

Law

Abstract Book

From the 8th Annual International
Conference on Law,

18-21 July 2011,

Athens, Greece.

Edited by Gregory T. Papanikos



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Preface

This abstract book includes all the abstracts of the papers presented at the *8th Annual International Conference on Law, 18-21 July 2011*, organized by the Athens Institute for Education and Research. In total there were 52 papers and 66 participants, coming from 13 different countries (Australia, Brazil, China, Czech Republic, India, Indonesia, Israel, the Netherlands, South Africa, Spain, Taiwan, the United Kingdom, and the United States of America). The conference was organized into 13 sessions. As it is the publication policy of the Institute, the papers presented in this conference will be considered for publication in one of the books of ATINER.

The Institute was established in 1995 as an independent academic organization with the mission to become a forum where academics and researchers from all over the world could meet in Athens and exchange ideas on their research and consider the future developments of their fields of study. Our mission is to make ATHENS a place where academics and researchers from all over the world meet to discuss the developments of their discipline and present their work. To serve this purpose, conferences are organized along the lines of well established and well defined scientific disciplines. In addition, interdisciplinary conferences are also organized because they serve the mission statement of the Institute. Since 1995, ATINER has organized more than 100 international conferences and has published over 100 books. Academically, the Institute is organized into four research divisions and nineteen research units. Each research unit organizes at least one annual conference and undertakes various small and large research projects.

I would like to thank all the participants, the members of the organizing and academic committee and most importantly the administration staff of ATINER for putting this conference together.

Gregory T. Papanikos
President

FINAL CONFERENCE PROGRAM

Athens Institute for Education and Research
Business and Law Research Division
Law Research Unit

**8th Annual International Conference on Law,
18-21 July 2011, Athens, Greece**



**Conference Venue: St George Lycabettus Boutique Hotel, 2 Kleomenous Street,
Kolonaki, Athens**

Organization and Scientific Committee

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- Dr. J. Kirkland Grant, Distinguished Visiting Professor of Law, Charleston School of Law, USA.
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- Ms. Lila Skountridaki, Researcher, ATINER & Ph.D. Student, University of Strathclyde, U.K.

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C O N F E R E N C E P R O G R A M

Monday 18 July 2011

08:30-09:00 Registration

09:00-09:10 Welcome and Opening Remarks

- Dr. Gregory T. Papanikos, President, ATINER.
- Dr. David A. Frenkel, Head, Law Research Unit, ATINER & Professor, Ben-Gurion University, Beer-Sheva, Israel.

09:10-11:00 Session I (Room A)

Chair: Papanikos, G.T., President, ATINER.

1. Millard, D., Associate Professor, University of Johannesburg, South Africa. *Permanent Impairment, Road Accident Victims And The "Ama Guides": Going Out On A Limb? (Monday, 18th of July 2011)*
2. Routh, S., Assistant Professor, WB National University, India. *Reconceptualising Labour Law for Informal Economic Activities. (Monday)*
3. Ripley, S., Ph.D. Student, King's College London, UK. *The Posted Workers Directive: A Critical Study of its Applicability in Today's European Union.*
4. *Lamont-Black, S., Lecturer, University of Edinburgh, UK. *Purchasing a 'Black Hole' - Liability of the Lawful Holder of the Bill of Lading for Damage caused by Dangerous Cargo?*
5. Salholz, M., Assistant Professor, St. Francis College, USA. *It's Your Trial and I Can Lie If I Want To: Absolute Privilege for Witness Testimony.*

11:00-13:00 Session II (Room A)

Chair: *Lamont-Black, S., Lecturer, University of Edinburgh, UK.

1. Matheson, J., Professor, University of Minnesota Law School, USA. *Common Law Veil Piercing in the United States: An Empirical Examination.*
2. Demaine, L., Professor, Arizona State University, USA. *Celebrity Entertainers' Involvement in American Federal Lawmaking.*
3. Feldman, D., Associate Professor, City University of New York, USA. *Prescription for Reinforcing the Legitimacy of Law and Legal Institutions: Lon Fuller's 'Neutral Principles' Revisited.*
4. Akirav, O., Lecturer, Western Galilee College, Israel. *Preliminary Framework for Significant Legislation.*
5. Dixon, D., Ph.D. Student, Birkbeck College, University of London, UK. *The Rule of Law and Parliamentary Sovereignty in Britain.*

11:00-13:00 Session III (Room B)

Chair: Routh, S., Assistant Professor, WB National University, India.

1. Sangkuhl, E., Lecturer, University of Western Sydney, Australia. *As The Need to Impose Global Taxes Becomes More Pressing so Does the Need to Re-Examine the Sovereign Power to Impose Taxation.*
2. Rajaretnam, T., Ph.D. Student, University of Western Sydney, Australia. *Online Trading Practices: The Benefits and Problems for Internet Users.*
3. Mahfuz, Ph.D. Student, University of Manchester, UK. *A Proportionate Remedy for Both the Insured and Insurer. (Monday, 18th of July 2011)*
4. Lochagin, G.L., University of Sao Paulo, Brazil, Carvalho, A., Ph.D. Student, University of Sao Paulo, Brazil & Conti, J.M., University of Sao Paulo, Brazil. *Legal Qualification of Public Expenditure.*
5. Tsagas, G., Doctoral Researcher, Queen Mary University of London, UK. *An Ominous Fate for the 13th Directive on Takeover Bids: Will Economic Nationalism in the EU Bar the Creation of an Open Market for Corporate Control? (Monday, 18th of July 2011, 09:00-13:30 session)*

13:00-14:00 LUNCH

<p>14:00-15:30 Session IV (Room A) Chair: Poulos, G., Vice-President of Research, ATINER & Emeritus Professor, University of South Africa, South Africa.</p>	<p>14:00-15:30 Session V (Room B) Chair: Sangkuhl, E., Lecturer, University of Western Sydney, Australia.</p>
<ol style="list-style-type: none"> 1. Kohm, L.M., Professor, Regent University School of Law, USA. <i>The Challenges of Family Law and Policy in Immigration Regulation.</i> 2. *Lennertz, J., Associate Professor, Lafayette College, USA. <i>Living the Ticking Bomb 'Hypothetical'? Torture in the 'War on Terror' under U.S. and International Law. (Monday, 18th of July 2011)</i> 3. Gray, J., Principal Lecturer, Northumbria University, UK. <i>What is the Good Life for Lawyers? Legal Education and Ethics.</i> 	<ol style="list-style-type: none"> 1. Powell, C.D., Assistant Professor, Baylor Law School, USA. <i>We All Know it's a Knock-Off! Re-Evaluating the Need for the Post Sale Confusion Doctrine.</i> 2. Assaduzzaman, A.K., Senior Lecturer, University of Southampton, UK. <i>Reception of Evidence in International Commercial Arbitration: Bangladesh Perspective.</i> 3. Agapiou, N., Ph.D. Student, University of Leicester, UK. <i>The UN Convention on Contracts for the International Sale of Goods (CISG): (Genuinely) Promoting the Development of International Trade.</i>

<p>15:30-17:30 Session VI (Room A) Chair: *Lennertz, J., Associate Professor, Lafayette College, USA.</p>	<p>15:30-17:30 Session VII (Room B) Chair: Powell, C.D., Assistant Professor, Baylor Law School, USA.</p>
<ol style="list-style-type: none"> 1. Godsey, M., Professor, University of Cincinnati, USA. <i>Wrongful Conviction of the Innocent: An International Overview.</i> 2. Griffin, R., Professor, Washburn University, USA. <i>Cyberspace: Hackers, Crackers and the Fair Credit Reporting.</i> 3. Pritikin, M., Associate Professor, Whittier Law School, USA & Ross, E., Lecturer, UCLA School of Law, USA. <i>The Collection Gap: Under enforcement of Corporate and White-Collar Fines and Penalties. (Monday, 18th of July 2011, afternoon).</i> 4. Haque, M., Lecturer, University of Western Sydney, Australia. <i>Martial Law and Judicial Review in Bangladesh.</i> 5. Heniarti, D.D., Ph.D. Student, University of Padjadjaran, Indonesia. <i>Developing Trends of Military Justice System.</i> 6. Kyprianou, M., Ph.D. Student, University of Leicester, UK. <i>Thinking outside the Box: Policies behind Perspectives of the Transnational Crime of Human Trafficking for the Purposes of Sexual Exploitation.</i> 	<ol style="list-style-type: none"> 1. Lovdahl Gormsen, L., Lecturer, The University of Manchester, UK. <i>How Revisiting Fundamental Concepts of Article 101 TFEU Clarifies why the Court of Justice Maintains Its Approach to Article 102 TFEU despite the Commission's New Policy towards Abuse of Dominance. (Monday, 18th of July 2011)</i> 2. Dolezalova, H., Ph.D. Student, Masaryk University, Czech Republic. <i>Biodiversity Protection Related to Renewable Energy Sources: Precautionary Principle.</i> 3. Pressler, A., Graduate, Stetson University College of Law, USA. <i>Penumbra: A Comedy of Illegitimate Means.</i>

17:30-19:30 Session VIII (Room A)

Chair: Dolezalova, H., Ph.D. Student, Masaryk University, Czech Republic.

1. Fellmeth, A., Professor, Arizona State University, USA. *Negative and Positive Human Rights.*
2. Smith, J., Associate Professor, Florida A&M University College of Law, USA. *Electronic Discovery and the U.S. Constitution: Inaccessible Justice.*
3. Imoukhuede, A., Assistant Professor, Nova Southeastern University, USA. *Freedom from Ignorance: The International and U.S. Constitutional Duty to Provide Public Education.*

21:00-23:00 Greek Night and Dinner

Tuesday 19 July 2011

09:00-10:30 Session IX (Room A)

Chair: *Malloy, M., Distinguished Professor and Scholar, University of the Pacific McGeorge School of Law, USA.

1. Wang, Z.J., Lecturer, University of Western Sydney, Australia. *Intellectual Property Protection in the Era of Globalisation – Meeting the Challenge the Chinese Way.*
2. Hua, J., Ph.D. Student, University of Hong Kong, China. *The Comparative Analysis of Internet Service Provider Liability and Safe Harbor Regulations of Developed Societies and the Implication to China's Digital Copyright Reform.*
3. Sahni, A., LL.B. Student, Dr. Ram Manohar Lohiya National Law University, Lucknow, India. *Parody as a 'Fair Use' Exception to Copyright Infringement: How Funny is it anyway?*

10:30-12:00 Session X (Room A): Law in Society – Meanings & Deployments of Intellectual Property Law on the Ground

Chair: Wang, Z.J., Lecturer, University of Western Sydney, Australia.

1. Kheria, S., Lecturer, University of Edinburgh, UK. *Perspectives of Digital Artists on Copyright.*
2. Giannatou, E., Ph.D. Student, University of Edinburgh, UK. *Exploring the Sociotechnical Dynamics of Creative Commons Licenses.*
3. Harmon, S., Research Fellow, University of Edinburgh, UK. *Law in Society: Uses of IP Law in Bioscience Regulation.*

<p>12:00-13:30 Session XI (Room A) Chair: Harmon, S., Research Fellow, University of Edinburgh, UK.</p>	<p>12:00-13:30 Session XII (Room B) Chair: Griffin, R., Professor, Washburn University, USA.</p>
<ol style="list-style-type: none"> 1. Du Plessis, W.J., Lecturer, University of Johannesburg, South Africa. <i>Protection of Traditional Knowledge in South Africa: Does the "Commons" Provide a Solution?</i> 2. Benedi, S., Ph.D. Student, University of Zaragoza, Spain. <i>Should the Scope of Protection against Racial and Religious Discrimination be set at the Same Level?</i> 3. *Lin, D.S., Ph.D. Candidate, University of Hong Kong, China. <i>Leapfrog Attempted: Unjust Enrichment, Implied Contract or Quitsclose Trust?</i> 	<ol style="list-style-type: none"> 1. *Malloy, M., Distinguished Professor and Scholar, University of the Pacific McGeorge School of Law, USA. <i>Zone Defense: The Euro Zone and the Crisis in Financial Services Markets.</i> 2. Flores Filho, E.G.J., Adjunt Professor, Universidade Federal de Ouro Preto, Brazil & Sousa Faria, M., Student, Universidade Federal de Ouro Preto, Brazil. <i>Market Conditions May Lead to Application of Consumer Law in Typical Contracts? Study on the Situation of the Real Estate Market for Students' Fraternities in the City of Ouro Preto, Brazil.</i> 3. Leen, A., Professor, Leiden University, the Netherlands. <i>The Fiscal Sovereignty of the E.U. Member States.</i> 4. Chen, A., Associate Professor, Chung Yuan Christian University, Taiwan. <i>Understanding Economic Law as Law and Economics: A Suggested Framework and Its Implications.</i> 5. Gao, P., Ph.D. Student, City University of Hong Kong, China. <i>Critical Examination of Legal Regime for Securitization in China: Sham Transfer for True Partition?</i>

13:30-14:30 Lunch

<p>14:30-16:30 Session XIII (Room A) Chair: Frenkel, D.A., Head, Law Research Unit, ATINER & Professor, Ben-Gurion University, Beer-Sheva, Israel.</p>
<ol style="list-style-type: none"> 1. George, C., Associate Professor, Lincoln Memorial University, USA. <i>The Strong Arm of the Law is Weak: How the TVPA and other International Law are not Protecting Victims of the International Sex Trade.</i> 2. Chronopoulou, A., Ph.D. Student, Birkbeck College, UK. <i>Addressing Disappearances: Representations of Rape in Balkan Cinema.</i> 3. Alhaiyaf, K.N., Ph.D. Student, Sussex University, UK. <i>Different Perspectives about the Principle of the Balance of the Power among the Member Countries of the Gulf Cooperation Council (GCC).</i> 4. Dagilyte, E., Ph.D. Researcher, King's College London, UK. <i>Playing Tug-of-War in the European Union after Lisbon? Human Rights Policy, Law-Making and Judicial Interpretation. (Tuesday, 19th of July 2011)</i> 5. Tugyan, T., Ph.D. Student, University of Leicester, UK. <i>What Changed with Al Skeini v. the UK?</i>

16:30-19:30 Urban Walk

20:00- 21:00 Dinner

Wednesday 20 July 2011

Cruise: Departure at 07:15 Return at 20:30

Thursday 21 July 2011

Delphi Visit: Departure at 07:45 Return at 19:30

Nevi Agapiou

Ph.D. Student, University of Leicester, UK.

The UN Convention on Contracts for the International Sale of Goods (CISG): (Genuinely) Promoting the Development of International Trade

The 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), entered into force on 1 January 1988 after a long pursuit for uniformity in international sales. The principal aim was to remove legal barriers in international trade. UNCITRAL, by way of compromise, thrived in marrying common and civil sales law principles in a comprehensive code of legal rules governing the formation of contracts for the international sale of goods, the obligations of the buyer and seller, remedies for breach of contract and other aspects of the sale contract. This Convention now governs over three-quarters of all world trade and stands with 76 Contracting States including most of the European Union Member States, major trading countries such as China and Japan and common law countries such as the United States of America and Australia but also countries like Albania, Armenia, Serbia, Syria, Uganda and Zambia.

As stated in its Preamble, the CISG was created, bearing in mind, the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order (NIEO). Therefore, it is not another example of Marxism, rather an honest effort to promote the development of international trade. The adoption of uniform rules contributes to the removal of legal barriers in international trade both for developed and for developing countries. This paper will examine exactly how, the CISG, *can and does* promote the development of international trade in an effort to rebut the notion that only rich, industrial developed countries can benefit from the adoption of the CISG.

Osnat Akirav

Lecturer, Western Galilee College, Israel.

Preliminary Framework for Significant Legislation

Can we define and measure significant legislation? Previous research has examined the quantity of legislation or the ability of government to control the agenda by passing bills or delaying those of the opposition. Defining and measuring significant legislation is necessary to advance our understanding in this area. This paper presents a preliminary framework of eight criteria for accomplishing these goals and uses three laws passed in Israel within the last 30 years to test its validity.

Khalid Alhaiyaf

Ph.D. Student, Sussex University, UK.

Different Perspectives about the Principle of the Balance of the Power among the Member Countries of the Gulf Cooperation Council (GCC)

This article analyse the reason behind the existence of the GCC in 1981 and the implication of that on the GCC since then. It is commonly believed that achieving a balance of power in the Gulf is the key guarantee for the Gulf to remain secure and stable. This belief is widely accepted by Western powers, especially by the US, and it is accepted in the Arabic world as well¹. According to Bull, the balance of power functions in two area: the general balance of power which prevents a single international actor from being the only supreme international power, and the local balance of power which protects the sovereignty of countries from any external aggression². In other words, the general balance of power functions in the area between the world's most powerful actors while the local balance of power functions in any region within the countries in that region. Some may apply these two kinds of balance of power to the different views of the member countries about the extent to which Western powers should be permitted to become involved in helping the GCC countries to secure the Gulf. While some GCC countries, those interested in security cooperation, view the balance of power locally in the Gulf area within the GCC countries and Iran and Iraq, others, mainly Kuwait, view the balance of power as a universal matter in which the GCC countries have no direct role and instead it is left to the international powerful actors.

This article suggests that some leaders of the GCC countries had in mind the important of balancing the power in the Gulf. This Chapter proposes that one reason for the variety of the proposals of the GCC countries is, perhaps, that they had different perspectives about the principle of the balance of power. The countries interested in military cooperation possibly believed that the balance of power between the GCC members and the non-member countries in the area, mainly Iran and Iraq, would maintain stability and safety in the Gulf. In other words, there was a balance between the GCC countries as a block and Iran, as well as a balance between the GCC countries as a block and Iraq. Iran and Iraq (before the third Gulf war in 2003) were powerful

¹ Barzegar, Kayhan (22 September 2010) Balance of Power in the Persian Gulf: an Iranian View. Middle East Policy. Vol. XVII, 3, pp. 74-87. p. 1.

² Bull, Hedley (1977) *The Anarchical Society*. Basingstoke, Macmillan. p. 98.

countries in the area in term of their military forces. The Iranian and Iraqi had avidity for having their sovereignty extended over some of the GCC countries which were weak countries individually, compared to Iran or Iraq. So, there was an obvious unbalance of power in the region between Iran or Iraq on one side and the GCC countries on the other. Yet according to the concept of the balance of power, there needed to be a balance between these powers. This unbalance of power made the Gulf a region on the verge of ignition and war.

Assad Khan Assaduzzaman

Senior Lecturer, University of Southampton, UK.

Reception of Evidence in International Commercial Arbitration: Bangladesh Perspective

Rules and principles of evidence guide the arbitral tribunal as to what facts are relevant and admissible. They provide, for example, that the evidence can be given with respect to facts in issue, or to any other matter which has some relevance to the disputed issue. The law of evidence ensures that the arbitral tribunal is not distracted by collateral matters¹ and thus seeks to save the time, energy and money, usually associated with arbitration proceedings. In many established legal systems domestic courts are provided with an effective and enforceable mechanism for obtaining evidence relevant to the dispute. The practice of international commercial arbitration is that formal rules of evidence do not apply in arbitral proceedings, unless the parties expressly mandate it, which is rare. Under the arbitration law of Bangladesh the arbitral tribunal is not bound by the Code of Civil Procedure and Evidence Act in disposing of a dispute.²

Before the new Arbitration Law was enacted in 2001, Bangladesh arbitration procedures were governed by The Arbitration Act 1940 which was promulgated by British authority for whole subcontinent. For more than 60 years, Arbitration Act 1940 was not been substantially amended. Arbitration Act 2001 has been modeled on the UNCITRAL Model Law on International Commercial Arbitration to promote arbitration in Bangladesh. Rules of Arbitration of the Bangladesh Council of Arbitration 2001 provides the procedural guidelines for reception of evidence in arbitral proceedings.³

In the case of discovery most of the institutional arbitration rules grant the arbitral tribunal the right to order the production of documents but the scope of discovery varies as to how the evidence gathering process should be conducted. In most of the civil law countries restrictive approach is being applied towards discovery whilst in common law countries may have absolute rights to access the documents of opposing party. Rules of Arbitration of the Bangladesh Council of Arbitration 2001 is silent about the procedure of discovery.

This paper will discuss the evidence rules which should be applied in the Bangladesh arbitration community in relation to discovery. IBA Rules of Evidence were adopted on June 1, 1999, by the resolution of the IBA Council which provides the guidelines for discovery. Further, it will discuss the future prospects for the IBA Rules of Evidence as persuasive principle in conducting arbitration in Bangladesh.

- 1 John Sopinka et al, *The Law of Evidence in Canada*, Ontario: Butterworths, 1992, p 3.
- 2 Sec. 24 Bangladesh Arbitration Act 2001; Rule 20 of the Rules of Arbitration of the Bangladesh Council of Arbitration 2001.
- 3 Rule 20 of the Rules of Arbitration of the Bangladesh Council of Arbitration 2001.

Sara Benedi

Ph.D. Student, University of Zaragoza, Spain.

Should the Scope of Protection against Racial and Religious Discrimination be Set at the Same Level?

In a globalized world with increasing ethno-religious diversity, cases of religious and racial discrimination are growing steadily. In these circumstances, it is often difficult to make the distinction on whether the real ground for the discriminatory behaviour is the religious or the racial element, or the combination of both of them in a specific person (multiple or intersectional discrimination). In order to address this problem, non-discrimination laws must take into account this reality. If we have a look at international norms, some provide the same scope of protection for both grounds of discrimination, but others do not, and very few take into account the specialities of multiple and intersectional discrimination. For example, both art. 14 of the European Convention on Human Rights (ECHR) and art. 26 of the International Covenant on Civil and Political Rights (ICCPR) include religion and race as grounds of discrimination. However, whilst there is a specific UN *convention* addressing racial discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1966, there is no equivalent convention for the fight against religious discrimination; there is only a *declaration* adopted in 1981. At the EU level, the Racial Equality Directive (43/3000/EC) provides a wider protection against racial discrimination than the Framework Equality Directive (78/2000/EC) which covers religious discrimination. In this paper I will analyze whether different scopes of protection against religious and racial discrimination are justified from a theoretical point of view and which problems can derive from different levels of protection in non-discrimination litigation.

Andy Chen

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Understanding Economic Law as Law and Economics: A Suggested Framework and Its Implications

Enlightened by the learning from *Law and Economics* and *Competition Law*, this paper proposes an integrated framework for understanding *Economic Law* as a unified subject. The term "*Economic Law*" in this paper is broadly defined as a legal system to regulate relationship from domestic or international economic activities. In developing this framework, this paper first assumes *Economic Law* to be an independent body of law containing various branches of rules to redress market-failure problems from economic interactions. Competition law is at its center to demonstrate the advantages of a perfectly competitive market and its limits. Each branch of rules is then considered as solutions to improve the following four types of market-failure problems: (1) the **externality** problem leading to inefficient provision of goods or services (Environmental Law, Law of Intellectual Property, Tax Law); (2) the **small-number** problem due to scarcity, industry characteristics, or entry barriers (Telecommunication law or laws on public utilities); (3) the **information-asymmetry** problem causing sub-optimal market transactions (Consumer Protection Law, Commercial Law, or Labor Law); (4) the **transaction-cost** problem arising from the principal-agent dilemma, adverse-selection or moral-hazard phenomenon (Banking Law, Insurance law, Business Organizations, Labor Law.)

With its emphasis on "functionality" rather than "subject matters," this framework opens up new research possibilities for *Economic Law*. Among them, this paper elaborates upon the issues concerning the *substitutability* and *complementarities* between different branches of *Economic Law*. For example, it is interesting to compare the effectiveness between competition law and the other more market-intrusive economic laws in addressing the same types of market-failure problem. This paper concludes by noting and responding to likely critiques to defend its contribution. Overall, this paper contributes to transform progressively *Economic Law* into a subject capable of being studied as an integrated whole. It represents also an effort to improve the quality of a "good" subject to competition in what Erin O'Hara has termed "the law market" by ameliorating the "race to the bottom" problem in that sort of competition.

Anna Chronopoulou
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Addressing Disappearances: Representations of Rape in Balkan Cinema

This paper seeks to explore the specifics of violence as found and expressed through the Balkan cinematic tradition. More specifically, this paper concentrates on cinematic representations of rape in Balkan films. By unravelling the extensive metaphorical use of rape as an integrated part of the historical discourse, in the Balkan cinematic tradition, this paper brings forward the claim that rape as a particular theme is treated by film makers not so much within the discourse on gender but rather within the discourse on violence. The approach taken in the Balkan cinematic tradition is compared to Western approaches on cinematic representations of rape. At the same time, this paper attempts to expose the differences and similarities between the two approaches. Although this paper offers a discussion of feminist accounts it should not be treated as such. This paper offers nothing more and nothing less than an attempt to identify the paradoxical reversals that take place in the positioning of perpetrators and victims.

Egle Dagilyte

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Playing Tug-of-War in the European Union after Lisbon? Human Rights Policy, Law-Making and Judicial Interpretation

Since *Van Gend en Loos* and *Costa*, The Court of Justice (CJEU) was many times criticised for being too progressive in interpreting European law by favouring European integration and disregarding national interests of the Member States. However, we must not forget that the task given for the Court is usually more difficult where law is left ambiguous by political and law-making actors (the Member States or the European institutions). This is very likely to happen when a political agreement among the Member States is not easily reached and the adopted Treaty text – or the Charter of Fundamental Rights (the Charter) for that matter – is too vague in order to satisfy the interests of all.

The aim of this article is to assess by analysing case law whether the Court feels it has been given a stronger mandate for pro-European interpretation with coming into force of the Lisbon Treaty and the legally binding Charter. To this end, the question of progressive interpretation will be raised in the light of recent human rights cases relating to the general principle of equality (C-555/07 *Küçükdeveci*, C-236/09 *Test-Achats*), rights of custody of children (C-400/10 *McB*), EU citizenship rights that extend to third-country nationals (C-578/08 *Chakroun*, C-34/09 *Zambrano*), the right to privacy (C-92/09 and C-93/09 *Schecke*) and the right to effective judicial protection for legal persons (C-279/09 *DEB*).

The author hopes to convince the reader that the CJEU does stay within the powers given to it by the recently amended Treaties and does not interfere in Member States' competences in the areas that EU law does not touch upon. These are the sovereignty-sensitive human rights areas, specifically left for the Member States to regulate by the Treaties and the Charter.

Linda Demaine
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Celebrity Entertainers' Involvement in American Federal Lawmaking

Celebrity entertainers - including actors, musicians, and professional athletes - have become actively engaged in U.S. social and political issues during the past few decades. During this time, Members of Congress have invited numerous celebrity entertainers to testify at congressional hearings on issues unrelated to the celebrities' occupations. This practice has generated controversy among Members of Congress and social commentators over the proper role celebrity entertainers should play in American federal lawmaking. This article presents the results of a study that documents celebrity testimony before the U.S. Congress, and explores why it is happening and its implications for federal legislation and legislative procedure. One major implication uncovered in the study is that celebrity entertainers may even power disparities by counterbalancing the influences exerted by business lobbyists. In other words, celebrity entertainers, with their preponderantly liberal views, may represent people, issues and perspectives that otherwise might not be heard. Given the study's finding that celebrity entertainers testify on a variety of fundamental social issues - including health, crime, the environment, and labor - coupled with the finding that they have a substantial impact on legislation, they may provide one means by which to alter traditional power imbalances. On the other hand, because celebrities tend to affiliate with causes for haphazard reasons (e.g., their agents recommend it), the disproportionate power of their testimony may direct citizens' and legislators' attention away from issues and policy positions that would better serve the electorate. These and related policy issues are discussed in the paper.

Dennis Dixon

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The Rule of Law and Parliamentary Sovereign in Britain

The paper will critique rule of law arguments against Parliamentary sovereignty, using Fuller's eight principles of legality as the theoretical framework for understanding the rule of law. It will argue that the real rule of law restraints on a legislature derive from the inevitability of government through general rather than particular rules, and that Parliament must delegate prescribed powers to officials and not its full sovereignty. The choice of creating a general rule or a prescribed power necessitates the existence of enforcement of those rules, and thus the existence of a power to define the rules. The total abolition of judicial review thus defeats government through the creation of rules, and would be self-defeating.

Fuller explained that the rule of law is an ideal which is never wholly achievable. The real question is as to whether exceptions are justified, a question that should not be co-opted into the rule of law. 1) As a right presupposes a remedy, arguments as to abolition of remedies are arguments as to whether the right should exist and in what form. 2) Arguments as to limiting rights of appeal beyond specialist tribunals to the ordinary courts are disputes as to the suitability of different forms of the judiciary. 3) Some argue that Parliament and courts share "bi-polar" sovereignty, but this presupposes that each have a precise orbit, that Parliament never adjudicates and courts never legislate; neither is true, and the real question is as to how far incursions by each institution are tolerable.

Rule of law objections to Parliamentary sovereignty come back to what is justifiable, and who is the judge of the justification? These are questions which the principles of legality cannot answer - the limits of an ideal cannot be deduced solely by reference to that ideal.

Helena Dolezalova

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Biodiversity Protection Related to Renewable Energy Sources: Precautionary Principle

The use of renewable energy is growing worldwide as it has an important part to play in promoting a development. According to European Commission's Green Paper on a European Strategy for Sustainable, Competitive and Secure Energy, a binding minimum target should be achieved by all Member States of the European Union by 2020 as concerned renewables. The concept of sustainable development relates to enforcing the environmental development without the negative impacts of this effort onto the economic and social spheres (or vice versa), which is not always possible. The main obstacle to the development of some renewable energy sources is environmental. Although the promotion of the use of energy from renewable sources is one of measures needed to reduce greenhouse gas emissions it could have negative impacts on the environment. Biomass cultivation could entail land use changes, the introduction of invasive alien species and other effects on biodiversity. Some countries plant invasive alien species as bioenergy crops despite a risk of the spread into unintended habitats. Alien species that become invasive are considered to be a main direct driver of biodiversity loss across the globe therefore the cultivation is either preventively regulated or banned. Several international treaties and EU Directives have been adopted in order to prevent the introduction of those alien species which threaten ecosystems, habitats or species. This aim should be fulfilled through application of precautionary principle, the most controversial principle of environmental law. This concept relates to lack of full scientific certainty in connection with measures to prevent environmental damage. The purpose of this paper is to analyse the precautionary principle in relation to the promotion of the use of energy from renewable sources in addition to a comparison of relevant legal regulations in European states. An emphasis is put on a balancing of interests in legislation.

Wilhelmina J (Elmien) Du Plessis
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Protection of Traditional Knowledge in South Africa: Does the “Commons” Provide a Solution

The Kruger to Canyons Biosphere Region in the Limpopo and Mpumalanga provinces in South Africa is part of UNESCO's World Network of Biosphere Reserves. Bushbuckridge (or *Bosbokrand*), an area in this region, has many traditional healers that provide primary healthcare services for people in this region. Traditional knowledge about the different types of local medicinal plants and uses are developed by these healers, and many of these plants own their sustainable use and survival to the traditional healers. Access to these plants, however, became increasingly threatened by people outside the community (*muti* hunters and pharmaceutical companies) who over-harvested the plants, thereby threatening the continued existence of traditional healers and traditional knowledge.

The government recently tabled The Intellectual Property Laws Amendment Bill [8 of 2010] in an effort to protect traditional knowledge through existing forms of intellectual property legislation such as trademarks, copyrights, geographical indications, designs and patents. The Bill was not passed due to heavy criticism from civil society, mainly centred on the fact that traditional intellectual property law is not the most suitable avenue for protecting traditional knowledge. Finding a solution to the protection of traditional knowledge in the traditional Intellectual Property framework seems unfavourable, since traditional intellectual property law does not pay adequate regard to the communities' ability to regulate the use of traditional knowledge through customary law and practices.

This paper suggests that the discourse of the commons might provide a solution for this problem. The preliminary hypothesis is that the commons can be employed as an institution where communities can freely manage access (also from outsiders) and use of the traditional knowledge without having to rely on a model of *exclusion*.

Daniel Feldman

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Prescription for Reinforcing the Legitimacy of Law and Legal Institutions: Lon Fuller's 'Neutral Principles' Revisited

The legitimacy of law and legal institutions in the United States and elsewhere increasingly suffers from the perception that judges "just make it up" according to their political predilections. (While I am most familiar with the evidence of this decline in the United States, scholars such as Marc Loth, dean of the law faculty of Erasmus University, Rotterdam, have noted a decline in the legitimacy of legal institutions in Western Europe as well. See, e.g., Loth's *Courts in Quest for Legitimacy*, 2005, www.follesdal.net/projects/ratify/TXT/Loth.doc.) In the 1950s, Herbert Wechsler wrote a famous law review article called "Toward Neutral Principles of Constitutional Law," in which he warned that the increasing politicization of judicial decisions would undermine the legitimacy of law. But no such neutral principles have yet won sufficient acceptance to provide a sound foundation supporting such legitimacy.

Lon Fuller was the leading American philosopher of law in the third quarter of the 20th century. As the leading neo-natural rights advocate, he was the intellectual predecessor of Ronald Dworkin, currently the leading jurisprudential scholar. However, in his time he was overshadowed by HLA Hart, the British legal positivist, and later by Dworkin. My paper argues that Fuller's philosophy of law, far more persuasively than Dworkin's or Hart's, or for that matter the approaches of Scalia, Bork, Ackerman, or any of the leading modern jurisprudential scholars, provides those needed neutral principles.

However, in so doing, I found it necessary to reinterpret Fuller in terms of the kind of modern preference utilitarianism that philosophers like Peter Singer have favored. Fuller himself explicitly rejected utilitarianism, but I argue that his relative lack of philosophical sophistication, together with advances in modern utilitarian thought, make this reinterpretation very plausible.

Aaron Fellmeth

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Negative and Positive Human Rights

The UN Committee on Economic, Social, and Cultural Rights has classified human rights into three categories: to respect, to protection, and to fulfillment. The first is often characterized as a “negative” right and the latter two as “positive” rights. Most philosophers and international lawyers consider the relevance of this classification scheme as exhausted by the observation that negative rights merely require the state to restraint its agents from violating the right, while positive rights require active efforts by the state to redress infringements originating from historical or cultural conditions, including threats to the right posed by private actors. However, some writers have questioned the utility of the distinction. Others have argued that all human rights (or some select group of “basic” rights) must be positive rights to bear any moral weight. Others have argued that it is inappropriate on moral or pragmatic grounds to hold the state to any duty but that of restraint.

This paper evaluates these challenges to the dichotomy between positive and negative rights on moral and pragmatic grounds. More important, it analyzes the legal and policy consequences of the decision to frame a human right as negative or positive. Arguments that the framing of the right as positive or negative have no effect on the substance of the state’s obligations are found to be overstated. Less obviously, the choice of framing both reflects and recursively shapes the international community’s understanding of the role of law in international relations. By framing a human right negatively, the international community implies that the state itself poses the most serious threat to the enjoyment of the right. By framing the right positively, the community implies that the state may be trusted not only to honor the right, but to play the quite different role of guarantor against private threats. The paper concludes by rejecting the argument that all international human rights should be framed negatively in legal instruments, while observing that the opposite argument that all human rights should be framed positively misunderstands the role of international law in the world public order.

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Market Conditions May Lead to Application of Consumer Law in Typical Contracts? Study on the Situation of the Real Estate Market for Students' Fraternities in the City of Ouro Preto, Brazil

Ouro Preto, MG, Brazil is a city of 70,227 inhabitants that has a large collection of buildings Historic Landmarks, which generate much of the income of people in the city. In parallel, the city receives an injection of funds from another social action, students. Most of them live in fraternities, and currently this group is composed of a number ranging from five to six thousand people.

The Federal University of Ouro Preto, MG, Brazil - UFOP - is a public institution with 8.851 million students worldwide in 38 courses. Most of them are from other cities and other states of Brazil. In 2009, for example, of 2,437 new places for new students that offered by UFOP, 1,677 of them went to courses on the Campus of Ouro Preto. And that same period, the UFOP received students from all regions of Brazil. This article addresses the issue of hiring in this context.

Due to the number of students that the city receives in every semester, the demand for houses that can be leased exceeds (a lot) to offer them. This fact creates distortions in the local real estate market causing a situation where rental prices are not consistent with the conditions of the leased premises, readjustments of contracts do not meet any criterion and the tenants do not have great opportunities for negotiation and bargaining, having to undergo logic of "take it or leave it."

At first we discuss the situation out of proportion (and already noted) that exists in Ouro Preto in relation to the provision of rental services to students from UFOP.

Given this, we explain the reasons which lead us to consider the leasing of real estate in Ouro Preto a consumer relationship, making it possible, in our view, the application of consumer law.

Then, we will show that one who rents property in Ouro Preto is a subject often presents as a disadvantage and vulnerable because of the way (substantially commodified), in which homes are offered, and that information can improve the competitive position of these renters.

Then we will bring legal disputes concerning the application of the Code of Consumer Protection in lawsuits which involve real estate

leases and demonstrate that although much of the case to be positioned against the application of the Consumer Law in contracts dealing with rental properties and, that the use of consumerist legislation (and its principles) in this market is possible, since it is different.

Thus, based on existing data we present our thesis, as substantiated, that the renters can be considered consumers in some circumstances and, perhaps, is the one that presents the city of Ouro Preto.

Pengcheng Gao

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**Critical Examination of Legal Regime for
Securitization in China:
Sham Transfer for True Partition?**

Chinese financial industry tries to structure securitization by following the U.S. model. However, this inclination is confronted with the actual issues resulting from legal resilience of Chinese legal regime. This paper will employ legal normative methodology, assisted with practical operation. The purpose is to reveal the specific and particular problems of Chinese legal rules that are under continuous dispute, including the uncertainty caused by the recent availability of receivables for pledge with the entry into force of Chinese Property Law in 2007; the true concept about Chinese trust and the commercial trust; the nature of so-called "scheme" used in Chinese corporate asset securitization; the consistency of Chinese trust law with insolvency law. Such an examination will be distinguished from others by especially going beyond the doctrinal scope to reach the policy plane. The paper will show because of the lack of judicial clarification of legal rules, China seems to rely more on the accounting or other financial criteria but leave the legal specification lagging behind. In the post-financial crisis era, every nation is reflecting on what they can learn. By mainly paralleling the Chinese practice with the counterparty in the U.S., accompanied with the reference to that of other countries, especially with civil law traditions, the paper is going to make a different voice from the countervailing view that considers securitization in China as safe and sound for its incomplex design and expresses no concern at all. The paper foresees the necessity of Chinese securitization rules in the future process of securitization industrialization and argues for the full preparation in Chinese legal regime in advance.

Cheryl George

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The Strong Arm of the Law is Weak: How the TVPA and other International Law are not Protecting Victims of the International Sex Trade

Slavery is alive, well and flourishing. Not the slavery that ended with the U.S. Civil War, which is what most people think about when the word “slavery” is mentioned. Today, we call this form of slavery: *HUMAN TRAFFICKING*. As innocent as this term may sound, it is a tragic situation where many innocent women and children are trapped, suffering and dying.

When one counts all of the victims forced or coerced into servitude—from farms in India to charcoal mines in Brazil—the numbers reach into the millions.³ Even America is a major importer of sex slaves, with conservative estimates fluctuating between 18,000 and 20,000.⁴ Of those, nearly 80% are women, and half are minors.⁵ Cases of human trafficking have been reported in all fifty states in the United States.⁶

“Over the last 10 years, the numbers of women and children [who] have been trafficked have multiplied so that they are now on par with estimates of the numbers of Africans who were enslaved in the 16th and 17th centuries.”⁷

One expert defines human trafficking as “‘an opportunistic response’ to the tension between the economic necessity to migrate . . . and the politically motivated restrictions on migration”⁸

Globalization, indeed, led to an increased exchange of both capital and goods, but it also led to an increase in labor migration.⁹

³ Kathleen Parker, *Slavery by Any Other Name*, AUSTIN-AMERICAN STATESMAN (Oct. 1, 2007). (referencing two movies/documentaries that chronicle actual cases of sex trafficking, which movies/documentaries are sold and traded).

⁴ *Opposing and Preventing Global Sexual Trafficking*, http://www1.salvationarmy.org/ihq/www_sa.nsf/vw-dynamic-arrays/B5DD72A243A1150B80256E49006C621E?openDocument (last visited Feb. 28, 2009).

⁵ Kathleen Parker, *Slavery by Any Other Name*, AUSTIN-AMERICAN STATESMAN (Oct. 1, 2007).

⁶ Human Trafficking Cheat Sheet-Polaris Project

⁷ *Opposing and Preventing Global Sexual Trafficking*, http://www1.salvationarmy.org/ihq/www_sa.nsf/vw-dynamic-arrays/B5DD72A243A1150B80256E49006C621E?openDocument (last visited Feb. 28, 2009) (quoting Dr. Laura Lederer). Dr. Lederer, a senior state department adviser on trafficking, has studied sexual trafficking for twenty years at Harvard University. *Id.*

⁸ Janie Chuang, *Beyond a Snapshot: Preventing Human Trafficking in the Global Economy*, 13 IND. J. GLOBAL LEGAL STUD. 137, 140 (2006).

⁹ *Id.*

Subsequently, the globalization restructuring is what harshly affects women in developing countries by either “fostering exploitative conditions for women working in the formal sector, or pushing women directly into work in the informal sector.”¹⁰ Further, “[t]he conflation of prostitution and trafficking has also led to the faulty idea that ending ‘demand’ for commercial sex will lead to a reduction in or eradication of trafficking.”¹¹ Sexual exploitation has taken the media forefront in recent years.¹² Human trafficking is one of the most rapidly growing transnational criminal activities.¹³ Much legislation has been passed to try to curb this illegal marketing of women and children. Up until 2005, the legislation has been suggested but has had no “backing” or support to pass legislation to fight this criminal enterprise.¹⁴

Four components comprise the demand for human sex trafficking: (1) the men who purchase commercial sex acts; (2) the exploiters who make up the sex industry; (3) the states that serve as destination countries; and (4) the cultures and environments that tolerate and promote sexual exploitation.¹⁵

This paper will focus on the law of certain countries (as well as the international community) and the culture that allows these traffickers and Johns to largely go unprosecuted and undeterred. I will address this issue and propose policy considerations to tackle this problem head on.

¹⁰ *Id.* at 143.

¹¹ Grace Change & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 317, 331 (2007).

¹² See U.S. Dep't of State, *Trafficking in Persons Report 1 (2003)* [hereinafter TIP Report], available at <http://www.state.gov/documents/organization/21555.pdf> (last visited May 18, 2010).

¹³ LeRoy G. Potts, *Global Trafficking in Human Beings: Assessing the Success of the United Nations Protocol to Prevent Trafficking in Persons*, 35 *Geo. Wash. Int'l L. Rev.* 227, 227 (2003)

¹⁴ Margaret A. Healy, Note, *Prosecuting Child Sex Tourists at Home: Do Laws in Sweden, Australia, and the United States Safeguard the Rights of Children as Mandated by International Law?*, 18 *Fordham Int'l L.J.* 1884-88 (1995).

¹⁵ Donna M. Hughes, *The Demand for Victims of Sex Trafficking*, Women's Studies Program, Univ. of R.I., June 2005.

Evi Giannatou

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Exploring the Sociotechnical Dynamics of Creative Commons License

It has been noted by legal scholars that much of Intellectual Property scholarship remains hypothetical and abstract, although there has been an increased interest in the interdisciplinary study of intellectual property in recent years. The need for further interdisciplinary research in Intellectual property law has been emphasized in both policy documents and academic commentaries. In view of this, the aim of the panel is to bring together scholars who are using a law and society perspective to study Intellectual Property law. Each panellist will use their research to provide a case study of how Intellectual property law is understood and deployed in practice. Specifically, the panellists' analysis will address the interaction between copyright law and digital art practice, creative commons licenses and open content filmmaking and grant of life patents and related legal procedures. Such analysis, grounded in examples from their current research, will enable a critical discussion of the role played by Intellectual property law and related tools. It will also serve to highlight the different interdisciplinary approaches deployed by the panellists to study intellectual property on the ground as well as the value brought by them.

Mark Godsey
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Wrongful Conviction of the Innocent: An International Overview

In the United States, more than 260 inmates have been proven by DNA testing to be innocent of the crimes for which they were convicted and sent to prison. But the phenomenon of wrongful conviction of the innocent is by no means limited to the United States. More than 80 countries have struggled with public claims of wrongful conviction in recent years, and high profile exonerations have caused outcries for reform in countries from England and Norway to Mexico and China.

In April of 2011, the Innocence Network and the Ohio Innocence Project at the University of Cincinnati College of Law will host the first-ever conference and symposium dedicated to exploring the phenomenon of wrongful conviction of the innocent in the international arena. The object of the conference will be to bring selected scholars, lawyers and exonerees from around the world together in one place to interact and learn from one another. You can learn more about the conference by going to www.2011innocenceconference.com and clicking on "register."

Delegates from the following countries, among others, will be attending the conference to discuss the problem of wrongful conviction in their home country:

- | | | |
|-------------|-----------|----------------|
| · Australia | · India | · Norway |
| · Canada | · Ireland | · Pakistan |
| · Chile | · Japan | · Poland |
| · China | · Mexico | · South Africa |
| · England | · Nigeria | · Switzerland |

In the paper submitted to ATINER and presented in Athens in July 2011, I will discuss the evolution of the Innocence Movement from its roots in DNA testing in the United States to its growth around the globe in the past decade. I will discuss the developments and most interesting points of comparison between countries that are explored during the April 2011 conference. For example, I will address the strengths and weakness of the adversarial vs. the inquisitorial systems of criminal justice for accuracy and reliability. In general, I will discuss the causes of wrongful conviction around the globe, what we can all learn from one another on this important issue, and what various countries are doing to combat this problem.

James Gray

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What is the Good Life for Lawyers? Legal Education and Ethics

In England and Wales, the Solicitors Regulation Authority and the Bar Standards Board are undertaking a full-scale review of legal education and training with the aim, inter alia, of ensuring ethical standards in the professions. The question of the role of legal education in inculcating such standards has a long history. In 1996, the First Report of the Lord Chancellor's Advisory Committee on Legal Education and Training argued that law students "must be made aware of the values that legal solutions carry, and of the ethical and humanitarian dimensions of law as an instrument which affects the quality of life". The problem of how this might be achieved has persisted; there is consciousness that the legal professions in other common law jurisdictions, the US, Australia, and Canada, already incorporate professional ethics in first law degrees. Two recent reports, *Preparatory Ethics Training for Future Solicitors*, (Economides and Rogers 2009) and *Legal Ethics at the Initial Stage: A Model Curriculum* (Boon 2010) are relevant. Boon's work is a realisation of Economides and Rogers' recommendation that "awareness of and commitment to legal values, and the moral context of the law" be made mandatory in the teaching of undergraduate law degrees. The model curriculum defines ethics in the context of the degree as "the study of the relationship between morality and law, the values underpinning the legal system, and the regulation of the legal services market, including the institutions, professional roles and ethics of the judiciary and legal professions." This paper examines the current debate and, in particular, its significance to the teaching of legal theory mindful of Aristotle's observation, when speaking of the laws of his own country, that "jurisprudence, or the knowledge of those laws, is the principal and most perfect branch of ethics".

Ronald Griffin

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Cyberspace: Hackers, Crackers and the Fair Credit Reporting

The times are a-changing. We are witnesses to shape shifting. We live in physical realities (amounting to self-perception and a sensory grasp of our surroundings), and virtual realities (created with computers and software) and, in a span of forty years, one has been overtaken by the other. In 2010, we've decided that the net is a suitable platform for moving all commerce in the United States. With structural decisions of this magnitude being made by influential people, there are mathematical mysteries to be solved by software engineers, confusion about what the decision portends, golden opportunities to make money, a climate for predations, predators, entrepreneurs, and profits. There are vandals, hackers, crackers, and law enforcement people doing things in cyberspace. This essay describes them, their deeds, and the debris they leave behind. There is an accounting of what cannot be done to cyberspace characters under international law, what can be done to some under domestic law, and a code of ethics to police the rest.

Masudul Haque

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Martial Law and Judicial Review in Bangladesh

The expectation created through the emergence of Bangladesh, a former province of Pakistan, through a bloody war was that Bangladesh would never encounter usurpation of power by the army. Ironically, within three and half years of independence Martial Law was imposed in August 1975. During Martial Law the constitution was suspended and was made subservient to martial law regulations. Many constitutional provisions outlining the basic principles and structure of the government were amended. On 18th February 1979 a parliamentary election was held under the martial law regulations. In its first session the Parliament passed the 5th Amendment Bill which ratified all actions of the martial law administration including all Martial Law Promulgations and Ordinances. The actions of the military government were given retrospective validity. It also prohibited any action of the military government from being challenged in any court on the ground of unconstitutionality. Following the passage of this Bill, martial law was officially withdrawn. However the Amendment was declared unconstitutional in early 2010 by the Supreme Court thereby rendering the activities of the martial government invalid. The judgement also repudiates Kelsenian doctrine of necessity and the doctrine of effectiveness, used previously by the judiciary in different countries. While the judgement raises many fundamental issues of constitutional law, this article will mainly focus on issues relating to the judicial review of the acts of the parliament. This paper argues that the exercise of the inherent power of the highest court to review the constitutionality of any act of the parliament is vital to have proper checks and balances between the various organs of the government in order to stop excesses by the executive government through misusing its majority in the parliament. The conclusion drawn in Bangladesh may be of relevance to other countries, especially the ones trying to establish constitutionality by changing governments through popular uprisings.

Shawn Harmon

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Law in Society: Uses of IP Law in Bioscience Regulation

It has been noted by legal scholars that much of Intellectual Property scholarship remains hypothetical and abstract, although there has been an increased interest in the interdisciplinary study of intellectual property in recent years. The need for further interdisciplinary research in Intellectual property law has been emphasized in both policy documents and academic commentaries. In view of this, the aim of the panel is to bring together scholars who are using a law and society perspective to study Intellectual Property law. Each panellist will use their research to provide a case study of how Intellectual property law is understood and deployed in practice. Specifically, the panellists' analysis will address the interaction between copyright law and digital art practice, creative commons licenses and open content filmmaking and grant of life patents and related legal procedures. Such analysis, grounded in examples from their current research, will enable a critical discussion of the role played by Intellectual property law and related tools. It will also serve to highlight the different interdisciplinary approaches deployed by the panellists to study intellectual property on the ground as well as the value brought by them.

Dini Dewi Heniarti

Ph.D. Student, University of Padjadjaran, Indonesia.

Developing Trends of Military Justice System

It is generally known that military justice has existed since armies came into being. There have been various attempts to classify types of military jurisdiction. According to a prominent scholar view, the military jurisdiction classification is based on the three main existing law systems: the Common law system, the Roman law one and the socialist law system. The other scholars use the jurisdictional powers of military classification based on four different systems, namely: general jurisdiction, temporary one, limited jurisdiction and war military jurisdiction. On other issues, in particular, some scholars have different views by using thematic classifications/typologies, based on the specific features of military courts, and a national models approach. The above classifications have helped in understanding different aspects of military course as seen from the comparative law perspective though they remain debatable among the scholars. The paper will demonstrate that military jurisdiction and military justice have been institutionalized in many countries. There is a growing trend towards abolition of the use of military courts for the trial of civilians. Shortcomings in this area and ambiguous constitutional regulations on the subject of military jurisdiction, are largely a contributory factor to the persistence of human rights violations and impunity. Military courts of those states have extensive jurisdiction to try any offence committed in a military establishment, any ordinary offence committed by or against military personnel in the course of service or due to it and any ordinary offence committed by a soldier against another soldier when not on duty among others things. A number of States have military jurisdiction established in their constitutions, along with regulations relating to their composition, operation and powers. This paper examines the convergent and divergent military courts of state practices as seen from the comparative law perspective and scope of such regulations varies from country to country.

Jie Hua

Ph.D. Student, University of Hong Kong, China.

The Comparative Analysis of Internet Service Provider Liability and Safe Harbor Regulations of Developed Societies and the Implication to China's Digital Copyright Reform

Copyright Law originates and changes with the development of technology. The wide application of Internet and digital technology strongly promote the reproduction, recreation and dissemination of works, thus result in a large number of unauthorized use of works and copyright holders' management of properties out of their control. The copyright industry pushed the legislators to adopt updated legal measures to better protect their interests under the digital network environment. Among the new legal framework, one of the important measures includes regulating the liability of the Internet Service Provider (ISP). The ISP plays the crucial role as a conduit for data transmission and information dissemination, also as a platform on which Internet users access, post and download digital works. On the one hand, ISP accelerates the exchange of knowledge thus promotes the progress of social and economic development, but on the other hand, it induces the flooding of piracy due to lack of invigilation and legal regulation. Therefore, setting up certainty to ISP liability is necessary in national copyright legislation so as to effectively attack the online piracy as well as to maintain the ISP's incentive for facilitating communication and adopting new technologies.

This paper will discuss the ISP liability and safe harbor regulations with the aim to illustrate the issue of piracy control under the digital network environment, and explore an appropriate way to promote the development of copyright industries and balance the interests among copyright holders, intermediaries and end-users. Theoretical and comparative research will be used to help find the inspiration for the improvement of Chinese digital copyright system and application and enforcement of law. The first part will brief the economics of copyright protection. The second part will examine the ISP liability legislations in different countries, focusing on relevant laws of a couple of jurisdictions such as the United States, France, Hong Kong and Mainland China, since typical models are represented by the DMCA of the United States, the "three strikes and you're out" policy of France, and Hong Kong's public consultation on the copyright protection in the digital environment. Relevant cases will be discussed to shed light on the impact of the lawmaking to industries. The third part will suggest

recommendations for China's copyright reform in the field of ISP liability and safe harbor and will analyze whether the interest balance could be achieved in which the protection on copyright holders will not result in the suffocating of the development of telecommunication technologies.

Areto Imoukhuede

Assistant Professor, Nova Southeastern University, USA.

Freedom from Ignorance: The International and U.S. Constitutional Duty to Provide Public Education

Public education is a means by which government ensures that every individual is able to enter the world marketplace with the foundational tools to compete without handicap or unfair disadvantage arising from the intergenerational affects of wealth that lie outside an individual's control. In the absence of this safeguard, the very foundation upon which today's world economy has been built would be called into question. Unfortunately, the U.S. Supreme Court's liberty-centered constitutional rights doctrine has short-circuited what otherwise should have been a realization of a U.S. constitutional duty to provide public education.

This article argues that current U.S. education rights doctrine is the flawed result of an American bias towards negative rights. This bias has led the U.S. Supreme court to undermine established U.S. traditions and the internationally recognized positive duty to provide public education. The article analyzes how infamous *San Antonio v. Rodriguez* case and its progeny are out of step with U.S. history and tradition as well as international norms as expressed by the U.N. Charter and several United Nations Conventions. Viewed from the limited perspective of rights as liberties, the article recognizes that the concern with declaring a fundamental right to education is that education legislation would be strictly scrutinized, thus causing the undesired result of preventing the enactment of laws regarding education. It argues that recognizing the fundamental right to public education as a positive right would correct a major inconsistency in U.S. constitutional law and bring it more in line with international understandings of social justice. The article concludes that in order to safeguard the fundamental right to public education, a new form of fundamental rights analysis for all positive rights must be developed. The details of such a rights analysis will take time to develop, but must begin with an understanding that traditional strict scrutiny analysis cannot be applied in the same way to positive rights as it is to negative rights.

Smita Kheria

Lecturer, University of Edinburgh, UK.

Perspectives of Digital Artists on Copyright

The digital environment enables creation of not only many different types of creative works in which copyright may or may not subsist, but also facilitates their creation, dissemination and experience in very diverse contexts and manifestations in different forms, both of which are continually growing in number. As a result, copyright law has faced considerable challenges, both conceptual and practical, from the onslaught of digital technologies and consequently been strengthened. This paper focuses on the interaction of copyright with the everyday life of creators and draws upon first hand accounts from digital artists to explore what law means in the local context of artist's creative practice based in the digital environment. It focuses on the life that law and policy take, in ways which are in contrast with their own purpose, because of the various connections and complexities between the artist and other actors in an artistic practice. It uses the perspective of artists on matters such as creation, dissemination and exploitation of their artworks to address the following questions: Is the law of copyright, as it currently stands, fit for purpose for these creators: is it encouraging creativity or inhibiting it? More broadly, is copyright inhibiting those cultural practices which are based on drawing upon existing data, information and works and remaking or remixing them to create new creative works?

Lynne Marie Kohm

Professor, Regent University School of Law, USA.

The Challenges of Family Law and Policy in Immigration Regulation

Stable nations and societies are largely based on stable family law and policy. Questions of family preservation and stability in immigration policy present new dimensions of legal intervention. For example, does spousal immigration with an extended waiting period encourage family stability? Do children benefit from their parents' immigration, and if so, how? Legal immigration presents challenges to family preservation, causing some migrants to resort to illegal immigration for family preservation or family restoration. How are marriage and parenting affected by illegal immigration? What, if any, moral obligations are required of societies adhering to the rule of law, but wishing to operate with global justice, while balancing the desire to exercise and demonstrate mercy with security concerns, economic concerns and legal policy concerns?

This presentation will offer a review of the relevant literature, and present the arguments from each angle of this family law and policy discussion. It will consider the latest developments in marriage and immigration policy regarding the United States federal Defense of Marriage Act (DOMA), the clash of family law and illegal immigration, and family law in the context of national security. It will also consider immigration law and asylum to protect children taken from their families in the global trafficking scourge, and the concept of the rule of law in setting policy to establish both present and future national stability, and attain global justice. This presentation will result in an article that will offer a comprehensive approach to these challenges of family law policy and immigration regulation, with the objective of providing a strategy for current and developing nations toward the formulation of strong family policy promoting national stability in the face of global mobilization of families.

Maria Kyprianou
Ph.D. Student, University of Leicester, UK.

Thinking Outside the Box: Policies behind Perspectives of the Transnational Crime of Human Trafficking for the Purposes of Sexual Exploitation

When examining and evaluating the effectiveness and efficiency of Human Trafficking Laws in a global standpoint, one could not disregard the different views and perspectives on the matter, including feminist perspectives, liberal or democratic views, human rights perceptions, dignitarian or even utilitarian perspectives, that most commonly present the desirable results of a national or International public Policy.

This paper seeks to explore the multiplicity of perspectives of the transnational crime of Human Trafficking, through the study of International Instruments, such as the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the UN Convention against Transnational Organized Crime*. Furthermore, looking at different state's practices would aid in the illustration of various perspectives enabling the fulfilment of specific policies. When it comes to serving international policies, the cooperation of many states, especially the states participating in the Human Trafficking as commencement, transit or destination countries, is deemed essential.

As a result, this paper aspires to achieve three main objectives: to reveal the policy considerations of each aforementioned perspective, to investigate the advantages and disadvantages of the current identified perspectives and finally to demonstrate that the use of policy considerations should be limited in serving the purposes of International and European Conventions, yet tailored to the specific requirements of each country.

Simone Lamont-Black

Lecturer, University of Edinburgh, UK.

Purchasing a 'Black Hole' - Liability of the Lawful Holder of the Bill of Lading for Damage caused by Dangerous Cargo?

The paper looks at the potential liabilities of the lawful holder of the bill of lading for dangerous cargo. Whilst the obligation to inform the carrier of the dangerous nature and liability resulting from the breach is with the shipper, English case-law contains conflicting decisions as to whether the lawful holder of the bill of lading is burdened with such liability by virtue of exercising his rights under the bill of lading against the carrier. The Law Commission Document 'Rights of Suit in Respect to Carriage of Goods by Sea' (LAW COM No 196; SCOT LAW COM No 130, at para 3.22) on the reform of the Bill of Lading Act 1855 rejected the proposition that special provision should be made to avoid transfer of liability of such liability to the holder of the bill of lading.

The paper investigates the rationale of such a transfer of liability and its suitability with general principles of English law and drawing on a comparative analysis with other legal systems on carriage of goods.

The relevant provisions of international carriage conventions, in particular the recent 2008 UN Convention on contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), which contains provisions regarding a transfer or rights and duties, and also road, rail and air carriage conventions with their provisions on consignment notes and waybills will be analysed.

It is argued that such conventions only transfer liabilities clearly indicated on the bill of lading, waybill or consignment note. In order to transfer the shipper's personal duty on a third party lawful holder of the bill of lading further elements are required, justifying the imposition of liability. Otherwise the cargo purchaser could end up buying a 'black hole' of liabilities, practically insuring the risk of enforcement against the shipper.

Auke R. Leen

Professor, Leiden University, the Netherlands.

The Fiscal Sovereignty of the E.U. Member States

On September 7, 2010, Barosso, President of the European Commission, delivered his first State of the Union Address. Since matters relating to financing go to the very heart of the common undertaking, the revenues of the EU played a central role. The present system has two major drawbacks. First, it leads to the infamous *juste retour* thinking by the Member States: emphasis is placed on net contributors and net recipients. The EU, therefore, seeks a greater degree of autonomy *vis à vis* the states. Second, the EU has evolved from a mere union of states to a union of states and citizens, and a direct bond between citizens and the Union is the next logical step. A Eurotax, paid to the EU by its citizens, would solve both problems.

A Eurotax is a bold idea, but a problematic one. It brings to the forefront the tension between those who want the EU to become the United States of Europe and those who want to maintain the status quo. The Eurotax highlights the debate regarding the fiscal sovereignty of the Member States. How can the EU cope with this problem is the question the paper tries to answer.

A long-held goal for the EU, as Article 201 of the Treaty of Rome states, just as Article 311 of the Treaty of Lisbon, is to maintain a genuine system of own resources. The Commission states that own resources are revenue flowing automatically to the European Union budget, pursuant to the treaties and implementing legislation, without the need for any subsequent decision by national authorities. How this definition relates to the cornerstone principle for any future system of the EU's own resources, with respect to the fiscal sovereignty of Member States, however, remains unclear.

At present, the EU is considering direct taxes on consumption, transport, communications, and financial services. One problem with the proposed taxes concerns the quality of the legislative process. The problem is the shopping list of criteria the Eurotax would have to fulfill. The tax actually chosen will, no doubt, be an *ad hoc* political choice based on odd compromises. In order to facilitate a rational discussion that will fulfill the quality demands of both national and international law, the EU must arrive at a manageable list of criteria.

The reasoning behind the, at present, EU's own traditional resources is convincing: they are the direct result of the existence of the EU and its policies. The European taxes proposed by the EU, however, are not the direct result of EU policies, unless one artificially strains the argument. Member States interpret these new resources as a loss of

fiscal sovereignty. Hence, the EU emphasizes that full fiscal sovereignty will remain with the Member States. From an economic perspective, however, —the eternal socialization of an asset's return is the same as the socialization of the asset itself. *Mutatis mutandis*, the same goes for the temporary pooling of taxation revenue, which also entails a loss of fiscal sovereignty for Member States.

Jim Lennertz

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Living the Ticking Bomb 'Hypothetical'? Torture in the 'War on Terror' under U.S. and International Law

If state authorities have reason to believe that a suspect knows critical details of a terroristic plot may they legally and/or morally inflict extraordinary pain to obtain those details and prevent more severe harm to innocent civilians?

Torture's long history in western societies goes back at least to Athens and Rome. The international community after World War II recommitted itself to rights-based constraints that prohibit torture and inhuman treatment in all circumstances. In 1994 the United States enacted a statutory basis for enforcement of these prohibitions. On September 11, 2001, the ticking bomb hypothetical ceased for many to be hypothetical.

Indefinite detention and questionable interrogation methods continue to be justified by a "quasi-law-of-war" model with increased governmental authority and reduced combatant and civilian protections. Indeed, some assert that the substance of U.S. policy has persisted under President Obama even as the rhetoric has softened.

Torture in the war on terror has not been clearly and effectively dealt with by the United States or by the world community. The United States has failed to meaningfully live up to its own commitment to checks and balances, the rule of law and individual rights. The United States asserts the need for new paradigms for the law of war and human rights but without broad international participation. Radical groups fail to realize that the ends – redress of legitimate grievances – do not justify the means – a reign of terror that is torture writ large. The international community wrings its hands at terror, torture and the unilateralism of the U.S., but without resolute, balanced and sustained commitment to crafting international human rights norms that reconcile new realities with enduring values. This research will analyze these developments and propose procedural and substantive ways to facilitate such reconciliation.

Devin Sen Lin

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Leapfrog Attempted: Unjust Enrichment, Implied Contract or Quitsclose Trust?

The paper thoroughly exams all the relevant legal devices for a sub-contractor to cover payment directly from the employer in the case of the solvency of the main-contract including (a) the direct payment clause in the main contract; (b) unjust enrichment in the law of restitution; (c) implied contract; (d) collateral contract; and (e) the Quitsclose trust. The paper goes through the landmark cases on UK and Hong Kong Construction Law with *Yew Sang Hong Ltd v Hong Kong Housing Authority* [2008] 3 HKLRD 307 as a case study. The paper tries to answer the question whether and on what grounds can a nominated sub-contractor cover the consideration of the subcontract work directly from the employer, where the main contractor had become bankrupt? As subcontracting remains a salient feature in the construction industry where the bankruptcy of the main contractor is not a rare phenomenon, the search for the supportive legal doctrines is of the immediate interests of nominated sub-contractors. Under the dual-contract framework, the employer is only bound by the main contract to pay the principal contractor, whilst the nominated sub-contractors are to be paid by the main contractor according to the terms in the sub-contracts. After a thorough exploration of the relevant legal doctrines, the paper proves that the sub-contractors are in the position of bare legal protection if the main contractor goes bankrupt before the advancement of payment. The problem appears to be unacceptable if viewed against the background that in Hong Kong many employers give direct instructions to the subcontractors on the site work. The research demonstrates that the current position in the construction law of Hong Kong is disappointing, providing insufficient protection of the rights of sub-contractors. The paper calls for the legislative intervention to provide a direct remedy for sub-contractors.

Gabriel Loretto Lochagin

University of Sao Paulo, Brazil.

Andre Carvalho

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Jose Mauricio Conti

University of Sao Paulo, Brazil.

Legal Qualification of Public Expenditure

The purpose of this work is to analyze how the public expenditure can be legally evaluated since it has different values according to the legal rules in public finance. As a matter of fact, the rules pursue the present trend in politics and preferences from individuals and for this reason they sometimes represent this judgment based on the human behavior. Some scholars call this “behavioral public finance” and illustrate how the financial and tax rules are able to influence the behavior and judgment of individuals (and also how this can be sometimes misinterpreted by heuristics and biases). I argue that this trend can be inferred by some constitutional rules in a country – based on, *v. g.*, Brazilian experience in public finance rules. In Brazilian Constitution, it is possible to observe several rules that reflect a specific value in the public expenditure as a result of some heuristics and biases, *e. g.*, minimum mandatory spending and earmarking. After this constitutional process, the same phenomenon occurs in the budget with respect to some budgetary techniques whose function is to give a legal qualification on specific public expenditure, *i. e.*, Congressmen use their control over the budget-making process to “protect” some expenditure over others based on the same process of heuristics and biases, which sometimes could be used by some politicians as a “reelection tool”. I conclude that even if sometimes it is not possible preventing these judgments based on biases, we have some advantages of being aware of these choices: (i) it avoids pork-barrel utilization of public expenditure; (ii) it serves to reduce judicial claims over the budget based on an aprioristic value of the public expenditure, as long as these legal qualifications is conceived as a result of the current preferences.

Liza Lovdahl Gormsen
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How Revisiting Fundamental Concepts of Article 101 TFEU Clarifies Why the Court of Justice Maintains its Approach to Article 102 TFEU Despite the Commission's New Policy Towards Abuse of Dominance

During the modernisation of Article 101,¹⁶ it became clear that the European Commission was focused on adopting an economics-based approach to agreements and concerted practices.¹⁷ A similar attempt was made during the modernisation of Article 102.¹⁸ In the context of abuse of dominance, an economics-based approach was understood to require 'a careful examination of how competition works in each particular market in order to evaluate how specific company strategies affect consumer welfare'.¹⁹ In the Commission's policy review of Article 102, it linked the objective of consumer welfare with effects on consumers.²⁰ Linking consumer welfare to effects implies an examination of what effect dominant undertakings' conduct has on consumers. Not only may this be an impossible task, but also the Court of Justice has never required effects on consumers to be part of establishing whether a dominant undertaking is abusing its position.²¹

This paper explains why linking consumer welfare to effects in Article 101 makes sense and why this should be avoided in Article 102. It entails a conceptual analysis of 'object' and 'effect' and demonstrates how those concepts are applied differently in the two provisions. Recent case law in Article 101 has blurred the distinction between 'object' and 'effect', so the paper questions what implications that may

¹⁶ The main driver behind the initiation of the modernisation of Article 101 (at the time Article 81) was the Commission's Green Paper on Vertical Restraints in EC competition Policy, COM (96) 721 final.

¹⁷ For example, Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty OJ C [2004] 101/97.

¹⁸ DG COMP's discussion paper on the Application of Article 82 of the Treaty to Exclusionary Abuses (December, 2005). Available at: <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>.

¹⁹ EAGCP Report An economic approach to Article 82 EC, July, 2005, page 2. Available at: http://ec.europa.eu/competition/publications/studies/eagcp_july_21_05.pdf.

²⁰ OJ [2009] C45/7 Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, paragraph 19 in conjunction with footnote 2.

²¹ Case T-203/01 Manufacture Française des Pneumatiques Michelin v. Commission [2003] ECR II-4071; Case C-95/04P British Airways plc v. Commission [2007] ECR I-2331; T-321/05 AstraZeneca v. Commission.

have for the application of Article 102. It concludes that revisiting fundamental concepts in Article 101 allow us to understand why the Court of Justice's application of Article 102 remains the same despite the Commission's new policy approach to Article 102.

Mahfuz

Ph.D. Student, University of Manchester, UK.

A Proportionate Remedy for Both the Insured and Insurer

Insurance contract is seen as a noble approach of cooperation during the tough time of the insured caused by the unwanted peril. This noble approach is threatened by some ill-minded insureds who misuses the policy to obtain that cooperation. To stop that malpractice the Marine Insurance Act 1906 imposed the duty to observe utmost good faith. S. 18 explains the duty holding that the insured must disclose every material fact before making contract. If anyone fails to observe that duty the insurer shall be allowed to avoid the contract *ab initio* (S.17).

The remedy sounds perfect, but in practice it is imperfect since it is too heavy that an honest insured also get caught by it. For example, Y has insured his house but failed to realise that a certain fact would be material which was actually material in the eye of a reasonable insurer and as such he did not disclose. According to the English law, the insurer can avoid that contract. On the other hand X has insured his house fraudulently hiding some material information from the insurer. The law says that X shall face the similar punishment.

To avoid that unreasonable effect of the remedy the Law Commission proposed that only the fraudulent misrepresentation shall attract the remedy of avoidance. If the misrepresentation is made by negligence the insurer shall be placed where he should have been if there were no misrepresentation. If the insured acts innocently the insurer shall not have any remedy.

The proposed remedy is not free from loopholes. Such as, an honest insured who fails to disclose a very important fact that would have made the insurer either to increase the premium or refuse the policy that misrepresentation shall bring no remedy for the insurer leading it disproportionate for him. Consequently, the proposed recommendation should be reconsidered for the insured and insurer to have some remedy making it proportionate for both parties. Further to that, the reckless insured should face lighter punishment than the fraudulent insured by having the premiums back.

Michael Malloy

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McGeorge School of Law, USA.

Zone Defense: The Euro Zone and the Crisis in Financial Services Markets

The financial crisis that originated in the collapse of the U.S. subprime mortgage market in 2008 quickly metamorphosed into a multipolar capital markets meltdown. In its latest manifestation, the crisis has significantly affected the economies of many states that are members of the European Union, and in particular of states that participate in the common currency of the Euro zone. Member states like Ireland and Greece have been driven by the financial distress into political crisis as well. The paper explores three interrelated questions prompted by these events: (i) Are the structures of the EU and of the Euro zone adequate to resolve systemic crisis? (ii) Did Euro zone policies and objectives exacerbate the financial crises in individual national economies? (iii) Should the Euro zone be contracted or dismantled as a result of the crisis? The paper considers each of these issues and concludes that the current debate should shift its focus from the solvency issues that have dominated public attention so far, and concentrate on improving safety and soundness supervision throughout the EU.

John Matheson

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Common Law Veil Piercing in the United States: An Empirical Examination

Limited liability of business owners for the liabilities of their companies has been commonplace in the USA for over one hundred and fifty years. This concept of limited liability means that a business owner's potential personal loss is a fixed amount; the amount invested in the business, usually in the form of stock ownership. If the business succeeds, the owner obtains the profits. If the business fails, all of the losses beyond the owner's fixed investment are absorbed by others, that is, voluntary or involuntary creditors, or society at large.

Piercing the corporate veil is a common law legal doctrine used to break through the presumptive traditional limited liability for owners, and to hold shareholders accountable as though the corporation's action was the shareholders' own. Piercing the corporate veil is the most litigated issue in U.S. corporate law.

The empirical project summarized by this Article is unique. This study is the first to empirically examine the issue of substantive common law piercing of the corporate veil in the USA. One would generally expect that any common law doctrine would be applied by the courts neutrally, that is, evenhandedly except for variations in factors explicitly and specifically identified as part of the applicable test. Given that presumption, the empirical results of this study, even on a descriptive level, are startling. More fundamentally, using advanced statistical techniques of quantitative analysis, this study has produced a number of key findings brought to light only through the implementation of logistic regression methodology.

Daleen Millard

Associate Professor, University of Johannesburg, South Africa.

Permanent Impairment, Road Accident Victims and the “AMA Guides”: Going Out On A Limb?

The Road Accident Fund Act²² allows for the payment of compensation to victims of road accidents for personal injuries and death. The Road Accident Fund Amendment Act²³ introduced far-reaching changes to the nature and extent of compensation payable to victims. One of these changes was brought about by the introduction of Regulation 3(1)(b) of the Road Accident Regulations, 2008. This particular regulation prescribes the American Medical Association’s Guides as a testing model for determining whether a victim’s injuries are sufficiently serious to entitle that victim to the payment of a lump sum for non-patrimonial loss.

This paper takes a look at the implementation of testing models as prescribed by legislation in general and uses the example of the testing model prescribed by the Compensation for Occupational Injuries and Diseases Act²⁴ as an example of how any chosen testing model should serve the purpose of the legislation in terms of which it had been adopted. It also refers to the German occupational injuries system as an example in international law of how testing models are designed with a specific purpose in mind.

The paper concludes that despite the fact that this particular regulation had been found to be constitutional, it is extremely problematic to employ a foreign testing model, first and foremost because it bears no relation to the objective of the Road Accident Fund Act and secondly because it was written for a purpose that has nothing to do with South African road accident victims. Finally, it proceeds to suggest alternative methods of achieving the aims of the Road Accident Fund Act as far as permanent impairment is concerned.

²² Act 56 of 1996.

²³ Act 19 of 2005.

²⁴ Act 130 of 1993.

Connie Davis Powell

Assistant Professor, Baylor Law School, USA.

We All Know it's a Knock-Off! Re-Evaluating the Need for the Post Sale Confusion Doctrine

"Copy bags" and "replicas". Canal Street²⁵ exists almost everywhere. Whether it is a kiosk in a mall, a flea market, or the Internet, vendors are making available to many consumers what they desire—counterfeit handbags and knock-off luxury goods. In a society where counterfeits are not only sought out by consumers, but also recognized by the sophisticated shopper, it is important to re-evaluate trademark doctrine to ensure it has not been expanded beyond its core policy principles. This Article will evaluate whether the doctrine of post-sale confusion is an illegitimate expansion of trademark law. The Article will proceed in three parts. First, the Article will provide a synopsis of the two core policies of trademark law—consumer protection and trade diversion. Second, the Article will look at the development of the post-sale confusion doctrine and identify the principle that the courts sought to address when adopting the doctrine. Third and finally, the Article will conclude by arguing that the post-sale confusion doctrine is unnecessary and not aligned with either core principles of trademark law, giving how savvy consumers have become with brand identity and the availability of other remedies for the sale and distribution of counterfeit goods.

²⁵ Canal Street is the infamous street located in New York's Chinatown known for the availability of replica bags, watches and other high-end goods.

Abigail Pressler

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Penumbra: A Comedy of Illegitimate Means

The purpose of this paper is to elaborate the idea of civil disobedience as a duty from a legal-moral perspective. It is written in the form of a humorous allegory with footnotes providing theoretical and historical commentary. The prologue and epilogue are in the style of Shakespeare.

In Part I of the paper, I present a morally-grey law to establish the different theories of Austin, Hart, Kelsen, Dworkin, and St. Thomas Aquinas in a neutral setting. In Part II, I address the problem of moral relativism and suggest that it is an illusion. This is presented as a debate between the protagonist and a judge. The protagonist sets out to defend morality as a universal product of our common humanity, dismissing moral pluralism as the product of different perspectives of concept/conception. In this section I also present a patently immoral law and offer the responses of Austin, Hart, Kelsen, and Dworkin. It concludes with an introduction to my own moral theory of law, including why we have a duty to disobey laws that we know to be wrong. Part III considers Durkheim's concept of anomie, the effect of changing laws on society, including moral contagion and mob mentality; it parallels the story of Antigone. Part IV concludes with an affirmation of the power of civil disobedience to effect great change. It illustrates the total effect of civil disobedience when practiced as a duty-mass refusal to cooperate leading to impossible enforcement and change.

Martin Pritikin

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Ezra Ross

Lecturer, UCLA School of Law, USA.

The Collection Gap: Under Enforcement of Corporate and White-Collar Fines and Penalties

Civil and criminal monetary sanctions (fines, penalties, and restitution orders) are primary tools in the enforcement activities of the modern administrative state, particularly in the context of corporate wrongdoing.

Although the enforcement literature debates the fairness and efficiency of imposing corporate sanctions, once imposed, those sanctions must be collected to be effective. Yet federal and state agencies are leaving untold billions in collectible fines unrecovered. This is a problem of both theoretical and practical importance, yet it has been largely overlooked. This Article, for the first time, amasses the evidence of pervasive governmental undercollection; rebuts the argument that the problem is due to factors beyond governmental control; examines the root causes of undercollection; and recommends solutions that address the political and economic circumstances that impede reform.

Thilla Rajaretnam

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Online Trading Practices: The Benefits and Problems for Internet Users

This paper examines the benefits and problems from the use of behaviour-tracking ad system, the phenomenon of online behavioural advertising (OBA) and sentiment analysis, and the privacy implications for Internet users from the use of such technologies. Technology has given corporations the ability to collect, correlate and manipulate personal information. The significance of technology for privacy concerns the flow of personal information with or without the consent of data subjects. Privacy rests on two principles that include: the right to be left alone; and the right to control personal information. The emergence and launch of OBA, and sentiment analysis have profound implications for online information privacy. ISPs and e-businesses are using behavioural-tracking ad system to track the web activities of Internet users for OBA; and sentiment analysis or sentiment mining, where online conversations are mined for the sentiments and emotions that individuals express on websites only, to be exploited by advertisers. Personal information, once collected by Internet service providers (ISPs) and online businesses is being used across a variety of web domains that are owned and operated by different entities without consumer consent or even knowledge. There are a broad range of views on the use of such technologies. The use of OBA and sentiment analysis is claimed to help e-businesses tailor advertisements based on previous interactions with a web visitor making it cost efficient while others compare its use to the “postal service steaming open your letters so that they could scan the content, work out your interests, and then deliver a better class of junk mail”. The economic benefit from the use of such technology has increased the collection of even more personal information. This paper will examine if consumers have any protection against such activities under the current consumer protection and privacy laws in Australia.

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The Posted Workers Directive: A Critical Study of its Applicability in Today's European Union

This paper critically analyses whether the Posted Workers Directive²⁶ continues to be coherent in the current social and economic climate of the European Union.

This Directive governs workers posted to another Member State to fulfil a short-term contract, under the freedom to provide services. Since the Directive came into effect, the EU has witnessed unprecedented changes. The accession of twelve Member States, primarily from Eastern Europe, has highlighted the wage disparities that remain within the Union.

The Directive intends to maintain fair competition and protect the rights of workers. However, it is possible that the Directive can no longer be tailored to the current needs of the Union. Recent case law has revealed a growing unrest in this area, especially during the recession and at times of locally high unemployment. The infamous *Laval*²⁷ case replaced Swedish workers with cheaper posted workers from Latvia. The Swedish trade unionists' social rights were quashed in the interests of securing the economic freedom to provide services.

This paper elicits the timeless issues of the European Union: national law versus Union law; the compatibility of social interests with economic factors; and the consequences of an expanding Union. Equally, this paper is based on a very current debate; as we witness an organic evolution of the rising status of social values in today's EU, the anticipated importance of the EU Charter of Fundamental Rights is at the forefront of academic debate in this area. The Lisbon Treaty has changed the EU legal order and these developments are reflected in this much-debated Directive.

²⁶ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L18, 21/01/1997, p. 1.

²⁷ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

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Reconceptualising Labour Law for Informal Economic Activities

The normative goal of labour law as redistribution, addressing the power imbalance between workers and employer, and reducing industrial conflict is the creation of the industrial revolution period in the developed countries (Fudge 2010). Ideologically labour law is rooted in the subordinate status of workers inherited from the master-servant law of the medieval period (in common law countries) (Deakin 2007, 2005). Conceptually labour law regulates relations between the employer and the employees in the traditional industrial model (Supiot 2001).

Based on developed country model of industrial relations, labour law is increasing found wanting in regulating informal economic activities, which is significantly a developing country phenomenon. In this backdrop I propose to reconceptualise labour law so that it is able to address the mischief posed by informal economic activities prevalent in the developing countries.

I argue that economist and philosopher Amartya Sen's Capability Approach, which is the positive freedom of individuals to choose what they have reason to value, can provide a new normative basis of labour law (Sen 1999, 1992, 1979). I argue that the new normative basis of labour law must be the enhancement of capabilities of the workers.

I supplement Sen's non-dogmatic approach with Elizabeth Anderson's theorising of democratic equality as an ideological basis of labour law (Anderson 1999, 2010). Anderson's concept of democratic equality for the workers mean that the workers (irrespective of their employment status) should be equally enabled to be able to participate in the cooperative production process as equals.

I further argue that labour law needs to have a new conceptual basis on the lines suggested by the Alain Supiot Report, which proposes substitution of the 'employer-employee' conceptualisation with the overarching concept of 'work' (Supiot 2001: 24-57). Moreover, Sen's idea of 'integrated institutions' helps conceptualise the role of social and political institutions (such as family, kinship relations, NGOs, media etc.) in labour law dispensation (Sen 2009: 75-86).

REFERENCES:

1. Alain Supiot, Maria Emilia Casas, Jean de Munck, Peter Hanau, Anders L. Johansson, Pamela Meadows, Enzo Mingione, Robert Salais and Paul van der Heijden, *Beyond Employment Changes in Work and the Future of Labour Law in Europe* (New York: Oxford University Press, 2001).

2. Amartya Sen, *Development as Freedom* (Oxford: OUP, 1999).
3. Amartya Sen, *Inequality Reexamined* (New York: Russell Sage Foundation/Cambridge: Harvard University Press, 1992).
4. Amartya Sen, "Equality of What?" The Tanner Lecture on Human Values, delivered at Stanford University, May 22, 1979 in *The Tanner Lectures On Human Values, Vol. I* (Salt Lake City: University of Utah Press/Cambridge, London, Melbourne and Sydney: Cambridge University Press, 1980).
5. Amartya Sen, *The Idea of Justice* (Cambridge: Harvard University Press, 2009).
6. Elizabeth Anderson, "Justifying the capabilities approach to justice" in Harry Brighouse and Ingrid Robeyns (eds.), *Measuring Justice Primary Goods and Capabilities* (Cambridge: Cambridge University Press, 2010) 81.
7. Elizabeth S. Anderson, "What is the Point of Equality?", 109: 2 *Ethics* (1999) 287.
8. Judy Fudge, "Labour as a 'Fictive Commodity': Radically Reconceptualizing labour Law" (2010: in file with author).
9. Simon Deakin and Frank Wilkinson, *The Law of the Labour Market; Industrialization, Employment, and Legal Evolution* (Oxford U.P., Oxford, 2005).
10. Simon Deakin, Priya Lele and Mathias Siems, "The evolution of labour law: Calibrating and comparing regulatory regimes", 146: 3-4 *International Labour Review* (2007) 133.

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Parody as a 'Fair Use' Exception to Copyright Infringement: How Funny is it Anyway?

A parody is a work that ridicules another, usually well-known work, by imitating it in a comic way. By its nature, parody demands some taking from the original work being parodied. Unlike other forms of fair use, a fairly extensive use of the original work is permitted in a parody in order to "conjure up" the original. A new dimension regarding parody work came to be known for the first time in the year 1994 when the United States' Supreme Court approved the following objective test for determining whether a work was a parody of another - "whether a parodic character may reasonably be perceived." The test lies in the fact that the parodist may be allowed only to take as much from the original work as is necessary to make the audience aware that the original is being mimicked. Since parody involves mimicking the expression, words and style of another author, it may collide with the claims of such author of the original work being mimicked. Thus, most parody law suits parade around four broad areas of discussion and dispute, which this paper aims at discussing in detail: (a) Parodic works may violate the Copyright of an author over his original work; (b) it may amount to violation of a public figure's Right to Publicity, which includes their right to control their name, likeness, image and identity from being commercially exploited; (c) it may affect the moral rights of an author by portraying his work in a manner which may be demeaning to the author's reputation and his work; (d) it may have the effect of diluting an individual's trademark rights. This paper aims at proving that parody, as an art form is not, and should not be actionable under intellectual property law, as it achieves advancement of knowledge and progress of the arts by stimulating creativity, with the critical use of humour and satire as its tools.

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It's Your Trial and I Can Lie If I Want To: Absolute Privilege for Witness Testimony

In the United States, a witness in both civil and criminal cases is sworn to tell the truth, the whole truth and nothing but the truth. If a witness does not, the government may prosecute under the criminal law for perjury, defined as "swearing falsely".²⁸

There is also a remedy against falsehoods under the civil law, *i.e.*, defamation, classified as an intentional tort against persons. The components of a defamation tort are: 1) communication to a third party; 2) of an untrue statement about a person; 3) damaging to that person's reputation.

The issue is whether the victim of false testimony given on the witness stand may sue for defamation, instead of or in addition to any government action in perjury. Most people are surprised to learn that recovery is barred, because testimony given by witnesses in court is absolutely privileged and may not form the basis of a suit in defamation. The question is particularly pertinent if defamation occurs in a suit sounding in civil law, where the government is less likely to prosecute for perjury.

This article discusses the history, use and continued validity of absolute privilege for false statements in sworn court testimony, drawing on existing scholarship (law review articles, books and cases) and research in the New York State courts to determine to what extent courts have elected to prosecute perjurers if the perjury occurred in civil cases.

²⁸ *I.e.*, perjury in the third degree (a class A misdemeanor). See NYS statutes § 210 *et seq.* There is also perjury in the second degree (a class E felony); and perjury in the first degree (a class D felony) "when he swears falsely and when his false statement (a) consists of testimony, and (b) is material to the action, proceeding or matter in which it is made."

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As the Need to Impose Global Taxes Becomes More Pressing so Does the Need to Re-Examine the Sovereign Power to Impose Taxation

The recent global financial crisis and the threat of global warming presents world leaders with global problems created, largely, by corporations operating globally. These global corporations are called Transnational Corporations (TNCs). In response to the problems created by TNCs global environmental taxes, global currency transaction taxes and financial transaction taxes have been proposed.

Currently, national taxes are imposed on the profits of corporations and are an uncontroversial exercise of the authority of a nation states' sovereignty. Unfortunately TNCs can easily avoid paying national taxes as they operate supranationally and can shift profits between national jurisdictions in order to seek the most favourable taxing jurisdiction for their enterprise.

Sovereignty, in the final analysis is about a plausible and reasonably effective claim to ultimate authority, made on behalf of a society which is (more or less successfully) constitutive of that society *as* a political society, or as a polity.²⁹

In order to impose supranational taxes on currency trading, financial transactions and carbon, nations must begin to work beyond their national institutions and national authority in the same way the TNCs operate beyond national boundaries. Different approaches must be found to impose authority outside the normal national taxing authorities.

If nation states are unable to effectively impose taxation it is uncontroversial to assert this as an economic threat. "Taxes allow governments to provide for public goods, like public services that give equal access to all social services (education, health, environment and so on)."³⁰

However, if nation states are unable to effectively impose taxation, this also threatens democracy.

Taxes allow governments to have more legitimacy, as citizens can exert pressure for efficient spending and governments can be made

²⁹ Walker N, 'Late Sovereignty in the European Union', in Walker N (ed), *Sovereignty in Transition*, published by Hart Publishing, Oxford and Portland Oregon, 2003, 17

³⁰ Kohonen M and Mestrum F (eds), *Tax Justice: Putting global inequality on the agenda*, Pluto Press, London, 2009, 39

accountable. Taxation can become an important element in the pursuit of good governance and democratisation³¹.

The effective imposition of supranational taxes on TNCs will provide nation states the means to counter the effects of climate change and financial instability caused by TNCs. The effective imposition of supranational taxes on TNCs will also improve the legitimacy of nation states and make governments more accountable to their citizenry rather than to TNCs. Therefore, the question of how to claim sovereign power to impose supranational taxes becomes ever more urgent.

³¹ Ibid, 39-40

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Electronic Discovery and the U.S. Constitution: Inaccessible Justice

Computers are the cynosure of American society. As a result, most information is stored electronically and only a small amount of information ever becomes a paper document. This explosion of electronically stored information has affected every aspect of society, including the court system. Litigation is drastically different than a few years ago due to this onset of electronically stored information. The discovery of electronically stored information in litigation has become known as electronic discovery. Electronic discovery is expensive and complicated, and thus, litigants are settling frivolous cases to avoid the costs and complexities of engaging in discovery to exchange electronically stored information. Even now, many attorneys do not understand how to obtain and utilize electronically stored information nor do they have the resources to engage an information technology technician or an electronic discovery vendor to assist them. Often judges are not educated in the exchange of electronically stored information either. The advent of electronic discovery in civil litigation is not only foreign to many attorneys and judges, but also unrepresented parties, and thus, impacting indigents' access to justice.

The United States Supreme Court has declared access to justice – including access to the courts – a fundamental right. The United States recognizes a right to counsel for indigent litigants in criminal cases, but not civil cases. Indigent civil litigants already are at the losing end when involved in the court system, even with the aid of the self-help centers and the handful of volunteer lawyers and legal aid societies. Poor litigants are usually self-represented in civil matters because of the inability to afford counsel. Yet, significant rights – basic needs -- may be at stake in these cases, such as housing, safety, health, child custody or sustenance. Electronic discovery is significantly impacting access to justice because the costs and complexities of electronic discovery are further preventing poor and even moderate income litigants from accessing justice in the legal system.

The onset of electronic discovery affects indigent litigants' ability to obtain access to justice, but law schools, lawyers, judges, courthouses, bar associations, legal aid societies, electronic discovery vendors, and others must team together to prevent electronic discovery from further widening the gap for poor people. Employing some proactive measures will lay a foundation to ensure that the self-represented litigant is not left behind.

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An Ominous Fate for the 13th Directive on Takeover Bids: Will Economic Nationalism in the EU Bar the Creation of an Open Market for Corporate Control?

The rise of economic nationalism in the EU has been one of the less discussed consequences stemming from the financial crisis. Member States have attempted to block several acquisitions from foreign acquirers, even more so than in the past, on the basis that the targeted domestic companies are strategically important to the nation's economic sovereignty. Within this context, even the UK's open market for corporate control has been questioned, preceding the successful takeover of UK's *Cadbury Plc.* by US multinational *Kraft Foods Inc.* earlier in 2010. At present, fearing an attempt by French dairy giant *Lactalis* to gain control of rival *Parmalat*, Italy is moving towards drawing up a list of "strategic" industrial sectors for which foreign takeover bids are excluded. The 13th Directive on Takeover Bids, following the Single Market initiative, was intended to constitute the harmonised regulatory framework that would effectively regulate and facilitate cross border takeovers in the EU. However, implementation patterns show that most Member States have utilised the optionality arrangements of the Directive and have adopted its provisions in a protectionist way. The desired harmonisation has not been achieved and Member States have remained reluctant to adopt provisions that are unfamiliar to their national takeover regulation culture (Hooghten, 2009). As the Directive's revision date in May 2011 is approaching and with barriers to takeover activity having increased, it is important to question the Commission's aims of creating an open market for corporate control in the EU. The paper will discuss the effects of EU takeover law on the domestic level and estimate whether the political need to protect so called 'national champions' from 'foreigners' will temporarily or rather infinitely override the law's ability to push for an EU open market for corporate control.

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What Changed with *Al Skeini v. the UK*?

In the ever growing literature and case-law on extraterritorial application of international human rights treaties, two main approaches to extraterritorial state conduct emerge: namely *effective control* test which is strongly defended by the European Court of Human Rights (ECtHR) and British domestic case-law, and *authority and control* test which is also created by ECtHR in the past but defended by all other human rights mechanisms such as the Inter-American Court and the Human Rights Council of the UN. Recently, the ECtHR in some cases, and British judiciary with respect to British army in Iraq, seems to adopt the 'effective control' test in a way to exclude the application of the authority and control test. They tend to see 'effective control' as the one and only test to trigger state obligations. This means that, the ECHR can not be applied to the instances when State agents bring persons under their actual authority and control by their actions or omissions, if the 'effective control' over the relevant area is not present.

However, this is about to change. Not more than two weeks ago, the ECHR Grand Chamber released a landmark case decision in *Al Skeini and others v. the UK*. It unanimously found that the UK had violated Article 2 of the ECHR, namely right to life, by failing to perform adequate investigation into the deaths of five Iraqi civilians who were killed by British armed forces in 2003 during British security operations in Basrah city. What is the main element of this case, that has the potential for future human rights protection? Is it a step forward? How is 'jurisdiction' interpreted? Is it control over territory, or is it exercise of power over individuals?

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Intellectual Property Protection in the Era of Globalisation – Meeting the Challenge the Chinese Way

Realising that an intellectual property protection system plays a significant role in developing of the market economy addition to promoting international exchange and cooperation in science, the Chinese government considered the protection of intellectual property an important part of its economic reform and Open Door policy introduced in 1978. China joined the World Intellectual Property Organisation in 1980 shortly after opening up. China is also a signatory to most major international intellectual property treaties and has been active in enacting domestic laws.

Particularly, as a result of WTO accession, China has developed its legal system to bring it in line with international practice. However, criticisms from Western countries on China's intellectual property protection continue. Such criticisms are directed not so much to the law, but to enforcement of the law. Under international pressure, the Chinese government has taken many measures to meet the enforcement challenge.

This paper exams the current intellectual property law regime in China from a historical approach and analyses how China's WTO accession negotiations facilitated the change of law. It considers the measures taken by the Chinese government to address the frequent infringements of intellectual property rights by businesses in China. The paper reviews how intellectual property law in China, while in line with international law, is interpreted by the Chinese courts and whether such interpretations are influenced by international pressure and political consideration. Finally, this paper analyses the remaining challenges for the Chinese government in the area of intellectual property protection.