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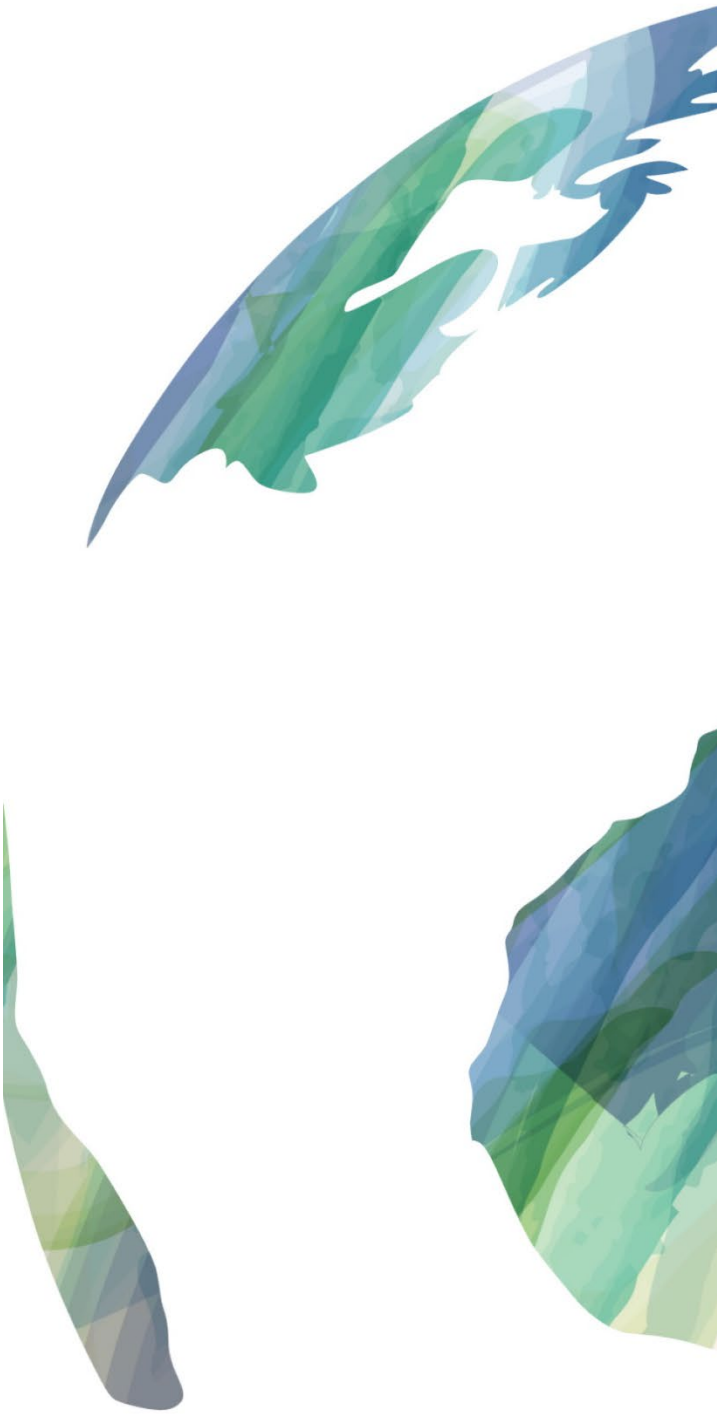

INTERNATIONAL LAW NEWS

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Kelly Blount, Editor-in-Chief, Karin Paparelli, Managing Editor, and Timothy Franklin, Deputy Managing Editor

The Lawyer as… *U.S. Customs and Trade Attorney*
Featuring Peter Quinter

Karin Paparelli

The Lawyer As… is an editorial series created to illuminate, explore, and applaud the diverse roles lawyers hold from litigator to legislator, from advocate to agent. It is our goal here at the *International Law News* to introduce to you, our readers, legal professionals from varying backgrounds, educations, and career paths from all around the world in an effort to better understand and appreciate the vibrant mosaic of opportunities a career in law has to offer.

The Spring 2024 edition of ILN is proud to shine the spotlight on Peter Quinter, our ***Lawyer as a U.S. Customs and International Trade Attorney.***

We asked Mr. Quinter to kindly provide our readership with answers to the following questions with the hope that his responses will illuminate the life of a United States Customs and International Trade Attorney. Newly minted attorneys are encouraged to explore the possibility of a career in U.S. Customs and International Trade. The editorial team here at the International Law News join with our esteemed colleagues around the globe in applauding you, Peter, as you exemplify the definition of excellence in the practice of law serving the United States and the global business community.

Q: Mr. Quinter, would you please provide a definition/explanation of your role as a U.S. Customs and International Trade Attorney:

As the Chair of the U.S. Customs and International Trade Law practice at Gunster, one of Florida's oldest and largest law firms, I principally represent U.S. importers, U.S. exporters, customs brokers, freight forwarders, and air and ocean carriers to resolve situations with various Federal law enforcement agencies. Sometimes, the matter is urgent such as Homeland Security Investigations (HSI) Special Agents appearing at the corporate office to demand to speak to the President or Import Manager of the company, or $1 million of perishable food products have been selected for examination by U.S. Food and Drug Administration (FDA), or the Bureau of Industry and Security (BIS) of the U.S. Department of Commerce detains an export shipment because it suspects that aircraft parts being exported from the United States may violate an export license. Mostly, I interact with my former employer, U.S. Customs and Border Protection (CBP) which is the lead border enforcement agency of the U.S. Government.

Q: Would you please provide your personal history achieving this role? Peter, what is your story?

My career began in August 1989 as an attorney in the Office of Chief Counsel, U.S. Customs Service (now known as U.S. Customs and Border Protection), in Miami, Florida. For five years, I worked closely to provide legal advice to Auditors, Special Agents, Inspectors, Entry Specialists, and Fines, Penalties and Forfeitures Officers, and Seized Property Specialists, Air and Marine Officers, and other employees. It was exciting to work on matters regarding narco-smuggling, commercial fraud, human cocaine 'swallowers', counterfeiting, money laundering, sanctions violations, trade embargoes, evasion of antidumping duties, false country of origin declarations, and failure to declare imported merchandise. I worked closely with the U.S. Department of Justice, DEA, Secret Service, FBI, OFAC, FDA, CPSC, USDA, FMC, and other Federal law enforcement agencies to enforce their respective laws and regulations. It was superb training for my private law career.

Q: Where are you based, what is your geographic location?

Florida, U.S.A.

Q: How difficult was it to transition into private practice?

In 1994, I left U.S. Customs to enter the private practice of law. It was shocking. I did not know anything about billing, and was clueless about client development, and of course, as a government employee, I was prohibited from asking anyone for money to provide legal advice and representation. The transition was difficult. Fortunately, representing one successful client after another in private practice eventually created a reputation locally, then nationally, and now, internationally. In 1999, I became one of the first

attorneys Board Certified in International Law by the Florida Bar.

Q: You are a highly sought after speaker and have graced many organizations with your leadership. I'm sure I don't know the half of it, would you kindly elaborate?

I have been a leader of many legal organizations and lectured often to business or industry organizations and conferences. I have been Chair of the International Law Section of the Florida Bar, Co-Chair of the Customs and International Transportation Committees, and Co-Chair of various Annual Conferences of the American Bar Association's International Law Section, am Co-Chair of the International Trade and Transportation Committee of the Transportation Lawyers Association, and am on the Board of Directors of the Florida Customs Brokers and Forwarders Association. I first went to China in 2002 for a client matter, was honored to be selected by the U.S. Government to travel to Karachi, Pakistan in 2012 for a U.S. Embassy-organized conference on exporting to the United States, and led the first delegation of lawyers to Havana, Cuba, in 2016 to discuss the "Rule of Law." For the last several years have been recognized as one of the best U.S. Customs and International Trade lawyers in the world according to Global Chambers and Chambers USA legal directories, and listed in Florida 500: Florida's Most Influential Business Leaders for the past four years, as published in the Florida Trend magazine. I have many 'reported' Federal court decisions.

Q: How long have you served as a US international trade attorney?

35 years.

Q: You and I had the privilege of visiting Cuba together with the Florida bar in 2015 and that was certainly a memorable trip. Would you please share with our readers some of your experiences and adventures as a U.S. international trade attorney?

I have travelled to 54 countries as varied as Cuba, China, Germany, UAE, and Argentina, heard many languages, eaten what most Americans would consider to be very strange food, got sick a few times in Asia, and been in some tense security situation overseas. Some memories include lecturing annually in Boston, Massachusetts for two hours at the Seafood Expo North America and then eating delicious lobster, scallops, New England clam chowder, and other seafood for 2 days at the show; lecturing at the International Precious Metals Institute in Orlando about importing gold into the United States; and participating at the annual Premium Cigar Association Conference in Las Vegas where I can enjoy the fine cigars and drinks. I have developed a fundamental philosophy of "Have Fun Making Money" and "TEAMWORK".

Q: What would you say is the difficulty of the workload?

I consider myself extremely fortunate. I work in a law firm that emphasizes camaraderie, cross-selling, and community service. The daily grind is stressful because of the complex nature of the practice having to know so many laws and regulations of various Federal agencies, deadlines, and clients demanding positive results as soon as possible.

Q: How would you describe your overall career satisfaction in this role and your work / life balance?

I work 40+ hours a week, typically am in the office on weekends, and am available to clients 24/7 on my mobile phone, vacations included. Just ask my wife and kids. To me, there really is no such thing as a "vacation" once smartphones were created.

Q: Any final thoughts?

I know there are many lawyers who don't like being lawyers, but that's never been me. I enjoy the intellectual challenge, the interaction with clients, and advocating on behalf of my clients to persuade Federal Government officials to pursue or not initiate specific actions. Each day is different. The laws, regulations, policies, and procedures keep changing, so I am always learning. I do wish I had learned Spanish, lived overseas for 2 years, and worked as an Assistant General Counsel for a Fortune 500 company, or even a non-governmental organization based in Europe. Nevertheless, I am thankful for all the unique experiences I've had, the superb mentors who've paved the way, and all the close relationships I've developed around the world.

Karin Paparelli is an active member of the New York, Florida and Tennessee Bars, admitted to the U.S. Court of International Trade in New York, and the Federal Court Middle District of Tennessee. She is active in leadership in the ABA and serves as an arbitrator for the Financial Regulatory Authority (FINRA) for greater Nashville, TN.

When Terror Strikes: International Humanitarian Law and Operation Iron Swords

Harry Baumgarten, Robert E. Lutz, Bruce Rashkow, Shira Scheindlin, and David A. Schwartz

On October 7, 2023 thousands of Hamas terrorists forcibly entered sovereign Israeli territory where they killed, tortured, raped, or took hostage over 1,000 Israeli civilians and several hundred Israeli soldiers.[1] The Israeli Defense Forces responded with a campaign of aerial strikes, followed by a ground incursion, eventually titled Operation Swords of Iron, targeting Hamas operatives and infrastructure deeply embedded in the Gazan civilian population.[2] According to both Western estimates and Hamas casualty figures, the operation has killed tens of thousands of Gazans, a substantial majority of whom are believed to be civilians.[3] The following is an explanation of relevant international legal principles as they relate to the October 7 terrorist attack and Israel's response.[4]

International Law Relevant to the Conflict

International Humanitarian Law (IHL) is the body of international law that governs the conduct of armed conflict. It is found in treaties such as the four Geneva Conventions of 1949 and in customary international law, i.e., general and consistent state practice observed due to a sense of legal obligation. Among other objectives, IHL seeks to limit unnecessary suffering during armed conflict, preserve the professionalism and humanity of combatants, and facilitate the restoration of peace.[5]

Because Hamas is a non-state actor,[6] the legal status of Gaza is contested,[7] and Israel is a party only to certain IHL treaties,[8] there is substantial debate about whether several IHL principles apply to the present Israel-Hamas conflict in Gaza. Nonetheless, there is widespread consensus that certain rules of IHL apply universally, regardless of whether a participant in a conflict is a state or a non-state actor, or whether the participant is a party to any particular treaty.[9] Those rules include the requirements of Common Article 3 of the 1949 Geneva Conventions, which has been ratified by every state in the world, and other principles of customary IHL overwhelmingly acknowledged by states across the world.[10]

The Relevant Principles of International Law

Common Article 3 of the 1949 Geneva Conventions, which indisputably applies both to Israel and to Hamas, requires all parties engaged in the current conflict to treat humanely all people who take no active part in the

[1] JIM ZANOTTI AND JEREMY M. SHARP, CONG. RSCH. SERV., R47828, ISRAEL AND HAMAS CONFLICT IN BRIEF: OVERVIEW, U.S. POLICY, AND OPTIONS FOR CONGRESS (2024), https://crsreports.congress.gov/product/pdf/download/R/R47828/R47828.pdf/.

[2] THE KNESSET, SWORDS OF IRON WAR, https://main.knesset.gov.il/en/about/lexicon/pages/swordsiron.aspx (last visited Apr. 2, 2024).

[3] OCHA, OCCUPIED PALESTINIAN TERRITORY, https://www.ochaopt.org/ (last visited Apr. 2, 2024).

[4] The bulk of this article was drafted in November 2023. We recognize that the debate has begun to shift to other areas of discussion, such as whether Israel is doing enough to prevent famine and starvation, in compliance with the March 28, 2024, International Court of Justice provisional measures order, and whether Israel should be showing greater improvement in the avoidance of civilian deaths by learning in an iterative manner from its experience. Nonetheless, we share this article in the hope that it will contribute to the legal discourse. Even as we do so, we note the tragedy of every innocent death in Israel and Gaza. Nothing in this article takes away from this heartbreaking reality.

[5] *See generally,* ICRC, WHAT IS INTERNATIONAL HUMANITARIAN LAW? (2004) https://www.icrc.org/en/doc /assets/files/other/what_is_ihl.pdf; § 1.3.1 at 8, OFFICE OF GENERAL COUNSEL, DEPT. OF DEFENSE LAW OF WAR MANUAL (2023), https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF (utilizing terms "international humanitarian law", "law of war", and "law of armed conflict" often, but not always, interchangeably).

[6] U.S. DEPT. OF STATE BUREAU OF COUNTERTERRORISM, FOREIGN TERRORIST ORGS, https://www.state.gov/foreign-terrorist-organizations/ (last visited Mar. 14, 2024) (listing Hamas as a US-designated terrorist organization), *see also* HOME OFFICE, PROSCRIBED TERRORIST GROUPS OR ORGANISATIONS, https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2/proscribed-terrorist-groups-or-organisations-accessible-version (last visited Mar. 14, 2024) (listing Hamas as a UK-designated terrorist organization).

[7] ISRAEL MINISTRY OF FOREIGN AFFAIRS, HAMAS-ISRAEL CONFLICT 2023: KEY LEGAL ASPECTS, https://www.gov.il/en/Departments/news/hamas-israel-conflict2023-key-legal-aspects (last visited Apr. 2, 2024).

[8] Israel, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/ihl-treaties/treaties-and-states-parties?title=&topic=&state=IL&from=&to=&sort=state&order=ASC (last visited Mar. 19, 2024) (listing treaties to which Israel is a party); *cf.* Palestine, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/ihl-treaties/treaties-and-states-parties?title=&topic =&state=PS&from=&to=&sort=state&order=ASC (last visited Mar. 19, 2024) (listing treaties to which the UN-recognized Palestine is a party).

[9] ISRAEL MINISTRY OF FOREIGN AFFAIRS, *supra* note 6.

[10] *See, e.g.*, States Party to the Following International Humanitarian Law and Other Related Treaties as of 19-January-2024, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/public/refdocs/IHL_and_other_related_Treaties.pdf (last visited Mar. 19, 2024) (detailing treaties to which UN members are party).

hostilities.[11] With respect to these non-combatants, the provisions of Common Article 3 expressly prohibit "violence to life and person," "[o]utrages upon personal dignity, in particular humiliating and degrading treatment," and "cruel treatment and torture."[12] Murder, rape, and the taking of hostages are all prohibited.[13]

Customary IHL likewise prohibits using human shields and intentionally locating military operations in close proximity to civilian facilities.[14] While states have the right to engage militarily in acts of self-defense, states must conform to the rules established by international law regarding armed conflict, including the principles of distinction and proportionality.[15] The principle of distinction means that belligerents have an obligation to direct attacks only against combatants and military objectives and not to intentionally target civilians or civilian objects, such as schools, houses of worship, or medical facilities, so long as these objects are not used for military purposes.[16] Similarly, belligerents are prohibited from using starvation of the civilian population as a method of warfare, or from deliberately targeting "objects indispensable to the survival of the civilian population" as such.[17]

Consistent with the principle of distinction, civilian facilities can lose protected status under IHL if it is clear that they are being used for military purposes.[18] For example, a hospital or school may become a legitimate military target if it contributes to a party's military operations, such as serving as a weapons depot or housing fighters who do not require medical attention.[19] To prevent this from happening, parties are not permitted to locate military facilities in close proximity to hospitals.[20] If a hospital becomes a legitimate target, the opposing party must still attempt to protect any civilians present by conforming to the requirements of proportionality.[21]

The principle of proportionality provides that combatants must refrain from a specific military attack if the expected loss of civilian life or injury to civilians, incidental to the attack, would be excessive in relation to the concrete military advantage expected to be gained.[22] This analysis focuses on the combatant's understanding based on the information reasonably available before the military operation has been effected; the proportionality of a strike thus turns on assessing both the extent of the anticipated civilian harm and the concrete military advantage the combatant expected to achieve before undertaking the specific military operation.[23] There is no formula for determining whether the expected value of a military target justifies the expected harm to civilians.[24] But the required analysis confirms that, under international law, collateral civilian harm is understood to be a tragic but often inevitable consequence of warfare. Whether such harm to civilians violates international law depends on conformity with the principle of proportionality.

The international legal principles of distinction and proportionality apply to all participants in warfare irrespective of whether one or both sides has violated them.[25] Whether specific military operations accord with these principles is a fact-driven inquiry.[26] A proper analysis of whether operations comply with IHL necessarily involves knowledge of the direct military objective that was expected to be achieved by a specific action and the extent of harm to civilian life and property that was anticipated based on the information available before the action was undertaken.[27]

Application of the Relevant Principles of International Law

Applying these and other relevant international legal principles to the current conflict leads to the following findings:

- Hamas's deliberate killing of civilians, hostage-taking, rape, torture, and other inhumane treatment

[11] *See* ART. 3, GENEVA CONV. RELATIVE TO THE TREATMENT OF PRISONERS OF WAR OF 12 AUG. 1949, *available at* https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949?activeTab=1949GCs-APs-and-commentaries (last visited Mar. 19, 2024).
[12] *Id*. at ART. 3(1).
[13] *Id.*; *see also* Rules, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/customary-ihl/v1 (last visited Mar. 15, 2024) (rules 1 and 2).
[14] Rule 97. Human Shields, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule97 (last visited Mar. 19, 2024).
[15] *Fundamental Principles of IHL,* ICRC, https://casebook.icrc.org/a_to_z/glossary/fundamental-principles-ihl (last visited Mar. 15, 2024); Rule 14. Proportionality of Attack, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/customary-ihl/v1/rule14.
[16] Rules 23 and 24, ICRC, *Int'l Humanitarian Law Databases*, ICRC.
[17] Rule 54, *International Humanitarian Law Databases*.
[18] Rules 23 and 24, ICRC, *Int'l Humanitarian Law Databases.*
[19] *See id*.
[20] *See id*.
[21] *See id*.
[22] Rule 14, ICRC, *Int'l Humanitarian Law Databases, supra* note 12.
[23] Rule 14, ICRC*, supra* note 12.
[24] *See id*.
[25] ICRC, *Fundamental Principles of IHL*, *supra* note 14.
[26] *See* Rule 14, ICRC*, Int'l Humanitarian Law Databases, supra* note 12.
[27] *See id*.

of Israeli and other civilians on October 7 constitute war crimes.[28]

- Consistent with Article 51 of the UN Charter, Israel has the inherent right to conduct military actions in self-defense, and in doing so it is obligated to observe international humanitarian law, including the principles of distinction and proportionality.[29]
- Hamas's use of hospitals, schools, mosques, ambulances, and other civilian facilities for military purposes, and its construction of military facilities in tunnels underneath or otherwise in proximity to such facilities is prohibited,[30] and may result in those facilities becoming legitimate targets provided Israel complies with the principle of proportionality.[31]
- In light of Hamas's established use of civilian and protected facilities for military purposes, the question of whether Israeli strikes may have violated the principles of distinction and proportionality requires evidence of what Israeli commanders believed about their targets, what they intended to achieve by striking those targets, as well as the measures the Israeli commanders took to minimize civilian casualties in making the strikes in question.[32] Absent such evidence, any assessment of proportionality would be flawed and incomplete.[33]
- Although some have asserted that the high number of reported Palestinian civilians killed indicates that the Israeli military has violated the principle of proportionality, violations of IHL cannot be determined based on partial information, such as reported casualty counts. Instead, any such assessment must depend on reliable information concerning anticipated or actual civilian casualties, the anticipated military value of particular targets, and the availability of less harmful alternatives.[34]
- International aid organizations have warned of imminent famine in Gaza and placed much of the blame on Israel for slowing or limiting the flow of humanitarian aid in Gaza.[35] Israel insists that it permits substantial aid to enter Gaza and that the primary obstacle is distribution within Gaza, namely that Hamas and armed gangs are diverting aid or deliberately causing starvation to achieve propaganda aims.[36] Insofar as any party is engaged in a deliberate policy of starving civilians, that constitutes a violation of the IHL.[37]
- No principle of international law requires comparable casualty counts, civilian or military, of the sides to an armed conflict.[38]

Recommendations

Based on the foregoing analysis of fundamental norms of international law and related findings, we believe the following recommendations should be adopted by all parties to this conflict:

- All parties to the conflict must comply rigorously with international humanitarian law, particularly with regard to the protection of civilians.
- Hamas should immediately and unconditionally release all hostages and cease all incursions and rocket-fire into the sovereign territory of Israel.[39]
- The legal community should reject the fallacy of IHL equivalence between civilians forcibly kidnapped by Hamas and held without justification or legal process, and Palestinian prisoners in Israeli jails convicted of terrorist acts or held pursuant to legal process, security justification, and with access to humanitarian services.
- Hamas should immediately cease using Gazan civilians as human shields, preventing residents of Gaza from leaving the areas in which Hamas has placed its soldiers and weapons, and locating and operating military equipment, camps, and headquarters in, near, or underneath civilian locations such as mosques, schools, and hospitals.[40]
- Consistent with the appropriate exercise of military force otherwise authorized under IHL, Israel should do everything possible to protect civilians and civilian objects from the effects of the conflict. Israel

[28] *See* ART. 3, GENEVA CONV., *supra* note 10; Rules 1 and 2, ICRC, *Int'l Humanitarian Law Databases*, https://ihl-databases.icrc.org/en/customary-ihl/v1 (last visited Mar. 15, 2024).
[29] *See* ART. 51, U.N. CHARTER, *available at* https://www.un.org/en/about-us/un-charter/full-text (last visited Mar. 17, 2024); *see also* ICRC, *Fundamental Principles of IHL*, *supra* note 14.
[30] Rules 23 and 24, ICRC, *Int'l Humanitarian Law Databases*.
[31] *See id*. at Rule 10.
[32] *See Fundamental Principles of IHL,* ICRC; § 5.3, p. 196 *et seq*., DOD MANUAL, *supra* note 4.
[33] *See id*.
[34] *See Id*.
[35] *See*, *e.g.*, Steve Inskeep and Daniel Estrin, *Experts Say Gaza Faces Imminent Famine. Israel Says That Is A Myth*, NPR MORNING EDITION (Mar. 22, 2024), https://www.npr.org/2024/03/22/1240108446/ experts-say-gaza-faces-imminent-famine-israel-says-that-is-a-myth.
[36] *Id*.
[37] Rule 54, *International Humanitarian Law Databases*, ICRC, https://ihl-databases.icrc.org/en/customary-ihl/v1.
[38] *See Fundamental Principles of IHL,* ICRC.
[39] *See* ART. 3, GENEVA CONV., *supra* note 10; Rules 1 and 2, ICRC, *Int'l Humanitarian Law Databases*, https://ihl-databases.icrc.org/en/customary-ihl/v1 (last visited Mar. 15, 2024).
[40] *See* Rules 23, 24, and 97, ICRC, *Int'l Humanitarian Law Databases*.

should make additional efforts to allow supplies of humanitarian aid to Gazan civilians, including food, water, medical supplies, and fuel, provided it can be reasonably assured that such aid will not interfere with its immediate ongoing military operations and will not be diverted by Hamas or others for military purposes.[41] Efforts by credible parties to airdrop humanitarian supplies or deliver them to Gaza's civilian population by sea in coordination with Israel are also justified.[42]

- Based on the current, publicly available record, the legal community should not assert that Israel is engaged in war crimes in Gaza without fairly and objectively examining whether and to what extent credible and reliable bases exist for such a conclusion.[43]

Both Israelis and Palestinians have already suffered tragically due to the horrific and unjustifiable attack of October 7th. However, one matter remains clear. The rigorous application of international humanitarian law is essential to prevent rewarding brutal aggressors and to help ensure a future peace.

Harry Baumgarten previously served as Legislative Director and Counsel to Members of Congress, where he advised on foreign policy.

Robert E. Lutz, Distinguished Professor Emeritus of International Legal Studies, Southwestern Law School, and ESG Consultant.

Bruce Rashkow, retired Office of the Legal Adviser, U.S. Department of State; retired U.S. Mission to the United Nations; retired Office of Legal Affairs, United Nations.

Judge Shira Scheindlin served as a United States District Judge in the Southern District of New York for 22 years. She previously served as a U.S. Magistrate Judge in the Eastern District of New York and as an Assistant U.S. Attorney in the Eastern District of New York. She is now a full-time arbitrator and mediator.

David A. Schwartz, Of Counsel, Wachtell, Lipton, Rosen & Katz.

The authors thank Ronald J. Bettauer, former Deputy Legal Adviser, U.S. Department of State, for his significant assistance with this article.

[41] *See* ART. 23, GENEVA CONV. IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR OF 12 AUG. 1949, *available at* https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949?activeTab=1949GCs-APs-and-commentaries (last visited Mar. 22, 2024); *see also* DOD MANUAL, *supra* note 4, at 294 (The Manual states that the U.S. government supports the concept in Article 54 of the Additional Protocol I, but suggests that it would be difficult to argue that such concept is customary international law. This may not be an international armed conflict to which Article 23 of the Fourth Geneva Convention would apply, and Israel argues that Article 55 does not apply because it no longer occupies Gaza. Without taking a position on these questions, Israel should act as if these articles apply).

[42] *See id*.

[43] *See*, *e.g.*, REUTERS, *US 'Not Seeing Acts of Genocide' in Gaza, State Dept Says* (Jan. 3, 2024), https://www.usnews.com/news/world/articles/2024-01-03/us-not-seeing-acts-of-genocide-in-gaza-state-dept-says.

Creative Machines: Artificial Intelligence and Copyright Law

Ryan Abbott and Elizabeth Rothman

I. Introduction

Artificial Intelligence (AI) is having a significant impact on the creative economy.[1] Advancements in computing power, software designs, and the proliferation of big data have evolved AI from a mere assistive tool to a potential automator and creator of original content. By the end of this decade, it is expected that a significant amount of art, literature, music, software, and web content will be AI-generated. This shift in technology will have profound social and economic effects, posing disruptive challenges to legal frameworks including in the realm of intellectual property (IP). Just with respect to copyright, the use of AI in the creative industry involves unresolved questions related to whether training machine learning based AI-systems on copyright protected content is copyright infringement or fair use, how AI systems themselves can be protected by IP rights, and whether and how the output of AI systems can be protected.

Why AI-Generated Works Should be Protected

Both the Constitution and the Copyright Act's history and objectives support protecting AI-generated works. Such protection would encourage the development and use of creative AI technologies, promoting the distribution of socially beneficial works, aligning with copyright law's aims. Without such protection, some AI-generated works might not be developed or shared, as significant time and financial investments are often necessary for their creation and dissemination, similar to human-created works.

While it could be possible to designate a natural person under non-traditional criteria as the author of an AI-generated work, such as an AI's programmer or a user providing a prompt to an AI, it may be most appropriate to list an AI as an author for an AI-generated work. That is because it is factually accurate and prevents someone from taking credit for work they have not done. Of course, protecting AI-generated works and listing AI as an author for copyright purposes is not about granting legal rights to machines, as AI is not a legal entity and cannot possess rights or obligations. Instead, protecting AI-generated works would foster transparency, appropriate allocation of rights, and informed policymaking.

If AI-generated works are to be eligible for copyright protection, this raises the question of who should be the owner of such copyright. Obvious candidates include an AI's programmer, user, or owner. This article suggests that making an AI's owner the owner of any works it generates is most consistent with general property law principles, such that the owner of property is the owner of property made by their property, whether that is fruit from a tree, a physical painting made by a 3D printer, or a digital painting made by a generative AI. Ultimately, the specific identity of the default owner is less crucial than the establishment of clear property rights. Where different parties are involved—users, programmers, owners—contracts can dictate optimal arrangements, especially where copyright is a key creation or collaboration incentive.

By contrast, some commentators believe that AI-created works should not be copyrighted, either for moral reasons—arguing that AI creations do not merit protection—or for economic reasons—suggesting that AI does not require financial motivation to create, or that protection is unnecessary for other reasons, or that the costs of protection outweigh the benefits. In the United States, the Copyright Office has had a "Human Authorship Requirement" policy since at least 1973, disallowing copyright registration for AI-generated works.[2] While the Copyright Act does not explicitly state that an author must be human or that human creativity is necessary for copyright, legal precedents have historically viewed creativity through a human-centric lens. However, it is worth noting that other forms of artificial authors—like corporations and nations—have been considered authors under the Copyright Act for over a century.

[1] This article has been adapted from Ryan Abbott & Elizabeth Rothman, *Disrupting Creativity: Copyright Law in the Age of Generative Artificial Intelligence*, 75 Fla. L. Rev. 1141 (2023).

[2] U.S. Copyright Off., Compendium (First) Of U.S. Copyright Office Practices §§ 2-287, 2-290 (1973).

Protection of AI-Generated Works in the United States

Until recently, no case in the United States had directly addressed the copyrightability of AI-generated works. *Thaler v. Perlmutter,* part of the Artificial Inventor Project led by Ryan Abbott, coauthor of this Article, has sought to challenge the Copyright Office's Human Authorship Requirement. [3] This project, through a series of pro bono legal test cases, aims to secure intellectual property rights for AI-generated works in the absence of a traditional human inventor or author. Its purpose is to spark discussion on the societal, economic, and legal impacts of cutting-edge technologies like AI and to provide guidance on the protectability of AI-generated outputs.[4]

In 2019, the Copyright Office declined to register "A Recent Entrance to Paradise," a 2D artwork generated by an AI system owned by Stephen Thaler. Dr. Thaler, as the owner, user, and developer of the Creativity Machine, attempted to register the artwork but faced rejection due to the absence of traditional human authorship. After two reconsideration requests, the final decision on February 14, 2022, upheld the rejection, affirming human authorship as a prerequisite for copyright protection in the U.S.[5] Subsequently, Thaler filed a lawsuit in June 2022 against the Copyright Office, seeking to compel the registration of the artwork with the AI listed as the author and Thaler as the copyright owner.

Other applicants tested the system by trying to register works created with text-to-image generators. One notable case involved artist Kristina Kashtanova, who registered a comic book titled "Zarya of the Dawn," with images produced using the generative AI system Midjourney. Initially accepted on September 15, 2022, the registration faced reconsideration after Kashtanova publicized the AI's role on social media. The USCO decided on February 21, 2023, to maintain copyright for Kashtanova's text, selection, coordination, and arrangement, but not for the Midjourney-generated images.[6] This led to the cancellation of the original certificate and the issuance of a new one excluding the AI-generated content.

Following this decision, on March 16, 2023, the USCO released guidance on works containing AI-generated material.[7] The USCO has clarified that the duty to disclose AI-generated elements depends on whether the AI-created content in a work is significant or de minimus. The criterion used to determine significance is whether the content would be copyrightable if created by a human.

Subsequently, in Thaler v. Perlmutter, the court ruled in favor of the Copyright Office on August 18, 2023, reiterating that human authorship remains a fundamental requirement for copyright. Judge Beryl A. Howell, acknowledging copyright law's adaptability to new technologies, nevertheless upheld the principle that human creativity is central to copyright eligibility. The case is now under appeal to the Court of Appeals for the District of Columbia Circuit.

Protection of AI-Generated Works Internationally

By contrast to the U.S., some jurisdictions provide copyright protection for AI-generated works. The United Kingdom, for instance, amended its copyright law in 1988[8] in part to explicitly provide copyright for AI-generated works, albeit with a shorter term of protection, namely 50 years from the date of creation vs. 70 years plus the life of an author. The person who undertakes to have the work created is legally deemed or fictionalized to be the author. Other jurisdictions, like India, South Africa, Ireland, and New Zealand have similar statutory provisions.

Internationally, most jurisdictions lack definitive rules on the protectability of AI-generated works, and some are actively reevaluating their existing policies. International copyright agreements neither explicitly allow nor forbid protections for AI-generated works. Yet, under such agreements, if a country like the United States offers such protection, it must extend this protection globally, even to works created in countries that might not offer similar protection. This scenario leads to a disparity where consumers in certain countries, but not others, can freely use and copy AI-generated works from any location. This could be viewed as unfair, allowing some countries to benefit from the

[3] Thaler v. Perlmutter, 1:22-cv-01564, (D.D.C. 2023).
[4] ARTIFICIAL INVENTOR PROJECT, https://artificialinventor.com.
[5] Letter from U.S. Copyright Rev. Bd., U.S. Copyright Off., to Ryan Abbott, Esq., Couns. For Dr. Stephen Thaler (Feb. 14, 2022), https://www.copyright.gov/rulings-filings/review-board/docs/a-recent-entrance-to-paradise.pdf
[6] U.S. COPYRIGHT OFF., REGISTRATION RECORD VAU001480196 (2022), https://publicrecords.copyright.gov/detailed-record/34309499: Letter from Robert Kasunie, Assoc. Reg. of Copyrights, U.S. Copyright Off., to Van Lindberg, Esq., Couns. for Kristina Kashtanova (Feb. 21, 2023), https://www.copyright.gov/docs/zarya-of-the-dawn.pdf.
[7] Copyright Registration Guidance, 88 Fed. Reg. at 16190.
[8] Copyright, Designs and Patents Act 1988 (UK).

creative output of others without offering similar protections. Conversely, countries that primarily import AI-generated works might benefit from not providing such protections.

Technological advancements often prompt copyright law reassessment. With AI now significantly contributing to creative works that hold consumer value, its ever-improving capabilities and the challenges in attributing AI outputs directly to human creators call for a comprehensive reevaluation of what copyright rules will maximize social benefits.

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Intensifying Storms and Intensifying Risks:
Merchant Generators Underestimate the Increasing Risk of Grids' Capacity Regimes

Anthony Alden, Elijah Turner, and Andrew Shifren

In December 2022, Winter Storm Elliot slammed the United States with a wave of Siberian air so cold that it broke records across the country. In Cincinnati, Ohio, temperatures dropped 52 degrees Fahrenheit in twelve hours. In Cheyenne, Wyoming, temperatures fell from 43 to three degrees in just 30 minutes. And in Elk Park, Montana, the recorded temperature of -50 Fahrenheit was as low as sensors could detect. Known as a Category 4 "Crippling" winter storm, Elliot pushed the U.S. power system to its limit. On December 23, 2022, nearly 1.5 million electricity customers lost power. As of December 24, 400,000 electricity customers across New England's six states still could not turn on the lights.[1]

Two organizations that manage interstate electricity grids, PJM Interconnection (PJM) and New England-Independent System Operator (ISO-NE), prepare for emergency events like Winter Storm Elliot with a unique system of payments and penalties for electricity generators. Generators receive payments from the grid in exchange for committing to provide a certain amount of power during emergency periods. Generators that exceed their commitment receive bonus payments, paid by the generators that produced less.

But this system had never before been tested by a storm like Elliot. Months after generators throughout PJM's territory failed to meet their supply obligations, they were hit with colossal eight- and nine-figure penalties that were inconceivable before the Storm. In total, PJM fined underperforming power generators $1.8 billion.[2] In New England, the overall figure was smaller, but still catastrophic for individual generators, totaling $39 million in penalties.[3]

Companies that participate in these pay-for-performance programs must reassess the risks in the face of climate change. Record-breaking, unpredictable weather events like Winter Storm Elliot are becoming more common, and generators need to scrutinize any business model with exposure to crippling penalties for non-performance out of their control. Winter Storm Elliot demonstrates that power producers in PJM and ISO-NE have not accurately forecast the colossal liability they may face under these capacity payment regimes. Companies can take certain steps to manage the risk, but climate change may require a complete reassessment of participation in these programs.

Background

There are seven Regional Transmission Organizations/Independent System Operators (RTOs/ISOs) in the United States, which coordinate, plan, and control multi-state energy systems.[4] These organizations serve as marketplaces for wholesale power. While they play key roles in short term energy transactions, coordinating auctions in both spot and day-ahead electricity markets, some RTOs/ISOs also incentivize longer-term planning of the energy system.

This long-term planning is driven by capacity markets. Unlike energy markets, which facilitate the sale of energy on the grid, capacity markets facilitate sale of the potential to generate electricity when needed in the future. RTOs/ISOs that run capacity markets pay electricity generators for generation capacity, instead of electricity. In other words, generators are paid in exchange for a contractual commitment to supply power in the future.

What happens when a generator cannot uphold its commitment during an emergency?

Two ISOs, PJM and ISO-NE, pay power generators bonuses for providing extra power during high-demand periods, and penalize those who fail to generate when they are needed.[5] During emergencies, these RTOs/ISOs put generators on notice that the exact

[1] Klein, Asher, "As Freezing Temps Arrive, Over 450,000 Without Power Across New England" NBC Boston, (December 24, 2022), https://www.nbcboston.com/news/local/storm-knocks-out-power-for-thousands-in-mass-ahead-of-cold-snap/2927853/

[2] Leith-Yessian, Devin, "PJM: Elliott Nonperformance Penalties Total More Than $1.8B" RTO Insider LLC, (14 Apr. 2023), https://www.rtoinsider.com/32003-pjm-elliott-nonperformance-penalties-18b/

[3] Sharp, David, "ISO New England Fines Power Plants $39M for Coming Up Short on Christmas Eve" NECN.com, (9 Jan. 2023), https://www.necn.com/news/local/iso-new-england-fines-power-plants-39m-for-coming-up-short-on-christmas-eve/2904704/

[4] The seven are: 1. California ISO 2. Southwest Power Pool 3. Electric Reliability Council of Texas 4. Midcontinent ISO 5. PJM Interconnection 6. New York ISO 7. ISO New England

[5] "Capacity Market (RJM)", PJM Learning Center, https://learn.pjm.com/three-priorities/buying-and-selling-energy/capacity-markets.aspx

amount of electricity they produce is being recorded. PJM calls each hour of this evaluation a Performance Assessment Hour (PAH). The incentive system is designed so that generators performing during an emergency period of low energy supply and high demand receive bonus payments from the ISO for every PAH in which they generated more power than they committed. Bonuses are paid out of the penalties levied against generators that supplied less than their promised electricity during each PAH.[6]

During Winter Storm Elliot, steep temperature drops caused mechanical and electrical failures at gas wells, pipelines, and plants. Gas-fired generation accounted for 63 percent of outages in the Eastern Connection.[7] While the record temperatures constrained gas supply, they also caused a dramatic increase in demand for heating. The combination led to skyrocketing energy prices and penalties, with catastrophic consequences for some generators.

Elliot Exploded Past Assumptions

A 2017 whitepaper by Charles River Associates entitled, "Navigating PJM's Changing Capacity Market," analyzed the bonus-and-penalty scheme that PJM was then beginning to incorporate into its capacity market. The paper stated, "The parameters defined by PJM make it highly unlikely any [generator] will lose all of its capacity revenues." It continued that even in a scenario where a generator had relatively conservative capacity revenues, "it would take more than 10 [Performance Assessment Hours] without performance for a resource to owe more in penalties than it collects in revenues. This is a greater number of PAH than are expected for most years, particularly as system performance improves."[8]

In 2022, analyses still underestimated the risk that severe storms pose to capacity market participants. A March 2022 consulting memorandum commissioned by PJM entitled, "Deriving the Optimal No-Look Offer Cap Considering Only Performance Penalties," calculated the breakpoint at which the reward of accepting capacity payments began to outweigh the risk of non-performance penalties. The calculation was based on data from 2011 through 2021, with the author concluding that "the average number of performance assessment hours has been just over 7 hours." But this average obscures the risk that many years of single-digit PAHs could precede a year that exceeded 20 PAHs where a generator could not produce power.[9]

Whatever system performance improvements the 2017 paper anticipated did not materialize during Storm Elliot. PJM instituted more than 23 PAHs in just two days during the Storm (December 23 and 24), more than three times the average number of PAHs from 2011 through 2021.[10] While both PJM and ISO-NE cap penalties per year, both caps on annual penalties were insufficient to protect small merchant generators.

To illustrate the potential risk that generators can face for non-performance during high-demand events, consider the case of the Cogentrix Energy companies Lincoln Power (owners of the Elgin and Rocky Road plants in Illinois) and Nautilus Power (a power marketer). During Winter Storm Elliott, both of these plants underperformed, and both now face business-altering consequences due to PJM penalties. Lincoln Power is restructuring under Chapter 11 bankruptcy, after it was assessed a $38.9 million penalty for violating its obligations to produce power.[11] Nautilus, also facing millions in penalties, has petitioned the Federal Energy Regulatory Commission (FERC) for relief.[12] Given these risks, power generators would be wise to consider all actions they can take to minimize the risk of non-performance under a PJM or ISO-NE capacity market regime.

Generators Can Hedge Risk Their Risk

Extreme weather events that increase demand for or decrease the supply of power capacity on the grid are forecast to grow over the coming years.[13] Even

[6] "Capacity Performance / Performance Assessment Hour Education", PJM CTC (2 May 2016) https://www.pjm.com/~/media/committees-groups/committees/oc/20160502/20150502-capacity-performance-performance-assessment-hour-education.ashx

[7] The Eastern Connection is the electric power transmission grid east of the Rocky Mountains, which supplies two thirds of the country's electricity. *See*, Howland, Ethan, "Record 13% of Eastern Interconnect capacity failed in Winter Storm Elliott: FERC, NERC", Utility Dive, (22 Sept. 2023), https://www.utilitydive.com/news/winter-storm-elliott-ferc-nerc-report-power-plant-outages/694451/

[8] David Hunger et. al., "Navigating PJM's Changing Capacity Market", Charles River Associates, (Mar. 2017), <https://media.crai.com/sites/default/files/publications/Navigating-PJMs-Changing-Capacity-Market-03072017.pdf>

[9] Sotkiewicz, Paul, "Proposed Default MSOC", Memorandum of E-Cubed Policy Associates, LLC, (14 Mar. 2022), https://www.pjm.com/-/media/committees-groups/task-forces/rastf/2022/20220314/20220314-item-02b-msoc-package-e-cubed-policy-associates.ashx

[10] "Winter Storm Elliot Event Analysis and Recommendation Report", PJM, (17 Jul. 2024) https://www.pjm.com/-/media/library/reports-notices/special-reports/2023/20230717-winter-storm-elliott-event-analysis-and-recommendation-report.ashx

[11] Howland, Ethan, "Lincoln Power Files for Bankruptcy after $38.9M PJM charge for failing to run during Winter Storm Elliot" Utility Dive, (3 Apr. 2023), https://www.utilitydive.com/news/lincoln-power-nautilus-power-ferc-pjm-penalties-elliott-complaint/646615/.

[12] *Id*.

[13] Climate Change Indicators: Weather and Climate | US EPA

generators that meet their capacity obligations may feel the ripple effects of these penalties, because lenders associate the possibility of capacity performance penalties with increased credit risk, driving up the cost of capital.[14] Additionally, reliable performance during past demand events does not ensure reliable performance during future events. The rapid drop in temperature during Winter Storm Elliot snarled gas pipelines in PJM, but the next extreme weather event could pose a different set of risks to generators.

So, what can generators do to mitigate these risks?

Preventive investment. Given that generators' costs of capital could increase due to added penalty risk, they should weatherize assets, while lenders still have an appetite for cheaper loans. Generators operating in PJM and ISO-NE should treat this as both a risk and an opportunity. Failure to meet capacity obligations can pose grave consequences, but well-prepared generators that meet or exceed their obligations could receive more frequent windfalls from performance bonuses.

Severe weather protocols. Generators should implement protocols for severe weather events to ensure that all personnel understand their responsibilities when things go wrong. Identifying pressure points in plant operations and instructing staff and leadership on how to navigate issues can prevent avoidable errors that compound problems caused by high demand and severe weather. For gas-powered generators, one such pressure point is the gas scheduling process in which generators provide estimates of the next day's gas requirements to gas marketers, who then coordinate with pipelines. This process requires clarity in timing, as a misstatement of the window during which the generator will need gas could lead to fuel deficiencies and trigger capacity non-performance penalties. Generators would be wise to implement redundancies in the gas nomination process to ensure that correct orders are executed during high stakes capacity performance events.

Fuel supply contracts. Gas generators should reevaluate their fuel supply contracts, as well. Data from Winter Storm Elliott suggests that about one third of underperforming gas-powered generators in PJM utilized interruptible gas contracts, meaning their fuel was the first to be cut when demand for gas spiked, along with demand for power.[15] While pricier in the short term, firm gas supply contracts could pay off later, because they reduce the possibility that a generator will not be able to acquire fuel in an emergency.

PJM/ISO-NE participation. Generators and their parent companies may want to reevaluate the proportion of assets in their portfolios that are subject to PJM and ISO-NE penalties. PJM and ISO-NE include generators in Delaware, Illinois, Indiana, Kentucky, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, Washington DC, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Generators could consider new acquisitions and developments in regions that do not employ capacity performance penalties. Generators may also wish to "rebalance" their portfolio by shedding assets in PJM and ISO-NE regions. With the right counsel and the right strategy, generators can manage their assets in ways that allow them to not only endure but thrive in extreme weather events.

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[14] PJM penalties a 'material downside' risk for merchant power plants – Moody's | S&P Global Market Intelligence (spglobal.com)
[15] Bryson, Mike, "Winter Storm Elliot" PJM, (11 Jan. 2023), https://www.pjm.com/-/media/committees groups/committees/mic/2023/20230111/item-0x---winter-storm-elliott-overview.ashx

Professional Responsibility on Social Media in Canada

Sergio Karas and Hannah Cho

This article reviews the current state of the law in Canada regarding lawyers' use of social media, with specific reference to the Rules of Professional Conduct in Ontario, Canada's largest jurisdiction. The article reviews recent caselaw amid a decline in civility and professional courtesy as a result of the Israel-Hamas conflict.

Introduction

Social media has become deeply integrated into our daily lives, providing a platform for unrestricted expression. Yet, with this uncharted freedom comes an increased responsibility for individuals to exercise caution in their online interactions, especially considering the potential legal consequences stemming from the amplified harm caused by careless posts. This caution is especially crucial for professionals subject to regulatory oversight, such as lawyers governed by bodies like the Law Society of Ontario ("LSO").

There is a fine balance between the right to freedom of expression enshrined in Canada's *Charter of Rights and Freedoms* ("Charter")[1] and the obligations imposed by regulatory bodies. There are boundaries for acceptable conduct by regulated professionals. Regulators have the authority to discipline lawyers for online content under the *Rules of Professional Conduct* ("Rules"),[2] and legal professionals should maintain decorum in their online presence. These Rules serve to safeguard not only individual professional reputations but also the overall integrity of the legal profession.

I. The Limits of Freedom of Expression on Social Media

(a) Free Speech

Navigating the complexities of free speech within the framework of the Charter can be challenging. Section 2(b) of the Charter bestows upon individuals "fundamental freedoms of thought, belief, opinion, and expression."[3] While Canadian law upholds the values of democratic self-governance, truth-seeking, and individual self-fulfillment through open communication, it is vital to acknowledge that freedom of expression is not without its limitations.[4]

Even though social media is a platform for self-expression, legal boundaries exist, with defamation and libel serving as clear examples of these constraints. It is noteworthy that "expression on a matter of public interest may be protected, even if it is conclusive or sarcastic."[5] The degree of public interest in safeguarding expression is determined by its proximity to core values such as intelligent democratic self-governance, truth determination, and individual self-fulfillment.[6] Conversely, expressions containing deliberate falsehoods, personal attacks, or offensive language are afforded limited protection.[7] As such, publications motivated by malice are granted minimal safeguarding under the law.[8]

(b) Defamation

Defamation and libel on social media can have severe consequences for personal and professional reputations. In defamation cases, courts evaluate whether statements published online lower a person's standing in the eyes of a reasonable individual, considering both the literal and implied meanings of the communication.[9] Courts have also acknowledged the rapid dissemination and sharing dynamics inherent in social media platforms.[10] This has emphasized the crucial

[1] *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].
[2] *Law Society of Ontario Rules of Professional Conduct*, r. 5.1-5 [LSO Rules].
[3] *Charter*, *supra* note 1, s 2(b).
[4] Julian Walker, "Hate Speech and Freedom of Expression: Legal Boundaries in Canada" (2018) 2018-25-E Background Paper, Library of Parliament.
[5] Halsbury's Laws of Canada (online), " Weighing freedom of expression and harm to the plaintiff" (IV.3.(2)(c)) at HDE-196 "Defamation" (2023 Reissue) [HDE-196].
[6] *Ibid*.
[7] *Ibid*.
[8] *Ibid*.
[9] *Hosseini v Gharagozloo*, 2024 ONSC 1106 at para 56 [*Hosseini*]; *Grant v. Torstar*, 2009 SCC 61 at para 28 [*Grant*]; *Ibid* at paras 57-58; Crookes v. Newton, 2011 SCC 47 [*Crookes*]; *Kam v. CBC*, 2021 ONSC 1304 at para 38, aff'd 2022 ONCA 13 [*Kam*]; *Bernstein v. Poon*, 2015 ONSC 155 at para 43 [*Bernstein*]; *Botiuk v. Toronto Free Press Publications Ltd*., [1995] 3 S.C.R. 3 at para 62 [*Botiuk*].
[10] Peter A. Downard, The Law of Libel in Canada, 5th ed (LexisNexis Canada Inc, 2022) at §3.01 [§3.01];
Stocker v. Stocker, [2019] U.K.S.C. 17 at para 39, [2020] A.C. 593 (S.C.) [*Stocker*].

understanding that the response and opinions of a "reasonable reader" are often immediate and transient, rather than the result of deliberate reflection.[11]

Consequently, accusations made on social media platforms—such as those alleging dishonesty, immorality, pedophilia, terrorism, racism, or other grave offenses—are inherently defamatory and pose heightened risks.[12] The potential harm to an individual's reputation is so evident that the likelihood of damages can be readily inferred.[13] Recent legal cases underscore the complexities of grappling with defamation in the digital age, where false allegations and hate speech can swiftly propagate to a global audience.

In 2023, the Ontario Superior Court in *D'Alessio v. Chowdhury*[14] responded decisively to online defamation, awarding damages to a law firm following a negative Google review from a dissatisfied client. This decision recognized the review's defamatory nature and potential harm to the law firm's reputation.[15] Other cases further underscore the complexities of grappling with defamation in the digital age. In *Paramount Fine Foods v. Johnston*,[16] the defendant disseminated derogatory statements about Canadian Muslims, including branding them as "terrorists," "terrorist scumbags," and "Nazis," with the effect of demonizing Islam.[17] Similarly, in the defamation case involving a doctor and media publication owner, a social media post labeled the complainant doctor as a "long-time Hamas activist."[18]

Furthermore, a recent social media dispute over pro-Palestinian rallies involved a Hamilton lawyer facing defamation claims for criticizing a call by a local union director to halt the rallies.[19] Tensions rose when the respondent tagged the union director's employer, accusing her of attempting to generate "manufactured consent for the genocide and ethnic cleansing of Palestinian people."[20] The complainant argued that the respondent's social media posts aimed to damage her reputation and expose her to harm.

Professional Regulatory Bodies

Professionals who propagate false statements and disseminate hate speech on social media, especially those implicating individuals in serious crimes cause substantial reputational harm and risk facing defamation suits and potential disciplinary action by professional regulatory bodies. Central to professional responsibility is the concept of civility, which requires that members maintain a respectful demeanor, even in their online interactions.

Professionals are obligated to adhere to their respective codes of conduct when engaging in online activities, considering the wide-ranging audience their posts may reach. Maintaining civility in online interactions is paramount for upholding public trust in various professions, particularly in influential roles such as those held by lawyers.[21]

Civility encompasses human respect and fundamental standards of polite conduct, whereas incivility extends beyond overt behaviors like shouting or using profanity to include actions such as blame-shifting and condescending communication.[22] In the justice system, incivility is viewed as a serious breach, characterized by displays of disrespect and patterns of rude, improper, demeaning, and disruptive conduct.[23]

The recent surge in public displays of hostility due to the Israel-Hamas conflict has presented new challenges in maintaining civility among professionals.[24] One notable instance of incivility occurred when Illinois government lawyer Sarah Chowdhury who worked in the comptroller's office was terminated from her position for making antisemitic remarks in private Instagram messages. Chowdhury's derogatory comments included

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[11] *Ibid*.
[12] *Hosseini*, *supra* note 6, at para 60; *Canadian Union of Postal Workers v. B'nai Brith Canada*, 2021 ONCA 529 at para 10, aff'g 2020 ONSC 323 [*Canadian Union of Postal Workers*].
[13] *Ibid*.
[14] *D'Alessio v. Chowdhury*, 2023 ONSC 6075 [*D'Alessio*].
[15] *Ibid*.
[16] *Paramount Fine Foods v. Johnston*, 2019 ONSC 2910 [*Paramount Fine Foods*].
[17] *Ibid* at para 19.
[18] Khalil Hamra & Meghan Grant, "London, Ont., doctor files defamation suit against Rebel Media owner over Social Media Post | CBC News", (21 February 2024), online: *CBC News,* https://www.cbc.ca/news/canada/london/london-doctor-defamation-lawsuit-rebel-news-owner 1.7120817.
[19] Bobby Hristova, "Hamilton lawyer faces $250K defamation lawsuit over social media posts about Israel-hamas war | CBC News", (1 February 2024), online: *CBC News,* https://www.cbc.ca/news/canada/hamilton/israel-hamas-mancinelli-bsat-lawsuit-1.7100357.
[20] *Ibid*.
[21] *Strom v Saskatchewan Registered Nurses' Association*, 2020 SKCA 112 at para 21 [*Strom*].
[22] Melissa D. Mortazavi, "Incivility as Identity" (2020) 2020 Michigan State Law Review 939 at 950 [Mortazavi].
[23] *Ibid*.
[24] Joe Adam George, "Are the pro-Hamas protests in violation of Canada's hate speech and terrorism laws?" (13 November 2023), online: *MLI*, https://macdonaldlaurier.ca/are-pro-hamasprotestsviolation-of-canadas-laws/.

referring to a Jewish account user as a "Zionist pig" and stating, "Hitler should have eradicated all of you."[25]

Chief Justice Richard Wagner of the Supreme Court of Canada (SCC) underscored the importance of cooperation, civility, and professionalism within the legal profession, even amid disagreements.[26] The Canadian judicial system recognizes the right to dissent but emphasizes the exercise of this freedom in support of the rule of law, rather than as a pretext for personal attacks.[27]

(a) *Professional Regulatory Oversight*

Professional regulatory bodies can enforce standards of conduct on social media to ensure alignment with professional responsibilities. Instances of disciplinary actions against professionals who express controversial or harmful views serve as poignant reminders of the importance of upholding elevated standards, even beyond their official duties.[28]

In the United Kingdom case of Farrukh Najeeb Husain, a solicitor faced disciplinary measures and was ultimately barred by the Solicitors Regulation Authority (SRA) for sharing offensive and antisemitic tweets.[29] Despite the solicitor's assertion that his Twitter account was personal, the SRA deemed the tweets blatantly inappropriate and antisemitic, employing terms such as "typical Zionist" and "Zionist pig."[30] This case highlights the regulatory bodies' mandate to address misconduct and emphasizes the wider implications of maintaining professional standards.[31]

Similarly, in *Peterson v. College of Psychologists*,[32] Dr. Peterson, a clinical psychologist and member of the College of Psychologists of Ontario, found himself compelled to undergo a mandated continuing education program by that College. This was prompted by concerns about his public comments and social media posts being perceived as "degrading, demeaning, and unprofessional," raising potential risks to the public and trust in the psychology profession.[33] The psychologist's extensive presence on social media and his contentious commentary on topics such as transgender issues, racism, overpopulation, and COVID-19 led to the intervention.[34] The court left that decision undisturbed. This case underscores the critical importance of upholding high standards in regulated professions, even when individuals act in personal capacities.[35]

(b) *The Rules of Professional Conduct*

i. Conduct Guidelines for Lawyers on Social Media

The LSO has established guidelines in the Rules governing lawyers' conduct. The Ontario Bar Association offers further guidance, emphasizing the importance of exercising good judgment and understanding the impact of online comments.[36] These guidelines emphasize the necessity of thoughtful expression and professionalism. Despite these efforts, surveys indicate a significant decline in civility in the legal profession, with nearly 70 percent of respondents reporting encounters with uncivil behavior in 2023.[37]

Under the Rules, lawyers are obligated to adhere to specific standards when representing themselves online. The Rules can be extended to their conduct and posts on social media, advising them to exercise restraint in public comments regarding the administration of justice, recognizing the weight their opinions carry in the public eye.[38] For example, Rule 5.1-5 mandates that lawyers

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[25] David Thomas, "Illinois official fires lawyer over antisemitic Instagram messages ...", (19 October 2023), online: Reuters https://www.reuters.com/legal/legalindustry/illinois-official-fires-lawyer-over-antisemitic-instagram-messages-2023-10-19/.
[26] Zena Olijnyk, "Why collegiality in the legal profession is important for lawyers, judges – and the law", (18 June 2021), online: *Canadian Lawyer*, https://www.canadianlawyermag.com/resources/practice-management/why-collegiality-in-the-legal-profession-is-important-for-lawyers-judges-and-the-law/357334; Richard Wagner, *Opening Statement by the Right Honourable Richard Wagner, P.C. Chief Justice of Canada* (Queen's College, University of Cambridge, England, 2019).
[27] *Ibid*.
[28] *Peterson v. College of Psychologists*, 2023 ONSC 4685 at paras 50-51 [*Peterson*].
[29] Bianca Castro, "Solicitor faces tribunal over 'plainly extremely offensive' tweets", (18 September 2023), online: Law Gazette, https://www.lawgazette.co.uk/news/solicitor-faces-tribunal-over-plainly-extremely-offensive-tweets/5117265.article.
[30] *Ibid*.
[31] *Ibid*.
[32] Peterson, *supra* note 28, at paras 50-51.
[33] *Ibid* at paras 1-3 & 41.
[34] *Ibid*.
[35] *Ibid* at para 5.
[36] Dan Ciraco, "10 THINGS EVERY LAWYER SHOULD KNOW ABOUT SOCIAL MEDIA", (18 October 2016), online: Ontario Bar Association, https://www.oba.org/JUST/Archives_List/2016/October-2016/SocialTips-5.
[37] Julie Sobowale, "Experience of incivility pervasive for Ontario Lawyers: Toronto Lawyers Association Survey", (13 December 2023), online: *Law Times*, https://www.lawtimesnews.com/resources/professional-regulation/experience-of-incivility-pervasive-for-ontario-lawyers-toronto-lawyers-association-survey/382235 [Sobowale].
[38] "Public appearances and statements", (27 April 2023), online: The Law Society of Ontario, https://lso.ca/lawyers/practice-supports-and-resources/topics/the-lawyer-client-relationship/public-appearances-and-statements.

should be courteous, civil, and act in good faith toward tribunals and all individuals with which they engage.[39] Rule 5.6-1 directs licensees to uphold public respect for the administration of justice, cautioning against making petty, intemperate, or meritless criticisms about other legal professionals.[40] Moreover, Rule 7.2-1 extends this requirement to dealings in the course of legal practice, emphasizing the avoidance of ill-considered or uninformed criticism of fellow legal practitioners.[41] Rule 7.2-4 states that lawyers must not communicate in a manner that is abusive, offensive, or inconsistent with the proper tone of professional communication.[42] Finally, Rule 7.5-1 allows lawyers to make public appearances and statements, provided there is no infringement on the lawyer's obligations to the client, the profession, the courts, or the administration of justice.[43]

In terms of striking a balance between lawyers' rights and the constraints placed by rules of professional conduct, the Supreme Court of Canada decision in *Doré v. Barreau du Quebec*[44] highlights the need for a proportionate balancing act.[45] The court held that while lawyers have the right to speak their minds freely, they also must do so with dignified restraint, in line with the expectations of their profession.[46]

ii. Disciplinary Authority Over Social Media Posts

Professional regulatory bodies, such as the LSO, have the authority to discipline members for their behavior on social media, especially in cases where misconduct involves inappropriate, disrespectful, or unprofessional conduct. The significance of maintaining professional conduct early in a legal career is that "to practice law is not a right, but a privilege."[47] This is reflected in s. 27(2) of the *Law Society Act* (the "Act"),[48] which states that a law license can only be issued to an applicant of good character, to safeguard the public, uphold ethical standards, and maintain trust in the legal profession.[49]

Following its mission to promote justice and uphold the rule of law, the LSO is empowered to take disciplinary action when a lawyer's social media activity demonstrates incivility, creates confusion, undermines trust in the administration of justice, or obstructs the LSO from fulfilling its statutory duties.[50] In *Law Society of Ontario v McEachern,*[51] the lawyer was subject to discipline proceedings due to social media posts, which he referred to as a "witch hunt."[52] The decision issued by the LSO included ceasing public broadcasts, deleting specific Facebook materials, and refraining from making unwelcome comments about LSO staff, complainants, and witnesses.[53] Further, the LSO's disciplinary jurisdiction extends beyond professional conduct to include personal behavior that could detrimentally affect the legal profession or hinder the administration of justice, as articulated in s. 33 of the Act.[54]

Section 33 of the Act prohibits licensees from engaging in professional misconduct or conduct unbecoming, with disciplinary proceedings initiated under s. 34(1).[55] Importantly, the LSO's disciplinary reach extends to both professional and personal social media accounts, irrespective of disclaimers or the absence of a direct link to the legal profession.[56] Disciplinary measures may be taken if there is a reasonable belief that a client's trust in the lawyer or the legal system could be compromised. The Rules state that a lawyer's conduct is not excused solely by its occurrence outside the courtroom or the lawyer's office.[57]

The LSO oversees lawyers, paralegals, and licensing candidates, administering disciplinary proceedings, and conducting good character investigations for candidates. In *Guo v. Law Society of Ontario*,[58] a licensing candidate faced disciplinary action for inappropriate social media posts, resulting in the referral of her licensing application for a good character hearing.[59] The tribunal considered factors such as the nature and duration of the misconduct, the passage of time, and expressions of remorse and rehabilitation.[60]

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[39] LSO Rules, *supra* note 2, r. 5.1-5.
[40] *Ibid*, r. 5.6-1 and Commentary 1 and 3.
[41] *Ibid,* r. 7.2-1.
[42] *Ibid,* r. 7.2-4; Sobowale, *supra* note 30.
[43] LSO Rules, *supra* note 2, r. 7.5-1.
[44] *Doré v. Barreau du Quebec*, 2012 SCC 12 [*Doré*].
[45] *Ibid*.
[46] *Ibid* at para 68.
[47] Warren K. Winkler, *Remarks of Chief Justice Warren K. Winkler on the Occasion of the Law Society of Upper Canada's Call to the Bar Ceremony* (Toronto: Ontario, 2010).
[48] *Law Society Act*, RSO 1990, c L.8, s. 27(2) [*Law Society Act*].
[49] *Ibid*; *Puchiele v. Law Society of Upper Canada*, 2018 ONLSTH 19 at para 42 [Puchiele].
[50] *Ibid*.
[51] *Law Society of Ontario v McEachern*, 2020 LSDD No 24 at para 51 [McEachern].
[52] *Ibid* at para 51.
[53] *Ibid* at para 33.
[54] LSO Rules, *supra* note 2, r. 1-1.
[55] Law Society Act, *supra* note 48, s. 33 & s. 34(1).
[56] LSO Rules, *supra* note 2, r. 7.5-1 and Commentary 1.
[57] *Ibid*.
[58] *Guo v. Law Society of Ontario*, 2019 ONLSTH 46 at para 3 [*Guo*]; *Law Society of Ontario v. Forte*, 2019 ONLSTH 9 [Forte].
[59] *Ibid*.
[60] *Ibid* at paras 2 & 46.

Similarly, in *Simone v Law Society of Ontario*,[61] a paralegal licensing candidate's 2020 social media posts were scrutinized, emphasizing the importance of tone, language, and compliance with human rights laws.[62] The discipline panel clarified that the case does not advocate for silence on contemporary issues, affirming that engaging in social or political commentary is not inherently misconduct.[63] Instead, it held there is a need for respectful language, particularly when expressing dissenting views on cultural and political matters.[64]

Conclusion

Navigating social media effectively requires an understanding of the limits of freedom of expression, particularly for regulated professionals. There is a complex interplay between free speech, defamation, and professional responsibility. Lawyers must exercise caution in their online communications. In today's digital age, prudent online behavior is essential to upholding public trust and maintaining the integrity of the legal profession.

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[61] *Simone v Law Society of Ontario*, 2023 LSDD No 27-30, 36 [*Simone*].
[62] *Ibid* at paras 25, 39, 75 & 83.
[63] *Ibid* at paras 75 & 83.
[64] *Ibid* at para 69.

USAID Introduces Landmark Rule of Law Policy:
A Pragmatic Approach to Global Development

Steven E. Hendrix

In a significant stride towards fortifying democratic norms and fostering sustainable development, the U.S. Agency for International Development (USAID) has unveiled its inaugural Rule of Law (ROL) Policy.[1] This pioneering initiative marks a pivotal moment in the agency's history, signaling a concerted effort to prioritize the promotion of rule of law assistance worldwide. Grounded in pragmatism and guided by a steadfast commitment to democratic values, USAID's latest endeavor underscores the indispensable role of the rule of law in underpinning equitable and inclusive development.

At its core, USAID's Rule of Law Policy acknowledges the inherent link between access to justice and conflict mitigation.[2] Drawing upon empirical evidence, the policy recognizes that bolstering justice mechanisms not only fosters social cohesion but also reduces the risk of conflicts, thereby laying the groundwork for sustained development. This recognition is underscored by the Strategic Development Goal 16 Plus data, which highlights the substantial return on investment in justice initiatives, with every dollar invested yielding approximately $16 in benefits from reduced conflict risk.[3]

Nevertheless, despite the compelling case for justice reform, many low-income countries continue to grapple with a pervasive justice deficit.[4] The Overseas Development Institute's findings shed light on the stark reality that addressing everyday justice needs necessitates only a modest investment, yet the justice gap remains stubbornly wide.[5] In light of these challenges, USAID's Rule of Law Policy assumes a pragmatic stance, advocating for the reprioritization of domestic justice budgets to focus on scalable, people-centered approaches that promise to narrow the justice gap and catalyze development.

In a global landscape marred by the erosion of democratic norms, USAID's Rule of Law Policy emerges as a timely response to the burgeoning threats to the rule of law. Building upon decades of programming expertise, the policy articulates a strategic vision underscored by evidence-based methodologies and guided by principles espoused by leading legal scholars.[6] Embracing a "people-centered justice" approach, USAID's policy places individuals at the forefront, championing inclusive strategies that empower communities to shape their legal landscapes.

Central to the Rule of Law Policy is a commitment to leveraging innovative programming and data-driven interventions to bridge the justice gap and fortify democratic resilience. By prioritizing local actors and

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[1] U.S. Agency for International Development, “Rule of Law Policy” (2023) posted at https://www.usaid.gov/democracy/rule-law-policy

[2] Task Force on Justice, Justice for All – Final Report. (New York: Center on International Cooperation, 2019), available at https://www.justice.sdg16.plus/

[3] Id.

[4] World Justice Project, “Measuring the Justice Gap” (2023) posted at https://worldjusticeproject.org/our-work/research-and-data/access-justice/measuring-justice-gap#:~:text=The%20justice%20gap%20can%20be,everyday%20problems%20and%20severe%20injustices.

[5] Overseas Development Institute (ODI), “Financing scaled-up investments in people-centred justice” (2023) posted at https://odi.org/en/about/our-work/taking-people-centred-justice-to-scale-investing-in-what-works-to-deliver-sdg-163-in-lower-income-countries/

[6] USAID programming in the rule of law field goes back to the 1960s with the “Law and Development” programming of that era. For historical perspectives on USAID’s past work, see generally the following: Steven E. Hendrix, “Institutional Capacity Building and Legal Reform in Iraq: Toward Innovation and Public Administration Modernization,” 6 Law & Development Review 225 (2013); Steven E. Hendrix, “The Merida Initiative for Mexico and Central America: The New Paradigm for Security Cooperation, Attacking Organized Crime, Corruption and Violence,” 5 Loyola International Law Review 107 (2008); Steven E. Hendrix, “New Approaches to Addressing Corruption in the Context of U.S. Foreign Assistance with Examples from Latin America and the Caribbean,”12 Southwestern Journal of Law and Trade in the Americas 1 (2005); Steven E. Hendrix, “Restructuring Legal Education in Guatemala: A Model for Law School Reform in Latin America,” 54 Journal of Legal Education 597 (2004); Steven E. Hendrix, “Centros de Justicia" guatemaltecos: la piedra angular para avanzar en la transparencia, eficiencia, debido proceso y acceso a la justicia, 37 Revista Instituto Inter-Americano de los Derechos Humanos 249 (2003). Hendrix & Ferrigno, Dispute Settlement and Customary Indigenous Legal Practice in a Multicultural Guatemala: Empirical Data on Conflict Resolution and Strategies to Advance Access to justice in Rural Areas, 6 Sistemas Judiciales 108 (2003); Steven E. Hendrix, “USAID Promoting Democracy and the Rule of Law in Latin America and the Caribbean,” 9 Southwestern Journal of Law and Trade in the Americas 277 (2003). Pages 277-299 and Pages 300-320; Steven E. Hendrix, “Lessons from Guatemala: US Foreign Policy and the Rule of Law,” 23:4 Harvard International Review 14 (2002); Steven E. Hendrix, “Innovación en el procedimiento penal en America Latina: Conversión de Guatemala al Sistema Acusatorio,” 16 Revista Centroamericana Justicia Penal y Social 155 (2002); Steven E. Hendrix, “Guatemalan "Justice Centers": The Centerpiece for Advancing Transparency, Efficiency, Due Process and Justice Access,” 15:4 American University International Law Review 101 (2000); Steven E. Hendrix, “Helping Guatemalans Get Their Day in Court,” 40:6 Front Lines 14 (2000).

grassroots initiatives, USAID aims to foster diverse and inclusive societies where the rule of law serves as the cornerstone of progress. Through collaborative efforts with justice operators, paralegals, and community actors, the agency seeks to catalyze transformative change and promote justice, rights, and security for all.

The policy is already in action across the globe. In the Republic of Georgia, USAID is promoting "People Centered Justice" by building community awareness and trust in the justice system and helping courts to be more responsive to people's needs.[7] With USAID support, Ukraine was the first country to organize specific national consultations on People Centered Justice, leading to the development of roadmaps for government action on both Gender Based Violence and informal employment.[8] In Kosovo, USAID is supporting the implementation of a People Centered Justice approach that brings together communities and practitioners using an innovative approach to collectively define problems and propose improvements for better justice services.[9] In Serbia, USAID is supporting the implementation of a digital platform that promotes a People Centered Justice approach with online communication between judicial representatives and citizens.[10] In Colombia, USAID is closing the justice gap with a People Centered Justice approach that is grounded in local systems development and places individual legal problems and community justice needs at the center of Rule Of Law programming.[11]

As USAID embarks on this new chapter, the Rule of Law Policy stands as a testament to the agency's unwavering dedication to advancing democratic norms and fostering sustainable development. In a world beset by uncertainty, USAID's pragmatic approach to bolstering the rule of law offers a glimmer of hope, charting a course towards a future where justice is not just an aspiration but a tangible reality for millions around the globe.

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[7] U.S. Agency for International Development, "USAID Launches New Program to Strengthen Georgia's Courts, Expand Access to Justice" (2023) posted at http://ow.ly/RJNN50NIB9q
[8] Chemonics, "Championing People-Centered Justice in Ukraine" (2023) posted at http://ow.ly/UM9b50NIBix
[9] U.S. Agency for International Development, USAID/Kosovo, "Toward a People Centered-Justice Approach" (2023) posted at http://ow.ly/bmrr50NIBkU
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Unconventional Means of Enforcement in Civil Procedure Law:
An Analysis in Light of Constitutional Principles

Domingos Rodrigues Pandeló Jr.

This article addresses the adoption of unconventional enforcement measures in execution proceedings, aiming at the satisfaction of judicial protection. It emphasizes the importance of the effectiveness of judicial performance in civil procedural law, while underscoring that such effectiveness should not be pursued disregarding constitutional values, requiring a balancing of the means used in light of fundamental principles enshrined in the Constitution. In the context of unconventional enforcement measures, it is crucial that such measures do not violate human dignity, a fundamental principle of the Constitution, and that they are proportional and reasonable, in addition to being effective. The pursuit of effectiveness is a fundamental principle in the adoption of such measures, as otherwise the implementation of an unconventional measure may have a purely punitive character, contributing little or nothing to the effective satisfaction of the intended protection. Furthermore, it is essential to ensure due process and full defense to the debtor, respecting their fundamental rights and subsistence. The flexibility of unconventional enforcement means allows for an adaptive approach, which must be analyzed on a case-by-case basis, based on the specificities of the proceeding, however, attention must always be paid to not compromise the dignity of the debtor and to ensure a balance between the effectiveness of enforcement and the protection of fundamental rights. Undoubtedly, it represents a useful instrument for specific cases, in which it is proven possible to satisfy judicial protection with such unconventional means, they may be used as a means of satisfying creditors' rights, which also deserve judicial protection.

I. Introduction

This article discusses the adoption of unconventional means as an alternative to seek enforcement satisfaction, in situations where typical enforcement means prove ineffective. Throughout the work, some constitutional guidelines will be adopted as delineating elements to establish the limits and possibilities in the adoption of unconventional means in enforcement. Thus, aspects such as enforcement satisfaction, effectiveness of enforcement, as well as proportionality, reasonableness, and effectiveness in enforcement, with the adoption of unconventional means, will be central themes. Therefore, the general objective of the article is to analyze unconventional means of enforcement in civil procedural law, considering constitutional principles and their conformity with human dignity, without forgetting the pursuit of enforcement satisfaction. As specific objectives, we can list the following: 1) investigate the application of the principles of proportionality and reasonableness in unconventional enforcement means, 2) analyze the effectiveness of enforcement in light of fundamental rights and, 3) verify the position of the Federal Supreme Court (STF) regarding unconventional enforcement means. The research methodology involved bibliographic review on the topic, as well as analysis of jurisprudence from specific courts, as described above. It is, therefore, bibliographical and documentary research. Due to the theme addressed, the cut-off point for most documents and references was established as the year 2016, since the object of study is one of the items of Article 139 of the Code of Civil Procedure of 2015.

To achieve the intended objectives, the article is structured in the following topics, briefly described below. Initially, a general overview of civil enforcement proceedings in Brazil will be presented, in order to highlight the degree of satisfaction of civil enforcement. Then, unconventional enforcement means will be addressed, as well as any constitutional principles involved in this type of discussion, such as those related to credit satisfaction (enforcement), as well as those of human dignity, among others. The central point will be how to seek the effectiveness of enforcement, in accordance with the fundamental rights of the debtor (and the creditor). Therefore, among others, the analysis of the principles of proportionality, reasonableness, and, last but not least, effectiveness, will be made, since without effectiveness, the adoption of an unconventional enforcement means may be characterized by the adoption of a restrictive measure without any effectiveness to the useful result of the process.

2. Unconventional Enforcement Means: Definition and Legal Basis

The judge, in conducting the process, must seek to resolve the dispute within a reasonable time. The reasonable duration of the process is a constitutional matter, enshrined in Article 5, LXXVIII, which establishes the "reasonable duration of the process and the means that guarantee the speed of its processing." The Code of Civil Procedure, Article 4, establishes that "the parties have the right to obtain in a reasonable time the full solution of the merit, including the satisfaction activity" (Brazil, 2015). In practice, as seen in the first topic of this article, the satisfaction activity is far from being resolved within a reasonable time. It is in this context that the possibility of applying unconventional means arises to try to meet the constitutional and procedural precept outlined in the previous paragraph, namely, the satisfaction of credit, of protection, within a reasonable time.

Usually, when one thinks of unconventional enforcement means, what comes to mind is Article 139, in its item IV, which states, textually: "The judge shall direct the process according to the provisions of this Code, being incumbent upon him: (...) IV - to determine all necessary inductive, coercive, mandamus or subrogatory measures to ensure compliance with a court order, including in actions concerning pecuniary performance" (Brazil, 2015).

It is clear that in order to seek the effectiveness of enforcement, other measures beyond those provided for in the 2015 Code of Civil Procedure are necessary. It is worth noting, however, that there are other articles in the aforementioned legal framework that deal with enforcement effectiveness, even by unconventional means. For example, Article 297 states, literally, "The judge may determine the measures he deems appropriate for the enforcement of provisional relief." Furthermore, Article 380 of the same law can be cited, which states in its sole paragraph that "the judge may, in case of non-compliance, determine, in addition to the imposition of a fine, other inductive, coercive, mandamus or subrogatory measures." Or even, one can resort to Article 403, also in its sole paragraph, which states:

> "If the third party fails to comply with the order, the judge shall issue a seizure warrant, requisitioning, if necessary, police force, without prejudice to liability for the crime of disobedience, payment of a fine, and other inductive, coercive, mandamus or subrogatory measures necessary to ensure the enforcement of the decision" (Brazil, 2015).

The articles related to unconventional means of enforcement, or forced execution, do not end there. Article 536 of the Code of Civil Procedure can be cited, which asserts that "in the enforcement of a judgment recognizing the enforceability of an obligation to do or not to do, the judge may, ex officio or upon request, for the effectiveness of specific protection or the obtaining of protection by equivalent practical result, determine the measures necessary for the satisfaction of the creditor." Finally, still within the scope of the Code of Civil Procedure, there is Article 773, which mandates that "the judge may, ex officio or upon request, determine the measures necessary to comply with the order to deliver documents and data".

3. Constitutional Principles Applicable to Unconventional Enforcement Measures

Individual rights and guarantees hold a special place in the Brazilian legal system, finding shelter in the Constitution of the Republic. Barroso (2023) asserts that "right is the possibility to exercise powers or demand conduct. Guarantees are institutions, material conditions, or procedures made available to right holders to promote or safeguard them." The cited author also states that human dignity is one of the main foundations of the Brazilian constitutional state, which implies that in the presence of eventual conflicts in the application of legal norms, that which is considered one of the main, if not the main, constitutional foundation, should prevail. This position is also supported by Nery Jr. and Abboud (2019) when they affirmed that: "this principle is not just a rhetorical device or a last resort for complementing possible interpretations of established norms. It is the reason for the existence of Law. It would be sufficient on its own to structure the legal system."

Certainly, the satisfaction of judicial protection intended by the creditor, which finds support in the Federal Constitution itself, as well as in the Code of Civil Procedure, as discussed in the previous section, must be sought, however, some important elements and considerations must be taken into account in the analysis of the specific case, after all, "this is not about an unchecked power: it is a duty-power guided by scientific criteria of moderation, proportionality, reasonableness, and sufficiency" (Guerra, 2021).

The need for the judiciary to seek unconventional means, in specific situations, is supported so that the

effectiveness of judicial protection can occur; otherwise, justice itself would be discredited (Theodoro Junior, 2015). Guerra (2021) raises an interesting point regarding the use of unconventional enforcement measures, which is sufficiency. The concept of sufficiency proposed by the author can be related to effectiveness, which will be presented shortly in this section.

Next, the discussion of the concepts of proportionality, reasonableness, and effectiveness will be presented. These are important concepts, not only from the perspective of civil procedure but also from a constitutional perspective. In a decision from 2019, the Fourth Panel of the Superior Court of Justice, in AREsp. 1.495.012/SP, under the rapporteurship of Minister Marco Buzzi, defined that:

> "The jurisprudence of this Superior Court has established that unconventional measures for credit satisfaction cannot exceed the principles of proportionality and reasonableness, and it must also observe the principle of the least onerousness to the debtor, with the use of the institute not being admissible as a procedural penalty."

The above decision already anticipates the concept of effectiveness, insofar as it states that the unconventional measure to be adopted cannot be configured as mere procedural penalty. In other words, in addition to proportionality and reasonableness, there must be the possibility of achieving the intended protection with the unconventional measure to be adopted.

3.1. Proportionality

Proportionality is a term commonly used when discussing the use of unconventional means. The purpose of proportionality is to curb abuses by the Public Power, especially when restricting fundamental rights in any way. In this sense, there can only be a restriction on fundamental rights when a set of requirements is met: a) the restriction must be constitutionally authorized; b) the restriction must serve the social interest and cannot be based on the preservation of public interest; c) the restriction must be exhaustively justified; d) the Public Power act that restricts the fundamental right can be extensively reviewed by the judiciary; e) the restriction on fundamental rights must be proportional in terms of Ubermassverbot and Untermassverbot (Nery Jr; Abboud, 2019).

Ubermassverbot can be understood as effective protection, while Untermassverbot can be defined as limitation of excess (Nery Jr; Abboud, 2019). It is worth noting that proportionality should not be confused with balancing, which, in the words of Robert Alexy, applies to resolve any conflicts between fundamental rights (Alexy, 2011).

3.2. Reasonableness

The principle of reasonableness is of vital importance for judicial protection. It is a crucial element for the administration of justice. According to Barroso (1996), it is an important tool for evaluating the actions of public power, in the sense that it does not offend essential principles of justice. "Reasonable is what is in accordance with reason, assuming balance, moderation, and harmony; what is not arbitrary..." (Barroso, 1996). The adoption of the principles of proportionality and reasonableness is fundamental for the application of the so-called unconventional measures. This command is more constitutional than procedural. Procedural commands are more related to the exhaustion of typical enforcement means without having achieved protection satisfaction.

However, for the legitimate application of unconventional enforcement means to be characterized, proportionality and reasonableness alone are not enough. Effectiveness, which will be discussed next, must also be considered.

3.3. Effectiveness

The analysis of effectiveness here can initially be weighed in the terms proposed by Didier Jr (2017) when he states that "effective is the process that realizes the right asserted and judicially recognized." However, it should be clear that effectiveness here is closely related to the importance of adopting the unconventional measure for the satisfaction of enforcement. In other words, to be effective, to have effectiveness, means that the unconventional measure, usually restrictive of rights, typically affecting the debtor's person rather than their assets, will lead to the resolution of the process. Otherwise, the measure will resemble a lasting or eternal punishment to the debtor's person, with no practical result for the intended satisfaction.

4. Analysis of Jurisprudence

In this section, we will analyze the jurisprudence on the topic, starting with the discussion of ADIN 5491 within the scope of the Supreme Federal Court (STF), followed by the analysis of the jurisprudence of the Superior

Court of Justice (STJ), and concluding with the analysis of the jurisprudence of the Court of Justice of the State of São Paulo (TJ-SP).

4.1. Judgment of ADIN 5491 by the Supreme Federal Court

The Direct Action of Unconstitutionality (ADIN) 5491, proposed by the Workers' Party, was filed with the STF on May 11, 2018. It was assigned to Justice Luiz Fux's docket, and on December 19, 2018, the opinion of the Attorney General of the Republic, represented by Attorney General Raquel Dodge, was attached, advocating for the unconstitutionality of atypical execution methods, specifically Articles 139-IV, 297, 380, single paragraph, 403, single paragraph, 536-head and §1 and 773 of the Code of Civil Procedure.

In the judgment of ADIN 5491, the vote of the Reporting Justice Luiz Fux pointed to the constitutionality of the provisions of the Civil Procedure Code related to atypical execution methods. Thus, the adoption of measures such as the seizure of the national driver's license, passports, and the prohibition of participating in public tenders, to name a few examples, could be adopted when necessary, "provided that fundamental rights are not infringed upon and the principles of proportionality and reasonableness are observed."

It is worth noting that the judgment of ADIN 5491, which determined the constitutionality of article 139, IV, and other articles related to atypical execution methods, did not aim to release the indiscriminate adoption of such measures. During the execution process, attention must be paid to constitutional principles.

5. Final Considerations

First and foremost, it is important to highlight that civil procedural law has, as one of its fundamental objectives, the effectiveness of judicial protection, which includes the effectiveness of decisions rendered by judicial bodies. It is not acceptable for an execution judgment to be deliberately disobeyed, risking the demoralization of the judiciary as well as the risk of the tutelage obtained being rendered useless.

However, the pursuit of this effectiveness cannot be pursued in a manner disconnected from constitutional values, requiring the weighing of means used in light of fundamental principles. In the context of atypical execution methods, it is essential that such measures do not violate the dignity of the human person, a fundamental principle of the Constitution.

The adoption of measures that cause disproportionate embarrassment, exposure, or humiliation of the debtor, for example, would be inconsistent with this principle. Thus, when analyzing atypical execution methods, it is necessary to observe the proportionality and reasonableness of the measures adopted. Measures that are excessively invasive or cause disproportionate harm to the individual sphere of the debtor may be considered unconstitutional.

Moreover, it is relevant to consider the guarantee of due process and full defense. Atypical execution methods must ensure the debtors the opportunity to express themselves and contest the measures adopted, guaranteeing them space to present arguments and evidence in their defense. Another crucial point is the need to respect the fundamental rights of the debtors, including regarding their subsistence and dignity.

Measures that severely compromise the ability to sustain oneself or violate fundamental rights must be carefully analyzed in light of the constitutional principle of human dignity. The critical analysis of atypical execution methods in civil procedural law, in light of constitutional law, must prioritize compatibility with fundamental principles, especially the dignity of the human person.

The effectiveness of execution cannot override constitutional values, requiring a balanced weighing between the pursuit of creditor satisfaction and the protection of debtor rights and dignity. When addressing atypical execution methods, it is important to emphasize that civil procedure should not be seen only as a technical instrument for the satisfaction of material rights, but also as a means of protecting fundamental rights.

In this sense, respect for human dignity, a principle enshrined in Article 1, III, of the Brazilian Federal Constitution, is essential.

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