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# Experience in Sentencing: New Empirical Insights on What Judges Think They Do in Court

Diana Richards<sup>1</sup>

## I. Study Overview

The aim of the current study was to measure the variation in attitudes of judges towards various aspects of judicial decision-making, based on their prior professional experience. The main hypothesis of this study was that a different amount of professional experience might make judges have different opinions towards their own judicial activity. This hypothesis was inspired by psychological studies focused on the importance of experience in decision-making,<sup>2</sup> which are explored in more detail in section II. The idea that experts might think differently than novices is probably intuitively known for quite some time (often expressed anecdotally by both advocates and judges themselves). Yet no empirical study of judicial decision-making has yet measured the dynamic view that judicial attitudes can change over time with levels of experience. There are almost no longitudinal studies done on judges,<sup>3</sup> and certainly none in Europe. A few cross-sectional studies included the age or experience as one of their variables, but these variables were counted as one among the many generic background factors and never given central importance in the findings discussions.<sup>4</sup>

To explore the impact of *professional* experience, the current study operationalised the concept by splitting it into 3 different variables: judicial experience (number of years on the bench/tenure), criminal legal experience

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<sup>2</sup> Gary Klein, *Sources of Power: How People Make Decisions* (MIT Press 1998); Amy L Baylor, 'A U-Shaped Model for the Development of Intuition by Level of Expertise' (2001) 19 *New Ideas in Psychology* 237; Barbara A Spellman, 'On the Supposed Expertise of Judges in Evaluating Evidence' <<http://papers.ssrn.com/abstract=977854>> accessed 24 December 2014; Daniel Kahneman and Gary Klein, 'Conditions for Intuitive Expertise: A Failure to Disagree' (2009) 64 *American Psychologist* 515.

<sup>3</sup> With the notable exception of Lee Epstein and others, 'Do Political Preferences Change? A Longitudinal Study of U.S. Supreme Court Justices' (1998) 60 *The Journal of Politics* 801. More recently, Niv and Lachman have discovered that more experienced Israeli judges are more likely to consider other judges' sentencing more lenient than novice judges, although the samples were rather small and it is not very clear from the research design if the study is indeed longitudinal (if it has the same respondents over time). Moshe Bar Niv and Ran Lachman, 'Judges' Perspective on the Level of Punishment | EJLS - European Journal of Legal Studies' [2017] *European Journal of Legal Studies* s IV.2 <<http://www.ejls.eu/23/243UK.htm>> accessed 9 September 2017.

<sup>4</sup> Sheldon Goldman, 'Voting Behavior on the United States Courts of Appeals, 1961-1964' [1966] *The American Political Science Review* 374; S Sidney Ulmer, 'Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms' (1973) 17 *American Journal of Political Science* 622; Orley Ashenfelter, Theodore Eisenberg and Stewart J Schwab, 'Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes' (1995) 24 *Journal of Legal Studies* 257; Kenneth L Manning, Bruce A Carroll and Robert A Carp, 'Does Age Matter? Judicial Decision Making in Age Discrimination Cases\*' (2004) 85 *Social Science Quarterly* 1; Lee Epstein, Andrew D Martin and Andrew W Martin, 'Does Age (Really) Matter? A Response to Manning, Carroll, and Carp' (2004) 85 *Social Science Quarterly* 19.

(number of years spent dealing with criminal cases), and pre-appointment legal experience (number of years gained in law practice before becoming a judge). While potentially overlapping, these three variables also reflect different aspects of professional expertise of judges, and allow the study to explore in more detail what it is exactly that makes judges change their attitudes towards their sentencing practice.

While 'experience' could presumably be operationalised in several ways, the current study aimed to measure the level of experience of judges not by self-reported measures, but by using objective variables such as the amount of years spent on the bench, or the amount of years in legal practice. This methodological choice was directly inspired by psychological studies on expertise and decision-making, most notably dual processing accounts of decision-making,<sup>5</sup> Gary Klein's extensive work on the decision-making of experts such as firefighters, airplane pilots and military officers.<sup>6</sup> Most notably, although Kahneman and Klein disagreed on many points, they agreed that professional experience is built under three necessary conditions: prolonged practice, routine and feedback.<sup>7</sup> In other words, the [prolonged] exposure to certain kind of practice (be it legal, judicial or criminal) of judges seems to be a solid predictor of their professional experience.

The study was ambitious in aiming to include judges from all levels of courts, and not just focus on judges from appellate or supreme courts. Due to this fact, it had to tame its other ambitions in three other ways. First, it was designed as a sociological study of *attitudes* (expressed by the judges themselves), and not a psychological experiment testing their internal mental processes. The European judges have yet to be as comfortable as American judges with undergoing psychological testing. That said, judicial experience is not seen as a potentially contentious factor affecting the judicial image, so it was expected that judges would not hide their opinions or falsify their answers in any way (at least consciously).

Second, while experience might be expected to influence attitudes towards many aspects of the judicial activity, for the sake of scientific clarity the study only focused on one type of judicial decision-making: sentencing. Sentencing was considered one of the most challenging and important duties a judge has; on one hand, due to the importance of the consequences for the parties involved, and therefore the pressure to get the "right sentence" in a case; on the other hand, due to the multitude of aggravating and mitigating factors a judge has to take into account (or disregard) when deciding the right sentence. For this reason, the questions focused on the respondents' attitudes towards their sentencing activity.

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<sup>5</sup> Daniel Kahneman, *Thinking, Fast and Slow* (1st edn, Farrar, Straus and Giroux 2011); Jonathan Evans, 'Dual-Processing Accounts of Reasoning, Judgment, and Social Cognition' (2008) 59 *Annual Review of Psychology* 255.

<sup>6</sup> Gary Klein, 'Jumping to Conclusions Can Make for Good Decisions' (2010) 177 *Science News* 32; Klein, *Sources of Power* (n 2).

<sup>7</sup> Kahneman and Klein (n 2) 241.

Third, while empirical studies on judicial decision-making are perhaps often conducted with the unspoken desire to describe characteristics that are universal, applicable cross-jurisdictionally, each researcher is bound to focus on one jurisdiction and hope that the study shall have the chance to be replicated in other jurisdictions in the future. This study makes no exception. While it was designed to be conducted in any world jurisdiction, the study was eventually conducted in one European jurisdiction, namely Romania.

Perhaps surprisingly, Romania has a key advantage in constituting a good case study for this type of study: it has a hybrid judicial appointment and training system, combining the typical characteristics of continental jurisdictions (e.g. the recruitment of young judges, with no prior legal experience) with a common law jurisdiction (e.g. focus on judicial recruitment of legal professionals with significant legal experience). Having access to two different samples of judges, with different levels of experience (as well as exposure to different types of judicial training) but with the same historical and cultural background proved fortunate, because it was able to measure the impact of expertise on various judicial attitudes, without having to worry about a range of confounding variables that cannot typically be controlled for in cross-jurisdictional studies, such as different socio-political conditions, different judicial systems or different historical and cultural backgrounds. Judges from both types of recruitment and training routes were included in the study, along with a wide range of judges that have already served for years on the bench. The details of how the sampling was made and how the interventions took place are detailed in section III.

There are two key questions (and corresponding findings) that shall be presented in this article:

1. Sentencing tools – How do judges in Romania say they use different **tools** in sentencing, and how does their prior experience relate to the way they use sentencing tools;
2. Sentencing factors – How do judges say they approach the weighing of sentencing factors (and whether their approach changes with experience).

Section II briefly overviews the main theories and studies that have influenced the current research. As this is an interdisciplinary study, it drew influences from judicial studies (traditionally developed within political science and psychology), sociological studies on sentencing, as well as developmental theories of experiential learning. Due to space constraints, section II only focuses on the direct influences.

## II. Theoretical Framework

While in the United States empirical legal studies judicial behaviour have been conducted for almost a century, judicial studies are still in their infancy in UK and Europe. The scholarship so far developed in the United States has proven a valuable

lesson for European researchers when designing empirical studies that assess judicial decision-making. The initial attempts in the States, most probably inspired by the legal realist movement,<sup>8</sup> focused on attempting to prove that the legal model (whereby a judge is merely applying the law in a case and none of her background or personal beliefs play any role) is not depicting how judicial decision-making actually works. For this reason, the earlier empirical studies measured one variable – the individual judge’s political orientation – as the key variable that shows there is much more to judicial decision-making than mere rule-applying.<sup>9</sup> In time, the models derived became more sophisticated, either by incorporating a strategic dimension explaining the dynamics between judges,<sup>10</sup> or the importance of economic factors in the decision-making process,<sup>11</sup> or by incorporating the idea that judges are preoccupied by how they are perceived by various audiences, be it the general public, their colleagues, the mass media or colleagues from other branches of the government.<sup>12</sup> Perhaps the most complex models were the ones to acknowledge the multi-faceted nature of the judicial decision-making activity, and to argue that it is simply wrong to only focus on just one type of factors that might influence judges.<sup>13</sup>

Apart from the research activity produced in political science departments across the US in the past 70 years, *psychologists* have also brought incredibly important contributions to our understanding of the decision-making process. Most often, in these studies, judges were considered first and foremost as human beings, subjected to the same range of biases and unconscious processes as other people. Given this fundamental assumption, a flurry of studies made on judge or non-judge participants who were given judicial decision-making tasks revealed important problems and biases.<sup>14</sup> Another strand of psychological studies took a step further and looked at how professional decision-makers differ from average human beings. These studies revealed that expert decision-makers differ from novice decision-makers in the way they make decisions – be it the factors they take into account, the

<sup>8</sup> Oliver Wendell Holmes, ‘1897. The Path of the Law’ (1896) 10 Harvard Law Review 457; Karl N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana Publications 1930).

<sup>9</sup> S Sidney Ulmer, ‘The Political Party Variable in the Michigan Supreme Court’ (1962) 11 J. Pub. L. 352; Glendon Schubert, ‘Judicial Attitudes and Voting Behavior: The 1961 Term of the United States Supreme Court’ [1963] Law and Contemporary Problems 100; Goldman (n 4).

<sup>10</sup> Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press 1994); Lee Epstein and Jack Knight, *The Choices Justices Make* (SAGE 1997).

<sup>11</sup> Richard A Posner, *How Judges Think* (Harvard University Press 2008).

<sup>12</sup> Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press 2009).

<sup>13</sup> Paul H Robinson and Barbara A Spellman, ‘Sentencing Decisions: Matching the Decisionmaker to the Decision Nature’ [2005] Columbia Law Review 1124; Jennifer K Robbennolt, Robert MacCoun and John M Darley, ‘Multiple Constraint Satisfaction in Judging’ in David E Klein and Gregory Mitchell (eds), *The Psychology of Judicial Decision Making* (Oxford University Press 2010).

<sup>14</sup> Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, ‘Inside the Judicial Mind’ (2000) 86 Cornell Law Review 777; Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, ‘Blinking on the Bench: How Judges Decide Cases’ (2007) 93 Cornell L. Rev. 1; Keith J Holyoak, ‘Analogy’ in Robert G Morrison (ed), *The Cambridge Handbook of Thinking and Reasoning* (Cambridge University Press 2005).

weight they give to different factors, the speed of decision-making, or the fact that they have “hunches”.<sup>15</sup>

In addition to research conducted on judges more generally, some sociological and criminological research has specifically focused on judicial sentencing. The empirical research on sentencing is split into two major strands of research: behavioural research on sentencing, on one hand, and research on attitudes towards sentencing, on the other. The common premise of both strands is that there is a whole range of factors that impact on the decisions of judges when they sentence. What distinguished the two strands was a methodological assumption on how to best find out what those factors are. The behavioural research adopted *indirect* measures of judicial attitudes (for instance, votes in panels, variation in sentencing decisions etc.),<sup>16</sup> while the other strand of studies adopted *direct* measures of judicial attitudes (surveys, interviews, judicial notes).<sup>17</sup> Almost none of these studies looked at judicial experience as an independent variable, apart from two major exceptions: Hogarth’s 1971 study on Canadian magistrates,<sup>18</sup> and Jacobson and Hough’s 2007 study on English judges’ attitudes towards mitigation factors in sentencing.<sup>19</sup>

Hogarth’s study was a sophisticated, mixed-method sociological study, the first to measure (1) the magistrates’ age, legal background, years on the bench, and to verify if these explained variations in their attitudes; (2) their attitudes towards legal instruments (such as guideline judgments from higher courts); and he was highly innovative in (3) looking at how “magistrates search for and use information in the process of coming to decisions”<sup>20</sup> – which meant he asked magistrates to rank sentencing factors, as well as the sources of information used in deciding a sentence. One of Hogarth’s major findings was that

*About 50 per cent of the variation in sentencing behaviour could be accounted for by knowing nothing about the cases and relying solely*

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<sup>15</sup> Gary Klein, *Intuition at Work: Why Developing Your Gut Instincts Will Make You Better at What You Do* (Currency/Doubleday 2003); Kahneman and Klein (n 2); Livingston Armytage, *Educating Judges: Towards a New Model of Continuing Judicial Learning* (Martinus Nijhoff Publishers 1996); Marta Sinclair, ‘Misconceptions About Intuition’ (2010) 21 *Psychological Inquiry* 378.

<sup>16</sup> George Everson, ‘The Human Element in Justice’ (1919) 10 *Journal of the American Institute of Criminal Law and Criminology* 90; Edward Green, *Judicial Attitudes in Sentencing; a Study of the Factors Underlying the Sentencing Practice of the Criminal Court of Philadelphia*. (Macmillan; St Martin’s Press 1961); Franz Exner, *Studien über die Strafzumessungspraxis der deutschen Gerichte* (Wiegandt 1931); Roger Hood, *Sentencing in Magistrates’ Courts: A Study in Variations of Policy* (Stevens 1962); William Edler von Eyben, *Strafudmaling* (GEC Gads Forlag 1950); Jorge Sobral Fernandez, ‘Judges and Their Decisions’ in Santiago Redondo, *Advances in Psychology and Law: International Contributions* (Walter de Gruyter 1997).

<sup>17</sup> John Hogarth, *Sentencing as a Human Process* (University of Toronto Press in association with the Centre of Criminology, University of Toronto 1971).

<sup>18</sup> *ibid.*

<sup>19</sup> Jessica Jacobson and Mike Hough, ‘Mitigation: The Role of Personal Factors in Sentencing’ (Prison Reform Trust 2007).

<sup>20</sup> Hogarth (n 17) 229.

*on three pieces of information about the magistrate [n.b. attitudinal variables].*<sup>21</sup>

This finding is very strong supporting evidence for the idea that studies that interview or survey judges are important. Unlike what critics of direct measures of attitudes might claim, the characteristics of judges and their beliefs about sentencing are much more powerfully predictive than just examining details of a case.

Finally, the current study is inspired by one of the major educational theories of the 20th century – the theory of experiential learning – through David Kolb’s theory of the Learning Cycle and the Learning Styles Inventory (LSI).<sup>22</sup> Kolb’s theory is useful in explaining why it is that, during the *formal* training process, judges might have different needs at different points of the learning process, depending on their prior exposure to training and their prior legal experience. More importantly for this paper, experiential theory is also useful in explaining differences between judges in using different *informal* learning tools have in their day to day job, depending on the stage of their career development. Interestingly, although Kolb’s Learning Cycle has been replicated with learners from many professions, across more than 1,000 studies, it has never so far been validated on judges.<sup>23</sup>

### III. Methodology and Sampling

#### *A. Research Questions and Variables Measured*

This part of the study tested the hypothesis that judges of different levels of expertise will have different informal learning preferences and will approach sentencing differently. This hypothesis was based on the assumption (derived from the theoretical framework) that judges do not just learn during judicial training, but also from a variety of situations and sources outside of the training context. To explore this hypothesis, the research asked judges to share their thoughts on three main research questions:

1. How judges in Romania say they use different **tools** in sentencing;
2. How does their prior experience relate to the way they use sentencing tools;
3. How do judges say they approach the weighing of sentencing **factors** (and whether their approach changes with experience);

**Sentencing Tools.** The first two questions refer to the so-called ‘sentencing tools.’ Sentencing tools represent the wide variety of legal materials and sources of

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<sup>21</sup> *ibid* 351.

<sup>22</sup> David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice-Hall 1984).

<sup>23</sup> Alice Y Kolb and David A Kolb, ‘The Kolb Learning Style Inventory — Version 3.1 2005 Technical Specifications’ (2005).

information that the judge can use throughout his court practice in attempting to identify what the best sentence is in a particular case. In this sense, sentencing tools are complementary to formal training. In Romanian sentencing practice, the legally binding tools are:

- Sentence ranges (stipulated in the Criminal Code);
- Sentencing guidelines (stipulated in the Criminal Procedure Code);
- Landmark cases (“Appeals in the Interest of the Law” judgments);

While the non-binding sentencing tools are:

- Sentencing remarks from own court or other courts;
- Pre-sentence reports;
- Prosecutorial recommendations of appropriate sentence.

While the Romanian justice system has a hierarchical and unified structure that is typical of other European continental countries,<sup>24</sup> whereby rights of appeal are automatically accepted and appeal judges have the power to review the sentence given by lower courts,<sup>25</sup> its sentencing framework is much more hybrid, combining elements from both civil and common law jurisdictions.

Just like in many European countries, Romanian law defines and classifies criminal offences based on severity,<sup>26</sup> offers a diversity of available punishments (custodial, community, fines, suspension of rights, security measures),<sup>27</sup> and indicates a mandatory sentencing range for each offence. Sentencing ranges are comparable to most European countries,<sup>28</sup> although it allows a wider judicial discretion on theft and rape,<sup>29</sup> and it is slightly less lenient on burglary.<sup>30</sup> Romanian criminal law also specifies instructions on how to compute a sentence for single, repeated and multiple offences,<sup>31</sup> how to discount sentences for guilty pleas,<sup>32</sup> and what sentencing factors judges ought to take into account in sentencing.<sup>33</sup> Together, these sentencing guidelines are binding, but still allow judicial discretion. The timing of the sentencing

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<sup>24</sup> Carlo Guarnieri, Patrizia Pederzoli, and Cheryl Thomas (English Editor) *The Power of Judges: A Comparative Study of Courts and Democracy* (Oxford University Press 2002).

<sup>25</sup> Which means that virtually all judges hearing criminal cases have sentencing powers in Romania.

<sup>26</sup> Noul Cod Penal (v 1 Feb 2014) 2014 ss 188–445 Partea Speciala.

<sup>27</sup> *ibid* 53–70, 107–12, 115–25.

<sup>28</sup> Romania has the same sentence ranges as most European countries for offences such as intentional homicide (10+ years), robbery (2-5 years), assault (up to 2 years), sexual assault (2-7 years), and drug offences (2-5 years).

<sup>29</sup> For theft, Romania has a very wide range (6 months – 3 years) allowing judges a wider sentencing discretion than most other European counterparts. For rape, Romania offers again a wider discretion, by allowing judges to award custody anywhere between 3 and 10 years – other European jurisdictions seem to be split, with some countries awarding 2-5 years, while others award 5-10 years of custody.

<sup>30</sup> For burglary, Romania resembles only England and Wales (2-7 years), as most European countries are more lenient with this category of offence (less than 2 years custody).

<sup>31</sup> Noul Cod Penal (v 1 Feb 2014) (n 26) ss 35–35.

<sup>32</sup> Noul Cod de Procedura Penala 2014 s 374.

<sup>33</sup> Noul Cod Penal (v 1 Feb 2014) (n 26) s 77.

process is also very similar to many other European jurisdictions – it takes place at the end of the litigation, after the defendant has been found or has pleaded guilty.

Similar to other continental justice systems, Romania does not officially acknowledge the doctrine of precedent, and so judges are not bound by judgments formulated in courts. Yet since 2005 a new legal instrument, called the “Appeal in the Interest of the Law” (RIL), allows the High Court of Cassation and Justice to issue guideline judgments. These judgments give guidance on interpretations of statutes, including on sentencing practices, and they are binding.<sup>34</sup>

Apart from sentence ranges, sentencing guidelines and RILs, which are binding, three other non-binding tools constitute a source of information for judges in their sentencing practice:

1. **Sentencing information systems – sentences from previous cases** – although there is no doctrine of precedent and Romanian judges are not bound by previous judgments of their court or by judgments from other courts, these judgments were still mentioned as useful sources of information on best judicial practices in sentencing. All Romanian judges have access to ECRIS, an internal database containing judgments from all courts.<sup>35</sup> This system is similar to other sentencing information systems implemented in Canada, Australia, Scotland or Israel.<sup>36</sup>
2. **Pre-sentence reports** – in a case, the Romanian judge can ask the probation officer to write a pre-sentence report on the background and characteristics of the defendant. By law, the probation officer is instructed to “assist the court in the sentencing process”.<sup>37</sup> These reports are expected to constitute an important source of learning for the judge, as it provides insights into the defendant’s reoffending patterns, social background and circumstances, character and likelihood of reoffending. Pre-sentence reports are a widespread judicial practice in countries such as England and Wales,<sup>38</sup> United States,<sup>39</sup> Canada,<sup>40</sup> and New Zealand.<sup>41</sup> In Europe, the Committee of Ministers has recommended all COE member states to allow probation services to formulate

<sup>34</sup> Noul Cod de Procedura Penala (n 32) s 474.

<sup>35</sup> ‘Portalul Instanțelor de Judecată - Despre Portalul ECRIS’

<<http://portal.just.ro/SitePages/despre.aspx>> accessed 5 March 2017.

<sup>36</sup> Michael Tonry, ‘Punishment Policies and Patterns in Western Countries’ in Richard S Frase and Michael Tonry (eds), *Sentencing and Sanctions in Western Countries* (Oxford University Press 2001) 21–4; Uri J Schild, ‘Statistical Information Systems for Sentencing: The Israeli Approach’ (2000) 14 *International Review of Law, Computers & Technology* 317.

<sup>37</sup> Parlamentul României, Legea 252/2013 privind organizarea și funcționarea sistemului de probatiune 2013 s 32.

<sup>38</sup> Cyrus Tata and others, ‘Assisting and Advising The Sentencing Decision Process The Pursuit of “Quality” in Pre-Sentence Reports’ (2008) 48 *British Journal of Criminology* 835.

<sup>39</sup> Green (n 16) 22; Robert M Carter and Leslie T Wilkins, ‘Some Factors in Sentencing Policy’ (1967) 58 *Journal of Criminal Law, Criminology and Police Science* 503; Vladimir Konecni and Ebbe B Ebbesen, ‘The Mythology of Legal Decision Making’ (1984) 7 *International Journal of Law and Psychiatry* 5.

<sup>40</sup> Hogarth (n 17) 240–61.

<sup>41</sup> Christina Rush and Jeremy Robertson, ‘Presentence Reports: The Utility of Information to the Sentencing Decision’ (1987) 11 *Law and Human Behavior* 147.

pre-sentence reports “on individual alleged offenders in order to assist, where applicable, the judicial authorities in deciding whether to prosecute or what would be the appropriate sanctions or measures”.<sup>42</sup>

3. **Prosecutor’s sentence recommendation** – in Romania, when charging a defendant, the prosecutor also customarily suggests the best offence allocation and, at the end, can suggest the appropriate sentence.<sup>43</sup> The judge is not bound to follow the prosecutor’s recommendation, but it is expected that the prosecutor’s suggestion would be a good source of insight for the judge in learning what the customary sentence is in a specific type of case. This practice is also encountered in other European countries such as the Netherlands,<sup>44</sup> or Germany.<sup>45</sup>

**Sentencing Factors.** Most jurisdictions around the world stipulate lists of sentencing factors, in both common law<sup>46</sup> and civil law traditions.<sup>47</sup> The Romanian sentencing guidelines stipulate that the most important two general criteria a judge ought to take into account are the general harm caused (considered an objective element of the offence) corroborated with the degree of dangerousness of the defendant (considered a subjective element of the offence). The guidelines then detail the underlying aggravating and mitigating factors that could account for the two criteria. On one hand, the harm caused is understood in two ways – first, towards society at large (the sentencing guidelines mention “socially-protected values”) – and secondly, towards the victim. On the other hand, the dangerousness of the defendant can be assessed by taking into account the offender’s previous convictions, his socio-economic and personal background, or his behaviour throughout the court proceedings.

Although the guidelines strive to be specific in detailing 7 main criteria judges must take into account, they do not also provide a hierarchy of importance to guide the judge in assessing which factor is more important than another, or which one to prioritise against another. For this reason, the survey included a ranking question that forced judges to assess the importance they assign to various sentencing factors.

In addition to the research questions pertaining to formal training and informal learning practices, a range of demographic and attitudinal input variables were collected for each respondent:

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<sup>42</sup> Committee of Ministers, Recommendation CM/Rec(2010)1 on the Council of Europe Probation Rules 2010 s 42.

<sup>43</sup> Noul Cod Penal (v 1 Feb 2014) (n 26) s 390.

<sup>44</sup> Sentencing Commission for Scotland, ‘Sentencing Guidelines Around the World’ (2015) 37 <<https://www.scottishsentencingcouncil.org.uk/media/1109/paper-31a-sentencing-guidelines-around-the-world.pdf>> accessed 28 November 2016.

<sup>45</sup> *ibid* 42.

<sup>46</sup> “Almost all common law jurisdictions have placed certain mitigating and aggravating factors on a statutory footing.” (Julian Roberts, ‘Punishing, More or Less’ in Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 6.)

<sup>47</sup> Andrew Ashworth, ‘Re-Evaluating the Justifications for Aggravation and Mitigation at Sentencing’ in Julian V Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press 2011) 21.

1. The level of professional experience (split into 3 separate variables: years in the legal profession, years on the bench, years in hearing criminal cases, where applicable);
2. The type of prior legal experience, if applicable;
3. The amount of prior exposure to initial, induction and continuous training;
4. The judicial specialty, if applicable (civil, criminal, etc).

Experience for the purposes of this study is a multi-layered concept that focuses not on general life experience but on professional experience more specifically. In addition, it distinguishes between the professional legal experience gained before judicial appointment, which is assumed to be qualitatively different from judicial experience, the experience of being a judge in general, as well as asking more specifically about the experience gained in hearing criminal cases, which is assumed to have an even tighter connection with attitudes towards sentencing. In order to explore the effect of these experience-related variables, the sample was stratified in such a way so as to contain respondents that have varying degrees of legal, judicial and criminal judicial experience.<sup>48</sup> In addition, the data analysis phase included multivariate analysis to identify possible collinearity between experience-related variables and to identify genuine impact of each type of variable.

### *B. Participants*

The main sample consisted of 226 judges with judicial experience ranging from 0 to 35 years on the bench (mean 11 years). They were randomly selected from all levels of the court and from all around the country.<sup>49</sup> Half of the respondents had no judicial experience at the time of the survey, while the other half had already been hearing cases in court. In addition, out of those without judicial experience, the stratified sample contained both new appointees without any legal experience as well as appointees with at least 5 years of legal experience, to isolate legal experience from the potentially confounding effect of judicial experience.

Thirty-nine percent of the sample (N 88) consisted of young newly recruited judges through the continental-style judicial appointment route: Romanian citizens who have an undergraduate law degree are allowed to participate in a highly competitive<sup>50</sup> state exam organised by the National Institute of Magistracy (NIM) –

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<sup>48</sup> In order to isolate the effect of judicial experience on the attitudes of respondents towards sentencing tools and sentencing factors from any other potentially-confounding variables, the study asked both non-experienced respondents (experience=0 years) and experienced respondents (experience >0 years) the same questions. In addition, asking both novice “NIM route” and novice “direct route” appointees the same questions, the study was also able to isolate the effect of the *legal* experience variable.

<sup>49</sup> The selection was made by an automated program operated by the Romanian National Institute of Magistracy for selection of judges for centralized judicial training sessions. Each court in the country has a number of allocated places, the judges have to opt in themselves but the algorithm does not allow them to participate in training more than once in a couple of years, to ensure all judges get the same access to judicial training overall.

<sup>50</sup> In October 2013 3,733 candidates applied for the 200 places available (19 candidates per

for this reason they shall be called in short “NIM route judicial appointees”. The number of allocated places for new judges is around 100 every year. The newly recruited judges from the sample are representative of the typically young and inexperienced law graduates specific to this type of judicial recruitment in continental jurisdictions. First, 85% of them had graduated from the law school during the past 4 years (median graduation year 2012), which suggests indeed they are young. Second, only 24% of them had some legal experience, and that experience was in the majority of cases not longer than 2 years. In contrast, as all other law graduates around the world, the Romanian law graduates had some legal internship experience before being appointed, the most frequent being a court internship (60% of respondents).<sup>51</sup>

Twelve percent of the sample (N 28) consisted of the other category of newly appointed judges, more specific to common law systems, where candidates are required to have at least a few years of legal experience in addition to an undergraduate degree in law. For the purposes of clarity this category of respondents will be defined as “direct route judicial appointees”. The reason why the sample was relatively small was that in 2014 only 73 judges were recruited in total through this route, so the respondents represent 38% from the 2014 cohort.<sup>52</sup> These respondents are both similar and different to the first category of respondents: similar in that they had just begun their judicial career and therefore have no experience on the bench; different in that they have nevertheless at least 5 years of practical legal experience. On average direct route appointees had 7 years of legal experience, with 95% of them having between 5 and 9.5 years of legal experience (SD 3.65). The typical legal background direct route appointees seem to come from is either advocacy (43%) or the police forces (57%).

Finally, forty-nine percent of the sample represents judges already appointed with varying degrees of judicial and sentencing experience (N 110). The judicial experience of this category of respondents, which for the sake of clarity will be called “experienced judges”, ranged from 8 months to 35 years on the bench, with 12 years of experience on average. 95% of respondents have between 4 and 20 years of experience. The experienced judges were also asked about their experience in

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place). Out of the 200 selected trainees, 100 will become judges and 100 will become prosecutors. 88 out of the 100 judges of the 2013 generation were included in the study Institutul National al Magistraturii, “Tabel Rezultate Proba Eliminatorie de Verif. Cunostinte Jur. (30.08.13)” (2013) <[http://www.inm-lex.ro/fisiere/d\\_198/Tabel%20rezultate%20proba%20eliminatorie%20de%20verif.cunostinte%20jur.\(30.08.13\).pdf](http://www.inm-lex.ro/fisiere/d_198/Tabel%20rezultate%20proba%20eliminatorie%20de%20verif.cunostinte%20jur.(30.08.13).pdf)> accessed 20 March 2015.

<sup>51</sup> 74% of the respondents had at least one legal internship during their studies, median 3 weeks long.

<sup>52</sup> Apart from being rather small, this sample is also biased geographically because 37 of the judges were located remotely from the survey (based on the location of their courts) and for technical reasons they could not be included in the study. While the small sample prevents generalisations, it does nevertheless offer interesting insight into how judges with some legal experience differ in their attitudes from the first category of respondents, but also from the judges who already gained judicial experience.

criminal law more specifically: 95% had prior experience in criminal law; out of those, 70% gained that experience solely as judges (so, one can assume, while hearing criminal law cases and sentencing), while others also indicated additional roles in which they gained criminal law experience.<sup>53</sup>

A secondary sample consisted of prosecutors (N 236) ranging from 0 to 29 years of prosecutorial experience (average experience 11 years). Although this is a study on judicial decision-making, therefore focusing mainly on judges, prosecutors were also included as a secondary sample in order to offer an external viewpoint from legal professionals who undergo the same training and have the same legal background, but have a different role in court. While the questions addressed to judges asked them about their own sentencing, the prosecutors were asked about how they think judges conduct their sentencing. This brought about an original and innovative vantage point on judicial decision-making. Although the focus of this paper is to present the findings on *judicial* attitudes towards decision-making, specific mentions will be made when prosecutors had statistically significant differences in their perceptions of judicial activity.

All the participants were recruited with the kind help of the Romanian National Institute of Magistracy (NIM), in reference to the stratified sampling requirements of the study.

### *C. Procedure*

The study consisted of two phases: the qualitative exploratory phase and the main quantitative phase. The qualitative exploratory phase was meant to help test and refine the questions, which were then included in the survey in the quantitative phase. It consisted of observations and semi-structured interviews with judicial appointees from all routes and with judicial trainers in charge with conducting sentencing training for both newly appointed judges (“direct route” and “NIM route”) and for experienced judges (continuous training).

The main phase consisted in a 20-question pen and paper survey. The survey was designed to not take longer than 10 minutes to fill in, and for that purpose it mainly contained closed single choice, multiple choice, rating and ranking questions. In addition, each type of respondent as described above received a survey only pertaining to their particular profile, which meant that no question skipping was necessary and no unnecessary was asked. That said, most questions were formulated similarly/identically so as to allow cross-sample comparisons.

The survey was applied during the centralised training sessions for all the types of respondents described: for the “NIM route” initial appointees, at the end of

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<sup>53</sup> 14% as lawyer/legal advisor, 6% as prosecutor, 2% as police officer and 7% as other (clerk, legal academic).

their criminal law module (including sentencing) during their first year of judicial training; for the “direct route” appointees, at the end of their criminal law induction training, taking place within the first month of appointment; for the experienced judges and prosecutors, during several continuous training sessions on criminal law and sentencing.<sup>54</sup> The research project was presented at the beginning of the session, endorsed by the Institute, and the survey also contained a short description of the research project aims, as well as the assurances that the participation is entirely voluntary and anonymous. The researcher was in the room during the application of the survey and was ready to answer any queries.

All these techniques ensured a high response rate (70%). In total, 510 surveys were received. During the data clean-up and analysis phase, 470 surveys were retained (226 judges and 236 prosecutors).

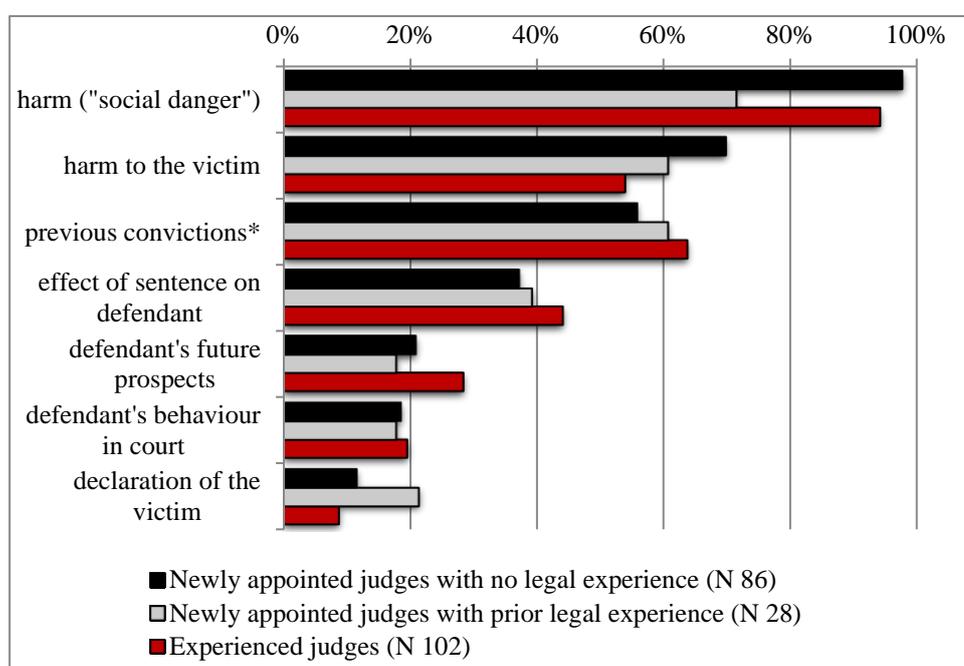
The findings will be presented in the next section in turn.

## IV. Results

### *A. Factors in Sentencing*

The following figure summarises the aggregate responses from 216 judges, split by the three samples based on their past judicial and legal experience. The respondents had to rank all the 7 sentencing factors on a scale in order of their importance. The figure shows the percentage of respondents who chose one factor among their top 3 choices.

Figure 1: Factors that judges think ought to influence them in sentencing (N 226)



<sup>54</sup> The survey also contained questions regarding attitudes towards the judicial training offered on sentencing, but the corresponding findings are not central for the thesis of this article and are therefore not included here.

While the 7 sentencing factors were ordered depending on their overall importance for all the 216 respondents, the figure also shows the visual differences between subsets of the respondents. The first thing worthy of notice is that the ordering of the 7 sentencing factors is roughly the same across all 3 samples.

Perhaps not surprisingly, the general harm (done to society and the legal order) was considered among the most important sentencing factors. In many criminal justice systems, civil and common legal alike, harm to society or to the social values is seen as a definitional element of the criminal offence.

None of the category distributions were normally distributed (Shapiro-Wilk sig.  $<.05$  for all factors for all subsets) therefore all the tests used subsequently on this question were non-parametric tests.

The first question was if there were any statistically significant differences in the three subsets of judges in their appreciation for different sentencing factors, as the figure above might be visually misleading. The second question was if the judicial experience in general (and experience in criminal cases in particular) could account for the differences among respondents.

Table 1: Variation of attitudes towards sentencing factors with experience (N 226)

Experience category	As experience (in each category) increases	
	Greater appreciation of	Lesser appreciation of
Legal practical experience		General harm
Judicial experience	Defendant's future prospects	Harm to the victim
Experience in criminal cases	Previous convictions	Harm to the victim

Since the sentencing factor scores constitute an ordinal variable, a Kruskal-Wallis test was run for each of them. As the figure above also suggests, newly appointed judges with prior legal experience think the **general harm** caused ought to be significantly less important in sentencing than the other two categories of judges ( $H(2)=7.604$   $p=.022$  mean rank 130 vs 105 and 105). It was not clear just from this test whether this might be due to their legal practice background or another factor.

In addition, newly appointed judges seem to give significantly more importance to **the specific harm caused to the victim** than experienced judges ( $H(2)=8.891$   $p=.012$ , mean rank 93 vs 118). This was further explored as it signalled that the experience on the bench might render judges less sensitive to the victim's

harm in time. A binary variable *exp\_prof\_yes* was computed across all judges' subsets, variable which indicates if the respondent has any experience in hearing cases or not. An ordinal regression model confirms that judges with experience on the bench are less likely to consider harm to the victim an important factor in sentencing (Est. -.316 SE .245 p .035). A potential explanation for this series of findings is that when hearing cases, judges are also exposed to the defendant – their claims, their profile, their future prospects – and that seems to render them more sensitive towards the defendants as well not just towards the victim. This is further strengthened by an additional regression model confirming that judges with experience seem to take more into consideration **the defendant's future prospects** in their sentencing (Est. .661 SE .245 p .007).

Even if Figure 1 above might visually suggest that judicial experience also has a significant impact on what judges think about the defendant's previous convictions or the effect of the sentence on the defendant, the regression models do not seem to confirm this intuition ("previous convictions" p .118; "effect of sentence on defendant" p .331). An alternative hypothesis, which cannot be tested in this study, is that *age* (or life experience) is actually a predictor, as the 3 subsets of judges also differ in their age. Age was not a focus of this study but it could constitute the object of future studies.

While judicial experience does not correlate with a higher concern for previous convictions, this correlation was discovered for the secondary sample consisting of prosecutors. As mentioned in the introduction, prosecutors' views on judicial sentencing are not a focus of this article, but this was a particular finding worth mentioning as it could throw light on the judges' attitudes as well. The more experienced prosecutors are, the more they seem to believe judges do indeed consider previous convictions (Est -.046 SE .015 Wald 9.757 p .002) more important for their sentencing. In fact, an aggregate figure representing the prosecutors' responses would show that they think previous convictions are more important than the harm caused to the victim in judges' minds.<sup>55</sup> This could mean that 1) prosecutors might indeed see in court that judges of different ages take previous convictions into account differently, while, at the same time, 2) being slightly biased due to the nature of their efforts into thinking that judges care about previous convictions more than they actually think.

### *B. Useful sentencing tools*

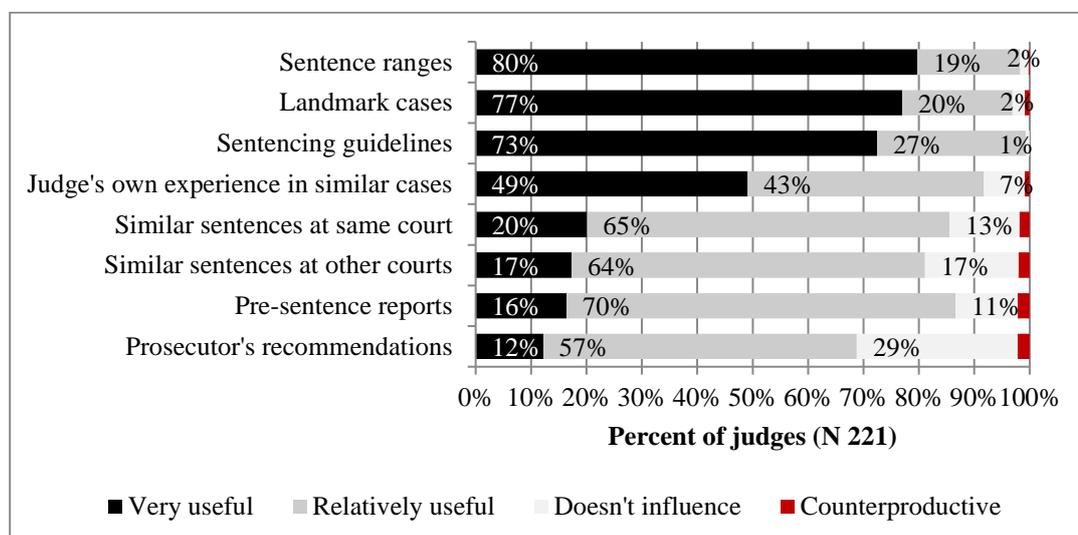
Because experience was a central variable in the study, a natural question to ask was what do judges do in order to gain the experience they need to do their job? This question asked the respondents to reflect on what tools they find more useful in

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<sup>55</sup> This explains why the difference was marked by an asterisk in Figure 1, being the only significant difference in perception between judges and prosecutors on this matter.

their sentencing activity. Each of the eight tools suggested needed to be rated on a 4-point Likert scale (very useful, relatively useful, doesn't influence, counterproductive). The eight tools are of very different kinds and they emerged as the main sources of inspiration in the exploratory phase, but they naturally clustered in the survey findings. The figure below summarises the responses:

Figure 2: Tools that judges consider useful in their sentencing practice (N 221)



In this case the figure represents all judicial respondents, without indicating the respondents of the 3 subsets of judges, because the figure would be too complicated. This is compensated for by indicating in the following few pages where significant differences between the respondents were found, and on what basis. The responses were ordered based on the percentage of respondents considering a particular sentencing tool very useful, because there seemed to be a significant difference in which the respondents distinguished between “very useful” and “relatively useful”, which warranted a clustering of categories.

There are several aspects which need to be explained regarding the options given to respondents – as they might be particular to the Romanian justice system or they might have an ambiguous meaning. They will be explained in the subsections below. As the figure might already suggest, there are 3 main clusters of sentencing tools judges had significantly different perceptions of. They will be presented in turn.

The main finding of this study regarding the use of various tools in sentencing is that *the more experienced judges are, the more likely they are to diversify the range of tools they use in their activity*. Different types of experience seem to account for an increase in appreciation for different types of tools: for instance, judges with more experience on the bench seem to appreciate landmark cases more, while those with

more sentencing experience also appreciate pre-sentence reports more, whilst taking prosecutor's recommendations into account less. These findings are summarised in the table below and will be explored in more detail afterwards:

Table 2: Variation of attitudes towards sentencing tools with experience (N 226)

Experience category	As experience (in each category) increases	
	Greater appreciation of	Lesser appreciation of
Legal practical experience	Sentencing guidelines Landmark cases Sentencing remarks (own court)	Pre-sentence reports
Judicial experience	Landmark cases	
Experience in criminal cases	Landmark cases Pre-sentence reports Sentencing remarks (own court)	Prosecutor's recommendations

### C. Binding sentencing tools

As previously explained, there are three types of sentencing tools that Romanian judges can use in their activity and are well-known in other world jurisdictions as well: the sentence ranges for every type of offence, the sentencing guidelines and landmark cases. As Figure 2 shows, between 73% and 80% Romanian judges considered each of these tools very useful to their activity, and almost all judges (98-99%) considered them either relatively useful or very useful.

It is important to note that by sentencing guidelines Romanian judges understand the legal indications stipulated by the criminal procedure code on how to compute a sentence by taking into account various aggravating and mitigating factors. While the Romanian judiciary does not have separate sentencing guidelines formulated and updated by a dedicated sentencing council, the criminal procedure code computation methods are very similar in giving precise indications on the steps and variables judges have to take or have to disregard while sentencing.

In addition, since it is a civil law jurisdiction, Romanian law does not follow the doctrine of the precedent. For this reason, it is not the case that every decision given by a higher (or a judge's own court) is binding for future judgments. This is why, in this question addressed to the Romanian judges, a clear demarcation between "similar sentences given at one's own court" and "landmark cases" was made. The Romanian judiciary has nonetheless a growing corpus of decisions that *are* binding –

decided by the Romanian Supreme Court in view of ensuring consistency in judgment. The landmark cases resulted, including cases specifying specific sentences for a specific offence, or sentencing computations, are binding for Romanian judges.

While for sentence ranges there was no significant difference between the 3 types of judges surveyed, they had different views on the importance of sentencing guidelines and landmark cases.

Sentencing guidelines seemed to be considered significantly more useful by newly-appointed judges who *had* legal experience (mean rank 132) than newly appointed judges with no legal experience (mean rank 104) ( $H(2) = 6.758$  p .034). An ordinal regression model testing that the *amount* of legal experience might significantly account for a change in attitude towards sentencing guidelines confirmed that, indeed, judges with more previous legal experience are more likely to consider sentencing guidelines useful (Est. .467 SE .235 Wald 3.953 p .047).

Landmark cases seemed to be considered more useful by experienced judges (mean rank 116) than by newly-appointed judges with no legal experience (mean rank 99) ( $H(2) = 8.047$  p .018). An ordinal regression model testing that the existence of judicial experience might account for a change in attitude towards landmark cases confirmed that judges with no experience on the bench are less likely to consider landmark cases useful than experienced judges (Est. -.733 SE .340 Wald 4.656 p .031). The difference between judges with no *sentencing* experience and those with sentencing experience is even starker (Est. -.810 SE .341 Wald 5.644 p .018). In addition, prior legal experience before becoming a judge seems again to increase appreciation, this time for landmark cases (Est. .343 SE .160 Wald 4.576 p .032).

#### *D. Non-binding sentencing tools*

Apart from landmark cases issued by the Supreme Court, Romanian judges are not bound by sentences given in similar cases in their own court or other courts. That said, most judges (78-84%) do consider those useful or very useful sources of inspiration for their sentencing decisions, with the majority of them (64-67%) seeing them useful but perhaps not essential for their activity.

Yet again, the amount of prior legal experience before becoming judge seem to play a significant role in increasing appreciation for similar sentences as sources of inspiration in sentencing. Ordinal regressions confirm that, the more legal experience judges had before being appointed, the more likely they are to consider similar sentences from their own court (Est. .197 SE .098 Wald 4.073 p .044) and from other courts (Est. .210 SE .097 Wald 4.712 p .030) as useful sources of inspiration in their own sentencing practice. In addition, sentencing experience itself seems to have an impact: judges who never sentenced before are much less likely to appreciate

sentences from one's own court useful than judges who have at least some sentencing experience (Est. -.663 SE .306 Wald 4.680 p .031).

A second category of non-binding sentencing tools are made of the suggestions that other court actors make to judges regarding the appropriate sentence. In this survey, judges were asked how useful they consider the pre-sentence reports formulated by probation officers and the recommendations prosecutors make with regards to the appropriate sentence during the trial. While most judges considered these suggestions useful overall, only a very small percentage of them (6-16%) considered these recommendations essential for their sentencing decision. In fact, 43% of respondents considered that the prosecutors' recommendations play no role whatsoever in their decision.

Newly appointed judges with prior legal experience were significantly *less* likely to think pre-sentence reports are useful in sentencing than judges with no legal experience (Est. 1.428 SE .474 Wald 9.068 p .003). Yet the amount of sentencing experience seems to have an opposite effect – that of making judges more reliable on pre-sentence reports than less experienced colleagues (Est. .104 SE .035 Wald 8.669 p .003).

Finally, the judges' reliance on prosecutor's recommendations seems to decrease as they gain sentencing experience (Est. .622 SE .288 Wald 4.663 p .031), which could be part of the explanation for why it is one of the least preferred sources of inspiration in sentencing.<sup>56</sup>

## V. Discussion and Conclusions

This research has sought to show that judicial decision-making is a dynamic process, whose ingredients might change in time and with experience. Judicial studies have so far sought to draw an accurate picture of what influences judges in their activity, but far too little attention was paid to the idea that judges' behaviour and mental processes might change with time, and therefore an empirical study that does not measure time-related variables offers just a momentary "snapshot" of judicial decision-making. The chief finding of this study is that, indeed, judges of various levels of experience pay attention to different aspects of their activity, and can thus arrive at different results.

This article explored two more specific research questions:

1. How do judges say they approach the weighing of sentencing **factors** (and whether their approach changes with experience);

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<sup>56</sup> This is in tension with what the prosecutors themselves think about how judges consider their recommendations – the more experienced are, the more likely they are to think judges consider their recommendations useful (Est. .042 SE .016 Wald 6.670 p .010).

2. How do judges in Romania say they use different **tools** in sentencing, and how does their prior experience relate to the way they use sentencing tools.

With regards to the *factors* that judges think influence them in establishing a sentence, it was good to confirm that general harm remains the most important factor taken into account. This somewhat replicates Hogarth's and Tombs' studies on sentencing factors.<sup>57</sup> But, perhaps more interestingly, this study found that experience on the bench increases the judge's concern for the defendant and his future prospects, while judges without experience are more likely to empathise with the victim. The study found that there is a clear tension between the two.

The judges do not sentence in a vacuum, nor do they think they do. This study's results on sentencing tools shows that judges use a variety of sources of inspiration when they need to calculate a sentence. Not surprisingly, they give a lot of attention to the instruments they are bound to take into account (sentence ranges, sentencing guidelines, landmark cases), which suggests they conform to the requirements of the rule of law. But at the same time, they also draw inspiration from a range of non-binding tools. Once again, experience seems to play a significant role in which instruments are seen more useful than others, and the findings suggest that the more experienced judges are, the more they diversify the range of tools they use in sentencing. Almost all sentencing tools display some level of variation with experience. Although a few studies explored the way in which magistrates search and process sentencing-related information,<sup>58</sup> none of the previous research asked judges to rank sentencing tools by their relative usefulness to sentencing practice, which makes this study unique.

The author is aware that the focus on Romania might, at first glance, seem limited, but the actual findings are intuitive and interesting enough to warrant an extrapolation to other jurisdictions. Any initiatives in applying the same methodology for studies in other jurisdictions are much welcome. For instance, future research could attempt to combine an attitudinal study with behavioural studies of sentencing (e.g. including sentencing exercises or analysis of sentencing remarks),<sup>59</sup> while maintaining an interest for expertise-related variables. Even more desirable would be a longitudinal study of judicial sentencing, which would entail willingness of judges to participate throughout their career.

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<sup>57</sup> Although comparisons need to be treated with caution as these previous studies used slightly different categorisations of sentencing factors (Hogarth (n 17) 281 Table 86; Jacqueline Tombs, *A Unique Punishment: Sentencing and the Prison Population in Scotland* (Scottish Consortium on Crime and Criminal Justice 2004) 49 Table 4.1.).

<sup>58</sup> Hogarth (n 17) 239–44.

<sup>59</sup> Along the lines of Jacobson and Hough's, Hogarth's or Arce's mixed-method studies (Jacobson and Hough (n 19); Hogarth (n 17); Ramon Arce and others, 'Judges' Decision-Making from within' in Raymond R Corrado, Rebecca Dempster and Ronald Roesch (eds), *Psychology in the Courts* (Routledge 2001).)

# Let the Users be the Filter? Crowdsourced Filtering to Avoid Online Intermediary Liability<sup>1</sup>

Ivar A. Hartmann<sup>2</sup>

## I. Introduction

Online platforms for decentralised content production or for plain social interaction constitute one of the fundamental frontiers of innovation on the internet. Companies and other entities contribute to this by designing the system and maintaining it in their servers, while also taking steps to guarantee that internet users can make the best out of such environments. That is to say, although the purpose of such companies is to profit from user-generated content or to simply let individuals co-exist in communion with one another, they play a crucial role as intermediaries. Because they are the managers of online communities where – just like in the real world – infringements of the law can occur, these companies are constantly sued by users or third parties alleging that they have a responsibility for what is done on their platform.

Even though safe harbour<sup>3</sup> provisions exist in American and EU law that release intermediaries from a duty to proactively monitor and filter user activity on their platforms, the liability standard is constantly shifting. Copyright owners' pleas, for example, demanding a different, less passive role for intermediaries have been gaining ground recently. The most prominent examples of this trend in recent times are, first, the U.S. Court of Appeals for the Second Circuit's decision in April 2012 that overturned a summary judgment dismissing Viacom's case against YouTube<sup>4</sup> and the "right to be forgotten" ruling by the Court of Justice of the European Union.<sup>5</sup> In the former, a bold challenge of the longstanding safe harbour in the Digital Millennium Copyright Act against strict liability for copyright violations was not summarily dismissed by the appeals court. In the latter, the court created a dangerous precedent

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<sup>1</sup> A previous version of this paper was presented at the Oxford Internet Institute's The Internet, Policy & Politics Conference in 2014. See <http://ipp.oii.ox.ac.uk/2014/programme-2014/track-b-policy/information-law-regulation-and-ethics/ivar-hartmann-let-the-users-be-the>.

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<sup>3</sup> Safe harbour provisions, in this context, are legal rules that exempt online intermediaries from liability provided that they remove content deemed illegal upon a notice – by the offended party or by a court.

<sup>4</sup> *Viacom International, Inc. v YouTube, Inc.* (2013) No. 07 Civ. The case was later settled, which goes to show exactly how safe Google felt the safe harbour provisions to be. See Joe Silver, 'Viacom and Google settle \$1 billion YouTube lawsuit' <<http://arstechnica.com/tech-policy/2014/03/viacom-and-google-reach-settlement-in-long-running-youtube-lawsuit>> accessed 18 August 2014.

<sup>5</sup> *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* (2012) Case C-131.

by classifying Google as a data controller instead of a content intermediary, thus creating a risk that any social network or forum be denied the safe harbour awarded to intermediaries.

These developments create an environment where safe harbour provisions no longer offer the same protection they previously did against strict liability. Engaging in full-fledged filtering, on the other hand, has its problems. As a result, intermediaries find themselves between a rock and a hard place.

This article describes such a setting – where intermediaries have incentives both to filter and not to filter content on their platforms – and outlines a few arguments why enabling and encouraging users themselves to filter content on platforms could present itself as a solution to intermediaries' problems. It is not intended as an exhaustive enumeration of the arguments in favour and against having users themselves filter content – be it social networks, video streaming websites, forums or peer-to-peer file-sharing networks. Rather, this article proposes a first approach on the subject. The driving purpose is to find a solution to the increasingly dire situation of online intermediaries – without which the internet as we know it simply would not exist.

## II. Internet Users' Deep-Rooted Wish for Self-Governance

For many years the idea that behaviour on the internet could not be regulated was very popular. It was a completely new world where the entities that exercised regulation either could not enter or did so only to remain at the same level as individual users. A court system, thousands of police officials, large armies, nuclear missiles – none of this mattered in the virtual world because it was inherently free and uncontrollable. Regulation by the “weary giants of flesh and steel” was not believed to be possible by internet users because governments have “no moral right to rule us nor [do they] possess any methods of enforcement we have true reason to fear.”<sup>6</sup> It is remarkable that this held to some extent true for a short while in the early days of the internet and then the “world wide web” – especially since the internet was born as a research project of the United States military. That may very well have been true while the internet was still in its academic and hippie era. During the 1990s, however, after the era of online academia and hippie dominance, the internet was taken over by the market logic, or “commodified.”<sup>7</sup>

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<sup>6</sup> John Perry Barlow, 'A Declaration of the Independence of Cyberspace' <<https://projects.eff.org/~barlow/Declaration-Final.html>> accessed 23 April 2012.

<sup>7</sup> This phenomenon has been described by many authors. See, for instance, Graham Murdock and Peter Golding's explanation: “Economically it involves moving the production and provision of communications and information services from the public sector to the market, both by transferring ownership of key facilities to private investors and by making success in the marketplace the major criterion for judging the performance of all communications and information organizations.” Graham Murdock and Peter Golding, 'Information poverty and

Notwithstanding the appropriateness of understanding the internet as a new and different place,<sup>8</sup> the fact is that, once it was noticed as a good forum for commercial activity, private companies flocked to it. Their need for legal certainty and stability was a driving force in the alteration of technical standards that had earlier prevented the possibility of regulation. Changes effected in the Net's architecture gradually enabled governments to exercise increased control to the point where the issue was no longer whether to regulate, but rather how to go about doing it. The fact that it constitutes a distinct place for human interaction does not automatically make it an isolated place: web users are the same people who live within the borders of nation states and even those who do not access the internet are nonetheless affected by it. Total separation, although legally possible with the recognition of an independent cyberspace jurisdiction,<sup>9</sup> is unpractical and unreal. The contention that it is impossible to track information flow online was perhaps partially true up until the mid-1990s. However, the use of Deep Packet Inspection<sup>10</sup> and other mechanisms has allowed internet service providers (ISPs) and governments to constantly and effectively control online communication. Governments, in particular, seem to be intent in recent years to make up for lost time with "strenuous reassertions of national authority."<sup>11</sup> According to some accounts, in certain countries the government

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political inequality' in Robin Mansell (ed), *The information society. v. III (Democracy, governance and regulation)* (2009), 15. This transition is achieved on the internet by prioritizing data flow based on merit attributed by market criteria: if streaming a movie makes more direct money than disseminating a post in a political blog, the latter is left with lower bandwidth. Howard Rheingold had predicted that once this transition is completed the internet will turn into a mass communication media not unlike cable television. "The great power of the idea of electronic democracy is that technical trends in communications technologies can help citizens break the monopoly on their attention that has been enjoyed by the powers behind the broadcast paradigm – the owners of television networks, newspaper syndicates, and publishing conglomerates." Howard Rheingold, *The virtual community: homesteading on the electronic frontier* (2000), 308.  
<sup>8</sup> "Cyberspace is a place. People live there. They experience all the sorts of things that they experience in real space, there. For some, they experience more. They experience this not as isolated individuals, playing some high tech computer game; they experience it in groups, in communities, among strangers, among people they come to know, and sometimes like." Lawrence Lessig, 'The zones of cyberspace' [1996] 48 *Stanford Law Review* 1403, 1403. See also Colin Crawford, 'Cyberplace: defining a right to Internet access through public accommodation law' [2003] 76 *Temple Law Review* 225.

<sup>9</sup> "Many of the jurisdictional and substantive quandaries raised by bordercrossing electronic communications could be resolved by one simple principle: conceiving of Cyberspace as a distinct 'place' for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the 'real world.'" David R. Johnson and David Post, 'Law And Borders - The Rise of Law in Cyberspace' [1995] 48 *Stanford Law Review* 1367, 1378. The authors do not, however, affirm that cyberspace and the physical world are perfectly separable.

<sup>10</sup> This technique allows an ISP to search into the data packets that carry information on the internet, thus searching, e.g., someone's email to check whether they have used a certain word. See Alex Wawro, 'What Is Deep Packet Inspection?'

<[http://www.pcworld.com/article/249137/what\\_is\\_deep\\_packet\\_inspection.html](http://www.pcworld.com/article/249137/what_is_deep_packet_inspection.html)> accessed 26 April 2012.

<sup>11</sup> "States lay claim to geographic names and the representation of linguistic scripts in cyberspace; they scale up their surveillance capabilities; they make plans to weaponized cyberspace and 'secure' their part of it; they try to set themselves up as gatekeepers who can censor content." Milton L. Mueller, *Networks and States. The Global Politics of Internet Governance* (2010) 253.

controlled the internet from the very beginning, so that there never even was an initial golden period of freedom.<sup>12</sup>

Another common argument to support the unfeasibility of governmental regulation online was that it was impossible to identify the location of the people exchanging information on the internet. This difficulty was frequently posed in conjunction with that of the inconvenience of allowing one nation to enforce its laws upon citizens of other countries.<sup>13</sup> While geolocation software has all but solved the problem, the existence of conflicts involving the law of different countries was never something pioneered by the internet.<sup>14</sup>

Therefore, after a period of exhilarating freedom in an environment that was by its nature hostile to regulation, the internet was taken by commercial activity and had its technical rules changed just enough to adapt to the needs of private companies. For-profit websites covered the landscape and the cyberflâneur was gone.<sup>15</sup> Although there's a case to be made that such modifications to the internet architecture in order to solve the transborder law enforcement tribulations will mean a departure from the kind of communication network the potential of which was lauded as revolutionary,<sup>16</sup> the fact remains that it is perfectly possible to regulate internet behaviour and this has been done for many years now.

A completely different issue is whether the internet *should* be regulated in the first place, especially by nation-states. Most of the current arguments for multistakeholderism in international internet governance<sup>17</sup> and self-regulation by the

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<sup>12</sup> See James Curran, 'Reinterpreting the Internet' in James Curran, Natalie Fenton, Des Freedman (eds) *Misunderstanding the Internet* (2012) 12.

<sup>13</sup> Or even of one state being able to impose its laws on citizens of another state in a federalist national system. "The average user simply cannot afford the cost of defending multiple suits in multiple jurisdictions, or of complying with the regulatory requirements of every jurisdiction she might electronically touch. Thus, the need for dormant commerce nullification of state overreaching is greater on the Internet than any previous scenario." Dan L. Burk, 'Federalism in Cyberspace' [1996] 28 Conn L Rev 1095, 1126.

<sup>14</sup> "They also are no more complex or challenging than similar issues presented by increasingly prevalent real-space events such as airplane crashes, mass torts, multistate insurance coverage, or multinational commercial transactions, all of which form the bread and butter of modern conflict of laws." Jack L. Goldsmith, 'Against Cyberanarchy' [1998] 65 University of Chicago Law Review 1199, 1234.

<sup>15</sup> "Something similar has happened to the Internet. Transcending its original playful identity, it's no longer a place for strolling — it's a place for getting things done. Hardly anyone "surfs" the Web anymore. The popularity of the "app paradigm," whereby dedicated mobile and tablet applications help us accomplish what we want without ever opening the browser or visiting the rest of the Internet, has made cyberflânerie less likely. That so much of today's online activity revolves around shopping — for virtual presents, for virtual pets, for virtual presents for virtual pets — has not helped either. Strolling through Groupon isn't as much fun as strolling through an arcade, online or off." Evgeny Morozov, 'The Death of the Cyberflâneur' <<http://www.nytimes.com/2012/02/05/opinion/sunday/the-death-of-the-cyberflaneur.html?pagewanted=all>> accessed 23 April 2012.

<sup>16</sup> See Jonathan Zittrain, 'Be Careful What You Ask For: Reconciling a Global Internet and Local Law'. (Harvard Law School Public Law Research Paper No. 60, 2003) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=395300](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=395300)>.

<sup>17</sup> Multistakeholderism is an approach to internet regulation that requires civil society to participate in decision-making along with governments and representatives of the private sector and academia. Among many proponents of such approach, see Milton Mueller et al., 'The Internet

private sector are built on top of beliefs shared by many authors who in the late 1990s and early 2000s openly rejected government regulation of the Net, even assuming that it could technically be done. Even today, authors call for an internet governance framework that emphasises the necessary diversity of the stakeholders,<sup>18</sup> avoiding a predominance of state power.

A common view was that state authority should be rejected as unnecessary: in a “cyberpopulist” model, “netizens” could themselves decide the rules that would govern them, adopting a direct democracy system. This idea has been dismissed by some as unrealistic and blind to the contribution of a representative legislating body that no society can do without,<sup>19</sup> but construed by others as a new justification for sovereignty: instead of a liberal state, power comes from the free choice of people to gather online in their self-governed communities.<sup>20</sup> A different proposed model was the recognition, by the nation state, of a new type of rulemaking process – one that is not performed by government and is also (and perhaps because of that) internationally applicable. A *lex informatica* would be developed by repeated social practices online (customs) and by technical standards,<sup>21</sup> accepting the decisive regulatory role played by choices on how the internet architecture is configured.<sup>22</sup>

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and Global Governance: Principles and Norms for a New Regime’ [2007] 13 Global Governance 237, 250: “[M]ultistakeholder governance should be legitimized and maintained. This norm is a logical extension of principles relating to private networks and global scope. The Internet is in effect a global confederation of network operators and users and should not be regulated in a top-down manner via agreements among states alone.” See also Wolfgang Kleinwächter, ‘Internet co-governance. Towards a multilayer multiplayer mechanism of consultation, coordination and cooperation (M3C3)’ in Robin Mansell (org), *The information society. v. III (Democracy, governance and regulation)* (2009), 384.

<sup>18</sup> See Luca Belli, ‘A heterostakeholder cooperation for sustainable internet policymaking’ [2015] 4 Internet Policy Review 2. For an example of this notion put into practice at a high-level internet governance event, Brazil’s 2014 NETmundial, see the detailed description in Marilia Maciel, Nicolò Zingales, and Daniel Fink, ‘The Global Multistakeholder Meeting on the Future of Internet Governance (NETmundial)’ in *Multistakeholder as governance groups: observation from case-studies*. Research Publication 2015/001 (Berkman Center 2015).

<sup>19</sup> “First, cyberpopulists overestimate the extent to which the plebiscite, whether territorial or virtual, can truly reflect the voice of the people. Second, they ignore significant democracy-enhancing benefits of representative government.” Neil Weinstock Netanel, ‘Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory’ [2000] 88 California Law Review 395, 417.

<sup>20</sup> David Post credits the choice of self-government and free association online with the possibility of acknowledging sovereignty to internet users. This would be an alternative to the liberal state theory of sovereignty, where the agents of power and decision-making capacity are netizens themselves. David G. Post, ‘„The Unsettled Paradox”: The Internet, The State, and the consent of the Governed’ [1998] 5 Ind J Global Legal Stud 512, 535-539 and 542.

<sup>21</sup> “The source of default rules for a legal regime is typically the state. The political-governance process ordinarily establishes the substantive law of the land. For Lex Informatica, however, the primary source of default rule-making is the technology developer and the social process by which customary uses evolve.” Joel R. Reidenberg, ‘Lex Informatica: The Formulation of Information Policy Rules Through Technology’ [1998] 76 Texas Law Review 553, 571.

<sup>22</sup> This is the landmark contribution of Lawrence Lessig to the field of internet regulation. The way the code is written creates a constraint on action online just as much as law does on action offline. The key difference, however, is that regulation by code is by its nature *ex ante*, whereas law is *ex post facto* – the former prevents an individual from even doing something in the first place; the latter punishes certain behavior after it has been engaged on. Lawrence Lessig, *Code: And Other Laws of Cyberspace, Version 2.0* (2006) 7. An important fact that should not be overlooked is that law constrains human conduct directly, *ex post facto*, and indirectly, by influencing the code or architecture of the internet itself. See Lawrence Lessig, ‘The New Chicago

Unlike in the cyberpopulist model, *lex informatica* would be enforced by government, such that the latter would merely lose its rulemaking prerogative<sup>23</sup>, and even then only on what concerns human action online.<sup>24</sup> Even those who accepted enforcement of traditional legal norms, especially regarding commerce on websites, argued for concessions. A company could not be considered to be offering its products or services to everyone in the whole world. As adjudication of online conflicts slowly developed, it seemed reasonable to recognise that companies often targeted a specific audience despite the fact that their website was viewable to anyone.<sup>25</sup>

It is very important to notice that these models fundamentally evoke self-government, just as advocates of the impossibility of regulating internet did. John Perry Barlow's 1996 Declaration of Independence of Cyberspace symbolised a view that was more about autonomy of internet users to establish their own rules than about the technical impossibility of state regulation of the internet. But in order for this governance model to even have a shot at succeeding, a delicate balance must be struck between the people's freedom to leave a community whenever they so desire and, on the other hand, a reason for them to stay that is strong enough to maintain some stability in the composition of the community over time.<sup>26</sup>

The point is that there has been great force, for many years, in the idea that internet users deserve a higher level of autonomy to make and indeed enforce their own rules regarding online conduct. Interestingly, this idea was getting stronger in a

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School' [1998] 27 The Journal of Legal Studies 661, 666. More recent literature has further developed Lessig's concept, arguing that "arrangements of technical architecture are also arrangements of power" and presenting current examples in the worldwide internet governance. Laura DeNardis, 'Hidden Levers of Internet Control' [2012] 15 Information, Communication & Society 720, 721.

<sup>23</sup> That is because "[*lex Informatica* has three sets of characteristics that are particularly valuable for establishing information policy and rule-making in an Information Society. First, technological rules do not rely on national borders. Second, *Lex Informatica* allows easy customization of rules with a variety of technical mechanisms. Finally, technological rules may also benefit from built-in self-enforcement and compliance-monitoring capabilities." Reidenberg, *supra* note 21, at 577.

<sup>24</sup> A much less romantic view is that this is none other than a free market mechanism for regulation of conduct, such that it is "essential to permit the participants in this evolving world to make their own decisions. That means three things: make rules clear; create property rights where now there are none; and facilitate de formation of bargaining institutions. Then let the world of cyberspace evolve as it will, and enjoy the benefits." Frank H. Easterbrook, 'Cyberspace and the law of the horse' [1996] U. Chi. Legal F. 207, 216. The problem is, of course, that creating property rights invites more, rather than less, state intrusion as it is government that protects individual property through private law rules of contract and civil liability.

<sup>25</sup> "Courts have almost universally required some additional proof of either traditional commercial contacts or intentional direction of the activity toward the forum – a form of purposeful availment. Because some courts have allowed plaintiffs to conduct "jurisdictional discovery" and have also occasionally found the web site's records of forum visitors to be relevant, it would seem prudent for states seeking to enforce their laws against outlaw websites to seek discovery of the web server logs in order to attempt to make a sufficient record as to the number of forum contacts." Terrence Berg, 'www.wildwest.gov: The impact of the Internet on state power to enforce the law' [2000] BYU L Rev 1305, 1338.

<sup>26</sup> "[W]hen individuals have a substantial stake in a particular virtual community, exit is not a tenable option to protect them against majority oppression. But when individuals lack that investment, the result is a flame-ridden cacophony rather than a cohesive community capable of government by the "bottom-up" generation of social norms". Netanel, *supra* note 19, at 432.

time when the United States government pushed to control the world wide web via the domain name system.<sup>27</sup> The netizen self-governance rational arguably derives from a notion that states are not well suited to make regulatory decisions concerning the internet because the traditional state decision-making mechanisms and actors completely fail to grasp the reality of the internet. As a result, internet users are often eager to take regulation into their own hands.

They feel empowered, in control, and most importantly, legitimated to create and apply rules and principles on behaviour. This is different from social norms, which are created by a practice repeated over a long time, engendering a social custom. Some of the rules internet users obey in their communities are of that kind, but others are explicit, voluntarily created and codified, much like legal norms.<sup>28</sup> It is obvious that these two types of self-imposed rules have an intrinsic relationship such as that of law and morals<sup>29</sup> and therefore an attempt at a clear split would be both unwise and difficult.

For the purposes of this paper, I assume that nation states can and should regulate the web. At this point it should be clear that the early literature on whether the internet could be regulated and how is relevant here only to show that there was always an interest on the part of users to exercise choice on the configuration of the rules and power in their enforcement. The question of *whether nation states can in fact regulate* internet behaviour is irrelevant here not only because they have effectively been doing so for years,<sup>30</sup> but also – and more importantly – because it doesn't negate or decrease the interest of internet users in playing an active and direct role in such regulation. The state's regulatory capabilities do not have to be nullified in order for other stakeholders to play a part. Much to the contrary: in Europe and the United States, there is a trend of moving from online company self-regulation to co-regulation, where the government dispenses more attention to internet activity.<sup>31</sup> In both systems, however, companies play a part along with nation states.

For the same reason, with the literature on cyber-anarchism theory mentioned here I do not intend to argue that nation states *should not regulate* the internet. That argument is barely tangential to the core discussion of intermediary liability that is my focus in this paper. What matters is that these works show users do not want be passive subjects of regulation. I suggest they have actually been feeding an instinct of self-government.

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<sup>27</sup> See Jack Goldsmith and Tim Wu, 'Who Controls the Internet? Illusions of a Borderless World' (2006) 46.

<sup>28</sup> I'm adopting the distinction between customary norms and legal (positive) norms made by Hans Kelsen, *Pure Theory of Law* (2<sup>nd</sup> ed 1978).

<sup>29</sup> As described by H. L. A. Hart, 'Positivism and the Separation of Law and Morals' [1958] 71 Harvard Law Review.

<sup>30</sup> Goldsmith and Wu, *supra* note 27.

<sup>31</sup> Ian Brown and Christopher T Marsden, *Regulating Code. Good governance and better regulation in the information age* (2013).

My argument is merely that while internet users today often recognise the force of traditional regulation, the codified, written rules that the user communities spontaneously create undeniably demonstrate the assertion of a self-governance prerogative. More than in other contexts, people in online communities feel they are entitled to some rule-setting powers. In the third part of the paper, I intend to show that under adequate circumstances, a private company could harness this enthusiasm.

In the case of speech, that means users making censoring or filtering decisions. We face a scenario where users themselves set rules on allowed and forbidden content, albeit under the auspices of traditional state regulation and with the cooperation of private companies. The first part of the paper has so far suggested that users wish to take on that task. The second part is about the convenience for companies that users do so. The third part discusses the technical mechanisms required to carry this out. It would be pertinent, however, to ponder on the legality of crowdsourced filtering.

Concerning the flow of information, the law has always preoccupied itself with tailoring the conditions in which speech might be censored for being abusive of a third party's individual rights. Historically, rule making on speech has thus focused on the details of excessive speech and how it should be constrained. There are many legal dispositions with limitations for speech – such as libel and copyright. That is because the path of least resistance was for expression to flow naturally. Under such traditional regulation of speech, the only concern with crowdsourced filtering would be to set the limit for speech that legitimates users in their task of taking down content. In short: law must define what of their own speech private parties should refrain from uttering.

However, one of the internet's many collateral effects has been a shift in the power of private parties to express themselves. The more noticeable and discussed aspect of such a shift is that there is no longer any scarcity of space and everyone can potentially be heard by everyone. The less discussed and perhaps more decisive aspect is that the platforms for speech are now owned and operated by private parties. When public spaces and the main forum, censorship rules concern state action. However, when private spaces – social network newsfeeds, search engine results – become the main forum, censorship rules concern private action. In short: law must now define what speech of others private parties should be forced to tolerate.

Private censorship is one of the most daunting problems of internet regulation right now. The law is severely late to address this and state action doctrine is one of the obstacles. In Germany the constitutional tradition establishes the duty also of private parties to respect constitutional rights. The German Constitutional Court

demonstrated in the Lüth case, half a century ago, that individuals can harm censor speech just as dangerously as the state and should therefore be constrained in their efforts to do so.<sup>32</sup>

If and when rules are set to define what kind of speech companies must allow in their platforms and their policy guidelines, these laws will also have to answer whether and to what extent the exercise of filtering by users is compatible with proper protection of the right to freedom of expression. It should be noted that this challenge is not related to separating speech that is allowed from forbidden speech. Rather, as the other major challenges of protecting free speech in the digital age, it is about the institutional design of platforms and the law itself, which includes choices on procedural remedies and who gets to make the decisions about content.<sup>33</sup> The risk of abuse when society moves decisions on free speech from the courts to the hands of private companies or users is not negligible. Where groups of users dictate what can and cannot be said, the rise of a tyranny of the majority is high – especially with our current legal tradition. That is the main legal challenge one could pose against crowdsourced filtering.

### III. The Problems Faced by Online Intermediaries

Commercial web pages and online applications currently thrive whenever they can establish and sell themselves as a platform. Very few internet start-ups incorporate into their business plan the autonomous production of content. What they expect is to create an environment where social interaction based on the contributions of users themselves would boost the popularity of their platform.<sup>34</sup> The community sentiment is stimulated not only to motivate users to create content, but to suggest the impression of a shared commons, where users feel that they are voluntarily collaborating for a mutual purpose and that each of them has a stake in the continuation of the platform.<sup>35</sup> Autonomy and self-governance are a decisive part of this sentiment.

This focus by internet companies to play the role of an intermediary instead of the content producer has raised, along with the activity of internet service providers, the hotly debated question of online intermediary liability. Online intermediaries all have to face a dire and pressing matter: *will* they filter and censor content created by

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<sup>32</sup> BVerfGE 7, 198 I. Senate (1 BvR 400/51)

<sup>33</sup> Jack Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for The Information Society' [2004] 79 1 NYU L Rev 1.

<sup>34</sup> See Jeff Jarvis, *What Would Google Do?* (2009).

<sup>35</sup> Companies like Zipcar currently tap into this inherent selflessness of humans as a way to strengthen their business. See Yochai Benkler, *The Penguin and the Leviathan: How Cooperation Triumphs over Self-Interest* (2011).

their users / customers? *Could* they engage in such filtering? *Should* they? Will they be liable when users in their platform violate the privacy or property of third parties?

A brief summary<sup>36</sup> is in order before I lay out the specific cases in more detail. The rules that govern online intermediary liability have nuances in the United States and Europe depending on the type of intermediary and nature of the rights that were violated by the users. The more editorial and content-management power the company has, the stricter the standard.

Regardless of the liability standard set by statute or jurisprudence, rights holders are constantly pushing for an expansion in the filtering obligations of intermediaries. In this section of the paper, I intend to show that such a push has been at least partially successful in most jurisdictions, increasing the need of intermediaries to search for means of filtering.

In the mid-1990s, intermediary liability was noticed as an entirely new and incredibly relevant issue. Companies had never relied so heavily and successfully on the contribution of customers for the operation of their business, while at the same time foregoing the exercise of an editorial function whereby the managers go through all of the content produced or shared by users. They profited from the input of customers, but they were not exercising review. This was a defining moment for online crowdsourcing and, had the United States (the country where the absolute majority of such innovative companies are settled and where most of the users originate) opted for attributing liability to the intermediaries, this industry as we know it today arguably would not exist.<sup>37</sup> The solution found, however, was to give immunity to intermediaries when users exchange data that infringes copyright<sup>38</sup> or

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<sup>36</sup> Good overviews of the scenario for intermediary liability before the changes I describe in this section are provided by Benoît Frydman and Isabelle Rorive, 'Regulating Internet Content through Intermediaries in Europe and the USA' [2002] 23 *Zeitschrift für Rechtssoziologie* 1 and Yulia A. Timofeeva, 'Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany' [2003] 12 *Journal of Transnational Law & Policy*.

<sup>37</sup> This is why the Digital Millennium Copyright Act of 1998 has been hailed as the law that saved the internet. David Kravets, '10 Years Later, Misunderstood DMCA is the Law That Saved the Web' <<http://www.wired.com/threatlevel/2008/10/ten-years-later/>> accessed 26 April 2012.

<sup>38</sup> Section 512 of the Digital Millennium Copyright Act of 1998 reads: "(a) TRANSITORY DIGITAL NETWORK COMMUNICATIONS- A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for the service provider, or by reason of the intermediate and transient storage of that material in the course of such transmitting, routing, or providing connections, if (1) the transmission of the material was initiated by or at the direction of a person other than the service provider; (2) the transmission, routing, provision of connections, or storage is carried out through an automatic technical process without selection of the material by the service provider; (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person; (4) no copy of the material made by the service provider in the course of such intermediate or transient storage is maintained on the system or network in a manner ordinarily accessible to anyone other than anticipated recipients, and no such copy is maintained on the system or network in a manner ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary for the transmission, routing, or provision of connections; and (5) the material is transmitted through the system or network without modification of its

constitutes lewd speech.<sup>39</sup> In theory, this would have meant that internet companies were safe from a big headache and could further conduct their business unhampered by fear of liability. But the current reality is much different.

Firstly, the adoption of a safe harbour for intermediaries in the United States was not followed by the same choice in all other countries. Fortunately, the European Union's e-commerce directive, enacted in 2000, mandated member states to ensure that intermediaries would not be held liable,<sup>40</sup> similarly to what had been done by American legislation. This has proved to be a not-so-safe harbour for companies in Europe. In 2010, Google executives themselves were criminally convicted in Italy of privacy invasion due to a video that was posted of a boy with autism being beaten by other boys.<sup>41</sup> The solution found, however, was to give immunity to intermediaries when users exchange data that infringes copyright<sup>42</sup> or constitutes lewd speech.<sup>43</sup> In theory, this would have meant that internet companies were safe from a big headache and could further conduct their business unhampered by fear of liability. Nevertheless, the current reality is much different.

The copyright industry has been the greatest champion of intermediary liability. The Belgian Society of Authors, Composers and Publishers (SABAM) has twice tried and twice failed, within a short interval, to obtain a ruling by the European Court of Justice that would impose on internet intermediaries the obligation to monitor information flow between users. The decision issued on November 2011 denied that ISPs could be legally forced to monitor copyright infringement by their

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content."

<sup>39</sup> Section 230 of the Communications Decency Act reads: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

<sup>40</sup> Directive 2000/31/EC of the European Parliament and of the Council [2000] on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. Article 15 (1): "Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity." The Directive left open the possibility that legislation would provide injunctive relief for copyright holders against intermediaries in order to cease infringement, but not to obtain compensation. Four years later, the Directive on intellectual property rights required that such an injunction be made available for judicial authorities in member states. Directive 2004/48/EC of The European Parliament and of The Council [2004] on the enforcement of intellectual property rights", Article 9 (Provisional and precautionary measures) (1) Member States shall ensure that the judicial authorities may, at the request of the applicant: (a) (...) an interlocutory injunction may also be issued, under the same conditions, against an intermediary whose services are being used by a third party to infringe an intellectual property right; injunctions against intermediaries whose services are used by a third party to infringe a copyright or a related right are covered by Directive 2001/29/EC."

<sup>41</sup> The video had been posted to the Google Video website in 2006. See Stephen Shankland, 'Execs convicted in Google Video case in Italy' <[http://news.cnet.com/8301-30685\\_3-20000092-264.html?tag=newsEditorsPicksArea.0](http://news.cnet.com/8301-30685_3-20000092-264.html?tag=newsEditorsPicksArea.0)> accessed 24 April 2012. The executives were eventually acquitted, which does not entirely assuage concerns of online intermediaries. Jon Brodtkin, 'Italy finally acquits Google execs convicted over user-uploaded video' <<http://arstechnica.com/tech-policy/2012/12/italy-finally-acquits-google-execs-convicted-over-user-uploaded-video/>> accessed 3 June 2015.

<sup>42</sup> Section 512 of the Digital Millennium Copyright Act [1998].

<sup>43</sup> Section 230 of the Communications Decency Act.

customers.<sup>44</sup> The one issued on February 2012 confirmed its predecessor, now exempting online social network operators from a duty to filter content in order to block copyright infringing material.<sup>45</sup> SABAM's strategy was to interpret the IP Directive of 2004's guarantee of injunction against intermediaries to cease infringement as a right to force them to implement and maintain, at their own expense, a permanent filtering system.

In both cases, the reasoning of the Court was that imposing an absolute blanket-censorship obligation on ISPs and social networks was a disproportionate balancing of the rights to receive and impart information, to privacy, and to conduct a business activity, on one hand; and to (intellectual) property on the other. SABAM's success in taking these cases all the way up to the ECJ twelve years after the safe harbour rule was enshrined in the e-commerce Directive illustrates the constant liability threat under which platform providers find themselves in Europe. Furthermore, it shows that even if the law has established the absence of liability, intermediaries have a perpetual disbursement of resources in order to pay for litigation costs.

The ECJ's "right to be forgotten" ruling in May 2014 is yet another reason for online intermediaries to worry. Privacy protection was understood to trump safe harbour or at least call for a different, least protective interpretation of it. That is because the Court considered Google to be a data controller instead of a content intermediary. The reason was that Google conducted "organization and aggregation of information" producing a "structured overview of the information."<sup>46</sup> The fundamental mistake made by the Court was that it created a "right to oblivion" with the excuse of trying to protect a "right to erasure." The former relates to publications and expression, while the latter relates to personal data stored in databases (as opposed to published) and subject to automated processing (as opposed to readership.)<sup>47</sup>

The editing of third-party content that the ECJ found Google to be performing is precisely what Facebook's newsfeed is. Any intermediary that purports to offer its users a "structured overview" of the user content in its platform is in risk of being labelled a data controller. This is in rampant conflict with the e-commerce directive's

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<sup>44</sup> *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*. [2010] Case C-70/10.

<sup>45</sup> *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) v Netlog NV* [2010] Case C-360/10.

<sup>46</sup> "Also, the organization and aggregation of information published on the internet that are effected by search engines with the aim of facilitating their users' access to that information may, when users carry out their search on the basis of an individual's name, result in them obtaining through the list of results a structured overview of the information relating to that individual that can be found on the internet enabling them to establish a more or less detailed profile of the data subject." C-131/12, *supra* note 5.

<sup>47</sup> Ambrose, Meg Leta and Jef Ausloos, "The right to be forgotten across the pond" [2013] 3 *Journal of Information Policy*.

rules and creates precisely the level of risk and uncertainty<sup>48</sup> for the intermediary that the safe harbour rule was enacted to prevent. Any intermediary that purports to offer its users a “structured overview” of the user content in its platform is in risk of being labelled a data controller. Back when the right to be forgotten was introduced to the draft of the new EU personal data protection directive, legal scholars predicted that solution would have serious chilling effects.<sup>49</sup> The Court ruling turned out to be much worse. The ECJ found that Google was producing new information by organising and aggregating previously published information. Yet somehow the Court did not grant the company the safe harbour protection that the EU personal data protection directive guarantees to those who are in the business of disseminating information – such as the press.

Even legislators in Europe, who have been quarrelling with American tech giants in the past few years over tax evasion allegations,<sup>50</sup> came out against the ruling stating it is “unworkable.”<sup>51</sup> That is because “[t]he requests received in June alone mean that Google's staff have to review over a quarter of a million URLs to see whether the information appears to be “inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing” carried out by them.”<sup>52</sup> The future for intermediaries in Europe is indeed grim.

The company has since been doing just that. Even if we disregard the fact that the ECJ ruling has pushed Google into exercising a role that was meant for courts – deciding what is and is not protected expression, the practical outcome is that the search engine is now vulnerable to litigation and liability if it disagrees with a user on whether specific search results should be taken down. That is precisely the opposite of what the safe harbour for intermediaries intended. Even those who do not oppose it in principle<sup>53</sup> acknowledge this uncertainty about the standard and application of the right to be forgotten as a problem.

<sup>48</sup> One need only take a quick look at paragraph 99 of the ruling to grasp how subjective supposed standard is and how problematic it will be for any intermediary – even with the help of legal counsel – to make filtering decisions based on it. C-131/12, *supra* note 5.

<sup>49</sup> Jeffrey Rosen, ‘The right to be forgotten’ [2012] 64 Stan L Rev Online 88.

<sup>50</sup> See Andrew Frye, ‘Renzi Pressed to Put Google, Facebook Taxes on EU Agenda’ <<http://www.bloomberg.com/news/2014-07-01/renzi-pressed-to-put-google-facebook-taxes-on-eu-agenda.html>> accessed 18 August 2014; Frances Robinson, ‘France Pushes EU to Regulate U.S. Internet Companies’

<<http://online.wsj.com/news/articles/SB10001424127887324492604579085222987377040>> accessed 18 August 2014. See also House of Commons. Committee of Public Accounts, *Tax Avoidance–Google* (Ninth Report of Session 2013–14)

<<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmpubacc/112/112.pdf>> accessed 18 August 2014, which reports that in order “[t]o avoid UK corporation tax, Google relies on the deeply unconvincing argument that its sales to UK clients take place in Ireland, despite clear evidence that the vast majority of sales activity takes place in the UK.”

<sup>51</sup> Alex Hern. ‘Lords describe Right to be Forgotten as ‘unworkable, unreasonable, and wrong’ <<http://www.theguardian.com/technology/2014/jul/30/lords-right-to-be-forgotten-ruling-unworkable>> accessed 18 August 2014.

<sup>52</sup> European Union Committee. Second Report, *EU Data Protection law: a ‘right to be forgotten’?* <<http://www.publications.parliament.uk/pa/ld201415/ldselect/lducom/40/4002.htm>> accessed 18 August 2014, para 33.

<sup>53</sup> Rolf Weber ‘The Right to Be Forgotten. More Than a Pandora’s Box?’ [2011] 2 JIPITEC 120.

The latest addition in the series of rulings eroding the e-commerce directive's safe harbour is *Delfi AS v. Estonia* (2015) ECtHR 64659/09. Delfi.ee, a major Estonian news outlet, published a story on ice bridges. The piece generated many reader comments, and some of them included threats to a certain individual. This person asked Delfi to remove the threats and pay damages for hosting them. The company removed the comments as requested, but refused to pay. A court later forced Delfi to pay damages, even though as an intermediary it had removed the allegedly abusive posts upon request. The European Court of Human Rights heard the case and decided that Delfi's liability did not violate the European Convention on Human Rights' free speech protection. This means that any intermediary that is sued for damages in Europe, even after having removed content upon request, cannot seek freedom of expression shelter under the Convention. The future for intermediaries in Europe is indeed grim.

The prospect in other countries is shaky at best. In 2014 Brazil enacted its *Marco Civil da Internet*, a groundbreaking landmark internet regulation statute<sup>54</sup> that contains several provisions regarding intermediaries. Instead of notice-and-takedown, the system adopted was court-order-and-takedown. While this is good news to intermediaries, copyright violations and child pornography accusations were left out of this strong safe harbour and tend to be solved by Brazilian courts with notice-and-takedown or something even worse. Moreover, the judiciary's track record is certainly a bad omen.

Provisions of the Brazilian Consumer Protection Code on strict liability of service providers who engage in risky activity have been often interpreted as requiring liability of social networks for defamation engaged in by its users. Brazil's Superior Court of Justice adopted this view for years, until it receded to a notice-and-takedown standard on a more recent ruling, which explicitly finds support on the merits of a similar case.<sup>55</sup> The Supreme Constitutional Court has picked up a similar case for judgment and could go one way or the other. In theory it is not even bound

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<sup>54</sup> Glyn Moody, 'Brazil's 'Marco Civil' Internet Civil Rights Law Finally Passes, With Key Protections Largely Intact' <<https://www.techdirt.com/articles/20140326/09012226690/brazils-marco-civil-internet-civil-rights-law-finally-passes-with-key-protections-largely-intact.shtml>> accessed 18 August 2014

<sup>55</sup> RECURSO ESPECIAL Nº 1.193.764 - SP (2010/0084512-0). Justice Nancy Andrighi concluded that "não se pode considerar de risco a atividade desenvolvida pelos provedores de conteúdo, tampouco se pode ter por defeituosa a ausência de fiscalização prévia das informações inseridas por terceiros no site, inexistindo justificativa para a sua responsabilização objetiva pela veiculação de mensagens de teor ofensivo." ("the activity developed by content providers cannot be considered as a risky one; the absence of prior restraint on information inserted in the website by third parties also cannot be seen as a defect in the service, therefore remaining without justification a strict liability of such providers for messages of offensive content made available on the website") (author's translation). The opinion explicitly finds support on the DMCA safe harbor provision as well as on the European e-commerce Directive. Doctrine in Brazil is generally more receptive to a safe harbor system than to strict liability. See Marcel Leonardi, *Responsabilidade Civil dos Provedores de Serviços de Internet* (2005) and Bruno Miragem, 'Responsabilidade por danos na sociedade de informação e proteção do consumidor: desafios atuais da regulação jurídica da internet' [2009] 70 *Revista de Direito do Consumidor* 41.

by the *Marco Civil* choice for court-order-and-takedown because the Justices could easily rule that the Constitution requires more effective protection for defamation victims.

The second reason why companies cannot completely ignore the content of exchanges in their platforms is that the safe harbour rule has caveats and the result of judicial interpretation over the last ten years has not been entirely favourable to intermediaries. In the United States, for example, companies have to find a sweet spot between managing their online platform to achieve their business goals and avoiding a level of intervention on the activity of users that would characterise editorial action and thus trigger liability. This has been the case for peer-to-peer software, where since Napster the developers have gradually decentralised control of the file exchange process, relying more and more on the sense of centralized coordination below a certain threshold over which indirect liability ensues.<sup>56</sup>

Two cases that reached federal appeals courts show that the distinction between a liable intermediary and one that is in safe harbour is workable but by no means a clear-cut rule. This invites case-by-case interpretation and therefore keeps the possibility of finding the intermediary liable always present. In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008), the manager of a website that served as a platform where anyone could find other people to share an apartment was deemed liable for discrimination under the Fair Housing Act. Individuals who had to participate were forced to fill out a profile which asked for information on gender, sexual orientation and number of children, among other personal information. The website's search engine featured filtering options that employed these criteria. In order to determine whether Roommates.com was an interactive computer service (immune) or an information content provider (liable), the Court asserted whether the platform manager acted as a content co-developer and whether it had induced infringement.<sup>57</sup> Both questions were answered in the affirmative for Roommates.com.

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<sup>56</sup> See Tim Wu, 'When code isn't law' [2003] 89 Va L Rev 679, 724: Wu points to the sense of community that exists between users of peer-to-peer systems as one of the reasons for the success of such platforms.

<sup>57</sup> "CDA does not grant immunity for inducing third parties to express illegal preferences. Roommate's own acts--posting the questionnaire and requiring answers to it--are entirely its doing and thus section 230 of the CDA does not apply to them. Roommate is entitled to no immunity." *Fair Housing Council of San Fernando Valley v Roommates.com, LLC*, 521 F.3d at 1165. Judge Kozinski's opinion also affirmed "that reading the exception for co-developers as applying only to content that originates entirely with the website--as the dissent would seem to suggest--ignores the words "development . . . in part" in the statutory passage "creation or development in whole or in part." 47 U.S.C. § 230(f)(3) (emphasis added). We believe that both the immunity for passive conduits and the exception for co-developers must be given their proper scope and, to that end, we interpret the term "development" as referring not merely to augmenting the content generally, but to materially contributing to its alleged unlawfulness. In other words, a website helps to develop unlawful content, and thus falls within the exception to section 230, if it contributes materially to the alleged illegality of the conduct." *Id.*, at 1167-1168.

The result was different in *Chicago Lawyers' Committee For Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666 (7th Cir., 2008). Challenged under the same Fair Housing Act accusation, that it was liable for discriminatory housing ads posted by its users, Craigslist was granted immunity because the Court felt it did not in any way induce users to post such ads – it had no mandatory boxes that a user had to fill-in in order to use the platform.<sup>58</sup> However, Judge Easterbrook explicitly denied that safe harbour could work as a rule that would give clear safety to intermediaries if they chose not to worry about the content or messages exchanged by their users.

Grokster was not about a social network or another type of website, rather it concerned a peer-to-peer software. This shows that intermediary liability is an overarching issue encompassing any platform operator that employs the internet to interconnect individuals and let them exchange information of any kind – pictures, status updates, comments, music files etc. The concept of platform is itself increasingly more fluid. Airbnb, for example, is used both as website and an app and it must be careful, in both contexts, not to commit the same error as Roommates.com.

*Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) marks a strong shift away from anything resembling a safe harbour for platform providers. In Grokster the Court went beyond the standard it had set in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). While in Sony the existence of non-infringing uses of a technology ensured that the developer would not be held liable,<sup>59</sup> in Grokster the Court ventured into the intentions of the platform developer. Regardless of the possibility of using the platform for legal purposes, the manager could be held liable if it had induced infringement.<sup>60</sup> Of course Justice Souter in Grokster did all he could to make it seem as though the Sony rule was not being abandoned, but the fact is the rule changed.<sup>61</sup> This made intermediary liability more uncertain than it was before the ruling.<sup>62</sup> This was only the culmination of an ongoing

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<sup>58</sup> Craigslist was understood as a common carrier in this sense: "Online services are in some respects like the classified pages of newspapers, but in others they operate like common carriers such as telephone services, which are unaffected by § 3604(c) because they neither make nor publish any discriminatory advertisement, text message, or conversation that may pass over their networks." *Chicago Lawyers' Committee For Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d at 668.

<sup>59</sup> "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial noninfringing uses." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. at 442.

<sup>60</sup> "where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, Sony's staple-article rule will not preclude liability." *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. at 935.

<sup>61</sup> "The Court created a new type of contributory copyright infringement—while apparently denying it was doing so." James Boyle, *The Public Domain. Enclosing The Commons of the Mind* (2008) 77.

<sup>62</sup> "[T]here is no such thing as a bright-line rule for technologists to make reliable ex ante determinations as to what it means to be too close to the line of secondary copyright liability in the Post-Grokster World." Urs Gasser and John G. Palfrey, Jr., 'Catch-As-Catch-Can: A Case Note on Grokster' [2006] 78 *Swiss Review of Business Law and Financial Market Law* 119, 125. This

process in lower courts, where the changes being made to the law were increasing the uncertainty for platform developers.<sup>63</sup>

Safe harbour for online intermediaries has thus been turned into an indirect liability standard, one that inevitably curtails legitimate use that individuals may make of a legitimate online platform.<sup>64</sup> Furthermore, advocates of the fight against online child pornography call for a revision of the safe harbour provision in the U.S. Communications Decency Act (CDA),<sup>65</sup> which shields companies from civil liability – except for intellectual property issues. Criminal liability, on the other hand, is being revamped by revenge porn legislation that is now appearing in more and more countries, requiring more caution from intermediaries than ever before.<sup>66</sup>

The only “safe” thing about all of this is that it is safe to say intermediaries cannot easily forego some kind of management of the content exchanged in the platform that they operate.

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uncertainty is more than enough to hamper online platform providers: “A decision does not need to make an activity illegal in order to impede it. It only needs to make it uncertain.” James Boyle, *supra* note 62, 79.

<sup>63</sup> Jonathan Zittrain points out that in *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003) “[t]he Seventh Circuit’s test put all authors of generative technologies at risk of finding themselves on the wrong side of a court’s cost/benefit balancing. Indeed, they were asked to actively anticipate misuses of their products and to code to avoid them. Such gatekeeping is nice when it works, but it imposes extraordinary costs not readily captured by a single cost/benefit test in a given instance.” Jonathan Zittrain, ‘A History of Online Gatekeeping’ [2006] 19 Harv JL & Tech 253, 285.

<sup>64</sup> “Indirect liability has a significant drawback, however, in that legal liability — even if carefully tailored — inevitably interferes with the legitimate use of implicated tools, services, and venues. (...) This concern is particularly pronounced for new technologies, where the implications of copyright liability are often difficult to predict.” Douglas Lichtman and William Landes, ‘Indirect Liability For Copyright Infringement: An Economic Perspective’ [2003] 16 Harv JL & Tech 395, 409. That is because in countries like the United States, the main driving force of intermediary liability online is copyright protection, something which is inherently in tension with the protection of freedom of expression, since “[r]ecognizing property rights in information consists in preventing some people from using or communicating information under certain circumstances. To this extent, all property rights in information conflict with the “make no law” injunction of the First Amendment.” Yochai Benkler, ‘Free as the Air to Common Use: First Amendment Constraints on Enclosure of The Public Domain’ [1998] 74 NYU L Rev. 354, 393.

<sup>65</sup> The shaky indirect liability standard would then be replaced by a free-for-all negligence standard: “The young person (or his parents, more likely, I suppose) seeks to bring suit against the service provider involved. In my view, the service provider should not have special protection from such a tort claim. Such a claim should be decided on the merits. Was the service provider negligent or not? I do not think that the fact that the service provider is offering an Internet-based service, rather than a physically based service, should result in a shield to liability.” John Palfrey Jr. in Adam Thierer ‘*Dialogue: the future of online obscenity and social networks*’ <<http://arstechnica.com/tech-policy/news/2009/03/a-friendly-exchange-about-the-future-of-online-liability.ars>> accessed 24 April 2012. Intermediary liability for child pornography involves a balancing of free speech with the need to protect vulnerable internet users – children – “who do not have the same skills as adults to make a broad range of quality judgments that accompany these informational processes – limitations that are due to their respective stage of development and their limited set of life experience based on which content can be evaluated.” Urs Gasser et al., ‘Response to FCC Notice of Inquiry 09-94. Empowering Parents and Protecting Children in an Evolving Media Landscape’ <<http://ssrn.com/abstract=1559208>> accessed 24 April 2012, 3.

<sup>66</sup> See Mary Anne Franks, ‘Drafting An Effective “Revenge Porn” Law: A Guide for Legislators’ <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2468823](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2468823)> accessed 3 June 2015.

This carries its own set of problems, of course. First, engaging in filtering has a cost. Companies commonly allude to the impracticability of exercising human oversight over the activity in online platforms. Automated filtering is not at all unfeasible, and filters like the ones used against spam by Gmail and against copyright infringement on Youtube employ sophisticated algorithms capable of lowering the so-called false negatives and false positives. They still have a cost, however, and even 5% of false positives represent a significant social cost when freedom of expression is involved.

Second, if companies take it upon themselves to exercise the filtering that would keep them free of liability, there will be a natural tendency to filter more, not less.<sup>67</sup> Liability poses a big financial threat, one that is not always offset by the dissatisfaction of a couple of users who had their posting, comment or video deleted. Third, the very possibility of user insurrection against filtering executed by the platform manager works as a force opposing that of risk-averse over-censorship. Indeed, the intermediary finds itself in a difficult situation: if it filters content, consumers potentially react badly, organise and protest;<sup>68</sup> if it does not filter, it highly increases the chances of being held liable – and sometimes incurring millions of dollars in penalties. Litigation costs also need to be added to that bill. By 2010, four years before the settlement, Google had reportedly already spent US\$ 100 million in legal fees with *Viacom v. YouTube*.<sup>69</sup> Actively filtering content in social networks creates a very bad image these days, even if the company explains that it does so in order to comply with government regulation.<sup>70</sup>

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<sup>67</sup> This predisposition for censorship amounts to a serious chilling effect on free speech. The problem has been described in detail by Wendy Seltzer, 'Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of The DMCA on The First Amendment' [2010] 24 Harv JL & Tech 171. The author diagnosed the problem in a system of strong safe harbour, but warns of an even worst scenario under the relative intermediary liability standard: "Moreover, the chilling effect analysis indicates that over-deterrence is a problem deeper than the DMCA notice-and-takedown regime; it is a problem endemic to copyright law and its secondary liabilities. As copyright expands in scope, time, and breadth, its erroneous application and the chill of secondary liability assume greater significance." *Id.*, at 227.

<sup>68</sup> Yochai Benkler explains how these seemingly decentralized, bottom-up user campaigns in a networked-society are effective at bending the will of powerful actors, including large private companies. One of the examples reported by Benkler is that of how users successfully forced Sinclair Broadcasting not to air a controversial TV ad during the 2004 presidential elections in the United States. See *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (2006) 220.

<sup>69</sup> Liz Miller, 'Google's Viacom Suit Legal Fees: \$100 Million' <<http://gigaom.com/2010/07/15/googles-viacom-suit-legal-fees-100-million/>> accessed 18 August 2014. While this only hurts a company like Google, it does much worse to startups. According to the story, litigation costs were largely responsible for Veoh's bankruptcy.

<sup>70</sup> A good example of this is the surge of criticism that followed Twitter's announcement that it would start to suppress tweets that governments in countries like Syria or Iran asked to be removed. See Somini Sengupta, 'Censoring of Tweets Sets Off #Outrage' <<http://www.nytimes.com/2012/01/28/technology/when-twitter-blocks-tweets-its-outrage.html?pagewanted=all>> accessed 25 April 2012. To its credit, the company has taken an unusual path and decided to maintain the transparency of the tweet removals, by acknowledging them explicitly in each case.

## IV. The Alternative – Harnessing User Self-Governance for Platform Management

The ideal of self-governance by internet users was very prominent in the late 1990s and early 2000s. However, momentum has been lost due to the realisation that countries can and do regulate the internet; it has not been fully abandoned. Users of many online platforms are willing to assert some level of self-governance prerogative whereby they perform direct or indirect norm-enforcing roles. This arises as an alternative for intermediaries: when giving up filtering for illegal content is risky and taking up filtering has financial and political costs, outsourcing this task to users themselves could potentially solve many of the platform manager's problems.

Two comments are warranted at this point. First, I am discussing an option that private companies might exercise to lower their costs of operation. They could employ internet users' motivation for self-governance as a means to an end. The platform owners would therefore retain last-word authority over code and architecture choices as well as over individual user decisions.<sup>71</sup> User filtering, in this sense, is not a first step for users to liberate themselves and take over. The latest developments at Reddit illustrate this very well: a forum that is highly renowned for the libertarian views of its users when it comes to freedom of expression is currently taking initial steps to curtail instances of serious bullying and harassment.<sup>72</sup>

Second, this paper's main proposition operates within the current Western legal paradigm, including the protection of free speech and property as individual rights. Nevertheless, it could be read as a first step to a much more profound change, one that would require an entirely different framework of peer-to-peer elements in the development of law itself.<sup>73</sup>

People sharing an environment over a certain time tend to cultivate a bond with the platform itself but also with the individuals that co-exist with them.<sup>74</sup> This is

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<sup>71</sup> That is my assumption in this article. For a more detailed discussion of why that is the case, especially from a Marxist perspective, see Christian Fuchs (2012) 'Critique of the political economy of web 2.0 surveillance' in *Internet and surveillance: the challenges of web 2.0 and social media* (Routledge, New York, 2012), 31-70.

<sup>72</sup> Julia Greenberg, 'Reddit wants to exile trolls. But growing up is hard' <<http://www.wired.com/2015/05/reddit-wants-exile-trolls-growing-hard/>> accessed 3 June 2015.

<sup>73</sup> See Melanie Dulong de Rosnay, 'Peer-to-Peer as a Design Principle for Law: Distribute The Law' [2015] 6 *Journal of Peer Production*. While I do not intend to support this bolder argument here, I believe it is compatible with the core ideas behind this paper.

<sup>74</sup> Studies find, for example, that posting as well as reading posts from other users have a positive impact on a participant's *sense of virtual community* (see Lisbeth Tonteri et al. 'Antecedents of an experienced sense of virtual community' [2011] 27 *Computers in Human Behavior*); that attachment of the individual to a platform based on identity with the group is easy to achieve and that such attachment varies according to the type of online community (see Yuqing Ren et al. 'Building Member Attachment in Online Communities: Applying Theories of Group Identity and Interpersonal Bonds' [2012] 36 *MIS Quarterly* 3); that "Most if not all of [Wikipedia's] growth is grassroots and bottom up. This growth is not explained by traditional vectors of funding, fiat, or momentum. Instead, the multidimensional, sociological, and psychological motivations of

the case in social networks like Facebook, user-moderated news websites like Slashdot, user-generated content websites like 9GAG or Wikipedia and virtual worlds like World of Warcraft.<sup>75</sup> A notion of community develops which evokes that independence and group self-determination feeling that has existed on the internet since the very beginning. It seems that the sense of communion is proportional to the level of detachment from the real world that the environment produces. In massively multiplayer online games, this reaches perhaps the strongest stance.<sup>76</sup> In most other platforms maintained by intermediaries, however, user zeal for the common space and resources is pervasive and persistent. There is a big difference in the perception of users between the filtering enforced by the intermediary and that which is carried out by users themselves. The former is a bottom-down imposition of values; the latter is a bottom-up exercise of self-regulation and independent authority. While it is true that this authority derives from the desire of the intermediary to maintain a platform that is compliant with the law (and therefore not all values are necessarily shared by the company and its customers), to the extent that some users – not the company – take the leading role in putting them into practice, there are elements of self-governance to be found in this context. This greatly reduces the rejection and dissatisfaction by users with the filtering that is performed.

One successful example of crowdsourcing filtering of user-generated content is 9GAG.<sup>77</sup> Anyone can become a user and post something – usually an image. Posts vary in meaning and purpose, but the majority is humorous and revolves around common internet memes. A user's post goes to the voting page.<sup>78</sup> If it manages to attract support from enough users through a voting system, the post will then be shown in the first page. 9GAG users will usually spend most of their time in the first page, where they will not see the posts that never garnered enough popularity. Crowdsourced filtering on 9GAG is mostly positive filtering, but the result is nevertheless that some posts will not be visible to the average user due to

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individual contributors take center stage.” (Sheizaf Rafaeli and Yaron Ariel, ‘Online Motivational Factors: Incentives for Participation and Contribution in Wikipedia’ in A Barak (ed) *Psychological Aspects of Cyberspace* (2008)).

<sup>75</sup> On the potential of community filtering, Yochai Benkler states that “[c]onsistent with what we have been seeing in more structured peer-production projects like Wikipedia, Slashdot, or free software, communities of interest use clustering and mutual pointing to peer produce the basic filtering mechanism necessary for the public sphere to be effective and avoid being drowned in the din of the crowd.” Benkler, *supra* note 69, 258.

<sup>76</sup> The bonding and community-forming goals can be noticed in all kinds of online games, not only those such as Second Life: “As these examples indicate, each virtual world is different, making categorical statements about virtual worlds suspect. Still, the lines drawn between worlds might not be as bright as they seem at first. For instance, while *The Sims Online* does not involve gaining power and wealth through leveling, prestige and affluence are motivating forces for many participants. And while leveling worlds such as *Ultima Online* often force players to engage in repetitive killing exercises, what makes this bearable seems to be the social bonds formed among players, who may find more fulfillment in being virtual seamstresses, alchemists, and blacksmiths.” F. Gregory Lastowka and Dan Hunter, ‘Virtual Worlds: A Primer’ in Jack Balkin and Beth Noveck (eds) *The State of Play. Law, Games, and Virtual Worlds* (2006) 24.

<sup>77</sup> <http://www.9gag.com>.

<sup>78</sup> <http://www.9gag.com/fresh>.

decentralized filtering conducted by other users. The managers of the website hardly have to worry about, for example, a child abuse post reaching the average users.

In the example of 9GAG, user action has direct effect on whether content is visible to others. It is not removed from the website altogether just for not being popular. Nevertheless, filtering doesn't only mean the identification and removal of content, it also means separation and categorisation of content. If a platform has managed to have users successfully categorise posts over time, then it is one important step closer to stimulating users to remove posts with certain abusive contents.

Even then, managing visibility or availability of content is not the only foreseeable role that users can play. Rather, it is one type within a large variety of options, ranging from more to less direct user influence on what content is displayed. Users could, for example, merely contribute with knowledge about what content is worthy and unworthy, making the software that actually filters fundamentally more accurate.<sup>79</sup> The more indirect the user input is, however, the more susceptible the intermediary becomes to the costs of filtering mentioned earlier.

There is a fine line between indirect user filtering and company filtering. The ideal solution for some companies might be an algorithm with machine-learning features that takes qualitative user input (e.g. not merely red flags) on what content should be taken down. One reason for that is if user input feeds human judgement calls instead of a machine-learning-enabled algorithm, then the company could be vulnerable to biases in its evaluation of the information.<sup>80</sup>

To illustrate the problem, suppose Facebook had one large team of employees located in the United States reviewing all of illegal content flags pointed out by users in different countries. Due to their personal biases, this group of people would very likely interpret reports of indecent pictures made by American users and those made by Iranian users in a significantly different fashion. Prejudice in the revision of user filtering could constitute cause for liability. The question then is: how accurate can an algorithm be at identifying content that should be taken down, given that it can draw help from user input? The job is highly complex, but advances have been made using the bias of users themselves to improve a software with a similarly complex task.<sup>81</sup>

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<sup>79</sup> See Kuldeep Yadav et al., 'SMSAssassin: crowdsourcing driven mobile-based system for SMS spam filtering' [2011] HotMobile '11 Proceedings of the 12th Workshop on Mobile Computing Systems and Applications 1-6. The authors describe how user input helped calibrate an algorithm for filtering spam in SMS texts.

<sup>80</sup> See Henning Piezunka and Linus Dahlander, 'Distant Search, Narrow Attention: How Crowding Alters Organizations' Filtering of Suggestions in Crowdsourcing' [2014] *Academy of Management Journal*, June. The study finds that when organizations crowdsource input they tend to favor suggestions more familiar to them over those that are distant.

<sup>81</sup> Pedro Henrique Calais Guerra et al., 'From bias to opinion: a transfer-learning approach to real-time sentiment analysis' [2011] KDD '11 Proceedings of the 17th ACM SIGKDD international

The main issue with crowdsourced filtering is whether users could successfully entertain a task of governance. Filtering is a form of censorship and would require, in some cases, shunning the users who engage in wrongdoing. It is useful to frame this as the decentralised, commons-based production of an information service: filtering content. This model of production depends on modularity, granularity and heterogeneity.<sup>82</sup> The task of filtering can only be undertaken by users in a decentralized approach if the overall work can be broken up into pieces; if these pieces or isolated parts of the job are small; and if they are of different sizes and levels of complexity. It seems mechanisms such as red-flagging, which today are familiar to users of many social networks,<sup>83</sup> go a long way in providing for modularity and granularity. Heterogeneity seems to characterise the task as well: while certain content is more obviously infringing than others are, there are also those grey-area instances. There is the sale of copyrighted music and then there is remixing under fair use; there are pictures of naked children and then there are artistic paintings which include nude children among other elements.

User filtering is a mechanism of gatekeeping because it concerns the control of information flow.<sup>84</sup> At the same time, this is a peculiar kind of gatekeeping because it involves the traditionally gated becoming the gatekeepers,<sup>85</sup> the decision-makers on the issue of whether or not certain content passes scrutiny and can be shared in a community. This is decentralised gatekeeping whereby the users of an online platform purport to collectively fulfil a goal related to the control of information flow.<sup>86</sup> In order for user filtering to work, coordination is not as essential as in other collective endeavours like the production of encyclopaedia articles in Wikipedia.<sup>87</sup> It is nonetheless crucial that the users exchange their views or produce standards and general guidelines for the filtering, lest the whole process collapses with excessive or

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conference on Knowledge discovery and data mining, 150-158. ACM New York, NY, US.

<sup>82</sup> Yochai Benkler, 'Coase's Penguin, or, Linux and The Nature of the Firm' [2002] 112 Yale LJ 369, 435-436.

<sup>83</sup> In some websites this is even required of users. In Craigslist, for example, when people enter any of the subsections of the personal ads portion of the listings, they are prompted to agree to certain conditions in order to continue. One of them reads: "I agree to flag as "prohibited" anything illegal or in violation of the craigslist terms of use." <<http://boston.craigslist.org/cgi-bin/personals.cgi?category=stp>> accessed 26 April 2012.

<sup>84</sup> Gatekeeping can be defined "as the process of controlling information as it moves through a gate. Activities include, among others, selection, addition, withholding, display, channeling, shaping, manipulation, repetition, timing, localization, integration, disregard, and deletion of information." Karine Barzilai-Nahon, 'Toward a Theory of Network Gatekeeping: A Framework for Exploring Information Control' [2008] 59 Journal of The American Society For Information Science and Technology 1493, 1496.

<sup>85</sup> Id., at 1506.

<sup>86</sup> As Aaron Shaw contends, in an analysis of user-moderated platform Daily Kos, "decentralized gatekeeping consists of numerous, microlevel interactions between individuals engaged in a particular collective endeavor." Aaron Shaw, 'Centralized and Decentralized Gatekeeping in an Open Online Collective' [2012] Politics & Society 40, 357.

<sup>87</sup> In Wikipedia, it has been found that coordination through the use of communication tools is sometimes a better predictor of article quality than the total number of editors that work in a specific article. See Aniket Kittur and Robert E. Kraut, 'Harnessing the Wisdom of Crowds in Wikipedia: Quality Through Coordination' [2008] CSCW'08, November 8-12, 2008, San Diego, California, USA, 44.

insufficient censorship. This does not mean that without unanimity on a general set of rules the whole enterprise is doomed to fail. Rough consensus can play an important part in the decision-making process of online communities,<sup>88</sup> but in any event, the existence of some common parameters for filtering serve as guidance for all users, not as coercive authority such as the rule of law.<sup>89</sup> Crowdsourced work – free or paid – could benefit from some hierarchy mechanisms<sup>90</sup> in order to begin tackling the minimal coordination issue which, in this case, consists e.g. of avoiding overfiltering. Decentralised management of Wikipedia, for example, relies on different user strata in order to avoid too much or too little redaction of user edits.<sup>91</sup>

There are certain aspects of how the platform is designed that facilitate user filtering. If the environment is shaped to allow for reputation monitoring, where the identity of users is clear, and certain modes of user surveillance by users themselves are built in, filtering can be more precise and effective.<sup>92</sup> Suppose a filter confirmation mechanism is established, whereby a post or file is only blocked once three different users decide it is illegal. When someone is considering if she should add the third “vote” for a block, trust on the user who made the first “vote” can influence her assessment. If that first user has had its block decisions confirmed in 95% of the cases, that third user can devote less work into evaluating whether or not to add the third filter order. Furthermore, these trust and collaboration mechanisms can be made to allow one user to profit from the viewing decisions of another user,<sup>93</sup> such that content that is less and less viewed over time could be more vulnerable to censor “votes” than content that is widely shared and read.

<sup>88</sup> See A. Michael Froomkin, ‘Habermas@discourse.net: Toward a critical theory of cyberspace’ [2003] 116 Harvard Law Review 749, describing the adoption of Jürgen Habermas’ rough consensus by the Internet Engineering Task Force in their decision-making processes.

<sup>89</sup> Which is why decentralized gatekeeping is not completely useless without codified, agreed-upon rules. Codification here serves a purpose of guidance, not legitimation: “even if users consent to being governed by community norms, they often have no idea what they are consenting to, and more important-ly, they have no ability to find out other than through trial and error. There are no pre-announced, publicly available, attainable, written, forward-looking, impartially enforced rules.” Michael Risch, ‘Virtual Rule of Law’ [2009] 112 W Va L Rev 1, 35.

<sup>90</sup> A better framework for the use of hierarchy mechanisms is an important research agenda for both free and paid online crowdsourced work, as pointed out by Aniket Kittur et al., ‘The Future of Crowd Work’ [2013] Proceedings of the CSCW’13, February 23–27, 2013, San Antonio, Texas, USA.

<sup>91</sup> For empirical evidence that provides a detailed account, see Dariusz Jemielniak, *Common Knowledge?: An Ethnography of Wikipedia* (2014).

<sup>92</sup> This is especially true in online virtual worlds where MMOGs are played. “Reputation is a key element of social value to many players. The accumulation of social status is part of the reward for participation. Players institute their own regimes of surveillance.” Sal Humphreys, ‘Ruling the Virtual World. Governance in Massively Multiplayer Online Games’ [2008] 11 European Journal of Cultural Studies 149, 162.

<sup>93</sup> “Using previous experiences from users who change options easily, it is possible to further expand the role of ratings in structuring large-scale online conversations to provide customized, worthwhile content to a heterogeneous community of users.” Cliff Lampe et al., ‘Follow the Reader: Filtering Comments on Slashdot’ [2007] Proceedings of the ACM Conference on Human Factors in Computing Systems (CHI’07). San Jose, CA. April 28-May 3, 2007, 1253, 1261.

Problems obviously arise from reliance on user filtering. At least three can be identified upfront: incentives to engage in filtering, the tendency to over-filter and the skewed demographics of the users who engage in filtering.

The prohibition on the exchange of child pornography material is perhaps the only worldwide consensus in the field of internet governance. If a company wants to give users the tools necessary for collective filtering of paedophilia on its platform, it need not worry whether or not users will employ them. The self-governance aspect of user filtering would be largely eroded if users were offered money to perform this task. There's the risk of a backlash against the company.<sup>94</sup> The average internet user would actively engage in censoring instances of child pornography and would gladly denounce and exclude other users responsible for these violations, such that no monetary compensation is required. What is crucial here is that the filtering that a company needs to have accomplished on its platform is based on values that are not always shared by the users. Fighting child pornography and hate speech usually are; banning the exchange of copyrighted works usually is not.<sup>95</sup> In the already mentioned case of Reddit, a platform that relies heavily on user self-governance, the users share an extremely expansive notion of free speech. Because this evidently hinders attempts to contain serious harassment, the company's new measures to discipline trolls seems to be to "change the social norms and values of the site, to create an emerging culture of free expression online that is sensitive to harassment."<sup>96</sup> It is decentralised, but it remains gatekeeping. The intermediaries still hold the reins and could potentially influence user's values and practices. Naturally, it all depends whether companies can find and exercise the proper incentives. Companies would have a hard time shaping user motivation and purpose vis-à-vis an online platform in order to get libertarians to protect copyright or liberals to combat vicious harassment, but research suggests that might be possible.<sup>97</sup>

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<sup>94</sup> The recent discovery of a kind of "rulebook for filtering" that paid censors receive from Facebook has caused some revolt by Facebook users. In this case most of the disappointment by users was directed at the rules themselves, not the widely known fact that Facebook outsources the job of filtering to poorly-compensated workers. However, this incident shows that the company is exposed to criticism precisely because of this practice, regardless of what the enforced filtering criteria are. 'Inside Facebook's Outsourced Anti-Porn and Gore Brigade, Where 'Camel Toes' are More Offensive Than 'Crushed Heads' <<http://gawker.com/5885714/>> accessed 26 April 2012.

<sup>95</sup> The notion that exchanging copyrighted content online is morally acceptable is especially prominent among teenagers, as studies have shown that they completely differentiate between material and immaterial theft ('Study: To college students, shoplifting and music piracy are worlds apart' <<http://newsroom.unl.edu/releases/2011/05/03/Study%3A+To+college+students,+shoplifting+and+music+piracy+are+worlds+apart>> accessed 15 October 2017) and on average have 842 illegally downloaded songs on their portable devices (Stevie Smith, 'Study: digital music piracy is rampant amongst teens' <<http://www.thetechherald.com/articles/Study-digital-music-piracy-is-rampant-amongst-teens/618/>> accessed 15 October 2017).

<sup>96</sup> Greenberg, *supra* note 73.

<sup>97</sup> That is because "users may continue to participate in a site for different reasons than those that led them to the site", according to evidence from Cliff Lampe et al., 'Motivations to Participate in Online Communities' [2010] CHI '10 Proceedings of the SIGCHI Conference on

The second problem is excessive filtering: when given power, users have a tendency to gradually apply stricter standards and filter more and more content. Social networks are constantly troubled by this and Facebook recently had to face the online and offline wrath<sup>98</sup> of mothers who mobilised against the removal of pictures in which women are shown breastfeeding.<sup>99</sup> This calls for mechanisms that operate as a check on the user filtering decisions. This restraint does not need to come from the direct intervention of the company in each case, overruling a user's decision to delete certain content. Other tools of checks and balances, such as distributed trust-building, multiple confirmation requirement and strict review and transparency of the actions by users with records of high number of filtering attempts all ensure the continuance of bottom-up, decentralised filtering.

The third problem that affects the chances of user filtering becoming a reliable and effective mechanism has to do with the digital divide that plagues most countries and negatively affects the diversity of online communities. Naturally, the lack of means to access the web and digital illiteracy pose a challenge that is not limited to user filtering. Graham, Straumann and Hogan have shown how "Wikipedia is characterized by highly uneven geographies of participation."<sup>100</sup> They find that users from developing countries focus on editing entries concerning developed countries, which suggests that a well-functioning filtering community on pages and groups related to a poor country might be difficult even when the first steps to overcome the problem of access have already been successful. The lack of diversity and the replication of offline predictors of engagement in governance (mainly gender) is a problem of online e-democracy schemes.<sup>101</sup> As with social inequality, digital illiteracy can only be fought gradually, with the implementation of digital inclusion policies. Above all, it is paramount that governments invest in broadband infrastructure as well as digital literacy, acknowledging that internet access is an autonomous constitutional right with a complex positive dimension.<sup>102</sup>

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Human Factors in Computing Systems, 10-15 April, 2010, Atlanta, United States.

<sup>98</sup> Emil Protalinski, 'Breastfeeding women protest outside Facebook offices' <<http://www.zdnet.com/blog/facebook/breastfeeding-women-protest-outside-facebook-offices/8673>> accessed 26 April 2012.

<sup>99</sup> The company itself was making the final decisions on picture removal, but it relied on user input to identify them, as they made clear in a press release: "It is important to note that any breastfeeding photos that are removed – whether inappropriately or in accordance with our policies – are only done so after being brought to our attention by other Facebook users who report them as violations and subsequently reviewed by Facebook." Emil Protalinski, 'Facebook clarifies breastfeeding photo policy' <<http://www.zdnet.com/blog/facebook/facebook-clarifies-breastfeeding-photo-policy/8791>> accessed 26 April 2012.

<sup>100</sup> Mark Graham, Ralph K. Straumann and Bernie Hogan, 'Digital Divisions of Labor and Informational Magnetism: Mapping Participation in Wikipedia' [2015] *Annals of the Association of American Geographers*.

<sup>101</sup> Ralf Lindner and Ulrich Riehm, 'Broadening Participation Through E-Petitions? An Empirical Study of Petitions to the German Parliament' [2011] *Policy & Internet: Vol. 3: Issue 1, Article 4*.  
María Rosalía Vicente and Amparo Novo, 'An empirical analysis of e-participation. The role of social networks and e-government over citizens' online engagement' [2014] 31 *Government Information Quarterly*, 379–387.

<sup>102</sup> Ivar A. Hartmann, 'A Right to Free Internet? On Internet Access and Social Rights' [2013] 13 *J High Tech L* 297.

## V. Conclusion

Addressing the issue of internet intermediary liability is absolutely critical to the protection of an online environment that is conducive to innovation and that fosters freedom of expression. The developments in this legal field over the years have brought about the continuous risk for companies that operate online platforms such as social networks, peer-to-peer file-sharing networks and virtual gaming worlds. The current legal environment in the United States and Europe raises uncertainty about liability for the actions of users such that failing to filter content is not an option. The law consistently shifts with new rulings from higher courts revising or reinterpreting safe harbour protections. The push from copyright holders and ordinary people worried about their reputation is a strong deterrent to speech-protective standards for intermediaries. Even where the law is seemingly clear, legal costs from constant court battles are high enough to suggest that companies should think of filtering options.

This uncertainty is even more worrisome for companies that wish to conduct business concomitantly in several countries. The latest legal developments in Brazil were used as an example to illustrate a legal environment that repeats itself in many other Latin American, African and Asian countries – where intermediary liability standards are sometimes even harsher as a result of reduced free speech protection. This scenario might make one conclude that heavy filtering is a near win-win option for platform providers. That, however, is not the case.

Society – and internet users themselves, in particular – are progressively adopting a very critical view of the censorship performed by these companies. People are successfully organising movements and isolated protests that push back against content filtering done by the platform provider. This happens in a context where big platforms are already facing criticism for multiple reasons. American companies take fire at home for slacking off in the protection of user personal data and abroad for tax evasion. They also often suffer trying to balance their global accepted content rulebook, on one side, and local values and customs, on the other. Finding the sweet spot between too much and too little filtering is an extremely delicate and complex task that companies have to perform in a time when even small mishaps can have enormous legal and public relations costs. This is what I tried to show in the second part of this paper.

Enter the online community. In this setting, enabling and stimulating users of the platforms to filter illegal content themselves appears as an alternative that has great potential in building on top of the resilient objection to external, bottom-down control of the internet that netizens have asserted with great force on the early days of the web. In the first part of this paper, I intended to show that this sense of community is as old as the Net itself and runs deep. I would argue that even casual

users of humour websites would be willing to play a part and dedicate a small portion of their time to help separate acceptable from abusive content. The empirical studies find that the instinct is there, the organisation mechanisms exist and success cases are plenty.

The point is that user filtering is compatible with the notion of self-government by internet users and might work in certain platforms where a sense of community has developed among the participants. This alternative solution requires mechanisms to be encoded into the company's platform. The third part of the paper presented the contribution of the literature on decentralised gatekeeping and crowdsourcing of platform management. The phenomenon is neither new nor temporary in social networks – both online and offline. Studies have produced evidence of what works and what does not, the types of interactions between users and the limitations of this model. Practical examples from the daily use of the internet attest that companies are gradually enabling users to red-flag content, view the reputation of each other on the platform and collectively coordinate guidelines for how the filtering would be exercised. Decentralised or crowdsourced filtering is not an anarchist alternative to total control in the hands of the company owning the platform. The examples discussed reveal an interaction between the free action of users and light management mechanisms put in place and operated by the company.

User hierarchy, up and down-voting and the revision of user take down decisions by users themselves are all schemes that coexist and interact with the company's policy as well as the community standards for what posts are allowed. In a well-crafted platform, the company can afford to play a supporting role in the filtering process, while also reserving some swaying capabilities to eventually correct course if the community is overfiltering or being too shy about taking down certain types of content. After all, despite being a promising substitute for platform manager-controlled central filtering, it would appear user filtering suffers from problems like lack of incentives to censor certain content (especially that which infringes copyright) and the tendency to gradually over-filter.

User filtering has the potential to address the liability risk of online intermediaries, currently one of the main problems in cyberlaw. Unfortunately, there is a dearth of research on how decentralised gatekeeping could substitute for company-imposed content filtering, such that further study on this subject is required to better evaluate the possibilities for the success of user filtering in addressing the problem of online intermediary liability.

# Multi-parenthood from a Legal, Doctrinal and Jurisprudential Perspective in Brazil: The Recent Decision of the Brazilian Supreme Court on Socio-affective and Biological Paternity

Fernanda Mathias de Souza Garcia<sup>1</sup>

## I. The Brazilian Supreme Court Decision on Multi-Paternity

The concept of parenthood in Brazil has been modified recently by an important decision of the Brazilian Federal Supreme Court (STF) facing the revolutionary concept of multi-paternity in family law. The notion of parenthood and all the ideologies around parenting and kinship vary over time, as they are constantly changing to keep up with the dynamics of life.

On September 21<sup>st</sup>, 2016, the STF, by 8 votes against 2, decided the Extraordinary Appeal (RE) No. 898.060 recognizing the general repercussions to society (*repercussão geral* - item 622) of the debate over the possibility of the dominance of socio-affective paternity over biological paternity or their coexistence. The court established the contours for multi-paternity in the Brazilian legal context in an interesting leading case. The winning thesis serves as a parameter for future similar situations all over the country.

### *A. Case premises*

Brazilian law recognizes the possibility of the concomitance of paternities, as Article 48 of the Child and Adolescent Statute (Law No. 8.069/1990) provides that the origin of paternity is biological and Article 1.593 of the 2002 Civil Code establishes that paternity may be affective.

### *B. Facts*

The debate involved a woman who was raised by an affective-based parent. She wished to also have her biological father recognized as a parent, forming, thus, a multi-parental relationship. After turning 18 years old she discovered that her socio-affective father, the same that registered her, was not her biological father at all. To guarantee her legal rights and determine her ancestry she brought a suit into court asking for a DNA test.

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### *C. Judgements in the first (district court) and second (state court of appeals) instances*

The Tribunal of Justice of the State of Santa Catarina confirmed the first-degree decision stating that genetic fatherhood should be recognized. The court chose not to establish any precedence among the modalities of parental attachment, pointing to the possibility of the coexistence of both paternities without any hierarchy between them.

### *D. Appeal to the Brazilian Supreme Court (STF) through an Extraordinary Appeal (RE)*

The defendant's biological father appealed the State Court of Appeals' decision (upheld by the Superior Court of Justice – STJ),<sup>2</sup> which recognized the biological paternity, with all its patrimonial effects, independently of the previous socio-affective paternal bond with his genetic daughter.

The appellant (biological father) said that he was only "discovered" by the daughter when she was 18 years old. In addition, just because the young woman was registered by another person (the socio-affective father), he alleged that the subsequent kinship could not produce any patrimonial effects. The appellant claimed that not recognizing the paternal parenthood of a biological father would prevent the "convenience" of searching for family bonds just to obtain material gains since the daughter herself stated that she did not want to break ties with her socio-affective father.

### *E. Rapporteur's Vote*

The reporting Justice for the case, Luiz Fux, stressed in his opinion that the Brazilian Constitution rules out a family-based model and, therefore, any choice between paternities must be rejected.

The rapporteur emphasized legislative developments in family law, noting that in the Brazilian 1916 Civil Code the concept of family was centred on marriage and on the "odious distinction" between legitimate and illegitimate children, with filiation being based on a rigid presumption of paternity. However, with social evolution, the field of family relations has accepted new forms of unions.

Justice Fux argued that since the 1988 Brazilian Constitution, there has been a reversal of goals in civil law. Currently, all legal statutes and regulations must to all the peculiarities of interpersonal relationships, rather than imposing static frameworks based on marriage between a man and a woman.

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<sup>2</sup> The Superior Court of Justice (STJ) is the Brazilian Higher Non-Constitutional Tribunal.

The socio-affective relationship established with the civil registry at the notary does not prevent a paternity investigation, which can be proposed by the child, who has the most personal and imprescriptible right to clarify his biological paternity as well as his ancestry, according to her/his best interest. In the end, the General Repercussion thesis was summarized as follows: "*The socio-affective paternity, declared or not in public registry, does not prevent the recognition of the concomitant affiliation based on biological origin, with its own legal effects.*"<sup>3</sup>

### *F. Rapporteur's opinion*

The trial of the case was guided by several legal principles, among them the principles of human dignity, the pursuit of happiness and the best interests of the child.

The principle of human dignity demands the overcoming of obstacles imposed by legal arrangements to the full development of the family formats built by the individuals themselves in their interpersonal affective relations. Justice Fux recorded that it is the law that should serve a citizen, not the opposite, to avoid the risk of transforming human beings into mere instruments of the application of the limits determined by legislators.<sup>4</sup>

For the rapporteur, the pursuit of happiness is a precept that elevates the individual to the centrality of the juridical-political order, protecting the individual from State invasion and from the risk of the State making choices in her/his place since no political arrangement can provide social welfare in the event of the overlapping of collective wills to particular ends.

For Justice Fux, the interpreter must abdicate standardized understandings about family to realize the dignity of its members and with full respect for people's personalities. To him, family should not portray a "*plastered and static configuration*".

On that matter, the jurisprudence of the STF has already had the opportunity to invoke the right to pursue happiness.<sup>5</sup> It is also important to emphasize that the Court has ruled earlier on the question of civil unions between persons of the same sex, also invoking the right to pursue happiness.<sup>6</sup>

In addition, the principle of human dignity, as a component of the protection of happiness, imposes the recognition of other family models, which are different from the traditional concept of family. Thus, the legal spectrum must accept both bonds of filiation, either the one built by the affective relationship between those

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<sup>3</sup><<http://www.stf.jus.br/portal/jurisprudenciaRepercussao/abrirTemasComTesesFirmadas.asp>> accessed 8 January 2017.

<sup>4</sup><<http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE898060.pdf>> accessed 8 January 2017.

<sup>5</sup> RE 477554-AgR, Justice Celso de Melo.

<sup>6</sup>ADI 4.277, Justice Ayres Britto.

involved, or the other originated from biological descentance as imposed by the principle of responsible parenthood expressly stated in Article 226, paragraph 7<sup>o</sup>, of the Brazilian Constitution.<sup>7</sup>

Although, based on a completely different factual assumption, Justice Fux's vision of the matter made it possible, by analogy, to apply the principle of the right to pursue happiness to the subject of family membership. For this reason, he sought the historical origins of a right to pursue happiness which is not related to family law, but rather, reflects the birth of civil rights in the United States of America.

Therefore, according to Fux, even though there is no direct provision for the right to pursue happiness in the text of the United States Constitution, its historical importance and its enormous value in the interpretation of other clauses of the charter are undeniable.

The Brazilian legal system is, by origin, descended from Roman-Germanic law. However, given the intense dynamics and complexity of the social facts, Brazilian legal operators also rely, alternatively, on other sources, such as precedents, leading cases and overall jurisprudence in Brazil, as well as those cases occurring in other jurisdictions, including the United States and other common law countries. That denotes plasticity, adaptation and new contours applied to Brazilian law and jurisprudence.

Legal chaos, comparable to that of the 1970s in the United States, was established in Brazil in the 1990s. Virtually any case, from condo bill suits to parochial matters, could reach the Brazilian Supreme Court (STF).

Law No. 11.418/16 was enacted, adding Articles 543-A and 543-B to Law No. 5.869/73 (CPC/1973) providing that the Federal Supreme Court, in an unappealable decision, would not hear the extraordinary appeal (RE) when the constitutional question raised does not have general repercussions. The Brazilian legal system had started to change. It is now midway between a 100% civil law system and a common law one. Filtering cases that can reach the Brazilian Supreme Court is ongoing and will probably make the Brazilian legal system a hybrid system.

The New Brazilian National Civil Procedural Code (approved by Law No. 13.105/2015 and modified by Law No. 13.256/2016) is a direct effect of this new "jurisprudential attachment" trend in the country's legal system.

The citation of leading US cases on human and civil rights is very common in significant Brazilian Supreme Court cases, as it should be, due to the US' worldwide leadership on those issues, which, by the way, was built on tough social events. In this way, Fux recognized the origin of the right to pursue happiness, pointing to some

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<sup>7</sup> RE 898.060, Justice Luiz Fux.

interesting cases decided by the US Supreme Court. Among the US Supreme Court's cases cited in the decision, *Loving v. Virginia* stands as one of the most significant. In 1967, (388 US 1), the Court reversed the conviction of Mildred Loving, a black woman, and Richard Loving, a white man, who had been sentenced to one year's imprisonment for being married in breach of the Racial Integrity Act of 1924, a statute that prohibited marriages considered "interracial". By unanimous decision, the court declared that prohibition unconstitutional, adopting, among other grounds, that the right to free marriage is one of the vital rights of a person and is essential to his/her happiness ("freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men").

The rapporteur for the Brazilian Supreme Court case also noted that this precedent was one of the bases of US Supreme Court's decision on same-sex marriage in *Obergefell v. Hodges* in 2015 (576 U.S.).<sup>8</sup> He concluded that, in his opinion, it is imperative to modernize the juridical approach to family membership, which is a central concern of the constitutional text that informs Brazilian democracy.

### *G. Comparative law cited by the rapporteur about multi-parenting*

Justice Fox noted that the concept of multi-parenthood is not new to comparative law. In the United States, where states have legislative competence in family law regulation, the Louisiana Supreme Court has consolidated the jurisprudence regarding the recognition of dual paternity. In *Smith v. Cole* (553 So.2d 847, 848), 1989, the court determined that a child born during the marriage of his mother to a man other than his/her biological father might have the parenthood in relation to the two fathers (biological and affection-based) recognized, bypassing the rigors of art. 184 of the Civil Code of that State, which enshrines the rule "*pater is est quem nuptiae demonstrant*". In the court's words: "*the presumed father's acceptance of paternal responsibilities, either by intent or default, does not ensure to the benefit of the biological father. (...) The biological father does not escape his support obligations merely because others may share with him the responsibility*".<sup>9</sup>

Similarly, the same court in, the case T.D., wife of M.M.M. v. M.M.M., 1999 (730 So. 2d 873), recognized the right of both biological and affective fathers, resulting in a double paternity for the son. It was emphasized, however, that sometimes the biological parent can lose his right to a paternity declaration, though still maintaining his obligations, when it does not serve the best interests of the child, especially in cases of unreasonable delay in seeking recognition of the status of father ("a biological

<sup>8</sup> <[https://www.supremecourt.gov/opinions/14pdf/14-556\\_3204.pdf](https://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf)> accessed 14 July 2017.

<sup>9</sup> <<http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE898060.pdf>> accessed 6 January 2017.

<<https://www.courtlistener.com/opinion/1670353/smith-v-cole/>> accessed 14 July 2017.

father who cannot meet the best-interest-of-the-child standard retains his obligation of support but cannot claim the privilege of parental rights”).<sup>10</sup>

The precedent led to a Louisiana State Civil Code revision in 2005, recognizing dual paternity in Articles 197 and 198.<sup>11</sup> Louisiana became the first American state to allow a child to have two fathers, attributing to both the obligations inherent to parenting.<sup>12</sup>

The Brazilian legislators’ omission about the diversity of modern family arrangements cannot serve as an excuse for denying protection to situations of multi-parenthood.

The existence of a link with the registered parent does not, therefore, prevent the exercise of the right to search for genetic origin or for recognition of biological paternity. Still, the rights of real ancestry, genetic origin and affection, are compatible.

### *H. Court’s debate and conclusions*

From the noted precepts, such as the right to happiness and the dignity of the human being, the new form of family structure can no longer be reduced to standardized or hierarchical models because it constitutes a cosmopolitan concept. In the same way, it is necessary to recognize a new conception of parenting besides the traditional ones.

Thus, from the Brazilian Supreme Court case, all kinds of responsible parenthood (article 226, § 7º, 1988 Brazilian Federal Constitution) may exist, such as (i) by presumption arising from marriage or other legal hypothesis (such as homologous artificial fertilization or heterologous artificial insemination - Article 1.597, III to V of the 2002 Civil Code), (ii) by biological offspring, or (iii) by affectivity. It can also be observed that affectivity was recognized as a legal value by the court.

Justices Rosa Weber, Ricardo Lewandowski, Dias Toffoli, Gilmar Mendes, Marco Aurélio, Celso de Mello and the current president of the court Justice Carmen Lúcia concurred with the rapporteur. Justices Edson Fachin and Teori Zavascki presented dissenting opinions.<sup>13</sup>

According to Justice Weber, it is possible to recognize a socio-affective paternity and a biological paternity, both producing legal effects. Similarly, Justice

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<sup>10</sup> <<http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE898060.pdf>> accessed 6 January 2017.

<<https://casetext.com/case/td-v-mmm#!>> accessed 14 July 2017.

<sup>11</sup> Vernon Valentine Palmer, *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd edn, Cambridge University Press 2012).

<sup>12</sup> Sarah McGinnis, ‘You Are Not The Father: How State Paternity Laws Protect (And Fail To Protect) the Best Interests of Children’ (2008) 16 *Journal of Gender, Social Policy & the Law* 311.

<sup>13</sup> <<http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=325781&caixaBusca=N>> accessed 6 January 2017.

Lewandowski acknowledged that a double parenthood, that is, biological and affective parenting, is possible and exclusivity is not always necessary.

Justice Dias Toffoli defended the right to love, which is related to the legal obligations of the biological father in parallel with his duties to feed, educate and care: "*If you had a child, then you have obligations, even if the child was raised by someone else*", he added in his opinion.

On the other hand, Justice Toffoli sustained<sup>14</sup> that the final thesis given by the court should be a minimalist one: "*Social reality cannot go beyond what is legal. With all due respect to those who think differently, it is impossible to recognize double parenthood if two uncles care for a child throughout life. There is no way to recognize, at least currently, the right of two or three neighbours that have taken care of a child for years to adopt just because a bond of care and affection has been formed among them.*"

While concurring with the rapporteur, Justice Gilmar Mendes stressed that the thesis supported by the biological father represented, after all, a "*manifest cynicism.*" The idea of responsible parenthood needs to be taken seriously, otherwise, it would stimulate similar situations, especially when the case is a binding precedent.

Justice Marco Aurelio, who also followed the majority, stressed that the right to be informed about biological parenthood is a natural right. For him, in the analysed case, the child had the right to change the birth records, with all necessary consequences.

In turn, Justice Celso de Mello reaffirmed the fundamental right to pursue happiness and responsible parenthood in order to accept the reasoning of the rapporteur's opinion. He noted that the purpose of the Brazilian Republic is to promote the welfare of all citizens without any prejudice based on origin, race, sex, colour, age or any other form of discrimination.

The president of the court, Justice Carmen Lúcia accentuated that love cannot be imposed but care can be, which seems to be the framework of the rights that are being ensured in the case regarding responsible parenthood.

For the Justices who dissented, genetic parenthood does not necessarily give rise to legal paternity, thus rejecting the possibility of the legal coexistence of two parents.

The first dissent was from Justice Fachin. He voted for the partial dismissal of the appeal, understanding that the socio-affective bond "is what can be legally imposed" in the case, considering that there is a socio-affective bond with a father and

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<sup>14</sup><<http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/RE898060DT.pdf>> accessed 6 January 2017.

a biological bond with the parent. Therefore, there is a difference between the genetic dominant parent and the father, emphasizing that the existence of kinship cannot be confused exclusively with the question of biology. "The biological link, in fact, may be able, on its own, to determine legal kinship, if there was an absence of a relational dimension that overlapped it", he stated. In Fachin's view, in the examined case, there was a previous socio-affective relationship to be respected, which is not a second-class kinship. He emphasized similar cases such as heterologous artificial insemination (where the donor is third rather than the husband of the mother) and adoption as examples where the biological bond does not prevail, concluding that the coexistence of paternities is impossible.

Justice Fachin was consistent with his doctrinal approach. For him, genitor is only the progenitor because being a father is something else, a situation that adds value to life.<sup>15</sup>

Justice Teori Zavascki also dissented from the rapporteur. For him, biological parenting does not necessarily generate a paternity relationship: "*In the case there is a socio-affective paternity that persisted, persists and must be preserved*". He noticed that it is difficult to establish a general rule in this kind of process because each case submitted to the court should be considered independently, based on its on concrete and peculiar situations.

The General Prosecutor's Office representative and the *amicus curiae* (IBDFAM)<sup>16</sup> who acted in the case were concerned with the risk of opening a door to frivolous demands against biological parents, which aimed purely on the patrimonial consequences of dual paternity. In other words, the concrete risk of encouraging demands founded only on the virtual needs of alimony or to search for and justify a dual inheritance is a questionable situation because it would favour unjust enrichment and stimulate family relationships based on money and shady interests.

Having more than one father or more than one mother intersects with moral and economic questions. Anyone who receives a greater number of legacies is seen as a "bad" person, inhibiting the recognition of the existence of more than one paternal or maternal bond-affiliation, which is unacceptable since such recognition is a human and a civil right.

In the end, the prevailing court view was to affirm that socio-affective and biological paternities should have the same legal status. They should be treated on equal footing, without any hierarchy since it is impossible to establish, *a priori*, when

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<sup>15</sup> Luiz Edson Fachin, *Comentários Ao Novo Código Civil: Arts. 1.591 a 1.638*, vol XVIII (Forense 2008).

<sup>16</sup> IBDFAM: Instituto Brasileiro de Direito de Família (Brazilian Institute of Family Law).

one prevails over the other, and they could coexist. Thus, according to the most current Brazilian legal precedent, multi-paternity is possible.

It can be mentioned that, even before STF's conclusion, an interesting decision from a state judge concluded that multi-paternity was in the best interests of the child, admitting the recognition of both paternities, the socio-affective and the biological one, with all their legal effects. The decision also made the information of the double paternity appear on the birth record of the minor.

The magistrate also favoured the affective parents but established free coexistence in favour of the biological father. In fact, the biological father knew from the beginning about the paternity and did not wish to reverse the situation at any time. Moreover, the biological father was the manager of the affective parent. According to the judge, the right to the recognition of multi-parenthood was based on personal rights in consideration of the principles of the comprehensive protection of children and adolescents and of the dignity of the human person.<sup>17</sup>

## II. The Development of the Concept of Parenting

### *A. Brief historical analysis of family law in Brazil: a new concept of family membership and the consequences of changes to legislation*

Under the 1916 Brazilian Civil Code, the biological fact was predominant in establishing parenthood. This legislation restricted parental relationships to consanguineous and adoptive children (Articles 330 and 336). It established that marriage was the most important origin of filiation, considering exclusively biological bonds. The ultimate purpose of the mentioned Code, which was based on the child's rigid presumption of paternity (*pater is est quem nuptiae demonstrant*), was to concentrate the families' patrimony, prohibiting the division of inheritances with "bastard" children born out of extramarital affairs.

The typical 19<sup>th</sup> century family in Brazil was not concerned with people's affection or happiness because what really mattered were the economic interests to protect and support the acquisition and construction of assets.<sup>18</sup>

Article 338 of the cited Code presumed that children born at least 180 days after marriage, and those born within 300 days after the dissolution of the marital society by death, "disquiet" or annulled were considered the couple's children.

During that time, the so-called "legitimate family" could only be established by marriage because other kinds of bonds were not recognized by the State and did not

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<sup>17</sup><<http://www.migalhas.com.br/Quentes/17.MI204229.31047Multiparentalidade+preserva+interesse+de+crianca>> accessed 12 July 2017.

<sup>18</sup> Rolf Madaleno, *Curso de Direito de Família* (6th edn, Forense 2015) 6.

receive its protection. A legal presumption of paternity, regardless the biological origin, predominated. By that time, legal science ignored genetics, putting in its place paternity based on family morality: a father was supposed to be the one married to someone's mother during the birth or as indicated in the previous legal presumption.

The 1916 Civil Code authorized a cruel classification of children by using terminology full of discrimination. Until then, children were qualified as legitimate (those born from a legal marriage), illegitimate (those generated outside a marriage: bastards or incestuous children) and legitimized sons (when recognized by parents after a subsequent marriage.)<sup>19</sup> In the end, children were punished for their biological parents' position, and, in most cases, biological parents escaped from typical parenting responsibilities.

The 1988 Brazilian Constitution finally recognized equality among all types of family membership. In its Article 227, paragraph 6<sup>o</sup>, the Constitution ensures that children, whether they have married parents or were adopted, shall have the same rights and qualifications, prohibiting any kind of discrimination. Regardless of their origin (adoption, marriage, artificial insemination or extramarital affair) all children have the same rights.

In addition, it cannot be forgotten that this same Constitution provides for, as one of its fundamental principles, the dignity of the human person (Article 1<sup>o</sup>, III) that also applies to family relationships. This Constitutional view undeniably reflected on the Civil Law, replacing the dominant patriarchal ideology present in the 1916 Code.

Currently, marriage is not considered to be the only way to form a family. There is now recognition of stable unions (*união estável*)<sup>20</sup> and single-parent families (*famílias monoparentais*).

Article 1.723 of the 2002 Civil Code recognizes the "stable union" as a family entity, which is a civil relationship between two persons configuring a public coexistence with a lasting and solid relationship in order to form a family, even if the partners do not cohabit, and should not be confused with marriage.

Brazil's Constitution Article 226, paragraph 4<sup>o</sup>, provides that a family can also be understood as "*a community formed by either parent and their descendants (single-parent families.)*" This means that a family can exist, and in particular be protected, if formed by only one parent, subtracting the sexual connotation that is typically a part of the concept of a "traditional family."<sup>21</sup>

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<sup>19</sup> Articles 352 to 367 of 1916 Civil Code.

<sup>20</sup> STF recognized homosexual stable unions as family entities and their constitutional and civil rights on May 5th, 2011 - ADI 4.277 and ADPF 132 - Rappouteur Justice Ayres Britto.

<sup>21</sup> Article 42 of the Brazilian Statute for Children and Adolescents - ECA - Law No. 8.069/1990 - synthesizes the concept.

Dias affirms that the new century family cannot be defined by the classical triangulation: father, mother and son. Any living structure that somehow forms an affective unit that radiates effects deserves to be protected by law. It cannot be denied the existence of a family entity formed by only one parent, considering the affection that characterizes this unit.<sup>22</sup>

This development of a humanistic understanding of the social concept of family, based on Constitutional principles, undeniably sustained a new concept of paternity that especially values the bonds of affection.<sup>23</sup> This change permitted the development of socio-affective filiation, which is characterized by feelings of solidarity, responsible parenthood, respect, care and family coexistence, among others.

The principle of affectivity works as a vector that restructured the legal protection of families. The current social institution focus is more on the quality of the bonds held between parents than on the way in which entities formally present themselves in society, overcoming the liberal and patriarchal codifications. Conrado Paulino states that the real family is a “*communion of affections, before being a legal institute.*”<sup>24</sup>

The idea that the family was reduced to an economic, social, and religious unit has given place to other values, especially the value of affectivity in family relationships. Currently, the existence of non-genetic paternity is recognized since filiation can also originate from psychological roots since it is not only a mechanical or physical act.

Regarding socio-affective paternity as a form of transcendence of biological paternity, Farias and Rosenvald, while explaining socio-affective paternity (social parenthood), affirm that “*different studies from other branches of knowledge, especially Psychoanalysis, recognizes that the father figure is built daily - not a mere transmission of genetic load.*”<sup>25</sup> This form of paternity is based on the general idea of guardianship of the human personality, supported on the principle of good faith and based on the prohibition of contradictory behaviours (*nemo auditur propriam turpitudinem allegans*) and on the moral characteristics that this affiliation possesses.<sup>26</sup> After all, affective bonds can induce civil kinship.<sup>27</sup> The concept of parenthood can result not just from a biological bond but also from a “*psychological*

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<sup>22</sup> Maria Berenice Dias, ‘Curso de Direito de Família’ (11th edn, Revista dos Tribunais) 291.

<sup>23</sup> Conrado Paulino da Rosa, *iFamily: Um Novo Conceito de Família?* (Saraiva 2013) 109.

<sup>24</sup> *Ibid.*

<sup>25</sup> Cristiano Chaves de Farias and Nelson Rosevald, *Curso de Direito Civil: Famílias* (7th edn, Atlas 2015).

<sup>26</sup> Maria Berenice Dias, ‘Manual de Direito Das Famílias’, *Manual de Direito das Famílias* (11th edn, Revista dos Tribunais 2013) 402.

<sup>27</sup> Cristiano Cassettari, *Multiparentalidade e Parentalidade Socioafetiva: Efeitos Jurídicos* (2nd edn, Atlas 2015).

*edification, through which the father or mother is the one who supports and assists the child in his/her discovery as a human being,<sup>28</sup> loving and supporting him/her on his/her life”.*

The socio-affective fatherhood relationship occurs when a father loves, educates and follows the development of another human being in a way that configures a strong bond.

The socio-affective membership is based on the recognition of the expressed state of child possession (*posse de estado de filho*), which is the belief that the condition of being considered a child is based on ties of affection. This state is the most exuberant expression of psychological kinship and affective affiliation. Biological parenthood is worthless when faced with the affective bond formed between a child and the one who cares for him/her, giving love and participating in his/her life. As noted, affection has legal value and can be understood as a legal principle, even if it may conflict, sometimes, with the “*pater is est quem nuptiae demonstrant*” presumption.

For Dias, in the clash between fact and law, presumption needs to give place to affection.<sup>29</sup> For her, the State has the primary responsibility to ensure it for its citizens<sup>30</sup> because the right to affection is closely linked to the fundamental right to happiness. It is important that the State acts to help people carry out their projects of legitimate preferences or desires. The mere absence of state interference is not sufficient. In addition, even if the word affection is not expressed in the Constitution, affectivity is linked to the scope of its protections.

Constitutional and non-constitutional Brazilian norms show that socio-affective affiliation has been accepted in Brazil’s legal system, even if there is no biological link between the parties.

In addition to the already mentioned Article 1.593, another example of the importance of affection to the legal system is in Article 1.597, V of the 2002 Brazilian Civil Code, which presumes that the child conceived by heterologous artificial insemination, with the prior authorization of the husband, has a partially biological origin. In other words, the husband who authorises assisted human reproduction using another parent's genetic material will be exclusively socio-affective and cannot contest the paternity later, once the law authorizes the artificial procedure.

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<sup>28</sup> Belmiro Pedro Welter, ‘Teoria Tridimensional No Direito de Família: Reconhecimento de Todos Os Direitos Das Filiações Genética e Socioafetiva’ (2009) 10 *Revista Brasileira de Direito de Família* 104.

<sup>29</sup> Maria Berenice Dias, ‘Manual de Direito Das Famílias’, *Manual de Direito das Famílias* (11th edn, Revista dos Tribunais 2013) 401.

<sup>30</sup> Maria Berenice Dias, ‘Manual de Direito Das Famílias’, *Manual de Direito das Famílias* (11th edn, Revista dos Tribunais 2013) 55.

Affection is also brought up by Article 1.605, item II of the Civil Code, which provides that, in the absence or defect of the term of birth, filiation may be proven by any admissible proof, especially "*when there are vehement presumptions resulting from certain facts*", for example, when there is personal and public behaviour and reciprocal affection between two people, as father and son and vice versa.

Article 57, paragraph 8 of Law No. 6.015/1973 allows the stepson or the stepdaughter, if there is a substantial reason, to request the competent court to include the family name of his stepfather or his stepmother as his own last names, with the express agreement of the parties involved, without prejudice to her/his family names. As a rule, three elements should be considered to characterize a filiation bond: name (*nomen*), the individual use of the father's name; treatment (*tractatus*), which refers to the way the individual is treated by the family; and recognition (*famulus*), the public recognition of the bonds.

Therefore, parameters for the definition of parental ties that include affection are a reality that can no longer be disregarded.

However, on the other hand, after the development of medical science, given the possibility of using a DNA test to determine biological paternity, Brazil is experiencing a new era.<sup>31</sup> As a matter of fact, the search for genetic identity is also guaranteed by non-constitutional legislation, such as Article 48 of the Statute for Children and Adolescents that recognizes the child's right to know his/her biological origin.

Summing up, today it is possible to identify, in Brazil, three distinct forms of paternity: i) public notary registered paternity (Articles 1.604 and 1.609 – Civil Code),<sup>32</sup> ii) biological paternity (based on the genetic origin of the person), and iii) socio-affective paternity (extracts paternity from love and care given to children). Apparently, these concepts are not mutually exclusive.

It has been culturally analysed that parenthood is not just a construction of scientific data but also something that is built over time through dedication, attention, respect, love, zeal, and care for the child. As seen, multi-paternity is a reality that must produce legal effects. In addition, the same paternal-filial relationship can fit into several types of paternity or only one of them, as was exposed by the analysis of Brazilian Supreme Court's decision based on the principles of human dignity, the right to pursue happiness and the best interests of the child.

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<sup>31</sup> RE 363.889, Justice Toffoli. STF assured the possibility of the relativization of the *res judicata* if a new DNA examination is taken, in respect of the fundamental right to search for genetic identity as a natural emanation of the right to human personality.

<sup>32</sup> Maria Berenice Dias, 'Manual de Direito Das Famílias', *Manual de Direito das Famílias* (11th edn, Revista dos Tribunais 2013) 386.

### *B. Brazilian adoption style (adoção à brasileira)*

There is a peculiar aspect of Brazilian law known as “Brazilian Adoption style”. It occurs when someone, without due process, adopts a juvenile person as if he/she was his/her own son/daughter, providing him/her with education and material support. This represents a concept named “the possession of a state of affiliation”. It usually occurs when someone, without observing the regular adoption procedure imposed by Civil Law, registers an infant as his/her daughter/son assuming the risk of criminal liability.

Even though the recognition of non-biological paternity or maternity without due process of adoption is an act classified as a crime in Brazil, apparently, the crime is not very relevant to the courts. They seem to be more concerned with the welfare of the child since it is undoubted that this kind of act produces civil effects and may generate responsibility.

The Brazilian Superior Tribunal of Justice (STJ) has produced some interesting decisions about this clear conflict between criminal and civil law (Articles 242 and 299 of the Criminal Code). In most cases, the court affirms that the criminal aspects of the “Brazilian adoption” are irrelevant, which is mainly because the child’s best interests must be considered first, and the affective bonds must be respected and considered irrevocable.

### *C. Is it also possible to have more than one mother?*

Another interesting question can be raised: is it possible to have more than one mother? Although the STF’s decision focused only on fatherhood, the answer to the question is positive as can be deduced from some Brazilian precedents.

For example, in 2014, a first instance judgement in Rio de Janeiro (15<sup>a</sup> Vara de Família/Family Court) acknowledged the right of three siblings to have two mothers. Both biological and socio-affective mothers were recognized in their civil records.<sup>33</sup>

The STJ had the chance to hear another interesting case about the possibility of double motherhood.<sup>34</sup> The plaintiff explained that when she was 10 months old she was registered by a foster parent (“adopted on the Brazilian style”). According to reports, in fact, the child was “adopted” by a lesbian couple, therefore, involving 2 mothers. The daughter claimed to have been raised, indistinctly, by her two mothers, and since her non-biological mother died, she had a legal right to a *post-mortem* socio-affective maternity. High Judge Bellize, rapporteur for the case, considered that the request was possible and required the return of the case to the court of first instance for the production of more evidence on that issue.

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<sup>33</sup><<http://www.ibdfam.org.br/noticias/5243/TJRJ+reconhece+multiparentalidade.>> accessed 12 July 2017.

<sup>34</sup> REsp No. 1.328.380/MS, 21.10.2014, Rapporteur Marco Aurélio Bellize.

#### *D. Parenthood and Multi-paternity in other legal systems*

It is important to note that the matter discussed in this paper is not totally new since the “*concept of parenthood, the nature of parenting, even who is a parent, are all contested ideas*”. In the context of the European Union, parenthood law is mostly attached to a traditional concept, even though it is “*imperative that a reconsideration of this limited atheoretical and apolitical approach to parenthood occurs. The Union must move away from a traditional ideology of motherhood and fatherhood (...) and must embrace more modern approaches to parenting based on principles of gender neutrality*” since “*parenting should be based on equality, on democracy within families and on parental roles being negotiated and not based on some pre-ordained gendered division of roles and competences*”.<sup>35</sup>

As warned by Schaffer, those who assume that the bonds between a child and his or her attachment figures can be broken simply because they are not linked to each other by ties of blood make a serious mistake because “*children can suffer severe psychological trauma when separated from such care givers, whether they are biologically related or not*.”<sup>36</sup>

Unfortunately, the European Court of Justice has not yet been challenged to confront the theme of multi-paternity. Until now, Europe has mostly maintained a traditional ideologic pattern to family law when confronting parenthood based on Articles 7, 8 and 9 of the Convention on the Rights of the Child (CRC)<sup>37</sup> that provide the right of children to be brought up by their birth parents, considering the importance of their own natural families, and on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Without intending to exhaust the examples, there are some emblematic cases on the subject that can be presented in comparative law:

(i) In Italy, the Appeal Court of Trento (ordinanza – 23 February 2017)<sup>38</sup> decided the theme of multi-paternity. Some minors born through assisted procreation and gestation in a foreign country could be considered children of a homosexual couple consisting of two men, giving the status of a father to a man who had no genetic connection with the children.

The incontrovertible lack of genetic connection between the two children and the father does not represent an obstacle to the recognition of the filiation relationship ascertained by the judge, excluding the fact that in Italian law there is a

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<sup>35</sup> Clare McGlynn, *Families and the European Union: Law, Politics and Pluralism (Law in Context)* (Cambridge University Press 2006). 78-79 88.

<sup>36</sup> Jane Fortin, *Children's Rights and the Developing Law (Law in Context)* (3rd edn, Cambridge University Press 2009) 518.

<sup>37</sup> Adopted by Resolution No. L 44 (XLIV) of the General Assembly of the United Nations, on November 20, 1989, and ratified by Brazil (Decreto No. 99.710/1990).

<sup>38</sup> <<http://www.biodiritto.org/index.php/item/897-trento-gpa>> accessed 9 July 2017.

model of parenthood solely based on the biological bond between the parent and the child.

The opposite must be considered. The importance, at the normative level, of the concept of parental responsibility that manifests itself in the conscious decision to raise and care for a child. The legal system, through the regulation of the institution of adoption, favourably considers the project of the formation of a family characterized by the presence of children independent of the genetic data. It is possible that there is an absence of a biological relationship with one of the parents (in this case the father) for children born from permitted heterologous fertilization techniques.

Courts around the world are dealing with hard cases when confronting disputes over children who are emotionally attached to those who care for them and love them on a day-to-day basis but who, for many reasons, are not their biological parents.

In this context, disputes between birth parents and private foster parents are being faced by European Courts, and the rationale and logic of their positions regarding the balance of blood ties and socio-affective bonds are not always easy to portray.

(ii) *J. (a child) v. C* (1970): The House of Lords faced a dispute between birth parents and foster parents and was challenged to whether a 10-year-old boy should be returned to his biological parents in Spain or remain with his foster parents who, for many years, based on an informal agreement, demonstrated excellent care for the child in England.<sup>39</sup> The court considered the entire context of the child's life, avoiding any presumption favouring the birth parents who did not benefit from their genetic position, and finally established that although the claims of birth parents often carry great weight and cogency when equally treated, they had to be 'assessed and weighed'<sup>40</sup> favouring the adoptive parents in this case.<sup>41</sup>

The non-privileged treatment of biological parents was replicated in other similar cases, contextualizing the concrete cases. However, in other precedents, the Court of Appeals has been inclined differently, favouring birth parents and sometimes not considering the possibility of the psychological damages that this type of claim can cause to the children involved.

(iii) *Case Re K (minor) (ward: care and control)* (1990): A boy, now aged 4½ years, had been placed by his father with his maternal aunt and uncle after his mother's suicide. The foster parents, after one year of care, refused to return the child

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<sup>39</sup> Mary Welstead and Susan Edwards, *Family Law* (4th edn, Oxford University Press 2013) 269.

<sup>40</sup> Fortin (n 36) 521.

<sup>41</sup> Welstead and Edwards (n 39) 269.

to his biological father. In this case, the British House of Lords gave greater importance to blood ties. It ruled that the child's welfare principle and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms both expressed the concept that the natural bond and relationship between a parent and child should only be interfered with when the child's welfare so dictates.<sup>42</sup>

(iv) While criticizing the court's choice to presume that the blood tie between a child and his or her parent would always produce a relationship valuable to both, Jane Fortin cites a very interesting case: *Re M (Child's Upbringing)*. The Court of Appeals ordered that a 10-year-old Zulu boy be returned to Africa with Neill LJ stating that he had "*the right to be reunited with his Zulu parents and with his extended family in South Africa*" after years (since a baby) of being well taken care of by his foster parents and despite expert warnings and evidence. The court solemnly ignored the psychiatrist's warnings that the damage to the boy's emotional well-being was unacceptable, and in the end, he was forced to return to his birth parents. Unfortunately, "*court orders cannot magically transform children's affections. The boy's unhappiness in South Africa forced his parents to admit defeat and to return him to his foster mother's care in England*".<sup>43</sup>

By the way, Jonathan Herring points out that "*Hayes and Williams note that the outcome of the court's ruling proved disastrous and the child eventually returned to his foster mother in England*".<sup>44</sup>

(v) It can be concluded that the court often tends to consider the time spent with foster parents and age factor to determine the best path, as whether to keep the child with the socio-affective parents or to return him to his biological family.<sup>45</sup>

As seen, the jurisprudence in this family law area is pretty much discretionary, often lacking clarity in the courts' choices, leading to some legal uncertainty. However, regardless, "*a court order is unable to put the clock back on a child's changed affections*."<sup>46</sup>

The focus of the complex controversies must always be the child's well-being, his safety and his happiness. It is not possible to simplify such demands with legal rigidity. It is necessary to evaluate meta-judicial questions and to consider the whole context of the cause, especially the possible real psychological harm to those involved.

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<sup>42</sup> <<https://www.ncbi.nlm.nih.gov/pubmed/12289194>> accessed 14 July 2017.

<sup>43</sup> Fortin (n 36) 526.

<sup>44</sup> Jonathan Herring, *Family Law, Issues, Debates, Policy* (Willan Publishing 2001) 215.

<sup>45</sup> Check *Re P (a child) (residence order: restriction order)*, *Görgülü v. Germany* and *Hokkanen v. Finland* and *Pini and Bertani*; *Manera and Atripaldi v. Romania* - Jane Fortin, *Children's Rights and the Developing Law (Law in Context)* (3rd edn, Cambridge University Press 2009) 527-529.

<sup>46</sup> *ibid*, 530.

Sometimes the European Court lends value to the socio-affective relationship between a child and another family member with whom he/she has no biological link, considering the best interests of the child.<sup>47</sup> Still, its positions are not as progressive as the Brazilian STF's.

Recognition of this reality "*is necessary to ensure that families which do not conform to the married nuclear norm do not suffer, either with fathers being excluded from parental rights, or children being prejudiced as a result of their parents' status, or lack of status.*"<sup>48</sup>

For instance, in the US the law gives some recognition to social parenthood, although it is restricted to those who are married. When a married couple treats any child as a part of the family, even if they are not genetically related, the couple can be asked to provide financial support under Section 1 of the 1989 Children Act and under Section 38 of the 1978 Domestic Proceedings and Magistrates' Courts Act. It is, therefore, permissible for an affective child of a deceased adult to claim family status, even as against the State (1975 Family and Dependants Act).<sup>49</sup>

It is important to emphasize the relevance of the role of the child in the family that is given to the rise of the new family concept, which is different from the traditional unit that was formed only by a married heterosexual couple.

### III. Conclusions

Some important conclusions can be drawn from the analysed decisions:

- 1) The decision defines who a parent is, a concept not always clear currently;
- 2) The central axis of the system shifted from the Civil Code to the Constitution;
- 3) There is legal recognition of affection. It was recognized that affection is a principle that can guide the court in other situations due to its legal significance, bringing a parameter of social life to the world of law;
- 4) Socio-affective and biological links are equally recognized. There is recognition by the Brazilian higher courts of both paternities – biological and socio-affective - with the same status, without any *a priori* hierarchy (in the abstract). This assimilation is important and constitutes a big step forward for family law since the concept of family cannot be reduced to standardized models anymore. In each case

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<sup>47</sup> Suzana Assis, *Parentalidade Sócio-Afectiva: Portugal e Brasil*, vol 2 (Almedina 2012) 62.

<sup>48</sup> McGlynn (n 35) 108.

<sup>49</sup> Jonathan Herring, *Family Law* (Pearson Education Limited 2017) 382-383.

presented, the Justice should point to the best solution to the factual situation that is under review.

- 5) There is a legal possibility of multi-parentality. This is one of the major advances achieved by the vanguard thesis adopted by the STF. No longer can it be said that someone can have only one father or one mother in Brazil. As noted, this idea is being debated in several other countries as well;
- 6) After the STF's decision, a Brazilian citizen raised and registered by a socio-affective parent does not have to give up his biological parent or the rights that come with that recognition, such as pensions and inheritance.

All these changes in parenting portray the evolution that family law is going through, and this seems to be a path of no-return. The historical and revolutionary decision of Brazil's Supreme Court sought to answer some complex questions: (i) Does a biological father have the right to deny paternity? (ii) Does a person have the right to seek legal recognition of his/her biological status even if a socio-affective parent pre-exists?

It is, however, undeniable that some changes have brought about the possibility of searching biological parents only for financial purposes. To avoid this problematic mercenary action, it is important to remember that theories of abuse of law and of good faith are also applicable in family law. Some questions are, indeed, still open: (i) Do multiple parents also have rights to their children? (ii) What would occur if the child dies before his/her parents?

The courts have always looked at the problem from the children's point of view, seldom from the parents'.

Other questions from this perspective are what occurs if multiple parents need alimony? Could the child, strictly speaking, be called to provide alimony to multiple parents? In the end, multi-parentality may become a great burden on children, usually seen as benefiting from the judicial system.

Additionally, an issue that should also be better explained is whether the Brazilian STF's understanding will have any effect on formal adoptions that follow all the legal procedures necessary for the accomplishment of the right. The inquiry is relevant especially when thinking of those adoptions made without respect to formalities, a frequent situation in Brazil. Should adoption procedures be changed?

The general concept of the human being is not only affected by interactions with the world of things (genetic world), as has until currently been sustained by the western world's legal culture but also by the process of being in a family and in society (the affective world). In the 21st century, it is necessary to recognize that families are

not formed as they were in the past, based on procreation, but, essentially, by the freedom of democratic institutions. Therefore, understanding that the human being is, at the same time, biological, affective (or non-affective) and ontological resonates with the existence of a "family trilogy" and, consequently, with the possibility of establishing three paternal bonds (and other three, logically, maternal) for each human being. Hence, the existence of the family law expression "three-dimensional theory." Therefore, all paternities are equal, without any priority among them, and all legal consequences must be guaranteed in relation to all types of affiliations.<sup>50</sup>

In this sense, the Brazilian Supreme Court has accepted the claim of dual paternity from a systematic interpretation of constitutional and non-constitutional provisions and based on principles of human dignity, affectivity, equality and the best interests of the child, concluding that biological character is not the exclusive criterion for the formation of a family due to the absence of hierarchy between the bonds. As is known, parenting is a day-by-day effort. In addition, the biological link helps, but it is not everything and does not exclude other links.

Family law could not be understood by closed rules. This requires that doctrine and jurisprudence be open to a vision that understands family in all its space of personal achievements and meta-juridical understandings, respecting social and individuals' choices, freedom, prosperity and the equality of people, without any kind of discrimination.

In addition, the responsibility among relatives means the commitment to seek to practice positive behaviours and attitudes that will undoubtedly contribute to the promotion of a healthy coexistence, emotional balance and happiness for those involved in family relations that must be inspired by the objective of good faith and by the avoidance of adversarial behaviour. This is the challenge.

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<sup>50</sup> Pedro Belmiro, *Teoria Tridimensional No Direito de Família: Reconhecimento de Todos Os Direitos Das Filiações Genética e Socioafetiva* (Livraria do Advogado 2009).

# The Constitutional Crisis of 2016: An Historical Perspective<sup>1</sup>

Denis Galligan<sup>2</sup>

## I. Introduction

Following the referendum of 23rd June 2016, as to whether the UK should remain in the European Union, the constitution has become the centre of public attention in a way not seen for over a century. Several issues have arisen: the status of the referendum; the authority of parliament; the power of the executive; and the rightful role of the courts. Each contains matters of interest and concern; all have provoked opinions and reactions as unexpected as they are, in some cases, crude in expression and ignorant in sentiment. But the issue of utmost constitutional importance, the issue at the very core of the constitution, is the status of the people and their relationship to parliament.

David Hume, the philosopher, historian, social theorist, writing in the 18th century observed:

*Nothing appears more surprising to those who consider human affairs with a philosophical eye, than the easiness with which the many are governed by the few; and the implicit submission with which men resign their own sentiments to those of their rulers.*

Hume went on to say it is all the more curious when you consider that power, raw power, is always on the side of the governed for ‘the governors have nothing to sustain them but opinion. It is on opinion only that government is founded.’

A constitution depends on the self-restraint of the people; self-restraint in not exerting their natural liberty; accepting instead the standards set by the constitution for the conduct of government. Hume thought two conditions were necessary and adequate for self-restraint and acquiescence. One is that the people are inclined to fall in with the settled way of doing things. The other, the more substantial, is provision of the ‘necessities of life’: if the system ensures the necessities of life, that is, essentially security of person and property, the people will exercise self-restraint and accept the constitution.

Questions may be raised about Hume’s claim, which is ultimately causal and empirical. Whether it takes account of the people’s concern to be ruled according to

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certain values and in certain ways is not clear. Nor does it seem to take account of people's inextinguishable desire to have some say in how they are ruled, to play some part in ruling. But Hume is not my subject. Rather, inspired by Hume, I want to examine the ruler-ruled relationship in the British historical context.

## II. Is There a Crisis of the Constitution in the UK?

The title of this paper ought to end with a question-mark. For what does it mean to talk of a crisis of the constitution? I take it to mean simply: (i) the established principles of the constitution are under question, and (ii) there is no plan or vision for resolving the matter.

English history is rich in constitutional crises; one of the most important was 1647 in the wake of the Civil War. Similarities with the present are not wholly fanciful: old constitutional certainties in relations between king, peers, and Commons were overturned; the king was in captivity, the House of Lords abolished, the House of Commons in disarray. No one was quite sure what to do, how to re-establish the constitution and ensure effective government. The Putney Debates in October 1647, perhaps the closest we have to a constitutional convention, ended in confusion and contention, out of which Oliver Cromwell was able to seize power and govern for a decade as the kind of dictator we would now condemn.

And yet the crisis of the 1640s opened the way for, made possible, set in train, the creation of the constitutional order we now have. The House of Commons, being the only elected part of the constitution, was able to assert in the name of the people superiority over king and peers. This was a novel idea but it worked. The House of Commons, itself on the whole composed of the upper class, had its own motives, and neither intended nor foresaw the consequences of its actions. But, once having acted in the name of the people, as the elected representatives of the people, once having proclaimed the people as the foundation of constitutional authority, there was no turning back.

Along the road to a modern constitution, the 1640s are a turning point. That the people are in some sense the foundation of constitutional authority is true, as we saw with Hume. That is a political reality. The parliamentarians turned that political reality into a constitutional principle, to their advantage. But it was double-edged: on the one hand it gave parliamentarians a constitutional advantage over king and peers; on the other hand, in empowering the people, in accepting perhaps for the first time that they have a distinct place in the constitution, the parliamentarians unleashed a mighty force - a force the full unfolding of which would potentially lead to popular democracy, an unthinkable outcome. It had to be contained and much of constitutional history since is about its containment. To the extent there is now a crisis, it is about that same issue: the place of the people in the constitution.

Constitutions provide the framework of government: the rules and institutions. They are artificial constructions, created by one generation and inherited by another. They are neither timeless nor unchanging. Being artificial, constitutions on occasions fall out of step with society and politics, and hence opinion. Jeremy Bentham thought each generation should review the constitution to bring it into line with contemporary opinion. Indeed, the average life of a written constitution is nineteen years. Constitutions should not, however, change with the wind, for the wind, as with attitudes, can blow in different directions in the same day. A constitution, in providing stable and effective government, is meant to protect against the whims of the day, the fickleness of the press, the fashionable ideas no more permanent than the seasons, especially when such ideas encourage intolerance and oppression, the very things a constitution is meant to protect against. We need not fear change, but change creates uncertainty and incurs risk. To avoid such risk, we should first understand what we now have and how it came about. That is my present purpose.

Focusing on relations between parliament and the people, we should be clear about a few basic points. The sovereignty of parliament is a fundamental principle of the UK constitution and has been for centuries. Within the trinity of monarch, peers, and Commons, the House of Commons is the main part. The powers of the Queen and House of Lords gradually have diminished as those of the House of Commons have increased, so that it now has the final say on matters of law and policy. It must act as it considers best in the public interest, for the common good.

Among the many processes for gauging opinions of the people - petitions, addresses, complaints, and so on - the referendum has traditionally had no place. If considered a modern successor or addition to those other processes, the referendum raises no constitutional problem: parliament has a duty to consider it, take it into account, and decide what weight to give to it, the final decision being parliament's. If parliament considers a referendum binding on it, regardless of whether a majority of members judge the outcome to be in the best interests of the nation, then there is a dilemma. Parliament might try to escape the dilemma by holding the outcome to be in the national interest just because that is the opinion of a majority of those voting. That would be to accept, in effect, that the referendum is binding. To accept the referendum as binding would be a change of constitutional principle, an abdication of parliament's responsibility to determine what is best for the nation, all things considered. In allowing the people to decide directly a matter of immense importance to the nation would be to compromise both parliamentary authority and the principle of representative democracy on which it is based.

That would be a constitutional change of great moment. But, you may be wondering, what is the problem. We live in a democracy; democracy means that constitutional authority derives from the people; and the people should have the final say on matters of moment. We elect representatives to act on our behalf, but we are the principals, they the agents, the delegates. As principals, why should we not from

time to time reclaim our original authority? These are elementary questions that need serious consideration. The introduction of elements of direct democracy, that is to say, allowing the people to have more direct say over how they are governed, is a common feature of many constitutions. You may think the more direct democracy the better. The merits and demerits of more direct democracy and less reliance on representatives are issues of great and pressing importance; they raise matters of both high principle and practical consequences. They are not however my concern in this lecture. That is simply to understand better the UK constitution as it now is and how it came about.

I consider four issues:

- a) How the doctrine of parliamentary sovereignty became the foundation of the constitution;
- b) The place and meaning of democracy in the historical constitution;
- c) The relationship between parliamentary sovereignty and representative democracy;
- d) The relationship between politics and the constitution.

### III. Nature and Origins of Parliamentary Sovereignty

According to Nigel Farage, the 2016 ruling of the High Court on the use of the prerogative to trigger leaving the EU is an affront to the *sovereignty of the people* [citation]. While this captures the mood of some, to others the concept of the sovereignty of the people is alien to the British constitution, which is based on the sovereignty of parliament, not the people.

Among national constitutions, especially those broadly democratic, the sovereignty of the people is proclaimed as the foundation of constitutional authority. Around 25% begin with the words: We the People, who go on to recite the constitution they have made. What could be a more confident display of popular sovereignty? From that the rest follows: parliament and executive institutions owe their authority to the people; parliamentary sovereignty does not exist. The British exception is written-off as an anachronism peculiar to British history and temperament, and in line with the refusal to adopt a constitutional text.

To this account must be entered two reservations. Despite We the People, the sovereignty of the people turns out not to be quite what is claimed. In many cases, the people are not sovereign at all; they are instead the source of sovereignty, while sovereignty itself is vested in either the nation or the institutions of government or both. The Republic of Turkey might not be the obvious model to cite, but its constitution captures the idea precisely and elegantly: the people are the source of sovereignty. Sovereignty is vested in the nation: sovereignty is exercised by the institutions of government. Many other constitutions have the same structure, while lacking the precision.

When sovereignty is analysed in this way, the UK is not so different. It was commonplace throughout constitutional history to acknowledge the people as the ultimate source of political authority, while sovereignty itself is vested in the realm, which became the king-in-parliament. For constitutional theorists, Hobbes, Locke, Smith, among many others, it was assumed that ultimate power lies with the people, that constitutional authority finally depends on the support of the people. And recall Hume: a constitutional order depends on the self-restraint of the people, self-restraint in the exertion of their raw power. It is correct to say that, in any constitutional order, the people are, in this political, practical sense, sovereign.

In grasping the distinction between the source of sovereignty and the bearer of sovereignty, it helps to keep clear the distinction between the constitutional domain and the political. First, by political action of the people, a constitutional order is created; once created it has its own logic and method, and is distinct from the political. Secondly, notice that sovereignty, in relation to the constitution is a legal concept; the power of the people, on the other hand, is a political fact. As political fact, the people have final power, while as a constitutional doctrine, parliament is sovereign.

The concept of parliamentary sovereignty, and the language to express it, are of fairly recent origin. But the idea of the king-in-parliament as the supreme constitutional authority is as ancient as the English constitution. As early as 1322, to take one example, the Statute of York makes reference to parliament as the king, the prelates, earls, and barons, and the 'commonalty of the realm'. [Clarke: 155]. John Fortescue in the 15th century drew a line between *dominium regale* from the dominium *politicum et regale*: the absolute king, who ruled as he wished, as opposed to the constitutional monarch, who ruled through parliament. By the time of the Tudors, a dynasty inclined to absolutist tendencies, the king-in-parliament was accepted as the final authority in the realm. Only later does sovereignty become the term to describe the constitutional reality.

But a word of caution: we should hesitate in reading back into history modern concepts and language. To the medieval and early modern mind, sovereignty was not the issue. The logic was different: the realm, the nation, was constituted by the three estates: monarch, magnates, and Commons. That the three should come together, in a complex relationship, flowed naturally from the organic nature of the society and, once together, signified its unity. The body politic modelled itself on the body natural; the king was the head, but without the other organs, the other estates, the body could not function and would be powerless. Only through corporate unity could the common weal be advanced and the body politic enjoy good health.

John of Salisbury, reflecting on the organic constitution, described graphically the body politic: the head the king, the arms the military, the belly the tax collectors, and so on, while the common people naturally were the feet. John goes on to say that if the feet stop working the body will be left to crawl along on its belly. The body can

work well only if the feet are well-shod; there is nothing worse, he warned, than a 'barefoot republic'.

Events of the 17th century - the Civil War, destruction and chaos, the Commonwealth of Cromwell, the Restoration of the Stuarts, and the Glorious Revolution - shattered what remained of the medieval notion of the organic unity of the realm. The beneficiary was the House of Commons. Its authority swelled while that of the king and peers shrank. The process, which had begun in the 1640s, ended in the early 20th century with the House of Commons emerging as the dominant and effective part of the queen-in-parliament, the other two being rendered essentially adornments. We saw how that process began with the House of Commons' contention that, being the elected chamber, the only elected part of parliament, it had a foundation for its authority lacking in the other two, one an hereditary monarch, the other a mixture of the unelected and the aristocracy. As the right to vote was extended between the 18th century and the 20th, the Commons' case further strengthened and became unstoppable.

Progress from organic unity to the hegemony of the Commons was gradual. Organic unity gave way to the mixed and balanced constitution: from being united in an organic union, the three branches of government were now in competition, each seeking a role in government, each checking and containing the others. Charles I in 1642, in his last reply to parliament before declaring war, acknowledged the distinct and separate role of the Commons, albeit a rather limited one, perhaps for the first time:

*--- the House of Commons (an excellent conservor of liberty but never intended for any share in government, or the choosing of them that should govern) is solely concerned with the - levies of monies [ie tax] (which is the sinews as well of peace as war.)*

From that modest position, the House of Commons has over time moved from its role as defender of liberty to the supreme law-maker and the overseer of the executive.

#### IV. Democracy and the Constitution

To many, that progression is right and welcome. That the House of Commons, the elected branch, should prevail over and render obsolete the unelected nobility, monarch and magnates, together with the class structure they stand for, is surely a right response in the age of democracy. The Commons, the ordinary people, now, through their representatives rule themselves. Hume's question has lost its point: the many are no longer ruled by the few but rule themselves. The republican dream of a self-governing people has been achieved; democracy has prevailed. These are lofty

ideals; let us consider what foundations they have in the British case, and what they mean in practice.

In 1559, John Aylmer, in defending the possible ascendancy of a woman to the throne, wrote:

*The regimen of England is not a mere monarchy, -- nor a mere oligarchy, nor democracy, but a rule mixed of all these three ---. In the Parliament House - you shall find these three estates: the king or queen --- the noblemen --- and the burgesses and knights [which represents] the democracy.*

It is hard to date exactly the emergence of parliament in this form. Aylmer was writing thirty years after the Reformation, in the design and enforcement of which parliament was part. By involving the House of Commons, and through it the people, the transformation could better be justified and managed.

Two issues warrant consideration: one the nature of this democratic element; the other its origins.

According to Charles Stuart, each of the three forms of constitution - monarchy, aristocracy, and democracy (he did unusually for the time use the word 'democracy') - have their 'conveniences and inconveniences'. Experience and wisdom have taught us how to mix the three' without the inconveniences of any one', 'as long as the balance hangs even between the three estates'. If any one dominates, evil follows: from monarchy it is tyranny; from aristocracy it is faction and division; from democracy 'tumults, violence, and licentiousness'. The goods of each are just as plain: monarchy unites the nation by providing security abroad and against insurrection at home; aristocracy is the provision of counsel by the ablest in the realm; democracy is 'liberty, and the courage and industry which liberty begets'.

The King adds a warning about democracy. Take away 'subordination and degree' and the people become the mob. The mob leads to such horrors as the levelling of estates, loss of rights and property, and the distinction of families, which is bound to result in 'the dark equal chaos of confusion' and the long line of our noble ancestors in 'a Jack Cade or a Wat Tyler'. Note the warning: the people must obey the constitution for 'nothing stands between them and that "dark chaos of confusion" but the maintenance of the balance which men have made', that is, the mixed constitution. Left to themselves, that is, in a strong and direct democracy, the people are doomed to that fate. This was not new. The King was repeating an established line of constitutional thought: the people, although the foundation of a society, act responsibly through their representatives; but, left to themselves, they 'know not how to govern' and soon sink into the mob. A century later these words echoed in the mind of Edmund Burke and his contemporaries as they witnessed the mob howling through

the streets of Paris. Similar scenes on the docks of Boston haunted John Adams and influenced the design of the new constitutional order.

The democratic element that King Charles, John Aylmer, and many others describe, was one part of the mixed constitution, but a thin and mean part at that. The democratic credentials of the House of Commons consisted in its being elected, but election by a small section of the adult population, and in conditions that were only occasionally fair and open. Several features are worth noting.

- a. Historically, there is no sense of the people governing themselves. The King and his council govern, while the House of Commons is there to be a moderating force on government.
- b. It was a form of representative democracy of a kind far removed from any sense of direct engagement of the people in affairs of state. Representatives, once elected, were not the agents or delegates of electors; nor could they act on direction or instruction; their duty was to serve the common good, the well-being of the nation.
- c. That the connection between this sense of democracy and the people is slight and tenuous is made plain when we consider its origins. It was not born of the actions of the people; it did not spring from popular agitation and argument, from popular movements over time. Medieval and early modern English society, like others in Europe, did not work that way. On the contrary, the democratic element of the early constitution originates as a constituent part of the unity of the realm. It is a long story, the gist of which is as follows.

By the 14th century, the three parts of constitutional authority were in place. The 'commonalty of the realm' was one of them. It consisted initially of knights and burghers who were summoned to the king's council, later the king's parliament, and whose duty it was to consent on behalf of the shire, later the towns and cities, to actions proposed by the king. It was usually a matter of taxation, where by established custom the consent of those affected was required. The consent of bishops and magnates, it came to be acknowledged, was not enough; the commonalty of tax-payers had to consent, which they did through representatives, not representatives they chose or elected, but representatives who could consent on their behalf.

As the Statute of 1340 abolishing tillage (a form of tax) recites: 'the common assent of the prelates, earls, barons, and other magnates, and the Commons of our said realm of England and that in parliament'. What began as consent of the Commons, was by the 16th century described as a 'democratic element'. Over the following centuries, the electoral base expanded, but the narrow democratic element remained much the same.

## V. Parliamentary Sovereignty and Representative Democracy

Having seen how the concept of parliamentary sovereignty arose and the place of democracy in the mixed constitution, we should now note the conceptual link between the two, for together they are vital to the contemporary constitution. The link is this: members of the House of Commons, as representatives of the people, stand in a singular manner in the place of those whom they represent. 'Representation', having several senses, is prone to loose usage. In normal usage, the representative is in some sense the agent or delegate of, or spokesman for, the represented, suggesting a relationship of control and direction of the one over the other.

Representation in the constitution has a different meaning. Here the representatives become, stand in the place of, embody the represented. Its origins probably lie in the theatre: the actor becomes the character represented. That character no longer exists beyond the actor's re-presentation of him. The word itself holds the secret: we say 'representation' as if it were one word; more accurately it is two: 're-presentation' - presenting again some persona. The actor re-presents the character as he the actor thinks fit. The two - representer and represented - are merged, the one indistinguishable from the other; the one having no known features outside the representation.

Parliament, it was said, represents the people in this sense: parliament becomes the people. Members of parliament used to claim that when the parliament was assembled, meaning the House of Commons in particular, the whole people was assembled there in parliament. And since representatives constitute the people, the real people are outside parliament and have no constitutional identity, standing, or voice.

Parliamentary sovereignty now makes more sense. It is shorthand for the more complex social concepts I have just explained. Since parliament constitutes the people, the sovereignty of parliament is the sovereignty of the people. The people is then the true sovereign, but people in this special sense that they exist only in representatives.

There is another aspect to add. You may be wondering how to make sense of the idea of the people being present in parliament through their representatives. This again is a long constitutional story. It turns on the distinction between the real people, flesh and blood persons, *and* a corporate sense of the people. When parliament claims to constitute the people, it is using 'people' in the corporate sense. The corporate sense derives from Roman Law, from the *universitas* - the corporation. The word *university* is a descendant: the corporation that constitutes the collection of students and teachers. The Italians still say 'l'universita' degli studi' di Siena etc- the *universitas* of studies as opposed to all the other *universitas* - corporations. It is a way of creating

a distinct entity separate from its members. The modern corporation is another descendent: it has legal identity distinct from its owners.

From Roman Law to Canon Law, where it proved useful in solving problems of authority in the Church, the corporate concept of the people found its way into secular constitutional thought and proved to be most useful. The medieval king represents, embodies, stands for the realm; he acts for and on behalf of its members as if they were acting for themselves. As Commons replace king at the centre of constitutional authority, they take on the mantle of representatives of the people, the corporate sense of the people. While this concept would sound strange in the mouth of a modern parliamentary, the sovereignty of parliament cannot be understood without it.

The social dilemma created by the double sense of the people should not be overlooked. The House of Commons, having relied on its ties to the real people, having aroused in them a sense of their place in the constitution, then had to prevent the people, the real people, from taking control, as the Levellers in the post-war years threatened. The corporate notion of the people is a fiction, the sustaining of which, in the face of growing political awareness, occupies much of later constitutional history.

## VI. Between Politics and the Constitution

By the late 18<sup>th</sup> century, the constitutional concepts I have explained were settled. The sovereignty of parliament as supreme legislative authority was undisputed. Within the mixed constitution, the House of Commons was in the ascendant. Democracy had a place, a small place. Parliament represented the people, in the sense that it embodied the people, a corporate notion of the people. The real people had no place in the constitution. Having no status or standing, constitutionally they did not exist. Parliament could act in the name of the people, while keeping the people out of the way in the constitutional wilderness.

But of course the people, the real people, the final holders of raw political power, cannot be ignored or defined out of existence. Constitutional concepts are fictions, constructions of the mind, of someone's mind. Their purpose is to form institutions and justify a set of rules for the exercise of political power. In this case the rule by the few of the many. But, as Hume pointed out, a constitutional order, and the power structure it entrenches, has nothing to support it but opinion, the opinion of the people, the locus of ultimate power. By the 18th century, the people were beginning to question the constitutional order, the fictions on which it was based, the power relations it supported. The constitutional arrangements came under scrutiny, the rule of the few under pressure.

The question then as always was: why should the people accept, exercise self-restraint, and curb their natural power with respect to a constitutional order, from

engagement in which they were excluded. Why be content with such a mean sense of democracy when, across the Channel, the French were displaying the true power of the people and offering a very different constitutional vision? And yet the British system remained intact; the mixed constitution, with its stunted sense of democracy, survived. How and why it survived, although at times touch-and-go, is a complex matter that I cannot now consider, except to comment on one aspect, namely, how the representatives, the parliamentarians, confronted the rise in popular agitation and the consequences for parliament as the sovereign, representative body.

The 18th century was the high watermark of parliamentary deliberation on the nature of the constitution, and the place of the people. Members of the House of Commons such as Fox, Pitt, and Burke, to name just a few of many, engaged with the central issue in a manner and with a seriousness not seen since. The issue was plain: the relationship between parliament and the people. Although the constitution was settled, parliamentarians knew it was a contingent and fragile settlement; they understood the tension between the constitutional concept of a sovereign representative parliament and a growing political awareness among the people, the real people. But was it adequate and could it be justifiable in light of political events at home and abroad; could it cope with and withstand the demands of a constitutionally conscious people?

Within the general question of the relationship between people and parliament, three themes were prominent.

- a) First: by political necessity, the voice of the people *outside parliament* had to be heard. Practical issues had to be settled. Such as: how should parliament take account of that voice, whether expressed at election or by other means? Should it be bound by a clear expression of public opinion? Was parliament bound by electoral mandates, or should it reserve the right to act as it thought best, even if that were contrary to the mandate or public opinion otherwise expressed? Behind such practical matters lay deeper divisions about the merits of the constitutional order.
- b) Second: whether the democratic element of the constitution ought to be expanded, a fuller sense of democracy embraced?
- c) Third: whether the people should be acknowledged as the true seat of sovereignty; and, if so, what would be the constitutional consequences?

Space allows just a few brief comments.

Parliamentarians of the time demonstrated an understanding of the issue – the relationship between parliament and the people – an understanding of a quality, in my opinion, unmatched in later debates. Influenced perhaps by David Hume, whose writings they would have known, parliamentarians of the eighteenth century understood the fragility of the constitutional order. They grasped the unavoidable tensions between rule by representatives, aware they had nothing but popular opinion to support them, and the wish of the people to have more control over their own destinies.

Opinions were divided, with some arguing the traditional line that sound and effective government was best achieved within the mixed constitution, others that parliament could no longer resist the wishes of the people. It is true that the results at the end of the 18th century were fairly much to sustain the status quo, the mixed constitution, the notion of parliament as the sovereign representative authority, a limited franchise, and in general a minor role for the people. But things could have gone the other way; many argued for a fuller place for the people, a stronger notion of democracy.

Pitt and Burke were eloquent in defence of the mixed constitution and minimal democracy, partly because it worked well; and partly because history paints a bleak picture of direct democracy, to which the howls of the sovereign French mob, ringing through the kingdom, were living proof. But for the horrors unfolding before their eyes, the direct result, parliamentarians thought, of direct democracy, the case for constitutional reform could have won the day. Some like Burke, who had earlier moved tentatively towards fuller democracy, in light of the spectacle of the French experiment, were driven into obstinate opposition. The French revolution was a sobering lesson and a major force against constitutional reform. The French influence on British opinion is hard to over-state; without it the balance between people and parliament might have been adjusted.

The mixed constitution seemed a safe and reliable refuge from the unpredictability of change. The mixed constitution, after all, allowed the people to influence the course of parliamentary affairs, but without controlling them. Representative government, Pitt argued, ensures 'conformity of the sentiments of the people and their representatives'. That such platitudes beg the question, and are not an accurate description of the relationship, hardly mattered in the climate of the time.

The voices for change were equally eloquent and equally compelling. Fox was consistent over a long parliamentary career in arguing the case for the sovereignty of the people and hence a fuller constitutional role for them. Amongst others of similar mind, Thelwall's view states the case concisely: 'representative democracy is no democracy at all'.

To those in favour of the status quo, the founding of another constitutional order at the same time, that of the USA, must have been of some comfort. James Madison, the principal architect, opted for a republic rather than a democracy, after weighing the merits of each. In a republic the people delegate government to 'a small number of citizens elected by the rest.' Its virtue is:

*to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, and whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.*

The consequence may be:

*that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.*

There is no mention of the British system, but take away monarch and peers, and Madison's solution to the core constitutional question is essentially the British solution. And now that monarch and peers have been reduced to ornaments, the match is even better.

The 19th century and the first part of the 20th are held to be the age of reform. Beginning in 1832 and culminating in 1928, by a series of Acts of Parliament, universal adult suffrage was achieved. That was a major advance, for the power to elect and remove representatives, or governments, is a fundamental principle in its own right. It leaves intact, however, the relationship established in the late 18th century, between the people and the elected, the representatives. The rise of political parties, arguably, distanced the people even further from parliament, but I shall not go into that here.

## VII. Concluding Remarks

To conclude with three points.

First: you may be wondering why I have said little about the merits of the referendum. Two reasons. One is that while it raises issues particular to itself, it is best approached, its merits and demerits judged, within the broader people-parliament relationship. The other reason is the referendum is one among several ways of adding to the people's constitutional position. If reform is in the wind, all ways should be considered.

Second: nor have I said anything about populism, which is supposed to be sweeping through Europe, the USA, and elsewhere. If by populism we mean 'an ideology that separates society into two antagonistic groups: the pure people and the corrupt elite, one consequence is to place the people - representative relationship under scrutiny.'

Third: the people - parliamentary relationship, anyhow, is coming under scrutiny, which is likely to become more intense. All I hope to have shown is how that relationship came about, how it came to be the foundation of the constitution of the UK. It is an historical legacy, a social invention, a response to historical events. Many consider that it has contributed well to the creation of a reasonably stable and peaceful society; a society of reasonable liberty and tolerance. On other grounds it may have failed, other needs and aspirations may not have been met. Representative democracy is neither the end nor the apogee of constitutional history. It has secured a place in modern societies, having served their ends at various stages in their history;

it has produced social goods of worth. But societies change as the attitudes of the people change. Perhaps they are no longer content with a minor place in the constitution and hence in the political process. The remedy may be constitutional change. If so, let it be considered and deliberate, neither by ambush of an irresponsible parliament, nor by creeping in the back door as a thief in the night.

# Devolution in Disguise: Miller and the Curse of the Government's "Victory"

Jo Murkens<sup>1</sup>

The mythical Article 50 TEU gives Member States the option to withdraw from the EU 'in accordance with its own constitutional requirements.' But what are the constitutional requirements of a country with no written constitution? And on what basis should the UK Supreme Court resolve the competing constitutional claims regarding prerogative powers, Acts of Parliament, conventions, and individual rights that were voiced by the government, the devolved administrations, and by the claimants? On the basis of strictly legal questions? Or by taking into account the UK's broader political context and constitutional arrangements?

An unprecedented eleven-member UK Supreme Court decided *Miller*<sup>2</sup> – supposedly the constitutional case of the century – on 24 January 2017. As had been generally predicted, the government's argument; that it could start the process of withdrawing from the EU using a prerogative power instead of an Act of Parliament, was roundly rejected by an 8:3 majority. The *Miller* case will no doubt be discussed for years to come. The government's unconstitutional attempt to bypass Parliament was thwarted by confident and convincing reasoning in a single judgement signed by eight Supreme Court Justices.

## I. Article 50 and EU Law

Lord Neuberger, for the majority, makes two points. He agrees that the European Communities Act 1972 gives effect to the Treaty of Rome and is the source of EU law. That is to say, EU law originates from the institutions of the European Union, and then becomes effective in UK law via the gateway of the European Communities Act 1972. But, instead of leaving it there, he goes on to say that, more fundamentally and more realistically, that, 'it is the EU institutions which are the relevant source of that law.' For as long as the European Communities Act 1972 remains in force, the entire *acquis communautaire*, i.e. the EU Treaties, EU legislation, and the jurisprudence of the Court of Justice, 'are direct sources of UK law.'<sup>3</sup> In other words, the validity of EU law does not originate from the European Communities Act 1972. Instead, the effect of the Act is to 'constitute' (a better term would be: to recognise) EU law as 'an independent and overriding source of domestic law.'<sup>4</sup> Should this make you blink twice, the UK Supreme Court repeats the point by positing EU law

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<sup>2</sup> R (Miller) v Secretary of State for Exiting the European Union [2017] UKSC 5.

<sup>3</sup> *Miller* [60-61].

<sup>4</sup> *Miller* [65].

‘as an entirely new, independent and overriding source of domestic law, and the Court of Justice as a source of binding judicial decisions about its meaning.’<sup>5</sup>

Referring to the EU as an independent and overriding source of law allows the UK Supreme Court to develop a different line of reasoning from the Divisional Court in November 2016. That decision accepted that prerogative powers could be used to sign and terminate treaties as a matter of international law and foreign relations. However, they could not be used to trigger Article 50 TEU due to the loss of certain rights guaranteed to individuals under EU membership. Although the UK Supreme Court agrees that the government cannot rely on prerogative powers to initiate withdrawal from the EU, it does so by another route. Instead of focusing on individual rights, it makes a broader constitutional argument by establishing a link between triggering Article 50 TEU and the loss of EU law as a domestic source of law, which amounts to a fundamental constitutional change that mandates statutory authorisation.

## II. Article 50 and Devolution

Beyond the headline-grabbing defeat and the subsequent focus on statutory authorisation in the form of the European Union (Notification of Withdrawal) Bill 2017, the government also secured a strong victory on the question whether it needed the consent from the devolved legislatures before the invoking of Article 50 TEU. The UK Supreme Court unanimously held that such consent was not required. The UK Supreme Court had already required parliamentary legislation in relation to the first question, which took some of the heat out of the second question. Yet the government’s victory on the devolution question is likely to be short-lived.

Since the referendum in June 2016, the government’s official policy towards the regions has been inclusive. In his statement to Parliament on Brexit on 27 June 2016, PM David Cameron said that: ‘we must ensure that the interests of all parts of our United Kingdom are protected and advanced, so as we prepare for a new negotiation with the European Union we will fully involve the Scottish, Welsh and Northern Ireland Governments.’<sup>6</sup> On her first visit to Scotland after becoming Prime Minister on 15 July 2016, Theresa May said that:

*‘I’ve been very clear with the first minister today that I want the Scottish government to be fully engaged in our discussion. I have already said that I won’t be triggering Article 50 until I think that we have a UK approach and objectives for negotiations. I think it is important that we establish that before we trigger Article 50.’<sup>7</sup>*

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<sup>5</sup> *Miller* [80].

<sup>6</sup> HC Deb, 27 June 2016, vol. 612.

<sup>7</sup> L Brooks, ‘May tells Sturgeon Holyrood will be ‘fully engaged’ in EU talks’ (*The Guardian*, 15 July 2016) <<https://www.theguardian.com/uk-news/2016/jul/15/theresa-may-nicola-sturgeon-holyrood-article-50-decision>> accessed 13 July 2017.

In contrast to the inclusive approach, PM May has also repeatedly made clear that agreeing a UK-wide approach did not mean giving any of the regions a veto. The devolved legislatures would not be allowed to 'block Brexit.'<sup>8</sup>

The UK Supreme Court has now stepped into the breach by concluding that the consent of the devolved legislatures is not constitutionally necessary before official notice to withdraw from the EU is given under Art. 50 TEU. The question it had to address was whether any UK legislation that sought, for instance, to repeal the European Communities Act 1972 and amend the devolution legislation would be subject to the Sewel Convention.

### III. Law vs. Politics

This question opens up a gulf between constitutional law and constitutional politics. Legally speaking, the UK government can claim that EU relations are an 'excepted' matter or reserved to Westminster. The devolution legislation in Scotland, Wales, and Northern Ireland assumes that the UK would be a member of the EU, but does not require the UK to remain a member.<sup>9</sup> It follows that there can be no 'parallel legislative competence' by which the devolved legislatures could withdraw from the EU.

However, the devolved administrations will point out equally correctly, that to give effect to EU withdrawal Westminster would have to relieve the devolved legislatures of their statutory obligation to respect EU law. This will require changing the devolution legislation – which is no mean feat. The Northern Ireland Act 1998 has been described as the 'constitution' for Northern Ireland.<sup>10</sup> It involves a delicate three-way power sharing structure between the Republic of Ireland, the devolved administrations and legislatures, and the UK. Amending the Northern Ireland Act 1998 unilaterally would be especially reckless, if not actually impossible as a matter of international relations and practical politics.

As a matter of constitutional law, Westminster may of course repeal the European Communities Act 1972 or amend the devolution legislation at any time. However, as a matter of constitutional politics, the UK government will not normally invite Westminster to legislate on devolved matters or on the extent of devolved powers without first obtaining the consent of the relevant devolved legislature. That understanding stems from the Sewel Convention, which exists in two forms: first, as an uncodified constitutional convention for Northern Ireland; second, in statutory form for Scotland and Wales. The Smith Commission was established in the aftermath

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<sup>8</sup> S Johnson, 'Theresa May: No Scotland opt-out or veto from Brexit' (*Daily Telegraph* 2 October 2016) < <http://www.telegraph.co.uk/news/2016/10/02/theresa-may-no-scotland-opt-out-or-veto-from-brexit/> > accessed 13 July 2017; P Walker 'Theresa May to warn devolved nations: you have no veto on Brexit' (*The Guardian* 30 January 2017) < <https://www.theguardian.com/politics/2017/jan/30/theresa-may-devolved-nations-veto-brexit-scotland-northern-ireland-wales-article-50> > accessed 13 July 2017.

<sup>9</sup> *Miller* [129].

<sup>10</sup> *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32; [2002] NI 390.

of the Scottish Independence referendum of 2014. As part of the overall drive to create a stronger and more autonomous Scottish Parliament it proposed that 'the Sewel Convention will be put on a statutory footing.'<sup>11</sup> The Scotland Act 2016 inserted this recommendation into the 1998 Act,<sup>12</sup> and the Wales Act 2017 has now similarly amended the Government of Wales Act 2006.<sup>13</sup>

Instead of reiterating doctrinal Westminster-centric notions of sovereignty, the UK Supreme Court could have conceived of the relationship between the centre and the regions with reference to wider considerations of constitutional politics. The UK Supreme Court could have built on its view that the loss of EU law amounts to a fundamental change to the UK constitution to express concern that such a loss would destabilise cooperation in the North-South Ministerial Council as established under the Belfast and British-Irish agreements. This institution is set up to implement EU policies and programmes on an all-Ireland and on a cross-border basis. The observance and implementation of EU law is expressly a 'transferred matter', and as such forms part of the responsibilities of the devolved administration in Northern Ireland. A reasonable case can be made that Westminster legislation that amended those provisions that affected the 'complex power-sharing' arrangements<sup>14</sup> between the Republic of Ireland, the devolved administrations and legislatures, and the UK would not fall under the Sewel convention and would, therefore, require the consent of the devolved legislatures.

On the one hand, the Sewel convention is the key constitutional mechanism by which boundary questions between the centre and the regions are framed. Indeed, the UK Supreme Court recognises that some conventions perform 'a fundamental role in the operation of our constitution.'<sup>15</sup> The function of the Sewel Convention is to facilitate 'harmonious relationships' between the centre and the regions. It acts as the key to an interlocking and interdependent constitutional structure. It can be used as the mouthpiece for cross-community and cross-border dialogue. On the other hand, the Sewel convention creates no legal obligations, and the UK Supreme Court will not police the fundamental role that the convention plays, notwithstanding its statutory form.

## IV. Conclusion

In trying to work out what the constitution requires, the UK Supreme Court is caught by the UK's own constitutional fault lines. Devolution disguises a clash between law, the constitution, and politics. The UK Supreme Court is undoubtedly

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<sup>11</sup> Smith Commission, Report of the Smith Commission for further devolution of powers to the Scottish Parliament, para. 22.

<sup>12</sup> S. 28(8) Scotland Act 1998, as amended by s.2(2) Scotland Act 2016.

<sup>13</sup> S.2 Wales Act 2017.

<sup>14</sup> B. O'Leary, 'Complex Power-Sharing in and over Northern Ireland: a Self-determination Agreement, a Treaty, a Consociation, a Federacy, Matching Confederal Institutions, Intergovernmentalism, and a Peace Process', in M. Weller and B. Metzger (eds), *Settling Self-Determination Disputes: Complex Power-Sharing in Theory and Practice* (Boston: Martinus Nijhoff, 2008).

<sup>15</sup> Miller [151].

correct that the consent of the devolved legislatures is not legally required for the purposes of triggering Article 50 TEU – or indeed for the purposes of amending the devolution legislation. However, so long as the Sewel Convention is in place, it is a constitutional requirement that the devolved assemblies pass a legislative consent motion under the Sewel convention before those parts of the devolution legislation incorporating EU law can be amended. Politically, there is a danger that the UK Supreme Court's retreat to constitutional formalism will be interpreted as constitutional intransigence in the regions. The Miller decision allows the SNP to proclaim that the UK government's promises to enhance the Sewel Convention are 'not worth the paper they were written on', and that Scotland cannot be an equal partner in the UK so long as its 'voice is simply not being heard or listened to within the UK.'<sup>16</sup>

The UK Supreme Court adds to the government's humiliation after the Divisional Court's ruling by turning the loss of individual rights into a loss of a domestic source of law. It then appears to throw the government some rope on the devolution question. But it is a devilish rope, which on current evidence looks more like a noose than a lifeline. The single most important constitutional requirement for the UK lies in prioritising the Northern Irish and Scottish questions as a matter of urgency. Devolution happens to be intrinsically tied up with the UK's membership of the EU. It is unfortunate that the British tradition steadfastly refuses to discuss politics through a constitutional matrix. That is an old habit that needs to fade quickly. Finding an answer to the devolution question is not just indispensable to working out the legal process of withdrawal under Article 50 TEU. More than that, it is constitutionally important, politically urgent and, in relation to the long-term national interest, vital.

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<sup>16</sup> N Sturgeon, 'Nicola Sturgeon responds to UK Supreme Court ruling' (*SNP website*, 24 January 2017) <[https://www.snp.org/nicola\\_sturgeon\\_uk\\_supreme\\_court\\_ruling](https://www.snp.org/nicola_sturgeon_uk_supreme_court_ruling)> accessed 13 July 2017.

## Can One Own the Bible?

Cristina Golomoz<sup>1</sup>



Dead Sea Scroll fragment from the book of Genesis, Museum of the Bible  
<https://museumofthebible.org/media/museum-collection>

**C**an one truly own the Bible? Looking at the impressive collection of biblical materials to be put on display at the forthcoming 'Museum of the Bible' the answer would appear to be a resounding 'Yes!' The Museum of the Bible will open in Washington, D.C., in November 2017. It will house one of the biggest collections of biblical texts in the world, including rare manuscripts and books such as Dead Sea Scroll fragments, the first editions of the King James Bible, and fragments from the Gutenberg Bible.<sup>2</sup> The museum's exhibition space is set to be 20 percent larger than Tate Modern's in London – an impressive figure which reflects the project's 'biblical' proportions.

The project's mastermind is David Green, an American businessman who founded Hobby Lobby, an arts and crafts chain based in Oklahoma City. Hobby Lobby is well-known for its victory in a Supreme Court case in 2014 in which it sought

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<sup>2</sup> Highlights of the museum collection can be found here:  
<https://museumofthebible.org/museum-of-the-bible-collection>.

exemption from paying insurance that covered contraception for employees on religious grounds. The Green family are evangelical Christians who have long dedicated their time, effort, and money to religious education and dissemination projects.<sup>3</sup> The Museum of the Bible is the most recent cause they have devoted themselves to in an attempt to 'convey the global impact and compelling history of the Bible in a unique and powerful way.'<sup>4</sup>

Another cause sponsored by the Green family is the so-called 'Scholars Initiative.' This is a programme which supports scholarly research into the rare biblical texts owned by the Green family as part of the 'Green Collection', which will feature in the soon-to-be Museum's exhibitions. Not only does this programme facilitate scholars' access to previously unstudied material, but also to generous research funding and cutting-edge technologies used in this type of research. A veritable scholar's paradise. But, according to some critics, there is a catch. Whilst officially there is 'no religious requirement for involvement', the institutions affiliated with the Green Scholars Initiative are almost all explicitly Christian, predominantly of the evangelical denomination.<sup>5</sup> Steve Green, David Green's son and the chairman of the Scholars Initiative, explains how the scholars' selection process is construed: they favour those researchers who 'seek after facts' and avoid those who are 'antagonistic and are going to come to a conclusion that this book [the Bible] is not what it claims to be.'<sup>6</sup>

This approach to scholarly research has been widely criticised as a way to restrict the access of certain researchers to the biblical texts included in the Green Collection.<sup>7</sup> Furthermore, critics have also argued that this approach reflects a particular understanding of what the Bible is, which is grounded in the Green family's evangelical faith.<sup>8</sup> Specifically, a vision of the Bible which stresses the text's consistency throughout history and geographical contexts, and seeks to eliminate any contradictions within or fragmentation of the text. An illustration of this is provided

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<sup>3</sup> Details about Hobby Lobby's Donations and Ministry Projects can be found here: <http://www.hobbylobby.com/about-us/donations-ministry>.

<sup>4</sup> 'Museum Collection | Museum of the Bible' <<https://museumofthebible.org/museum-collection>> accessed 18 February 2017.

<sup>5</sup> Joel Baden and Candida Moss, 'Can Hobby Lobby Buy the Bible?' (*The Atlantic*, January/February 2016 Issue) <<https://www.theatlantic.com/magazine/archive/2016/01/can-hobby-lobby-buy-the-bible/419088/>> accessed 13 February 2017.

<sup>6</sup> Steven Green quoted in: 'More than a Hobby' (*The Economist*, 2 July 2016) <<http://www.economist.com/news/united-states/21701487-steve-green-man-building-bible-museum-washington-explains-what-he-up>> accessed 13 February 2017.

<sup>7</sup> Noah Charney, 'Critics Call It Evangelical Propaganda. Can the Museum of the Bible Convert Them?' (*The Washington Post*, 4 September 2015) <[https://www.washingtonpost.com/opinions/2015/09/04/f145def4-4b59-11e5-bfb9-9736d04fc8e4\\_story.html?utm\\_term=.302dae2588fa](https://www.washingtonpost.com/opinions/2015/09/04/f145def4-4b59-11e5-bfb9-9736d04fc8e4_story.html?utm_term=.302dae2588fa)> accessed 14 February 2017.

<sup>8</sup> 'Biblicism', the belief according to which the Scripture is 'the central authority' over a believer's life, is one of the essential characteristics of evangelical theology. Arguably, this understanding of the Bible resonates with that promoted through the Green family's charitable actions. See 'Evangelical Theology', Ian A McFarland and others, *The Cambridge Dictionary of Christian Theology* (Cambridge University Press 2011) <<http://ebookcentral.proquest.com/lib/oxford/detail.action?docID=691811>>.

in the description of the Museum's mission: 'to bring to life the living word of God, to tell its compelling story of preservation, and to inspire confidence in the absolute authority and reliability of the Bible.'<sup>9</sup> Such an understanding, it has been argued, fails to recognise the commonly held scholarly position that the Bible cannot be traced back to one single original text.<sup>10</sup> Rather, most historic theologians argue that it is a collection of texts and fragments upon which the passage of time and a great many complex socio-political contexts – such as the breakup of the Roman Empire or the Reformation, to mention just two well-known examples – have left their mark. Avoiding those scholars who 'are going to come to a conclusion that this book is not what it claims to be' does not appear to account for the ways in which ideology, interpretation, contradiction, and randomness have been incorporated in the biblical text as we today know it.<sup>11</sup>

Even though they are the owners of one of the largest private collections of biblical objects and artefacts in the world, the Greens like to describe themselves as 'storytellers' and 'educators', rather than 'collectors.'<sup>12</sup> In Steve Green's own words, the Scholars Initiative and the Museum aim to 'tell the story of the Bible.'<sup>13</sup> This statement is perhaps an indication of just how far the Greens' claim over the manner in which the meaning of the biblical text is transmitted reaches. By telling the story of the biblical artefacts and objects included in their collection, the Greens aspire to represent the Bible itself.

The fact that they own these rare objects is not without importance here. Being the owners of this collection has enabled them to control not only which researchers are selected onto their Scholars Initiative, but also the questions that are asked and the interpretations that are given to those biblical fragments. The insistence that we are presented with 'simply the facts' reads as an explicit attempt to legitimise the Greens' vision of the Bible as true, or 'factual', whilst censoring alternative interpretations. This has the potential to influence not only what the millions of people who will visit the Museum learn about the Bible, but also how we understand the history of Christianity more generally.

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<sup>9</sup> The museum's mission according to the tax filing for 2011: The Museum of the Bible, 'Form 990 Department of the Treasury, Internal Revenue Service, Return of Organization Exempt from Income Tax', <[http://207.153.189.83/EINS/273444987/273444987\\_2011\\_09591cf7.PDF](http://207.153.189.83/EINS/273444987/273444987_2011_09591cf7.PDF)> accessed 14 February 2017.

<sup>10</sup> Michelle Boorstein and Michelle Boorstein, 'Hobby Lobby's Steve Green Has Big Plans for His Bible Museum in Washington' (*The Washington Post*, 11 September 2014) <[https://www.washingtonpost.com/lifestyle/magazine/hobby-lobbys-steve-green-has-big-plans-for-his-bible-museum-in-washington/2014/09/11/52e20444-1410-11e4-8936-26932bcfd6ed\\_story.html?utm\\_term=.d9cf0f2dbaa1](https://www.washingtonpost.com/lifestyle/magazine/hobby-lobbys-steve-green-has-big-plans-for-his-bible-museum-in-washington/2014/09/11/52e20444-1410-11e4-8936-26932bcfd6ed_story.html?utm_term=.d9cf0f2dbaa1)> accessed 22 February 2017.

<sup>11</sup> For scholarly research which analysis the transformations of the biblical text throughout history, see Eldon Jay Epp, 'The Multivalence of the Term "Original Text" in New Testament Textual Criticism' (1999) 92 *Harvard Theological Review* 245.

<sup>12</sup> Steven Green quoted in: Joel Baden and Candida Moss (n 5).

<sup>13</sup> Quoted in: Alan Rappeport, 'Family Behind Hobby Lobby Has New Project: Bible Museum' (*The New York Times*, 16 July 2014) <<https://www.nytimes.com/2014/07/17/us/politics/family-that-owns-hobby-lobby-plans-bible-museum-in-washington.html>> accessed 15 February 2017.

That the Green family will control access to and the interpretation of the biblical material in its possession then raises the interesting question about what can and cannot be owned privately. What is the line of demarcation, and how rigid is it? The Greens own a collection of rare biblical artefacts, but can they be said to own the Bible? Surely, most would say that they do not. To take another example, we can imagine a situation in which a fragment of the original copy of the 1787 US Constitution comes into private hands. Yet, we would be reluctant to think that the US Constitution can be privately owned. What is the basis of this reluctance? There is no explicit rule of law that excludes the Constitution or the Bible from the things that can be privately appropriated. The Constitution and the Bible are intangible things, unlike the paper on which their texts are written. Yet, many intangible things can indeed be privately owned, such as a song, an invention, or a brand.<sup>14</sup> What, then, makes the idea of owning the Constitution or the Bible so inconceivable?

In the case of the Constitution, anthropologist Maurice Godelier argued that the inconceivability of ownership is grounded in the understanding that the principles and ideals expressed in this text are the 'common property' of the collective body of citizens.<sup>15</sup> In other words, the Constitution is thought to belong to each and every citizen by virtue of their citizenship – not by the simple virtue of possessing some tangible object. What sort of rights might such a notion of 'common property' involve? A possible answer is provided by Macpherson, who suggests that common property could entail a guarantee against being excluded from the use or benefit of a thing.<sup>16</sup> This contrasts with private property, which gives one the right to exclude others from the use or benefit of something. An example of a good which the state might declare for common use is a town park. If governed by a common property regime (also known as 'the commons'), then the park would be considered non-transferable to a private owner.

In the context of Western legal systems, the idea of excluding certain categories of things from private ownership and commerce goes back to Roman law. Legal historian Yan Thomas showed that Roman law used a distinct legal category, called '*pecunia communis*', for goods designated as non-appropriable by private individuals.<sup>17</sup> This legal category applied to two types of goods: '*res sacrae*' ('sacred things') and '*res publicae*' ('public things'). Among the sacred things, Thomas listed objects and places used in the religious practice. The public things included objects and places such as water pipes, theatres, markets, and roads. According to Thomas,

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<sup>14</sup> Under intellectual property rights.

<sup>15</sup> Maurice Godelier, *The Enigma of the Gift* (University of Chicago Press, 1999) 206.

<sup>16</sup> Crawford Brough Macpherson, *Property, Mainstream and Critical Positions* (University of Toronto Press, 1978) 5.

<sup>17</sup> This term was used under the Empire. '*Pecunia populi*' was the corresponding term used under the Republic. Yan Thomas, 'La Valeur Des Choses', *Annales. Histoire, sciences sociales* (Éditions de l'EHESS 2002) 1435; 1441.

there was no clear separation between *'res sacrae'* and *'res publicae'* in Roman law, and they were both considered 'common goods'. These were distinguished from *'res in commercio'* ('commodities') by their function, that is, the fact that they were reserved for a common use.<sup>18</sup>

As both an expression of and a catalyst for community life, 'common goods' were seen as things for which there could be no monetary equivalent.<sup>19</sup> In other words, they were priceless. Viewed from this perspective, their exclusion from private ownership and trade is easy to understand. If their function as an expression of and a catalyst for community life is lost, they cease to be 'common goods' and they become 'commodities'. In that sense, it is impossible to appropriate 'common goods' because they are beyond the reach of *'singuli homines'* (literally 'isolated men').

Going back to the discussion about the Bible and the Constitution, I suggest that this could be a helpful way to think about what can and cannot be owned privately. Understood as 'common goods' in the sense illustrated by Thomas in his study of Roman law, both the Bible and the Constitution are at the same time a community's statement of shared beliefs, and something involved in the making of that community. One cannot privately appropriate these 'common goods' and, thus, terminate their communal use without degrading their communal meaning.<sup>20</sup>

Therefore, one cannot be said to own the Bible in its communal sense. Yet, as the case of the Green Collection shows, one can own rare biblical artefacts and objects. But how rigid is the line of demarcation between those aspects of the Bible that can be owned and those that cannot? I suggest that, in practice, the separation might not be as clear. As owners of rare biblical artefacts, the Greens gain control not only over the manner in which these objects are represented, but also over how the story of the Bible itself is told through them. This, I have argued, has been used by the Greens as means to legitimate their understanding of what the Bible is, and of the social or communal status it should be given in believers' lives ('absolute authority'). In retelling the story of the Bible, controlling its representation, and legitimising this interpretation, the Bible's ownership may cease to remain beyond private reach.

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<sup>18</sup> *ibid* 1434–1435; 1461.

<sup>19</sup> *ibid* 1460.

<sup>20</sup> A similar idea is articulated by philosopher Michael Sandel with regards to the commercialisation of certain higher value goods. Michael J Sandel, *What Money Can't Buy: The Moral Limits of Markets* (Penguin, 2013) 96.

# Navigating Methodological Approaches in Sensitive Research

Menaal Munshey<sup>1</sup>

In April 2015, I left Cambridge to embark on fieldwork in Sukkur, Pakistan. The study was centred around the topic of blasphemy and aimed at understanding blasphemy-related violence in Pakistan through a criminological lens. Blasphemy is criminalised in Pakistan with severe penalties of capital punishment and life imprisonment. Blasphemy laws are disproportionately used to target religious minorities, and are enforced largely through vigilante violence. The state and criminal justice system appear either silent or complicit, and this phenomenon has a profound effect on communities.

Sukkur is a city of 1 million people on the banks of the river Indus in Sindh.<sup>2</sup> Sindh is renowned for its principles of Sufism, peace and multiculturalism.<sup>3</sup> Historically many religious communities (especially Hindus and Muslims) have peacefully coexisted.<sup>4</sup> It is also home to my paternal family. As an insider on the outside, fieldwork turned into a larger journey to critically analyse societal phenomena I had observed over the years: intolerance, overt Islamisation, and increasing levels of violence and criminality. In 2006 the only two churches in the city were destroyed by angry mobs based on an accusation of blasphemy.<sup>5</sup> This was personally disturbing as it exposed the inequality and discrimination faced by religious minorities,<sup>6</sup> and the changing nature of violence in Sindh. This incident sparked my inquiry into blasphemy, law, and violence in an attempt to situate these trends within a larger narrative.

## I. Sensitive Research

Blasphemy is considered taboo and controversial. Often simply speaking about blasphemy is considered to be blasphemy itself. The research potentially posed a substantial threat to those involved and was 'sensitive' in nature.<sup>7</sup> The security and safety of the participants and researcher was a major concern. I was aware of the

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<sup>2</sup> 'Sindh population surges by 81.5 pc, households by 83.9 pc' *The News* (Lahore, 2 April 2012).

<sup>3</sup> Alice Albinia, *Empires of the Indus: The Story of a River* (John Murray Publishers 2012).

<sup>4</sup> *Ibid.*

<sup>5</sup> 'Churches Torched over Blasphemy Rumor' *World Watch Monitor* (Karachi, 2 February 2006).

<sup>6</sup> Menaal Munshey and Haya Emaan Zahid, 'Inequality and Discrimination faced by Religious Minorities in Pakistan' (*Oxford Human Rights Hub Blog*, 31 January 2017) <<http://ohrh.law.ox.ac.uk/inequality-and-discrimination-faced-by-religious-minorities-in-pakistan/>> accessed 15 August 2017.

<sup>7</sup> Raymond M. Lee, *Doing research on sensitive topics* (Sage Publications 1993).

'presentational' danger in the form of aggression, hostility, or violence I might face.<sup>8</sup> In these challenging circumstances, fieldwork required reflexivity, improvisation and flexibility.<sup>9</sup>

These conundrums are rarely explained in Western methodological training. Most criminological research is conducted in developed countries, whereas it is the global South that faces the highest levels of violence.<sup>10</sup> As a result, theoretical knowledge and methodological training is skewed towards applicability in contexts where broadly the rule of law, democracy, and legitimacy of the state are upheld. Although we are taught how to tackle ethical considerations within a Western context, the same assumptions don't apply in relatively fragile environments. Fieldwork acts as a reminder to question the underlying assumptions of our methodological training and begin to create more appropriate ethical rules in the given context.

I planned a short period of fieldwork to minimise attention drawn to asking questions about a sensitive subject in a small community. This may traditionally be considered inappropriate for in-depth qualitative research, however, methodology must be adapted to the context safely and sensitively. For example, conventional advice is not to let participants know of your home address. However, in Sukkur this proved to be impossible. Sukkur is a relatively small community where members of the community are easily identifiable. Most of the participants were familiar with a member of my family, and knew exactly where we lived. Although this was not advisable, it was important to recognise that "[m]any important empirical and theoretical problems taken up in the social sciences can be thoroughly and honestly studied only by placing oneself in situations that may compromise safety and security in a normative or corporeal sense".<sup>11</sup>

The methodological training I had received thus far was largely ill equipped to tackle situations of physical insecurity, and many decisions were instinctual based on a contextual understanding. The general guidance, for example, is to contact the police in dangerous situations. This advice was largely misplaced in Pakistan where the police is considered the most untrustworthy state institution and the topic being studied implicates the police.<sup>12</sup> Instead, I formed an exit strategy from the interview

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<sup>8</sup> Ibid.

<sup>9</sup> Ruth Armstrong, 'From Paper Ethics To Real World Research: Supervising Ethical Reflexivity When Taking Risks In Research With The 'Risky' in Karen Lumsden (ed.), *Reflexivity In Criminological Research* (Palgrave Macmillan 2014).

<sup>10</sup> Christopher Minkton, Masako Tanaka, Mark Tomlinson, David L Streiner, Lil Tonmyr, Bandy X Lee, Jane Fisher, Kathy Hegadoren, Joam Evans Pim, Shr-Jie Sharlenna Wang and Harriet L MacMillan, 'Global research priorities for interpersonal violence prevention: a modified Delphi study' (Bulletin of the World Health Organization, 20 October 2017) <<http://www.who.int/bulletin/volumes/95/1/16-172965/en/>> accessed 15 August 2017.

<sup>11</sup> Stephen Lyng, 'Dangerous Methods: Risk Taking and the Research Process' in Jeff Ferrell and Mark S. Hamm (eds), *Ethnography at the Edge* (Northeastern University Press 1998).

<sup>12</sup> Transparency International Pakistan, 'National Corruption Perception Survey' (Transparency International, 28 December 2011) <<http://www.transparency.org.pk/report/ncps2011/ncps2011.pdf>> accessed 1 April 2017.

location. Since I was not driving myself and public transport is largely unreliable and unsafe, I nominated a few contacts whom I could rely on to immediately pick me up in case of an emergency. This proved difficult when I was conducting research on an island in the Indus, with limited accessibility to the mainland! These situations highlight the importance of building trust and remaining reflexive when conducting fieldwork in a context that is largely untouched by research.

## II. Identity and Building Trust

The study aimed at “getting the description right” in a “humanistic [...] creative and intimate” manner.<sup>13</sup> A qualitative research method consisting of interviews and semi-structured interviews was considered most appropriate to “dig deep to get a complete understanding of the phenomenon” and create a “meaningful picture of a [...] multifaceted situation”.<sup>14</sup> The researcher is thus the primary instrument for data collection and analysis.<sup>15</sup> “Ultimately the outcome of the interview or focus group depends on the knowledge, sensitivity and empathy of the interviewer”.<sup>16</sup> In fieldwork as in life, there are crucial moments when aspects of identity intersect fluidly, shifting their meaning in context.<sup>17</sup> The researcher's identity is inevitably involved in the way they interpret participants' responses.<sup>18</sup>

I am part of a small proportion of the population that is viewed as privileged by the majority. I am a twenty-six year old woman, and was born and brought up in Karachi. I have lived abroad since 2009 while training to be a lawyer and criminologist. I have had the privilege of studying abroad mainly because of financial ability. Building trust between myself and the participants required offering a large amount of information about myself and often answering uncomfortable questions. I was careful to affirm mutual understanding and friendliness to break down these barriers, often discussing memories of growing up in Sukkur, and how the city has changed over my lifetime. I was asked, especially by the Muslim women in the study, why I did not wear a headscarf and why I conversed with men so openly. A Hindu man asked me how I felt safe on an island after sunset without a male member of my family as a chaperone. Many Christians asked me what it felt like to live in a ‘Christian’ country (i.e. the UK), and how I felt capable to live independently without a father or

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<sup>13</sup> Alison Liebling, ‘Description at the Edge? I-It/I-Thou Relations and Action in Prisons Research’ [2015] 4(1) IJCSD 18.

<sup>14</sup> Paul D. Leedy and Jeanne Ellis Ormrod, *Practical Research: Planning and Design* (Prentice Hall 2013) 147.

<sup>15</sup> Sharan B. Merriam, *Qualitative Research: A Guide to Design and Implementation* (Jossey-Bass 2014) 15.

<sup>16</sup> Steiner Kvale, *Interviews: An Introduction to Qualitative Research Interviewing* (Sage Publications 1996) 105.

<sup>17</sup> Stephanie Kane, ‘Armed Robbery and Ethnographic Connection in Salvador de Bahia, Brazil’ in Karen Lumsden (ed.), *Reflexivity In Criminological Research* (Palgrave Macmillan 2014).

<sup>18</sup> Martyn Denscombe, *The Good Research Guide for small-scale research projects* (4th ed, Open University Press 2011).

brother accompanying me. Many of these views linked to patriarchy and a culture of “women’s subordination” which I gently explained I did not subscribe to.<sup>19</sup> A Muslim man asked me to explain and justify my religious beliefs, which I did by highlighting aspects of our common Sufi beliefs. Police officers often accused me of leaving Pakistan instead of dealing with the religiosity, extremism and violence I was studying. They saw this as cowardice in comparison to their frontline positions. I ended up sharing difficult and personal experiences, which I had not prepared for. Many Christians accused me of tokenism. It was their view that I could never understand what they experience on a daily basis, because I was privileged to be born a Muslim. To them, I was part of the antagonistic Muslim community and just by virtue of that could be seen as untrustworthy. I reminded the participants that in fact there is more that binds us culturally than simply our religion, and that most Muslims are not supporters or sympathisers of blasphemy-related violence. In fact, my work was a critique of the phenomenon.

While building trust and sharing stories, I was conscious of the need to be perceived as impartial. This often required masking instinctive responses when participants made shocking or borderline offensive statements. Police officers, for example, admitted to resorting to the use of force: “The criminals that are documented, and those we have information on, we usually kill them in encounters. We do this in Sukkur specially. People go to Court to protest this, and even though we are making society safer by doing this, the Court doesn’t support us. We have to face all these challenges personally” (Police Officer). In this statement, he explicitly acknowledged the use of extrajudicial killings of ‘criminals’, which the police increasingly use as an alternative to the formal, legal court process.<sup>20</sup> I had an ethical responsibility not to condone such acts, and was careful to remain impartial in my reaction and demeanour. In discussions with Muslim men, blasphemy-related violence was largely justified: “People just can’t bear this type of insult (blasphemy), it is too close to their heart, they have no tolerance or patience for it. People feel that they must act, even if the state doesn’t” (Muslim Man). To probe further, I asked the controversial question of whether Ahmadis were considered Muslims or are committing blasphemy by practicing their religion: “What if I told you I was Ahmadi?” Suddenly the mood in the room became highly tense, and the participants were outraged at the suggestion. They verged on ordering me to leave, but I reeled the situation back in by assuring them this was just a hypothetical question. It provides

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<sup>19</sup> Menaal Munshey, ‘Sheroes of the Subcontinent’ (*Sisterhood Magazine*, 6 June 2017) <<http://sister-hood.com/menaal-munshey/sheroes-of-the-subcontinent/>> accessed 14 August 2017.

<sup>20</sup> Asian Human Rights Commission, ‘A call for an immediate intervention to stop extrajudicial killings’ (*Asian Human Rights Commission*, 27 October 2014). <<http://www.humanrights.asia/news/alrc-news/human-rightscouncil/hrc27/ALRC-CWS-27-10-2014/?searchterm=extrajudicial%20killings%20pakistan>> accessed 1 April 2017.

an indication of the emotionally charged atmosphere surrounding blasphemy and religious beliefs.

I embarked on this study with the approach of being solely the interviewer, and quickly realised that these interactions would be organic conversations where I had to be forthcoming. I engaged in ‘active’ and ‘creative’ interviewing<sup>21</sup>. Instead of remaining impersonal as is suggested in traditional interviewing, I was willing to share my own experiences to activate the respondents’ knowledge in ways that were appropriate to the research aims.<sup>22</sup> Although this blurred lines to some extent, without this it is unlikely I would have been able to elicit the authentic stories and life experiences that were shared with me. Knowledge was co-produced with the researched, and reflexivity was essential to this process.<sup>23</sup>

### III. Negotiating Access

There were many social dynamics involved in gaining access to participants during fieldwork with “the researcher's right to be present being continually renegotiated”.<sup>24</sup> The aim of the sample was to gather a range of perspectives from a variety of groups, including Hindus, Muslims, Christians and police officers. Access to participants was gained through discussions with family members and friends who acted as sponsors.<sup>25</sup> Sponsors acted as a “bridge” to “a new social world” and “patrons” who “simply by associating with the researcher, helped to secure the trust of those in the setting”.<sup>26</sup> Prior to conducting fieldwork I tried to contact these sponsors to set up interviews with participants. They were largely unresponsive, and none of the interviews or discussions were scheduled prior to my arrival in Sukkur. Despite being taught the importance of planning it was proving to be difficult to plan this research adequately in advance. I arrived in Sukkur worrying about the efficacy of the timeframe, and soon found that everything began to come together.

Prior to the police interviews, I felt unsure of the safety of the environment I was entering as it is male dominated and unfamiliar. Ironically, it was only for the police interviews that I felt I needed to take extra precautions. Due to these hesitations, I requested a community officer who works with a local charity in Sukkur to accompany me. I am a consultant with this charity and did not have to pay the community officer. The community officer was involved in off-the-record chats with police officers, however, he did not ask any questions during the interviews to limit his effect on these interviews. Despite the commonly-held view that the presence of a

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<sup>21</sup> Jack Douglas, *Creative interviewing* (Sage Publications 1985).

<sup>22</sup> James Holstein and Jaber Gubrium, ‘Active Interviewing’ in Jaber Gubrium and James Holstein (eds.), *Postmodern Interviewing* (Sage Publications 2003).

<sup>23</sup> Aaron Winter and Karen Lumsden, ‘Reflexivity In Criminological Research’ in Karen Lumsden (ed) *Reflexivity In Criminological Research* (Palgrave Macmillan 2014).

<sup>24</sup> Raymond Lee, *Doing research on sensitive topics* (Sage Publications 1993) 122.

<sup>25</sup> Jack Douglas, *Creative interviewing* (Sage Publications 1985).

<sup>26</sup> Ibid 131.

person other than the researcher might skew results, it is my view that in fact having a male companion during this phase of data collection actually meant the police officers were not dismissive of a young 20-something year old girl, did not feel uncomfortable about being alone with a female stranger, and may have added legitimacy to my own presence. This is another example of an unorthodox practice, which I considered necessary in the context despite the potential limitations it might pose.

#### IV. Contextual Methodological Approaches

Social phenomena and societies are not the same, and methodology must be adapted to reflect this. This article is a contribution to bridging gaps in methodological approaches, while highlighting the benefit of adopting a reflexive approach in criminological research.<sup>27</sup> It is important to confront sensitive ethical challenges candidly, especially in fragile contexts where researcher safety is not guaranteed and many traditional rules do not apply. It is time for criminological and social science researchers to take a concerted approach to developing innovative and context-appropriate thinking on research methodology.

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<sup>27</sup> Aaron Winter and Karen Lumsden, 'Reflexivity In Criminological Research' in Karen Lumsden (ed) *Reflexivity In Criminological Research* (Palgrave Macmillan 2014).