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Law, Market and Marketization

ROBIN PAUL MALLOY[†]

TABLE OF CONTENTS: 1. Introduction; 2. Law & Markets; 3. Law & Marketization; 3.1. Assetization; 3.2 Transferring Assets; 3.3 Authentication and Valuation of Assets; 4. Conclusion.

ABSTRACT: Marketization is a process occurring in many transitional economies as countries seek to adjust their legal systems to facilitate broader market participation while expanding global trade. This essay sets out one way of understanding this process by focusing on the relationship among, law, markets, and marketization. It identifies and explains basic legal requirements for marketization and links these to a need to transform legal thinking by integrating a greater understanding of economics into both law and public policy.

KEYWORDS: *Law and Economics; Markets; Marketization; Rule of Law; Property.*

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1. INTRODUCTION

In the second decade of the new millennium, as we deal with the post-financial market meltdown and the failure of self-correcting market theory to prevent a global financial crisis, the legal pragmatists among us realize a need to think carefully about the relationship between law, markets and marketization.[1] Putting the recent financial collapse into perspective, we should note that we have already spent some forty years with law and economics as an important influence in jurisprudence,[2] bringing market thinking firmly into law, and that we have already been through the processes of *globalization*, *harmonization*, and the *transition to market economies* in such countries as China, and in some of the countries of Eastern Europe and the former Soviet Union. Therefore, it is a fitting time to reflect on the role of law in facilitating the ongoing process currently referred to as *marketization*.

The process of marketization can be understood in at least two different ways. First, it might simply refer to the process of expanding competition and choice. This interpretation is consistent with the jurisprudence of people such as Adam Smith. A second way of understanding marketization is in terms of legal commodification. This article uses the second interpretation. The process of marketization as a form of commodification is one in which various social, legal, political, and cultural

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† E.I. White Chair and Distinguished Professor of Law, and Kauffman Professor of Entrepreneurship and Innovation at Syracuse University. He has published sixteen books and over 30 articles on subjects including law and market economy, real estate, land use, and Adam Smith. This paper is the product of participating as a member in a series of meetings with the Working Group on Marketization sponsored by the University of Helsinki, Finland. The working group was interdisciplinary and comprised of about two dozen people from several countries working in economics, sociology, biology, linguistics, science, and law.

[1] *See* THE FUTURE OF FINANCIAL REGULATION (Ian G. MacNeil & Justin O'Brien eds., 2010); LAW AND ECONOMICS OF GLOBAL FINANCIAL INSTITUTIONS (Peter Nobel, Katrin Krehan, & Anne-Catherine Tanner, eds., 3d ed. 2010); MICHAEL MALLOY, ANATOMY MELTDOWN: A DUAL FINANCIAL BIOGRAPHY OF THE SUBPRIME MORTGAGE CRISIS (2010); Robin Paul Malloy, *Mortgage Market Reform and Fallacy of Self-Correcting Markets*, 30 PACE L. REV. 79 (2009); David Reiss, *Subprime Standardization: How Rating Agencies Allow Predatory Lending to Flourish in the Secondary Mortgage Market*, 33 FLA. ST. U. L. REV. 985 (2006); THOMAS E. WOODS, MELTDOWN: A FREE-MARKET LOOK AT WHY THE STOCK MARKET COLLAPSED, THE ECONOMY TANKED, AND GOVERNMENT BAILOUTS WILL MAKE THINGS WORSE (2009).

[2] Ronald H. Coase, *The Problem of Social Cost*, 56 J.L & ECON 837 (1960); GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (9th ed. 2014); ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS (2000); ROBIN P. MALLOY, LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS (2000); NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM AND BEYOND (2d ed. 2006).

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institutions reform themselves with reference to market mechanisms and market values. Thus, lawyers move from discussions of "natural law" and of the moral foundations of law, to conversations of "cost and benefit" analysis and the economics of justice.[3] Similarly, legal institutions increase their focus on matters of "efficiency", and increasingly speak of "justice" in terms of economic opportunities and outcomes. The process of marketization involves a reinterpretation of legal and social relationships in terms of the needs of commerce, and it increasingly makes reference to economic terms such as efficiency and wealth maximization when evaluating such relationships. While this process does not equate law to economics, it does mean that the legal interpretive frame of reference changes and that more and more decision making is based on price calculations and other economic considerations. In the process of marketization law serves the purpose of commercialization by protecting property, promoting production, and facilitating consumption and trade. Freedom, equality, fairness, and progress become understood in terms of law's relationship to market interests; including the perceived interests of owners, creditors, investors, entrepreneurs, consumers, and workers.

In this brief essay, I approach the process of marketization as one of understanding the market from a legal perspective rather than one of doing an economic analysis of law; and, I outline the way in which law functions as a form of infrastructure to facilitate trade and exchange. Because the law and legal institutions function primarily as infrastructure for trade and exchange, they are frequently underappreciated. To many people, trade seems to happen by operation of an invisible hand; with law appearing primarily when a transaction goes bad and the parties need to resolve a dispute.[4] Dispute resolution is, of course, an important function of law, but much of law deals with making transactions stable, efficient, and predictable, even as between parties who are unknown to each other.

[3] *See* POSNER [THE ECONOMICS OF JUSTICE], *supra* note 2; POSNER [ECONOMIC ANALYSIS OF LAW], *supra* note 2; COOTER AND ULEN *supra* note 2; MALLOY, *supra* note 2; ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING (2004).
[4] *See* MALLOY, *supra* note 2; MALLOY, *supra* note 3; Malloy, *supra* note 1.

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The starting point for identifying the connections among law, markets, and marketization probably goes back to Adam Smith.[5] In THE WEALTH OF NATIONS,[6] published in 1776, Adam Smith observed that legal and economic systems developed together and reflected a community's' economic stage of development. Smith identified four stages of development and suggested that the age of commerce; based on the specialization of labor, the protection of property, the freedom of contract, and the development of good legislation, produced more prosperity and greater freedom than observable in any one of the earlier three stages of hunting, herding, and farming.[7] Each stage also involved a stronger emphasis on property, and on the need for more advanced legal arrangements to deal with property. For Smith, the age of commerce and the process of marketization facilitated social progress. This was because Smith understood that advancing through these stages involved expanding opportunities for competition and choice, and this in turn facilitated a rising standard of living for everyone.

Today, political and economic elites in emerging and developing countries see the prospects for a more prosperous future arising from marketization and the transition to a market economy. In such a market economy, relationships are structured in terms of costs and benefits and are translated in to value neutral exchanges. Talk of morals and politics are implicitly sidestepped as interaction is driven by the desire for making money and for turning a profit. This may potentially reduce interpersonal conflict as people are motivated by self-interest to work at making money and improving their personal fortunes rather than engaging in conflict over abstract ethical, moral, and theological matters. In Smithian terms, this may also be beneficial because individuals pursuing their own self-interest

[5] ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776); ADAM SMITH, LECTURES ON JURISPRUDENCE (Glasgow ed., Lexicos Publishing 1982) (1896).

[6] *See* SMITH, *supra* note 5.

[7] *See generally* C.A. Cooke, *Adam Smith and Jurisprudence*, Neil McCormick, *Adam Smith on Law*, Peter Stein, *Adam Smith's Jurisprudence—Between Morality and Economics*, David Lieberman, *Adam Smith on Justice, Rights, and Law*, Fabrizio Simon, *Adam Smith and the Law*, *in* ADAM SMITH AND LAW (Robin Paul Malloy ed., forthcoming Feb. 2017).

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naturally advance the public interest at the same time; even though the public interest may be no part of their original intention.[8]

To be effective, the process of marketization requires embracing a need to reform other institutions to reflect the language, values, and outcomes that a market economy will hopefully bring. This is because market economies not only need the infrastructure of open and unrestricted trade; they need the validation of desirability from a variety of other social institutions. Marketization, thus, becomes the process of cross validation of institutional support for a more open, competitive, and decentralized coordination of scarce goods, resources, and services; and, ultimately for stronger legal rights. In the process, law not only provides the infrastructure for more efficient market activity, it normalizes the power dynamics of market relationships and makes them appear "natural."[9]

In exploring these ideas, this essay describes some of the key ways that law and legal institutions facilitate market exchange. The essay is not intended to be all encompassing nor overly detailed. It is meant to offer a general and overarching understanding of the various ways in which law usefully functions to incentivize and protect market expectations. In proceeding, therefore, I should note that many of the ideas expressed herein extend on work explored in two of my early books: *Law and Market Economy: Reinterpreting the Values of Law and Economics*;[10] and *Law in a Market Context: An Introduction to Market Concepts in Legal Reasoning*.[11] In each of these books I develop the idea of law and market economy. This approach is one based on understanding the market as a dynamic process of exchange in which the act of exchange itself creates and transforms meanings and values in the relationships of participants and the things they trade.[12] For instance, when the United States engages in trade with China, both countries have a change in values over time. While the United States may believe that trade facilitates China becoming more invested in freer markets and in democratic reforms, the United States simultaneously experiences pressure to adjust its labor and

[8] *See* MALLOY, *supra* note 2; MALLOY, *supra* note 3; Malloy, *supra* note 1.
[9] *See generally* ADAM SMITH AND LAW (Robin Paul Malloy ed., forthcoming Feb. 2017).
[10] MALLOY, *supra* note 2.
[11] MALLOY, *supra* note 3
[12] *Id.*, MALLOY, *supra* note 2.

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production practices in order to be more competitive with China. Consequently, as with any exchange relationship, both sides to the exchange influence each other because exchange requires the continuous mediation of conflicting cultural-interpretive tensions.

In this approach, the problems of the law are economic because law governs the ways that people deal with the competition for limited resources; and, the problems of economics are legal because law provides the "tools" and infrastructure for trade and exchange. Consequently, this approach focuses on the strategic role of law in relation to the stages of social development; and, marketization involves the movement of a community from the early stages of economic development (the age of hunters, herders, and farmers), to the more advanced stages of commerce. In this transition to a commercial society, it is also important to understand that the value of any given market transaction depends on its position and its relation to all other elements of a given system of exchange (a given market context). Thus, exchange and the values generated by it are contextually informed by a variety of factors such as history, ideology, and culture. In such an environment, price functions as a relative interpretation of value; and is not value itself. An important implication of this is that cost and benefit analysis implicitly incorporates within its calculus a set of historical, ideological, and cultural values. For this reason, cost and benefit analysis cannot provide a neutral and objective approach to legal decision making. Cost and benefit analysis must reflect community values with respect to relative pricing, and it favors values that are easily priced over values that are abstract and difficult to price, while privileging the preferences of those with many resources over the preferences of those with few resources. In this context, law not only facilitates these transactions, it normalizes them and makes them appear to be natural and desirable.

In exploring the ways that law functions as an infrastructure for markets and marketization, I proceed in two steps. First, I consider the relationship between law and markets; where trades are organized, stabilized, and pursued in ways that respond to the legal environment in which trade takes place. Second, I address the relationship between law and the process of

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marketization; where marketization is understood as the process of institutionalizing and incentivizing interpersonal relationships in terms that facilitate the capture and creation of value through trade.

2. LAW & MARKETS

Markets are about the human process of exchange; a giving of a "this" for a "that". In this process, the rules, standards, and norms of law mediate the tension between private and public interest so as to peacefully promote the common interest.[13] Importantly, law organizes exchange by creating the infrastructure to expand beyond local and informal trade networks.[14] It does this in several ways. For the purposes of this paper, discussion is focused on five key functions of law. These functions include establishing and enhancing: 1) acceptable networks and patterns of exchange; 2) transparency; 3) predictability; 4) stability; and 5) trust.

Law is critical to formalizing exchange networks that operate effectively across time, and beyond reliance on local and personal relationships.[15] Law defines and frames the terms, consequences, and acceptable objects of exchange. It also categorizes different types of exchanges; such as by consent (contract), gift, and operation of law. Each of these categories of exchange has different rules. Likewise, law informs us about who may engage in certain types of exchanges. For example, minor children (under the age of eighteen years) often have no power or only limited power to engage in certain types of trades, and corporations have to meet certain tests to qualify as legal persons able to enforce contracts or conduct legal trades. In a similar way, law often regulates pricing and the content of exchange agreements, while also limiting legally permissible objects of exchange. For example, law permits trade in oil, diamonds, and automobiles but does not generally permit transactions for the sale of babies, body parts, or governmental elections.

[13] MALLOY, *supra* note 2; MALLOY, *supra* note 3.
[14] *See, e.g.*, DE SOTO HERNANDO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000); MALLOY, *supra* note 2, at 109.
[15] *See, e.g.*, DE SOTO, *supra* note 14; MALLOY, *supra* note 14.

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Law must also define consequences of trades. Some trades, if permitted and properly executed, are upheld by law, other types of trades such as those in violation of the appropriate exchange rules (exchanges on the black market, for instance), may be disallowed and the parties may be charged with crimes. Some exchanges may be legally classified as fraudulent or be unenforceable because of the way in which one party obtained the consensual compliance of the other party. The nature of what is exchanged, who participates in exchange, and the terms and consequences of exchange are all structured in reference to law and legal institutions. Even informal and illegal trades make reference to formal law by the simple fact that they hold the status of informal and illegal exchanges because they are outside of the formal framework.

In addition to identifying the permitted objects of exchange, law functions to describe, quantify, and represent the objects of trade. For example, the law may provide for private property ownership and for the sale and purchase of property within certain approved exchange networks. For this to work effectively, law must also describe and define the interest being exchanged. Thus, law has to provide a representation of the property that can be easily dealt with; this can be accomplished with a deed or other document of title. The deed is not the property but a representation of the property that is easier to deal with.[16] Extending this example, the deed can be used to represent a person's interest in a particular property and can be used to support credit, as in using it to secure a mortgage.[17] The mortgage is thus a representation of a right against the property by the creditor in the event of nonpayment, and simultaneously a representation of the right to receive a stream of cash flow under the terms of the mortgage repayment schedule. As a representation of the cash flow under the mortgage, this representation can be used to support the issuing of a security based on the expected value of the cash stream (e.g. mortgage backed securities).[18] All of this facilitates trade and enhances the opportunities for capturing and creating value from exchange.

[16] MALLOY, *supra* note 14; MALLOY, *supra* note 3.
[17] MALLOY, *supra* note 3.
[18] Malloy, *supra* note 1; ROBIN PAUL MALLOY & JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS: PROBLEMS, CASES AND MATERIALS 400 (4th ed. 2013).

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Law plays an important role in establishing transparency in the exchange network. Transparency is very important for purposes of reducing transactions costs, particularly in large and impersonal trading networks.[19] Transparency performs at least two very critical functions. It reduces information and search costs across the network, and it facilitates the process of authentication. The idea of information and search costs is well known. Authentication is probably less well understood.[20] Authentication is a key factor in exchange. It involves the ability to "prove out" the substance of a trade. This includes confirming the identity of the other parties, the validity of the documents, the accuracy and availability of credit, and the substance of the underlying object of the trade. For example, in a ponzi scheme (such as that undertaken by Bernie Madoff)[21], and as in the recent collapse of mortgage markets in the United States, there was little or no reality in the underlying economic substance of the trade to support the represented value of the exchange. In each case the underlying value was misrepresented such that the exchange at the level of a representational interaction (e.g. buying securities based on an underlying real estate transaction) was not an authentic reflection of the actual economic substance of the underlying situation.[22] People were engaging in trades that had no sound basis in economics because they either did not or could not properly authenticate the underlying arrangements upon which their trades were based. Law can provide mechanisms for making it possible to better authenticate the trades people are making. Transparency thus reduces risk and lowers the cost of exchange.

Law facilitates predictability in exchange. This also reduces risk and cost. By establishing uniform documents, and promoting the standardization and harmonization of the terms and conditions of trade, law enhances predictability while reducing bargaining costs. Law identifies the background legal framework and default rules that apply to certain exchanges and it establishes remedies for particular types of failures in performance among

[19] MALLOY, *supra* note 2; MALLOY, *supra* note 3.
[20] Malloy, *supra* note 1.
[21] *See* STEPHANIE YANG, *5 Years Ago Bernie Madoff Was Sentenced to 150 Years In Prison – Here's How His Scheme Worked*, BUSINESS INSIDER, (Jul. 1, 2014), http://www.businessinsider.com/how-bernie-madoffs-ponzi-scheme-worked-2014-7.
[22] Malloy, *supra* note 1.

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the parties. With shared knowledge of these criteria, strategic planning and structuring of a trade is greatly enhanced because the parties have a more predictable basis for assessing and managing risk.

Law, through legal institutions, must also establish stability. Even though markets are dynamic and fluid, the legal system must impose a sense of stability on the networks of exchange. Just as it is difficult and costly to work in an environment when one never knows if there will be electric power available, or if the computer system will be working, or if the banks will be open and operating from one day to the next, so too if the stability and longevity of the legally supported network is in doubt. Markets can be destabilized when governments simply confiscate private property, or unexpectedly deflate the currency. Likewise, if the very governance structure and functionality of a state and its legal system are in question, exchange will be much more difficult and costly.

Finally, we know from the success of some informal exchange networks that trust is an important element of a strong, extensive, and efficient trading network.[23] Trust can arise within kinship groups, in local communities where everyone knows each other, and in other specified circumstances. Trust, however, is really about reputation value. Close friends can trade with each other because they probably have good information about each other and they have a sense of the reputational value of the likely performance of the other party to the exchange (trust). Law can facilitate trust by backing up and enhancing that which already exists in the network of trades taking place. It can also make many more trades possible by providing a substitute reputational reference point. A party can effectively trade with another unfamiliar party over a very long distance and across a long time horizon if both parties place a high value on the rule of law and legal framework applicable to their exchange. In other words, a transparent, predictable, stable, and well defined legal system can provide the reputational trust value necessary to facilitate trade on a global scale.

Some aspects of a legal system may even become individually "branded". While there are a number of strong legal systems from which to

[23] *See* FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1996).

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choose when doing trades (choice of law rules), some aspects of a particular system may take on the status of a highly sought after brand product. For example, many exchanges involving admiralty and maritime law select England and English law to govern the trades.[24] Similarly, in the United States, many people select the law of the state of Delaware in choosing to incorporate their business.[25] Maritime law and England, and corporate law and Delaware; these are examples of particular legal institutions that have gained "brand status" for facilitating trust among distant and impersonal exchange partners trading in these particular legal categories.

While particular details of law and legal institutions are subject to many variables, it seems critical for law to perform the above five functions. In facilitating markets by providing a formal infrastructure of exchange, law reduces the cost of trading and it makes it possible to extend the networks of exchange beyond that of purely local and personal arrangements. This is important because value and opportunity are greatly enhanced as the scale of trading increases and the flow of information expands. Global market activity and economic growth on a large scale are only really manageable under a rule of law. Among other things this rule of law must address are: exchange, transparency, predictability, stability, and trust.

3. LAW & MARKETIZATION

By the term marketization I refer to the process of institutionalizing the meanings and values of exchange in networks designed to transform, capture, and create value from economically beneficial trades. This process is facilitated by law in several ways. Law provides infrastructure for: 1) fixing of assets (defining property / the process of assetization); 2) transferring of assets (most significantly for markets the voluntary transfer by contract); 3) authenticating and valuing assets; and 4) sustaining a dynamic process of value formation.

[24] *See generally* Joseph C. Smith, *Comparative Aspects of Commonwealth and U.S. Law Since the Collision Convention*, 57 TUL. L. REV. 1092 (1983).
[25] *See* FRANKLIN A. GEVURTZ, CORPORATION LAW 38-40 (2d ed. 2000).

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3.1 ASSETIZATION

Assetization is the process of fixing assets so that they are capable of easy exchange.[26] This includes fixing a writing for purposes of copyright, and fixing an invention for purposes of patent law, just as much as it includes fixing a legal description and an estate interest for the identification of real property.[27] Thus, while real property and intellectual property may have significantly different qualities, each is able to be properly understood as a property asset because each involves the fixing of an interest within the basic framework of a property law regime. The idea that certain interests might also be describable in non-property terms does little to diminish the reality that such an interest can also be a legally fixed property asset.[28] Not all property assets need to share exactly the same qualities or characteristics.

Fixing an asset involves identification, definition, and assignment of certain qualities, characteristics, and categories to it.[29] The underlying qualities include definitional matters such as fixing a legal description and the particular estate interest for real property. In terms of assigning characteristics to the asset, the typical characteristics of ownership include the right of use and possession, the right to exclude, the right to transfer, and the right to the profits attributed to the asset (including equity appreciation).[30] Finally, property related assets are categorized in such terms as real, personal, intangible, cultural, and intellectual property. This permits a more nuanced treatment of the asset. Fixing the asset also involves ascribing certain default rules, such as remedies, for example, to transactions in that asset.[31] Thus, by simply categorizing something as "real property" one can ascribe certain qualities, characteristics, and potential causes of action to the asset. This makes dealing with the asset more efficient by reducing

[26] *See, e.g.*, Robin Paul Malloy, *Real Estate Transactions and Entrepreneurship: Transforming Value Through Exchange*, 43 IND. L. REV. 1150 (2010); DE SOTO, *supra* note 14.
[27] Malloy, *supra* note 26.
[28] Malloy, *supra* note 26.
[29] Malloy, *supra* note 26.
[30] *See* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES (4th ed. 2006).
[31] *See* RICHARD H. THALER AND CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS (2008).

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various transaction costs associated with learning about its potential value. Property law and property lawyers focus primarily on the fixing of assets.[32]

Assetization is a more flexible term than property because the idea of property has different meanings in different communities, and the legal mechanisms for dealing with property vary significantly among and between common law and civil law jurisdictions. There are some interests such as trademark which function in many ways like property but are not categorized as property.[33] We can talk about "property-like" assets in a broader context of discussing assets that express property-like characteristics in certain circumstances and under certain conditions.

Once fixed, assets become commodified and they are capable of being more readily traded and exchanged in the marketplace.Part of assetization, therefore, involves the creation of standard and formal representations of the assets; such as developing paper representations of assets that are difficult to move or are abstract in nature; including deeds for real property that "represent" the interest held in an underlying piece of land, and mortgage documents that represent the right to cash flow from payments being made to purchase land on a credit basis (as well as contingent rights to the land itself if the borrower defaults), and a patent or copyright representing rights in a given invention or expression.

3.2 TRANSFERRING ASSETS

There are generally three methods of transferring property: by gift, operation of law, and by exchange for value. A gift is generally not a market event in the sense that it need not involve a quid pro quo exchange. A transfer by operation of law involves such things as a transfer of ownership under the rules applicable at death; the law by it**s** operation transfers the asset from one party to another. Exchanges for value can be consensual or forced. Consensual exchanges make up the biggest part of market transactions between willing buyers and sellers. Forced exchanges might include transfers by trespass with a remedy, or a takings with just compensation under the United States Constitution, or a taking under the property provisions of

[32] Malloy, *supra* note 26.
[33] Malloy, *supra* note 26.

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constitutional documents as they exist in many countries.[34] Law must provide rules, standards, and institutional infrastructure for each type of transfer, with consensual transfers being of most interest to the idea of market exchange. Thus, there are rules on contract formation, performance, and enforcement, as well as rules dealing with gifts and other types of transfers.

Two important concepts that facilitate incentivizing transfers are liquidity and leverage. In turn, both of these are enhanced by the fact that assets can be fixed and represented in documentary form. Liquidity involves the velocity of value capture, formation, and transformation through market exchange.[35] Assetization involves the fixing of assets, and liquidity relates to the efficiency of the exchange networks. Liquidity is enhanced by a system of uniform and predictable contract rules, standardization of forms and documentation, certainty of pricing, ease of spreading risk, and availability of good information. Liquidity is also enhanced by expanding the scale of the market to include more and more potential traders.

Related to liquidity is the idea of leverage. Leverage advances the quantity and volume of trade value by allowing current access to future value by way of debt and equity financing.[36] Leverage can facilitate liquidity by making more exchanges possible by expanding the amount of money/credit in circulation. Liquidity focuses on the velocity of exchange and leverage expands the pool of credit available for exchange.

Connectivity is also important to transactions and trade. An expanding market creates more and more opportunities for interactive exchange combinations.[37] As the exchange combinations expand, the system can become more diverse and organize more and more information, thereby enhancing the potential for value-adding creativity. Connectivity is akin to

[34] TOM ALLEN, THE RIGHT TO PROPERTY IN COMMONWEALTH CONSTITUTIONS (2000).
[35] *See* JEFFREY J. HAAS, CORPORATE FINANCE 25 (2014).
[36] *Id.* at 157.
[37] *See generally* OZ SHY, THE ECONOMICS OF NETWORK INDUSTRIES (2001); Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005); BRETT M. FRISCHMANN, INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES (2012); YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006); 1 MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY: THE INFORMATION AGE – ECONOMY, SOCIETY, AND CULTURE (2nd ed. 2010); KECHENG LIU, SEMIOTICS IN INFORMATION SYSTEMS ENGINEERING (2000).

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expanding the network architecture of exchange. As with a computer or cell phone network, expanding the legal infrastructure of exchange to enhance liquidity, leverage, capacity, accessibility, and strategic interaction can increase participation value for all users. The more interconnected (in the sense of degrees of connectivity) the system and the larger the scaling of exchange, the more strategic the network is to the value of market activity.

Law facilitates connectivity by developing uniform documents, standardizing and harmonizing rules and norms, and by establishing a set of default rules that lower the cost of bargaining. Law also functions to expand the market by creating a partial substitute and an enhancement to "trust". Law can provide a formal, transparent, predictable, and stable substitute for local and personal contacts. In this way, the trust functions of personal knowledge and experience can be substantially shifted from the individuals to the reputational value of the legal system governing exchange, and if the system is highly regarded it can function to reduce the risk associated with impersonal exchanges across place, space, and time. This reputational value may be associated with strong protection of rights to assets, well developed contract rights and remedies, objective (apolitical) decision making, and a variety of other factors.

3.3 AUTHENTICATION AND VALUATION OF ASSETS

In order for the marketization process to work effectively law must provide mechanisms to facilitate authentication and valuation.[38] Authenticating a transaction is similar to the idea of authenticating a password access to certain web pages on the internet, or authenticating a right to be in a given place by use of encrypted codes driven by finger prints and other devices. In the typical transactional setting it means authenticating the existence of the asset, its basic quality and quantity, and such things as the authority of the person transferring the goods. It also involves authenticating the "originality" and completeness of all documentation. Some ways of dealing with these issues require reference to information recorded on the public records; review of corporate documents with respect to corporate existence and authority of particular individuals to transfer assets; surveying with

[38] Malloy, *supra* note 1.

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respect to land, and other similar action such as credit checks. The basic idea is that markets with good tools for authentication have more liquidity, better capacity for leverage, and greatly reduced risk.

As to valuation, law must provide a means for translating value into easily measurable units, usually in terms of money for purposes of trade. In the marketization process, price, to a large extent, serves as an interpretation of value. Through pricing mechanisms, complex systems become easily comprehensible in terms of the relative exchange values between different positions in the system. Pricing performs the function of translating numerous competing preferences and values into a common language. This enhances the speed and ease of comparing relative tradeoffs across a large scale network. Law and legal institutions need to define the acceptable and enforceable methods of translating price into value and the degree to which particular translations will be backed up with legal sanctions and remedies.[39]

More particularly, value is a complex theoretical subject but we can begin to understand some basic elements of value by thinking in terms of three transactional categories of value: use value, exchange value, and network value. Simply and briefly stated: use value is the value derived from being able to use an asset (a house provides shelter); exchange value is the value, and potential value, that an asset represents as an access point to the market (the ability to borrow against one's home, or its value in resale); and, network value is the value of an asset in relationship to an integrated plan of asset exchanges (such as the value of housing in terms of being a source of employment for construction workers and lumber companies, and as an engine for furniture and appliance sales, and in terms of an input item, via mortgage activity, to securitized asset markets).

Value must, of course, also account for different underlying measures of fair market, hedonic, and contingent valuation across the above three mentioned categories. It also requires knowledge of present discounted value

[39] *See* EVE PREMINGER ET AL., TRUSTS AND ESTATES PRACTICE IN N.Y. § 9:249 (Volume D-E New York Practice Series)(explaining that the three most common methods used to determine the fair market value of real property are cost method, income capitalization and the comparable sales method); *see also* MALLOY, *supra* note 3 (discussing contingent and hedonic value); *see also* HAAS, *supra* note 35, at 53-5 (explaining how to calculate discounted present value).

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and the extent to which various legal rules account for different definitions of value.

The process of marketization can be positive when it expands the opportunities for trade. For instance, being in a small village with an informal market system provides much less value enhancing potential than being connected to a larger scale national or global market network. In the local market, people may know each other and have relatively good information about the people and parties to an exchange. Larger and more effective exchange networks bring in more and more people so that discrete bits and pieces of knowledge (embedded within individual and personal experiences) come into the market. It is the bringing together and mixing of fragmented information that allows for opportunities to discover new, better, and lower cost avenues of trade.

Marketization can have negative implications to the extent that it involves subordinating a variety of cultural and ethical values to a system in which price stands not just for an interpretation of value but is interpreted as value itself. Thus, rewriting the grounds upon which human relationships take place. It can be a move away from the idea of the sacred, of nature, of the spiritual, and the mystical, to the rational reduction of feelings and emotion into a cost and benefit calculus; a calculus in which all human values are expressed in terms of wealth calculations, whereby everything is given a price, and wealth maximization becomes the highest value. Law must function to "soften" the marketization process to ensure that it is understood as a means to achieving desirable human ends, and that it avoids the temptation to become a simplifying end in itself.

To be positive, marketization has to be based on the advancement of human values and the respect for community standards and norms. Marketization does not involve merely privileging the individual pursuit of self-interest. Market actors are social beings embedded within a culture. In order for the pursuit of self-interest to be positive it must be tempered with a regard for others, and this tempering and constraint is judged with reference

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to a third party; a party that Adam Smith identified as the *impartial spectator*.[40] The idea of an impartial spectator might well define the modern day understanding of the phrase, "the rule of law". The impartial spectator is symbolically akin to lady justice both representing impartiality and a sense of blindness to the qualities of the individuals involved in the exchange. Law functions as an impartial spectator to facilitate trades in ways that are transparent, predictable, stable, and within the reasonable expectations of the original intentions of the parties. At the transactions level, law frequently imposes rules on exchange that focus on the protection of third parties. This happens, for example, in terms of title registration and recording which protects not on the immediate parties to an exchange but third parties who might deal in the property at a future date.[41] Likewise, with rules related to protecting bona fide purchasers and holders in due course.[42] A third party, impartial spectator view is also apparent in such legal standards as those that evaluate action with reference to that of a reasonably prudent person, custom in trade, and course of dealing. Law functions to promote impartiality so as to encourage a perception of fairness in exchange. At the same time, law seeks to protect third parties so that future exchanges can be lower risk and thus, more highly valued. The value of the property I acquire today includes the potential for me to exchange it at a later date with a willing third party buyer. Therefore, sustainability of exchange depends on including legal protections for potential, yet possibly unidentifiable, future traders.

4. CONCLUSION

Law plays an important role in the process of marketization. Through the process of marketization law facilitates trades and exchanges in ways that validate unequal distributions of resources and that protect the owners of many assets from the desires of those who have fewer assets. At the same time, law creates a network infrastructure capable of peacefully organizing human activity across place, space, and time. This network infrastructure

[40] *See* ROBIN PAUL MALLOY, *supra* note 2; *see also* MALLOY, *supra* note 3; *see generally* ADAM SMITH AND LAW (Robin Paul Malloy eds., forthcoming Feb. 2017).
[41] MALLOY & SMITH, *supra* note 18, at 235 –94.
[42] *See, e.g.,* JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 151-52 (4th ed. 1995).

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facilitates opportunities for all people to improve their well-being. In so doing, law provides a foundation upon which a market society may rest, and where the language of the market becomes ubiquitous in talking about and describing activities and relationships that had not previously been thought of in market terms.

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The Messianic in the Law: Rule, Exception, Health and the Emancipatory Potential of the Legal Maxim Salus Populi Suprema Lex Esto

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TABLE OF CONTENTS: 1. Introduction; 2. Law's Ambiguity; 3. Nomos and Sherperd; 4. Fate and Exception; 5. Health and Justice; 6. A Brief History of the Maxim; 7. Reinterpreting the Maxim; 8. Conclusion.

ABSTRACT: The following article discusses the contradictory relationship between the concepts of the messianic and the law, and reconciles this in a critical interpretation of the legal maxim *salus populi suprema lex esto*. After discussing the concepts of the messianic, the law and the exception in the thought of Carl Schmitt, Walter Benjamin, Judith Butler, and others, this essay argues that there is a messianic presence in the law traceable from classical myth (particularly the myth of the Fates and Asclepius) to the figure of Jesus, the Trinity, and into contemporary constitutional structures. Appearing most clearly in the legal maxim *salus populi suprema lex esto*, a genealogy of the maxim is undertaken. Distinguishing the concept of health and the figure of the healer from the concept of necessity and the *nomos*, and demonstrating how these manifest in the maxim's opposing (mutative and conservative) meanings, the modern history of the maxim is explored. Following this, and a discussion of the interrelation of the concepts of law, justice, and health, this essay concludes with a critical reinterpretation of the maxim, one that uncovers positive rights to water, food, housing, health care, and other conditions of health.

KEYWORDS: *Constitutional Theory; Legal History; Law and Literature; Political Theology; Law and Health; Jurisprudence; The Nomos; Biopolitics.*

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1. INTRODUCTION

Although legal scholars and historians consider the claim that the U.S. Constitution was inspired by the figure of Jesus of Nazareth to be little more than myth,[1] the figure of Jesus (or, more precisely, the messianic) nevertheless maintains an objective, albeit unintended, presence in the structure of the U.S. Constitution, as well as in Western law as such.

Not only does an analysis of the relation between the U.S. Constitution and the messianic figure of Jesus provide an opportunity to explore the often contradictory concepts of justice and the law, on a practical level an analysis of the presence of the messianic (in the general emancipatory sense) within the law allows for the presentation of a theory of justice and rights responsive to the exigencies of the early 21st century, and the demands of an actually democratic form of politics.

Beyond Carl Schmitt's claim that all significant political concepts are "secularized theological concepts,"[2] or Hans Kelsen's critique of the notion that "the nature of modernity is Gnosticism,"[3] an examination of the relation between law and myth reveals that present day legal structures are not only theological, or mythical, in origin. An analysis of the structures of the *trias politica* (the tripartite separation of powers schema) and the Greek Fates, and their relation to the *nomos*, reveals the lingering presence of ancient models of order in present day constitutional structures; and though this examination may not uncover "the metaphysical core of all politics,"[4] it may at least uncover the theological, or mythic core of Western law and its exception.

By comparing these systems and their respective exceptions (the mythical figure of Asclepius as the exception to the Fates, and the maxim

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[1] *See* STEVEN K. GREEN, INVENTING A CHRISTIAN AMERICA: THE MYTH OF THE RELIGIOUS FOUNDING 3 (2015).

[2] CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY 36 (George Schwab ed. and trans., The U. of Chi. Press 2005) (1985).

[3] HANS KELSEN, SECULAR RELIGION, A POLEMIC AGAINST THE MISINTERPRETATION OF MODERN SOCIAL PHILOSOPHY, SCIENCE AND POLITICS AS "NEW RELIGIONS" 262 (Clemens Jabloner et al eds., 2012).

[4] HEINRICH MEIER, CARL SCHMITT AND LEO STRAUSS: THE HIDDEN DIALOGUE 77 (Harvey Lomax trans., 1995).

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salus populi suprema lex esto as the exception to the constitutions of the United States of America, France, Italy, India, Pakistan, and others whose tripartite separation of powers structure replicates that of the Fates), we can distinguish the maxim from the maxim of necessity (*necessitas vincit legem*), with which it is often conflated. Moreover, we can begin to distinguish a critical notion of justice (related to a critical conceptualization of health) from a model of order and public safety steeped in myth and religion, enabling us to articulate the practical and emancipatory potential of the Ciceronian maxim.

After discussing the ambiguity of the concept of law, and the symbolic manifestation of its antitheses (order and justice) in the figures of the shepherd and the healer (which comprise two aspects, or roles, of the figure of Jesus, as well), this essay will discuss the conceptual and symbolic relationship between law as order and necessity (the *nomos*), and law as justice and its historical and conceptual association with the concept of health. After distinguishing the concept of necessity (and its appearance in classical myth) from the concept of health, the figure of the healer, symbolic of noncoercive power, and its opposition to coercive power, the *nomos* (represented by the figure of the *nomeus*, the shepherd), will be examined.

Appearing as an exception to a political order, functioning as a secular messiah "associated with the destruction of the legal framework,"[5] the healer points to affinities between the concept of health and the concept of justice. After discussing the mythical and historical relationship between the concepts of justice and health, and presenting a novel interpretation of the iconography of the rod of Asclepius, the history of the maxim that the health of the people should be the supreme law is surveyed. Employed historically to support both conservative and emancipatory politics (the shepherd and the healer), the maxim is discussed in the context of modern constitutional history.

[5] Judith Butler, *Critique, Coercion, and Sacred Life in Walter Benjamin's "Critique of Violence," in* POLITICAL THEOLOGIES: PUBLIC RELIGIONS IN A POST-SECULAR WORLD 207 (Hent De Vries & Lawrence E. Sullivan eds., 2006).

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After examining its relation to the healer, and clarifying its emancipatory aspects, the maxim is distinguished from another maxim, associated with the *nomos*, which is concerned with bare survival, particularly the survival of the state and coercive power (as opposed to health, wellness, and human flourishing) – the maxim of necessity. Finally, in light of its history, and its relation to the messianic, *salus populi suprema lex esto*, the maxim that the health of the people should be the supreme law, is reinterpreted in the context of the requirements for social, economic, and environmental justice in the Anthropocene - the increasingly unhealthy and unjust world of the early 21st century.

2. LAW'S AMBIGUITY

Since at least the time of the Athenian statesman Solon, whose reforms in the 6th century B.C.E. are credited with setting the historical stage for the emergence of democracy in ancient Athens, the concept of law has contained a crucial ambiguity. While the law is rightfully recognized as an instrument of any existing order, legitimizing and maintaining a status quo, it is not by any means restricted to this conservative function. Any consideration of its origin raises its diametrical opposition. That is, mirroring its retentive, conservative aspect, is law's mutative, metamorphic one. In this respect law may even be likened to D.N.A.; it not only clones itself (maintaining the same), it mutates, and adjusts (a term which literally translates as 'toward the just').

This latter aspect of the law is what allowed Solon to not only nullify the law of Draco – abolishing people's debts, freeing debt-slaves, and constraining the power of Athens' ancient oligarchy[6] – but enabled a relatively egalitarian redistribution of the social world of the ancient Athenians to occur as well. And while it is important to note that this egalitarianism did not extend to women, slaves, and other excluded people, and so exposes the limitations of Athenian democracy, it does not diminish the emancipatory potential of this mutative aspect of the law.

[6] *See* PLUTARCH, THE RISE AND FALL OF ATHENS 60-61 (Ian Scott-Klivert trans., Penguin Classics 1960).

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Law as such is constituted by this very contradiction. Unstable, it is forever adjusting and responding to the flux of the living world. Beside the inanimate letter of the law that a given order enshrines and appeals to for support and legitimacy, is its living, vital aspect – justice, the unwritten, divine law that, among others, Martin Luther King, in his *Letter from a Birmingham Jail*, argued trumps the written law of human beings. And though King, in paraphrasing Augustine of Hippo that "an unjust law is no law at all,"[7] seems to resolve the contradiction between these two types of law, in the diametrically opposed symbolic appearance of shepherd and healer, the figure of Jesus expresses both of law's contrary, overlapping, modes – and maintains, leaving unresolved, the contradiction.

In his role as shepherd, central to the institution of the pastorate, with its emphasis on obedience, the figure of Jesus is not only a part of, but is also symbolic of, the structure of the Trinity – a structure reflected in the U.S. Constitution's separation of powers schema. Norm and *nomos*, the shepherd, or *nomeus*, represent the conservative modes of law: order, tradition, precedent, obedience. Simultaneously, as a healer, the figure of Jesus appears as the exception, or deactivation, of the law. Not only does Jesus, the healer, oppose the law with grace; the healer is immanent in the ancient legal maxim and metanorm *salus populi suprema lex esto*. As the following will demonstrate, the contradiction of this double (antithetical) presence (of shepherd and healer) is entirely reconcilable.

3. NOMOS AND SHEPHERD

"All significant concepts of the modern theory of the state are secularized theological concepts," argued Carl Schmitt in his *Political Theology*,[8] advancing the claim put forth by, among others, the philosophical giant Leibniz back in the 17th century that there is a "systematic relationship between jurisprudence and theology."[9] The theological, however, beyond the merely conceptual and abstract, has determined the concrete structures of

[7] MARTIN LUTHER KING JR., *Letter from a Birmingham Jail*, *in* WHY WE CAN'T WAIT (1964).
[8] SCHMITT, *supra* note 2, at 5.
[9] *Id.* at 37.

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legal systems and, consequently, the concrete world as well. In addition to works of scholarship illuminating the degree to which secular legal concepts and religious traditions overlap and interact,[10] in his *The Kingdom and the Glory* contemporary philosopher and classical scholar Giorgio Agamben discusses how the medieval administrative structures and institutions of the Catholic Church mirror contemporary constitutional and administrative legal structures. In particular, Agamben points out the degree to which the structure of the Church's Trinity corresponds to that other tripartite schema of order, the separation of powers schema (the *trias politica*) handed down from Montesquieu.[11]

Indeed, it is not terribly difficult to see how the father – god, the creator – has an analogue in the creative branch of the government, the legislature. Nor is it difficult to recognize how the son, often referred to as the one who judges, can be seen to correspond to the institution of the judiciary. Lastly, the Holy Spirit – defined by the Fourth Lateral Council of 1215 as that "who proceeds" – corresponds to the executive branch. Insofar as the verb 'to execute' means to carry out fully, the executive branch of government conforms to this notion of one "who proceeds" quite closely. Because the figure of Jesus is not merely one aspect of the Trinity, however, but is symbolically inseparable from the Trinity (the basis for the institution of the pastorate) one may arguably see an echo of Jesus (however metonymically) in the U.S. Constitution's separation of powers structure – the *trias politica* – as a whole. This aspect of the law, the conservative aspect of order and norms, the *nomos*, may be regarded as one aspect of Jesus in the law, the aspect of the shepherd.

Hardly a novel coupling, the figure of the shepherd and the conservative aspect of the law have a long and deep association. As such, it is hardly surprising that the Greek word *nomos* (the conservative law of social convention, tradition, norms, and culture generally, as opposed to nature[12]) is

[10] *See* Peter Goodrich, *The Political Theology of Private Law*, 11 INT'L J. CONST. L. 146 (2013) in which Goodrich discusses the relationship between marriage and contract law.
[11] *See* GIORGIO AGAMBEN, THE KINGDOM AND THE GLORY 141-43 (2011).
[12] Dermot Moran, *The Secret Folds of Nature*, *in* REIMAGINIG NATURE: ENVIRONMENTAL HUMANITIES AND ECOSEMIOTICS 111 (Alfred Kentigern Siewers ed., 2014).

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derived from the Greek for pasturing (*nemein*)[13] and etymologically related to the Greek word for shepherd, *nomeus*. Indeed, the conservative, traditional aspect of the law, the social order that demands obedience, has been associated with shepherds for over four millennia. From the ancient Mesopotamian *Epic of Gilgamesh*, which apprises us that "the king should be a shepherd to his people,"[14] to the Sumerian myth of the shepherd-god Dumuzi (consort of the fertility goddess Inanna/Ishtar), to countless images of Egyptian Pharaohs wielding a shepherd's crook to the shepherd turned lawgiver Moses, to David, the shepherd turned King; from the Old Testament (Genesis, Isaiah, etc.), to the New Testament, and from Plato[15] to the medieval poem Beowulf,[16] the *nomos* (the law as custom, tradition, and authority) has been intertwined with the *nomeus*, the shepherd (associated not merely with the King or a god, but with law, authority, and power in general) since the earliest days of civilization.

It is this, the symbolic shepherd's demand for obedience and control, that results in a naturalized though ultimately arbitrary social order, one that the sociologist Peter Berger referred to as the *nomos* – that construct in which customs and tradition merge "with what are considered to be the fundamental meanings of the universe."[17] Likewise, the concept of the *nomos* is central to Carl Schmitt's later writings. Expressing a comprehensive "unity of space and law,"[18] a *nomos* for Schmitt is an entire social world, a concrete and cultural ideology that proceeds from an initial conquest of land or territory.[19] And, considering how politics and war are virtually indistinct in Schmitt's thought, it is hardly incidental that the concrete and cultural order, that is the *nomos,* proceeds from this originary violence. Nor is it irrelevant that, just as the shepherd demands obedience, Schmitt's "political theology places everything under the commandment to be obedient."[20] Just as

[13] *See, e.g.*, Benno Gerhard Teschke, *Fatal Attraction: A Critique of Carl Schmitt's International Political and Legal Theory*, 3 INT'L THEORY 179, 193 (2011).
[14] EPIC OF GILGAMESH 4 (Andrew George trans., Penguin Classics 2003).
[15] *See* PLATO, THE STATESMAN 10, 29 (Julia Annas & Robin Waterfield eds., Robin Waterfield trans., Cambridge U. Press 2000) in which the perfect statesman is equated with a shepherd.
[16] BEOWULF 200 (Seamus Heaney trans.,W. W. Norton & Company 2000).
[17] PETER L. BERGER, THE SACRED CANOPY 24-25 (Anchor Books Editions 1990)(1967).
[18] Teschke, *supra* note 13, at 193.
[19] *Id.*
[20] MEIER, SCHMITT & STRAUSS, *supra* note 4, at 80.

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Schmitt's political theology is rooted in obedience and faith,[21] as opposed to critical thought, subtending Schmitt's *nomos*, with its emphasis on obedience and order, is that blending and institutionalization of the shepherd and the law that we find in the institution of the pastorate of the Christian Church.

In his studies of governmentality and biopolitics, Michel Foucault devotes a lengthy examination to this institution of the pastorate and the specific form of power it wields.[22] Referring to the type of power associated with the shepherd (the power a shepherd exerts over a flock, which includes panoptic surveillance along with the determination of all aspects of the concrete context, and the obedience demanded in return) as pastoral power, Foucault describes the pastorate as being comprised of certain characteristics, foremost among which is that of "pure obedience."[23]

While the story is most likely apocryphal, the "perfect obedience" and "complete servitude" demanded by this type of political power is nicely illustrated by an anecdote related by Ernst Kantorowicz in his *The King's Two Bodies* in which Attila the Hun arrives at the gates of a Christian town and demands entrance. Asked by the bishop to identify himself, Attila the Hun reputedly announced that he was the scourge of god. Ever obedient to power, the bishop admitted the Hun, and was promptly eviscerated,[24] cut down by the sword of Attila (which, according to legend, was presented to him by a shepherd).

All of which is to say, as Foucault argues, the pastorate is a form of power. And though, with its demands for submission, it is a predominately coercive type of power (heteronomy, *potestas*),[25] practical concerns dictate that this power have some degree, however slight, of flexibility. For an example of an absolute, essential form of power we must turn our attention away from concrete, historically manifesting instances of power to the abstract realm of myth where coercive power's essence – total determination,

[21] *Id.*,at 68.
[22] *See* MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION 170 (Arnold I. Davidson ed., Graham Burchell trans., 2004).
[23] *Id.* at 178.
[24] *See* ERNST KANTOROWICZ, THE KING'S TWO BODIES 54-55 (7th paperback printing, 1997.
[25] FOUCAULT, *supra* note 22, at 150-1.

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the tyrannical demand for complete submission and obedience – finds eidetic expression in the Fates, or Moirai, of Greek myth.

Not only do The Fates illustrate the *nomos* (as a totality symbolic of a unity of space and law), by following the law of the shepherd to its purest representation we are also pointed to the diametrical opposition, the exception, to the shepherd, and the second form in which Jesus appears in Law – the healer, who not only contests but prevails over the "Hellenic or 'mythic violence'"[26] of the Fates.

4. FATE AND EXCEPTION

While the *trias politica*, the separation of powers schema of the U.S. Constitution, among others, and the Trinity correspond very closely, today's constitutional arrangement can be traced to an entity that predates the Trinity – not to mention the mixed constitutions described by Polybius and Aristotle – by centuries. Moreover, not only do the Greek *Moirai*, or Fates, substantially predate the Trinity, its tripartite structure matches the U.S. Constitution's separation of power schema exactly.

Like the single power (*potestas*) that, according to the *tria politicas* principle, is separated into legislative, judicial and executive branches – and the Trinity, which is one thing with three distinct aspects – the Fates are one force comprised of three aspects. The three daughters of *Ananke* are *Klotho* (the spinner), *Lachesis* (the measurer), and *Atropos* (the cutter).

Spinning the thread of life, *Klotho* corresponds to the creator of laws, the legislature. *Lachesis*, whose function is to measure the thread of life, is typically depicted with a scroll in her hand. She corresponds to the judiciary. And it is interesting to note that, aside from the fact that measuring implies a rule, or law, as a noun a measure is itself a rule or law. Thirdly, there is *Atropos*. Known as the cutter, Atropos' name translates as "the inflexible," or "the inevitable." The cutter of the thread of life, *Atropos*' analogue is the executive branch. And it is telling that, in describing his executive function,

[26] Butler, *supra* note 5, at 203.

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former president George W. Bush famously characterized himself as "the decider" (a designation that, etymologically, means to cut – unwittingly drawing the executive and the cutter even closer).

While the Fates manifest the *nomos* (in the general sense of an ideological or mythical order, as well as in the sense it has for Carl Schmitt, for whom "the political remains essentially fate"[27]), it is worth pointing out that, according to Hesiod at least,[28] the three sisters are the offspring of *Themis* (herself the personification of law, or the *nomos*). According to other authorities, foremost among whom is Plato, the mother of the three Fates is not the titan *Themis*, but an even more elemental entity: one of the Protogenoi, or primordial deities, *Ananke*.[29]

Known to the Romans as *Necessitas*, *Ananke*, it should be noted, was the personification of Necessity. And, according to the maxim believed to have been first formulated in the *Decretum* of Gratian in the 12th century,[30] it is equally pertinent to note that Necessity is said to both justify law and create law. Generating the Fates, Ananke/Necessity is hardly distinct, then, from the *nomos*, the law of the shepherd – illustrating the fact that, as Giorgio Agamben reminds us, throughout history jurists have maintained that the principle of necessity lies at the very root of law.[31] That is, politically, mythologically, and mythically, Necessity subtends legitimizations of political and legal orders. As such, it seems to reflect more than mere coincidence (and, as "mythos" arguably "reveals, discloses, and lets be seen"[32] the otherwise hidden historical fact) that *Klotho*, *Lachesis* and *Atropos* mirror Montesquieu's, and the U.S. Constitution's, tripartite separation of powers schema (i.e., the structure of the *nomos*).

To be sure, whether they are said to be the issue of Themis or Ananke, both sources of the Fates are associated with law and the *nomos*. Those

[27] *See* MEIER, SCHMITT & STRAUSS, *supra* note 4, at 70. *See also id.* at 68-9, where Meier discusses how Schmitt's thought is rooted in faith, a faith which leads to obligation, and that "Schmitt cannot understand the obligatoriness of the political in any other way than as fate."
[28] *See* HESIOD, THEOGONY 41 (Richard S. Caldwell trans., 1987).
[29] *See* PLATO, THE REPUBLIC 340 (Giovanni R. F. Ferrari ed., Cambridge Univ. Press 2000).
[30] *See* DIANE A. DESIERTO, NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGNTY IN MODERN TREATY INTERPRETATION 64, n.4, (2012)., Quia enim necessitas non habet legem, set ipsa sibi facit legem (necessity knows no law but makes law).
[31] *See* GIORGIO AGAMBEN, STATE OF EXCEPTION 25 (2005).
[32] MARTIN HEIDEGGER, PARMENIDES 60 (Indiana U. Press 1992).

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traditions that regard the Moirai as extensions of Ananke, however, may bear a closer relationship to the *nomos*, the law of the shepherd. For, among its other attributes, Necessity is that which cannot be avoided – its essence is that which must be obeyed (that which, like the shepherd, demands total subordination). Indeed, for Jean Bodin, the originator of the modern notion of sovereignty, it is precisely this, "urgent necessity," that releases a sovereign from the duty to assure and protect "the interests of the people."[33]

Furthermore, *Ananke* is typically associated with *Bia*, the goddess of force, compulsion and violence[34] – the "sine qua non" of the *nomos*. And, as Leo Strauss points out, not only Parmenides and Thucydides, but Greek thought generally equated necessity with what was compulsory; and the "alternative to compulsion was right,"[35] the unwritten law. Atropos, the unyielding, and its negation, illustrates the conceptual contradistinction inhering between law and justice. Substantiating this, Bia is counterposited in Greek myth to *Dike* (justice),[36] corroborating Walter Benjamin's observation in his *Critique of Violence* that "violence crowned by fate is the origin of the law."[37] And yet, for all of the insuperable, unyielding power of the Fates, like Law, the rule of the Fates has a (messianic) exception, "a distinct alternative to mythic power."[38]

Although none can defy the Fates, and even Zeus, "who is more powerful than all of the gods combined,"[39] can do nothing to alter the decisions of the Fates,[40] the son of a god, a healer, who is referred to again and again as "savior,"[41] able to restore sight to the blind and raise the dead – and who is ultimately killed and raised to the heavens as a god for his transgressions against the *nomos* – is able to act beyond the Fates' powers.

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[33] SCHMITT, *supra* note 2, at 8.
[34] *See, e.g.*, GIORGIO AGAMBEN, HOMO SACER 31 (1998).
[35] LEO STRAUSS, *Thucydides' Peloponnesian War, in* THE CITY AND MAN 174-77 (U. of Chi. Press 1978).
[36] *Id.*
[37] WALTER BENJAMIN, *Critique of Violence*, *in* REFLECTIONS 286 (1978).
[38] Butler, *supra* note 5, at 207.
[39] *See* LISA RAPHALS, *Fatalism, Fate, and Stratagem in China and Greece*, *in* EARLY CHINA/ANCIENT GREECE: THINKING THROUGH COMPARISONS 224 (Steven Shankman, et al eds., 2002). *See also* AESCHYLUS, *Prometheus Bound, in* THE COMPLETE GREEK TRAGEDIES: AESCHYLUS I 194 (Richard Lattimore et al. eds., David Grene trans. 2013) in which Prometheus says of Zeus that "[Yes, for] he, too, cannot escape what is fated."
[40] *See* PLATO, *supra* note 29, at 218.
[41] *See, e.g.*, JAMES H. CHARLESWORTH, THE GOOD AND EVIL SERPENT 164 (2010).

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The exception to the ancient *nomos*, the only figure able to act outside the rule of the Fates, is the son of Apollo, Asclepius.

Related to his function as exception, it is noteworthy that Asclepius' name translates as "cut open." Though this name derives from the conditions surrounding his birth (cut from the womb of his mother, Koronis), it also bears an inverted relation to the function of Atropos (i.e., cutting the causal chain). In cutting, *Atropos* decides – executes, and, according to Carl Schmitt's definition of the sovereign as "he who decides on the exception,"[42] appears to manifest sovereignty through a decision. Contesting this sovereign decision, Asclepius provides a countervailing sovereignty – or nullification, or deactivation, of sovereignty. For through his healing practice Asclepius demonstrates that he is not bound by the rule of the Fates. By raising the son of Theseus, Hippolytus, from the dead, for instance, Asclepius operates outside the *nomos* – beyond not only the arbitrary rule of traditional authority and custom, but outside of Necessity/*Ananke* itself.

Not merely able to operate outside the *nomos*, Asclepius is able to rewrite (by raising the dead, for instance, and retroactively changing or annulling Fate) what the Fates had previously decided. Illustrating Kelsen's critique of decisionistic notions of sovereignty as failing to account for the power to make and unmake law,[43] Asclepius' acts demonstrate not only that he is outside, or beyond, the power of the Fates, but that they are, as it turns out, subsumed by his. In the battle of their respective sovereignties (or, in the battle between sovereignty and its deactivation), Asclepius prevails, though not by overpowering the Fates. Asclepius' power is not quantitatively, but qualitatively different from that of the Fates. Unlike the coercive power of the shepherd (the *potestas* – force and violence) that demands obedience, Asclepius manifests the power of the healer – a generative power analogous to Spinoza's *potentia.* Rather than the transcendent, smothering power of the Fates, the immanent power of Asclepius is an enabling power. Enabling autonomy, as opposed to heteronomy, the healer may be said to possess the power to deactivate force – a type of power not unlike what anthropologist Pierre Clastres described as noncoercive political power among the

[42] SCHMITT, *supra* note 2, at 5.
[43] *See* KELSEN, *supra* note 3, at 18.

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Tupinamba, and the Jivaro,[44] or what in Judith Butler's reading of Walter Benjamin's *Critique of Violence* is associated with the notion of noncoercive "divine violence."[45] Indeed, although Asclepius' and *Atropos*' respective decisions may not illustrate the distinction between Carl Schmitt's "genuine decision" and its "degenerate" counterpart[46] (and the states of emergency extending from them), the decisions of Atropos and Asclepius may be illustrative of the distinction between the state of emergency and the "real state of emergency"[47] Benjamin refers to in his *Theses on the Philosophy of History*.

Along with the incarnation of force, *Bia*, the Fates are subsumed by and subordinated to the healer who manifests law as *recht*, as opposed to *gesetz* – not force, but a type of righteousness. And it is in this context all the more relevant that the word salvation (the essence of the figure of Jesus, which is also the purview of the healer, the "savior") is derived from the Greek verb 'to heal.' For not only are the figures of Jesus and Asclepius both healers,[48] the two share a similar messianic function; not merely the secular or political messianism of Marxism,[49] or of a messianic class,[50] but the broader secular notion of the messianic "associated with the destruction of the legal framework"[51] and the delivery of people from the tyranny of the *nomos*. Or, as Jacques Derrida put it, a "demand for salvation and for justice beyond law."[52]

Acting outside of the *nomos*, and exposing what was thought to be necessary as arbitrary, the command that demands faith and pure obedience (the purview of the Fates, *nomos*, *potestas,* and heteronomy) is revealed by Asclepius to be not only illusory, but tyrannical. As such, we see in the figure of the healer generally not only a manifestation of noncoercive, emancipatory

[44] PIERRE CLASTRES, SOCIETY AGAINST THE STATE 30 (Robert Hurley & Abe Stein trans., Zone Books Rev. ed., 1989).
[45] *See* Butler, *supra* note 5, at 207.
[46] *See* SCHMITT, *supra* note 2, at 3.
[47] Walter Benjamin, *Theses on the Philosophy of History*, *in* ILLUMINATIONS: ESSAYS AND REFLECTIONS 257 (Hannah Arendt ed., Harry Zohn trans., 1968).
[48] *See* CHARLESWORTH, *supra* note 41, at 371. Asclepius is "virtually a mirror of the story of Jesus."
[49] *See* KELSEN, *supra* note 3, at 44.
[50] *Id*. at 8.
[51] *See* Butler, *supra* note 5, at 207.
[52] *See* JACQUES DERRIDA ET AL., SPECTRES OF MARX: THE STATE OF DEBT, THE WORK OF MOURNING AND THE NEW INTERNATIONAL 210 (Peggy Kamuf trans., Routledge 2006) (1993).

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power, autonomy, and *potentia*, but justice (the overcoming of an arbitrary determination) prevailing over, or overruling, law.

This contrast between the shepherd and the healer finds further expression in the symbolism of the symbolism. The shepherd, the *nomeus*, carries the staff – the scepter, the rigid, unyielding letter of the law. And it is noteworthy that the staff, insofar as it is a phallus (associated with the symbolic order generally, according to Lacan, and with the law in particular[53]), is related to law in this respect as well. As the legal scholar Joseph Indaimo observes: "it is the masculine phallus which is the symbolic expression for the power and logic of traditional politico-legal institutions."[54]

The healer Asclepius, meanwhile, is not represented by the staff alone but by a staff constrained by a serpent. Symbolic of Asclepius, and his daughter, Hygieia, aka Salus (as well as, according to the Ophidians – early Gnostics who worshiped Jesus as a serpent[55] – the figure of Jesus himself), the serpent, as opposed to the staff, is flexible, rather than rigid, living, rather than dead. Symbolic of wisdom, the serpent may be said to represent not simply the generative, healing power (known to classical thought as the *vis medicatrix naturae*, associated with the life force itself) but the mutative function of the law of the healer.[56]

Among many others, the story of the physician Eustochius of Alexandria illustrates this symbolism. A follower of the neo-Platonic philosopher Plotinus, Eustochius reported that, as the philosopher lay dying, a serpent mysteriously appeared in his chamber. And just as the serpent disappeared into a hole in the wall, into another realm, Plotinus died.[57] Though most likely apocryphal, this tale nevertheless reflects the symbolic

[53] ALEXANDRA HOWSON, EMBODYING GENDER 103 (2005).
[54]. JOSEPH A. INDAIMO, THE SELF, ETHICS AND HUMAN RIGHTS, LACAN, LEVINAS, AND ALTERITY 88 (2015). Incidentally, the term phallus is related to the Greek *phalle* – which means whale, and is closely associated in the cultural imaginary with the leviathan – which for Hobbes is symbolic of the *potestas*.
[55] *See* CHARLESWORTH, *supra* note 41, at 36.
[56] It should be noted that the mutative and retentive aspects of the law of the healer and the mutative and retentive aspects of the law of the shepherd are distinct. Whereas the former tends to radiate, or distribute its surplus, the latter strives toward concentration. Concentrations of power are but one manifestation of this tendency.
[57] *See* M.J. Edwards, *Birth, Death, and Divinity in Porphyry's Life of Plotinus* in GREEK BIOGRAPHY AND PANEGYRIC IN LATE ANTIQUITY 59 (Tomas Hagg & Philip Rousseau eds., 2000).

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value of the serpent in classical thought. Not the serpent of Adam and Eve[58], but the serpent who, in eating its tail (like the ouroboros), and in sloughing off its skin, represents renewal, regeneration, noncoercive power and, by extension, autonomy.

Relatedly, the lawgiver Moses, who had worked as a shepherd for years in Midian, carried a rod that was instrumental to the realization of his powers. But while his staff was generally stiff and unyielding, in performing the role of an emancipator of the enslaved Hebrews, his rod was transformed into a flexible, living serpent.

In light of this symbolism, rather than simply symbolic of deliverance from death,[59] we may recognize the serpent-entwined rod of Asclepius as symbolic of the healer's noncoercive power prevailing over, and constraining, the coercive, unbending power, and demand for obedience, of the law of the shepherd. Relatedly, we may also view the fasces – the bundle of rods, or hypertrophied rod, that is symbolic of coercive power and authority, i.e., mythic power – as the symbolic antithesis of the rod of Asclepius.

None of this, however, should be construed to support the argument that Hans Kelsen critiqued in his *Secular Religion* – i.e., that modernity is characterized by a hidden gnostic order.[60] Rather, the structural resemblances between the *trias politica* and the Fates point to the presence of mythical structures embedded not merely in subjective beliefs but, to some degree, in objective structures and traditions – structures in conflict with properly modern structures that, as Kelsen notes, go "hand in hand with emancipation from religion."[61] In light of this it is no small irony that in the 1920s, decades before writing his *Secular Religion*, Kelsen helped draft the Austrian constitution, which incorporated the *trias politica*, this theological echo of the

[58] Not only do Adam and Eve not know the difference between good and evil in the story of Genesis, Yahweh wants to keep them ignorant of this knowledge. That is, he wants to prevent them from thinking for themselves, from developing autonomy. In leading them to negate a command that has no other reason than obedience – i.e., the shepherd – the serpent contests this *nomos*. And, though arguably not terribly successfully, the serpent contributes in this respect to the development of autonomy over heteronomy, too.
[59] *See* CHARLESWORTH, *supra* note 41, at 164.
[60] *See* KELSEN, *supra* note 3, at 262.
[61] *Id*. at 269.

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Trinity and the Fates.[62] Yet, this ancient mythical schema does not only perpetuate ancient superstitions and traditions. In both the myth of Asclepius and, in a more ambiguous way, in its analogue, the maxim *salus populi suprema lex esto*, the superstitious order's negation is embedded as well. Contrary to the determinism of the Fates, Asclepius, and the caring healer in general, contests traditional orders, arguably symbolizing an unconscious recognition that, among others, human health and flourishing are contrary to traditional authority, order and force.

5. HEALTH AND JUSTICE

But it is not simply the heteronomy of the Fates that is trumped by the emancipatory, noncoercive power of the healer. The law of custom (common sense, ideology, traditional authority – the *nomos*), and of the written law in particular, with its reliance on precedent (the principle of stare decisis), is trumped by the law as justice; not justice in the narrow, punitive sense of retribution – of the equilibrium of *jus talionis*, in which the weight of an eye is balanced out by the weight of another eye – but the equilibrium of egalitarian social conditions necessary for the actualization of a healthy and just society.

In addition to its relation to the concept of value, [63] health has a deep conceptual relationship with the notion of justice. Reflective of this kinship, everyday speech is replete with examples of the interchangeability of the language of justice and the language of health. When speaking of being wronged, for instance, one frequently expresses this in nominally medical language, remarking that one "suffers a harm," or "is injured." While the language of justice appears to be employing a type of medical metaphor, however, the term injury literally translates as 'not,' or 'the opposite of' right, law, or justice. In other words, the language of justice does not employ

[62] *See* David Ingram, *A Morally Enlightened Positivism? Kelsen and Habermas on the Democratic Roots of Validity in Municipal and International Law, in* HANS KELSEN IN AMERICA – SELECTIVE AFFINITIES AND THE MYSTERIES OF ACADEMIC INFLUENCE 202 (D.A. Jeremy Telman ed., 2016).
[63] Beyond that reification of value, money, the word value itself derives from the Latin word for health, valetudo.

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a medical metaphor in this case, so much as medical language appeals to notions of justice in the articulation of its most basic concepts. Similarly, notions of justice are often borrowed from the terminology of health. For example, the remedy for many types of legal wrongs, or injuries, is 'to be made whole' – and whole, like the word hale, derives from the word health.[64]

These metaphorical and symbolic associations reflect more than a superficial relationship. In many respects the material and social conditions necessary for the development of a genuine, general notion of health (not simply the health of individuals, but the health of communities and their general environment) may be said to be homologous with conditions of actual social justice. Hardly an outlier, when it comes to expressing the conceptual and symbolic relationship between health and justice, the myth of Asclepius is one of many illustrating the overlap, or greater unity, of the two concepts.

In Hesiod's *Works and Days* (c. 700 B.C.E.), for example, a work whose authority, along with his *Theogony*, is rivaled only by the epics of Homer, we are told that in the mythical Golden Age, people were not only free from the need to perform physical labor, human beings were free from disease altogether. It was only after Prometheus stole fire and granted this technology to humankind, Hesiod apprises us, that people had to work, and grew sick, and died. "Before this time men lived upon the earth/ Apart from sorrow and painful work/ Free from disease, which brings the death-Gods in."[65] Disease had been released from the jar of Pandora as a punishment.

Frequently depicted in ancient myth, plagues and epidemics were explained as divine retribution for transgressions of the law or as consequences stemming from insults to the gods. At the opening of Homer's *Iliad*, "the basic text of European civilization,"[66] the leader of the

[64] *See* OXFORD ENGLISH DICTIONARY, The root of health, the Old English hEl, related to Hale, means "Wholeness, a being whole, sound or well."
[65] *See* Hesiod, *Works and Days* in HESIOD AND THEOGNIS 61-62 (Dorothea Wender trans., 1976). Hesiod recounts that had Prometheus not provoked Zeus "you [people] would easily do work enough in a day to supply you for a full year even without working" 44-47, an amount of daily work only moderately less than what anthropologist MARSHALL SAHLINS argues in THE ORIGINAL AFFLUENT SOCIETY, and STONE AGE ECONOMICS, was the typical workload of early human beings; *see also* MARK NATHAN COHEN, HEALTH AND THE RISE OF CIVILIZATION 32-53 (1989), in which the author describes how diseases, from the common cold and the flu to tuberculosis, were introduced to humankind through animal domestication, i.e. by civilization.
[66] *See* MAX HORKHEIMER & THEODOR ADORNO, DIALECTIC OF ENLIGHTENMENT 37 (Gunzelin Schmid Noerr ed., Edmund Jephcott trans., Stanford U. Press 2002) (1987).

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assembled Greek forces, Agamemnon, insults Apollo's priest Chryses. As a punishment for this insult, Apollo ravages the Greek army with plague.[67] And who can forget how, in the story of *Oedipus Rex*, the city of Thebes is afflicted by a "grievous plague" as a consequence of Oedipus' unintentional patricide and matrophilia. Of course, the nexus of justice and health is not at all limited to the realm of myth.

Contemporaries of Sophocles, the writers of the Hippocratic Corpus, rejected the superstitious notion that disease was of divine origin. In spite of their rejection, however, they continued to assert that a strong relationship existed between justice and health. In following the Hippocratic Oath (late 5th century B.C.E.), for instance, physicians not only submitted to the well-known oath to "do no harm" to their patients, physicians swore to keep their patients "from harm and injustice" as well.[68]

Among other places, the source of this plexus of justice and health lies in the Ancient Greek regard for proportionality and harmony. As Ivan Illich writes, "For Greek philosophers 'healthy' was a concept for harmonious mingling, balanced order. A rational interplay of the basic elements. He was healthy who integrated himself into the harmony of the totality of his world according to the time and place he had come into the world."[69]

Healthy means balanced, and proportional. And just as health was regarded as an extension of this proportionality, harmony, and balance, so too was justice. As Ernst Bloch apprises us, since Pythagoras "justice has been thought without hesitation as proportionality par excellence."[70]

A contemporary of Pythagoras, one of the most eminent medical theorists of antiquity, provides us with further evidence of the homology of justice and health. In his *Concerning Nature* Alcmaeon of Croton not only defined health "as the proportionate blending of the qualities."[71] He also maintained "that the equality (*isonomia*) of the powers (wet, dry, cold, hot,

[67] *See* HOMER, THE ILIAD, Book I (Collins ed., Robert Fitzgerald trans., 1986).
[68] *See generally* LUDWIG EDELSTEIN, ANCIENT MEDICINE: SELECTED PAPERS OF LUDWIG EDELSTEIN 6 (Owsei Temkin et Clarice Lilian Temkin eds., Clarice Lilian Temkin trans., 1987).
[69] *See* Ivan Illich, *Brave New Biocracy: Health Care from Womb to Tomb,* NEW PERSP. Q., Winter 1994, at 4-12.
[70] ERNST BLOCH, NATURAL LAW AND HUMAN DIGNITY 40 (Dennis J. Schmidt trans., 1987).
[71] EARLY GREEK PHILOSOPHY 90 (Jonathan Barnes ed., 1987).

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bitter, sweet, etc.) maintains health but that monarchy [a harmful concentration] among them produces disease."[72] Beyond his definition of health, by equating disease with the explicitly political notion of monarchy, Alcmaeon drew the concepts of justice and health even closer.

This connection was developed further when, about a century later (c. 380 B.C.E.), in outlining what he reasoned was the perfect social arrangement, Plato wrote in his *Republic* that, among its other qualities, the "true city" is the "healthy version."[73] In contrast, the other version, the luxurious one, is "the swollen and inflamed city."[74]

Leading up to this comparison, Socrates informs us that in "looking at the origin of a luxurious city [the unhealthy one] … we may perhaps see the point where justice and injustice come into existence in cities,"[75] drawing a direct connection between justice and health in the art of government.

As the philosopher Hans-Georg Gadamer put it, "in Plato's great utopia of the *Republic* the true part of the citizen in the ideal state is described in terms of health, as a harmony in which everything is in accord, in which even the fateful problem of governing and being governed is resolved through reciprocal agreement and mutual interaction."[76]

And though the political philosopher Leo Strauss, in his course on Plato's *Gorgias*, noted that "justice is restoration of health of the soul,"[77] the conceptual relationship between justice and health must be construed to include the health of the body as well. For even if the soul were not regarded as a property of the body, physical health was an aspect of the good, the

[72] *See* IAIN M. LONIE, THE HIPPOCRATIC TREATISES "ON GENERATION" "ON THE NATURE OF THE CHILD" "DISEASES IV" 330 (Gerhard Baader et al eds., 1981).
[73] *See* PLATO, *supra* note 29, at 55; the city which, incidentally, is referred to as the "city of pigs" owing to the vegetarian dishes typically eaten there, described by Socrates describes a typical meal in this healthy city. The description that generates his interlocutor's ire, and thereby inspires the appellation City of Pigs, is of a vegetarian meal – olives, wild roots and vegetables, chickpeas, beans, figs, cheese, myrtle berries and acorns.
[74] *Id.*
[75] *Id*.
[76] *See* HANS-GEORG GADAMER, THE ENIGMA OF HEALTH 75 (Jason Gaiger & Nicholas Walker trans., 1996).
[77] *See* LEO STRAUSS, PLATO'S GORGIAS, A COURSE OFFERED IN THE AUTUMN QUARTER, 1963 AT THE UNIVERSITY OF CHICAGO (Devin Stauffer ed., 1963) https://leostrausscenter.uchicago.edu/sites/default/files/Plato's%20Gorgias%201963.pdf

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actualization of which is the aim of law. As Aristotle writes in his *Politics*: "*Eudaimonia* is the aim of the constitution."[78]

Notoriously difficult to render into English, *eudaimonia* literally translates as "good spirit." And though the term happiness has traditionally been employed, *eudaimonia* is just as often translated as "wellbeing," not to mention "doing and living well."[79] In attempting to articulate a more accurate definition, the term "human flourishing" has been adopted in recent years by scholars.[80]

Eudaimonia, Aristotle tells us in Book I of his *Nicomachean Ethics,* "is the best, noblest and most pleasant thing in the world."[81] Referring to the inscription at Delos, which defines the most pleasant as winning what we love, the most noble as that which is most just, and the best as health,[82] Aristotle writes that "these attributes are not severed."[83] In other words, health is a constitutive element of *eudaimonia.* Because Aristotle's notion of *eudaimonia* subsumes health – as a necessary precondition for its realization – and because he writes that *eudaimonia* is the aim of the constitution, health is implicitly the aim of the law as well.

Importantly for the present study, this notion finds lasting expression in the Roman legal maxim *salus populi suprema lex esto* – the health of the people should be the supreme law. Derived from the writings of the Roman statesman Marcus Tullius Cicero[84] (whose notion of justice, echoes Hippocrates' oath insofar as it "requires, first, not doing any harm to anyone"[85]), this legal maxim continues to this day to function as a

[78] *See* ARISTOTLE, POLITICS 426 (Trevor Saunders ed., Penguin Books 1992).
[79] *See* ARISTOTLE, NICHOMACHEAN ETHICS 4-5 (David Ross trans., Oxford U. Press 1991); equivalent to Aristotle's concept of eu zen, good life.
[80] Whether regarded as constitutive of happiness, or flourishing, health is associated with each in ancient thought. Ariphron of Sicyon (c. 550 B.C.E.) wrote of Hygieia that "without you no man is happy." [Ariphron, *Fragment 813, in* V GREEK LYRIC: THE NEW SCHOOL OF POETRY AND ANONYMOUS SONGS AND HYMNS (David A. Campbell trans. 1993)] Also said of Hygieia: "Every house is flourishing and fair, if with rejoicing aspect thou art there." ORPHIC HYMN 67, TO HYGIEIA (Thomas Taylor trans., 1792)
[81] *See* ARISTOTLE, *supra* note 79, at 17.
[82] *Id.*
[83] *Id.*
[84] *See* ANDREW R. DYCK, A COMMENTARY ON CICERO, DE LEGIBUS 459 (2003) where Dyck writes that the maxim appears several times in Cicero's work on law, DE LEGIBUS (c. 51 B.C.E.), as well as appearing 18 times in his speeches and "is virtually Ciceronian property."
[85] *See* Martha Nussbaum, *Duties Of Justice, Duties Of Material Aid: Cicero's Problematic Legacy*, 8 J. OF POL. PHIL. 176, 181 (2000).

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constitutional metanorm, capable of nullifying those laws that conflict with it. Replicating the god of medicine Asclepius' function as exception to the Fates, Asclepius' daughter, the goddess of health Hygieia, known to the Romans as the goddess Salus,[86] finds her way into the maxim that functions as an exception to the law. Insofar as it ushers the healer into the law (the exception to the shepherd), Salus (translated as health, but also as safety, security, good, welfare, and, notably, salvation), manifests the second, countervailing, presence of Jesus in the law: the messianic (the secular, or political messiah – such as Gramsci's modern prince, or those discussed by Kelsen[87] and Butler[88] – as opposed to a strictly theological, magical savior) that negates the law of the shepherd.

6. A BRIEF HISTORY OF THE MAXIM

Associated with declarations of states of exception (in which emergencies justified limited suspensions of the law) during the late Roman Republic and across the Roman Empire,[89] the maxim *salus populi suprema lex esto* functioned throughout the Roman world. And there, embedded in legal systems, it remained long after the Empire's dissolution. Among other former Roman jurisdictions, the maxim has enjoyed an authoritative position in English law (and, subsequently, in U.S. law) since the time that the English Common Law was first cobbled together during the reign of Henry II (1133-89). Throughout the Middle Ages and well into the modern period legal maxims in general exerted "the same strength as acts of parliament" in England.[90] And the maxim *salus populi suprema lex esto* occupied a particularly esteemed position among these.

Usually translated as the health of the people is the supreme law, in his *Table Talk*, 17th century English jurist John Selden pointed out that

[86] *See* Angelos Chaniotis, Book Review, 97 BRYN MAWR CLASSICAL REV., no. 3, 1997 (reviewing LORENZO WINKLER, SALUS. VON STAATSKULT ZUR POLITISCHEN IDEE. EINE ARCHEOLOGISCHE UNTERSUCHUNG *[Salus. From state cult to political idea. An archaeological study]* 1995).
[87] *See* KELSEN, *supra* note 3, at 100-1.
[88] *See* Butler, *supra* note 5, at 207.
[89] *See* THOMAS POOLE, REASON OF STATE: LAW, PREROGATIVE AND EMPIRE 1-2 (2015).
[90] *See* SIR THOMAS EDLYNE TOMLINS, THE LAW-DICTIONARY, EXPLAINING THE RISE, PROGRESS AND PRESENT STATE OF THE BRITISH LAW: DEFINING AND INTERPRETING THE TERMS AND WORDS OF ART, AND COMPRISING ALSO COPIOUS INFORMATION ON THE SUBJECTS OF TRADE AND GOVERNMENT VOL. II 540 (1836).

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because "it is not *salus populi suprema lex est*, but *esto*,"[91] the maxim ought to be translated as 'the health of the people *should* be the supreme law.' In other words, rather than a (descriptive) statement of fact the maxim should be seen as a (prescriptive) command. When confronted with the question of how social life ought to be arranged, of what the supreme law should be, the maxim holds that the deciding factor should be the health of the people.

Cited in innumerable U.S. state, federal, and Supreme Court decisions, the maxim has exerted a significant influence on the development of U.S. law.[92] Yet, because the maxim suffers from the same ambiguity that law itself suffers from (privileging sometimes its mutative character, the healer, and at other times privileging its retentive, conservative aspect – the shepherd), over the centuries the maxim has been construed to mean both responsive justice and reactive order – the welfare of people in general, or the welfare of particular people, or a particular social class, or even a particular person. During the reign of Augustus, for example, the health of the people became identified with the health (or power) of the emperor.[93] That is, far from functioning as an exception to traditional order and custom (*nomos*), the maxim was used to reiterate the rule of the shepherd; anticipating Bodin's concept of sovereignty,[94] it enabled coercive power to function, in a state of exception, outside of legal constraints, in order to preserve itself.[95] [96]

In other words, rather than the pursuit of anything approximating social or public health (which is distinguishable from necessity insofar as health is concerned not with mere self-preservation and survival but with human flourishing) the notion and maxim of the health of the people became conflated with necessity (Ananke), particularly with what is necessary for the preservation and aggrandizement of the *nomos*. Consequently, over the centuries, jurists and political philosophers alike came to view the maxim

[91] *See* JOHN SELDEN, THE TABLE TALK 100 (London, 1821).
[92] WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN 19TH CENTURY AMERICA 42-50 (1996).
[93] *See* STEFAN WEINSTOCK, DIVUS JULIUS 174 (1971); *see also* WINKLER, *supra* note 86.
[94] *See* SCHMITT, *supra* note 2, at 8.
[95] *See* Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L. J. 1011, 1011-1134 (2003).
[96] *See* John Ferejohn & Pasquale Pasquino, *The Law of the Exception: a Tipology of Emergency Powers*, 2 INT'L J. OF CONST. L. 210 (2004).

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salus populi as interchangeable with Gratian's maxim that necessity has no law.

Cicero's more philosophical writings notwithstanding, the maxim was used to further *potestas* since the time he penned it. While persisting in various forms after the erosion of the Roman Empire, especially in Canon Law (where the term *salus* was understood to mean, among other things, the salvation of people's souls), like so many facets of the classical world it was revived during the Renaissance. As Ferejohn and Pasquino put it, its use by Machiavelli, and later writers such as James Harrington, and Rousseau, came to act "as a kind of bridge between the Roman model of dictatorship and the modern idea of constitutional emergency powers."[97] And this use was more often than not inextricable from the defense or justification of necessity.

Thomas Jefferson's use of the maxim provides a good example of this overlap. Zealously pursuing territorial expansion, Jefferson purchased the Louisiana Territory from France in 1803. Justifying his extralegal executive act after retiring from office in his 1810 letter to John B. Colvin, Jefferson wrote that beating imperial rivals to possession of valuable and strategic territory was necessary for "self-preservation and rendered the *salus populi* supreme over the written law."[98] In writing that "A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but… the laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation,"[99] Jefferson simultaneously conflated national security with a notion of human security (the health of the people), and the maxim *salus populi* with Gratian's maxim that necessity triumphs over law.

In spite of Jefferson's claim and use, however, the actual health of the people subjected to his decision was not advanced at all. While the ruling classes and the state would profit from territorial expansion, nearly everyone else experienced the opposite of security and health. The autochthonous people of the territory of the newly expanded nation, for instance, were annihilated. And for millions more it meant a new world of plantations to live

[97] *Id.* at 213.
[98] Quoted in MAURIZIO VALSANIA, THE LIMITS OF OPTIMISM: THOMAS JEFFERSON'S DUALISTIC ENLIGHTENMENT 150 (2013 ed., 2013).
[99] *Id*.

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and suffer in, to say nothing of the plight of women, the poor, and others. Although appearing to deviate from the *nomos*, the rule of the shepherd, Jefferson was not instantiating the law of the healer. Rather, via Bia, he was advancing Necessity, the mythical, the law of the shepherd in a less robed form.

Notwithstanding its utilization by coercive power/*potestas*, however, the maxim's inherent ambiguity continued to manifest throughout modern political thought. In the mid-17th century, for instance, while common lands were being transformed into salable things, enclosed, and sold off in England (transforming the people that had historically lived on those lands into refugees and paupers[100]), the Levellers, fighting in the English Civil War, appropriated and radicalized the maxim *salus populi*, appealing to the mutative, emancipatory aspect of the maxim for the satisfaction of their demands.[101]

Advocating autonomy over heteronomy, the Levellers (whose name derived from the practice of those revolting against the enclosure and privatization of the commons by leveling the hedges used to enclose plots of land) stood for the rule of law, the extension of suffrage, and religious tolerance, among other contemporaneous issues. And because the health of the people requires land on which to live, among other conditions, or preconditions, of health, its alienation was contrary to the supreme law and must for that reason (that the health of the people should be the supreme law) be halted, they argued.

Reappropriating the maxim from the Levellers, invoking it in the introduction to his *Leviathan* (the "artificall man" that in so many ways resembles the coercive shepherd) Hobbes used the maxim for conservative ends.[102] This was not, of course, at all innovative. As the historian Peter Miller notes in his study of the period, "in the war between parliament and the crown, the *salus populi* could be found on all sides."[103]

[100] *See* GERTRUDE HIMMELFARB, THE IDEA OF POVERTY (1983) in which she discusses the historical development of the new class of people of the pauper.
[101] *See, e.g.*, JASON S. MALOY, THE COLONIAL AMERICAN ORIGINS OF MODERN DEMOCRATIC THOUGHT 160 (2008).
[102] *Id.*
See PETER N. MILLER, DEFINING THE COMMON GOOD 42 (1994).

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A generation after Hobbes, John Locke famously employed the maxim in both the epitaph to his *Second Treatise on Government* as well as in its section on executive prerogative. And it was by way of Locke (who wrote that "Salus Populi Suprema Lex is so just and fundamental a rule that he who sincerely follows it cannot dangerously err"[104]), among others, such as the Scottish Enlightenment philosopher Francis Hutcheson,[105] that the maxim influenced the Founders of the United States of America – who, like Locke, emphasized the emancipatory dimension of the maxim (to the degree that it benefitted them) in their efforts to free themselves from the *nomos* of the British Crown.

While the maxim was instrumental in justifying the shift from monarchical to nominally democratic rule in North America, its double nature persisted. As John Adams put it, "The public good, the *salus populi* is the professed end of all government, the most despotic, as well as the most free."[106] And as British law gave way to U.S. law, this intrinsic ambiguity persisted.

In the late 1780s, for instance, when farmers and veterans of the Continental Army found themselves facing the confiscation of their farms and/or time in debtors' prisons for debts accumulated during the time they were fighting an ostensible war of liberation, what came to be known as Shays' Rebellion broke out in Massachusetts. Rising up against their creditors to secure debt relief and the cessation of the confiscation of their farms, the creditor-dominated Massachusetts legislature found little compunction in opposing the movement with military force.

At the same time, in February of 1787, debtors in the state of South Carolina also challenged the legitimacy of their debts. Unlike the situation in Massachusetts, however, the South Carolina legislature represented predominantly debtors and, to the great chagrin of their creditors, the

[104] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 2 (Crawford Brough Macpherson ed., Hackett Publishing Company 1980)(1690).
[105] *See generally* ISTVAN HONT, JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE 412-419 (2005).
[106] CHARLES F. ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES, VOL. III 479 (Boston, Little, Brown & Co. 1851).

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legislature granted debtors radical debt-relief.[107] Citing the maxim *salus populi suprema lex esto*, the future attorney general of South Carolina, John Julius Pringle, defended the debt nullification, maintaining that it is the purpose of government to secure the welfare of the community (however narrowly defined in this case); where the law of contracts conflicts with this, he argued, the law must yield.[108] Norms (laws) must yield to metanorms. Among others who felt that the democratic tendencies (relatively economically democratic, at least) of the revolution were going too far, George Washington was prompted by these events to vocalize his support for a stronger national government and the adoption of the Fates-like Constitution to achieve such ends.[109]

While the above example illustrates one aspect of the emancipatory tendency of the maxim, the South Carolina example is problematic – not least because of the proliferation of slavery (which was not seen as violating the health of the people). Nevertheless, it marks an important event in the history of the maxim – a precedent that contemporary debtors could arguably employ as well.

After the ratification of the U.S. Constitution (which both reflects the structure of the Fates and alludes to the Ciceronian maxim in the phrase 'the general welfare' in its preamble[110]), and throughout the 19th century, courts in all regions of the United States deferred to the maxim in affirming or sanctioning municipalities' power to regulate all manners of daily life. Not only were "the people" empowered to build things (e.g., sanitation systems) that improved "the health of the people," the maxim also empowered "the people" to destroy unhealthy conditions. If, for instance, a slaughterhouse, or tannery, a cache of gunpowder, wooden buildings, or any other noxious or potentially harmful condition or activity were found to intrude upon the public health (polluting waterways, producing toxic effluence, or noxious smells, or creating fire hazards, inter alia), the courts found again and again

[107] *See* Robert. A. Becker, *Salus Populi Suprema Lex: Public Peace and South Carolina Debtor Relief Laws, 1783-1788*, 80 S.C. HIST. MAG. 65, 74-75 (1979).
[108] *Id*. at 75.
[109] *See* LEONARD L. RICHARDS, SHAY'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 1-4, 129-130 (2002).
[110] *See generally* NOVAK, *supra* note 92, at 52.

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that the people had the power and authority to eliminate the offensive operation.[111] Courts held nearly uniformly that the health of the people trumped both property rights and the right of contract.[112]

If the above leads some to conclude that the public health was being pursued in these instances in the interest of autonomy (over heteronomy), and manifested the messianic, healing aspect of the maxim (over the determinations of the invisible shepherd), they would do well to consider the fact that, though public health legislation did reflect a general tendency toward (quasi-) egalitarian salutariness, and while it did objectively ameliorate many harmful conditions (the noxious presence of slaughterhouses, for instance), this apparent salutariness was in conflict with a properly egalitarian health for the simple reason that these reforms were not only pursued in concert with deep expressions of heteronomy (in the form of economic exploitation, not to mention genocide, within a *nomos* that justified the enslavement of millions, wars of expansion, pervasive, systemic misogyny, among other concrete harms), the poor laws and sanitary reforms were not pursued for their own sake. Rather than a genuine, general health, the maxim's use in North America reflects not the manifestation of the healer but its semblance; instead of the deactivation of the *nomos*, its application is congruent with Carl Schmitt's particular notion of the *nomos*, which refers to an antagonistic concrete social order derived from the forcible conquest and "division of pastureland."[113]

Indeed, as Michel Foucault points out, public health legislation was not instituted to help the public generally.[114] Epidemics and health crises may have been avoided, but these policies were enacted primarily to protect the wealthy from the slums and disease of the poor. In addition to protecting the rich from the poor, rather than the good health of the people in general, what was strived for was the minimal health of the poor. As opposed to that which was supportive of human flourishing, what was simply necessary for the survival of the general order was advocated and pursued. These policies advanced the interest of the *nomos*, the law of the shepherd, not the healer,

[111] *Id.*
[112] *Id*.
[113] Teschke, *supra* note 13, at 193.
[114] *See* Michel Foucault, *Birth of Social Medicine*, *in* POWER (James D. Faubion ed., 2001).

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since genuine health would not maintain and administer poverty (and mere survival) but eliminate it. Likewise, eugenicist policies, human subject research, and other practices that were justified by reference to the public health pursued not an actual, critical (genuine, general) health but the health of the state, or the health or wellbeing of only a particular class of people.

As such, a critical conception of health (of a genuine, general health) should not be mistaken for the type of health that Foucault, for instance, has argued provided the justification for the pervasive and invasive administrative control of populations.[115] To be sure, such a conception (concerned with health in an instrumental sense – not the health of the human being but the limited health of the soldier or worker, or of the health of such entities as forests for their exchange-value, rather than for their use-value) may be said, to be the health of, if anything, the shepherd – of the *nomos* (custom, tradition, and coercive power). In other words, it is merely a qualified type of health, the health, ability, or power to dominate akin to Randolph Bourne's observation that "war is the health of the state."[116] Unlike the messianic, which is "radically distinct from, and opposed to, coerced obedience,"[117] such an instrumental type of health is an illusory health ancillary to obedience to the *nomos*, rather than an end in itself.

While history has produced numerous instances of this instrumental form of health (the semblance of actual health), the Nazis' concept of health provides perhaps the most notorious example. Subjecting its population to every manner of biopolitical intrusion, the Nazi order appeared to be obsessed with health. In addition to the glorification of such outdoor activities (bound up with nationalistic sentiments as they were) as mountain climbing, and wrestling, and sports in general, scores of laws were passed that appeared to promote social health in order to advance only the health of the so-called *volk*. Bakeries, for instance, were required to carry whole grain bread[118] – though, as with other regulations, this law had just as much to do with a genocidal national chauvinism than with any appreciation for the salutary

[115] *See, e.g.*, MICHEL FOUCAULT, THE HISTORY OF SEXUALITY; VOLUME I: AN INTRODUCTION (Robert Hurley trans., Vintage Books 1990)(1976).
Quoted in HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 359 (2003 ed., 2003).
[117] Butler, *supra* note 5, at 215.
[118] *See, e.g.*, ROBERT N. PROCTOR, THE NAZI WAR ON CANCER 47 (2000).

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characteristics or lack thereof of white bread (which was associated with the French and said to be decadent).[119] Rather than for its own sake, the Nazis' racist, superstitious, and militaristic pseudoscientific notion of health was entirely in the service of coercive power – the shepherd. In addition to restricting people of Jewish descent from entering parks, for instance (nominally to protect the fictitious German germ plasm from fictitious contamination), German women were rewarded for producing many children; not because a large population was good or healthy for its own sake, but simply because this produced workers and soldiers that strengthened the state – a type of instrumental reasoning that subtended the eugenicist policies of Nazi Germany, not to mention those of the U.S. Supreme Court in decisions upholding the constitutionality of forced sterilization in the 1920s and 30s.[120] Rather than an end in itself, health was always directed toward violence and power. As Martin Heidegger, a one-time enthusiastic member of the Nazi party, put it, for the Nazis the "essence of health" is "the capacity to act for the state."[121]

Rather than aiding coercive forms of power (*potestas*), however, what we might refer to as critical notions of health involve perpetual contestations of and (in both the physiological as well as the political sense) resistances to coercive powers and structures.

7. REINTERPRETING THE MAXIM

Although the maxim would continue to be invoked by U.S. courts well into the 20th century, as the industrial business classes exerted more influence over social policy, a shift in legal philosophy led the courts to employ the maxim less and less frequently.[122] By the beginning of the 21st century, the rise of the national security jurisprudence and the ideology of the so-called war on terror only furthered the reading of the maxim prioritizing the

[119] *Id.*
[120] *See* Buck v. Bell, 274 U.S. 200 (1927).
[121] EMMANUEL FAYE, HEIDEGGER: THE INTRODUCTION OF NAZISM INTO PHILOSOPHY IN LIGHT OF THE UNPUBLISHED SEMINARS OF 1933-1935 68 (Michael B. Smith trans., Yale U. Press 2011).
[122] *See* NOVAK, *supra* note 92, at 247.

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shepherd which sees the health of the state justifying harms, such as war and torture, committed against the actual health of actual people.[123]

While the maxim that the health of the people should be the supreme law has been interpreted over the centuries to support authoritarian and heteronomous regimes, however, we must not forget that it has also been employed in egalitarian and emancipatory struggles. And as manifold exigencies (stemming from the unprecedented exploitation of the physical and social worlds) daily confront us, we ought to consider that the maxim could – and should – be (re)interpreted today to support a critical notion of health, which would, in practice, translate to a radically egalitarian politics.

Such a reinterpretation would have to grapple with three basic components of the maxim: health, people, and the supreme law. Of these, "the supreme law" is the most straightforward. We can simply refer to the supremacy clause in Article VI of the U.S. Constitution and similar clauses in other constitutions, which define the supreme law simply as that which prevails in any conflict.

Next is the term people. While Giorgio Agamben reminds us that, historically, in European languages at least, people has referred specifically to the poor,[124] and the marginalized, there are competing traditions with less egalitarian tendencies. The most notorious of these, perhaps, is that of the Nazi *volk*, which had an explicitly racist and genocidal meaning. Relatedly, since the Enlightenment 'people' has tended in practice to refer juridically to wealthy or property owning, white, males – denying not only the status of people but of human being from everyone else. In short, the term people has exclusionary as well as inclusionary implications. And though a proper examination of the term people would require a thorough investigation of, among others, non-human entities (organic and inorganic) with which human flourishing is interdependent (the so-called natural environment, or ecology, for instance, not to mention the wellbeing of non-human animals), for a provisional, emancipatory interpretation of the maxim we can note that, in the early 21st century, international norms recognize, at the very least, all

[123] *See* Conor Gearty, *State Surveillance in an Age of Security, in* SURVEILLANCE, COUNTERTERRORISM, AND COMPARATIVE CONSTITUTIONALISM 288-289 (Fergal Davis et al eds., 2013).
[124] *See* AGAMBEN, *supra* note 34, at 176.

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human beings as people. As such, in addition to every human being, since our health is interdependent with theirs, ecosystems and animals generally ought to be included within the notion of people as well.

Of the maxim's three elements, the most problematic is the concept of health. Associated for centuries with tyrannical norms, the concept of health suffers from a host of definitional problems. For an egalitarian interpretation of the maxim, however, it perhaps suffices to discuss health in the Asclepian sense as that radiance or resistance which contests the coercive power of the law of the shepherd – the immanent (as opposed to transcendent), noncoercive power of autonomy, or *potentia,* as opposed to *potestas* and heteronomy.

Consistent with mainstream bioethical norms (the four basic principles of which are justice, beneficence, non-maleficence, and autonomy[125]), as well as with Cicero's own position that something "is only just if it is voluntary,"[126] and that "a healthy human being could not live as a slave,"[127] so long as personal practices do not directly intrude upon the public health, questions of personal behavior lie entirely outside the social category of the "health of the people." In the shadow of the racist, patriarchal, and genocidal measures undertaken in the name of health and "the health of the people" in recent history, distinctions between private and public health remain crucial. In order for this autonomy, or *potentia*, to overcome its mere potentiality, however, the presence of particular, concrete conditions – the conditions for health – must be present. For just as it is in many respects an absurdity to force a person to be healthy, it is equally the case that justice is impeded to the degree that people are forced, by circumstances people are born into, to be *un*healthy.

Because most people in the world today find themselves born into circumstances in which basic conditions of health, such as housing and nutrition, are systemically scarcified, and not only the energy systems and

[125] *See* Raanan Gillon, *Medical ethics: four principles plus attention to scope* 309 BRITISH MED. J. 184(1994 http://www.bmj.com/content/309/6948/184).
[126] CICERO, ON DUTIES 12 (Miriam T. Griffin & E. Margaret Atkins eds., Cambridge U. Press 1991).
[127] LEO STRAUSS, CICERO, The Leo Strauss Center, University of Chicago (Spring, 1959), https://leostrausscenter.uchicago.edu/sites/default/files/Cicero%20%281959%29.pdf.

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the water but the air itself is carcinogenic,[128] most people, then, find themselves born into an unjust position. And just as Cicero noted that slavery and health are antithetical, Schopenhauer's observation that poverty and slavery are indistinct[129] must lead us to consider (as copious studies linking poverty to shorter lifespans, poor nutrition, increases in unhealthy stress levels, and heightened exposure to toxins, among other harms) that poverty is contrary to health as well – and, therefore, is contrary to the supreme law. Vis-à-vis these problems, an emancipatory interpretation of the maxim might proceed in the following manner:

If the health of the people should be the supreme law, then those conditions that conflict with the health of the people should be against the law. As such, the existence of unhealthy conditions (slums, food deserts, brownfields, prisons, land mines, toxic waste, etc.) would be illegal according to the maxim. Consequently, they must not be allowed to persist – a turn of the maxim that gives rise to a duty to correct unhealthy conditions.

While what constitutes a condition (or precondition) for health is subject to debate, no reasonable person can disagree that there are certain basic material conditions without which health cannot flourish. The most basic of these are: housing, nutrition, health care, and a healthy environment (which, in the urban context, at least, includes basic infrastructures such as sanitation systems, transportation systems, communication systems, educational systems, etc.).

If a particular condition for health, such as housing (of a quality sufficient to support not basic survival but the minimal flourishing of health) is absent, then, the health of the people, the supreme law, is violated. And because this condition cannot be allowed to remain in a state of violation (a form of neglect that is itself a type of violence) a duty to correct the insufficient condition(s) arises. This duty, in this case, creates a positive right to housing sufficient to support actual health. And because this is a right, it must not only be supplied directly, not through exchange, but as an end in

[128] *See* WORLD HEALTH ORG., *Ambient (Outdoor) Air Quality and Health*, WHO.INT (Sep., 2016), http://www.who.int/mediacentre/factsheets/fs313/en/.
[129] *See* ARTHUR SCHOPENHAUER, *Government, in* ON HUMAN NATURE: ESSAYS IN ETHICS AND POLITICS 23, 28 (Thomas Bailey Sauders trans., Dover 2010)(1897).

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itself, it must also be inalienable – i.e., not for sale. Through this interpretation of the maxim, positive rights to housing, food, health care, a healthy environment, and other conditions of health are uncovered.

According to a critical reading, then, the (messianic) maxim does not merely create a duty to deactivate the *nomos* – that is, to remove unhealthy conditions (e.g. banning the ecocidal commercial meat industry, and the fossil fuel industry). A duty of care, to supply basic conditions of health, extends from this duty to correct, which in turn creates positive rights to the conditions for health. The basis of a society's legitimacy, the satisfaction of its duty to itself, is to supply these conditions to itself – not in exchange for any other thing, or act, but for its own sake. According to a critical reading of the maxim that the health of the people should be the supreme law, the society that neglects to correct unhealthy conditions and supply the conditions of health – that neglects to dismantle the mythic law and realize the law's messianic command – commits a positive harm; where it fails to satisfy this duty a society is in breach, and itself needs to be corrected in order to comply with the demands of justice.

8. CONCLUSION

This essay has argued that the fundamental structure of Western law is grounded in a dynamic of conservation and change, law as order and law as justice, preservation of the existing order and its messianic destruction. Since the dawn of civilization, when legal systems were indistinct from mythical orders, the concept of necessity, symbolized by the *nomos*, the Fates, and the etymologically and conceptually related figure of the shepherd, has played a role in justifying existing orders. So prevalent is this symbolism that it arguably displaced and colonized its own negation; for as the intuition of the messianic (the healer as opposed to the shepherd) traveled through myth and into history the exception became conflated with the rule. Jesus as healer became interblended with Jesus the shepherd, and the healer (Asclepius, Hygieia, Salus, Jesus) of the maxim *salus populi suprema lex esto* was fused, or confused, with Necessity and the Fates – i.e., the *nomos.*

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Conflated with necessity, the maxim has functioned to preserve and conserve legal orders. Yet its messianic potentiality has historically flickered into actuality as well, justifying emancipatory deviations from traditional orders. And though the maxim remains ambiguous (and, like Augustine's City of God and City of Man, the healer and the shepherd are blended and to some degree indissoluble), a critical reading of the maxim uncovers a radically democratic, egalitarian notion of justice that, by prioritizing the actual health, nourishment, and wellbeing of the people of the world over the necessity of the existing biophagous order, could enable the development of an actually healthy, just society. Rather than the states of emergency justified by necessity, perhaps this is the "real state of emergency" of which Benjamin writes,[130] one which implies a messianic deactivation of the law of the shepherd, and the instantiation of noncoercive modes of social life – the law of the healer.

[130] Benjamin, *supra* note 47, at 257.

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A Contract among States: Capturing Income of the World's Multijurisdictional Taxpayers

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TABLE OF CONTENTS: 1. Managing Jurisdictions in an Evolving Economy; 2. The Multistate Tax Compact; 2.1. Mission and Goals; 2.2. Congressional Consent and the Authority of the Compact; 2.3. Articles III and IV: Election and Three Factor Apportionment; 2.4. Modern Use of the Multistate Tax Compact; 3. State Courts Respond to Taxpayer Elections; 3.1. I.B.M. in Michigan; 3.2. Gillette in California; 3.3. Kimberly-Clark in Minnesota; 3.4. Amici Curiæ and Other Stakeholders; 4. The Future of the Multistate Tax Compact.

ABSTRACT: Systems for managing multiple taxing jurisdictions in a larger group are working to keep up with the evolution of the modern multijurisdictional taxpayer. Recent decisions from the high courts of several states have brought attention to a meaningful tension in the goals of the Multistate Tax Compact, an agreement between states. Though the federal government has ruled that no congressional approval is necessary based on the Compact Clause of the U.S. Constitution, this agreement between states has taken its place as a significant accord among the vast majority of jurisdictions. Having operated as the most effective solution to the problems identified by Congress in the 1960's Willis Report, the Compact simultaneously disavows its binding authority and relies on States meet its goal of promoting uniformity in state tax administration. With billions of dollars of much needed tax revenue at issue, this article seeks to examine the intricacies of the legal principles applied to this contract among states while understanding its role in the modern economy, both within the United States and beyond.

KEYWORDS: *Multistate Tax Compact; Multi-Jurisdictional Tax; Apportionment; Compact Clause; State Tax.*

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Interstate commerce is a rich tax base.
It has, moreover, special political fascination.
A state or local tax levied upon it falls largely upon people in other states.
Here is a legislator's dream: a lush source of tax revenue,
the burden of which falls largely on those who cannot vote him out of office.[1]

1. MANAGING JURISDICTION IN AN EVOLVING ECONOMY

The way in which businesses conduct themselves across jurisdictional lines both globally and nationally has rapidly evolved alongside technology. The question of how to manage multiple taxing jurisdictions within a group has given rise to some tensions that arise from our form of government. From the inception of the United States,[2] courts and legislatures have grappled with the problem of creating a series of tax rules in various jurisdictions[3] that work together to create a fair, predictable and organized system that will result in the free flow of commerce between and among jurisdictions while appropriately compensating the relevant governments.[4] The European Union, despite many relevant distinctions, may glean some applicable principals about the tension between allowing each jurisdiction the independence to create and administer their own tax laws while seeking conformity with a larger system designed for a group of jurisdictions.

After the U.S. Supreme Court's 1959 ruling in *Northwestern States Portland Cement Co. v. Minnesota*, which held that net income of a foreign corporation may be taxed by a state if that tax is fairly apportioned, Congress commissioned a study which later became known as the "Willis Report" and passed P.L. 86-272. The legislation that was enacted was intended to be a "stopgap" measure until the question could be properly addressed recently

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[1] Wallace Mendelson, *Epilogue* to FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 118 (Quadrangle Books 1964)(1937).

[2] *See* THE FEDERALIST NOS. 30-36 (Alexander Hamilton).: balancing authority to tax of individual states. *See also* U.S. CONST. amend. XIV, § 1. *See also* U.S. CONST. art. I, § 8, cl. 3

[3] The Commerce Clause grants authority to Congress to limit the ability of the individual states to impose a tax where such tax would be a burden on interstate commerce. The "Dormant" Commerce Clause has developed by judicial opinion and has become an accepted grant of authority to the Federal government to limit powers of individual states to tax even in the absence of Federal legislation.

[4] *See* U.S. Constitution Commerce Clause, see also International Harvester Co. v. Wis. Dep't of Taxation, 322 U.S. 435 (1944); Northwestern Cement Co. v. Minnesota, 358 U.S. 450 (1959); Quill Corp. v. North Dakota, 504 U.S. 298 (1992).

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celebrated its fiftieth anniversary of being enacted. The specter of Federal Legislation to limit the rights of the States to impose led to the creation of the Multistate Tax Compact (hereinafter Compact), an agreement between and among states with the facially conflicting goals of promoting uniformity and state autonomy.[5] After the Supreme Court considered the authority of the Compact in the case of *U.S. Steel Corp. v. Multistate Tax Commission.*[6] and applied the law as it has stood since the 1960's, the economy has continued to evolve. Understanding the inherent tensions built into the issue, the Multistate Tax Commission (hereinafter Commission), created by the Compact,[7] has managed its Member States since its inception.

The feature of the Compact was the creation of the Model Apportionment Formula, which has influenced the division of income in every jurisdiction.[8] The Compact granted taxpayers of member states to use the state provided apportionment formula or to elect the formula contained in the Compact.[9] As technology pushes a more rapid evolution of the economy than ever, States and taxpayers are attempting to find ways to more efficiently apply existing rules within the bounds of constitutionality. Recent legislation at the highest levels in State courts has revealed a tension between the goals of uniformity and autonomy, and the role of the Compact has faced new constitutional challenges.[10] The Founding Fathers anticipated that the power to impose a tax was central in order to define the role and identity of various jurisdictions and has accordingly been considered by Congress, the Supreme Court and the States throughout this country's history.[11]

This article seeks to explore the applicability of those early principles in determining how to begin shaping a solution that will satisfy constitutional requirements and that is palatable to States and taxpayers alike. While the

[5] Multistate Tax Compact (effective Aug. 4, 1967), *available at* http://www.mtc.gov/The-Commission/Multistate-Tax-Compact.
[6] *See generally* United States Steel Corp. v. Multistate Tax Comm'n 434 U.S. 452 (1978)
[7] *See* Multistate Tax Compact, art. VI (effective Aug. 4, 1967).
[8] *See* Multistate Tax Compact, art. IV (effective Aug. 4, 1967) (amended 2015).
[9] *See* Multistate Tax Compact, art. III (effective Aug. 4, 1967).
[10] *See infra* I.B.M. v. Department of Treasury, 496 Mich. 642; 852 N.W.2d 865 (2014); Gillette Co. et al. v. Franchise Tax Board, 196 Cal. Rptr. 3d 486 (2015); Kimberly Clark Co. v. Commissioner of Revenue, Minn., 880 N.W.2d 844 (2016)., et al.
[11] *See infra* Northwestern Cement Co. v. Minnesota, 358 U.S. 450 (1959), The Willis Report, United States Steel Corp. v. Multistate Tax Comm'n
434 U.S. 452 (1978) and supra note 10.

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tension between the Federal government and the States with regard to the power to tax has a long and complicated history, this article will seek to uncover only the parts of that story that may color our understanding of the narrow subject at hand, and conclude with an exploration of how States and Taxpayers might continue to refine the place of this agreement between states.

2. THE MULTISTATE TAX COMPACT

At the January 1966 meeting of the National Association of Tax Administrators, the idea of creating the Multistate Tax Commission was unanimously approved.[12] Created in 1967 by Article III of the Multistate Tax Compact, the Commission was created "as an effort by states to protect their tax authority in the face of [...] proposals to transfer the writing of key features of state tax law from the state legislature."[13] Today, the voting members that manage the Commission are tax officials from member states, who work to serve both state governments and taxpayers. The prevalence of the standards set by the Commission and the impact it has on the system of taxing multijurisdictional taxpayers reveals that it is the most successful solution to the problems identified in the Willis Report that this country has seen to date.

2.1 MISSION AND GOALS

Created by the Multistate Tax Compact, the Commission is charged with:

> "Facilitating the proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; Promoting uniformity or compatibility in significant components of the tax systems; facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and avoiding duplicate taxation."[14]

[12] *See generally* EUGENE F. CORRIGAN, MULTISTATE TAX COMM'N, SECOND ANNUAL REPORT (1969),
[13] http://www.mtc.gov/The-Commission.
[14] Multistate Tax Compact, art. I (Original Model 1966), http://www.mtc.gov/getattachment/The-Commission/Multistate-Tax-Compact/Original-Model-Multistate-Tax-Compact.pdf.aspx.

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The stated objective of the Commission has been and is "to achieve and provide maximum uniformity in the administration of state taxes as they affect companies engaged in multistate business.".[15] In its early stages, the Commission believed that proposed federal legislation posed a "direct threat to the independent authority and political integrity of every state as a direct result of inevitable Federal dictation of state tax administration…"[16] and was charged with opposing such legislation, which it did successfully by providing an alternative solution in the form of the Compact. From the early stages of the organization, balancing the competing principles of uniformity and autonomy for states has been central to the purpose of the Commission, and that tension continues to underlie actions taken.

States quickly responded to the Willis Report and proposed Federal legislation regarding the regulation of interstate commerce through state tax. The Multistate Tax Compact became effective on August 4, 1967.[17] At the first organizational meeting, eleven states were represented and involved in conceiving the Compact, which by its terms, would be effective when it had seven member states.[18] As directed by those early members, States became members by enacting the Compact into the laws of their state. By December 31, 1968, fifteen states had passed legislation that enacted the Multistate Compact into state law, and by 1972, there were twenty-one member states.[19] By the early 1970's, the Compact had such an influence on State's tax policies, that multi-jurisdictional taxpayers challenged its validity in what has become a landmark case in the history of the Multistate Tax Commission. Gathering members to the compact is essential for its existence: in order for a uniform system to work, it is necessary for states to agree. The status of the relationship between members, however, and the extent to which the Compact binds states to that uniformity, is the question that State courts are visiting

[15] CORRIGAN, *supra* note 12, at 16.
[16] *Id.* 17.
[17] http://www.mtc.gov/getattachment/The-Commission/Multistate-Tax-Compact/About-the-Compact-and-Suggested-Enabling-Act.pdf.aspx.
[18] *See* S. ED TVEDEN, MULTISTATE TAX COMM'N, FIRST ANNUAL REPORT 3 (1968). The original states present were: Arkansas, Idaho, Illinois, Kansas, Missouri, Nebraska, Nevada, New Mexico, Oregon, Texas and Washington. An additional twenty-two states and the District of Columbia had present "discussion participants" at the organizational meeting.
[19] *Id.*, at 14. *See also* U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978).

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today. Preserving the autonomy of states and protecting their power to tax is as central to the goal of the Compact as is providing uniformity.

2.2 CONGRESSIONAL CONSENT AND THE AUTHORITY OF THE COMPACT

At the inception of the Compact, before even the first meeting of the members, creators were aware that it was necessary to examine the ways in which the agreement between states should be structured in order to achieve their purposes. Accordingly, a select committee was appointed to consider the question of whether the consent of Congress must be secured to make the Compact legally effective.[20] In its grant of congressional authority in what has come to be known as "The Compact Clause," the U.S. Constitution says that "No state shall, without the consent of Congress [...] enter into any Agreement or Compact with another state [...]".[21] The Commission noted the U.S. Supreme Court's interpretation that the intent of this particular provision was a "prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.".[22] The group noted that the Court has consistently held that only a small fraction of agreements entered between states require approval of Congress in the form of Federal Legislation.[23] Nevertheless, they sought to determine whether congressional approval was necessary both to determine whether public funds could be used in furtherance of the mission of the Compact and because three states had conditioned their membership on congressional approval in those early stages.[24] Congressional approval of a Compact results in it being considered both a contract and a federal law. Having the force of federal law allows access to federal courts, while those Compacts without congressional approval have

[20] *See* TVEDEN, *supra* note 18, at 3. There are a number of "Compacts" that exist in the United States currently, including the Interstate Civil Defense and Disaster Compact, which is operational in all fifty states; the Vehicle Equipment Safety Compact, enacted in forty-four states; the Interstate Compact on Juveniles, which is in force in forty-two states; and the Interstate Compact to Conserve Oil and gas, which is operational in thirty states.
[21] U.S. CONST., art. I, §10 cl. 3(Compact Clause).
[22] Virginia v. Tennessee, 148 U. S. 503 (1893). In this case the Court considered a boundary dispute between two states and in attempting to resolve the dispute by agreement between the two states, considered the Compact Clause.
[23] *See* TVEDEN, *supra* note 18, at 3.
[24] *Id.* Subsequently, those three states removed that conditional language and became members without congressional approval after the Special Committee concluded its legal analysis.

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the binding force of a contract.[25] It was clear that the question of congressional approval needed to be addressed.

In October of 1967, still in the initial stages of the Compact, a meeting was held in Washington D.C. for planning a response to the Willis Bills and further refining the proposed solution of the Multistate Tax Compact.[26] An important agenda item on that meeting was a presentation of the analysis of the special committee appointed to study the extent to which congressional approval was necessary.[27] The Committee chairman reported that "an analysis had been made of each article of the Compact to determine whether consent was needed for that part, and that since there was found no part for which congressional consent was needed, the Compact as a whole did not require such consent."[28] Despite this, however, the report encouraged obtaining congressional approval "because the Compact is of the type for which consent traditionally has been sought and obtained, and for policy reasons it would be desirable to have a declaration of the support of Congress for this cooperative state action."[29] This is an understandable position in the early days of the Compact, when the effort to attract member states to an enterprise must have required some showing of validity and importance. In the end, the Multistate Compact did not require the consent of Congress to demonstrate or achieve its goals. [30]

Approximately a decade later, the Supreme Court ruled directly on the validity of the Compact with regard to the language contained in Article I of the Constitution in *U.S. Steel Corporation v. Multistate Tax Commission*.[31] In 1972, there were twenty-one member states of the Multistate Tax Compact, which had received no form of approval from the federal Congress. On behalf of all multistate taxpayers that were subject to or threatened by audits of the

[25] *See* Michael Herbert & Bryan Mayster, *The journey of the MTC's Joint Audit Program*, 69 ST. TAX NOTES 845 (2013).
[26] *Id.* at 3.
[27] *Id.* at 4 (Item 8).
[28] *Id.*
[29] *Id.*
[30] *See generally* Matthew Pincus, *When should Interstate Compacts Require Congressional Consent?*, 42 COLUM. J. OF L. AND SOC. PROBS., 511 (2009).
[31] *See generally* U.S. Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978). Justice Powell delivered the opinion of the court joined by Justices Burger, Brennan, Stewart, Marshall, Rehnquist and Stevens joined. Justice White delivered a dissenting opinion in which Justice Blackmun joined.

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Multistate Tax Commission, U.S. Steel Corporation brought this suit on three grounds: first, it challenged the validity of the Compact under Article I §10 of the U.S. Constitution as the Compact had not received congressional approval; second, it challenged that the Multistate Tax Compact was invalid because it was an unreasonable burden on interstate commerce; and third, it challenged that it violated the due process of multi-jurisdictional taxpayers as provided for in the Fourteenth Amendment to the Constitution.[32] In holding that the Multistate Tax Compact was not invalid under the standard set in *Virginia v. Tennessee*,[33] the Court articulated a modernized standard for when an agreement between states required congressional approval. As "encroaching on" or "interfering with the supremacy of the United States" was not the same concern in 1972 as it was in 1893, the update of this standard was a welcome addition to the Court's jurisprudence.

The first part of the Court's analysis focused on whether the agreement in question (the Multistate Tax Compact in the case at hand) enhanced the power of states "at the expense" of federal supremacy.[34] The majority decided that no power was granted to the states by the Compact that each state could not exercise by themselves, nor was there any delegation of sovereign power that was delegated by the M.T.C., so agreement could not be categorized as an impermissible grant of power that the Compact Clause was designed to protect against. In addition, the Court noted that participation in the Multistate Tax Compact was voluntary and that each state maintained the power to adopt or reject any regulations of the M.T.C., or to withdraw entirely at any time.[35]

In considering the argument that activities of the Multistate Tax Commission placed an unreasonable burden on interstate commerce and encroached on federal authority in doing so, the Court also rejected that argument on the grounds that there was no procedure or requirement that the

[32] *Id.* As the third argument of the taxpayers related to Due Process was held to be "irrelevant to the facial validity of the Compact" this argument is beyond the scope of this article.
[33] *Supra* the standard set forth in the late 19th century by this case concerned itself with whether the agreement between states increased the political power of the states such that it threatened, encroached or interfered with the supremacy of the Federal government.
[34] *See U.S. Steel Corp.*, 434 U.S. at 472.
[35] *Id.* at 473-474.

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M.T.C. granted that any individual state could not enact on its own.[36] Further, the court held, if it was conceded that there was some "enhancement" in the power of states, it was not at the expense of Federal authority.[37] Since this decision was promulgated in 1978, the Multistate Tax Compact has enjoyed confidence that their endeavor is safely within the bounds of the U.S. Constitution. The question of the extent to which the member states are bound to one another, however, was beyond the scope of the Court, and is being addressed by States today.

2.3 ARTICLES III AND IV: ELECTION AND THREE FACTOR APPORTIONMENT

As the purpose of the Multistate Tax Compact is to deal with taxpayers that conduct business in more than one state, its primary feature can be found in Article IV, entitled "Division of Income". [38] This was created in response to the legislation that came out of the Willis Committee which used the factors of property and payroll to divide the income of multi-jurisdictional taxpayers. The major distinction between those proposals and the formula contained in the Compact today is the addition of the Sales Factor, which allows taxpayers to consider where their sales are made in dividing their income in addition to just whether their property and payroll are located.

The Three-Factor Apportionment system outlined in Article IV, if not in its pure form, is the base of a great many state laws for taxation of multi-jurisdictional corporate taxpayers. In short, it outlines a formula that averages three rations: that of property in state to property everywhere; payroll in state to payroll everywhere; and finally sales in state to sales everywhere[39]. The average of those three ratios is taken to determine the percentage of income of the taxpayer that should be "apportioned" to and therefore subject to the tax of that particular jurisdiction. It can be illustrated as follows:

(See Table in the next page)

[36] *Id.* at 473-478.
[37] *Id.*
[38] *See* Multistate Tax Compact, art. IV (effective Aug. 4, 1967) (amended 2015), http://www.mtc.gov/The-Commission/Multistate-Tax-Compact.
[39] *Id.*

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Table 1

Property Factor	**Payroll Factor**	**Sales Factor**		**Apportionment**
Property in State	Payroll in State	Sales in State	Total ÷ 3	Average In State
Total Property	Total Payroll	Total Sales	Total ÷ 3	Average Everywhere

Though each factor is nuanced in its application,[40] his general formula was designed by the Multistate Tax Compact both to respond to the proposals contained in the legislation introduced from the Willis Committee and to address the lack of uniformity among the various state apportionment schemes.[41]

The Compact allows taxpayers in member states that are subject to a net income tax in other member states to elect the formula contained in Article IV. When States enact the entire Compact, it includes this provision that allows taxpayers to choose what may be an alternative apportionment formula. It is for states to manage the remaining alternatives for apportioning income in their statutes.

2.4 MODERN USE OF THE MULTISTATE TAX COMPACT

From the time of its creation to current day, the apportionment formula contained in Article IV of the Compact has, indeed, addressed the lack of uniformity in state tax laws and improved the administrative burden for multistate taxpayers while strengthening the system of collecting revenues for states. As was anticipated by Alexander Hamilton, courts, legal scholars, legislators, drafters of the Multistate Tax Compact and members of the Multistate Tax Commission, a common thread of balancing the usefulness of uniformity of states laws with the autonomy of states has been and continues to be present in the evolution of the application of these rules.[42] The usefulness of the Compact, and indeed the Commission that it created, is rooted in the faith and agreement given to it by member states. Despite the

[40] *See* Multistate Tax Compact, art. III (effective Aug. 4, 1967).
[41] *See* EUGENE F. CARRIGAN, MULTISTATE TAX COMM'N, THIRD ANNUAL REPORT 2 (1970), http://www.mtc.gov/uploadedFiles/Multistate_Tax_Commission/Resources/Archives/Annual_Reports/FY69-70.pdf.
[42] *Supra*.

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encouragement of early members to gain congressional approval in order to strengthen validity and force, the fact that the Compact does not have the force of Federal law has come to be an important attribute to the way that it is currently used both by member states and well as multijurisdictional taxpayers.

In order to understand the role of the Compact and the Commission among member states, it is important to understand the mechanics of membership. Membership to the Multistate Tax Commission has evolved. Today, there are different types of members: Compact Members, Sovereignty Members, Associate Members and Project Members.[43] Fifteen states[44] and the District of Columbia are Compact Members, which is defined as states (as represented by Commissioners or head of those agencies that administer corporate tax) that have enacted the Multistate Tax Compact into their state law.[45] These states are charged with and have the authority to govern the Commission created by the Compact.[46] Seven states[47] are Sovereignty Members i.e. those that provide financial support for and general participation in the activities of the Commission.[48] Though these members may participate in shaping in the tax policy and administration efforts of the Commission, they are not governing members. Lastly, there are twenty-six states[49] that are Associate and Project Members, which participate in meetings of the Commission, consult and cooperate with the Commission and other member states.

In total, forty-eight states are in some form members of the Multistate Tax Compact which holds itself out to be a body with no regulatory authority. The Commission views the Compact or any part of it, including the formula

[43] *See* http://www.mtc.gov/The-Commission/Member-States.
[44] Alabama, Alaska, Arkansas, Colorado, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah and Washington.
[45] *See* http://www.mtc.gov/The-Commission/Member-States.
[46] *Id.*
[47] Georgia, Kentucky, Louisiana, Michigan, Minnesota, New Jersey and West Virginia.
[48] *See* http://www.mtc.gov/The-Commission/Member-States.
[49] Arizona, California (Franchise Tax Board and Sales Tax Board), Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Wisconsin and Wyoming.

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contained in Article IV as a model rule.[50] While state legislatures may choose to enact or modify any or all parts of the Compact, no such changes will alter the Compact itself. In other words, while states are free to enact whatever apportionment formula they wish, they are not free to modify the Compact itself.[51] Indeed, member states have modified the versions of the Compact's apportionment formula that are enacted and applied to multi-state taxpayers. Not only do various states offer alterations to three factor apportionment, but a single state may allow different types of taxpayers to use varied methods of apportionment.[52] The freedom to tailor and modify an apportionment formula is a right that has been protected through the history of the United States. States are vested in preserving their right to create a tax scheme that is consistent with the culture and goals of the state, so long as they can be considered "fairly apportioned" by the standards set forth in Northwestern States Portland Cement Co. v. Minnesota.[53] In the modern economy, the ability to create a system of corporate tax that may provide an incentive for large, multistate taxpayers to establish a presence in a state is an important tool for states to manage both their revenues and the general economic health of the state and its residents. While the goal of uniformity that the Multistate Tax Compact has come a long way to achieving it is a worthy one for administration of corporate tax filings, the protection of a state's right to choose is an equally important goal. As rapidly changing technology has a significant impact on all three of the apportionment factors,[54] states and taxpayers are increasingly seeking ways to manage the amount of tax paid. Most recently, large multi-jurisdictional corporate taxpayers have taken to questioning the role of the Compact in light of the decision in *U.S. Steel Co. v. M.T.C.* Taxpayers are seeking to rely on their ability to select an apportionment

[50] The three factor apportionment formula contained in Article IV is very similar to the one contained in the Uniform Division of Income for Tax Purposes Act ("U.D.I.T.P.A.") which was drafted by the National Conference of Commissioners on Uniform State Laws. *See* Uniform Division of Income for Tax Purposes Act, §§ 1-18 (Proposed Official Draft 1957) (comments amended 1966), available at http://www.uniformlaws.org/shared/docs/uditpa/uditpa66.pdf.

[51] *See* Herbert & Mayster, *supra* note 25.

[52] Some common alterations to the apportionment formula include "Double Weighted Sales" in which the sales factor is counted twice in the apportionment formula, and "Single Sales Factor" in which neither the property nor payroll factor are considered.

[53] *Supra*.

[54] Electronic commerce and the rise of digital goods has changed the fundamental nature of a sales factor and has encouraged a recent proposed amendment to the "sourcing" of sales. In addition, the question of where intangible property is "used" and where employees work are also becoming increasingly complex.

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formula that optimizes their tax liability based on the status and validity of the Compact as a multi-lateral contract among states.

In 2015, the Multistate Tax Commission passed a resolution modifying the Compact to allow the adopting member state to use, instead of the previous three factors apportionment formula, any apportionment method the state sees fit.[55] The motivation underlying this amendment as well as the potential ramifications are best considered after a review of some recent state case law on the subject of the election provision contained in Article III of the Compact.

3. STATE COURTS RESPOND TO TAXPAYER ELECTIONS

Recently, large multi-jurisdictional corporate taxpayers have taken to questioning the role of the Compact. Taxpayers are seeking to rely on their ability to select an apportionment formula that optimizes their tax liability based on the status and validity of the Compact as a multi-lateral contract among states. Three major decisions made by the highest state courts have been published on this topic beginning in July of 2014 with *International Business Machines Corp. v. Department of the Treasury*[56] decided in the Michigan Supreme Court. Subsequently, on December 31, 2015, the California Supreme Court published an opinion in the matter of *The Gillette Company (with five other plaintiffs) v. Franchise Tax Board*.[57] Most recently, on June 22, 2016, the Supreme Court of Minnesota weighed in on the matter of in the decision of *Kimberly-Clark Corporation & Subsidiaries v. the Commissioner of Revenue*.[58] Though similar cases are pending in other states, this article will focus on these three as seen through the lens of the tensions, principles and actions that have brought us to this point, and will conclude with a brief exploration of a few of the most likely potential outcomes in this area of litigation.

[55] *See* Multistate Tax Compact, art. IV, § 9 (as revised on Jul. 29, 2015).
[56] *See* I.B.M. v. Department of Treasury, 496, Mich. 642 (2014).
[57] *See* Gillette Co. v. Franchise Tax Bd., No. S206587, JUSTIA US Law (Cal. Dec. 31, 2015).
[58] *See* Kimberly-Clark Corp. v. Comm'r of Revenue, LexisNexis, No. A15-1322 (Minn. Jun. 22, 2016).

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3.1 I.B.M. IN MICHIGAN

The central question in this case was whether the taxpayer, International Business Machines, Corp. ("I.B.M.") which had had business operations and revenue in a number of different states, was entitled to elect the three factor apportionment formula contained in the Multistate Tax Compact[59] instead of using the single sales factor apportionment formula codified into Michigan's law.[60] Central to this question is whether Michigan's enacted Business Tax Act (hereinafter B.T.A.),[61] which contained an apportionment formula distinct from the Compact's three factor formula, served to ***implicitly*** repeal the election to be a part of the Multistate Tax Compact (emphasis added). In order to fully understand the ways in which Michigan's membership in the Compact related to the enacted B.T.A. and the impact of that on taxpayers, it is important to briefly review the history of corporate tax statutes in Michigan, as well as its membership to the Multistate Tax Compact.

After adopting its first corporate income tax three years earlier,[62] Michigan became a member of the Multistate Tax Compact in 1970[63] recognizing that traditional tax administration was inefficient and burdensome to both states and taxpayers. In joining the Compact, Michigan included those provisions that were required to be enacted in order to become a member state. In 1976, Michigan replaced the corporate income tax with the Single Business Tax Act, which taxed activity instead of income and functioned as a "value added tax" instead of the more traditional income tax that it replaced.[64] In enacting the Single Business Tax Act, the Legislature expressly amended or

[59] I.B.M. used the election provision contained in Article III of the Multistate Tax Compact that was codified into Michigan Law at MCL 205.581, which states that a taxpayer may use the three factor apportionment formula contained in Article IV of the Compact, or "may elect to apportion and allocate his income in the matter provided by the laws of such state … without reference to the Compact…" Multistate Tax Compact of 1969, Pub. Act No. 343, art. III (codified as amended in MICH. COMP. LAWS § 205.581(2014)).

[60] *See generally I.B.M,* 496 Mich., 642.

[61] *See* Michigan Business Tax Act of 2007, Pub. Act No. 36, MICH. COMP. LAWS §§ 208.1101-208.1601 (*repealed* by Act of 2011, Pub. Act No 39).

[62] The Income Tax Act of 1967, Pub. Act No. 281 (codified as amended in MICH. COMP. LAWS § 206.61 (2014)) was measured by net income activities of the taxpayer.

[63] *See* Multistate Tax Compact of 1969, Pub. Act No. 343 (codified as amended in MICH. COMP. LAWS §§ 205.581-205.589 (2014)).

[64] *See* Single Business Tax Act of 1975, Pub. Act No 228, MICH. COMP. LAWS §§ 208.1- 208.145 (*repealed* by Act of 2002, Pub. Act. No 531).

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repealed the provisions of the prior tax to the extent that was in conflict, but did not expressly repeal the Multistate Tax Compact.[65]

In 2008, the Michigan Legislature enacted the Business Tax Act, and in doing so, expressly repealed the Single Business Tax Act but again did not expressly repeal the Compact.[66] The B.T.A., the statute in effect during the tax periods at issue in this case, was in effect only until January 1, 2012, when Michigan expressly repealed the B.T.A. and returned to a Corporate Income Tax. From the time that Michigan has imposed a tax on business, it has always required the apportionment of income for multi-jurisdictional taxpayers in order to keep from violating the limits of the U.S. Constitution.[67] Another consistency in the system of corporate taxation in Michigan has been the presence of the Compact on the statutes. From the time that it was enacted through the tax periods at issue, through repeals of prior and inconsistent tax statutes, the Compact has remained in effect.[68] Since the Compact was not expressly repealed in 2008, the Michigan Supreme Court was charged with deciding whether the Compact's election provision was repealed by implication when the B.T.A. was put into effect. The majority decided that there was no repeal by implication because it can be read in pari materia[69] the B.T.A. and prior tax statutes with which the Compact has coexisted. Accordingly, I.B.M. maintained the right to elect to use the three factor apportionment formula instead of the sales factor apportionment outlined with apparently mandatory language in the B.T.A..[70]

In 2011, the Michigan legislature expressly amended the provision of the enacted Compact that allowed taxpayers to elect to use the three factor apportionment formula contained in Article IV of the Compact and required taxpayers to use the apportionment formula contained in the B.T.A..[71] This

[65] *See* Income Tax Act of 1967, Pub. Act No. 281, Mich. Comp. Laws §§ 206.61-206.81 (repealed by Act of 1975, Pub. Act No 233).
[66] *See* Michigan Business Tax Act of 2007, Pub. Act No 36, MICH. COMP. LAWS §§ 208.1101, 208.1201 (*repealed* by Act of 2011, Pub. Act No 39).
[67] *Supra*; *see also* Malpass v. Department of Treasury, 494, Michi., 237 (2013).
[68] *See* I.B.M. v. Department of Treasury, 496, Mich. 642 (2014) at 7.
[69] A designation that applies to statutes that were enacted at different times but apply to the same subject matter.
[70] *Id.*
[71] *See* Multistate Tax Compact of 1969, Pub. Act No. 343, § 1 (codified as amended in MICH. COMP. LAWS § 205.581 (2014)).

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amendment to the statute was made retroactive and applied beginning January 1, 2011.[72] The Michigan Supreme court, in its holding, recognized that the "Legislature could have – but did not – extend this retroactive repeal to the start date of the B.T.A.".[73] The court held that by repealing the election provision of the Compact to the beginning of the year instead of to the effective date of the B.T.A., "it created a window in which it did not expressly preclude use of the Compact's election provision for B.T.A. taxpayers.".[74] Based on this reasoning, the majority of the Court did not reach the issue of whether the Multistate Tax Compact was a binding contract between and among states.[75]

In response to this ruling, on September 11, 2014, the Michigan Legislature once again repealed the election provision contained in the Compact as codified in Michigan law, but did so back to the effective date of the B.T.A..[76] Though taxpayers have challenged this retroactive repeal of the election on constitutional grounds, the Michigan Courts have held the legislature's appeal to be effective and have denied taxpayers appeals. On September 29, 2015 the Michigan Appellate Court upheld the state's retroactive repeal of its membership in the Multistate Tax Compact, holding that the Compact was not a binding contract under state law and retroactive repeal did not violate state or federal contract clauses. The court also held that the retroactive repeal did not violate state or federal due process clauses on a number of grounds, including the determination that taxpayers did not have a vested right in the state's tax laws. In that decision, the Appeals court held that the Multistate Tax Compact was an advisory agreement, not a binding compact or a contract, and accordingly, removal from the Compact was not prohibited by its terms. Most recently in June of 2016, the Michigan Supreme Court declined to review the Appeals Court decision that consolidated claims of over

[72] *Id.*

[73] *I.B.M.*, 496 Mich. at 16.

[74] *Id.*, 17.

[75] The Concurring opinion in this case agreed that I.B.M. was entitled to use the Compact's apportionment formula, and that the tax base at issue was an income tax, but said it would not have reached the question of whether there was a repeal by implication. The dissenting opinion in this case understood an "unambiguous directive" from the state legislature. The majority read the dissent's argument as "tantalizingly simple" but countered that it relied on a reading of the B.T.A. without regard to similar statutes or context.

[76] *See* Act of Sep. 12, 2014, Pub. Act No. 242 (repealing MICH. COMP. LAWS §§ 205.581-205.589 (2008)).

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fifty multijurisdictional taxpayers.[77] A dissent was filed with the refusal opining that the constitutional issues raised by the taxpayers should be heard by the Court. Though taxpayers have exhausted their options in Michigan courts, a writ of certiorari may be filed by taxpayers with the U.S. Supreme Court.

3.2 GILLETTE IN CALIFORNIA

California became a member state of the Compact in 1974 when it enacted the entire text of the Compact in its statutes.[78] At the time, the law that existed prior to California becoming a member state was identical to the formula contained in the Compact. In 1993 the California Legislature adopted a new apportionment formula[79] which, since the first time since becoming a member state, varied from the Compact formula.[80] The legislation passed in 1993 did not in modify or amend the election provision set forth in the Compact, or the apportionment formula contained therein, nor did it in any way change the member status of California to the Compact. In this appeal, Gillette and five other multijurisdictional entities sought to establish that the Legislature is bound to permit the taxpayer to choose the three factor apportionment formula contained in the compact, notwithstanding the existence of a different apportionment formula contained elsewhere in the corporate tax code.[81]

In its decision, the California Supreme Court does not reach the issue of whether the Compact takes precedence over State law because of its holding that the Compact is NOT a binding contract among member states.[82] In its analysis, the court takes into account the Multistate Tax Commission's view of the Compact that it is not binding but an "advisory compact [….] which is more

[77] *See* Gillette Commercial Operations North America & Subsidiaries v. Department of Treasury, No. 152588(Jun.24, 2016), http://publicdocs.courts.mi.gov:81/SCT/PUBLIC/ORDERS/152588_97_01.pdf.
[78] *See* 1974 Cal. Stat., ch. 93, § 3, at 193.
[79] A "double weighted sales" apportionment formula, in which the sales factor accounts for half of the apportionment formula.
[80] *See* CAL. REV. & TAX. CODE §25128 (West 1992), *amended by* 1993 Cal. Stat. 5441, § 1.
[81] *See Gillette Co. et al.* v. Franchise Tax Board, 196 Cal. Rptr. 3d 486 (2015), at 7-8.
[82] *Id.*, at 8-9.

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in the nature of model uniform laws.".[83] As the taxpayers point out, the Compact's fundamental goal of uniformity distinguishes the Compact somewhat from a model law. Though both can be enacted and repealed according to the will of the legislature, the Compact's fundamental purpose of uniformity can only be achieved if a critical number of member states use its provisions, and that "member states commitment to the U.D.I.T.P.A. [Compact] formula" is what prevented congressional intervention, the specter of which gave rise to the compact in the first place.[84]

The court considers the origins of the Compact, and distinguishes the status of state laws at the time of the creation of the Compact from present day, and separates that wholly from the question of whether the Compact creates any reciprocal binding obligation among members. Whether or not the goal of uniformity is better served if more states enact the formula is a separate question from whether or not a binding, multi-lateral contract has been created. The court finds no evidence of the creation of such contract. After a brief discussion of how the amendment of the corporate tax does not violate the "Reenactment Rule" in California,[85] the Court goes on to conclude that the Legislature had both the authority and intent to eliminate the Compact's election provision. Though the authority is clear from a review of the state constitution which gives broad and plenary authority to the legislature when it comes to the powers of taxation,[86] it relies both on the mandatory nature of the language in the statute as enacted–as well as the legislative history that

[83] *Id.*, at 9. The M.T.C. relies on the factors set forth in Northeast Bancorp v. Board of Governors, 472 U.S. 159, which, after the holding in *U.S. Steel v. M.T.C.*, identified the "classic indicia" of a Compact, including the establishment of a body to regulate, no conditioning of action on another state, and that each state is free to modify or repeal its law unilaterally. Though arguably the Multistate Tax Commission can be viewed as a body, there has been some discussion among scholars about the level of regulatory authority the Commission exerts, in particular with regard to its joint audit program. While no action is conditioned upon the action of another member state, the entire goal of uniformity, while not requiring any specific action, rests on the assumption that some critical number of states will agree to standardize at least terms, if not formulas. The last indicator is the strongest and best argument in favor of the state that the Compact itself is designed to allow states to modify and appeal any provisions at any time and therefore functions more like a model law than a binding contract between states.

[84] *See Gillette Co. et al.*, 196 Cal. Rptr. 3d at 11.

[85] A procedural rule designed to 'make sure legislators are not operating in the blind when they amend legislation and to make sure the public can become apprised of changes in the law'. *See* Gillette at 17-18 citing St John's Well Child and Family center v. Schwarzenegger, 50 Cal 4th. 960 and Hellman v. Shoulters, 114 Cal. 136 at 152.

[86] *Id.*, at 8, 18.

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indicates a preference to require taxpayers to use the new apportionment formula.[87]

3.3 KIMBERLY – CLARK IN MINNESOTA

In Minnesota, the Supreme Court considered whether the state's membership in the Compact bound it to make available to taxpayers the three-factor apportionment formula contained in Article IV despite having repealed Articles III and IV of the Compact.[88] During the tax years at issue the parties agreed that taxpayers, when apportioning their income, had the option to (1) use the formula set forth in the Minnesota statute[89] or (2) to petition the Commissioner to permit the use of an alternative formula. Kimberly-Clark, argued that there was a third option: to use the apportionment formula contained in the Multistate Tax Compact that was enacted in Minnesota's statute in 1983, but repealed in 1987.[90] Despite the repeal of the section of the Compact that contained the apportionment formula, Kimberly-Clark argued that the election provision that was enacted in 1983 (and repealed in 1987) was part of a binding multi-state compact and accordingly, Minnesota was obligated to make that formula available to taxpayers until it fully withdrew from the Compact.[91] Kimberly-Clark contends that by enacting the Compact and becoming a member state, Minnesota relinquished a bit of its autonomy "in order to benefit from the collective action of multiple states" and that, by enacting the Compact in 1983, Minnesota created a binding obligation that would only be terminated by a complete withdrawal from the Compact.[92]

Minnesota Supreme Court held that there was no commitment binding Minnesota that was violated when the election provision was repealed. The Court based its holding on the grounds that the Compact was enacted into the Minnesota code and the Legislature had the authority and intent to amend it without violating any agreement that the State had entered when it became a member. The Multistate Tax Commission holds itself out to be advisory and

[87] *See Gillette Co. et al.*, 196 Cal. Rptr. 3d, at 19.
[88] *See* Kimberly Clark Co. v. Commissioner of Revenue, Minn., 880 N.W.2d 844 (2016).
[89] *See* MINN. STAT. §290.191(2) (2008).
[90] *See Kimberly-Clark* , Minn., 880 at 5.
[91] *Id.*, at 5. Minnesota repealed the remaining provisions of the Compact from its statues in 2013, after the tax periods at issue in this case.
[92] *Id.*, at 10.

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non-binding in nature, and prides itself on allowing the states to modify and repeal the provisions of the Compact at will.

The Minnesota Court further held that even if Minnesota did enter into a binding agreement when enacting the Compact, the Legislature did not and could not relinquish any of its authority on the subject of tax.[93] The Minnesota Constitution states that the "power of taxation shall never be surrendered, suspended or contracted away.".[94] Lastly, the Court considers the function of the "unmistakeability doctrine" to support the finding that the legislature gave up no authority when becoming a member of the Compact, and acted within the scope of its power in repealing Sections II and IV of the Compact. Under this doctrine, sovereign powers remain intact unless relinquished in unmistakable terms. The court found no clear indication that the Legislature intended to relinquish any authority to amend the system of taxation when becoming members of the Compact. In holding for the Commissioner that the taxpayer did not have the option to elect the apportionment formula in the Compact, the Court relied on federal and state constitutional principles, state legislative history and construction, and a very particular evolution of the corporate tax statutes.[95]

3.4 AMICI CURIÆ AND OTHER STAKEHOLDERS

The Multistate Tax Commission (created by Article VI of the Compact) has filed Amicus briefs in the three above mentioned cases as well as others in the country.[96] Decisions in Oregon and Texas have also supported the position of the State and the Multistate Tax Commission though on grounds specific to each jurisdiction.[97] The Multistate Tax Commission has maintained the

[93] *Id.,* at 11.
[94] *Kimberly-Clark* , Minn., 880 at 11 citing Minn. Const. art X § 1.
[95] Kimberly-Clark has sixty days from the date of decision to file a motion for reconsideration to the Minnesota Supreme Court. At the date of submission of this article, Kimberly-Clark has not filed such a motion, but sixty days from the filing of the opinion have not passed.
[96] Other cases include Health Net, Inc. & Subsidiaries v. Department of Revenue, T.C. 5127, Or. Tax Sept. 9, 2015) which held that the Legislature in Oregon "effectively disabled" the taxpayer from making the election to use the three factor apportionment formula contained in the Compact. This case is currently being reviewed by the Oregon Supreme Court which selected it for direct appellate review; *see also* Graphic Packaging Corp. v. Comptroller, Tx App. Ct., 3d Dist. No. 03-14-00197-CV (July 28, 2015) in which the court ruled that the Texas Franchise tax was not an income tax pursuant to the definition in the Compact, and so the taxpayer was unable to elect to use the M.T.C.'s apportionment formula.
[97] *Id.*

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position that it is a non-biding Compact, and its member states are free to amend and repeal the Compact at will. While on first blush it may seem antithetical for the Commission to argue that it lacks authority, but when its twin goals of uniformity and autonomy are considered, the logic of the position is revealed. The balance of promoting uniform state laws while preserving the rights and powers of the states is a difficult one to strike. Though the system among states created by the Compact is constantly growing and adjusting along with the economy, the mission and purpose of the M.T.C. conceived in 1967 has been fulfilled. The issues identified by the Willis report are no longer present, taxpayers not only respect and comply with multiple taxing jurisdictions, but there is also a respect for the law that is consistent.

The Council on State Taxation (hereinafter C.O.S.T.) has also filed a number of Amicus briefs in support of the taxpayers on this issue, and argued state by state that taxpayers have the right to elect the apportionment formula. Whether based on constitutional principles, theories of Contract law, or the history of the M.T.C. legislation in state, C.O.S.T., in representing large multijurisdictional taxpayers, argues for the strength of authority of the M.T.C. in order to protect the right to elect the optimal apportionment formula.

4. THE FUTURE OF THE MULTISTATE TAX COMPACT

The revenue impact of these decisions alone is sufficient to result in continuing efforts on both sides to shape the issue. While taxpayers are more anxious than ever to lower their effective tax rates, states, after years of budget shortfalls, are equally concerned about collecting sufficient revenue to maintain operating budgets. The Supreme Court is unlikely to grant a writ of certiorari to on the Gillette case.[98] Though the U.S. Supreme Court would be the proper arbiter of the constitutional issues at stake, including interpretation of the Commerce Clause, Due Process Clause and agreements among states, the holdings across states and response of state legislatures may lead the Court to decline to review the issue on the grounds that the system is

[98] The petition for writ of certiorari in Gillette was filed on May 27, 2016 and placed on the docket May 31, 2016 as No. 15-1442.

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continuing to function. It may rely on its precedent in U.S. Steel Corp v. Multistate Tax Compact and allow State courts to continue to apply the principles contained therein. Federal intervention in the form of legislation seems even less likely than action by the courts. In a time of historically low productivity from the federal senate, with unprecedented partisan divide, neither chamber is likely to take up a tax matter that will not result in any revenue for the federal government.

Given the slim prospect of federal intervention, and the nature of the question as it currently exists, this issue should be resolved by the States. The decision about the extent to which each state is bound to the Compact is not a large question for the Commission, but depends on the specific history of each state. The Commission has plainly articulated its intent to be non-binding. Yet the success of the entire endeavor that began in response to the Willis report depends on the willingness of the States to work with one another in a committed, if not binding way.

Stakeholders in this debate, including large multi-jurisdictional taxpayers, state courts and legislatures, each have a distinct and substantial way of impacting policymakers. The leadership of the Multistate Tax Commission is made up of Commissioners of Revenue and other high-ranking figures in the tax administration of each state, which results in an alignment of the goals of the states and the Commission.[99] The goal of autonomy for states remains a fundamental tenant for the Commission, and each state seeks to optimize its revenue position for its citizens. Some jurisdictions attempt to optimize their revenues by creating a system of tax that attracts large, multijurisdictional taxpayers, while others seek to maximize revenue from those taxpayers that operate in state. It is the ability to make this choice in the context of all the other variables considered by states that is the heart of the reason for maintaining autonomy, and not far from what Hamilton predicted in the Federalist Papers.

On the other hand, it is notable that all of the states that have found the Compact not to be binding on the states hold elections for judges in the highest

[99] *See Multistate Tax Commission, Commission Officers & Executive Committee Members (2016-2017),* http://www.mtc.gov/The-Commission/Officers-Executive-Committee.

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state courts.[100] Despite the distinction between politics and policymaking, those taxpayers with the most at stake may also have the resources and capability to exert political influence on policymakers – both in the legislatures as well as state courts. As Oregon and other states continue to grapple with the legal history on this issue and the intricacies of the laws as enacted and applied in each state, this debate will be one that has the potential to shift. Taking a long view through the lens of history at this agreement between states, the Multistate Tax Compact, shows past success in managing goals, but may also demonstrate the need for some adjustment of course.

[100] *See, e.g.*, American Bar, Fact Sheet Judicial Selection Methods in the States (Dec. 2016), http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf

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Polish Perceptions on the Immigration Influx: a Critical Analysis

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TABLE OF CONTENTS: 1. Introductory Remarks; 2. Poland as an Immigration Country; 2.1. Poland as an Ethnically Homogenous Nation; 2.2. Poland's Migration Profile; 2.3. The Catholic Church's Ingluence on the Pole's Immigration Awareness; 2.4. Profile of poles holding particular perceptions; 3. Immigrants as a Challenge for Poland; 3.1. Concern over National Security; 3.2. Cultural and Religious Differences as a Source of Potential Conflicts; 3.3. Detrimental Impact of immigration on the Polish Labour Market; 3.4. Burden to the Polish Social System; 3.5. Anti-immigrants Demonstrations and Hate Speech; 4.Positive Attitudes of Immigration for Poland; 4.1. Solidarity and Compassion over Human Misery; 4.2 Cultural Enrichment of the Country and Benefits of Cultural Diversity; 4.3. Poorly and Highly Educated Employees of Polish Labour Market; 4.4. Solution to the Demographic Problem; 4.5. Helping Hand Given to Poles in the Past: Obligation to the Same; 5. Concluding remarks.

ABSTRACT: The article addresses the issue of Poles' attitude towards the influx of migrants to Poland in the context of the migration crisis, which Europe has to face today. The issues discussed in the present paper are aimed to illustrate the characteristic features specific to Poles' attitudes in favour of or against the process of influx of migrants to EU Member States or Poland. The analysis covers both positive and negative aspects of migration to Poland, which have been most often indicated by Poles with respect to migrants. On the one hand, they include fears with regard to national security, potential conflicts of cultural and religious beliefs, fear of the alleged loss of jobs to migrants and their preying on the country's social security system. All of the above result in anti-migration demonstrations and the language of hatred. On the other hand, positive aspects of the migration influx are believed to consist in cultural enrichment, benefits for the labor market resulting from the inflow of both qualified professionals and laborers with lower pay expectations in comparison to Polish workers and believing that migrants might be a chance to minimize the negative effects of the demographic crisis. Those who support helping migrants also point out the issue of solidarity and sympathy for the victims, and the fact that in the past it was the Poles who received support from other countries in Poland's difficult moments. Thus, extending such help to others may prove beneficial in the future. The present paper is based on academic articles, internet sources and statistical data, which all reveal a division into two camps: supporters and opponents of receiving migrants in Poland, which prevents determining Poland's definitive stance on this issue. All the aspects of the problem discussed in the paper are undoubtedly a basis for further analysis.

KEYWORDS: *Immigration; Migration Crisis; Refugees; Common European Asylum System; Poland.*

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1. INTRODUCTORY REMARKS

Immigration phenomenon has existed since the beginning of humanity. Due to diverse reasons, people moved, are moving and will move from one place to another – it is nothing new. However, nowadays the issue of immigration in the European Union is a matter of huge debate. The phenomenon has evolved into one of the biggest mass migrations of people in modern times. Hundreds of thousands of immigrants have already streamed into Europe, which is perceived to be the largest influx of immigrants since World War II. In 2015 more than a million migrants and refugees crossed into Europe, compared to just 280,000 the year before.[1] These days, discussions over the reception of immigrants by European countries are numerous and the decisions made on the European level are shaping the reality of tomorrow of the whole Europe. Despite a high number of proponents of the immigration influx, there are more and more negative attitudes rising in societies based on experiences of some European countries with immigrants. Poland and Polish society have also experienced the impact of the migration crisis. In the case of Poland, the issue of immigration from the East, even though it has clearly fallen by the wayside, is still present.

The purpose of this research is to identify Poles' attitudes towards the immigration influx in Poland with regard to the European Migration Crisis. The paper outlines Poles' perceptions about immigrants in relation to a variety of determinants. The main focus is put on the issue of immigration from beyond the eastern border on the one hand, and the intensified wave of immigration from the Middle East and Africa on the other. The research investigates major issues related to the determinants of Poles' perception shaping process and their reactions to the reception of immigrants by Poland. This analysis involves discovering how complex the factors influencing attitudes towards immigrants are, with regard to aspects of national, cultural,

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[1] *See Why is EU struggling with migrants and asylum?*, BBC (Mar. 3, 2016), http://www.bbc.com/news/world-europe-24583286.

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ethnic and religious identity. Last but not least, the investigation offers insight into and provides responses to the problem of the influence of the discussed perceptions on the Polish reality and society.

2. POLAND AS AN IMMIGRATION COUNTRY

2.1 POLAND AS AN ETHNICALLY HOMOGENOUS NATION

Despite the emergence of new migratory flows, Poland is still the country from which more people emigrate than immigrate to. In comparison to other EU countries, Poland is almost completely monoethnic. The registered number of foreigners, in relation to the Western European countries, is much lower. Indeed, Poland has never been as ethnically homogenous as nowadays. This is proven by the results of the Polish Census of 2011. According to the collected data, Polish citizenship was declared by as many as 99,7% of the surveyed, while only 0,2% acknowledged to be foreign nationals. What is more, the Polish descent was pointed out by 93,8% of the surveyed, other than Polish by 3,8% and 2,4% of the respondents gave no answers.[2] However, despite a widespread opinion that the country is monocultural and homogenous, the existence of ethnographic regions such as Silesia, Masovia, Pomerania, Malopolska cannot be ignored. These areas are diverse with regard to many aspects – culture, cuisine and even language, with the greatest distinctiveness manifested by the Silesians, Kashubians and Lemkos. It is also crucial at this point to relate to the existence of national minorities in Poland, especially those coming from the neighbouring countries, as they are not abstract or unknown to Poles. It is due to the fact that national minorities have resided in Poland for many years.[3]

However, the knowledge of at least some history of the country is needed to understand that this kind of trend was not always the case. Tomasz Teluk emphasizes the fact that over the centuries Poland was ethnically and culturally diverse, offering refuge and hospitality to representatives of many

[2] *See* GUS, *Wyniki Narodowego Spisu Powszechnego Ludności i Mieszkań 2011 [Results of the Polish census of 2011],* Warsaw 2012, http://www.stat.gov.pl/.
[3] *See Cudzoziemcy w Polsce [Foreigners in Poland],* (Mar.17,2015 / Last visit: 13/03/2016), https://roznorodnosc.wordpress.com/category/obszary-diversity/pochodzenie-etniczne.

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nations. Since the beginning of its existence, the country's geographical location facilitated the intersection of paths of many tribes, cultures and religions. The position of openness of the country towards foreigners was especially adopted at the time of Casimir the Great's reign in the 16th century, which encouraged representatives of different nations to come to Poland. As a matter of fact, numerous wars with invading neighbours over the years, border instabilities and consequently, acquisitions and losses of territories by Poland, together with the inhabitants residing there, were the factors leading to the coexistence of a mixture of nations, cultures and religions.[4] The national feeling among Poles was strengthened in the 19th century in the aftermath of Poland's disappearance from the world map. National awareness was being continually shaped in the whole society and the effect of that became transparent at the time of the second independent Polish Republic. Dariusz Czaja points out that after 1945 Poland became a homogenous country in terms of ethnicity, which was enhanced by several factors: shifts of the borders to the West, forced resettlements of Germans from the western parts of the Polish territory and the arrival of new inhabitants, Polish settlers from pre-war Eastern borderlands, to replace the Germans. Simultaneously, a huge group of the Mazurs and Silesians emigrated to Germany, which altogether only encouraged ethnic homogenizing trends.[5]

The sense of otherness of newcomers still constitutes a great challenge for many Poles who are not used to the presence of racially and ethnically differing representatives of other nations in Poland.

2.2 POLAND'S MIGRATION PROFILE

Legal Framework

Poland has been a member of the EU since 2004 and a member of the Schengen Area since 2007. Thus, Poland has fully implemented the provisions of asylum directives and complies with the legal obligations concerning its membership in the Area of Freedom, Security and Justice imposed by the

[4] *See* Tomasz Teluk, *Jeszcze Polska nie zginęła!!! [Poland has not perished yet!!!]*, FRONDA (Feb. 14, 2016), http://www.fronda.pl/a/jeszcze-polska-nie-zginela,65866.html.
[5] *See* DARIUSZ A. CZAJA, *Wielonarodowość Polski na przestrzeni wieków* [*Multinationalism of Poland over the centuries*], (Date not found / Last visit: 16/05/2016), http://peku.pl/414/wielonarodowosc-polski-na-przestrzeni-wiekow.

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Treaties. Poland is also a Party to the Geneva Convention with regard to the refugee status, whereas the legislative instruments governing the functioning of migration policy at the national level include the Act of 12 December 2013 on foreigners[6] and the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland.[7]

It is worth remembering that the Area of Freedom, Security and Justice came into existence through the Treaty of Amsterdam and the EU has started building the Common European Asylum System since 1999. At present, the CEAS includes the following directives: asylum,[8] reception,[9] qualification,[10] the Dublin III Regulation [11] and the Eurodac Regulation. [12]

In accordance with the decision of the Council of 22 September 2015 on accepting by Member States (as part of the so-called relocation from Greece and Italy) migrants seeking international protection, [13] Poland was obliged to accept 1201 migrants from Italy and 3881 from Greece.

The fundamental law with regard to the functioning of the asylum system in Poland is the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland, which implemented

[6] Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach [Act of 12 December 2013 on foreigners] (as amended in Dz. U. of 2013, item 1650).

[7] Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej [Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland] (consolidated version in Dz. U. of 2012, item 680).

[8] Directive 2013/32, of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, 2013 O.J. (L180) 60.

[9] Directive 2013/33, of the European Parliament and of the Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection, 2013 O.J. (L 180) 96.

[10] Directive 2011/95, of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted, 2011 O.J. (L 337) 9.

[11] Regulation 604/2013, of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in one of the Member States by a Third-Country National or a Stateless Person, 2013 O.J (L 180) 31.

[12] Regulation 603/2013, of the European Parliament and of the Council of 26 June 2013 on the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of Regulation (EU) No. 604/2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person and on Requests for the Comparison with Eurodac Data by Member States' Law Enforcement Authorities and Europol for Law Enforcement Purposes, and Amending Regulation (EU) No. 1077/2011 Establishing a European Agency for the Operational Management of Large-scale IT Systems in the Area of Freedom, Security and Justice (recast), 2013 O.J (L 180) 1.

[13] Council Decision 2015/1523 Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece, 2015 O.J. (L 239) 146.

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the so-called asylum package. Issues related to the submission of applications for protection and for granting tolerated stay were regulated in the Act of 12 December 2013 on foreigners.

In Poland, there are two types of international protection that can be granted: refugee status and subsidiary protection. Apart from that, in accordance with the Act on foreigners, in cases provided for in the Act, the protection against expulsion may be granted, that is, tolerated stay or stay for humanitarian reasons. The procedure which is applied in Poland is the unified asylum procedure, which entails that in the course of the proceedings for granting international protection, it is not only examined whether the foreigner meets the conditions for being granted refugee status, but also other circumstances which might effectively protect the foreigner from expulsion are taken into account.

In accordance with the Act on granting protection, the competent authority for accepting the application for granting international protection is the Border Guard authority – the application may be submitted at the border inspection post or on the territory of the Republic of Poland. The authority responsible for examining the applications is the Head of the Office for Foreigners ("OFF"). The persons under the procedure are directed to centres for foreigners – in 2015, according to the data from the OFF, there were 11 such centres in operation. Persons applying for international protection are also entitled to receive social assistance and medical care. Apart from that, foreigners under the procedure are offered re-integration support.

Administrative procedure terminates with the decision of the Head of the OFF – if a foreigner has received a negative decision, he may appeal against it to the Council on Refugees. In the event of a further negative decision, the foreigner may appeal against it to the administrative court.

The problem of implementing regulations and their practical application is presented in the annual report of the Head of the OFF, available on the OFF website. As emphasized in the report for 2015, in November 2015 a significant amendment to the Act on granting protection was passed, which introduced several changes, among others, differentiation between the foreigner's declaration of intent of applying for international protection and an application for granting international protection on the form, the

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possibility of extending the 6-month period for examining the application for granting international protection to 15 months, assuming that an applicant is a minor in cases when it is impossible to determine whether the examined person is an adult and in cases of unaccompanied minors, the limitation on a manifestly unfounded application (an accelerated procedure) only to situations when the applicant poses a danger to the national security or public order, or has already been expelled from the territory of the Republic of Poland for that reason.[14] However, the key provision seems to be the introduction of the system of free legal assistance financed from the State's budget and administered in the first instance by the workers of the OFF and in the case of appellations by lawyers, legal advisers or representatives of non-governmental organizations.

It is worth emphasizing that non-governmental organizations (The Halina Nieć Legal Aid Centre, the Helsinki Foundation for Human Rights, the Rule of Law Institute, the Association for Legal Intervention, to mention just a few) play a special role in the Polish asylum system, as legal regulations facilitate their participation in the asylum procedure practically on its every stage. The functioning of the Polish asylum system was also evaluated by the Supreme Chamber of Control in the report of 2016 covering the years 2012-1014 on granting protection to foreigners by competent authorities of the Republic of Poland.[15] The report presents the activities of the Border Guard and the OFF in generally good light – the main objection to the Border Guard was the lack of documents confirming the execution of other tasks provided for under the programme with regard to accepting applications; neither was there evidence on activities performed at the time of accepting applications. At the same time, the OFF completed 34% of cases in the time exceeding the 6-month time frame provided for in the Act for issuing the decision on granting protection.

At the executive level, the legally binding political document is the Migration policy of Poland: current state and proposed action adopted by the

[14] *See* URZAD DO SPRAW CUDZOZIEMCÒW, SPRAWOZDANIE Z WYKONYWANIA USTAWY O OCHRONIE MIEDZYNARODOWEJ ZA 2015 ROK (2016).
[15] *See* (Mar. 15, 2016), https://www.nik.gov.pl/kontrole/I/14/007/KPB/.

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Council of Ministers on 31 July 2012.[16] Currently, the government has been working on adopting a new document and defining new migration priorities for Poland.

Statistic data

The number of foreigners in Poland is still relatively small, but it is worth pointing out that about 1 million Ukrainians reside permanently and temporarily on the territory of the country. However, migration to Poland is rather of a regional nature (that is, it concerns migration from neighboring countries, especially the former Soviet Union and the Caucasus) and of a transit nature – the basic aim of the majority of migrants is to enter the EU through the Polish border and thus get to richer Western countries. It is well illustrated by the statistical data of the Head of the OFF with regard to the Dublin proceedings, i.e. returning migrants to the Member State responsible for examining an asylum claim within the EU.[17] In accordance with the Dublin III Regulation, it is, as a rule, the country of the first entry into the territory of the EU. In 2015, Polish authorities received a total of 6 395 applications for re-admission of foreigners who had filed for asylum in Poland before and then left for Germany (3 775 applications), for France (901 applications), for Austria (438 applications) and for Sweden (272 applications).[18]

In accordance with the data of the Head of the OFF (it is the authority responsible for examining applications for granting international protection in the first instance) 12 325 (M 6237, F 6088) applications for granting international protection were filed in Poland in 2015. It was a significant increase in comparison with the year 2014, when the figure concerned 6 625 persons. The asylum decisions which resulted in positive outcomes included 348 grants of refugee status, 167 grants of subsidiary protection and 122 of tolerated stay. The majority of nationalities applying for protection included nationals of the Russian Federation (65%), Ukraine (19%), Tajikistan, Georgia, Syria, Armenia and Kyrgyzstan. Refugee status was granted to 348 persons,

[16] *See* (Jul. 31, 2012), https://bip.mswia.gov.pl/bip/polityka-migracyjna-po/19529,Polityka-migracyjna-Polski.html.
[17] *See* (Date not found / Last visit: 20/10/2016), http://udsc.gov.pl/statystyki/raporty-okresowe/.
[18] *Id*.

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including 203 Syrians, 24 foreigners from Iraq, 21 nationals of the Russian Federation, 20 stateless persons, 15 foreigners from Egypt, 14 nationals of Belarus and 12 persons from Turkmenistan.[19]

Polish eastern border is the external border of the EU at the section of the border with Ukraine, Belarus and the Kaliningrad District of the Russian Federation. However, in comparison with the EU southern borders (especially those at sea), the eastern borders are not particularly exposed to the influx of irregular migrants. In accordance with the statistical data gathered by the Border Guard Headquarters, 3 365 persons were stopped at the external borders for crossing or attempted crossing of the border in 2015, in breach of border regulations. Generally, 14 836 012 foreigners crossed the borders of Poland in 2015.[20]

A significant role in the movement of persons is played by the local border traffic, especially at the border with Ukraine – the agreement entered into force in 2009. The number of Poland-Ukrainian crossings on this basis totaled 10 734 959 in 2015.[21] NGOs also play a significant role in the Polish reception policy, especially in the area of legal counseling and reintegration measures. Among the leading NGOs it is worth mentioning the Helsinki Human Rights Foundation, the Association for Legal Intervention, the Halina Nieć Legal Aid Centre, the Rule of Law Institute or the Centre for Volunteers.

2.3 THE CATHOLIC CHURCH'S INFLUENCE ON THE POLE'S IMMIGRATION AWARENESS

The Catholic Church retains a strong political influence on the Polish population, and thus plays a significant role in influencing Polish attitudes to immigration. Indeed, Poland is an exceptional example in terms of religiosity. In the context of the current situation of the EU, Poles are one of the most religiously homogenous nations, where the majority of citizens officially declare their affiliation to the Roman Catholic Church.

[19] *Id*.
[20] *See* (Jan. 22,2013/ Last visit: 20/05/2016), https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206,Statystyki-SG.html.
[21] *Id*.

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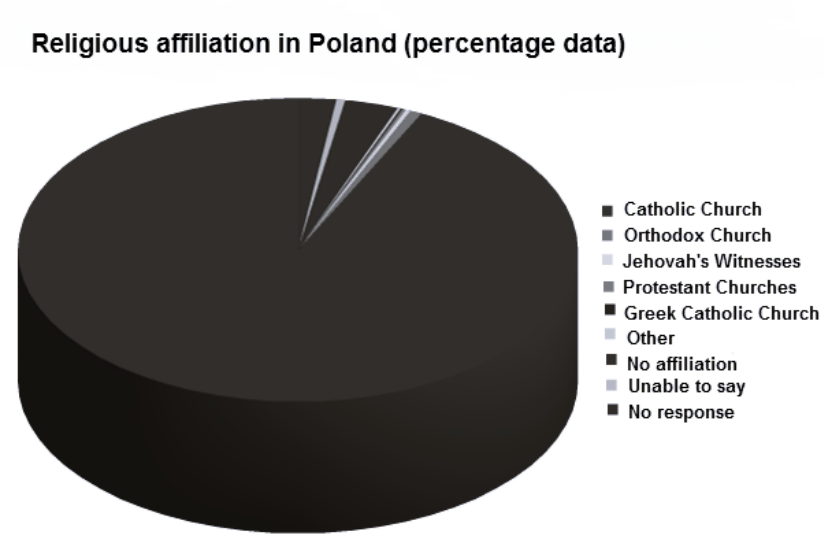
Indeed, there are not many conflicts on religious grounds in Poland. However, the question of inviting Muslim immigrants into the country is extremely controversial for many Poles, especially in religious terms. This is intensified by common fears related to Muslim extremists, on account of terrorist attacks being more likely to take place due to their presence in Poland. In fact, the number of Muslims in Poland is marginal at present. The graph below presents the results of the Polish Census of 2011 in relation to the question of religious affiliation.[22]



Picture no. 1: Percentage illustration of religious affiliation in Poland.
Source: Badania Statystyczne (translated by Kinga Hodór)

Undoubtedly, religion is one of the strongest cultural influences, while the influence of Catholicism on Western European culture has been especially important. Apart from the fact that Poland has strong roots in Western European tradition, the Polish culture has characteristics which make it distinct among other nations. When trying to find features which determine the uniqueness of the Polish culture, the importance of Catholicism, which has been extremely crucial in the national consciousness of Poles, must be noted. Over the ages, the Catholic Church was the most significant patron in many aspects of life, as well as the focal point in the case of fights for preserving

[22] *See* GUS, *supra* note 2.

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national identity during partition times or wars. What is more, during the troubled times for Poland, the honour given to the Virgin Mary became a distinctive feature of Poles, especially praising the mother of Jesus and believing in her special intercession to God.[23] Despite Poland's rising societal secularization in the last decades, the still strong presence of the Church cannot be ignored in the debate on immigrants in Poland.

Approaching the topic of the Migration Crisis from a religious standpoint creates and opportunity to relate the experience of being a refugee to the person of Jesus who was also a refugee. Indeed, Biblical teachings call for compassion for fellow men in need, which is usually emphasized by Polish Church representatives in their preaching. Poles expressing their will to help victims of the crisis point out that Poland shall only welcome Christian refugees, emphasizing the fact that this kind of solution would be best for future integration of newcomers with the Polish society.

2.4 PROFILE OF POLES HOLDING PARTICULAR PERCEPTIONS

Perceptions towards immigrants are conditioned by many factors specific to the surroundings in which Poles live. They differ in relation to age, financial circumstances, education level, place of residence, knowledge about immigrants and their countries of origin, worldviews and many others. As a result, certain trends can be identified with regard to the perception shaping processes. For the purpose of the current article, some conditions are discussed below.

When it comes to the question of age, Małgorzata Omyła-Rudzka puts emphasis on the fact that Poles aged 25-44 express their sympathy to the idea of welcoming refugees into Poland the most frequently. A bit less positive emotions are held by people over 55 years old, while the elderly, over 65 years of age, rarely declare positions of hostility towards foreigners or have no precise opinions on the matter. Nevertheless, the surveyed 55-64 year-olds, are often negative towards nationals of other countries.[24] As for the Polish

[23] Anna M. Kosińska, Kulturalne Prawa Człowieka: Regulacje Normatywne I Ich Realizacja [Cultural Human Rights: Normative Regulations And Their Realization] 60 (2014).
[24] Małgorzata Omyła-Rudzka, Centrum Badania Opinii Społecznej, Stosunek do Innych Narodów [Attitude Towards Other Nations] 14 (2015).

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youth, they usually understand the need for solidarity in the contemporary world and they are much more likely to put themselves in the immigrants' shoes. Małgorzata Omyła-Rudzka notices that Poles with higher education are much less likely to express their dislike towards immigrants. Hence, the more educated the less negative about immigrants Poles are.[25] Knowledge about different cultures and religions is of a huge importance in shaping perceptions about representatives of other nations as it gives a chance to leave stereotypes or prejudices aside. The level of acceptance is higher among those who know foreign nationals themselves. International projects, trips, studying or working abroad for some time, taking part in events which bring immigrants' cultures closer are just some examples which may contribute to greater understanding between people of different origins. In fact, personal experiences make perceptions the most valuable. They create space to get to know representatives of other nations which results in opening minds and shaping attitudes. This kind of approach is usually followed by an increase in tolerance and ability to appreciate differences between cultures.

Another factor, partially related to the level of education and significant in conditioning attitudes towards other nations, is connected to financial circumstances of Poles. Citizens with lower incomes tend to have more negative attitudes than those who are satisfied with their earnings. The higher the evaluation of their own situation is, the more favourable approach towards immigrants and refugees can be observed.[26] There also exists a relationship between age and the level of education of Poles and their influence on their perception of immigrants in the face the Migration Crisis. Finally, the place of residence also influences people's perceptions to some extent. Inhabitants of villages and small towns declare their sympathy towards other nations much less frequently than others. However, Poles living in villages are the most hostile towards immigrants.[27] Having fewer chances for personal contact with foreigners than Poles living in cities, they usually form their attitudes on the information that reaches them through the media or by contact with friends,

[25] *Id.*
[26] *Id.*
[27] *Id.*

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family members or neighbours who have already met other foreign nationals. Even so, such knowledge is of a limited nature.

3. IMMIGRANTS AS A CHALLENGE FOR POLAND

3.1 CONCERN OVER NATIONAL SECURITY

The question of national security for Poland in relation to the immigration influx is a sensitive topic. The Migration Crisis has caused chaos throughout Europe. At the same time, it is a victory for ISIS trying to send the message to Europeans that they cannot feel secure anymore in their countries, cities and streets.[28] Terrorist attacks taking place in the world are more and more common and result in growing fears in the whole of Europe, including Poland. Increasing numbers of non-European immigrants in European countries together with acts of violence caused by immigrants are the source of uncertainty and scepticism. The examples of criminal acts and aggression caused by the presence of Muslim immigrants within the EU live strong in people's memory, which is why immigration continues to face such strong opposition in Poland. Another controversial topic is the treatment of women by some Muslim immigrants. Examples of Swedish, German or French women, beaten up, slapped in the face, kicked, molested, harassed or raped are multiple and this is another factor enhancing negative perceptions about Muslim immigrants within Polish society.[29] From the point of view of many Poles, the experience of Western Europe will be the lesson to learn in order not to repeat the mistakes made by some European countries.[30]

On the other hand, Poland's geographical location invites other types of problems that other European countries do not necessarily experience. The role of Poland, whose eastern border is at the same time the EU's external

[28] *See* Nathan Giannini, *ISIS Threatens Attacks on Major European Cities*, AOL (Apr. 5, 2016), https://www.aol.com/article/2016/04/05/isis-threatens-attacks-on-major-european-cities/21338480/.
[29] *See* Aldona Zaorska, *Zgwałcona Europa. Przekonaj się na Jaką Skalę Niemcy Sparaliżowała Fala Gwałtów* [*Raped Europe. Find Out to What Extent Germany Paralyzed by a Wave of Violence*] (Feb. 2, 2016), http://warszawskagazeta.pl/kraj/item/3253-zgwalcona-europa-przekonaj-sie-na-jaka-skale-niemcy-sparalizowala-fala-gwaltow%20.
[30] *See* CAB, *Muzułmańscy imigranci to paliwo dla ekstremistów i radykałów* [*Muslim immigrants are the fuel for extremists and radicals*], BINASE.PL (Sept. 14, 2015), http://binase.pl/?p=914.

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border, poses numerous challenges for the security of Poland and the EU in the context of the Migration Crisis. Jacek Czaputowicz highlights the fact that, with regard to Poland, challenges and threats come from the East. The Russian aggression on Ukraine and an unstable situation in the eastern part of the country have led to an intensified immigration from the region. The war in the Eastern Ukraine is one of the major reasons of Ukrainians' mass migrations to Poland, perceived as an escape to a safe place, which is not distant and which offers a chance to live a normal life. In principle, Poles do not oppose the trend and rather support Ukrainians' integration into Polish society. Indeed, the stability of Ukraine is of great importance in case of a potential military conflict in this region.[31]

3.2 CULTURAL AND RELIGIOUS DIFFERENCES AS A SOURCE OF POTENTIAL CONFLICTS

People of different cultures are often unable to understand each other which is the source of conflicts on different levels. History provides many examples of clashes between Christian and Muslim cultures, which had long lasting consequences. Europe, once strong in its position, gradually started to lose the fundamental values on which it was built. Christian values have been replaced to some extent by atheist ethics negating the sense of God's existence. What is more, numerous ideologies have replaced religion, i.e. the fundament of European values and traditions. In the face of the Migration Crisis, fears of Islamization of Europe or terrorist threats are considered to be more possible.

Hanna Bojar points out that one of the most important factors influencing mutual relations is the degree of similarity or difference between an immigrant's culture of origin and the receiving culture, which in this case means Poland.[32] When asked, Poles often point out the provision that Poland should accept only Christian refugees. Since Muslim immigrants are mostly people with a strong value system, rooted in their religion and culture in accordance with which they have lived back in their countries, Poles are afraid

[31] *See* Jacek Czaputowicz , *Polityka bezpieczeństwa Polski – między samodzielnością a europeizacją [Security Policy of Poland – Between Independence and Europeanization]*, KWARTALNIK NAUKOWY OAP UW "E-POLITIKON", no. 6, 2013, at 24, 24-25.

[32] *See* Hanna Bojar, *To Be an Immigrant in Poland An Analysis of the Experiences of Immigrants from Non-EU Countries*, 160 POLISH SOC. REV. 401, 403 (2007).

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of conflicts on religious grounds. Many Polish citizens do not want immigrants from the Middle East and Africa in Poland, as they are sceptical and afraid of Islamization of the country, maybe not instantaneous but over time. At this point it is noteworthy to mention the Battle of Vienna of September 1683, when Poland and the Holy Roman Empire joined forces as allies against the invading Muslim Ottoman Empire, which is often seen as a turning point in history, after which "the Ottoman Turks ceased to be a menace to the Christian world".[33] Many Polish people, proud of this fact, relate the current influx of Muslim immigrants to Europe to that event and believe that the role of Poland is to stay firm and repeat the 'victory' from the past. In the case of immigrants from beyond the eastern border, there are not many cultural and religious differences which might exacerbate the mutual relations. However, there exist other factors which are of a huge importance. With regard to Poles' attitude to eastern immigrants, the legacy of communism left in people's minds is of major importance in their perception of the world, which is especially true for elder generations of Poles. Certainly, the region's history in regards to Russia makes relations even more complex.[34] The common history marked by the influence of the Soviet Union and its communist approach cannot be omitted while discussing the issue of communication between Poles and immigrants from beyond the Polish eastern border.

Here also comes the question of a stereotypical approach towards Eastern immigrants and Poles looking down on them. Poorer, less developed and backward in many respects – that is what is somehow rooted in many Poles' way of thinking about nationals of such countries as Ukraine, Belarus, Armenia, Georgia, Moldova or Azerbaijan. The reasons for this kind of approach vary but they are mostly connected with the fact that Poland, being the member of the European Union, has developed in many areas throughout the last years and the barriers between the countries have deepened as a result of that. This fact happens to be a major communication obstacle which Poles

[33] Walter Leitsch, *1683: The Siege of Vienna,* HIST. TODAY (Jul. 7, 1983), http://www.historytoday.com/walter-leitsch/1683-siege-vienna.
[34] *See* ZWIĄZEK PRZEDSIĘBIORCÓW I PRACODAWCÓW (ZPP) [ASSOCIATION OF ENTREPRENEURS AND EMPLOYERS], RAPORT IMIGRANCI Z UKRAINY RATUNKIEM DLA POLSKIEJ DEMOGRAFII [REPORT IMMIGRANTS FROM UKRAINE AS A RESCUE TO THE POLISH DEMOGRAPHY] 8 (2016).

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and immigrants meet in building relations, as it makes mutual understanding more difficult, based on past events."

3.3 DETRIMENTAL IMPACT OF IMMIGRATION ON THE POLISH LABOUR MARKET

Poland is basically a country with high negative migration. The number of people who leave the homeland in search of better living conditions, education opportunities or career development is still higher than the number of those who come to Poland with the same aims. Konrad Pędziwiatr points out dynamic political and economic changes and modernization of the country's economy as factors enhancing attractiveness of Poland among different groups of immigrants.[35] An important characteristic of today's migration is geographical proximity – the most numerous groups of foreigners staying in Poland come from the neighbouring countries. The fact that has spurred some negative reactions is that for some immigrants, Poland is only a transit country on the way to eventually reach other better prospering European countries. However, one of the most common arguments Poles use against immigrants is that instead of staying in their own countries they come to Poland to steal jobs from Polish citizens. As cultural closeness is an important factor influencing the functioning in the workplace, Polish employers often point out their preference to hire foreigners who are culturally closer.[36]

Opponents also point out high rates of unemployment in Poland and claim that many immigrants work illegally and send money to their countries of origin, siphoning money off Poland. [37] This belief is intensified by the fact that it is difficult to find a job in Poland and many Polish citizens go abroad in order to find well-paid jobs. From this standpoint, immigrants who come to Poland to work are perceived as invaders. These issues sometimes lead to the intensification of hate speech and discrimination towards immigrants. These

[35] *See* Konrad Pędziwiatr, *Imigranci w Polsce i wyzwania integracyjne [Immigrants and Integration Challenges in Poland]*, 4 *STUDIA BIURO ANALIZ SEJMOWYCH*, no. 40, 2014, at 135, 136.
[36] *Id*. at 10.
[37] *See* Michał Wąsowski, *Imigranci zapełniają polski rynek pracy. Czy potrzebujemy ich więcej niż teraz? [Immigrants Fill in the Polish Labour Market. Do We Need Them More Than Now?]*, NA TEMAT (Mar. 14, 2012), http://natemat.pl/5377,imigranci-zapelniaja-polski-rynek-pracy-czy-potrzebujemy-ich-wiecej-niz-teraz

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examples, mostly encountered on Internet forums, even though extreme, are not rare. According to the results of the study carried out by the Work Service, 38% of Poles are concerned about the possibility of a higher competition on the labour market. The main reason for such anxieties is the fear of losing jobs to immigrants. These kinds of concerns are even higher than those related to cultural or ethnic differences and are mostly expressed by the youth and persons with basic education as well as inhabitants of villages – groups of people whose situation on the labour market is the least stable.[38]

3.4 BURDEN TO THE POLISH SOCIAL SYSTEM

Some of the popular arguments behind the above idea include a high rate of homelessness, low social assistance benefits, repatriation issues and the general view that refugees would live at the expense of the Polish state. The opinion is strengthened by the argument that Poland cannot afford to receive refugees as it is not even able to ensure proper support to its own citizens.

The issue of homelessness of Poles, strongly connected to the problem of poverty which they face, is one of the arguments used by opponents of immigration influx to Poland to show that homeless people in Poland should be given priority in access to housing. Although no institution is able to present the exact figures concerning the number of homeless individuals living in Poland, surveys conducted every few years show specific trends in relation to the problem of homelessness. The results of the survey commissioned by MPiPS, presented in the chart below, indicate that over 36,1 thousand homeless people lived in Poland at the beginning of 2015.[39] Janusz Kowalski compares the outcomes of the two consecutive studies (from 2013 and 2015) emphasizing the fact that within two years the number of homeless people in Poland increased by 5,5 thousand persons, which constitutes 17,6%

[38] *See* Work Service, *Polacy obawiają się imigrantów na rynku pracy [Poles are Concerned About Immigrants on the Polish Labour Market]*, INTERIA PRACA (Oct. 19, 2015), http://praca.interia.pl/news-polacy-obawiaja-sie-imigrantow-na-rynku-pracy,nId,1906218

[39] MINISTERSTWO PRACY I POLITYKI SPOŁECZNEJ [THE MINISTRY OF LABOUR AND SOCIAL POLICY], *SPRAWOZDANIE Z REALIZACJI DZIAŁAŃ NA RZECZ LUDZI BEZDOMNYCH W WOJEWÓDZTWACH W ROKU 2014 ORAZ WYNIKI OGÓLNOPOLSKIEGO BADANIA LICZBY OSÓB BEZDOMNYCH* (Jan. 21, 2015), https://www.mpips.gov.pl/pomoc-spoleczna/bezdomnosc/materialy-informacyjne-na-temat-bezdomnosci/.

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increase in comparison to the situation from 2013.[40] When these statistics are interpreted in the anti-immigration setting they create space for the view that giving priority to refugees in the case of housing facilities at Poles' expense is not what the government should do.

Chart Number of the homeless diagnozed at night 21/22 January 2015 in Poland - with a division into particular voivodeships

No.	Voivodeship	Number of the homeless in institutional centres	Number of the homeless outside institutional entres	IN TOTAL: Number of the homeless in a particular voievodeship
1	dolnośląskie	2 400	816	**3 216**
2	kujawsko-pomorskie	1 462	2 475	**3 937**
3	lubelskie	822	136	**958**
4	lubuskie	661	352	**1 013**
5	łódzkie	1 606	476	**2 082**
6	małopolskie	1 589	353	**1 942**
7	mazowieckie	3 434	1 192	**4 626**
8	opolskie	779	301	**1 080**
9	podkarpackie	870	261	**1 131**
10	podlaskie	610	112	**722**
11	pomorskie	2 329	880	**3 209**
12	śląskie	3 765	650	**4 415**
13	świętokrzyskie	604	143	**747**
14	warmińsko-mazurskie	1 103	347	**1 450**
15	wielkopolskie	1 913	789	**2 702**
16	zachodniopomorskie	1 676	1 255	**2 931**
	In total	**25 623**	**10 538**	**36 161**

Picture no. 2 Chart representing the number of homeless persons estimated on the night of 21/22 January 2015 in Poland – with a division into particular voivodeships.
Source: MPiPS (translated by Kinga Hodór)

Another popular notion against refugees in Poland is the one related to the repatriation issue. The majority of Poles support the idea of helping those who want to come back to the homeland rather than welcoming refugees in the country. Aleksandra Grzymała-Kozłowska and Halina Grzymała-Moszczyńska notice that the repatriation of people of Polish origin from Kazakhstan continues to be an unsolved problem by the Polish immigration policy. Moreover, existing legal and administrative solutions are not sufficient and effective for the anticipated scale of repatriation nor do they provide

[40] *See* Janusz K. Kowalski, *Najwięcej bezdomnych w Polsce jest w najbogatszych regionach* [*The Highest Number of the Homeless in the Richest Polish Regions*], GAZETA PWANA (Jan. 2017), http://www.gazetaprawna.pl/galerie/903503,duze-zdjecie,1,bieda-w-polsce-najwiecej-bezdomnych-jest-w-najbogatszych-regionach.html.

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appropriate support for repatriates in Poland.[41] The results of the study carried out by CBOS in 2012 indicate that the majority of Poles (over 78% of respondents) actually express their support for repatriates to come back and settle in Poland.[42] Those who approve of the idea share the view that streamlining and extension of the repatriation process shall be a major concern of the Polish government as it is the moral obligation of the Polish state to facilitate a return to the homeland for repatriates. The Assignee of the Prime Minister for the International Dialogue, Anna Maria Anders, while presenting premises of the project of a new repatriation act in January 2016, emphasized that 'Within 10 years all descendants of the victimized Poles will be able to come back to Poland'. The victimized persons, together with their descendants would have priority, while their spouses and children would also be covered by the repatriation act.[43] In the context of the Migration Crisis, repatriation supporters have become even more visible in the Polish public sphere. At any opportunity arising, they manifest their dissatisfaction over the reception of refugees by Poland, usually with banners saying: 'WE WANT A REPATRIATE, NOT AN IMMIGRANT!'. Especially active in this aspect are members of Młodzież WSzechpolska (All-Polish Youth), the youth organization based on nationalistic grounds.

3.5 ANTI-IMMIGRANTS DEMONSTRATIONS AND HATE SPEECH

There have been many tensions in society connected with the decision of the former Prime Minister of Poland, Ewa Kopacz, on the reception of seven thousand refugees in the country. The decision instantaneously met with an immense demur and it is considered by many Poles to be scandalous.[44] They strongly oppose being restricted by EU quotas on immigrants to be accepted by

[41] *See* Aleksandra Grzymała-Kazłowska & Halina Grzymała-Moszczyńska, *The Anguish of Repatriation: Immigration to Poland and Integration of Polish Descendants from Kazakhstan, 28* SAGE JOURNAL 593, 609 (2014).
[42] *See generally* Marcin Herrmann, *Pomoc Polakom Na Wschodzie* [*Assistance to Poles In The East*], CENTRUM BADANIA OPINII SPOLECZNEJ, Jan. 11, 2012.
[43] *Minister Anna Maria Anders: Będzie nowa ustawa o repatriacji* [*Minister Anna Maria Anders: There will be a new repatriation act*], PREMIER.GOV.PL (Jan. 25, 2016), https://www.premier.gov.pl/wydarzenia/aktualnosci/minister-anna-maria-anders-bedzie-nowa-ustawa-o-repatriacji.html.
[44] *See Rząd PiS jednak przyjmie 7 tys uchodźców [Law and Justice government will yet receive 7 thousands refugees]*, NEWSWEEK (Jan. 3, 2016), http://swiat.newsweek.pl/rzad-pis-przyjmie-jednak-7-tys-uchodzcow,artykuly,376667,1.html.

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Poland. Demonstrators share the idea that it is better to learn from the experience of other European countries that have already faced the problem of the influx of immigrants from Islamic countries e.g. Germany, Italy, France or the UK. They believe that it is not the right course to repeat the mistakes made by the West and instead propose to fight against Islamization of their homeland and Europe.[45]

There have already been many manifestations and protests against Muslim immigrants organized on the streets of Polish cities. On 11 November 2015, while celebrating the Independence Day, Polish protesters marched not only to commemorate the day which is so important for the Polish history but they also manifested against the 'Muslim invasion of Europe' in what was one of the biggest demonstrations in the history of Poland.[46] There was not a single report in the mainstream European media mentioning that event. Poles taking part in manifestations are resistant and hostile to the influx of Muslim immigrants to Poland and Europe. They unite under anti-immigration slogans like 'Poland for the Polish', 'Great Catholic Poland', 'Stop Islamization', 'Yesterday Moscow, today Brussels, taking our freedom away'.[47] Such demonstrations are expressions of the voice of Poles trying to influence the government's decisions on the issue of immigrants in Poland. Attachment to their country and national pride are often emphasized by protestors of the marches. In fact, it is more and more visible that the spirit of a shared concern among Poles is in the process of strengthening and that nationalist and xenophobic moods are coming onto the stage as well.

The Polish are open in expressing their extreme views on the problem of immigration and they do not hide that. There are many comments under articles on Polish websites relating to the Migration Crisis which abundantly criticize the idea of receveing immigrants from the countries concerned by

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45 *See, e.g.*, M. Rola, *POLACY PRZECIWKO "IMIGRANTOM". TEGO NIE ZOBACZYSZ W TELEWIZJI!* [*POLES AGAINST 'IMMIGRANTS'. YOU WILL NOT SEE THIS ON TV!*], (Sep. 12, 2015). https://www.youtube.com/watch?v=mbSHr87kjgM&list=PLq2O0_3e9fZ3bmBdM5_TXO-zxb27qB6Us&index=23.

46 *See 70,000 March in Poland against Immigration* (Date not found /Last visit: 26/04/2016), https://anongalactic.com/50000-march-in-poland-against-immigration/.

47 *Refugees Arabs Muslims - Not Welcome in Poland* (Dec. 19, 2015), https://www.youtube.com/watch?v=hwbklh6UgOg&list=PLq2O0_3e9fZ3bmBdM5_TXO-zxb27qB6Us&index=17.

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Poland and Europe. Generally, opponents aim to send the message to Muslims immigrants:

> *'In Poland, there will be NO sharia law. NO headbanging or shouting Allahu Akbar in the streets. NO insulting of our religion and our culture. NO burning cars like in France. NO burning down of police stations. NO imposing your ways on us. NO calling us the sons of apes and pigs. If you do, we will be the ones waging jihad...on YOU!'*[48]

The Internet is full of hate speech examples against immigrants. There are more and more groups and communities on Facebook being created e.g. 'No to Islamization of Europe' or 'No to Muslim immigrants from Africa and the Middle East' which are joined by new followers every day.[49] The same applies to YouTube, Twitter and other social media channels. There is also an interesting trend worth mentioning here which has appeared recently – Polish rap against Muslim immigrants from the Middle East and Africa. Several music videos addressed at immigrants are available on YouTube.[50] The videos are the reaction to the massive influx of immigrants to Europe and express anxieties against such situation taking place in Poland. Although full of hate speech, they are considered by their creators to be expressions of patriotism combined with concern for the future of the country.

4. POSITIVE ATTITUDES OF IMMIGRATION FOR POLAND

4.1 SOLIDARITY AND COMPASSION OVER HUMAN MISERY

Pictures of boats overloaded with refugees desperately approaching the European continent and increasing numbers of deaths in the waters of the Mediterranean Sea are presented by the media on a regular basis and for many Poles, they are already a part of today's reality. Indeed, these are tragedies of many people trying to escape from the terror of war and searching for chances to survive, with each family and each person having a traumatic story of

[48] *See* Polish Def. League, Speech to Muslims Around Western Europe (Jul. 5, 2013), https://www.youtube.com/watch?v=he-ycVqxQPM.
[49] *See, e.g.*, *Nie dla Islamizacji Europy [No to Islamization of Europe]* (Date not found / Last visit: 07/02/2016), https://www.facebook.com/niedlaislamizacjieuropy/?fref=ts.
[50] *See Rap przeciw Imigrantom..* [*Rap against Immigrants..*], (Sep. 15, 2015), https://www.youtube.com/watch?v=fJBOjCam0o4&list=PLXkrpRCWcnywURbAYPYC0qkAYHyW9YW5p .

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leaving everything behind. Despite voices of dissatisfaction with refugees' presence in Poland, which are broadly heard in the public sphere, there is still space for those who share pro-immigration views, calling for compassion and solidarity instead of indifference towards human misery. Supporters argue that being part of the EU implies solidarity with other countries struggling with great numbers of immigrants so that the balance in relocation of immigrants in the EU can be ensured. Demonstrations and actions of support are still not as influential and visible as those which aim at hitting immigrants but they still gather Poles willing to help and do exert influence to some extent. Pro-immigration demonstrators unite under expressions of support such as: 'Refugees warmly welcomed', 'Guest coming into house – God coming into house' or 'Refugees, we warmly welcome you'.

Moreover, the existence of many organizations dealing with immigration issues in Poland must be noted, as they gather Poles whose aim is to bring aid to immigrants, both internationally and locally. What they put emphasis on is human dignity. Help takes different forms, including, among other things, humanitarian, material, medical and financial aid but also legal support and actions enhancing integration in the Polish society. Those who are willing to help can engage in voluntary activities.

4.2 CULTURAL ENRICHMENT OF THE COUNTRY AND BENEFITS OF CULTURAL DIVERSITY

Since 1989, the Polish society has been becoming increasingly diverse in terms of politics, religion, ethnicity, culture and worldview. Incoming migrants are still quite a new phenomenon for Poland while the process of shaping socio-cultural images of foreigners is taking place simultaneously. Results of the CBOS survey show that Poles' openness is rising slowly and it is on quite a high level nowadays. Two thirds of Poles believe that the possibility of migration and working in other countries is positive and that foreigners' presence enriches cultural diversity and makes people more open-minded towards others. Contacts with immigrants result in opening minds and as it transpires from the analyzed data from 1999 and 2015, the distrust towards newcomers seems to be declining. In between these years, attitudes have

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changed and foreigners are much more accepted in all the roles the respondents were asked for.[51]

One of the pro-immigration arguments from the cultural perspective is that migration inflow is likely to enhance tolerance towards nationals of other countries, exchange of experiences and appreciation of existing differences, at the same time creating space for rejection of existing stereotypes.

A cultural and geographical proximity is the reason why Poles are much more likely to accept immigrants from the eastern neighborhood than those coming from Africa or the Middle East.[52] Indeed, the common history and shared Slavic culture create much more space for the dialogue building processes among Poles and immigrants from the East. A similar rule applies to the question of language. Immigrants from beyond the eastern border are generally willing to learn Polish and it is quite easy for them to do so as the languages belong to the family of Slavic languages. The fact that eastern immigrants tend to learn the language quickly, assimilate easily and have cultural symmetry altogether contributes to better mutual relations.

4.3 POORLY AND HIGHLY EDUCATED EMPLOYEES ON THE POLISH LABOUR MARKET

Currently, immigration has a moderate influence on the Polish economy as it is still of a limited scale. Poland is not the most popular immigration destination but it is important to notice that the scale of labor immigration in Poland is growing. As a result, step by step, Poland is becoming an emigration-immigration country. Experts from the Centre of Migration Research Foundation point out an interesting phenomenon, which is a dual structure of immigration to Poland. On the one hand, it concerns highly qualified workers from well-developed countries who contribute to the Polish economic growth with their knowledge and skills or set up their own businesses in Poland thus offering jobs to Poles. This is undoubtedly met with citizens' approval. On the other hand, foreigners often take up low-paid seasonal jobs, mostly in agriculture, construction or household keeping, which

[51] *See* KATARZYNA KOWALCZUK, FUNDACJA CENTRUM BADANIA OPINII SPOŁECZNEJ, PRZYBYSZE Z BLISKA I Z DALEKA, CZYLI O IMIGRANTACH W POLSCE [NEWCOMERS FROM THE NEAR AND FAR, ABOUT IMMIGRANTS IN POLAND] (2015).
[52] *See* KRYSTYNA IGLICKA, POLAND: WAITING FOR IMMIGRANTS. BUT DO WE REALLY WANT THEM? 7 (2008).

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is cost-efficient for many Polish employers.[53] Since immigrants often take posts which Poles do not want to occupy, there is quite a high demand for their work. Some of the reasons for this kind of trend are higher earnings expectations of Poles than those of newcomers', lower costs of foreigners' work and their great motivation. However, for many immigrants, Poland is just a short-term destination, a transit country on their way to richer countries of the EU.

An important characteristic of today's migration is geographical proximity. The most numerous groups of foreigners staying in Poland come from neighboring countries. Konrad Pędziwiatr emphasizes the fact that a cultural closeness is an important factor influencing the easiness of immigrants' functioning in the workplace and that Polish employers often point out their preference to hire foreigners who are culturally more similar.[54] According to the Center of Surveys over Migrations, till 2020 Poland will receive over 1 million, and till 2040, 4,5 million of immigrants to balance the lack of workforce. It has even been proposed that all Ukrainians residing currently on the territory of Poland, as culturally and geographically close, should have their stay legalized.[55]

Another important issue to mention is the fact that there are more and more foreigners studying in Poland, which emphasizes Poland's attractiveness in the sphere of education. Positive attitudes of young Poles enhance the assimilation process of their peers from other countries and help them to adjust to the new surroundings. Foreigners' presence at Polish universities is related to the assumption that some of them will stay in Poland for good, contributing to the country's development.

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[53] *See* Os Agata Gomy, Pawel Kaczmarczyk, Joanna Napierala & Sabina Torunczyk-Ruiz, Osrodek Badan Nad Migracjami Fundacja [The Foundation Center of Migrant Research], Raport Z Badania Imigrantow W polsce [Report From The Survey On Immigrants In Poland] 9 (2013).

[54] *See See* Konrad Pędziwiatr, *Imigranci W Polsce I Wyzwania Integracyjne* [*Immigrants And Integration Challenges In Poland*], 40 Studia BAS Rev. 10 (2014).

[55] *See* ZPP, Raport Imigranci z Ukrainy ratunkiem dla polskiej demografii [Report Immigrants from Ukraine as a rescue to the Polish demography] 13 (2016).

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4.4 SOLUTION TO THE DEMOGRAPHIC PROBLEM

The Migration Crisis is not the only issue Poland is struggling with. Worries about the country's aging of population and declining birthrates have reached a crisis level as well. According to the prognosis of GUS, till 2050, the Polish population will shrink from 38 to 34 million of citizens. What is more, 10,5% of this figure will be persons over 80 years old, and one third, 65 years old and more.[56] Indeed, the natural decrease in population and lower birthrates constitute challenges for Poland as they deplete the ranks of the working-age group. In fact, low fertility and, resulting from it, demographic problems have a negative influence on the pension system.

Statements according to which Poland is on the edge of a demographic catastrophy are repeatedly presented by the media. In fact, Poland needs people in a productive or pre-working age and an influx of people from abroad seems to be necessary to tackle the problem. The ideal scenario would include immigrants who work willingly, assimilate easily, function within an analogous, identical or very similar cultural identity, confess a similar value system and have a similar concept of morality. According to experts from Związek Przedsiębiorców i Pracodawców (Entrepreneurs and Employers Union), in order to maintain the economy balanced and ensure the payment of pensions till 2050, Poland should take in 5 million immigrants. In their view, the best solution would be to legalize the stay of Ukrainians already present on the territory of Poland as a massive Ukrainian immigration might help to fill the demographic gap in the country. The feeling of stabilization would most probably motivate immigrants to stay in Poland and start families, both Ukrainian and Polish-Ukrainian which might slightly mitigate the negative demographic trends. A crucial advantage behind this idea is that legalization of stay of Ukrainians would be followed by the additional income for the Polish state budget and ZUS. ZPP estimations point out that the Polish state budget could benefit with 10 billion PLN annually.[57]

Moreover, a visible presence of Ukrainians in Poland constitutes an additional argument in negotiations with the EU on relocation of immigrants

[56] *See Population projection 2014-2050*, STAT.GOV.PL (Date not found / Last visit: 25/04/2016), http://www.stat.gov.pl/.
[57] *See* ZPP, *supra* note 55, at 3.

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from the Middle East and Africa. It is a proof that Poland implements a clearly specified immigration policy whose basic assumption is a friendly attitude towards reception of certain groups of immigrants. The survey conducted in January 2016 by Dom Badawczy Maison shows that 52% of Poles are positive about granting permanent stay to Ukrainians, while 28% are against. Ukrainians also hold the first place on the list of nations to be received. They are perceived as economically attractive, unproblematic and costless for Polish taxpayers.[58]

4.5 HELPING HAND GIVEN TO POLES IN THE PAST: OBLIGATION TO DO THE SAME

The question of opening the Polish borders for refugees from Syria and Eritrea induces some Poles to think about the times of WWII when thousands of compatriots tragically affected by war found refuge in other countries and continents, e.g. Iran, India, the USA, South Africa and others. Help was offered there in different ways; refugee camps were built, medical care and access to education and culture were provided. The actions of the government in-exile were invaluable, but it was the support and good will of the receiving societies which played the most important role.[59]

Polish history, however, is much richer in examples related to emigration of Poles. Opening of borders in 1989, accession to the EU and benefits of the Schengen zone are only several aspects which boosted the movement of Poles to other states. This fact is often raised by people who feel compassion to refugees and express concern about their fate.

There is an interesting statement prepared by the Refugee Foundation and presented below, which places emphasis on the fact that 7 thousand refugees to be relocated into different parts of Poland should actually not be alarming, provided that they are Christians. This approach, together with elimination of indifference and egoism are crucial factors in breaking barriers in the perceptions towards refugees.

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[58] *See Dom Badawczy Maison dla ZPP - badanie dot. Imigrantów* [*Dom Badawczy Maison for ZPP – survey concerning Immigrants*] (Date not found / Last visit: 25/04/2016), http://zpp.net.pl/video/run,dom-badawczy-maison-dla-zpp-badanie-dot-imigrantow,video,V-KhGFwkT5o.html.

[59] *See* Waldemar Kowalski, *My też byliśmy uchodźcami. W czasie II wojny światowej przyjmowali nas na całym świecie [We were refugees too. During the WWII we were helped around the world]*, NA TEMAT (Jul., 13, 2015), http://natemat.pl/148383,my-tez-bylismy-uchodzcami-w-czasie-ii-wojny-swiatowej-przyjmowali-nas-na-calym-swiecie.

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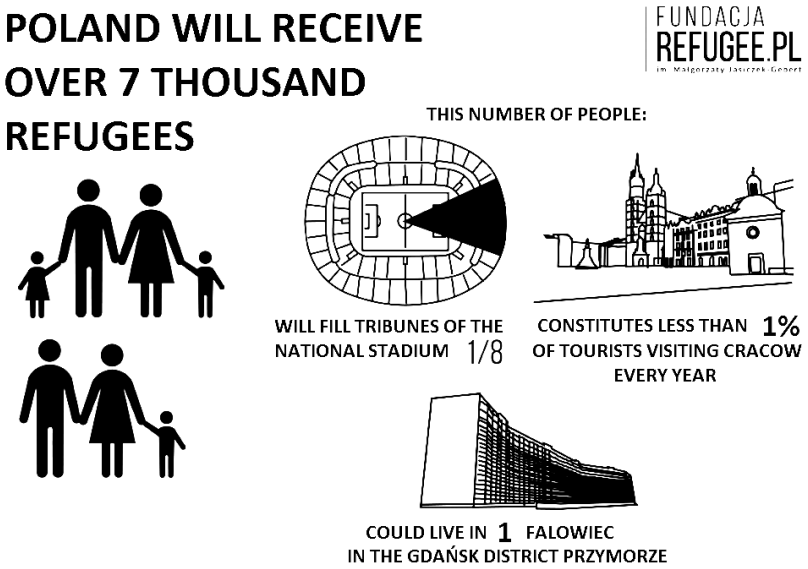

Picture no. 3: Infographic on the impact of receiving 7 thousand refugees by Poland.
Source: refugee.pl (translated by Kinga Hodór)

5. CONCLUDING REMARKS

Upon examination of the issues in the work 'A critical analysis of Poles' perceptions on the immigration influx into the country', it becomes clear that Poles' attitudes towards immigrants and refugees range from positive to negative ones and they are influenced by a wide spectrum of factors. In fact, one unequivocal position of Polish people towards immigrants cannot be easily singled out. It is especially difficult due to the fact that the motives of immigrants' coming to Poland and their countries of origin differ, which meets with various reactions from Poles.

On the one hand, Poles are concerned about potential problems on cultural or religious grounds, which are likely to appear due to growing numbers of foreigners living in the country. Frequently raised are also anxieties about possible threats to the national security, fears related to terrorist attacks and, generally, concerns about the safety of Polish citizens. Some people express their dislike because they think that they would have to lose their jobs at the expense of immigrants or it would be more difficult for Poles to find employment. Another worry is related to the Polish social

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services system and the belief that it would suffer because of newcomers' presence in the country. In the reality of the Migration Crisis and growing dissatisfaction regarding mass immigration in other European Union countries, the issue of hate speech directed at immigrants and, especially, refugees from the Middle East and Africa, is a common problem in the Polish reality these days. Numerous demonstrations are expressions of disapproval towards the reception of immigrants by Poland and aim at turning the government's attention the many views present among Polish citizens. Voices in favour of helping repatriated Poles to come back to their homeland instead of welcoming Muslim immigrants are heard as well in the debate.

On the other hand, those who support the immigration influx to Poland believe that it would contribute to a cultural enrichment of the country, creating new opportunities and opening of the Polish society to other nations. Those in favour also emphasize the benefits for the labour market: the presence of qualified experts with their specific skills and unskilled workers with lower earnings demands than Polish labourers, both groups contributing to Poland's economic development. Another advantage for the country is related to a potential decrease in negative aspects of the demographic crisis with which Poland has been struggling. What is more, supporters of extending help to refugees emphasize the need to show solidarity and compassion towards the victims. At the same time, they accentuate the fact that Poles were also offered help in Poland's troubled history and that the Polish may also find themselves in need of support in the future.

Poles are less welcoming towards Islamic immigrants and refugees, mostly due to the belief that their presence may cause conflicts on cultural or religious grounds and be a threat to national security. It is mostly related to the cultural and geographic closeness as well as shared historical experiences, which create more space for dialogue building.

With regard to immigrants from well-developed countries, since they are not numerous, there is usually little attention in the debates paid to their coming to Poland and their presence is perceived to be rather beneficial for Poland. However, it must be stated that, step by step, Poles are getting used to the presence of immigrants in Poland as well as in the public discourse. This is

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especially the consequence of the fact of the opening of the country towards the world as a result of the fall of communism and accession to the EU.

Therefore, the idea that it is better to learn from the mistakes of other European countries, which have already experienced problems with great numbers of immigrants, is increasingly attracting more followers, especially in the face of the Migration Crisis. Obviously, immigrants' integration into Polish reality is the source of many challenges for the present as well as for the future of the country and its citizens. Hence the issues analyzed in the current paper are undoubtedly worth being discussed more broadly.

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Court-Annexed Mediation Practice in Malaysia: What the Future Holds

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ABSTRACT: It is an indubitable fact that the use of mediation as a form of dispute resolution has gained traction across the globe. More importantly, the practice of mediation has also been transformed through the establishment of several techniques for formalized mediation. This article will provide insights into one of these avenues for formalised mediation, namely, court-annexed mediation practice in Malaysia. It will first discuss the motivations that led to the introduction of such a programme. This will be followed by an analysis of the operational aspects of the practice. A matter of utmost importance concerns the role of the courts and the judiciary in court-annexed mediation and will be considered in great detail. This article will then offer suggestions on how some of the challenges that exist and are inherent in this particular method of formalised mediation could be overcome. These views are expressed with the hope that court-annexed mediation can function as an effective alternative dispute resolution mechanism under the umbrella of the Malaysian courts. Last but not least, it is also hoped that the above deliberations will be a catalyst for further comparative research and debates concerning this increasingly imperative form of formalised mediation process across all jurisdictions.

KEYWORDS: *Court-Annexed; Mediation; Judges; Mediators.*

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1. INTRODUCTION

Mediation practice in Malaysia has come a long way since its embryonic days in the mid-1990s.[1] Today, mediation forms a core component in the Malaysian judicial system where it provides an alternative to disputing parties to resolve their dispute without going through the trial process.[2] The focal point of this article is on this form of formalised mediation, namely court-assisted or court-referred mediation. It will provide insights into this method of formalised mediation.

This article will begin by discussing the motivations that led to the introduction of such a programme by the Malaysian judiciary. This will be followed by an analysis of the operational aspects of the practice. It will then proceed to offer suggestions on how some of the challenges that exist and are inherent in this particular method of formalised mediation could be overcome.

These views are expressed with the hope that court-annexed mediation can function as an effective alternative dispute resolution mechanism under the umbrella of the Malaysian courts. Last but not least, it is also hoped that the above-mentioned deliberations will be a catalyst for further comparative research and debates concerning this increasingly imperative form of formalised mediation process across all jurisdictions.

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[1] *See* Cecil Abraham, *Alternative Dispute Resolution*, 20 Asian Bus. L. Rev. (1998).

[2] *See* YAA Tan Sri Arifin Bin Zakaria, Chief Justice, Malay., Speech at the Opening of the Legal Year 2012 (Jan. 14, 2012) (transcript available in http://www.kehakiman.gov.my/sites/default/files/document3/Penerbitan%20Kehakiman/KetuaHakim.pdf).

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2. COURT-ANNEXED MEDIATION – THE MOTIVATIONS AND THE MECHANISM OF THE PROGRAMME

Court-annexed mediation refers to mediation where active judges and judicial officers act as mediators to litigating parties after they have filed their action in the courts. The Malaysian judiciary is the prime mover for introducing this form of mediation in the legal system in Malaysia. As far back as in 2005, mediation was viewed by the Malaysian judiciary as an alternative mode to clear the backlog of cases where it was stated in its 2005/2006 annual report that "the absence of [a] critical provision such as the power of the court to direct parties to go for Alternative Dispute Resolution (ADR) is another reason [for the delay in disposing of cases]".[3] In fact, one author suggested that mediation would be more popular if it is placed on a statutory footing.[4] As summarised by U.S. Senior Judge and Chief Judge Emeritus J. Clifford Wallace of the United States Court of Appeals (Ninth Circuit) that "what we are dealing with in Malaysia is court-annexed mediation, that is, what do you do to mediate after you have filed in court…"[5] Hence, severe backlog of cases in this country has somewhat provided the catalyst for mediation to be taken seriously by the courts.[6] In fact, it has been stated that court-assisted or court-referred mediation would be an opportunity to introduce measures to alleviate the problem of backlog of cases in the lower and High Courts.[7]

On the 14th February 2010, it was reported in a local newspaper that the Chief Justice was quoted to have said that the judiciary was in discussionwith the Malaysian Bar to draft a Practice Direction to encourage litigating parties to mediate instead of going to trial to resolve their disputes in Malaysian courts.[8] The Practice Direction No. 5 of 2010 (Practice Direction on Mediation) came into effect on the 16th August 2010. It can be said that the 2010 Practice

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3 Aniza Damis, *Go Mediate! Mediation may be ordered to clear cases*, NEW STRAITS TIMES MALAYSIA (Jun. 18,2007),http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/go_mediate_mediation_may_be_ordered_to_clear_cases.html.

4 *See* Swee Seng Lee, *Mediation in Construction Contracts: Mediation, Adjudication, Litigation and Arbitration in Construction Contracts*, CURRENT L.J. (2006).

5 Shaila Koshy, *The case for mediation*, THE STAR ONLINE (Feb. 14, 2010), http://www.thestar.com.my/story/?file=%2F2010%2F2%2F14%2Ffocus%2F5645878

6 Damis, s*upra* note 3.

7 *See* Aida Othman, *Introducing Alternative Dispute Resolution in Malaysia: Prospects and Challenges*, 2 MALAYAN L. REV. 230 (2002). The author made a comparison with Singapore which already has an established Court Mediation Centre.

8 *See* Shaila Koshy, *Opt for mediation, people told*, THE STAR MALAYSIA, (Feb. 14, 2010), http://www.thestar.com.my/news/nation/2010/02/14/opt-for-mediation-people-told/.

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Direction has formalised the ad hoc practice of some judges asking litigating parties in certain cases whether they would like to opt for mediation.[9]

Seen as a call for disputing parties who have filed their action in the courts to find a solution to resolve their disputes via mediation, the Malaysian judiciary introduced a free court-annexed mediation programme using judges as mediators in August 2011.[10] In conjunction with the said introduction, it has also launched the Kuala Lumpur Court Mediation Centre (hereinafter K.L.C.M.C.) as its official premises, and opened its doors to all litigating parties. In essence, the free-of-charge service, which is alternative to trials, is aimed at encouraging litigating parties to mediate a solution to resolve their disputes.

Launched as a pilot project, the said programme was planned to be integrated into the court process as part of civil litigation. This is to ensure that the right message is sent to all litigating parties and their lawyers: that the mediation process is now under the umbrella of the courts. It was revealed at the said launch that twenty-eight civil cases from the High Court had already been referred to the K.L.C.M.C. pending mediation to commence, with a mediation success rate of 52% at all trial courts, and 15% at the Court of Appeal.[11]

With the set-up of the K.L.C.M.C., litigants and their lawyers have been encouraged to take advantage of the benefits of the said mediation programme. Litigating parties could optimize the allocated time, to try their best to communicate with each other, and to break down barriers between them during mediation. Even if litigating parties do not reach a settlement via mediation, they would not have wasted their time. In fact, they would have received assistance from the mediator to find a solution or agreement to reduce the number of issues before proceeding to trial.

Yet another benefit is the opportunity for litigating parties to re-think about the dispute at hand, and to reassess their risks of not agreeing to come

[9] *See* Shaila Koshy, *CJ pushes mediation option*, THE STAR ONLINE, (Oct. 29, 2010), http://www.thestar.com.my/story/?file=%2F2010%2F10%2F29%2Fnation%2F7311125&sec=nation.
[10] *See Court Annexed Mediation a Free Programme – Chief Justice,* BERNAMA, (Aug. 25, 2011). The said press release was subsequently reported in *Chief Justice says court annexed mediation a free programme,* BORNEO POST ONLINE (Aug. 26, 2011), http://www.theborneopost.com/2011/08/26/chief-justice-says-court-annexed-mediation-a-free-programme/.
[11] *Id.*

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to a settlement in the first instance. Under the said mediation programme, they would have the opportunity to experience the mediation process which is mediated by a judge or a judicial officer, and to hear directly from the judge or judicial officer who may provide alternative options for litigating parties to consider. As such, litigating parties may be even more convinced to reach a settlement.

Since its inception, the K.L.C.M.C. has issued an eight-page document entitled 'Kuala Lumpur Court Mediation Centre, Pioneer Court-Annexed Mediation in Malaysia' which is given out to all litigating parties who have filed their cases in court. It describes the idea of the court-annexed mediation programme as a pilot project where mediation is conducted by judges or judicial officers as mediators at the K.L.C.M.C., at no cost to all litigating parties to help them find a solution. The main content of the said brochure focuses on mediation procedures on order of referral, mediation agreement, scheduling and attendance, conduct of mediation sessions, duration, settlement agreement, adjournment; and if no agreement is reached, rules on confidentiality, and withdrawal of mediation by litigating parties. It also features the organization structure of the K.L.C.M.C., where its panel of mediators comprises ten judges from the High Court, and three Sessions Court judges and magistrates.

The said brochure is aimed primarily to provide general information about court-annexed mediation in Malaysia. It also covers general rules and procedures which govern how such mediation process works, including the names of judges and judicial officers who have been appointed as the panel of mediators at the K.L.C.M.C. However, the said brochure does not cover any rules and procedures on how judges or judicial officers who act as mediators should conduct such mediation sessions. In essence, it does not provide guidelines to mediators on the process, practice and procedures of conducting court-annexed mediation at the K.L.C.M.C.

The K.L.C.M.C., which has since changed its name to the Court-Annexed Mediation Centre Kuala Lumpur (hereinafter C.M.C.K.L.), is situated inside the Kuala Lumpur Court Complex where facilities such as mediation rooms, caucus

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rooms, and telecommunications are provided for use by litigants.[12] At the C.M.C.K.L., there are part-time mediators who are current sitting High Court judges and Sessions Court judges, and full-time mediators.[13]

With the set-up of its own facilities and infrastructure, mediation sessions are no longer conducted in judges' chambers but on its own C.M.C.K.L. premises. A revised set of general information and guidelines on the court-annexed mediation programme has since been issued in a brochure entitled 'The Court-Annexed Mediation Centre Kuala Lumpur – a positive solution' to replace the previous eight-page document. Compared to the previous K.L.C.M.C. document, the said brochure contains seven sections on general information and guidelines on the said court-annexed mediation programme, including 'Agreement to Mediate' form for litigating parties to execute. As a move to encourage litigating parties to opt for court-annexed mediation to resolve their disputes, more court-annexed mediation centres (hereinafter C.M.Cs.) have since been established in several other locations nation-wide.[14]

Under the court-annexed mediation programme, all cases must first be filed in the courts before they can be registered for mediation. The only exception is 'running down' cases on claims for personal injuries and other damages due to road accidents which are automatically referred to mediation under Practice Direction No. 2 of 2013 on 'Mediation Process for Road Accident Cases in Magistrate's Courts and Sessions Courts' prior to the case being fixed for hearing.

At the C.M.C.K.L., all registered cases for mediation which originate from the lower courts are mediated by full-time mediators while those from the higher courts are mediated by current sitting High Court judges who act as

[12] C.M.C.K.L. is located on Level 2, Kuala Lumpur Court Complex, Kuala Lumpur, Malaysia.

[13] As of 24 March 2014.

[14] Court-annexed mediation centres have been set up in a number of cities in Peninsular Malaysia. *See Mediation can help court reduce case backlog*, BUSINESS TIMES (Feb. 28, 2014); *Use mediation to resolve disputes, urges CJ*, NEW STRAITS TIMES (Mar. 1, 2014); See YAA Tan Sri Arifin Bin Zakaria, supra 2; YAA Tan Sri Arifin Bin Zakaria, Chief Justice, Malay., Speech at the Opening of the Legal Year 2013 (Jan. 12, 2013) (transcript available in http://www.kehakiman.gov.my/sites/default/files/document3/Penerbitan%20Kehakiman/OLY2013%20SPEECH%20BY%20THE%20RT.%20HON.%20TUN%20ARIFIN%20ZAKARIA%20CHIEF%20JUSTICE%20OF%20MALAYSIA.pd); YAA Tan Sri Arifin Bin Zakaria, Chief Justice, Malay., Speech at the Opening of the Legal Year 2014 (Jan. 11, 2014) (transcript available in http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/UcapanTUN2014_15JAN.pdf).

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part-time mediators. Over a period of three years from 2011 to 2013, a total of 2,036 cases were registered at the C.M.C.K.L., where it increased by almost three-fold from 2011 to 2012, followed by an increase of almost two and a half times the number of registered cases between 2012 and 2013.[15] It must also be noted that following the implementation of the said 2013 Practice Direction, the number of cases registered at the C.M.C.K.L. increased to 1,287 cases with the inclusion of 779 accident cases in 2013, comprising more than 60% of the total number of cases in that year.[16]

Based on the report issued by the C.M.C.K.L. in December 2013, 816 cases were successfully mediated over the said three-year period with a settlement rate of 40%. It is interesting to note that full-time mediators recorded a 35% settlement rate (707 cases), while current sitting judges who acted as mediators on a part-time basis contributed a settlement rate of 5% or 109 cases from the total of 816 cases which were successfully mediated over the three years. Also worth noting is the success rate of accident cases which were registered for mediation for the first time in 2013 following implementation of the 2013 Practice Direction. From the 779 'running down' accident cases which were registered for mediation at the C.M.C.K.L., a settlement rate of close to 50% at 49.7% was recorded while 287 cases did not settle (37%), and those pending mediation made up 13.2% as at December 2013. The said accident cases constituted 38.3% of the total number of cases registered at the C.M.C.K.L. for automatic mediation across the three years in accordance with the 2013 Practice Direction.

In terms of total number of cases mediated by all C.M.Cs., up until December 2013, a total of 3,134 cases were referred to the C.M.Cs. in three cities with a collective settlement rate close to 50% at 47%.[17] The C.M.C. in the city of Shah Alam was reported to have successfully mediated and settled 168 cases out of 539 cases which were registered between early 2013 and January 2014, recording a 31.2% settlement rate.[18] From the C.M.C. in the city of Johor Bahru,

[15] As of 24 March 2014.
[16] *Id.*
[17] *See* YAA Tan Sri Arifin Bin Zakaria, Chief Justice, Malay., Speech at the Opening of the Legal Year 2014 (Jan. 11, 2014) (transcript available in http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/UcapanTUN2014_15JAN.pdf).
[18] *See* BUSINESS TIMES, *supra* note 14; NEW STRAITS TIMES, *supra* note 14.

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a total of 251 cases were registered for mediation between September 2011 and December 2012 with a settlement rate of 47.6%, while the C.M.C. in the Kuantan city recorded a 25% settlement rate where it successfully mediated twenty out of eighty cases which were registered for mediation between November 2011 and December 2012.[19]

It could be surmised that, since the formal inception of the C.M.C.K.L. and subsequent establishment of C.M.Cs. in the said cities nationwide, a steady rise of cases has been registered at these C.M.Cs. over the last three years, with a slow increase of settlement rates recorded where the highest rates are evident in the C.M.C.K.L., being the first C.M.C. which was established. Such a positive trend should encourage C.M.Cs. to be set up in more locations nationwide including those in the states of Sabah and Sarawak in East Malaysia.

3. PROVISIONS ON COURT-ANNEXED MEDIATION

There is no primary statutory provision in Malaysia which expressly provides for litigating parties to resolve their dispute through court-annexed mediation, or for courts to resolve disputes via mediation as an alternative dispute resolution (A.D.R.) mechanism. However, reference must be made to Order 34 rule 2(2)(a) of the recently revamped Rules of Court 2012.[20] This Order relates to pre-trial case management.[21] Rule 2(2)(a) provides that:

> *"At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including – mediation in accordance with any practice direction for the time being issued."*

[19] *Supra* note 14.
[20] *See* 205 P.U. (A) 2012), http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=3766.
[21] Similar provision can be seen in FED. R. CIV. P 16 (amended 1983) to strengthen the hand of the trial judge in brokering settlements on "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute". *See* Owen M Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

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Reference to mediation in the 2012 Rules can also be traced to O 59 r 8(c), concerning the exercise of a court's discretion as to costs. The relevant rules mandate that in exercising its discretion as to costs, the court "shall, to such extent, if any, as may be appropriate in the circumstances, take into account – the conduct of the parties in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution." These two provisions in the 2012 Rules confirm that litigating parties must pay heed to mediation, and that the practice of mediation is now firmly entrenched in the civil litigation landscape in Malaysia.

In addition, there is a provision which requires claims for personal injuries and other damages due to road accidents to be automatically referred to court-annexed mediation prior to the cases being fixed for hearing. The said provision can be found in the 2013 Practice Direction where all accident cases under code 73 in the Magistrate's Court, and those under code 53 in the Sessions Court, must first be referred to court-annexed mediation within ten weeks from the date of filing before pleadings are closed. However, litigating parties could request for a court hearing date prior to the said referral to court-annexed mediation in their effort for early preparation in the event that mediation does not succeed in resolving their dispute.

In essence, in the absence of any comprehensive statutory provisions governing court-annexed mediation in Malaysia, current sitting judges and judicial officers who act as mediators rely solely on two main sources of mediation rules, guidelines and procedures when conducting mediation. The said sources are the 2010 Practice Direction, and the Rules for Court Assisted Mediation. The latter is used by all current sitting judicial officers who as act mediators in the courts in East Malaysia.

4. PRACTICE DIRECTION NO. 5 OF 2010 (PRACTICE DIRECTION ON MEDIATION)

The Practice Direction No. 5 of 2010, which is the Practice Direction on Mediation that came into effect on 16 August 2010, governs mediation for civil and commercial cases which are pending in the High Court and Subordinate Courts. Under the 2010 Practice Direction, the Chief Justice of Malaysia directs that all judges of the High Court and its Deputy Registrars, and all judges of the

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Sessions Court and Magistrates and their Registrars, may, at the pre-trial case management stage, give such directions that litigating parties facilitate the settlement of the matter before the court by way of mediation.[22]

In fact, judges may encourage litigating parties to settle their disputes at the pre-trial case management stage or at any stage, whether prior to, or even after a trial has commenced, or even be suggested at the appeal stage, where settlement can occur during any interlocutory application stage.[23] This is the power to direct bestow on judges as part of their responsibility.[24] It is to be noted that the 2010 Practice Direction is intended only as a guideline for settlement, and that judges and litigating parties may suggest alternative modes of settlement other than through mediation.[25]

In fact, lawyers representing litigating parties are required to cooperate and assist their clients in resolving their disputes in the most amicable manner.[26] Essentially, the key objective of the 2010 Practice Direction is to encourage litigating parties to come to an amicable settlement without having to go through or to complete a trial or appeal for the simple benefits of litigating parties arriving at a settlement which is agreed by both parties, that it is expeditious, and that it is a final settlement.[27] The 2010 Practice Direction contains six key areas which cover general guidelines on responsibilities of judges, including the "without prejudice" rule on confidentiality, which which judges are required to ahere to when they act as mediators.[28]

Under the judge-led mediation mode, the general rule is not to have the judge hearing the case to be the mediating judge unless litigating parties agree to that.[29] If litigating parties do not agree to that, the hearing judge should then pass the case to another judge for mediation. In the judge-led mediation process, litigating parties must have their lawyers present during the

[22] *See* 5 PRACTICE DIRECTION (hereinafter PRACTICE DIRECTION ON MEDIATION) §. 1.1 (2010) (The term "judge" includes a Judge or Judicial Commissioner of the High Court, Judge of the Sessions Court, Magistrate or a registrar of the High Court).
[23] *Id.,* §. 3.1.
[24] *See* YAA Tan Sri Arifin Bin Zakaria, Chief Justice, Malay., Responsibility of Judges Under Practise Direction no. 5 of 2010 (Oct. 10, 2010).
[25] *See* PRACTICE DIRECTION ON MEDIATION *supra* note 22, §. 2.2; §. 5.1(a) and (b. (2010) (Stipulates that mediation may be conducted in two modes, namely, "Judge-led Mediation," and "Mediation by any other mediator").
[26] PRACTICE DIRECTION ON MEDIATION *supra* note 22,, §. 2.3.
[27] PRACTICE DIRECTION ON MEDIATION *supra* note 22,, §. 2.1.
[28] PRACTICE DIRECTION ON MEDIATION *supra* note 22,, §. 6.2(a).
[29] PRACTICE DIRECTION ON MEDIATION *supra* note 22,, Annexure A (Judge-led mediation).

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mediation session unless litigating parties are not represented by any legal counsel. In cases where the mediation is successful, the mediating judge will record a consent judgment on the agreed terms by litigating parties. However, if the mediation is not successful, the case is then reverted to the hearing judge to continue to hear the case for disposal.

It is submitted that the phrase "unless agreed to by the parties" gives litigating parties the option to decide whether if they want the judge or the judicial officer who is hearing their case to be the judge or the judicial officer to mediate their matter.[30] Based on the principles of mediator impartiality and mediator neutrality, it is safe to state that the existence of the said phrase goes against the fundamental rule that the current sitting judge or judicial officer who hears the matter cannot be the same person to mediate the same case. It also goes against the fundamental rule on confidentiality in mediation where all materials, communication and information exchanged and shared during mediation are kept confidential, and cannot be communicated to the trial judge.

In this respect, where the said phrase exists in the mediation rule under Annexure A, we argue that a number of issues could arise. First, there is the issue of perception which raises the question of whether the appearance of independence and objectivity of judges or judicial officers who conduct court-annexed mediation would be compromised. This would also raise other questions as to whether the judges or judicial officers could compromise their mediator impartiality, mediator neutrality, and mediator biasness wherein as mediators, the judges or judicial officers have ethical, and express and implied duties to be objective, and to keep all communication and information shared and exchanged by the parties during mediation confidential, and to ensure that mediation is fairly conducted. In short, public confidence in the integrity and impartiality of the court, and the judges or the judicial officers, may be threatened.

The other issue is the fear as to the impartiality at a post-mediation trial by the same judge where the judge or the judicial officer conducts the mediation, and the dispute does not settle. The said phrase "unless agreed to by the parties" which exists in the mediation rule under Annexure A allows the

[30] PRACTICE DIRECTION ON MEDIATION *supra* note 22,

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judge or the judicial officer who has mediated the dispute to have further involvement with the matter, as all communication and information exchanged and shared during mediation when the judge or the judicial officer hears the matter during the trial. In other words, the said phrase allows for the same person to act as both the mediator and the hearing judge in the same case if agreed by the parties.

Aside from the potential negative perception on current sitting judges and judicial officers when they act as mediators, the said phrase, if allowed to be retained in the said Annexure A, could also provide the opportunity to litigating parties and/or their lawyers to undermine the mediation process. There is the potential risk of litigating parties and/or their lawyers to use mediation as a 'dry run' of their case to obtain materials, communication and information from the other party which otherwise may not be made available to them in litigation. Where the said phrase allows for the judge or the judicial officer, and the mediator to be the same person, we submit that litigating parties and/or their lawyers may be familiar with the mediator who hears the matter as the trial judge, and this could provide litigating parties and/or their lawyers the opportunity to react in a certain way in response to the various options which were made available by the other party during mediation.

At the end of the day, all these could lead to increasing dissatisfaction with judicial conduct of court-annexed mediation which would not be healthy. In fact, it may reflect negatively upon the judiciary as a whole. Consequently, it is suggested that the said phrase ought to be removed from Section 1 in the said Annexure and should be amended accordingly to read as follows – "The Judge hearing the case should not be the mediating Judge."

It is to be noted that the 2010 Practice Direction does not cover mediation for Court of Appeal cases which could then be conducted on a voluntary basis with the consent of litigating parties.[31] The inaugural court-initiated mediation for Court of Appeal was reported to have begun its own court-initiated mediation process to clear outstanding and civil appeal cases on 9 April 2010.[32] To illustrate by way of statistics, since the introduction of

[31] *See* Datuk Wira Low Hop Bing, Retired Court of Appeal Judge, Malay., Alternative Dispute Resolution in Civil and Commercial Cases (Jul. 18, 2011).
[32] *See Court of Appeal sits for first time to clear cases through mediation*, THE MALAYSIAN INSIDER (Apr. 9, 2010).

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mediation in the Court of Appeal in April 2010 until November 2010, forty-five cases had been set down for mediation, of which seventeen cases were settled and consent judgments were recorded, two cases were withdrawn by way of Notices of Discontinuance, and mediation was not successful in nineteen cases.[33] At the Federal Court, two cases were mediated in 2011 while a total thirteen cases were settled at the Court of Appeal through mediation; 2,276 cases at the High Court, and 4,347 cases at the subordinate courts were mediated with a 50% settlement rate achieved in all these cases.[34]

In the courts of Sabah and Sarawak, court-annexed mediation programme is equally popular with settlement rate of 44% achieved over 746 mediations conducted in the courts from the period 2007 through 2009.[35] A further illustration on statistics gathered from 2007 through 2010 also indicated that the Sabah and Sarawak Courts had saved 1,368 sitting days or three and three-quarter years of judicial time, where 456 cases were mediated, assuming each case took three sitting (trial) days.[36]

5. RULES FOR COURT ASSISTED MEDIATION

The second source of guidelines which is available to all current sitting judges and judicial officers who act as mediators is the Rules for Court Assisted Mediation which were introduced in 2011.[37] Although the 2011 Rules are posted in the official website of The High Court in Sabah and Sarawak, they can be referred to by all current sitting judges and judicial officers who act as mediators, including those in Peninsular Malaysia. It is to be noted that there are a number of inconsistencies in the use of terminologies to describe

[33] *See* Datuk Wira Low Hop Bing, Retired Court of Appeal Judge, Malay., Mediation: The Way Forward, Challenges & Solutions, (Jul. 3, 2012).
[34] *Supra* note 2.
[35] *See* EUGUSRA ALI and EDWARD PAUL, *Mediation*, OFFICIAL WEBSITE OF THE HIGH COURT IN SABAH AND SARAWAK, (Feb. 17, 2010), http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/ *(last visited Jan.6, 2013)* (Eugusra Ali, Sessions Court Judge, Sessions Court Tawau, Sabah, and Edward Paul, Magistrate, Magistrate's Court, Tawau, Sabah, Malaysia).
[36] *See* THE HONOURABLE MR JUSTICE DATUK DAVID WONG DAK WAH (High Court Judge, Kota Kinabalu High Court, Sabah, Malaysia), *Court-Annexed Mediation,* (2011), http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/ *(last visited Jan. 6, 2013).*
[37] *See* THE HONOURABLE JUSTICE RAVINTHRAN N. PARAMAGURU, *Rules for Court Assisted Mediation*, OFFICIAL WEBSITE OF THE HIGH COURT IN SABAH AND SARAWAK, (Mar. 18, 2011), http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/v3/modules/highcourt_web/mediation.php *(last visited Jan. 6, 2013).*

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mediation which is conducted by judges and judicial officers. The 2011 Rules refer to it as "court assisted mediation" while the 2010 Practice Direction describes it as 'Judge-led mediation,' and the C.M.Cs. refer to it as 'court-annexed mediation.' It is unclear why such inconsistencies existed in the first place.

In the absence of primary statutory provisions on current sitting judges and judicial officers who act as mediators in court assisted mediation, the 2011 Rules have been written with the sole objective of using them to operate as guidelines to assist these judges and judicial officers.[38] Contained in sixteen sections, the 2011 Rules cover roles and responsibilities of judicial officers sitting as mediators, do's and don'ts of the mediation process, the mediation process itself, and the effect of a successful mediation, including guidelines governing termination of a mediation session.

On the role of judges and judicial officers as mediators, the principle of mediator impartiality touches on the importance of not allowing current sitting judges and judicial officers to mediate their own trial cases.[39] Further, guidance is given on the basic function of a mediator as a facilitator at the first stage of the mediation process, and as an evaluator at the second stage. This is a manifestation of the principle of mediator impartiality and mediator neutrality which needs to be maintained throughout the process, including the duty to discharge with caution, tact and diplomacy.[40] The 2011 Rules also cover guidelines on how to conduct the mediation session from the first meeting with litigating parties, to the actual mediation session itself, and the conclusion of the session, whether or not settlement is reached. These guidelines are governed by mediation principles on confidentiality, party autonomy, fair treatment, impartiality and neutrality.[41]

We are of the view that the 2011 Rules are adequate to provide general guidelines for current sitting judges and judicial officers who act as mediators in court assisted mediation in the absence of any primary statutory legislation or provisions. It is understood that the 2011 Rules have been widely practised by the Sabah and Sarawak courts since its inception in March 2011. However,

[38] *See* RULES FOR COURT ASSISTED MEDIATION §. 1.
[39] *Id.*, §. 2.
[40] *Id.*, §. 4.
[41] *Id.*, §.§§ 5-16.

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the same could not be said about the extent of the 2011 Rules being practiced by current sitting judges and judicial officers in the courts in Peninsular Malaysia. It is conceded that the 2011 Rules are by far the most comprehensive on court assisted mediation to guide all current sitting judges and judicial officers when acting as mediators. One can safely conclude that the 2011 Rules constitute the official procedural set of guidelines on court assisted mediation currently recognized by the courts both in Peninsular Malaysia and East Malaysia as compared to the 2010 Practice Direction. Be that as it may, there are statutory provisions which govern non-court-annexed mediation where mediators are not current sitting judges or judicial officers. These provisions are governed in the Mediation Act 2012 (Act 749).

6. THE MEDIATION ACT 2012

The Mediation Act 2012 (Act 749) came into operation on the 1st August 2012 with the objective "to promote and encourage mediation as a method of alternative dispute resolution by providing the process of mediation, thereby facilitating the parties to settle disputes in a fair, speedy and cost-effective manner and to provide for related matters." The enactment of the 2012 Act indicates that the Malaysian Government is desirous of having a mediation statute to promote mediation as an A.D.R., and is also indicative that the Government is moving along the international trend.[42]

Be that as it may, the 2012 Act is not applicable to any mediation conducted by a judge, magistrate or officer of the court pursuant to any civil action that has been filed in court.[43] However, all judges and judicial officers who act as mediators do take guidance from the 2010 Practice Direction, and the 2011 Rules, which provide the required guidelines on court-annexed mediation practice during the pre-trial case management stage. In any case, mediation as an A.D.R. mechanism encourages consensus, mutuality and voluntariness where parties are not compelled to use mediation to resolve their dispute, whether before or after they have commenced any civil action in court.

[42] *See* Lay Choo Lee, Deputy Comm'r, Law Revision & Reform Div. in the Attorney Gen.'s Chambers, Overview of Malaysian Mediation Act 2012 (Jul. 3, 2012).
[43] Mediation Act, 749 L.O.M., § 2(b), (2012).

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At the same time, every person has the legal right to seek remedy or recourse through the court process.

This point is clearly stipulated in Section 4 of the 2012 Act which states that "mediation under this Act shall not prevent the commencement of any civil action in court or arbitration nor shall it act as a stay of, or execution of any proceedings, if the proceedings have been commenced."[44] It is to be noted that the 2012 Act is not intended to restrain or curb flexibility and voluntariness of the mediation process per se; instead, its purpose is to promote, encourage and facilitate fair, speedy and cost-effective resolution of disputes by mediation within the confines and governance of confidentiality and privilege accorded to this alternative dispute resolution mechanism.

7. ROLE OF THE COURTS AND JUDICIARY IN COURT-ANNEXED MEDIATION

The conventional view of the role of the judiciary in the administration of justice is to judge (not mediate), to apply the law (not interests), to evaluate the evidence (not facilitate), to make relevant order(s) (not accommodate), and to decide (not settle).[45] However, in the context of court-annexed mediation, this view is now considered an oxymoron because current sitting judges also play the role to mediate, to apply interests, to facilitate, to accommodate, and to settle "as part of his Key Performance Indicators (hereinafter K.P.Is.) in Malaysian judiciary,"[46] which is based on the assumption that the functions of judging and mediation are mutually exclusive.[47] However, this observation may no longer be true in the light of an increasingly more active role played by the courts and the judiciary in court-annexed mediation.

The role of current sitting judges and judicial officers in court-annexed mediation is evident in the mediation process. First, the hearing judge may encourage litigating parties to settle their disputes at the pre-trial case management or at any stage, whether prior to, or even after a trial has

[44] *Id.*, §.§§ 4(1), 4(2).
[45] *See* Hiram E. Chodosh, *Judicial Mediation and Legal Culture,* ISSUES OF DEMOCRACY, Dec. 1999, at 6-12.
[46] Our own emphasis.
[47] Chodosh, s*upra* note 45.

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commenced. It can even be suggested at the appeal stage.[48] Further, if litigating parties agree to mediate their matter, mediation may be conducted in either mode, either through judge-led mediation, or mediation by a third party, the decision of which is made by litigating parties.[49]

In the event that the litigating parties agree for a mediating judge to mediate their matter, the mediating judge takes over from the hearing judge to conduct the mediation. Unless agreed by the litigating parties, the hearing judge should not be the mediating judge, where he should pass the case to another judge.[50] Finally, if the matter is successfully mediated and settled, the hearing judge shall record a consent judgement on the terms as agreed to by litigating parties.[51] If the matter is not settled through mediation, the court shall, on application of either one of the litigating parties or on the court's own motion, give such directions as the court deems fit.[52]

Presumably, there has been substantial focus in articulating the distinction between the role of the judge, and the role of the mediator insofar as court-annexed mediation is concerned. The issues at hand relate to whether the mediating judge could mediate his or her own trial list, what should litigants expect when the case is settled through mediation, and what happens next if the case does not settle, with a view to preserve the fundamentals of mediation as an A.D.R. mechanism. At the end of the day, as with private mediation, court-annexed mediation is no different in the courts' efforts to ensure fairness in the mediation process. It is the duty and responsibilities of current sitting judges and judicial officers when they act as mediators to guide and provide assistance to litigating parties to enable them to reach their agreed outcome, one which they can live with.

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[48] *See* PRACTICE DIRECTION ON MEDIATION *supra* note 22, §. 3.1 ; PIONEER COURT-ANNEXED MEDIATION IN MALAYSIA §. 1.
[49] *See* PRACTICE DIRECTION ON MEDIATION *supra* note 22, §.§§ 5.1 5.3 .
[50] *Supra* note 29; *See* RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 2.2; *See also* PIONEER COURT-ANNEXED MEDIATION IN MALAYSIA, *supra* note 48, §. 5(d) (as issued by the Kuala Lumpur Court Mediation Centre).
[51] *See* 5 PRACTICE DIRECTION, *supra* note 22, *Annexure A (Judge-led Mediation)* §. 4; RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 15.1; *See also* PIONEER COURT-ANNEXED MEDIATION IN MALAYSIA, *supra* note 48, §. 7.
[52] *See* 5 PRACTICE DIRECTION, *supra* note 22, §. 6.3(b); RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 16.1; *See also* PIONEER COURT-ANNEXED MEDIATION IN MALAYSIA, *supra* note 48, §. 9.

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Be that as it may, there are different schools of thought on whether these judges and judicial officers should play the role as mediators. Proponents of judicial mediation opined that "it is an opportunity to combine the legal and moral gravitas of the judicial role with the flexibility and adaptability of ADR."[53] In further support of these judges and judicial officers playing the role as mediators, it is believed that they are able to address the fear of impartiality at post-mediation trials (where mediation did not succeed) by recusing himself or herself; they are resolvers of disputes through other mechanisms besides litigation; they have been trained in and are highly skilled at identifying issues; and they do understand that mediation is not the same as adjudication.[54]

In fact, newly-appointed judges are reminded that the proper judicial role is to include functions as mediator, and as judicial administrator, where 95% of their cases should be settled with the judge's active intervention.[55] It has been said that mediation has become an accepted part of the litigation process where judges and judicial officers are currently being encouraged to engage in A.D.R. mechanisms such as judicial case management–mediation, just to name a couple.[56] This statement also holds water in the context of court-annexed mediation in Malaysia where current sitting judges and judicial officers participate actively as mediators on a part-time basis with the formalization of several C.M.Cs. nationwide.

Yet another reason in support of the idea for these judges and judicial officers to mediate disputes centers on the notion that having judges or judicial officers as mediators could increase the likelihood of a settlement because litigating parties respect the bench and the mantle of the judge or the judicial officer. However, there is also the other side of the coin to consider. When judges or judicial officers take on the role as mediators, they become mediators, and are no longer adjudicators. This crucial point needs proper explanation to litigating parties, including these judges or judicial officers who act as mediators.[57] Once they step into the role as the mediator, that notion of a

[53] Louise Otis & Eric H Reiter, *Mediation by Judges: A New Phenomenon in the Transformation of Justice*, 6 PEPP. DISP. RESOL. L. J., 351 (2006).
[54] *See* Bruce Debelle, Justice, Should Judges Act as Mediators? (Jun. 1-3, 2007).
[55] *See* Frederick B. Lacey, Judge, The Judge's Role in the Settlement of Civil Suits (Sep. 26, 1977), as cited in Marc Galanter, *A Settlement Judge, not a Trial Judge: Judicial Mediation in the United States*, 12 J. OF L. & SOC'Y 1 (1985).
[56] *See* Marilyn Louise Warren, *Should judges be mediators?* 21 AUSTRALASIA DISP. RESOL. J. 77 (2010).
[57] *Id.*

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mediator must be crystalized in the perception, understanding and acceptance by litigating parties, and the judges or judicial officers themselves. In other words, there cannot be any unfair advantage of having judges or judicial officers as mediators when compared to other mediators who are not judges nor judicial officers.

While litigating parties and the public at large do respect judges and judicial officers as persons of higher authority, they must understand that in mediation, the judge or the judicial officer as the mediator does not make any decision for litigating parties. Neither would any award or judgement be handed down by the mediator to litigating parties, just as how mediation is conducted by mediators who are not judges or judicial officers. The final outcome of the dispute still lies in the hands of litigating parties who have full autonomy.

The second reason in support of judges and judicial officers as mediators is related to the notion that if judges and judicial officers do not start getting engaged in A.D.R. mechanisms such as mediation, the courts will risk being marginalised, and eventually become appellate and supervisory institutions, and could no longer be involved in civil litigation matters.[58] In fact, this scenario is well summarised by Farley J of the Ontario Supreme Court when he said "one can only hope that the litigating public and bar will recognise the benefits of resolving disputes through alternative dispute resolution (ADR); as a judge, one is constantly amazed at how many matters can be resolved if the parties face up to the practical problem…"[59] It is granted that the above is a valid concern. As noted, such a concern was the catalyst for the induction of the mediation process into the Malaysian litigation landscape.

Another reason in support of current sitting judges and judicial officers as mediators is to give them the opportunity to develop variety in their judicial life, and to expand their judicial role for mutual benefits of judges and the community at large when they adopt A.D.R. skills.[60] It is contended here that, relative to the other reasons, this reason is not compelling because A.D.R. processes, or specifically, mediation, is not every judge's cup of tea. In other

[58] *Id.*
[59] Abraham, *supra* note 1.
[60] Warren, *supra* note 56.

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words, not every judge views this as an opportunity to enhance his or her judicial role by adopting mediation capabilities and skills such as identifying underlying issues, being empathic, enhancing negotiation skills, have innate passion or affinity to mediate, have humility, or even being a patient person.

On the other side of the coin, the Australian National Alternative Dispute Resolution Advisory Council (hereinafter N.A.D.R.A.C.) comes down hard on judges playing the role as mediators because there is uncertainty in what actually constitutes judge-led mediation.[61] In total support of N.A.D.R.A.C.'s position is the Victorian Bar when it said that judges are appointed to judge, and not to negotiate or take part in commercial negotiations between commercial parties, and that judges are appointed not for their mediation skills, but for their judicial abilities.[62] However, judges could mediate under exceptional circumstances in which case the judge should not hear the case, and must be an accredited mediator.[63]

There are also other reasons which do not support the idea of having judges take on the role of mediators.[64] The first reason is premised on the traditional notion that the judicial role is a pure one, and that it should not be diluted, which may hold true to its principle in the past.[65] However, in recent years, with changing times, judges and judicial officers have been trained to have wider and practical perspectives on how to resolve disputes other than through the litigation process.[66] Having judges and judicial officers mediate is not new news in developed countries such as Canada, the United States, and

[61] *See* MURRAY KELLAM AO ET AL., NATIONAL ALTERNATIVE DISPUTE RESOLUTION ADVISORY COUNCIL (NADRAC), THE RESOLVE TO RESOLVE - EMBRACING ADR TO IMPROVE ACCESS TO JUSTICE IN THE FEDERAL JURISDICTION: A REPORT TO THE ATTORNEY-GENERAL 111 (2009). The main concern was on the incompatibility with the constitutional role of judges exercising federal jurisdiction (sec. 7.42). Other concerns included judges expressing opinion on the likely outcome which may be inconsistent with the principles of mediation and the role of a judge (sec. 7.42), being an inappropriate application of judicial authority (sec. 7.43), and the negative implication on the judiciary as a whole from dissatisfaction with judicial conduct of mediation by the judge (sec. 7.45).
[62] N.A.D.R.A.C., sec. 7.52.
[63] *Id.*, sec. 7.59.
[64] *Cf.* Warren, *supra* note 56.
[65] Warren, *supra* note 56.
[66] Warren, *supra* note 56.

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South Australia, just to name a few.[67] A developing country such as Malaysia has already made efforts to promote free court-annexed mediation programmes by having current sitting judges and judicial officers mediate cases through several C.M.Cs. which have been set up nation-wide.

The second reason is that judges and judicial officers would be frowned upon when they are engaged in private sessions, such as mediation, because their roles must be conducted transparently, and in public.[68] Lastly, where judges and judicial officers play the mediator role, judicial resource is seen to be taken away from trials and appeals.[69] We are of the view that this reason is relevant to the court-annexed mediation programme in Malaysia where current sitting judges and judicial officers who act as mediators on a part-time basis still have their adjudication role, which requires their undivided attention and focus on trials and appeals. Until they become full-time mediators, this reason will be the most compelling reason why judges and judicial officers should not be mediators.

Further, it has been seen that full-time mediators recorded a higher settlement rate (at 35%) than judges and judicial officers who act as mediators on a part-time basis (at a settlement rate of 5%) from the total of 816 cases which were successfully mediated over the three years at the C.M.C.K.L.[70] Hence, it is argued that based on the said statistics, it is evident that the move to make judges and judicial officers full-time mediators is an effort which could be seriously looked at by the courts and judiciary to promote court-annexed mediation practice in Malaysia as an A.D.R. mechanism to facilitate settlement of disputes.

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[67] For example, in Canada, Judicial Dispute Resolution has since 2001 become a permanent programme within the Edmonton Provisional Court which involved judges meeting litigants to discuss settlement, without prejudice and is confidential, and the judge will not hear the trial. *See* Geetha Ravindra, *Virginia's Judicial Settlement Conference Program*, 26 THE JUST. SYS. J. 293 (2005). In the United States, the Del. Code Ann., tit.10, §§ 346-347 were passed in Spring 2003 where the jurisdiction of the Chancery Court was increased to allow its sitting judges to hear technology disputes and act as mediators in negotiations which are closed to the public. *See generally* Maureen Milford, *Jurisdiction, judges' power expanded*, WILMINGTON NEWS J., Jun. 8, 2003, at.1. . In South Australia, *Supreme Court Act 1935* (SA) s 65 (Austl.) provides judges with the capacity to engage in mediation. *See* Iain D Field, Judicial Mediation and Ch III of the Commonwealth Constitution (2009) (unpublished Ph.D. thesis, Bond University, Faculty of Law).

[68] Warren, *supra* note 56.

[69] Warren, *supra* note 56.

[70] As of 24 March 2014.

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Judges and judicial officers who act as mediators must be guided by ethical standards when conducting mediation. In Singapore, judges are guided by the Model Standards of Practice for Court Mediators of the Subordinate Courts under clause 4 according to which mediators are required to comply with the Code of Ethics for Court Mediators of the Subordinate Courts of Singapore, which covers key areas on impartiality, neutrality, confidentiality, conflict of interests and the like.[71] However, in Malaysia, there are no similar standards of practice for court mediators although current sitting judges and judicial officers who act as mediators are guided by the 2010 Practice Direction and the 2011 Rules.

8. OVERCOMING THE CHALLENGES

As seen in the preceding sections, court-annexed mediation practice in Malaysia has since evolved within the Malaysian legal system, relying on current mediation guidelines in the absence of primary statutory provisions governing such practice. What we have seen is a number of aspects which could severely hamper or restrict the growth and future of such practice in Malaysia, which can be summed up as follows, namely:

1. There is lack of consistency and standardization in mediation practice across court-annexed mediation and private mediation in Malaysia, from three perspectives – the mediation process, procedure and governance; mediator competency and assessment; and mediation standards and ethics.

2. The current mediation guidelines, the 2010 Practice Direction, and the 2011 Rules are relatively inadequate and general in nature.

3. Current sitting judges and judicial officers in Malaysia could mediate their own trial cases under the 2010 Practice Direction where the trial judge and the mediator could be the same person in the same case.

4. Current sitting judges and judicial officers who act as mediators are still viewed as having higher authority because they are viewed as having higher authority as sitting judges and judicial officers.

5. Current sitting judges and judicial officers are only part-time mediators.

[71] *See* Seng Oon Loong, *Mediation*. LAWS OF SINGAPORE, SINGAPORE ACADEMY OF LAW (2009), http://www.singaporelaw.sg/sglaw/laws-of-singapore/overview/chapter-3.

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If mediation is to be promoted and encouraged as an A.D.R. mechanism to disputing parties and litigating parties, then the name of the game is to ensure that there is consistency and standardization in mediation practice across the board regardless of who the mediators are, whether they are current sitting judges or judicial officers, practising lawyers, or other professionals. This is especially critical at a time when court-annexed mediation practice in Malaysia is not legislated while private mediation has already been legislated through the 2012 Act.[72]

Presently, all private mediators practise mediation in accordance with the 2012 Act which contains provisions on regulatory, beneficial and procedural elements on mediation agreement, settlement agreement, issue of enforceability of these agreements, mediation process, confidentiality and privileges, and mediator's liability.[73] On the other hand, current sitting judges and judicial officers who act as mediators take guidance from the 2010 Practice Direction, and the 2011 Rules, which provide the required guidelines on court-annexed mediation practice during the pre-trial case management stage.

Hence, it is evident that there is more than one single source of reference on mediation practice for all mediators in Malaysia. By having different sources of reference, there is a risk of allowing inconsistent mediation practices to prevail without check. In the effort to consider implementing consistency and standardization in mediation practice where court-annexed mediation is new in Malaysia, we argue whether it is fair to impose the same standards of mediation practice to judges and judicial officers as with private mediators who are bound by the Malaysia Mediation Centre (hereinafter M.M.C.) Mediation Service Code of Conduct, and M.M.C. Mediation Rules as issued by the Malaysian Bar (also known as the Bar Council).[74]

It is to be noted that the panel of mediators from M.M.C. are accredited mediators, comprising lawyers and other professionals, who have completed 40 hours of mediation skills training workshop which is conducted by the Bar

[72] *Supra* note 43.
[73] *Supra* note 43.
[74] *See* official website of MALAYSIAN BAR (also known as the BAR COUNCIL), www.malaysianbar.org.my.

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Council or other recognised bodies.[75] In contrast, no mediator accreditation has since been formalised for current sitting judges and judicial officers who act as mediators, although continuous but ad-hoc training sessions have been conducted for these judges and judicial officers to enhance their skills in mediation.[76] We submit that the same standard of mediation practice should apply to these judges and judicial officers as do their private mediator counterparts.

In terms of ensuring consistency in mediator competency and its assessment, current sitting judges and judicial officers must, therefore, be trained, taught and reminded to mediate litigating parties' dispute based on mediation principles, process, procedures and governance as mediators. These judges and judicial officers may be tempted to conduct mediation in an evaluative style, which they practise in their adjudication role, instead of using the facilitative approach which is expected of mediators. They should not focus solely to push or pressure litigating parties to reach a settlement at all costs although they face mounting pressure to increase the likelihood of settlements in the cases they mediate. As an example, these judges and judicial officers in Malaysia are driven by their K.P.Is. to reduce the volume of backlog of cases they adjudicate.[77]

Hence, we are of the view that judges and judicial officers have to be mindful that mediation sessions are not the same as settlement conferences where the focus is to get litigating parties to reach settlement. There is the need to ensure that their capabilities and skills to conduct court-annexed mediation are constantly kept in check for purposes of consistency and standardization of mediator competency and competency-based assessment.

Simply put, in any training programme for mediators, including accreditation, the content ought to focus on development of such skills, and full understanding of the mediation process. It has been noted that effective mediators ought to demonstrate their level of competencies in three areas,

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[75] *See* Gunavathi Subramaniam, Mediator, Malay. Mediation Ctr., The Practice of Mediation in Malaysia (Jul. 3, 2012).

[76] *See* Tan Sri Bin Zakaria, Chief Justice, Malay., Appointment Speech as the 13th Chief Justice of Malaysia(Sep.14,2011).http://www.kehakiman.gov.my/sites/default/files/document3/Penerbitan%20Kehakiman/UcapanKHNBI.pdf. *See also* Mediation and the Courts – The Right Approach (Jul. 30, 2010).

[77] *Supra* note 10, *supra* note 14, and *supra* note 19.

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namely, knowledge (negotiation theory, mediation strategies, tactics, and processes in both negotiation and mediation), skills (analytical, communication in listening and questioning skills, organization and planning skills), and attitude (ethics, values and professionalism).[78] According to one author, there is the need for intercultural mediation training to be included on cross-cultural studies, role plays, cross-cultural communication skill development, and processes that encourage reflective and life-long learning.[79] We share the same view given the fact that Malaysia is a multi-cultural society. For current sitting judges and judicial officers who act as mediators, they require professional training and accreditation in mediation. This is because the role of the mediator and the role of the adjudicator have very different skill sets where they would be exposed to theories and principles of mediation, including the opportunity to enhance their practical mediation skills.

As an example, in an effort to enhance mediation skills of judges and judicial officers in Malaysia, a special training was conducted in 2011 for these judges and officers.[80] Further, in an effort by the Malaysian judiciary to enhance such skills, a special training was also conducted for judges and judicial officers by a senior judge from the United States.[81] We submit that in order to ensure mediators' competency levels are current and up-to-date, they must be encouraged to focus on their professional development as mediators on a continuous basis. As such, continuous assessments on their mediator competency levels and professional development requirements should be established for this purpose, and would serve to provide regular quality checks for the benefit of these mediators, the public, and the profession. In short, training programmes such as proper initial training, initial post-training supervision, and on-going review and continuing education are necessary to ensure that the appropriate standards are maintained amongst all current sitting judges and judicial officers who act as mediators.

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[78] *See* David A Cruickshank, *Training mediators: moving towards competency-based training, in* A HANDBOOK OF DISPUTE RESOLUTION (Karl Mackie, ed., 1991).
[79] *See* Siew Fang Law, *Culturally-sensitive mediation: The importance of culture in mediation accreditation*, 20 AUSTRALASIA DISP. RESOL. J. 3 (2009).
[80] *Supra* note 2.
[81] The special six-month training was conducted by Mr Justice Gordon J. Low, a Senior Federal Judge of Utah, U.S. in 2011.

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In essence, such efforts should be consolidated and leveraged with existing efforts, which are organised and conducted by M.M.C. for its panel of mediators in private mediation. We contend that all efforts on mediator competency, assessment of mediator competency, and accreditation of mediators ought to be standardised and regulated across all types of mediation, including court-annexed mediation, with emphasis on mediation principles such as confidentiality, party autonomy, mediator impartiality, mediator neutrality, and fair treatment. The objective is to ensure that consistency and quality in mediation practice are not compromised in the interests of the parties and the profession.

It is recommended that references ought to be drawn from countries which have implemented formal training programmes including certification and accreditation of all mediators, including judges and judicial officers. As evident in countries like Australia and Singapore, we are of the view that the process and content of such programmes have been comprehensively thought through for the benefit of all mediators, and to raise the standard of the mediation profession in their respective countries.

In Australia, accreditation of mediators is handled by National Mediator Accreditation System (N.M.A.S.).[82] The Australian National Mediator Standards cover a variety of areas such as the creation of Recognised Mediation Accreditation Bodies (R.M.A.Bs.) to handle the process of accreditation, the establishment of the approval process, and continuing accreditation requirements for mediators.[83] Singapore, on the other hand, has a different challenge. In the absence of a national system or law to regulate the accreditation and the quality of standards of mediators, and to regulate mediation practice, the Singapore Mediation Centre (S.M.C.) developed its own system of mediator training and accreditation, and also established its training arm in mediation, negotiation and conflict management.[84]

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[82] *See* Rachel Nickless, *Victoria allows Judge Mediators*, AUSTL. FIN. REV., Apr. 13, 2012 in Patricia Anne Bergin, Chief Justice in Equity, Supreme Court of N.S.W., The Objectives, Scope and Focus of Mediation Legislation in Australia (May 11, 2012).

[83] *Id.*

[84] Loong, *supra* note 71. Accreditation is limited to one year, and is subject to renewal. Re-accreditation is granted if the mediator engages in at least four hours of annual continuing education in mediation, and is available to conduct at least five mediations per year if requested to do so to ensure the maintenance of his or her skills.

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In other words, judges and judicial officers who act as mediators require continuing mediation education and training in order to gain more practical experience in mediation. This should apply as early as possible in the competency and its assessment process, starting with those who are just entering into the judiciary where they would require such exposures to mediation through pre-bench orientation, guest speakers, workshops, seminars and judicial conferences which offer content on conflict management, interest-based negotiation, and conducting mediation sessions in accordance with the mediation process.

In fact, we opine that there must be any distinction between current sitting judges and judicial officers as mediators, and private mediators who are not current sitting judges and judicial officers. It is submitted that the need to standardize such mediation competency, its competency assessments, certification and accreditation for all mediators, and for all the above mentioned elements to be assimilated into the mediation profession and practice in Malaysia, cannot be overemphasized. Our view is that these elements ought to be regulated to ensure that the standard and quality of the mediation profession are not compromised.

Such efforts would ensure consistency and standardization in mediation standards and ethics. This is because presently, there are no such standards and professional ethics in mediation *per se* governing current sitting judges and judicial officers in Malaysia when they act as mediators although they are guided by the 2010 Practice Direction, and the 2011 Rules. It was seen from earlier discussions in this article that there are inadequate provisions governing ethical standards of mediation practice in both sets of the guidelines and procedures. The panel of mediators from M.M.C., on the other hand, refer to the M.M.C. Code of Conduct when they act as mediators in sessions held by the M.M.C.[85] The need for a standardized code of conduct on mediation practice and professional ethics in mediation cannot be overemphasized as it must apply to all mediators regardless of their background, whether they are mediators in court-directed mediation or private mediation.

It is contended that mediators face ethical issues when conducting mediation throughout the mediation process. When judges and judicial officers

[85] *Supra* note 74.

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act as mediators, mediation moves them out of their familiar adjudicative role where they do not communicate directly with litigating parties unless litigating parties are unrepresented by their respective legal counsels. In mediation, however, they are placed into closer proximity to the parties where they are required to play the facilitative role which requires them to communicate directly and constantly with the parties throughout the mediation process. Further, they may be required to conduct caucuses during mediation. This has important ethical implications because they are now put in the delicate position of keeping, and on occasions, strategically revealing the confidences of each of the parties.[86] Such closer contacts with the parties which take place in an informal atmosphere like mediation would start to blur the rules and boundaries, which are not clearly defined, and therefore may present ethical dilemmas for judges and judicial officers.[87]

However, there are also issues which challenge the creation and implementation of a code of ethics for mediators.[88] First, mediation is a flexible process, which is not easy to define. Such a difficulty adds to the complication in trying to determine the right ethics and standards of practice. Next of consideration is where mediators could be bound to comply with other professional ethics due to their primary professions, that is, their training, background, education, and the like, prior to becoming mediators. The question is how do mediators handle this challenge in the event there is a conflict of the code of ethics between that of mediation, and of their primary professions.

In this respect, references should also be drawn from other countries which have implemented such standards and professional ethics in mediation for all mediators, including those who conduct court-annexed mediation, for strict compliance by all mediators. For instance, the Model Standards of Conduct for Mediators (Model Standards) was adopted in August 2005 by the American Bar Association (A.B.A.), the American Arbitration Association (A.A.A.), and the Association for Conflict Resolution, the Standards of Ethics

[86] *See* Otis and Reiter, *supra* note 53.
[87] *See* Robert A Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications*, J. DISP. RESOL. 1 (1994).
[88] *See* KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE (1994).

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and Professional Responsibility in Virginia, U.S.,[89] and a set of code of ethics under the Model Standards of Practice for Court Mediators in Singapore.[90]

One of the key challenges facing court-annexed mediation in Malaysia is the inadequacy and inconsistency of current mediation guidelines. As we saw in the earlier section of this article, the said guidelines in the 2010 Practice Direction are general in nature, and lack the depth and precision in several areas, namely, scope of the mediation process and its procedures; the role, responsibilities, duties, "dos and don'ts" of the mediator; the fundamental ethics on the conduct of mediators on impartiality, neutrality, and conflict of interest. In short, they are not as comprehensive as those in the 2011 Rules.

Be that as it may, we are of the view that the 2011 Rules could be further enhanced and improved, specifically in a number of areas. On 'other cases which can be referred to mediation,' further clarity and direction could be included.[91] Under the basic function of the mediator, no guidelines are provided on the different mediation styles to be adopted.[92] In terms of the mediation process per se, there are no details on the step-by-step process of the end-to-end mediation session included to guide mediators.[93] The section on conflict of interest does not include principles of mediator impartiality and mediator neutrality.[94] Last but not least, the provision on confidentiality does not touch on limitations and exceptions to this rule.[95]

In addition, we also saw the inconsistent provision in the 2010 Practice Direction with that in the 2011 Rules, which allows litigating parties to decide if they choose to have the same judge or judicial officer who is hearing their case to be the mediator.[96] Simply put, the said provision also allows trial judges to mediate their own cases, and if mediation fails, the mediator could hear the case as the trial judge with consent from litigating parties. In contrast, the 2011

[89] *See* Ravindra, *supra* note 67.
[90] *See* LAN YUAN LIM & THIAM LENG LIEW, COURT MEDIATION IN SINGAPORE (1997). The Model Standards of Practice for Court Mediators covers objective and role of court mediation, types of mediation conducted, the nature of mediation purposes with an emphasis on quality and training of court mediators, including general responsibilities of mediators, and their responsibilities to parties.
[91] *See* RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 3.3.
[92] RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 4.
[93] RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 5.
[94] RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 8.
[95] RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 9.
[96] *Supra* note 29.

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Rules expressly prohibit the mediator from trying his own cases.[97] In other words, such inconsistent provisions in the said two sources of mediation guidelines allow judges and judicial officers when acting as mediators to choose either provision, whichever they decide to make reference to or to rely on. Trial judges who had acted as mediators may be prejudiced or have pre-conceived notions of the facts or evidence which they were privy to during mediation which could influence their delivery of the judgment.

This opens up inconsistent practices in mediation which would gravely undermine fundamental mediation principles of ethics, fair treatment, impartiality and neutrality of judges and judicial officers who act as mediators. We are of the view that the said phrase in the 2010 Practice Direction ought to be removed, and that the two sources of mediation guidelines should be streamlined into one single source of mediation guidelines for all mediators nation-wide, whether it is for court-annexed mediation or private mediation, whether they are in Peninsular Malaysia, or in East Malaysia.

Other countries have taken a clear stand to prohibit trial judges from mediating their own trial list, and for mediating judges to hear the same case if mediation fails.[98] For example, in the United States under the Delaware and Edmonton judicial dispute resolution programmes, sitting judges may act as mediators but these judges will not be assigned to the mediated cases should mediation fail.[99] A similar prohibition can be seen in Australia.[100]

However, it was held in one Malaysian case that the said Annexure A on judge-led mediation in the 2010 Practice Direction is not an automatic disqualification of the trial judge who mediated the case.[101] The court held that it must be satisfied that there is a real danger of bias on the part of the judge if he or she were to proceed to hear the case as each case has to be decided on its own set of facts and circumstances, and therefore cannot be a blanket disqualification.[102] In other words, the present Malaysian position holds that it

[97] *See* RULES FOR COURT ASSISTED MEDIATION, *supra* note 38, §. 14.
[98] *See* Ravindra, *supra* note 67; *see also* Field, *supra* note 67.
[99] *See* Ravindra, *supra* note 67.
[100] Ravindra, *supra* note 67. *See Supreme Court Act 1935* (SA) s 65(5) (Austl.) provides that a judge who has attempted to mediate a dispute should be excluded from adjudication; AUSTRALIAN INSTITUTE OF JUDICIAL ADMINISTRATION INCORPORATED, GUIDE TO JUDICIAL CONDUCT (2002).
[101] *See* Dato' Dr Joseph Eravelly v Dato' Hilmi Mohd Nor & Ors, 3 CLJ 294 (2011).
[102] *Id.*, at 295. *See also* judgment of VT Singham, J, 305.

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is still possible for the judge who mediated the case to be the trial judge as long as litigating parties consent to having the same judge, and that the courts must be satisfied that there is no "real danger of bias."

One of the areas which could hamper the growth of court-annexed mediation practice in Malaysia is the notion that judges and judicial officers will always remain as judges and judicial officers in the eyes of litigating parties even when they act as mediators in the informal setting of the mediation room.[103] This is because mediators' position in society is such that it would be difficult for the parties to make a distinction between current sitting judges and judicial officers, and mediators. The parties could misinterpret or misconstrue what judges and judicial officers say during mediation as the court's decision on the mediated issues concerning the dispute. In our view, people respect the bench which has traditionally been seen as the place of higher authority and wisdom. Presumably, court-annexed mediation has the "force of the law" because it is conducted by judges and judicial officers where the parties may appear to be more receptive to options or suggestions tabled by these mediators. Judges and judicial officers may be tempted to push forward their views using the evaluative style of mediation to pressure the parties to reach a settlement in order for cases to be closed expeditiously. The Honorable Marilyn Warren has this to say in respect of this point, "in difficult cases, the gravitas of a judge would increase the likelihood of a settlement because parties do respect the bench and the mantle of the judicial office."[104]

It is submitted that litigating parties need to be educated on the role of judges and judicial officers as mediators, and the role court-annexed mediation plays as an A.D.R. mechanism, including how it is integrated in the litigation process and court system. As emphasized in the earlier, we are of the view that having a common and standardised set of mediation guidelines for both court-annexed mediation and private mediation could ensure the right behavior and compliance amongst judges and judicial officers when they act as mediators. Only then would they be subject to the mandated requirements of professional mediator competency and its standardised assessment as do their counterparts in private mediation.

[103] *See* Otis and Reiter, *supra* note 53.
[104] Warren, *supra* note 56.

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Last but not least, the current practice of court-annexed mediation is for current sitting judges and judicial officers to act as mediators on a part-time basis. Suffice to state at this point that presently the only mediators who practise court-annexed mediation on a full-time basis are those mediators who conduct court-annexed mediation programmes at the C.M.Cs. other than judges and judicial officers who are on a part-time basis. At the C.M.C.K.L., for example, all registered cases for mediation which originate from the lower courts are mediated by full-time mediators while those from the higher courts are mediated by part-time High Court judges.

We are of the view that the area of contention is the time factor. Owing to the dual role by current sitting judges and judicial officers who act as mediators, the perpetual challenge or obstacle faced by mediators is insufficient time on their hands to dispose of their daily load of trial cases, and to handle mediation cases as well. Presumably, such time constraints could compromise the quality of the judgments delivered by judges and judicial officers in cases which they adjudicate, and the quality and the settlement rate of cases which they mediate.

Hence, it is submitted that there seems to be a sufficient cause to regulate requirements on the appointment of mediators to be on a full-time basis, which should not be applicable to all mediators, for the mediation profession in Malaysia is to be taken seriously. We are of the view that formalizing such requirements through a common set of regulations on mediator eligibility to be on a full-time basis before they are duly appointed could ensure consistency and standardisation of the said regulations.

Simply put, such a move would benefit both litigating parties and mediators alike. For the parties, they would no longer need to be burdened with the notion of whether mediators wear the "adjudicator hat" or the "mediator hat" where current sitting judges and judicial officers act as mediators. For mediators, they would be able to completely focus and concentrate on being full-time mediators without having to go through any ethical dilemmas of being the "judge" to the litigating parties to resolve the dispute at hand.

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9. WHAT THE FUTURE HOLDS

The question is this: Given the challenges faced by current sitting judges and judicial officers who act as mediators, is there a future for court-annexed mediation practice in Malaysia? What would the future hold? How can these challenges be addressed and overcome? It is our contention that much could still be done by the Malaysian courts and judiciary to tackle these challenges little by little because they are not insurmountable. In our view, there are five solutions to manage the future of court-annexed mediation practice in Malaysia, which are to be adopted cohesively in an integrated manner when being implemented.

The first solution is to amend the 2010 Practice Direction and the 2011 Rules, given their shortcomings and inadequacies, as elaborated earlier. This could be seen as a quick fix without having to go through the process of regulating the said amendments via legislation and codification. We are of the opinion that the situation deserves immediate attention in the light of the Malaysian position to allow current sitting judges and judicial officers to try cases which they did not succeed in mediation, provided the courts must be satisfied that there is no "real danger of bias."[105] Hence, our submission is that the current sources of mediation guidelines on court-directed mediation are to be replaced with an amended version which should be premised on the 2011 Rules as the base reference material. This is because the 2011 Rules contain a relatively more comprehensive account and elaboration of mediation guidelines for court mediators than the 2010 Practice Direction, as discussed earlier.

The next suggested solution is to draw up a common set of mediation standards and code of conduct which governs all mediators, whether they conduct court-annexed mediation or private mediation. As seen in the earlier section of this article, presently, there are no standards and code of conduct governing judges and judicial officers when they act as mediators, unlike their counterparts in private mediation practice, where they are bound by the said M.M.C. Mediation Service Code of Conduct, and the M.M.C. Mediation Rules as

[105] *Supra* note 101.

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issued by the Malaysian Bar.[106] As a step forward, the immediate approach would be to use the said information as issued by the Malaysian Bar as the base reference materials when drawing up one common set of mediation standards and code of conduct, which is applicable to all mediators in Malaysia.

In addition, there is a need to look into forming one centralised mediation institution in Malaysia to look into the following important functions, namely:

1. Regulate and enforce consistent and standardised mediation process and governance;
2. Regulate and enforce consistent and standardised mediation standards and professional ethics;
3. Focus on delivering consistent and standardised mediation competency and its assessment;
4. Regulate and enforce mediator registration and accreditation;
5. Provide education to the public, lawyers, judges and judicial officers;
6. Be the focal point for all information on mediation; and
7. Conduct independent complaints review process.

Presently, some of the above functions are separately administered and conducted by different organizations, namely, the C.M.Cs. and the M.M.C., which focus on court-annexed mediation practice, and private mediation practice respectively. We are of the view that the above functions be streamlined, and be housed under one roof through the establishment of a centralised mediation institution to ensure consistency, standardization and quality of mediation services, and of the profession. Such an initiative could also contribute to the elimination of duplication of effort, time and cost leading to wastage and inefficiencies.

Taking a baby step forward, our suggestion is to form a mediation resource organization first.[107] Such a centralised resource office could provide administrative support and function with a view to oversee, and to could

[106] *Supra* note 74.
[107] *See* Ravindra, *supra* note 67. As an example, in the state of Virginia, U.S., the Department of Dispute Resolution Services was created within the Office of the Executive Secretary of the Supreme Court of Virginia (OES), which is the Administrative Office of the Courts. The OES is the centralised ADR resource office.

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streamline the scope of responsibilities, which are currently undertaken by both the C.M.Cs. and the M.M.C. Through such a centralised mediation institution, all efforts to regulate and enforce consistent and standardised mediation process and governance, mediation standards and professional ethics, to deliver consistent and standardised mediation competency and its assessment, and mediator registration and accreditation, could be achieved and leveraged through such an establishment.

The next solution is to reach out to retired judges to join the mediator workforce.[108] This is an attempt to enhance mediator competency in addition to providing formal mediator training to current sitting judges and judicial officers who act as mediators. There are several advantages of using retired judges as court mediators in the C.M.Cs. which are currently located in several cities and towns nationwide.[109] First, they have the legal expertise which could be put to better use; they do not pose the same ethical concerns as current sitting judges and judicial officers would, such as those which relate to coercion to pressure litigating parties to settle in order to clear backlog of cases, and role conflict in situations where the current sitting judge or judicial officer who act as the mediator, and the trial judge could be the same person in the same case. Presumably, as retirees, they would have more time on their hands which they could spare to offer their expertise and services. However, we are of the view that retired judges would still need to undergo formal mediator training, just like every mediator needs to.

First, these retired judges will join the panel of trained mediators from the C.M.Cs. They would be recommended to be assigned to the most proximate C.M.Cs. depending on their residential locations. They would be on an "on demand" basis where they would be duly compensated by the courts whenever they conduct court-annexed mediation sessions. They do not have trial authority in all the cases which they mediate. They would be equally bound by the same set of mediator standards and professional ethics in mediation, which is also applicable to the panel of mediators from the M.M.C., and current sitting judges and judicial officers who act as part-time mediators.

[108] Ravindra, *supra* note 67. As an example, the Norfolk Circuit Court in the United States brought in retired Circuit Court judges to conduct settlement conferences in complex cases. In order to ensure that the programme works, comprehensive training in mediation and settlement conference techniques of 16 hours were conducted to a pre-selected group of these retired judges.
[109] *Supra* note 14.

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Under this arrangement, suffice to note that there would be no change in the current C.M.C. model where litigating parties would be assigned a mediating judge from the panel of trained mediators to handle their matter by the relevant C.M.C. Such court-annexed mediation services would still be provided free of charge to litigating parties, and would still be open to any civil case which is filed in the courts. It is in our humble opinion that such an arrangement would only pose minimal changes so as not to disrupt the current C.M.C. model. Instead, such an arrangement would help to enhance the value of the C.M.Cs. to the current court-annexed mediation practice in Malaysia.

Last but not least, our suggested solution to address the current challenges in court-annexed mediation practice is to enhance and expand the scope of the C.M.Cs. Since its inception in Kuala Lumpur in 2010, C.M.Cs. have mushroomed in major cities nationwide.[110] The results so far have been encouraging with reasonable settlement rates achieved in C.M.C.K.L. since the pilot programme.[111] Barring all circumstances, similar achievements would be forthcoming from the other C.M.Cs. in the near future.

Be that as it may, it is worth noting that in order for higher settlement rates to be achieved and sustained from all C.M.Cs., there must be continued efforts to promote and enhance public awareness of, and education on, court-annexed mediation programmes, which are provided free of charge to litigating parties. It is most important for the public to be educated about how C.M.Cs. can help and guide litigating parties to reach an agreed outcome in mediation which needs to be promoted as an A.D.R. mechanism, and to correct the perception that litigation in the courts is the only way to resolve disputes. This is particularly important as more and more C.M.Cs. could be established nationwide in the coming years. Further, in order to cater for increasing demand of court-annexed mediation services, the scope of C.M.Cs. ought to be progressively enhanced and expanded.

Presently, C.M.Cs. cover cases which are referred by the courts for mediation, and also 'running down' cases which are automatically referred to C.M.Cs. for mediation under the 2013 Practice Direction. Potentially, the type of cases should also be expanded to include family/divorce matters, and building

[110] *Supra* note 17.
[111] *Supra* note 17.

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and construction disputes. However, this would very much depend on whether such cases could be automatically referred to C.M.Cs. as in the "running down" accident cases through Practice Directions as issued by the judiciary.

10. CONCLUSION

As court-directed mediation practice is still new in Malaysia, what is required is a cultural change on the current public perception of judges and judicial officers when they act as court mediators. Undoubtedly, a lot of proactive education and awareness programmes need to be implemented across the nation to reach the public at large, the lawyers and even the judges and judicial officers on the role of C.M.Cs. and how court-annexed mediation services are administered and integrated into the court process.

Next, amending the current guidelines on court-directed mediation practice would provide clarity and consistency in standardised mediation process and governance, mediator competency, its assessment and accreditation, and standards and professional ethics in mediation. Fears of trial judges mediating their own trial lists, and mediating judges hearing their own cases if mediation fails would be allayed. Concerns about judges and judicial officers not performing their mediator role on a full-time basis in order to deliver higher settlement rates would be addressed, although there is no guarantee that more mediated cases will get settled by full-time mediators.

Worries that judges and judicial officers, when acting as court mediators lack mediator, competency, and lack the required capabilities and skills to the extent that they do not practise court-directed mediation in accordance with 'pure' mediation principles would no longer hold water. Thoughts that litigating parties may be pressured or coerced by judges and judicial officers to accept mediation as an A.D.R. mechanism, or even to accept settlement terms which are passed down to litigating parties would be a thing of the past.

Be that as it may, it cannot be over-emphasized that all the recommended positive changes and amendments to the current guidelines on court-directed mediation would come to naught if there is lack of focus,

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regulation and enforcement on a sustainable basis. To this end, it is our recommendation that a centralised mediation institution is to be established to hold all these together in order to achieve the desired results albeit that baby steps may need to be progressively implemented with a view to materialise this vision by the Malaysian judiciary.

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Collaboration for Innovation in the Brazilian Soybean Market

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TABLE OF CONTENTS: 1. Introduction; 2. The Brazilian Soybean History and Relevance; 3. The Evolution of the Agricultural Sector in Brazil; 3.1. The Evolution of the Soybean Research in Brazil; 3.2. The Applicable Brazilian Legislation; 4. Embrapa; 4.1. The Main Similarities Between the Argentinian National Institute of Agricultural Technology – INTA and Embrapa; 4.2. Embrapa Public Private Agreements; 5. Governance; 5.1. Governance in the Local Soybean Production Arrangement; 6. Conclusion.

ABSTRACT: The establishment of strategic collaborative partnerships is of great value to innovate under uncertainty. The agricultural sector could not be different. Brazil has one of the most complete and complex agricultural research structures in the world and this article focus on the Brazilian soybean, considering its economical relevance. In this context, this article explains the Brazilian Agricultural Research Corporation (hereinafter Embrapa) central role in articulating networks to develop soybean with efficiency gains and overcoming market uncertainties.

KEYWORDS: *Collaboration; Innovation; Uncertainty; Brazilian Soybean Research*.

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1. INTRODUCTION

Brazil has one of the most complex and complete agricultural research structures. The Brazilian Agricultural Research Corporation (hereinafter Embrapa) plays a central role collaborating with the several actors who contribute to that research.

Considering the broad range of agricultural cultivars in Brazil and the different ways the actors who develop, produce and commercialize them interact, it was necessary to delimit the study to one specific cultivar. Hence, we chose the soybean because of its relevance to the Brazilian economy.

The main purpose of this paper is to explain the collaborative structures for soybean research under uncertainty and Embrapa's role in this scenario.[1] As explained by Professor Charles F. Sabel[2], contracts are mechanisms employed to enable communication and avoid opportunistic behaviors among the actors. Moreover, rules are necessary to decrease or mitigate the undesired behaviors. Therefore, this paper analyzes the agreements and legislation in these collaborative structures.

This paper proceeds in four parts. The first part explains the history and the relevance of the soybean in the Brazilian context. The second part analyzes the evolution of the agricultural sector in Brazil, including the evolution of soybean research and the applicable legislation. The third part then explains what Embrapa is, showing its main features. It also compares the Brazilian Embrapa and the Argentinian INTA and reviews Embrapa's agreements. The fourth part focuses on governance and specifically, about the local soybean production arrangement in Santarém and Belterra. In conclusion, the main differences between Embrapa's relationship with private and with public partners are highlighted.

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[1] In this paper uncertainty refers to the knightian concept FRANK HYNEMAN KNIGHT, RISK, UNCERTAINTY AND PROFIT (1921), explained by Ronald J. Gilson, Charles Fredrick Sabel & Robert E. Scott, *Contracting for innovation: Vertical disintegration and interfirm collaboration*, 109 COLUM. L. REV. 431 (2009). According to them, uncertainty differs from risk because of its impossibility to quantify the probability of occurrence. Uncertainty also differs from asymmetry (one party detains the information).

[2] Charles F. Sabel is the Maurice T. Moore Professor of Law and Social Science at Columbia Law School.

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2. THE BRAZILIAN SOYBEAN HISTORY AND RELEVANCE

According to Bonato and Bonato, the soybean is a species of legume of the pea family whose main products are grain, oil and bran. Its ancient history is unclear.[3] The Chinese literature states that it was domesticated hundreds of years before the first records dated 2838 B.C. in Pen-tsao Kang-mu herbarium. Based on this, it is believed that the soybean is one of the oldest types of cultivars on earth. However, the soybean evolved over time because of the natural and artificial crossing of different species.

Despite the disagreement in research on the origin of the soybean, it is certain that its origin is in East Asia. Between the 2nd century B.C. and 3rd century A.D., the soybean was brought to Korea and Japan. In 1790, England planted soybeans in the royal botanic garden in Kew. Later, the Professor of Vienna University Friedrich Hamberlandt, distributed soybean seeds to Austria, Germany, Poland, Hungary, Switzerland and the Netherlands. The soybean came to the United States in 1840, but only in 1980 did American producers get commercially interested in it. In Latin America, it was introduced in Brazil in 1882, in Argentina in 1909, in 1921 in Paraguay and in 1928 in Colombia.

Until the beginning of the 1940s, the production of soybean was concentrated in Asia. Production in the West, especially in the United States, started growing in 1940 and in 1942 it was the first ranked country in world production.

The São Paulo Agronomic Institute did the first studies about soybean in Brazil in 1892, which were published in 1899. In order to encourage soybean cultivation in Brazil, the Department of Agriculture of São Paulo distributed soybean seeds to farmers in 1900. The first Brazilian state to produce soybeans on a commercial scale was Rio Grande do Sul in 1901. Paraná held the title of the biggest producer of soybean in Brazil for many years, until the production in Mato Grosso surpassed it. Other Brazilian states, such as Minas Gerais, Santa Catarina, Bahia, Goiás, Distrito Federal and Maranhão also produce soybeans, despite not being relevant for commercial production.

[3] *See generally* EMIDIO RIZZO BONATO & ANA LIDIA VARIANI BONATO, A SOJA NO BRASIL: HISTORIA E ESTATISTICA [SOYBEAN IN BRAZIL: HISTORY AND STATISTIC] (1987).

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In the opinion of Guimarães, the expansion in the soybean market in Brazil is a result of many factors such as market favorable conditions, cooperatives' participation in production and commercialization, and the possibility of total automation.[4] However, among all the factors, it is believed that the key to the success of soybean cultivation is the establishment of an articulated research network.

The data reveals the importance of soybean cultivation in Brazil. As stated by Embrapa, Brazil is the second largest producer of soybeans in the world.[5] In the 2014/2015 harvest, the total production was 95,070 million tons, while the United States, the largest producer of soybeans, produced 108,014 million tons. Currently, the agricultural sector corresponds to 30% of the Brazilian GDP and 40% of total exports. In accordance with Albuquerque and da Silva, Brazilian agriculture productivity has grown at an annual rate of 2.51% in the last 30 years due to the investments in research, technology and human capital.[6]

3. THE EVOLUTION OF THE AGRICULTURAL SECTOR IN BRAZIL

According to Lopes and Arcuri, the agricultural research in Brazil started in the 19th century with the establishment of the Botanical Garden in Rio de Janeiro, followed by the inauguration of the Baiano Imperial Institute of Agriculture and the Pernambucano Institute.[7] Later, the Agronomic Station of Campinas established by the federal government was subsequently transferred to the state government of São Paulo.

Important events such as the First World War, the economic crisis of 1929 and the Brazilian Revolution of 1930, forced Brazil to rethink its

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[4] Thiago André Guimarães, *A Dinâmica da Cultura da Soja no Estado do Paraná: O Papel da Embrapa entre 1989 e 2002. [The Dynamic of the Soybean Cultivation in Paraná State: Embrapa's role between 1989 and 2002]*, VITRINE DA CONJUNTURA, Aug. 2011, at 1, 4-6.

[5] *See* BRAZILIAN AGRICULTURAL RESEARCH CORPORATION (EMBRAPA), *Soybean*, EMBRAPA.BR, http://www.Embrapa.br/soja/cultivos/soja1 (last visited May 9, 2016).

[6] *See generally* ANA CHRISTINA SABEGIN ALBUQUERQUE & ALIOMAR GABRIEL DA SILVA, BRAZILIAN AGRICULTURAL RESEARCH CORPORATION (EMBRAPA), AGRICULTURA TROPICAL: QUATRO DÉCADAS DE INOVAÇOES TECNOLOGICAS, INSTITUCIONAIS E POLITICAS [TROPICAL AGRICULTURE: FOUR DECADES OF TECHNOLOGICAL, INSTITUTIONAL AND POLITICAL INNOVATION] (2008).

[7] *See generally* Mauricio Antonio Lopes & Pedro Braga Arcuri, Ph.D., Brazilian Agricultural Research Corporation (Embrapa), The Brazilian Agricultural Research for Development (R&D) System, (Feb. 8 - 10, 2010).

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agricultural production, which was mainly focused on coffee and sugarcane. According to Alves and Souza, by that time the agriculture was harmed because of thoughts that it did not respond to incentives, demanded a great deal of work force on the farms, and the international commerce was unfavorable to raw material exporters.[8] Only from 1960 on it is possible to perceive a modernization process of the agricultural sector with the creation of a National Rural Credit Program (provided financing to the acquisition of modern inputs and equipment), the Warranty Policy for Minimum Prices (improved stock control, commercialization and logistics), and the PROAGRO (a rural insurance program). By that time, many state governments created their own agricultural research organizations. Thus, Embrapa and agricultural schools became part of the National System for Agricultural Research (hereinafter SNPA).

As noted by Mathias, the modernization also resulted from policies that increased R&D.[9] The idea was to expand the agriculture production through technological advancements that included research, especially related to genetic engineering, and reduce its costs. Nonetheless, as stated by Rivaldo, most of these policies were discontinued due to economic crisis and high inflation.[10] The stabilization of the Brazilian market in the 1990s attracted private investors. Hereafter, the government started assuming a new role.

Brazil has one of the most complex and complete agricultural research structures. Embrapa plays a central role collaborating with the several actors who contribute to that research, as demonstrated in the figure below.[11]

[8] *See generally* Eliseu Alves & Geraldo da Silva e Souza, *A Pesquisa Agrícola numa Agricultura Integrada ao Mercado Internacional – O caso da Embrapa e do Cerrado. [The Agricultural Research as an Integrated Agriculture in the International Market – Embrapa and Brazilian Savannah Case]*, 2 REVISTA DE POLITICA AGRICOLA 56 [REV. POL. AGR.] (2007).

[9] *See generally* JOAO FELIPE CURY MARINHO MATHIAS, *Modernização e Produtividade da Agropecuária no Brasil [Modernization and Productivity in Brazil's Agriculture in How is Brazil?]*, *in* COMO VAI O BRASIL? [HOW IS BRAZIL?], Imã (2014).

[10] *See generally* ORMUZ FREITAS RIVALDO, *Estratégias para o Fortalecimento do Sistema Brasileiro de Pesquisa Agropecuária* [*Strategies to Strengthen the Brazilian System of Agricultural Research*], Brazilian Agricultural Research Corporation (1986).

[11] Despite Embrapa's important role, the actors also have their own projects and relates to the others without Embrapa's interference. It is important to note that Embrapa's Directive No. 14/2000 that will be reviewed in the Brazilian legislation section, prohibits the actors to develop parallel programs when they are collaborating with Embrapa, to avoid mixing the results.

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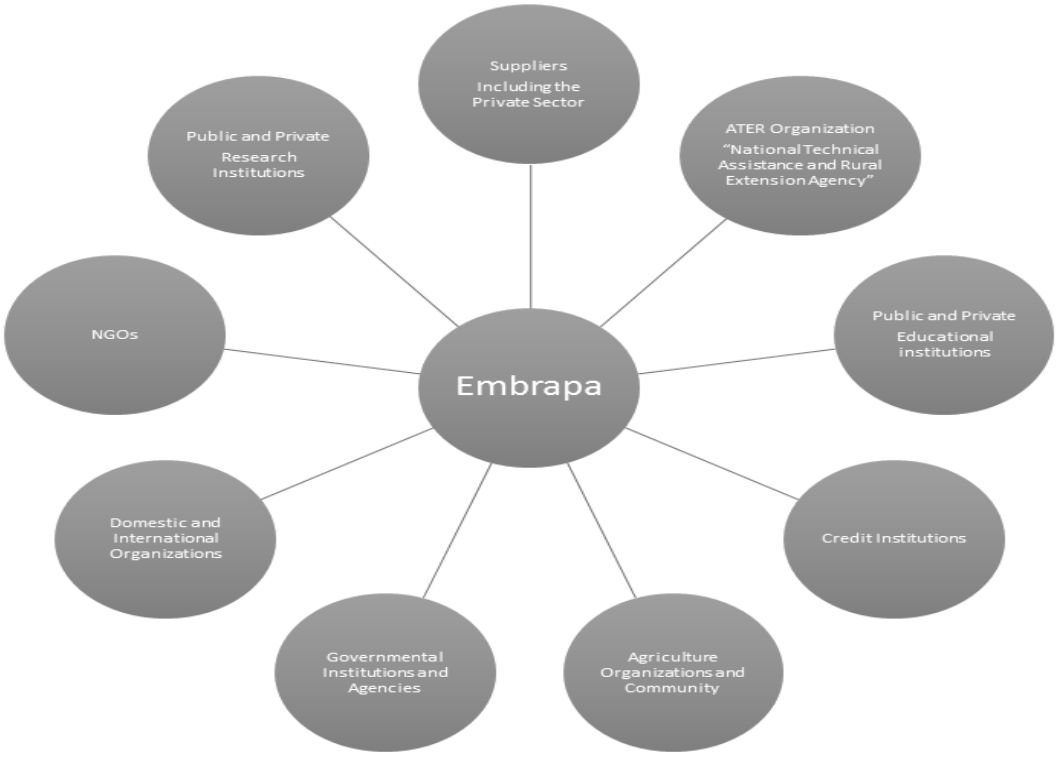

Embrapa's adapted figure.[12]

As aforementioned, the public structure started in 1970 with the creation of SNPA, of which Embrapa is the most important component. In 1962, the Agriculture Research and Experimentation Department (DPEA), which was later transformed into the Research and Experimentation Office (EPE), substituted SNPA in 1971, EPE was finally transformed into the National Department of Agriculture Research (DNPEA). Also linked to the current DNPEA, Brazil has the State Organizations for Agricultural Research (OEPAS). OEPAS are composed of public and private educational institutes and public institutions that support general research, like the National Scientific and Technological Development Council (CNPq).

In accordance with Fuck and Bonacelli, it is possible to observe a shift in the agriculture research model from a totally public environment to a model

[12] The fig. is available at http://embrapa.br

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with more private sector participation.[13] Currently the private sector is the main agent in agriculture research, motivated by possible financial gains. The concern about this model is that in developing countries, poor and small producers cannot access the benefits of the private research.

Considering the expected growth of the world population, estimated at nine billion people in 2050[14], Vieira Filho asserts that the world's agricultural R&D biggest challenge is to promote sustainable development.[15] Therefore, the specific goals are to develop safe and healthy products that are competitive and meet the environmental needs.

The most important element to agricultural innovation is the establishment of strategic collaborative partnerships. The main purpose of this type of cooperation is to develop the technology with efficiency gains (reducing possible mistakes, disseminating knowledge and transferring technology), ensuring the competitiveness and overcoming the market uncertainties. The key to success of such partnerships is the establishment of a plain policy regarding the intellectual property of the produced knowledge.

3.1. THE EVOLUTION OF THE SOYBEAN RESEARCH IN BRAZIL

The first soybean researcher in Brazil was the private company Francisco Terasawa (FT), by the end of the 1960s in Paraná. In the 1980s, FT developed the first Brazilian soybean variations. In 1973, the *Federação das Cooperativas de Trigo e Soja do Rio Grande do Sul Ltda* [Federation of Wheat and Soybean Cooperatives of Rio Grande do Sul Ltda] was created. In the 1970s, the *Organização das Cooperativas do Paraná* – OCEPAR [Cooperatives Organizations of Paraná State] was created and later transformed in *Cooperativa Central de Pesquisa Agrícola* - COODETEC (Central Cooperative for Agriculture Research). In 1975, *Embrapa Soja* [Embrapa Soybeans] was created in Paraná. This unit's

[13] *See generally* Marcos Paulo Fuck & Maria Beatriz Bonacelli, *A Pesquisa Pública e a Indústria Sementeira nos Segmentos de Soja e Milho Híbrido no Brasil [The Public Research and the Seed Industry in the Soybean and Hybrid Corn Segments in Brazil]*, 6 Revista Brasileira da Inovaçao 9 [Rev. Braz. In.], 87-121 (2007).
[14] *See generally* Empresa Brasileira de Pesquisa Agropecuária, Secretaria de Comunicação, Embrapa em Números [Embrapa in Numbers] (2015).
[15] *See generally* José Eustàquio Ribeiro Vieira Filho, *Technological Trajectory and Learning in the Agricultural Sector in Brazilian Agriculture Development and Changes*, Brazilian Agricultural Research Corporation (Embrapa), 2012.

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central role is to research conventional, organic and transgenic soybeans and study sunflowers.

Influenced by the international organizations and bound by GATT at the Uruguay round, that by the time was trying to standardize the legislation regarding intellectual property, Brazil promulgated, in 1997, the Federal Statute No. 9.456, known as *Lei de Proteção aos Cultivares* [Protection Act to Cultivars]. This legislation safeguards the intellectual property for cultivars and requires producers to pay royalties and tax to use the technology. As a result, several multinationals came to the Brazilian market. In order to enter the market, these multinationals bought some small national companies. An important example in the sector was the purchase of FT, Sementes Hatã and later, Calgene, Asgrow, Monsoy, Dekaland and Agroceres by Monsanto. In 2005, Monsanto also bought Seminis, the largest producer of vegetable seeds and Emergent Genetics in the world. Other multinationals that entered the Brazilian market in this M&A movement were Agr-Ev and Du Pont. These companies had a lot of expertise, but did not have the germplasm[16] adapted to a different environment. From the M&A transaction on, these corporations have been using licensing, integration and collaboration instruments to develop joint researches. It is essential to mention that the soybean market in Brazil is a differentiated oligarchy; the entrance barriers relate to the access to genetic material and the technical and financial capacities.

3.2. THE APPLICABLE BRAZILIAN LEGISLATION

Brazil has an extensive legislation in agriculture and R&D. This confirms the theory that under uncertainty, regulation is necessary. Firstly, the Brazilian Constitution dedicates an entire chapter (IV) to scientific and technological development, where R&D is included. According to Tavares, since the promulgation of the Brazilian Constitution, scientific development is not only a manner of producing knowledge but also generating capital and resolving social problems.[17] This proves the relevance of science and technology to the

[16] Simply put, the germplasm is the genetic material of germs cells.
[17] *See generally* André Ramos Tavares, *Ciência e Tecnologia na Constituição [Science and Technology in the Constitution]*, 44 REVISTA DE INFORMACAO LEGISLATIVA, 7, 7-20 (2007).

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economic development. Despite some Constitutional scholars defending the idea that the constitutional narrative on this topic is abstract serving only as a recommendation, it is believed that chapter IV is completely self-applicable.

The Federal Statute No. 8.171/1991, also known as Agricultural Law, establishes the objectives and institutional competences of the agricultural research in Brazil. The statute also institutes resources and instruments to achieve these objectives.

The Federal Statute No. 9.279/1996 that protects the industrial property, permits, for example, the patenting of GMOs, complements the Federal Statute No. 9.456/1997, known as the "Protection Act to Cultivars". This legislation is the base for GMO soybean production in Brazil. The Protection Act to Cultivars creates the National Service for Cultivar Protection (SNPC) and is regulated by two Federal Ordinances, No. 527/1997 and No. 199/1998 that, respectively, establish the National Cultivars Register (RNC) and the National Service for the Cultivars Protection.

Following the Federal Statute No. 9.456/1997, Embrapa established the Directive No. 14/1998 to regulate its collaborations. This Directive was updated and resulted in a new Directive, the No. 14/2000, which specifically regulates its collaboration with the private sector for research. It prohibits its private partners from being the proprietors of possible cultivars conjointly developed with Embrapa. In addition, Embrapa forbids its collaborators from creating parallel programs in genetics enhancement, to avoid the mixture of results, the loss of control and quality information. Another concern that can be seen in this Directive is the maintenance of Embrapa's germplasm, to which the collaborators may have access through the genetics enhancement program. By the end of the research, Embrapa collaborators must return all the genetic material to Embrapa. The Directive made explicit the possibility for Embrapa to receive funding resources from its partners. All the collaborations are established by written agreements that must contain an annual work plan that meets some specific technical conditions. Some of these conditions are the number and denomination of the lines that are going to be studied; the number and identification of the progenies that are going to be studied and multiplied, if the work contemplates segregating germplasm; and all the required infrastructure, including the human resources. Embrapa supervises all the

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work based in two instruments: the spreadsheet and notebook field. The collaborator fills the first with information of the implementation and follow up of the tests. Embrapa fills the second whenever it sends segregating germplasm with the crossings and/or the advances, among other important information. In a later stage, the partner also fills this document with the enhancement methods, which must be very detailed. Embrapa audits all its agreements, the consequent resources and the eventual remittance of germplasm through an internal audit. The celebration of agreements is preceded by negotiation with the partner, involving the decentralized unit of Embrapa interested in the partnership, Embrapa Technological Deals and the Intellectual Propriety Secretary. Embrapa Technological Deals is responsible for updating Embrapa system with all the information generated by the research. The Directive also establishes three different models of collaboration, which will be analyzed in the "Embrapa public-private agreements" section. The drafting and signing of agreements that does not follow the Directive are subject to fines. Since the establishment of this Directive, Embrapa had to review all its previous agreements.

Embrapa has several other Directives, among which the most relevant for this study are the No. 22/1996, that establishes Embrapa's Institutional Policy of Intellectual Property Management; the No. 15/1998, which creates a uniform denomination and identification process to Embrapa's cultivars and establishes Embrapa's cultivars bank – BCE; the No. 26/1998 that establishes the bylaws of its Intellectual Property Secretary (SPRI) and the No. 4/2012 that established its Business Secretary – SNE.

The Federal Statute No. 10.711/2004 establishes the national system for seeds and seedlings. The statute's main goal is to ensure the identity and quality of the seeds and seedlings in the Brazilian territory. In addition, the statute classifies the seeds and seedlings into two categories: certified and non-certified. The public structure is responsible for providing the certification through a formal public structure.

The Federal Statute No. 10.973/2004 establishes incentives for innovation and scientific and technological research.

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The Federal Statute No. 11.105/2005 regulates biosafety and introduces safety norms and inspection mechanisms to the GMOs.

According to De'Carli the Federal State No. 11.079/2004 is relevant for establishing public private partnerships (hereinafter PPP) in Brazil, which, according to him, Embrapa is the precursor.[18] However, this does not seem to be the most correct perspective. The definition of PPP varies if it is applied its sensu lato and sensu stricto meaning. In the sensu lato meaning, PPP comprehends any partnership where the public and the private are collaborating with one shared goal. Therefore, Embrapa could be the PPP precursor in this sense. On the other hand, the Federal Statute No. 11.079/2004, in its second article, defines the sensu stricto meaning of PPP, as the administrative concession agreement in the sponsored or administrative modalities. In the first section, it is explained that the sponsored concession is the concession of public services or public construction when it involves, besides the tariff (the pecuniary amount paid by the user), a pecuniary payment from the public to the private partner. Certainly, Embrapa collaboration for research cannot be framed into this category, since there will never be pecuniary payments from the public to the private partner. The administrative concession, in turn, is explained in the second section as the service agreement where the Public Administration is the direct or indirect user, even if it involves construction, installation or supply of goods. The concept here is that the Public Administration is the user and not the contractor. An example of this type of concession is the construction and maintenance of prisons. In this case, the Public Administration pays 100% of the tariffs to the private partner. Hence, we can affirm this is not Embrapa's case when it collaborates with the private for research. Finally, in the fourth section, the legislation prohibits the celebration of PPP agreements which total amount is less than BRL 20,000,000 (about USD 5,000,000), that lasts for less than five years and that the only purposes are services, supply or installation of goods or public construction. Most of Embrapa's agreements do not fulfill these conditions. In addition, Di Pietro explains that in Brazil the public concession is more clearly related to maintenance, charging and construction

[18] *See* Carlos Ricardo De'Carli. Embrapa: Precursora da Parceria Público Privada no Brasil. [Embrapa Precursor of Private Public Partnership in Brazil] (Jun., 2005) (dissertation, Universidade de Brasília, UnB Centro de Desenvolvimento Sustentável).

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of highways, airports, ports and railways. In other words, it is intrinsically related to infrastructure projects.[19]

Finally, the Federal Statute No. 8.666/1993 states that a public bidding must precede all agreements involving the Public Administration. Nonetheless, Embrapa does not bid to celebrate agreements to research because the federal law explicitly excepts the cases of research, education and technical services.

Due to its massive legislation in comparison with trade and services, Brazil agribusiness is one of the sectors most susceptible to the effects of judicial decisions.

4. EMBRAPA

According to Moreira and Teixeira, Embrapa is a publicly held corporation created in 1973 through the Federal Statute No. 5.851/1972.[20] Eliseu Alves, a Brazilian scientist, headed Embrapa's establishment as an answer to the supply crisis between 1960 and 1970, and the necessity to diversify products and reduce prices. Embrapa is attached to the Ministry of Agriculture, Livestock and Supply (hereinafter MAPA) and operates through 47 decentralized units that are present in almost all the Brazilian states. Embrapa's success can be attributed to its diversified R&D portfolio, continuous support from the Federal Government, interactivity, decentralization, independent reviews and specialized staff. Currently Embrapa has 2,427 scientists of which 1,789 have a doctorate degree and 242 postdoctoral degree.

Each of Embrapa's units has an R&D sector with administrative and patrimonial autonomy and is supervised by the deputy head of R&D with the Internal Technical Committee support. The group of the R&Ds has an Advisory Committee that is composed by the bosses of the units that are chosen by the Board of Directors. Their competence is related to analyzing, systematizing and consolidating information regarding eventual problems with the R&D policy, sending them to the Board of Directors proposals and updates of the policy.

[19] *See generally* MARIA SYLVIA ZANELLA DI PIETRO, DIREITO ADMINISTRATIVO [ADMINISTRATIVE LAW], (19th ed. 2006).
[20] *See generally* Gustavo Carvalho Moreira & Erly Cardoso Teixeira, *Polìtica Pùblica de Pesquisa Agropecuària no Brasil [Public Policy for Agricultural Research in Brazil]*, 3 REV. POL. AGR. (2014).

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According to Silva an R&D policy is important to guide its professionals and partners.[21] Hence, they can always identify the main problems to draft and execute efficient projects.

The internationalization of Embrapa started almost simultaneously to its creation, through a post-graduation program that sent hundreds of professionals abroad. This was important to establish relationships worldwide.

Simultaneously, Embrapa had the cooperation of the Inter-American Development Bank, the World Bank, the Food and Agriculture Organization of the United Nations, the Inter-American Institute for Cooperation on Agriculture, the Consortium of International Agricultural Research Centers, Agricultural Research for Development, among others, to establish its international structure and implementation of its research program. Initially, the cooperation model was very simple; Embrapa only received benefits. In a later stage, Embrapa was involved in more complex cooperation models. The first example was the Cooperative Program for Agrifood and Agroindustrial Technological Development of the Southern Cone in 1980.

Another important project to internationalize Embrapa is the Virtual Laboratory (hereinafter Labex). This project started in 1990 in the United States and is currently present in France, Germany, United Kingdom, Korea and China. The program was conceived to innovatively strengthen international scientific cooperation. The concept was to create a faster communication flux in the research and development area by the physical presence of Embrapa's researchers in the most advanced research centers, intensifying the collaboration with research organizations around the world. The area of study, which is defined based on Embrapa's priority agenda and made explicit in its master plan, determines the international partner. The potential partners are identified based on a study of excellence in its field of study (this is measured in a range of ways, for instance, by the number of scientific publications and patents), the infrastructure available, the interest in participating in the program, the history and the current technological and scientific performance of the institution. Next, Embrapa starts a negotiation process. In this phase, a technical and governance mission is realized in the

[21] *See generally* RENATO CRUZ SILVA, *Política de P&D [R&D Policy]*, Brazilian Agricultural Research Corporation (Embrapa), 1999.

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institutions to support the decision process. Strategic purposes and operational mechanisms are discussed. If the negotiation succeeds, collaboration agreements are drafted stating its areas of study, mechanisms, obligation of the parties, and funding resources. The following step is to designate the researches, that working together draft a common interest project (PIC), specifying the objectives, the possible results and the methodologies to develop the research. Embrapa's internal committees select the participants of the program, who can be designated as coordinator or researcher, depending of his personal, academic and professional abilities. Each researcher and/or coordinator is firstly allocated for a two-year term, but with Embrapa's internal committee approval, this period can be extended in one year. Embrapa's internal committee can also early terminate the researcher agreement when it understand that the researcher and/or coordinator is no longer required abroad. A committee composed of the secretary of international relations, the coordinating body of scientific cooperation, and the R&D department, annually evaluates the participant of Labex and the program itself. In this annual analysis, the technical reports developed by the researchers that are working abroad and their coordinator and interviews with them and the appointed responsible in the recipient institution are evaluated. Labex has a guiding document, which states as its objectives: promote international cooperation for innovation in agriculture; generate knowledge and innovative technologies to the development of the agricultural production chains; monitor and identify scientific, technological and innovative tendencies with potential to solve problems.[22]

Labex program also receive senior researchers of international partners at Embrapa in what is called "inverted Labex".

Currently Brazil has seventy international collaboration projects with Africa, Asia and Latin America, including Caribbean, involving more than thirty-seven countries.[23]

An important collaboration raised in the international scenario was with Japan. After the increasing concerns with food safety in 1973, the United

[22] *See generally* Secretary of International Relations. Coordinating Body of Scientific Cooperation, *Documento Orientador do Programa Embrapa-Labex [Guiding Document of the Program Embrapa-Labex]*, Brazilian Agricultural Research Corporation (Embrapa) (2015).
[23] *See generally* EMPRESA BRASILEIRA DE PESQUISA AGROPECUÁRIA, *supra* note 14.

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States, Japan's only supplier of soybean by this time, imposed a control in the export of the grains, which resulted in the exponential rise of the price of soybean. Therefore, Japan started searching for different suppliers. In 1975, the collaboration between Japan and Brazil created the Brazilian Savanah (known as *cerrado*) Development Program (PROCEDER). Also, the Japan International Cooperation Agency (JICA) gave technical and financial support for over twenty years to Brazil. Both goals were to promote the cultivation and the consequent capitalization of agriculture at *cerrado*, increasing the production and productivity of the soybean. These programs were executed in collaboration with cooperatives and farmers under the supervision of the MAPA.

According to Fuck and Bonacelli, Embrapa also has collaboration agreements with public and private foundations.[24] Their presence all over the country enables Embrapa to test its cultivars in different regions and consequently adapt them. The foundations main obligations are to provide partial financial, physical and human resources to researches, in addition to supporting Embrapa's collection of royalties. On the other hand, Embrapa's obligations are to provide germplasms according to the region and the foundation interest, transfer technology, researchers and technical team. The main benefit for the parties is the possibility of improving and enlarging the genetic enhancement.

Despite being a Brazilian successful example of publicly held corporation, recently Embrapa's President, Maurício Lopes, in an interview for a Brazilian Newspaper, asserted that Embrapa is not improving in the same rhythm of the other competitors.[25] Annually, Brazil invests only 1.9% of its GDP prevenient from agriculture in research. This amount is proportional to half of the United States investment. Thus, Brazil must double its investment to maintain its competitiveness. Currently, Brazil only contributes with 5% of the world's investment in agricultural research. Moreover, Maurício Lopes argues in favor of the establishment of a subsidiary to Embrapa, which will be named "EmbrapaTec". This institution would receive the technology developed in Embrapa's laboratories and would work with the private sector, which

[24] Fuck and Bonacelli, *supra* note 13, at 87-121.

[25] Cristiano *Mariz, Estamos Ficando para Trás, Diz Presidente da EMBRAPA. [We Are Losing Competitiveness, Says Embrapa's President*], Exame (last visited May 9, 2016), exame.abril.com.br/revista-exame/edicoes/1095/noticias/estamos-ficando-para-tras-diz-presidente-da-Embrapa.

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would bring investments. The former Brazilian Minister of Agriculture, Livestock and Supply, Kátia Abreu, agreed with this project. Hence, the government drafted a bill to create this subsidiary, which was sent to Congress in May 2016. Currently the draft is being examined by the Brazilian House of Representatives. The idea is that EmbrapaTec should have more liberty than Embrapa. Maurício Lopes concluded the interview emphasizing that Embrapa's roles must evolve with society. Considering the biggest investments in agricultural research are made by the private sector, the government should invest in different areas.

Embrapa's master plan for 2014-2034 asserts its proposal to expand its partnerships, facilitating innovative mechanisms and models of interaction, and prioritizing open innovation models.[26]

The 2013 Embrapa's activities report stated that during that year 102 technologies were developed in 230 cultivars. The developments include three new soybean variations, that were launched in partnerships with Fundação Meridional (BRS 360RR), with Epamig and Fundação Triângulo de Apoio à Pesquisa (BRSMG772), Centro Tecnológico para Pesquisa Agropecuária, and Emater from Goiás (BRSGO 6955 RR).[27] Embrapa currently owns 260 variations of soybeans. In April 2015, Embrapa totaled 3,185 agreements with national and international organizations.[28]

4.1. THE MAIN SIMILARITIES BETWEEN THE ARGENTINIAN NATIONAL INSTITUTE OF AGRICULTURAL TECHNOLOGY – INTA AND EMBRAPA

Publicly held corporations, such as Embrapa, are very important to the scientific research and the development of new technologies benefits all society. Therefore, the Brazilian Embrapa and the Argentinian INTA develop these activities in collaboration and in competition with several actors.

Despite the fact that they lived through a financial and institutional crisis that resulted in a necessity of institutional reorganization, they were

[26] *See generally* BRAZILIAN AGRICULTURAL RESEARCH CORPORATION, VI PLANO DIRETOR DA EMBRAPA 2014-2034. [VI EMBRAPA MASTER PLAN 2014-2034] (2015).
[27] *See generally* LABORATÓRIO NACIONAL DE ENERGIA E GEOLOGIA, BRAZILIAN AGRICULTURAL RESEARCH CORPORATION (EMBRAPA), RELATÓRIO DE ATIVIDADES 2013 [2013 ACTIVITIES REPORT] (2015).
[28] *See generally* EMPRESA BRASILEIRA DE PESQUISA AGROPECUÁRIA, *supra* note 14.

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created in different contexts. INTA was created much earlier than Embrapa, in 1956, during the Green Revolution, and its main purpose was to modernize the agriculture in Argentina. Since then, the institution is located in the most important producing regions in its country. Embrapa, on the other hand, was created in 1973 focused on research.

While Embrapa's participation in the soybean market is expressive, collaborating with different partners to enlarge the competition, INTA's participation is decreasing.[29]

4.2. EMBRAPA'S PUBLIC-PRIVATE AGREEMENTS

Adam Smith observed in 1776 that the main source of innovation and improvement comes from the men who work with machines and discover ways to improve it, and the manufacturers that developed such improvements.[30] Edwin Mansfield later confirmed this theory, when he evaluated that less than 10% of the new products or processes in the United States were introduced by academic research.[31] According to him, the successful development of a product or process depends on a detailed knowledge of the production and market. This comes from experience in the company.

As stated by Fuck, Bonacelli and Carvalho,[32] in the recent years the organization for research has been changing. Based on an investigation in twenty different countries, the most relevant elements that are being changed are its funding sources, space, actors and roles and the interaction and coordination between them. The public institutions are collaborating each time more with the private sector.

According to Alves and Souza the main benefits of a public-private collaboration for research are: a) increase the public's research pragmatism, helping it focus in current problems; b) preserve talented researchers in the

[29] *See* Marcos Paulo Fuck and Maria Beatriz Bonacelli, *Os Novos Caminhos das Instituições Públicas de Pesquisa Agropecuária: Observações a Partir dos Casos da Embrapa e do INTA [The New Ways of the Public Institutions of Agricultural Investigation: Observations from the Cases of Embrapa and INTA],* 30 REVISTA ESPACIOS [REV. ESP.], no.1, 2009 at 29.
[30] *See* ADAM SMITH, WEALTH OF NATIONS, (Charles Jesse Bullock ed., Bartleby.com 2001) (1901) (ebook).
[31] *Cf.* Edwin Mansfield, *Contributions of New Technology to the Economy, in* TECHNOLOGY, R&D AND THE ECONOMY (Bruce Smith and Claude Barfield eds., 1996).
[32] Fuck and Bonacelli, *supra* note 29.

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public sector; c) increase the research's budget; d) reduce the total costs of research in the public and private sector; e) increase the knowledge; f) facilitate the international interaction.[33]

In accordance with De'Carli an example of Embrapa's collaboration with a private foundation is the agreement with Fundação MT, which is composed of twenty-two seed producers in Mato Grosso.[34] The partnership was successful, resulting in the production of several cultivars adapted to the soil and climate conditions of Mato Grosso. This includes the production of three types of soybean cultivars (Uirapuru, Crixás and Pintado). Considering the agreement was celebrated before the Federal statute No. 9.456/1997 and the Directive No. 14/2000, it had to be amended. Nonetheless, Fundação MT did not accept the new rules, which among others, established that Embrapa would be the exclusive proprietor of the soybean cultivars. Hence, Fundação MT decided to create its own program, which is against Embrapa Directive No. 14/2000. With the breach, Fundação MT proposed Embrapa to divide equally all the genetic material obtained by the crossings achieved by Embrapa with the Foundation resources. This would mean that Fundação MT would have a copy of the enhanced germplasm. Embrapa did not agree with the proposal since the genetic material is a national patrimony, developed with society's resources (considering it is a publicly held corporation). Next, Embrapa required Fundação MT to return the genetic material that was with the Foundation, and all the related technical information. Thus, Embrapa proposed Fundação MT to maintain the exclusive right to commercially use all the cultivars developed in collaboration, considering this would be sufficient remuneration to the Foundation's investment. After several months trying to negotiate, the parties did not reach an agreement. Hence, Embrapa filed a lawsuit against Fundação MT in the Federal Courts, that held that the Foundation had to return all the genetic material to Embrapa.

Another example brought by De'Carli is the collaboration between Embrapa and Fundação Centro-Oeste, that took place after the collaboration

[33] *See* Eliseu Alves and Geraldo da Silva e Souza, *A Pesquisa Agrícola numa Agricultura Integrada ao Mercado Internacional O caso da Embrapa e do Cerrado. [The Agricultural Research as an Integrated Agriculture in the International Market. Embrapa and Brazilian Savannah Case]*, 16 REV. POL. AGR., no. 2, 2007, at 56.
[34] *See generally* De'Carli, *supra* note 18.

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between Embrapa and Fundação MT had finished.[35] Indeed, Fundação Centro-Oeste was treated as Fundação MT successor. Embrapa aims with this collaboration to regain its lost market share in the region that is currently owned by its former ally and now competitor, Fundação MT. The collaboration works the same as it used to work with Fundação MT, except for the fact that it does not limit the entrance of new collaborators and respects the rules of the Directive No. 14/2000.

One of Embrapa's most important private partnership in Brazil is with Monsanto, a multinational headquartered in St. Louis, Missouri. According to Moura and Marin in attempt to expand its production diversity Monsanto started investing in genetics engineering, which was absorbed as a complimentary asset for the agrochemical.[36] Monsanto was stimulated to start working with biotechnology when its herbicide Roundup's patent, that was expiring, was extended. Their plan was to avoid other companies to use generic versions of its product. Hence, Monsanto invested in researching plants that were resistant to Roundup to put in the market a technological combo consisted of the selling of the GMO seeds and the Roundup herbicide.

In 1970, Monsanto synthesized the glyphosate, the main component of Roundup, which was registered in 120 countries. This product revolutionized agriculture in the world since it efficiently controlled the weeds. Initially, the product was exported to Brazil, but later, when Monsanto started investing in research in Brazil, it was technologically improved and started being produced in the country.

According to Moura and Marin based on the Federal Statutes No. 9.279/1996 that protect cultivars, the No. 9.456/1997 that protects the industrial property, and Embrapa's Directive No. 14 /2000, Embrapa developed three types of agreements with the private and public sector.[37] The first model is a technical cooperation for crossing planning. In this case, the partner must have a technical team with its own enhancement program and must participate in the whole process of the creation of a new cultivar. In this situation, the

[35] De'Carli, *supra* note 18.
[36] *See generally* Luís Cláudio Martins de Moura & Joel Bevilaqua Marin, *Rede Empresarial: A Estratégia da Produção de Sementes de Soja Transgênica em Goiás. [Business Networking: The Strategy of Transgenic Soy Seeds Production in Goiás]*, 14 INTERAÇÕES (CAMPO GRANDE) [INTER. C. G.], n. 1 (2013).
[37] *Id.*

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final product is registered in co-participation with the public partner and the commercial benefits are rated. The private partner can commercially use the cultivars for ten years. In the second model, the technical cooperation regards lines. The private partner co-develops with Embrapa soybean cultivars, receiving genetic material and realizing the necessary tests for an eventual commercial use. Embrapa owns alone the intellectual property registry and the private partner can commercially use the soybean cultivars for five years, with a subleasing option. The third model is a financial cooperation which the partner provides the financial and human resources and Embrapa research. In this case, the private partner may exclusively multiply and commercialize the cultivars for a period to be established between the parties. The production, distribution and marketing are structured in licensing agreements that establish obligations to each party linked to this network. According to Santini and Paulillo Embrapa celebrates two types of agreements.[38] The first one is the collaboration agreement that must be framed within the three previously mentioned models and when the research has positive results, the licensing agreement.

By analyzing Embrapa's agreements, it is possible to note the generality of its terms. In most cases, the agreements state as objectives the integrated effort among the parties to research in a general area; for example soybean.[39] The technical specifications of the research are part of the first annex, that are discussed in a later moment (after the signing of the agreement). Another possibility for Embrapa's agreement is the establishment of an annual work plan that is also discussed after the signing of the agreement. In both cases, technical specifications or annual work plan, the projects are formally specified and must accompany a research protocol. Generally, Embrapa is responsible for guiding the research, but the agreement does not mention in which ways, which defers to Embrapa lots of authority. In the agreements, it is clearly stated where the research is going to take place and the materials (including the quantity) that must be transferred. The

[38] GIULIANA APARECIDA SANTINI & LUIZ FERNANDO PAULILLO, ENCONTRO NACIONAL DE ENGENHARIA DE PRODUCAO, ASSOCIAÇÃO BRASILEIRA DE ENGENHARIA DE PRODUÇÃO, ESTRATEGIAS DAS EMPRESAS DE SEMENTES FRENTE AOS ASPECTOS CONCORRENCIAIS [STRATEGIES OF SEED COMPANIES FACING THE COMPETITION ASPECTS], 2002.

[39] The agreements' analysis was made considering the agreements that are available on the internet and other studies. Most of Embrapa's agreements are not available in full for general consultation, considering its confidential information.

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parties cannot disclose, in any hypothesis, the technological invention, improvement or innovation obtained as the result of the agreement. In most of the situations Embrapa will own the intellectual property. In each agreement, one representative of each party is designated to coordinate and supervise the research. It is also estimated a cost and the way in which it will be shared (or completely privately funded). Considering Embrapa is a public corporation, the extract of its agreements[40] are published in the "Official Journal of the Union" and in all cases the disputes are settled by the Judiciary.

It is important to note that according to Ronald J. Gilson, Charles F. Sabel and Robert E. Scott in contracting for innovation, hard and soft terms do not solve problems.[41] While the first is inefficient because of its inflexibility, the latter depends on vague standard that invites subsequent adjustments. Embrapa's agreements for research use many soft terms that force the parties to negotiate all the time. This can create undesired opportunistic behaviors, for depending very much on good faith.

According to Fuck and Bonacelli, Embrapa entered into its first collaboration agreement with Monsanto in 1997.[42] By that moment, the Brazilian government opted for the GMO technology. Moreover, it chose to defend the substantial equivalent principle, whereby there are no substantive and nutrition differences between conventional and GMO products. Hence, these products are not harmful for the health or environment. This agreement aimed to develop soybeans resistant to glyphosate herbicide that would be registered in Embrapa's name. The agreement was extended and incorporated in its object the commercial use of the GMO soybean. This agreement was amended in 2000 and 2002.

In the original agreement, dated 1997, Embrapa was obliged to use only the Roundup herbicide. This violates the free competition agreement. Thence, the Brazilian Administrative Council for Economic Defense (hereinfter CADE) interfered in the agreement to require its modification. This adjustment was materialized in 2002. The new wording of the agreement excludes all

[40] The extract of the agreements comprehends its basic information, i.e. the name of the parties, the object, the amounts involved, and the term.
[41] Gilson, Sabel and Scott, *supra* note 1.
[42] *See generally* Marcos Paulo Fuck & Maria Beatriz Bonacelli, *A Pesquisa Pública e a Indústria Sementeira nos Segmentos de Soja e Milho Híbrido no Brasil. [The Public Research and the Seed Industry in the Soybean and Hybrid Corn Segments in Brazil],* 6 Rev. Braz. In. 87 (2007).

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references to Roundup, that was substituted for herbicides with glyphosate as its main component. Despite this, the agreement was still valid and among other obligations, it was required for the partners indicated by Embrapa to also sign an agreement with Monsanto to use the cultivar. Afterwards, the seed producers licensed by Embrapa, after signing an agreement with Monsanto, would pay royalties to Embrapa for the use of the cultivar. Monsanto would receive from these seed producers a tax correspondent to the technology use, which is an agreement and not a classical licensing. The tax amount is negotiated between Monsanto and the seed producers. Embrapa and Monsanto continue to be completely independent. Monsanto interest is in receiving the technological tax and the possibility of increasing its herbicide sales. Embrapa, in turn, benefits from accessing RR gene that is Monsanto's propriety. According to Santini and Paulillo this new model benefits Embrapa in obtaining scale and scope economies.[43] Both are important factors to reduce the costs, but the first mainly relates to the increasing investments in R&D, sharing risks and exploring the complementarity of the assets. Scope economy, in turn, is gained when they use the same infrastructure to commercialize and distribute its grains.

In 2006, Embrapa has published a note mentioning that it received BRL 800,000 (about USD 200,000) from Monsanto as one of the results of the research partnership and that it was going to invest in its biotech research fund. More specifically, the agreement states that this amount is going to be invested in accordance to the definitions of a manager committee composed by Embrapa's and Monsanto's representatives. In the occasion, Embrapa also announced the launching of three other conjoint projects with Monsanto: the book "Basis for the Collection of Vegetal Germplasm"; another cooperation agreement to develop cotton with Roundup Ready®Flex technology (also resistant to the glyphosate herbicide), and the result of the project which also

[43] *See generally* Giuliana Aparecida Santini & Luiz Fernando Paulillo, *Estratégias Tecnológicas e Aspectos Concorrenciais das Empresas de Sementes de Milho Híbrido e Soja No Brasil. [Technological Strategies and Competitive Aspects of the Hybrid Corn and Soybean Seed Companies in Brazil],* 32 INFORMAÇÕES ECONÔMICAS, no. 10, 2002, at 20.

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involved the MAPA that consisted of empowering farmers to produce different cultures.[44]

Despite the apparent success of the collaboration between Embrapa and Monsanto, many parcels of the Brazilian society disapproved it. This can be seen in some of the news of the period. The news informed that more than 1,200 rural workers protested against the collaboration, alleging that it was harmful to the Brazilian economy. They pled that Embrapa was "giving" to Monsanto the technology developed by Embrapa to be transformed in transgenic seeds Roundup's herbicide resistant. Their dissatisfaction also regarded the fact that the U.S. multinational would have the monopoly of transgenic soybean in Brazil and in the herbicide market. Moreover, they claimed that it is an outrage to the Brazilian technological and food sovereignty. Finally, they were against the commercial planting and consumption of transgenic products while its biosafety conditions were not completely proven.[45] The discontentment was also manifested by the Citizenship and Human Rights Commission of the Legislative, who publicly asked Embrapa to disclose the terms of the agreement with Monsanto, alleging that rather than being concerned with economics they were trying to defend the sustainable social and natural environment.[46] A critical term of the agreement is the non-disclosure term, since it restrains the access to the research results. Some scholars affirm that this clause is harmful to the society, since the disclosure of the results would result in a social benefit.

Embrapa signed the agreement in an unstable scenario since only in 2005 Brazil approved the commercial production of GMO soybeans. In an attempt to solve this matter, Embrapa and Monsanto asked CADE to further analyze their commercial agreement that was celebrated in April 2000. In its opinion, CADE explained the agreement's objective: commercial use of the GMO soybean developed to tolerate the glyphosate (that is heavily used in

[44] *See* Embrapa Media Advisory. *Embrapa e Monsanto Apresentam Resultados de Pesquisa. [Embrapa and Monsanto Present Research Results],* Renorbio. Rede Nordeste de Biotecnologia. EMBRAPA.BR (last visited May 9, 2016).
[45] *See* MST Brasil, *1200 Trabalhadores Rurais Protestam Contra Contratos com a Monsanto [1200 Rural Workers Protest Against Monsanto Agreements],* GALIZA (2001), http://www.galizacig.gal/actualidade/200110/mst_brasil_1200_trabalhadores_rurais_protestan_monsanto.html, 2001, (last visited May 9, 2016).
[46] *See generally* Vera Monteiro, *CCDH Pede Divulgação das Cláusulas do Contrato de Pesquisa Embrapa-Monsanto [CCHR Request the Disclosure of the Terms of Embrapa-Monsanto Research Agreement]*, PORTAL DA AGÊNCIA DE NOTÍCIAS ALRS, Sept. 12, 2001.

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herbicide production). The agreement allows Embrapa to develop, produce and commercialize directly or through licensed third parties, GMO soybean cultivars with Monsanto technology that makes the seeds resistant to glyphosate. CADE concluded for the legality of the agreement, considering it is not an exclusivity agreement, meaning that Monsanto can license its technology for other corporations and Embrapa can use technology owned by the competitors.[47] In addition, Embrapa publicly explained the main controversial issues of the agreement. Basing in research, Embrapa proved that Monsanto's technology is in fact efficient. It also explained that Embrapa owns the soybean cultivars that are resistant to glyphosate. Thus, Embrapa was not licensing its germplasm to Monsanto, but Monsanto was licensing its soybean technology to Embrapa. Based on the Federal Statute No. 9.456/1997 and the Directive No. 14/2000, Embrapa owns all the GMO cultivars obtained by Embrapa. Besides, Embrapa decides where, how much and who must produce. It is also stated that the technological tax due to Monsanto cannot be higher than Monsanto's competitors and partners. Embrapa also maintains its soybean enhancement program and has partnerships to provide alternatives to the producers. Finally, it highlighted that the farmers can stock seeds for their own use in a new planting, according to the Federal Statute No. 9.456/1997. However, this possibility has been intensively discussed, since not determining the volume limits the farmers can stock may incentivize an informal market. Fuck and Bonacelli are examples of scholars that vehemently defend this theory.[48]

The idea of Monsanto and Embrapa's agreement is in some aspects similar to Warner-Lambert-Lingand agreement, explained by Gilson, Sabel and Scott.[49] Both aim innovation as a result of a collaboration that is necessary to maintain simultaneously a variety of researches. Its high uncertainty requires a close monitoring. However, in Embrapa's case, the Judiciary solves the eventual conflicts.

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[47] *See generally* Ricardo Villas Bôas Cueva, Minister of Braz, Ministério da Justiça, Conselho Administrativo de Defesa Econômica (CADE), *Ato de Concentração n. 08012.004808/2000-01 [Concentration Act n. 08012.004808/2000-01]*, www.cade.gov.br (last visited May 9, 2016).
[48] M. P. Fuck & M. B. M. Bonacelli, *As Interações entre os Setores Público e Privado no Lançamento de Novas Cultivares de Soja, Milho e Trigo no Brasil [The Interactions Between the Public and Private Sectors in the Launch of New Soybean, Corn and Wheat Cultivars in Brazil]*, ANPAD.ORG.BR, 17- 20 (Oct. 17 - 20, 2006), http://www.anpad.org.br/admin/pdf/RED567.pdf.
[49] Gilson, Sabel & Scott, *supra* note 1.

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In Goiás State, the most important GMO soybean production is organized under a public-private agreement between Embrapa, Monsanto and CTPA (Technological Center for Agricultural Research), which is a non-profit company created by the private seed production companies. The main purpose of the partnership it to enhance GMO cultivars in the Brazilian *cerrado*. Monsanto detains the soybean GMO's technology that is resistant to the glyphosate herbicide and Embrapa, in turn, keeps the property over the cultivars adapted to the soil and climate conditions of Goiás. According to Moura and Marin,[50] Embrapa and CTPA are responsible for researching to enable the GMO soybean in Goiás (Embrapa licenses its cultivars and CTPA offers financial support and contact the producers).

Another example of a collaboration agreement with the private sector is with BASF, chemical world leader. The collaboration agreement was signed in 2001 with an initial five year term, aiming the development of new technologies that are interesting for both corporations regarding the sustainable growth of the Brazilian agriculture. The agreement follows the idea of open innovation. Both companies can trigger each other when they identify new development opportunities, where the partnership can add value. They are investing together seeking productivity enhancement. For the first two projects, the partnership is focusing on biotech products, but for the future, they aim for genetic enhancement, fertility, soil mechanization, plant protection, and physiology. The largest benefits of the collaboration are experiences and know-how exchange with the possibility of generating new agricultural technologies.[51] Embrapa received BRL 1,000,000 (about USD 250,000) for this partnership until the final product was launched because then BASF would also pay royalties to Embrapa.[52] One of the most important researches conducted by Embrapa in its collaboration with BASF is the development of other type of GMO soybean cultivars resistant to the herbicide that belong to the imidazolinones group.

[50] *See generally* de Moura & Marin, *supra* note 36.
[51] *See Embrapa e BASF Anunciam Acordo de Cooperação. [Embrapa and BASF Announce a Cooperation Agreement]*, UOL Rural Centro (June 17, 2011) http://ruralcentro.com.br/noticias/Embrapa-e-basf-anunciam-acordo-de-cooperação-42418#y=303.
[52] *See* Daily Trading Industry and Services. *Embrapa Reforça as Parcerias Privadas. [Embrapa Strengthens Private Partnerships]* UOL, (2007) ruralcentro.uol.com.br/noticias.Embrapa-reforca-as-parcerias-privadas-2019.

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According to De'Carli, in March 2005 Embrapa realized a workshop to discuss its partnerships.[53] It was concluded that Embrapa's operations through partnerships are successful. However, it still must work in new managing proposals for its collaboration agreements, which must be approved by its Board of Directors. The main issue is to improve the definition of each party's obligations with a straightforward approach. Nonetheless, it is believed that under uncertainty, it is impossible to know ex ante all the features of the agreement. Moreover, according to Gilson, Sabel and Scott contracting for innovation is a new tool that should use a formal and informal braiding of governance mechanisms to avoid opportunistic behavior, instead of base only in formal structures.[54]

In order to maintain its competitiveness in the agricultural sector, the private sector has adopted Embrapa's similar behavior. It is very open collaboration with universities, research agencies and even other companies, and it uses the main appropriation mechanisms and technological transfer. According to Santini and Paulillo Monsanto is the only company that opts for a vertical integration, maintaining the integration between the chemical and seed areas in its own company for biotechnology development, even when there are several other companies that may offer chemical solutions, like Sygenta, Pioneer (Du Pont), and Dow AgroSciences.[55] General perception is that vertical integration is the most beneficial type of organization. According to Zylbersztajn, this is not true, especially in the agribusiness R&D sector, for its uncertainty.[56] This confirms the idea of Gilson, Sabel and Scott when they state that vertical integration is the wrong answer for uncertain markets. Therefore, there is a historical decrease of its use.[57]

[53] *See generally* De'Carli, *supra* note 18.
[54] *See* Gilson, Sabel & Scott, *supra* note 1.
[55] *See generally* Santini & Paulillo, *supra* note 43.
[56] Decio Zylbersztajn. Estruturas de Governança e Coordenação do Agribusiness: Uma Aplicação da Nova Economia das Instituições [Governance Structures and Coordination of Agribusiness: An Application of the New Institutional Economics] (1995) (dissertation, Universidade de São Paulo, Faculdade de Economia Administração e Contabilidade).
[57] *See generally* Gilson, Sabel & Scott, *supra* note 1.

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5. GOVERNANCE

The purpose of governing a relation is to reduce its transactional costs, related to limited rationality and opportunistic behavior. While the first can result in an agreement with gaps, the second carries the risk of benefiting from these gaps. The magnitude of these factors depends on each transaction. In order to choose the most adequate governance standard, it is important to analyze the frequency the transaction takes place, the available assets and the type of uncertainty, according to Williamson, cited in Feltre.[58] Still according to Feltre the frequency is important because the higher the recurrence, the higher the motivation of its agents to not impose losses on its partners.[59] Otherwise, it can result in the termination of the agreement. Uncertainty, in turn, is important because in an environment where it is impossible to know ex ante the result of the external impacts, renegotiations are necessary, and consequently, more exposed to opportunistic behaviors. As previously mentioned, the research agreements are a good example of this kind, since the practical and technical results are not known in advance of the celebration of an agreement, being impossible to totally define in the agreement terms. Finally, the available specific assets are important due to the adaptation costs.

According to Sologuren competitiveness problems are not solved based only on the individual choice of a governance model based on collaboration, but also depend on government policies to reduce opportunism and externalities, where the collective rationality is not achieved because of the individual rationality preponderance.[60] However, there are situations that the government can negatively impact through policies or with its high interference.

An agreement is not able to fill all the gaps created by the uncertainty, because of the limited rationality and the informational asymmetry. This

[58] *See generally* Cristiane Feltre, A Diversidade de Mecanismos de Governança na Multiplicação de Sementes de Milho Híbrido e Soja no Brasil [The Diversity of Governance Mechanisms in the Multiplication of Hybrid Corn and Soybean Seeds in Brazil] (2005) (dissertation, Universidade Federal de São Carlos, Centro de Ciências Exatas e de Tecnologia).
[59] *Id.*
[60] *See generally* Leonardo Junho Sologuren, Integração Vertical, Grupos Estratégicos e Competitividade: O Caso do Sistema Agroindustrial da Soja [Vertical Integration, Strategic Groups and Competitivity: The Agroindustrial Soybean Sytem] (2004) (dissertation, Universidade Federal de Uberlândia, Instituto de Economia)

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results in the need for a combination of agreements and organizational forms. Gilson, Sabel and Scott also express this concept, when they mention, "the higher the level of uncertainty, the more difficult it is for parties to write and Courts to interpret complete state-contingent contracts".[61] The structure to govern the relation must mix formal and informal tools to foster information exchange. Accordingly, no contract theory offers a general solution.

Sologuren based on Williamson, identify three types of existing agreements. a) classical agreements, which are the most basic ones and must meet the following conditions: the agent's identity is irrelevant for the transaction, the dimension and nature of the agreement is completely defined, there is no corrective flexibility in the case of non-celebration of the agreement. In this type of instrument, the judicial form of dispute resolution is the most used. b) neoclassical agreements, which are long term agreements celebrated in an uncertain environment. In this type of agreement, the identity of the parties is relevant, in order to assure the relation continuity. There is flexibility in the agreements structure that is negotiated every time there is a need to avoid losing the investments. In this kind of agreements, arbitration is heavily used. c) Relationship agreements that, as defined by Williamson, are kind of "mini societies", where the description is substituted for the exercise of authority. Based on this classification, Williamson, cited by Sologuren (2004), defines three types of governance: a) Market Governance (classical agreements), where there is no effort to sustain the relationship; b) Trilateral Governance (neoclassical agreements), that is a hybrid form of governance situated between the market and the integration; c) Specific Transaction Governance (relationship agreements), where the transactions risks are high and the possibility of conflicts are expensive and uncertain since there are no standards.[62]

Professor Charles F. Sabel[63] explains that in the governance process, it is important to establish a target, despite not having all the information; a timeline; the milestone to follow the progress and information exchange, so people could talk openly.

[61] *See* Ronald J. Gilson et al., *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23 (2014).
[62] *See* Sologuren, *supra* note 60.
[63] *Supra* note 2.

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Finally, the most efficient contracting structure must:

> 1) induce efficient transaction-specific investment by both parties; 2) establish a framework for iterative collaboration and adjustment of the parties' obligations under conditions of continuing uncertainty – responding, that is, to coordination cascades; and 3) limit the risk of opportunism that could undermine the incentive to make relation-specific investments in the first place.[64]

5.1. GOVERNANCE IN THE LOCAL SOYBEAN PRODUCTION ARRANGEMENT

Considering Embrapa is still incipient in the use of governance in its agreements for innovation[65], in this section the governance in the local soybean production arrangement in Santarém and Belterra municipalities is addressed, since it seems to be a more mature type of governance.

According to Williamson, governance is a coordination structure where the participants interact to reduce their transaction costs related with contractual risks.[66] Accordingly, the more efficient the governance, the lower the transaction costs. Also, according to Williamson governance has three specific features: the specificity of the involved assets, the uncertainty and the frequency.[67] The first feature is the most relevant for governance.

Santarém and Belterra have a considerable soybean production headed by Cargill Agrícola S.A that acts as a monopoly in the area.[68] It is the only soybean buyer and supplier of the low Amazon area. This allows Cargill to dictate the rules and norms for the producers. The local producers highly depend on Cargill as a funding partner.[69] Except for the National Program of Family Farming, all the credit comes from Cargill, which anticipates in up until

64 *See* Gilson, Sabel & Scott, *supra* note 1.
65 Considering Embrapa's documents and contracts that are available on the internet and other studies. Most of Embrapa's agreements are not available in full for general consultation, because of its confidential information.
66 *See generally* OLIVER EATON WILLIAMSON, THE MECHANISMS OF GOVERNANCE (Oxford University Press ed., 1999).
67 *See* Oliver Eaton Williamson, Comparative Economic Organization: The Analysis of Discrete Structural Alternatives, 36(2) ADMIN. SCI. Q. 269 (1991).
68 At least until 2003, when the analysis was made.
69 Considering in this region of Brazil it is common for producers not to get bank loans because they do not have the required documents and due to Brazil's high level of bureaucracy.

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40% of the production or providing supplies, through a contract named *Soja Verde* [Green Soybean]. This is Cargill's way to incentivize the producer to keep producing and minimize the producer uncertainties regarding the cost.

The soybean production has visible uncertainties such as incomplete information of all the links of the production, opportunism, necessity of high investments, and the possibility of financial losses. All this happens in a rapidly changing market. This proves that in this market, technology is an important competition element. In the mentioned municipality, other common uncertainties arise such as price (because of the buyer manipulation or domain of information in the spot market) and technology (because of the difficulty to locally access research and information). In this context, the producers' cooperative is essential to minimize the uncertainty and opportunism. Governance is crucial to the creation of cooperatives with the aim of reducing the producers' limited rationality.

In global value chains, it is possible to determine three types of governance, that according to Kaplinsky are the legislative (agreements between the parties, the environmental and labor law and production and quality standards), judicial (the performance and applicability of the legislative rules) and executive (assistance for the chain participants to find operation rules) governance.[70] These forms of governance regulate the economic activity.

As explained by Gilson, Sabel and Scott in the Deere-Stanadyne Agreement, Cargill has a set of rules and norms for the soybean producers integrated in the corporation, being called *Cultivo Responsável* [Conscious Cultivation].[71] Firstly, there is the *Moratória da Soja* [Soybean moratorium], that is the compromise of not commercializing soybean from deforested areas, since July 2006, inside the Amazon biome. In addition, there is a concern with the labor laws, in order to incentivize the regular registration of all workers and avoid the slave work. Hence, similarly to the Deere-Stanadyne agreement, Cargill has a hierarchy relation with the soybean producers and it does not depend on them. Nonetheless, Cargill decides most of the time without the

[70] *See* R. KAPLINSKY, SPREADING THE GAINS FROM GLOBALIZATION: WHAT CAN BE LEARNED FROM VALUE CHAIN-ANALYSIS?, Institute of Development Studies, (1985).
[71] Gilson, Sabel & Scott, *supra* note 61.

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participation of the cooperatives. Cargill's relation with the soybean producers is also an example of an intersection of contract and regulation.

Cargill rules and norms rise from the concerns in the region regarding the environmentalists and the organized society. These sectors tend to influence the public agencies against the soybean production, due to the potential negative environmental impacts it may produce in a fragile ecosystem. Another challenge for the soybean production is the Sustainable Development Plan BR-163 that aims to harmonize the progress and environmental conservation. In 2003, Cargill had 160 producers, which enabled it to create an organized society to bargain with the competent authorities to develop technologies that increase the productivity and decrease the investments.

Despite importing researches from Mato Grosso, which is considered the most advanced technological research center of Brazil regarding soybean, many of the techniques cannot be employed in such a different biome. In this sense, the lack of specific research for this region increases the producer uncertainty, provoking losses for the sector. This situation corresponds to a governance failure. The local soybean production arrangement in Santarém and Belterra should solve this situation with a governance involving Embrapa, universities, the private sector and the state and municipal governments to foster the activity.

In sum, despite being a source of progress to Pará, the local soybean production arrangement must improve its governance relations. The best way to do it would be involve not only the multinational (private sector), but also to engage the public sector and social organizations.

6. CONCLUSION

The key to success for the Brazilian expansion in the soybean market is the establishment of an articulated research network. Considering that the soybean market in Brazil is a differentiated oligarchy, a collaborative network is necessary to develop technology with efficiency gains, ensuring the competitiveness and overcoming market uncertainties.

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In this context, Embrapa celebrates several collaborative contracts with other actors, public and private, mostly based on formal agreements with soft terms that are structured according to the legislation, its directives and its internal policies.

The requirements for a partnership with the public partners are the signing of a technical collaboration agreement and the use of Embrapa's germplasm. Further, both parties must have researchers working in collaboration and have shared infrastructure. The main benefits for both parties are the co-ownership of the possible future intellectual property, the royalties share and the indication of the partner's name in the cultivar. On the other hand, the requirements for a partnership with the private partners are the signing of a technical collaboration agreement, no maintenance of the private partner's own genetic enhancement program and the private partner must perform the technical works described in the annual work plan. The main benefits for both are Embrapa's exclusive license, through royalty's payments to the private partner, to multiply and sell the seeds (in the crossing program ten years, in the line program five years).

Despite being a successful example of a publicly held corporation, Embrapa still must develop its collaboration tools, especially the informal ones, in order to give the institution more flexibility, but at the same time security. The way its contracts are currently structured heavily depends on constant negotiations. This practice results in opportunistic behavior, even when each research collaboration has a managing committee composed of Embrapa's and the collaborator's representatives. Improving the definition of each party's obligations, as desired by Embrapa, will not be useful, since under uncertainty it is impossible to know ex ante all the features of the agreement. This confirms the idea that the most successful way of contracting for innovation is through the combination of formal agreements and organizational forms.

The most efficient contracting structure must:

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1) induce efficient transaction-specific investment; 2) establish a framework for iterative collaboration and adjustment of the parties' obligations; 3) limit the risk of opportunism.[72]

[72] *See* Gilson, Sabel & Scott, *supra* note 1.

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