within a single state, as during the Korean war[56]. Since North Korea was not a widely recognized state, the conflict could have been regarded as a civil war[57], and since then, the UN has found threats to international peace arising from conflicts in Rwanda, Somalia, and the former Yugoslavia, all of which were internal to those states[58]. Lastly, the UN intervention in the Libyan civil war labeled the conflict between rival factions as a threat to international peace, suggesting that article 33 could be interpreted to impose an obligation on states to resolve conflicts with their own contested elements peacefully[59].

---

51. See Jochen A. Frowein, *De Facto Regime* at 4, in Anne Peters and Rüdiger Wolfrum (eds.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2013).

52. See *ibid*. at 73.

53. Charter of the United Nations, Art. 33(1) (1945).

54. Christian Tomuschat, *Chapter 6 - Pacific Settlement of Disputes*, *Article 33* in Simma, Khan, Nolte, Paulus and Wessendorf *The Charter of the United Nations: A Commentary* at 9 (cited in note 30).

55. Charter of the United Nations, Art. 39 (1945).

56. See Christian Henderson, *Contested States and the Rights and Obligations of the Jus ad Bellum*, 21 Cardozo Journal of International law 367, 382 (2013).

57. See Bruce Cumings, *The Korean war: a history* at 64-67 (Random House Publishing Group 2010).

58. Charney and Prescott, *Resolving Cross-Strait Relations Between China and Taiwan* at 453 (cited in note 36); Frederic Lee Kirgis, Jr, *Prior consultation in international law: a study of state practice* at 359-360 (University Press of Virginia, 1983).

59. Resolution 2362, UN Security Council (June 29, 2017) UN Doc. S/RES/2362.

So far, this paper has focused on the role of Taiwan in international law, stating that under *uti possidetis*, *self-determination* and Montevideo principles, the island can be labeled as a sovereign nation, protected against armed aggression, particularly thanks to article 33 and the broadening interpretation of art. 2 of the UN Charter. The following and final chapter will discuss the role played by China in this chess game after the country enacted the "anti-secession" law. The Economist has in fact recently described the Taiwan Strait as "the most dangerous place on earth"[60], and this statute can be easily accused of warmongery. Nonetheless, albeit with rising nationalism in the country, it seems that the anti-secession law has not heightened the conditions for an armed attack. Available data suggest instead that this measure has simply codified a 40-years-standing policy.

3. *The Anti-Secession Law and its Implicit Meaning*

3.1. *Much Ado about Nothing*

In 2005, the Chinese People's Republic passed the "anti-secession law", a controversial act, considered by most of Western chancelleries a law of war that would have enabled the People's Liberation Army to invade the island of Taiwan in a few months. As we have instead sorted out, after more than 15 years, Taiwan is all but a mere Chinese province. In concrete, evidence suggests that China may have considered naval warfare as a solution, but the middle empire is aware that military aggression would constitute a breach of international law under the UN Charter and the recently signed United Nations Convention on the Law of the Sea (UNCLOS)[61]. But as far as tensions across the Strait have been getting tougher and tougher in the last couple of years, it is natural to wonder if, in the twisty system of international relations, the anti-secession law was just a bluff (as the

60. See *The most dangerous place on earth: America and China must work harder to avoid war over the future of Taiwan*, The Economist (May 1, 2021), available at https://www.economist.com/leaders/2021/05/01/the-most-dangerous-place-on-earth (last visited November 5, 2022).

61. See Nigel Biggar, *Just War and International Law: A Response to Mary Ellen O'Connell*, 35 No 2 Journal of the Society of Christian Ethics 53, 53-62 (2015).

last fifteen years might confirm), or a dangerous step towards war in the Strait.

On March 15th, 2005, after just four months of preliminary discussion, the third session of the X National People's Congress passed the anti-secession law, "to prevent the island of Taiwan to secede from the fatherland"[62]. The act, depicted by the People's Daily (the main Chinese newspaper and voice of the communist party) as an extraordinary example of patriotism, was intended to regularize the relationship between the island of Taiwan and the People's Republic of China (China). Unsurprisingly, the law was internationally seen as an act of aggression, and a breach of the principle of self-determination of peoples by the Taiwanese government[63]. But as we look closer at the short 10 articles which form the body of this law, we can detect through them the core of the Chinese foreign policy, which is clearly oriented to obtain a dominant position in the Far East, but, as evidence will suggest, has not substantially changed in the last forty years.

If we inspect the text of this controversial law, it will be surprising to note that the only article dedicated to the use of force is art. 8, while the remaining others regard the use of pacific and diplomatic measures to obtain the reunification, or simply narrate the history of China and Taiwan[64]. Chinese legislators have many times changed their political attitudes towards the annexation of the island, but their purpose has never been questioned in almost a century of troubled relations: Taiwan is part of China, and it will come back one way or

62. See *China Enacted Historical Anti-Secession Law - Statement from the People's Republic of China Embassy in Namibia* (March 18, 2005), available at http://bw.china-embassy.gov.cn/eng/zfgx/200503/t20050318_5709600.htm (last visited November 7, 2022).

63. See *The Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession (Anti-Separation) Law* (March 29, 2005), available at https://www.mac.gov.tw/en/News_Content.aspx?n=8A319E37A32E01EA&sms=2413CFE1BCE87E0E&s=D1B0D66D5788F2DE#:~:text=Since%20the%20%E2%80%9CAnti%2Dsecession%20Law,is%20not%20applicable%20to%20Taiwan (last visited November 7, 2022).

64. See generally an English translation of the full text of the Anti-Secession (Anti-Separation) Law, available at https://www.mfa.gov.cn/ce/ceus/eng/zt/999999999/t187406.htm (last visited November 7, 2022).

another[65]. As the XVIII national congress of the communist party has in fact approved, patriotism has a fundamental role in shaping modern Chinese legislation, a path that is rooted in the Confucian values of loyalty and brotherhood[66].

Although in more than seventy years Chinese naval forces have never crossed the 150 km Strait, (in the aftermath of the Revolution, Mao focused his attention and the few available resources in the Korean war) China has developed a peculiar strategy: the *Liang Shou Celue* grand strategy, often referred to as the "carrot and stick approach"[67]. According to the Confucian tradition of *talking tough but acting prudently*, the anti-secession law in fact threatens the use of force as a lasting resource, favoring negotiations among the Strait at the same time[68]. Albeit the PRC is not a liberal democracy, at first sight, we can be surprised that the *nomenklatura* needed a legislative act to authorize an amphibious landing on the Island. But the truth is that *ubi societas ibi ius*, and modern China has to deal with a rising nationalism that the communist party (CCP) could no longer ignore[69]. Furthermore, the CCP has lost total control of the House: since the constitutional reforms that followed the death of Mao and the accession of Deng Xiaoping, the party controls today "only" 70% of all the seats, with the remaining third shared among eight minor parties, which have been anyway forced to swear allegiance to the regime and to acknowledge the supremacy of the communist party[70]. That is why lawmakers wanted to secure, and then obtained, a solid consensus

65. See Guo Zhenyuan, *Evolution of China's Taiwan-related foreign policy and its main features and causes (1949-2007*), 31 China International Studies 153, 153-170 (2011).

66. See Ivan Cardillo and Yu Ronggen, *La cultura giuridica cinese tra tradizione e modernità*, 49(1) Quaderni fiorentini, per la storia del pensiero giuridico moderno 97 (2020).

67. See Suisheng Zhao, *Conflict prevention across the Taiwan strait and the making of China's anti-secession law*, 30(1) Asian Perspective 79 (2006).

68. Anti-secession law, Art 8.

69. See James Townsend, *Chinese nationalism*, 27 The Australian Journal of Chinese Affairs 97, 97-130 (1992).

70. Constitution of the People's Republic of China, Art. 1 §2 (December 4, 1982). For a comprehensive discussion of the topic see generally Xiaodan Zhang, *The Leadership of the CCP: From the Preamble to the Main Body of the Constitution - What Are Its Consequences for the Chinese Socialist Rule of Law?*, 12(1) Hague Journal on the Rule of Law 147, 147-166 (2020).

around this nationalist theme: the law passed with an overwhelming majority of 2986 yes and 2 abstentions[71]. Nationalism is indeed a powerful ally to raise consensus, and scholars have identified an evolution throughout Chinese nationalism during the last century and how this feeling has shaped domestic and foreign legislation. Nevertheless, this feeling has been also deployed in China by the dominant ethnic group (the Han clan) to keep the fifty-six different Chinese ethnicities in conflict with each other[72]. This modern version of *divide et impera* has provoked tremendous economic growth in the east of the country, whilst also allowing atrocities that seem to violate the central tenets of human rights, such as the policy towards the Uyghur minority[73]. Three different kinds of nationalism have been identified, each of which has shaped the legislation from the imperial to the socialist era. Nativism is the oldest one, and it looks with favor to traditional institutions and legal arrangements, abhorring any attempt to establish Western legal institutes. (e.g., the imperial decrees which had expelled Western diplomats during the boxer revolt in 1901). Nativism was heavily criticized during the Cultural Revolution when the country built an Eastern European socialist state (with a praesidium, and a central military commission) mostly copying the soviet form of government. This anti-traditional nationalism, clearly more aggressive, sees the imperial Chinese past as the main cause of the country's backwardness. Lastly, pragmatism gained momentum through the ruling class, and that is perfectly visible in the hybridization between the market economy and the communist principles of government[74]. There is no doubt that pragmatism today is prevalent, and the anti-secession law mirrors it trying to strike a fair balance between a more demanding nationalistic public opinion, and the willingness to maintain the status quo in the Strait since a war with the USA (Arleigh Burke-class destroyers, the backbone of the US Navy's VII fleet constantly patrol

71. See *China Enacted Historical Anti-Secession Law* (cited in note 62).

72. See Emma Iannini, *Cultivating Civilization: The Confucian Principles behind the Chinese Communist Party's Mass Imprisonment of Ethnic Minorities in Xinjiang and What Human Rights Advocates Can Do to Stop It*, 53(1) New York University Journal of International Law and Politics 189, 189-227 (2020).

73. See *ibid*.

74. See Suisheng Zhao, *A Nation-State by Construction: Dynamics of Modern Chinese Nationalism* (Stanford University press 2004).

the Taiwanese coasts[75]) would deteriorate the Chinese technological supply chain, which is largely dependent on TMSC, a multinational Taiwanese company that manufactures around 50% of all semiconductors in the world[76].

3.2. *The Preparatory Works*

Moving now to analyze the preparatory works, which can tell us more about the real intentions of lawmakers, it is noteworthy that, despite the hysterical reactions by Taiwanese authorities, scholars do not consider the law as a shift in the direction of a more aggressive foreign policy[77]. In fact, the anti-secession law codifies the same policy that China had adopted in the previous decades, allowing the use of force, but not expanding it[78]. As a matter of fact, in 2000, a month before the Taiwanese general elections, a white paper of the central military commission (CMC) indicated three conditions that could have allowed military actions against Taiwan: a formal declaration of independence, an invasion of the island by a third country (basically the USA and Japan), or the perpetual refusal by Taiwanese authorities to a pacific reunification[79]. Furthermore, although grave menaces persisted up to three days before elections when the pro-independence Democratic Progressive Party (DPP) won majority votes, no military actions followed: a demonstration of the *Liang Shou Celue* grand strategy. The idea for the anti-secession law gained momentum years later

75. See Lara Seligman and Lee Hudson, *Provision Would Prevent Inactivation: Senators Blast Navy's Plan To Defer Decision On Carrier RCOH Until FY-16*, 27(23) Inside the Navy 1, 1-9 (2014); Brad Lendon, *US Navy sends its most advanced surface warship to east Asia*, CNN (September 27, 2022), available at https://edition.cnn.com/2022/09/26/asia/uss-zumwalt-warship-us-navy-deployment-intl-hnk-ml/index.html (last visited November 7, 2022).

76. See Yen Nee Lee, *2 charts show how much the world depends on Taiwan for semiconductors*, CNBC (March 15, 2021), available at https://www.cnbc.com/2021/03/16/2-charts-show-how-much-the-world-depends-on-taiwan-for-semiconductors.html (last visited November 7, 2022).

77. See *The Official Position of the Republic of China (Taiwan) on the People's Republic of China's Anti-Secession (Anti-Separation) Law* (cited in note 63).

78. See Zhao, *Conflict prevention across the Taiwan strait and the making of China's anti-secession law* at 86 (cited in note 67).

79. See *id.* at 86-87.

when former Taiwan president Chen proposed to amend the constitution in order to change the names of the foreign ministry and state companies. The failure of the referendum, followed by Chen's defeat in 2006, did not prevent the National People's Congress from passing the bill, pushed by public opinion. To pour cold water, President Hu Jintao promised to decrease duties on Taiwan imports, and, in the following days, Kuomintang leaders flew to Beijing for a historical handshake (today, the nationalist Taiwanese party is Beijing's main ally on the Island). To summarize, the anti-secession law simply codifies what was only an attitude of the communist leadership, a path called 依法治国 "yifa zhiguo", known as "governing the country in accordance with the law". For the first time, a law was agreed upon in article 87 of the Constitution, a legal base for the use of force. What the law does not clarify, even though the Constitution declares "holy" the reunification with Taiwan, is a deadline, an ultimatum for the reunification[80]. It simply forbids a formal declaration of independence (admitting backroom, *de facto* independence of the Island)[81]. Even before the present Constitution came into force, Chinese legislators had codified the current policy regarding the South China Sea, like in the 1958 Declaration on China's Territorial Sea and the 1992 Law on the Territorial Sea and the Contiguous Zone, followed by the signature of the United Nations Convention on the Law of the Sea[82].

3.3. *The Text*

Let us now consider the text, and we will immediately spot the *Liang Shou Celue* approach, or the carrot-stick method, in articles 8 and 6. The latter imposes, with a fair amount of pragmatism, measures to maintain peace and to increase relationships on the two Strait's sides: confidence-building exercises (such as cultural exchanges), and a common policy regarding crime fighting. In addition, article 7

80. Constitution of the People's Republic of China, Preamble (December 4, 1982).

81. See Keyuan Zou, *Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti- Secession Law*, 4 Chinese Journal of International Law 455, 456 (2005).

82. Office of Policy, Law and Regulation, State Oceanic Administration, *Collection of the Sea Laws and Regulations of the People's Republic of China* (in Chinese and English) at 197-198 and 201 (Ocean Press 3rd ed 2001).

clarifies that Beijing and Taipei are equal partners, whose negotiations are enforced on equal terms. Even article 8, the one that prescribes the conditions under which the use of force is allowed, in the first chapter clarifies that before ordering the invasion "possibilities for a peaceful reunification should be completely exhausted"[83]. The word "possibilities" instead of "conditions" is a clear signal that authorities must run out of any diplomatic attempt (even those not specified by the law) before ordering the attack[84]. This provision supports the idea that the anti-secession law has not increased the conditions for an armed attack. As pointed out, article 8 is the keystone of the anti-secession law's architecture. Its major drawback, however, is how broadly the three allowing-force conditions are formulated. Firstly, "secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession". The condition, as described in the previous pages, refers to the DPP and its intention to declare a *de jure* independence, but of course, the statement and its interpretation can be bent in various ways: a democratic election won by secessionist parties, a non grata military exercise, or a constitutional reform. Secondly "major incidents entailing Taiwan's secession from China should occur" is such a broad sentence that every single episode of tension can potentially be considered a "major incident" (only on January 24th, thirty-nine Chinese warplanes flew over Taiwanese air space[85]), and lastly the aforementioned exhaustion of all peaceful possibilities. Thus far, such a wide range of chances would justify an accusation of warmongery, but as explained in the introduction, it is clear that these 15 years have demonstrated that the "talking tough and acting prudently" policy is far from being based just on military threats. The second chapter of article 8 raises another question: according to the Constitution, the parliament, called "the National People's Congress" (NPC), is entitled to decide on questions of war and peace, but the article allows the Central Military Commission and the State Council to have powers of war, with a mere duty to report their decisions to the

83. Anti-secession law, Art. 8 ch.1.

84. Bruce Klingner, *The Dragon Squeezes Taiwan* (Asia Times Online March 15, 2005).

85. *China flies 39 warplanes into Taiwan's air defense zone in a day,* CBS News (January 24, 2022), available at https://www.cbsnews.com/news/china-taiwan-warplanes-fly-incursions-air-defense-zone/ (last visited November 8, 2022).

Standing Committee of the NPC. Few scholars argued that constitutional provisions do not apply to the Taiwan issue, as it is considered a domestic matter, and not a dispute with a sovereign state, to which the Constitution refers. However, as a clear breach of constitutional provisions, this article raises concerns about the respect of the rule of law in the country[86].

The final problem with the anti-secession law is that it fails to take Taiwan's sovereignty into account. Article 7 affirms that peaceful reunification might be achieved through "... consultations and negotiations on an equal footing between the two sides of the Taiwan Strait ..." seeming to suggest that the middle empire considers the Taiwanese government as his equal, and no longer a rebel province: a full legitimate authority of an independent and third country. However, a serious weakness of this argument is that the law itself shows opposite principles in previous articles: article 2 "There is only one China in the world. Both the mainland and Taiwan belong to one China"; then article 4 "Accomplishing the great task of reunifying the motherland is the sacred duty of all Chinese people, the Taiwan compatriots included"; (the special reservation in the NPC for Taiwanese delegates is a good illustration of this point), and lastly, article 5 "Upholding the principle of one China is the basis of peaceful reunification of the country"[87]. The effectiveness of the one China principle has been exemplified in the name of the law itself: scholars in China proposed enacting a law of "unification", but "anti-secession" was deliberately chosen. The term "reunification" or "unification" has the connotation of recognizing that the two sides of the Taiwan Strait are separate, and such recognition will be inconsistent with the "one China" principle[88].

Overall, these confounding provisions support the view that the anti-secession law, and generally, the Chinese leadership is willing to keep the *status quo* in the region: Taiwan is a de-facto independent

86. Zou, *Governing the Taiwan Issue in Accordance with Law: An Essay on China's Anti-Secession Law* at 459 (cited in note 81).

87. See *ibid*.

88. Yu Yuanzhou, *National Unification Promotion Law of the People's Republic of Chin*a (November 1, 2002); *New Changes in one country, two systems, China opens a new model for Taiwan* (Boxun Press November 5, 2019), available at https://en.boxun.com/2019/11/05/new-changes-in-one-country-two-systems-china-opens-a-new-model-for-taiwan/ (last visited November 7, 2022).

island, but for the People's Republic of China is fundamental to demonstrate to its own public opinion that "the century of humiliation" is eventually over. Both Taipei and Beijing know in fact how a war in the Strait would badly affect their economies: SMIC, the biggest Chinese semiconductor foundry company, was founded by a group of Taiwanese investors[89]. Furthermore, although still ongoing quarrels among American, Chinese, and Taiwanese tech companies, China has definitely become Taiwan's largest import and export partner, since in 2021 Taipei's exports to the mainland grew by over 25% as compared with the previous year's[90]. The effectiveness of the pragmatic approach has been exemplified by the new guidelines approved by the president and party leader Hu Jintao when he took over the chairmanship of the Central Military Commission in 2004: "strive for negotiation, prepare for war, and have no fear of Taiwan's procrastination"[91]. Furthermore, in the case of reunification, article 5 grants Taiwan "a high degree of autonomy" perhaps inspired by the legal principle "one country two systems" that China applied in Hong Kong and Macau, a well-known example of self-government, (at least before the brutal repression that followed the passing of the national security law[92]).

To conclude this section, it is noteworthy that neither the Constitution nor the anti-secession law has a timetable for reunification. Since the end of the Cultural Revolution and the establishment of the modern Chinese legal system (the one mentioned in the previous paragraph as the pragmatic legislative approach), Chinese lawmakers

89. Cheng Ting Fang, *Taiwan bans recruitments for jobs in China to combat brain drain*, Nikkei Asian Review (April 30, 2021), available at https://asia.nikkei.com/Business/Tech/Semiconductors/Taiwan-bans-recruitment-for-jobs-in-China-to-combat-brain-drain#:~:text=TAIPEI%20%2D%2D%20Taiwan%20has%20told,tensions%20between%20Taipei%20and%20Beijing (last visited November 8, 2022).

90. Roy C. Lee, *Taiwan's China dependency is a double edged sword* (East Asia Forum, July 6, 2021), available at https://www.eastasiaforum.org/2021/07/06/taiwans-china-dependency-is-a-double-edged-sword/ (last visited November 8, 2022).

91. Personal interview given to Suisheng Zhao, held in Beijing October 2005, mentioned in Zhao, *Conflict prevention across the Taiwan strait and the making of China's anti-secession law* at 92 (cited in note 67).

92. See Hingchau Lam, *The ouster clause in the Hong Kong national security law: its effectiveness in the common law and its implications for the rule of law*, 76(5) Crime, Law and Social Change: An Interdisciplinary Journal 543 (2021).

have taken into account the chance to achieve national reunification, as Hu emphasized: "by winning over the hearts and minds of the Taiwanese people". Consequently, measures such as the proposal to facilitate direct flights, or to import agricultural goods from Taiwan were enacted[93]. As Sun Tzu, the author of The Art of War stated, "to win without fighting" is a real possibility that the anti-secession law takes into account since negotiating is no longer synonymous with weakness. But as explained in the first paragraph, a sense of fear and fierce resistance is growing among the Taiwanese people.

4. *Conclusion*

To outline this final paragraph, the case reported here illustrates how the principle of one China is applied by Chinese lawmakers with a high degree of pragmatism. Following the rediscovery of tradition, after the dark years of the Maoist cultural revolution, the Confucian value of loyalty has shaped what we could define as an aggressive law, but, as described in the previous pages, this provision has simply codified the route that the communist leadership has been following for more than forty years. To sum up, the Chinese legislator is not looking for a fight in the Strait, as it will cause the fall of the microchip market and presumably, an intervention of the Americans. Moreover, the *Nomenklatura* is aware of how the core of international law has moved from state-to-state relations to a more anthropocentric and "humanitarian" approach. Nowadays, in fact, under the UN Charter, States have a legal obligation to resolve conflicts (even) with their own contested elements, peacefully. To conclude, "the great task of reunifying the motherland" is far away from coming true, as the Chinese legislature is bound by internal and international provisions.

93. Corten and Simma, *The law against war: the prohibition on the use of force in contemporary international law* (cited in note 32); Essen, *De Facto Regimes in International Law* (cited in note 32).

The encryption paradox: fostering security by threatening security

Francesco Fidel Camera*

Abstract: The debate on encryption has become more and more heated in the last few years. The resurgence is mainly linked to the recent advent of two factors: on the one hand, endpoint encryption is increasingly becoming the default setting on every device. While, on the other, Internet Service Providers have started to broadly offer end-to-end encryption services. So, if data is now strongly encrypted and protected both in transit and at rest, it is law enforcement and intelligence agencies that pay the price by being unable to access the content of numerous communications. This problem has been named by the US government "going dark" as it compromises investigations and surveillance activities by creating sudden "black holes" of pivotal information. Although the proliferation of encryption can often represent a major hurdle for law enforcement, it is justified on the Internet by its inherent insecurity as a dense network of nodes where packets of information are transmitted uninterruptedly. Indeed, the Internet infrastructure rests the foundation of its success on the possibility of encrypting information so that it cannot be accessed by malicious actors. Hence, encryption "weakened" by the presence of backdoors (required by the government) to access data in cases of national security protection would alter an otherwise ironclad mechanism. And so, it will undermine the security of global cyber trafficking and, consequently, of (digital) human rights such as freedom of expression and information, the protection of personal data, and even the smooth functioning of the online market. This article aims to seek a solution that can reconcile the - seemingly - opposing demands at stake: the national and collective security as opposed to the security of Internet architecture - and the entire ecosystem of rights exercised within it. In conclusion, it will be argued that it is not feasible to reduce the overall level of communication privacy to protect collective security, as a further erosion of communication privacy would result in a substantial violation of individual freedom.

Keywords: Encryption; internet governance; law enforcement; fundamental rights; digital constitutionalism.

Table of contents: 1. Introduction. – 2. Encryption Technology. – 2.1. The Cryptosystem. – 2.2. Cybersecurity. – 2.3. Backdoors. – 3. Preventing "Going Dark"? – 3.1. A practical example. Apple v. FBI: The San Bernardino Attack. – 4. The essentiality of Strong Encryption. – 4.1. Everyday Life & Cyberattacks. – 4.2. Globalization and the "Least Trusted Country" problem. – 5. Encryption Workarounds. – 5.1. Lawful Access Requirement. – 5.2. Lawful Hacking. – 6. Untangling the Encryption Paradox. – 6.1. The "Golden Age of Surveillance". – 6.2. De-emphasizing The "Going Dark" Problem. – 7. Conclusions.

1. *Introduction*

The debate on encryption, after having slumbered for some time since the end of the USA's "crypto wars", has become more and more heated in the last years. In 1999, the Clinton administration's output on its essentiality in preserving the security of electronic communications in the advancing Internet was counterbalanced by the poor diffusion of encryption technology to a wide audience, due to its excessive complexity. The extensive toolkit available to law enforcement agencies and the government's close collaboration with the industrial sector resulted in a partnership used by the former to conduct pervasive interception activities[1].

The resurgence of the encryption debate is mainly linked to the recent advent of two factors: on the one hand, endpoint encryption is increasingly becoming the default setting on every device. While, on the other, Internet Service Providers (ISPs) have started to broadly offer end-to-end encryption services and store encrypted data on

* Francesco Fidel Camera is a law student at the University of Trento with a comparative background. His field of interest focuses on Information Technology law, which he explored in depth during his mobility year at NOVA School of Law in Lisbon, where he attended the courses of its master in "Business Law & Technology".

1. Eric Manpearl, "*Preventing Going Dark": A Sober Analysis and Reasonable Solution to Preserve Security in the Encryption Debate*, 28 University of Florida Journal of Law & Public Policy 65 (2017), available at https://ssrn.com/abstract=3068578 (last visited on November 1, 2022).

cloud systems. This means that not even ISPs have the encryption key necessary to access the information, which makes it impossible for them to cooperate with law enforcement authorities even if willing to do so[2].

In particular, the dramatic escalation of terrorist attacks since 2014 and the recent proliferation of child sexual abuse content have made it necessary to implement methods of secure communications such as end-to-end encryption in instant messaging systems or within online platforms. Encryption is also increasingly cited in public debate as a "safe haven" for terrorists and pedophiles and pointed to by law enforcement as an insurmountable obstacle in conducting investigations.

From this powder keg, at the global level, countries have started to legislate in the direction of a functional downsizing of the technical capabilities of encryption technologies. In the European Union, as fear of terrorism increased, the most affected member states including France, Germany, and the UK started calling for a policy solution to the encryption problem by signing a joint letter highlighting the most critical aspects. They denounced the lack of technical expertise and computing processing power in law enforcement agencies combined with the absence of cross-border coordination and the inadequacy of Mutual Legal Assistance in Criminal Matters Treaties (MLATs). They also criticized the ubiquitous end-to-end encryption in e-mail services and messaging applications, which the inaccessibility to pivotal information during surveillance and investigation activities derives from.

On the opposite side of these alarming initiatives, there are privacy and freedom of expression activist groups, high-tech companies, and IT specialists who argue for strong encryption to protect digital communications from inappropriate interference. However, this heated debate should not be reduced to a mere tug-of-war between national security and privacy. The overall context is much more diverse, encompassing cybersecurity and Internet global governance issues, up

2. See *ibid*.

to economic repercussions on the reputation of companies and international trade policy[3].

This essay aims to seek a solution that can reconcile the seemingly opposing demands at stake. In doing so, we will begin with a technical description of encryption to highlight the peculiarities that make this type of technology so polarizing. Then the practical impact that widely disseminated strong encryption is having on law enforcement investigations will be analyzed. The third section discusses the indispensability of strong encryption to ensure full security in information infrastructures both in everyday life and at a global governance level. Afterward, the state of the art will be used to assess the possibility of identifying alternatives to strong encryption, or alternatives that can circumvent its effectiveness if necessary. In the final part of the article, conclusions are drawn about the legal implications arising from the implementation of end-to-end encryption tools in the public and private sectors. An attempt to solve the paradox generated by encryption by contextualizing the problem of "going dark" in the larger framework of the armamentarium of law enforcement and national security agencies, will be made.

2. *Encryption Technology*

Before proceeding to the legal dimension of this discussion, it is worth describing the basic elements and functioning of this technology. A technical overview is indeed essential to fully understand the legal issues related to end-to-encryption tools, and consequently to be able to examine policies adopted by some selected countries (namely India, China, and the USA).

2.1. *The Cryptosystem*

Although encryption entered the public debate not more than thirty years ago, its use dates back to ancient times, long before the

3. Olivia Gonzalez, *Cracks in the Armor: Legal Approaches to Encryption*, 1 University of Illinois Journal of Law, Technology & Policy 1-48 (2019), available at https://doi.org/10.2139/ssrn.3035045 (last visited November 1, 2022).

advent of computers. Numerous examples can be found in the Greek and Roman civilizations for military purposes. A more modern and well-known example might be Germany's Enigma code used during World War II to communicate between radio towers in Europe and U-boats in the Atlantic Ocean[4]. Certainly, these techniques were very rudimentary and even in the most complex scenarios, as in the last case, soon became obsolete and easy to decipher.

From the computer age onwards, encryption has shifted to the protection of electronic communications over the Internet as a mechanism to ensure the confidentiality of these. Especially in an ecosystem like the digital one where data, including access credentials and personal communications, can be intercepted by malicious actors at any time. Thus, inevitably putting privacy and business transactions at serious risk[5].

Encryption technology allows a process of encoding a text in order to make it indecipherable to those not authorized to read it[6]. Encryption is a one-way process that, while extremely easy to achieve forward, is much more difficult to carry out backward. This result is obtained through the use of a pair of algorithms selected from a series of non-reversible mathematical transformations of the encrypted text. The series of these transformations make up the so-called "cryptosystem"[7]. In the cryptosystem, the original text, known as plaintext, is turned by the encryption algorithm into its incomprehensible form, the ciphertext. It then returns to its initial form again thanks to the decryption algorithm. The operation of this pair of algorithms is driven by two keys: one for encryption and the other for decryption. Within this

4. Peter Swire and Kenesa Ahmad, *Encryption and Globalization*, 23 Columbia Science and Technology Law Review 416 (2012), available at https://doi.org/10.2139/ssrn.1960602 (last visited November 1, 2022).

5. See Gary C. Kessler, *An Overview of Cryptography* (Princeton University, November 17, 2006), available at https://www.cs.princeton.edu/~chazelle/courses/BIB/overview-crypto.pdf (last visited November 1, 2022).

6. Manpearl, *Preventing 'Going Dark': A Sober Analysis and Reasonable Solution to Preserve Security in the Encryption Debate* at 77 (cited in note 1).

7. Naresh Vats, *Weak Cryptography - A Threat to National Security and Economy*, 2 Himachal Pradesh Journal of Social Sciences 212, 212 (2012), available at https://www.academia.edu/14761025/_WEAK_CRYPTOGRAPHY_A_THREAT_TO_NATIONAL_SECURITY_ (last visited November 1, 2022).

mechanism, the focal point lies in the generation and sharing of these two keys.

There are two main approaches in this respect. First, the "symmetric" encryption approach, also called "private key" encryption in reference to the encryption key, which is the same on both ends of the communication, and which is kept secret. This means that the sender will encrypt the plain text with the same key that the receiver will use to decrypt the ciphertext. In alternative there is the "asymmetric" encryption approach, in which the receiver has a public key that everyone can access paired with a secret key that only he or she knows and is used to decrypt the messages. This way, anyone interested in sending a private text will only have to encrypt it using the public key knowing that only that specific receiver can decipher it[8]. The keys are two and they are kept separately. However, they are related to each other in a mathematical way through a "one-way function"[9]. The same is true vice-versa; hence if the receiver wants to reply to the received message, he has to wrap the text with the public key of the previous sender (now a receiver) who will in turn unwrap it using their private key.

2.2. *Cybersecurity*

One of the fundamental elements in ensuring the security of a cryptosystem is the length of its keys. The number of combinations needed to identify the keys increases exponentially as the number of bits increases. Indeed, each additional bit doubles the number of possible keys, making a hypothetical attacker's job more and more difficult, as well as the required computing power of his or her equipment more and more powerful.

A demonstration of the importance of the keys' length is given by the current Encryption Law of India, enacted in 2000, which stipulates that keys may not exceed 40 bits[10]. A key with only 40 bits is extremely easy to decipher as proven by cryptographic experts: in 1996

8. Swati Tawde, *Cryptosystems* (eduCBA March 6, 2021), available at https://www.educba.com/cryptosystems/ (last visited January 19, 2022).

9. A "one way function" in computer science represents a calculation significantly easier to execute in one direction than it is to reverse. To exemplify: from x it is quite simple to derive f (x) but, conversely, given f (x) to calculate x is highly complex.

10. See India's Information Technology Act, Section 84A.

Matt Blaze demonstrated how less than five hours were sufficient to break through with no more than $400 worth of equipment[11]. Today, with the enormous technological progress, such a barrier is basically an easy job for any hacker.

However, a long key alone does not ensure the impenetrability of encrypted messages if the cryptosystem is not properly implemented or if it is deficient by design[12]. In fact, in an immaculate cryptosystem in which each attempt generates the same chance of success, a malicious actor wishing to break into the cryptosystem, will need to expedite on average half the possible attempts to decipher the key. However, most of the algorithms on which these systems are implemented are imperfect, which means that they are not able to generate keys in a totally random manner[13]. Thus, an attacker who somehow learns, for example, that there are only odd numbers in the key will see the potential combinations further halved.

For this reason, an algorithmic peer review under public scrutiny is of fundamental importance to ensure the reliability of a cryptosystem. That is why the international community has serious doubts about the encryption algorithms developed domestically by China outside of any public peer review.

The last variable to consider, as mentioned above, is the implementation of the cryptosystem. Even if equipped with long keys and proven algorithms, its implementation in a more complex informatic system increases the overall number of vulnerabilities due to the many interactions that can take place with the other elements.

2.3. *Backdoors*

An artificial vulnerability that deserves separate treatment is backdoors. They are access points deliberately created by software designers at the request of certain stakeholders, usually law enforcement and national security agencies. However, this creates a weakness

11. Matt Blaze, et al., *Minimal Key Lengths for Symmetric Ciphers to Provide Adequate Commercial Security: A Report by an Ad Hoc Group of Cryptographers and Computer Scientists* (January, 1996), available at https://people.csail.mit.edu/rivest/pubs/BDRSx96.pdf (last visited January 19, 2022)

12. Swire and Ahmad, *Encryption and Globalization* at 431 (cited in note 4).

13. See *id*. at 432 (note 23).

that can easily be exploited by originally authorized third parties[14]. The main backdoor scheme can be exemplified by the "key escrow" mechanism. The US government creates and distributes encryption keys to national tech companies, maintaining a sort of "master key" in escrow, with which the government can decipher any encrypted data[15]. It is thus possible to allow law enforcement authorities to access the content of these tools while maintaining strong encryption with sufficiently long keys. However, it must be considered that the user will necessarily have to store the keys in a data bank, holding them in escrow. Access to the keys to decrypt the suspicious communication will be granted to law enforcement or national security agencies only after obtaining a court order. While unrelated communications will remain unavailable[16]. The problem with this approach is that there is no guarantee that these access points will only be used by authorized persons for lawful activities.

Keeping encryption keys in a registry also means exposing them to a high risk of ending up in the possession of malicious actors whose intent is to harm those same companies. Indeed, the storage of keys in a centralized database creates "high-value targets" for attackers[17].

So, if, on the one hand, backdoors can facilitate surveillance and investigation activities, on the other hand, they create a security vulnerability in a pivotal sector such as technology, undermining the security of the whole technological architecture implemented by the individual country.

14. Ben Wolford, *What is an encryption backdoor?* (ProtonMail Blog, June 22, 2018), available at https://protonmail.com/blog/encryption-backdoor/ (last visited January 21, 2022).

15. See *ibid.*

16. Manpearl, *Preventing 'Going Dark': A Sober Analysis and Reasonable Solution to Preserve Security in the Encryption Debate* at 77 (cited in note 1).

17. Whitfield Diffie and Martin Hellman, *New directions in cryptography*, 22 IEEE Transactions on Information Theory 644 (1976), available at https://doi.org/10.1109/tit.1976.1055638 (last visited November 1, 2022).

3. *Preventing "Going Dark"?*

Messaging and e-mail applications in today's world provide encrypted communication services as a technical standard for the benefit of users, who can exchange messages in a completely secure manner thanks to end-to-end encryption. In addition, mobile devices, once locked, do not allow access to their contents to anyone who does not have the unlock key. This is due to endpoint encryption[18].

But not all that glitters is gold. If data is now strongly encrypted and protected both in transit and at rest, it is law enforcement and intelligence agencies that pay the price. Efforts made during surveillance and investigation activities risk being undermined by these sudden "black holes". In a campaign against this blackout, the FBI has begun to refer to this problem as "going dark" and the urgent need to prevent it to ensure the safety of the community.

This technological structure constitutes a serious obstacle to investigations, leaving the field open to the recruitment and organization of terrorist attacks, and to the exchange of child pornography, now increasingly relocated on encrypted platforms. As devices and apps programmed by default with encryption have become widely available on the market, the number of communications that law enforcement authorities legally have the power to intercept, but the technical inability to execute so, has expanded exponentially. The discrepancy between legal and technical power has been addressed as creating an irremediable public safety problem. As eloquently described in the words of FBI Director James Comey, "going dark" means preventing people in charge of protecting the community from accessing the evidence needed to prosecute and prevent crime with lawful authority[19].

The need to obtain lawful access to encrypted information thus becomes the last resort to solve cases that would otherwise end up being filed. As well exemplified by the case between Apple and the FBI

18. Manpearl, *Preventing 'Going Dark': A Sober Analysis and Reasonable Solution to Preserve Security in the Encryption Debate* at 68 (cited in note 1).

19. James B. Comey, *Going Dark: Are Technology, Privacy, and Public Safety on a Collision Course?* (Federal Bureau of Investigation, October 16, 2014), available at https://www.fbi.gov/news/testimony/going-dark-encryption-technology-and-the-balances-between-public-safety-and-privacy (last visited November 1, 2022).

concerning the San Bernardino (California) massacre, which made headlines for its intense dispute.

3.1. *A practical example. Apple v. FBI: The San Bernardino Attack*

On December 2, 2015, a married couple fuelled by extremist Jihadist ideologies committed a mass shooting in the San Bernardino County Department of Public Health, killing 14 people and seriously injuring 22. A few hours later, both terrorists lost their lives in a firefight with the police. Apparently not connected to any terrorist group, the FBI claimed that their indoctrination had taken place via the Internet by exchanging private messages with each other. However, the device they were communicating with was the iPhone 5C, which provided for encryption of the data on it and complete deletion after ten failed attempts to unlock it. Hence, the FBI asked the National Security Agency (NSA) to break into the phone. However, they had no success because they did not have any experience with this kind of device. Finally, the request was forwarded directly to Apple Inc. which refused to change the software to allow the FBI access to the encrypted content through a backdoor. This opposition also persisted towards a warrant issued in favor of the FBI[20].

This stance by Apple was publicly justified by its CEO Tim Cook on the basis of the unprecedented significance of such a request. Allowing the government to demand changes to any software code at will in the future would significantly compromise the protections of the Fifth Amendment[21], as computer code has already been recognized as a form of speech[22].

"What is to stop the government from demanding that Apple write code to turn on the microphone in aid of government surveillance, activate the video camera, surreptitiously record conversations, or turn on location services to track the phone's user?" was argued eloquently

20. Tim Cook, *A Message to Our Customers* (Apple Inc. February 16, 2016), available at https://www.apple.com/customer-letter/ (last visited January 24, 2022).

21. The Fifth Amendment to the United States Constitution affirms a number of guarantees around the due process of law, including the right to be free from coercion as to what one wants to say. The so-called "compelled speech".

22. See *Bernstein v. U.S*, 192 F.3d 1308 (9th Cir 1999).

by Tim Cook[23]. Requiring software to be modified by removing its security features means endangering the privacy and safety of all its consumers, towards whom Apple has a responsibility to ensure the maximum security of its products[24]. Hence, it is crucial to avoid an impact that goes well beyond the present case and would set a precedent that could lead to dystopian scenarios.

The FBI, for its part, argued that the refusal to decrypt the contents on the mobile phone prevented the execution of a warrant obtained through legal channels and threatened the public interest in a complete investigation of a "horrific act of terrorism"[25]. Citing as precedent *United States v. New York Telephone Co.*[26], in which the Supreme Court had ruled on a telephone company's duty to provide technical assistance in order to allow access to the phone calling record.

In the end, faced with Apple's insurmountable wall, the FBI decided to hire professional hackers from an Israeli company who used a zero-day vulnerability in the iPhone's software. After 10 incorrect tries at guessing the code, the "Bureau"[27] could disable a feature in the device that wiped data in the smartphone, and later succeed to access the encrypted content[28].

---

23. Kim Zetter and Brian Barrett, *Apple to FBI: You Can't Force Us to Hack the San Bernardino iPhone* (Wired, February 25, 2016), available at https://www.wired.com/2016/02/apple-brief-fbi-response-iphone/ (last visited January 23, 2022).

24. Romain Dillet, *Apple's Tim Cook on iPhone unlocking case: "We will not shrink from this responsibility."* (TechCrunch, March 21, 2016), available at https://techcrunch.com/2016/03/21/apples-tim-cook-on-iphone-unlocking-case-we-will-not-shrink-from-this-responsibility/ (last visited January 23, 2022).

25. *US v. In the Matter of the Search of An Apple iPhone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203*, C.D.CA. February 16, 2016.

26. *United States v. New York Telephone Co.*, 434 U.S. 159 (1977).

27. In cybersecurity, a zero-day vulnerability is a security flaw of a software whose existence is unknown to the software developer. "The Zero day" is the period of time to take action, i.e. as soon as possible, so that those same vulnerabilities are not exploited by third parties.

28. Ellen Nakashima, *FBI paid professional hackers one-time fee to crack San Bernardino iPhone* (Washington Post, April 12, 2016), available at https://www.washingtonpost.com/world/national-security/fbi-paid-professional-hackers-one-time-fee-to-crack-san-bernardino-iphone/2016/04/12/5397814a-00de-11e6-9d36-33d198ea26c5_story.html (last visited January 24, 2022).

Anyway, this case between a national government and a manufacturing company marked the re-emergence of the public debate around encryption. The question of how it can be expected to carry out international and domestic defense duties if it is not possible to access the evidence needed, even if a legal title was obtained, is left open.

To better understand the impact that encryption is having on law enforcement, it may be very useful to briefly outline the history of wiretapping, through which lawful interception has been conducted in the recent past. It all began with the spread of telephones. The wiretapping practice originally consisted of placing a listening device, the wiretap, in the circuit which transmits sound waves between two phones, with the police touching a copper wire in the copper wire located between the interceptor's house and the telephone company's switch[29]. However, with the advent of optic fiber lines in the 1990s, this *modus operandi* was no longer viable as glass fiber directly connects the interceptor to his or her telephone exchange, creating a major obstacle to the investigation.

The response at the government level was to involve directly telco companies. In the U.S., the Communications Assistance for Law Enforcement Act (CALEA)[30] came into force in 1994, requiring telephone companies, telecommunication service providers and manufacturers of telecommunication equipment to implement features that allow for real-time monitoring of transmissions, to keep surveillance capabilities intact in a moment where the industry switched from copper-wire to optic fiber[31]. The result was to increase the effectiveness of remote interception and the pervasiveness of surveillance. But with a well-defined limitation in the legislation, which acted as a compromise, namely that these measures would apply exclusively to voice networks and not to internet protocol communications.

Over the years the debate around encryption has been ever arising, whilst in the judicial context, these tools have had limited use. In fact, it is thought that in the USA among the 4148 wiretaps authorized

29. See Swire and Ahmad, *Encryption and Globalization* at 420 (cited in note 4).

30. Communication Assistance for Law Enforcement Act (CALEA), Pub. L. No. 103-414, 108 Stat. 4279, codified at 47 USC 1001-1010.

31. Wiretap Report 2015, Administrative Office of the U.S. Courts (December 31, 2015).

by state and federal courts only 13 were encrypted[32]. Nevertheless, encryption by default was not as widespread then as it is now, these statistics need to be put into context so as not to naively underestimate the problem. In fact, in the practice of law enforcement, authorities will avoid wasting time and resources in obtaining authorization to intercept encrypted communications that they are unlikely to succeed in decrypting (as suggested by the fact that only 2 out of 13 encrypted devices were successfully accessed)[33]. In such cases, the police will prefer to turn to other means of investigation. Any wiretap request will thus only fall on devices that were mistakenly believed to be unencrypted[34]. However, if we analyze the statements of police officers, the situation is reversed. In 2015, Director James Comey stated that the FBI was unable to access data on 650 electronic devices out of the 5,000 that had been seized between October 2015 and August 2016. Comey then updated the numbers to 1200 out of 2800 in the period between October and December 2016 alone[35]. This suggests that even though law enforcement authorities are frequently confronted with encryption, the results that are achieved are very poor.

4. *The essentiality of Strong Encryption*

Although it can often represent a major hurdle for law enforcement, the proliferation of encryption on the Internet is justified by its inherent insecurity[36]. If one takes a look at its very structure, commu-

32. *Ibid.*

33. See *ibid.*

34. Stewart Baker, *Steptoe Cyberlaw Podcast: The Second Annual Triple Entente Beer Summit* (LAWFARE, February 23, 2016), available at https://lawfareblog.com/steptoe-cyberlaw-podcast-secondannual-triple-entente-beer-summit (last visited November 1, 2022).

35. Tom Winter et al., *Comey: FBI Couldn't Access Hundreds of Devices Because of Encryption* (NBC NEWS, March 8, 2017), available at http://www.nbcnews.com/news/us-news/comey-fbicouldn-t-access-hundreds-devices-because-encryption-n730646 (last visited November 1, 2022). See also James B. Comey, *Keynote Address at the Intelligence Studies Project Spring Symposium: Intelligence in Defense of the Homeland* (Strauss Center Events, March 23, 2017), available at http://intelligence-studies. utexas.edu/events/item/560-isp-spring-conference.

36. Swire and Ahmad, *Encryption and Globalization* at 423-425 (cited in note 4).

nications within it are transmitted from one Internet Service Provider to another through a dense network of nodes that receive packets of information[37]. The main problem is that, unlike other types of communication such as telephone communication where the players on the field were a few phone companies, here the faced situation embodies an indefinite number of possible intermediaries whose reliability is unknown. This systematic insecurity has been overcome only thanks to the possibility of encrypting messages and transactions that might otherwise have ended up easily in the hands of malicious actors, compromising any possibility of growth of the Internet[38].

4.1. *Everyday Life & Cyberattacks*

With the advent of globalization and digitalization, the issue of cybersecurity is increasingly at the center of legislative policies to better protect information infrastructures[39]. In this renewed scenario, cryptography techniques have played a prominent role in preserving security and privacy in everyday online activities. Encryption-enabled devices are ubiquitous in our daily actions: our mobile phones, our laptop, our credit card, our car keys, and so on. Decreasing the effectiveness of these protective capabilities would put a large part of our daily activities at serious risk, making our most precious assets easy prey for malicious attacks[40].

Following the advent of computer interconnectivity, we find ourselves in a cyber dimension where the "offense" (i.e., hackers), who wants to access and exploit a cyber system, needs to be able to access from only one point. In contrast, the "defense" (i.e., the user of the system in question), must be able to repel the attack on all fronts. This phenomenon can be summarized with a basic formula: "the defense is only as strong as its weakest point"[41].

Encryption is the primary defensive tool precisely because it can defend against attacks directed from any source of communication

37. See *id.* at 424-425.
38. See *ibid.*
39. See *id.* at 453-454.
40. See *ibid.*
41. Niels Ferguson, Bruce Schneier and Tadayoshi Kohno, *Cryptography Engineering: Design Principles and Practical Applications* at 5 (Wiley 1st ed 2011).

while data is in transit and specularly protects all files on encrypted devices while information is at rest, regardless of whether or not malicious actors have compromised the system[42]. Concerning authentication over the Internet, a pivotal function is played by the double key fob authentication, such as the one provided by RSA, which can prevent access to any hacker using an old key[43]. If we opt for a weakened or even forbidden encryption, the result in these cases is the exposure of each node of an unencrypted communication channel to "data in motion" cyber threats by malicious attackers. The disclosure of unencrypted files to a hacker who has gained access to a device for data at rest. And finally, the absence of encryption in the authentication procedure allows the hacker to gain access to the password and any other identifying information involved in the process[44].

4.2. *Globalization and the "Least Trusted Country" Problem*

The globalization of information infrastructures and the increasingly prominent role which the Internet has taken on worldwide have marked a prolific border transfer of information between countries and significantly impacted businesses and organizations[45]. To fully understand the importance of strong encryption in a globalized world we can refer to the so-called "least trusted country" problem[46]. This, in connection with the previous discourse according to which the resistance of a cyber system must be calibrated on its weakest link, states that if a country decreases or prohibits strong encryption, any communication which complies with its specific law will be compromised, regardless of the geographical location of the starting or ending point of the transmission[47].

42. Swire and Ahmad, *Encryption and Globalization* at 456 (cited in note 4).
43. *RSA Authentication Manager Express* (RSA.com, April 18, 2012), available at http://www.rsa.com/products/AMX/ds/11241_h9006-amx-ds-0711.pdf. (last visited November 1, 2022).
44. Swire and Ahmad, *Encryption and Globalization* at 456 (cited in note 4).
45. See *id.* at 453-454.
46. See *id.* at 457-459.
47. See *id.* at 457.

Let us take under scrutiny the situation in India and China, which we previously mentioned[48]. In India, the legal system inclines towards a categorical ban on any encryption key longer than 40 bits, which provides a derisory ceiling for current cybersecurity threats. If applied in practice, such a system could reduce the reliability level of an enormous volume of communications, as India is a crucial player in the global landscape of the sensitive data business processing industry. Regarding demographics and Internet use, the situation remains unchanged in China. Its regulation provides for the exclusive use of domestic encryption technology based on algorithms that have not undergone any international peer review, and the consequent risk of the presence of government backdoors[49]. This means that merchants operating in the vast Chinese market may be required to incorporate those algorithms into their products and services, even if they are used outside of China's borders[50].

This twofold testimony suggests a legal regime that requires only weak encryption technologies can threaten the security of communications and trade from a global governance perspective. Any communication that originates terminates, or travels through these security holes will be systemically compromised, being as secure as it would be in the hands of the least trusted country[51].

The importance of strong encryption in the international arena is as evident in the provision of legally weakened encryption as in the provision requiring backdoors. Indeed, the more countries will decide to provide unique access to their law enforcement and national security agencies, the greater the potential threats will be. Not only the ones faced by China and India but also the ones faced by any data traffic from any other nation that enters its flawed orbit.

48. See § 2.2 on Cybersecurity.

49. See Yan Luo and Eric Carlson, *China Enacts Encryption Law* (Covington, October 31, 2019), available at https://www.insideprivacy.com/data-security/china-enacts-encryption-law/ (last visited November 1, 2022).

50. See Swire and Ahmad, *Encryption and Globalization* at 458 (cited in note 4).

51. See *ibid.*

5. *Encryption Workarounds*

In this chapter, an attempt will be made to assess the feasibility of ways around encryption without diminishing its strength. In the first half, it will be assessed whether it is possible, according to the current state of technology, to assume that legal access can be left open to law enforcement without compromising overall cyber security. And in the second half, it might not be better to leave the IT architecture untouched while evaluating alternative techniques to be able to read the content of encrypted data traffic.

5.1. *Lawful Access Requirement*

As we have already addressed in the section on backdoors, imposing on tech companies an access route for government agencies, poses a serious risk to the technological infrastructure of the country in question. This is true even if such imposition is made in compliance with legal procedures. And the more dependent a country is on cyber-infrastructure, the greater said risk will be.

The reason is precisely the difficulty in keeping these portals secret and therefore in the hands of the "good guys" only. Indeed, there is a wide range of potential access seekers, ranging from the attackers who want to exploit the vulnerabilities economically or politically, to "white hat" hackers whose goal is to identify security gaps to be revealed to the creators or the public, to get richer or enhance their reputation[52].

In addition to security issues, one should not underestimate the strong impact that the imposition of lawful access to private companies could have on the market. Ensuring full confidentiality of communications has become one of the main features of any electronic device, as well as one of the differential factors valued in advertising campaigns[53]. What customer would want to buy technological goods or online services from a country whose government can access the

52. See *id.* at 460.

53. See Kif Leswing, *Apple is turning privacy into a business advantage, not just a marketing slogan* (CNBC, June 7, 2021), available at https://www.cnbc.com/2021/06/07/apple-is-turning-privacy-into-a-business-advantage.html (last visited November 4, 2022).

content of his or her communications and transactions without any problems? This would inevitably affect the market share of its companies and the transit of information from the rest of the world with irreparable damage to the national economy[54].

Potential threats might also regard intellectual property rights. Cyber espionage and cybercrime practices, which have been on the rise in recent years, would be exacerbated by intentionally debilitated computer systems[55].

However, it should be borne in mind that technological progress has made available various techniques that allow lawful access to the government without diminishing the security of the cryptosystem. In this section we will review some of the most promising ones:

1) *Key Escrow System*. The key escrow is a method with which an encryption key is stored in an escrow system tied to the original user and subsequently encrypted for security purposes[56]. So that access is preserved in case the key is forgotten or permanently lost, as in the case of the death of its owner. In this way, the government or an authorized third party remains in possession of the key and can use it following a lawful process.

2) *Mandatory Biometric Encryption*. Following this approach, the objective is twofold; on the one hand, to further strengthen encryption by requiring device manufacturers to provide a biometric lock such as a fingerprint or retinal image[57]; on the other hand, to allow law enforcement to obtain a coercive unlock as, unlike a password, it would not constitute self-incriminating testimony[58]. As a matter of case law, the discriminating factor is whether there has been a mental activity on the part of the suspect to communicate a fact or

54. See Manpearl, "*Preventing Going Dark": A Sober Analysis and Reasonable Solution to Preserve Security in the Encryption Debate* at 82 (cited in note 1)

55. See *id*. at 82-83.

56. See Zach DeMeyer, *What is Key Escrow? - Store Cryptographic Keys* (JumpCloud, April 2, 2019), available at https://jumpcloud.com/blog/key-escrow (last visited November 4, 2022).

57. See Paul Rosenzweig, *Encryption, Biometrics, and the Status Quo Ante* (Lawfare, July 6, 2015), available at https://www.lawfareblog.com/encryption-biometrics-and-status-quo-ante (last visited November 4, 2022).

58. See *Fisher v. United States*, 425 U.S. 391, 409 (1976).

information, whereas this does not apply to physical evidence, such as fingerprints[59].

3) *Split Key Encryption*. This type of encryption represents a very advanced technique through which encryption keys are separated and carefully stored by a plurality of trusted actors who will necessarily have to cooperate with each other in order to unlock access to the set of keys[60]. It runs with the information that can be further secured by encapsulating them in other encrypted data[61]. The work of malicious attackers is thus made extremely complex since they will necessarily have to obtain all the keys according to a cumbersome process[62].

4) *Cryptographic Envelopes*. The cryptographic envelope is so called because it traces the mechanism of a normal envelope. Here, the recipient's address is given by its public key with the message being sealed using cryptographic techniques. Once it is sealed, the corresponding private key, possessed only by the addressee, must be used before it can be opened[63]. Through this method, the encryption key of the device's drive is located inside a cryptographic envelope, so that the drive can be unlocked either by typing in the password held by the user or, alternatively, by opening the cryptographic envelope. The latter is forwarded to the same entity that uses the public key, which encrypts the information and seals it using strong encryption[64]. To surround the process with additional guarantees, it is possible to imagine storing the cryptographic envelope within other envelopes[65]. The operating mechanism, in this case, would be to send the envelope to the law enforcement authority using its public key and then insert it in another cryptographic envelope to be sent this time to the device

59. See *Schmerber v. California*, 384 U.S. 757, 764 (1966).

60. See Geoffrey S. Corn, *Averting the Inherent Dangers of "Going Dark": Why Congress Must Require a Locked Front Door to Encrypted Data* (SSRN Electronic Journal, July 13, 2015), available at https://doi.org/10.2139/ssrn.2630361 (last visited November 1, 2022).

61. See *ibid.*

62. See *ibid.*

63. See Matt Tait, *An Approach to James Comey's Technical Challenge* (Lawfare, April 27, 2016), available at https://www.lawfareblog.com/approach-james-comeys-technical-challenge (last visited November 1, 2022).

64. See *ibid.*

65. See *ibid.*

manufacturer, so that neither entity can unilaterally decrypt the device without cooperation.

Ultimately, if we decide to go down the route marked by these law enforcement techniques to access information, it becomes possible to keep surveillance capabilities intact during investigations in coexistence with a strong level of encryption in the technology sector. If nonetheless, the cryptosystem remains unscathed in its protection, the increased structural difficulties of the overall cyber architecture significantly intensify the risk of creating additional vulnerabilities that could be exploited by malicious attackers[66].

For this reason, many scholars believe that a lawful access requirement should be denied. However, they also claim that this denial would not leave law enforcement agencies groping in the "dark". According to this vision, law enforcement agencies should be afforded additional resources and capabilities in conducting investigations. A strengthened investigative capacity would allow them to obtain the information they need for national security. In this sense, an interesting alternative could be represented by lawful hacking[67].

5.2. *Lawful Hacking*

Another viable option is for law enforcement agencies to legally exploit existing vulnerabilities in software to get all the information they need to carry out investigations. A previously created backdoor would not be needed. This category includes a wide range of techniques, varying in complexity, which turn out to be about the same as those used by hackers[68]. Such as spear-phishing, through which a social engineering method is used to obtain the encryption keys of

66. See The Heritage Foundation, *Encryption And Law Enforcement Special Access: US Should Err On Side Of Stronger Encryption - Analysis* (Eurasia Review, September 6, 2015), available at https://www.eurasiareview.com/06092015-encryption-and-law-enforcement-special-access-us-should-err-on-side-of-stronger-encryption-analysis/ (last visited November 4, 2022).

67. See Steven M. Bellovin, Matt Blaze, Sandy Clark and Susan Landau, *Lawful hacking: Using existing vulnerabilities for wiretapping on the Internet*, 12(1) Northwestern Journal of Technology and Intellectual Property, available at https://doi.org/10.2139/ssrn.2312107 (last visited November 4, 2022).

68. See Gonzalez, *Cracks in the Armor: Legal Approaches to Encryption* at 33 (cited in note 3).

specific targets and hence decrypt their communication[69]. Another highly used option in practice is the so-called "watering hole strategy". A malicious actor takes control of a website to send surveillance malware to all users when they log in[70].

The shared feature in all these examples is that law enforcement agencies can use means of interception for circumventing encryption without undermining the security of the cryptosystem, and of the Internet more generally, in any way. Furthermore, if lawful hacking becomes established as a default practice, rather than government-mandated encryption backdoors, the whole civil society, or specifically certain social collectives would avoid the danger of indiscriminate mass surveillance by the public authorities[71].

However, the legalized use of hacking techniques by the government does not come without raising several legal and ethical dilemmas. From a legal perspective, it must first be determined whether law enforcement agencies must first have a warrant issued by a judicial authority to proceed. Only in this scenario, one could imagine a fair use of government surveillance power while respecting the reasonable expectation of privacy of any suspect.

On the ethical front, a major stumbling block is the responsibility of the third parties with which the government contracts to perform such tasks. It is in fact customary for national governments to hire private companies that specialize in performing highly technical tasks. The risk of such a system is that it might lead to anti-competitive conduct, damaging the internal functioning of the market and requiring competitors of a given business to sabotage its products[72].

Another problem on the ethical side is whether the government has a duty to inform companies of the cyber vulnerabilities it has discovered and exploited. For example, if new software updates that are about to be launched contained vulnerabilities that hackers would be able to exploit, it would be in the government's interest not to alert the company. Surveillance activities would be carried out with no

69. See *ibid.*

70. See *ibid.*

71. See Gonzalez, *Cracks in the Armor: Legal Approaches to Encryption* at 36 (cited in note 3).

72. Swire and Ahmad, *Encryption and Globalization at 37* (cited in note 37).

interruption[73]. The ability of law enforcement agencies to infiltrate private companies' computer systems may encourage them to invest more in cybersecurity. An increasingly secure ecosystem would in turn be created. However, in the long run, such an outcome would also make it increasingly difficult for the government to take advantage of vulnerabilities to lawfully exploit[74]. Finally, not every country has wide economic resources, (especially in IT) to be able to conduct these difficult operations and to employ private companies on a permanent basis.

6. *Untangling the Encryption Paradox*

The entire discussion underlying this essay was played out on the fine line between the need for a comprehensive law enforcement investigation and the need for a secure Internet architecture. In this difficult balancing act between fundamental rights, a perfect reconciliation is not possible. In fact, either a secure cryptographic system is ensured from the ground up, capable of guaranteeing full protection of personal data and ensuring effective freedom of expression without any constraints; or it is decided that the door should be left open for government authorities, so they can best protect public safety by having full access to all necessary information. The solution that untangles the "paradox" created by encryption must be found. The preferred solution should be capable of ensuring global security but at the same time not threatening collective security. The important thing, however, when balancing rights of fundamental importance, is that their core is preserved intact. Following this path, it is impossible to secure human rights on a network that is insecure by design without the presence of strong encryption. On the other hand, as we shall see below, as far as investigations are concerned, simply not having access to encrypted data does not mean groping in the dark. Tilting the balance in favor of privacy is then preferable.

73. See *ibid.*
74. See *id.* at 38.

6.1. *The "Golden Age of Surveillance"*

For years, law enforcement agencies have based their investigative activities on wiretapping techniques and easy access to stored records, which with the switch from "telephone" to "digital" surveillance under the banner of strong encryption have been rendered futile. Simply accessing suspicious communications does not allow any valuable insight if the data transmitted are encrypted without the possibility of decryption. This loss of pervasiveness in surveillance was emblematically described as "going dark" for law enforcement agencies, underlining how the inability to access this key information was such that investigations were permanently compromised. This conflict, which has been dormant for years following the end of the "crypto wars" in 1999, has returned to ignite public debate with strong encryption becoming the global technological standard.

Nevertheless, this aspect is only one side of the coin. The conflict must be contextualized within the broader framework of technological progress. Naturally, cryptography can create serious obstacles to investigations, but these obstacles are not insurmountable. On the contrary, surveillance capabilities of governments in the data-driven society have increased considerably, to the extent that some authors have spoken of a "golden age of surveillance"[75]. In three main areas, law enforcement agencies are now equipped with the largest surveillance capabilities ever seen:

1) *Location Tracking*. Tracking devices are so much a part of our daily lives that they have become essential for most of our actions. For many people, the mobile phone - the tracking device par excellence - is almost an extension of the body. In such a context, it is possible to trace the movements of a suspect at any time. It is now possible to verify whether he or she was at the scene of the crime at the time it took place, or to check the veracity of his or her alibi. For law enforcement, the mobile phone has become the most efficient of bugs. It eliminates the risk of having to place a physical tracker device on the suspect's person or property[76]. This is made possible by the operation of the

75. See also Swire and Ahmad, *Encryption and Globalization* at 466 (cited in note 4).

76. See *id.* at 466-467.

wireless network of telephone companies, which need access to the location of the customer at any given time in order to transmit calls to that specific phone[77]. Law enforcement agencies can retrieve this data and use it for the purposes of their investigations. While it is true that smart criminals will try to equip themselves with untraceable devices (such as prepaid mobile phones) to carry out their criminal activities, several states impose strong limits on the circulation of such devices. In addition, it should be considered that the larger the criminal circle, the more difficult it will be for each of its members to follow the same strict precautions to avoid any possible tracking activity[78].

2) *Contacts Information*. A category closely linked to the previous one is the data linked to the contacts that each subject creates through the various Internet platforms. In fact, once the police know the identifying details of a subject, they can easily trace the remaining members of a criminal organization or potential co-authors of the crime in question[79]. And, through these, further redefine the connections between them.

After the rise of Web 2.0 and online social networking[80], law enforcement agencies are able to create the "2Social Graph", or "the global mapping of everybody and how they're related"[81]. This is of paramount importance during the investigation activities because identifying the parties involved is often more useful than accessing the actual content of communications. Indeed, it allows us to expand the overall picture by adding new targets in a virtuous circle and hence enables us to better plan and direct the work needed.

3) *Digital Dossiers*. An average laptop today can hold a huge amount of information, much of which is personal data and, therefore, highly valuable for investigation purposes. However, the fact that these devices are equipped with endpoint encryption, and thus probably

77. See *ibid*.

78. See *ibid*.

79. See *id*. at 468.

80. The Web 2.0 can be seen as a second phase of the web, marked by a participatory culture that promotes the socialization among users and their direct contribution to the creation of online content.

81. Brad Fitzpatrick and David Recordon *Brad's Thoughts on the Social Graph* (LiveJournal, August 17, 2007), available at http://bradfitz.com/social-graph-problem/ (last visited February 3, 2022).

inaccessible, does not mean that those assets are necessarily lost. In a data-driven society and economy, there are many other computers, and databases, in which way more detailed records of a person's profile are stored. The reference is to records held by government agencies, banks, hospitals, data brokers, online advertisers, and many other record holders[82]. The combination of all these profiles, unthinkable until a few years ago, is able to generate a digital dossier updated continuously throughout the day, covering every activity carried out on the Internet and beyond. Once the target individual has been identified, all these records are lawfully accessible by law enforcement agencies after all relevant safeguards have been put in place. Although some try to refrain from leaving traces on the network, complete anonymity appears impossible to achieve in most developed countries, in which more and more activities are being delegated to the electronic dimension[83].

6.2. *De-emphasizing the "Going Dark" Problem*

At this point of the analysis, it should be inquired whether the problem faced by law enforcement during investigations, because of the difficulties generated by strong encryption, is overemphasized. In paragraph 2, it has been pointed out that the inability to access encrypted communications or devices is the biggest obstacle to investigations. That is because of the given constant and worldwide expansion of default strong encryption in the tech sector, as evidenced by the numbers and statements from stakeholders previously mentioned. How much of this, however, is actually true? In 2016, following the San Bernardino attack, a report from Harvard University's Berkman Center for Internet and Society titled "Don't Panic: Making Progress on the 'Going Dark' Debate" casts serious doubts on these claims, suggesting that the "going dark" issue was overstated[84].

82. Swire and Ahmad, *Encryption and Globalization* at 470 (cited in note 4).

83. See *ibid.*

84. Urs Gasser, et al., *Don't Panic: Making Progress on the "Going Dark" Debate* (Berkman Center for Internet and Society, January 2016), available at https://dash.harvard.edu/bitstream/handle/1/28552576/Dont_Panic_Making_Progress_on_Going_Dark_Debate.pdf?sequence=1 (last visited November 1, 2022).

The basis of the arguments supported by the *Don't Panic* report rested on the fact that, in the first place, this widespread adoption of end-to-end encryption was still far from being achieved. Essentially, because of commercial reasons, it seemed doubtful that it would be achieved even in future. In fact, a cryptographic system that does not allow the service provider access to the contents of the communication collides with the business model of many companies. Indeed, the free or freemium model consists in providing free content to users, which must be financed by personalized advertising revenue. The only way in which targeted advertisements can be offered by obtaining extensive personal data through the behavior and iterations of users on the Internet. Once browsing data are made unidentifiable through end-to-end encryption, the economic sustainability of this mechanism would be wiped out[85].

It should also be considered that cloud computing service providers also widely used today, transmit data and software in a mode of ubiquitous connectivity that allows these data and software to be accessed across multiple platforms. That would be inconceivable in an end-to-end encryption ecosystem as the companies involved need access to plaintext data[86]. Following this trajectory, the result is that end-to-end encryption is unlikely to be the technical standard on which the architecture of the Internet is and will be based.

These operational difficulties, however, do not apply to endpoint encryption, which is increasingly the rule for every device on the market. It is undeniable that unlocking these devices has been made extremely more challenging by this type of encryption. Moreover, on the other hand, the mere fact that end-to-end encryption is not everywhere does not prevent the most cunning criminals from deciding to use only services and products that include it[87]. But this is not a major threat to investigation and surveillance activities. In fact, the advent of the Internet of Things (IoT) has to be taken into consideration. IoT can be defined as a network of physical objects equipped with sensors and processing abilities that allow large-scale, real-time

85. See *id.* at 10-11.

86. See *id.* at 11-12.

87. Manpearl, *Preventing 'Going Dark': A Sober Analysis and Reasonable Solution to Preserve Security in the Encryption Debate* at 79-80 (cited in note 1).

data interchange between them. As in the cases of Smart TVs, Smart Cars, door locks, etc.[88], most of the data transmitted by these "things" are metadata, i.e. data that refer to other data, describing them or giving additional information about them. The peculiarity of metadata is that they tend to be unencrypted. And if we then look at what they can reveal, the benefit that their exploitation might bring to law enforcers' investigations is immediate:

- *Landline telephone*: data on the recipient of the call, at what time and for what duration the call has taken place;
- *Email*: data on the recipient of the mail, at what time, the information on the subject line, and the type of content;
- *Surfing the web*: the device and browser model used, the website visited, page preferences, login details (if auto-fill is enabled), previous interactions with a site (based on authorized cookies), and geographical location;
- *Uploading digital images*: at what time and place photos have been uploaded, with what type of camera, and what settings were set[89].

Pulling the threads together, the complex of metadata outlines overall patterns of an individual's daily life that are inspected using "traffic analysis"[90]. Through this process, law enforcement agencies can intercept and examine encrypted messages by deducing information from patterns in communication[91]. These techniques are very useful, for instance, to break the anonymity of a network, such as TOR[92]. But also to understand the strategies of suspects based on the frequency with which communications are made: deducing the state of activity of a criminal gang and, possibly, the hierarchical relationships between them.

88. See *ibid.*

89. Holly Porteous, *Metadata, National Security and Law Enforcement Agencies* (HillNotes, November 21, 2014), available at https://hillnotes.ca/2014/11/21/metadata-national-security-and-law-enforcement-agencies/ (last visited February 4, 2022).

90. See *ibid.*

91. Ramin Soltani, et al., *Towards Provably Invisible Network Flow Fingerprints*, 51st Asilomar Conference on Signals, Systems, and Computers at 258-262 (2017) available at https://doi.org/10.1109/ACSSC.2017.8335179 (last visited November 1, 2022).

92. See *ibid.*

7. *Conclusions*

The time has come to draw the lines of this essay and weigh up what has been said whereby to identify the desirable direction to take in the present and the future.

The return of encryption to the public discourse has marked a radical polarization between two factions: those who advocate for strong encryption in order to ensure full security in the digital world. On the other hand, the promoters of "crippled" encryption can, if necessary, be bypassed by authorities legitimately dedicated to the pursuit of collective security. In this clash between numerous stakeholders, the needle of the scales is moving frantically without finding common ground.

However, given the intrinsic architectural insecurity of the Internet, it can be argued that strong encryption is the main safeguard against the continuous threats faced in the transmission of communications and transactions. Without it, it would be unimaginable to ensure the confidentiality of correspondence, which inevitably compromises freedom of expression. The same applies to the possibility of concluding commercial operations in a network where any credentials could be easy prey for the malicious. The awareness of Internet users that secure interactions can be enabled has been the basis of its global expansion. Cryptography has evolved into an actual science, refining itself over time, to the point where strong encryption has become a constant in the technology market.

Platforms offering end-to-end encryption prevent anyone but the sender or the receiver from deciphering the content of the communication. Similarly, devices equipped with endpoint encryption prevent unlocking by anyone who does not have the password. Law enforcement and national security agencies thus see their investigative capabilities diminished and are clamoring for tech companies and ISPs to set up a backdoor in their favor to remedy this disadvantage.

Unfortunately, in the current state of the matter, this is not possible without compromising the overall security of the system, even following the most advanced techniques such as those discussed in paragraph 4.

In a seemingly deadlocked situation where a compromise does not appear to be attainable, the choice must fall on the side which prevails

on the basis of a cost-benefit analysis of the fundamental rights here involved. Having clear in mind that encryption technology - and the way it is regulated - merely represents the medium through which this balance should be achieved.

Following the setting line of this essay (and of its title), the clash between strong and weak encryption becomes the bearer of (seemingly) conflicting instances. On the one hand, the protection of national security. Oppositely, the concept of security - in a more generic sense - of the Internet infrastructure as well as of the data of those who, in any way, come into contact with all the economic and personal repercussions that this entails. Within this paradox generated by the use of this technology, it is necessary to observe the bigger picture, so as to succeed in balancing the rights at stake without sacrificing the essential core of any of them.

The bottom line is that without strong encryption, there can be no secure and fully constitutional Internet, according to the requirements set forth by democratic societies. These societies aim to ensure freedom of expression and information, protection of personal data, and a flourishing as well as competitive digital market. At the same time, a provision of legal access to encrypted contents by law enforcement is not necessary to its full extent. This is because the disadvantages of going partially dark are largely offset by the extraordinary surveillance capabilities that the government has at its disposal in a redesigned online society.

Location tracking contacts information and, more generally, the boom of metadata production with the rise of IoT has enabled to build deeply detailed digital dossiers on each individual and their digital interaction. Within this framework, the much-coveted national security is thus saved. Clearly, it is not intended to deny that in some investigations the content of some encrypted communication may be essential to ascertain specific facts and that the lack of an access door may preclude an important investigative contribution or may hinder a preventive strategy. However, what has been argued and constitutes the point of arrival of this essay, is that there are other paths that can be taken to reach the same solution and, in doing so, to be able at the same time to effectively protect digital human rights by ensuring a secure Internet architecture.

Sting operations and entrapment defense in corruption behaviors

A systematic analysis between Italy, Europe, and the United States

Mattia Cutolo*

Abstract: The paper aims to provide an overview on sting operations facilitating crimes and entrapment defense, related to public corruption behaviors. A historiographic introduction will show how the U.S. system has managed corruption from the XVIII century; afterward, the focus will shift on the dogmatic profiles to clarify complications and practical functioning of entrapment defense as to the general theory of the offense. A reflection is also needed on whether or not the agent provocateur figure should be imported into European systems, displaying how case law from the Italian Supreme Court are inspired by the Grand Chamber of the European Court of Human Rights in Strasbourg: despite theoretical discrepancies, both these courts are in a constant, however silent, dialogue with the U.S. courts. The crucial issue is the analysis of legal principles pertinent to the agent provocateur and to the instigated individual in order to understand, from the European point of view, whether or not the former is indictable and, from the U.S. point of view, whether or not the latter is.

Keywords: Comparative criminal law; entrapment; agent provocateur; public corruption; extrema ratio principle.

1. *Introduction*

This paper aims to investigate the entrapment defense from the U.S. legal perspective, in relation to sting operations seeking to provoke conducts of corruption[1]. Afterwards, a reflection will lead to

* Mattia Cutolo is a Ph.D. student in criminal law at University of Salerno. He graduated from University of Trento in 2020, after being Visiting Researcher at University of Pennsylvania Carey Law School in 2019 and obtaining an LL.M. at Washington University School of Law in 2017.

1. Related to bribery offenses see Stefano Fiore, Giuseppe Amarelli, *I delitti dei pubblici ufficiali contro la pubblica amministrazione* (Utet, Milan, 2018). In particular, about the Italian reforms: Sergio Seminara, *La riforma dei reati di corruzione e concussione come problema giuridico e culturale*, Dir. pen. proc. (2012); Roberto Garofoli, *La nuova disciplina dei reati contro la P.A.*, Dir. pen. cont. (2012); Gabriele Fornasari, *Il significato della riforma dei delitti di corruzione (e incidenze "minori" su altri delitti contro la P.A.)*, Giur. it. (2012).

See also: Marco Pelissero, *"Nuove" misure di contrasto alla corruzione?* Dir. pen. proc. (2015); Giovanni Domeniconi, *Alcune osservazioni in merito alle modifiche apportate dalla legge n. 69/2015 alla disciplina dei delitti dei pubblici ufficiali contro la pubblica amministrazione*, Dir. pen. cont. (2016); Vincenzo Mongillo, *Le riforme in materia di contrasto alla corruzione introdotte dalla legge n. 69 del 2015*, Dir. pen. cont. (2015); Tullio Padovani, *La spazzacorrotti. Riforma delle illusioni e illusioni della riforma*, 3 Arch. pen. (2018); Vincenzo Mongillo, *La legge "spazzacorrotti": ultimo approdo del diritto penale emergenziale nel cantiere permanente dell'anticorruzione*, 5 Dir. pen. cont. (2019). On the

exploring whether or not those legal solutions could apply to the Italian and European criminal systems[2].

One of the reasons this topic was selected, resides in a proposal supported by an Italian minor political movement in the XVII Italian Legislature, which suggested adopting the so-called "agent provocateur" as a tool for the prosecution of bribery: it inspired the legislator to draw bill n. 3 of 2019, in the following term.

In the U.S. criminal system, the character of agent provocateur has always played a crucial role in undercover operations, especially related to economic crimes; it would be otherwise hard to prove those kinds of conduct in court. Bribery is not the only crime in which agent provocateur and entrapment are critical: as a matter of fact, the U.S. legal system takes tremendous advantage of these legal instruments in different fields, such as drug-related offenses and organized crime.

This paper, however, will focus the reader's attention only on bribery. Firstly, due to the central role the agent provocateur has assumed in the Italian political debate, as a potential solution to corruptive behaviors. Although there is theoretically much to admire about this institution theoretically, as this paper will demonstrate, it is not a proper

---

U.S. side, see: Kevin Abikoff, John Wood and Michael Huneke, *Anti-corruption law and compliance: guide to the FCPA and beyond* (Bloomberg BNA, Arlington, 2014); Neil J. Levine, *Bribery*, 26 American Criminal Law Review (1989); Ilissa B. Gold, *Explicit, Express, and Everything in Between: The Quid Pro Quo Requirement for Bribery and Hobbs Act Prosecutions in the 2000s*, 36 Washington University Journal of Law & Policy (2011); Taylor Williams, *Criminal Law - A Formal Exercise of Governmental Corruption: Applying the Stream of Benefits Theory to the Federal Bribery Statute. McDonnell v. United States*, 40 UALR Law Review 161 (2017); Gregory M. Gilchrist, *Corruption Law After Mcdonnell: Not Dead Yet*, 165 Univ. Pa. Law Rev. Online 11 (2016); Patrick Fackrell, *The Uncertain Boundaries of Conspiracy under the Hobbs Act, 18 U.S.C. 1951 (a): Is Proof of an Overt Act Required*, 10 Idaho Critical Legal Studies Journal 34 (2017). Italian criminal literature on undercover operations and agents provocateurs has also been attentive, with references to manuals and various contributions. In particular, with regard to books, see: Enrico Califano, *L'agente provocatore* (Giuffrè, Milan, 1964); Cristina De Maglie, *L'agente provocatore: un'indagine dommatica e politico-criminale* (Giuffrè, Milan, 1991). On the other hand, on the U.S. side: Gary T. Marx, *Undercover: Police Surveillance In America*, (University of California Press, Berkeley, 1988); David C. Larson, *Undercover Operations: Law and Policy Guide* (LegalWorks, Eagan, 2014).

2. For a study of the U.S. criminal system from a comparative view see: Gabriele Fornasari, Antonia Menghini, *Percorsi europei di diritto penale* (Cedam, Padua, 2012).

way to pursue justice[3]. Furthermore, such behaviors also allow a clear understanding of entrapment defense and agent provocateur, legal arrangements that illustrate just how far the power of government to repress criminal conduct can extend. Ultimately, this analysis will consider how the U.S. legal system regulates the use of entrapment defense in bribery offenses. While it might be argued that general rules apply to different crimes, the truth is that bribery has a higher standard of triggering such defense and, consequently, it will be more difficult for those who are "entrapped" for bribery to benefit from it.

In the United States the invasive power of police forces in conducting sting operations is striking: there is a lack of regulation, and, in particular, there is a lack of willingness to overcome this legal vacuum. Agents can lead people to commit crimes under the name of public authority justification, and those actions have rarely brought them to trial.

As regards the structure of this paper, a legal-historical framework on corruption in the United States will be drawn. Starting with the years of independence from British colonialism and their dissolute morals, to *Citizens United* (2010), where freedom of expression ended up becoming a shield for "liberalized bribery" in financing political parties. This overview allows for contemplation on the vast difference in attitudes to corruption that the United States had at the beginning of their history as an independent country and in recent developments.

Afterwards, sting operations will be framed both from a dogmatic and functional perspective, paired with an analysis focusing on their impact on personal freedom.

Entrapment will be then scrutinized considering, on the one hand, the role of entrapment as to the general theory of the offense[4]; on the

3. On suggested ways to fight corruption, see the overview drawn by Andrea R. Castaldo, *La bellezza è negli occhi di chi guarda: diverse prospettive per combattere la corruzione* (Criminal Justice Network, 2020).

4. "General theory of the offense" here means an investigation connected to questions which are related to the analysis of the crime or to the crime in general. Franco Bricola, *Scritti di diritto penale* 542 edited by Stefano Canestrari, Alessandro Melchionda (Giuffrè, Milan, 1997) "we believe ... that the theory of the criminal offense, in order to be truly *general*, must try to identify those data that connote it in its globality with respect to the other types of offense".

other hand, it will explore the role of entrapment as to the general theory of the offense.

Finally, the essay will try to draw a few reflections on the potential applicability and consistency of the agent provocateur in the Italian and European legal systems: among others; the first thing to note is that, especially from a constitutional perspective, there are some limits that still appear hard to overcome.

2. *A summary of corruption's history in the United States: a legal perspective*

2.1. *The post-independence period*

It is necessary to begin with a historical framework showing how Americans have changed their cultural and legal approach to corruption from the eighteenth century to the present: from being considered a true *cultural anathema* in the post-colonial era, with *Citizens United* (2010) freedom of expression became a shield for corruption.

Pocock, a New Zealand historian regarded as one of the most prominent figures of contemporary thought, summarized the United States' independence from England as follows in a passage from a 1987 work: "legislative power exercised conjointly by kings, lords and commons is ... a reminder that the notion of separation of powers, though invented largely in England, could not be effective there and could be realized in the United States only after rejection of parliamentary government ..."[5]. Pocock reasons about the origins of common law and reflects on how the genesis of English history is strongly related to its law and politics.

The passage argues that the American Constitutional system is based on corruption and anti-corruption. Indeed, at the time of their declaration of independence from the Crown adopted in Philadelphia on July 4th 1776, Americans valued the English empire as corrupted. And it was conventional wisdom that an actual separation of powers could only be reached by rejecting the parliamentary form of

5. John Greville Agard Pocock, *Ancient constitution and the feudal law* 310, (Cambridge University Press, New York, 1987).

government[6]. As a matter of fact, the parliamentary principle was a source of corruption in England at the time. Someone fairly argued that American Revolution had not occurred in opposition to the English constitution but actually in favor of it[7].

The (newly) United States wanted to emphasize their detachment from Europe and England[8], and this remark is highlighted in Teachout's work, a masterpiece in the U.S. historical-legal literature on corruption. Teachout illustrates how, since the beginning, Americans have always been attentive to build their culture on anti-corruption values, by reevaluating what was considered lawful in Europe and importing those conducts to the U.S., labeling them as criminal[9]. At the time, western political traditions outside the U.S. were more concerned with concrete issues such as stability, anarchy, inequality, or violence, whereas the American political tradition has always been concerned with the virtues of love for the public and the dangers of unrestrained self-interest[10].

As a consequence, American culture has always rejected corrupted European customs. Indeed, from their point of view, those traditions used to be bounded with the governmental power's archetype more intent on individual self-interest rather than working for the common

6. Ernst-Wolfgang Böckenförde, *Diritto e secolarizzazione. Dallo Stato moderno all'Europa unita* at 148, edited by Geminello Preterossi (Laterza Rome-Bari 2010) "... Under a different constellation, but with similar result, came the creation of national identity in the United States. What prompted the citizens of the New England States to separate from the British crown and the Parliament in London and to proclaim their independence was, concretely and in their conscience, the assertion and defense of their rights and freedom, the foundation of which was seen in *common law* and *natural rights*".

7. Gordon Wood, *The creation of the American republic, 1776-1787*, at 10 (Omohundro Institute and University of North Carolina Press Chapel Hill 1969) "What made their revolution so unusual, for they revolted not against the English constitution but on behalf of it ...".

8. Zephyr Teachout, *Corruption in America. From Benjamin Franklin's Snuff Box to Citizens United* at 3 (Harvard University Press Cambridge 2014) "Disappointed with Britain and Europe, Americans felt the need to constitute a political society with civic virtue and a deep commitment to representative responsiveness at the core. They enlisted law to help them to do it, reclassifying noncorrupt, normal behaviors from Europe as corrupt behaviors in America. During the revolutionary period, the Americans not only created a new country but crafted a powerful political grammar".

9. *Ibid.*

10. *Id* at 4.

good. This is clearly referred to England firstly, because of the English colonialism and their powerful administration, but also to other continental countries, especially France, where power has always been associated with pomp.

To clarify the cultural aspect that has been entrenched in American society for a long time, the book reports an anecdote involving Benjamin Franklin (1706-1790). After years of diplomatic service, before leaving Paris in 1785, Louis XVI donated him a painting that represented himself, surrounded by 408 pure diamonds, set in two rows intertwined around the image, all scrupulously contained in a gold container. Even though Europeans were used to those expensive gifts when a diplomat reached the end of his career, from the U.S. perspective this custom was neither understandable nor acceptable: it appeared as a danger to democracy[11]. For this reason, Louis XVI's gift to Franklin was conditioned by Congress' approval under an anti-corruption law enacted at that time, which stated that every gift a diplomat received during his career was subjected to a parliamentary decision.

The Author explains how such high attention to corruption would have been the basis of every other democratic liberty since it would disrupt the social contract on which people delegate power to public officials[12].

11. *Id*. at 1-2 "Such a luxurious preset was perceived as having the potential to corrupt men like Franklin, and therefore it needed to be carefully managed. In Europe, in other words, the gift had positive associations of connection and graciousness; in the United States it had negative associations of inappropriate attachments and dependencies. The snuff box stood for friendship or old-world corruption, respect or bribery, depending on the perspective".

12. *Ibid*., "The argument of this book is that the gifts rule embodies a particularly demanding notion of corruption that survived through most of American legal history. This conception of corruption is at the foundation of the architecture of our freedoms".

2.2. *The impact of Citizens United on the 2000s*

Moving the attention to the early 2000s, the *Citizens United* case (2010)[13] describes the current cultural and political approach to corruption in the U.S.[14].

Citizens United is a conservative, nonprofit political organization, funded by donations from both private citizens and corporations. In 2008 – during the presidential campaign for the Democratic nomination, when New York Senator Hillary Clinton was running against Illinois Senator Barack Obama – Citizens United released a docufilm titled *Hillary: The Movie* and wanted to broadcast it on DirecTV to damage the image of the former First Lady who meant to run for the White House.

The issue was whether or not the act was legal since it would have entailed investing money to transmit the movie and advertise during its broadcasting for mere political reasons. It seemed to violate the Bipartisan Campaign Reform Act of 2002 (B.C.R.A.), specifically section §441(b). That section made it a felony[15] for any corporation to endorse the victory or defeat of a candidate or run a political campaign within thirty days before a local election or sixty days before a national election.

Nevertheless, Citizens United opposed the order to interrupt films and advertising the Federal Election Commission (also F.E.C.) had imposed. They considered section §441(b) unlawful because it violated the First Amendment, freedom of speech, whose interpretation and practical implications are related to article 21 of the Italian Constitution and article 10 of the European Convention on Human Rights.

In 2010 the Supreme Court was demanded to rule on that case, and the opinion recalled the whole First Amendment's history and its (very) few exceptions. To sum up, in a decision drafted by Justice

13. *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

14. For an exemplary review on how the U.S. legal system approaches corruption, see: Gian Luigi Gatta, *La repressione della corruzione negli Stati Uniti: strategie politico-giudiziarie e crisi del principio di legalità*, 59 Riv. it. dir. proc. pen. 1287 ff. (2016).

15. Crimes in U.S. criminal law are divided into felonies, misdemeanors and infractions, unlike the Italian system where there is a bipartition between crimes and contraventions. On the subject, see Wayne R. LaFave, Austin W. Scott Jr., *Substantive Criminal Law* at 41 ff. (West Group, St. Paul 1986).

Kennedy, the Court overruled *Austin v. Michigan State Chamber of Commerce* (1990)[16], which had stated that the government could limit freedom of expression when there are "corrosive and distorting effects of immense aggregations of wealth"[17]. Thus, under the *stare decisis* theory[18], the Court reinstated the former judicial precedent *Bellotti v. Baird* (1979)[19]: the government was not allowed to set limits on freedom of expression, even for corporations.

The potential issue behind this ruling lies in the advantage big companies can take. It allows for a perverse mechanism in which, in order to obtain endorsements, politicians tend to promote legislative acts that benefit their benefactors, the companies. However, somebody reasonably stated "money isn't speech!"[20]. The answer to why should the First Amendment protect financial contributions to politics can be found in *Buckley v. Valeo* (1976)[21] where the Supreme Court ruled that investing money to express one's thoughts (including political positions) is equivalent to freely expressing ideas by speech and, therefore, the First Amendment applies. In this scenario, the Court comes up with a broad-spectrum or multi-purpose concept of freedom of speech: it means that every single human act linked to expressing opinions must be protected, falling under the First Amendment.

This argument suggests that even if the federal government did not restrict the right to practice whatever religion one chooses to follow but instead prohibited spending money to build churches, buy religious utensils, or pay clergy, religious freedom would still be irreparably restricted. Similarly, in politics, investing money to endorse a candidate aims to promote them, so the more you invest in a candidate, the more they have the chance to win, supporting one's political position[22].

---

16. And partially also *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003).

17. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658-659 (1990).

18. On the doctrine of precedent in the United States, see Bryan A. Garner et al., *The Law of Judicial Precedent* (Thomson Reuters, St. Paul 2016); Christopher J. Peters, *Precedent in the United States Supreme Court* (Springer, Dordrecht, 2013).

19. *Bellotti v. Baird*, 443 U.S. 622 (1979).

20. Brad Smith, *Is Money Speech?* (2017), available at https://www.ifs.org/blog/is-money-speech/ (last visited November 11, 2022).

21. *Buckley v. Valeo*, 424 U.S. 1 (1976).

22. James Skelly Wright, *Politics And The Constitution: Is Money Speech*, 85 Yale Law Journal 1004 (1976) "Money does facilitate communication of political

As regards this judgment, the Republican Justice Stevens wrote the dissenting opinion, which was also backed by Democratic Justices Ginsburg, Sotomayor, and Breyer. Responding to Justice Scalia, who wrote the concurring opinion, Stevens argues that the B.C.R.A's scope was not only to prevent corruption, but also to avoid the negative impact the appearance of corruption would have had on the electorate and, generally, on the trust citizens place in the institutions of a liberal democratic country[23]. Stevens also considers that, since minority shareholders might disagree with the majority ones, their right to expression would be violated. Before a court where the judges' opinion was divided by 5 to 4 (a fairly rare event), Stevens tries to clarify that there is an ontological difference between people and people organized in companies when it comes to free expression within the political-electoral context.

In an article of December 2018 written by Edsall, the New York Times showed that, as a result of Citizen United's ruling, funding for elections increased from $203.9 million in 2010 to $1.48 billion in 2016[24]. As a result, freedom of expression had broadly spread, but it also represented a threat: acts of corruption were now covered by free speech, used as an excuse to justify huge money transfers to political candidates.

This decision draws a worrying picture of the lack of independence of politics from corporations, which can afford to finance electoral campaigns. In the article, Edsall reports the words of professor Robert C. Post, who strongly criticizes Kennedy, the Judge-Rapporteur, by accusing him of ὕβρις: "It is the height of hubris for the Court, by a vote of five justices on a bench of nine, simply to dismiss concerns for

---

preferences and prejudices. It is also clear that money influences the outcome of elections. generally speaking, the more money spent in behalf of a candidate, the better the candidate's chances of winning ... money is the mother's milk of politics".

23. *Citizens United v. Federal Election Comm'n - Dissenting opinion of Justice Stevens*, 558 U.S. 310, 42-43 (2010) "It is enough to say that the Act was primarily driven by two pressing concerns: first, the enormous power corporations had come to wield in federal elections, with the accompanying threat of both actual corruption and a public perception of corruption; and second, a respect for the interest of shareholders and members in preventing the use of their money to support candidates they opposed".

24. Thomas B. Edsall, *After Citizens United, A Vicious Cycle Of Corruption*, The New York Times (2018), available at https://www.nytimes.com/2018/12/06/opinion/citizens-united-corruption-pacs.html (last visited November 11, 2022).

electoral integrity on the ground that electoral integrity is a question of law rather than of social fact"[25].

3. *Sting operations*

3.1. *Framework and background*

After this general overview of bribery in the United States' legal history, the focus now shifts to the approach the U.S. legal system adopted to pursue such a crime.

Sting operations are intelligence activities in which, more often, a police officer enters a criminal channel establishing contacts and relations with subjects suspected to have committed or are committing crimes, with the aim of exposing them. The main scope of these operations is, indeed, uncovering and prosecuting crimes, especially as to corruption conducts.

As a matter of fact, corruption is known as a *diffuse* form of crime: it is a criminal offense (like drug dealing) in which those harmed by the crime, for instance, the public administration (or public health, in case of drug dealing), are kept unaware of the criminal conduct. On the contrary, in crimes harming the individual (i.e., manslaughter) or personal property (i.e., stealing), the victims of criminal conduct experience the damage firsthand and are directly hurt. This is the reason why it can be hard for prosecutors not only to prove bribery conducts in court, but to become aware of them in the first place.

Prudent academics[26] analyze undercover operations by distinguishing among operations of *surveillance*, *prevention*, and *facilitation* (or *provocation*). Surveillance operations assume an informative role by obtaining data on possible suspects and relative criminal conduct; the prevention operations show a more marked action since they seek to prevent crimes. Specifically, the difference between the first and the second type of operations resides in the fact of accepting

25. Robert C. Post, *Citizens Divided. Campaign Finance Reform and The Constitution*, 64 (Harvard University Press, Cambridge, 2014).

26. Elizabeth E. Joh, *Breaking the Law to Enforce it: Undercover Police Participation in Crime*, 62 Stanford Law Review 163,165 (2009).

(surveillance) or not (prevention) the risk that the crime may occur in order to provide immediate arrest or, in the second case, to do what is necessary to prevent it[27]. Whereas the scope of the third kind of operation (facilitation or provocation) is to instigate the crime, to expose highly offensive criminal conducts.

One of the most distinguished scholars proposed an alternative categorization based on the use of such operations prior to the commission of the crime, or when the crime has already been committed[28]. In particular, the present paper, as anticipated, will analyze the so-called "facilitating sting operations", raising top-notch criminal and constitutional issues.

Summarizing a case will give an idea of what we are discussing. In the first half of the '80s, an operation marked the history of undercover activities, a case that still maintains a great impact on doctrine nowadays: *United States v. Myers* (1982)[29].

3.2. *The leading case: United States v. Myers (1982)*

The investigations began in 1977, when the Federal Bureau of Investigation's Long Island (New York, NY) division relied on the collaboration of a professional crook named Melvin Weinberg, who had paid $1,000 per month instead of serving a prison sentence, to recover stolen pieces of art and uncover other frauds[30]. The undercover agents pretended to be two sheiks who owned a fake company called Abdul Enterprises Limited.

However, the operations evolved when the mayor of Camden (New Jersey), Angelo Errichetti, began checking over the sheiks: they were rich and without excessive inhibitions with respect to abiding by the law. The sheiks proposed to Errichetti to invest in new casinos

27. Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 Missouri Law Review 394,395 (2005).

28. Thus Gary T. Marx, *Undercover: Police Surveillance in America* at 61 (cited in note 1) "An important distinction is whether the intelligence investigation seeks to discover information about an offense that has occurred or one that might occur. This distinction permits further classification of undercover efforts as postliminary or anticipatory".

29. *United States v. Myers*, 692 F2d 823 (1982).

30. Matthew W. Kinskey, *American Hustle: Reflections on Abscam and the Entrapment Defense*, 41 American Journal of Criminal Law 235 (2014).

in his town and the mayor saw this as an opportunity for himself and the whole city[31].

During the meeting between the sheiks and the mayor, Errichetti gave a list of local policemen to the undercover agents who, according to him, could be easily "persuaded" and, therefore, were more suited to the needs of the rich guests who had just arrived in town and needed to obtain political asylum in the United States through privileged and quicker channels, since they were forced to leave their own country[32].

As stated in the facts of the ruling, there was a turning point: the mayor introduced the sheiks to some members of Congress he was in contact with and asked for $50,000 for each politician who would help the sheiks to obtain political asylum as a price of his mediation. What happened was recorded by undercover agents' hidden cameras that filmed the politicians accepting, discussing, and working out the details of those arrangements.

The defendants were found guilty of federal bribery under section §201, Title 18 of the U.S.C., and academics are still discussing those investigations. That operation (called ABSCAM[33]) is known as the most famous but also the most invasive sting operation ever performed in the United States.

3.3. *The defenses of entrapment and due process. First remarks*

Among the defendants, someone invoked the entrapment defense, claiming that, throughout undercover operations, the federal government had instigated the crime without proving the defendants showed any inclination to commit it. As it will further be explained *infra*, to invoke the entrapment defense, it is required for the government to instigate the commission of a crime and for the defendant not to be inclined to commit that crime. It is identified as *proactive entrapment* and it takes place when police officers use deception, in order to create an offense, being able to observe the situation: so, they procure

31. *Id*. at 236.

32. *Ibid*.

33. "AB" stands for the fictitious company *Abdul Enterprises Limited* and "SCAM" for its literal meaning of "scam", "deceit".

the criminal activity when actually, without such incitement, the instigated person would not have engaged in it[34].

Other defendants appealed to the defense of procedural due process, common to thwart sting operations[35]. They invoked the Fifth Amendment of the U.S. Constitution[36], which is considered a general defense belonging to the nonexculpatory category. The leading case on due process is *United States v. Russell* (1973) which stated that such defense can only be invoked when law enforcement's conduct "is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction"[37].

This standard, based on the vague concept of *outrageous*, may be coming from a case ruled in 1960, *Kinsella v. United States*, when the court defined outrageous conduct as one violating "fundamental fairness, shocking to the universal sense of justice" and reckoning that "[*i*]t deals neither with power nor with jurisdiction, but with their exercise"[38]. While not clarifying what *outrageous* means, this standard turns out to be very narrow: in *Myers*, the court affirmed it was unable to grant this defense because, after *Russell*, there have been no more convictions overturned for due process[39].

---

34. Gerald Dworkin, *The Serpent Beguiled me and I Did Eat: Entrapment and the Creation of Crime*, 4(1) Law and Philosophy 17, 21 (1985).

35. The reference is to *United States v. Williams*, 705 F2d 603 (1983).

36. United States Bill of Rights, 5th Amendment (1791) "Criminal actions, Provisions concerning, Due process of law and just compensation clauses: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation".

37. *United States v. Russell*, 411 U.S. 423, 431-2 (1973).

38. *Kinsella v. United States*, 361 U.S. 234, 246 (1960), referring to *Betts v. Brady*, 316 U.S. 455 (1942).

39. *United States v. Myers*, 692 F.2d 823, 837 (1982) "At the same time, we recognize that ... convictions have not been invalidated by federal appellate courts on grounds of excessive government involvement after the decisions of the Supreme Court in Russell and Hampton narrowed the availability of this defense".

This happened even though in the same judgment[40], the court acknowledged that using due process is the most appropriate and immediate way of defending when the state violates individuals' freedom, instigating the commission of crimes. As well, it is often invoked, but as often rejected[41]. Not only is it hard to define such a standard, but also to overcome the test adopted by the Court that, unlike the entrapment test[42], is *objective*: what matters, in order to apply or not to apply the due process defense, is understanding how the government exercised its investigative powers, exceeding them.

The concept of *outrageous* and the functioning of objective tests, can be better appreciated by mentioning an uncommon decision: *Greene v. United States* (1971). Here, due process was actually recognized as a defense in a case of undercover operations facilitating offenses. The opinion illustrates what governmental *outrageous activity* could possibly mean: police agents who have carried out criminal activities continuously, despite the purpose of combating them. Indeed, the Government does not have the right to exercise such penetrating and invasive role, also because its professional purpose lies in the fight against crime. Moreover, the Court takes a clear position about the due process defense: "we do not believe the Government may involve itself so directly and continuously over such a long period in the creation and maintenance of criminal operations, and yet prosecute its collaborators"[43].

It is extremely important to clarify that – even though sometimes they comprehend similar situations – entrapment and due process are independent and autonomous criminal defenses. The outrageous

40. *Ibid*. "In assessing this collection of claims, we acknowledge the intimations in decisions of the Supreme Court and this Court that the due process requirement of fundamental fairness may have a special pertinence when Government creates opportunities for criminal conduct in order to apprehend those willing to commit crimes".

41. *United States v. Dahl*, 2008 CCA 30, 31 (2008). Also, Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 Seton Hall Law Review 275 (2003), particularly footnote n. 142.

42. As will be stated by the following paragraphs, the entrapment test is based on two remarks: firstly, the incitement from the Government to commit the offense; secondly, the predisposition status, according to which the person was predisposed to engage in criminal activity.

43. *Greene v. United States*, 454 F.2d 783, 787 (1971).

conduct carried out by public officials may offer the defendant the due process defense even when the entrapment defense is unavailable due to the presence of predisposition[44]. It can only be explained because of the mutual dogmatic and procedural autonomy of the two defenses, based on the different standards the courts adopt to verify if the defenses apply. The due process defense requires an objective test, founded on the outrageous activity by the police officers, while the entrapment defense, given the importance of the negative counterfactual requirement, mainly calls for a subjective test.

3.4. *Critical issues in undercover operations. The public authority justification's extension*

In this section, a normative issue will be analyzed. Undercover operations are widely used even though there is a lack of empirical data on this topic[45] and a lack of comprehensive regulation, especially due to the absence of federal regulation. Law enforcement operations are covered by the public authority defense[46] which is a justification defense and can be compared to Art. 51 of the Italian criminal code (also "c.p." from now on) or, for extreme cases, under Art. 53 c.p.

This defense is usually associated with "actors specially authorized and usually specially trained to engage in conduct that would otherwise constitute an offense but is necessary to protect or further a social interest"[47]. It may refer to the use of force by police officers, but there is a broader meaning to take into consideration[48]. Generally speaking, public authority justification, relating to law enforcement

44. *United States v. Myers*, 692 F.2d 823, 837 (1982) "Although the defendants' predisposition, as evidenced by their past involvement in maintaining illegal stills, automatically denied them an entrapment defense, their predisposition did not prevent the court from recognizing a due process defense without expressly labeling it as such".

45. See Joh, *Breaking the Law to Enforce it* at 158 (cited in note 26).

46. *Ibid.* "In the vast majority of situations, the police are immune from prosecution, so long as their actions lie within the scope of their official undercover role. A legal justification called the "public authority defense" shields these activities...".

47. Paul H. Robinson, Shima B. Baughman and Michael T. Cahill, *Criminal Law: Case Studies and Controversies* at 587 (Wolters Kluwer, New York 2017).

48. United States Department of Justice Archives, *Criminal Resource Manual (2001-2099) – 2055. Public Authority Defense.*

conduct, refers to those acts performed by the police with a deep impact on citizens' personal freedom. Those acts are justified, and balanced, by other protected interests: for instance, prevention of crime commission; apprehension and detention of those who have committed the act; the credibility of law enforcement agencies[49].

To be lawful, those conducts require administrative authorization (a unique requirement in the category of justification defenses[50]), and secondly, they should be both necessary and proportional to the situation they are facing. These requirements are deeply discussed among academics. The necessity requirement indicates that "no less harmful means could have been used as effectively"[51]. However, it is often coupled with another dogmatic element, the *purpose*, which aims to partially subjectify the defense. As a consequence, especially in undercover operations, this criterion is often useful to increase the application of the defense[52]. By adding the *purpose*-element, it becomes a necessity that is usually extended in a longer term. Actors need to prove that they were pursuing the scope of further social interests: in this way, if the purpose is proved, even though they just *believed* their acts were necessary (even mistakenly), that will suffice for the public authority justification to come into play. This is a way to subjectivize the justification defenses[53], similar to Italian Art. 59 par. 4 c.p. There are doubts about how this requirement has been interpreted, especially when it applies to undercover operations aiming to instigate a crime.

Whereas *proportionality* is satisfied when the use of force does not exceed the relevance of the interest it aims to protect: "no matter how much force would be necessary to protect or further the interest at stake, no more force may be used than the relative importance of the interest warrants"[54]. These requirements present the common issue

49. Robinson, Baughman and Cahill, *Criminal Law* at 588 (cited in note 47).

50. *Ibid.*

51. *Id.* at 590.

52. *Ibid.* "Conduct motivated by the purpose to protect the relevant interest often will be necessary for that purpose, thus satisfying a necessity requirement. But a "purpose" requirement does give an actor somewhat greater latitude than would a pure 'necessity' requirement".

53. *Ibid.*

54. *Ibid.*

of defining which are their limits. Relating to entrapment, there is no significant case law to refer to. Indeed, it is rare for law enforcement officers to be prosecuted, as legal literature shows[55].

Therefore, the troublesome aspect appears to be, on the one hand, the extent of this defense that has just theoretical or textbook functional limits, lacking solid case law; on the other hand, the fact that "unlike defensive force justifications, the actor's authority under these provisions is not limited to defensive action"[56], but it is proactive as well.

3.5. *The manufacturing of criminal conducts*

As we approach the second critical issue linked to facilitating sting operations, this section faces the increased number of crimes incited by those who should prevent them in the first place. It is not by chance that American literature often referred to this phenomenon as "manufacturing criminal liability" where entrapment defense should constitute a "safeguard" against it[57].

Some examples may be helpful in understanding the nearly unlimited extension which characterizes investigative activities. Analyzing multiple operations, it emerges the police have printed false invoices (*United States v. Gonzales-Benitez*, 1976[58]), delivered heroin (*Hampton v. the United States*, 1976[59]), laundered money on behalf of Mexican cartels (in the well-known Operation Casablanca[60]), allowed drugs

55. See Joh, *Breaking the Law to Enforce It* at 158 (cited in note 26); see also Jacqueline E. Ross, *Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy*, 52 The American Journal of Comparative Law 584,585 (2017).

56. See Robinson, Baughman and Cahill, *Criminal Law* at 587 (cited in note 47).

57. John Braithwaite, Brent Fisse and Gilbert Geis, *Sting Facilitation and Crime: Restoring Balance to the Entrapment Debate*, 43(3) Journal of Social Issues 13 (1987); beforehand, John Griffiths, *The serpent beguiled me and I did eat: The constitutional status of the entrapment defense*, 74 Yale Law Journal 942, 955 (1965) "A fundamental objection to sting facilitation is that government agents should not be allowed to manufacture criminal liability by facilitating the commission of an offense that, but for the governmental action, would not have occurred".

58. *United States v. Gonzales-Benitez*, 537 F.2d 1051 (9th Cir. 1976).

59. *Hampton v. United States*, 425 U.S. 484 (1976).

60. About which, in a 1998 congressional resolution (adopted by 404 votes to 3), the participants in the operations were praised.

into prison (*United States v. Wiley*, 1986[61]), falsified documents[62] and stolen cars[63], sold food stamps and then claimed they had been stolen (*Shaw v. Winters*, 1986[64]), committed perjury (*United States v. Murphy*, 1985[65]).

Academics have questioned the limits within which police agents can commit crimes in terms of both authorization and scope. Hence, three types of crimes have been identified: constitutive, ancillary, and private purpose[66]. Both *constitutive* crimes (wrongdoing the police officer is sent to stop and may be committing along with the investigation) and *ancillary* crimes (wrongdoing instrumental to constitutive crimes committed by the undercover agent) can be committed under the public authority justification[67]. By contrast, *private-purpose* crimes cannot be committed without being prosecuted. This represents a complex issue in a system where the abuse of the police force is widely spread[68].

What was just described allows to understand the reason behind the interest academics have shown in sting operations, especially when they are analyzed compared to entrapment theory.

Criminal law and criminal procedure can be defined as a "democracy thermometer". Indeed, these two branches of law are critical in deciding *why* (substantive law) and *how* (procedural law) citizens' personal freedom can be restricted. In fact, for a long time, democracies have supported the argument that a country is safe when law enforcement has as much power as possible. This conclusion is grossly distorted, which is quite manifest because "a society that cares only

61. *United States v. Wiley*, 794 F.2d 514 (9th Cir. 1986).

62. See Ross, *Impediments to Transnational Cooperation in Undercover Policing* at 608 (cited in note 55).

63. See Marx, *Undercover* at 143 (cited in note 1).

64. *Shaw v. Winters*, 796 F.2d 1124 (9th Cir. 1986).

65. *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985).

66. See Ross, *Impediments to Transnational Cooperation in Undercover Policing* at 586 (cited in note 55).

67. *Id.* at 586 ff.

68. For in-depth studies on the problematic extension of law enforcement powers in the United States, we recommend reading an essay (exquisitely non-legal): Alex Vitale, *The End of Policing* (2017); or also: Jordan T. Camp, Christina Heatherton, *Policing the Planet: Why the Policing Crisis Led to Black Lives Matter* (2016).

about law enforcement has already lost most of what laws are necessary to protect"[69].

4. *The entrapment defense. Structure, analysis, problems*

4.1. *Introduction and presentation of general defenses*

We are going to analyze the central topic of the paper. The entrapment represents the link between public officials' corruption and sting operations conducted by law enforcement agencies. These kinds of operations are often adopted in bribery cases to provoke the crime commission and later arrest the suspect. Once the trial begins, the defendant can invoke the entrapment defense.

Even if it is difficult to precisely place it in time, we can assert that no courts granted the entrapment defense before 1870 and historically has three phases: when there was a private-law type of entrapment (founded on *Eggington's Case*, an English ruling from 1801); the defense's rise as a way to exonerate manufactured-criminals; finally, the academic efforts to deter government misconduct by developing an objective model of entrapment[70].

The institution of entrapment refers to a dogmatic subcategory of general defenses[71]. In American criminal law, general defenses are specified in justification defenses, excuse defenses and nonexculpatory defenses. About the first ones, even if a subject has satisfied the objective elements of a crime, the conduct is not only tolerated but sometimes encouraged[72] (an example is self-defense). The fact cannot

69. Ferdinand Shoeman, *Undercover Operations: Some Moral Questions about S.804*, 5(2) Criminal Justice Ethics 21 (1986).

70. Roiphe, *The Serpent Beguiled Me* at 271 (cited in note 41).

71. To deepen general *defenses* in the American legal literature, see: Paul H. Robinson, *Criminal Law Defenses* (West Publishing, St. Paul, 1984); more recently: Paul H. Robinson, Matthew Kussmaul, Camber Stoddard, Ilya Rudyak and Andreas Kuersten, *The American Criminal Code: General Defenses*, 7 Journal of Legal Analysis 37 (2015).

72. See Robinson, Baughman and Cahill, *Criminal law* at 528 (cited in note 47) "That is, while an actor satisfies the elements of an offense, her offense is tolerated (or even encouraged) because its offsetting benefits in a particular situation are such that it does not cause a net societal harm".

be considered a crime and it is completely lawful, and accordingly, it is not subjected to criminal prosecution of any kind or any other type of sanction (administrative, disciplinary, tax, etc.). There are also excuse defenses, a category only referring to the person and not to the fact as the previous ones. They apply when the person committing a crime cannot be considered responsible and thus blameworthy for his actions[73] (for instance, insanity). In this particular case, the actor could not have been expected to abide by the law[74]. Lastly, the nonexculpatory defenses: in these cases, criminal conduct is not excused, but sanction are prevented from being applied (diplomatic immunity is an example) because it furthers important social or political interests[75].

4.2. *The entrapment defense as to the theory of the offense*.

It is useful to analyze the entrapment defense according to the general theory of the offense in order to fully understand it. In common law systems, the study clearly cannot entirely rely on written laws. This statement might appear to be inconsistent with distinguished academics' affirmation claiming that the theory of the offense resides in "positive law"[76]. However, when it comes to common law systems, it is important to remember judicial precedent is considered as positive law, that exact "*quid* that can be changed".

European scholars could have trouble understanding the entrapment defense. Indeed, European studies about agent provocateur are mainly focused on the issue if the instigating agent engaged in criminal conduct. Sometimes the objective contribution is not deemed

73. See *ibid*. "Excuses apply to actors who have caused a net societal harm or evil - and are thus not justified - but who cannot justly be held responsible for their conduct".

74. *Id*. at 19.

75. See *id*. at 529 "Even for actors whose criminal conduct is not justified and who are fully responsible for it (thus not excused), the law might prevent punishment through application of a nonexculpatory defense ... because each furthers important societal interests that are thought, in particular cases, to outweigh society's interest in just punishment of criminal offenders".

76. See Bricola, *Scritti di diritto penale* at 554 (cited in note 4) "The general theory of crime resides on positive law, understood, however, it is a definitive datum, but as a *quid that* can be changed and to whose structural modifications the jurist, without exceeding his limits of competence, must cooperate".

subsisting, some others the subjective element is excluded; in other cases, however rare, the instigator may be found guilty.

Yet, what about the role of the instigated individual? As it was previously explained, the agent provocateur's actions during undercover operations are covered by the agency's authorization and possibly the public authority justification. However, the entrapment defense has to be deepened regarding the position of the instigated person who committed the crime. The question, under U.S. law, is whether or not the instigated person should be legally prosecuted if the crime would not have been committed without instigation.

About the entrapment defense, the lack of criminal punishment of the instigated person committing the crime upon incitement by police officers is not pivoted on the lack of *mens rea* or subjective element, but on a criminal-political interest, linked neither to the offense (justification defenses) nor to the defendant (excuse defenses), but only to a political conclusion *stricto sensu*. In other terms, people who would have not engaged in criminal conduct, but still committed a crime upon incitement by law enforcement, may not be charged solely because the system does not want to encourage illicit police actions.

However, it is our opinion the foundation of entrapment could be dogmatic as well, as to the theory of criminal sanction. The defense could be based on one of the criminal punishment's functions: the social re-education of the offender. It can be argued that prosecuting an instigated person who has committed a crime (or an inchoate crime) in such circumstances, would reasonably contrast with this punishment's theory which aims to socially reinstate offenders after imprisonment. The person did not want to engage in criminal conduct in the first place but did so just upon incitement by law enforcement. Therefore, holding him accountable and sanctioning him would diverge from the scope of social re-education of the offender since the criminal penalty in such a case would fall beyond its own sphere. How can a person not willing to commit a crime be socially re-educated?

Apart from the underlying *ratio*, which can be both political and dogmatic, academics and courts have thoroughly discussed entrapment's dogmatic position[77]. As anticipated, among scholars, the most

77. Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82(2) Columbia Law Review 236 ff. (1982).

distinguished sustain entrapment belongs to the third category, non-exculpatory defenses: "objective formulations of the entrapment defense ... clearly provide non-exculpatory defenses; they exist not as a reflection of the defendant's lack of blameworthiness, but as a means of deterring improper police conduct"[78].

Given the fact that the reason behind such exemption from criminal responsibility relies on the need to prevent police agents' unlawful conduct, this defense has nothing to do with the actor, conduct and event, or with the subjective element. Robinson keenly explained that, in this case, the absence of criminal sanction does not mean there is no blameworthiness; rather, it can be explained by the need to prevent and deter improper or, rather, criminal police conduct. The same reasoning can apply to due process defense which is also invoked in cases of sting operations.

According to other authors, the instigation to commit a crime can be justified by the duress theory[79], a type of defense similar to the Italian "state of necessity" *ex* Art. 54 c.p. However, the coefficient of coercion characterizing entrapment cases does not suffice to reach the duress defense[80].

Interestingly a data-based study conducted in the mid-1990s showed how U.S. citizens would prefer for entrapment to be considered as a mitigating circumstance (mitigation), rather than a defense that would completely eliminate the criminal liability of the subject who committed the crime[81] - as a matter of fact, in English criminal law it constitutes a mitigating circumstance and not a defense[82].

---

78. Robinson, Baughman and Cahill, *Criminal Law* at 852 (cited in note 47).

79. On the relationship between duress and entrapment, see Paul H. Robinson and John M. Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* 155 (Boulder, 1995) "Instead, they seemed to judge these cases using considerations similar to the ones they used in the duress cases, leading us to consider the possibility that the entrapment defense might properly disappear as a separate defense and be subsumed under the duress defense".

80. *Ibid.* "The "inducement" in entrapment may be analogous to the coercion that supports a duress defense. But a duress defense requires more than the existence of coercion, just as an insanity defense requires more than the existence of mental illness".

81. *Id.* at 154.

82. Andrew L.-T. Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* at 134-5 (Oxford University Press, 2003) "It was established by the House of Lords in

Ultimately, the dogmatic placement of entrapment as to the general theory of the offense can indeed be found within the nonexculpatory defenses, meaning that such conducts are both unlawful and criminal and the actor just results not liable for it because the penalty is removed due to social urgencies.

4.3. *Requirements: (a) inducement*

This section seeks to analyze the requirements of entrapment: the objective content of inducement by public officials and the subjective content based on the inclination not to commit a crime.

In 1932, in *Sorrells v. United States*, the first case where the applicability of this defense was recognized, the Court stated there is inducement where: "... the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences"[83]. *Mathews v. United States* (1988)[84] reaffirmed the necessary concurrent presence of both these requirements and entrapment was invoked in a bribery case.

Jacobson v. United States (1992), another important Supreme Court ruling involving the requirement of inducement[85], regards a bill of 1984 banning children's pornography magazines from being published and purchased. Before 1984, Mr. Jacobson had bought a few of those magazines, and years after, when the bill was already enacted, some fake organizations supporting free sexuality between adults and minors called him in order to sell him some materials: he accepted and was arrested immediately after.

During the investigations, the prosecutor realized the only child pornography magazine in Jacobson's home was the one the agent provocateur had sold him. This is the reason why the Court granted the entrapment defense in favor of Jacobson: there was no evidence

---

R v *Sang* almost three decades ago that there was no defence of entrapment in English criminal law, but that entrapment could be taken into account in mitigation of sentence".

83. *Sorrells v. United States*, 287 U.S. 435, 441 (1932).

84. *Mathews v. United States*, 485 U.S. 58 (1988).

85. *Jacobson v. United States*, 503 U.S. 540 (1992).

indeed that he would have committed the crime if he had not been provoked.

In *Sorrells* and *Jacobson*, Courts based their ruling on the principle that the government cannot instigate people who otherwise would not have committed any crime[86]. The courts clarified the concept of incitement, affirming that the mere opportunity or suggestion may not be considered as inducement for entrapment purposes[87]; at the same time, academics and jurisprudence consider inducement a necessary but insufficient requirement[88]. Thus, the predisposition of the instigated person aims to establish whether or not police officers participating in undercover operations have instigated an "undisposed person" to perpetrate a crime he would never have committed[89].

4.4. *Requirements: (b) predisposition, real and apparent*

The second requirement is the lack of inclination of the instigated person to commit a crime[90].

As shown by by *United States v. Viviano* (1971), once inducement is established, the prosecutor must prove, firstly, the predisposition by demonstrating the defendant was used to engage in such criminal conduct; secondly, that the defendant had already formed a pattern to realize the offense; and, finally, the willingness to commit the crime upon inducement by the police[91].

---

86. *Sorrells v. United States*, 287 U.S. 435, 442 (1932) "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute".

87. *United States v. Simas*, 937 F.2d 459, 462 (1991) "Mere suggestions or the offering of an opportunity to commit a crime is not conduct amounting to inducement".

88. Douglas R. Young, *Entrapment in Federal Bribery and Corruption Cases*, Complex Crimes Journal 150 (1994).

89. *United States v. Kelly*, 748 F.2d 691, 697 (1984) "Inducement focuses on whether the government's conduct could have caused an undisposed person to commit a crime".

90. As regards the subjective element in *entrapment defense*, see the survey by Robinson and Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* at 147 ff. (cited in note 79).

91. *United States v. Viviano*, 437 F.2d 295, 299 (1971) "Once the defendant demonstrates inducement, the Government may prove propensity by showing (1) an existing course of criminal conduct similar to the crime for which the defendant is charged,

In *Russell* and *Hampton*[92], the Courts crystallized a subjective test[93]: in matters of evidence, how the government exercised its investigation power during undercover operations is less decisive than the predisposition the subject showed to commit the crime. Not by chance, predisposition is considered "the principal element in entrapment defense"[94]. In this case, the defendants' lawyers proposed the objective test, insisting on the incitement element; however, until today, except for some concurrence opinions, this test has been rejected.

Generally, some conditions have been selected to show whether or not the defendant's predisposition subsists[95] and since predisposition is a subjective characteristic, it needs to be proved by evidence[96]. Some of the conditions to be considered are the kind of behavior adopted towards the instigation, the person's mental health before the instigation, characteristics of the negotiation between the incited subject and the agent, and whether or not the subject has refused to commit similar offenses in the past. Some of these elements clearly aim to represent the predisposition requirement; others seem to be more related to Cesare Lombroso's theory on biological determinism rather than substantial criminal law[97].

Interestingly, the level of predisposition to invoke entrapment defense in favor of the defendant is way greater in bribery cases rather than in drug-related crimes, another offense in which undercover operations are common[98]. This is how the Court faced the issue: "... such officials are often intelligent, educated and worldly, it is unlikely that

---

(2) an already formed pattern on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement".

92. Rulings mentioned before referring to the due process defense, often involved in entrapment cases.

93. Patrick M. Verrone, *The Abscam Investigation: Use and Abuse of Entrapment and Due Process Defenses*, 25(5) Boston College Law Review 356,357 (1984).

94. *United States v. Russell*, 411 U.S. 423, 433 (1973).

95. *United States v. Dion*, 762 F.2d 674, 687,688 (1985).

96. Young, *Entrapment in Federal Bribery and Corruption Cases* at 152 (cited in note 88).

97. Kevin Walby and Nicolas Carrier, *The rise of biocriminology: Capturing observable bodily economies of "criminal man"*, 10 Criminology and Criminal Justice 266 ff. (2010).

98. Young, *Entrapment in Federal Bribery and Corruption Cases* at 155 (cited in note 88).

they will accept money from those to whom they have not had "safe" introductions ... Since the ultimate factual determination is whether the defendant was "ready and willing to commit the crime if an opportunity should be presented", as distinguished from having been "corrupted by some overreaching or special inducement", the very acceptance of a bribe by a public official may be evidence of a predisposition to do so when the opportunity is presented"[99]. However, this way of thinking is more criminological than juridical and is not persuasive for the following reasons.

The court finds it hard to recognize real predispositions for bribery conducts. Indeed, unlike other criminals, the so-called white-collar offenders are more intelligent, educated, and experienced. As a consequence, when a public official commits a crime after being instigated by an undercover agent, even if it is the first time occurring, the Court may affirm the predisposition requirement to be fulfilled.

Above all, according to the general theory of the offense, a requirement like predisposition cannot be interpreted arbitrarily only for the purposes of a non-exculpatory defense. Secondly, the Court's interpretation violates the equality principle[100]: a subject accused of drug-related crimes could invoke the entrapment defense easier than in bribery cases, taking advantage of a more real or effective interpretation of the predisposition requirement.

Therefore, this is why a person accused of bribery would experience difficulties in proving the absence of predisposition. As shown, even a single criminal conduct committed by the same person would be sufficient to show a predisposition. This constitutive element is apparent since it does not apply to bribery cases like others. In this scenario, the criterion of predisposition is, in fact, illusory: proving the absence of any inclination to commit a crime seems impossible when the commission of the only incited offense is enough to consider that individual prone to criminal conduct.

99. *United States v. Jannotti*, 673 F.2d 578, 604 (1982).

100. The equality and non-discrimination principles are recognized by the 14th Amendment of the U.S. Constitution; Art. 14 of the European Convention on Human Rights (ECHR); Art. 2 of the Universal Declaration of Human Rights (UDHR); Art. 27 of the International Covenant on Civil and Political Rights (ICCPR); Art. 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

As a result, for the prosecution to indict the defendant in drug offenses, the subject has to be consistent in his criminal behavior; whereas referring to bribery, a single and isolated criminal conduct will be enough to prevent defendants from taking advantage of the entrapment defense. Assuming a procedural perspective, the direct and (il)logical consequence will be that a drug dealer will have way more benefits from the system versus a public official who committed bribery, even when the latter has no criminal records. Therefore, it can be declared that such conclusions are not based on substantial criminal law.

Eventually, it is important to also include that courts cannot arbitrarily decide to interpret the same constitutive element of the defense in such contrasting ways, basing its decision on the social position of the offender. As to the equality principle, it constitutes a serious violation considering that everybody should be treated the same way under the law.

4.5. *The problematic extension of police officers' power and the objective-element corrective*

The last issue is the extension of the police's powers in inducing a subject to commit a crime. Courts stretched the meaning of inducement, which now includes different conducts, such as persuasion, but also as threats or coercive tactics[101]. It is hard to consider persuasion, threats, and harassment at the same level when influencing the commission of a crime. There is no argument able to support that choice.

An objective-element corrective in order to make the subjective test less critical could be a possible solution[102]. It would help to link predisposition to the public official's inducement action.

---

101. *United States v. Burkley*, 591 F.2d 903, 914 (1978) "... inducement that is, for a finding of persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, pleas based on need, sympathy, or friendship, or any other government conduct that would create a risk of causing an otherwise un-predisposed person to commit the crime charged.".

102. This view is supported by authors who "push for an objective model of entrapment designed to deter government misconduct", e.g., Roiphe, *The Serpent Beguiled Me* at 271 (cited in note 41).

Considering how broad police officers' conduct could be in discovering corruption, when that influence appeared particularly pervasive (i.e., threats), the subjective test to assess the predisposition of the incited person should be less strict. It is blatant that an insistent instigation is more likely to reduce margins for resistance to incitement.

Therefore, the subjective test should be used to assess predisposition but sharpened as hereby described. In this way, even a person accused of bribery could be able to prove the lack of predisposition by demonstrating the intense pressure they suffered. On the contrary, this defense would not apply in the case of simple agents' persuasive behavior when the incited person poorly resisted the instigated crime and promptly welcomed it. Without sharpened scrutiny, the same subjective test applied to different situations could raise grave theoretical discrepancies and constitutional inequalities.

In *United States v. Townsend* (1977), the court related to a similar principle even if it was placed in a footnote and was not part of the opinion where principles of law reside[103]. Therefore, it is easy to understand why the entrapment defense is so often denied: the scrutiny applied to assess the subjective test element is very hard to overcome by the defendant, and it is even harder for bribery cases, where the predisposition element plays an illusory role.

4.6. *The leading case: United States v. Barta (2015).*

Despite the problems of invoking the entrapment defense, the presentation of a rare[104] bribery case shows an opposite situation: *United States v. Barta* (2015)[105]. Paradoxically, the court decided entrapment's defense could apply since the prosecution recognized in the first place the lack of predisposition.

---

103. *United States v. Townsend*, 555 F.2d 152, 145 (1977) "First, one considers the defendant's personal background to determine where he sits on the continuum between naive first offender and street-wise habitue. Second, one considers the degree of coercion present in the instigation law officers have contributed to the transaction. The stronger the inducement and the scantier defendant's background, the greater is the need to declare an entrapment".

104. As recently specified in Charles Doyle, *Attempt: An Overview of Federal Criminal Law* at 11 (Congressional Research Service 2020).

105. *United States v. Barta*, 776 F.3d 931, 937 (7th Cir., 2015).

In this case, the prosecutor aimed to show that the crime had not been instigated by police forces; therefore entrapment defense could not be invoked, lacking the first objective requirement. If a crime has never been instigated, there is no inducement, and accordingly, entrapment's applicability is logically excluded.

In the case at hand, Mr. Barta is convicted in the first proceeding because, while conducting an undercover operation, he and other co-defendants bribed a fake public official to draft a contract on behalf of the government in California. In court, even though the prosecution acknowledged that the defendant was contacted several times in order to lead him to commit the crime, they also argued that the specific number of contacts was lower compared to other cases where entrapment defense was not deemed conclusive[106], implying that there was no actual incitement by the police.

However, the court affirmed there are no "per se" rules and stated that "it is not just the number of contacts between Castro and Barta or the length of their relationship that amounted to inducement here. It was also the frequency of those contacts. And the fact that the emails and calls to Mr. Barta received no responses-even when they gave fake ultimatums"[107]. The Court deemed that behaviors held by the fake-California public official resulted in incitement and, as a consequence, must be considered in the decision for the entrapment defense purposes.

The analysis was focused on a qualitative element more than a quantitative one: the frequency and intensity[108] of contacts in a short while, pressuring Mr. Barta into the commission of the offense. The Court claimed that what matters is the way inducement took place in the short term rather than considering the number of individual encouragements and instigations to carry out the conduct. At that time, in *Barta*, the frequency and recurrence of police contacts led to a criminal inclination by the defendant that would never have happened without police's incitement.

106. *Id.* at 937.
107. *Id.* at 938.
108. It is to be translated here as "recurring" or "insistent".

4.7. *The Supreme Court and the logic asymmetry about predicate offense*

Lastly, a further issue about the predicate offense's function related to entrapment defense needs to be analyzed. As the Court ruled in *United States v. Russell* (1973), the commission of a crime is necessary to invoke the entrapment defense[109]: the problem is understanding whether the entrapment defense can take place even if the offense is not constituted in all its typical elements.

In this scenario, the Court affirmed that the defendant could not logically sustain the lack of constitutive elements of the offense and entrapment defense at the same time[110]: it is illogical to couple the nonexecution of a crime with entrapment defense. At first glance, the Supreme Court's ruling seems reasonable. However, there is an issue worthy of attention.

As a matter of fact, the U.S. criminal law system considers an attempted crime as "a perfect one" too[111]. It is an offense even if inchoate and despite the lack of one typical element: the naturalistic or normative event of the crime. As a consequence, if an instigated public official made a substantial step to commit a crime (we consider extortion as an example), but then changed his mind, he would be found guilty of the inchoate offense, while not being able to benefit from the entrapment defense anymore.

The committed crime would indeed not have all the required elements to be considered a crime for entrapment defense purposes. Thus, in order to invoke the entrapment defense, a "consummated crime" is essential.

---

109. *United States v. Russell*, 411 U.S. 423, 435 (1973) "The entrapment defense is rooted ... in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government".

110. *Mathews v. United States*, 485 U.S. 58, 63 (1988) "The Government insists that a defendant should not be allowed both to deny the offense and to rely on the affirmative defense of entrapment. Because entrapment presupposes the commission of a crime, a jury could not logically conclude that the defendant had both failed to commit the elements of the offense and been entrapped".

111. For an in-depth discussion of attempted crime within the U.S. landscape, see Michael T. Cahill, *Inchoate Crimes*, in Markus D. Dubber and Tatjana Hörnle (ed.), *The Oxford Handbook of Criminal Law* (New York 2014).

This conclusion reveals some issues with sanctioning treatment. There is a paradoxical contradiction between a subject who committed a crime and could invoke the entrapment defense and a subject who only attempted to commit it. Indeed, in case of an attempt, the defendant would not be able to benefit from the nonexculpatory defense because of the lack of one constitutive element of the offense and, in this way, that attempted crime's penalty would apply.

5. *The "agent provocateur" in the Italian and European legal systems*

5.1. *Introduction*

In this paragraph, we will analyze whether or not the agent provocateur figure, and consequently, the entrapment defense, may apply to the Italian and European legal systems.

As previously stated, entrapment represents a nonexculpatory defense. Indeed, the subject who is instigated to commit a crime by police will not suffer any punishment when it is proved the fact would not have been committed without that incitement.

It is important to clarify the role entrapment defense assumes in the United States: it aims to balance a very invasive power by police officers, especially in white-collar crimes such as corruption cases, even if it does not succeed in such a purpose[112]. As some academics pointed out[113], European countries start from the opposite assumption,

112. John Braithwaite, Brent Fisse and Gilbert Geis, *Sting Facilitation and Crime: Restoring Balance to the Entrapment Debate*, 43(3) Journal of Social Issues 13 (1987). In the same sense also Roiphe, *The Serpent Beguiled Me* at 275 (cited in note 41).

113. Gabriella Micheli, *L'agente sotto copertura nei reati contro la pubblica amministrazione*, 12 Dir. pen. e proc. 1712 ff. (2019) "In fact, the Model Criminal Code of the United States provides that the induction to the crime (the so-called entrapment) by the public agent, can be utilized as a defensive argument to ask for acquittal if the defendant is able to demonstrate that, without the provocation, he would not have committed the crime. On the other hand, in the United States, where the undercover operations are widely utilized also for the counteraction of crimes against the public administration, the entrapment defense is an exception intended to counterbalance the very ample power that the forces of law and order have in the ambit of the undercover operations. Opposite is, however, the assumption from which European orders move in order to place a guarantee against the abuse of agents ...".

focusing more on the position of the agent provocateur than the instigated one.

Even though Italian Law No. 3 of 2019 does not include the agent provocateur figure, it introduced new defenses for undercover agents in bribery cases and, as a consequence, it is also clear this bill sourced from the assortment of U.S. legal remedies to combat public corruption. This is why it is critical to take into consideration the impact the introduction of covert operations facilitating crimes could imprint on the Italian and European legal systems: it could indeed represent the next remedy to emulate the United States in the fight against bribery.

The first critical aspect regards the theoretical foundation of these defenses, as to the general theory of the offense according to Italian principles on law enforcement incitement conducts; the second is connected to the European Court of Human Rights standing on sting operations facilitating crimes; finally, a general remark is brought into play: the *extrema ratio* principle, according to which criminal law has to be the last resort of the whole legal system.

In other words, if European scholars are still shy with respect to undercover operations, serious problems arise when we try to envision the agent provocateur figure within the Italian or European legal system.

5.2. *A. Italian principles on law enforcement incitement conduct*

It may be unclear if incitement conducts by law enforcement can be considered suitable for the Italian legal system.

Art. 55 of the Italian code of criminal procedure (also "c.p.p.") provides that the Judicial Police has the duty to "prevent crimes from being carried to further consequences, search for the perpetrators, carry out the necessary acts to secure evidence and collect whatever else may be useful under the law".

Someone could argue there is no room for the agent provocateur figure because it would clash with principles regulating preliminary investigations and the role of Judicial Police when it comes to "prevent crimes from being carried to further consequences", considering the provoking actions by police officers in entrapment cases. In other terms, Judicial Police could not instigate a crime without being considered guilty of participating in the offense for moral, more likely

than material, contribution[114] to the commission (or even the attempted commission) of a crime[115].

On the opposite, similarly to what courts stated in the past[116], the agent provocateur's consistency with the Italian system may be claimed by considering the justification defense of execution of a public duty under Art. 51 and 55 c.p.p. According to these articles in combined reading, a police officer can be covered by such justification defense because of the general duty of preventing criminal behaviors.

However, those arguments could also be used to oppose that conclusion: Judicial Police must also prevent crimes "from being carried to further consequences". For this reason, without reform, there is no room in Art. 55 c.p.p. to include "inciting to committing a crime" among public officials' functions, as, under Italian law, a duty to prevent further consequences stands and it forbids any kind of instigation conduct.

On the opposite, in the United States sting operations are covered by public authority justification, the complete defense for acting under a law enforcement duty, similar principle to Art. 51 c.p., but – as shown – much broader.

The agent provocateur's acts may be deemed criminal without a general defense to cover such conduct because, although distinguished Italian doctrine opposes this thesis[117], it does not seem convincing to argue the absence of intent in inducement conducted by law enforcement. Meaning there is no mental element since the agent provocateur does not want the crime to be committed but acts with the aim of bringing the guilty to justice.

The thesis is not satisfying for the simple reason that the agent provocateur, as to the psychological element, actually wants the instigated subject to carry out the criminal conduct precisely to expose

114. To deepen the criminal participation within a crime, see Marcello Gallo, *Lineamenti di una teoria sul concorso di persone nel reato* (Milan 1957); Sergio Seminara, *Tecniche normative e concorso di persone nel reato* (Milan 1987).

115. Considering that attempted criminal participation is not indictable, whereas a criminal participation to commit an attempted crime is.

116. Anna Paola Liguoro, *L'agente provocatore: cosa sancisce la Corte di Strasburgo e come si muove la giurisprudenza italiana sul tema*, Ius in Itinere 2 (2018), available at http://www.iusinitinere.it/ (November 11, 2022).

117. Among others De Maglie, *L'agente provocatore* at 399 (cited in note 1).

him. Otherwise, the instigated person could not be punished in the chance that he does not commit the crime.

The agent provocateur wants the crime to happen. However, this circumstance does not constitute his true purpose, which is the pursuit of justice as to the subject who engaged in criminal conduct when incited to do so: therefore, it seems to be specific intent and that is the mental element supporting the conduct by an actor who *incidentally* wants the commission of the offense, whereas actually has a further purpose[118]. Surely, if the agent provocateur does not want the crime to occur, he would not be able to achieve the goal of arresting the instigated person, since no criminal offense would have been then materialized.

5.3. *B. The European Courts of Human Rights' view on sting operations facilitating crimes*

The following paragraph will focus on whether the agent provocateur's role is consistent with due process principles under Article 6 of the European Convention on Human Rights[119].

The Grand Chamber of the European Court of Human Rights in Strasbourg clarified that, even though sting operations are generally accepted when certain guarantees are observed[120], an undercover agent is not only banned from instigating the commission of crimes but if

118. Robinson, Baughman and Cahill, *Criminal Law* at 127 (cited in note 47). "The actor must have some further purpose or design in mind when doing so"*;* on mens rea in American criminal law see Francis B. Sayre, *The Present Significance of Mens Rea in the Criminal Law*, Harvard Legal Essays 399, 404 (1934).

119. About it, also Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings* at 135 ff (cited in note 82); Francesco Vergine, *Poche luci e molte ombre nelle nuove norme introdotte dalla legge n. 3 del 2019*, 1 Il proc. 13,14 (2019) "For this purpose, it must also be underlined those undercover operations involve high risk of becoming undue instruments of instigation to the crime. In these terms, undercover agents cannot instigate or determine the subjects under investigation to carry out corruptive acts which, in the absence of the agent's action, would not have been carried out. In fact, the risk is a *non-pecuniary liability* under art. 323-ter c.p. and a ban from using evidence they collected during those undercover operations in trial".

120. *Khudobin v. Russia,* no. 59696/00, 26/10/2006, 27 "... The Court's case-law does not preclude reliance, at the investigation stage of criminal proceedings and where the nature of the offence so warrants, on evidence obtained as a result of an undercover police operation".

he were to hold these forbidden actions, any of the gathered evidence could never be used in the trial[121]. This ban is defined as "external" by recent doctrine because it regards the necessity not to manufacture brand-new criminal activity[122].

Without considering some concerning rulings[123], in the last years, the Italian Supreme Court has excluded undercover agents' blameworthiness when the conduct does not result in the instigation of the crime[124].

The European Court of Human Rights has played a crucial role in defining what is considered "criminal" as to sting facilitating operations. In one of its most important decisions, the Strasbourg Court, defining the difference between an undercover agent and a provocateur agent, stated that "police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offense that would otherwise not have been committed, in order to make it possible to establish the offense, that is, to provide evidence and institute a prosecution"[125].

Counterintuitively, in this passage, the Court bases its reasoning on the very same U.S. concepts of incitement and predisposition. Thus, even though this ruling seems to state the opposite, the Court here

121. *Teixeira De Castro v. Portugal*, no. 44/1997/828/1034, 9/6/1998, 9 "Although the admissibility of evidence is primarily a matter for regulation by national law, the requirements of a fair criminal trial under Article 6 entail that the public interest in the fight against crime cannot justify the use of evidence obtained as a result of police incitement". In the same sense, see also *Edwards and Lewis v. The United Kingdom*, nos. 39647/98 and 40461/98, 27/10/2004.

122. Paolo Ielo, *L'agente sotto copertura per i reati di corruzione nel quadro delle tecniche speciali di investigazioni attive e passive*, Dir. pen. cont. (2019) "Both Court of Legitimacy and the ECHR place an external limit on the activity of the undercover agents, consisting of the need not to instigate or provoke criminal activity".

123. See, as an example: Cassazione penale, Sezione III, 10.1.2013, no. 254174 or also Cassazione penale, Sezione III, 3.7.2008, no. 240270.

124. Ex multis: Cassazione penale, Sezione VI, 17.4.2008, no. 16163; Cassazione penale, Sezione III, 7.4.2011, no. 17199; Cassazione penale, Sezione III, 9.5.2013, no. 37805; Cassazione penale, Sezione III, 7.2.2014, no. 20238; Cassazione penale, Sezione VI, 11.12.2014, no. 51678; Cassazione penale, Sezione III, 15.1.2016, no. 31415.

125. *Ramanauskas v. Lithuania*, no. 74420/01, 5/2/2008, 12.

explains that the provocateur agent is not completely unlawful under the Convention law, especially according to what Art. 6 provides. In fact, by saying "that would otherwise not have been committed", the Court seems to refer to that negative counterfactual requirement the U.S. system deems essential for the entrapment defense.

To be clear, the Grand Chamber based its reasoning on the undercover agent's causal contribution: the so-called *but-for* test of causation aimed to understand whether police facilitated the commission of the offense or, on the contrary, exercised definitive influence on a person who would not have engaged in criminal conducts[126].

All considered it is also true that the Court took into account the predisposition requirement in *Khudobin v. Russia* (inspired by Teixeira de Castro's ruling): "the Court has previously considered the use in criminal proceedings of evidence gained through entrapment by State agents. Thus, in the case of Teixeira de Castro the applicant was offered money by undercover police officers to supply them with heroin. Although having no previous criminal record, he had contacts for obtaining drugs. Tempted by the money, the applicant accepted the officers' request. He was subsequently charged and convicted of a drug offense"[127].

Thus, here is the question: what would the Court have observed if Mr. de Castro had a criminal record related to drug crimes? Had predisposition been present? As a matter of fact, on this topic, the U.S. influence shines through similar phrasing by the Court: the Grand

126. Beatrice Fragasso, *L'estensione delle operazioni sotto copertura ai delitti contro la pubblica amministrazione: dalla giurisprudenza della Corte EDU, e dalle corti americane, un freno allo sdoganamento della provocazione poliziesca*, Dir. pen. cont. (2019), available at https://archiviodpc.dirittopenaleuomo.org/d/6530-lestensione-delle-operazioni-sotto-copertura-ai-delitti-contro-la-pubblica-amministrazione-dalla-gi (last visited November 11, 2022). "[*If law enforcement*] have simply allowed the appellant to commit a crime which he would have committed anyway or whether they have exercised a decisive influence, instilling in the appellant's mind a criminal intention which have not existed before". In the same sense, with considerable analysis of the procedural elements, see also Antonio Vallini, *Agente infiltrato, agente provocatore e utilizzabilità delle prove: spunti dalla giurisprudenza della Corte EDU,* Dir. pen. cont. (2011), available at https://archiviodpc.dirittopenaleuomo.org/d/667-agente-infiltrato-agente-provocatore-e-utilizzabilita-delle-prove-spunti-dalla-giurisprudenza-della (last visited November 11, 2022).

127. *Khudobin v. Russia*, no. 59696/00, 26/10/2006, 27.

Chamber theoretically does not accept the agent provocateur's function since, in its rulings, it clearly brings out the differences between a legit sting operation and a forbidden facilitating operation. However, they are tempted to think within U.S. legal categories, and it is evident from the remark on Mr. de Castro's criminal record: it is reasonable to think that if he had had a drug-related criminal record, the Court could have argued for the presence of predisposition to engage in criminal conduct.

In other words, it seems that the Strasbourg Court, in order to acquit Mr. de Castro, states that the lack of predisposition is proved, so the defendant was entrapped, resulting in a violation of Art. 6 of the European Convention. Similarities with the American system are stunningly evident.

This is why we tend to affirm that, despite the theoretical discrepancies, the European Court of Human Rights – but also the Italian Supreme Court mentioned above – are in a constant, however silent, dialogue with the U.S. courts: still remain the concerns about the extension of law enforcement inducement actions within the American system.

5.4. *C. The extrema ratio principle*

Another aspect must be considered to understand why sting operations facilitating crimes cannot be admitted into European legal systems. In this paragraph we will argue that the principle of *extrema ratio* forbids undercover agents' incitement conduct[128].

Extrema ratio principle regulates the relationship between the usage of criminal law instruments (which conducts are deemed to be an offense and what punishment it deserves) and the democracy rate of a certain legal system: criminal law should, indeed, cover a minimalistic function in liberal democracies.

128. On *extrema ratio's* concept, German criminal law literature has deeply focused its interest: Bernd Hecker, *Das strafrechtliche Verbot geschäftsmäßiger Förderung der Selbsttötung* (§ 217 StGB), 163(7) Goltdammer's Archiv für Strafrecht 455-471 (2016); Albin Eser and Detlev Sternberg-Lieben, *§ 217* in Adolf Schönke and Horst Schröder (ed), *Strafgesetzbuch Kommentar* (C.H.Beck 30th ed, München, 2019); Urs Kindhäuser, Ulfrid Neumann and Hans-Ullrich Paeffgen, *§ 217*, in Adolf Schönke et. al., *Strafgesetzbuch, Vol. 2* (Nomos 5th ed, Baden-Baden, 2017).

It is known in U.S. legal literature as "last resort principle" or "ultima ratio principle" and has been deeply analyzed in works focused on limits of criminal law and overcriminalization problems[129]. As it will be shown, such principle is yet studied from opposite views: the U.S. one mainly focuses on overcriminalization and number of offenses (is it justified to have so many offenses in our criminal system?); whereas the European one focuses more on punishments (is it justified to impose a criminal penalty upon an individual for so many conducts?). Two different ways to sketch the same problem up: the first is more related to the legality principle; the latter more related to the harm principle[130].

In postmodernism, such principle was challenged[131] because of its origins backing to the Enlightenment period[132]. During those years, the main gnoseological approaches[133] were logical-deductive (Carte-

129. Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 The Annals of the American Academy of Political and Social Science 854 (1967); Douglas N. Husak, *Overcriminalization. The Limits of the Criminal Law* (Oxford University Press, New York, 2008); Douglas N. Husak, *Applying Ultima Ratio: A Skeptical Assessment*, 2 Ohio St. J. Crim. 535 (2005); Douglas N. Husak, *The Criminal Law as Last Resort*, 24 Oxford Journal of Legal Studies 207, 235 (2004).

130. On criminal law fundamental principles: Paul H. Robinson, *Criminal Law's Core Principles*, 14 Washington University Jurisprudence Review, 157 (2021).

131. Postmodernism is a cultural current which has developed since the second half of the twentieth century. It affected all disciplines: science (i.e., Einstein's theory of relativity or Heisenberg's uncertainty principle), literature (i.e., Calvino), philosophy (i.e., Freud or Nietzsche). This phenomenon is about the epistemological rupture of all the certainties related to the theory of knowledge known until then. To deepen the harm principle in this context, see Gabriele Fornasari, *Offensività e postmodernità. Un binomio inconciliabile?* 61(3) Riv. it. dir. proc. pen., (2018). On the concept of harm principle, see also: Domenico Pulitanò, *Offensività (principio di)*, Enc. dir., Annali, VIII (2015).

132. Alberto Gargani, *Il diritto penale quale extrema ratio tra postmodernità e utopia*, 61(3) Riv. it. dir. proc. pen., 1489, 1490 (2018) "Coupled with the canon of proportion, the principle of the extrema ratio was known in the Enlightenment-liberal thought, at the origins of modern legal culture ... . The theoretical value of this principle is widely shared both in civil law (for instance, the principle of Subsidiarität in the Germany and the minimum intervention criterion in Spain) and in common law systems (see, the Anglo-Saxon reference to the "minimalist approach" and to "criminalization as a last resort")".

133. "Gnoseology" in philosophical studies is the process through which the subject knows the object. It is the theory to understand how humans engage in the knowledge process.

sian) or empirical-inductive (Galilean). When postmodernism arose, and a new epistemological method was spread, these approaches were abandoned, and even the principle of *extrema ratio* became less decisive. However, scholars keep on stressing the importance in post-modernity of *extrema ratio* principle, not only as a theoretical benchmark but assuming a functional approach during criminal trials as well[134].

It is claimed that *extrema ratio* criminal approach's first scope is to set a limit on criminal sanctions in terms of general prevention and subsidiarity principle[135].

According to the subsidiary principle, criminal law must not be invoked when any other branch of the legal system may apply to solve an issue, referring to the minimalist function of criminal law[136]. However, suppose the instigated person cannot be prosecuted yet (since the crime has not been committed or evidence is not collected[137]): in that case, the question is how can we consider an undercover agent's conduct consistent with the principle of subsidiarity when the agent promotes himself the commission of crimes and claims the lawfulness of his own conduct?

It is important to point out that crimes usually object of instigation are connected to severe penalties (drugs, white-collar crimes, internet sex offenders, etc.), so it calls for both a complete and solid regulation of the matter and deep scrutiny by academics.

To better explain, according to subsidiarity and *extrema ratio*'s principles, under criminal law, a crime can be prosecuted only after the verification of a typical, wrongful, and blameworthy fact. And instead, one must refrain from using it when a need, merely tied to the investigations of law enforcement, arises. Furthermore, the process of constitutionalizing the principle of *extrema ratio* crosses the

134. Gargani *Il diritto penale quale extrema ratio tra postmodernità e utopia* at 1496 (cited in note 132) "In post-modernity, criminal law became crucial in social conflicts so that extrema ratio [principle] must apply to the criminal trial as a social control technique. It is not only the neutral and instrumental dimension to test whether or not a person is guilty, now it aims to perform complex functions".

135. *Id* at 1490.

136. On this topic, Mike C. Materni, *The 100-plus-Year Old Case for a Minimalist Criminal Law (Sketch of a General Theory of Substantive Criminal Law)* 18(3) New Crim. L. Rev. 331, 347 ff. (2015).

137. Paolo Scevi, *Riflessioni sul ricorso all'agente sotto copertura quale strumento di accertamento dei reati di corruzione*, 1 Arch. pen. 5 (2019).

(mediated or immediate) link with the Constitution as to the theory of legal goods protected by the criminal system[138], and it further thins out the margins of a constitutionally oriented instigating conduct.

To clarify, a great philosopher and criminalist stated: "criminal justice is necessary even if painful; if it exceeds the bounds of necessity, just the pain remains"[139]. Now, it is clear that in order to understand what *necessity* means, it is crucial to analyze law enforcement incitement to commit crimes since it reflects the fundamental limits of criminal law. It would be especially interesting to know whether the so-called "pragmatic logic of double effect" would apply to this situation: in a liberal democratic criminal law, "would an unlawful behavior be accepted when it aims to a right scope?"[140].

As anticipated, classically, *extrema ratio* theory limits criminal law action as to the general prevention[141]; however general deterrence is not enough to justify the role of the provocateur agent. We tend to believe the *ultima ratio* principle's aim does not only reside in the limitation of the *ius terribile* as general prevention[142], but also in a special-preventive perspective.

Under this view, it can also be argued that such principle limits the use of criminal punishment in facilitating undercover operations because the guarantees to which the criminal system must be subjected cannot be disregarded to ensure that a police officer inciting crimes is not criminally liable.

---

138. Fornasari, *Offensività e postmodernità. Un binomio inconciliabile?* 61(3) Riv. it. dir. proc. pen. 23 (cited in note 131).

139. Claus Roxin, *Fragwürdige Tendenzen in der Strafrechtsreform*, 3 Radius 37 (1966).

140. Gabriele Fornasari, *Dilemma etico del male minore e «ticking bomb»* scenario. Riflessioni penalistiche (e non) sulle strategie di legittimazione della tortura at 233 (ESI, Naples 2020).

141. As to the theory of criminal punishment, general prevention is the general deterrence on people when a crime is followed by punishment. It is opposed to special prevention, which is, on the other hand, the specific deterrence on the very person who committed the crime. According to this view, the general prevention principle means that the criminal sanctioning system aims to prevent people from engaging in criminal conducts; whereas special prevention aims to prevent that person who just committed the crime from engaging in (more) criminal conducts.

142. Gargani, *Il diritto penale quale extrema ratio tra postmodernità e utopia* at 1489 (cited in note 132).

We will make the case of a subject who, according to the police, has engaged in bribery; however, the prosecutor has not collected enough evidence for the indictment. Would an undercover operation be legitimate to provoke that same person into committing another act of corruption? In such a case, it is reasonable to believe the *extrema ratio* principle limits the use of criminal sanction in special prevention terms: prosecuting that same person by gathering more evidence through incitement conduct by police officers violates the *extrema ratio* principle as to its special prevention function.

In other words, these remarks aim to clarify that the *extrema ratio* principle would be diminished and emptied if considered a limit to criminal intervention solely under the general-prevention perspective. As a matter of fact, in the cited example, it bars the inciting action by a police officer because of criminal punishment's special-prevention function. If that is the deterrence for a single person to reiterate the offense, it means that the *ultima ratio* principle prohibits the Judicial Police from instigating a crime on the suspicion the individual may have already engaged in criminal conducts in order to impose a sanction for the new incited conducts.

The deterrence cannot be limitless: sting operations, agent provocateur, and entrapment cases should be confined by the subsidiarity principle, the *general prevention* theory of punishment, as well as by the *special prevention* perspective theory of punishment. The former is the general dogmatic conception according to which, within a democratic society, the criminal sanction cannot be used to create public deterrence when inflicted as a result of incitement behaviors by law enforcement; the latter is the principle barring police enforcement from provoking acts when it is deemed necessary to nail someone who may (or may not) have realized crimes in the past.

6. *Concluding remarks*

The general scope of this paper is to clarify the discipline of the agent provocateur's role in sting operations – the most decisive and used to tackle corruption – in order to highlight its effectiveness, but also to show the results of invasive behaviors by law enforcement: the subjective test for an entrapment defense, especially in bribery cases,

is indeed nearly impossible to meet. On this topic, an apparent strong division could be noticed between the U.S. Supreme Court and the European Court of Human Rights. The discrepancies on whether or not to allow facilitating conducts by law enforcement tend to be solely theoretical, and European judges ape in their reasoning the American ones, referring to the same categories of entrapment (inducement and predisposition).

All things considered, the historical part of the essay is about the two faces bribery assumed in American legal history: from corruption as a cultural anathema after the independence past, to present days, when the Supreme Court does not have the courage and interest to face corruption in finance and politics, leading to qualifying bribery conducts only in clear – and very rare – *quid pro quo* scenarios. Consequently, the majority of cases, when conducts are more subtle and less manifest, turn out to be very insidious and still will not be considered criminal.

The central part of the work analyzes the position of the incited person. If the defendant's argument is founded on the fact that he engaged in criminal conduct at police officers' instigation, he must prove a negative-counterfactual-subjective element: he has to show that he would not have committed that crime if he had not been instigated to it. This nonexculpatory defense struggles to balance the invasive provocative acts by law enforcement when, upon invitation, the defendant would not have engaged in such conducts. As explained in the paper, the test is mainly subjective because the most important element is predisposition. So, not only entrapment defense is difficult to benefit from for the defendant, but in bribery cases, it is even harder to get because the predisposition requirement is peculiar in such cases and arduous to meet.

The last section of the study is focused on the role of the agent provocateur, crucial, as shown, to fight corruption. After outlining its dogmatic traits and functioning, the main issue is whether or not this figure could be implemented in the Italian and European legal systems. In the first place, such conduct cannot be covered by a general defense because the Italian public authority justification does not reach the American one's extension, and such behavior is supported by specific intent, as to the psychological element. Also, the rulings by the European Court of Human Rights in Strasbourg still show

that plain provocative conduct cannot be aligned with the European Convention provision on due process – even if sometimes (like in *de Castro*) its reasoning resembles the U.S. Supreme Court's. Finally, the *extrema ratio* principle should bar incitement conducted by officials from being legal because it would clash with the subsidiarity of criminal law and the scope of criminal punishment, both as to general and special deterrence.

In conclusion, from a comparative perspective, what stands out is that European and American academics' analyses on agent provocateur came to different results, focusing on different aspects. The European approach is all about the instigator's role (whether or not he can be criminally liable, since there was a contribution to the offense), while the U.S. one focuses on the entrapped person (whether or not the instigated subject should be punished since he committed the offense), barely considering the position of the instigator.

This research shows how civil law and common law models deal with the same legal issues approaching them in a fascinating reverse way. And if comparative law is not a science but rather a method (as it seems preferable), it sometimes may not be able to provide all the answers on a specific profile. Certainly, and perhaps this is an even more precious resource, it will be able to provide a starting point for problematizing a single question, linking others, and granting the jurist the best means for his investigation.

Christian sermons and the law of defamation in Cameroon: A common Law approach

Fon Fielding Forsuh*

Abstract: The statutory guarantee of the right to worship and practice any religion in Cameroon entails the freedom to make utterances within Christian sermons and an obligation not to attack the reputation of individuals. Christian sermons have served as a medium for defamation, especially with revivalist or Pentecostal churches as they are commonly known. These institutions establish strong links with their worshipers causing them not to see any defects in their practices even if an injury to their reputation might lead to ostracism. Thus, persons whose reputations are injured hardly lay claims, as they fear being termed evil. This paper has been accomplished through visits to some churches, informal interviews, analysis of legal instruments, and content analysis of relevant literature. It establishes that even though Christian sermons have an impact on building good morals, they may also take advantage of the obedience of worshipers, ruining the lives of some individuals by injuring their reputations through false statements in sermons. This paper, therefore, demonstrates the possibility of laying claims for defamation in Christian sermons and proposes that massive sensitization on the existence of civil and criminal liabilities for defamation should be done to create awareness among aggrieved persons and to reduce the negative effect of fanaticism.

Keywords: Christian; sermons; defamation; common law; Cameroon.

1. *Introduction*

The right to worship and practice any religion in Cameroon is guaranteed by its Constitution[1]. Article 18, in fact, states that "Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance". Therefore, freedom of worship states that any person practicing any form of religion has the right to make any utterances in line with each religious practice, connoting freedom of speech but not implying the right to injure any other person in his or her physical integrity and reputation.

Among many religions practiced in Cameroon, Christianity, as the International Religious Freedom Report shows, was the most

* Dr. Fon Fielding Forsuh is a Senior Lecturer in Law and Currently Head of Service for Legal Affairs at the University of Bamenda. He is a Lecturer in the Department of English Private Law and Department of English Law of the Faculty of Laws and Political Science of both The University of Bamenda and Dschang-Cameroon. He is author of several publications and is interested on issues of private law, human rights law, and international criminal law.

1. See art. 18 of Law No. 2008/001 of 14 April 2008, which amends and supplements some provisions of Law No. 96/06 of 18 January 1996 and the 1972 Constitution of Cameroon.

dominant among Cameroonians in 2005, involving statistically 69.2% of the population. However, a remarkable Muslim minority is also present, despite the fact that the 2010 Pew-Templeton Global Religious Futures Project indicates that the number is dropping to the advantage of Christian believers[2].

Instead, from a geographical point of view, Christians are concentrated primarily in the southern and western parts of the country. The two Anglophone regions are largely Protestant, and the five southern Francophone regions are mostly Catholic. The Fulani (Peuhl) ethnic group is mostly Muslim and lives primarily in the northern Francophone regions; the Bamoun ethnic group is also predominantly Muslim and lives in the West Region. Many Muslims, Christians, and members of other faiths also adhere to some aspects of animist beliefs[3].

Christian ideologies and beliefs are mostly communicated to followers through sermons. A sermon can be defined as a talk on a moral or religious subject, usually given by a religious leader during service[4]. Christian sermons can generally be understood as a discussion on a religious or moral subject, especially those given during church services and based on passages from the Bible. Such talks are usually delivered in public or open spaces reserved for worship or other religious manifestations and done by clergies, pastors, men of God, or other religious leaders called by different names[5]. During such sermons, those involved are bound to respect the law relating to the protection of the reputation of individuals, while enjoying their right to freedom of worship. Any statement made during a sermon which injures the personality of any individual would amount to defamation and can attract both criminal and civil liabilities under Cameroonian law.

2. See *International Religious Freedom Report for 2020*, United States Department of State, Office of International Religious Freedom, available at https://www.state.gov/reports/2020-report-on-international-religious-freedom/ (last visited November 4, 2022).

3. See *ibid*.

4. See Albert S. Hornby, *Oxford Advanced Learner's Dictionary of Current English* at 1348 (Oxford University Press 8th ed 2010).

5. A visit to several revivalist or Pentecostal churches revealed that most followers who are so attached to their denominations have adopted different appellations for their leader e.g., Papa, daddy, prophet, major one, general overseer etc.

Defamation simply denotes the act of harming the reputation of another by making false statements to a third person[6]. Such statements can either be written (libel) or oral (slander). Defamation can also be defined as oral or written communication of a false statement about another that unjustly harms their reputation and usually constitutes a tort or crime[7]. Therefore, in the context of Christian sermons, defamation would be a false statement delivered during a biblical talk which has the effect of harming the reputation of someone. Christian sermons have served as a medium for committing defamation, through the exploitation of worshipers' (could also be referred to as congregants or communicants) unconditional trust in their denominations. Persons who are injured in their reputation would hardly lay claims because of attachment to their churches, especially in cases where the church leader is seen as a demi-god. In Cameroon, most denominations, especially revivalist and Pentecostals, whose number has strongly increased, establish strong attachments with congregants such that they would never find anything wrong even when an injury to their reputation might amount to ostracism[8]. This has made it difficult for the few who might find something wrong to lay claims and even when they do that, they can be termed evil. The law of defamation in this light tries to balance competing interests. On one hand, freedom of worship should not ruin other people's lives by making false statements about them; but on the other hand, people and Christian leaders should enjoy their freedom of religion by making their sermons freely without fear of litigation over every statement which might convey insults.

---

6. See Bryan A. Garner, *Black's Law Dictionary* at 479 (Thomson Reuters 9th ed 2009).

7. See Roger LeRoy Miller, *Business Law Today: The Essentials* at 127 (South-Western Cengage Learning 9th ed 2011).

8. The researcher from an informal discussion with some worshipers from churches like Omega Fire, Eshadi Shall Never Die International, My Righteousness, Church of Christ, True Church of God, Rama, Faith Ministries International, Deeper life ministries, etc. discovered that some of their Christians have become fanatics and believe in no other thing than their churches to an extent that they would never find anything wrong. Informal discussions were implored here because of the sensitive nature of the research interest given the degree of fanaticism involved.

2. *Freedom of worship and prohibition of defamation in Cameroon*

It has earlier been mentioned that the law of defamation in this dimension seeks to balance two interests, that of ensuring freedom of worship which involves freedom of speech through sermons, and that of protecting the reputation of individuals. There is a legal guarantee on the freedom of worship which is the corollary of freedom to deliver sermons as well as a prohibition on the use of false statements which can amount to defamation.

2.1. *Constitutional guarantee of freedom of worship*

The constitutional guarantee of freedom of worship is regulated under the head "freedom of religion and worship"[9]. Stating both as such is not very relevant because freedom of religion connotes freedom of worship. With this regard, one of the best definitions of freedom of religion which covers worship was given by the Canadian Supreme Court in *R v. Big M Drug Mart Ltd*[10] to the effect that:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterised by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition, and he cannot be said to be truly free.

The Constitution of Cameroon in its preamble guarantees individuals' freedom of religion and worship. Moreover, an additional clause requires the national government to remain secular and neutral with regard to religion in order to further the respect for all faiths.

9. See Law No. 2008/001 of 14 April 2008 (cited in note 1).
10. See *R. v. Big M Drug Mart, Ltd*., 1 S.C.R. 295 (1985).

The foregoing is crystalized with a provision to the effect that no person shall be harassed on grounds of his origin, religious, philosophical, or political opinions or beliefs, subject to the respect of public policy. These provisions in the preamble of the Constitution affirm the state's commitment to international human rights instruments on the subject of freedom of religion and worship. Examples include the 1948 Universal Declaration of Human Rights, which in article 18 strengthens the Constitutional Preamble's protection of religious freedom by broadly interpreting the term to include religious teachings, practices, observances, and worship. This article goes further to protect religious actions whether they are performed by an individual or group and whether they are performed in a private or public setting. This provision is replicated in the International Covenant on Civil and Political Rights[11], article 1 of the Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion and Belief[12] and African Charter on Human and Peoples' Rights[13].

The above provisions on freedom of religion and worship imply the right to practice any form of religion and this covers even the most dominant religion in Cameroon, which is Christianity. It equally covers the right to manifest belief by worship and practice or by teaching and dissemination which is mostly done through sermons which they are free to do. Therefore, sermons are guaranteed by the preamble of the constitution of Cameroon by affirming the state's commitment to international instruments on the subject. But this does not imply the right to make false statements as it would amount to defamation, which is prohibited.

2.2. *Prohibition on defamation*

The preamble of the constitution guarantees the freedom of worship and equally sets a standard for equal rights and obligations for all citizens in Cameroon. This entails the right to freedom of worship and a corresponding obligation not to infringe on any other person's

11. See art. 18, International Covenant on Civil and Political Rights.

12. See art. 1, Declaration on the Elimination of all Forms of Intolerance and Discrimination Based on Religion and Belief.

13. See art. 8, African Charter on Human and Peoples' Rights.

rights be it in his or her physical integrity or reputation in any form. Thus, Christian sermons should not harm the reputation of individuals as this would amount to defamation.

2.1.1. *Statutory Prohibition of defamation*

Defamation in Cameroon constitutes both civil and criminal wrongs. That is to say it is a civil wrong or a tort which attracts damages for civil liabilities and a crime which attracts criminal sanctions. This, therefore, implies that any statement in a Christian sermon, which has the effect of harming someone's reputation to the public to which it is addressed, is prohibited as it would attract liabilities where necessary.

English law applicable in the Anglophone regions of Cameroon classifies libel both as civil and criminal wrong actionable per se (without proof), while slander only constitutes a civil wrong, actionable upon proof of special damage, if the statement does not come within one of the categories of statement actionable per se[14]. This is probably because libel endures longer, is easy to disseminate and is borne with premeditation. In the case under consideration, this would be applicable to sermons which are recorded or printed. Unlike the position under English law, Cameroon criminal law does not make such distinction as it proscribes defamation in 305(1) providing that:

> Whoever by any of the means described in section 152 injures the honour or reputation of another by imputation, direct or indirect, of facts which he is unable to prove shall be punished with imprisonment for from 6(six) days to 6(six) months and with a fine of from CFAF 5000 (five thousand) to CFAF 2 000 000 (two million) or with only one of the penalties[15].

The penal code from the above provision punished defamation in non-permanent or oral form (slander) as indicated in section 152 and

14. See Joseph Nzalie Ebi, *Electoral Campaigns in Cameroon and the Law of Defamation*, in *La gouvernance électorale en Afrique subsaharienne*, 16 Annales de la Faculté des Sciences Juridique et Politiques, Université de Dschang 92 (2012).

15. See art. 305 (1), Penal Code of Cameroon.

permanent or recorded form in section 305(2). This therefore implies that any Christian sermon which carries defamatory statements in either of the forms is sanctioned by the penal code. In dealing with defamation, section 152 talks of contempt which shall mean "any defamation, abuse or threat conveyed by gesture, word or cry uttered in any place open to the public, or any procedure intended to reach the public". Section 305(2), on its part, refers to defamation in the print or audio-visual media. More discussion on the identification of the various forms of defamatory statements in Christian sermons is explained below in point 3.2.1. of this article.

2.1.2. *Biblical Prohibition of defamation*

A sermon has earlier been defined as a talk on a moral or religious subject, based on passages from the bible and usually given by a religious leader during church service. Even though the Bible from which Christian sermons are delivered prohibit defamatory statements, most preachers or church leaders, especially in Pentecostal churches, deviate from it. According to the Bible, slander is a serious sin which is not supposed to be practised by Christians and which is prohibited in several verses[16]. The Bible in Psalms 101:5 says that God will destroy those who slander their neighbours secretly. It goes further to provide that whoever has a haughty look, and an arrogant heart will not endure. This briefly, but significantly demonstrates that the Bible condemns any form of oral or spoken or gesticulation which amounts to defamation not leaving out sermons bearing such characteristics.

The foregoing analysis establishes the existence of the right to worship and a corresponding obligation not to indulge in statements amounting to defamation, implying that it is prohibited by statute and the Bible from which Christian sermons are preached. The next step is to identify who can sue in the advent of defamatory statements

16. See *The Holy Bible, English Standard Version* (Crossway Bibles 2016). Proverbs 11:9, Proverbs 12: 6, Proverbs 16:28. For more on the biblical prohibition of defamation, see James 4:11, 2 Timothy 3:1-5, 1 Peter 2:1, Ephesians 4:31-32, Proverbs 20:19, Exodus 23:1, Mark 7:20-23, 1 Peter 3:10, Colossians 3:8, Proverbs 6:19, 1 Corinthians 4:13, Leviticus 19:16, Romans 1:30, Proverbs 26:28, Proverbs 25:23, Jeremiah 9:4, Psalms 109:2, 1 Timothy 3:11, Galatians 5:19-21, Mark 10:19, Jeremiah 6:28, Romans 1:29, Titus 2:3, etc.

from a sermon and what the claimant is expected to establish to lay his or her claims.

3. *Persons entitled to sue/claim for defamation in Christian sermons and elements to establish*

3.1. *Persons entitled to sue*

The capacity to sue in law encompasses human beings and persons in contemplation of the law or corporate bodies and legal fictions. In Cameroon, living human beings of adult age have the capacity[17] to sue for defamation. These would be those persons who can prove that the defamatory words in the Christian sermons were referred to them and were intended to bring down their reputation. They can generally be referred to as claimants.

Persons in contemplation of the law refer to corporate bodies such as companies registered and incorporated under companies' legislation granting it legal personality[18] or other associations registered under specific statute like political parties in Cameroon[19]. Such bodies have the capacity to sue for defamation and they can equally be sued. As an instance, in the case *Upjohn v. BBC and Others*[20], a trading corporation which was a maker of the drug "Halcion", was sued over allegations regarding dangerous side effects. The decision of the court rejected charges of dishonesty levelled by the BBC and by Ian Oswald, a vocal, long-time critic of the US Company. Hence, like human beings, Corporations may sue for defamation if they can show that the published material has caused them or is likely to cause them financial loss.

17. With regards to the capacity to sue in civil and commercial litigations, see generally Joseph Mbah-Ndam, *Practice and Procedure in Civil and Commercial Litigation* at 135 (Press Universitaires d'Afrique 2003).

18. See *Salomon v. Salomon & CO Ltd,* A.C. 22 (1897).

19. See section 12, Law 19 December 1990, No 90/056.

20. See Vivienne Harpwood, *Principles of Tort Law* at 369-70 (Cavendish Publishing Limited London-Sydney 4th ed 2000).

3.2. *Elements Claimants/Plaintiff Must Prove*

Just like in all defamation actions or claims, the plaintiff or claimant is expected to establish four elements in the Christian sermons to wit- that the words or statements in the sermon were defamatory, that the statement(s) referred to him or her and the statement(s) were or was published and the existence of malice.

3.2.1. *The Statement(s) or word(s) in the Christian Sermon was/were defamatory*

The determination as to whether statements or words in a Christian sermon were defamatory is to be made by the judge. The test is not what the claimant or plaintiff thinks of the words or of the statements, but what a reasonable man or right-thinking member of the society thinks of them. The usual practice is to construe words in their ordinary meaning or by the use of innuendo. Innuendo can be referred to as defamation in an indirect form or hidden form. Certain statements may not be defamatory on their face value but can contain an innuendo which has a defamatory meaning. The hidden meaning must be one that could be understood from the words themselves by people who knew the claimant. Therefore, the defamatory sense of the words is established connotatively in the context in which they are used. This is in line with the quote made by Lord Hodson in *Lewis v. Daily Telegraph*[21] referring to the ascertainment of this element as "no more than an elaboration or embroidering of the words used without proof of extraneous facts". Innuendo could either be true or false. In true innuendo, extrinsic evidence is adduced to support the allegation that the statement is defamatory[22], while a false innuendo does not require such evidence. In Cameroon, a person is guilty of criminal defamation, according to section 305(1), if he or she injures the honour or reputation of another by imputation, direct or indirect, of facts which he is unable to prove. On a charge of defamation, if an innuendo is

21. See *Lewis v Daily Telegraph Ltd*, A.C. 234 (1964).

22. See *Cassidy v. Daily Mirror Newspaper Ltd*, 2 KB 331 (1929), *Davis v. Boeheim*, 110 A.D.3d 1431 (NY 2014)

alleged, it must be pleaded otherwise the charge will fail[23]. In *Nchang Boniface Chinje v. The People and Anor*[24], the finding of the trial court was that the words qualifying Tabong as an "insane man" amounted to an innuendo which was not proven, and that the appellant's conduct was actuated by malice. The appellant was accordingly found guilty of defamation under section 305(1) of the Cameroon Penal Code.

The abuse of reputation has skyrocketed with the proliferation of Pentecostal churches operating within Cameroon mostly in Anglophone regions. Most of these churches operate unregistered as required by the 1990 Law of Freedom of Association. This lack of registration can be attributed to the lengthy procedure requiring a presidential decree under which most applications are pending approval. Thus, many have been operating illegally and some have taken advantage of this to operate even without introducing their applications for authorization. Most of these Pentecostal churches through their sermons indulge into testimonies related to exaggerated miracles they perform. Some sermons make allusion to followers who have repented from what they might term as evil (for instance referring to someone as an occultist who has killed several persons and repented, or someone who was suffering from deadly disease like HIV/AIDS etc and has been healed through miracles). Such persons after their claimed miracles may be excluded by other members and parishioners or church members may ascribe defamatory meanings to such utterances which are sometimes recorded and broadcasted for churches with television channels, having the effect of destroying the reputation of persons they make allusion to. Such statements can cause someone to be regarded with feeling of hatred (especially with allusion made to murder), contempt, ridicule, and fear.

23. See Carlson Anyangwe, *Criminal Law in Cameroon, Specific Offences* (Langaa RPCIG 2011).

24. See *Nchang Boniface Chinje v. The People and Anor*, Appeal No. BCA MS/31c/2003. (The judgement was set aside on Appeal as the Court pointed out that an innuendo in a defamation charge must be pleaded but that, in the instant case, the lower court had relied on an alleged innuendo which had not been explained in the charge. The Appeal Court therefore concluded that, on a careful evaluation of the facts of the case, malice cannot be imputed on the appellant and that the letter he wrote falls within the terms of section 306(8) of the Penal Code). See to this effect, Anyangwe, *Criminal Law in Cameroon, Specific Offences* at 403 (cited in note 23).

A basic definition of defamatory statement can be seen in the articulation Lord Atkin in *Sim v. Stretch*[25] where he stated that a defamatory statement is "A statement which tends to lower the claimant in the estimation of right-thinking members of society generally, and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disteem". Thus, statements which reflect on a person's moral character or professional competence will be defamatory.

3.2.2. *Statement in the Christian Sermon referred to the claimant*

The claimant must be able to demonstrate that the defamatory words in the sermon referred to him or her. This implies that the words must have been defamatory of the claimant and no other person real or imaginary[26]. This does not in any way mean that the claimant's name has to appear, but merely that anyone who knew the claimant would know that the words referred to him or her. This is the case with most Christian sermons which make allusions to confessions of individuals relating to particular aspects, to the extent that such persons could easily be identified by closed persons or others who know them. Most sermons make use of indirect references like the plaintiff's initials, verbal descriptions or by reference to the particular group to which the claimant belongs.

Liability for defamation would hardly lie where the claimant is part of a class or group. In fact, the general rule is that a class or group of persons cannot be defamed, with the exception of a company with legal personality. Such statements are so loose and general that they are not taken seriously, and, in any case, no single member of the group could claim to have been set apart for defamation[27]. If a class of people is defamed, there will only be an action available to individual members of that class if they are identifiable as individuals[28]. It would not be defamatory to describe all jurors as incompetent, but it would be defamatory to describe all 12 members of a particular

25. See *Sim v Stretch*, 2 All ER 1237 (1936).

26. See *Bruce v. Odhams Press Ltd*, 1KB, 697 (1936).

27. See William Vaughan Horton Rogers, Percy Henry Winfield and John Anthony Jolowicz, *Winfiled & Jolowicz on Torts* at 410 (Sweet & Maxwell 15th ed 1998).

28. See Harpwood, *Principles of Tort Law* at 376 (cited in note 20).

jury as incompetent[29]. This issue of class defamation was addressed in *Knupffer v. London Express Newspaper*,[30] where the House of Lords held that, where a class of peoples is defamed, no individual can succeed in defamation proceedings unless he or she can prove that the statement was capable of referring to him or her and that it was in fact actually understood to refer to him or her.

3.2.3. *The Statement was or has been published*

The standard requirement for actionable defamation is that the defamatory statement must have been published. This goes in line with the provision of section 152(1) of the Penal Code of Cameroon which prescribes that the actionable defamation consists in statements made "in any place open to the public or by any procedure intended to reach the public". This therefore implies that the defamatory statement in the Christian sermon must be published to persons other than the claimant alone.

Publication assumes a special meaning in defamation, implying to make the defamatory statement or matter known to persons other than the claimant[31]. What is necessary is for the statement to be communicated to at least one person other than the complainant. Publication in the context of this write-up is not limited to Christian sermons being preached in the open like in churches during service and other open places like crusade grounds where messages are open to all. It can be printed in books, magazines, newspapers, church news, etc. Publications can equally take the form of audio-visual dissemination where church sermons are recorded and broadcasted and re-broadcasted through television channels which are owned by churches. Examples of these church channels include My Righteous TV, Emmanuel TV, Resurrection TV, Glory TV Bamenda, Champion TV, Kingship TV Bamenda, Zion Light TV Bamenda etc.

Since defamation seeks to protect a person from loss of reputation among other people, communication to a third party is therefore of essence. Thus, making a defamatory statement to the claimant alone

29. See *ibid.*
30. See *Knupffer v. London Express Newspaper*, AC 116 (1944).
31. See *Pullman v. W. Hill & Co Ltd*, 1 QB 534 (1891).

out of the ear-shot of a third person would not enable an action for defamation. Nevertheless, if a defamatory letter is sent to a claimant who decides to show the letter to someone else, there is a defense of *volenti* as the claimant, not the defendant, has published the statement. In *Hinderer v. Cole*[32], the claimant was sent a letter by his brother-in-law which was addressed to "Mr Stonehouse Hinderer". It contained a vicious personal attack on his character, describing him as "sick, mean, twisted, vicious, cheap, ugly, filthy, bitter, nasty, hateful, vulgar, loathsome, gnarled, warped, lazy and evil". The defamatory words in the letter were shown by the claimant to other people, but the defendant had only sent them to him. There was therefore no publication by the defendant to a third party, and those words could not form the basis of a libel action. However, the claimant did obtain damages of £75 because the word "Stonehouse" was held to be defamatory, as it implied that the claimant was like John Stonehouse, an MP who had recently disappeared by faking his death to escape paying his debts. Also, in the Cameroonian case of *W.N.O Effiom v. Mpame Ashu*[33], the libel was allegedly made in a circular letter by the defendant as "secretary for the Ejagham Block Victoria" during the Southern Cameroons Parliamentary election campaign of 1961. The defendant was said to have made allegations of corruption against the plaintiff, Minister of Natural Resources running for Member of Parliament (MP) on the KNDP ticket, in furtherance of the campaign of one Mr. J.O Takim, a prospective candidate for MP in the same constituency as the plaintiff. The Court held that the letter was indeed defamatory.

3.2.4. *Malice*

In many areas of the law of tort, the presence or absence of malice is irrelevant, or if it is relevant, it may only go to enhancing the number of damages payable to the claimant. However, in defamation actions, it may be especially important to consider whether the statement was published maliciously, not only to allow the claimant to recover a higher award of damages but because it is a necessary element in the law itself. For this reason, it is important to appreciate

32. See Harpwood, *Principles of Tort Law* at 370-71 (cited in note 20).
33. See *W.N.O Effiom v. Mpame Ashu*, W.C.L.R. 21 (1962-1964).

the meaning of the term malice as it is used in the law of defamation. This means that the publication was made spitefully, or with ill will or recklessness as to whether it was true or false. The bad feeling must have led to the words being published and must, in particular, have been directed toward the claimant. The presence of malice will destroy defenses of justification in relation to spent convictions, unintentional defamation, fair comment on a matter of public interest, and qualified privilege.

4. *Defenses in Defamation for Christian sermons*

In bringing out the requirement for actionable defamation by the claimant/plaintiff, the law is liberal in that it establishes defenses on which the defendant could rely to limit or refute liability. The defenses can be categorized under two heads to wit- defense as to time bar or limitation period for actions in defamation and defenses proper to defamation.

4.1. *Limitation Period*

The limitation period is the amount of time within which an action for defamation could be instituted by the claimant. This period is generally short and usually works in favor of the defendant. In English law, it has moved from an initial six to three months and now one year[34]. It is important to note that this English law position applies to Anglophone Cameroon by virtues of article 68 of the Constitution which authorizes the application of Section 11 of the Southern Cameroons High Court Law 1995, permitting the application of the said English rules equally taking into consideration the provision of section 10 as regards practice and procedure. As concerns criminal defamation, section 305(1) of the Cameroon Penal Code makes allusion to section 152 which in its sub-section 3 sets the limitation period at four

34. See Robert Francis Vere Heuston and Richard A. Buckley, *Salmond & Heutson on the Law of Torts* at 144 (Sweet & Maxwell 21st ed 1996). See also Rogers, Winfield and Jolowicz, *Winfiled & Jolwiez on Torts* at 887 (cited in note 27).

months from the commission of the offense or from the last step in preparation or prosecution.

4.2. *Defenses proper to defamation in Christian sermon*

As earlier mentioned, this refers to those Defenses which can be relied upon by the defendant to limit his or her liability or totally refute or discard liability for defamation. They include communication on church discipline, justification of truth, innocent dissemination, volenti, accord and satisfaction, and privileges.

4.2.1. *Communication regarding Church discipline*

In the law of defamation (libel and slander,) exceptions are made with regard to communications and oral statements of a disciplinary character made by church leaders or ministers and those in charge of, or at the head of religious organizations and societies. The privileges allowed under these exceptions relate only to church proceedings of a disciplinary character, rather than to utterances in ordinary church services. Communications coming within the bounds of church discipline may be qualified or conditional. Anyone publishing defamatory words under a qualified or conditional privilege is liable, but only so upon proof of expressed malice, as held by the Supreme Court of Connecticut[35]. This, therefore, implies that church leaders, pastors, clergies as the case may be to benefit from this defense are supposed to be extremely cautious in what they say to members of a congregation in the way of criticism, whether directly or indirectly, unless a meeting has been specially appointed for disciplinary purposes, dealing with some member of the church or the denomination of which the speaker may be a member. But even then, observance of the requirements should be taken with great care before the publishing of any statement or statements by ministers and officers of a denomination.

If a minister makes a slanderous statement concerning a member of his congregation, as a part of his sermon, on a theory that is necessary for the welfare of his parish, the communication is, at most,

35. See *Blakeslee & Sons v. Carroll*, 64 Conn. 223 (1894); *Dennehy v. O'Connell*, 66 Conn. 175 (1895).

only a qualified privilege, and hence sufficient to sustain a recovery of damages if proof of expressed malice is shown. Statements made by a clergyman in the pulpit, regarding parishioners, must be guarded with the greatest of care, in order for the clergyman not to become liable for defamation. A priest or pastor may criticize from the pulpit the official acts of a public officer who is a member of his congregation, provided he acts in good faith in so doing; but he cannot make his sermon the medium for bringing false, malicious, and criminal accusations against an individual[36].

The clergyman, pastor, prophet, or any person in such capacities according to the rules of certain churches may sometimes be called upon to pronounce the sentence of excommunication on certain of his or their members. Such an act, if done in good faith, will not lay the minister open to an action of slander, however much he may have to hurt the feelings of the excommunicated person. However, if the clergyman goes further, and advises his people to shun the excommunicated person in business transactions, and not to come near his or her home or to employ the excommunicated one in any capacity, he then steps outside of his privilege and will be liable to an action of slander or libel[37].

4.2.2. *Justification of Truth*

It normally would seem logical that only false statements can be subjects of defamation proceedings, meaning that, if the statement made about the claimant is true, there can be no action for defamation. Therefore, the publication of a defamatory statement or matter is justified if the matter or statement is completely true, and it is published for the public interest. However, partial truthfulness would not benefit from the defense. The burden of proof in our case would lie on the clergy, pastor, or preacher of the sermon to establish that the defamatory statement made is true so as to benefit from this defense. In some or most cases claimants would want to bring defamation actions simply to clear themselves of damaging allegations forgetting that

36. See *Hassett v. Carroll*, 81 A. 1013: 85 Conn. 23 (Conn. 1911).

37. See generally *The Ministry* at 4 (Ministerial Association of Seventh-day Adventists April 1929).

defendants might put up good defenses. In *Irving v. Penguin Books*[38], the judge delivered a devastating condemnation of the claimant when he failed to establish that the defendants had published false information about the existence of the Holocaust. The claimant's reputation here was damaged further by his efforts to vindicate himself and he faced a bill of £2.5 million in legal costs.

4.2.3. *Innocent dissemination of defamatory Christian sermons*

This defense is designed to protect booksellers, newspaper vendors, and distributors of material that may contain libelous statements or Christian sermons. That is those involved in distributing recorded Christian sermons carrying defamatory statements. The success of this defense depends on the existence of three conditions as explained in *Vizetelly v. Mudie's Select Library Ltd*[39] in which publishers had requested the defendants, a circulating library, to return certain books which were likely to contain libels. They did not do so, and they were liable for defamation. It was held that the defense could apply to libraries, booksellers, and other "mechanical" publishers of libels, provided that: (1) the publication is innocent, in the sense that they did not know that it contained a libel; (2) there were no circumstances which ought to have made them aware that the publication could have contained a libel; and (3) there was no negligence on their part in not knowing of the libel.

4.2.4. *Volenti*

This refers to the consent of the claimant to the publication of a statement, by the claimant showing other people defamatory material which the defendant meant for his/her eyes alone. Where a person claims that he or she has a recording of a sermon that contains defamatory statements given to him by the defendant and later shows it to the third party or other persons without the defendant doing so, this will amount to volenti. In *Moore v News of the World*[40], the singer Dorothy

38. See Harpwood, *Principles of Tort Law* at 379 (cited in note 20).
39. See *Vizetelly v. Mudie's Select Library Ltd*, 2 QB 170 (1900).
40. See *Moore v News of the World*, 1 QB 441 (1972).

Squires, in an attempt to launch a musical comeback, gave a detailed account to the News of the World reporter of her life with her former husband Roger Moore. The piece was written in the first person as she actually made the statements, but she said that it was complete fiction, and sued for libel because she claimed that the article portrayed her as the sort of person who was prepared to discuss her private life in intimate detail in front of the entire world. She succeeded in her action, but had she been willing to give an account of herself in that way, the newspaper would have had a defense of volenti.

4.2.5. *Privilege*

Privilege as a defense in defamation is based on the fact that public interest would justify the publication of certain statements no matter how defamatory they are. Privilege is absolute or qualified. While absolute privilege cannot be defeated, qualified privilege can be. This implies that the defense of absolute privilege is available even if the maker of the defamatory statement was actuated by malice when making it. It is therefore intended to protect statements made in certain instances when public interest requires complete freedom of speech. These instances include (a) Statements made in the House of Parliament during Parliamentary proceedings and Parliamentary papers and proceedings published[41]. (b) Statements made in the course of judicial proceedings. These include statements made out of court during the investigation of and in court during the trial. The defense covers statements made by judges, parties, lawyers (counsels), and witnesses in so far as it relates to the case at hand. The defense equally extends to no malicious accounts of judicial proceedings and publications relating to the judgment of the case at hand[42]. (c) Statement made by high-ranking members of the executive. This involves the protection of defamatory statements made by state officials in the performance of their duty. This defense of absolute privilege here is justified on the ground that these officials may be discouraged in the

41. This position is regulated as an exception to defamation in section 306 (1) of the Cameroon Penal Code.

42. Also regulated as an exception to defamation *id.* at section 306 (3) and (4) and (5).

performance of their duties if they feel themselves threatened by actions in defamation[43].

The defense of absolute privilege discussed above cannot be available in situations of defamation within the context of a Christian sermon. Therefore, a defendant, in this case, can only make use of qualified privilege[44]. Qualified privilege operates to protect statements that are made without malice. It exists in honest and faithful accounts of statements made in circumstances of absolute privilege[45].

The defense of qualified privilege can be available in situations where statements are made on matters of public interest, matters of interest to the publisher, matters of interest to others, and matters of common interest[46]. It is predicated on the existence of a legal, moral, or social duty on the maker of the statement and a corresponding duty on the person meant to receive it[47]. This indicates an element of reciprocity requiring the maker of a statement not to venture into any information given without the duty to do so and to an audience not entitled to receive it. Christian sermons which involve talks or discuss morals to ensure peaceful co-existence among communicants and society at large can also be considered matters of interest to the public as well as the preacher of the sermons. There is therefore an implied duty on the part of the preacher (pastors, clergy, prophet, etc.) to deliver sermons and a corresponding duty on the part of communicants or the public as the case may receive it. Consequently, statements made without malice would not be actionable in defamation.

In Cameroon, Churches have several outlets through which their sermons and ideas are disseminated to a wider public in view of not only limiting their messages on good morals and peaceful co-existence to their members. Some churches run television stations, radio stations, newspapers, websites, etc. These mediums under the auspices of their various churches have a moral or social duty to communicate their sermons to the public, willing to receive them. Such

43. This is also regulated as a defense to defamation *id*. at section 306 (7).

44. See *id*. at section 306 (9) and (10).

45. This is available as an exception to defamation *id*. at section 306 (2).

46. See Simon Deakin, Angus Johnston and Basil Markesinis, *Tort Law* at 633 (Clarendon Press 4th ed 1999).

47. See *Stuart v Bell*, 2 QB 341 (1891); *Spring v Guardian Assurance*, IRLR 173 (1992); *Watt v Longsden*, 1 KB 595 (1930); *Adam v. Ward*, AC 309 (1917).

sermons could be covered by the defense of qualified privilege if they contain defamatory statements made in the absence of malice. In the English case *of Reynolds v. Times Newspaper Ltd and Others*[48], the Court of Appeal gave careful consideration to the application of qualified privilege in relation to newspaper publications and, after reviewing the Porter Committee Report of 1948 and the Faulks Committee Report of 1975, laid down a series of tests. In order to maintain a proper balance between freedom of speech and the right of individuals in public life to protect their reputations, the Court of Appeal held that the defense of qualified privilege was available to newspapers, as long as the following tests were satisfied:

the newspaper must have had a legal, moral, or social duty to the general public to publish the material in question;

the general public must have had a corresponding interest in receiving the information; and

the nature, status, and source of the material and the circumstances of itspublication must have been such as to justify the protection of such privilege in the absence of malice.

4.2.6. *Fair Comment*

Unlike the defense of qualified privilege discussed above, the defense of fair comment is wider in the sense that it is available to everyone provided the matter is of public interest not predicated on reciprocity required under the qualified privilege. Fair comment can be described as a fair and honestly held opinion on matters of public interest[49]. This comment, which mostly involves honest criticism, is important for the efficient functioning of any public, or para-public institutions and is equally salutary for private persons who make themselves or their activities the object of public interest.

48. See *Reynolds v Times Newspapers Ltd*, 3 WLR 862 (1998). (When this case proceeded to the House of Lords, the last of these three criteria was rejected. It was made clear that, if the statement or communication goes beyond the class of persons with a reciprocal interest or duty to receive it, the communication to the wider class of people is in excess of the privilege and the defense cannot be relied upon in respect of this further communication).

49. See J. E. Nzalei, *Electoral Campaigns in Cameroon and the Law of Defamation* at 107 (cited in note 15).

This is mostly the case with religious leaders in Cameroon. They have made their activities public in the sense that, through their sermons, they tend to address public morality, criticizing state practices and institutions that they consider not to work in the interest of the citizenry[50]. Some of their criticisms at times touch on the personality of both public and private individuals involved in activities geared towards serving the public interest. Consequently, they could claim that their sermon consisted of fair comments on matters of public interest. The courts as guardians of public interest, on the one hand, and reputation, on the other, must have very strong reasons to set aside a defense of fair comment in favor of the plaintiff's reputation; and they have been known to readily accept the defense as long as they are convinced that the statement was not made maliciously[51]. Note should be taken of the fact that there are four requirements for the defense of fair comment to wit: the comment must be on a matter of public interest, it must be an expression of opinion and not as an assertion of fact, it must be fair and not be malicious.

The current social context in Cameroon is influencing religious practice with the proliferation of churches in most metropolitan cities. Their ideologies and doctrines are disseminated through sermons addressing aspects of public and private morality, not leaving out criticisms and opinions on the functioning of the state in relation to the population and integrating matters of public interest.

A comment is fair when it is based on facts that are in existence at the time of the comment. Fairness is not synonymous with correctness. The test is subjective to the defendant and is not based upon what

50. Examples include several criticisms made by Church leaders with respect to government response measures to crises plaguing the North West and the south West Regions of Cameroon. Measures which they term cosmetic and marred by corruption. See generally Moki Edwin Kindzeka, *Reopened Cameroon Churches Fear Criticizing Government* (VOA Africa, October 30, 2015) available at https://www.voanews.com/a/reopened-churches-in-camroon-not-critizing-biya-government/3029686.html (last visited October 31, 2022). Some churches have been critical of President Paul Biya's long stay in Power. Examples include Reverend Atana Dieudonne of the Seed of Life church who said the government has kept his church door closed because he is still critical of President Biya's long stay in power.

51. See Nji Akonnumbo Atangcho, *Defamation: Jurisdiction of Court, Elements of Action in Defamation, Defenses - Defense of Fair Comment*, 48 Juridis Périodique 50 (2001).

a reasonable man would consider "fair", but on whether the defendant honestly held the view expressed on matters of public interest. This test for this defense is available without considering whether the expression of the defendant conveys defamatory imputations, is wrong or exaggerated, or even prejudicial, and does not matter whether those who read the statement interpret all sorts of innuendos into it. Honesty is therefore the test for fairness[52]. This implies that a dishonest statement would be malicious. This position was given judicial recognition in *Thomas v. Bradbury*[53], where it was held that a statement that is objective and *prima facie* fair may become unfair if made with a malicious motive. The absence of any genuine belief in the truthfulness of the comment would be conclusive evidence of malice. No person can hold a proper motive for making a defamatory statement that he does not believe to be true. Therefore, the person who makes the comment has the burden to establish that it was made honestly. Consequently, those who suggest that a person is corrupt, dishonest, immoral like is the case with most Christian sermon criticisms, must be ready to justify these accusations by proving truthfulness. This sets in a limitation on the right of criticism as engrafted in *Campbell v. Spottiswoode*[54] in which it was held actionable to suggest however honestly, that the editor of a religious magazine, in advocating a scheme for missions to the heathen, was, in reality, an impostor motivated by motives of pecuniary gains.

5. *Remedies for Christian Sermon based defamation*

The remedies for defamation in Cameroon as applicable within the common law jurisdiction are both criminal sanctions as regulated by the penal code and civil redress which include injunctions and damages.

52. See *Turner v. Metro Goldwyn Mayer Pictures*, 1 ALL ER 449, 461 (1950). (Where Lord Porter held that "The question is not whether the comment is justified in the eyes of the judge or jury, but whether it is the honest expression of the commentator's real view and not mere abuse or invective in the guise of criticism").

53. *Thomas v Bradbury, Agnew & Co Ltd*, 2 KB 627 (1906).

54. *Campbell v. Spottiswoode*, 176 E.R. 188 (1863).

5.1. *Criminal Sanction/Penalty*

Criminal sanctions otherwise referred to as penalties, in this case, are intended to punish the wrongdoer i.e., the author of the defamatory statement, and to deter future commission. Section 305 (1) of the Cameroon Penal Code prescribes both imprisonment and fines for the offense of defamation. Imprisonment runs from six days to six months while the fine runs from five hundred thousand CFAF to two million CFAF. Worthy of note is the fact that such penalties can be put in place only when an individual has been charged and found guilty of committing the offense beyond reasonable doubt as required under criminal prosecutions.

A general reading of section 305 indicated that the Penal Code punishes the offenses of defamation in its simple and aggravated form. The penalties in subsection one as indicated above are its simple form. Under subsection 7, half the penalty prescribed in 305 (1) in cases where defamation is not made public, is established. Defamation is punished in its aggravated/doubled form under section 305 (8) which implies that the penalties indicated in subsection one would be doubled when they concern anonymous defamation. A criminal sanction for defamation was passed in the case of *E.L Woleta and M.N Namata v. The Commissioner of Police*[55], where the appellants, the owner, and editor respectively of the Cameroon Champion newspaper, were convicted of knowingly and falsely publishing a defamatory article in their paper on 25th May 1962 and were each sentenced to 3 months imprisonment by the then Victoria Magistrate's Court.

5.2. *Injunction*

An injunction is a court order commanding or preventing an action[56]. To get an injunction, the complainant must show that there is

55. *E.L Woleta and M.N Namata v. The Commissioner of Police*, WCLR.3 (1962-1964). (The accused appealed to the then High Court of West Cameroon and lost. Per Gordon C.J, "The totality of the evidence and the article itself prove every justification to the Magistrate's finding of the fact that the article in question was false and scurrilous and that it was likely to injure the reputation of Mr. Vincent Nchami, the Senior District Officer to whom it unmistakably referred").

56. Garner, *Black's Law Dictionary* at 855 (cited in note 6).

no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted. Thus, any person who fears an imminent threat to their reputation may obtain an injunction to prevent the publication of the defamatory material. In Anglophone Cameroon, an injunction may be obtained through an interlocutory order to the High Court requiring it to grant an interim relief through what is termed an interim injunction. In the case of defamation, this can happen prior to the publication of the potentially defamatory statement. These interlocutory injunctions are issued at any time during the pendency of the action for the short-term purpose of preventing irreparable injury to the claimant or applicant prior to the time that the court will be in a position to either grant or deny the permanent relief on the merits[57].

5.3. *Damages*

At Common Law, damages are a remedy in the form of a monetary award to be paid to a claimant as compensation for loss or injury. The general aim of an award of damages in tort is to put the injured in the same position as they would have been if the tort had not occurred. Therefore, damages in tort are aimed to restore the claimant to their pre-incident position. Damages are the primary remedy in a defamation action; they have the purpose to vindicate the claimant's good name and reputation. These damages can take the form of nominal damage, contemptuous damages, and exemplary damages.

Nominal damages are usually of a token sum, awarded where a tort is actionable per se and where the plaintiff is unable to prove any injury, loss, or damage. It provides mere recognition that the wrong has occurred, but it was not a serious infringement of the plaintiff's rights. It can take the form of a trivial sum of money awarded to a plaintiff who, even though his legal rights have technically been violated, is not entitled to compensatory damages. They are awarded to commemorate the plaintiff's vindication in court. Such awards for a

57. For the powers of the High Court to grant interlocutory injunction in Anglophone Cameroon, see Order 21, *The Supreme Court Civil Procedure Rules* in Neville John Brooke, *The Laws of the Federation of Nigeria* at chapter 211 (Government Printer 1948).

trivial sum of money could be requested by the plaintiff to restore his reputation as was in the case of *Ministere Public et Gregoire Owona C/. Jean-Pierre Amougou Belinga*[58], where Mr. Gregoire Owona, the then Minister at the Presidency of the Republic in charge of relations with the National Assembly of Cameroon, requested symbolic damage of a single franc for defamation even though the accused was sentenced to four months prison term and ordered to pay a fine of one million as well as the single franc requested.

Contemptuous damages, like nominal damages, are a very small sum of money, usually as low as one cent or one penny or one CFAF, that a court awards to a winning claimant to show that the case should never have been brought to court. They are awarded when the level of harm caused to the claimant's reputation is low and the successful claimant is made to pay damages for bringing the lawsuit.

Exemplary damages on its part unlike nominal and contemptuous damages are punitive in nature. They are awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit[59]. It is therefore awarded in an action for tort where the defendant has not only committed a legal wrong but has also behaved in an outrageous and insulting manner. Consequently, exemplary damages are awarded to punish or penalize the wrongdoer and to set an example for others. Furthermore, exemplary damages may be awarded in defamation cases, if it emerges that the defendant published the statement in a calculated attempt to increase sales or circulation. This can be attributed to the case of Christian sermons where the message was disseminated or published in an attempt to attract more members and extend the influence of their various ministries. Most of these acts are done with financial motives attached to them, especially with the sale of church gadgets like wristbands, church stickers, holy water, anointing oil, etc[60]. The award of damages in this situation will then

58. See Andrew Ewang Sone, *Examination of Witnesses and Joint Trial under the Cameroon Criminal Procedure Code* in Andrew Ewang Sone, *Readings in the Cameroon Criminal Procedure Code* 113, 123-24 (Press Universitaire d'Afrique 2007).

59. See Garner, *Black's Law Dictionary* at 446-48 (cited in note 6).

60. A visit to most revivalist churches revealed that they are miracle oriented which the researcher finds a lot of pecuniary motives attached to their actions. They are involved in excessive requests for tithes, involved in the sale of anointing oil, holy or anointing water, wrist bands, stickers which they claim possess miraculous powers

be inflated in an attempt to express disapproval of the unscrupulous conduct of the defendant. In *Cassell & Co v. Broome*[61], the House of Lords upheld what was then an extremely high award of damages against the defendants because they had been reckless about the statements made and hoped that their sensational nature would increase sales.

Exemplary damages for the purpose of punishing the wrongdoer are also regulated by section 305 of the Cameroon Penal Code, which sanctions defamation with a fine added to an imprisonment term as has been discussed in this paper. The application of this was seen in *Ministere Public et Gregoire Owona C/. Jean-Pierre Amougou Belinga*[62], where the plaintiff Gregoire Owona filed an action in the Yaoundé Magistrate's Court for defamation relating to statements asserting that he was involved in acts of homosexuality. Based on an inability of the defendant to establish satisfactory evidence of Owona's involvement in acts of homosexuality, the defendant (Belinga) was sentenced on the basis of section 305 (1) and (2) of the Penal Code to (4) four months imprisonment term and a fine of (1) one million CFAF as well as additional (1) one symbolic CFAF requested by the plaintiff Gregoire Owona. The Court further ordered the defendant to publish the said judgment in over fifty (50) news outlets (both national and international) or pay a fine of 300, 000FCFA for each day he fails to do so. A similar ruling was taken by the same Yaoundé Magistrate's Court in *Ministere Public et Jean-Pierre Mayo C/. Biloa Ayissi*. The defendant Mr. Biloa Ayissi, publisher of Nouvelle Afrique Newspaper, was sentenced to months' imprisonment while asking to pay one million CFAF to the Court, three million CFAF, and a symbolic one CFAF to Mr. Jean-Pierre Mayo, Director of the CNPS hospital Yaounde, as compensation for character defamation.

---

from God. Some of the churches even go to the extent of allocating entrance fees and fees for seats. All of these acts go against the general dictation of the bible to the effect that salvation is free and does not require any one to pay any money. See the Bible in the following books; John 3:16, John 4:10, Romans 5:15, Romans 6:23, Romans 8:32, Ephesians 2:8, John 3:16, Hebrews 5: 8-9, Mark 16:16, etc.

61. See *Cassell & Co v. Broome*, 1 All ER 801 (1972).

62. See Ewang Sone, *Examination of Witnesses and Joint Trial under the Cameroon Criminal Procedure Code* at 123-24 (cited in note 58).

6. *Conclusion*

The right to worship and practice any religion is guaranteed by the constitution of the Republic of Cameroon. This connotes the freedom of speech in the dissemination of Christian ideologies through sermons. Nevertheless, such freedom is not a fiat to indulge in statements that are defamatory. The law of defamation, in this respect, tries to balance the difference between freedom of worship and the protection of the reputation of individuals. As far as defamatory statements in Christian sermons are concerned, the worrisome aspect is the absence of their existence caused by the high level of fanaticism and attachment to ideologies instigated by the various churches through their leaders. It is therefore important that massive sensitization of the existence of defamation in Christian sermons is made to break the myth of fanaticism and to make people aware of the existence of both criminal and civil liabilities for defamation in such circumstances. This could finally lead people to denounce it, making this offense more punishable and visible.

Are Top-down Approaches of Transitional Justice Enough to Deliver Justice?

To what extent can transitional justice from below tackle the contemporary problems of doing justice after mass violence?

Davide Toniatti*

Abstract: The aim of the article is to shed light on the values of transitional justice from below: this peculiar approach fits in the whole process of transition towards democracy, peace, and reconciliation and constitutes a praiseworthy course of action to deliver justice after mass atrocities have been perpetrated during a conflict. To begin with, the "bottom-up approach" will be analyzed. Secondly, the article will consider the specular "top-down approach" by pointing out its deficiencies. The call for an enriched transitional process that considers the needs and the will of the affected communities comes from civil society itself; if not, it is feared that the whole process might be perceived as illegitimate, compromising the entire transition. In fact, civil society, in its various forms, is a key player that can benefit the transitional process. After these introductory remarks, the article tries to investigate the ideal role that civil society should play when governmental institutions of a particular country obstruct, or at least, do not undertake, initiatives of transitional justice. It goes without saying that not even bottom-up initiatives are free from criticism.

Keywords: Transitional justice; justice "from below"; conflicts and mass atrocities; civil society; reconciliation.

1. *Introduction*

Post-conflict peace is very fragile: societies that have recently experienced mass atrocities are much more likely to return amid a conflict[1]. More than 40% of post-conflict societies will be experiencing a new conflict within a span of ten years[2]. In these scenarios, transitional justice constitutes a necessary discipline to ensure peace. The processes of delivering justice after violence are often examined in a "top-down" perspective that focuses on the role of states and international actors, while the contribution made by civil society remains largely uninvestigated[3]. Indeed, over the years, civil society has played a crucial role in the protection of human rights and in the fulfillment

---

* Davide Toniatti is currently attending the fourth year of the five-year Integrated Master's Degree in law at the University of Trento. He has a strong interest in comparative and international criminal law. In the academic year 2021-22 he took part in the Erasmus+ program and studied at the School of law - Queen's University Belfast (UK).

1. See Paul Collier, V. L. Elliott, Håvard Hegre, Anke Hoeffler Marta Reynal-Querol and Nicholas Sambanis, *Breaking the Conflict Trap: Civil War and Development Policy, World Bank Policy Research Report* at 150-151 (World Bank and Oxford University Press 2003), available at https://openknowledge.worldbank.org/handle/10986/13938 (last visited November 2, 2022).

2. See Patricia Lundy and Mark McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom up*, vol 35, no 2, Journal of Law and Society 265, 279 (2008).

3. According to Ruti G. Teitel, *Transitional Justice Genealogy*, 16 Harvard Human Rights Journal 69 (Symposium: Human Rights in Transition 2003), transitional justice "can be defined as the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes". For an in-depth analysis of transitional justice, see also Ruti G.

of transitional justice processes[4]. This article will focus on transitional justice "from below"[5]. It will examine how the "bottom-up approach" can fit into the transitional process to deliver justice after periods of conflict and mass atrocities. At first, the bottom-up approach will be analyzed. Secondly, transitional justice "from the top" will be considered by highlighting its weaknesses. It will also be exposed how initiatives from below can enrich the transitional process. In addition, a few cases will be presented to demonstrate that communities must be taken into consideration when trying to do justice, otherwise, the risk is that they will perceive the whole process as illegitimate, compromising the entire transition[6]. Civil society, in its various forms, in fact, is a key player that can benefit the transitional process. Sometimes, however, it may happen that governmental institutions of a particular country obstruct, or at least do not undertake, any initiatives of transitional justice. Therefore, the ideal role that civil society should play on those occasions will be investigated. In this regard, two examples will be identified that successfully summarize the consequences deriving from the intervention of civil society. Moreover, it will be clarified that not every bottom-up initiative is free from criticism. Finally, although the common goal of any transitional justice initiative is to promote

---

Teitel, *Transitional Justice* (Oxford University Press, 2000) and Neil J. Kritz, *Transitional Justice: how emerging societies reckon with former regimes* (1997).

4. See Hugo van de Merwe and Maya Schkolne, *The role of local civil society in transitional justice* in Cheryl Lawther, Luke Moffett and Dov Jacobs (ed.), *Research Handbook on Transitional Justice* at 221 (Edward Elgar Publishing 2019).

5. For further in-depth analysis on the subject, see Aaron P. Boesenecker and Leslie Vinjamuri, *Lost in Translation? Civil Society, Faith-based Organizations and the Negotiation of International Norms*, 5 International Journal of Transitional Justice (2011); Audrey R Chapman and Hugo van der Merwe, *Truth and Reconciliation in South Africa: Did the TRC Deliver?*, Pennsylvania University Press (2008); Heidy Rombouts, *Victim Organizations and the Politics of reparation: A Case-study on Rwanda*, Intersentia (2004); Jonah S Rubin, *Transitional Justice Against the State: Lessons from Spanish Civil Society-led Forensic Exhumations*, International Journal of Transitional Justice (2014); Reem Abou-El-Fadl, *Beyond Conventional Transitional Justice: Egypt's 2011 Revolution and the Absence of Political Will*, International Journal of Transitional Justice (2012). For an academic and almost comprehensively deal of transitional justice "from below" see Hugo van der Merwe and Maya Sckolme, *The role of local civil society in transitional justice* in Cheryl Lawther, Luke Moffett and Dov Jacobs (ed.), *Research Handbook on Transitional Justice* (Edward Elgar 2019).

6. See Dustin N. Sharp, *Transitional Justice and "Local" Justice* in Dov Jacobs (ed.) *Research Handbook on Transitional Justice* at 142-3 (Edward Elgar Publishing 2017).

peace, democracy, and reconciliation, it is not possible to provide "a priori" a right combination of transitional tools that can guarantee the success of the transitional process. This is indeed a very open debate.

2. *Transitional Justice "from below"*

As a report of the UN Secretary-General designated in 2004, transitional justice "comprises the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation"[7]. Usually, it's done through state-led initiatives (i.e., prosecutions, truth commissions and/or amnesties); however, transitional justice can also derive from local communities themselves[8]. In fact, they have at times been involved in truth recovery, ex-combatants' demobilization, and in the challenging of cultures of violence (e.g., through community restorative justice). It is of the utmost importance to highlight that these initiatives do not involve any participation of the state or any governmental organization, and it goes without saying that bottom-up initiatives have great chances of success as civil society shares a common interest: to put an end to a very often destructive and ruinous conflict[9]. Civil society, as defined in an excellent way by Paul Gready and Simon Robins, is constituted from "all public spheres, separate from the apparatus of the state and the economic market, which serve as locations of political participation and discursive interaction. It is a site of political and social action and contestation, characterized by a diverse range of actors with different, sometimes competing, agendas and repertoires of actions"[10].

7. UN Security Council Doc S/2004/616, *The rule of law and transitional justice in conflict and post-conflict societies - Report of the Secretary General* at 4, available at https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/PCS%20S%202004%20616.pdf (last visited November 2, 2022).

8. See Lundy and McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom up* at 271 (cited in note 2).

9. Kieran McEvoy and Lorna McGregor, *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* at 2 (Bloomsbury Publishing 2008).

10. Paul Gready and Simon Robins, *Rethinking civil society and transitional justice: lessons from social movements and "new" civil society*, The International Journal of

It follows that the involvement of communities is increasingly taken into consideration given their inherent character of resilience and mobilization against the several political and economic forces that enter the field[11]. Additionally, the standard transitional justice mechanisms are often corrupt, inefficient, or otherwise unable to respond to the needs of the transitional process[12]. Thus, non-governmental organizations, groups of victims, or survivors organize themselves independently in order to give the necessary impetus to a process that aims at healing old wounds. Needless to say, communities act with the awareness of not being able to cancel the horrors previously committed by authoritarian regimes or deriving from conflicts between multiple factions[13]. Frequently, civil society's initiatives are undertaken precisely because the state has failed to implement sufficiently effective transitional justice mechanisms, or none at all, that lead to accountability, truth, healing, and so on[14].

3. *The Evolution of Transitional Justice and the Contribution of Civil Society*

Transitional justice practices "from the top" have never been conceived as being malleable and adaptable to peculiar situations. In view of this, the international community has always tried to impose solutions from the outside according to the "one-size-fits-all" paradigm[15]. It has to be admitted that attempts have been made to modify the praxis and to take into account the preferences or suggestions of local communities and constituencies; however, these attempts have been characterized by superficiality and little accuracy[16]. Inevitably, some

---

Human Rights (2017) 958, available at https://doi.org/10.1080/13642987.2017.1313237 (last visited November 2, 2022).

11. See van de Merwe and Schkolne, *The role of local civil society in transitional justice* at 221 (cited in note 4).

12. Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice*, 34(4) Journal of Law and Society 411 (2007) 413-414.

13. See van de Merwe and Schkolne, *The role of local civil society in transitional justice* at 221 (cited in note 4).

14. See *id*., at 5.

15. See Sharp, *Transitional Justice and "Local" Justice* at 142 (cited in note 6).

16. See *ibid*.

argue that this participatory approach arose from the underdeveloped world because North-inspired transitional justice mechanisms "from the top" failed to serve justice[17]. Nowadays, there is a growing sentiment that pushes towards considering more civil society as it is believed that peacebuilding and justice initiatives "from the top" and not adapted to a precise socio-political context fear to be seen as illegitimate by the local communities and therefore will not bring benefits in the long term[18]. This conclusion has also been reached in the report of the UN Secretary-General of 2004[19]. It follows that not only should local communities be involved in the implementation stage, but they should also take part in every stage of the transitional process (i.e., conception, design, decision making, and management)[20]. The theoretical benefits that derive from the implementation of grassroots practices are many: in particular, one can well imagine that these appear to be closer to civil society, thus ensuring a more widespread participation. Not only a higher level of physical participation, but it is reported that these techniques are more welcomed by the affected communities both from a social and cultural point of view[21]. To reiterate, it has not been argued that the integration of the bottom-up approach with the traditional top-down one would grant success to the transitional process but it can surely increase possibilities of non-recurrence of the conflict.

4. *The Limits of Top-down Approaches deriving from the Inevitable Peculiarities of each National Legal System*

17. See Lundy and McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom up* at 279 (cited in note 2). Transitional justice was born after World War I but started to be conceived as extraordinary in 1945 when the international community came to terms with the cruelties of the Nazi regime. State-led initiatives of transitional justice were then employed soon after the collapse of the Soviet Union in 1989. Bottom-up participatory approaches stem (in South America, Sub-Saharan Africa and the Asian sub-continent) from the awareness that these top-down tools - inspired from transitional processes that took place in the Northern countries of the world - failed (at least partially) to meet their scope.

18. See Sharp, *Transitional Justice and "Local" Justice* at 142-3 (cited in note 6).

19. See UN Doc S/2004/616, at 7 (cited in note 8).

20. See Lundy and McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom up* at 266 (cited in note 2).

21. See Sharp, *Transitional Justice and "Local" Justice* at 145 (cited in note 6).

Another aspect that deserves to be considered is that every legal system is "sui generis". Justice is a concept that is declined differently according to the legal tradition on which one intends to dwell: it is definitely linked to the historical and cultural context. For this reason, the way in which justice is done necessarily varies in time and space. In the past, attempts have been made to "consult" with civil society but the confrontations with these realities have always been carried out in a very superficial way[22]. That is the reason why some feel the need for a "turn to local": there needs to implement the use of "non-Western" tools of dispute revolutions, truth-telling and reconciliation[23]. By way of illustration, African legal systems present multiple and overlapping systems of justice. It follows that claiming to take mainstream mechanisms and simply to bring them into a legal system is risky. Indeed, the danger is that they might be useless and/or inaccessible to many[24]. Evidently, a number of practices from the top have recently been considered both remote and inaccessible. Let us consider, for instance, the most famous international tribunals delivering justice in Rwanda and Yugoslavia. These mechanisms have proven to be very expensive and were placed far away from the communities they had to serve. Moreover, they have also been deeply criticized by their own national governments[25]. One of the most used mechanisms of transitional justice is the one of truth commissions: these seem to promise to solve the aforementioned problems. Yet, their simple export without taking into account the historical and cultural context ought once again to be rejected[26]. It can be argued that not every post-conflict society is willing to deal with the past. Therefore, the establishment of truth commissions might be viewed negatively as it necessarily leads to "the reopening of old wounds from which further polarizations may arise"[27]. Furthermore, it is quite possible that the truth sought by the

22. See Sandra Rubli, *Transitional Justice: Justice by Bureaucratic Means?* at 12 (Swiss Peace Working Paper 4/2012).

23. See Martien Schotsmans, *International Actors and Traditional Justice in Sub-Saharan Africa; Policies and Interventions in Transitional Justice and Justice Sector Aid* (Intersentia 2015).

24. See Sharp, *Transitional Justice and "Local" Justice* at 145 (cited in note 6).

25. See *ibid.*

26. See *id.*, *at* 146.

27. See *id.*, *at* 146-7.

commission is partial and limited. Indeed, the very fact that it is imposed by state policies can result in the marginalization of the victims and in the exclusion of some socio-economic injustices. An example can be the one offered by the transition of Sierra Leone: there the words "revealing is healing" were rejected as this practice was not in tune with the local tradition of "social forgetting" and ritual cleansing. In short, the *modus operandi* of truth commissions can sometimes lead to a re-traumatization of civil society and be against indigenous traditions relating to reconciliation[28].

5. *Benefits of Transitional Justice from below*

As it can be deduced, the favored thesis is that the "from below" perspective can certainly give benefits to the normal top-down approach: for instance, the participation of social movements and grassroots organizations can make sure that economic crimes and/or corruption are included in the list of crimes to be investigated. In fact, these crimes are not generally considered in transitions mainly characterized by practices from the top[29]. Furthermore, one of the purposes of the bottom-up approach is to ensure that local actors continue to pursue ideals of justice and the development of the transitional process also, and above all, from the moment in which foreign donors leave[30]. As argued previously, there is no mathematical rule that can establish with absolute certainty what the perfect balance between the different practices of transitional justice is: the evaluation must take into account the socio-economic and political situation as well as suggestions and opinions of civil society. This is the only course of action: in this way, the chances of a return to conflict are minimal.

28. See *id*., at 147.

29. See McEvoy and McGregor, *Transitional Justice from Below* at 6 (cited in note 9).

30. See Lundy and McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom up* at 280 (cited in note 2).

6. *The Various Roles of Civil Society in Transitional Justice*

The contributions of civil society to transitional justice are numerous. In one of his writings[31], Backer tries to outline some fundamental functions that civil society can fulfill in the context of the transitional justice processes. Human rights organizations and associations are well-known for their work in collecting data and testimony on human rights abuses. Certainly, it is a valuable contribution to international justice processes for several reasons. First, it creates accurate and specific historical documentation indispensable for obtaining the truth about the past[32]. Given that judicial processes and formal transitional justice processes often start several years after the conflict, there is a risk that necessary evidence would no longer be accessible. For this reason, the collection of testimonies and evidence from civil society in some cases has proved essential to bringing out the events, causes, and relationships between the various abuses and events during the conflict. For example, during the Pinochet dictatorship, some religious organizations collected thousands of judicial transcripts and other proof regarding the disappearances which later proved crucial to the investigation of the National Commission for Truth and Reconciliation whose extremely short term of 18 months would not have allowed it to achieve such work of collection[33]. Additionally, the mechanisms of transitional justice may sometimes not find a uniform application and therefore would be destined to fail to fulfill their mandates. Consequently, civil society is also often involved in monitoring the implementation of these tools and verifying their transparency. Indeed, when there is room for discretionary decisions, civil society has the task of paying attention and acting so that governmental institutions operate transparently[34]. Another key function of civil society is to feed the public debate on its past and on the issue of human rights, especially in those situations where local politics is prone to denial and

31. David Backer, *Civil Society and Transitional Justice: Possibilities, Patterns and Prospects*, 3 Journal of Human Rights 297, 302 (2003).

32. See *ibid.*

33. See *ibid.*

34. See van de Merwe and Schkolne, *The role of local civil society in transitional justice* at 235 (cited in note 4).

amnesia about the events that have occurred[35]. With regard to support for victims in many areas, such as medical and legal assistance, associations and civil society groups often come into play and fill the gaps left by state institutions. Activities of this type are aimed to reduce the effects of trauma to victims of torture, rape, and other forms of abuse, preventing the transgenerational transmission of trauma and facilitating the reintegration of victims into the community[36]. Overall, these activities make an important contribution to reconciliation and development of those societies that have recently emerged from civil wars or ethnic-religious conflicts.

7. *The Need for Collaboration between Governmental Institutions and Civil Society to Achieve Proper Justice*

The scenarios outlined above can constitute a theoretical reference framework within which to insert the activities of civil society and describe the different types of collaboration that are established between it and governments, and the implications in the transitional justice process and in the political development landscape[37]. The ideal situation is undoubtedly the one in which civil society is already present and organized at the moment of transition, and a relationship of collaboration with the government has already been established. In this scenario, the most favorable one designated by Backer, civil society can make an effective contribution from the beginning or perhaps even before the issue of transitional justice is raised on the political agenda[38]. Secondly, in this ideal circumstance, the government is open to new proposals and makes itself available to establish new partnerships with associations and non-governmental organizations present in the area[39]. This type of orientation, however, does not imply that the entire work must be carried out on a collaborative basis, but that there is also a clear division of tasks that avoids the overlapping of activities and dispersion of economic resources. It is an aspect that should

35. See Backer, *Civil Society and Transitional Justice* at 303 (cited in note 31).
36. *See id*., at 304.
37. See *id*., at 306.
38. See *id*., at. 306-7.
39. See *ibid*.

not be underestimated since countries facing transitions are often in severe conditions of deficit[40]. Yet, it is very difficult for transitional justice processes to establish this ideal type of collaboration: the other scenarios presented by Becker, on the other hand, highlight a series of phenomena that have been encountered in numerous post-conflict situations[41]. In transitional scenarios, civil society is often in an embryonic phase. It is unrealistic to expect it to play an indicative role in the political landscape of countries that have just emerged from a conflict; consequently, despite governments or the international community starting transitional justice processes, it is unlikely that these are followed by an active involvement of society. Frequently, it tends to be very limited besides still being an essential ingredient for the success of the entire transitional process[42]. However, as already mentioned, the risk incurred when civil society is not involved is that the real needs of the community are neglected and that at a certain point the process is abandoned and falls into oblivion, thus decreeing the failure of the whole operation[43].

8. *(follows) The Spanish Case: no collaboration between Governmental Institutions and Civil Society*

When the government, for various reasons, has no intention of dealing with the past, it can resort to instruments such as amnesties and decide not to legally prosecute the guilty. This type of decision, however, is hazardous for the government itself, whose legitimacy risks being strongly questioned by civil society, which, just out of a conflict, expects change and a democratic transition[44]. In Spain, after the death of the dictator Francisco Franco (1975), almost all political forces agreed to grant immunity to all individuals who had committed crimes to defend or to go against the regime[45]. It was a conscious

40. See *ibid.*
41. See *id*., at. 306-10.
42. See *id*., at. 307 (table 2 - Theoretical framework).
43. See Sharp, *Transitional Justice and "Local" Justice* at 142-3 (cited in note 6).
44. See *id*., at 310.
45. Josep Marìa Tamarit Sumalla, *Transition, Historical Memory and Criminal Justice in Spain*, Journal of International Criminal Justice 9 729-730 (2011).

decision to forgive unconditionally and no longer look at the past; the focus was on the future. According to many, it is not a passive process but one that deliberately aims to ignore the events that were known and remembered very well[46]. Precisely for this reason, Spain is a very interesting case as it is the only country in which it has been chosen to avoid transitional justice: this decision has often been praised but never copied and today this path no longer seems to be viable[47]. However, with the gradual appearance of democracy, numerous non-governmental associations made up of victims and their descendants have emerged[48]. In particular, in 2000 the first association was created for the recovery of historical memory after the discovery of a mass grave. Some of these associations have begun to promote further excavations and identification through the use of DNA[49]. Thanks to the contribution of civil society, the desire to deal with the past has also been forming in Spain: successive governments have begun to enact laws with the aim of granting economic compensation to the victims, condemning Francoism (and the relative symbols and public monuments) to identify and possibly exhume the victims[50]. Despite the non-homogeneity of the implementation of the "Ley de la Memoria Històrica" (2007) throughout Spain, some autonomous communities have pushed themselves much further and promoted other measures aimed to heal old wounds[51].

9. *Criticism of Transitional Justice "from below". The "Participatory Action Research" (PAR)*

As has been noted, the "bottom-up" perspective is particularly relevant in those environments where politics and institutions are obstacles to transitional justice initiatives. In these scenarios, civil society plays a critical role in promoting initiatives aimed at establishing reconciliation and/or accountability for crimes by subjecting official

46. See *id*., at 730.
47. See *ibid.*
48. See *id*., at 737.
49. See *ibid.*
50. See *id*., at 737-743.
51. See *id*., at 744-745.

authorities to relentless criticism of state inaction. Thus, civil society drives transitional justice as a prime actor, as it normally should be[52]. However, the role of civil society should not be romanticized: the pluralism inherent in the concept itself also denotes the presence and support of different NGOs, some of which follow extremist and illiberal ideas and interests. Just as there can be seen initiatives that promote reconciliation, other segments of civil society might work in the opposite direction. This aspect raises a question: what are the criteria through which transitional justice policies establish what agendas to follow between the ones pushed by certain CSOs rather than others[53]? However, precisely in these cases, a community-based truth-telling and research approach should be organized in, with and by members of the community and should be guided by the PAR (Participatory Action Research) paradigm[54]. This approach was devised to challenge the dominant paradigm of liberal knowledge, control and development as North-inspired transitional justice mechanisms "from the top" failed to deliver proper justice[55]. This approach sees those who are "research objects" directly involved in all phases of the research, from problem definition to dissemination and action - "it is action research that is participatory and participatory research that unites with action"[56]. The PAR is innovative: it is an "internal" research that actively involves people, triggers the truth-seeking and awareness of their conditions and, in accordance with these, of how change can be initiated[57]. The goal is to bring people to be able, through the sharing of knowledge-experiences, to transform their environment. In this process, other actors can play a catalytic and supportive role, but they will not do so from a dominant point of view as it remains driven by the local community (e.g., the transition of Northern Ireland). In other words, this approach seeks to solve the problems that arise in a region through the

52. Lundy and McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom up* at 289 (cited in note 2).

53. See van de Merwe and Schkolne, *The role of local civil society in transitional justice* at 234-5 (cited in note 4).

54. Lundy and McGovern, *Whose Justice? Rethinking Transitional Justice from the Bottom up* at 286 (cited in note 2).

55. See *id*., at 279.

56. See *id*., at 286.

57. See *ibid*.

involvement of endogenous resources and not through the imposition of an externally conceived and designed model[58].

10. *(follows) An example of the "Participatory Action Research" (PAR): the Ardoyne Commemoration Project (ACP).*

The Ardoyne Commemoration Project (ACP) aimed to seek truth in the Ardoyne area, north of Belfast[59]. We know that in 1998 the Good Friday Agreement created a partial and not simple peace. This frail diplomatic achievement gave way to a widespread popular process of reflection on the events they experienced during the conflict[60]. However, no transitional justice mechanisms have been established[61]. In a context of uncertainty and inertia on the part of the government to implement practices to deal with the past, an "ad hoc" group of victims, relatives of victims, interested individuals and civil society activists was set up with the aim of producing a book in which to insert testimonies of events of the conflict[62]. This is an original idea as they wanted to identify and honor those who were killed in the conflict regardless of their faction: no one was prevented from testifying on an ethnic, religious or political basis[63]. This is recognized as one of the many positive elements of the project that facilitated its success[64]. A very interesting aspect about the PAR is that participation implies the development of solidarity and empathy among the various participants who, although they may have different positions on the issue under consideration, must identify common problems and work together on social change. The ACP is also studied today as it is seen as a project in which individuals and communities have been able to express themselves and tell about events hitherto unknown to most[65]. A particular aspect of the project is that, in order to participate, the victims had to

58. See *ibid.*
59. See *id.*, at 284.
60. See *ibid.*
61. See *id.*, at 285.
62. See *ibid.*
63. See *id.*, at 287.
64. See *ibid.*
65. See *id.*, at 289.

have lived for a period of their life in Ardoyne[66]. Some studies have been conducted to investigate the ACP's strengths and limitations: recognition and acknowledgment have been included in the reports as positive results[67]. A limitation that deserves to be mentioned is the inability of the project to disclose information from outside agencies in order to obtain some official recognition or any form of accountability[68]. Furthermore, for some respondents, the mere fact of revealing hidden truths is not enough; they would have preferred the state to take legal action against those who committed crimes during the conflict[69]. In any case, at the same time, idealizing participatory approaches should be avoided, as these have limits too: for example, the selection of individuals who will be entitled to give testimonies can lead to substantively marginalizing some minority groups just as in top-down practices[70]. That is why grassroots approaches must also be handled with care. Furthermore, it is quite likely that in post-conflict societies, those who decide to seek the truth and deal with the past will soon run out of resources and/or authority to investigate all crimes. As previously discussed, it is believed that corruption and economic crimes would be the most neglected and therefore the risk is to create inequality of treatment[71].

11. *Conclusion*

In conclusion, transitional justice is nowadays characterized by a dominance of legalism[72]: some argue that there is a logical relationship between the dominance of legalism in the transitional doctrine/practice and the trend to intend justice and justice delivery as a matter of "state-like" institutions[73]. Probably, this tendency comes from the

66. See *id*., at 287.
67. See *id*., at 289.
68. See *id*., at 290.
69. See *id*., at 291.
70. See *id*., at 292.
71. See McEvoy and McGregor, *Transitional Justice from Below* at 6 (cited in note 9).
72. Kieran McEvoy, *Beyond Legalism: Towards a Thicker Understanding of Transitional Justice* at 411 (cited in note 12).
73. See *id*., at 424.

fact that the goals of transitional justice are so complex to achieve that some contribution of the state is needed to "render such objectives legible"[74]. Conceived in this way, it leaves little room for new interpretations and alternatives of transitional justice. What emerges is that to make space for new ways of justice that better respond to local needs is a necessary course of action to expand the idea of transitional justice. In addition to the state level, civil society, understood as the vast range of actors that constitute a country, exists and must absolutely be taken into account. Therefore, the support and legitimation of initiatives such as that of ACP, even at an international level, lead not only to the recognition of civil society as the protagonist of transitional justice, but also encourages domestic pressure that can finally induce a change in political and social orientations. Finally, the creation of a truth commission or an international court will never solve all the problems related to the past: any initiative must be accompanied and followed by a widespread diffusion of the truth that will be revealed by projects of reconciliation, commemoration and many other initiatives "from below" aimed at reminding of previous harder times.

74. See *ibid.*

UNIVERSITÀ DEGLI STUDI
DI TRENTO

Opera Universitaria di Trento

ISSN 2612-4874