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E.MA European Master's Degree in Human Rights and Democratisation

New governance mechanisms and international human rights law: moratoriums in law and practice

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FOREWORD

The *European Master's Programme in Human Rights and Democratisation* (E.MA) is the first Master's course in human rights and democratisation launched and financed by the European Commission that later served as model for establishing other Regional Master's around the world. Since January 2013 these are all connected and managed by the *European Inter-University Centre for Human Rights and Democratisation* (EIUC) under the *Global Campus of Regional Master's Programmes* (GC).

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• DARTS, Rebecca Thérèse, *The Interplay between Human Rights and Translation in Multilingual Newborn Kosovo*. University of Seville (Spain).

• GIÃO, De Brito Rita, *New Governance Mechanisms and International Human Rights Law: Moratoriums in Law and Practice*. Central European University in cooperation with Eötvös Loránd University, Budapest (Hungary).

• GRUYAERT, Laura, *Safeguarding the Right to Water for Basic Human Needs in the Context of Transboundary Watercourses: Analysis of the Combined Use of Two Legal Regimes: International Water Law and International Human Rights Law*. Université de Montpellier (France).

• MINCHEVA, Ioanna, *Beyond Equality and Non-Discrimination: Escaping Narrow Human Rights Framings in the Context of Sexual Orientation and Gender Identity*. Masaryk University, Brno (Czech Republic).

This volume includes the thesis *New Governance Mechanisms and International Human Rghts Law: Moratoriums in Law and Practice* by Gião, De Brito Rita, and supervised by Prof. Marie-Pierre Granger, Central European University in cooperation with Eötvös Loránd University, Budapest (Hungary).

ABSTRACT

Moratoriums in IHRL, as new governance mechanisms, can be defined as "the temporary suspension of a specific domestic law or regulation, which results from a varying degree of external influence of the international human rights politics or practice. Their purpose is to explore alternatives to the existing legal framework, with a view to proceeding with its definite modification in the long-term." They offer a middle-ground solution to a "persistent lack of consensus" on issues where there is a deep clash of culture, morals or values, where no universally agreed standards seem to exist and where the human rights nature of issues is debated. Due to the increased recourse to such "soft law" instruments, which operate on the margin of the rule of law and the traditional separation of powers doctrines, it is crucial to assess the nature of their relationship with the law. Through the application of the conceptual framework of new governance onto moratoriums addressing the highly contentious issues of the death penalty and discrimination based on sexual orientation, it is possible to demonstrate that these instruments – as a flexible alternative to the conventional rule-making processes – have the potential to shape public policies and transform human rights law, in particular through the intervention of peer-review and judicial review.

Like past editions, the selected theses amply demonstrate the richness and diversity of the E.MA programme and the outstanding quality of the work performed by its students.

On behalf of the Governing Bodies of EIUC and E.MA and of all participating universities, we congratulate the author.

PROF. FLORENCE BENOÎT-ROHMER
EIUC Secretary General

PROF. RIA WOLLESWINKEL
E.MA Chairperson

RITA DE BRITO GIÃO

NEW GOVERNANCE MECHANISMS AND INTERNATIONAL HUMAN RIGHTS LAW: MORATORIUMS IN LAW AND PRACTICE

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INTRODUCTION

The establishment of moratoriums is not a new phenomenon, but its widespread use certainly is[1]. Moratoriums constitute an option that is more flexible than traditional hard law mechanisms. The adoption of regulatory or legislative acts, at the national level, or the approval and ratification of a treaty, at the international level, may not be feasible, especially when politically sensitive and highly contentious issues that touch upon people's personal or religious beliefs and traditions are at stake. The lengthiness and cumbersome nature of the traditional formal procedures and the large number of stakeholders involved can seriously undermine the ability to reach a consensus in a timely fashion. Policy- and law-makers thus turn to alternative modes of governance, such as moratoriums.

The fora and the fields of law in which moratoriums are implemented are increasingly varied: sustainable development, human security, public health, environmental concerns, etc.

At the national level, the United States of America is the country that has adopted the widest range of moratoriums, and the most sophisticated legal framework for their application[2]. Resort to this mechanism has been diffused nationwide. Presently, moratoriums are most commonly established by the local governments in the exercise of administrative or police powers – e.g. land use moratoriums – but they can also be imposed by the President[3]. Other countries have followed

[1] Yin, 2012, p. 322.
[2] New York State Department of State, 2010, p. 1.
[3] These are the so-called *regulatory moratoriums*. New York State Department of State, 2010, p. 1; Eagle, 2003, pp. 429-507; Callagy, 2008, pp. 223-262; Watts, 2012, p. 1890.

suit. Private industrial actors in Brazil have voluntarily implemented a soya moratorium[4]. China has implemented moratoriums on issues as disparate as environmental impact assessments (EIA), fisheries[5], and marriages[6].

Moratoriums have also assumed a more distinctive part in international politics[7]. The moratorium on commercial whaling imposed in 1982, by the International Whaling Commission (hereinafter "IWC"), or the moratorium on the importation, exportation and manufacture of small arms and light weapons in West Africa in 1998, by the Economic Community of the West African States (hereinafter "ECOWAS"), are just two of the many examples of moratoriums which have allowed states, intergovernmental organisations or private actors to achieve an agreement on contentious issues in the international fora[8].

The recourse to moratoriums is a solution that has been incorporated in the discourse of several actors besides states. The Council of Europe's Human Rights Commissioner, Thomas Hammarberg, de–manded, in an open letter to the German Chancellor, Angela Merkel, "a moratorium on deportations of Roma to Kosovo" in 2009[9]. Civil society, too, has included them in its discourse. The "call for" the adoption of a moratorium on the development or implementation of new systems of mass surveillance by the Madrid Privacy Declaration is just one of several examples[10].

The legal literature has looked into moratoriums from different angles[11]. Initially, scholars focused more on the circumstances that led

[4] "On July 24, 2006, ABIOVE (Brazilian Vegetable Oil Industry Association) and ANEC (Brazilian Grain Exporters Association), and their respective member companies, pledged not to trade soy originated after that date in deforested areas within the Amazon Biome." This measure has become known as "soy moratorium." It was initially set for two years and renewed annually since 2008. Information available at http://www.abiove.com.br/english/ss_moratoria_us.html (consulted on 2 May 2012).

[5] You, 2008, pp. 163-188; Cheng et al., 2006, pp. 1-19.

[6] Tien, 1970, pp. 311-323.

[7] On moratoriums in international law, see Yin, 2012, p. 321. On moratoriums in international politics, more specifically the moratoriums on genetically modified products and commercial whaling, see Lieberman, Gray & Groom, 2011, pp. 1-2.

[8] Lieberman, Gray & Groom, 2011, pp. 1-2; Ebo & Mazal, 2003, pp. 1-53.

[9] Information provided in the context of the attribution of the European Civil Rights Prize of the Sinti and Roma to Thomas Hammarberg, 3 April 2012, available at http://www.buergerrechtspreis.de/en/homepage.html (consulted on 3 June 2012).

[10] Available at http://thepublicvoice.org/madrid-declaration/ (consulted on 3 June 2012).

[11] The moratoriums that are mentioned and analysed throughout the present study are examples – it does not aim at being an exhaustive list.

to the adoption of a moratorium, overlooking the very concept of moratorium. Most of them assuming it is a "soft law" instrument or simply a temporary extraordinary measure, but not really addressing the issue of its actual nature[12]. More recently, due to the growing use of moratoriums and their potential impact at both the national and international levels, authors have become increasingly aware of this instrument and have finally attempted to define and conceptualise them[13]. In reference to the whaling moratorium and the genetically modified organisms moratorium, Lieberman, Groom and Gray have defined them as a "temporary prohibition on some behaviour, ostensibly imposed in order to allow further investigation to take place before resumption of that behaviour can be considered[14]." In international law, and through a broader analysis of several moratoriums, Yin has underlined that a moratorium "is widely used as a middle-ground solution between 'yes' and 'no' in the international legal arena, which reflects the value of compromise and cooperation in international intercourse[15]."

Despite the valuable contribution of these definitions, no research has been carried out on moratoriums in the field of international human rights law. This presents two sets of challenges. First, even if there is a minimum common denominator of characteristics that all moratoriums share, they also differ in many others. Indeed, the context in which they are adopted, who adopts them and what their goal is, differs and so do their effects on the legal order. Second, moratoriums can be adopted in many forms – some moratoriums have been enacted through a presidential decree, others by a mere ministerial statement. A moratorium is thus not necessarily a legal instrument *stricto sensu*, its form is not always that of a recognised source of law. However, moratoriums can effectively suspend the application of other, perfectly legal, instruments. This may run counter to the principle of separation of powers, one of the essentials of a democratic constitutional state based on rule-

[12] Some of the scholars that have approached different moratoriums without really discussing their conceptual nature are: Tysiachniouk & Reisman, 2004, pp. 157-178; Falkner, 2006, pp. 473-494; Rudorff et al., 2012, pp. 1074-1088; Murdiyarso et al., 2011, pp. vi-13.

[13] Lieberman, Gray & Groom, 2011, pp. 1-16; McKaskle, 2003, pp. 273-338; Yin, 2012, p. 321; Seymour, 2005-2006, pp. 523-554.

[14] Lieberman, Gray & Groom, 2011, p. 1.

[15] Yin, 2012, p. 321.

of-law. Hence, there is the need to clarify what is the relationship between moratoriums and the law: i.e. whether the rights contained are justiciable before a court, whether they provide any immediate protection to individuals, and if so what their legal basis is. None of the scholars dealing with moratoriums have provided a legal framework that would address moratoriums' challenges. Nevertheless, they all agree that given the increase of their use and transformative effects, more research should be conducted to address their nature, potential, and shortcomings[16].

In this thesis, I take on this challenge. I start by offering a definition of moratoriums in the field of human rights as the *temporary suspension of a specific domestic law or regulation, which results from a varying degree of external influence of the international human rights politics or practice* and situate moratoriums with the new governance conceptual frameworks. I will argue that, since moratoriums in the field of human rights have been established in areas where there are no universal human rights standards, such as the death penalty and non-discrimination on the basis of sexual orientation, their purpose is to *explore alternatives to the present legal framework, with a view to proceeding with its definite transformation in the long-term*. The present study will demonstrate that the establishment of a particular type of new governance mechanisms in the field of human rights, namely moratoriums, contributes to the shaping of public policies towards the promotion and protection of human rights and the advancement of the human rights agenda at the national and global levels. I will provide an insight into the relationship between the "new" and "old governance", their potential clashes and, more importantly, into their possible *mutually constitutive* relationship. In particular, I will explore the moratoriums' potential (and, by implication, that of other new governance tools) to *transform* human rights standards, which often represent the very core of particularistic national values and thus the most controversial issues.

New governance mechanisms are sometimes difficult to grasp, "each of them [having] its particular form and 'history[17].'" Notwithstanding,

[16] "Moratoria are powerful instruments in international relations, yet very little analysis of their role has been published," Lieberman, Gray & Groom, 2011, p. 1; "Due to its auxiliary position, very few published works have paid attention to it," see Yin, 2012, p. 321.

[17] Scott & Trubek, 2002, pp. 1-18, cited by Craig & De Búrca, 2011 (a), p. 175.

they have often, exactly like moratoriums, emerged in the legal order as more flexible, experimentalist decision-making processes, as a reaction from legal actors to a fast evolving, multi-levelled legal order where the plurality of agents and the diversity of their interests can be an opportunity to progress in certain fields rather than an impediment. They are also, as moratoriums, often voluntary or non-binding and therefore more easily revisable and result-oriented. Moratoriums seem, as most new governance mechanisms, to have emerged as an attempt to tackle these challenges. The recourse to new governance mechanisms has been explored in various fields and jurisdictions, namely in the fields of health and environmental law both in the EU and in the US, and the Open Method of Coordination in the EU has repeatedly been distinguished as the "archetypical" example of new governance within the EU[18]. New governance has also been explored in the scope of rights-claims, more specifically in the fields of human rights in respect to the EU race discrimination law and of the Convention on Rights of Persons with Disabilities[19]. The analysis of transnational corporations' responsibility through the application of their codes of conduct by national courts has very recently also been approached through the lenses of new governance. The application of the new governance framework to moratoriums is nevertheless in itself new.

In line with Scott and Trubek's approach, I consider new governance as a domain that "covers a number of very disparate mechanisms," sometimes difficult to conceptualise[20]. When applying experimentalist mechanisms in the field of human rights, I will follow the framework advanced by De Búrca, which combines elements of Sabel and Zeitlin's theory, suggesting that in circumstances of irreducible diversity it is important to prioritise broad framework goals as a way of reaching initial consensus, placing a great deal of emphasis on learning from practice and on peer-review as a follow-up to those goals[21]. Neverthe-

[18] Harvey, 2006, pp. 179-210; Trubek, Nance & Cottrell, 2006, pp. 245-268; Scott & Holder, 2006, pp. 211-244; Karkkainen, 2006, pp. 1249-1258; De Búrca & Scott, 2006, p. 6; Sabel & Zeitlin, 2008, pp. 271-327.

[19] De Búrca, 2006, pp. 97-120; De Búrca, 2009; De Búrca, 2010.

[20] Craig and De Búrca apply Scott and Trubek's broad definition in the scope of EU law. This approach is tempered by Sabel and Zeitlin's experimentalist model. Scott & Trubek, 2002, pp. 1-18, cited by Craig & De Búrca, 2011 (a), p. 175.

[21] Sabel & Zeitlin, 2008, pp. 271-327, cited by De Búrca, 2010 in the context of the

less, I will depart from such methodology in what concerns the definition of the relationship of moratoriums with the law. De Búrca has opted to explain the relationship between some specific new governance mechanisms established in the field of human rights and the law through the *hybridisation thesis*. I leave aside this assumption both conceptually, as the *hybridisation* process even if tenuous already entails some kind of *transformation*, and due to the main distinctive trait of moratoriums established in the field of human rights: their transformative dimension[22].

Demonstrating by example, I will argue that the moratoriums in the field of human rights, more specifically the *de jure* moratorium on the death penalty in the Russian Federation and the *de facto* moratorium on the criminalisation of male homosexual acts in Singapore, are both expressions of experimentalist governance[23]. Relying on Sabel and Zeitlin's definition of new governance mechanisms, I then structure the analysis through a "mutually constitutive" approach combined with Sabel and Simon's *transformation thesis*, to apprehend the nature of the relationship between moratoriums and law[24].

The Russian Federation's *de jure* moratorium on the use of the death penalty and the Singaporean *de facto* moratorium on the criminalisation of homosexual acts were chosen as case studies for four reasons. First, as far as some human rights issues are concerned, both the Russian Federation and Singapore occupy ambivalent positions, including the ones on which moratoriums were imposed. Secondly, both moratoriums offer paradigmatic examples of how global trends evolve on the human rights agenda. Thirdly, these two moratoriums represent two very different stages of the shaping of public policy potential behind the adoption of a moratorium: while one is still non-binding and remains the result of a mere political decision, the other has already achieved,

adoption of the Convention on the Rights of Persons with Disabilities and by Craig & De Búrca, 2011 (a), p. 176, in the context of EU governance.

[22] Sabel & Simon, 2006, pp. 395-411.

[23] Sabel & Zeitlin, 2008, pp. 271-327.

[24] De Búrca applies Sabel and Zeitlin's experimentalist model to the Convention on the Rights of Persons with Disabilities – see De Búrca, 2010. While I adopt this model to describe moratoriums in the field of human rights as expressions of experimentalist governance, I do not share this author's approach to its relation with the law. In this respect, I depart from the hybridisation thesis to adopt the transformation thesis. De Búrca & Scott, 2006, p. 9; Armstrong, 2011, p. 32.

through a series of judicial decisions, a binding nature. Finally, these two moratoriums also offer a good comparative analysis as their scrutiny highlights the determinant role that national courts and peer-review may assume in the advancement of the human rights agenda.

The first chapter establishes what moratoriums are. It starts with an overview of the research that has been made on moratoriums up to the present date. I discuss the main characteristics of moratoriums and divide them into two categories: *moratoriums lato sensu* and *transformative moratoriums*. As this paper focuses on a specific type of moratoriums, those dealing with human rights issues, the chapter proceeds by proposing a taxonomy of moratoriums, based on their different characteristics and effects, helping one understand *how the moratoriums in the field of human rights are different* from moratoriums in other fields and hence deserve conceptual autonomy. I explore their characteristics by delving into the context in which they are adopted, identify who adopts them and with what goal. In order to document these characteristics, the two above-mentioned case-studies are then introduced. The fact that both these moratoriums are established on issues on which there are *no universal international human rights standards* is emphasised as it is where their biggest potential lies. The chapter also raises the shortcomings and advantages of the new governance vis-à-vis the traditional legal schemes.

In the second chapter, the characteristics of the moratoriums established in the field of human rights law are confronted with new governance elements in order to show that *the moratoriums' characteristics are compatible with the notion of a new governance mechanism* and that, therefore, moratoriums are in fact new governance mechanisms. I will show the appropriateness of this conceptual framework to explain both their emergence in the legal order and their *transformative* relationship with the legal order. I will demonstrate that a moratorium's broader goal is to alter the status quo towards the increased protection of human rights. The *mutually constitutive* relationship between "new" and "old" governance is emphasised through the analysis of the adoption of UN General Assembly Resolution 62/149 that called upon states to adopt moratoriums on the use of the death penalty with a view to abolition.

The third chapter follows to show *how the potential of the human rights moratoriums, as new governance mechanisms, is materialised in practice*. The Russian and Singaporean case-studies are re-visited to that

end. I corroborate that "old" governance tackles the moratoriums' challenges and shortcomings by verifying that the transformation in the field of IHRL takes place both at the political level – through the shaping of public policies by peer-review –, and in the legal order – through judicial review. In closing, the third chapter elaborates on whether the transformation operated by moratoriums upon the legal order results in an increased protection of individuals or rather on international human rights law, broadening its scope.

I will conclude by highlighting the main implications of moratoriums for policy shaping and international human rights law as well as with predictions on how the use of such instruments might impact governance in the future.

1.

MORATORIUMS IN LAW AND IN PRACTICE

The increasingly prominent role of moratoriums in international politics has led to recent attempts to define them[25]. Despite the valuable contribution of such definitions, and in light of the growing number of moratoriums, they cannot encompass the diversity of instruments that such concept shelters. In reality, there is a conceptual set of characteristics that is shared by all existing moratoriums. But beyond that minimum common definitional denominator, some specific types of moratoriums have other particular properties in addition to the latter.

To define moratoriums in international human rights law, it is essential to carry out a brief analysis of other types of moratoriums, and especially the ones that have played a relevant part in international politics. The objective of the present chapter is to identify common traits to all moratoriums and, most importantly, the distinctive qualities of moratoriums established in the field of international human rights law. The identification of these characteristics confers a certain degree of autonomy to the concept of human rights moratorium and draws

[25] In reference to moratoriums in international law in general, Yin has defined them as "a postponement or suspension of an activity, [which] is widely used as a middle ground between 'yes' and 'no' in the international legal arena which reflects the value of compromise and cooperation in international intercourse," see Yin, 2012, abstract. In reference to moratoriums in international politics, Lieberman, Gray and Groom have proposed the following definition: "a temporary prohibition on some behaviour, ostensibly imposed in order to allow further investigation to take place before a resumption of that behaviour can be considered," see Lieberman, Gray & Groom, 2011, p. 1. At the political level, and still in the US, the jurisdiction in which moratoriums seem to be more popular, Watts, in addressing the (regulatory) moratoriums issued by Presidents right after coming into office, defined them as an instrument "which stems from legislative or executive action, [that] aims to freeze rulemaking activity for a period of time," see Watts, 2012, p. 1883.

attention to their potential to promote the advancement of the human rights agenda and transform the international legal order.

This analysis contributes to the taxonomy of moratoriums, following three major categories. The first group is composed mostly of moratoriums established at the national level, and allows for the isolation of the four characteristics that can be described as defining moratorium *lato sensu*: *pressing challenge*, *unsettled nature of the matter*, *precarious solution* and *competence "creep."* These will be further elaborated later. The second set of moratoriums consists of those established by a group of states at the international level. The above core characteristics are present in these moratoriums too. However, in this case the intrinsic legal uncertainty attached to the precariousness of a moratorium is mitigated by a fifth characteristic: the goal that drives the adoption of the moratorium, i.e. to *transform* the legal order. Finally, moratoriums established in the field of international human rights law have a sixth additional and noteworthy trait: they are established on issues on which there are *no universal human rights standards* per se, on which it is even arguable if the subject at stake is a human rights issue at all.

1.1. MORATORIUM *LATO SENSU*

The four core characteristics that define a moratorium emerge from *the context in which it is adopted*, from *who adopts it* and from *what its nature is*. The analysis of a few examples of national moratoriums confirms the presence of these characteristics. The context in which a moratorium is more often adopted is when governments – at the local, regional or national level – face a political deadlock. There are no strict legal mechanisms available to remedy a certain situation but there is still a strong political conviction that inaction is no longer an option. This may be so either because the existing mechanisms are not adequate to the situation (e.g. the land use moratorium)[26], because there is no agreement on the suspension or revocation of a law (e.g. the abolition

[26] A land use moratorium is "a local enactment which temporarily suspends a landowner's right to obtain development approvals while the community considers and potentially adopts changes to its comprehensive plan and/or its land use regulations to address new circumstances not addressed by its current laws." New York State Department of State, 2010, p. 1.

of the death penalty), or because it is necessary to avoid a natural or man-made calamity (e.g. debt moratoriums, environmental moratoriums). This lack of availability of a solution to a *pressing challenge* results from the *unsettled nature of the subject matter*. This may be so for technical, scientific (e.g. the moratorium on genetically modified organisms) or political/cultural reasons (e.g. the moratorium on the criminalisation of male homosexual acts).

In addition, a moratorium is by definition a temporary suspension of a given activity or law and therefore a *precarious* solution. It is uncertain what the outcome of the adoption of a moratorium might be. It might be conducive to a more definitive modification of the legal framework or it might be temporary, until the problem is overcome or the scientific uncertainty removed.

Finally, moratoriums defy the traditional theories of separation of powers, as it is not always entirely clear where the power to adopt a moratorium comes from, i.e. whether it is a legislative, executive or merely political competence[27]. Furthermore, the adoption of a moratorium, which always entails the suspension of an existing law, also touches upon democratic principles, such as transparency, accountability and legal certainty. In most cases there is a sort of *competence "creep"* from the body that implements the moratorium[28].

The 19th century debt moratoriums already carried these four characteristics – a fact that strongly suggests that the core concept of moratorium has remained, to a certain degree, unaltered[29]. Frequently resulting from a pressing situation of financial or political nature

[27] On the problem of "where the power to adopt land use moratoria originates," McKaskle, 2003, pp. 273-338.

[28] The notion of *competence "creep"* entails that a moratorium adopted by the executive power has the potential to create positive obligations through the application of general principles of law, even if not as a result of any administrative or legislative procedure. This concept has been largely used within EU law to refer to its reach and scope expansion: the EU operates according to the principle of attributed competence and the legal principles that are supposed to refrain and control its use (subsidiarity and proportionality) are rather loose – see Wheaterill, 2004, p. 1; Prechal, 2010, pp. 5-22. The term, however, can be broadly used to mean a entity's self-authorisation of an increase in its competences – e.g., Pollack coined the term "Parliamentary creep" to refer to the "tendency for [the European] Parliament to increase the Council's allocation to new and emerging policies, and the tendency of the Commission to incorporate these increases into its preliminary draft budget for the following year" – Pollack, 1994, p. 116.

[29] Yin lists a number of debt moratoriums to contextualise the origin of moratorium in domestic law: the Franco-Prussian War moratorium, the World War I United Kingdom moratorium on commercial transactions in 1914, the Moratorium Act of Australia of 1930,

(*pressing challenge*), their expression in the 19th and 20th centuries corresponds to embryonic versions of the moratoriums we have today. The moratorium law approved by the French government during the Franco-Prussian War[30] or the Hoover Moratorium became notorious as in both cases principles related to the welfare of the state and its citizens were invoked by governments to legitimately opt out of a legal obligation, or allow other countries to opt out, to the detriment of the creditors' interests (*unsettled subject matter*)[31]. Yin underlines that already in the case of the Franco-Prussian War the lawfulness (and in my understanding, the *precariousness*) of this moratorium in the international fora was considered in an English Court. In the case *Rouquette v. Overman*[32], the Court decided that "the power of a legislature to interfere with and modify vested and existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation" (*competence "creep"*)[33].

However, the Hoover Moratorium, which determined the suspension of World War I debts, emphasises that there are certain nuances to each of these characteristics. It becomes evident that, in this case, it was not so important to determine whether the moratorium will solve the problem or not: there was an impending urgent situation that called for an equally urgent, if yet *precarious*, action[34]. There was a strong pre-

and the November 2008 Moratorium on Payment to Creditors by Iceland's Kaupthing Bank. Yin considers a domestic moratorium one that only has national effects. Differently, for me the criteria in this regard is determined by who adopted the moratorium and if, at its inception, it results from a national decision or an international formal or informal agreement and not if its effects have international repercussions. Beyond these debt moratoriums, at the national level, Yin only briefly mentions the existence of two other moratoriums: China's fishing moratoriums and the United States' moratorium on the hiring of new Muslim chaplains in Federal Prisons facilities after 9/11.

[30] Also know as the Franco-German War (July 1870-May 1871) between the French Empire and the Kingdom of Prussia.

[31] In 1931, President Hoover proposed a one year postponement of all World War I "payments on inter-governmental debts, reparations, and relief debts, [...], not including obligations of Governments held by private parties," Kuhn, 1932, p. 572. "At the Peace Conference in 1919, the Allied leaders avoided a confrontation with public opinion by refusing to fix any reparation figure. In 1921 when the figure was finally determined, the real motivating factor was not war resentment but war debts. The Allies owed the United States $11 billion, only slightly less than the 50 billion gold marks that made up the only serious part of the London Payments Plan. The Allies were using the 50 billion as a defense against an insistent repayment demand that would have bankrupted them. The Hoover Moratorium let both reparations and war debts disappear as they had existed – together," Felix, 1971, p. 178.

[32] Yin, 2012, p. 321.

[33] Ibidem.

[34] "The Hoover Moratorium of July 1931 and the Lausanne Conference of June-July 1932

cautionary goal that overshadowed third parties interests, settling the *unsettled*. In this regard, these pilot moratoriums are often close to Yin's definition. In addition, the Hoover Moratorium was put forward through a mere public statement of President Hoover in July 1931 and only later adopted by the US Congress as an act (*competence "creep"*)[35]. The objective was to curb the financial crisis in Europe in 1931 (*pressing challenge*).

The most interesting aspect of these early manifestations of moratoriums is that they are an expression of a strong political will in preventing a catastrophe above all other interests. This precautionary approach has been inherited by the moratoriums established in the field of environmental law – a policy area under which many moratoriums are presently adopted. The same four characteristics can be identified in the establishment of moratoriums by the State Environmental Protection Administration (hereinafter "SEPA") on Environmental Impact Assessment (hereinafter "EIA")[36]. China, facing a problem of deficient harmonisation of its national legislation and dissenting political views on environmental concerns at the local and central level, has taken what has been defined as a "daring and controversial administrative measure" to tackle "escalating environmental problems[37]." Here, the nature of the pressing challenge results from a dissociation of interests: while the central government is more concerned with environmental protection, local governments are too eager to develop their economy[38]. While apparently legislation and policies are not harmonised in a way that these interests would converge, a moratorium is imposed to address the *unsettled matter*. These moratoriums can be "region-wide," "enterprise-wide" or "industry-wide," meaning that if

did, at last, permit reparations to disappear, but it was too late. The unemployment and despair had given Hitler the last materials for gaining power," Felix, 1971, p. 176.

[35] Herbert Hoover, Statement on Signing the Foreign Debt Moratorium, 23 December 1931, cited by Yin, 2012, pp. 323-325.

[36] "To carry out any Project, be it a new Project or the modification or expansion of an existing Project, it is a prerequisite to obtain approval of an EIA from the appropriate environmental protection authority," You, 2008, p. 164.

[37] Ibidem.

[38] The relevant documents are the following: Decision on Implementing the Scientific Development View and Strengthening Environmental Protection (2005), the Eleventh Five-Year Plan for National Economic and Social Development, and the Sixth National Environmental Protection Conference (both 2006). You considers that through these documents China has sent "a clear message that resource conservation and environmental protection are as important as economic development," You, 2008, p. 178.

one actor exceeds pollutant discharge limits or any other environmental protection rules all actors are reprehended through the withholding of licenses' issuance by the state. By implementing a moratorium, SEPA implicitly encourages cities and enterprises to swiftly apply environmental-friendly changes. As in the above-mentioned debt moratoriums, it is not clear what the legal basis is to adopt such a moratorium (*precariousness*). It "cannot be properly classified as a law or an administrative regulation of the People's Republic of China" and "there is no clear procedure for imposing moratorium measures[39]." The interference of the central government is, according to You, legitimised by the "principle of totality" (*competence "creep"*)[40]. As "the environmental laws of all nations generally establish a goal of harmonizing the relationship between the environment and human beings[41]," this calls for a holistic approach to the legal order.

Interestingly enough, both in the debt moratoriums and in the field of environment law it was the external pressure or influence that determined the adoption of a national moratorium. In the case of the EIA moratorium, external pressure determined the shift in environmental policy at the national level. Peer pressure determined the shift in the behaviour of enterprises at the local level. What is also compelling is that the precarious nature of the moratorium, fuelled by the dubious nature of this pressure, created a level of legal uncertainty and lack of transparency that urges authors not to advocate against it, but in favour of its legal reinforcement[42].

In the end, roughly the same analysis can be inferred from the implementation of Land Use Moratoriums in the United States, only in this case what is crucial to highlight is the active role the courts have played in defining what the consequences are to the legal order[43]. There is a conflict between private property rights and sustainable develop-

[39] You, 2008, p. 164.

[40] "The totality principle of environmental law means that in legislation, administrative enforcement, compliance and adjudication, one should regard the environment as a totality and solve environmental problems from a perspective of totality," ibidem, pp. 164, 170.

[41] Ibidem, p. 164.

[42] "As SEPA declared that it would use moratorium measures more frequently and against more cities and enterprize groups, there is a clear need to improve this law enforcement mechanism in the future," You, 2008, p. 186.

[43] Guidelines established by the State of New York on the Concept and Implementation of Land Use Moratoriums, avaliable at http://www.dos.ny.gov.

ment, the latter being an interest that is upheld by the state[44]. The moratorium is adopted temporarily in order to give time to initiate or conclude a revision of the land use plan. If the moratorium were not adopted, the utility of the plan would be compromised as there could be a spree on licensing. These moratoriums have been to a great extent discussed in courts[45]. While some states have somewhat institutionalised this kind of moratorium and transformed it into an administrative mechanism, jurisprudence shows that there is no agreement on who has the power to implement a moratorium and where it originates[46]. Furthermore, although these moratoriums are temporary in nature in some cases they have become perpetual, which has raised democratic accountability concerns[47]. The case of the Water Moratorium in Bolinas, California, represents how a temporary measure in nature can become permanent if the challenge it is aimed at tackling or the crisis it is aimed at preventing is not overcome or solved[48].

In the United States of America, more controversial moratoriums have also marked the most recent stages of evolution of the concept. Following 9/11, and in name of national security, the Federal Bureau of Prison implemented a "blanket moratorium on the hiring of Muslim chaplains in its facilities[49]." The possibility that Muslim chaplains had recruited some of the terrorists involved in the attacks determined the adoption of such a measure. In these particular circumstances, the conflict between national security and freedom of religion is solved through

[44] On land use limits and sustainable development in Great Britain, see Owens & Cowell, 2013.

[45] On the redefinition of Land Use Moratoriums after the Lake Tahoe case, see McKaskle, 2003, p. 275.

[46] In the state of New York, "a landowner challenged a moratorium on sewer connections to the village sewer system [...]. The Court of Appeals recognized: a municipality has ample power to remedy sanitation problems including difficulties presented by inadequate treatment or disposal of sewage and waste," New York State Department of State, 2010, p. 1. However, "The Pennsylvania Supreme Court, for instance, stated that the power to impose a moratorium, which suspends land development, is a power distinct from, and not incidental to, any power to regulate land development. The Tennessee Supreme Court, on the other hand, stated that the power to enact a moratorium ordinance is included within the broad sweep of the state's legislative power. California has conferred broad police powers on local governments to regulate the use of land within their jurisdictions, and courts have been willing to uphold the moratorium ordinances if they bear a rational relation to the public health, safety, morals, or general welfare," McKaskle, 2003, p. 281.

[47] On unreasonable planning moratoriums, see Eagle, 2003, p. 470.

[48] On the Water Moratorium in Bolinas, California, which is now in its fourth decade, see Callagy, 2008, pp. 223-262.

[49] Seymour, 2005-2006, pp. 523-554.

the adoption of a temporary moratorium until further investigations take place. Again, the precautionary approach determines the urgency of the decision. It is not so important to assess if the moratorium has any impact; the suspension is adopted in any case[50].

In conclusion, no matter how different and varied the contexts in which moratoriums are adopted, all moratoriums under analysis seem to share these four characteristics. They all arise from a problem or a *pressing challenge* on which, for whatever reason, it is too soon to take a definite decision – *unsettled subject matter*. In the same respect, all moratoriums are therefore inherently temporary but mostly *precarious*. It is unclear where the power to adopt a moratorium emanates from as moratoriums are either imposed by the executive to suspend a law or by the administrative authorities to suspend an activity under an otherwise perfectly enforceable regulation – *competence "creep."* Consequently, these four characteristics seem to constitute the core definition of moratoriums or the *lato sensu* definition of moratorium.

1.2. MORATORIUMS ESTABLISHED AT THE INTERNATIONAL LEVEL: THE *TRANSFORMATIVE* DIMENSION

In the moratoriums established by a group of states or by an international organisation, the goal is less to prevent a present threat to any given public interest and more to operate a long-term transformation of the legal order. The characteristics described above are also present in the moratoriums adopted at the international level. However, more specifically in the field of international human rights, moratoriums go beyond the goal of "resuming" the behaviour thereby suspended. From the moment of the adoption of a moratorium on the use of the death penalty, there is already the aspiration to transform the present status quo towards the abolition of the death penalty, regardless of this being in the end the outcome achieved. The objective is not only

[50] The moratorium on hiring Muslim chaplains might have negative repercussion in what human rights are concerned, namely by affecting the exercise of freedom of religion. Nevertheless, I chose not to pair it with the moratoriums established in the field of human rights because their main object, or the public interest behind its adoption, is not a human rights issue, but rather (even if arguably) national security. Therefore, the human rights dimension is not causal but merely consequential.

to prevent executions, but mostly to open the way for abolition[51].

This characteristic manifests itself as an answer to the question of with what goal is a moratorium established: are moratoriums designed to maintain the status quo or to modify the status quo? Most moratoriums established at the national level have the goal of maintaining the status quo, not only for preservation purposes (public health, national security or environment), but also in the sense that there is a high likelihood that in the long run the suspension will be lifted, the activity resumed and the law or regulation will not be revoked. Quite differently, the moratoriums established at the international level, either by a group of states or by an international organisation, do not aim at resuming the activity or re-enacting the law, even if by their nature moratoriums still carry that possibility. The objective of changing the status quo is a noteworthy trait[52]. This particularity is that even if they propose a short-term alternative solution to a problem or challenge they aim at the long-term modification of the status quo – they operate as a *transformative mechanism*. A brief review of these moratoriums is crucial for the contextualisation of the most recent experiments in the field of international human rights law that also share this characteristic.

The whaling moratorium, adopted in 1982 in the scope of the International Whaling Commission (hereinafter "IWC"), is a clear example of how this *transformative* characteristic can influence the behaviour of individual states[53]. To address the extinction threat that the high number of whales caught and killed had brought about, the IWC decided in 1979 to ban "pelagic factory ship whaling" for all species except the ones for which it considered that there were high stocks[54]. In 1982, instead of a temporary decrease or suspension of the

[51] Lieberman, Gray and Groom, who focus on the moratoriums on genetically modified products and the moratoriums on commercial whaling, conclude that it is often difficult to determine what their effect is, but that they "may transform the regime that spawns them, taking a life of their own, and resisting attempts to end them," Lieberman, Gray & Groom, 2011, p. 13. Yin, who conducts a broader research on moratoriums in international law, acknowledges that moratoriums established at the international level may be used as a means "of achieving some goals." The emphasis is more on the moratoriums as "a practical instrument" employed by governments to solve a stalemate or tackle an urgent situation. Yin, 2012, pp. 339-340.

[52] In this respect my conclusion departs both from Lieberman's and Yin's assertion that moratoriums at the international level may have the effect of maintaining the status quo.

[53] Lieberman, Gray & Groom, 2011, p. 13.

[54] Available at http://weblog.greenpeace.org/oceandefenders/archive/2007/02/whaling_timeline.html (consulted on 3 May 2012).

catching of certain species, the IWC decided to establish what became a permanent *de jure* moratorium, setting whaling catch limits to zero[55]. Although the establishment of the moratorium has allegedly been motivated by strictly technical concerns, it is not easy to ignore that other alternatives were available[56]. Lieberman, Gray and Groom argue that the reasoning was in fact "political[57]," which is confirmed by Greenpeace's records[58]. The IWC was only reacting to a global trend: in 1972, the UN Conference on the Human Environment had passed a unanimous resolution calling for a ten-year moratorium on commercial whaling[59].

Advertently or inadvertently, the moratorium changed the behaviour of several countries that not only had a commercial interest in whaling but that also had a long lasting tradition and culture of whaling, as it is the case of the Azores, in Portugal[60]. Today, although a total ban on whaling is not universally consensual, the reintroduction of whaling without restrictions (or with temporary restrictions based strictly on preservation of specific species) would not be the object of international consensus either[61]. Even the IWC has undergone a transformation throughout the years and is now more of a preservation agency[62].

The same kind of *tentative transformational* rationale can be extracted from the reasons that led states to implement a moratorium on nuclear testing[63]. By 1992, the Soviet Union, the United Kingdom and

[55] It was not uncommon for the IWC to temporarily decrease or suspend the catching of certain species. What was more surprising was that the Commission was created to regulate whaling stocks, which presupposes that whaling is still allowed. Suspending whaling *tout court* threatens the nature and existence of the IWC itself.

[56] On "scientific uncertainty" as being the main reason for the moratorium, Lieberman, Gray & Groom, 2011, p. 8.

[57] Ibidem.

[58] Aron suggests, for example, that there was actually abundance of the species of minke whale, Aron, Burke & Freeman, 2000, pp. 179-182.

[59] Available at http://www.greenpeace.org/usa/en/campaigns/oceans/whale-defenders/iwc/ (consulted on 3 May 2012).

[60] On the cultural shift and life changes imposed on people from Azores after the adoption of the moratorium on whaling, see Sakakibara, 2011, pp. 75-90.

[61] "The last attempt [to lift the moratorium] took place in June 2010 at the IWC's annual meeting in Agadir, but the 88 member states failed to come to an agreement," Lieberman, Gray & Groom, 2011, p. 11.

[62] The pro-whaling members now form a group known as "Normalisers," which seek to return the IWC from its current "disfunctionality" to its original function of regulating commercial whaling, while the anti-whaling members now form a group known as "Modernisers," which seek to update the IWC to take account of changing values during the last 60 years," Illif, 2008, cited by Lieberman, Gray & Groom, 2011, p. 11.

[63] A series of UNGA non-binding resolutions have influenced that decision, the first of

the USA had announced a moratorium on nuclear testing, followed by France and China. The issue is that the Comprehensive Nuclear-Test-Ban Treaty has not yet entered into force[64]. The moratorium is the result of a voluntary political commitment to an international agreement, which is not yet fully binding. For political reasons, it is highly unlikely that all 44 states on which entry into force depends on will ratify the Convention. In the meantime, the moratorium provides a legal framework for a certain number of countries to execute the provisions of the Convention. It is the Convention that is being enforced, through the moratorium, by a restricted number of countries[65]. Human security is preserved and states adapt to a new reality, indirectly imposing a new option upon others[66].

In the specific case of the import, export and manufacture of small arms and light weapons in West Africa, the moratorium established in 1998 opened way for the drafting and approval of a legally binding treaty[67]. The moratorium laid ground for the 2006 ECOWAS Convention on small arms to be adopted and therefore an international convention is the direct product of a moratorium[68]. Ebo highlights that "the moratorium has emerged as a useful template[69]" and that it has "received active support from several multilateral organisations like the UN and the Organisation of African Unity," providing not only a framework but also the creation of momentum for a binding commitment[70].

Finally, the "anatomy" of moratoriums established at the international level in the field of environmental law or conflict prevention is

which in 1969 (A/RES/2604), followed by A/RES/48/69 in 1993, A/RES/49/69 in 1994, A/RES/57/59 in 2002 and finally A/RES/58/51 in 2003.

[64] Comprehensive Nuclear-Test-Ban Treaty, UN Doc. A/50/1027, adopted by UN General Assembly Resolution 50/245, 10 September 1996, opened for signature 24 September 1996, available at http://www.ctbto.org/the-treaty/status-of-signature-and-ratification/ (consulted on 23 April 2012).

[65] A moratorium by the "NPT-five [...] equates to a *de facto* CTBT," Ghose, 2006, p. 23.

[66] "The need to maintain the moratoria should not be underestimated, particularly if the CTBT does not enter into force for another ten years," ibidem, p. 27.

[67] The moratorium was adopted at the 21st Session of the Meeting of Heads of State and Government of ECOWAS on 30 October 1998 and became part of the ECOWAS conflict prevention framework, available at http://www.ecowas.int/publications/en/framework/ECPF_final.pdf (consulted on 16 May 2012).

[68] Here, too, it is possible to draw a connection, and influence, with a number of resolutions adopted in the UN fora.

[69] Ebo & Mazal, 2003, p. 16.

[70] Aning, 2008, pp. 170-177.

slightly different from that of the moratoriums on the use of the death penalty or the criminalisation of homosexual acts. The latter, and overall the moratoriums in the scope of human rights, deserve being singled out as they always offer a middle-ground solution to a persistent lack of consensus in international human rights law – they are adopted on issues over which it is disputable whether there are international universal standards. It is on a detailed analysis of how these two moratoriums happened to be established that the present research draws its conclusions on the concept of moratorium adopted in the scope of international human rights law.

1.3. MORATORIUMS IN THE FIELD OF INTERNATIONAL HUMAN RIGHTS LAW

I will now focus on the *de jure* moratorium on the use of the death penalty in Russia and on the *de facto* moratorium on the criminalisation of male homosexual acts in Singapore.

The context, the goal, and the nature of these two moratoriums will be briefly analysed to confirm whether they share the same characteristics as the above described moratoriums and whether human rights moratoriums deserve conceptual autonomy. Other aspects concerning the political dimension, policy shaping, legal framework and challenges will be discussed in greater detail in the following chapters.

1.3.1. The Lack of Universal Standards

In the case of the death penalty, several regional organisations have adopted instruments repealing its use and calling for abolition. The Council of Europe, the Organisation of American States (OAS), the European Union and the UN all have adopted these instruments. The statutes of international courts, which do not contemplate capital punishment as a possible penalty either, even for the gravest crimes, observe the same trend "towards abolition[71]." However, in international law the only treaty with universal coverage that bans the death penalty

[71] Schabas, 2003, p. 2.

is the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Only 74 states (out of 193 UN member states) are parties to the Protocol, many of them with reservations[72]. In addition, there are authors who defend that abolition of the death penalty has become customary international law, but it is not possible to sustain this view outside of Europe and eventually in Latin America[73]. Many states still consider it strictly as a criminal justice system issue and therefore one which should be addressed under Article 2(7) of the United Nations Charter[74]. Others consider it to be intrinsically connected to religion and that an attempt to approach it from a human rights perspective is detrimental to other rights[75]. For these reasons, it is not possible to affirm that for the time being abolition is a universal cannon. It will, however, be assessed in what way the widespread adoption of moratoriums on the use of the death penalty may contribute to the shaping of a universal standard on abolition.

With regards to sexual orientation, the situation is even far more complex. Before December 2008, the UN had not approached the issue of sexual orientation. The adoption of the Yogyakarta Principles by scholars set the foundations for the issue to be taken to UN fora[76]. Nevertheless, it was the adoption of a resolution by the General Assembly of the OAS on "Human Rights, Sexual Orientation, and Gender Identity" that was truly determinant[77]. As a follow-up, the European Union, under the French Presidency, led a cross-regional alliance at the UN General Assembly. No resolution was adopted, but

[72] Status of ratification available at http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (consulted on 25 April 2012).

[73] Ohlin cited by Simmons, 2009, p. 191. The death penalty is not an issue on which the traditional divisions between east and west, north and south apply. These conflictive views will be observed below in the analysis of the context that led to the adoption of a UN General Assembly resolution calling for all states that still retain the death penalty to adopt a moratorium with a view to abolition.

[74] Singapore, Malaysia and China's Statements, UN General Assembly 76th plenary meeting, 18 December 2007, UN Doc. A/62/PV.76, pp. 23-25.

[75] Egypt Statement, UN General Assembly 76th plenary meeting, 18 December 2007, UN Doc. A/62/PV.76, pp. 23-25.

[76] The Yogyakarta Principles are available at http://www.yogyakartaprinciples.org/ (consulted on 25 April 2012).

[77] Resolution AG/RES. 2435 (XXXVIII-O/08) on Human Rights, Sexual Orientation, and Gender Identity by the General Assembly of the Organisation of American States, during its 38th session on 3 June 2008.

66 countries brought the issue to the UN agenda for the first time by signing a statement that in content replicated the OAS' resolution[78]. In 2011, the adoption in the Human Rights Council of a resolution was labelled a "landmark" by Human Rights Watch[79]. Despite the advances, opposing states have kept the pressure high to maintain the status quo. This so-called landmark resolution was adopted with 23 votes in favour and 19 against. Very harsh statements accompanied the explanations of vote by the countries that voted against.

These three initiatives can be approached, firstly, from the broader perspective of private life, equality and non-discrimination. The international law standards that repel any discrimination on the basis of sexual orientation are Article 1 of the Universal Declaration of Human Rights (hereinafter "UDHR"), which proclaims that "all human beings are born free and equal in dignity and rights," Article 2 of the International Covenant on Economic, Social and Cultural Rights, and Article 26 of the International Covenant on Civil and Political Rights. Still, these norms did not come into force in 2008, but long ago. Only now, however, has a consensus been achieved to consider that equality should encompass the prohibition to discriminate on the basis of sexual orientation. Some authors refer to this phenomenon as the "rise" of equality or the "expanding role of equal protection in international law[80]." Progress has been made but there are no universal standards, there is not even "European universality" in what refers to equality of civil rights between heterosexual and homosexual couples – e.g. marriage.

There is yet another perspective to analyse the mentioned initiatives: the one that departs from the assertion that the criminalisation of Lesbian, Gay, Bisexual Transgender (hereinafter "LGBT") people is a violation of human rights. In this aspect, there is a broader consensus. Some countries still go as far as to, at least in theory, sentence homosexuals to death penalty[81]. Persistent objectors (the Organisation of

[78] UN General Assembly, *Statement on Human Rights, Sexual Orientation and Gender Identity*, 18 December 2008, available at http://www.unhcr.org/refworld/docid/49997ae312.html (consulted on 5 May 2012).

[79] Resolution A/HRC/RES/17/19 on Human Rights, Sexual Orientation and Gender Identity, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/19 (consulted on 25 April 2012).

[80] Seibert-Fohr, 2010, pp. 1-5.

[81] "Iran, Mauritania, Sudan, Saudi Arabia and Yemen have laws that allow the death

Islamic Countries and the Arab League) argue that this is an issue that touches upon religion, tradition and cultural identity. Even the 2011 Nobel Prize winner, the Liberian President, Ellen Johnson, when facing a question pointing to the possible decriminalisation of homosexuality in Liberia, declared that "we have certain traditional values in our society we would like to preserve. [...] We like ourselves the way we are[82]."

Under these circumstances the *de facto* moratorium on the criminalisation of male homosexuals may offer a trial period during which public opinion might be shaped by an alternative. The human rights agenda seems to be ever expanding. In a "transitional" state of affairs in which international and national legislations are concerned, a moratorium might prove to be a step forward.

1.4. THE RUSSIAN FEDERATION'S *DE JURE* MORATORIUM ON THE APPLICATION OF DEATH PENALTY

The Russian Federation's accession to the Council of Europe in 1996 was seen as a sign of its commitment to an ongoing democratisation process. It was, in addition, a hopeful prognosis that there was a European common identity, and that this identity included Russia[83]. However, more than 15 years later, Russia's membership to the Council of Europe is still marked by many contradictions, its reiterated uncertain position towards the death penalty being one of the most heavily criticised[84].

The Council of Europe made abolition of the death penalty compulsory for states wishing to accede. For this purpose, Council of Europe member states must ratify Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms. In 1995, eager to accede, Russia committed to ratifying Protocol 6 in three years

penalty to be imposed for different crimes of sexual orientation. Somalia and Nigeria in some areas also impose the death penalty," Cowell & Millon, 2012, pp. 341-352.

[82] http://www.guardian.co.uk (consulted on 26 March 2012).

[83] Jordan, 2003, p. 281; Neumayer, 2008 (a), p. 7.

[84] Burkov, 2007. On the historical developments between 1996 and 1999, see Barry & Williams, 1997, pp. 244-248; Semukhina & Galliher, 2009, pp. 139-142; Zorkin, 2010, pp. 71-73.

time and therefore to abolish the death penalty but, until today, Russia has done neither. After formalising accession, in May 1996, President Boris Yeltsin issued a national decree determining "the gradual curtailing of the application of the death penalty[85]." It was in this context that a moratorium, with all its ambiguity, began to take shape. The rather long sequence of political and legislative measures that followed this first decree emphasises how the lack of competence of the President to take a definitive decision threatened its survival from the very beginning[86]. The ambiguous content of the document, as well as the fact that it was simply a presidential decree, and not a legislative measure, led to the non-ratification of Protocol 6 and three years of great legal uncertainty[87].

The Presidential 1996 decree did not allow for the actual suspension of executions for a wide array of reasons. To start with, because the President was not competent to determine the suspension of the death penalty as such. The recommendations contained in the decree entailed an array of legislative changes that would need to be discussed and approved by the Parliament. The State Duma, however, rejected the draft law proposal on the accession to Protocol 6 that the government submitted to its consideration in March 1997. The following year, the draft law was submitted again to the Duma and did not pass either. The same happened in 1999. If the ratification of Protocol 6 was not possible without the Duma's cooperation, its signature was and the President instructed the Minister of Foreign Affairs to sign it in the meantime.

This meant that, from a technical point of view, it became unclear whether at that point the commitment not to execute death sentences was, or was not, entrenched in Russian law. Indeed, Article 18 of the 1969 Vienna Convention on the Law of Treaties, to which the Russian Federation is a signatory, states that member states are "obliged to refrain from acts which would defeat the object and purpose of a

[85] Barry & Williams, 1997, pp. 244-248; Semukhina & Galliher, 2009, pp. 139-142.
[86] Ibidem.
[87] "This 'inaction' is even more incomprehensible given that Russia indicated a precise schedule for the adoption of this measure (three years) in a letter dated 18 January 1995, signed by the four highest figures of authority in the state (President Boris Yeltsin, Prime Minister Viktor Chernomyrdin, President of the State Duma Ivan Rybkin, and President of the Federation Council Vladimir Shumeyko)," Massias, 2007, p. 11.

treaty" if they have "signed the treaty" and until they have made their "intention clear not to become a party to the treaty." As Russia has a monist system, international law is binding domestically and is hierarchically superior to domestic law[88]. This would mean that the signature of Protocol 6 would require Russia to refrain from executing death sentences, at least until Russia makes clear and public its decision not to ratify it. This was the argument of the Council of Europe experts when they visited Russia in 1997, to which Russia vehemently opposed[89].

Regardless, the truth is that there was no consensus among the President, the State Duma and public opinion[90].

It was only in 1999 that the Constitutional Court of Russia formally established a temporary moratorium, making it legally binding. The Court resorted to "technical" argument to stop executions. The application of the death penalty could only be determined by a jury trial, as provided for in Article 20(2) of the Constitution, and at the time jury trials were non-existent in some regions of Russia. It was therefore considered that the death penalty could not be applicable only in certain regions. In other words, the Court considered that it was either applicable in the whole of the Russian territory or not applicable at all, with no possible *media via*. The mentioned provision of the Russian Constitution foresees a gradual path towards the abolition[91] and the Court acknowledged this by noting more than five years had gone by since the approval of the Constitution, which would be enough time for the required legislative amendments to have been approved[92]. Finally, in 2009 the Constitutional Court determined the extension of the mora-

[88] Article 15(4) of the Russian Constitution determines that "generally accepted principles and rules of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If an international agreement of the Russian Federation establishes rules which differ from those stipulated by law, then the rules of the international agreement shall apply."

[89] On the visit and report of Council of Europe experts, see Bowring, 2000, p. 61.

[90] "Different political actors and institutions with contradictory agendas are involved. They include supporters of the death penalty, such as the State Duma, as well as the majority of the Russian population and opponents of capital punishment that comprize the Russian President and the Parliament Assembly of the Council of Europe (PACE), with the Constitutional Court of Russia holding the middle ground," see Semukhina & Galliher, 2009, p. 132.

[91] It states that "until its complete elimination [the death penalty] may be envisaged by federal law as an exclusive penalty for especially grave crimes against life, and the accused shall be granted the right to have his case examined by jury trial."

[92] On how the Constitutional Court of Russia has held "the middle ground," see Semukhina & Galliher, 2009, p. 132 and p. 141; Bowring, 2000, pp. 61-62.

torium until the Duma ratifies Protocol 6. Chief Justice Valery Zorkin, when reading the ruling, stated that an irreversible process to abolish capital punishment was underway[93].

The issue of the death penalty in the Russian Federation has been dubbed as a "dilemma" by numerous authors[94]. It is hard not to associate this "dilemma" with the broader so-called "civilisational dilemma" of Russia[95]. The moratorium remains a fragile and precarious solution to the unwillingness of Russia to ratify Protocol 6.

However, the transformative process is still ongoing. Already in 1997 it was considered that a "process" had been initiated[96]. As soon as the discussion on the death penalty was permitted, the society immediately made room for abolitionists and "gradualists" views[97]. Today, even if in absolute terms the population would support reinstating the death penalty[98], the young, more educated population does not seem to be as eager[99]. This data is indicative of progress, even if slow, in the public opinion's position.

In conclusion, what is to be highlighted, for the time being, is that the moratorium on the application of the death penalty in the Russian Federation was grounded on a political decision, challenging the traditional theories of separation of power. On the other hand, it has evolved and has been transformed into a *de jure* moratorium through the action of the Constitutional Court of Russia. The political decision that led to the adoption of a moratorium at that point in time was strictly determined by the external influence of the Council of Europe. Although the *matter is unsettled*, and it remains a *precarious solution* to

[93] Zorkin, 2010, p. 73.

[94] Barry & Williams, 1997, pp. 231-258; Ritter, 2000, pp. 129-161. In Taiwan, a similar process took place and a "dilemma" has been identified by Wang Ching-Feng, Minister of Justice of Taiwan between 2008 and 2010. Deadlocks on the issue of death penalty lead her to abandon her position after a conflict with President Ma. On "why a *de facto* moratorium [in Taiwan] was established and lost," see Liao, 2010, pp. 1-22.

[95] Tsygankov, 2007, pp. 375-399.

[96] Barry & Williams, 1997, p. 257.

[97] On "the abolitionist, retentionist and gradualist positions," see ibidem, pp. 248-249.

[98] "People in Russia believe that the official position of the Russian President is just a tribute to the European Community, and that he is forced to hold these views under the pressure of current foreign policy," Semukhina & Galliher, 2009, p. 145.

[99] "A study by Levada in 2007 shows that only 17% of all Russians believe that the death penalty is morally unacceptable (Levada 2007). This number is much higher (36%) for users of the internet, who tend to be younger and more educated than the general population (RuNet, 2008)," ibidem, p. 143. "The Russian President Vladimir Putin made it clear that the ultimate abolition of the death penalty is his firm policy," Bae, 2008, p. 144.

the non-ratification of Protocol 6, no execution has taken place since 1996 and the path to abolition remains open.

1.5. SINGAPORE'S *DE FACTO* MORATORIUM ON THE CRIMINALISATION OF MALE HOMOSEXUALITY

A decision not to enforce the law that criminalises male homosexuality in Singapore was taken and it is so far consistent with the existence of a *de facto* moratorium. The Prime Minister has not used the term *moratorium* but that is not in itself an impediment for the consideration of the existence of one[100]. However, male homosexuality remains criminalised in Singapore[101].

Until 2007, oral and anal sex among consenting heterosexuals was also criminalised[102]. This legislation goes back to British colonial times and has been the object of great national and international attention. In 2007, a parliamentary petition aiming at repealing Section 377A of the Singaporean Penal Code was debated. A Penal Code reform was ongoing and a proposal put forward by a nominated member of Parliament to decriminalise anal sex between consenting heterosexuals was on the table (Section 377)[103]. The petition was, in any case, rejected[104]. However, acknowledging that the Singaporean tradition no longer accounts for maintaining such a discriminatory legislation, the government offered what has been interpreted as a compromise solu-

[100] The EU alleged "unofficial moratorium" on GMO was not recognised by its authors as such. Rosendal, 2005, pp. 86-88; Dabrowska, 2010, p. 180.

[101] "Any male person who, in public or private, commits, or abets the commission by any male person, of any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years." Section 377A of the Singaporean Penal Code. A parallel between this decision and the Romanian non-enforcement of its sodomy provisions can be established: Burleson, 2010, p. 405.

[102] "The debate in Parliament made abundantly clear that the Government's intention is to decriminalise oral and anal sex between a consenting adult heterosexual couple in private by repealing Section 377 but to retain the status quo whereby homosexual acts under Section 377A remain criminalised. In this regard, the Attorney-General's Chambers had earlier advised that Section 377A covers the act of anal sex between male persons," reply of the Ministry of Home Affairs to a Straits Times Review Piece by Amirthalingam that argued that retaining Section 377A while repealing Section 377 (which criminalised unnatural offences such as all anal sex) arguably created a lacuna in the law that would leave private, consensual anal sex between males unregulated (and possibly legal), Chen, 2013, pp. 106-137.

[103] Lee, 2008, p. 347.

[104] "In 2007 amidst the comprehensive review of the Penal Code, a petition was presented to Parliament by a nominated Member of Parliament," Chen, 2013, p. 107.

tion to the political deadlock and Singapore's "dilemma[105]." The Prime Minister Lee Hsien Loong declared that there would be "no proactive" enforcement of 377A by the police, "as long as the acts would take place between two consenting adults and in private[106]." Prosecution would only take place if the consenting adults breached laws on "public indecency." This compromise solution is in itself a *de facto* moratorium on Section 377A.

As in all other moratoriums, here too there is no way to guarantee that a political decision, in the form of the statement of the Prime Minister, will be observed by the courts. The Parliament would have been the organ holding the power to make the legislative change or to suspend the law. Notwithstanding, the government has repeatedly affirmed that one such law will not be enacted. Still, it has incorporated the moratorium in its foreign policy, having affirmed it within the Human Rights Council. During the Universal Periodic Review, the Singaporean delegation argued that "it was decided to leave things be" in what legislation is concerned but "the Singaporean police has not been proactively enforcing this provision and will continue to take this stance[107]." The current government appears to have deliberately given a transformative dimension to this particular moratorium when it recognises that something is changing in the society. However, it failed in not conferring it at least a *de jure* dimension. In 2009, Minister of Law Shanmugam further reassured that the law would not be enforced and explained the government's position: "The way society is going, we do not think it is fair for us to prosecute people who say that they are homosexual[108]." In the words of the Minister of Law, the policy adopted by the Singaporean government defers a definitive solution for the future – it has a long-term transformative dimension.

For the time being, decriminalisation is seen as a foreign and western imposition. This is curious because prior to the British colonial presence homosexuality was actually condoned in Singapore[109]. Nevertheless, the precariousness of this policy lies on the fact that it depends

[105] "Singapore's dilemma," Weiss, 2011, pp. 625-641.
[106] Prime-Minister Lee Hsien Loong cited by Lee, 2008, p. 348.
[107] Webcast available at http://www.ohchr.org/EN/HRBodies/UPR/Pages/SGWebArchives.aspx (consulted on 25 April 2012).
[108] 'Report: Singapore Won't Repeal Law Banning Gay Sex, Minister Says', in *The Canadian Press*, 7 June 2009.
[109] Gupta & Long, 2008, p. 5.

on the courts' goodwill and creativity. It is also precarious because a new government might have a different idea of what the present and future of 377A should be. A recent case has proved that police authorities do not press charges under 377A, but the Constitutional Court has yet to pronounce on whether 377A is unconstitutional or not.

In the case of the *de facto* moratorium on the criminalisation of male homosexual acts, it is less clear what part, if any, the international community has played in its adoption. For instance, the Romanian government's decision, differently, derived from international pressure upon accession to the Council of Europe. However, this moratorium is contemporary of the above described latest political developments on sexual orientation – which makes it at least an expression of that wave of transformation.

To sum up, the moratorium on Section 377A of the Singaporean Penal Code is conceptually a mere political decision that was embodied in a public statement by the Prime Minister in 2007. Although it challenges the traditional theories of separation of powers, public prosecution has not enforced the legislation so far. On the other hand, it remains only a *de facto* moratorium as the Constitutional Court, when faced with a case where the issue was only indirectly at stake, affirmed that it could be re-enforced. The matter is unsettled and the moratorium persists only as a precarious solution that for the time arguably provides human rights protection.

1.6. CONCLUSIONS

The concept of moratorium is based on four core features: (a) the *unsettled nature of the matter* – they arise from a problem or challenge on which, for whatever reason, it is too soon to take a definitive decision but inaction is no longer an option; (b) *precarity* – they are temporary in nature although they can become permanent; (c) *competence "creep"* – it is most of the times unclear where the power to adopt a moratorium comes from. A small group of moratoriums (mostly those established at the international level by a number of states) share one characteristic: even if they propose a short-term alternative solution to a problem/challenge, they actually aim at the long-term alteration of the status quo. Moratoriums in the scope of human rights issues share all the above characteristics. In addition, they offer a middle-ground solution to a

persistent lack of consensus. They result from strong political will and are adopted on issues on which there is a persistent *clash of culture, moral or values*. They are not only adopted on issues over which it is disputable whether there are "universal" standards or not, they are adopted on issues which arguably integrate the human rights "agenda." It is therefore possible to conclude that, for the purposes of the present study, *a moratorium in the field of human rights is the temporary suspension of a specific domestic law or regulation, which results from a varying degree of external influence of the international human rights politics or practice*. The purpose of the introduction of a moratorium is to *explore alternatives to the existing legal framework, with a view to proceeding with its definite modification in the long-term*.

However, defining moratoriums in the scope of international human rights law is only the first step to tackle the challenges and legal uncertainty that arises from their implementation namely the ones that defy the rule of law, as well as the traditional theories of separations. Several authors have advocated in favour of the strengthening of this mechanism, but have failed in providing for a framework that would confer them additional legitimacy. In the next chapter I will assess to what extent can moratoriums in international human rights law be considered an expression of new governance mechanisms and, if so, how they relate to the law.

2.

MORATORIUMS, EXPERIMENTALIST GOVERNANCE AND INTERNATIONAL HUMAN RIGHTS LAW

In the first chapter, I have demonstrated that the study of moratoriums has been sparse and unsystematic. The starting point of the present chapter is that so have been the attempts to provide a theoretical framework that would clarify what their role is in the legal order. Lieberman, Gray and Groom have framed moratoriums in international politics under neo-realism, neo-liberalism and cognitivism theories. Despite their characterisation of the effects of moratoriums as potentially "transformative," this framework adds very little to their part in the legal order[110]. Yin, without applying any particular framework, argues that its normative or non-normative character depends on the nature of the act that approves it. Notwithstanding, Yin does go along with my approach that moratoriums are a "compromise" or a "middle-ground" solution, a pragmatic approach to decision-making when a deadlock in negotiations between the parties is reached[111]. Semukhina and Galliher classified it as an expression of symbolic law[112]. Finally, Dabrowska comes close to analysing the *de facto* moratorium on genetically modified organisms established by the EU under new governance lenses, but bypasses the instrument and focuses rather on

[110] Lieberman, Gray & Groom, 2011, p. 2.

[111] According to whom if a resolution is adopted by the IWC then it is legally binding, if it is adopted by a resolution of the UN General Assembly then it is a mere expression of "soft law." Nevertheless, Yin's study assembled characteristics of moratoriums, such as them being a "middle-ground between *yes* and *no* in the international arena" and a "practical" approach to law. From this perspective, this is an additional argument to sustain my approach that moratoriums are an expression of experimentalist governance design, Yin, 2012, pp. 339-340.

[112] When specifically analysing the moratorium on the death penalty in the Russian Federation. It is not clear, though, what "symbolic law" exactly is, but its aspirational feature is compatible with abolition as a goal and not as an immediate effect.

the EU governance, the Open Method of Coordination and comitology – a field already widely explored by new governance scholars[113]. By contrast, the application of the experimentalist governance framework to moratoriums is in itself new.

However vital the contributions of these studies might be, the proposed frameworks – unlike new governance – fail to acknowledge moratoriums as an expression of a larger, global trend on new forms of decision-making processes, as well as its legitimacy and transformative character on the legal order towards protection of human rights. These studies do not provide for a clarification of the nature of the relationship between moratoriums and the legal order either, commending their potential but coming short of proposing how to address their shortcomings.

Having already established what the characteristics of moratoriums are, and having also established the conceptual autonomy of moratoriums in the field of human rights, I will now propose a theoretical framework befitting of its qualities and nature. In this chapter, I will argue that the moratoriums in the field of human rights, more specifically the *de jure* moratorium on the death penalty in the Russian Federation and the *de facto* moratorium on the criminalisation of male homosexual acts in Singapore, are both expressions of experimentalist governance[114]. In this context, as previously mentioned, the definition of new governance mechanisms adopted for the purposes of the present study will be the one that characterises it as "experimentalist." This notion puts significant weight on the "accommodation and promotion of diversity, on the importance of provisionability and revisibility" applied to problem solving and policy shaping[115]. As far as the relationship between moratoriums and the law is concerned, I will structure it according to De Búrca and Scott's description of a *mutually constitutive* model, combined with Sabel and Simon's *transformation thesis*. The

[113] Although Lieberman analyses it as if it were indeed an "unofficial moratorium," the EU has never recognised it as such. Dabrowska adopts, in my view, a much more accurate approach to the issue by focusing on comitology procedures and deliberation in the EU. Among the scholars that have delved into EU Governance and the Open Method of Coordination, see: Armstrong & Kilpatrick, 2007, pp. 647-677; Joerges & Neyer, 1997, pp. 273-299; Trubek & Trubeck, 2005, pp. 343-364; Scott & Trubeck, 2002, pp. 1-18; Sabel & Zeitlin, 2008, pp. 271-327; Eberlein & Kewer, 2004, pp. 121-142.

[114] Sabel & Zeitlin, 2008, pp. 271-327.

[115] De Búrca & Scott, 2006, p. 6; Sabel & Zeitlin, 2008, pp. 271-327.

objective is to clarify how law and moratoriums, as new governance mechanisms, influence each other, shaping one another, and how they are not mutually exclusive but mutually constitutive[116]. The argument proceeds as follows.

In its first part, I will demonstrate that the overall architecture of moratoriums in the field of human rights shares the values of the experimentalist new governance regime as designed by Sabel and Zeitlin, offering the *ability to handle irreducible diversity/strategic uncertainty* and *dispersed authority*; combining *learning from practice/experimentation with revisibility and flexibility*; and, finally, *setting a broad goal as a way of reaching initial consensus* amongst parties[117]. It should be noted, in reference to the revisibility and flexibility elements, that they will be developed in an autonomous chapter on the role of judicial review and peer-review (Chapter 3) in addressing possible shortcomings and challenges posed by moratoriums – especially the ones connected with the rule of law, democratic institutions and the traditional theories of separation of powers.

From the human rights point of view, experimental governance could, at least in theory, drain political commitments of any substance. I will show that there is no such incompatibility by drawing some connection points between two other expressions of new governance in the field of human rights and the moratoriums: the EU anti-discrimination framework and the Convention on the Rights of Persons with Disabilities, both as reviewed by De Búrca[118]. This analysis will be complemented by a brief reference to transnational corporations' codes of conduct which, although not legally binding, contain provisions with human rights implications and which have been identified as carrying some of the new governance elements.

In the second part of the chapter, I will explore the relationship between moratoriums and international human rights law instruments. I will argue that moratoriums do not fill a gap in international human rights law and that there is no rivalry between the positive obligations of international human rights treaties and moratoriums. Quite the

[116] Walker & De Búrca, 2006-2007, pp. 519-534; De Búrca & Scott, 2006, p. 9.
[117] Sabel & Zeitlin, 2008, pp. 271-327.
[118] De Búrca, 2006, pp. 97-120; De Búrca, 2009; De Búrca, 2010.

opposite, I will demonstrate that moratoriums *transform* the legal order, increasing the protection of human rights not only through their (arguable) immediate effects, but also through their long-term goal of changing the legal regimes and eventually by enlarging the scope of the human rights agenda and ultimately the scope of universal human rights standards.

2.1. EXPERIMENTALIST GOVERNANCE IN THE FIELD OF INTERNATIONAL HUMAN RIGHTS

There are two manifestations of new governance (hereinafter "NG") that are paramount to the analysis of moratoriums in international human rights law (hereinafter "IHRL"): the EU anti-discrimination regime and the Convention on the Rights of Persons with Disabilities (hereinafter "CRPD"). The added value of these examples is twofold. First, they help establish a pattern in the decision-making processes that is conducive to the establishment of experimentalist governance mechanisms in IHRL, as well as to overcome any potential compatibility issues between NG and IHRL in general. Second, these examples are also crucial to setting the premises of the articulation between "old" governance – traditional IHRL – and NG.

However, it is not possible to establish a direct comparison among all the elements of the mechanisms contained in EU directives and international treaties, on the one hand, and the elements of an *ad hoc*, non-traditional regulatory mechanism such as a moratorium, on the other. What is possible is to draw similarities based on the assumption that all these mechanisms' bottom line is human rights-related and by exploring how some of the experimentalist governance traits contribute to the pursue of human rights goals.

De Búrca's account of the EU anti-discrimination constitutes the appropriate starting point to frame moratoriums in IHRL under the NG approach. The reason for this is that it begins by questioning the ability of NG to pursue human rights goals. NG mechanisms are many times expressions of "soft law[119]" which may be adopted by organs or

[119] "A further characteristic often present in NG processes is the voluntary or non-binding nature of the norms." This feature is sometimes described in terms of "soft law," but the

institutions that are usually not competent to do so. Its provisions are often vague or "open-ended" in the specification of their goals and tend to rely on a sort of "heterarchical" approach to rule-making. IHRL, being a rights-claims system focused on accountability, makes NG less appealing. Indeed, the human rights model might be "suspicious of voluntarism, self-regulation" and demand a certain degree of "definition and clarity in the content of the commitment in question[120]." From this perspective, one would anticipate that the application of a NG approach to IHRL would hardly have any potential to actually contribute to the protection and promotion of human rights.

De Búrca's answer, through her analysis of the EU anti-discrimination legislation and the CRPD, is that IHRL and NG are not incompatible approaches to rule-making in the field of human rights. For the author, these mechanisms are still an expression of experimentalist governance, gathering characteristics both from the IHRL and the NG models through a process of *hybridisation*[121]. I will not reach exactly this same conclusion – as it will be developed below.

I will now compare some of the experimentalist governance characteristics of the EU anti-discrimination framework and CRPD with the elements of moratoriums in the field of human rights, identifying their similarities and disparities, so as to corroborate that both are NG mechanisms.

2.1.1. Ability to Handle Diversity/Strategic Uncertainty and Dispersed Authority

IHRL is a domain where irreducible diversity/strategic uncertainty or dispersed authority does not come as a shock. It is therefore not easy to go along with De Búrca's assumption that the IHRL and the NG models are by nature incompatible[122]. In reality, the death penalty or non-discrimination on the basis of sexual orientation are just two of the most flagrant examples of what Donnely refers to as the "relative universality" of human rights or a rawlsian "overlapping consensus[123]."

ambiguity of the notion is not accurate to fully capture the NG framework, see De Búrca & Scott, 2006, p. 3.

[120] De Búrca, 2006, p. 98.

[121] Ibidem, p. 99.

[122] Ibidem, p. 98.

[123] Donnely, 2007, p. 281; "the point of the idea of an overlapping consensus on a political

Human rights are universal because they are inherent to all human beings, but they are not universally enforced. Some of the IHRL structural shortcomings are shared by international law in general, and do not require extended consideration at this point. I would simply highlight that they usually focus either on the deficiency of its sanction mechanisms or the quality of its norms[124]. The lack of universal ratification of international treaties combined with the existence of different human rights regional systems and the multiplicity of national legal regimes, all with different, yet overlapping, interpretations of what human rights obligations might entail, is at the core of its lack of accountability and enforcement. What NG offers is the ability to handle irreducible diversity and dispersed authority in a constructive manner.

In the case of the EU anti-discrimination framework, the ability to handle diversity and dispersed authority arises from the fact that the EU is itself an intergovernmental body that coexists, operates and legislates within the diversity of its members – it cannot resist diversity, it embraces it. The ultimate goal of the anti-discrimination framework has been, and still is, to broaden the scope of non-discrimination[125]. The *modus operandi* has nevertheless been characterised by a capacity-building approach by the Commission. This approach has rested more on the promotion of values and awareness-raising – exactly as moratoriums propose the abandonment of certain preconceptions. Additionally, this framework has been set up to include all relevant stakeholders, thereby attributing a particularly prominent role to non-governmental organisations. Still today, De Búrca considers that it is too soon to draw conclusions on the regime. Notwithstanding, she stresses that the anti-discrimination framework founded on Article 13 of the Amsterdam Treaty and its "mainstreaming" motto has gone a long way from its inception and the Commission has still not relinquished,

conception is to show how, despite a diversity of doctrines, convergence on a political conception of justice may be achieved and social unity sustained in long-run equilibrium," Rawls, 1987, p. 5.

[124] Weil, 1983, p. 414.

[125] In the words of De Búrca, its aim is to broaden "the central norm – which is already a deliberately broad and open-ended norm of non-discrimination – to include a wider conception of indirect discrimination and a range of second generation equality issues such as harassment and victimisation," see De Búrca, 2010.

having declared that it will put forward new proposals on age, disability, religion and sexual orientation[126].

The same sort of considerations can be made about some of the innovative characteristics of the CRPD, which foster a "holistic conception of rights," through a more participative mode of treaty-drafting and negotiating, softening some of the traditional divisions such as public/private, state/individual, immediate/progressive[127].

From this perspective, "the fractured, disaggregated nature of much of IHRL is itself what requires reinvention if the rights of persons with disabilities are to be fully respected[128]." The CRPD's contribution – such as the moratoriums' – is attached to a certain degree of ignoring, transcending or reinventing IHRL.

As far as the death penalty and non-discrimination on the basis of sexual orientation are concerned, the irreducible diversity and dispersed authority dimensions are more complex in nature than in the cases of the CRPD and the EU framework on non-discrimination for two previously mentioned reasons. On the one hand, there is no universal cannon in relation to abolition or non-discrimination on the basis of sexual orientation. On the other hand, the source of the power to adopt moratoriums is often hard to determine (*competence "creep"*). In this context, I would recall that moratoriums arise from a persistent lack of consensus at the international level, as it has been developed in detail in the previous chapter. Various regional human rights systems have adopted different instruments repealing the use of the death penalty. However, even within the membership of these systems the positive obligations of the member states are not uniform. The Russian Federation's case is paradigmatic: it is a member of the Council of Europe but it has not yet ratified Protocol 6. As to the *de facto* moratorium on the criminalisation of male homosexual acts, from the wider perspective of equality and non-discrimination there is no universal cannon either. There is no common understanding on non-discrimination as provisioned by Article 1 of UDHR, Article 2 of the ICESCR and Article 26 of ICCPR. There is a broader consensus on barring the criminalisation of homosexual acts and the prosecution of individuals

[126] Ibidem.
[127] Mégrét, 2008, pp. 261-277, cited by De Búrca, 2010.
[128] Mégrét, 2008, p. 264.

based on their sexual orientation[129]. A moratorium therefore offers a compromise solution that is acceptable to all parties[130].

In addition, neither the President of the Russian Federation nor the Prime Minister of Singapore had the power to take such a unilateral decision[131]. There is hence a problem of legitimacy. This type of "intervention" is what came to be known in the scope of the EU as *competence "creep"*[132]. In the case of the moratoriums in the field of IHRL, the decision-maker does not hold the relevant competence either. There is a constitutionally prescribed procedure to be followed to change or to revoke the law which has not been respected[133]. Parliamentary bodies were either not heard altogether or were heard and rejected the proposed alteration. Administrative authorities would not be expected to comply with such an *ad hoc* suspension of the law. Courts are not legally required to comply with a government decrees – in the best case scenario, the Russian Federation – or a mere political statements – in the worst case scenario, as in Singapore – that enact moratoriums. Surprisingly, nonetheless, both administrative authorities and courts tend to do so. Moratoriums seem to provide a rather unifying dimension to this dispersed authority dimension – which would make the outcome unpredictable according to traditional theories of separation of powers – by tackling legal uncertainty with strategic uncertainty.

[129] "The criminalisation of sexual orientation has been repeatedly held to be incompatible with international human rights law and a violation of the right to privacy and equal treatment but, due to the strength of political opposition, IHRL institutions have had to proceed cautiously," Cowell & Millon, 2012, pp. 341-352.

[130] "In similar terms, and on the IATTC program as a 'compromise' vis-à-vis a 'more complicated set of goals'", Sabel & Simon, 2012, p. 1297.

[131] A moratorium on the death penalty was enacted in Taiwan and then abandoned. "Political leadership" is what Wang Ching-Feng, Minister of Justice of Taiwan between May 2008 and March 2010, said to be decisive, giving the "example of French President Mitterrand who in 1981 abolished the death penalty despite 60% of the public opposed to such a move," see Liao, 2010, p. 7.

[132] It is what Scott and Trubek refer to when the NG mechanisms in the scope of the EU are adopted in areas where authority for EU initiatives is either limited or completely inexistent: "some of the new approaches may have been adopted to deal with areas where legal authority for EU level action is limited or non-existent. This may well be true of some of the areas to be covered by future OMCs. While the EES has a treaty base, there is no explicit treaty base for such areas as social exclusion and pensions. In such cases, NG may or may not be the best available approach to policy-making, but it may be the only way the Union can play a role in a particular domain," see Scott & Trubek, 2002, p. 7, cited by Craig & De Búrca, 2011 (a), p. 175. When this is the case, the application of "general principles of law may lead to an extension of EU competences," see Prechal, 2010, p. 5.

[133] See Chapter 1.

Moratoriums enable a consensus by "sitting on the fence": the law has not been revoked; yet it is dead. NG offers a middle-ground solution to this irreducible diversity, allowing for the coexistence of two realities[134]. A moratorium does not compete with IHRL instruments or oppose their establishment: it enables a continuum between two legal approaches to the same issue. The teleological reasoning behind the decision to adopt a moratorium is therefore a simple, yet sophisticated, *problem-solving approach*.

2.1.2. The Problem-Solving Approach and the Setting of a Broad Goal as a Way of Reaching an Initial Consensus

Experimentalist governance, especially in the field of IHRL, moves forward where traditional regulatory mechanisms have led to a dead-end: it does not entail a definite decision but rather that there is a practical, pragmatic, result-oriented approach to a certain issue[135]. Setting a broad goal as a way of reaching an initial consensus often fuels this pragmatic approach. In the case of the EU anti-discrimination framework, the purpose in 2000 was to give the "first steps towards a new kind of European social law[136]." The EU competences have many times been enlarged by this comprehensive approach to a certain subject or, from the strictly legal point of view, by the application of general principles of law[137]. States are more willing to agree with broader notions if the general principles of law are the claimed sources of law.

In what the CRPD is concerned, its provisions correspond to an "articulation of rights in broad and general terms," leaving up to the states a wide margin of discretion as to the implementation[138]. It sets broad goals

[134] "The Soviet Union and Russia have a long tradition of frequent executions. Yet, for over 100 years there has existed a slender reed of Russian abolitionist thought. As in other settings, symbolic, unenforced law in Russia serves the age-old goal of attempting to bridge the gap between incompatible parties. Frequent executions would incite an adamant official response from the EC and make membership impossible while outright abolition would antagonise Russian citizens," see Semukhina & Galliher, 2009, p. 145.

[135] "NG modes are by no means restricted to uncontroversial cases in which there is a high level of consensus. On the contrary, they are almost always introduced after legislative deadlocks," Eberlein & Kerwer, 2004, p. 125.

[136] De Búrca, 2006, p. 99.

[137] Prechal, 2010, p. 5.

[138] De Búrca, 2009, pp. 4-5.

on which all parties would hardly disagree, such as "promoting and ensuring full equal enjoyment of all human rights and fundamental freedoms of all persons with disabilities," then complemented by general principles. But more importantly, CRPD provisions reveal that it was drafted by states in the spirit of solving very practical problems of people with disabilities. There are two telling examples that corroborate this assertion. The first is related to a particular controversy on whether to include a definition of the concept of "disability" or not. Instead of following what would be classified as a traditional IHRL approach and opting for a clear definition, the compromise reached was to follow an experimentalist approach and not include a definition at all. The second example is related to the above-mentioned diluted dichotomies: the distinction between positive and negative obligations is often very problematic in IHRL. Persons with disabilities are often targets of structural discriminations very hard to tackle either through positive or negative obligations. On this point, the CRPD is groundbreaking as it mixes the obligations, making them more effective and result-oriented. The state party becomes both part of the problem and of the solution[139].

As to the *de jure* moratorium on the use of the death penalty in the Russian Federation, its immediate result is freezing the provisions that enable the courts to sentence someone to death and prevent the execution if the person has already been convicted. It is the most practical problem-solving approach the political power can apply when all other possibilities are exhausted. The ones that oppose the death penalty regard it as a step towards abolition; the ones that believe that the Russian Federation ought to retain the death penalty are not threatened by the prospect of irreversibility; the Council of Europe's demands are met[140]. In the particular case of the Russian Federation, the immediate effects of the moratorium are widespread, addressing simultaneously national and international obligations[141].

Finally, in the case of the Singapore *de facto* moratorium on Section 377A of the Penal Code, the immediate consequence that arises from it

[139] Mégrét, 2008, p. 264.

[140] "The President remains a very popular institution even with this support for abolition. The Russian public can have it both ways; they support the death penalty but also support a President who does not," see Semukhina & Galliher, 2009, p. 146.

[141] The issue at stake here is larger than the immediate effects of moratoriums. In this regard, they go much beyond the "precautionary approach" inherent to moratoriums in the field of environmental law. This dimension will be explored in the next chapter.

is the freezing of the provision that would enable the state prosecution of individuals on the basis of homosexual male acts. The broader goal can be seen as a *media via* between keeping the law and revoking it[142].

And for this it is indifferent if one conceives the moratorium as a way to adapt to an increasingly complex world and at the same time abstain from irreversibly altering a "morally controversial issue," or as the first step to end violence against people based on sexual orientation. This pragmatic approach is admittedly based on a certain amount of ideological ambiguity, but it does produce results that enhance the protection of human rights.

2.1.3. Learning from Practice/Experimentation or from the Knowledge Generated

The *learning from practice* is very different in moratoriums from the one created by more complex experimentalist governance mechanisms (such as the ones that I have been comparing moratoriums to). In this particular feature, moratoriums could not be farther from the CRPD or the anti-discrimination framework. One of the main reasons for this contrast is that the EU anti-discrimination regime and CRPD are both contained in "hard law" instruments. The first comprises a set of directives and the second is an international treaty. Regardless of how vague, broad or holistic their approach to rights might be, there are clear-cut legal obligations enshrined therein. They are mechanisms with an unequivocal legal pedigree – their inception does not defy the rule of law or the traditional theories of separation of powers. In addition, their adoption predicts the establishment of various other measures directed at their implementation, monitoring and reviewing. In this context, it is possible to attribute different roles to different stakeholders, as it is possible to develop a true institutional learning experiment between the state and non-state actors, at the national and international levels. This dimension is completely absent in moratoriums[143]. The *learning from*

[142] Chen calls it an "interesting compromise." Those "who supported the retention of Section 377A cheered the government's decision as a victory and affirmation of the majority's morality and values [...]. Gay activists and supporters of repealing Section 377A did not walk away empty handed [...]. The government also acknowledged that there should be accommodation of the gay community in the society and the prospect of continued evolution in the future," see Chen, 2013, p. 107.

[143] "Participants that respond to uncertainty in this sense are more likely to see their efforts as

knowledge-generated element in the EU anti-discrimination framework and in the CRPD envisage data collection, research, statistics, and the involvement of all relevant stakeholders. This dimension is completely absent from moratoriums, too[144].

In this respect, moratoriums are much closer to the transnational corporations' codes of conduct that introduce "soft law" mechanisms connected with human rights in the legal order. They are voluntarily created in an effort to "build reputational capital[145]." The issue is, very much alike moratoriums, the extent of the expectations created by these new regulatory mechanisms and if corporations can be held accountable. The latter will be further analysed below, when the issue of revisibility – and NG and courts – is addressed, but the learning from practice/experimentation is exactly the same as in moratoriums. The only difference is that the proposed alternative comes from private actors and not from the state. Public opinion and legal actors, such as lawyers and courts, will then determine the fate of these "soft law" norms through experimentation. Experimentation explores the willingness of these actors to collaboratively incorporate these mechanisms and to exploring their full potential.

In the cases of both moratoriums under analysis, the *learning from practice/experimentation* or *from knowledge-generated* dimension is offered strictly through the trial period during which the public opinion and legal actors might be shaped by an alternative. In the case of the *de jure* moratorium on the use of the death penalty in the Russian Federation, the objective is not to change the public opinion, but rather to revert the Duma's position, which has always strongly opposed abolition. It is well known that if decisions were based on public opinion alone the death penalty would be reintroduced in most abolitionist countries and those statistics are not different in the Russian Federation[146]. Deterrence is one of the still prevailing arguments and in the case of the Russian Federation some scholars argue that given prison

joint exploration of possibilities and reinterpretation of premises and goals in the light of what is discovered than as the elaboration of established knowledge," see Sabel & Simon, 2012, p. 1267.

[144] De Búrca, 2009, p. 5.

[145] Heijden, 2011, p. 2.

[146] "Russian opinion polls show solid support for the death penalty. On the other hand it must be said that this public opinion is not totally unlike that found in Western Europe, which has no capital punishment laws," see Semukhina & Galliher, 2009, p. 145.

conditions – and that life imprisonment might amount to torture, cruel, inhuman or degrading treatment – death penalty is actually "a form of 'human rights' for prisoners[147]." This understanding highlights that moratoriums might, all matters considered, not amount to an immediate protection of individuals against IHRL violations. As far as Singapore is concerned, the matter involves various dynamics and even includes economics, according to some scholars. In 2003, the government lifted the restrictions to hiring homosexuals (of both sexes) to sensitive government positions "as part of a broader effort to shake the city-state's repressive reputation and foster the kind of lifestyles common to cities whose entrepreneurial dynamism Singapore would like to emulate[148]."

Before this measure was taken, civil servants could be dismissed on the grounds of the alleged "individual's [who is homosexual] susceptibility to blackmail," but in reality there was no formalised disciplinary procedure or provision that predicted the punishment or reprehension of homosexuals[149]. While the government has shown increasing openness to review its position, and the gay Singaporean community and civil society is described as "vibrant," society remains divided. The cultural and religious component of this impasse is much stronger than in the case of the death penalty. The conflict, a true "cultural war[150]," has liberty and equality in one side and the preservation of the existing social norms, traditional family values and Christian and Muslim views on homosexuality in the other side[151]. It is unclear to what extent the government has maintained the status quo or proposed to alter it when it declared the non-enforcement of Section 377A[152]. In this context, it is fair to conclude that moratoriums promote human rights only by suggesting a change of behaviour by the state without the threat of imposition, fostering compliance or self-regulation.

[147] Fawn, 2001, p. 79.

[148] 'Quietly, Singapore Lifts Its Ban on Hiring Gays', in *New York Times*, 5 July 2003.

[149] Members of Parliament who spoke on behalf of the government expressed the view "that homosexuality should no longer be criminalised, but Section 377A should be retained because Singapore is a conservative society. They took the position that the 'silent majority' of Singaporeans are against the repeal, notwithstanding the fact that having promised not to prosecute homosexual activities, the law is as good as dead," see Huat, 2008, p. 60.

[150] Low & Yong, 2009 and Yong & Hussain, 2009, both cited by Chen, 2013, pp. 106-137; Dworkin, 2006 cited by Lee, 2008, p. 392.

[151] Lee, 2008, p. 368; Chen, 2013, pp. 106-137.

[152] Chen, 2013, pp. 106-137.

2.1.4. Revisibility and Flexibility

NG's revisibility and flexibility can be seen, from the IHRL approach, as the evil sisters of accountability (even legitimacy in the case of moratoriums) and commitment. The assumption that the shortcomings of IHRL diminish the *prima facie* contrast between these two approaches is key to disperse any doubts on the adequateness of NG mechanisms as the appropriate theoretical framework under which moratoriums operate in the international order. However, it is still necessary to exemplify how the legal order has reacted to them. Peer-review and judicial review are still significant components of the experimentalist governance model. It is undeniable that moratoriums pose challenges to the rule of law in general and to democratic institutions in particular, defying the traditional theories of separation of powers. The role that peer-review and judicial review play in the case of moratoriums is of such importance, both in addressing its shortcomings and in the determination of its fate, that it deserves particular attention[153].

In the second part of the present chapter, the relationship between old governance (IHRL) and NG will be clarified. In what way do moratoriums operate outside the legal order or actually integrate it? I will argue that NG instruments, such as moratoriums, do not erode or delegalise IHRL. The two realities are rather mutually constitutive, operating a transformation in the applicable legal regime, but not necessarily of the legal order itself. This mutually constitutive interaction between IHRL and experimentalist governance will be further exemplified through the analysis of the adoption of UNGA Resolution 62/149, which called upon states that still retained the death penalty to establish a moratorium on executions with a view to abolition.

2.2. MORATORIUMS AND IHRL: THE *TRANSFORMATION THESIS*

Armstrong presents the relation between "old" governance and "new" governance as often being a choice between delegalisation and transformation. I consider this binary opposition as a constructive point

[153] See Chapter 3.

of departure in determining the nature of the relation between IHRL instruments and moratoriums[154]. Rejecting Chinkin's concerns for "blurring normativity," Klabbers' warnings against "subjectivity," and Joerges' account of NG as a "farewell to law[155]," I will argue that the "partial delegalisation" operated by moratoriums, even if it might entail negative consequences, should be looked upon as "secondary effects of changes that in themselves are beneficial[156]."

As it has been mentioned, moratoriums established at the international level in the field of human rights, either by a group of states or by an international organisation, do not aim at resuming the activity or at re-enacting the law in force – even if the temporary nature of moratoriums would still afford that possibility[157]. The modification of the status quo is the ultimate aim of moratoriums. Even if moratoriums do not offer the clarity and determinability that a positive obligation emerging from "hard law" would, the expectations generated from the adoption of a moratorium are clear and determinable. The word "expectation" here is not used, however, strictly as a legal position to which private parties are individually entitled. It also encompasses the expectations generated in the society as a whole. Moratoriums are what Weil describes as "pre-normative acts" that "create expectations and exert on the conduct of states an influence that in certain cases may be greater than that of rules of treaty[158]." Even if they propose a short-term alternative solution to a problem or challenge, they aim at the long-term modification of the status quo, thereby operating as a *transformative mechanism*.

Moratoriums do not compete with the "hard law" and do not aim at indefinitely replacing it, but aim instead at transforming the law so that one day it contemplates the regime proposed by the moratoriums[159]. In addition, moratoriums are only able to function and operate within the legal order through its application by the courts. If democratic institutions do not recognise moratoriums, the latter not only fall outside

[154] "The major question concerns how new modes of governance can be reconciled with the need for binding rules," Eberlein & Kerwer, 2004, p. 136.
[155] Armstrong, 2011, p. 31.
[156] Weil, 1983, p. 423.
[157] Lieberman, Gray & Groom, 2011, p. 1.
[158] Weil, 1983, p. 423.
[159] In Singapore, "the Government's retention of the law is no more than a symbolic gesture in concession to the conservative majority; officials promised that they will change their stance as public opinion shifts," see Huat, 2008, p. 60.

the political system, they cease to exist[160]. This peculiarity of the moratoriums established in the field of IHRL fits perfectly with scholars' suggestion that law and governance may be *mutually constitutive*[161].

The glass-half-full interpretation of mutually reinforcing systems of governance corresponds to the *transformation thesis* as developed by Simon. The two other theories that conceive the relationship between law and NG are the *gap thesis* and the *hybrid thesis*. Without going too much into detail, the hypothesis of basing the relationship between NG mechanisms, such as moratoriums, and the law on the *gap thesis* can be easily discarded. The gap thesis' premise is that there is a certain "blindness" from formal law towards the existence of NG[162]. The reason why this thesis does not proceed is straightforward: moratoriums in the field of IHRL might or might not materialise as "soft" or "hard law," *de jure* or *de facto*, but in both cases there are immediate legal consequences arising from their application. In what regards the hybrid thesis, it is harder to make such an upfront rejection[163]. Nevertheless, there is one characteristic of both theses, gap and hybrid, that is incompatible with the nature and aim of moratoriums: both rest upon an "unduly formalistic and positivist account of the law." Moratoriums in the field of IHRL, as less rigid, less prescriptive, and less able to produce uniform outcomes could be only perceived as a threat to the legal order[164]. In other words, to admit that this was the case would be to allow a certain measure of rivalry between IHRL and moratoriums in the field of human rights[165].

[160] Transformative mechanisms are "configurations in which NG and traditional law are not only complementary, they are also integrated into a single system in which the functioning of each element is necessary for the successful operation of the other," see Trubek & Trubek, 2007, p. 543.

[161] De Búrca & Scott, 2006, p. 9 cited by Armstrong, 2011, p. 33.

[162] "According to this thesis, formal law, including constitutional law, is largely blind to NG. [...] At least two distinct if related strands can be identified. The first argues that law resists the NG phenomenon, and the second argues that law is confronted with a reduction in its capacity," De Búrca & Scott, 2006, pp. 4-5.

[163] "The *hybridity thesis* approaches the relationship between law and NG in a more optimistic and constructive manner. It acknowledges the co-existence and engagement of law and NG, and explores different ways of securing their fruitful interaction. Law and NG are posited as mutually interdependent and mutually sustaining," ibidem, p. 6.

[164] Ibidem, p. 9.

[165] Trubek and Trubek consider that "when the newer forms of governance are designed to perform the same tasks as legal regulation and are thought to do it better, or otherwise there seems to be a necessary choice between systems, we speak of *rivalry* between the co-existing systems," Trubek & Trubek, 2007, p. 5.

The *transformation thesis* does not focus on how "old" governance (in this case IHRL) and NG's relationship might be marked by either "blindness" or "antagonism." Its cornerstone is instead the "mutually constitutive nature of these phenomena[166]." Although De Búrca has affirmed that the complementarity between the IHRL model and the experimentalist model would build a "hybrid," Sabel and Simon have stated that "as a practical matter, to agree that old and NG form a hybrid at all is to agree that profound changes of a certain general kind are underway[167]." The above-mentioned continuum between two realities on the same issue operated by the enactment of a moratorium – i.e., a perfectly valid yet "dead" law – confirms that "law, as a social phenomenon, is necessarily shaped and informed by the practices and characteristics of NG, and NG both generates and operates within the context of a normative order of law[168]."

Moratoriums offer a political bridge between non-compliance and ratification of international treaties at the same time that they transform the legal order[169]. At the international level, states benefit from the same advantages provided by the ratification of IHRL conventions: they enjoy the sense of cooperating with the states that ratified these instruments, they avoid criticism, to some extent may even gain recognition for the steps taken. At the national level, they collect support from the public opinion at the same time as they attempt to shape those constituents who are not yet convinced[170].

Above all, with moratoriums states have an increased sense of ownership over the transformation. Indeed, they do not see it so much as an imposition. Even if transformation is operated by external influence, moratoriums are an expression of self-regulation. The mutually consti-

[166] "The *transformation thesis* argues that NG has demanded, and will increasingly demand, a re-conceptualisation of our understanding of law and of the role of lawyers. [...] The discussion ought to focus less upon the relationship between two ostensibly independent, but interacting realities (or mutually blind and antagonistic) than on the mutually constitutive nature of these phenomena," see De Búrca & Scott, 2006, p. 9.

[167] "Hybridisation in progress is transformative," see Sabel & Simon, 2006, p. 404.

[168] De Búrca & Scott, 2006, p. 9.

[169] "There are arguably two weaker or stronger versions of [the *transformation*] *thesis*. At a minimum, the thesis suggests that the functional demands of governance must confront the legitimacy and accountability demands of law. [...] A much stronger version suggests that the basic premises and normative presuppositions of law, legal form and legal function need to be re-thought," Armstrong, 2011, p. 33.

[170] "The activities of international institutions have [...] [started] producing more and more soft law and entirely non-legal instruments," Goldmann, 2012, p. 339.

tutive potential of moratoriums as a self-regulating mechanism takes a whole new dimension when they are formally recognised by the international legal order. When the international legal order calls on states to adopt a moratorium – through a non-binding instrument – but it does not urge them to do so, states take their time, again heightening the sense of ownership over the decision. This is the reason why I believe that the adoption of the UN General Assembly Resolution 62/149 that called for the adoption on a moratorium on executions deserves special attention.

2.3. MORATORIUMS AND IHRL: MUTUALLY CONSTITUTIVE

The landmark resolution that called upon "all states that still maintain the death penalty to establish a moratorium on executions with a view to abolishing the death penalty" was adopted in December 2007 by the UN General Assembly[171]. The cross-regional initiative that led to the adoption of the resolution was initially co-authored by 10 states from all regional groups: Albania, Angola, Brazil, Chile, Croatia, East Timor, Gabon, Mexico, Philippines and Portugal (on behalf of the EU). At the time of its adoption, it was co-sponsored by 87 member states. The negotiations of this resolution were lengthy, complex and far from uneventful. The adoption of the resolution, as a recommendation, in the Third Committee lasted two days and was haunted by the perspective of the adoption of a "killer amendment" that would invoke Article 2(7) of the UN Charter. As previously mentioned, retentionist states argue that the death penalty is a matter strictly connected with the organisation of each country's criminal justice system, while abolitionists aim at bringing the issue into the human rights law agenda.

Calling for the establishment of a moratorium was not the first choice of proposed "language" – abolition was the actual goal[172]. It is

[171] Adopted by 104 votes in favour, 54 against and 29 abstentions – UN General Assembly Resolution A/RES/62/149.

[172] Negotiations at the multilateral level are all about "UN agreed language." Around the table, matters are not discussed in terms of having been internationally agreed by the ratification of international treaties, but rather if the "language" has been agreed on. There is a universe of agreements and disagreements at the multilateral level that reflects international legally binding agreements, but there is a lot in-between that is referred to as "language" too, and that does not reflect the law but rather aims at one day becoming the law.

interesting, for the purpose of measuring the mutually constitutive effect between moratoriums and IHRL, to consider how the idea of calling for a moratorium came into place. First, the obvious answer is that although in the end 87 member states co-sponsored the resolution, it would have been hard to gather such broad support and adopt the resolution without "watering down" the language – this was clear from the early stages of negotiations. Two homologous proposals had been put forward in 1994 and 1999, neither of them having been successful, and this time the supporters of the initiative did not want to lose momentum. Second, at the national level member states had a long history of adopting *de facto* or *de jure* moratoriums on the death penalty. Over 30 countries are considered, and were before the adoption of the resolution, "abolitionists in practice." The Russian Federation is just one of a long list of countries, such as Algeria, Morocco or South Korea, that had adopted a moratorium before the adoption of Resolution 62/149[173].

In Kissack's words, "the resolution passed thanks to a fortuitous constellation" of actors, efforts and interests. In my opinion, it is this multiplicity of stakeholders involved and of interests that translates exactly what experimentalist governance is all about[174]. In addition, I would argue that this constellation was not "fortuitous" but fostered towards a mutually constitutive outcome[175]. It was the sense of ownership of the text by all co-authors that enabled the gathering of support to approve the resolution. This meant not only giving up abolition as the main focus of the resolution, but also abandoning any mention of the Second Optional Protocol in the text of the resolution. The EU had to give up the spotlight, and take a step back in order for the initiative to succeed. The active involvement of all the co-authors in the lobbying and negotiation processes is what actually enabled the initiative to succeed. Kissack acknowledges that "for better or worse, a constellation is required to get results in the UN" and this seems to be a good starting point: to accept that progress on rights-claims at the international level demands experimentalist, or at least non-traditional ap-

[173] The list of countries considered to be abolitionist in practice is available at http://www.amnesty.org/en/death-penalty/countries-abolitionist-in-practice (consulted on 8 June 2012).
[174] Kissack, 2008, p. 5.
[175] Ibidem.

proaches that allow for compromise but without deflecting from the broader goal.

More specifically on the mutually constitutive nature of this initiative, calling for other states that had not done so to adopt a moratorium expresses the acknowledgement of moratoriums by the international community, thereby attributing them a legitimacy they did not have before. It both retroactively leads to the recognition that it produces results and elevates the status quo of the mechanisms. In most cases, moratoriums do not fit in any particular framework except as a "soft law" instrument – especially when it is not clear where the power to adopt them comes from or when it defies the traditional theories of separation of powers. By embracing it with a UN General Assembly resolution, the international community validates the adoption of moratoriums at the national level, attributing them a positive connotation[176]. This was not the first time a resolution, by calling for the adoption of a moratorium, stirred the "soft law" v. "hard law" traditional dichotomy, as well as the transformation of such practice into custom. Schwebel, in his account of the effect of resolutions of the UNGA on customary law noted, as early as 1979, that in the General Assembly resolution calling for a moratorium on deep sea mining, the Soviet Union considered that the resolution established "if not a legal, then a moral and political norm[177]." Other examples include the moratorium on large-scale seas driftnet fishing established by the UN General Assembly in 1991 – in this case not a "call for the adoption" but actually establishing one – which has been considered by scholars to be legally binding[178].

Concomitantly, the adoption of a resolution calling for the adoption of a moratorium not only encourages, but also legitimises that state practice – the adoption of a moratorium – for the future. In the international fora, since 2007, two other resolutions have been adopted under the agenda item "promotion and protection of human rights[179]."

[176] "Soft law has become a ubiquitous governance instrument that plays in many cases the role of a functional equivalent to binding international law. The functional equivalence of soft law might also justify putting it on a par with binding international law in order to better reflect in the conceptual framework the reality of contemporary international governance," see Goldmann, 2012, p. 337.

[177] Schwebel, 1979, p. 307.

[178] Hewison, 1994, pp. 557-579.

[179] UN General Assembly Resolutions A/RES/63/168 and A/RES/65/206.

Although votes in favour of the resolution are not increasing, votes against are dropping and the number of abstentions is rising[180]. The last Secretary-General report concluded that there is an unequivocal growing trend, that there is a "shift" in the international community towards abolition and that retentionist states are now a minority. More than two thirds of the 193 member states have either abolished the death penalty or are abolitionists in practice[181].

This is not to suggest that the call for a moratorium changes the nature of UN resolutions, but it does enhance its transformative function in the legal order, underlining its "embryonic norm" nature[182]. It is not a matter of normative force, but it is instead, as Weil put it, a matter of "degree[183]." Moreover, the adoption of the resolution itself contributes to the broader goal, not only of abolition, but of "establishing it as a human rights issue and one in which the UN can have a more active role in norm-setting and monitoring[184]." Ultimately, the mutually constitutive relationship between moratoriums and IHRL instruments allows for the ever enlarging of the human rights agenda, contributing to the setting of a universal human rights standard on abolition[185].

2.4. CONCLUSIONS

In conclusion, NG can definitely be applied to IHRL. Moratoriums are only one of the experimentalist forms of governance that proves so. Therefore, moratoriums are an expression of NG experimentalist decision-making processes as they: emerge from circumstances of irreducible diversity and dispersed authority; combine learning from

[180] UN General Assembly Resolution A/RES/65/206, the third since 2007, was adopted by 103 votes in favour, 41 against, with 35 abstentions.

[181] "Some member states that opposed the abolition of the death penalty in the recent past have moved to abolish it. Some member states have taken steps towards the abolition of the death penalty or imposed a moratorium. [...] Currently, more than two thirds of the states members of the UN have either abolished the death penalty or do not practice it. Among these, a total of 72 States have ratified the Optional Protocol," see Report of the Secretary-General on Moratoriums on the Use of the Death Penalty, A/65/280.

[182] Weil considers that "even if resolutions do not attain full normative stature, they nevertheless constitute 'embryonic norms' of nascent legal force or quasi-legal rules," Weil, 1983, p. 416.

[183] Weil, 1983, p. 416.

[184] Kissack, 2007, p. 5.

[185] Ibidem.

practice with revisibility and flexibility; are problem-solving-oriented; and set broad goals as a way of reaching initial consensus amongst all parties.

A moratorium's broader goal is to alter the status quo towards the increased protection of human rights. Moratoriums do not fill a gap in IHRL and there is no rivalry between the positive obligations of IHRL treaties and moratoriums. A moratorium is an expression of how "old" and "new" governance might be mutually reinforcing towards one common goal. Moratoriums carry the potential to change the law. Moratoriums are transformative insofar as they eventually increase the protection of human rights by enlarging the scope of the human rights agenda and ultimately the scope of universal human rights standards. This seems to suggest that moratoriums, in what the theoretical framework is concerned, allow for the "stronger version" of the transformation thesis according to which NG has an impact on the normative preconceptions of law[186].

However, how the legal order reacts to such mechanisms and tackles their challenges and shortcomings is a most crucial matter to establish whether NG mechanisms are able to survive the "legitimacy and accountability" demands of old governance[187]. A question that might compromise their immediate contribution to policy shaping towards the promotion and the protection of human rights – and that corresponds to a milder version of the transformation thesis. In the next chapter, I will explore whether this transformation in the field of IHRL is applicable in practice, both at the political level – through the shaping of public policies by peer-review – and in the legal order – through judicial review.

[186] De Búrca & Scott, 2006, p. 9.
[187] Ibidem, p. 10.

3.

COURTS AND NEW GOVERNANCE IN INTERNATIONAL HUMAN RIGHTS LAW

As established in the previous chapter, moratoriums in the field of human rights can be classified as an expression of NG experimentalism. This conceptual framework applicable to moratoriums and their relationship with the law contains great potential for the shaping of public policies towards the promotion and protection of human rights. However, it is not entirely certain that such potential actually gets materialised.

The starting point of this chapter is that the two moratoriums used as case-studies offer paradigmatic examples of how global trends evolve on the human rights agenda, representing two very different stages of the shaping of public policy. Indeed, while one is non-binding and remains the result of a mere political decision, the other, supported by a series of judicial decisions, has already achieved a binding status.

Moratoriums' problem-solving elements are often accompanied by the shortcomings and challenges that are also characteristic of NG. As previously stated, there are a number of characteristics that defy the notions of rule of law and democracy, namely that they contravene traditional theories of separation of powers. Accountability, transparency and enforceability are the values and principles which are at stake. From this perspective, these two moratoriums also offer a good standpoint for a comparative analysis. Their fate at the national level depends on whether President Yeltsin's 1996 decree or Senior Minister of State and Prime Minister Lee's 2007 statements are justiciable[188].

[188] President Boris Yeltsin's Decree no. 724 of 16 May 1996; Second Reading Speech of The Penal Code (Amendment) Bill, by Senior Minister of State A/P Ho Peng Kee on 22 October 2007; Loong, 2007.

Whether these NG mechanisms contribute to the advancement of the human rights agenda, at the national and international level, is tied to the transformation of the legal order itself.

What I propose in this chapter is that NG is part of the solution and not part of the problem; that what a traditional rule-of-law perspective views as its handicaps are in fact its greatest advantages[189]. Traditional legal actors – such as courts, private stakeholders, NGOs and lawyers – can play, and have already played in some cases, a collaborative part[190]. From the values that emanate from NG – i.e., the ability to handle diversity, facilitating experimentation, promoting learning – it is its *revisibility* that carries the prospect of intercepting the challenges and exploiting moratoriums to their full capacity.

The moratoriums' high flexibility and *revisibility* can assume a "catalyst" role. In the case-studies under analysis, courts and peer review have assumed two roles: first of mediators, second of stimulus to change the legal order[191]. In order to illustrate this, in the first part of this chapter I will give a general overview of the part played by the Council of Europe, the UN General Assembly and the Universal Periodic Review (hereinafter "UPR"). In addition, I will explore the decisions of the Russian Federation's Constitutional Court and of Singapore's Courts. This approach will problematise the transformative effect that moratoriums may have not only in the specific provisions they suspend, thereby changing the applicable legal regime, but also in the legal order itself, namely as far as the dichotomy "soft law" v. "hard law" is concerned. I will argue that moratoriums have become an integral part of "old" governance, transforming it through the action of courts and peer review.

3.1. PEER REVIEW

The political background at the national and international levels

[189] "It is correct, then, that NG repudiates the rule-of-law in its principal-agent variation, mostly fundamentally by disrespecting the distinction between enforcement and enactment. On the other hand, it suggests an alternative discipline that could be seen as a reinterpretation of the basic rule-of-law ideal of accountability," Sabel & Simon, 2006, p. 400.

[190] Teubner, 2004, pp. 3-28; Trubek & Trubek, 2007, p. 564.

[191] I consider "peers" to be other states, civil society, in the scope of national consultation or of intergovernmental organisations such as the Council of Europe, the EU, and the UN.

necessarily contextualises the catalyst role of courts in human rights[192]. Courts are not the only institutions struggling with issues of accountability as far as NG processes are concerned. Many of these NG expressions, including moratoriums, are in practice closely interconnected with what came to be known as "deliberative supra-nationalism[193]." Deliberative supra-nationalism is an important component of the *revisibility* of moratoriums as states gather to discuss contentious issues or to assess the progress achieved so far[194].

In the case of moratoriums established in the field of IHRL, the "other institutions" and processes that face similar issues to those confronted by courts are the ones established at the international level, such as the UN General Assembly, where states can present draft proposals of resolutions and discuss Secretary-General reports, or the UPR[195]. It is not unheard of that soft law instruments have, on occasion, imposed on states the sense of obligation to comply with human rights standards[196]. The Millennium Development Goals, despite all their

[192] Young, 2010, p. 420.

[193] "The transformation of accountability lies in opening up closed worlds of decision-making to the external gaze of other actors seeking to 'learn from difference.' In this way, it is not competition as a mode of governance through which one secures accountability, but rather processes of public coordination, mutual learning, and peer review," Cohen & Sabel, 1997, p. 313, cited by Armstrong, 2011, p. 7. On the guarantees "deliberative supra-nationalism" must provide, see Zürn, 2005, p. 37. These include "that the deliberations surrounding the enactment of a particular regulation the grounds brought forward for and against it are acceptable to all parties involved; that it requires arguing about the relevant problems, and that the general public is given the chance to articulate its opinions on matters." On the EU's deliberative supra-nationalism, see Joerges & Neyer, 1997, pp. 273-299.

[194] At the domestic level, moratoriums can also play a role in nudging other actors – the decision of the New Hampshire legislature of May 2000 to repeal the death penalty has been interpreted as being part of a "new abolitionist" movement which was partly initiated by an American Bar Association resolution calling for a moratorium on state killing, passed in February 1997 – Sarat, 2002, pp. 356-369.

[195] On the UN as an "alliance of well-ordered peoples on certain issues," see Rawls, 1999, pp. 16-45. On how the "good offices" of the Secretary-General include "investigation and reporting," see Chesterman, Franck & Malone, 2008, p. 151. On how the UN plays a role by filling in the gaps in global governance, namely on "discussing knowledge gaps," on codifying norms in the form of resolutions and declarations (soft law) and conventions and treaties (hard law), see Weiss & Thakur, 2010, p. 8.

[196] "Peer review is the answer of NG to the inadequacies of principal-agent accountability. Peer review imposes on implementing 'agents' the obligation to justify the exercise of discretion they have been granted by framework-making 'principals' in the light of pooled comparable experience. In peer review, the actors at all levels learn from and correct each other, thus undermining the hierarchical distinction between principals and agents and creating a form of dynamic accountability – accountability that anticipates the transformation of rules in use. Dynamic accountability becomes the means of controlling discretion when that control cannot be hardwired into the rules of hierarchy," Sabel & Simon, 2006, p. 400.

shortcomings, are a good example of a peer review procedure with this kind of influence over states[197]. The UPR has been a "catalyst" in the case of criminalisation of homosexual acts.

3.1.1. Death Penalty

The Council of Europe has not faltered in making Europe a death penalty-free zone for the last ten years. It might have failed in having the Russian Federation ratify Protocol 6 to the ECHR, but (formal and informal) threats of expulsion[198] made it impossible for them to re-consider an automatic return to the death penalty in 2007. The Duma's hesitation in letting the moratorium expire demonstrates a sense of obligation, one which if it was not concealed under the official interpretation of the law, could almost amount to customary law. The Court conferred a *de jure* character to the moratorium in 2009 and, despite not being explicit about it, seems to confirm this view.

On the other hand, at the multilateral level, the death penalty was an equally hot issue in 2007. As it has been previously mentioned, thanks to the approval of Moratorium 62/149, the death penalty, previously a mere human rights issue, is now discussed, debated and deliberated on every two years in the UN General Assembly under the respective agenda item. A Secretary-General report is issued in preparation of that session. States are since 2007 being scrutinised on their stance towards abolition: they are now asked if they have adopted a moratorium, if they have abolished the death penalty, if the number of executions has risen or decreased. None of these questions could be posed directly by the UN to member states before. The death penalty is now a matter for the international community formally to consider, debate and deliberate on – it is no longer arguable that it is a matter under Article 2(7) of the UN Charter. It has been unequivocally "removed" from the scope of 2(7) of the UN Charter.

[197] "Certain soft law instruments are enforced by mechanisms like peer review procedures. An example of this would be the Millennium Declaration of the UN General Assembly," i.e., UN Doc. A/RES/55/2, 18 September 2000, referenced by Goldmann, 2012, p. 347.

[198] After Russia executed 140 people in 1996, "the Parliamentary Assembly of the Council of Europe adopted a resolution [declaring that all member states should] adopt a moratorium on the death penalty [...] [and that] further executions could imperil the continued membership," Schabas, 1998, p. 828.

Peer review under a call for a moratorium has proven to be highly effective in engaging countries usually portrayed as the perpetrators in dialogue. Some of the states that could be part of the opposition to this call for a moratorium already had moratoriums in place for years and were put under the spotlight as the compilers. Whenever a questionnaire from the UN arrives, they will not have any reason to "hide it" in the drawer destined to those that are not to be answered. If a certain country has adopted a moratorium – because abolition was a too far-fetched goal – it can proudly report on that. What is more, they can for once lead by example: the Russian Federation has, for example, come forward and urged Belarus to adopt a moratorium on the use of the death penalty[199].

In what positive results are concerned, the international legally binding instruments have been complemented, in its effects, by the adoption of the UN General Assembly resolution. Due to the political stalemates mentioned above (see Chapter 2), "hard law" was not the first option for some states, but "soft law," in the form of a moratorium, was[200]. 14 additional states have ratified the Second Optional Protocol to the ICCPR since 2007[201] and states like Burundi, the Cook Islands, Gabon and Togo have not yet ratified the Protocol but have adopted a moratorium. The Secretary-General reports indicate that there has been a clear shift in the attitude of states towards the death penalty and that now only a minority thereof still applies it[202].

In conclusion, in the case of the moratorium on the use of death penalty in the Russian Federation it is possible to observe a strong mutually constitutive dimension between the national and international legal orders. The developments in the Council of Europe and in the UN, as far as the death penalty in the Russian Federation and other countries is concerned, demonstrate the added value of deliberative supra-nationalism and the development of step-by-step approaches.

[199] 'Russian Foreign Minister Sergei Lavrov has called on Belarus to join the rest of Europe and impose a moratorium on the death penalty', Press release available at http://www.unhcr.org/refworld/docid/4f717ae923.html (consulted on 1 June 2012).

[200] A total of 129 countries do not apply the death penalty, 34 states have abolished it in practice (and have a moratorium *de jure* or *de facto* in place), and 95 states have abolished it.

[201] As of 8 July 2012, a total of 75 states have ratified the Second Optional Protocol to the International Convenant on Civil and Political Rights, aiming at the abolition of the death penalty (information avaliable at the UN Treaty Collection database).

[202] UN Doc. A/65/280, 11 August 2010.

3.1.2. Decriminalisation of Homosexual Acts

The evolution of Singapore's discourse in the international fora on decriminalisation of homosexual acts is timid, but is still worthy of some attention. It is hard to assess how the rise of the principle of non-discrimination in international law and the increase of the initiatives on non-discrimination based on sexual orientation at the international level have influenced Singapore. Notwithstanding, the governmental statement, in reply to questions posed in the context of the UPR, that Section 377A of the Penal Code will not be enforced shows a willingness to engage that was previously absent from the Singaporean foreign policy[203].

In 1994, the Minister of Foreign Affairs of Singapore, Wong Kan Seng, in his statement at the World Conference on Human Rights in Vienna, affirmed that "Singaporeans and people in many parts of the world do not agree, for instance, that pornography is an acceptable manifestation of free expression or that a homosexual relation is just a matter of lifestyle[204]." Commenting on this statement later in 1997, Müllerson stressed that homosexuality was an issue on which, although closely related to human rights, "there were no universal human rights standards[205]." Today, as previously stated, the criminalisation of sexual orientation is considered to be incompatible with IHRL, a violation of the right to privacy and of non-discrimination[206].

The recommendations that result from the UPR process are not legally binding, but this is not necessarily a disadvantage when the issues at stake are controversial and culturally sensitive. Some authors have mentioned that the response to recommendations has in some cases triggered national consultation processes and legal reforms[207]. I argue that this has been the case of Singapore.

The legal reform of the Penal Code took place in 2007 and Singapore underwent its first UPR in May 2011[208]. The resemblance between

[203] Human Rights Council, Eleventh Session of the UPR, 2-13 May 2011.

[204] 'The Real World of Human Rights', statement by Foreign Minister Wong Kan Seng of Singapore at the World Conference on Human Rights, Vienna, 16 June 1993, cited by Müllerson, 1997, p. 79.

[205] Müllerson, 1997, p. 79.

[206] Cowell & Millon, 2012, pp. 341-352.

[207] Ibidem, p. 6.

[208] Again, it seems that a momentum has been created because, although in many juris-

the Singaporean government declarations, both domestically and internationally, is striking. At the national level, during the parliamentary debate over Section 377A, the Prime Minister stated: "We live and let live[209]." This position was initially presented in Parliament by Senior Minister of State Ho Peng Kee, who affirmed that "neither side was going to persuade or convince the other of their position. We should live and let live, and let the situation evolve, in tandem with the values of our society. This approach is a pragmatic one that maintains Singapore's social cohesion. The police has not been pro-actively enforcing the provision and will continue to take this stance[210]."

During the UPR, when answering questions by the United Kingdom and Canada, the Singaporean delegation emphasised that a debate had taken place and that the "matter was not taken lightly [...]. In the end, it was decided to leave things be," further adding that "the Singaporean police has not been proactively enforcing the provision and will continue to take this stance." They further clarified that "no action was being taken against consenting adult males who may have relations unless their conduct breaks other laws. The reality is that LGBT people did not have to hide their sexuality for fear of losing their job or for fear of prosecution by the state. They have a place in our society and are entitled to their private lives[211]."

Authors still consider that Singapore is in the group of states that offer "resistance," along with Togo and Gambia, having decided to maintain the status quo and not to engage[212]. I consider, nonetheless, that this is debatable and that the most recent position of Singapore in the international fora demonstrates limited, but still some, engagement in deliberative supra-nationalism. France's recommendation is constructive as it asks Singapore to "draw the consequences of the positive evolution of society" with respect to homosexuality[213]. The truth, however, is that until there is a judicial decision, it is impossible

dictions the issue has not been entirely clarified, it is increasingly being discussed at the national and international levels.

[209] Prime Minister Lee's Parliamentary Speech, Parliamentary Debates, vol. 83 at cols. 2469-2472 (23 October 2007), cited by Lee, 2008, p. 349.

[210] Second Reading Speech of The Penal Code (Amendment) Bill, by Senior Minister of State A/P Ho Peng Kee on 22 October 2007, cited by Chen, 2013, pp. 106-137.

[211] Human Rights Council, Eleventh Session of the UPR, 2-13 May 2011.

[212] Report of the Working Group on the UPR on Singapore, 11 July 2011, A/HRC/18/11, para. 82, cited by Cowell & Millon, 2012, pp. 341-352.

[213] Ibidem, para. 97.12.

to tell what the consequences of the moratorium are or even if there will be any.

In conclusion, in the case of the *de facto* moratorium on the criminalisation of homosexual acts in Singapore, it is not possible to observe a strong mutually constitutive dimension between the national and international legal orders. As to the "soft law" v. "hard law" conflict, the Singaporean delegation at the UPR stated that attitudes or society "could not be changed by legislation alone." In this case, it is hard to distinguish whether the transformation operated by the establishment of a moratorium aims at changing values and society or if it is intended at catching up with an already changed society.

3.2. COURTS AS "CATALYSTS"

Courts, mostly constitutional courts, have a "catalytic" role in the crystallisation of the transformation operated by moratoriums in the legal order[214]. This "courts as catalysts" doctrine was developed by Scott and Sturm and further expanded by Young. Envisaging courts only, or mainly, as legal norms' elaborators and enforcers, is, in the view of Scott and Sturm, both "descriptively and normatively incomplete[215]." The degrees of complexity and uncertainty of certain areas of the law such as the ones of the case-studies under analysis call for courts to assume a pivotal role in adjudication[216]. In IHRL, as in any field where rights are adjudicated, the legal terms are often vague and indeterminate, there is a certain amount of unpredictability that results from the law's relationship with experience[217]. Courts, as duty-holders themselves, are very frequently at arms with this uncertainty – such is the case of moratoriums in the field of IHRL[218].

[214] On courts as "catalysts," see Scott & Sturm, 2006-2007, p. 565. On the relationship between NG and constitutionalism, see De Búrca & Scott, 2006, pp. 10-12; on constitutionalism as a "responsible discourse of transformation," see Walker, 2006, pp. 15-35.

[215] Scott & Sturm, 2006-2007, p. 567.

[216] On the courts' "pivotal role," see ibidem, pp. 565-567; Young, 2010, pp. 385-420.

[217] Young, 2010, p. 386; Zorkin, 2010, p. 74.

[218] "Judges are not equipped in circumstances of uncertainty and deep value contestation to proclaim as Socratic oracles, nor should they seek to do so [...] what they are equipped to do is to listen to, and evaluate, diverse explanations as to why any given political process is, or is not, likely to satisfy core constitutional requirements, including that of democracy, and to

While in most rights-based constitutional systems courts are versed in dealing with the material aspect of this uncertainty (e.g. the balancing of rights in constitutional case-law[219]) as long as it stems from the traditional sources, NG "brings to law a highly pragmatic and flexible approach to- and modality of regulation, a method of ensuring maximum responsiveness and adaptability[220]." In the specific case of moratoriums in the field of IHRL, courts not only review the application of moratoriums but actually reflexively determine if they are, or not, part of the legal order, and if the rights contained therein are justiciable.

Within this NG theory of judicial adjudication, Young suggests that there are five types of judicial review: *deferential*, *conversational*, *experimentalist*, *managerial*, and *peremptory*[221]. A deferential court hesitates to overwrite or second-guess legislation or policies, always yielding to the democratically elected legislator. A conversational court opens the channels of communication with other constitutional bodies, relying on "interbranch dialogue" over constitutional provisions. An experimentalist court is ready to take part in a zealous review of the legislation or policy in question. A managerial court assumes its responsibility for interpreting the legislation, monitoring and "supervising its implementation" with "strict timelines and detailed plans." A peremptory court works in a "binary fashion," either striking down the legislation or upholding it, just like the traditional all-or-nothing model of judicial review[222]. I will argue that the Russian Federation Court has, in the case of the moratorium on the use of the death penalty, adopted an experimental judicial review. In respect to Singapore, the fact that the court has not yet pronounced itself on the merits of the issue determines that the question remains open.

The theory of the role of the judiciary within NG is not in its nature entirely new[223]. Indeed, courts have been playing a more dynamic role

ensure the existence of an adequate fit between normative explanation and political practice," Scott & Sturm, 2006-2007, p. 592.

[219] On balancing constitutional rights, see Aleinikoff, 1987, pp. 943-1005. On its worldwide diffusion, see Stone Sweet & Matthews, 2008, p. 74.

[220] Walker & De Búrca, 2006-2007, p. 17, cited by Perju, 2012, p. 19.

[221] "Many aspects of one type of review are shared by those of another, and the five are not exhaustive," Young, 2010, p. 387.

[222] Ibidem, pp. 392, 395, 407.

[223] "The judicial function ought to be, and in some important respects already is, able to work collaboratively with other actors in devising and promoting governance structures which

and scholars are increasingly approaching it from a normative point of view[224]. Several examples illustrate this. The application of the provisions of transnational corporations' codes of conduct with a human rights scope by domestic courts has opened the door for these soft law norms to hold corporations accountable[225]. The South African Constitutional Court has been credited with "catalysing" a transformation in the field of economic, social and cultural rights[226]. Also in the area of welfare rights adjudication, the Supreme Court of India has been using the writ of "continuing mandamus" in an innovative way[227]. In common law systems such as England or Canada, courts have overturned deportation decisions declaring them to be irreconcilable with IHRL, even when these norms were not binding at the national level[228]. And finally in the scope of the EU, courts have catalysed the EU treaty values in their decisions[229].

It needs to be mentioned that, obviously, the approach of the above-mentioned courts also depends on factors which have little to do with NG, such as: a) The scope of the legal norms the court is bound to: the Constitution, legal principles, whether it can resort to comparative law argument; b) How the constitution is construed: how rigid or flexible it is, whether it is universalist or particularist; c) The system of reception of international law: monist or dualist; d) The degree of activism of the court and judges themselves; e) Whether the court is conducting a concrete or abstract review: a court is probably more likely to be experimentalist when it is a matter of reviewing a concrete legislation to decide on an

are at once effective and legitimate problem-solving," Scott & Sturm, 2006-2007, p. 592.

[224] Among others, ibidem, pp. 565-594; Young, 2010, pp. 385-420; Dorf & Sabel, 1998, pp. 267-473; Armstrong, 2011, pp. 25-36; Eberlein & Kerwer, 2004, p. 133.

[225] On how IHRL is increasingly binding private actors, namely transnational corporations, and how this results from IHRL "expansion," see Peters, 2009, pp. 243-246. On the enforcement of international and soft law by business actors, see ibidem, pp. 251-255. On transnational governance, domestic courts, corporate conduct and human rights, see Heijden, 2011, pp. 1-2; Scott & Wai, 2004, pp. 287-319; Trubek & Trubeck, 2007, pp. 539-564.

[226] Young, 2010, p. 420.

[227] On judicial experimentalism, see Dorf & Sabel, 1998, pp. 267-473. On the role of judges in experimentalism, see Klein, 2007-2008, pp. 351-357. On continuing mandamus, see Sengupta & Ambast, 2012.

[228] "Dyzenhaus argues that these common law judges have been amenable to the influence of international law because they reject positivist assumptions that have led to the marginalisation of international law within domestic legal orders, and have accordingly been able to recognise international law norms as a component of the rule of law conceptions that they apply," Dyzenhaus, 2005, p. 127, cited by Kingsbury et al., 2004-2005, p. 9.

[229] Scott & Sturm, 2006-2007, pp. 575-592.

actual case or having to dismiss a case when an individual's rights are at stake; if, on the other hand, the issue reaches the Constitutional Court as an abstract review petition, it might be more inclined to be formalistic and stick to traditional separation of powers approaches.

What I propose to do is to analyse both the Russian Federation Constitutional Court's decisions and the Singaporean Constitutional Court's in order to assess the approach of both jurisdictions to these NG mechanisms: can they be characterised as experimentalist, how they have "catalysed" the transformation proposed by moratoriums, and how they have suppressed the accountability deficit[230].

3.2.1. The Russian Federation

There are two decisions by the Constitutional Court of the Russian Federation[231] that allow the identification of two different stages of collaboration with the political actors (the President and the State Duma): the Court went from a *mitigated judicial review* methodology to a full *experimentalist review*.

The Court came into play in April 1999 but only reluctantly assumed the role of a player in the dispute, neither putting a definite end to the discord between President Yeltsin and the State Duma, nor to the legal stalemate produced by the patchwork of legislative measures that followed the Russian Federation's accession to the Council of Europe in 1996[232].

When the Constitutional Court was called to decide on the criminal procedure legislation by the Moscow City Court upon complaints of several individuals, it ruled that the use of the death penalty was unconstitutional[233]. This first decision is the one I have identified as a case of mitigated *experimentalist judicial review*[234], one in which the

[230] Ibidem, pp. 565-567.

[231] In any case, it should be noted at the outset that the Constitutional Court of Russia has a slightly tainted reputation – for an overview, see Trochev, 2008.

[232] The case of Lithuania illustrates a different approach to accession to international organisations: its Constitutional Court abolished the death penalty as a EU accession conditionality – Judgement of the Constitutional Court of Lithuania of 9 December 1998, available at http://www.lrkt.lt/dokumentai/1998/n8a1209a.htm (consulted on 13 June 2012).

[233] *Rossiyskaya Gazeta* (Official Gazette), 10 February 1999, available in English in the Council of Europe's database CODICES and *Bulletin on Constitutional Case-Law*.

[234] Judgement of the Constitutional Court of the Russian Federation of 2 February 1999,

Court is "ready to engage in a vigorous assessment of the reasonableness of policy or legislation[235]." Until the intervention of the Court as a third player, there was straightforward opposition between the abolitionist executive power and the retentionist legislative power[236]. The Constitutional Court found a camouflaged way to temporarily settle the dispute.

The reason why it is "mitigated," rather than full-fledged experimentalist judicial review, is that the Court merely discontinued a dispute, not solving it by directly addressing abolition or the moratorium for that matter. There is no actual review of the moratorium, or any assessment of its constitutionality. Pursuant to this limited intent, its ruling focused only on the part of Article 20(2) of the Constitution of the Russian Federation that ensures that defendants being accused of a crime punishable with the death penalty must be tried by a jury. In reality, the core argument of the ruling was that, taking into account that in 1999 it was not possible to hold jury trials in all Russian regions, it would violate the principle of equal protection to apply the death penalty only in the regions where jury trials were already in place[237]. Therefore, the Constitutional Court's understanding was that the use of the death penalty was unconstitutional until jury trials were introduced in the whole country. Different factors kept Russia from country-wide jury trials, among which one can identify the judges' lack of experience, as well as organisational and financial constraints. A rather long and gradual period was established for the introduction of jury trials in all regions, the last of which was set to be in the Chechen Republic in 2007[238].

No. 3-P, available at the Council of Europe's database CODICES and B*ulletin on Constitutional Case-Law*.

[235] Young, 2010, p. 398.

[236] As Schabas puts it, "There are many paths to abolition [...]. In Russia it was by executive fiat," Schabas, 2004, p. 444.

[237] The Constitutional Court's final ruling did not mention abolition. It ruled as follows: "Persons with an offence for which federal law prescribes the death penalty as an exceptional penalty must in all cases have an effective attempt right to trial by jury. Consequently, the Federal Assembly should immediately amend the legislation to ensure, throughout the territory of the Federation, that all persons charged with an offence for which federal law prescribes the death penalty as an exceptional penalty are able to exercise this right. Until a law guaranteeing this right throughout the territory of the Federation comes into force, no person may be sentenced to death," Judgement of the Constitutional Court of the Russian Federation, No. 3-P, 2 February 1999, available at the Council of Europe's database CODICES and *Bulletin on Constitutional Case-Law*.

[238] "The Statute 'on the effect of CPC of Russia of 2001' provided that jury trials would resume in 9 regions of Russia starting July 2002; in 62 regions starting January 2003; in 13

The judgement did not bypass the death penalty abolition issue altogether, but the Court approached it only by "nudging" and "destabilising" other governmental bodies[239]. It did not put an end to the legal uncertainty. The Court bound the President and the State Duma to a new option that implied not plain abolition, but forced them to accept that "immediate steps towards a solution" be effectively taken. Paragraph 5 of the 1999 ruling affirmed the "transitional nature" of death penalty under Article 20(2) of the Constitution. It noted that five years had gone by since the adoption of the Constitution and expressed concern that "what was intended as a transitional provision was in fact becoming a permanent restriction and therefore conflicted with the Constitution[240]."

The achievement of the Constitutional Court in 1999 was restricted to putting a stop to the open legislative war between the President and the State Duma and allowing the *experiment* to actually begin[241]. As a consequence, all the actors went on for almost 10 years for an abolition test-drive. A lot has been said about how a moratorium's experimentation dimension lies solely on the pilot-suspension of the law: a moratorium gives all parties – governments, courts, lawyers – a certain period of time to, without any compromise, work with a new legal framework. What the Constitutional Court did was to finally enable what the President was trying to do without success: establish a *de jure moratorium* on the use of the death penalty, i.e., making that experiment or pilot-suspension possible. This decision created a dynamic relationship between the President, the State Duma, and the Constitutional Court that triggered a temporary structural change, but left the final problem-solving task to the two other actors: "forcing the active reconsideration of interests by the legislature[242]." It is more "dy-

regions starting July 2003; in 4 regions starting January 2004; and in 1 region, Chechen Republic, starting January 2007," Semukhina & Galliher, 2009, p. 142.

[239] On "judging by nudging," see Klein, 2007-2008, pp. 351-357.

[240] The death penalty is referred to in the Constitution only as a provisional and exceptional penalty, which is to be abolished when appropriate conditions mature," Zorkin, 2010, p. 72.

[241] On the sequence of events, see Semukhina & Galliher, 2009 and others.

[242] "The ability of such experiments to induce structural reform through litigation has gained prominence with writers in the tradition of 'NG,' and 'democratic experimentalism.' They suggest that the dynamic and reciprocal relationship between courts and other institutions of government and governance can spur structural change while avoiding problems of the traditional 'command and control' courts," Sabel & Simon, 2004; Orly, 2004, all cited by Young, 2010, p. 399.

namic than the formal expectation that electoral politics will take its proper course," but it still does not settle the matter for good, "hoping" that the other participants will[243].

The reinstatement of the death penalty after so many years of suspension would hardly be automatic, especially because in the meantime the Russian Federation's relationship with the Council of Europe was strongly marked by the death penalty clash. The death penalty had already been the target of the Parliamentary Assemblies of the Council of Europe. Furthermore, the President, now Vladimir Putin, remained an abolitionist, and the State Duma maintained its retentionist position. While public opinion had not changed considerably, the world stance on the death penalty had. This was reflected in the Russian's Federation ambiguous position. In late 2006, more or less at the same time that jury trials were about to be introduced in the last region, a new initiative to bring the death penalty into the UN was being forged by the European Union. It would become a hot issue in the human rights agenda during the 62nd Session of the UN General Assembly in 2007. Numbers were very different from the ones sustaining the 1994 and 1999 initiatives on the death penalty and so was the strategy. The Russian Federation was no longer an outsider, but one of the countries that had successfully implemented a moratorium on the use of the death penalty for 8 years – it had become an example. Its "ambiguous" position was crystallised in the international community as a good thing. NG is precisely about the blurring of the static and traditional ways of binding a country to international law. It is about reading a moratorium, a middle-ground solution, as a glass half-full, even if the Russian Federation would read it as a glass half-empty.

It is in this context that in November 2006 the State Duma preventively delayed the introduction of jury trials in the last region (the Chechen Republic) until 2010. The State Duma, while passionately still fighting against abolition, gave in. It took up the Constitutional Court's challenge, albeit replying with a further 3-year delay. The official rationale put forward for such a delay was that in the Chechen Republic the lists of putative jurors had not been compiled yet. The bill was

[243] On the "dynamic" component of experimental judicial review see Young, 2010, p. 399. On the "hope that by the time jury trials had been set up across Russia, the political branches would ratify Protocol no. 6," see Trochev, 2008, p. 163.

signed by the President and came into effect on 31 December 2006, "in the nick of time[244]."

In November 2009, the Constitutional Court finally put an end to the discord. Following Federal Law 241-FZ of December 2006, with the introduction of jury trials in Chechnya, death penalty would still be reinstated. The judiciary took the lead and prevented this from happening. The Supreme Court asked the Constitutional Court to clarify its ruling of February 1999: could the death penalty be reinstated from January 2010 onwards?[245] The judgement of the Constitutional Court of the Russian Federation of 2 February 1999 had not provided a straightforward answer. One of its paragraphs affirmed the "transitional nature" of the death penalty and regretted not seeing this gradual path to abolition reflected in the law, but this was mere *dicta*, not included in the ruling itself[246]. In its 2009 decision, however, the Constitutional Court determined that "stable safeguards of a human right not to be subjected to death penalty have been formed and the constitutional law regime has been formed, within the framework of which – considering international law's tendency and obligations assumed by the Russian Federation – an irreversible process was taking place: the process being aimed at abolishing the death penalty." The Constitutional Court considered that a different understanding would violate Article 18 of the 1969 Vienna Convention on the Law of Treaties from April 1997, date of the signature of Protocol 6, onwards[247]. This ruling rectified the act all the way to its inception. In the present case, the Court took a final stand on both legislation and policy, translated in the moratorium, thereby replacing the legislator and pursuing a policy goal – a clear example of how "old" and NG can be mutually constitutive.

[244] Bowring, 2007, pp. 167-172.

[245] Zorkin, 2010, p. 73.

[246] Paragraph 5 of the operative part of the judgement by the Constitutional Court of the Russian Federation, No. 3-P, 2 February 1999.

[247] "The Russian Federation is bound by the requirement of Article 18 of the Vienna Convention [...] to refrain from acts which would defeat the object and purpose of Protocol No. 6 [...]. Since the major commitment under Protocol No. 6 is the complete abolition of the death penalty, including removal of this penalty from the law for all criminal offences with the exception 'of acts committed in time of war or of imminent threat of war' and refusal to apply it with the same exception, in Russia, from 16 April 1997 the death penalty may not be applied, i.e. [...] imposed or executed," paragraph 4.3 of the operative part of the judgment of the Constitutional Court of the Russian Federation, No. 1344-O-R, 19 November 2009.

The Constitutional Court was no longer merely referring to equal protection, or using a diversionary manoeuvre to ban the death penalty, it was "curing" the first decree of President Yeltsin of its challenges and shortcomings. The State Duma still had to ratify the Protocol, but the Constitutional Court made it a merely symbolic act. At the same time, the Constitutional Court played a significant role in making use of the full potential of the moratorium at the international level: it recognised a global trend towards abolition, enlarging the human rights agenda and having the Russian Federation be officially a part of it all.

In conclusion, the Constitutional Court had a fundamental role in "patching up" the moratorium of the rule of law challenges it faced. Moreover, it conferred it a *de jure* nature, transforming a "soft law" instrument into "hard law." The 1996 decree is now justiciable and represents the entrenchment of additional human rights protection for individuals. The Court integrated the moratorium in the legal order and the moratorium changed the legal order, the Court hence inciting the mutually constitutive transformation.

3.2.2. Singapore

When the Singaporean government announced that it would not enforce Section 377A of its Penal Code, such a statement produced little practical change as it had not really been enforced against adults that engaged in consensual private sexual acts hitherto. In the majority of the cases in which there had been a conviction, the action had taken place in public[248].

After the government's 2007 proclamation, there is one case which has the potential to serve as a test-case: case *Tang Eng Hong v. Attorney-General*, in which a person was charged for an offence under 377A[249]. This alleged criminal offence took place in the beginning of 2011 and was prosecuted. As a counterclaim to the prosecution, the defendant challenged the constitutionality of 377A[250]. In the course of the pre-trial conference, "the charge [was] amended to one under Section 294 (a) of the Penal Code," i.e., committing an obscene act in public. As charges

[248] "Police entrapment" was quite a common practice. Chen, 2013, pp. 106-137.
[249] District Arrest Case no. 41402 of 2010.
[250] Tan Eng Hong filed for the Originating Summons [no. 994 of 2010] on September 2010.

under Section 377A had, for all purposes, been dropped, the constitutional challenge was set aside through a "strike out" application by the Attorney-General, which was granted[251]. The defendant pleaded guilty to the amended charge, was convicted and fined. Although there is no real decision on 377A at this point, it is worth noting that the prosecution took a very defensive position. The moratorium did not prevent prosecution under 377A, it only made the Attorney-General modify the charges when the defendant challenged the constitutionality of the norm under which he was prosecuted.

Tan Eng Hong appealed to the Supreme Court against the decision that granted the "striking out" of the constitutional challenge. The Court said that even though the complaint was admissible, recognising that there was a threat of prosecution, there was no real "controversy" because the case was already solved and dismissed it[252].

The complainant appealed to the Court of Appeals, requesting the overturn of the decision. The defendant pleaded that while "Parliament had said gay men would not be prosecuted for sexual acts in private, the very existence of the law meant they faced the possible threat of prosecution[253]." This would entail a violation of liberty of the person (Article 9 of the Constitution), adding that it was "discriminatory that gay sex in public places could bring a jail term of up to two years, while sex between a man and a woman in public can result in a three-month jail term at the most." What is more, "no similar law criminalised sex acts between lesbians" (Article 12, prohibition against discrimination).

At a heated public hearing in September 2011, the prosecution argued that the case should be dismissed for lack of standing[254]. Not only had the defendant not been prosecuted under Section 377A, but he also had already pleaded guilty under Section 294A. In a passionate discussion between the justices and the prosecution, it became never-

[251] The Attorney-General applied under summons no. 50630 of 2010 so that the originating summons would be striken out. The Assistant Registar granted the striking out application on 7 December 2010.

[252] *Tan Eng Hong v. Attorney-General*, Registrar's Appeal no. 488 of 2010 was dismissed: "Tan undoubtedly had locus standi to raise a constitutional issue as he had satisfied the 'substantial interests' test in *Colin Chan*. What he failed to prove was that there was a real controversy," paragraph 53 of decision of the High Court of 15 March 2011.

[253] 'Challenge to Gay Sex Law: Judgment to Be Given Later', in *The Straits Times*, 28 September 2011.

[254] Ibidem.

theless clear that the Attorney-General "could not give a binding statement that gay men would not be prosecuted under 377A[255]." So far there is no decision, but from the first session it seems that the case is likely to go into the merits phase.

All options remain open. It would be groundbreaking if the Court allowed the challenge to proceed and eventually stroke down Section 377A, but it all depends on its willingness. It may rule that it is admissible because the plaintiff faces a serious future threat on being prosecuted under 377A and the fact that the present provision is interpreted in a way that criminalises male homosexual alone is sufficient basis to declare it unconstitutional according to the prohibition against discrimination.

The main issue is that so far no court has ruled on the merits of the announcement of the Singaporean government that Section 377A would not be enforced, and therefore it is completely unclear how the Court will handle it[256]. In addition, such a statement is much less determined than the act of the President of the Russian Federation in 1996. There is no real "ownership" of the decision; the decision does not stand on the fence because it is both formally and substantially ambiguous, as was the Russian moratorium on the death penalty.

Other countries that share the same British colonial inheritance[257] also went through a sinuous path to overturn it[258]. India, for example, did that in 2009 by a decision of the Delhi High Court which put an end to the criminalisation of homosexual acts. In the specific case of India, although the core of the petition was the unconstitutionality of Section 377, interestingly enough human rights were also raised: the ICCPR, the case *Toonen v. Australia*, and even the Yogyakarta Principles[259]. However, Delhi High Court's decision was limited to interpreting 377 as not applying to private, consensual, adult sexual activity – in scope, not a very different decision from the one taken by

[255] Ibidem

[256] On "pluralism anxiety" as a reason for the US Supreme Court to curtail group identity equality rights (such as gay rights), see Yoshino, 2011, pp. 751-776.

[257] On sodomy laws as a legacy of British colonialism, see Gupta & Long, 2008, pp. 1-66.

[258] Nepal provides an interesting example of decriminalisation by court (even though it was never a British colony) – see http://news.bbc.co.uk/2/hi/south_asia/7156577.stm (last visited on 30 June 2012).

[259] High Court of Delhi at New Delhi, *Naz Foundation v. Government of NCT of Delhi and Others*, 2 July 2009, WP(C)7455/2001, pp. 36-37, cited by Waites, 2010, p. 972.

Singapore's government. The matter has not yet been settled. Although the government did not challenge the judgment, several NGOs have contested the decision before the Supreme Court of India[260].

In conclusion, the Singaporean Constitutional Court has not yet taken a final stance on the moratorium, although it is already promising that it has admitted the petition and will rule on its merits. The survival of the *de facto* moratorium on the criminalisation of male homosexual acts in Singapore, as well as its transformation into a "hard law" instrument, depends on this decision. For the time being, the non-justiciable compromise attained in 2007 is too fragile to amount to any additional protection of human rights for Singaporeans. The Court needs to integrate it in the legal order, legitimising it – only then can a mutually constitutive transformation take place.

3.3. CONCLUSIONS

As to the challenges posed by moratoriums as far as traditional conceptions of rule of law and separation of powers are concerned, the high *revisibility* of NG mechanisms carries with it the prospect of not only supressing the challenges, but also exploring moratoriums to their full capacity. The moratoriums' high flexibility and *revisibility* can assume a "catalyst" role in the legal order through the action of courts and peer review.

The transformation effect that moratoriums may have is reflected on the specific provisions they suspend, thereby changing the applicable legal regime, but also on the legal order itself, namely by blurring the dichotomy "soft law" v. "hard law" through the action of courts.

Pursuant to political deadlocks, in many cases "hard law" is not an option if the objective is to move forward. In this respect, moratoriums, even if they do not immediately increase the level of human rights protection, have contributed to the strengthening of a form of deliberative supra-nationalism that allows for the debate on universal human rights to continue, indirectly enlarging its scope.

[260] On India's Penal Code provision that criminalises homosexual acts (also 377), see Waites, 2010, pp. 971-993; Wintemute, 2011, pp. 31-61; Misra, 2009, pp. 20-28; Gupta, 2006, pp. 4815-4823; 'India Court Criticises "Shifting Stand" on Gay Sex', in *BBC News*, 28 February 2012.

CONCLUSIONS

The purpose of the current study was to determine whether moratoriums, as NG mechanisms, are able to shape public policies towards an increased promotion and protection of human rights and the advancement of the human rights agenda, ultimately contributing to the broadening of the scope of universal human rights standards.

The empirical findings of this research provide, first of all, a new understanding of moratoriums established in the field of human rights as an instrument that deserves conceptual autonomy. An analysis of moratoriums shows that the concept of moratorium is based on four core features: (a) *unsettled subject matter* – they arise from a problem or challenge on which, for whatever reason, it is too soon to take a definitive decision; (b) *pressing challenge* – inaction is no longer an option; (c) *precarity* – they are aimed at being strictly temporary but can become permanent; (d) *competence "creep"* – it is most of the time unclear where the power to adopt a moratorium comes from. A small group of moratoriums – mostly those established at the international level by a number of states – share one supplementary characteristic: even if they propose a short-term alternative solution to a problem/challenge, they actually aim at the long-term *transformation of the status quo*.

The reason why moratoriums in the scope of human rights issues deserve conceptual autonomy is that, although they share all the above characteristics, they also offer a *middle-ground solution to a persistent lack of consensus* on issues on which there is a persistent clash of culture, morals or values. In other words, they are not only adopted on issues over which it is disputable whether there are "universal" standards or not, they are adopted on issues which arguably integrate the human rights "agenda." Moratoriums are a way to keep moving forward on certain issues or at least keep the discussion alive at the

institutional level, when all other more traditional options have been exhausted. In this context, moratoriums in IHRL, as NG mechanisms, can be defined as *the temporary suspension of a specific domestic law or regulation, which results from a varying degree of external influence of the international human rights politics or practice*.

The second major finding is that moratoriums in the field of human rights are part of a wider trend of experimentalist processes of decision-making that have come to be known as NG mechanisms. These develop as a way to address the shortcomings of the traditional law-making processes, such as enforceability problems, difficulties in getting through domestic ratification processes, of legally binding instruments, and political stalemates.

Moratoriums promote policy learning – and transformation – through experimentation, privileging accommodation and promotion of diversity, problem-solving approaches, revisibility and flexibility. At the national level this can trigger national consultations; at the international level, it contributes to human rights developments and provides space and opportunities for discussions and deliberations on human rights issues, previously considered to be outside of the human rights agenda.

Moratoriums in the field of human rights may have limited and uncertain effect only allowing for the instant stabilisation of expectations. Moreover, their long-term effects and "mutually constitutive" relationship with "harder" law can also be compromised by their precarious nature; yet, these are mechanisms that often take a life of their own.

The two moratoriums object of the present study, the Russian Federation's *de jure* moratorium on the use of the death penalty and the Singaporean *de facto* moratorium on the criminalisation of male homosexual acts, have offered a good comparative analysis. Scrutiny of their judicial use highlights the prevailing role that national courts may assume in the advancement of the human rights agenda through creative interpretation and application of these more informal instruments, where there are disagreements on human rights standards. In the case of the moratorium on the death penalty, it has attained a *de jure* status and the rights contained therein are justiciable. In the case of the moratorium on the criminalisation of homosexual acts, however, as no court has yet ruled on the executive act that determined the non-enforcement of Section 377A of the Singaporean Penal Code, all

options remain open, thus endangering its already fragile *de facto* status. In addition, while in the case of the Russian Federation the moratorium operated a change in society and in its values with a view to changing the law, in Singapore the antagonising cultural beliefs make it hard to distinguish whether the eventual transformation operated by the moratorium aims at societal and cultural change or if it will only catch up with an already changed society.

As far as moratoriums' relationship with the law is concerned, it is now possible to state that moratoriums in the field of human rights have the potential both to transform legal regimes – through the immediate suspension of the law – and the legal order as such – contributing to the blurring of the traditional dichotomy between "soft law" and "hard law" and fostering effective interactions between different sources of law.

Moratoriums are *transformative* instruments aimed at altering the status quo. They have proved that they can pass the legitimacy and accountability tests of "old" governance as long as courts, lawyers and other legal actors assume the role of catalysts. Courts are not, in the context of deep cultural and value conflict, supposed to pronounce as if they were "oracles" but rather attest to a given decision-making process' satisfaction of core constitutional requirements. They ought to guarantee an adequate balance between the normative dimension of law – through the application of principles of international law, IHRL or national constitutional law – and political practice[261]. Fundamentally, moratoriums emphasise how new and old governance can be in fact mutually constitutive, and not mutually exclusive, how the law learns from practice and NG mechanisms operate "with" and "from within" old governance.

The current findings add to a growing body of literature on moratoriums in international politics and international law. I have drawn on Yin's assumption of the "practical nature" of moratoriums in tackling complex issues by offering a middle-ground solution, as well as on Lieberman, Gray and Groom's conclusion that moratoriums might have "a major effect on state actors behaviour [...] [transforming] the regime that spawns them, taking a life of their own, and resisting

[261] Scott & Sturm, 2006-2007, p. 592.

attempts to end[262]." Nevertheless, I have deepened the analysis of such a hypothesis and have explored their impact on international human rights – a field in which they had not yet been tested. From the theoretical framework point of view, the present study provides additional evidence to support De Búrca's assumption that the NG model and the human rights model are indeed compatible[263]. However, taken together, these findings suggest a role for NG in promoting human rights based on the *transformation* of the part played by all actors – state actors, courts, lawyers, private stakeholders and civil society, mostly in the context of judicial and peer-review – in overcoming political deadlocks and contributing to the broadening of the scope of universal human rights standards.

Notwithstanding, the limitations of the present study lie in the fact that only two moratoriums were analysed and that one of them has yet to survive judicial review to establish itself in the legal order. Follow-up research on the life span of these moratoriums in the field of human rights should be needed in order to further study the patterns of behaviour of political actors, legislative powers and public opinion in reaction to this form of experimentalist governance.

In addition, these findings might not be applicable to all moratoriums in IHRL. Further work needs to be done to establish whether, for instance, moratoriums could be used to allow for temporary retrogress in human rights to take place – in similar terms as the state of exception – in this case, dangerously perpetuating that negative change in the legal order, actually perverting the constructive effect proposed by the present study.

The findings of this study might have a number of positive implications for future practice though. At the national level it might further help to legitimise governments' decision to adhere to international law or practices through the adoption of moratoriums while not being able to yet ratify international legally bindings instruments – fostering compliance and increased protection. At the international level, it might support the tendency to increase engagement and deliberation on contentious issues and strengthen the impact of non-

[262] Yin, 2012, p. 321; Lieberman, Gray & Groom, 2011, p. 13.
[263] De Búrca, 2006, pp. 97-120.

legally binding instruments such as UN General Assembly resolutions as more than simple soft law instruments and rather as multi-leveled governance accountability mechanisms that accelerate the process of customary law formation.

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