

THEORY AND PRACTICE OF GENERAL PRINCIPLES OF INTERNATIONAL LEGAL COOPERATION: A THEMATICAL AND COMPARATIVE APPROACH

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This publication features extended abstracts of papers which were presented at the roundtable on International Legal Cooperation at the Law and Society Association conference in Denver, from 28 to 31 May 2020. The roundtable was organized by Professor Ricardo Perlingeiro from Estacio de Sa University (Brazil) and Dr Emilie Ghio from Birmingham City University (UK). It gathered experts from different jurisdictions across the world who discussed the theory and practice of selected general principles of international legal cooperation, from a thematical and comparative perspective.

The debate on international legal cooperation is wide and rich, and over the last two decades, many academic contributions have suggested recommendations to some of the main challenges facing international legal cooperation. However, discussions around issues of legal cooperation at international level have usually taken either a global approach, focusing on procedural challenges, or a thematical approach, focusing on specific areas of law. We believe that there is space for innovative insights that may be able to move the discussion beyond these established lines of research. This is why the Roundtable on International Legal Cooperation at the LSA conference in Denver adopted both a theoretical, as well as concrete approach, while engaging in thematical, as well as comparative debates.

The comparative element of the discussion stemmed from the variety of jurisdictions represented at the roundtable: Brazil, Spain, the UK, the USA and the EU. The presenters' varied legal backgrounds allowed for a thematical approach to the discussion around selected general principles of international legal cooperation, as presenters have expertise in: (i) administrative law and environmental law; (ii) criminal law; (iii) family law; (iv) insolvency law; (v) intellectual property law; (vi) healthcare law; and (vii) extradition law.

Methodologically, the roundtable proceeded as follows. Selected general principles of international legal cooperation were presented. These principles included: (i) the equality of nations; (ii) harmonization; (iii) reciprocity; (iv) public order; (v) jurisdiction; (vi) recognition and enforcement; and (vii) general procedural issues. Each principle was allocated to one expert, who discussed that principle in a theoretical manner, exposing how it is exercised and perhaps, raises issues, in the context of international legal cooperation. Following this short theoretical presentation, the other discussants joined in the conversation and provided concrete

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examples of how the principle presented applies to their own field of expertise. Participants flagged notorious cases or instances in which these principles have caused – or solved – problems in the context of international legal cooperation.

The uniqueness of the discussion came from the fact that the discussants hold different views on a same principle, depending on their area of expertise as well as their jurisdiction. This diversity is welcomed as it illustrates the richness of the debate on international legal cooperation and encourages readers to reflect on the complementarity of these different approaches to common issues.

The extended abstracts which feature in this issue are the preliminary results of the research conducted by the LSA roundtable participants on the abovementioned general principles of international legal cooperation. Professor Guilherme Calmon, from Estácio de Sá University (Brazil) will discuss the principle of jurisdiction, from a family law perspective; Dr Leticia Fontestad Portales, from the University of Malaga (Spain) will discuss the principle of reciprocity, using examples from extradition law; Professor Lissa Griffin, from Pace University (United States) will discuss the principle of equality of nations, from a criminal law perspective; Dr Nadia Naim, from Birmingham City University (United Kingdom) will discuss the principle of public policy from an intellectual property law perspective; Professor Ricardo Perlingeiro from Estácio de Sá University (Brazil) will discuss procedural principles, using examples from administrative law; finally, Dr Emilie Ghio from Birmingham City University (United Kingdom) will discuss the principle of harmonization, from an insolvency law perspective.

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INTERNATIONAL LEGAL COOPERATION AND THE PRINCIPLE OF HARMONISATION: LESSONS FROM CROSS-BORDER INSOLVENCY

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ABSTRACT

This project assesses how harmonisation can be promoted and achieved in the EU without a completely uniform legal system in place. The project focuses on international legal cooperation as a means to promote harmonisation throughout the EU. It uses the area of cross-border insolvency law as a case study to investigate the interaction between harmonisation and international legal cooperation. This abstract presents the preliminary hypotheses and some preliminary conclusions of this project.

Keywords: International legal cooperation, harmonisation, insolvency law.

Contents: 1 Introduction. 2 Functions and agenda of harmonisation. 3 Harmonisation and international legal cooperation. 4 The challenges to the harmonisation of cross-border insolvency law in the EU: the role of international legal cooperation.

1. INTRODUCTION

The link between harmonisation and international legal cooperation is an intimate one. In the EU, this link is particularly visible in Article 81 of the Treaty on the Functioning of the EU (TFEU). Article 81 states that “[t]he Union shall develop international legal cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. *Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.*”² Article 81 gives the EU competence to promote international legal cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. The acts adopted by the EU under Article 81 TFEU may serve various purposes, including ensuring the compatibility of the private international law rules of the Member States (conflict of laws and conflict of jurisdiction). The scope of this competence is not limited by subject-matter, *i.e.* any aspect of conflict of law and conflict of jurisdiction may fall under the scope of Article 81.

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² Emphasis added.

As a result of the broad competence it confers upon the EU,³ Article 81 TFEU has been the legal basis of a growing number of regulations in the field of private international law and civil procedure. For example, the Regulation on Insolvency Proceedings (1346/2000)⁴ was the first Regulation adopted on the basis of Article 65 TEU (now Article 81 TFEU). Its recast version, (2015/848) is also one such regulation.⁵ The objective of the Regulation is to approximate the laws of the Member States in the area of cross-border insolvency law, which is a field falling within the scope of international legal cooperation in civil matters.⁶ Therefore, in the area of cross-border insolvency law, achieving harmonisation is intrinsically linked with international legal cooperation.

2. FUNCTIONS AND AGENDA OF HARMONISATION

The project starts by focusing on the functions and objectives of harmonisation. This theoretical analysis first looks at the context in which the harmonisation process is taking place. It focuses on the harmonisation of cross-border insolvency law in the context of furthering the integration of the EU Single Market and ensuring its smooth functioning. This section therefore determines what shape the harmonisation process must take to achieve the goals of creating an “ever closer union”⁷ and being “united in diversity” in order to integrate the Single Market.⁸ It looks at several Treaty provisions, such as the original EU competence to build the Single Market found in Article 2 TEC;⁹ Article 3 TEC;¹⁰ Article 26 TFEU;¹¹ and Article 114 TFEU.¹²

³ Compared for example with TFEU art. 114 which is slightly more narrow as it allows the EU to enact measures for the harmonisation of national rules only if these are necessary for the establishment and functioning of the Single Market. Therefore, compared to TFEU art. 114, TFEU art. 81 does not require that a link between the EU harmonisation measures and the proper functioning of the Single Market be proven.

⁴ Council Regulation 1346/2000/EC (29 May 2000) on insolvency proceedings, O.J. L160/1. [Hereinafter, the European Insolvency Regulation 2000].

⁵ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141. [Hereinafter, the European Insolvency Regulation 2015]

⁶ European Insolvency Regulation (2015) Recital 3.

⁷ TEU art. 1.

⁸ See the Europa website at https://europa.eu/european-union/about-eu/symbols/motto_en.

⁹ TEC art. 2 reads: “The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it.”

¹⁰ TEC art. 3 reads: “For the purposes set out in Article 2, the activities of the Community shall include: ... (b) a common commercial policy; (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital; ... (h) the approximation of the laws of the Member States to the extent required for the functioning of the common market...”

¹¹ TFEU art. 26 reads: “The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market...”

¹² TFEU art. 114 reads: “[...] The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure ... adopt the measures for the approximation of the provisions laid down by law ... in the Member States which have as their object the establishment and functioning of the internal market.”

Second, a linguistic analysis of the word “harmonisation” is undertaken, to determine whether: (1) harmonisation shuns legal diversity; and (2) harmonisation equates uniformity. The starting point is the word “approximation” which is the most commonly used word in the Treaties when speaking of furthering the integration of the Single Market. Over time, the term “approximation” has been replaced by the more generic term “harmonisation”. However, the lack of consensus regarding the meaning of “harmonisation” in scholarly literature, as well as EU documents, has led to confusion regarding the true objectives of the EU in building the Single Market. In fact, this section shows that the word “harmonisation” is often used interchangeably with words such as “approximation”, “convergence”, “coordination” and “uniformity”.

This section concludes that:

- (1) Harmonisation does not mean uniformity, but rather, increased similarity;
- (2) Harmonisation is an umbrella term which encompasses diverse regulatory methods such as approximation, convergence and reflexive harmonisation.
- (3) Harmonisation can be achieved through different media, which include legislative measures such as regulations and directives, but also softer, more flexible media such as international legal cooperation.

3. HARMONISATION AND international LEGAL COOPERATION

This section links the use of harmonisation measures to achieve the overarching goal of furthering the integration of the Single Market with international legal cooperation. Starting with a constitutional analysis of Article 81 TFEU, this section then proceeds to analyse the synergy between harmonisation and international legal cooperation. As a starting point, this interaction is considered from two angles: (1) international legal cooperation as a *premise* to harmonisation; and (2) international legal cooperation as an *alternative* to harmonisation. It is anticipated that further research in this area will lead to additional associations between international legal cooperation and harmonisation.

The aim of this research is to determine whether legislative intervention is sufficient to achieve the harmonisation (defined in Section 2). It assesses how harmonisation can be promoted without a completely uniform legal system in place by looking at the role of international legal cooperation in the harmonisation process.

4. THE CHALLENGES TO THE HARMONISATION OF CROSS-BORDER INSOLVENCY LAW IN THE EU: The role of international legal cooperation

The final section applies the previous theoretical discussions to the field of cross-border insolvency law. It analyses the challenges to the harmonisation process and determines what role international legal cooperation plays in promoting a more harmonised EU insolvency system. Indeed, the diversity that characterises European Union Member States' national legal systems, which is both its greatest strength and a weakness, carries through to the field of corporate insolvency law. The differences in European insolvency laws are seen as an obstacle to the proper functioning of the EU Single Market as they can hamper the effective administration of insolvency proceedings, thereby creating barriers to cross-border investment.¹³ As a result, harmonising the domestic insolvency regimes of the Member States has been at the top of the EU institutions' agenda over the last two decades. The latest global economic and financial crisis sped up this harmonisation frenzy as it saw an average of 200,000 firms going insolvent each year in the EU, resulting in job losses amounting to 5.1 million over three years.¹⁴

In the last five years alone, the European institutions have been very prolific in creating a comprehensive cross-border insolvency law framework, through the drafting of several legislative measures.¹⁵ A higher degree of harmonisation in insolvency law has therefore been a hot topic within the EU in recent years, not only for law-makers, but also for the judiciary who is a key institution in the insolvency system. The EU has focused on harmonising different aspects of cross-border insolvency law, such as pre-insolvency restructuring, the regulation of forum shopping and increased cooperation between courts.

The project focuses on the legal obligations imposed on EU courts in cross-border insolvency law cases. It focuses on the provisions of the European Insolvency Regulation 2015, especially Recitals 48-40; Articles 41-43; and 56-59, which bring to our attention that

¹³ Commission Staff Working Document Executive Summary of the Impact Assessment Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency, SWD (2014) 61 final, at p.2 (Mar. 12, 2014); Commission Inception Impact Assessment "Initiative on insolvency" 2-3 (2016), https://ec.europa.eu/smart-regulation/roadmaps/docs/2016_just_025_insolvency_en.pdf; Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132, Recital 8.

¹⁴ Commission Staff Working Document Impact Assessment Accompanying the document Commission Recommendation on a New Approach to Business Failure and Insolvency, SWD (2014) 62 final, 2 (Mar. 12, 2014).

¹⁵ European Commission Recommendation on a New Approach to Business Failure and Insolvency, COM(2014) 1500 final; Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141; Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132.

cooperation and communication across courts are fundamental mechanisms in cross-border insolvency cases. Interestingly, Recital 48 of the Regulation also request courts to take into account best practices, standards and guidelines developed by international institutions and organisations active in the area of international insolvency law. Indeed, international legal cooperation in cross-border insolvency cases has not only been a hot topic for the EU institutions, but also for international organisations such as the UN Commission on International Trade Law (UNCITRAL),¹⁶ as well as academics and practitioners who have come together to draft standards, guidelines and best practices in the area of international legal cooperation in cross-border insolvency cases.¹⁷ These initiatives represent an important step forward to align national legal systems, without amounting to complete uniformity.

Relying on the theoretical analysis provided in Section 3, this part of the project then proceeds to analyse international legal cooperation in the area of cross-border insolvency law as a *premise* to its harmonisation and; (2) as an *alternative* to the harmonisation of cross-border insolvency law.

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¹⁶ See *e.g.* UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (1997).

¹⁷ See *e.g.* EU Cross-Border Insolvency Court-to-Court Cooperation Principles (Dec. 2014), <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/fiscaal-en-economische-vakken/cross-border.pdf>; EU Cross-Border Insolvency Court-to-Court Guidelines (Dec. 2014), <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/fiscaal-en-economische-vakken/guidelines.pdf>. See also an ongoing project on Judicial Co-Operation supporting Economic Recovery in Europe (JCOERE), <https://www.ucc.ie/en/jcoere/>. This project aims to enhance judicial cooperation under the European Insolvency Regulation 2015 by looking at possible obstacles arising from the duty to cooperate.

EU Cross-Border Insolvency Court-to-Court Guidelines (Dec. 2014), <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/fiscaal-en-economische-vakken/guidelines.pdf>. See also an ongoing project on Judicial Co-Operation supporting Economic Recovery in Europe (JCOERE), <https://www.ucc.ie/en/jcoere/>.

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INTERNATIONAL LEGAL COOPERATION AND THE PRINCIPLE OF EQUALITY AMONG NATIONS: LESSONS FROM CRIMINAL LAW AND PROCEDURE

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ABSTRACT

International efforts to achieve fair, efficient and reliable criminal justice systems can benefit from the openminded exchange of ideas, values, and choices among nations, each respecting the other's contributions. Obstacles exist to the United States' fully joining this effort in its insistence on American exceptionalism and its continued reliance on unreliable evidence.

Keywords: International Legal cooperation, Equality among nations, criminal law.

Contents: 1 Introduction. 2 The Durability of American Exceptionalism. 3 Unreliable Factfinding. 4 Conclusion.

1. INTRODUCTION

In the area of criminal law and procedure, international legal cooperation is important in two respects. First, because virtually all criminal justice systems face the same concerns in balancing fairness and efficiency,² each system can benefit from learning about the experiences of and developments in other countries.³ Second, nations can and should collaborate to address international criminal law problems through treaties and other joint efforts.⁴ On both fronts, successful cooperation depends at least in part on an understanding of the commonality of the issues and challenges and an openness to learning how other systems deal with these problems. Another essential element is a trust in the integrity of cooperating partners in their efforts to

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² See HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (Stanford University Press 1968) (examining the rationale of the criminal sanction).

³ See, e.g., Richard S. Frase, *Comparative Criminal Justice As A Guide to American Law Reform: How do the french do it, how can we find out, and why should we care?*, 78 CAL. L. REV. 539, 544 (1990) (surveying "the prospects for future reform-oriented research on continental criminal procedure").

⁴ See, e.g., *Treaties and Agreements*, U.S. DEP'T OF STATE (Mar. 7, 2012), <https://2009-2017.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm> (listing countries in which the Department of Justice has negotiated Mutual Legal Assistance Treaties, allowing for the exchange of evidence and information in criminal and related matters).

improve their criminal justice systems. The requirements of open-mindedness and trust allow for equal and productive cooperation internationally.

Currently, obstacles exist that interfere with the ability of the United States to engage in international legal cooperation. First, the United States is limited in its ability to learn from other systems because of the notion of American exceptionalism.⁵ Second, from the perspective of other nations, the United States is an outlier in the international criminal justice community. Wariness and distrust stem from its refusal to join or join fully in international treaties, its continued imposition of the death penalty,⁶ and its mass incarceration system. Moreover, international concerns arise from US courts' reliance on procedural and evidentiary rules that undermine the reliability of fact-finding and an adversarial system that often devalues truth and accuracy. These factors have not only interfered with the United States' historic leadership role, but have sowed distrust that prevents the United States from being a successful partner in international cooperation.

2. THE DURABILITY OF AMERICAN EXCEPTIONALISM

“American exceptionalism” is a phrase originally coined in the 1830s by Alexis de Tocqueville, who observed that America seemed “exceptional” as a large, new democracy that practical success over the pursuit of the arts and sciences for their own sakes.⁷ The term has come to include the much larger idea that based on its free-market democracy, its ideology of liberty, equal opportunity (as opposed to equality of outcomes), and individualism, and its history, size, geography, and constitutional political structure, the United States occupies a special place in the world and is exempt from international norms.⁸ American exceptionalism manifests itself in several ways: exempting itself from the provisions of international human rights and other treaties; a double standard, by which the United States uses standards to judge

⁵ Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391 (2008); Steven G. Calabresi, *A Shining City on A Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1335 (2006); Randy E. Barnett, *The Separation of People and State*, 32 HARV. J.L. & PUB. POL'Y 451, 451 (2009).

⁶ Jordan M. Steiker, *The American Death Penalty: Constitutional Regulation As the Distinctive Feature of American Exceptionalism*, 67 U. MIAMI L. REV. (2) 329, 329 (2013); William W. Berry III, *American Procedural Exceptionalism: A Deterrent or A Catalyst for Death Penalty Abolition?*, 17 CORNELL J.L. & PUB. POL'Y 481 (2008); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (“Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”).

⁷ See ALEXIS DE TOQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1840).

⁸ Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L. J. (1) 1, 4–5 nn. 5–10 (2011) [hereinafter “Bradford”].

itself and countries with whom it has good relationships; and a form of legal isolation – refusing to acknowledge the laws of other countries or international tribunals.⁹ The United States is the only Western democracy that regularly refuses to adhere to international human rights treaties.¹⁰ It is also the only western democracy to retain the death penalty, which has resulted in the refusal of other countries to extradite their citizens to the United States.¹¹

3. UNRELIABLE FACTFINDING

The United States seems to systemically devalue truth through a willingness of its courts to admit and rely on unreliable evidence. The U.S. Supreme Court itself has been criticized repeatedly for allowing the explosive growth of amicus submissions that frequently are filed by partisan organizations and contain partisan, or otherwise unreliable, “facts.”¹² Those facts then find their way into Supreme Court decisions that are binding on all US courts. In addition, despite the alarm sounded by the National Academy of Sciences report about the unreliability of several well-known forensic techniques and crime lab scandals, state and federal courts continue to admit and rely on unsound and unreliable scientific evidence.¹³ In some cases, wrongful convictions based on unreliable proof are corrected after many years.¹⁴ But the existence of procedural hurdles and a rigid commitment to the doctrine of finality permit unsound convictions to stand.¹⁵

The systemic devaluation of truth has also been manifested by recent public legal discourse that has been dominated by misinformation. Visible and publically outspoken US lawyers such as Rudolph Giuliani, the President’s lawyer, and William Barr, his Attorney General, have been accused misrepresenting the truth. Mr. Giuliani has been exposed for

⁹ See AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 3–9 (Michael Ignatieff ed., Princeton University Press) (2005) (discussing American Exceptionalism).

¹⁰ Bradford, *supra* n. 7, at 4-5.

¹¹ Max Fisher, *Map: Which Countries Use the Death Penalty?*, THE ATLANTIC (July 6, 2011), <https://www.theatlantic.com/international/archive/2011/07/map-which-countries-use-the-death-penalty/241490/>. For a history of abolition of the death penalty among western democracies, see Carol S. Steiker, *Capital Punishment and American Exceptionalism*, AMERICAN EXCEPTIONALISM AND HUMAN RIGHT, *supra* note 8, at 59.

¹² Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 175 (2018).

¹³ Radley Balko, *The criminal justice system also has an ‘alternative facts’ problem*, WASH. POST (Jan. 31, 2019), <https://www.washingtonpost.com/opinions/2019/01/31/criminal-justice-system-also-has-an-alternative-facts-problem/>.

¹⁴ See, e.g., *Commonwealth v. Ross*, No. 1738 WDA 2018, 2019 WL 6211324 (Pa. Super. Ct. Nov. 21, 2019) <http://www.pacourts.us/assets/opinions/Superior/out/J-S55007-19m%20-%2010423159687925902.pdf>; *Commonwealth v. Kunko*, No. 482 C 1991 (Pa. Super. Oct. 29, 2010), <https://reason.com/wp-content/uploads/assets/db/13037486936458.pdf>; *Howard v. State*, 945 So. 2d 326 (Miss. 2006) (reimposing the death sentence on a defendant convicted using bite mark evidence, with the Mississippi Supreme Court writing “Just because [the expert] has been wrong a lot, does not mean, without something more, that he was wrong here.”).

¹⁵ Radley Balko, *Bad science puts innocent people in jail – and keeps them there*, WASH. POST. (Mar. 21, 2018), https://www.washingtonpost.com/outlook/bad-science-puts-innocent-people-in-jail--and-keeps-them-there/2018/03/20/f1fffd08-263e-11e8-b79d-f3d931db7f68_story.html (“Even once a field of forensics or a particular expert has been discredited, the courts have made it extremely difficult for those convicted by bad science to get a new trial.”).

stating untruths, and directly contradicting his own prior statements.¹⁶ He has stated publically that “truth isn’t truth.”¹⁷ William Barr has perpetuated misinformation by his attempt to misconstrue the Mueller Report’s findings and then claiming that the White House fully cooperated with the investigation when it did not.¹⁸ He also delegitimized the results of a full factual investigation by the inspector general.¹⁹ Similarly, Kelly Anne Conway, counsel to the President, is responsible for creating the phrase “alternative facts,” an obvious oxymoron, and for legitimizing it.²⁰

4. CONCLUSION

International legal cooperation on criminal justice issues presents the opportunity for the United States to contribute much and to help solve problems that cross international borders. Short of major changes in domestic law, which are beyond the scope of this article, several possibilities exist for restoring the role of the United States as an equal partner in international legal cooperation. First, the Supreme Court should continue Retired Justice Anthony Kennedy’s willingness to refer to international criminal justice standards in interpreting the US bill of rights.²¹ Other, lower courts, would follow suit. Indeed, a contributing factor to Justice Kennedy’s inclusion of international standards was his involvement in international judicial conferences and judicial and scholarly collaborations.²² This sort of cross-pollination of the judiciary – among judges at every level -- is invaluable. Second, an attempt could be made to broaden the perspective of US law students. While there is an organization for students interested in international law, there is no organization through

¹⁶ See Bennett L. Gershman, *Rudolph Giuliani and the Ethics of Bullshit*, 57 DUQ. L. REV. 293 (2019) (collecting list of untruths).

¹⁷ Rebecaa Morin & David Cohen, Giuliani: ‘Truth isn’t truth’, POLITICO (Aug. 19, 2019), <https://www.politico.com/story/2018/08/19/giuliani-truth-todd-trump-788161>.

¹⁸ Bill McCarthy, *Latest Mostly False Fact-Checks On William Barr*, POLITIFACT (Dec. 11, 2019), <https://www.politifact.com/factchecks/list/?category=&ruling=barely-true&speaker=william-barr> (last visited Feb. 26, 2020) (“The Inspector General’s report now makes clear that the FBI launched an intrusive investigation of a U.S. presidential campaign on the thinnest of suspicions.”); John Kruzell, *Latest False Fact-Checks On William Barr*, POLITIFACT (April 22, 2019), <https://www.politifact.com/factchecks/list/?category=&ruling=false&speaker=william-barr> (last visited Feb. 26, 2020) (“The white house fully cooperated with the special counsel’s investigation”).

¹⁹ *Statement of Attorney General William P. Barr on the Inspector General’s Report of the Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation*, DEP’T OF JUST. (Dec. 9, 2019), <https://www.justice.gov/opa/pr/statement-attorney-general-william-p-barr-inspector-generals-report-review-four-fisa>.

²⁰ Rebecca Sinderbrand, *How Kellyanne Conway ushered in the era of ‘alternative facts’*, WASH. POST. (Jan. 22, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/how-kellyanne-conway-ushered-in-the-era-of-alternative-facts/>.

²¹ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (“It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”).

²² See, Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, The New Yorker, Sept. 12, 2005 (describing Justice Kennedy’s extensive participation in such events).

which law students interested in criminal law and procedure can share information, developments, and insights or discuss comparative criminal procedure issues. Another possibility would be to increase the availability of international externships, through which students are exposed to and participate in the domestic criminal justice systems of other countries. Isolation and exceptionalism will not result in successful international cooperation, and trust in the integrity of cooperating nations is essential.

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INTERNATIONAL LEGAL COOPERATION AND THE PRINCIPLE OF RECIPROCITY: LESSONS FROM EXTRADITION LAW¹

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ABSTRACT

In this work, after making a brief reference to the principle of reciprocity in general, we will refer to its application in the field of international criminal legal cooperation, specifically, its application in the extradition process. However, given that within the European Union this extradition procedure has been replaced by the European arrest warrant ("EAW"), we will end our analysis with a brief reflection on the incidence of this principle in a judicial area such as the European that is governed by the principle of mutual judicial recognition.

Keywords: International Legal Cooperation, reciprocity, extradition law, European arrest warrant.

This research work is based on the analysis of the Principle of Reciprocity, which, as one of the fundamental principles of private international law, arises in the XVII to solve the limits that derive from the application of the principle of territoriality in international traffic (*Comitas Gentium*).³

Starting from the general concept of the Principle of Reciprocity that, in general terms, assumes that States assume rights and obligations based on reciprocal treatment, we will see how it is not specifically a formal recognition, but that we are faced with a principle that goes to require states to recognize the rights of other states.

Given the origin of this principle in the Doctrine *Comitas Gentium*, we will try to analyze the meaning of it based on a territorial conception by virtue of the quality of the States,

¹ This scientific contribution is made within the framework of the Program for "Ayudas a Proyectos de I+D+i para universidades y entidades públicas de investigación del Sistema Andaluz del Conocimiento, en el ámbito del Plan Andaluz de Investigación, Desarrollo e Innovación (PAIDI 2020)": "El uso de las TICs en la Cooperación Jurídica Penal Internacional: Construyendo la Sociedad Digital Andaluza del Futuro" (PY18-1059), being the project director Dra Leticia Fontestad Portalés.

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³ Since the objective of this research work is not to carry out a thorough and thorough study of the principle of reciprocity, but a brief reference to the application, in general, of this principle and its implication in the extradition process, we refer to a study on this subject to the work of Francisco Pan Montojo, *Estudio de la reciprocidad en la doctrina, legislación y jurisprudencia*, 9 (1-2) REDI, 147-172 (1956).

in the application of the principle of reciprocity, they may enforce their rights in the territory of another upon a reciprocal behavior.

As we see from the technical-legal point of view and, specifically for Private International Law, reciprocity implies that the application of a country's domestic law to a non-national individual or legal entity of that State is subject to the treatment given in that State the nationals of this country. In other words, territorial law applies to resident foreigners as regards the State to which it foresees identical treatment for nationals of that State.

This reciprocal treatment may or may not have its conventional origin, although more and more are added to incorporate it in certain types of international Treaties, such as, for example, those referring to extradition; those whose purpose is the recognition of tax benefits to nationals of their State in the territory of another State Party; those who recognize rights to nationals of another State Party as well as those who recognize their own nationals when said foreigners are in their territory; or, for example, those that recognize judicial decisions taken by jurisdictional bodies of another State.

Even when it is affirmed that international reciprocity has had greater relevance when there were no conventional norms that established a uniform and general regime on the obligations of the States, throughout this work we will be able to verify that in the matter of international cooperation, the principle of reciprocity acquires greater importance since when there is an international agreement or treaty, the criterion that is being applied continues to be that of reciprocity.⁴ Thus, in diplomatic law, for example, regardless of the conventional regime adopted through the United Nations conventions on the subject, some issues are regulated according to what is established by international reciprocity. This is what happens, for example, with the freedom of movement granted to diplomatic agents within the host country.

In any case, the application of this principle should never involve a decompensation of efforts between the States involved, so that one of the States obtains a benefit clearly to the detriment of the other. Reciprocal treatment should also involve fair reciprocal treatment. In fact, as PLANTEY shows “*respect for reciprocity gives rise to good faith and credit among States*”.⁵

⁴ Specifically in international relations with the Holy See, Roca affirms that in relations between States there are hardly any differences, as far as the application of the principle of reciprocity is concerned, between the cases in which there is agreement between the States and those in those that there is no such agreement. Cfr. 65 MARÍA J. ROCA, *El Principio De Reciprocidad Y Las Relaciones Internacionales De La Santa Sede* 65, REDC 127, 136 (2008).

⁵ ALAIN PLANTEY, *TRATADO DE DERECHO DIPLOMÁTICO. TEORÍA Y PRÁCTICA* 768 (Juan Andres Iglesias Sanz trans. 1992).

Given that, as Pan Montojo states “the system of private international law is based on a reciprocity basis”, after analyzing what could be called a global reciprocity, that is, of the reciprocity of the States as the foundation of international law, our scientific work focuses on the interpretation that this principle should be carried out in the specific field of extradition, which, as we all know, involves a usual procedure of international legal assistance between two States in the mutual respect of their sovereignty in compliance with the rules of International right. However, we cannot forget that the States will regulate in their own Constitution and laws what the material requirements and the procedure for carrying out such international judicial assistance are.

Specifically in the Spanish legal system, Article 13.3 Spanish Constitution, states that “*Extradition shall only be granted in compliance with a treaty or the law, in accordance with the principle of reciprocity*”. And it is article 1 of Law 4/1985, of March 21, on passive extradition that incorporates this principle when it determines that “*The Government may demand a guarantee of reciprocity from the requesting State*”.

We will then finish this research work analyzing reciprocity as a general principle of extradition emphasizing the subjects since it tends to think that reciprocity is between jurisdictional bodies instead of realizing that it is between States, as well as emphasizing the content of this principle as well as in the procedure application in itself.

Finally, remember that the principle of reciprocity is particularly widespread as a principle in the states of tradition of continental law, where it acquires the status of a binding pact. However, reciprocity is not considered a mandatory principle in common law countries.

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INTERNATIONAL LEGAL COOPERATION AND THE PRINCIPLE OF PUBLIC POLICY: LESSONS FROM INTELLECTUAL PROPERTY LAW

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ABSTRACT

This research paper will examine the different approaches to corporate legal theory in the international legal co-operation of International Intellectual Property (IP). The focus will be on legal cooperation as a means to promoting harmonisation in line with international standard setting from the World Intellectual Property Office (WIPO) and the World Trade Organisation (WTO). Harmonisation can be seen through the minimum standards set through WIPO for all WTO members known as Trade Related Intellectual Property Rights (TRIPS). The landmark cases of *Philip Morris v. The Commonwealth of Australia* and *Eli Lilly v Canada* will be discussed as a case study to highlight the lack of harmonisation between Intellectual Property, corporate sovereignty and Investor to State Dispute Settlements (ISDS). This abstract presents the initial hypotheses and some primary conclusions from the research.

Keywords: International Legal Cooperation, public policy, intellectual property law.

Contents: 1 Introduction. 2 Public policy implications for harmonisation of international IP. 3 The harmonisation of public policy and intellectual property – Case studies.

1. INTRODUCTION

Intellectual Property Rights are not the only form of internationally recognised form of rights subject to treaties and multilateral agreements: public policy issues are also dealt with in this way, but the two subjects have historically been dealt with in different ways. This paper intends to get you to consider the relationship between these two subjects, and whether either is more significant or more important than the other. The issue at hand is that IP rights are territorial in nature and monopolise the market whereas public policy considerations come into play when there are competing interests between the private investor and Governments. The ramifications of the current divergence from taking into account the dichotomy between IP right and public policy, can be exemplified through the case study analysis of *Eli Lilly* and *Philip Morris*. Both cases deal with IP rights, international trade agreements and corporations taking Governments to Court over an alleged breach of IP rights within the trade agreements.

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2. PUBLIC POLICY IMPLICATIONS FOR HARMONISATION OF INTERNATIONAL IP

At the heart of all trade agreements and negotiations between different states and blocs is one fundamental principle, to increase economic ties between the trading partners. Intellectual property infringement costs the G20 countries \$125 billion annually; this includes losses in tax revenue from counterfeiting and piracy². In terms of the global economy, the International Chambers of Commerce (ICC) estimates the losses to the global economy from intellectual property infringements at \$1 trillion annually.³

The EC clearly appreciates the importance of IP rights, since they are specifically mentioned as a type of derogation from Articles 34 and states the provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security.

Whilst recognising these rights, the EU has sought to limit their effect due to their monopolistic nature. One way the EU has sought to do this is by encouraging businesses to seek protection of IP rights on a Community wide basis, through, inter alia, Designs Directive (98/71/EC), Regulation on Community Design 2001 (6/2002/EC), and EU Directive 89/104/EC regarding trade marks. However, whilst the existence of these instruments makes it easier to protect some IP rights throughout the EU as a whole, the EU cannot prevent businesses from exploiting different IP rights in different member states. Therefore, it has fallen to the ECJ to try to balance the competing interests that have arisen as a result of this conflict, i.e. free movement of goods vs. protection of IP rights.

At a national level, all IP legislation has public policy as an exception however how effective that is remains to be seen. As an example, The Patents Act 1977 at s1 (3) states that it is not possible to patent inventions whose commercial exploitation would be immoral or contrary to public policy. In view of the rise of genetic engineering and biotechnology, this is an increasingly contested area. In Harvard College's Onco Mouse Application,⁴ the case concerned a method of producing mice that would be born with cancer so that they could be used for medical experimentation. The case raised technical issues relating to what constitutes biological processes as well as questions of the morality and desirability of genetic engineering. On initial examination, the patent examiner did not consider the morality of this development. However, on appeal the board of appeal recognised the deep moral implications of

² Business Action to Stop Counterfeiting and Piracy (BASCAP), *Estimating the Global Economic and Social Impacts of Counterfeiting and Piracy*, FRONTIER ECONOMICS (Feb. 2011).

³ *Ibid.*

⁴ Harvard College's Onco Mouse Application, T 19/90 [1990] OJ EPOR 501 (Oct. 3, 1990).

manipulating the mice's genes to guarantee they would develop cancer, and instructed the examiner to "weigh up the suffering of animals and possible risks to the environment on one hand, and the invention's usefulness to mankind on the other." Applying this utilitarian balancing test, the examiner once again approved the patent.

Two years later, the European Patent Office refused an application to patent a mouse into which a gene had been introduced to cause the mouse to lose its hair, as it found the benefits (research into hair loss) did not outweigh the harm to the mice.

As a means of ensuring a balance between IP rights and free movement of goods, in the 1970s the ECJ began to develop the doctrine of "Exhaustion of Rights". The principle was initially defined thus in *Terrapin v Terranova*⁵ as:

The Proprietor of an industrial or commercial property right protected by the law of a member state cannot rely on that law to prevent the importation of a product which has lawfully been marketed in another member state by the proprietor himself or with his consent.⁶

This is not dependent on whether the first sale/marketing is in a member state where an IP right exists; it is sufficient that the goods are put into circulation by, or with the consent of, the owner of the IP right. Therefore in *Merck v Stephar*,⁷ a patent was held in every EC state except Italy. Defendants imported Merck's product, marketed in Italy, into Holland. Held, free movement rules of EC treaty prevented Merck from using their Dutch patent to prevent sales in Holland.

3. THE HARMONISATION OF PUBLIC POLICY AND INTELLECTUAL PROPERTY – CASE STUDIES

In relation to intellectual property, lessons can be learnt from existing intellectual property based ISDS cases. Take for example *Eli Lilly v. Canada*.⁸ In November 2012, Eli Lilly & Co started proceedings against the Canadian government's law on granting drug patents, claiming that the invalidation of a patent undermined the company's future profits and are asking for \$500 million in compensation. Claimant has submitted the present dispute to international arbitration pursuant to Chapter Eleven of the North American Free Trade Agreement, which entered into force on 1 January 1994 ("NAFTA"), and the United Nations Commission on International Trade Law's Arbitration Rules as adopted by General Assembly

⁵ *Terrapin v. Terranova* [1976] ECR 1039 (June 22, 1976).

⁶ *Ibid*

⁷ *Merck v. Stephar* [July 14, 1981] CMLR 463.

⁸ *Eli Lilly and Company v. Canada*, Case No. UNCT/14/2.

Resolution 31/98 on 15 December 1976 (“UNCITRAL Rules”). By agreement of the Parties, the International Centre for Settlement of Investment Disputes (“ICSID”) serves as the administering authority for this proceeding. In this arbitration, Claimant asserts claims arising from the invalidation of its Canadian patents protecting the drugs marketed in Canada as Strattera and Zyprexa. The Canadian courts invalidated these two patents in 2010 and 2011, respectively, on the ground that they did not meet the requirement under Canadian patent law that an invention be “useful”.

Further the case of Philip Morris highlights the real threat that corporate sovereignty can impose for domestic legislation and public policy at large. Australia won the international legal battle to uphold its control measures on tobacco with Philip Morris arguing it infringed their trademarks.⁹ The public policy issued raised by the case is a point of great interest as up until ISDS and corporate sovereignty was built in as valid clauses in trade agreements, the horizontal axis of disputes between states had to be brought at a governmental level. Philip Morris Asia Limited highlights how a corporation can vertically challenge governments directly and hence was legally able to commence arbitration proceeding against the Australian government in 2011. Philip Morris was able to utilise the intellectual property clause protection in the bilateral agreement between Australia and Hong Kong to argue the ban on its trademarks breached foreign investment provisions of Australia and Hong Kong’s 1993 Investment Promotion and Protection Agreement.¹⁰

What both these cases highlight is, that although the approaches to the decisions were different, there is a real threat to sovereignty and wider public policy by adding intellectual property clauses to international trade agreements.

LIST OF ABBREVIATIONS

BASCAP - Business Action to Stop Counterfeiting and Piracy

CMLR – Common Market Law Report

EC – European Commission

ECJ – European Court of Justice

EU – European Union

G20 - Group of Twenty

ICC - International Chambers of Commerce

⁹ Philip Morris Asia Limited v. The Commonwealth of Australia, UNCITRAL, PCA Case No. 2012-12.

¹⁰ *Investment dispute settlement navigator*, INVESTMENT POLICY HUB (Dec. 31, 2019), <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/421/philip-morris-v-australia>.

ICSID - International Centre for Settlement of Investment Disputes

IP - International Intellectual Property

ISDS - Investor to State Dispute Settlements

NAFTA - North American Free Trade Agreement

EPO – European Patent Office

TRIPS - Trade Related Intellectual Property Rights

UKSC – United Kingdom Supreme Court

UNCITRAL - United Nations Commission on International Trade Law

WIPO - World Intellectual Property Office

WTO - World Trade Organisation

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INTERNATIONAL LEGAL COOPERATION AND THE PRINCIPLE OF JURISDICTION: LESSONS FROM FAMILY LAW

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Abstract: This extended abstract aims to point out the need to conceptualize the principle of jurisdiction and to identify its main controversies in the field of international legal cooperation. Issues related to the notion of public order, private autonomy, rights and procedural guarantees, among others, have proved to be fundamental for a more adequate understanding of the subject of jurisdiction from the perspective of international legal cooperation. The specific study will address Hague Convention's approach to the civil aspects of international child abduction related to the theme "right of custody" under the Family Law.

Keywords: International Legal Cooperation, jurisdiction, family law.

Since March 2016, the Brazilian Code of Civil Procedure (CPC) regulates, in further detail, the issues of the limits of Brazilian national jurisdiction and instruments of international legal cooperation involving the justice system. Issues related to Brazilian jurisdiction, existence (or absence) of disputes, ratification of foreign judicial sentences, choice of court agreement in international contracts, direct assistance, rogatory letter, were dealt with in the rules contained in articles 21 to 41 of the CPC.

Brazilian law experiences a transformation in the culture that involves transnational relations. The search for greater agility, effectiveness and speed in resolving conflicts, encouraging foreign investments in the country, encouraging a consensual solution to conflicts - through conciliation, mediation, negotiation - are aspects that demonstrate a new stage inaugurated in the Brazilian legal system in international relations.

The greater agility in the procedural acts - including judicial ones - requires the presence of special rules that favor the fulfillment of the solutions that may be given to conflicts. There is a duty for national States to cooperate with each other to ensure the full functioning of justice systems and, ultimately, to ensure the smooth functioning of societies and national governments.

In light of the principle of jurisdictional unity, a monopoly of jurisdictional function has been attributed to judicial authorities in Brazil, but it is currently being questioned due to

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the various problems related to the effective solution of conflicts of interest. In the context of the so-called mass disputes, which are verified with increasing frequency, it is essential to reflect on the judicial procedures that were expressly adopted in the Brazilian procedural system, especially regarding the notion of effectiveness of the solutions.

As an example, the Hague Convention on international access to justice, approved in 1980, seeks to establish a similarity between the application of the rules on legal assistance to non-domiciled persons in Brazilian territory, such as exemption from the deposit for filing a lawsuit (art. 14 of the said Convention). In the Brazilian case, there was an “intense interaction between the Ministry of Justice, which acts as a central authority, and the Public Defender's Office, which provides legal assistance to those in need”.²

Current times impose a review of the concept of jurisdiction, which has traditionally been linked to the monopoly of the national State and to the concrete will of the law as an “attribute of sovereignty”.³ There is a tendency to increasingly value private autonomy in the search for the solution of controversies in the environment of the Democratic State.

In the civil and business (or commercial) sphere, it is recognized that contractors can elect a certain national state jurisdiction to resolve future conflicts that may arise from the contractual relationship. This is a clause for the choice of court or an extended forum agreement.

In the Brazilian legal system, some questions arose: i) may the court elected by the contractors not recognize and, therefore, not judge the judicial claims? ii) should a court decline the case in favor of another elected by the contractors (now litigants)? iii) should any sentence issued by the elected court be recognized in the derogated court?⁴

Such issues are more important according to the greater or lesser sensitivity of national States in terms of recognition of private autonomy in the submission of a dispute resolution to a given jurisdiction. There are two characteristics related to international legal cooperation that are associated with the notions of multiculturalism and the search for uniformity in the understanding and recognition of certain legal phenomena and institutes.

² NÁDIA DE ARAÚJO, A CONFERÊNCIA DA HAIA DE DIREITO INTERNACIONAL PRIVADO E SEUS IMPACTOS NA SOCIEDADE - 125 ANOS (1893-2018) 124 (2018).

³ Valesca Raizer Borges Moschen & Hermes Zaneti Júnior, *Temas controversos do Direito Processual Civil internacional*, DIREITO INTERNACIONAL PRIVADO 357 (André de Carvalho Ramos org.) (2016).

⁴ *Id.* at 358.

The court election clause, in international contracts, constitutes an act of provision according to which the contractors stipulate that only judicial proceedings can be initiated in the jurisdiction chosen by common agreement. However, there are limits to its stipulation, such as the availability of the substantive right involved in the issue, respect for the balance between the parties (and the "parity of arms") and the preservation of observance of the fundamental rights and guarantees of the process in the Democratic State⁵.

At the Hague Conference on Private International Law, the Convention on Choice of Court Agreements was approved in 2005, the main objective of the said Convention being to establish instruments of international legal cooperation in order to allow greater flexibility, effectiveness and security to contracts in civil and commercial matters, based on private autonomy. One of the main aspects of the aforementioned Convention represents the duty of national States to judge the processes based on the clause of choice of court (article 5, 2) and, thus, to rule out the possibility of using the "forum non conveniens" doctrine.

There are also rules that establish the obligation of national States to recognize and enforce judgments and decisions handed down in the exercise of the jurisdiction of the State elected by the contractors (article 8). Such rules are in line with the Brazilian CPC rules, especially article 25 which provides for the derogation of Brazilian jurisdiction when the parties have agreed another court, either in the instrument of the international contract or by a separate act of the contract.

Apart from international contracts, private international law has also been concerned with the issue of jurisdiction over certain sensitive matters, such as the Hague Convention on civil aspects of international child abduction. This Convention provides for the impossibility of the requested State not making a decision on the child's custody right until the issue of the child's return (or not) to the requesting State has been resolved (article 16 of the Convention).

Still on issues related to international child abduction, there is the recommendation of the Hague Conference to obtain "mirror decisions" that may reflect the same content as was decided in the Requested State also in the Requesting State, as for example in the regulation of the visiting rights in favor of one of the child's parents.

The research to be developed points to the need to conceptualize the principle of jurisdiction and to identify the main controversies surrounding the respective theme in the field

⁵ Moschen & Zaneti Júnior, *supra* note 3, at 359.

of international legal cooperation. Issues related to the notion of public order, private autonomy, rights and procedural guarantees, among others, have proved to be fundamental for a more adequate understanding of the subject of jurisdiction from the perspective of international legal cooperation.

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INTERNATIONAL LEGAL COOPERATION AND THE PRINCIPLES OF RECOGNITION AND ENFORCEMENT: LESSONS FROM HEALTHCARE LAW

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ABSTRACT

This research paper discusses the delivery of adequate healthcare in prisons in the context of compassionate release procedures, which typically allow prisoners to seek early release from prison due to ill-health. It provides an overview of procedures in the United States and England and Wales, and urges that the two jurisdictions co-operate to model best practices for compassionate release.

Keywords: International cooperation, recognition and enforcement, healthcare law.

Contents: 1. Introduction. 2. International co-operation: pursuing shared interests. 3. Compassionate release in the United States and England and Wales. 4. Modelling best practices [together]. 5. Conclusion.

1. INTRODUCTION

International co-operation describes interactions to achieve common objectives. Where common interests emerge, co-operation can develop and sustain. Grappling with the challenges of delivering adequate healthcare in prison systems supporting ageing and medically-complex populations, with limited resources and infrastructures, the United States (US) and England and Wales (E&W) both have an interest in determining best practices for determining what circumstances, if any, warrant the early release of prisoners on account of ill-health. Both jurisdictions have established compassionate release procedures, which typically allow for early release because of ill-health, but various reforms are urged. This short paper suggests that, motivated by their shared interest, the US and E&W should co-operate to model best practices for compassionate release, and suggests a series of questions to catalyse discussions.

2. INTERNATIONAL CO-OPERATION: PURSUING SHARED INTERESTS

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International co-operation describes “interactions to achieve common objectives when actors’ preferences are neither identical (harmony) nor irreconcilable (conflict).”² It can refer to a range of interactions, including “sharing research results, production, commerce, protection of investments, and industrial know-how...”³ and can occur across bi-lateral, multilateral, regional, and global levels, involving a diversity of intergovernmental and/or transnational agents and institutions.⁴ With an objective of promoting the interests of the “greater community,”⁵ international co-operation “requires the existence of community interests”⁶ in order to gain traction. Where such interests emerge, co-operation can develop and sustain. This is reflected across issues where international co-operation currently exists, including security, criminal investigations, environmental protection, the use of shared spaces (e.g., outer space), economics, healthcare, and the protection and promotion of human rights. International co-operation recognizes that there is value in, as Griffin describes in this volume, “the openminded exchange of ideas, values, and choices among nations, each respecting the other’s contributions.”⁷

Given the routine use of imprisonment as a punishment world-wide and the inherent challenges of delivering adequate healthcare in prison systems, one interest shared — generally — by the international community is in determining what circumstances, if any, warrant the early release of a prisoner on account of ill-health. This task requires stakeholders to decide on when the disadvantages associated with a prisoner not serving their full sentence are offset by the advantages of early release. This task comes with “many distractions.”⁸ Healthcare professionals, as well as criminal justice scholars, have recognized the inherent tensions involved. As two UK-based healthcare professionals researching palliative care in prison, describe:

Prisoners have the right to healthcare equal to that of any other patient,
but not at the expense of risk of harm to society. Tensions inevitably
arise in trying to respect the autonomy of people who have had their

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² Sebastian Paulo, *International Cooperation and Development: A Conceptual overview*, DISCUSSION PAPER 13/2014, GERMAN DEVELOPMENT INSTITUTE 3 (2014).

³ VASILII EROKHIN et al., *HANDBOOK OF RESEARCH ON INTERNATIONAL COLLABORATION, ECONOMIC DEVELOPMENT, AND SUSTAINABILITY IN THE ARTIC 23* (2019).

⁴ Paulo, *supra* note 2.

⁵ Rüdiger Wolfrum, *International Law*, in *THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 9 (2012).

⁶ *Id.*

⁷ *See*, Professor Lissa Griffin, this volume.

⁸ Robert B. Greifinger, *Commentary: Is It Politic to Limit Our Compassion?* 27 *J.L. MED. & ETHICS* (3) 234 (1999).

freedom curtailed by the state, especially when considering the preferred place of death of a prisoner...imprisonment provides public protection, prevention of recidivism, and rehabilitation. For the infirm prisoner approaching the end of life it could be argued that further incarceration serves no purpose; physical frailty makes recidivism and public harm unlikely and impending death makes rehabilitation largely irrelevant.⁹

Compassionate release procedures — when related to medical issues — typically allow for early release on account of serious terminal, non-terminal, and/or age-related ill-health. As such, they seek to navigate these tensions, and balance relevant interests. These procedures are present in justice systems around the world, including in the US and E&W.

3. COMPASSIONATE RELEASE IN THE UNITED STATES AND ENGLAND AND WALES

Compassionate release procedures in the US and E&W share in the typical make-up of compassionate release, namely they comprise a method, label, eligibility criteria, bespoke process, involve multi-agent interaction, and have reported outcomes.¹⁰

In the US, federal prisoners may apply for compassionate release (also referred to as a ‘reduction in sentence’) in two instances. First, if they have “extraordinary or compelling reasons,” which can relate to medical condition(s), age, family circumstances, or other reasons. Or, second, if they are aged seventy or above, have served thirty years in prison, and the Director of the Bureau of Prisons (“BOP”) determines s/he is not a danger to others. Following a process involving federal corrections and the BOP, the prisoner’s federal sentencing court (directed by U.S. Sentencing Commission guidelines) makes a final decision.¹¹ Across US states, research shows all but one state (Iowa)¹² to have at least one compassionate release procedure.¹³ Compassionate release methods include parole, executive clemency/commutation, reprieves, sentence modifications, extended confinement with supervision, respite programs, and furloughs, with around 50 different labels in use. Exclusions practices can include on the basis of offence, parole eligibility, and sentencing requirements.

⁹ James Burtonwood & Karen Forbes, *Early Release Rules for Prisoners at End of Life Need Reform*, THE BMJ OPINION (June 12, 2019).

¹⁰ See, generally, for a breakdown of procedures by reference to this framework, Sarah L. Cooper, *A Case for Broadening Arizona’s Approach to Compassionate Release*, 13 LAW JOURNAL FOR SOCIAL JUSTICE 3-23 (2020).

¹¹ 18 U.S.C. § 3582(c)(1)(A)(i)(ii) (2018). See also, U.S. Dep’t of Justice, Fed. Bureau of Prison, *Compassionate Release/Reduction in Sentence: Procedures for Implementation of 18 U.S.C. §§ 3582 and 4205(G)* (Jan. 17, 2019).

¹² See FAMILIES AGAINST MANDATORY MINIMUMS (FAMM), IOWA STATE MEMO 2 (2018). Note, however, as the memo indicates, the media reports there has been a compassionate release case in Iowa, but there are no identifiable procedures.

¹³ See generally, Mary Price, *Everywhere and Nowhere: Compassionate Release in the States*, FAMILIES AGAINST MANDATORY MINIMUMS (June 2018); and the ‘State Memos’ associated with the report *Find your state’s compassionate release policy*, FAMM.

Eligibility for non-terminal conditions typically requires that a prisoner be subject to serious medical conditions/disabilities that significantly incapacitate them, and terminal procedures can range from requiring that death be “imminent”, to that it must occur within 24 months. Age is referenced in various ways, including as the main criteria for eligibility. Risk to public safety, prisoner well-being, and cost can also inform eligibility decision-making. Processes generally involve sequenced multi-stakeholder interaction, including petitioners (and/or their representatives), corrections, medical professionals, and releasing authorities. Release conditions can range from agreeing to the public release of medical records and placements and being subject to periodic medical evaluations, to intensive supervision and fee payments. A change in circumstances can also result in revocation. Generally, procedures lack comprehensive reporting and tracking systems.¹⁴ Reports suggest compassionate release procedures are used “sparingly.”¹⁵

In E&W, Early Release on Compassionate Grounds (ERCG), allows for the Secretary of State to release a determinate sentenced prisoner on licence at any point in the sentence if justifying “exceptional circumstances” exist.¹⁶ This process does not expressly require consultation with the Parole Board. By contrast, ERCG for an indeterminate sentence prisoner,¹⁷ which operates under the same criteria, does require consultation.¹⁸ HM Prison Service’s Prison Service Order (PSO) 6000 for ‘Parole Release and Recall’ sets out the extended procedure for determinate sentence prisoners,¹⁹ and suggests exceptional circumstances include “terminal illness [where] death is likely to occur soon...”²⁰ (noting three months as an “appropriate period”²¹) and “where the prisoner is bedridden or severely incapacitated.”²² The application process involves an interaction between the prisoner, Governor, Medical Officer, Probation, and Department of Health.²³ Considerations of risk to public safety, information known by the trial and sentencing court, and the purpose(s) served

¹⁴ See for authorities and an expanded summary of this overview, Cooper, *supra* note 10.

¹⁵ Edward E. Rhine et al. *The Future of Parole Release*, 46 CRIME & JUST. 279 (2017) at n.11: “These include compassionate release or ‘medical parole’, mainly available to inmates with disabling or terminal illnesses, and the executive’s clemency powers, which in most jurisdictions are used sparingly (Barkow 2009; Love 2009; American Law Institute 2011, § 305.7)”.

¹⁶ s. 248(1) Criminal Justice Act 2003: “The Secretary of State may at any time release a fixed-term prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner’s release on compassionate grounds”.

¹⁷ s. 30(1) Crime (Sentences) Act 1997: “The Secretary of State may at any time release a life prisoner on licence if he is satisfied that exceptional circumstances exist which justify the prisoner’s release on compassionate grounds”.

¹⁸ s. 30(2) Crime (Sentences) Act 1997: “Before releasing a life prisoner under subsection (1) above, the Secretary of State shall consult the Parole Board, unless the circumstances are such as to render such consultation impracticable”.

¹⁹ HM Prison Service, PSO 6000, Parole Release and Recall (2005), Chapter 12.

²⁰ *Id.* at Chapter 12, page 3, para. 12.4.1.

²¹ *Id.*

²² *Id.* at Chapter 12, page 3, para. 12.4.2.

²³ *Id.* at Chapter 12, page 3, paras 12.5 - 12.5.3.

by granting release guide the process. PSO 6000 underscores that ERCG “is granted in only the most exceptional cases.”²⁴ Reports suggests this is the case.²⁵ HM Prison Service’s Prison Service Order 4700 sets out the extended procedure for indeterminate sentenced prisoners.²⁶ It applies the same terminology in terms of terminal illness, time, and incapacity,²⁷ but involves specific consideration of the risk of re-offending; whether future imprisonment would reduce the prisoner’s life expectancy; external care and treatment arrangements; and whether early release will bring some significant benefit to the prisoner or their family.²⁸ The process involves interaction with the Public Protection Casework Section and the Parole Board.²⁹

4. MODELLING BEST PRACTICES [TOGETHER]

Reform of compassionate release is an ongoing conversation in both the US and E&W. In both jurisdictions (and beyond), such discussions have been associated with the need to address the challenges of delivering adequate healthcare in prisons, where there are limited medical infrastructures, finite staffing and funding resources, challenging conditions, a range of serious medical problems suffered across diverse groups, and varying policy considerations.³⁰ Across these conversations minds have focussed on various ideas, including the need to harness expertise across methods available, use lay-friendly labels, generate medically-informed and appropriate eligibility criteria for terminal and non-terminal illness, establish appeal mechanisms, narrow exclusion practices, construct efficient processes, provide education and training across agents, implement reporting and tracking systems, tailor release requirements, and take account of the aims of penal policy (including public safety) and human

²⁴ *Id.* at Chapter 12, page 1, para. 12.1: “Early release on compassionate grounds may be considered on the basis of a prisoner’s medical condition or as a result of tragic family circumstances. It is granted in only the most exceptional cases”.

²⁵ *See*, for example, House of Commons Debate, *Column 208WH*, UK PARLIAMENT (Oct. 20, 2009): “Maria Eagle: Some 28 per cent. of applications for compassionate release are granted in England and Wales”.

²⁶ HM Prison Service, PSO 4700, Indeterminate sentence prisoners compassionate release on medical grounds, Chapter 12 (2010).

²⁷ *Id.* at page 1, para. 12.2.1

²⁸ *Id.*

²⁹ *Id.* at pages 1-2, paras 12.3.1 -12.4.

³⁰ For a selection of relevant literature *see*, generally, AM. CIVIL LIBERTIES UNION, *AT AMERICA’S EXPENSE: THE MASS INCARCERATION OF THE ELDERLY* (2012); NATIONAL RESEARCH COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* 230 (Jeremy Travis et al. Eds., 2014); David Cloud, *On life support: Public health in the age of mass incarceration*, VERA INSTITUTE OF JUSTICE 5 (Nov. 2014); Cooper, *supra* note 10; Price, *supra* note 13; Burtonwood, *supra* note 9; Eva Steiner, *Early release for seriously ill and elderly prisoners: Should French practice be followed?* 50 *THE JOURNAL OF COMMUNITY AND CRIMINAL JUSTICE* (3) 267–76 (2003); Violet Handtke et al., *The collision of care and punishment: Ageing prisoners’ view on compassionate release*, 19 *PUNISHMENT & SOCIETY* 5–22 (2017); Directorate General Human Rights and Rule of Law, *European Committee on Crime Problems, White Paper on Prison Overcrowding* (Council of Europe, June 30, 2016); House of Commons Debate, *Prisoner Release Decisions, Column 201WH*, UK PARLIAMENT (Oct. 20, 2009); House of Commons Debate, *Column 229WH*, UK PARLIAMENT (Oct. 20, 2009).

rights standards.³¹ Notably, COVID-19 has illuminated the challenges of delivering adequate healthcare in prisons.³²

Given their shared interest in addressing these challenges, the US and E&W should cooperate to model best practices. Through careful co-operation, these models can be both sensitive to the legal and cultural idiosyncrasies of the specific jurisdictions, but also the more universal principles that emerge in compassionate release cases, such as the application of medical science and the pursuit of protecting health³³ and prisoners' rights,³⁴ as promulgated through international human rights frameworks. They can take advantage of the full diversity of co-operation interactions, ranging from the sharing of research methodologies and evidence-bases, to the exchange of comparative stakeholder 'know-how', and co-investment in evaluation exercises. They can encourage interaction across various levels (e.g., joint engagement with the World Health Organization), institutions (e.g., facilitating dialogues between 'twin' institutions, such as the BOP and HM Prison Service), and disciplines (e.g., healthcare, corrections, law, and parole).

With this in mind, the following questions are presented as a catalyst for stakeholder discussion:

1. What aims and objectives should compassionate release procedures pursue? What interests should they take account of, and how can these be balanced?
2. What methods are most appropriate for co-ordinating compassionate release, and how should relevant procedures be labelled?
3. What exclusion criteria (unrelated to health), if any, should be applied, and on what basis?
4. Should eligibility criteria be informed by relevant medical science criteria, and, if so, how can this be achieved?
5. How can efficient and clear processes be constructed to take account of evidence requirements, standards of proof, decision-maker competencies, and the need for expedited review?

³¹ *Id.*

³² *See*, for example, in relation to the US, *We must urgently do more to address COVID-19 behind bars and avoid mass infection and death: Guidance for Attorney General Barr, governors, sheriffs, and corrections administrators*, VERA INSTITUTE OF JUSTICE (May 11/12, 2020). *See*, for example, in relation to E&W, *Tackling the Spread of Coronavirus in Prison*, PRISON REFORM TRUST (2020).

³³ Article 12 of International Covenant on Economic, Social and Cultural Rights: "...the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

³⁴ The vulnerability of prisoners is recognized across international human rights instruments. Article 10 of the International Covenant on Civil and Political Rights, specifically provides that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person..." More broadly, the Standard Minimum Rules for the Treatment of Prisoners – 'The Nelson Mandela Rules (NMRs)' - promulgate various standards, including in relation to the administration of corrections facilities and personnel, prisoners' living standards, and health(care).

6. Should those granted compassionate release be subject to release requirements, and, if so, what form should they take and why?

7. What aims and objectives should tracking and reporting systems serve, who should co-ordinate them, should they be mandatory, and what form should they take?

8. What support do stakeholders (including prisoners and their families, lawyers, medical professionals, corrections personnel and releasing authorities) need, in order to engage effectively in compassionate release procedures? How, in particular, can stakeholders be supported to develop an understanding of the roles, competencies, and aims of other stakeholders?

5. CONCLUSION

Given their shared interests and common practices, this short paper urges that the US and E&W co-operate to model best practices for compassionate release, suggesting a series of questions to catalyse stakeholder conversations. Given the broad relevance of compassionate release to jurisdictions around the world, this call to co-operate could usefully be extended. No matter the breadth of the co-operative endeavour, however, the questions presented should serve as a useful starting point.

LIST OF ABBREVIATIONS

BOP - Director of the Bureau of Prisons

E&W - England and Wales

ERCG - Early Release on Compassionate Grounds

PSO - Prison Service Order

US - United States

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INTERNATIONAL LEGAL COOPERATION AND PROCEDURAL ISSUES: LESSONS FROM ADMINISTRATIVE AND ENVIRONMENTAL LAW

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Abstract: The present project endeavors to identify, discuss and consolidate the procedural principles of international legal cooperation in the law of States called upon to cooperate with another. The research methodology includes the analysis of the current procedural rules of international legal cooperation under the laws of Brazil, the United Kingdom and the European Union, with a focus on administrative and environmental law.

Contents: 1 Introduction. 2 Authorities of the Requested State that are competent to rule on the request for cooperation. 3 Standing to initiate the international cooperation process. 4 Translation and interpretation in the process of international legal cooperation. 5 Content of the decision resulting from the review of compatibility with the Requested State's public policy. 6 Efficacy of the public policy review decision. 7 Timing of the public policy review process.

Keywords: International Legal Cooperation, public policy, mutual assistance, administrative law, environmental law.

1. INTRODUCTION

The international legal cooperation discussed in this article is associated with coordinated action among States with the objective of ensuring that the basic state functions, such as enforcement and protection of rights (conflict resolution) are effective across borders whenever necessary.

On the one hand, from the standpoint of the international human rights system, States have the duty to safeguard negative and positive freedoms, which includes both protecting individual rights and punishing those who violate the rights of others. If the nature of such public duties requires them to cross national borders, the State that is requested to cooperate has a duty and not just a discretionary power to enable international legal cooperation.

On the other hand, from the standpoint of national law, the Requested States must protect their sovereign power to investigate and control public order, *i.e.*, the Requested States must cooperate internationally to the extent that such cooperation is compatible with its

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fundamental principles and with its own version of the concept of due process of law, both substantive and procedural.

International legal cooperation therefore depends on rules of procedure influenced by the position of the Requested States, which are caught between international duties to cooperate, on the one hand, and constitutional duties to refrain from cooperating in order to preserve their own *ordre publique* [public policy].

In this context, the present study endeavors to identify, discuss and consolidate the procedural principles of the review of compatibility of a cooperative act with public policy (hereinafter referred to as “public policy review” for short) to be exercised by the authorities and courts of one State that is called upon to cooperate with another. The research methodology includes an analysis of the procedural rules of international legal cooperation in effect under the laws of Brazil, the United Kingdom and the European Union with a focus on administrative and environmental law.

2. AUTHORITIES OF THE REQUESTED STATE THAT ARE COMPETENT TO RULE ON THE REQUEST FOR COOPERATION

What is the sphere of the decision-making power in the Requested State that is competent to weigh the interests between the international duty to cooperate and the national duty to protect public policy?

The answer depends on the provisions of the Requested State’s current laws concerning the characteristics of the act of cooperation to be practiced in its territory and which of its bodies are constitutionally competent to perform such acts.

For example, imagine it is necessary to enforce a ruling of a foreign environmental authority intended to prohibit an industry located in the territory of the Requested State and near the bank of a river that drains into the territory of the Requesting State. If, in the Requested State, administrative authorities are competent to enforce environmental administrative decisions, then those same authorities would be responsible for the process of reviewing the ruling to ensure compatibility with national public policy; if only the courts could enforce administrative decisions, as is frequently the case in Brazil, then the courts would be responsible for reviewing the compatibility of the foreign administrative decision with the public policy of the Requested State.

3. STANDING TO INITIATE THE INTERNATIONAL COOPERATION PROCESS

Who is competent to initiate the review process in international legal cooperation? Apropos, is it a review that must be initiated by the interested parties or is it initiated *ex officio* by the authorities of the Requested State?

In the case of a measure of international legal cooperation intended to exercise a right beyond the national borders, exclusively the rights-holder can take the initiative. Thus, any person who feels harmed by the implementation of an act of cooperation is required to take the initiative to ask the competent authority for review of the international legal cooperation. This is true not only of civil law issues, which would make it very obvious, but also issues of administrative law with respect to the defense of an individual against administrative decisions that deprive citizens of rights. In the case of vulnerable persons, however, such as minors, it is understandable that they are always represented by specific authorities in the Requested States.

If the international cooperation involves a request to another country's state prosecution authorities to take action on their own territory, as in the case of transborder enforcement of the powers of an environmental authority, the review process must be initiated by the judicial and administrative authorities of the Requesting State. Such foreign authorities, having legitimate standing to participate in the cooperation process, may be represented by central authorities or by any other administrative or judicial authority of the Requested State, so long as it does not coincide with the authority competent to review compliance with public policy.

It should be stressed, however, that the role of intermediary authorities, such as the Central Authority should be limited to facilitating cooperation, so that they should be dispensed with whenever they are not necessary. The Requested State should encourage direct communication between the authorized parties and the authorities empowered to review international cooperation in the Requested State.

4. Translation and interpretation in the process of international legal cooperation

Understanding of the relevant languages is of fundamental importance to enable cooperation among States. It is therefore perfectly natural to recognize that States have the duty of assuming the costs of interpreters and translators for those who lack the necessary resources required for the process of international legal cooperation. Nevertheless, it is understanding rather than translation and interpreting that should be considered to be a *sine qua non* for

international cooperation. Translation and interpretation may therefore be dispensed with in cases in which the requested authorities and interested parties are proficient in the language of the Requesting State.

5. CONTENT OF THE DECISION RESULTING FROM THE REVIEW OF COMPATIBILITY WITH THE REQUESTED STATE'S PUBLIC POLICY

How intensive must be the Requested State's review as to whether the requested act of cooperation on its territory is compatible with public policy? Should the review be limited to the public policy of the Requested State or be extended to the current laws of the Requesting State?

It is typical of legal systems resistant to international cooperation to extend their review process to include issues decided in the Requesting State without any connection with current public policy in the Requested State. This is so, because if the body of review in the Requested State becomes an instance of full appeal of the foreign decision, that State, in practice, will be setting itself up as a State with universal jurisdiction.

Thus, it is more consistent with a legal system open to international legal cooperation if the Requested State merely reviews its own public policy rather than examining the laws in effect in the Requesting State; as they say in Italian law, the Requested State should limit itself to a *giudizio di delibazione*.

An apparent exception to the above rule occurs with certain urgent measures in international legal cooperation. In principle, solely the court of the main trial is competent to order injunctive relief measures. Nevertheless, there are situations in which the urgency is so pressing that it would not be effective to apply for the urgent measure in one State so that it may be subsequently enforced in the territory of another State. The application for the injunctive relief may therefore be submitted directly to a court of the Requested State, in connection with a pending or future proceeding in the Requesting State. In that specific case, the court of the Requested State will not only review the public policy of its own country but will also be responsible for examining issues of *fumus boni iuris* [likelihood of success on the merits of the case] and *periculum in mora* [danger in delay] of the judicial claim according to the laws in effect in the Requesting State.

6. EFFICACY OF THE PUBLIC POLICY REVIEW DECISION

Is the public policy review decision a decision that nationalizes the act of cooperation within the Requested State and makes it equivalent to the other administrative and judicial decisions made there? In other words, can a proceeding before a foreign court or foreign administrative authority, if not contrary to the Requested State's public policy, give rise to the defense of *litis pendens* or *res judicata* in relation to other proceedings in progress in the Requested State?

In reality, denying such effects would amount to refusing cooperation: international legal cooperation would be useless if a future administrative or judicial decision by the authorities of the Requested State always took precedence over foreign decisions that have already been expressly or implicitly admitted by the review authorities of that same Requested State.

7. TIMING OF THE PUBLIC POLICY REVIEW PROCESS

What is the most appropriate time for the public policy review by the Requested State, before or after the requested act of cooperation has entered into effect?

The answer depends on the level of mutual trust between the States and thus the propensity of the Requested State's legal system to be more or less willing to cooperate with the Requesting State. A legal system that is not highly disposed to cooperate opts for a preliminary review, as under the laws of Brazil and the United Kingdom, which makes the enforcement of the foreign decision conditional on prior "recognition". Among the EU States, however, the United Kingdom opts for a more open system of cooperation, by allowing automatic recognition of judicial decisions and the possibility of retrospective reviews.

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