

CONTRACTUALISM:  
A SOLUTION TO THE PUBLIC MORALS DEBATE IN THE  
WORLD TRADE ORGANIZATION

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## INTRODUCTION

The “public moral” is structured as one of several general exceptions to the basic obligation of trade liberalization in core agreements of the WTO, including General Agreement on Tariff and Trade (hereinafter “GATT”) and the General Agreement on Trade in Services (hereinafter “GATS”). The GATS public morals clause provides,

Subjects to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals...<sup>1</sup>

Under the GATT and GATS, the general exception clauses can be exercised as a defense by a respondent Member state after a complainant state successfully shows a violation of a trade regulation.<sup>2</sup> That is, public morals are a reason by which states can justify measures that would otherwise be in violation of the obligations of the World Trade Organization [WTO]. Therefore, it is important for both the WTO panel and the appellate body to analyze what parts of its members’ legislation are justified by the concept of “public morals,” in order to find out whether these justifications are appropriate for this purpose. The member states invoking the “public moral” clause must prove:

- (a) That the measure is designed to protect public morals; and  
 (b) That the measure for which justification is claimed must be “necessary” to protect public morals.<sup>3</sup>

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<sup>1</sup> See General Agreement on Trade in Services art.XIV(a), Apr.15,1994,Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments-Results of the Uruguay Round, 1869 U.N.T.S. 183, 33 I.L.M.1167(1994) [hereinafter GATS]. GATT similarly provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevails, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting part of measure:

- (a) necessary to protect public moral

<sup>2</sup> See, e.g., Appellate body Report, United States-*Measures Affecting Imports of Woven Wool Shirts and Blouse from India*, at 15-16, WT/DS/33AB/R (Apr.25,1997)(discussing burden of proof imposed on complaining party to establish initial violation of WTO agreements).

<sup>3</sup> Jeremy C. Marwell, *Trade and Morality: The WTO Public Morals Exception after Gambling*, 81 N.Y.U. L. REV. 802, 828 (2006) (explains that the requirement that measures be “necessary to protect public moral” is explicit in GATS and GATT. There are two-part

So far, only three disputed cases have referred to the public morals exception. *US-Gambling*<sup>4</sup> examined whether a measure of restricting cross-border gambling services could justifiably use the moral exception. *China-Audiovisual*<sup>5</sup> examined whether the measure banning imports of foreign audiovisual products was within the boundary of the moral exception. *EC-Seal Products*<sup>6</sup> analyzed whether the banning of imports and placing seal products on the market constituted an exception on the grounds of public morality. The panel and the appellate body found that all three measures fulfilled the requirements of the first step (i.e., that the measures were designed to protect public morals). However, none of these measures met the second aspect of justification (i.e., they were not deemed necessary to protect public morals), and thus were expected to be withdrawn.

This article re-examines the issue because the recent trend suggests that the public moral exception will play an increasingly crucial role in international law.<sup>7</sup> In fact, an increased number of member states with different cultural and religious backgrounds will trigger more trade-morality disputes.<sup>8</sup> To a large extent, public morals exceptions are actively utilized outside of the WTO in regional and bilateral trade or investment agreements.<sup>9</sup> Many countries have begun to insert Public Morals clauses in a number of other bilateral treaties, including the Chile–Mexico FTA, the India–Sri Lanka FTA, the China–ASEAN Framework Agreement,

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necessity test. The first part is a “weighing and balancing” of several factors, including the vitality of the interest at state, the effectiveness of the measure in achieving its stated end, and the measure’s overall effect on trade. The second part involves an inquiry as to whether a less trade-restrictive measure is “reasonable available” based on the degree to which an alternative measure achieves the state goal, the difficulty of implementing the alternative measure, and the identity of parties bearing any additional cost. A measure is only judged to be “necessary” if there is no reasonably available measure less restrictive of trade (i.e. the measure chosen must be the least trade restrictive of reasonable available alternatives)).

<sup>4</sup> Appellate Body Report, *United States –Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter *US-Gambling*].

<sup>5</sup> Appellate Body Report, *China- Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R (Dec. 21, 2009) [hereinafter *China-Audiovisual*].

<sup>6</sup> Panel, *European Communities - Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Docs WT/DS400/R, WT/DS401R (25 November 2013) (*EC - Seal Products*); AB, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* WT/DS400/AB/R, WT/DS401/AB/R (22 May 2014) (*EC - Seal Products*).

<sup>7</sup> Marwell, *supra* note 3, at 809, (discussing four reasons why public morals disputes will be invoked more frequently in the future. For instance, maturation of WTO doctrines on health and the environment might lead to a relative increase in the frequency of public morals litigation because ambiguity and unclarity of meaning of the public moral would lead a disagreement among States).

<sup>8</sup> Marwell, *Supra* note 3, at 803.

<sup>9</sup> *Id.* at 811.

and the Japan–Singapore regional trade agreement.<sup>10</sup>

Despite the increased use of public morals in trade agreements, the problem is that “public morals” as a concept has no clear boundary.<sup>11</sup> The panel and the appellate body have never defined public morals in concrete ways. Does public morality include only those principles that are universal and widely shared? Alternatively, does each nation have the discretion to exercise the scope of public morality? Other options would exist in between, such as requiring a certain number of nations, but not necessarily all nations, to have adopted a certain moral standard in their regime.<sup>12</sup>

Both universalism and relativism, however, have potential problems. If the panel and the appellate body choose universalism, the set of morals that would actually constitute public morals might be very limited.<sup>13</sup> Only a small number of moral principles, such as the prohibition of genocide<sup>14</sup> or slavery,<sup>15</sup> would be candidates for the “public morals” exception in trade agreements, and thus nations would rarely have to restrict trade to protect public morals if the norm is already widely shared. In addition, imposing universalism would force the elimination of many of the morality-based trade restrictions that nations currently maintain, such as banning the import of alcohol by some Muslim nations.<sup>16</sup>

On the other hand, relativism would open up the possibility for member states to abuse the exception by using the public moral

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<sup>10</sup> *Id.* (Of the 250 regional and bilateral free trade agreements that have been registered with the WTO in 2006, more than 100 contain public moral exceptions similar or identical to GATS Article XIV(a). Given that many of these agreements explicitly adopt the structure and language of WTO agreements, an effective public morals doctrine in the WTO is likely to affect decision under regional or bilateral agreement).

<sup>11</sup> Pelin Serpin, *The Public Morals Exception after the WTO Seal Products Dispute: Has the Exception Swallowed the Rules?* 2016 COLUM. BUS. L. REV. 217, 251 (2016) (argues the necessity of the boundaries of public moral exception. The article explains that the EU-Seal decision has left the exception with no boundaries, leaving the door open for validation of otherwise illegal protectionist measures disguised as measures intended to preserve a public moral. The article argues that the Appellate Body should properly and necessarily left the definition and scope of what constitutes a public moral to the discretion of individual WTO member countries).

<sup>12</sup> Marwell, *Supra* note 3, at 819-926 (raises a possibility of “moral majority” by showing similar spectrum of options).

<sup>13</sup> See Mark Wu, *Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine*, 33 YALE J. INT’L L. 215, 232 (2008).

<sup>14</sup> See e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dev. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

<sup>15</sup> See Convention to Suppress the Slave Trade and Slavery, Sept. 25, 1926, 46 Stat. 2183, 60 L.N.T.S.253, amended by Protocol Amending the Slavery Convention, Dec. 7, 1953, 7 U.S.T. 479, 182 U.N.T.S. 51.

<sup>16</sup> WTO Secretariat, Trade Policy Review: Indonesia, at 46, WT/TPR/184 (May 23, 2007); WTO Secretariat, Trade Policy Review: Qatar, at 26-7, WT/TPR/S/155(Jan 24, 2005).

restrictions to pass many trade restrictions.<sup>17</sup> Because there is no consensus on the boundary of defining public morals, the member states may bring their own standard of public morals and undermine the goals and core principles of the trade agreements.

Previous studies have failed to find creative solutions to resolve the issue of whether universalism or relativism should be adopted in such situations. Howse has pointed out the practical difficulty of finding a solution, which may require a philosophical discussion.<sup>18</sup> This Article is the first to start discussing the philosophical debate of the moral relativism and universalism in this context, and introduces a position that mixes relativism and universalism—the contractualist approach<sup>19</sup>—as a solution. The Article argues that the panel and the appellate body should adopt a contractualist framework in approaching the public moral exception. Contractualism and the WTO share the fundamental principle of reciprocity in common, and therefore they both recognize the fact that any decision should be made with its impact on other people or WTO members in mind. Moreover, a contractualist framework involves a “reasonable person standard” and a “balancing test,” which are familiar frameworks for legal scholars. This approach could help the WTO tribunal to resolve the issue.

Lastly, the Article recognizes the practical difficulties of the WTO Tribunal to apply such an approach, and suggests a modification of it by introducing the “right institution”<sup>20</sup> principle from the literature of law

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<sup>17</sup> Marwell, *Supra* note 3, at 826. (“Allowing a country to invoke the public morals exception unilaterally could shield from WTO scrutiny regulations that inefficiently restrict trade or are motivated by protectionism. Without reference to international practice, it might be feared that any municipal law or regulation could be case as a matter of public morals, undoing the WTO’s significant progress in liberalization regulatory barriers to trade”).

<sup>18</sup> See Howse, Robert; Langille, Joanna; Sykes, Katie, *Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products*, 48 GEO. WASH. INT’L L. REV. 81, 150 (2015).

<sup>19</sup> The term ‘Contractualism’ can be used in a broad sense—to indicate the view that morality is based on contract or agreement—or in a narrow sense—to refer to a particular view developed in recent years by the Harvard philosopher T. M. Scanlon, especially in his book *What We Owe to Each Other*. Scanlon’s version of Contractualism is not simply concerned with determining which acts are right and wrong. It is also concerned with what reasons and forms of reasoning are justifiable. Whether or not a principle is one that cannot be reasonably rejected is to be assessed by appeal to the implications of individuals or agents being either licensed or directed to reason in the way required by the principle. For brief summary of the Contractualism, see Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/entries/contractualism/> (last visited at Oct 23, 2015); see T.M. Scanlon, *WHAT WE OWE TO EACH OTHER* (1998).

<sup>20</sup> Right institutions means institutions that are tailored to local environments or culture of a society. Because developing nations are different from advanced countries in that they face many constraints and challenges, institutions that performed well in the advance countries may not work well in developing nations. Developing nations do not require an extensive set of institutions reforms. Rather, they need to diagnose their

and development.

Part II reviews the ways in which scholars have attempted to solve the public morals debate in the WTO and moral universalism/relativism in the field of philosophy. Part III suggests contractualism as a possible solution to the controversies of the public morals exception and applies the framework of contractualism to the previously decided case, *China-Audiovisual*, using it to reexamine the case. The Article then draws on the area of law and development, reconciling “right institutions” with “contractualism” to modify this framework in order to resolve practical difficulties of its application. The Article concludes with Part IV.

## I. LITERATURE REVIEW

### A. Public Moral Debate in the WTO

How have previous scholars tried to solve the unclear definition of public morals? There seems to be a consensus about the danger of abusing public morals because of its ambiguity and lack of definition.<sup>21</sup> Some suggest that public morals should be developed in accordance with other sources of public international law. For instance, international human rights law could be an option for defining the meaning of “public moral.”<sup>22</sup> The scope of public morals could be narrowed down by interpreting it in

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institutions level and find an “appropriate” institutional arrangements to further their growth. By doing so, the developing nations could find their own country-specific development path based on their institutional capacity. In other words, the Developing countries adopt an experimental attitude for policy selection and formulation because each developing country is under a different stage of economy with different institutional capacity from each other. For instance, the export led growth played in different time in different place based on the institutional capacity. South Korea adopted the export led growth strategy immediately after their Import Substitution Industrialization period (i.e. a trade and economic policy which advocates replacing foreign imports with domestic production. This is based on the premise that a country should attempt to reduce its foreign dependency through the local production of industrialized products), while China adopted the strategy without experiencing Import Substitution Industrialization period. Turkey and Brazil experienced the export led growth after both Import Substitution Industrialization and Neo liberalism. See generally Dani Rodrik, *One Economics Many Recipes: Globalization, Institutions and Economic Growth* 229 Princeton Express, (2008) (Arguing that “Right institution” is critical element for developing nations to achieve further economic growth); Dani Rodrik, *Second-Best Institutions*, 98 AM. ECON.REV. 100, 100-104 (2008); Dani Rodrik, *The Globalization Paradox*, 171(Norton 2011); see also, Joseph, E. Stiglitz, , *Globalization and its discontents* (Norton 2002); Jagdish Bhagwati, *In defense of globalization*(Oxford, 2004); Narcis Serra & Joseph E. Stiglitz, *the Washington Consensus Reconsidered* (Oxford University Press, 2008).

<sup>21</sup> Steve Charnovits, *The Moral Exception in Trade Policy*, 38 VA. J. INT’LL. 689 (1998) (arguing that “virtually anything can be characterized as a moral issue and therefore, some method to determine the legitimacy of a moral claim is needed in order to ensure that the moral exception does not begin to swallow the rule. Allowing each government to restrict import based on its own definition of morality could disrupt trade and allow imperialism by countries with market power”).

<sup>22</sup> *Id.*

line with public international law.

Some others recommend determining whether the nation at issue genuinely views the measure to be an appropriate or necessary moral regulation. One study has argued that polling data, for instance, is needed to examine whether a measure is qualified as a morally motivated legislation.<sup>23</sup> Others have also distinguished between inwardly- and outwardly-directed public morals justifications, arguing that a stricter evidentiary and procedural test must be applied to public moral legislation that is directed at foreign activity.<sup>24</sup>

There is also an argument addressing the WTO's limited institutional role and the practical difficulties of the panel and the appellate body in examining the various questions raised so far (i.e., whether something is a good moral belief, or a widely held belief, or a consistent moral belief, or a rational moral belief).<sup>25</sup> The argument suggests that the WTO should only look at whether or not the belief is of a *moral nature*.<sup>26</sup> It suggests that to ask whether the reason is the *right type* of moral reason is simply the wrong question.<sup>27</sup> Finally, some scholars have argued for the elimination of the public morals exception, stating that the unilateral suspension of trading access for reasons based on ethical preference should not be sanctioned by the WTO.<sup>28</sup>

#### B. MORAL RELATIVISM AND UNIVERSALISM IN PHILOSOPHY

Moral universalism is “the position that there is a universal ethic which applies to all people, regardless of culture, race, sex, religion, nationality, sexuality or other distinguishing feature, and all the time.”<sup>29</sup> Proponents of moral universalism argue that universality is part of the

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<sup>23</sup> Katarina Jakobsson, *The Dilemma of the Moral Exception in the WTO*, Faculty of Law, Stockholm University, LLM dissertation (argues that certain amount of domestic support, as evidenced by polling data, should be required for a measure to be considered representative of country's moral value).

<sup>24</sup> Wu, *supra* note 13, at 243-255.

<sup>25</sup> Howse et al., *supra* note 18, at 26.

<sup>26</sup> Howse et al., *supra* note 18, at 26.

<sup>27</sup> *Id.*

<sup>28</sup> Jagdish Bhagwati & TN Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case for Freed Trade*, in Fair Trade and Harmonization, Jagdish Bhagwati and Robert E. Hudec eds 187 (1996) (argues that “international trade should not be able to be restricted for moral reasons: Unilateral suspension of trading access for reasons based on ethical preference should not be sanctioned by the WTO. Morally motivated legislation opens the door to power politics in the law of the WTO. It allows countries to exploit their market power to enforce their will on less powerful countries. Instead, private action and persuasion should be used to achieve moral goals.”)

<sup>29</sup> Kemerling, Garth, *Philosophy Pages* (2011), <http://www.philosophypages.com/dy/u.htm#unvby> (last visited Oct 23, 2015).

very meaning of morality.<sup>30</sup> This seems to refer to how people understand the notion of a moral rule when they speak about “our understanding of what it means to take the moral point of view...”<sup>31</sup> Others are opposed to moral relativism due to its counter-intuitive implication. When discussing conflicting moral statements (e.g., “X is good” versus “X is not good,” argued by two different individuals), they refer to “the conviction shared by laymen and philosophers that only one of these arguments could possibly be right.”<sup>32</sup>

On the other hand, moral relativism means that a moral statement cannot be inferred from generally applicable statements. Instead, moral statements are relative to the individual, to opinions, times and places, etc. Moral relativism has three distinct forms: descriptive, normative, and meta-ethical relativism.<sup>33</sup>

In the world of descriptive relativism, different people have different fundamental moral views. They regard “cultural tradition as a prime source of the individual’s views and think that most disagreements in ethics among individuals stem from enculturation in different ethical traditions.”<sup>34</sup>

Normative relativism differs from descriptive relativism in that it argues that a person should act in accordance with his group’s views on certain issues. That is, an individual’s moral view is correct if it is consistent with the moral views of his social group.<sup>35</sup>

Meta-ethical relativism holds that moral truth is relative to a given moral framework, and that no one framework is truer or more valid than any other framework. Thus, what is morally right in relation to one moral framework can be morally wrong in relation to a different moral framework, and no moral framework is objectively privileged as to the one true morality.<sup>36</sup>

A mixed approach<sup>37</sup> has elements of both relativism and universalism.

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<sup>30</sup> R.M.Hare “universality”, in proceedings of the Aristotelian Society, 55, 306 (1954) (arguing universality is part of the true meaning of morality).

<sup>31</sup> P.W. Taylor, On taking the moral point of view, *Midwest Studies in Philosophy*, 35 (1978).

<sup>32</sup> D. Lyons, “Ethical relativism and the problems of incoherence” in *Moral relativism- A reader* 16 (Oxford University Press, 2001).

<sup>33</sup> Richard Brandt, *ETHICAL RELATIVISM, MORAL RELATIVISM: A READER* 25 (Paul K. Moser & Thomas L. Carson eds 2003).

<sup>34</sup> *Id.* at 25.

<sup>35</sup> *Id.* at 25.

<sup>36</sup> Gilbert Harman & Judith Jarvis Thompson, *MORAL OBJECTIVITY AND MORAL RELATIVISM* 3 (1996).

<sup>37</sup> See D. Copp, *Morality, Normativity, and Society*, Oxford University Press, 1995. (“it is true that something is morally wrong only if it is wrong in relation to the justified moral code of some society, and a code is justified in a society only if the society would be rationally required to select it”); Wong, D.B., *Pluralistic Relativism*, 20 *Midwest studies in*



This approach may be the one that better reflects the reality since, on an empirical level, there are both substantial moral disagreements and some striking moral agreements across different societies. That is, reality could include both elements of universalism and relativism, and we should not be restricted to either of them in an absolute manner. In addition, this approach is the best justified approach, since it better reflects the moral thinking of ordinary people, at least for the purpose of establishing law or other public institutions. This is because establishing law or other public institutions should be based on a common view on morality. This article is not aiming to find a “right” view; instead, it seeks to find a common view of morality across societies.

## II. CONTRACTUALISM AS A SOLUTION TO THE PUBLIC MORALS DEBATE IN THE WTO

The question of whether the WTO should choose relativism or universalism is still unresolved. This article finds a solution from a philosophical debate between moral relativism and universalism. It introduces contractualism, one of a mixed approach that combines relativism and universalism, as a solution. Contractualism includes the conceptual frameworks of “reasonable person standard”<sup>38</sup> and a

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philosophy: moral concepts, 378-399 (arguing that more than one morality may be true, but there are limits on which moralities are true. It says one morality may be true for one society and a conflicting morality may be true for another society and thus there is not one objectively correct morality for all societies); Foot, P. “*Moral relativism*” in *Foot, Moral dilemmas and other topics in moral philosophy*, 20-36, (Oxford: clarendon press, 2002) (argues that there are conceptual limit on what could count as a moral code, and that there are common features of human nature that set limits on what a good life could be. Because of this, there are some objective moral truth- for instance, that the Nazi attempts to exterminate the Jews was morally wrong. However, Foot says, these considerations do not ensure that all moral disagreements can be rationally resolved. Thus, in some cases, a moral judgment may be true by reference to the standards of one society and false by reference to the standards of another society- but neither true nor false in any absolute sense); Nussbaum. M.C., “*Non-relative Virtues: an Aristotelian approach.*” *The quality of Life*, 242-269 (Oxford: clarendon press, 1993) (argues that there is one objectively correct understanding of the human good and that this understanding provides a basis for criticizing the moral traditions of different societies. The specifics of this account are explained by a set of experiences or concerns, said to be common to all human beings and societies, such as fear, bodily appetite, distribution of resources. Corresponding to each of these is conception of living well, a virtue, such as courage, moderation and justice. Nussbaum also points out that sometime there may be more than one objectively correct conception of these virtues and that the specification of the conception may depend on the practices of a particular community).

<sup>38</sup> The term is used to explain the law to a jury. The “reasonable person” is an emergent concept of common law. But, there is no accepted technical definition. The standard holds that each person owes a duty to behave as a reasonable person would under the same or similar circumstances. While the specific circumstances of each case will require varying kinds of conduct and degrees of care, the reasonable person standard undergoes no variation itself. The “reasonable person” construct can be found applied in many areas of the law. The

“balancing test,”<sup>39</sup> which are frequently used in legal studies. Finally, the article addresses how contractualism could be modified when the court faces practical difficulties in applying the framework.

#### A. CONTRACTUALIST FRAMEWORK

The contractualist approach is as follows:

An act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced, general agreement.<sup>40</sup>

Alternatively, if there were some principle for permitting an act that it would not be reasonable to reject, then doing that certain act would be wrong.

One of the advantages of contractualism is that it has elements of both relativism and universalism. The term “no one” is a universalist element, and to “reasonably reject” is the relativist element. In addition, this approach and the WTO commonly share a fundamental principle: reciprocity.<sup>41</sup> Both the approach and the WTO recognize the importance of reciprocity and thus ones’ decision should always consider how the decision affects other people. Finally, the approach includes both “reasonable person standards” and the “balancing test,” which are frequently used in legal frameworks. The familiarity of this approach in legal frameworks would allow legal scholars to actively use the approach for resolving the public morals issue. This section first overviews the basics of contractualism and then addresses why this framework is applicable to our discussion.

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standard plays a crucial role in determining negligence in both criminal law—that is, criminal negligence—and tort law. See. Mayo Mora, *Reasonable Person: A Conceptual Biography in Comparative Perspective* 14, LEWIS & CLARK L. REV. 1233,1233-84 (2010) (reviews reasonable person in the law of negligence, criminal context, sexual harassment debate, discrimination inquiry).

<sup>39</sup> A balancing test is any judicial test in which the jurists weigh the importance of multiple factors in a legal case. Proponents of such tests argue that they allow a deeper consideration of complex issues than a bright line rule can allow. But critics say that such tests can be used to justify any conclusion which the judge might arbitrarily decide upon.

<sup>40</sup> Scanlon, *supra* note 19, at 153.

<sup>41</sup> Raph Ossa, A New Trade Theory of GATT/WTO Negotiations, Staff Working Paper, ERSD-2009-08, Economic Research and Statistic Division (“Dramatic liberalization was leargely the result of a sequence of successfully rounds of trade negotiations governed by GATT and WTO. The GATT/WTO is an instiutiton regulating trade negotiations through a set of prenegotiated articles. The Principles of reciprocity and nondiscrimination are usually considered to be the essence of these articles. Generally speaking, the former requires that trade policy changes jeep changes in imports equal across trading partners and the latter stipulates that the same tariff must be applied against all trading partners for any given traded product”).

## 1. BASICS OF CONTRACTUALISM

In contractualism, in order to determine whether it would be wrong to do X in certain circumstances, we must consider possible principles governing how one may act in such a situation, and ask whether any principle that permitted one to do X could be reasonably rejected. To decide, we need to form an idea of the burden that would be imposed on some people in a situation if others were permitted to do X.<sup>42</sup> We call this burden the “objections to permission.” Afterward, in order to decide whether the objections provide reasonable justification and rationale for rejecting the proposed principle, we need to establish methods in which others would be burdened by a principle forbidding one to do X in these circumstances.<sup>43</sup> Now we will apply the balancing test between the benefits and costs of applying the principle. If the objections to permission are greater than the objections to prohibition, then there are reasonable grounds for rejecting any principle that would permit one to do X.<sup>44</sup> Therefore, the action of X is wrong under contractualism. In contrast, if there were some principles for governing an action that would permit one to do X and that it would not be reasonable to reject, then the action X would not be wrong; it could be justified to others on the basis that they could not reasonably refuse to accept.

### *a. Principle*

Contractualism emphasizes justification, based on reasons and principles, for the judgment of right and wrong. The wrongness of actions is not simply the judgment that an act is wrong. Rather, it is wrong for some reason that might exist. Contractualism defines principles as a “general conclusion about the status of various kinds of reasons for action.”<sup>45</sup> Principles may rule out some actions by ruling out the reasons on which they are based, but they also leave room for interpretation and judgment.<sup>46</sup> For instance, principles relating to the taking of a human life are simple rules that prohibit certain actions.<sup>47</sup> However, members of the police killing someone in self-defense would leave some room for interpretation.

### *b. Reasonable Person Standard through Balancing Test*

In order to reasonably reject a principle, one must have some objection to it. This objection may begin with direct harm that someone suffers as a

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<sup>42</sup> Stanford, *Supra* note 19.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Stanford, *Supra* note 19.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

result of the principle. So far, if the harm involved is pain or suffering, contractualism mirrors utilitarianism.<sup>48</sup> However, the fact that a principle impacts negatively on me is not *sufficient*.<sup>49</sup> To know whether one can *reasonably* reject the principle, one must also ask how it affects others. If a principle imposes a certain burden on one person, but gives benefit to someone else, then one person's burden does not provide sufficient reason to reject the principle.<sup>50</sup> If this person is reasonable, then they withdraw the objection when they see that more people obtain benefit from the principle. Therefore, we can conclude that the principle of imposing a burden on someone cannot be reasonably rejected.<sup>51</sup>

During this "balancing" test; contractualism does not ask "how many" people would be burdened; it asks "how serious" the burdens on people would be, so that we cannot reasonably reject our own burdens under a principle if others are equally or even more seriously burdened.

## 2. WHY CONTRACTUALISM?

The article primarily argues that the panel and the appellate body under the WTO should take the contractualist approach in deciding whether a nation's morally motivated laws at issue are within the boundary of public morality. This is not a simple argument where one should pursue both the merits of universalism and relativism by finding a middle ground between the two. Instead, the argument is rooted in the fundamental principle of reciprocity, which both the WTO and contractualism share in common.

The initial assumption of contractualism is that there is a reasonable person who, already engaged in social cooperation, wants to find and live according to fair or just principles in reciprocity with others.<sup>52</sup> Contractualism recognizes the interactions and interconnectedness between members of society and thus members are motivated both by self-regard and by respect for others. For instance, as noted above, the standard of reasonable rejection does not solely examine the negative impact on one individual: instead, it sees how the principle affects other

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> The Routledge Companion to Ethics (John Skorupski ed., 2010) ("Scanlonian Contractualism lies in the social contract tradition of Rousseau and Kant, one that treats what motivates the parties to the hypothetical agreement as the appeal of living in community with others on a basis of mutual respect for one another. This is a bit different from what Rawls argues in his book, *A Theory of Justice*. Rawls' concern is with the nature of justice and how a society's basic institutions should be regulated so as to enable ongoing social cooperation on terms of fair reciprocity. On the other hand, Contractualism focuses on what makes it the case that a person is morally wronged by another's treating her in a certain way?").

members of the society. Contractualism can thus produce principles that balance the interests of different people against one another. In addition, contractualism recognizes the sacrifice for others if the sacrifice is in accordance with the principles of fairness. In short, contractualism permits the sacrifice of a member if it is fair considering the benefits of all other members of the society.

Likewise, reciprocity is one of the established principles of the WTO. Under this principle, negotiations result in tariff adjustments that generate an equal change in the volume of imports and exports for members.<sup>53</sup> In tariff adjustments, some gain and some lose. The WTO fundamentally recognizes the interconnectedness of WTO members, and thus tries to produce outcomes that balance the interests of all involved parties.

This is different from unilateralism,<sup>54</sup> where the decision should simply maximize the benefits for all. According to this approach, the panel may have to find a decision where benefits are maximized by aggregating the benefits of all WTO members. Maximization allows the panel to decide

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<sup>53</sup> K. Bagwell & R.W. Staiger, *Multilateral Trade Negotiations, Bilateral Opportunism and the Rules of GATT/WTO*, 67 J. INT'L ECON. 269 (2005) (“principle of reciprocity is represented in GATT/WTO practice in two ways. The GATT/WTO principle of reciprocity refers to the ideal of mutual changes in trade policy which bring about changes in the volume of each countries’ imports that are of equal value to changes in the volume of its exports. In our discussion above, the notion of reciprocity arises in two places. First, as we have observed, governments negotiate in GATT/WTO rounds with the stated goal of obtaining mutually advantageous arrangements through reciprocal reductions in tariff bindings: in this context, it is often observed that governments approach negotiations seeking a balance of concessions, so that there is a rough equivalence between the market access value of the tariff cuts offered by one government and the concessions won from its trading partner. Second, when a government seeks to renegotiate and modifies or withdraws a previous concession as an original action, and more generally whenever a government takes an action which nullifies or impairs the benefits expected under the agreement by another government, GATT/WTO rules permit affected trading partners to withdraw “substantially equivalent concessions,” and thereby to retaliate in a reciprocal manner.”).

<sup>54</sup> Unilateralism is any doctrine that supports one-sided action. Such action may be in disregard for other parties, or as an expression of a commitment toward a direction which other parties may find agreeable. *Unilateralism* is the doctrine which asserts the benefits of participation from as many parties as possible. The two terms together can refer to differences in foreign policy approached to international problems. When agreement by multiple parties is absolutely required—for example, in the context of international trade policies—bilateral agreements (involving two participants at a time) are usually preferred by proponents of unilateralism. Unilateralism may be preferred in those instances when it’s assumed to be the most efficient, i.e., in issues that can be solved without cooperation. However, a government may also have a principal preference for unilateralism or multilateralism, and, for instance, strive to avoid policies that cannot be realized unilaterally or alternatively to champion multilateral solutions to problems that could well have been solved unilaterally. Available at <https://en.wikipedia.org/wiki/Unilateralism> (last visited Oct. 24, 2015).

a case where one country is much better off and all other WTO members are much worse off if the decision is still a maximized optimal one. This does not seem to consider the principle of fairness. In contrast, contractualism allows the sacrifice of other members when it is the only fair thing to do.

Here, the article assumes that the individuals who apply a reasonable person standard to the principle are all members of the WTO. With this assumption, it simply argues that the panel and the appellate body's view should reflect all of the WTO members' views; this modifies the standard of contractualism as follows:

In order to determine whether to it would be wrong to do A, the panel and the appellate body should consider possible principles governing how individual WTO member may act in such situation, and ask whether any principle that permitted the member to do A could reasonably rejected by any WTO members.

Consequently, determining whether X is wrong should take into account the cost and benefits to WTO members. Here, we need to assume that there is no need of considering a non-WTO member such as Afghanistan, since the panel's decision has no legal effect on non-WTO members. This seems to be a reasonable assumption and it is the assumption that the WTO tribunal is probably taking now. Their decision obviously affects all WTO members, and thus it should consider the cost and benefits of WTO members.

Based on this assumption, in order for the panel and the appellate body to reasonably reject a principle, they would have to find whether objections to granting its permission (i.e., objections by WTO members to permitting a certain principle for an individual WTO member) are greater than objections to its prohibition. If the objections to permission are greater than the objections to prohibition, then there are reasonable grounds for rejecting the principle that would permit an individual WTO member to act. Therefore, such an act would be wrong under the contractualist approach, and thus the panel and the appellate body should be able to decide that such an action is outside the boundary of public morality.

Here, the tribunal should exercise a balancing test<sup>55</sup> to apply a

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<sup>55</sup> WTO tribunal has an experience of establishing and applying balancing test to the "necessity requirement" in GATT XX, which public morality exception belongs to. The article does not worry their capacity to apply the balancing test in repeated manner (i.e. apply to necessity requirement and public morality itself) *See e.g.* Donald H. Regan, *The Meaning of 'necessary' in GATT Article XX and GATS Article XIV: The Myth of Cost Benefit Balancing*. 6 WORLD TRADE REV. 347, 347(2007) ("In Korea-Beef, the Appellate body interpreted for the first time the word 'necessary' in GATT Article XX, specifically in paragraph XX(d). It is generally believed that the Appellate body established a cost-benefit balancing test: in order to decide whether a measure is necessary to achieve some specified goal, we 'weigh and

reasonable person standard on the principle at issue. The balancing test involves first distinguishing WTO members that are in favor of the principle for such an act (i.e., the objection to prohibition) from members that would be burdened by the act (i.e., objection to permission) and compare which is more significant. If this principle results in more burden than benefit as a result of this balancing test, the panel and the appellate body can reasonably reject the principle that permits the act, and thus the act is morally wrong.

Here, the tribunal does not seek to know “how many” WTO members would be burdened by its “balancing” test; it asks “how serious” the burdens on certain members would be, so that the tribunal cannot reasonably reject their burdens on principle unless other members are equally or even more seriously burdened.

### *B. Applying to China-Audiovisual*

In applying contractualism to *China-Audiovisual*, this article assumes the following Act and Principle, which seems to be the most likely scenario that was argued by the Chinese government.

Act: Preventing obscene materials

Principle: Viewing obscene materials is wrong<sup>56</sup>

In this scenario, the act of “preventing obscene materials” was permitted by the principle that “viewing obscene materials is wrong.” Accordingly, then, the panel and the appellate body should determine whether any WTO members could reasonably reject the principle that permits this act, and thus decide the act to be morally incorrect. In other words, if the court finds that any WTO members reasonably reject the idea that obscenity is bad for society, then preventing obscenity is wrong, and therefore China cannot use the public morals exception in this case. Alternatively, if no WTO members provide reasonable rejections of the principle that permits the act, then the court should decide that the act is not morally wrong; in this case, China would be able to use the public morality exception.

Applying a “reasonable person standard” requires a balancing test

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balance’ the benefits from the measure in the achievement of that goal against the cost of the measure in reduced trade).

<sup>56</sup> See e.g. Roizin, Emily M., *But Think of the Children! The Effects of Obscenity in Television on Moral Development* 542 Scripps Senior Theses (2015) (“The Federal Communications Commission and the Motion Picture Association of America have strict guidelines for regulating sex, nudity and obscene language in television and movies, but do not regulate violence nearly as much. However, empirical evidence suggests that violence can be harmful to children’s moral development. The current study results suggest that exposure to violent television can negatively affect moral development. Instead of regulating for sex, nudity, and obscene language, the FCC and the MMPA should focus more on the negative effects of violence).

among all WTO members. Some WTO members, such as conservative Muslim nations, would agree with this principle, and thus benefit from the principle in terms of, for instance, strengthening their moral discipline in society. Others, such as many liberal western countries, would not agree with the principle and thus would be burdened by it if such a principle were imposed on their society. The court should exercise the balancing test to determine which is more significant. If the court believes that the burden outweighs the benefit (i.e., that the objections to permission outweigh the objections to prohibition), they could conclude that any WTO members could reasonably reject the notion that viewing obscene materials is wrong and that preventing obscene materials is wrong, this would eliminate the justification for China to raise the public moral exception. On the other hand, if the court decides that the benefit outweighs the burden, then the court would have to conclude that no WTO members could reasonably reject the notion that viewing obscene materials is wrong, and thus would rule that preventing obscene material is not wrong, which justifies China using the public moral exception.

The tribunal does not consider how many WTO members would be burdened in this “balancing” test. Instead, they should ask “how serious” the burdens on certain WTO members would be, so that they cannot reasonably reject the burdens of certain members on principle if other WTO members are equally or even more seriously burdened. That is, the tribunal examines the relative amount of burden among all members and decides the case.

In short, the court should assess the principle of the act during the panel and the appellate proceeding and apply the balancing test to the principle in order to determine the extent to which WTO members would be burdened by it.

*C. Modified Contractualism: “Right Institutions” 57 in Law and*

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<sup>57</sup> There is no consensus on the definition of institutions. In Economist (Mar 13<sup>th</sup> 2008), Dani Rodrik asks: “am I the only economist guilty of using the term (rule of law) without having a good fix on what it really means? Well. maybe the first one to confess it”; See general North, *Institutions*, 5 J. ECON. PERSP. 97, 97(1991) (defines institutions as follows: “institutions are the rules of the game of a society, or, more formally, the humanly devised constraints that structure human interactions. They are composed of formal rules (statute law, common law, regulation), informal constraints (conventions, norms of behavior, and self-imposed codes of conduct), and the enforcement characteristics of both”); See also, M. Trebilock and M.M. Prado, What makes poor countries poor? Institutional Determinants of development 27-8 (Chetenham, UK and Northampton, MA, USA: Edward Elgar, 2011) (arguing that institutions are those organizations (formal and informal) are charged or entrusted by a society with making, administering, enforcing or adjudicating its laws or policies).



*Development<sup>58</sup> as a Fixed Principle*

So far, this article has examined the process of applying “reasonable person standards” and a “balancing test” under contractualism. However, some practical problems may exist in terms of applying this approach. It would sometimes be difficult for the tribunal to find out what type of principle was actually being used for the act. Moreover, even if the tribunal successfully uncovered the “right principle” that was actually used by the country in question, it would be difficult for them to ascertain to what extent other WTO members were in favor of such a principle. Even if the court successfully classified the WTO members into two groups—one in favor of the principle and the other against the principle—they would have a difficult time measuring and comparing the actual costs and benefits incurred by imposing the principle.

Pre-empting these difficulties, this article now tries to modify the current contractual framework. The article first assumes the following principle, which no WTO members could reasonably reject.

**Act: Preventing obscene materials**

**Principle: Right institutions should be implemented for further development.**

The article argues that this principle’s emphasis on implementing right institutions for further development is something that no WTO members could reasonably reject. This is because of the two goals of the

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<sup>58</sup> Law and Development studies have been rapidly growing for past few years. However, there is no consensus as to what this field is or whether it is an academic field at all. Different scholars have different answers to these questions. Some focuses on formal institutions, describing how enforcement of contracts or independent judiciary protect investors and improve economic growth in developing nations. Others have not focused on economic development, but instead on social development or democracy or freedom etc; See David Trubek, *Law and Development 50 Years on*, *University of Wisconsin Legal studies Research Paper* no. 1212(Oct 2012, available at:<http://ssrn.com/abstract=2161899>, accessed at 29 August 2015 (summarize three characteristics of the field. First, law and development never properly developed as an academic field. Second, the results from implementation of law and development projects were mixed and suffered from an insufficient quantity of case studies to isolate “what works and what does not”, third, there was a theoretical tension between the push for strong state involvement and for more laissez-faire regulatory approaches); See also David Trubek & Alvaros Santos(eds.), *The New Law and Economic Development: A Critical Appraisal* (2006) (classifying two groups of law and development scholars: those that see law as an instrument of promoting development(*law in development*) and those that see law as an end in itself and thus pursue development reforms of it(*law as development*); Kevis E. Davis; Michael J. Trebilock, *The Relationship between Law and Development: Optimists versus Skeptics*, 54 AM. J. COMP. L. 895 (2008); Yong Shik Lee, *Call for a New Analytical Model for Law and Development*, L. & DEV. REV. (2015) (establishing foundational work for the development or the analytical law and development model, or “ADM”); Michael J. Trebilcock & Mariana Mota Prado, *Advanced introduction to law and development*(2014).

WTO, as established in its charter: development and trade liberalization.<sup>59</sup> Development is one of the two goals that the WTO pursues, and thus the WTO must help all nations to continue their development. Because the most up-to-date literature<sup>60</sup> relating to law and development explains that nations should implement appropriate institutions for further development, WTO members should have an implicit consensus and generosity toward each other in order to make an effort to establish right institutions in their nations. In this sense, this principle (that right institutions should be implemented for further development) is something that no WTO members could reasonably reject.

With this in mind, the court's task becomes much easier. Because no WTO members could reasonably reject this principle, it could enable the court to avoid a difficult balancing test involving all WTO members. The tribunal's job is only to see if the act has actually come from the spirit of right institutions. That is, if preventing obscene materials through an import ban is regarded as a right institution and thus will help the development of China, then the tribunal could safely assume that China has utilized the principle of right institutions, which no WTO members could reasonably reject, and thus justify the public morals exception. In summary, the new framework eliminates the process of a difficult balancing test and suggests that the tribunal determines whether the morally motivated legislation by China actually reflects their environments and culture.

In this sense, the tribunal should now analyze whether the Chinese

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<sup>59</sup> Serra & Stiglitz, *Supra* note 20, (Explains that Preamble to the Marrakesh Agreement, establishing the WTO, recognize the objective of the sustainable development and also need for positive effort to ensure the developing countries secure a share in international trade growth for further economic growth)

<sup>60</sup> Law and development is the field in which the relationship between the rule of law and developments of various aspects is analyzed. Many scholars have discussed "law and development" in different contexts because there is no clear consensus on the definition of "institutions" and "development" among scholars. Some discuss, for instance, the relationship between law and economic growth, while others focus on the interplay of law and freedom or democracy. Beginning in the 1990s, an institutional perspective on development became increasingly prominent in the field of law and development. This perspective is based mostly on the framework established by new institutional economists, who argue that individuals make economic decisions based on incentives, and many of these incentives are created by institutions. Based on this view, North argues that "third world countries are poor because the institutional constraints define a set of payoffs to political/economic activity that do not encourage productive activity. Likewise, Rodrik argues that developing nations are economically stagnant because they fail to establish right institutions. In other words, developing nations fail to achieve further economic growth because they simply import the Washington Consensus policies (i.e. free market-oriented policies) without a careful consideration of their own institutions. They have not taken into account the establishing institutions, which are tailored to their local environment or culture.

government's adoption of an import ban to prevent obscene materials is something that directly reflects their cultural status and local environment. For instance, if Chinese citizens are still conservative about obscene materials, then an import ban would be the right institution. If Chinese citizens are liberal enough to digest obscene materials, then an import ban is not the right institution, and this would eliminate the justification for the public morals exception.

In fact, there is considerable evidence that China is undergoing rapid changes in sexual habits and acceptability for several reasons, including the decreasing control of the state over the private lives of individuals, the globalization of its economy, and some policies initiated by the State.<sup>61</sup> This evidence, for instance, may work against the argument that the import ban was the right institution. The court could use academic literature or the result of a poll to find out whether the act in question was a right institution.

Of course, there are cases where legislation is implemented to "upgrade" the morality of a society.<sup>62</sup> However, this article focuses more on how morally motivated legislation actually reflects the society and citizens of the nation and thus can be called a "right institution."

Furthermore, introducing the concept of right institutions does not mean reintroducing pure relativism. The pure relativistic approach simply requires the tribunal to understand the relative standard of morality in a society. In a purely relativistic viewpoint, as noted in the previous section, China could use the public morality exception if the tribunal believes that viewing obscene materials is morally wrong in China. On the other hand, the right institutions approach requires analysis of whether the institutions at issue are a better reflection of the society, enabling further development. The tribunal should carefully look at how institutions are locally tailored to the society, and additionally examine whether these institutions are established for the purpose of the society's development, which corresponds to the spirit of right institutions.

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<sup>61</sup> Xiao et al, *Sexual Revolution in China: Implication for Chinese Woman and Society* 23, *Aids Care*, 105 (2011) (argues that China society is experiencing a rapid changes of allowing sexuality. "There is increased acceptance of premarital sex and extramarital sex in China, especially among youth. In historically conservative China, influenced by Confucian ideals of patriarchal dominance for centuries, the sexual freedom currently enjoyed by many is unprecedented. This has impacted women's status and sexual lives in several positive ways such as increasing freedom of sexual expression, control over their bodies, sexual choices, and increasing equality with men in all spheres of life.")

<sup>62</sup> See Daniel F. Pier, *Morality as a Legitimate Government Interest*, 117 *PENN. ST. L. REV.* 139, 139 (2012) (argues that enhancing morality can be a purpose of implementing public policy. The article recognizes morality as a legitimate state interest in lawmaking, while highlighting the dangers to moral diversity posed by the constitutionalization of moral questions. the article further notes that how the law making ultimately advances the moral development of citizens and society)

For instance, the tribunal may refuse China's request to raise the public morality exception if they find evidence that the import ban was not implemented for the development of their society, but due to any political reasons or corruption in domestic society.

The right institutions approach is introduced to simplify the contractualist framework in case the tribunal faces practical difficulties, but the tribunal still needs to investigate the consistency between the measure and the culture of the society, and whether the real purpose of implementing the institutions is actually for the continued development of the society.

### CONCLUSION

The public morals exception to free trade was important enough that the original drafters of the WTO's "constitution" listed it as the first of several general exceptions.<sup>63</sup> However, the exception remained inactive for fifty-seven years and only recently reemerged, in the *US-Gambling* decision, finalized in April 2005. It is believed that the WTO may finally give greater consideration within its jurisprudence to morality-related issues. However, the tribunal has still not determined its view on the boundaries of what is meant by public morality. Previous studies on this topic may be regarded as providing a practical solution but not a fundamental solution. This article draws on the philosophical debate between moral relativism and universalism, asking whether the philosophical perspective could help the tribunal to assess the issue of public morality.

The proposed contractualist approach gives a helpful conceptual framework involving the reasonable person standard and a balancing test. The article also introduced a modified version of the approach in the light of the spirit of right institutions, in case the balancing test becomes practically difficult for the tribunal to apply. The article urges the WTO tribunal to take a contractualist approach, thus giving the members clear criteria for what constitutes the public moral exception.

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<sup>63</sup> See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000) (suggesting that the GATT and WTO founding documents serve as a world trade constitution).