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Former British Colonies: The Constructive Role of African Courts in the Development of Private International Law

PONTIAN OKOLI

Dr Pontian Okoli, PhD and LLM from the University of Dundee (Scotland), is a lecturer in Private International Law and Commercial Law at the University of Stirling (Scotland). He is a Barrister and Solicitor, his practice being mainly focused on international commercial/corporate dealings and investment risks. He has also published in several areas of law, including a special focus on Private International Law, International Commercial Law, and how access to justice concerns such areas.

@ pontian.okoli@stir.ac.uk

0000-0003-2704-4161

ABSTRACT

Significant strides have been made in efforts to facilitate the resolution of international disputes in Africa. However, cross-border issues that concern private litigants have remained challenging. One major reason is the legal history of relevant countries which often makes it difficult to contextualize legal principles inherited before independence. It is sometimes unclear how African courts determine the current law and how their discretionary powers should be used. This challenge is complicated where scholars focus on what they consider that the law ought to be without first accepting what the law is. Any sustainable growth of private international law requires a systematic approach to legal developments. Using the main comparators of South Africa and Nigeria, this article examines the connections between legal traditions and the legal methods that are required to ensure that there is a sustainable development of private international law in Africa. The core enquiry is set on a tripartite structure. Law in context, fidelity to context and functionalist approaches are essential elements that should drive the resolution of disputes in private international law matters. A dominant theme is how the recognition and enforcement of foreign judgments should be examined through appropriate interpretational mechanisms.

KEYWORDS

Comparative Law; Legal Context; Common Law; Judicial Discretion; Foreign Judgments

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INTRODUCTION

Generally, national laws cannot be divorced from the history and legal development of jurisdictions within which such laws exist.[1] Laws are in many cases not purely autochthonous,[2] and private international law cannot be divorced from relevant interactions with public international law.[3] In this regard, a distinction between imperialism and colonialism has its merits because both concepts have shaped African legal developments in different ways.[4] Imperialism may be understood in an industrial and capitalist context, while colonialism may be expressed in a more political sense. In the nineteenth century context of international law in Africa, it was persuasively argued that British protectorates did not distinguish between imperialism and colonialism even though both were different.[5] The British focused on "stability, tax revenue, and the flow in inter-colonial and transitional commerce" but adopted a more flexible approach in matters of culture and religion.[6]

[1] Knop, Michaels and Riles argued that "many conflicts problems are, in one way or another, a product of histories or present-day forms of colonization". *See* Karen Knop et al., *Transdisciplinary Conflict of Laws Foreword*, Law & Contemp. Probs., 2008, at 1, 12. (discussing the importance of colonial laws on conflicts problems).

[2] *See* Friedrich K. Juenger, *American and European Conflicts Law*, 30 Am. J. Comp. L. 117 (1982), (arguing that U.S. conflict of laws developed into "an indigenous crop of conflicts law and literature").

[3] Knop et al, *supra* note 1, at 12. María Julia Ochoa Jiménez, *Conflict of Laws and the Return of Indigenous Peoples' Cultural Property: A Latin American Perspective,* 26 Int'l. J. Cult Prop. 437, 438 (2019).

[4] Especially by European countries which colonized about ninety percent of Africa. Ethiopia successfully resisted colonialism, although occupied by Italy for half a decade. Free blacks in the U.S. were resettled in Liberia. *10 Countries Who Were Never Colonized by Europeans*, World Atlas, https://www.worldatlas.com/articles/10-countries-who-were-never-colonized-by-europeans.html (last visited Sept. 7 2021); Founding of Liberia, 1847, Office of The Historian (U.S. Department of State) https://history.state.gov/milestones/1830-1860/liberia (last visited Sept. 7, 2021).

[5] *See* James Thuo Gathii, *Imperialism, Colonialism and International Law,* 54 Buffalo L. Rev. 1013, 1014 (2007).

[6] *See* John R. Schmidhauser, *Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems,* 13 Int'l. Pol. Sci. Rev. 321, 323 (1992) (discussing how the British adopted different approaches depending on the end sought).

Imperialism and colonialism have had distinct influences on legal developments in Africa. For example, the Portuguese engaged in international commerce in parts of Africa long before the British and French, who were the predominant colonial powers in Africa.[7] While the former decided to focus on international commerce,[8] the latter went a step further to make political decisions in favor of their colonial conquests. However, even in the Portuguese context, the colonialists were involved in military campaigns usually only to promote their commercial interests in West Africa.[9] It may be suggested that in the context of national laws in Africa, colonialism usually involved some form of imperialism while imperialism did not necessarily lead to colonialism.[10] Thus, Portuguese law is not a part of Nigerian jurisprudence despite Portuguese commercial activities. By contrast, the English common law was introduced and gained traction in Nigeria and South Africa (the latter to a limited extent) because of the colonial approaches adopted in both countries.[11] This illustrative context is important because the development of transplanted law is interwoven with the need for its establishment and the functions that it serves.[12] Conscious decisions have been pivotal in shaping the legal development in former colonies. Legal history, development and conscious decisions extend to private international law, including the recognition and enforcement of foreign judgments, which have gained renewed attention partly due to the Hague Judgments Convention.[13]

Considering legal traditions, the central question is what legal methods are required to ensure that there is a sustainable development of private international law in Africa. This question is significant because it is foundational and there is no clarity on how legal development should take place in an area of law that has practical implications. The nature of private international law suggests that comparison during legal development is often inevitable - a point more self-evident in the alternative term

[7] *See The Portuguese had already traversed West Africa in the fifteenth century. See* J. Okoro Ijoma, *Portuguese Activities in West Africa before 1600 The Consequences,*11 TRANSAFRICAN J. HIST. 136 (1982).

[8] Also inspired by "the crusading spirit and the scientific enquiry" *see id.* For an insight into "the days of the Lagos market in the fifteenth century", see Eduardo Moreira, *Portuguese Colonial Policy,* 17 J. INT'L. AFR. INST. 181, 185 (1947), (describing trade in the Lagos area at the time).

[9] For example, the Portuguese helped the Oba of Benin to "ward off a strong threat" through supply of firearms and direct involvement. *See* Ijoma, *supra* note 7, at 145.

[10] Unlike the West African context, the Portuguese adopted a colonial power status in areas that include today's Mozambique and Angola. *See* Moreira, *supra* note 8, at 185.

[11] *E.g.* British conquest in South Africa. *See* BEAT LENEL,THE HISTORY OF SOUTH AFRICAN LAW AND ITS ROMAN DUTCH ROOTS 10 (2002).

[12] *See* Mathias Reimann, *Comparative Law and Neighbouring Disciplines, in* THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 13, 23-24 (Mauro Bussani & Ugo Mattei eds., 2012).

[13] Hague Conference on Private International Law, Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, July 2, 2019, https://www.hcch.net/en/instruments/conventions/full-text/?cid=137.

"conflict of laws".[14] Legal development has necessitated the evolution of laws generally, but this is particularly so for private international law in Africa because of colonial influences. This evolution has presented some challenges and contradictions in some former British colonies including Southern and West Africa. With a primary focus on South Africa and Nigeria, this article articulates such challenges and contradictions in two main categories: "the paradox of legal existence" and "the paradox of legal interpretation". A major argument is that there are two emergent schools of thought concerning both categories of paradoxes. First, with respect to the existence of law, legal commentary and even case law suggest that there is some conflict between the evidence of absence and the absence of evidence.[15] In other words, whether laws cease to exist merely because scholars or even courts do not mention them. Second, with respect to legal interpretation, there are significant concerns as to how relevant private international rules should be interpreted. For example, it is sometimes unclear what approach to legal interpretation should be applied.

Nigeria and South Africa are important jurisdictions for several reasons, including economic and political ones. For the purposes of this article, South Africa is also strategic because it has inspired calls for the "common law" to promote the development of private international law.[16] The recognition and enforcement of foreign judgments constitute a paradigm in this regard. Conventional wisdom suggests that a comparative approach is essential in private international law matters. For example, the laws of a Commonwealth African country may be compared with the English common law, considering former British colonialism. Also, the laws of such a country may be compared with those of other African countries or other parts of the Commonwealth. However, comparative approaches that do not factor in the contexts in which the relevant laws exist have created a gap from which significant challenges in dealing with the paradoxes of legal existence and legal interpretation follow. Not only is there considerable legal uncertainty, but there is also a questionable approach to sustainable legal developments, especially since scholars at times have different views on what the law is. It is a significant concern that scholars are sometimes divided as to what the law

[14] *See* Arthur Taylor von Mehren, *The Contribution of Comparative Law to the Theory and Practice of Private International Law*, 26 Am. J. Compar. L. 32, 33 (1978).

[15] Various fields have contained examples of the evidence of absence/absence of evidence dichotomy over centuries. But the presumption of innocence in law is a classic exception to the requirement of evidence. For a multi-disciplinary context, *see* Efraim Wallach, *Inference from Absence: The Case of Archaeology*, Palgrave Commc'n, 2019, at 1.

[16] *See* Muyiwa Adigun, *Enforcing ECOWAS Judgments in Nigeria through the Common Law Rule on the Enforcement of Foreign Judgments,* 15 J. Priv. Int'l L. 130, 161 (2019); *see also* Richard Frimpong Oppong, *The High Court of Ghana Declines to Enforce an ECOWAS Court Judgment,* 25 Afr. J. Int'l Compar. L. 127, 132 (2017).

is rather than what it should be. There are also implications for other African countries, especially former British colonies.

This article examines such paradoxes by using the recognition of foreign judgments as the main subject. This subject also highlights a major question: the extent to which an aspect of private international law (for example, foreign judgments) can be interpreted as inextricably connected with the law. Comparative insights may be sought but, generally, private international law is a part of domestic law and national approaches thereto may differ.[17] Colonial legal history and the peculiar challenges or experiences of countries require a contextual approach which is often missing in practice.[18] Thus, an overarching argument in this paper is that a tripartite contextual approach is necessary. First, a "law in context" approach requires an examination of the "special problems a legal order faces at a given time in its history".[19] Second, a "fidelity to context" approach requires "the analysis of particular institutions and social spheres" *vis-à-vis* the appropriateness of rules and procedures.[20] "Legal rules and judgments" also require adaptation to ensure "effectiveness, fairness as well as efficiency".[21] Third, a functionalist approach considers how "functions can serve as an interpretive cross-systemic perspective" in understanding different laws and in developing knowledge of legal rules and institutions.[22] To ensure legal comparison that is underpinned by a contextual approach, African courts should first determine and accept the current law as the law. This approach is critical to ensuring legal comparison that factors in contextual differences. Second, there should be a clear understanding of the courts' discretionary powers to amend the law. Third, courts need to decide how they want to use such powers. In all cases, there are several layers of context to be considered as African countries continue the journey of legal development in a sustainable manner.

[17] The Hague Conference is mandated to "work for the progressive unification of the rules of private international law". *See* Statute of the Hague Conference on Private International Law art 1, *adopted Oct. 31, 1951* (entered into force July 15, 1955). Many African countries are not members of the Hague Conference including Nigeria. South Africa is a member.

[18] For insights into the approach, see O. Kahn-Freund et al, *Reflections on Public Policy in the English Conflict of Laws,* 39 Transactions Grotius Soc'y 39, 48 (1953); Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Laws 457-58 (1942); Ronald J. Daniels et al., *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies,* 59 Am. J. Compar. L. 111, 115 (2011); Mark van Hoecke and Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards A New Model for Comparative Law*, *in* Legal Theory and the Legal Academy 495, 496-7 (1998).

[19] Philip Selznick, *Law in Context Revisited*, 30 J. L. Soc'y 177, 180 (2003).

[20] *Id.* at 181.

[21] *Id.*

[22] *See* Ralf Michaels, *Explanation and Interpretation in Functionalist Comparative Law - a Response to Julie de Conick*, 74 Rabel J. Compar. Int'l Priv. L. 351, 357 (2010).

Drawing on these major thematic aspects, this article concludes that sustainability in this regard requires African courts to take control of legal developments in a deliberate manner. The foundational task is to consider what laws exist.

1. THE PARADOX OF LEGAL EXISTENCE

It may appear basic to find out what laws apply, but this inquiry can be complex especially in a private international law context.[23] It is not always easy to draw a neat distinction between what the law is and how it is interpreted. This is also because judicial interpretation of the law represents the law in many cases. The difficulty in determining legal existence will be mainly illustrated through two jurisdictional bases for the recognition and enforcement of foreign judgments: domicile and mere presence.

Traditionally, persons are domiciled where they have their "permanent home",[24] although important modifications were introduced as the traditional meaning could affect those who have never been in a forum.[25] Mere presence implies that defendants may be served with court documents such as a writif they are physically present in the foreign jurisdiction.[26] Unlike other jurisdictional bases such as submission and residence, domicile and mere presence have proven to be divisive among courts and scholars. For example, it was argued that "under the current common law regime in Nigeria, South Africa, and many other African countries, only presence, residence and submission qualify as indirect bases of jurisdiction – no other basis of jurisdiction utilized by the foreign court, including service out of the jurisdiction, matters".[27] This argument means that domicile is not a ground of indirect jurisdiction in South Africa, but the case law clearly points to the contrary. In *Government of the Republic of Zimbabwe v Fick* [hereinafter *Fick*],[28] the South African Constitutional Court (the highest appellate court) observed that:

> The principles recognised by our law with reference to the jurisdiction of foreign courts for the enforcement of judgments sounding in money are: 1. at the time of the commencement of the proceedings the defendant [. . .] must have been domiciled or

[23] Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws,* 24 Cornell Int'l L. J. 245, 247 (1991).
[24] *See* Whicker v. Hume (1858) 7 H.L.C. 124 (H.L.).
[25] Civil Jurisdiction and Judgments Act 1982 § 41(2)-(6) (UK.), considering the EU Brussels regime.
[26] Also called causal, temporary, or transient presence.
[27] Richard Frimpong Oppong, *The Dawn of the Free and Fair Movement of Foreign Judgments in Africa?* 16 J. Priv. Int'l L. 575, 580 (2020).
[28] *Government of the Republic of Zimbabwe v. Fick* 2013 (5) S.A. (C.C.) at 325 (S. Afr.).

> resident within the State in which the foreign court exercised jurisdiction; or 2. The defendant must have submitted to the jurisdiction of the foreign court.[29]

Some other authors have, however, conceded that domicile is a ground of indirect jurisdiction even though they have also argued that domicile should be rejected.[30] There is merit in this approach of first accepting what the law is. This is also a good example of the tensions that sometimes exist between what the law is and perceptions of what the law ought to be. Relevant legal developments in South Africa have inspired considerable literature on how the common law can be used to further the recognition and enforcement of foreign judgments.[31] However, as this article will argue, *Fick* itself illustrates the contradictions that can emerge if the current law is glossed over or omitted. It is a different matter altogether what judges may want to do regarding the laws that exist considering any powers that they may have to exercise discretion.

There is a question as to why there may be a difference of opinion regarding what the law is. This is a crucial issue because the contestations should be more about how the law is applied or what the law ought to be. One major reason for this complex reality is the making of legal comparisons without contextualization. For example, it may be considered that South Africa and Nigeria are members of the Commonwealth, and therefore they should take similar or even the same positions on the same issues.[32] This is not necessarily the reality, as this article argues, and it is critical to examine when such laws may differ. There are two major justifications for examining the common law. First, both South African and Nigerian private international law regimes include the common law. Second, both regimes do not apply the common law in the same way.

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[29] *Id.* para. 38. *See also Purser v. Sales* 2001) (3) S.A. 445 (S.C.A) paras 8-13 (S. Afr.); for a confirmation of the legal position: *Cf. Maschinen Frommer v. Trisave Engineering & Machinery Supplies (Pty) Ltd.* 2003 (6) S.A. at 69 (C.P.D.) at 73 (S. Afr.) the argument that the latter is of no help because jurisdiction was not before the court. *See* Andrew Moran & Anthony Kennedy, *When Considering Whether to Recognize and Enforce a Foreign Money Judgment, Why Should the Domestic Court Accord the Foreign Court International Jurisdiction on the Basis that the Judgment Debtor Was Domiciled There? An Analysis of the Approach Taken by Courts in the Republic of South Africa*, 16 J. Priv. Int'l L. 549, 556 (2020).

[30] *See* Moran and Kennedy *id.* at 549.

[31] *See* Adigun; Oppong, *supra* note, at 16.

[32] *E.g.*, South Africa joined in 1931 and Nigeria in 1960 – both upon removing the vestiges of British rule: *Member Countries*, The Commonwealth, https://thecommonwealth.org/member-countries (last visited Sept. 18, 2021).

1.1. WHAT COMMON LAW?

The English common law "was essentially autochthonous, based on known rule and familiar practice. It owed very little to Roman law".[33] A distinctive feature of the English common law is that "it is to be found not in codes, treatises, statutes or learned compilations but in the decisions of the judges on the particular facts of particular cases argued before them, and in the body of precedent built up over the years".[34] The generic reference to "the common law" outside the judicial context of England has increasingly led to the assumption that any reference to "the common law" is the English common law. There may be a different understanding with respect to the "common law" and "English common law especially where the later had limited influence[35] and some former British colonies.[36] There has also been an emergent understanding of how the "common law" may evolve in uniquely local contexts.[37] The different evolutions of the common law were not unique to Africa. In the United States [hereinafter U.S.], there was no "federal common law".[38] States were to apply the common law as "altered, interpreted, or preserved by the state courts".[39] This does not mean that patterns did not emerge, but such patterns were preceded by an adaptation of the common law to particular contexts.[40] Thus, it is a question of fact whether the development of the common law in former colonies can or should be uniform.

The possibility of developing "a Nigerian common law" was considered shortly after Nigeria attained independence.[41] This was so considering that Nigeria received the English common law in force in England with a cut-off date of the 1st of January 1900.[42] This substantive reception of English law is objective. In other words, as will be demonstrated shortly, the reception of the English common law is determined by set

[33] Raoul C. van Caenegem, The Birth of the English Common Law 91 (2nd ed. 1988). This law is "so different" from the "common learned law of the European universities" *See id.* at 88.
[34] Thomas Bingham, *The future of the Common Law*, 18 Civ. Just. Q. 203, 208 (1999). *See also* Robert L.A. Goff, *The Future of Common Law*, 46 Int'l. Compar. L. Q. 745, 748 (1997).
[35] *See, e.g.*, Scotland. Smith argued that "one result of the consequent hostility [there were intermittent wars over centuries] between the two countries was a certain revulsion in Scotland against English methods, including those of English law". Thomas B. Smith, *English Influences on the Law of Scotland*, 3 Am. J. Compar. L. 522, 523 (1954).
[36] Such as South Africa which is a mixed jurisdiction.
[37] For a detailed analysis of case law on the need for a "Malaysian common law" *see, e.g.*, Tun A.H. Mohamad & Adnan Trakic, *The Reception of English Law in Malaysia and Development of the Malaysian Common Law*, 44 Common L. World Rev. 123 (2015).
[38] Morris L. Cohen, *The Common Law in the American Legal System: The Challenge of Conceptual Research*, 81 Law Libr. J. 13, 22 (1989).
[39] *Id.*
[40] *See* Lauren Benton & Kathryn Walker, *Law for the Empire: The Common Law in Colonial America and the Problem of Legal Diversity*, 89 Chicago-Kent L. Rev. 937 (2014).
[41] For a detailed analysis of this issue, see A. N. Allot, *The Common Law of Nigeria*, Int'l. Compar. L. Q. (1965).
[42] *See id.* at 38.

legal parameters. The need for a contextual approach to the English common law is illustrated by the evolution of the law in two West African countries that had similar colonial experiences, but significantly different approaches on approaching the English common law. On the one hand, after the attainment of independence, the Ghanaian legislator stated that "in deciding upon the existence or content of a rule of common law [. . .] the Court may have regard to any exposition of that rule by a court exercising jurisdiction in any country".[43] On the other hand, the Nigerian legislator stated that subject to Nigerian federal law and competence, "the common law of England and the doctrines of equity, together with the statutes of general application that were in force in England on the 1st of January 1900" shall apply in Nigeria.[44] This legal provision is consistent with a legal analysis provided just after Nigeria attained independence.[45] The different legislative approaches to the English common law by the two countries, Nigeria and Ghana, having very similar colonial experiences is a cautionary tale for a non-contextual approach to comparative analysis.

Unlike the Nigerian context, the South African common law has been long established. The British maintained the Roman-Dutch law as the common law of the Cape Colony.[46] This was later extended to the whole of the British Dominion which would become South Africa. The English common law complemented the Roman-Dutch law.[47] The South African common law encompasses South African judicial decisions but is also shaped by treatises of Roman-Dutch jurists as well as commentaries on Roman law.[48] This context is important because it will be demonstrated how, unlike Nigeria, the South African courts historically have not only had a more limited scope to apply the English common law but also had a wider berth to develop the South African common law. It is necessary to consider whether there is any scope for an automatic application of the English common law.

[43] Ghanaian Interpretation Act (1960) § 17(4). This was passed into law in 1960 but remained in the law after several amendments over decades. In a 2009 version of the Act, there were detailed provisions on how to deal with statutes of general application including "requisite alteration, modification or adaptation so as to make that statute or instrument applicable to the circumstances". *See* § 11(2) of the 2009 version.

[44] *See* Nigerian Interpretation Act § 32(1). *Cf.* §32(3) of the Nigerian Interpretation Act that any such alteration should not affect the substance.

[45] *See* Allot, *supra* note 41, at 37-88.

[46] *See* Lenel, *supra* note 11, at 9.

[47] *See* Elspeth Reid, *Mixed but not Codified: The Case of Scotland*, *in* The Scope and the Structure of Civile Codes 343 (Julio César Rivera ed., 2013).

[48] Customary law featured much later (centuries after the establishment of the Cape colony) and even then was subject to Roman-Dutch law and did not apply to foreign judgments. *See* Lenel, *supra* note 11; *see also* Joan Church et al., Human Rights from a Comparative and International Law Perspective 58 (2007).

1.2. THRESHOLD FOR AUTOMATIC APPLICATION OF THE ENGLISH COMMON LAW

Legal history suggests that the need for a contextual application of the English common law is sometimes glossed over. Even when appeals still lay to the Privy Council in certain jurisdictions, the Privy Council could decide that a jurisdiction was entitled to a legal development different to that of the English common law. In *Australian Consolidated Press Limited v. Uren* [hereinafter *Uren*],[49] the Australian High Court had to determine whether the law with respect to libel developed in Australian law should be changed considering *Rookes v. Barnard*.[50] The House of Lords was more concerned about whether such law had developed "by processes of faulty reasoning" or "founded upon misconceptions".[51] Otherwise, as the Privy Council observed, the focus should be on whether the policy of the relevant law "calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion".[52] The Privy Council concluded that the Australian High Court could not be faulted in its view that a change in approach was desirable. *Uren* is not a conflicts case but had clear implications for the development of the English common law in former colonies. This liberal approach was taken when the Privy Council had force in a former colony, to say nothing of when that appellate power and default uniformity had ceased.[53] In the absence of the Privy Council having powers in any former colony, as this article will argue, it is difficult to accept any premise that the current English common law should automatically apply to such a former colony.[54] The roles of private and public international law are complementary but should not be conflated.

The relationship between comparative law and private international law is "much more complicated" than that between comparative law and public international law.[55] It is critical to understand and develop rules of private international law within appropriate contexts.[56] This deliberate approach requires an acknowledgment of existing laws, not an obfuscation or rationalization. The trouble with not acknowledging existing rules of private international law is that mere disapplication of laws does not necessarily help to develop the jurisprudence. However, laws that are acknowledged but

[49] *See Australian Consolidated Press Ltd. v. Uren* (1969) 1 A.C. 590 (P.C.) (appeal taken from Australia).
[50] *See Rookes v. Barnard* [1964] (H.L.), [1964]A.C. 1129.
[51] Australian Consolidated Press Ltd. v. Uren (1969) 1 A.C. 590 (P.C.) (appeal taken from Australia).
[52] *Id.*
[53] Australia stopped appeals to the Privy Council only in 1986, decades after Nigeria had done so.
[54] Exceptions include the U.K.'s overseas territories etc. *See* THE PRIVY COUNCIL OFFICES, https://privycouncil.independent.gov.uk/privy-council/committees/ (last visited Sept. 10 2021).
[55] *See* George A. Bermann et al., *Comparative Law: Problems and Prospects*, 26 AM. UNIV. INT'L. L. REV. 935 (2011).
[56] Writing in the context of "choosing" laws, Symeonides argued that an "intelligent choice" was predicated on knowledge. See the arguments of Symeonides in response to George Berman et al. at 263.

consciously disapplied do potentially help to develop the jurisprudence where legal guidance or jurisprudence is lacking or scanty. If modern rules of private international law should be interpreted within appropriate contexts,[57] then it is also necessary to first understand other rules of private international law in their (English) common law context where applicable.

The experiences of the European Union [hereinafter E.U.] and the U.S. illustrate deliberate approaches to private international legal development. While the E.U. and U.S. approaches to aspects of private international law may be considered "revolutions",[58] the reality is that both approaches represent the aspirations of certain developing countries. Regional integration in the case of the E.U. and the assertiveness of considering policy interests in the case of the U.S. are instructive,[59] especially as the latter engaged the common law in a deliberate manner.[60] While the term "conflicts revolution" is often used to describe choice of law aspects, it is also used to "capture the jurisdictional elements as well"[61] and foreign judgments to a more limited extent.[62] An appropriate approach to interpreting rules of private international law is essential.

2. THE PARADOX OF LEGAL INTERPRETATION

The English common law was transplanted to relevant colonies, including Nigeria and South Africa. As a transplant, the English common law can and should be adapted where necessary to ensure that the law meets the individual needs of post-colonial States.[63] Otherwise, such States will be default receptacles for rules which may not necessarily

[57] For the argument that E.U. rules of private international law must be understood in the context of European integration, *see, e.g.*, Lydia Lundstedt & Erik Sinander, *Enhancing Critical Thinking in Private International Law,* 54 Law Tchr. 400 (2020).

[58] Mills largely focused on the choice of law aspect, but also considered how it related to other aspects of private international law such as jurisdiction. *See* Alex Mills, *The Identities of Private International Law: Lessons from the U.S. and E.U. Revolutions*, 23 Duke J. Comp. Int. Law 445, 445-446 (2013). For "a determined effort to build a new common law system of jurisdiction in the "proper forum", *see* Albert A. Ehrenzweig, *A Counter: Revolution in Conflicts Law? From Beale to Cavers*, 80(2) Harvard Law Rev. 377, 400 (1966).

[59] Mills argued that "identifying and pursuing state policy interests" could be associated with "the U.S. choice of law revolution". *See Mills*, at 465.

[60] Mills for example argued that "The U.S. rightfully rejected the artifice of vested rights which had become foundational to common law private international law in favor of policy-oriented approaches" even though American legal realism may have pushed things "too far". *See id.* at 447-48.

[61] Jesse M. Cross, *Rethinking the Conflicts Revolution in Personal Jurisdiction*, 105 Minn. L. Rev. 679 (2020).

[62] *See* Celia W. Fassberg, *Realism and Revolution in the Conflict of Laws: In with a Bang and Out with a Whimper*, 163 U. Pa. L. 1919, 1921 (2015).

[63] *See* Luis F. Del Duca and Alain A Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 Am. J. Int. L. 1 (2010); *see also Joost Blom, Canadian Private International Law: An English System Transplanted into a Federal State*, 39 Neth. Int. L. Rev. 155 (1992).

promote solutions to conflicts issues. For example, some colonies had "very divergent streams of common law transplantation and evolution".[64] Such nuances and complexities are important because private international law is a part of national law even though private international law is a technical area.

This law may be found in judicial precedents, statutes developed by the national legislator, or treaties incorporated into domestic law.[65] In South Africa and Nigeria, judges play a vital role in the development of private international law including common-law approaches to varying degrees. One aspect of private international law cannot be entirely separated from other aspects *vis-à-vis* the legal system within which the courts interpret and apply laws in general. In Nigeria for example, as this article will demonstrate, certain foundational statutory structures concern private international law in general, especially the framework for applying the English common law where relevant. Legal interpretation should be considered in relevant contexts (including South African and Nigerian), of which a fundamental one is jurisdictional.

2.1. A NIGERIAN PERSPECTIVE

There are two major questions with respect to the English common law. First, whether Nigeria is anchored to a default application of the English common law. This This question is partly justified because the Nigerian law is clear about the cut-off date for the application of the English common law.[66] In practical terms, there is no conflict between this legal position and the need for Nigerian law to be adapted to factor in modern needs. The argument that "as a matter of practice" Nigerian courts apply "the Common Law which is currently in force at a particular time in England"[67] cannot be accepted without contextualization. To sustain this logic, it was further argued that the Nigerian courts "determine what constitutes the current Common Law of England at a particular time".[68] It is potentially contradictory for Nigerian courts to subjectively ascertain the current position of the English common law, which is itself an objective matter. Arguably, as the

[64] Sandra Fullerton Joireman, *The Evolution of the Common Law: Legal Development in Kenya and India*", 44 Commonw. Comp. Politics 190 (2006). Comparing Kenya and India, Joireman argued that India had established common law courts more than a century before Kenya. This afforded the former an opportunity to adapt the common law to its context 199-200. Bennett argued that the common law was invariably applied where State interests were affected. *See* T.W. Bennett, *Conflict of Laws – the Application of Customary Law and the Common Law in Zimbabwe*, 30 Int. Comp. Law Q. 59 (1981).

[65] On the incorporation of such international rules "in domestic law", *see, e.g.*, the Private International Law (Implementation of Agreements) Bill 2020-21 (HL) cl. 2 enacted on 14 December 2020: (UK) https://publications.parliament.uk/pa/ld5801/ldselect/ldconst/55/5503.htm (last visited Sept. 17, 2021).

[66] *See* Nigerian Interpretation Act, *supra* note 43; *see also* Allot, *supra* note, at 41.

[67] Adigun, *supra* note 16, at 156.

[68] *Id.*

next question will demonstrate, it is more accurate to state that the Nigerian courts in practice interpret relevant Nigeria High Court laws including relevant references to the English common law.[69] The second question is whether the application of the English common law should automatically change because the law has changed. This will lead to major inconsistencies and undermine systematic legal development. The influence of relevant statutes that regulate the operation of Nigerian state courts illustrates the need to understand possible complexities in navigating the English common law. For example, the Lagos High Court is empowered to apply "law and equity [. . .] concurrently and in the same manner as they are administered by the High Court of Justice in England" subject to any contrary enactment in Nigeria.[70] This is the premise upon which an important case illustrative of this point was decided. The case is *Benson v. Ashiru*.[71] In 1967, well after Nigeria had become independent and a republic, Justice of the Supreme Court Brett observed that "[t]he rules of the common law of England on questions of private international law apply in the High Court of Lagos".[72] The case concerned defamation. In applying the English common law, this case has provided an important basis to amplify relevant provisions of the Lago State High Court Law. In *Zabusky v. Israeli Aircraft Industries*, the Court of Appeal considered Sections 10 and 11(1)(a) of the High Court Law to have "concurrent jurisdiction with Her Majesty's High Court of Justice".[73]

While this approach may have seemed expedient at the time, it creates the real potential for both legal uncertainty, contradictions, and inefficiency. This approach creates legal uncertainty because, by way of illustration, the Nigerian appellate courts can apply the current English common law in January and the law in England is then amended in June. The issue here is that a Nigerian appellate decision in January will remain binding on the lower courts due to *stare decisis*. Lower courts can only decide cases on similar facts but based on the English common law position. To decide differently based on the English common law position in June, lower courts must then wait for the Nigerian appellate courts to change the law to the English common law position in June. Distinguishing cases is a valid strategy in litigation. However, the art of distinguishing can be a double-edged sword as it can be easily politicized. More so, the absence of specific evidence concerning existing law does not necessarily mean that such certain laws do not exist. Thus, any recourse to a default application of the English common law should be scrutinized in specific legal contexts. This complex situation contrasts with the South African approach in terms of developing the common law.

[69] Each of the thirty-six federating states (including the Federal Territory) in Nigeria has a High Court.
[70] *See* § 10 Lagos State High Court Law (1955) Cap. (80) § 10 (Nigeria), https://laws.lawnigeria.com/2018/09/10/lagos-state-high-court-law/ (last visited Jul 10, 2022). *Cf.* § 8 on general jurisdiction.
[71] *See Benson v. Ashiru* [1967] NSCC (SC) 198 (Nigeria).
[72] *Id.* at 201.
[73] *Zabusky v. Israeli Aircraft Industries* [2006] LPELR-11597 (CA) (Nigeria).

Legislative authority remains supreme in common law countries, and there is a "preference for procedural rather than substantive justice"[74] in restricting the exercise of judicial discretion. However, procedural and substantive aims are not always easily distinguishable, especially where the courts have been empowered to develop and articulate mechanisms that can promote substantive justice. An appropriate approach to developing private international law in African countries will ensure that there is coherence between substantive laws and procedural laws. In Nigeria for example, the same High Court Law that was interpreted by the Supreme Court to be the basis for applying substantive English common law was also the basis for making High Court Rules which are revised regularly. Private international law has been driven by the courts either actively or passively. For example, there has been no statutory intervention in the recognition and enforcement of foreign judgments for more than half a century.[75] This is essentially a common denominator between Nigeria and South Africa. This is so because even though South Africa enacted a statutory law in this regard, only a neighboring country has been a beneficiary of that extension.[76]

There are advantages for the common law to develop along similar lines in former colonies, especially in non-domestic matters such as trade. However, Nigerian High Court laws do not necessarily create the same opportunity for jurisprudential development. Although there are many similarities, there are also significant differences. Northern States are usually subject to Sharia law due to Islamic influence. Clearly, English law does not apply to cases governed by Islamic law.[77] Islamic practice also exists in Southern States even though such express provisions are not contained in relevant High Court laws. Even within Southern States, the High Court laws of Lagos State and Abia State differ in some significant respects.[78] For example, the latter provides that the High Court may be guided by "decisions and other pronouncements made by any superior court with regard to like provisions on matters in *"any common law country"*.[79] But the provision is instructive and consistent with the argument that "the law may be influenced from any one direction".[80] A more pressing reality is that the

[74] Kermit Roosevelt, *Legal Realism and the Conflict of Laws*, 163 U. Pa. L. Rev. 1939, 1938 (2015).
[75] *See* Reciprocal Enforcement of Judgements Ordinance (1922) Cap. (175) (Nigeria); Foreign Judgements (Reciprocal Enforcement) Act (1961)Cap. (F35) (Nigeria).
[76] Namibia. *See* R. Kelbrick, Civil Procedure in South Africa, para. 23 (3rd ed. 2015) (explaining the applicability of the South African Statute).
[77] *See* Kano High Court Law. Cap. (53) HCL § 58, (Nigeria).
[78] *See Supra* notes, at 69-73.
[79] Abia State High Court Law HCL § 15(1) (Nigeria). This is subject to other laws including the Interpretation Law which specifically mentions the English common law.
[80] Australian Consolidated Press Ltd. v. Uren (1969) 1 A.C. 590 (P.C.) (appeal taken from Austl.). For the argument that English law ought also to develop considering Commonwealth decisions, see David Jackson, *The Judicial Commonwealth,* 28 (2) The Cambridge Law Journal 257, 259 (1970).

express inclusion of "any common law country" in the Abia State High Court law, unlike the Lagos law that refers to the English common law, underscores interpretational challenges. The interpretation of specific High Court Rules of Lagos has been assumed to apply always and in all situations. This is one issue with ignoring the 1900 threshold specifically preserved by the Interpretation Act which is a federal statute.[81] Otherwise, foreign decisions including English case law are merely persuasive and can be used for "expanding the frontiers of Nigerian jurisprudence".[82] Such frontiers can be expanded if there is no established precedent in Nigeria.[83]

Ogun State of Nigeria offers another useful illustration. Although the Ogun High Court Law replicates many provisions of the Lagos High Court Law, it signals a clear intention to chart its own path where it considers necessary and without recourse to other High Court laws. Section 29 specifically provides for commercial transactions and it states that the Court shall not enforce obligations against Nigerians if such obligations arise from credit.[84] In this regard, the Court has discretion to determine that it was not "reasonably probable that the Nigerian was fully aware of the nature of the obligation and the consequence of failure to perform the same".[85] When compared with the Lagos High Court Law that specifically provides for enabling powers regarding foreign judgments, this provision may have relevance to such obligations that arise in private international law. This is especially so considering the express mention of Nigerians in the provision. There is a possible argument that private international law is protected from such intricate in-country differences, but not if there are cases that historically evolved based on the interpretation of certain High Court provisions of a state.[86] Apart from the fact that relevant private international law statutes such as those on foreign judgments are federal, there is no supporting jurisprudence to adopt an approach solely determined by provisions of each High Court Law. Yet, if rules of private international law have developed through an interpretation of such individual state laws, then it means that they can be distinguished if other High Court laws with different provisions are considered. Most importantly, there are inadequate legal and institutional frameworks for the sustainable development of private international law. The situation is significantly different in South Africa. Since the analysis concerning the English common law is also applicable to Nigeria, this will be done in the next Section.

[81] *See Supra* note 44.
[82] *In Re: Abdullahi* [2018] 14 NWLR (Pt 1639) 272 (CA), 290-292 (Nigeria). In this case, the Supreme Court was persuaded.
[83] *See Id*.
[84] "The Court shall not enforce against a Nigerian living in any area specified by the Order of the Executive Council [. . .]".
[85] *Id.*
[86] *E.g.*, *Benson v. Ashiru* [1967] NSCC (SC) 198 (Nigeria).

2.2. A SOUTH AFRICAN PERSPECTIVE

The unique constitutional support for an active development of the South African common law has created the basis to determine what law exists and how it should be interpreted by searching for evidence. This approach may be illustrated through South African case law on foreign judgments and how there is a real risk of "cherry-picking" in a way that undermines legal certainty. The question whether the mere presence of a judgment debtor in the foreign jurisdiction is a valid jurisdictional ground concerning foreign judgments illustrates the need for appropriate methodology in determining the existence and interpretation of relevant laws. The mere presence of a natural person is relevant under the English common law where the person was served with process in the foreign jurisdiction.[87] This has been so since the nineteenth century,[88] even though doctrine law has been criticized.[89] The position under the English common law has also been accepted although there may be debates regarding the extent to which such a person benefited from that country's laws.[90] Essentially, more recent cases have clarified and confirmed the position on mere presence as valid.[91] Of course, mere presence has been questioned "as a desirable basis of jurisdiction if the parties are strangers and the cause of action arose outside the country concerned".[92] The concern from the standpoint of *forum conveniens* is whether the foreign court was adequately equipped to deal with factual or legal issues.[93] Interestingly, the parties in *Richman v. Ben-Tovim* [hereinafter *Richman*] (where the South African Supreme Court of Appeal enforced a

[87] *See Buchanan v. Rucker*, [1808] 103 E.R. 546 at 547 (KB) – this case was cited by the Court of Appeal in *Pemberton v. Hughes*, [1899] 1Ch 781 (UK); *see also Singh v. Rajah* of Faridkote, (1894) A.C. 670 at 683-684 (India). Relevant cases after the turn of the nineteenth century include Emanuel v. Symon, [1908] 1 KB 302.

[88] *See* the appellate case of *Carrick v. Hancock*, 12 T.L.R. 59 (Q.B. 1895). For the argument that important *dicta* of the English Court of Appeal (including the fact that "mere casual presence" will suffice) were correct, *see* J.G. Collier, *Conflicts and Company Law Combine to Bar Enforcement of Asbestosis Damages*, 43(3) Cambridge University Press 416, (1990). For the point that *Carrick* was "the main authority for the principle that mere presence coupled with service of the claim form was sufficient to confer jurisdiction a foreign court". *See* Trevor C. Hartley, International Commercial Litigation: Text, Cases And Materials On Private International Law 439 (3rd ed. 2020).

[89] *See, e.g.*, Lord Collins, Dicey, Morris and Collins, *The Conflict of Laws*, para. 14-060 (15th ed. 2012).

[90] Fentiman relied on cases such as Buchanan, Singh and Rucker concerning the significance of mere presence under the English common law. This was so even though he noted that the explanation of such a defendant taking advantage of the foreign jurisdiction's laws was undermined by the fact that it applied to natural persons. *See* Richard Fentiman, International Commercial Litigation 624 (2nd ed. 2015).

[91] *See Adams v. Cape* has been "accepted as an accurate statement of the current position on common law" with respect to temporary presence even though the case concerned companies. *See also* Hartley, *supra* note 87, at 438. In confirming the position under the common law, the U.K. Supreme Court observed that *Adams v. Cape* and relevant authorities which it "re-states or re-interprets" remained the "leading decisions". *See Rubin v. Eurofinance SA*, [2012] UKSC para. 108. The English Court of Appeal had analyzed and endorsed *Singh v. Rajah of Faridkote* concerning mere presence in its judgment. *See Adams v. Cape*, [1990] Ch 433 at 457-458. The U.K. Supreme Court thus endorsed the jurisdictional principles, including that of presence, stated in Lord Collins, *supra* note 89, at para. 14R-054.

[92] Lord Collins, *supra* note 91, at para. 14-060.

[93] *See Id.*

foreign judgment based on mere presence) were not "strangers" and the cause of action arose in England.[94] The need for a contextual approach to the determination and interpretation of the law can be illustrated through the Constitutional Court case of *Fick*.[95]

In *Fick*, the Zimbabwean Government expropriated the respondents' farms. That Government denied the farmers compensation and access to court.[96] The South African Development Community [hereinafter S.A.D.C.] Tribunal resolved the matter in favour of the farmers, but the government refused to comply with the decision of the Tribunal which then awarded a costs order. Again, the Zimbabwean Government refused to comply with the order and the farmers then sought recognition and enforcement in South Africa including the attachment of the Zimbabwean Government's property.[97] The Court observed that "[T]he origin of the costs order was a dispute that implicates human rights and the rule of law, which are central to the [S.A.D.C.] Treaty and our Constitution. A [c]onstitutional matter does therefore arise here in relation to access to courts which is an element of the rule of law".[98] Important issues such as the immunity that Zimbabwe claimed were considered. As statutory law was too restrictive,[99] the Constitutional Court resorted to the common law.[100] The Court simply quoted the jurisdictional grounds previously listed by the Supreme Court of Appeal (in 2000 and 1994): the defendant must have been either domiciled or resident in the foreign jurisdiction, or submitted to the jurisdiction of the foreign court. The Court neither made any commentary on *Purser v. Sales*[101] (from which it quoted) nor *Richman*[102] – both Supreme Court of Appeal decisions on jurisdictional grounds.

In *Richman*,[103] the judgment debtor was served with a writ when he was temporarily in England. The central issue was whether, considering South African law, the English Court had validly exercised jurisdiction based on the physical presence of the judgment debtor.[104] The Supreme Court of Appeal then observed that "The South African conflict of law *rules relevant to the present action* are clear"[105] and relied on Pollak concerning the rules on the foreign court's "jurisdiction to entertain an action for a judgment sounding in money against a defendant *who is a natural person*".[106]

[94] *Id.*
[95] *See Government of the Republic of Zimbabwe v. Fick*, 2013 (5) S.A. (C.C.).
[96] *See Id.* para. 2.
[97] *See Id.* para. 3.
[98] *Id.* para. 21.
[99] *See Id.* para. 37.
[100] *See Id.* para. 38.
[101] *Supra* note 28.
[102] *Supra* note 28, at 283.
[103] *Id.*
[104] *Id.* para. 1.
[105] Quoting an earlier case: *Reiss Engineering Co Ltd. v. Insamcor (Pty) Ltd.*, [1983(1)] SA 1033 (W) at 103 (S. Afr.).
[106] *Richman, supra* note 94, paras. 7 and 9.

The Court listed physical presence, domicile, residence, and submission.[107] The Supreme Court of Appeal enforced the English judgment. It is necessary to restate that the judgment debtor in *Fick* was the Zimbabwean Government. Even so, whether a company can be resident without being present is a different matter altogether. Practical logic suggests otherwise, which is in part why the United Kingdom [hereinafter U.K.] Supreme Court preferred the term "presence" to "residence" in the context of the English common law.[108]

Despite its context, *Fick* inspired a new perspective on jurisdictional grounds and the recognition and enforcement of foreign judgments generally[109] but also seemed to cause a bit of uncertainty. For example, it was argued that physical presence was "a well-established ground of international jurisdiction"[110] in South Africa. However, it was also argued shortly after that "fortunately" *Fick* gave "no consideration to mere presence".[111] There is an argument that *Fick* has provided a list of indirect jurisdictional grounds and, therefore, since it omits mere presence, this ground should be deleted. In other words, the South African Constitutional Court "discarded" the jurisdictional ground of mere presence.[112] "Discard" in this context suggests that mere presence was rejected in *Fick*. There are two major issues with this argument. First, this approach may seem practical but it has the potential undermine a systematic development of the law. Second, the approach does not consider the jurisprudential context of the relevant cases. The Supreme Court of Appeal enforced the foreign judgment as a matter of obligation. This decision drew criticisms not because the judgment debtor was not indebted, but essentially because the jurisdictional ground was considered as exorbitant.[113] As earlier

[107] *Id*.

[108] *Rubin v. Eurofinance SA*, [2012] UKSC para. 89. Indeed, the S.A.D.C. Treaty referred to jurisdiction over disputes both between Member States and natural or legal persons. *See* Treaty of the Southern African Development Community art. 15(1), Oct. 21, 2015 [hereinafter S.A.D.C.]; *see also Government of the Republic of Zimbabwe v. Fick* 2013 (5) S.A. (C.C.).

[109] *See* Adigun; Oppong *supra* note 16.

[110] Zhu Weidong, *The Recognition and Enforcement of Commercial Judgments between China and South Africa: Comparison and Convergence*, 7 China Leg. Sci. 33, (2019).

[111] Zhu Weidong, *Enforcing Commercial Judgments between China and South Africa in the Context of BRICS and BRI*, 65 J. Afr. Law 1-13 (2020).

[112] Since it "exclusively referred to" the grounds stated in *Purser v. Sales*, (2001) (3) S.A. 445 (S.C.A). Saloni Khanderia, *The Hague Conference on Private Law's Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments: Should South Africa Endorse It?*, 63 J. Afr. Law 413, 419 (2019). By contrast, although Xaba rejected the decision in Richman, the author conceded that the Constitutional Court's use of "the most relevant (grounds)" weakens the argument that court rejected mere presence. See GMN Xaba. *Presence as a Basis for the Recognition and Enforcement of Foreign Judgment Sounding in Money: The 'Real and Substantial Connection' Test Considered*, 36 Obiter 121, 125 (2015). See also Government of the Republic of Zimbabwe v. Fick, 2013 (5) S.A. (C.C.) para. 51 (S. Afr.).

[113] In rejecting the ground, Forsyth conceded that it promoted clarity and certainty. *See* C.F. Forsyth, The Mo Modern Roman-Dutch Law Including the Jurisdiction of The High Courts 90 (5th ed. 2012). *See also* Christian Schulze, *Conflict of Laws*, 1 Ann. Surv. S. Afr. Law 207, (2007); Moran and Kennedy *supra* note 29, at 573.

stated however, this article is not concerned with the merits, weaknesses, or viability of any jurisdictional ground.

A more poignant question is whether the ground is compatible with the South African common law. After all, the latter has also been influenced by the English common law which recognizes the jurisdictional ground. In *Fick*, the Constitutional Court in principle had the opportunity to overrule *Richman* but it did not do so. The Court endorsed the rationale of *Richman* on the need to secure the enforcement of obligations. However, the Court did not include presence as a jurisdictional ground. There are some possible reasons for this (in no order of importance). First, the Court took only what it needed from existing case law to decide the relevant issues. *Richman* was decided in the context of natural persons. The Zimbabwean Government is not a natural (or corporate person). Second, the Court did not want to overrule, perhaps for policy reasons. For example, that jurisdictional ground would usually be used as a last resort anyway. It would be pointless to serve a writ on a judgment debtor based on temporary presence if he resided within that foreign jurisdiction. Third, the Court may have considered it counterproductive to unduly curtail judicial flexibility to ensure that obligations are enforced. Fourth, the Court simply lacked the jurisdiction to overrule *Richman*. Generally, the jurisdiction of the Constitutional Court is restricted to constitutional matters, in which regard it has developed an impressive reputation.[114] Since 2013 the court has had expanded jurisdiction to hear appeals upon granting leave if "the matter raises an arguable point of law of general public importance" [115] which the court ought to consider. But this jurisdictional expansion was after *Fick*. *Fick* was decided on 27 June 2013 while the expansion of the court's jurisdiction took effect from 23 August 2013.[116] There is, therefore, merit in the view that mere presence remains a jurisdictional ground concerning foreign judgments in South Africa.[117]

In South Africa, the courts have a constitutional duty to develop the common law "in respect of both the civil and criminal law, whether or not the parties in any particular case request the court to develop the common law under [S]ection 39(2)".[118] As this is a solemn duty, the Constitutional Court has been deliberate, methodical, and thorough when it decides specifically to develop any aspect of the common law. There are examples in this regard including the development of the laws with respect to

[114] "Its reputation among constitutional courts in new democracies is second to none", *see* Theunis Roux, *Principle and Pragmatism on the Constitutional Court of South Africa*, 7 Int. J. Const. Law 106, (2009).
[115] S. Afr. Const., 1996, § 167(3)(b)(ii). This provision was absent in § 167(3) of the original version.
[116] S. Afr. Const., Seventeenth Amendment Act of 2012.
[117] *See* Moran and Kennedy, *supra* note 29, at 573; Hartley, *supra* note 88, at 439.
[118] *Carmichele v. Minister of Safety and Security*, 2001 BCLR 995 (CC) para. 36 (S. Afr.). *See also* para. 66 of Government of the Republic of Zimbabwe v. Fick, 2013 (5) S.A. (C.C.).

family[119] and delict.[120] In the former case, the existing common law and the Marriage Act prevented same-sex couples from enjoying the same rights as heterosexual couples.[121] The Constitutional Court developed the common law to surmount the challenges which existing restrictions posed to such couples with respect to marriage. In the latter case, the question was whether the law of delict should be developed to afford the applicant the right to claim damages if the police or prosecutor were negligent.[122] The Constitutional Court decided that, considering the complexity of the case, the High Court should deal with the issue in a factual context.[123] In contract law, the majority of the Constitutional Court declined to develop the common law in such a manner that would impose a duty to negotiate in good faith.[124] But the reason was technical as the case to develop the common law was made for the first time in the Constitutional Court.[125] Otherwise, it was "necessary to infuse the law of contract with constitutional values, including values of ubuntu".[126] This view was considered in another split decision of the Court but the applicants could not justify how enforcing the terms which they sought to avoid violated public policy.[127]

In *Fick*, once again, the Constitutional Court expanded access to justice through a development of the existing law.[128] The purpose of expanding access to justice in *Fick* was to enforce the costs order: "[T]he right to an effective remedy or execution of a costs order is recognized as a crucial component of right of access to courts".[129] The Constitutional Court further stated that an "observance of right of access to courts would therefore be hollow if the courts order were not to be enforced".[130] The Constitutional Court neither expressed any view on mere presence as a jurisdictional ground nor disapproved of it. In fact, references to *Richman* were only in approval.[131] *Fick* ensured that judgment creditors reaped the fruits of their foreign judgment. In such novel cases, it is essential to develop

[119] *See, e.g.*, *Minister of Home Affairs v. Fourie*, 2006(1) SA 524 (CC) para. 114 (S. Afr.).
[120] *Carmichele v. Minister of Safety and Security*, 2001 BCLR 995 (CC) paras. 78-80 (S. Afr.).
[121] *See Minister of Home Affairs v. Fourie*, 2006(1) SA 524 (CC) paras. 114 and 118 (S. Afr.).
[122] *Carmichele v. Minister of Safety and Security*, 2001 BCLR 995 (CC) para. 78 (S. Afr.).
[123] *Id.* para. 82.
[124] *See Everfresh Market Virginia (Pty) Ltd. v. Shoprite Checkers (Pty) Ltd.*, 2012 (1) SA 256 (CC) (S. Afr.): no consensus.
[125] *Id.* paras. 65-67 and 74.
[126] *Id.* para. 71 (*obiter*) per Moseneke D.C.J. who also observed that the common law would have been developed if the case had been "properly pleaded".
[127] *See, e.g.*, *Beadica 231 CC v. Trustees of the Time Being for the Oregon Trust*, 2020 (5) SA 247 (CC) paras 43, 102, 205 and 207 (S. Afr.).
[128] Access to the courts is a prerequisite to access to justice. On access to the courts, see *Government of the Republic of Zimbabwe v. Fick*, 2013 (5) S.A. (C.C.) paras. 2, 21, 60, 61, 62, 64, 66, 68, 69, 70, 71 (S. Afr.). In *Minister of Home Affairs v. Fourie*, 2006(1) SA 524 (CC) there were several references to access in terms of courts and marriage e.g. paras. 39, 49, 111.
[129] *Government of the Republic of Zimbabwe v. Fick*, 2013 (5) S.A. (C.C.) para. 61 (S. Afr.).
[130] *Id.* para. 62.
[131] *Id.* para. 55.

the common law "beyond existing precedent".[132] In *Fick*, there was a need to develop the common law beyond existing precedent to include "the enforcement of judgments and orders of international courts or tribunals, based on international agreements that are binding on South Africa".[133] Otherwise the judgment creditors would not realize the fruits of their judgments.Mere presence poses some challenges that may overlap with domicile in terms of ascertaining the position of the law.

As earlier noted, scholars have differed on the existence of domicile as a ground of jurisdiction concerning foreign judgments.[134] The preferred approach is, as with mere presence, first to accept the current legal position. It is a different matter to argue, as some scholars have, that domicile should be rejected as a jurisdictional ground for foreign judgments in South Africa.[135] The latter approach of first accepting what the law is (not necessarily the merits of the argument itself), is critical to developing private international law in a sustainable manner. In Nigeria, the default application of the English common law has made it easier to disregard domicile. While it is unnecessary to revive the debate,[136] the point here is that principled rejection of any jurisdictional ground in Nigeria will first require an investigation into pre-1900 English case law.[137] If it is the role of the Nigerian courts to determine the English common law then they cannot avoid such investigations into past or current law. This article remains only interested in legal validity and interpretation, including the pitfalls of comparative analysis without appropriate contextual underpinning.

If "for the sake of argument" there is strict adherence to the analytical premise that the South African Constitutional Court has exclusively listed the grounds of indirect jurisdiction, then domicile is a ground and mere presence is probably not. However, this premise needs to be considered in the context of the jurisdictional scope of the South African appellate courts especially at the time of *Richman* and *Fick*. There are at least two possible ways of considering laws that have not been amended or removed. The first is that such laws remain valid, and anyone can use such laws as may be appropriate. Alternatively, the second is that even if such laws are valid, it is also necessary to see that they achieve substantive justice in a practical way that prevents parties from evading their legal obligations. Laws do not become invalid through lack of use or because the

[132] *Carmichele v. Minister of Safety and Security*, 2001 BCLR 995 (C.C.) para. 40 (S. Afr.).
[133] *Government of the Republic of Zimbabwe v. Fick*, 2013 (5) S.A. (C.C.) para. 43 (S. Afr.).
[134] *See* Oppong, *supra* note 27; Moran and Kennedy, *supra* note 29.
[135] *See* Moran and Kennedy, *supra* note 29, at 573.
[136] For the argument that jurisdictional grounds should be considered in terms of any functional substantive value in part or in entirety, *see* Pontian N. Okoli, Promoting Foreign Judgments: Lessons In Legal Convergence From South Africa And Nigeria 192-195 (2019).
[137] On faint dicta in this regard, *see* Lord Collins *supra* note 89, at para. 14-086. *See generally*, *Douglas v. Forrest,* [1828] 130 ER 933 (CP).

occasions have not arisen to use them. The role of the judge is critical and has a greater force in South Africa because the Constitution specifically mandates the judge to develop the South African common law. The courts have been very active in this area. The role of the judge is also important in Nigeria, but with less force than in South Africa. This is because, unlike South Africa, the Nigerian judge is largely circumscribed by statutory law. Thus, there is an even more pressing need in Nigeria to develop the English common law in a clearly deliberate manner. The Nigerian Constitution does not contain provisions that concern the common law, unlike the South African Constitution that contains specific provisions on the application and amendment of the English common law. In any case, the progressive South African experience in developing the common law that has inspired calls for such development needs to be placed in proper context.[138] The need to differentiate contexts should also be examined through the applicability of judicial discretion.

3. THE IMPORTANCE OF JUDICIAL DISCRETION

There are two major aspects of the legal regime on the recognition and enforcement of foreign judgments in Nigeria and South Africa: statute and common law. The statutory regimes of Nigeria and South Africa are of contrasting importance. While in Nigeria, statutory law is by far the more important regime, in South Africa the common law is of very limited significance because of its scope.[139] The English common law on the recognition and enforcement of foreign judgments contains a rather narrow scope for discretion. In this regard, the English Court of Appeal observed that it was "a mistaken but nevertheless real concern" to state that common law rules for enforcing foreign judgments were "largely discretionary".[140] But some discretion exists. Any justice system that completely excludes any space for discretion will almost invariably lead to unfair or illogical results at some point.[141] Even under English common law, any exercise of discretion should factor in the need for different approaches to substantive and enforcement claims – the latter will not focus on the underlying cause of action.[142] To

[138] *Supra* note 16.

[139] *Supra* note 76.

[140] The Greer Committee thought this made foreign courts reluctant to recognize foreign judgments. *See* para. 36 of *Strategic Technologies Pte Ltd. v. Procurement Bureau of the Republic of China Ministry of National Defence*, [2020] EWC. Civ 1604 (CA).

[141] For the argument that, in principle, "submission should not provide an automatic ground for enforcement where the parties have explicitly agreed to resolve their dispute elsewhere" (although the courts are usually lenient), *see* Fentiman, *supra* note 90, at para 18.21.

[142] *See Lenkor Energy Trading DMCC v. Puri*, [2021] EWCA 770 para. 40 (CA). The Court of Appeal enforced the Dubai judgment.

exercise discretion properly, an element of fairness is essential, otherwise discretion will be abused. It may seem ironic that the statute on the same subject clearly provides for judicial discretion – more than the English common law which is essentially judge made. The exercise of discretion is a key and deliberate feature of the U.K. Act of 1920 of which the 1922 Nigerian Ordinance is essentially a rehash.[143] As case law clearly illustrates, the 1922 Ordinance has been the core of Nigerian jurisprudence on foreign judgments.[144] Under the Nigerian Ordinance, a court may enforce the foreign judgment if it is "just and convenient" to do so in all the circumstances of the case.[145]

Although the "just and convenient" ground has been described as "frighteningly wide" in Nigeria,[146] the concern exists because there has yet to be a clear articulation of how to exercise discretion on this ground. A careful navigation between this and public policy is also necessary and a purposeful sense of fairness is required to strike a balance.[147] In *Agbara v. Shell*, the defendant sought to set aside the registration of the Nigerian judgment. The English High Court observed that it was "necessary to have some understanding of Nigerian procedures in order to judge the extent to which Shell may have been unfairly treated".[148] The English High Court decided that there had been a "serious breach of natural justice" and set aside the registration of the Nigerian judgment.[149]

In South Africa, judicial discretion is an important element of developing the common law. Flexibility is required in developing the common law because the common law itself has evolved through organic growth as mandated by the South African Constitution. Nevertheless, the obligation to develop the common law is "not purely discretionary".[150] The exercise of this "general discretion" must be to promote the spirit and purpose of the Bill of Rights.[151] South Africa's neighbor, Swaziland, provides useful insights into the exercise of discretion, especially considering that both countries have a common Roman-Dutch law influence. Section 252(1) of the Constitution of Swaziland provides that the principles and rules of the Roman-Dutch Common Law that applied to Swaziland "*since* 22nd February 1907 are confirmed and shall be applied and enforced as

[143] The English Court of Appeal described discretion as a "critical difference" between the 1920 Act and the 1933 Act. The latter Act was intended to promote reciprocity. There is an equivalent of the 1933 Act in Nigeria, but it has not been extended to any country. *See* the Foreign Judgments (Reciprocal Enforcement) Act 1961.
[144] As case law referred to in this article shows.
[145] § 3(1) of the Nigerian Ordinance.
[146] *See* the dissenting opinion of Muhammad J.C.A. in *Shona-Jason Nigeria Ltd. v. Omega Air Ltd.*, [2006] 1NWLR (Pt 960) 1, 63 (CA) (Nigeria).
[147] *See also* Okoli, *supra* note, at 136, 227-228.
[148] *Agbara v Shell*, [2019] EWHC 3340 (Q.B.) para. 43 (Nigeria).
[149] *Id.* para. 45.
[150] *Carmichele v. Minister of Safety and Security*, 2001 BCLR 995 (CC) para. 39 (S. Afr.).
[151] S. Afr. Const. § 39(1).

the common law of Swaziland" subject to the Constitution or statutory law.[152] This constitutional empowerment has been important in the development of case law.

In *Mamba v. Mamba*,[153] the Swazi High Court had decided that foreign judgments obtained in the United States of America could not be enforced in Swaziland because it was not one of the Commonwealth countries listed in the relevant law on foreign judgments.[154] To disapprove of that judgment, the court in *Improchem Ltd. v. USA Distilleries* [hereinafter *Improchem*] had to first observe that it did "not see any inconsistency between the common law procedure and the statutory procedure for the recognition and enforcement of foreign judgments" in Swaziland.[155] In other words, both were different means to attaining the same end. The Swazi court observed that there was "no reason in logic or elsewhere" to deny enforcement merely because a country was not a part of the restricted list of countries.[156] There are two statements in *Improchem* that suggest the realization for African countries to take control of their laws on foreign judgments. First, the court was not persuaded that *mandament van reductie*[157] was a part of Swazi law.[158] "If it is a part of the law of South Africa, I think that this jurisdiction should be diffident towards it".[159] Second, in providing justifications that the legislator could not have intended the statutory regime to displace the common law, the court did not refer to South African law.[160] It rather applied itself to consider "this era of frenetic globalization, where goods are purchased online from anywhere in the world".[161] To decide otherwise would have impeded international commerce. There is, however, scope for arbitrariness where there is no principled approach to the exercise of discretion in promoting foreign judgments.

Fairness cannot be divorced from the recognition and enforcement of foreign judgments. In this context, it was argued that "[. . .] what must underlie a modern system of private international law are principles of order and fairness".[162] It was further argued that such considerations "compel more generous grounds for the enforcement of foreign judgments".[163] However, what amounts to fairness in the recognition and

[152] *See* The Constitution of the Kingdom of Swaziland Act 2005.
[153] *Mamba v. Mamba*, [2011] SZHC 43 (HC) (S. Afr.).
[154] *Id.*
[155] *Improchem (Pty) Ltd. v. USA Distilleries (Pty) Ltd.*, [2020] SZHC 23 (HC) para. 19 (Swz).
[156] *Id.*
[157] The respondent had argued for a reduction in capital, but the court considered that this would have required to reopen the merits of the case. *See id.* para. 22.
[158] *Id.*
[159] *Id.*
[160] *Id.* para. 10.2 (vi).
[161] *Id.* para. 22.
[162] Richard Frimpong Oppong, *Recognition and enforcement of foreign judgments in Ghana: A second look at a colonial inheritance*, 31 Commonw. Law Bull. 1, 24 (2005).
[163] *Id.*

enforcement of foreign judgments is debatable. A debt is an obligation and, to this extent, it has been persuasively argued that equity plays no role in "enforcement".[164] This argument is given impetus if recognition and enforcement are separated for the purposes of analytical discourse.[165] In reality, however, the court will not enforce a foreign judgment if it did not first recognize it. Thus, the English High Court has observed the need to consider "the question of whether it is just and convenient that the machinery of the High Court should be available for its enforcement."[166] The question of equity should not arise if a person is indebted and there is no dispute about the debt either by admission or because the courts have decided the dispute subject to any safeguards in the law. Thus, "actions for the enforcement of judgments are all but in name actions to enforce a debt".[167] Obligations should be enforced subject to applicable rules and a principled approach to the exercise of discretion where necessary.

As argued above, the Nigerian courts have since realized the discretionary function contained in the 1922 Ordinance.[168] Although there are different judicial views on its use, such views underscore the fact that judicial discretion is a matter of strategic importance. In *IFC v. DSNL*, the Nigerian Court of Appeal overturned the decision of the High Court because it decided that it was unjust or inconvenient to enforce, even though the High Court had observed that there was no violation of public policy. The Court of Appeal stated that this was a "contradiction in terms".[169] It is necessary to consider how English courts have dealt with discretion, which cannot be divorced from fairness.[170] Fairness should focus on producing results that are consistent with even initiating the dispute resolution process up to the outcome within legal limits. For example, "fairness to the defendant demands" that a claimant who applies to a tribunal must submit to its judgment.[171]

The evolution of commercial realities has compelled the need for flexibility.[172] The discretionary scope in the Administration of Justice Act 1920 [hereinafter A.J.A.] (*vis-à-vis* the 1922 Ordinance) is crucial. In several cases, the discretion in the A.J.A. has

[164] Hayk Kupelyants, *Recognition and enforcement of foreign judgments in the absence of the debtor and his assets within the jurisdiction: reversing the burden of proof*, 14 J. Priv. Int. Law 455, 474 (2018).
[165] Kupelyants first separated both for the purposes of contextual analytical discourse. *Id.*
[166] *Agbara v Shell* [2019] EWHC 3340 (Q.B.).
[167] Kupelyants, *supra* note 164, at 455, 474.
[168] *See, e.g.*, *supra* notes 145-146.
[169] *IFC v. DSNL Offshore Ltd.* [2008] 9NWLR (Pt 1093) 606, 637 (CA) (Nigeria).
[170] *See generally* Roger A. Shiner, Precedents, Discretion and Fairness 93-136, 93 (M.A. Stewart ed., 1983).
[171] *See* GFH Capital v Haigh [2020] EWHC 1269 (Comm) para. 51 (HC. *See also* Lord Collins, *supra* note 89, at para. 14-068.
[172] *E.g.*, "the 1920 and 1933 Acts gave little scope for the registration of foreign judgments against states". Per Lord Philips in *NML Capital Ltd. v. Republic of Argentina* [2011] UKSC 31 para 42 (SC). Lord Collins observed that "the English court had a discretion to exercise jurisdiction in an action on the New York judgment by virtue of C.P.R. 6.20(9) (now C.P.R. P.D. 6B para 3.1(10)). See *id.* para. 128.

been used merely to extend the time within which a foreign judgment may be registered which has been anything from five months[173] to up to ten years.[174] But the English courts have also exercised discretion in other complex substantive issues. The English High Court judgment in *Ogelegbanwei v. Nigeria* [hereinafter *Ogelegbanwei*] is illustrative.[175] The Court did not just decide that it was "fair" to allow the claimants an extended time to apply for registration of the order.[176] The claimants were also deemed to have submitted the application under the right statute although they had already applied under the wrong one.[177] The Court further decided that it was just and convenient to enforce the Nigerian judgment against a Nigerian general who was believed to have assets in England.[178] There was therefore no question of state immunity.[179] In *LR Avionics Technologies Limited v. the Federal Republic of Nigeria*,[180] the English Court of Appeal decided that the defendants were immune with respect to the application for registration and enforcement of the Nigerian judgment.[181] Thus, discretion was exercised to enforce the foreign judgment.[182] The scope for discretion under the English common law may be narrow, but the practical role of courts would be undermined without such scope.[183] In *Rubin v. Eurofinance*,[184] the U.K. Supreme Court observed in a majority opinion that "the introduction of judge-made law extending the recognition and enforcement of foreign judgments would only be to the detriment of United Kingdom businesses without any corresponding benefits"?[185] Nevertheless, the court further added that there was unlikely to be "any serious injustice if this court declines to sanction a departure from the traditional rule".[186] Thus, recognition and enforcement should not be left to judicial discretion as a rule. What amounts to "serious injustice" is debatable. It is instructive that the court declined to postulate absolute rigidity. In any case, there was no reference to the A.J.A. which contains a significant scope for judicial discretion. This is consistent with the position that the A.J.A. must be

[173] *See Lavallin v Weller* [2019] 3672 (Q.B.) para. 13 (HC).
[174] *See generally Tenaga Nasional Berhad v. Fraser Nash Research Ltd.* [2018] EWHC 2970 (Q.B.). In deciding that it was just and convenient to enforce a ten year old foreign judgment, the court however order a stay as a "safeguard", just in case the Federal Court of Malaysia decided to entertain a further appeal. *See* paras 78-79.
[175] *See Ogelegbanwei v. Nigeria* [2016] EWHC 8 (Q.B.) para 12 (Nigeria).
[176] *Id.*
[177] *Id.*
[178] *Id.* para. 13.
[179] *Id.*
[180] *See, e.g.*, *Avionics Technologies Ltd. v. the Federal Republic of Nigeria* [2016] EWHC 1761 (CA) (Nigeria).
[181] *Id.* para. 27.
[182] This was done pursuant to § 9 of the 1922 Act.
[183] On the "unfettered discretion" with respect to granting a stay of judgment at common law, see para. 12 of *Leicester Circuits Ltd. v Coates Brothers Plc* [2002] EWCA Civ 474 (CA).
[184] *See, e.g.*, *Rubin v. Eurofinance SA* [2012] UKSC.
[185] *Id.* para. 130.
[186] *Id.* para. 131.

construed not only "on its own terms" but also considering the purpose of the legislation.[187]

There is no fixed standard for what would amount to a "judicial overreach for judges to incrementally develop the common law foreign judgment enforcement regime"[188] in any direction. What is more likely to amount to an overreach is if courts cannot consider the need to be flexible in trying to ensure that obligations are enforced. Rigid rules are likely to overreach because they "tend to produce arbitrariness or unfairness when applied to new or unanticipated problems".[189] A comparison to what happens in other jurisdictions would help, but it is for the judges involved to resolve disputes considering challenges that they face. Courts have a "general obligation" to develop the common law.[190] This is not "purely discretionary",[191] but it is not so even under the English common law in England or in Nigeria. The South African Constitution provides that "every court, tribunal or forum may develop the common law or customary law to promote the Bill of Rights".[192] The development of the common law is connected to general legal development in a jurisdiction. Judicial decisions to amend the common law can hardly be said to be unilateral. Legal exceptions have been developed because courts needed to deal with difficult issues in particular cases. Real concerns thus emerge if legal exceptions become general rules. Courts should adopt a common-sense approach to solve glaring problems that confront them. In South Africa, the common law must be developed within its own "paradigm",[193] even though it will favor international law such as treaties that it has ratified.[194] In Nigeria, as already explained, the English common law and certain statutes were incorporated into Nigerian law. Otherwise, it is etched in Nigerian jurisprudence that "foreign decisions are only of persuasive authority, and even then as long as the legislation in question is *in pari materia* with a Nigerian legislation".[195]

The development of the common law in African countries may be shaped by its own challenges or realities.[196] The need for fidelity to context is not merely a

[187] *Strategic Technologies Pte Ltd. v. Procurement Bureau of the Republic of China Ministry of National Defence* [2020] EWCA. Civ 1604 (CA) para. 47.
[188] Oppong, *supra* note 27, at 586.
[189] Cass R. Sunstein, "Two Conceptions of Procedural Fairness" 73 Soc. Res. 619 (2006).
[190] *See Carmichele v. Minister of Safety and Security* 2001 BCLR 995 (CC) para. 39 (S. Afr.).
[191] *Id.*
[192] S. Afr. Const., *supra* note 116, para. § 39 of the South African Constitution.
[193] *Carmichele v. Minister of Safety and Security* 2001 BCLR 995 (CC) para. 55 (S. Afr.).
[194] *See Government of the Republic of Zimbabwe v. Fick* 2013 (5) S.A. (C.C.) para. 66 (S. Afr.).
[195] *SIFAX Nigeria Ltd. v. MIGFO Nigeria Ltd.* [2018] 9 NWLR (Pt 1623) 138, 179 (SC) (Nigeria).
[196] For the argument that certain presumptions regarding statutory interpretation constitute "a departure from its common-law origins", see Marius van Staden, *A Comparative Analysis of Common-Law Presumptions of Statutory Interpretation*, 26 Stell. L. R. 550, 560 (2015).

sociological issue.[197] How certain rules are applied can depend on an "analysis of particular institutions". The analysis of "social spheres" is more common.[198] If a court seeks to develop the common law, then it should be because existing precedents do not help to deliver justice in particular cases. This is in part how the English common law itself developed. Indeed, "the life of the law has not been logic: it has been experience" which requires a consideration of prevalent, contextual, and institutional issues.[199] The law may also be developed to promote clarity. Otherwise, the court would have acted in vain as losing parties would very easily appeal and secure different outcomes. Common law rules should be applied not only considering the needs of society, but also considering the institutional capacities of the jurisdictions involved.

Litigation easily lasts many years in Nigeria and reversal of legal principles is relatively rare.[200] In the U.K., on the contrary, the U.K. Supreme Court has reviewed its own decisions up to twenty-five times in just over forty years.[201] One challenge of relying on an automatic change of the English common law is that English courts may not have had the chance to decide an issue. For example, the English Court of Appeal observed that the question of whether there could be a "registration of a judgment on a judgment" was one of which "the position at common law has never been decided".[202] Thus, African courts cannot escape the responsibility of developing national laws considering peculiar challenges. While it is desirable that similar provisions (through the influence of British colonial heritage for example) are interpreted in a similar manner, this approach may not always guarantee fairness or a sustainable growth of private international law. There is a real risk of contradictions, legal uncertainty, and unfairness where there are no systematic efforts to develop the law in a deliberate manner. This is where the South African courts and Nigerian courts have largely contrasted.

[197] But the "sociological circumstances" are also important as well as other factors" are important. *See Okon v. State* (1988) 1 NWLR (Pt 69) 172, 180 (SC) (Nigeria).
[198] Selznick, *supra* note 19, at 181.
[199] *See generally* Oliver Wendell Holmes, The Common Law (Little Brown and Company, 1st ed. 1881).
[200] This point will be expanded in the next Section.
[201] *See* Lord Hodge "The Scope of Judicial Law-Making in the Common Law". Max Planck Institute of Comparative and International Private Law Hamburg, Germany 28 October 2019. He observed that "In the 43 years between 1966 and 2009, the House of Lords used this power on about 25 occasions". *See* para. 30.
[202] *Strategic Technologies Pte Ltd. v. Procurement Bureau of the Republic of China Ministry of National Defence* [2020] EWCA. Civ 1604 (CA) paras. 1-2 and 67.

4. POTENTIAL FOR CONTRADICTIONS

Statutory reform and the development of the common law need not compete, which could undermine solutions to practical problems. Rather, they can be complementary. In Nigeria, for example, any clear statutory amendment of the English common law, where necessary, will immediately circumvent the challenges of *stare decisis*. A contradiction in rejecting statutory reform is that in Nigeria treaties take effect through legislative action. If Nigeria ratifies the Hague Judgments Convention (or any other treaty), it will be domesticated through a statute.[203] It then depends on how much scope the Nigerian legislator wants such a treaty to have, subject to the provisions of that treaty and the terms of ratification.[204] Even where a treaty does not specifically amend a certain regime, it may influence the interpretation of parts of that regime. For example, this could be to focus on substantive analysis rather than mere labelling.[205] For example, there was a pragmatic argument in the context of Scots private international law that "it may be logical for the Scottish courts to accept an indirect jurisdiction that is equivalent to the harmonized position of the domicile of a non-natural person under art. 60 of Brussels I".[206] That is, domicile at the statutory seat, central administration, or principal place of business.[207] If domicile is applied to non-natural persons, there would be a risk of that ground applying to individuals who were never in the forum.[208] A ratification of the Hague Judgments Convention can also lead to a more secure development of the English common law in Nigeria or the South African common law for two reasons. First, judges will be guided by explanatory reports which help to ensure a compliance with the intention of the legislator.[209] Second, there will be a more compelling justification to see how judges in other jurisdictions that have ratified the same treaty. To emphasize the development of the common law at the expense of statutory intervention would perpetuate these contradictions. Beyond treaties, the scope for contradictions is influenced by the legislative history of former colonies.

A statute may deliberately allow certain issues to be amenable to judicial development. In this context, the U.K. Supreme Court observed that the common law of

[203] *See African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Ch. 10 LNF, 1990 (n.2 of 1983).*
[204] Application and effectiveness will also depend on how many countries ratify.
[205] *See* Okoli, *supra* note 136, at 216.
[206] Paul Beaumont & Peter McEleavy, Anton's Private International Law ¶ 9.26 (W. Green, 3rd ed. 2011).
[207] *Id.* For a similar argument in favor of domicile where a company is registered, see Lord Collins, *supra* note 89, paras. 30-002 and 30-003. *See also* Okoli, *supra* note 136, at 194.
[208] *See also* Okoli, *supra* note 136, at 193.
[209] *See generally* Paul Beaumont, *Hague Choice of Court Agreements Convention 2005: Background, negotiations, analysis and Current Status* 5 J. Priv. Int. Law 125 (2009) (discussing the importance of explanatory reports). It is also instructive that the Hague Judgments Convention "does not prevent the recognition or enforcement of judgments under national law". *See* Art 15 of the Convention *supra* note 13.

England and Wales can "keep pace with change" by factoring in international commercial practice.[210] The 1996 Arbitration Act is an example of a statute deliberately left incomplete to allow judges to develop the common law in areas that the law has not addressed.[211] This illustration is relevant to Nigeria because there has been no statutory intervention in foreign judgments in six decades. Similarly, there has been no such intervention in South Africa in four decades. Statutory intervention in the latter case is rather inconsequential because the South African Act has been extended only to Namibia, a neighboring country.[212] Despite the pivotal role of the English common law, the recognition and enforcement of foreign judgments-system has benefitted from statutory development.[213] Statutory intervention has also been used to address specific issues that have private international implications. For example, the U.S. Congress responded to the English common law position[214] concerning defamation on the Internet by enacting the Securing the Protection of our Endured and Established Constitutional Heritage [S.P.E.E.C.H.] Act 2010. The U.K. in response to the criticism of English libel law passed the Defamation Act which "contains a test reminiscent of *forum non conveniens*" only three years after the U.S. legislation.[215] The question of how or to what extent statutes may be amended *vis-à-vis* the common law also requires contextual consideration.

A common denominator between the English common law in former colonies and many of their current statutes is that both legal regimes were essentially in place before such countries attained independence. Statutes were often enacted in a rubber-stamp manner, not because conscious efforts were made as to what might work. This was not by itself a problem at the time as the relationship with the outside world was often shaped through the lens of the colonialists. It is necessary to use examples of other areas of private international law to demonstrate that foreign judgments cannot be divorced from the jurisprudence of other such areas. Family law and human rights law reflect core policy issues that have implications for private international law. The South African Constitutional Court decided that "the common law offence of sodomy" was "inconsistent with the provisions of the 1996 Act and invalid".[216] One efficient way

[210] *Halliburton Company v Chubbs Bermuda Insurance Ltd.* [2018] UKSC 48, [162].
[211] *Id.* at [47].
[212] Kelbrick, *supra* note 76.
[213] See the introduction to the Civil Jurisdiction and Judgments Act 1982 (c. 27) (UK). This Act made "further provision about the jurisdiction of courts and tribunals in the United Kingdom and certain other territories and about the recognition and enforcement of foreign judgments given in the United Kingdom or elsewhere".
[214] This focused only on the material published in England, however minimal. *See, e.g.*, *King v Lewis* [2004] EWCA Civ 1329 (CA).
[215] *See* HARTLEY, *supra* note 88, at 376.
[216] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1999) 1 SA 6 para 106 (1.1) (S. Afr.).

of developing the common law is to ensure that there are no contradictions. For example, in amending[217] the common law to include gay rights the South African Constitutional Court also declared statutory law to be inconsistent with the provisions of the 1996 Act and invalid.[218] Yet, in this regard, a comparative analysis between South Africa and Nigeria without a contextual approach will lead to patent contradictions.

Nigerian law on same sex relationships contrasts with South African law. Nigerian law criminalized homosexual relationships for decades. However, the Nigerian legislator consolidated this position by specifically prohibiting marriage contracts or civil unions between people of the same sex.[219] Any person who administers the solemnization of such contracts or unions or even merely witnesses commits an offence.[220] Provisions of the Act have clear implications for public policy which is important in the recognition and enforcement of foreign judgments.[221] The Act specifically provides that any marriage or civil contract certificate "issued by a foreign country is void in Nigeria" and no "benefit" that accrues therefrom can be enforced in Nigeria.[222] This has implications for any attempt to enforce money orders that may result from such relationships in Nigeria. Thus, important arguments including "Nigerian courts should be free to enforce a wider range of foreign judgments such as an order for specific performance, injunctions and account"[223] also require a contextual approach which is the more complex part. For example, that argument was also extended to South Africa "subject to appropriate conditions"[224] but no condition was suggested. Even in the context of enforcing money orders arising from non-commercial transactions, a non-contextual comparison will be problematic because no benefit can derive from same sex marriages or unions. But it can even get more complicated in commercial matters because it is doubtful that the core northern states of Nigeria would enforce foreign judgments if such transactions concern alcohol.[225] To this extent, there is no federal public policy although the federal legislator has covered the field in the

[217] For the fine distinction that the Court exercised its powers under s 172(1)(a) rather than develop the common law, *see Minister of Home Affairs v. Fourie* 2006(1) SA 524 (CC) para. 121 (S. Afr.).

[218] *See* Section 20A of the Sexual Offences Act 1957, Section 1 of the Criminal Procedure Act 1977 and Security Officers Act 1987 (S. Afr.). *See* para. 2.1-3.2 and para. 4.1-4.2.

[219] The punishment is fourteen years imprisonment for such parties, *see* Same-Sex Marriage (Prohibition) Act 2013 Section 5(1) (Nigeria). Same sex marriage is also illegal in many parts of Africa. *Cf.* Monica Karheiti & Frans Viljoen, *An Argument for the Continued Validity of Woman-to-Woman Marriages in Post-2010 Kenya*, 63 J. Afr. L. 303 (2019) (discussing the constitutional validity of woman-to-woman marriage).

[220] 10 yrs. *See* Same-Sex Marriage (Prohibition) Act 2013 s 5(3) (Nigeria).

[221] The statutes on foreign judgments.

[222] *See* Sections 1 and 2(1) of the Same-Sex Marriage (Prohibition) Act 2013 (Nigeria).

[223] This argument was made in the context of law reform. Chukwuma Okoli & Richard Oppong, Private International Law in Nigeria 354 (2020).

[224] Oppong, *supra* note 27, at 582.

[225] Thus, Kano and Lagos courts may have contrasting positions on this point.

enforcement of foreign judgments[226] as federal statutory law exists on the subject.[227] Such complications serve as a reminder that the genius of English common law adaptability requires appropriate contextual and institutional mechanisms to thrive.

A contextual approach should consider institutional realities. Courts do not require formal evidence to take notice of "obvious realities" such as any "substantial extra burden of costs or delay".[228] In *Ogelegbanwei*, for example, the English court considered it an important argument that the Nigerian judgment debtors controlled "the apparatus of judgment execution" (including the Nigerian President and the Attorney General).[229] There is also the tyranny of judicial inefficiency. Several foreign judgments cases lasted about a decade in the courts. *Halaoui* lasted a decade after the judgment creditor applied to enforce an English judgment in a Nigerian High Court.[230] That case was decided in 2009, but there is no indication that much has changed in terms of judicial efficiency.[231] In February 2021, the Nigerian Supreme Court decided a matter concerning the oil and gas industry (a strategic part of the Nigerian economy) a decade after it commenced at the Federal High Court.[232] In South Africa, *Fick* took less than half a decade even though it had to go to the Constitutional Court.[233] Arbitration has become more attractive to stakeholders in the business sector and this trend is expected to continue as private international law cases generally remain exposed to the perennial challenges of inefficiency that the Nigerian courts face. Other mechanisms such as exclusive jurisdiction agreements may be considered.[234] The question of inefficiency has direct implications for sole reliance on the courts for the incremental development of the law. Sole reliance on such incremental development may be weakened by inadequate law reporting or access to law reports because access can also influence how law develops. Commenting on why Scottish references to English law was "relatively infrequent" between the sixteenth and eighteenth centuries, Smith argued that "English decisions were neither readily accessible nor comprehensible outside England".[235]

[226] The enforcement of foreign judgments is on the exclusive legislative list. *See* Item 57 of the Exclusive Legislative List; Part 1 of the Second Schedule. 1999 Constitution (as amended).
[227] *See* The 1922 Ordinance and 1961 Act.
[228] Nasser v. United Bank of Kuwait [2001] C.P. Rep. 105 para 64 (CA).
[229] *See Ogelegbanwei v. Nigeria* [2016] EWHC 8 (Q.B.) para 12 (Nigeria).
[230] In *VAB Petroleum v. Momah* [2013] 14 NWLR (Pt 1347) 284 (Nigeria), the first High Court ruling on the foreign judgment application was in 1993. The Supreme Court concluded the matter in 2013.
[231] *Id.*
[232] In a non-conflicts case. *See Statoil Nigeria Ltd. v. Inducon Nigeria Ltd.* [2021] 7 NWLR (Pt. 1774) 1 (SC) (Nigeria).
[233] *See Government of the Republic of Zimbabwe v. Fick* 2013 (5) S.A. (C.C.), at 24-29 (S. Afr.). Most matters end at the Supreme Court of Appeal anyway.
[234] The English CA decided, in the context of an exclusive jurisdiction agreement, that it had jurisdiction to grant a worldwide anti-enforcement injunction to refuse compliance with a foreign judgment. *See Bank St Petersburg OJSC v. Arkhangelsky* [2014] EWCA 593 para. 39 (CA).
[235] Smith, *supra* note 35, at 522-542.

The Scottish legal system was safeguarded eventually,[236] and continued efforts to forge its own path are instructive.[237]

A contextual approach to private international law is necessary; whether it is a "broader context" considering the "underlying aims and objectives" generally or more regional approaches.[238] While the exercise of discretion may have its grey areas and thus should attract caution, the exercise of discretion is inevitable where the law expressly allows it and rules are not mathematically clear. For example, in the era where the Internet continues to drive innovation at short notice, African judges need to deal with such matters quickly. Traditional rules remain inapplicable even where it is conceded that traditional rules of private international law can hardly be adapted to the Internet era.[239] To attain substantive justice, flexibility is required and flexibility cannot be divorced from the exercise of discretion. The notion that former colonies should change their laws merely because the English common law has changed needs contextualization. A principled contextual approach should underpin comparative analysis that is often inevitable in private international law issues.

CONCLUSION

Courts need to develop the law in a systematic manner. Considering the legal history of many former British colonies, the first step is to determine and accept the current legal position. The next step is to develop it systematically. Inconsistencies and contradictions should be tackled through a principled exploration of the discretionary space available to judges, which is a pivotal component of legal development in private international law. As more complex issues arise in private international law, especially those driven by technology and assertions of individual liberty, it is increasingly difficult to predict the specific challenges with which courts may be confronted. In Nigeria, there is a general default recourse to the English common law. Unlike Nigeria, South African courts have been more consistent in actively developing the South African common law.

African courts can benefit from a comparative approach to decide difficult cases. However, this should be done in a principled and purposive manner. Indeed, there is a

[236] The Treaty of Union ratified in 1707 would then help to guarantee the independence of the Scots legal system. *Id.*

[237] On Scotland's engagement with presence and residence, *see Zigal v. Buchanan* [2019] CSIH 16 paras 7-10 (Scot.). There were no references to English cases. *Cf. Service Temps Inc v. Macleod* [2013] CSOH 162 (Scot.).

[238] *See* Lundstedt & Sinander, *supra* note 57, at 404.

[239] *See* Oppong, *supra* note 27, at 580.

limit to comparison.[240] A contextual approach should be complementary. The English common law has been developed in the context of the English legal system, even if such law may have implications for other jurisdictions with which the English common law interacts. There is a growing realization that courts need to consider how they want to deal with various aspects of private international law. For example, the international rise of commercial courts can promote a contextual approach.[241] While what amounts to a commercial matter ought to be expanded to fit with the evolution of the times, such expansion should always be made considering the relevant contexts. Thus, commercial matters should be considered differently but always with the knowledge that such issues exist within certain contexts.

The role of African judges is at the center of building a resilient private international law framework. The discretion in discharging that role is not only inevitable, but also critical if a sustainable development of private international law is to be attained in Africa. The question is more about what should be done with the discretion and what policy should drive the adaptation of the English common law. The role of scholars is important but it should complement, and not displace, the role of courts in legal systems where judicial precedents are critical to legal developments. One reason for this is that courts, unlike scholars, are legally required to be objective since they have constitutional functions of interpreting statutes and resolving disputes. Other African countries can draw lessons from proffered solutions to the challenges that former British colonies face.

[240] *See* Moran and Kennedy, *supra* note 29, at 572.
[241] Standing International Forum of Commercial Courts, Second SIFoCC COVID-19 Memorandum 2021 (UK).

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Beyond "Equity": The Continued Search for Guiding Principles of Transnational Anti-Corruption Investigations

MATTHEW J. FEELEY

Matthew J. Feeley obtained an M.A. in International Relations at The Fletcher School of Law and Diplomacy, Tufts University, a J.D., cum laude, at Boston College Law School and an A.B., Government, at Dartmouth College. He is currently an Assistant U.S. Attorney and Deputy Chief of the Civil Division of the U.S. Attorney's Office in the Southern District of Florida. A previous version of this article appeared in The International Lawyer (54 The Int'I Lawyer 281 (2021)).

@ matthewfeeley@hotmail.com

0000-0002-2381-6948

ABSTRACT

The recent global proliferation of domestic anti-corruption laws intended to have extraterritorial application has led to circumstances where multiple states seek to enforce their anti-corruption laws against the same entities based on the same set of facts. This work examines the development of these transnational enforcement circumstances, as well as the attendant policy complications, and poses the following research question: when approaching multi-jurisdictional anti-corruption enforcement efforts, have enforcement agencies developed a set of principles beyond general "equity" to inform their decisions about when and how to cooperate in investigations and coordinate and structure appropriate transnational anti-corruption settlement penalties? To attempt to answer this question, this work evaluates the context of these enforcement developments, recent transnational anti-corruption resolutions and interviews with former and current anti-corruption prosecutors from various states. The work concludes that the following guiding principles are emerging: (1) enforcement agencies seek to coordinate and cooperate during the investigatory stage if the benefits of cooperation outweigh the costs; (2) enforcement agencies seek to coordinate resolutions with enforcement agencies from other appropriate states recognition of jurisdictional nexuses and development of global anti-corruption efforts; (3) enforcement agencies utilize crediting of penalties and profit disgorgements paid to other states to both maintain domestic statutory enforcement and consistency and to encourage anti-corruption capacity building and future voluntary self-reporting by offending entities; (4) enforcement agencies consider "side-stepping" to encourage anti-corruption capacity building and future voluntary self-reporting by offending entities; and (5) enforcement agencies consider deference to other states for monitoring purposes to encourage anti-corruption capacity building. The identification of these emerging principles may provide additional insight into the investigation and resolution process and may inform entities and corporate counsel as they navigate potential transnational anti-corruption exposure.

KEYWORDS

Anti-Corruption; Bribery, Corruption, Transnational, Coordination

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INTRODUCTION

"In vain may heroes fight and patriots rave; if secret gold sap on from knave to knave."

— Alexander Pope[1]

Since the enactment of the United States [hereinafter U.S.] Foreign Corrupt Practices Act [hereinafter the F.C.P.A.] in 1977,[2] there has been a steady increase in global anti-corruption efforts.[3] In the past decade, these efforts have markedly increased in intensity.[4] The now significant global anti-corruption movement seeks to prohibit the provision of corrupt benefits to foreign officials that influence the performance of their duties.[5] This effort caused various states to enact legislation prohibiting the conveyance of bribes to foreign officials by entities or individuals that fall under the jurisdiction of the "home" state.[6] As the number of these domestic laws has grown, many "overlapping" jurisdictions have developed in the anti-corruption context.[7] Various circumstances have arisen wherein multiple states have sought to enforce their domestic anti-corruption laws against individuals or entities concurrently based on the same set of operative facts.[8] Many of these circumstances result in negotiated settlements with multiple enforcement agencies requiring payment of substantial monetary penalties, rather than trials in courtrooms.[9] For example, in 2020, a single multi-jurisdictional settlement led to multiple states sharing financial penalties reaching billions of dollars.[10] As a result, questions have arisen as to when, and how, in the face of competing interest, states cooperate, coordinate, and eventually apportion financial penalties. We do know

[1] Alexander Pope, The Works of Alexander Pope, With Notes and Illustrations, by Himself and others 235 (Will Roscoe ed., 1847).

[2] *See* Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified as amended at 15 U.S.C. §§ 78dd-1, 78dd-2, 78dd-3, 78ff, 78m (2012)).

[3] *See generally* Kevin E. Davis, *Between Impunity and Imperialism: the Regulation of Transnational* Bribey (2019); Michelle R. Sanchez-Badin & Arthur Sanchez-Badin, *Anticorruption in Brazil: From Transnational Legal Order to Disorder*, 113 Ajil Unbound 326, (2019); *see also Anti-Corruption Regulation Survey of 42 Countries*, Jones Day Tokio (Nov. 1, 2019), https://www.jonesday.com/en/insights/2019/11/anticorruption-regulation-survey-2019 [https://perma.cc/3SAZ-5TDX].

[4] *See* James Koukios & Amanda Aikman, *Top 10 Anti-Corruption Developments of the 2010s*, CORP. COMPLIANCE INSIGHTS (May 6, 2020), https://www.corporatecomplianceinsights.com/top-10-anti-corruption-developments-2010s/ [https://perma.cc/6L7R-URV8].

[5] Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, 37 I.L.M. 1. (establishing the most widely accepted definition for bribery of foreign official and is the most utilized by signatory states even with differing anti-corruption laws).

[6] *See* Jessie M. Reniere, *Fairness in FCPA Enforcement: A Call for Self-Restraint and Transparency in Multijurisdictional Anti-Bribery Enforcement Actions*, 24 Roger Williams Univ. L. Rev. 167, 170 (2019).

[7] *Id.*

[8] *Id.*

[9] *Id.* at 178.

[10] *See, e.g.*, Kate Beioley, *Airbus Case Reflects France's Changed Ways on Corruption*, Fin. Times (Feb.16, 2020), https://www.ft.com/content/fe71368e-4cf6-11ea-95a0-43d18ec715f5.

from public pronouncements issued by the relevant enforcement agencies, as well as publicly available settlement agreements and related documents, that, at times, there is some type of cooperation, coordination, and apportionment among states.[11] But we do not know how these decisions are made or if there is a set of shared principles that govern the process.

The major domestic anti-corruption laws do not address these issues. For instance, the F.C.P.A.,[12] the United Kingdom [hereinafter the U.K.] Bribery Act of 2010,[13] and the Brazil Clean Company Act[14] are silent about cooperation, coordination, and apportionment of penalties among and between multiple jurisdictions. International conventions and treaties on anti-corruption superficially address international cooperation, but do not address the issues of coordination or apportionment of penalties in transnational anti-corruption settlements.[15] For instance, the Organization for Economic Co-operation and Development's [hereinafter O.E.C.D.] Convention on Combating Bribery of Foreign Officials in International Business Transactions [hereinafter the O.E.C.D. Convention Against Bribery], adopted in 1997, states that when there is overlapping jurisdiction, all signatories should consult one another to determine the most appropriate jurisdiction and provide mutual legal assistance.[16] The United Nations Convention Against Corruption [hereinafter U.N.C.A.C.],[17] adopted in 2003, recognized the growing field of domestic anti-corruption legislation, but does not address methods or procedures states should use to cooperate, coordinate, and determine apportionment of financial penalties.[18] Various bilateral mutual legal

[11] *See* discussion *infra* Section 3.

[12] F.C.P.A., *supra* note 2.

[13] *See, e.g.*, U.K. Bribery Act 2010, UK Public General Acts, 2010 c. 23, http://www.legislation.gov.uk/ukpga/2010/23/contents. (Eng.).

[14] Lei No. 12846/14, de 1 de Agosto de 2013, *see* Diário Oficial da União [D.O.U.] de 29.01.2014 (Braz.), translated in Law No. 12,846 of August 1, 2013; *see also* Trench, Rossi e Watanbe Advogados (2013), http://f.datasrvr.com/fr1/813/29143/Trench_Rossi_e_Watanabe_-_Brazil's_anti-bribery_law__12846-2013.pdf [https://perma.cc/F85C-9YQW].

[15] *See generally* U.N. Convention Against Corruption, Oct. 31, 2003, G.A. Res. 58/4, UN Doc. A/RES/58/4.

[16] Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, supra note 5, art. 9.; but see Branislav Hock, Transnational Bribery: When is Extraterritoriality Appropriate?, 11 CHARLESTON L. REV. 305, 323-24 (2017) (criticizing the O.E.C.D. Convention Against Bribery language about "appropriate jurisdiction" as too "wide" and accordingly of little use in guiding enforcement agencies facing overlapping jurisdictional claims).

[17] *See* United Nations Convention Against Corruption, *supra* note 15, Art. 4, §3. https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf [https://perma.cc/MZ64-KB4D] ("When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution."). *See also* U.N.C.A.C., *supra* note 15.

[18] *See* Criminal Law Convention on Corruption, Jan. 27, 1999, 2216 U.N. Doc. 225, E.T.S. No. 173. Intern-American Convention Against Corruption, Mar. 29, 1996, Senate Consideration of Treaty Doc. No. 105-39, 35 I.L.M 724. African Union Convention on Preventing and Combating Corruption, July 1, 2003, 43 I.L.M. 5 (all generally accepted multistate anti-corruption agreements that do not address apportionment of criminal penalties amongst different jurisdictional authorities).

assistance treaties [hereinafter M.L.A.T.s] obligate cooperation in connection with evidence gathering, process of service, asset seizure, and so forth, but do not address resolution coordination or penalty apportionment in the multistate anti-corruption context.[19]

There is also little publicly available guidance from enforcement agencies or scholarly commentary that explains how enforcement agencies approach whether, and how much, they should apply shared principles in determining if and how to cooperate in investigations as well as coordinate and apportion financial penalties in circumstances of overlapping anti-corruption jurisdiction.[20] To date, the most relevant document appears to be the May 9, 2018, memorandum issued by the U.S. Department of Justice [hereinafter D.O.J.][21] This document charges all department components and U.S. Attorneys that they should "consider the totality of fines, penalties, and/or forfeiture imposed by all Department components as well as other law enforcement agencies and regulators in an effort to achieve an equitable result".[22] While the policy does not mention global anti-corruption efforts, former Deputy Attorney General Rosenstein made clear its application is particularly important in the anti-corruption context.[23] The May 2020 memorandum, informally called the D.O.J.'s "Anti-Piling on Policy",[24] directs that D.O.J. anti-corruption enforcers employ "equity" in addressing penalty apportionment issues.[25] While the "Anti-Piling on Policy" is an explicit statement advocating the role of equity for D.O.J. enforcers, it provides no detail on how equity is to be applied and, on its face, leaves those decisions solely to the judgment and discretion of D.O.J. prosecutors.[26] The document does not address cooperation or settlement coordination. Moreover, the "Anti-Piling on Policy" applies only to D.O.J. employees.[27]

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[19] Matt Reeder, *Bad Math: State-Centric Anti-Corruption Enforcement + International Information Sharing Agreements = Conflicting Corporate Incentives*, 49 Int'L. L. 325, 332 (2016).

[20] *See* Andrew T. Bulovsky, *Promoting Predictability in Business: Solutions for Overlapping Liability in International Anti-Corruption Enforcement,* 40 Mich. J. Int'L L. 549 (2019) (although there is little to no literature exploring prevailing principles, commentators have undertaken to criticize the current regime and advocate for formalized mechanisms for transnational anti-corruption enforcement).

[21] *See generally* Rod J. Rosenstein, Deputy Att'y Gen., Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act (May 9, 2018) in Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 20th Anniversary New York Conference on the Foreign Corrupt Practices Act, Dep't Just. (May 9, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institutes [https://perma.cc/2RXZ-EHE8] [hereinafter Memorandum from Rod J. Rosenstein].

[22] *Id.*

[23] *Id.*

[24] Sharon Oded, *The DOJ's Anti-Piling on Policy: Time to Reflect?, in* Negotiated Settlement in Bribery Case: a Principled Approach 256 (Tina Søreide & Abiola Makinwa eds., 2020).

[25] *See* Memorandum from Rod J. Rosenstein, *supra* note 21.

[26] *Contra* Oded, *supra* note 24, at 253.

[27] *Id.*

Indeed, "while the D.O.J. certainly has been one of the world's leading enforcement authorities in combating foreign corruption, its unilateral policy is not globally applicable, and other enforcement authorities—including U.S. authorities— may follow a different approach".[28]

This context prompts the following research question: in multi-jurisdictional anti-corruption enforcement efforts, have enforcement agencies developed a set of principles beyond general "equity" to inform their decisions regarding cooperation, coordination, and appropriate transnational anti-corruption settlement penalties? To that end, Section 1 of this paper identifies the research methodology used to approach this question. Section 2 describes the evolution of global anti-corruption efforts to present leading to the need for increased clarity in the transnational anti-corruption investigation and settlement context. Section 3 reviews recent global anti-corruption resolutions with an eye towards emerging principles. Section 4 reviews insights on these issues from interviews with former and current prosecutors employed by various governmental agencies tasked with enforcing anti-corruption laws. Section 5 answers the research question and offers emerging guiding principles helpful in understanding how states cooperate and attempt to employ equitable treatment in reaching just resolution when multiple states seek to enforce anti-corruption laws. Lastly follows the conclusion.

1. METHODOLOGY

To attempt to answer the research question, it is first necessary to understand the evolution of global anti-corruption enforcement. This contextual examination provides insight as to why international cooperation and coordination are imperative to reach just resolutions in multi-jurisdictional anti-corruption enforcement circumstances. After describing the context, the paper analyzes recent multi-state anti-corruption settlements and insights from anti-corruption prosecutors to identify emerging principles that guide the process.

[28] *Id.* at 253.

2. EVOLUTION OF GLOBAL ANTI-CORRUPTION EFFORTS AND THE NEED FOR COOPERATION IN INVESTIGATIONS AND COORDINATION AND PENALTY APPORTIONMENT IN TRANSNATIONAL ANTI-CORRUPTION RESOLUTIONS

For most of the last half-century, the F.C.P.A. was the only statute enforced in the global anti-corruption context.[29] Simply put, many states did not value the importance of the anti-corruption effort.[30] Some even considered bribery of foreign officials to be an integral and accepted part of the conduct of international business.[31] For some time, the prevailing notion was that foreign companies needed to pay bribes in territories with deeply rooted cultures of graft and that such conduct was neither unethical nor immoral.[32] In the 1970s, some even considered bribery to be "market enhancing".[33] For example, before 2000, France, Germany, Austria, Belgium, Australia, Portugal, New Zealand, Netherlands, and Switzerland allowed tax deductions for their companies that paid overseas bribes to secure business opportunities.[34]

But global anti-corruption efforts outside the United States slowly grew.[35] For instance, in 2010, the United Kingdom passed the U.K. Bribery Act 2010.[36] In August 2013, motivated by the commitments it undertook in the O.E.C.D. Convention Against Bribery, Brazil enacted both its Anti-Corruption Law and the Law on Fighting Organized Crime, commonly referred to as the Brazilian Clean Company Act.[37] In 2017, France

[29] *See, e.g.*, Crim. Div. U.S. Dep't Just. & Enf't Div. U.S. Sec. & Exch. Comm'n, A Resource Guide to the U.S. Foreign Corrupt Practices Act, (2020), https://www.sec.gov/spotlight/F.C.P.A./F.C.P.A.-resource-guide.pdf [https://perma.cc/CHY9-3HG2] (giving a primer on the F.C.P.A.); *see also* Matthew J. Feeley, *U.S. Foreign Corrupt Practices Act's Applicability to Non-U.S. Entities Sponsoring American Depository Receipts*, 8 BUS. L. INT'L. 91 (2007) (explaining F.C.P.A. jurisdictional issues).

[30] Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade against Corruption*, 33 VANDERBILT J. TRANSNAT'L L. 877 (2000) (discussing the concept of "geographic morality" and how it shaped the development of bribery of foreign officials).

[31] *Id.* at 881 (defining the "rule of geographical morality" as a norm by which a citizen of a country in the North may engage in acts of corruption in a country in the South, including bribery and extortion, without the attachment of any moral condemnation to those acts).

[32] *Id.* at 896–902.

[33] Rachel Brewster & Samuel W. Buell, *The Market for Global Anticorruption Enforcement*, 80 LAW Contemp. Probs. 193, 198-99 (2017).

[34] *See, e.g*, Siemens, *A Giant Awakens*, ECONOMIST (Sept. 9, 2020), https://www.economist.com/briefing/2010/09/09/a-giant-awakens [https://perma.cc/4GSG-Q7NV]; *see also* Martine Milliet Einbinder, *Writing off Tax Deductibility*, O.E.C.D. OBSERVER (Apr. 2000), https://oecdobserver.org/news/archivestory.php/aid/245/Writing_off_tax_deductibility_.html [https://perma.cc/2EHS-THDS].

[35] See Christopher J. Duncan, The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism, 1 ASIAN-PACIFIC L. Pol'Y J . 16 (2000) (highlighting a notion that the U.S. led effort to promote global anti-corruption laws and their meaningful enforcement is little more than cultural imperialism).

[36] See, e.g., U.K. Bribery Act 2010, supra note 13.

[37] See generally Renata Muzzi Gomes de Almeid & Shin Jae Kim, The New Brazilian Clean Company Act, EMPEA LEGAL Regul. Bull. 3 (2014), t.pdfhttps://www.empea.org/app/uploads/2017/03/Brazilian-Clean-Company-Act.pdf [Z-E4URhttps://perma.cc/D4RZ-E4UR].

enacted its own anti-corruption law—the Sapin II Legislation—and formed a new agency, the Agence Française Anticorruption [hereinafter the A.F.A.], charged with enacting regulations, monitoring compliance, and conducting enforcement.[38] Also in 2017, Argentina passed a law making domestic companies liable for bribery committed abroad.[39] Many other states, including China, India, Ireland, Malaysia, and Tanzania, have either recently enacted or amended domestic anti-corruption laws.[40] As of May 2018, the forty-four signatories to the O.E.C.D. Convention Against Bribery have implemented domestic legislation that makes bribery of foreign officials unlawful.[41]

Although many of these new laws are based on the provisions of the F.C.P.A.,[42] they are not replicas of the F.C.P.A. . For instance, the U.K. Bribery Act is a strict criminal liability statute that criminalizes receipt of a bribe, prohibits commercial bribery,[43] provides a defense for a company with a robust compliance program and excludes a facilitation payment exception.[44] The Brazilian Clean Company Act differs from the F.C.P.A., amongst other things, in that it cannot be used to assert criminal liability against a company, applies a strict liability standard, and provides an explicit compliance program defense.[45]

Nevertheless, these laws, as well as others, generally track the O.E.C.D. Convention Against Bribery's definition of bribery (which followed the F.C.P.A. definition).[46] States also borrow from U.S. enforcement agencies' anti-corruption protocols, including the use of deferred prosecution agreements [hereinafter the D.P.A.s], non-prosecution agreements [N.P.A.s], and publicized declinations of potential

[38] *See* Brandon L. Garrett, *The Path of F.C.P.A. Settlements, in* Negotiated Settlements in Bribery Cases: a Principled Approach 25, 38-39 (Tina Søreide & Abiola Mackinwa eds., 2020).
[39] *Id.* at 34.
[40] Marc Alain Bohn et al., *Anti-Corruption*, 53 Year in Rev. 347, 357-59 (2019).
[41] O.C.E.D. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, May 2018, Senate Consideration of Treaty Document 105-43. *See* Eric C. Chaffee, *From Legalized Business Ethics to International Trade Regulation: The Role of the Foreign Corrupt Practices Act and Other Transnational Anti-Bribery Regulations in Fighting Corruption in International Trade*, 65 Mercer L. Rev. 701, 713-23 (2014) (detailed description of the development of anti-corruption laws and agreements).
[42] *See* Glenn Ware & Kindra Mohr, *Anticorruption Litigation Does Not Stop at the Water's Edge*, 39 GLOB. LITIGATOR 59, 61 (2013).
[43] *See, e.g.*, Jeffrey Boles, *Examining the Lax Treatment of Commercial Bribery in the United States: A Prescription for Reform*, 51 AM. BUS. L.J. 119, 120 (2014) (defining commercial bribery as, generally, bribery of non-governmental officials, usually in a business context). For example, if a company employee responsible for selecting a supplier was paid a bribe to select a certain supplier, that payment would be commercial bribery. *Id.* at 119.
[44] *See* Dominic Saglibene, *The U.K. Bribery Act: A Benchmark for Anti-Corruption Reform in the United States*, 23 Transat'L L. & Contemp. Probs.119, 131-35 (2014); *see also* Margaret Ryznar & Samer Korkor, *Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing,* 76 Mo. L. Rev. 415, 438-43 (2011) (discussion on facilitation payments).
[45] *See* Lindsay B. Arrieta, *Taking the "Jeitinho" out of Brazilian Procurement: The Impact of Brazil's Anti-Bribery Law,* 44 Pub. Cony. L. J. 157, 170–74 (2014).
[46] See generally Organisation for Economic Cooperation and Development, Convention Against Bribery, *supra* note 5.

enforcements.[47] For example, the Brazilian Clean Company Act—following anti-corruption policy in the United States—provides incentives for voluntary disclosure.[48] Some development of global anti-corruption efforts may be attributed to the growing international consensus that corruption leads to economic waste and often causes competitive inefficiencies that slow growth. It is generally accepted that "corruption hurts competition, raises prices, negates fair trade, and has social consequences".[49] It is also generally accepted that corruption is linked to human rights abuses.[50] All that is true, and by way of example, the European Commission reports that corruption costs the European Union [the E.U.] at least €120 billion annually.[51] But there are other possible motivations to consider. First, states recognize the substantial anti-corruption penalties collected by U.S. enforcement agencies[52] and have decided that their treasuries could also benefit from the enforcement of similar laws with comparable financial penalties. Second, because most large financial settlements with U.S. enforcement agencies involve non-U.S. companies,[53] some states may view the United States' enforcement of the F.C.P.A. as discriminatory and anti-foreigner in nature. In turn, these states may desire laws they might use affirmatively against foreign companies in the global marketplace. [54] One commentator has more gently asserted that the goal of the F.C.P.A. was not to eradicate corruption, but rather to increase the competitive advantage of U.S. companies in the international marketplace.[55] Empirical data suggests that U.S. prosecutions, including F.C.P.A. prosecutions, increasingly target foreign corporations and foreign corporations pay larger fines than domestic corporations.[56] The latter finding stems from the fact that between 2004 and 2018, "the average F.C.P.A. monetary resolution against U.S. companies was $21,182,931, compared with $75,016,934 for non-U.S. companies".[57]

[47] *See* Garrett, *supra* note 38, at 38.
[48] See, e.g., Sanchez-Badin & Sanchez-Badin, *supra* note 3, at 327.
[49] Ron Brown, EU-China FTA: Enhanced Enforcement and Umbrella Coverage of Anticorruption, 43 HASTINGS INT'L Compar. L. Rev. 211, 213 (2020).
[50] See generally Steve O'Hagan, Fuelling Corruption, Geographical, Nov. 2004, at 50, 50–51.
[51] The Costs of Corruption Across the European Union, see Greens/EFA Eur. Parl., (Dec 7, 2018), union/https://www.greens-efa.eu/en/article/document/the-costs-of-corruption-across-the-european-union/ [U-C78Phttps://perma.cc/9JKU-C78P].
[52] But see Ellen Gutterman, Banning Bribes Abroad: US Enforcement of the Foreign Corrupt Practices Act, 53 OSGOODE HALL L. J. 31, 38 (2015).
[53] *Id.* at 49.
[54] *See* Brewster & Buell, *supra* note 33, at 204. "There are some abroad, especially in Europe, who believe that the United States may be using global corporate enforcement, especially F.C.P.A. enforcement, as a means of assisting U.S. firms in the competition for dominance among multi-nationals." *Id.*
[55] *See* Gutterman, *supra* note 52, at 49. The "central purpose of F.C.P.A. enforcement is to ensure competitive access to global markets by U.S. firms—not to control corruption more generally." *Id.* at 61.
[56] *See* Garrett, *supra* note 38, at 34.
[57] Michael S. Diamant et al., *F.C.P.A Enforcement Against U.S. and Non-U.S. Companies*, 8. MICH. BUS. & ENTRAPRENEURAL L. REV. 353, 371 (2019).

Indeed,

> foreign companies have faced stratospheric monetary penalties compared with domestic companies in recent years. The contrast was particularly acute in 2017, when foreign corporations paid an average of $150,349,415 (or $1.05 billion in total) compared with an average of $16,103,333 (or $96.6 million in total) for domestic corporations.[58]

The following graph demonstrates the disproportionate representation of non-U.S. companies in the largest F.C.P.A. resolutions to date:[59]

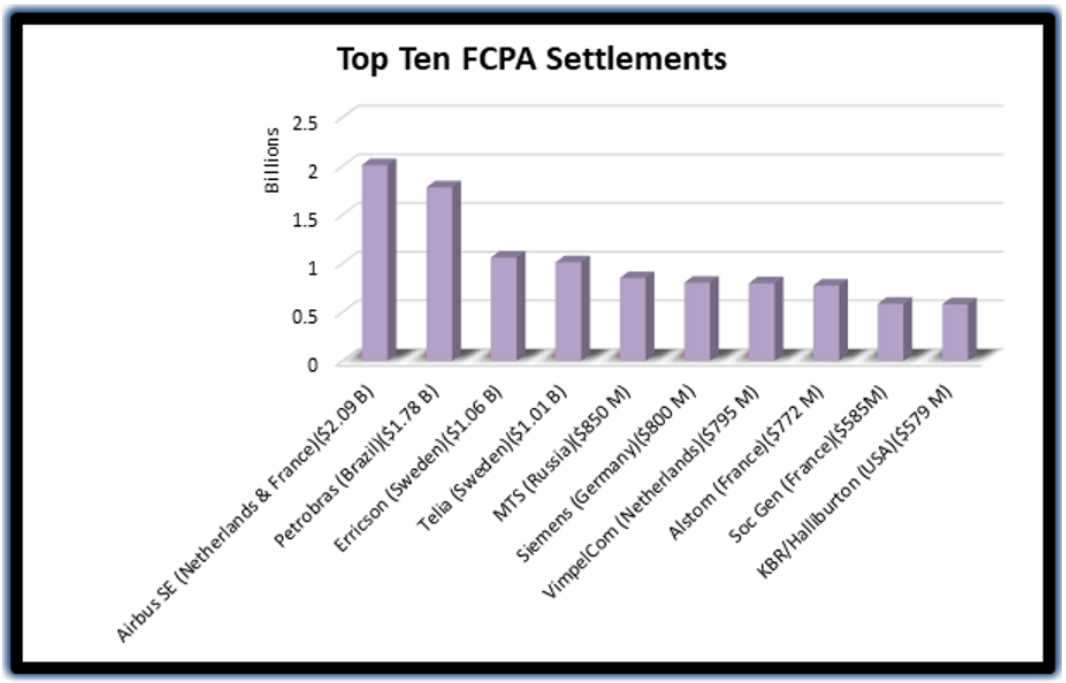

Figure 1

Notwithstanding the debate over the motivations and incentives for the growth of global anti-corruption laws, there is no dispute that these laws have proliferated. With the proliferation of this network of anti-corruption laws, corresponding investigations by various non-U.S. enforcement agencies have also grown.[60] As of December 31, 2019, there are no less than 328 active investigations of bribery of foreign officials being conducted by enforcement authorities in thirty-seven states.[61] Only thirty seven of these

[58] *Id.*

[59] *See generally* Harry Cassin, *Airbus Shatters the F.C.P.A. Top Ten*, F.C.P.A Blog(Feb. 3, 2020, 7:48 AM)https://F.C.P.A.blog.com/2020/02/03/airbus-shatters-the-F.C.P.A.-top-ten/[https://perma.cc/SGE5-J23G].

[60] *See* 2019 Global Enforcement Report, Trace Anti-Bribery Compliance Sols. 6 (2020), https://info.traceinternational.org/2019-ger [https://perma.cc/J3Z2-UBG3] (fill in the fields with requested information; then press "submit" to access report).

[61] *Id.* at 6.

investigations are being conducted by U.S. enforcement agencies.[62] The following graph illustrates these facts as provided by TRACE Anti-Bribery Compliance Solutions:[63]

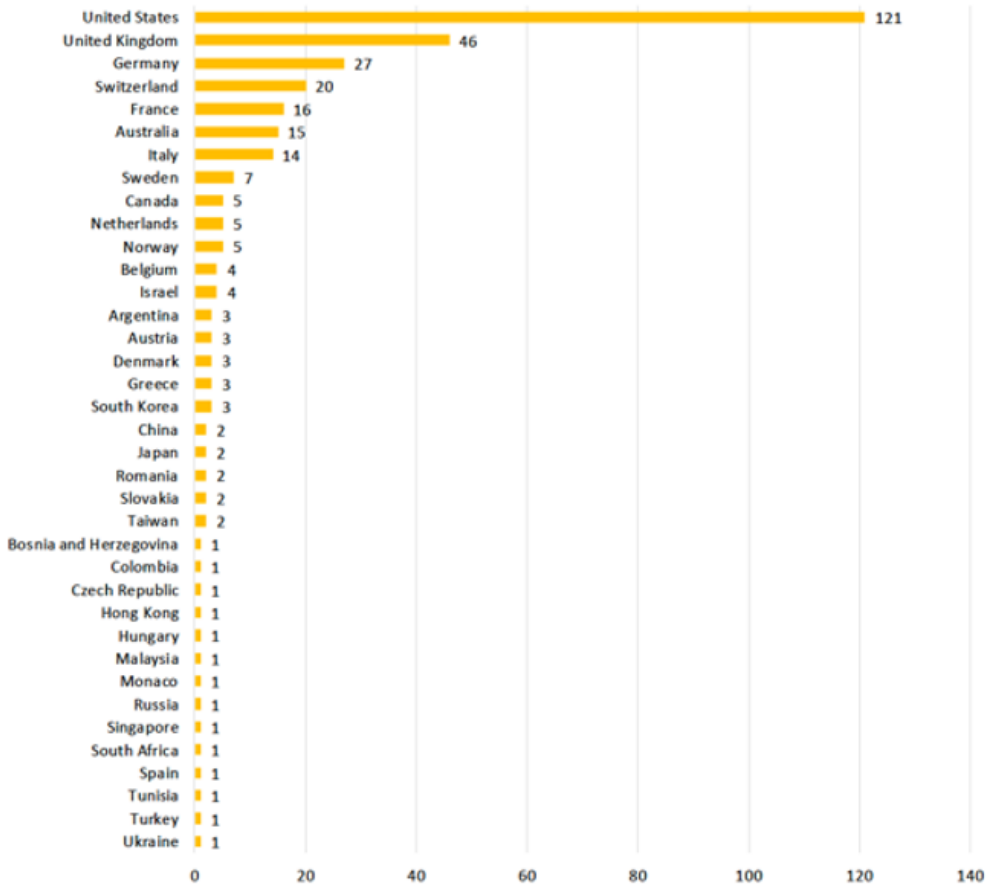

Figure 2: Investigations Concerning Bribery of Foreign Officials by Country

The vast majority of anti-corruption enforcement actions around the world result in negotiated settlement rather than litigation.[64] This is, in part, because the criminal trial risks - in terms of sentences and reputational harm - are quite substantial. Accused parties may also be motivated to settle because litigating an anti-corruption action with one state likely forecloses the possibility for future negotiated settlements with other states.[65] Historically, the concept of settled corporate criminal resolution was resisted by many in continental European legal circles, both inside and outside of the anti-corruption context, because of the notion that such settlements ran contrary to

[62] *Id.*
[63] *Id.* at 6 fig. 1.
[64] *See generally* Nick Gersh, *The Curious Absence of F.C.P.A. Trials*, GAB: GLOB ANTICORRUPTION BLOG (Sept. 8, 2017), https://globalanticorruptionblog.com/2017/09/08/the-curious-absence-of-F.C.P.A.-trials/ [https://perma.cc/5VY4-AYYW].
[65] *Id.*

fairness, the adversarial pursuit of truth, and the privilege against self-incrimination.[66] But the merit of negotiated resolution of corporate criminal liability in the anti-corruption context is widely accepted around the globe.

As global anti-corruption laws proliferated, circumstances arose where states recognized concurrent jurisdiction over the same conduct that gave rise to potential liability. These circumstances led to the advent of carbon copy enforcement, which refers to successive enforcement action initiated by several foreign states with respect to the same or similar nucleus of facts.[67] Butros and Funk "use the term carbon copy prosecutions to refer to successive, duplicative prosecutions by multiple sovereigns for conduct transgressing the laws of several nations, but arising out of the same common nucleus of operative facts".[68] The practice essentially makes it easier for subsequent enforcement actions to piggyback off the successful earlier enforcement action. This is true because most settlements - particularly under D.O.J. practice - typically include an agreed statement of facts.[69] Many Department of Justice's Foreign Corrupt Practices Act Settlements [hereinafter the D.O.J. F.C.P.A. Settlements] also include an obligation on the settling entity to cooperate with foreign enforcement agencies.[70] Accordingly, anti-corruption enforcement authorities learned to use the facts admitted in the D.O.J. F.C.P.A. settlement documents to subsequently assert additional liability against the settling parties.[71]

The advent of carbon copy enforcement led to an outcry from the anti-corruption defense bar that their clients were being subjected to a "double jeopardy" where they had no ability to assure themselves that a settlement with one enforcement agency would provide certainty against future prosecutions by other states and/or administrative actions by international entities.[72] Although this assertion has

[66] *See* Mark Pieth, *Negotiating Settlements in a Broader Law Enforcement Context, in* Negotiated Settlements in Bribery Cases: a Principled Approach 19 (Tina Soreide & Abiola Mackinwa eds., 2020).

[67] *See* Andrew S. Boutros & T. Markus Funk, *"Carbon Copy" Prosecution: A Growing Anticorruption Phenomenon in a Shrinking World,* 2012 U. Ch.I. Legal. F. 259, 269 (2012).

[68] *Id.*

[69] *Id.* at 275.

[70] *Id.* at 285.

[71] *See* Oded, *supra* note 24, at 235–36. The United States is not always the lead enforcer in copy-cat enforcement scenarios. For instance, in the *Alcatel-Lucent S.A.* matter, the D.O.J. and Security and Exchange commission [hereinafter S.E.C.] reached settlement with Alcatel-Lucent after the company had already settled the same conduct with Costa Rica. In the *GlaskoSmithKline* [hereinafter the G.S.K.] matter, G.S.K. reached settlement with Chinese authorities two years before it reached a settlement with the S.E.C. . *Id.*

[72] *See* Boutros & Funk, *supra* note 67, at 290–91. Indeed, the issues of certainty and finality are the bedrock of negotiated settlement process in U.S. domestic litigation. *See, e.g.*, Poole v. Recycling Serv. of Fla., Inc, 2:18-cv-810-FtM-99MRM, 2020 WL 1496151, 7 (M.D. Fla. 2020) ("[T]he proposed settlement containing mutual releases buy Plaintiff certainty and finality with respect to this litigation".); *see also* Gossinger v. Ass'n of Apartment Owners of Regency of Ala Wai, 835 P.2d 627, 633 (Haw. Super. Ct. 1992) (noting that public policy "favors the finality of negotiated settlements that avoid the costs and uncertainties of protracted litigation").

merit, it should be noted that once an entity becomes aware of issues surrounding potential international corruption, competent legal counsel should advise the client to consider exposure under the law of every state that might successfully assert jurisdiction related to the alleged conduct. For example, while discussing the problem of carbon copy enforcement, Oded points to the consortium that paid bribes to Nigerian officials (through a British lawyer), in relation to a natural gas processing plant in Bonny Island, Nigeria (commonly known as the "Bonny Island" matter).[73] The consortium was comprised of French, Italian, American, and Japanese companies.[74] Oded establishes that the parties, perhaps unfairly, were subjected to multiple subsequent enforcement actions over a period of six years after they settled with the U.S. enforcement authorities.[75] But given the sophistication of the parties involved and their respective lawyers, it is hard to imagine the consortium members did not consider - and likely deeply analyze - the full scope of multiple jurisdictional exposure at the outset of their own internal factual investigation, and certainly before they settled with the United States.

Nonetheless, uncoordinated and duplicative anti-corruption enforcement has been criticized for chilling self-reporting of potential violations, as a single report to one enforcement agency might ignite a firestorm of uncoordinated investigations and related expenses.[76] With over-enforcement, "[t]he worry here. . . is that national regulators, acting alone and without coordination with other national regulators, might deter beneficial corporate behavior or encourage wasteful corporate behavior".[77] Moreover, the proliferation of duplicative enforcements has been criticized by some for the disproportionate effects it renders on employers, shareholders, financiers, and customers of the culpable parties.[78] The criticism has been so substantial that some commentators have called for the establishment of a "supranational administrative body" to handle cases of overlapping anti-corruption jurisdiction in the transnational

[73] *See, e.g.*, Oded, *supra* note 24, at 234.

[74] *See* Richard L. Cassin, *'They Followed the Leader into F.C.P.A. Oblivion'*, F.C.P.A. BLOG (Sept. 17, 2013, 6:18 AM), https://F.C.P.A.blog.com/2013/09/17/they-followed-the-leader-into-F.C.P.A.-oblivion/ [https://perma.cc/867J-SBZX].

[75] *See, e.g.*, Oded, *supra* note 24, at 234.

[76] *See* Boutros & Funk, *supra* note 67, at 286–87. Indeed, this collective action excessive enforcement problem stands in stark contrast to recent commercial bribery circumstances, such as the FIFA matter, where many states failed to move forward with enforcement because of an apparent lack of jurisdiction and/or appropriate enforcement mechanism. *See, e.g.*, *Tip of the Iceberg: The Role of Banks in the FIFA Story*, Glob. Witness (June 19, 2015), https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/banks/tip-iceberg-role-banks-fifa-story/?gclid=Cj0KCQjw3s_4BRDPARIsAJsyoLMo3TT7JARKh-3t9ReYOnvKsT37zH6nlvQHiPeyUYEqz1fW1khsj8AaArYcEALw_wcB [https://perma.cc/DF73-YU4U].

[77] William Magnuson, *International Corporate Bribery and Unilateral Enforcement,* 51 Colum. J. Transnat'L L. 360, 413 (2013).

[78] *See, e.g.*, Oded, *supra* note 24, at 237–38; Jay Holtmeier, *Cross-Border Corruption Enforcement: A Case for Measured Coordination Among Multiple Enforcement Authorities*, 84 Fordham L. Rev. 493, 516 (2015).

context.[79] Given this context and in response to these challenges and criticism, the D.O.J. issued the "No Piling on Policy".[80] While the policy certainly provides some level of reassurance to the anti-corruption defense bar, questions remain as to how the policy is carried forth within the D.O.J. and how U.S. and international enforcers cooperate and coordinate amongst themselves in the anti-corruption context.

3. INSIGHTS FROM RECENT TRANSNATIONAL ANTI-CORRUPTION SETTLEMENTS

Recent transnational anti-corruption resolutions might provide both explicit and implicit indications of the development of guiding principles utilized by enforcement agencies in deciding when, and under what circumstances, to cooperate, coordinate, and apportion financial penalties in the investigation and resolution of transnational anti-corruption cases. While the following review is not exhaustive, it is intended to capture recent resolutions that might reflect practices and emerging principles currently utilized by enforcement agencies.

3.1. SOCIÉTÉ GÉNÉRALE S.A. CORRUPTION SETTLEMENT - UNITED STATES AND FRANCE

In June 2018, Société Générale S.A. [hereinafter Soc. Gen.] entered into coordinated settlements with French and U.S. enforcement authorities in relation to bribes it paid to Libyan officials and its manipulation of the London Inter Bank Offered Rate [hereinafter L.I.B.O.R.].[81] Soc. Gen. agreed to pay France and the United States more than $585 million related to the bribing scheme.[82] The United States credited Soc. Gen. $292,776,444 that it

[79] *But see* Thomas J. Bussen, *Midnight in the Garden of Ne Bis in Idem: The New Urgency for an International Enforcement Mechanism*, 23 CARDOZO J. INT'L Compar L. 485, 510 (2015).

[80] Jay Holtmeier et al., *New D.O.J. Policy to Prevent "Piling-On"*, WILMERHALE (May 30, 2018), https://www.wilmerhale.com/en/insights/client-alerts/2018-05-30-new-D.O.J.-policy-to-prevent-piling-on [https://perma.cc/8U4R-PQ4Z].

[81] *See* Press Release, U.S. Dep't Just., Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating L.I.B.O.R. Rate (June 4, 2018), https://www.justice.gov/usao-edny/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan [https://perma.cc/VD3S-38BJ].

[82] *Id.*; United States v. SGA Société Générale S.A., 18-CR-274, Plea Agreement 2, (D.N.Y. 2018) (dismissed as part of a deferred prosecution agreement, explaining that Soc. Gen. previously agreed to pay the Libyan Investment Authority $1.1 billion to settle the corruption conduct).

paid to the Parquet National Financier [hereinafter P.N.F.].[83] The U.S. credit equaled exactly fifty percent of the total criminal penalty due to the United States.[84] In announcing the settlement, the D.O.J. stated that it was the "first coordinated resolution with French authorities in a foreign bribery case".[85] The settlement did not include the requirement that Soc. Gen. engage an independent F.C.P.A. monitor,[86] in part, because Soc. Gen. was to be monitored by the A.F.A. .[87] In announcing the settlement, the D.O.J. expressly acknowledged the cooperation and assistance provided by the P.N.F., the United Kingdom's Serious Fraud Office [hereinafter S.F.O.], the Federal Office of Justice in Switzerland, and the Office of Attorney General in Switzerland [hereinafter Swiss A.G.].[88] The United States settlement with Soc. Gen. included a D.P.A. requiring cooperation with international law enforcement efforts and a detailed agreed statement of facts.[89]

The D.O.J. opened its investigation nearly two years before the P.N.F. opened its investigation of Soc. Gen. and the United States shared relevant internal Soc. Gen. documents with its French counterparts.[90] Indeed, it appears the D.O.J. delayed resolution with Soc. Gen. to allow the P.N.F. to complete its inquiry and conclude a joint resolution. French commentators believe the delegation of monitoring responsibility to the A.F.A. was of substantial import, as it signaled the credibility and authority of French enforcement agencies.[91]

[83] *See* Press Release, U.S. Dep't of Just., Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating L.I.B.O.R. Rate, *supra* note 81.
[84] *Id.*
[85] *Id.*
[86] *See* discussion *infra* Section 5.5. (further discussing monitors, which in this context are private attorneys engaged by the corporate entity at their expense and with the approval of the D.O.J. to monitor the entity's prospective remediation and compliance efforts under the terms of the agreement between the entity and the D.O.J.).
[87] *See* Press Release, U.S. Dep't of Just., Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating L.I.B.O.R. Rate, *supra* note 82.
[88] *Id.*
[89] S.G.A. Société Générale S.A., *supra* note 82 (in accordance with a deferred prosecution agreement).
[90] *See* Valérie de Senneville & Sharon Wajsbrot, *Le parquet enquête sur les opérations de Société Générale en Libye* [The Prosecution Investigates the Operations of Societe Generale in Libya], Les Echos, (Nov. 8, 2017, 1:01 AM), https://www.lesechos.fr/2017/11/le-parquet-enquete-sur-les-operations-de-societe-generale-en-libye-179033 [https://perma.cc/R3KJ-Q99A].
[91] *Id.*

3.2. AIRBUS S.E. CORRUPTION SETTLEMENT - UNITED STATES, FRANCE AND UNITED KINGDOM

In January 2020, Airbus SE [hereinafter Airbus] settled a corruption inquiry with U.S., French, and British enforcement authorities.[92] Airbus paid $3.9 billion in total to settle charges related to its scheme to bribe government officials around the world and to resolve the company's violations of the U.S. Arms Export Control Act [A.E.C.A.] and the International Traffic in Arms Regulations [hereinafter I.T.A.R.].[93] Airbus agreed to pay the United States $527 million to settle the F.C.P.A. and I.T.A.R. violations, France $2.29 billion to settle foreign official and commercial bribery violations, and the United Kingdom $1.09 billion related to bribes paid in Malaysia, Sri Lanka, Taiwan, Indonesia, and Ghana.[94] The U.S. settlement was reduced based on a credit for part of the fine paid to French authorities.[95] Under the resolution, the D.O.J. declined to require an appointment of a compliance monitor, in part because Airbus was subject to oversight from the A.F.A. .[96] The resolution expressly recognizes the U.S. ability to assert F.C.P.A. jurisdiction over Airbus "is limited" given that Airbus is neither an issuer nor domestic concern.[97]

In reference to international coordination in Airbus, Assistant Attorney General Brian A. Benczkowski stated:

> This coordinated resolution was possible thanks to the dedicated effort of our foreign partners at the Serious Fraud Office in the United Kingdom and the P.N.F. in France. The [D.O.J.] will continue to work aggressively with our partners across the globe to root out corruption, particularly corruption that harms American interests.[98]

[92] See Press Release, U.S. Dep't of Just., Airbus Agrees to Pay Over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and I.T.A.R. Case, The United States Department of Justice (Jan. 31, 2018), https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itarcase#:~:text=January%2031%2C%202020,Airbus%20Agrees%20to%20Pay%20over%20%243.9%20Billion%20in%20Global%20Penalties,Foreign%20Bribery%20and%20ITAR%20Case&text=The%20FCPA%20charge%20arose%20out,including%20contracts%20to%20sell%20aircraft [https://perma.cc/46K844J2].

[93] Id.

[94] Id.

[95] Id.

[96] *See* United States v. Airbus SE, 1226425, Airbus Deferred Prosecution Agreement 4(f), (D.D.C. 2020), The United States Department of Justice, https://www.justice.gov/opa/press-release/file/1241466/download [https://perma.cc/R6XN-WUXU].

[97] *Id.* § 4(i).

[98] U.S. Dep't Just., Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and I.T.A.R. Case, *supra* note 92.

Although anti-corruption inquiries of Airbus began with the S.F.O. in April 2016,[99] France and the United Kingdom investigated Airbus together as a part of a "Joint Investigative Team".[100]

In Airbus, it appears the D.O.J. made an explicit decision to seek a substantially lower penalty than its French and British counterparts, instead of only "crediting", because of Airbus's nexus to Europe and those states in particular.[101] In announcing the joint resolution, the D.O.J. stated:

> [F]or the F.C.P.A.-related conduct, the U.S. resolution recognizes the strength of France's and the United Kingdom's interests over the Company's corruption-related conduct, as well as the compelling equities of France and the United Kingdom to vindicate their respective interests as those countries deem appropriate, and the [D.O.J.] has taken into account these countries' determination of the appropriate resolution into all aspects of the U.S. resolution.[102]

3.3. VIMPELCOM CORRUPTION SETTLEMENT - UNITED STATES AND THE NETHERLANDS

In February 2016, VimpelCom Ltd. [hereinafter VimpelCom] and its wholly owned Uzbek subsidiary, Unitel LLC [hereinafter Unitel], settled allegations that they paid bribes to government officials in Uzbekistan to allow them to enter and operate in the Uzbek telecommunications market.[103] VimpelCom is based in the Netherlands and is the world's sixth largest telecommunications company.[104] VimpelCom agreed with the D.O.J. to pay $230 million.[105] VimpelCom agreed to pay the S.E.C. and the Public Prosecution Service of the Netherlands - Openbaar Ministrie [hereinafter the O.M.] - $375 million (to be divided amongst them).[106] Separately, VimpelCom agreed to pay the O.M. $230

[99] *See* Bruno Trevidic, *Airbus renforce son dispositif anti-corruption* [Airbus Strengthens its Anticorruption System], Les Echos, (May 22, 2017, 1:53 PM), https://www.lesechos.fr/2017/05/airbus-renforce-son-dispositif-anti-corruption-168670 [https://perma.cc/LR6S-DV6K].
[100] *Id.*
[101] U.S. Dep't Just., Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and I.T.A.R. Case, *supra* note 92.
[102] *Id.*
[103] *See* Press Release, U.S. Dep't Just., VimpelCom Limited and Unitel LLC Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Schemes (Feb. 18, 2016), https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more795-million [https://perma.cc/U9HV-W6XW].
[104] *Id.*
[105] *Id.*
[106] *Id.*

million in criminal penalties.[107] The D.O.J. agreed to credit the criminal penalty paid to the O.M. towards the total U.S. criminal penalty.[108] In separate civil actions, the D.O.J. sought the forfeiture of more than $850 million held in bank accounts in Switzerland, Belgium, Luxembourg, and Ireland under the theory that these funds were bribe payments or monies used to launder bribe payments.[109] The U.S. investigation was assisted by law enforcement in the Netherlands, Sweden, Switzerland, Latvia, Belgium, France, Ireland, Luxembourg, and the United Kingdom.[110]

3.4. TELIA CORRUPTION SETTLEMENT - UNITED STATES, SWEDEN, AND THE NETHERLANDS

In November 2017, Swedish company Telia Company AB [hereinafter Telia] and its Uzbek subsidiary, Coscom L.L.C. [hereinafter Coscom], agreed with Sweden and the United States to settle allegations that they paid bribes to Uzbek government officials to secure telecommunications opportunities.[111] In resolution with the D.O.J., Telia agreed to pay a criminal penalty of $275 million.[112] Telia agreed with the S.E.C. to a disgorgement of profits and interest of $457 million, with the S.E.C. agreeing to credit half that amount in disgorged profits if Telia makes payment of the same to either the Swedish Prosecution Authority, or the O.M. .[113] Separately, Telia agreed to pay O.M. $274 million in criminal penalties.[114] The D.O.J. agreed to credit the criminal penalty paid to the O.M. in its agreement.[115] In announcing the settlement, Acting D.O.J. Assistant Attorney General Kenneth A. Blanco stated the following: "This resolution underscores the Department's continued and unwavering commitment to robust F.C.P.A. and white-collar criminal enforcement. It also demonstrates the Department's cooperative posture with its foreign counterparts to stamp out international corruption and to reach fair, appropriate and coordinated resolutions".[116]

[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *See* Press Release, U.S. Dep't Just., Telia Company AB and its Uzbek Subsidiary Enter into a Global Foreign Bribery Resolution of More than $965 Million for Corrupt Payments in Uzbekistan, (Sept. 21, 2017), https://www.justice.gov/opa/pr/telia-company-ab-and-its-uzbek-subsidiary-enter-global-foreign-bribery-resolutionmore965#:~:text=Stockholm%2Dbased%20Telia%20Company%20AB,than%20%24965%20million%20to%20resolve [https://perma.cc/3N55-7EME].
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*

The Telia investigation was originally opened by Swedish authorities based on Swedish media reports about the corruption scheme.[117] Swedish, Dutch, and U.S. law enforcement provided each other with cooperation and assistance.[118] Assistance was also provided by law enforcement from Austria, Belgium, Cyprus, France, Ireland, Latvia, Luxembourg, Norway, Switzerland, the Isle of Man, and the United Kingdom.[119]

3.5. PETROBRAS AND CORRUPTION SETTLEMENT - BRAZIL AND THE UNITED STATES

In September 2018, Petróleo Brasileiro S.A.-Petrobras [hereinafter Petrobras] reached agreement with Brazil and the United States to settle allegations Petrobras made corrupt payments to politicians and political parties in Brazil.[120] Under an arrangement involving the D.O.J., S.E.C., and the Ministerio Publico Federal in Brazil [hereinafter M.P.L.], Petrobras agreed to pay a total criminal penalty of $853 million, with the United States receiving twenty percent and Brazil receiving eighty percent.[121] In explaining the settlement, the D.O.J. stated that the case presented a number of unique factors, "including that Petrobras is a Brazilian-owned company that entered into a resolution with Brazilian authorities and is subject to oversight by Brazilian authorities".[122] Separately, Petrobras agreed with the S.E.C. to disgorgement of profits and interests in the amount of $933 million.[123] In declining to require appointment of a compliance monitor, D.O.J. noted that Petrobras "will be subject to oversight by Brazilian authorities, including Brazil's Tribunal de Contas de União and Comissão de Valories Mobiliários".[124]

[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *See* Press Release, U.S. Dep't of Just., Petróleo Brasilero S.A.-Petrobras Agrees to Pay More Than $850 Million for F.C.P.A. Violations, THE UNITED STATES DEPARTMENT OF JUSTICE (Sept. 27, 2018), https://www.justice.gov/opa/pr/petr-leo-brasileiro-sa-petrobras-agrees-pay-more-850-million-F.C.P.A.-violations [https://perma.cc/6RE2-CB5K].
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] Letter from Sandra Moser, Acting Chief, U.S. Dep't Just., to Joseph Warin, Gibson, Dunn, & Crutcher, L.L.P. (Sept. 26, 2018), https://F.C.P.A..shearman.com/siteFiles/F.C.P.A.%20Cases/Petrobras%20-%20NPA.pdf [https://perma.cc/6N8R-E2LS].

3.6. ODEBRECHT AND BRASKEM CORRUPTION SETTLEMENT - BRAZIL, UNITED STATES, AND SWITZERLAND

In December 2016, Brazilian construction company Odebrecht S.A. [hereinafter Odebrecht] and Brazilian petrochemical company Braskem S.A. [hereinafter Braskem] resolved claims with Brazil, the United States, and Switzerland arising out of their schemes to pay bribes around the world.[125] The resolution was structured through settlement with the D.O.J., the M.P.L., and the Swiss A.G., with the United States and Switzerland receiving ten percent each and Brazil twenty percent of the total criminal penalty of $4.5 billion from Odebrecht.[126]

In resolution with D.O.J., Braskem agreed to pay the United States $632 million in criminal penalties.[127] Braskem also agreed with the S.E.C., M.P.L., and Swiss A.G. that Braskem would pay a total of $325 million in disgorgement of profits, with seventy percent going to Brazil and fifteen percent each going to Switzerland and the United States.[128]

The Odebrecht settlement was structured so that the U.S. criminal penalty was paid first, and the Brazilian and Swiss penalties were to be paid in subsequent installments.[129] This is because Odebrecht claimed it did not have the financial ability to pay the penalties in one lump sum.[130]

The Odebrecht settlement also served to emphasize the continuing challenge of carbon copy prosecutions[131] in the transnational anti-corruption context. As part of the Odebrecht settlement, the company admitted to bribery conduct in Angola, Argentina, Colombia, Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela.[132] Subsequently many of these jurisdictions either then began negotiating separate settlements with Odebrecht or banned Odebrecht from government contracting.[133]

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[125] *See* Press Release, U.S. Dep't Just., Odebrecht and Braskem Plead Guilty and Agree to Pay at Least $3.5 Billion in Global Penalties to Resolve Largest Foreign Bribery Case in History, (Dec. 21, 2016), https://www.justice.gov/opa/pr/odebrecht-and-braskem-plead-guilty-and-agree-pay-least-35-billion-global-penaltiesresolve#: :text=Odebrecht%20S.A.%20(Odebrecht)%2C%20a,States%2C%20Brazil%20and%20Switzerland%20arising [https://perma.cc/W7FN-KSCE].

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *See generally* Sanchez-Badin & Sanchez-Badin, *supra* note 3, at 329–30.

[130] *Id.*

[131] *See* discussion *supra* Section 4.2. .

[132] *See* Sanchez-Badin & Sanchez-Badin, *supra* note 3, at 330.

[133] *Id.*

3.7. GURLAP SYSTEMS LIMITED CORRUPTION SETTLEMENT - THE UNITED KINGDOM

In October 2019, the United Kingdom Serious Frauds Office entered into a deferred prosecution agreement with Guralp Systems Limited [hereinafter Guralp] to settle claims that Guralp paid bribes to a Korean official of the Korea Institute of Geoscience and Mineral Resources, in relation to opportunities to sell seismic measuring equipment to the same.[134] As part of the resolution, Guralp agreed to pay the United Kingdom two million pounds in profit disgorgement.[135]

While the D.O.J. opened an investigation Guralp, it declined to move forward with a prosecution in part because of

> the fact that [Guralp], a U.K. company with its principal place of business in the U.K., is the subject of an ongoing paral investigation by the U.K.'s Serious Fraud Office for violations of law relating to the same conduct and has committed to accepting responsibility for that conduct with the S.F.O. .[136]

3.8. ROLLS-ROYCE PLC CORRUPTION SETTLEMENT - BRAZIL, UNITED KINGDOM, AND UNITED STATES

In January 2017, Rolls Royce P.L.C. [hereinafter Rolls-Royce] agreed to pay $800 million in penalties to be split between Brazil, the United Kingdom, and the United States to settle charges it paid bribes in Thailand, Brazil, Kazakhstan, Azerbaijan, Angola, and Iraq.[137] Rolls-Royce agreed to pay the United States $170 million and enter into a D.P.A.[138] Rolls-Royce agreed to pay the United Kingdom $604 million and enter into a D.P.A.[139] Rolls-Royce agreed to pay Brazilian authorities $26 million with that amount to be

[134] *See generally* Statement of Facts, Regina (Serious Fraud Office) v. Guralp Systems Ltd., https://cdn.wide-area.com/acuris/files/private-equity-law-report/documents/Guralp%20Statement%20of%20Facts.pdf [https://perma.cc/T7NT-R94V], (last visited Dec. 19, 2020).

[135] *See generally* Deferred Prosection Agreement, Serious Fraud Office v. Guralp Systems Ltd., SERIOUS FREUD OFFICE, https://www.S.F.O..gov.uk/download/deferred-prosecution-agreement-statement-of-facts-approved-judgment-S.F.O.-v-guralp-systems-ltd/ [https://perma.cc/EUV6-QX5K], (last visited Dec. 19, 2020).

[136] *See* Letter from Daniel S. Kahn, Deputy Chief, U.S. Dep't Just., Criminal Division to Matthew Reinhard, at Miller and Chevalier Chartered, THE UNITED STATES DEPARTMENT OF JUSTICE (Aug. 20, 2018), https://www.justice.gov/criminal-fraud/page/file/1088621/download [https://perma.cc/58BJ-2KMN].

[137] *See* Press Release, *U.S. Dep't Just., Rolls-Royce P.L.C. Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case*, THE UNITED STATES DEPARTMENT OF JUSTICE (Jan. 17, 2017), https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act [https://perma.cc/V7BG-VL8X].

[138] *Id.*

[139] *Id.*

credited against the U.S. settlement.[140] The United Kingdom considered, but later decided against, bringing claims against individuals.[141] Austria, Germany, the Netherlands, Singapore, and Turkey provided significant investigative cooperation.[142]

3.9. CORRUPTION SETTLEMENT SUMMATION TABLE

The following summation table may assist in further analysis of the aforementioned resolutions:

Matter (Home State)	Total Financial Penalty with Crediting	States Involved	"Home" State Stake	"Away" States Stake
Soc. Gen. (Fr.)	$585 million	U.S., Fr.	$292.5 million (Fr.)	$292.5 million (U.S.)
Airbus (Fr.)	$3.9 billion	Fr., U.K., U.S.	$2.29 billion (Fr.)	$1.09 billion (U.K.) $527 million (U.S.)
VimpelCom (Neth.)	$605 million	Neth., U.S.	Unknown[143] (Neth.)	Unknown (U.S.)
Telia (Swed.)	$732 million	Swed., Neth., U.S.	$229 million (Swed.)	$274 million (Neth.) $229 million (U.S.)
Petrobras (Braz.)	$853 million	Braz., U.S.	$682 million (Braz.)	$171 million (U.S.)
Odebrecht (Braz.)	$4.5 billion	Braz., U.S., Switz.	$3.6 billion (Braz.)	$450 million (U.S.) $450 million (Switz.)
Braskem (Braz.)	$957 million	Braz., U.S., Switz.	$228 million (Braz.)	$680 million (U.S.) $49 million (Switz.)
Guralp (U.K.)	£2 million	U.K., U.S. (potentially)	£2 million (U.K.)	$0 (U.S.)
Rolls Royce (U.K.)	$774 million	U.K., Brazil, U.S.	$604 million (U.K.)	$144 million (U.S.) $26 million (Brazil)

Table 1

[140] *Id.*

[141] *But see* Henry Cassin, *UK Ends Draft Investigation of GSK and Individuals at Rolls-Royce*, F.C.P.A. BLOG (Feb. 25, 2019, 1:28 PM), https://F.C.P.A.blog.com/2019/02/25/uk-ends-graft-investigations-of-gsk-and-individuals-at-rolls/ [https://perma.cc/GBR8-458H]; *see also* Case Updates, U.K. Serious Frauds Off., S.F.O. Closes GlaxoSmithKline Investigation and Investigation into Rolls-Royce Individuals, SERIOUS FREUD OFFICE (Feb. 22, 2019), https://www.S.F.O.gov.uk/2019/02/22/S.F.O.-closes-glaxosmithkline-investigation-and-investigation-into-rolls-royce-individuals/ [https://perma.cc/8YD3-U34B].

[142] *See* United States Dep't. of Justice, Rolls-Royce P.L.C. Agrees to Pay $170 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act Case, *supra* note 137.

[143] The exact terms of the VimpelCom apportionment between the Netherlands and United States is unclear from publicly available information. See Press Release, U.S. Dep't Just., VimpelCom Limited and Unitel L.L.C. Enter into Global Foreign Bribery Resolution of More Than $795 Million; United States Seeks $850 Million Forfeiture in Corrupt Proceeds of Bribery Schemes, *supra* note 103.

4. INSIGHT FROM ANTI-CORRUPTION ENFORCERS

In the course of researching these issues, several former, and one current, government officials responsible for enforcement of anti-corruption laws generously provided insights based on their personal professional experiences as to how states interact in the context of transnational anti-corruption investigations and settlements. A description of their input follows.

4.1. ANTI-CORRUPTION INVESTIGATIONS

State-to-state cooperation in transnational anti-corruption investigations is often obligatory pursuant to either international conventions or bilateral treaties.[144] There is, however, an informal component to cooperation.[145] As a matter of practice, anti-corruption prosecutors work to develop personal relationships with their foreign counterparts.[146] For instance, the United States routinely sends D.O.J. anti-corruption prosecutors to international meetings and conventions regarding anti-corruption issues.[147] The D.O.J. and S.E.C. recently hosted non-U.S. anti-corruption prosecutors for a meeting on anti-corruption issues.[148] Accordingly, when they seek foreign cooperation in a particular investigation, enforcers often simply pick up the phone and call their known foreign contact.[149] But for these personal relationships, much of the investigatory cooperation we have recently seen in this area would not have developed.[150] The more formal cooperation request process, typically through the M.L.A.T. procedure is often cumbersome and recipient states may be non-responsive.[151] Even with the M.L.A.T. process, successful cooperation is greatly enhanced in the presence of a preexisting professional relationship.[152]

Deciding whether to seek international cooperation in the investigation phase often turns on a number of factors and is essentially a subjective balancing test. For instance, enforcement agencies might balance the benefits of cooperation with the

[144] *See* Telephone Interview with Ephraim Wernick, Partner, Vinson & Elkins, L.L.P. (July 1, 2020) (Wernick is the former Assistant Chief for the U.S. Department of Justice's Criminal Fraud Section and the former U.S. delegate and negotiator on anticorruption issues to O.E.C.D. and the United Nations. Wernick was also a negotiator of the anticorruption component of NAFTA 2.0.).

[145] *See generally* Telephone Interview with Taavi Pern, Chief State Prosecutor, Prosecution Dep't of the Estonian Prosecutor General, (July 15, 2020).

[146] *Id.*; *see* Telephone Interview with Marcello Miller, Former Federal Prosecutor, Brazilian Public Prosecutor's office (July 14, 2020) (Miller worked extensively on both the Embraer and Odebrecht matters).

[147] *See, e.g.*, Telephone Interview with Ephraim Wernick, *supra* note 144.

[148] *Id.*

[149] *Id.*

[150] *But see* Telephone Interview with Marcello Miller, *supra* note 146.

[151] *Id.*

[152] *Id.*

increases in bureaucratic complications and potential multiplicity of discovery obligations.[153] By deciding not to seek cooperation, particularly with the country that is the situs of the alleged bribing conduct, enforcers run the risk of angering their foreign counterparts if the investigation is later revealed.[154] Moreover, enforcers might seek foreign cooperation as a method of building personal relationships and to incentivize the development of foreign anti-corruption capabilities.[155] For example, if a U.S. enforcement agency developed corruption evidence but did not have a jurisdictional basis to assert a claim under U.S. law, it might seek foreign investigation cooperation with a state that does have jurisdiction both as a method of furthering the interest of justice and encouraging the development of that state's anti-corruption capabilities.[156] In other jurisdictions, however, the process for seeking international cooperation may be more formalized and might be initiated by separate officials before the matter is presented to the actual prosecutor.[157]

Circumstances arise where an enforcement agency may decline to consider cooperation and assistance from a foreign enforcement agency if there are concerns about foreign agency integrity, corruption, or the ability to maintain the covert nature of investigation.[158] Enforcers from some states might also decline to agree to a foreign anti-corruption investigation cooperation request if there were substantial concerns that the investigation was solely motivated by political considerations.[159] Some particularly non-friendly states may even decline a formal cooperation request based on treaty obligations seemingly to protect investigatory targets within their borders.[160] In other instances, enforcers might decline to seek cooperation in an investigation from a jurisdiction that retains the death penalty for corruption offenses.[161] In some states, like Brazil for example, cooperation is non-discretionary as a matter of law.[162]

Additionally, there are limits to the extent of cooperation. For example, it would not be possible for U.S. enforcement agencies to enter into a joint investigation team - as France and the United Kingdom did in Airbus[163] - because of U.S. concerns about discovery

[153] *See, e.g.*, Telephone Interview with Patrick Pericak, Senior Managing Director, FTI Consulting (July 2, 2020) (Pericak is currently a Senior Managing Director at FTI Consulting).
[154] *Id.*
[155] *See generally* Telephone Interview with Ephraim Wernick, *supra* note 144.
[156] *See, e.g.*, Telephone Interview with Patrick Pericak, *supra* note 153.
[157] *But see* Telephone Interview with Former Joint Head of Bribery and Corruption, United Kingdom's Serious Fraud Office ("S.F.O.") (July 8, 2020).
[158] *See* Telephone Interview with Ephraim Wernick, *supra* note 144.
[159] *See generally* Telephone Interview with Patrick Pericak, *supra* note 153.
[160] *See* Telephone Interview with Taavi Pern, *supra* note 145.
[161] *See* Telephone Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[162] *See, e.g.*, Telephone Interview with Marcello Miller, *supra* note 146.
[163] *See, e.g.*, The label "joint investigation team" may somewhat exaggerate the level of cooperation entailed by this arrangement. Typically, although the investigation is run jointly, the enforcers from different countries maintain a certain level of independence. *See also* Telephone Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.

obligations.[164] Cooperation is informal, and enforcement agencies may work nearly in unison.[165] In practice, given the complexities of differences in cultures and legal systems, the investigation cooperation process may be frustrating and bear little fruit.[166]

4.2. ANTI-CORRUPTION SETTLEMENTS

In deciding whether to coordinate with foreign anti-corruption enforcers during the resolution phase, enforcement professionals report typically undertaking a nuanced evaluation intended to further their state's investigation and the shared global anti-corruption capability. For instance, enforcers report delaying unilateral resolution in favor of the multi-state resolution as a matter of courtesy and professionalism to their foreign colleagues.[167] In terms of U.S. enforcement decisions to jointly resolve a matter with a foreign enforcement agency, enforcers report that the decision might be influenced by an incentive to lend U.S. credibility to the foreign agency's efforts.[168]

Joint resolutions may cause complications for enforcement authorities.[169] For instance, it appears there may have been tension between French and U.S. investigations into Airbus because of French efforts to assert their independence and demonstrate their new anti-corruption compliance capabilities under Sapin II and the general thinking that the United States often investigates non-American entities - like Airbus - to protect U.S. interests - like Boeing.[170] Indeed, the French government was criticized domestically for working with the United States to resolve Airbus.[171]

Generally, it would be natural for states cooperating in the investigation phase to discuss a joint resolution.[172] It is nearly inconceivable that states would consider a joint resolution if they had not previously worked together on the investigation.[173] Even then, however, an opportunity for a joint resolution might be diminished because of the

[164] *See* Interview with Ephraim Wernick, *supra* note 144.
[165] *See* Interview with Marcello Miller, *supra* note 146.
[166] *See* Interview with Patrick Pericak, *supra* note 153; *see also* Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[167] *See, e.g.*, Interview with Patrick Pericak, *supra* note 153; *see also* Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[168] *See* Interview with Patrick Pericak, *supra* note 153; *see also* Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[169] *Id.*
[170] *See, e.g.*, Beioley, *supra* note 10; *see also* Robert Lea, *US 'Set to Join' Airbus Corruption Inquiry*, THE TIMES (Aug. 15, 2016), https://www.thetimes.co.uk/article/us-set-to-join-airbus-corruption-inquiry-5w0pjhfhh [https://perma.cc/74WB-QDHL].
[171] *But see* James Thomas, *Airbus Settlement Proves France Can Go Toe-to-Toe with US Prosecutors*, GLOB. INVESTIGATIONS REV. (Feb. 19, 2020), https://globalinvestigationsreview.com/news-and-features/investigators-guides/france/article/airbus-settlement-proves-france-can-go-toe-toe-us-prosecutors [https://perma.cc/P5MP-ZFNP].
[172] *See generally* Interview with Ephraim Wernick, *supra* note 144.
[173] *See* Interview with Marcello Miller, *supra* note 146.

relationship between the states involved.[174] Before deciding whether to pursue a joint resolution, enforcers from different countries would likely consider basic parameters of the resolution, including whether the different states involved are intent on resolving based on the same conduct and whether they wish to allocate charging conduct based on geography, as appears to have occurred in Airbus.[175]

Enforcers report that after a decision is made to attempt to jointly resolve a matter with a foreign enforcement agency, typically the enforcement agency parties reach out to the corporate entity to suggest the joint resolution.[176] From that point forward the enforcement agencies typically negotiate independently with the entity while meeting bilaterally to coordinate amongst themselves.[177] The actual negotiations as to the specific terms of a joint settlement involving a foreign enforcement agency are known to be quite contentious at times - both in terms of the negotiations between the entity and the enforcement agencies, and amongst the enforcement agencies themselves.[178]

Even if states cooperate during the investigatory phase, enforcement agencies may decline to seek a joint resolution with a state if that state does not have complementary enforcement mechanisms.[179] For instance, a state that seeks to use D.P.A.s in the anti-corruption context may decline to consider a joint resolution with a state that does not provide for D.P.A.s.[180]

In determining the apportionment of the total financial penalty, as well as whether to apply credits and to what extent, enforcers generally consider the "sweat equity" that each enforcement agency committed to the investigation, the level of evidence that each party developed, and the "interest" that each state has in the entity and the conduct.[181] Moreover, negotiation concessions may be made to develop trust between enforcement agencies and encourage further anti-corruption capabilities.[182] There is no rigid financial formula applied to the apportionment, credit amount or priority of claim; rather, it is generally a matter of informal negotiation.[183] At least for D.O.J. enforcers, however, the starting point of the negotiation is determined by reference to the total possible fine amount pursuant to U.S. Sentencing Guidelines.[184]

[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *See* Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[180] *Id.*
[181] *Id.*; *see also* Interview with Ephraim Wernick, *supra* note 144; Interview with Patrick Pericak, *supra* note 153.
[182] *See* Interview with Marcello Miller, *supra* note 146; Interview with Patrick Pericak, *supra* note 153.
[183] *See* Interview with Marcello Miller, *supra* note 146.
[184] *See* Interview with Ephraim Wernick, *supra* note 144; Interview with Patrick Pericak, *supra* note 153; *see also* 2018 Guidelines Manual Annotated, United States Sentencing Commission, §§ 2B4.1, 2C1.1, USSC (Nov. 1, 2018), https://www.ussc.gov/guidelines.

This information is consistent with the data from the settlements explored.[185] In some resolutions, it appears that the home state nexus is a strong apportionment factor. That does not, however, hold true throughout the entire data set.

In reference to the challenges presented by carbon copy prosecutions, enforcers expressed both frustration and optimism.[186] Because of the reality of carbon copy prosecutions, enforcers are limited in the "carrot" they may offer to encourage settlement.[187] Indeed, an enforcer may not offer an entity the traditional litigation settlement notions of "certainty" and "finality" because they cannot compel other states to join the settlement.[188] Some enforcers have raised the idea of establishing a type of international process whereby states with potential claims would be compelled to either join settlements or bring claims within a reasonable time period.[189] Nonetheless, at least from the U.S. perspective, prosecutors must include a description of enough relevant conduct to prove the allegations of the offense.[190] In some cases, corporate counsel might actually prefer to expressly include covered conduct from other jurisdictions in the settlement documents to later bolster an argument against future prosecutions based on the theory of "double jeopardy".[191] Moreover, conduct included in settlement documents is a matter of negotiation with defense counsel and enforcement agencies may even agree to decline to require specific identifications of states.[192]

Enforcers generally report that they may decline to move forward with an investigation or resolution when a prior settlement is considered fair and adequate and national interests are vindicated.[193] In such instances, an agency might decline to even initiate an investigation.[194] Alternatively, there are circumstances under which an enforcement agency may jointly cooperate with an agency from another state during the investigation phase and decline prosecution in favor of the other state's prosecution efforts solely based on equitable considerations.[195]

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[185] *See* discussion *supra* Section 3.9.
[186] *See* Interview with Ephraim Wernick, *supra* note 144; Interview with Taavi Pern, *supra* note 145; Interview with Marcello Miller, *supra* note 146; Interview with Patrick Pericak, *supra* note 153; Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 158.
[187] *See* Interview with Ephraim Wernick, *supra* note 144; Interview with Taavi Pern, *supra* note 145; Interview with Marcello Miller, *supra* note 146; Interview with Patrick Pericak, *supra* note 153; Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[188] *See* Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[189] *See* Interview with Marcello Miller, *supra* note 146.
[190] *See* Interview with Ephraim Wernick, *supra* note 144.
[191] *Id.*
[192] *See generally* Interview with Patrick Pericak, *supra* note 153.
[193] *Id.*; Interview with Former Joint Head of Bribery & Corruption, U.K.'s S.F.O., *supra* note 157.
[194] *Id.*
[195] *But see* Interview with Taavi Pern, *supra* note 145.

An enforcement agency might also decline enforcement against an entity if the agency is able to identify an individual wrongdoer that it wishes to prosecute.[196] As such, under certain circumstances, an agency might consider the adequacy of enforcement against individuals when determining whether to proceed against a company.[197] The reality, however, is that the prosecutions of individuals also typically makes it easier to prove a case against an entity under criminal agency principles.[198] Prosecutors are bound to balance these two competing considerations, including when the individual may have been prosecuted by a foreign authority.[199]

By making such decisions, enforcers intend to send a message to the public and the markets that they are not heavy-handed and prefer fair settlements with other enforcement agencies that will encourage self-reporting and cooperation.[200] In this regard, enforcement agencies have given substantial thought to the possibility that declining enforcement may advance global anti-corruption capabilities.[201] But in some nations, such as Brazil, declinations are not permitted as a matter of law.[202] With very limited exceptions for the Brazilians, if a possible claim exists, it must be asserted.[203]

5. EMERGING GUIDING PRINCIPLES OF COOPERATION AND COORDINATION IN TRANSNATIONAL ANTI-CORRUPTION INVESTIGATIONS AND RESOLUTIONS

The foregoing information provides the basis for the identification of emerging guiding principles of cooperation and coordination in transnational anti-corruption investigations and resolutions. The following identified principles are not exclusive, exhaustive, or compulsory. Yet, their identification and description may be useful to better understand the incentives, motivations, and objectives of anti-corruption enforcement agencies as they seek to carry forth their duties and execute their authority with equity and discretion in the transnational anti-corruption environment. Importantly, the identification of these principles should take us further than the "equity" identified in the Anti-Piling on Policy, *see supra* section 1. These principles may

[196] *See* Interview with Ephraim Wernick, *supra* note 144.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *See* Interview with Patrick Pericak, *supra* note 153.
[201] *Id.*
[202] *But see* Interview with Marcello Miller, *supra* note 146.
[203] *Id.*

be particularly useful to companies and corporate counsel facing corruption issues or risking exposure as they attempt to chart a path forward.[204] Indeed, identifying a set of guiding principles may lower costs of both enforcement and defensive representation, increase predictability, encourage voluntary self-disclosures, and, more generally, move us further toward an optimal level of transparency and deterrence.[205]

5.1. ENFORCEMENT AGENCIES SEEK TO COORDINATE AND COOPERATE DURING THE INVESTIGATORY STAGE IF THE BENEFITS OF COOPERATION OUTWEIGH THE COSTS

States with an interest in the anti-corruption movement seek to cooperate with other states in anti-corruption investigations to the extent that such cooperation advances their own anti-corruption efforts and comports with their general policy objectives. As the Soc. Gen., Airbus, VimpelCom, Telia, Petrobras, Odebrecht, Braskem, and Rolls-Royce matters illustrate, at least the following states have cooperated amongst themselves in recent anti-corruption investigations: the United States, the United Kingdom, Switzerland, France, Brazil, the Netherlands, Sweden, Switzerland, Latvia, Belgium, Ireland, Luxembourg, Austria, Cyprus, Norway, Isle of Man, Germany, Singapore, and Turkey.[206] In at least one instance, as seen in the Airbus case, states have actually formed joint investigative teams.[207] While the cases surveyed here demonstrate coordination is predominately between the United States and European authorities, coordination and cooperation in anti-corruption efforts is becoming more global.[208] As the enforcer interviews established, however, a decision to cooperate or to seek cooperation from foreign anti-corruption counterparts is generally based on a risk/benefit balancing test.[209] "The benefits of assistance from foreign anti-corruption institutions should not be accessed without taking into account the costs - foreign assistance sometimes comes at a price".[210] As a result of this principle, companies facing anti-corruption legal

[204] *See* O.E.C.D., Anti-Corruption Ethics & Compliance Handbook for Business 10 (2013), https://www.O.E.C.D..org/corruption/Anti-CorruptionEthicsComplianceHandbook.pdf [https://perma.cc/HCK4-XSFN].
[205] *See* Oded, *supra* note 24, at 253–57.
[206] *See* discussion *supra* Section 3.
[207] See discussion *supra* Section 3.2.
[208] *See* Kevin Abikoff et al., *F.C.P.A. & Anti-Bribery Alert*, Hughes, Hubbard & Reed L.L.P. 109 (Dec. 23, 2016), https://www.hugheshubbard.com/news/F.C.P.A.-anti-bribery-alert-fall-2016 [https://perma.cc/TM3Y-5TLC] (detailing cooperation provided the S.E.C. by the South African Financial Services Board and the African Development Bank's Integrity and Anti-Corruption Department in relation to enforcement action against Hitachi).
[209] *See* discussion *supra* Section 4.1.
[210] Kevin E. Davis et al., *Transnational Anticorruption Law in Action: Cases from Argentina and Brazil*, 40 Law Soc. Inquiry 664, 693 (2015).

exposure should assume enforcement agencies will actively seek cooperation and share information with their foreign counterparts.

5.2. ENFORCEMENT AGENCIES SEEK TO COORDINATE RESOLUTIONS WITH ENFORCEMENT AGENCIES FROM OTHER APPROPRIATE STATES IN RECOGNITION OF JURISDICTIONAL NEXUSES AND DEVELOPMENT OF GLOBAL ANTI-CORRUPTION CAPABILITIES

The Soc. Gen., Airbus, VimpelCom, Telia, Petrobras, Braskem, Odebrecht, and Rolls Royce matters evidence that in recent years enforcement agencies from different states frequently sought to coordinate anti-corruption resolutions amongst themselves.[211] These cases demonstrate that enforcement authorities will, through crediting or other means, recognize penalties paid to enforcement authorities from other states that have a jurisdictional nexus to the underlying bribing conduct and will decline to require a monitor if a another state with an arguably stronger jurisdictional nexus seeks to monitor future compliance. This deference is not only in recognition of the corresponding jurisdictional nexus, but also reflects an interest in building anti-corruption enforcement capacity. That enforcement agencies work to coordinate the timing of resolution, often with a state delaying resolution for years, confirms these principles and emphasizes that global anti-corruption enforcement cooperation is sincere and important, in both practice and messaging.

Settlement coordination, however, is not always desired or possible and will only be considered if the subject enforcement agency determines it is in the best interest of the state and the greater global anti-corruption regime.[212] As the enforcer interviews indicate, there is a substantial amount of discretion involved in this decision and it appears to be made on a case-by-case basis.[213] Enforcement agencies, however, do seem willing to delay their own resolutions, as demonstrated in the Soc. Gen. matter, in favor of joint resolution.[214]

Odebrecht, however, demonstrates that coordination amongst several states presents its own problems if other relevant states are not included in the resolution. As the Sanchez-Badins, two Brazilian lawyers, note:

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[211] *See* discussion *supra* Section 3.

[212] *See* Stephen J. DeCosse et al., Anticorruption Regulation Survey, Jones Day 49 (Apr. 18, 2018), https://www.jonesday.com/en/insights/2018/04/anticorruption-regulation-survey-of-41-countries-2 [https://perma.cc/68BV-K4W3].

[213] *See* Press Release, U.S. Dep't of Just., Société Générale S.A. Agrees to Pay $860 Million in Criminal Penalties for Bribing Gaddafi-Era Libyan Officials and Manipulating L.I.B.O.R. Rate, *supra* note 81, §4.

[214] *See* de Senneville & Wajsbrot, *supra* note 90, ¶§6–7.

> The recent increase of local anti-corruption investigations beyond the United States has increased the pressure to develop a more sophisticated system of cooperation among authorities from different jurisdictions. The experience of Odebrecht dramatically illustrates the underdevelopment of such transnational mechanisms of coordination. In the Car Wash case, investigations have unfolded in forty-nine other jurisdictions.[215]

Indeed, the carbon copy litigation dilemma is a very real challenge to the principle. In this context, the recent U.S. Supreme Court decision in *United States v. Gamble* [hereinafter Gamble] might be particularly important.[216] As upheld in Gamble on June 17, 2019, the United States maintains its recognition of the "Dual Sovereignty Rule" under which two similar offenses against two states are separate and distinct and therefore not subject to domestic prohibition against double jeopardy.[217] First, there is some thought that the issues of fairness and equity in disputes implicating the laws of more than one state brought forth in Gamble may have informed the Anti-Piling-On Policy,[218] issued while Gamble was pending before the Supreme Court. Second, Gamble's holding may have also enlightened a defense to carbon copy litigation not previously considered on a substantial level. Indeed, it is now apparent that defense counsel may not always seek to include in a resolution all states with possible jurisdiction and potential claims.[219] Some counsel may strategically exclude states with an intent to later mount a double jeopardy defense. Although the United States does not recognize double jeopardy in a dual sovereignty context,[220] other states do. Accordingly, when reaching resolution with some, but not all, states that have both jurisdiction and national interest in the conduct, defense counsel may defend carbon copy enforcement actions on this theory of double jeopardy. More generally, as a result of this emerging principle, companies and their counsel would be wise to consider all possible combinations of joint resolutions, and the risks and rewards of each, when considering negotiation of an anti-corruption settlement. As the interviews demonstrate, companies should also consider the dynamics between the various enforcement agencies; although they may appear to have a united front, in practice there may be conflict and competition.

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[215] *See, e.g.*, Sanchez-Badin & Sanchez-Badin, *supra* note 3, at 329.
[216] See Gamble v. United States, 139 S. Ct. 1960, 1966 (2019).
[217] *Id.* at 1964.
[218] *See* discussion *supra* Section 2.
[219] *See* discussion *supra* Section 4.2.
[220] *See* Hock, *supra* note 16, at 325.

5.3. ENFORCEMENT AGENCIES UTILIZE CREDITING OF PENALTIES AND PROFIT DISGORGEMENTS PAID TO OTHER STATES TO BOTH MAINTAIN DOMESTIC STATUTORY ENFORCEMENT CONSISTENCY AND TO ENCOURAGE ANTI-CORRUPTION CAPACITY BUILDING AND FUTURE VOLUNTARY SELF-REPORTING BY OFFENDING ENTITIES

Both Soc Gen and Airbus demonstrate that "crediting" is a method by which enforcement agencies may consistently prosecute domestic based statutorily penalties while at the same time employing deference to fashion a resolution that is appears fair, does not amount to double enforcement, encourages capacity building and future voluntary self-reporting.[221] Petrobras, Odebrecht, and Braskem demonstrate that, even without crediting, states apportion total settlement amounts in multi-state settlement scenarios.[222] Publicly announcing an agreed financial settlement amount based on domestic statutory requirements allows the enforcement authority to confirm the statutory authority, publicize that authority to the market and build a record of consistent application. Later crediting payments to other states, encourages capacity building in other states and encourages future voluntary reporting by publicizing to entities and individuals that they will be treated fairly. The interviews evidence that they credit and apportionment process is fairly ad hoc, and can reflect geographic nexus issues, as well as the amount of investigatory resources an enforcing state has dedicated to the investigation.

Similarities may be drawn between crediting done in the anti-corruption context and crediting against tax liability by U.S. tax authorities for taxes paid to foreign tax authorities.[223] Both types of crediting allow agencies to recognize potential financial assessments generally authorized under regulatory schemes while also allowing for concessions made in the interest of equity and fairness.[224] While taxes are not punitive in nature, as anti-corruption penalties are, it is quite possible that the concept of anti-corruption crediting was "borrowed" from the U.S. tax law regime.[225]

Apportionment deference in this context is also considered as a means of encouraging another state's development of anti-corruption capabilities.[226] In Airbus,

[221] *See* discussion *supra* Sections 3.2., 3.2. .
[222] *See* discussion *supra* Sections 3.5., 3.6. .
[223] *See* Staff of J. Comm. on Taxation, 114th Cong., Present Law and Selected Policy Issue in the U.S. Taxation of Cross-Border Income 3 (Comm. Print 2015).
[224] *id.* at 4.
[225] *See* United States Dep't. of Justice, *supra* note 125.
[226] Commentators have argued that this type of deference be obligatory as established in "informal" agreements between members of the O.E.C.D. Convention. *See* Rachel Brewster & Christine Dryden, *Building Multilateral Anticorruption Enforcement: Analogies Between International Trade and Anti-Bribery Law*, 57 Va. J. Int'L L. 221, 253–54 (2018).

the United States expressly stated in a press release that its relatively lower settlement amount was in recognition of France and the United Kingdom's "interest" in Airbus's conduct and their "compelling equities" to vindicate their "respective interests".[227] In Airbus, this deference was likely based on the fact that Airbus is owned in part by the French government and much of the elicit conduct took place in, or was directed from, France and the United Kingdom.[228] Moreover, Airbus employs eleven thousand in the United Kingdom and provides for thousands more jobs though its supply chain.[229] Airbus employs nearly fifty thousand people in France.[230] In Airbus, France was also enthusiastic to demonstrate its competence with the new Sapin II law, which holds that deference by an established enforcement agency to a less established counterpart agency may be used to convey legitimacy and trust.[231] These messages, in turn, may build the general enforcement capability of that agency.

Of note, coordinated settlements are not a predicate for crediting in the transnational settlement context. For instance, in entering into a D.P.A. with S.B.M. Offshore in connection with bribes paid to foreign officials in Brazil, Angola, Equatorial Guinea, Kazakhstan, and Iraq, the D.O.J. agreed to credit S.B.M. Offshore for a $240 million penalty the company already paid to the Dutch Public Prosecutor's Office.[232]

As a result of this emerging principle, companies and their counsel should keep a keen eye towards opportunities to facilitate the apportionment and credit process for enforcement agencies and look for occasions to reduce the overall financial exposure through crediting and enforcement deference.

[227] Discussion *supra* Section 3.2. .

[228] *See Airbus in France*, AIRBUS §2, https://www.airbus.com/company/worldwide-presence/france.html [https://perma.cc/C9GE-CUNB] (last visited Dec. 20, 2020).

[229] *See* Lea, *supra* note 170.

[230] *See* Airbus in France, *supra* note 228, §1.

[231] *See* discussion *supra* Section 3.2. .

[232] *See* United States Dep't. Justice, Press Release No. 17-1348, SBM Offshore N.V. and United States-Based Subsidiary Resolve Foreign Corrupt Practices Act Case Involving Bribery in Five Countries §1 (Nov. 29, 2017). https://www.justice.gov/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case [https://perma.cc/V4XG-GQQC].

5.4. ENFORCEMENT AGENCIES CONSIDER "SIDE-STEPPING" TO ENCOURAGE ANTI-CORRUPTION CAPACITY BUILDING AND FUTURE VOLUNTARY SELF-REPORTING BY OFFENDING ENTITIES

The term "side-stepping" is used to describe situations in which an enforcement agency declines to move forward with an enforcement action when the target already resolved charges based on the same facts with a different enforcement agency.[233] Enforcement agencies employ side-stepping in both deference to their foreign counterparts to encourage development of legitimacy and capabilities, and also to encourage self-reporting.[234] An entity faced with an anti-corruption concern will be more able to voluntarily report conduct to various enforcement agencies if it is confident that those agencies will not seek double-enforcement. The D.O.J.'s treatment of Guralp exemplifies side-stepping.[235]

Until recently, the D.O.J.'s F.C.P.A. declinations were not made public, leaving the anti-corruption defense bar to speculate as to whether side-stepping decisions were actually made.[236] That changed in November 2017.[237] Now, D.O.J. declination letters are publicly available.[238] D.O.J. officials have indicated that the Guralp declination reflects the Anti-Piling-On Policy.[239] But as seen in the Statoil matter, enforcers may decline to side-step if they are unsatisfied with a prior settlement. Indeed, as seen in Statoil,

> [t]he United States has prosecuted companies after their home country governments have completed investigations and reached final settlements, in what appears to be an effort to register dissatisfaction with the resolution of the matter by home countries, either because the punishment was insufficient or the investigation was inadequately thorough.[240]

As such, an enforcement decision not to side-step may be as much a signal to foreign enforcement counterparts as it is to the market.

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[233] *See* Oded, *supra* note 24, at 229.
[234] *Id.*
[235] *See* discussion *supra* Section 3.7. .
[236] *See* Holtmeier et al., *supra* note 80, at 511–12.
[237] *See* Rod J. Rosenstein, Deputy Attorney General, U.S. Dep't of Justice, Remarks at the 34th International Conference of the Foreign Corrupt Practices Act ¶§33, 36-39, 42 (Nov. 29, 2017), https://www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign [https://perma.cc/68SC-GKTU]; see also U.S. DEP'T OF JUSTICE, JUSTICE MANUAL CH. 9-47.120, F.C.P.A. CORPORATE ENFORCEMENT POLICY § 4 (Mar. 2019), https://www.justice.gov/criminal-fraud/file/838416/download [https://perma.cc/XTW3-2S5K].
[238] *See* Declinations, U.S. Dep't of Just., (Aug. 6, 2020), https://www.justice.gov/criminal-fraud/corporate-enforcement-policy/declinations [https://perma.cc/VV5H-RL7H].
[239] *See* discussion *supra* Section 2. .
[240] Magnuson, *supra* note 77, at 414.

As a result of this emerging principle, companies and their counsel facing anti-corruption exposure should marshal facts, when possible, demonstrating that alternative enforcement actions—either already taken or underway - are just, reasonable, and adequate and that further enforcement actions would be imprudent.

5.5. ENFORCEMENT AGENCIES CONSIDER DEFERENCE TO OTHER STATES FOR MONITORING PURPOSES TO ENCOURAGE ANTI-CORRUPTION CAPACITY BUILDING

Soc. Gen., Airbus, and Petrobras demonstrate that enforcement agencies, at least U.S. enforcement agencies, will defer to other states for compliance monitoring purposes when those states have the required capability.[241] Independent compliance monitors in the F.C.P.A. context are frequently utilized by the D.O.J., as part of the terms of a D.P.A., to assure future compliance.[242] Monitors are often an expensive and cumbersome burden for corporate entities. In Soc. Gen., Airbus, and Petrobras, the United States declined to appoint a monitor and expressly stated that it was declining such a requirement because the entity was going to be monitored by a foreign agency.[243] It appears that such deference is exercised to signal legitimacy and anti-corruption capacity building in foreign counterparts.

As a result of this emerging principle, companies and their counsel facing anti-corruption issues, particularly with U.S. enforcement agencies, might argue that governmental agencies in the "home" state are capable of monitoring anti-corruption compliance going forward. If successful, this argument may be significant, as under U.S. practice, compliance monitors are generally private attorneys.[244] Such forced engagement of private attorneys as compliance monitors may be exceedingly expensive for offending entities.

[241] *See* discussion *supra* Sections 3.1., 3.2., 3.5. .
[242] *See* Monitorships: List of Independent Compliance Monitors for Active Fraud Section Monitorships, U.S DEPT. OF JUSTICE (updated Sept. 22, 2022). https://www.justice.gov/criminal-fraud/strategy-policy-and-training-unit/monitorships https://perma.Monitorshipscc/9CUJ-UKXK.
[243] See discussion supra Sections 3.1., 3.2., 3.5. .
[244] *Id.*

CONCLUSION

As the global community continues to move forward with the worthwhile anti-corruption effort, we will continue to see, likely with increasing frequency, circumstances where multiple states work together to investigate and resolve anti-corruption enforcement actions. In the absence of a formal collective institutional anti-corruption resolution system, we will likely continue to see these investigations and resolutions guided by the emerging principles identified herein. Although the present system is not perfect, it appears to be in the competent and well-meaning hands of anti-corruption enforcement agencies that seek justice, deterrence, and encouragement of the growing shared global anti-corruption capability on equitable terms.

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Cakes and Communication: A Trans-Atlantic Conversation Between the U.S. and U.K. Supreme Courts on the Tension Between Anti-Discrimination Law and the Freedoms of Religion and Speech

CARLO A. PEDRIOLI

Carlo A. Pedrioli is Professor of Law at Southern University (U.S.A.). He holds a J.D. from the University of the Pacific (U.S.A.) and a Ph.D. in Communication from the University of Utah (U.S.A.). He is also a member of the State Bar of California (U.S.A.).

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@ carlo.pedrioli@sulc.edu

0000-0001-5027-6054

ABSTRACT

In 2018, anti-discrimination law clashed with the freedoms of religion and speech at the tops of two major common law systems on both sides of the Atlantic Ocean. On June 4, the United States Supreme Court decided *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a case that involved a Christian baker who refused to bake a cake for a same-sex wedding. Several months later, on October 10, the United Kingdom Supreme Court decided *Lee v. Ashers Baking Company, Ltd.*, a case that involved a Christian family business that refused to bake a cake that promoted same-sex marriage. A key legal issue in both cases was whether the government, in the interest of furthering anti-discrimination law, may compel speech against one's religious beliefs. Also, permeating the two cases were especially rich issues of human communication.

Taking a comparative approach, and with an eye toward some of the communication-related matters involved in the cases, this paper examines *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* and *Lee v. Ashers Baking Company, Ltd.*, ultimately proposing that court systems consider, at a minimum, several factors in cases in which anti-discrimination law clashes with the freedoms of religion and speech in the sale of baked goods like cakes. The paper urges courts to consider at least the following factors: (1) the specificity of the message, (2) the likelihood that the baker will be identified as the creator of the baked good and thus potentially as a sender of the message, and (3) whether the baker knows the situation in which the baked good will be used. The paper unfolds by providing background on the cases, reviewing the various legal opinions, and then offering analysis of key communication issues presented.

KEYWORDS

Anti-Discrimination Law; Sexual Orientation; Freedom of Religion; Freedom of Speech; Same-Sex Marriage

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INTRODUCTION

In 2018, anti-discrimination law clashed with the freedoms of religion and speech at the tops of two major common law systems on both sides of the Atlantic Ocean. On June 4, the United States Supreme Court decided *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, a case that involved a Christian baker who refused to bake a cake for a same-sex wedding.[1] Several months later, on October 10, the United Kingdom Supreme Court decided *Lee v. Ashers Baking Company, Ltd.*, a case that involved a Christian family business that refused to bake a cake that promoted same-sex marriage.[2] A key legal issue in both cases was whether the government, in the interest of furthering anti-discrimination law, may compel speech against one's religious beliefs.

Permeating the two cases were especially rich issues of human communication. For instance, do both a cake with a specific message and a generic cake convey messages? Who would be behind sending the messages? Who would constitute the audience? Does context matter?

Conversation between and among courts in different jurisdictions around the world has led to constitutional cross-fertilization.[3] Through persuasive authority from another jurisdiction, a court in a given jurisdiction may gain insight into a similar problem elsewhere, whether the receiving court eventually adopts the same approach or not.[4] In *Lee v. Ashers Baking Company, Ltd.*, Lady Brenda Hale, the President of the U.K. Supreme Court, specifically referenced and engaged the opinions of the Justices of the

[1] *See* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).
[2] *See* Lee v. Ashers Baking Company, Ltd. [2018] UKSC 49 (N. Ir.). *Ashers Baking* citations are to the paragraphs in the U.K. Supreme Court's opinion.
[3] *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L.J. 191, 194-95 (2003).
[4] *Id.* at 199-202.

U.S. Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission.*[5] Beyond the United States and the United Kingdom, similar matters regarding anti-discrimination law and speech against one's religious beliefs can arise in various jurisdictions around the world, which opens up the possibility for additional cross-fertilization.[6]

Moreover, a supranational court was invited to enter the discourse. After the U.K. Supreme Court's decision in *Ashers Baking*, Gareth Lee, who originally had complained against the Ashers Baking Company, made an application to the European Court of Human Rights [hereinafter E.Ct.H.R.] based on rights under the European Convention on Human Rights [hereinafter E.C.H.R.].[7] Although the E.Ct.H.R. found the case inadmissible because Lee had not expressly raised his Convention rights in the domestic courts,[8] the E.Ct.H.R., in addition to referring to the U.K. Supreme Court case, also referred to the U.S. Supreme Court's *Masterpiece Cakeshop* decision.[9]

Taking a comparative approach, and with an eye toward some of the communication-related matters involved in the cases, this paper examines *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* and *Lee v. Ashers Baking Company, Ltd.*, ultimately proposing that court systems consider, at a minimum, several factors in cases in which anti-discrimination law clashes with the freedoms of religion and speech in the sale of baked goods like cakes. The paper will urge courts to consider at least the following factors: (1) the specificity of the message, (2) the likelihood that the baker will be identified as the creator of the baked good and thus potentially as a sender of the message, and (3) whether the baker knows the situation in which the baked good will be used. The paper will unfold by providing background on the cases, reviewing the various legal opinions, and then offering analysis of key communication issues presented.

[5] *See Ashers Baking*, UKSC 49 at [59]-[62].

[6] *See, e.g.*, Liam Elphick, *Sexual Orientation and "Gay Wedding Cake" Cases Under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions*, 38 Adelaide L. Rev. 149 (2017).

[7] *See, e.g.*, *Ashers "Gay Cake" Row Referred to European Court*, BBC News (Aug. 15, 2019), https://www.bbc.co.uk/news/uk-northern-ireland-49350891.

[8] *See* Lee v. United Kingdom, App. No. 18860/19, ¶ 77 (Jan. 6, 2022), https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-202151%22]. For context, see Eimear Flanagan, *Ashers "Gay Cake" Case: European Court Rules Case Inadmissible*, BBC News (Jan. 6, 2022), https://www.bbc.com/news/uk-northern-ireland-59882444.

[9] *See Lee*, App. No. 18860/19 at ¶¶ 38-42, 75.

1. BACKGROUND ON THE TWO CASES

In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, Jack Phillips operated a bakery in Lakewood, Colorado, which is near Denver.[10] Phillips, who was Christian, had operated the bakery for twenty-four years.[11] With his work, the baker attempted to honor God.[12] In line with his religious convictions, Phillips believed that God intended for marriage to be an exclusively heterosexual institution.[13]

During the summer of 2012, Charlie Craig and Dave Mullins, a gay couple, went to Phillips' shop and told him that they wanted to order a wedding cake for their wedding.[14] They offered no particular design for the cake.[15] At that time, same-sex marriage was not yet legal in Colorado, so the couple intended to marry in Massachusetts, where same-sex marriage was legal,[16] and then return to Colorado.[17] The baker informed the two men that he did not make cakes for same-sex weddings, although he would make the two men goods such as cakes for showers and birthdays.[18]

One day later, Craig's mother phoned Phillips to inquire why Phillips had refused to make the cake for her son and his fiancé.[19] Phillips explained his objection based on religious grounds; his understanding was that same-sex marriage contradicted biblical teachings.[20]

Craig and Mullins filed a civil rights complaint via the administrative system in Colorado.[21] After several steps, the Colorado Civil Rights Commission agreed that Phillips had violated the right of Craig and Mullins to be free from discrimination based on sexual orientation, a right that the Colorado Anti-Discrimination Act provided.[22] The Colorado Court of Appeal affirmed the decision, and the Colorado Supreme Court declined to hear the case.[23]

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[10] *See* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1724 (2018).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] For a discussion of the case that legalized same-sex marriage in Massachusetts, see Carlo A. Pedrioli, Goodridge v. Department of Public Health *, Same-Sex Marriage, and the Massachusetts Supreme Judicial Court as Critical Social Movement Ally*, 54 Loy. L.A. L. Rev. 515 (2021).
[17] *See Masterpiece Cakeshop*, 138 S. Ct. at 1724.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.* at 1725.
[22] *Id.* at 1725-26.
[23] *Id.* at 1726-27.

Of interest, in a 2017 matter not before the Supreme Court in *Masterpiece Cakeshop*, Phillips, citing his religious beliefs, refused to make a birthday cake for a transgender individual.[24] The proposed cake would have had a blue exterior and a pink interior.[25] In 2021, the state court that heard a lawsuit which the potential customer had brought found that Phillips had violated Colorado's anti-discrimination statute.[26] Phillips appealed.[27]

Thousands of miles away, on the other side of the Atlantic Ocean, in *Lee v. Ashers Baking Company, Ltd.*, Daniel and Amy McArthur, a married heterosexual couple, operated a bakery in Belfast, Northern Ireland.[28] The McArthurs were Christian and believed that sexual expression, if biblically-informed, should take place only in a heterosexual marriage.[29] They also accepted the idea that biblically-informed marriage was exclusively heterosexual.[30] Although they did not specifically advertise their beliefs, they named their business Ashers based on *Genesis* 49:20, which, in one translation, states, "'Bread from Asher shall be rich and he shall yield royal dainties'".[31]

Gareth Lee, who was gay, worked with QueerSpace, an entity that advocated for the queer community in Belfast, including the community's interest in promoting civil marriage for its members.[32] To a QueerSpace event in May 2014, Lee opted to bring a cake.[33] From Ashers, he ordered a cake with Bert and Ernie from the U.S. public television children's show *Sesame Street*; the desired cake would have had the message "'Support Gay Marriage'" and the QueerSpace logo on it.[34] Although the bakery took the order, and Lee then paid for it, the bakery later called Lee and indicated that, based on the religious beliefs of the McArthurs, the bakery could not fulfill the order.[35] The bakery refunded the charge to Lee, who then successfully ordered the cake from another bakery.[36] Staff members at Ashers were not aware of Lee's sexual orientation, and Lee was not aware

[24] *A Colorado Baker Is Fined for Refusing to Make a Cake for a Transgender Woman*, Nat'l Pub. Radio (June 17, 2021, 10:46 AM ET), https://www.npr.org/2021/06/17/1007594289/baker-fined-for-refusing-to-make-cake-for-transgender-woman.
[25] *Id.*
[26] *Id.*
[27] *Colorado Baker Fighting Ruling Over Gender Transition Cake*, NBC News (Oct. 6, 2022, 9:58 AM CDT), https://www.nbcnews.com/nbc-out/out-news/colorado-baker-fighting-rulinggender-transition-cake-rcna51018.
[28] *See* Lee v. Ashers Baking Company, Ltd. [2018] UKSC 49, [9], [11] (N. Ir.).
[29] *Id.* at [9].
[30] *Id.*
[31] *Id.* Other translations use *produce*, *food*, etc. instead of *bread*. *See generally* BibleaGateway, https://www.biblegateway.com/ (allowing for comparison of numerous translations of the Bible) (last visited Oct. 29, 2022).
[32] *See Ashers Baking*, UKSC 49 at [10].
[33] *Id.*
[34] *Id.* at [12].
[35] *Id.*
[36] *Id.* at [12], [14].

of the McArthurs' religious beliefs, including those on marriage.[37] In the past, Lee had bought cakes at Ashers, but the staff members did not know him personally.[38]

Lee complained about the refusal of the McArthurs to bake his cake to the Equality Commission of Northern Ireland, which supported him in subsequent legal action.[39] Both the trial court and appellate court found unlawful discrimination by the McArthurs.[40]

2. THE OPINION OF THE U.S. SUPREME COURT AND ASSOCIATED OPINIONS

Justice Anthony Kennedy wrote the opinion for the U.S. Supreme Court in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.[41] He admitted that the case involved "difficult questions as to the proper reconciliation of at least two principles".[42] Kennedy recognized that U.S. society "ha[d] come to the recognition that gay persons and gay couples [could] not be treated as social outcasts or as inferior in dignity and worth".[43] At the same time, the Justice noted that objections to same-sex marriage based on religion or other beliefs were legally protected.[44] Despite such objections, a business owner generally would not be allowed to refuse goods and services to someone in a protected group.[45] However, the government would not be able to compel a minster who held an objection to same-sex marriage to perform same-sex marriages.[46]

Kennedy acknowledged Phillips' argument that, if the baker were forced to make the cake, Colorado would be forcing him "to make an expressive statement, a wedding endorsement in his own voice and of his own creation".[47] As Phillips saw it, this situation would have implicated both speech and religious belief.[48]

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[37] *Id.* at [11].
[38] *Id.*
[39] *Id.* at [14].
[40] *Id.* at [15]-[16].
[41] *See* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719, 1723 (2018). Kennedy's opinion received criticism for its narrow ruling, which failed to give substantial guidance in cases in which anti-discrimination law clashed with freedom of religion and speech. *See, e.g.*, Chad Flanders & Sean Oliveira, *An Incomplete* Masterpiece, 66 UCLA L. Rev. Discourse 154 (2019).
[42] *Masterpiece Cakeshop*, 138 S. Ct. at 1723.
[43] *Id.* at 1727.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at 1728.
[48] *Id.*

Rather than addressing the coerced expression, Kennedy opted to address the requirement that the government approach religion from a perspective of neutrality. This approach provided a more efficient way to resolve the case, without the Court's having to formulate new constitutional doctrine. Kennedy's opinion reflected the ideal of U.S. constitutional theorist Alexander Bickel, who promoted what he called the *passive virtues*, via which a court avoids deciding cases on the merits when it can dispose of them in less involved ways.[49] Such an approach can avoid judicial overreach.

Specifically, as Kennedy observed things, the Colorado Civil Rights Commission had not taken a neutral position toward religion in handling the case before it.[50] At one meeting, a commissioner had stated the following:

> "Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others".[51]

Other commissioners apparently had not objected to this discourse.[52]

Adding to the above, Kennedy discussed three different cases in which the Civil Rights Division, a subpart of the Commission, had allowed bakers to refuse to make cakes that expressed anti-same-sex marriage messages. In the other cases, the Division had not addressed the issue of whether attribution of the messages on the cakes would be to the customers or the bakers.[53] In contrast, in Phillips' case, the Commission had decided that the attribution of the message from the cake would be to the two men who bought the cake, and not to the man who made the cake.[54] Kennedy believed that the Commission had given Phillips' religious objection less weight than the other bakers' non-religious objections.[55] Government assessment of the offensive nature of a message was an impermissible means of distinguishing between Phillips' case and those of the other bakers.[56]

[49] *See generally* Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 111-98 (1st ed. 1962).
[50] *See Masterpiece Cakeshop*, 138 S. Ct. at 1729.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 1730.
[54] *Id.*
[55] *Id.*
[56] *Id.* at 1731.

With the lack of neutrality toward religion in the proceedings below, Kennedy found a violation of the First Amendment.[57] Still, he admitted that the result in a case with neutrality toward religion would have to wait.[58] He instructed lower judicial and quasi-judicial entities to act "with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they [sought] goods and services in an open market".[59]

Several other Justices wrote opinions in *Masterpiece Cakeshop*. Since Kennedy's majority opinion resolved the case based on a lack of neutrality to religion in the lower proceedings, and thus, in avoiding a decision on the merits, employed the passive virtues,[60] the other opinions offered more substantively-oriented thinking.

Justice Elena Kagan, writing for herself and Justice Stephen Breyer, concurred.[61] She determined that Phillips had refused to make the cake for the couple based on the couple's sexual orientation, but that he would have made the cake for a straight couple.[62]

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[57] *Id.* at 1732.

[58] *Id.* Laws that burden religion and are "not neutral or not of general application" must withstand strict scrutiny, the most exacting form of judicial review. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993); *Masterpiece Cakeshop*, 138 S. Ct. at 1734 (Gorsuch, J., concurring). Because the Supreme Court resolved *Masterpiece Cakeshop* on lack of neutrality grounds, the Court did not have the opportunity to re-consider the standard appropriate for infringement of free exercise of religion when government action does not specifically target religious exercise, but rather impacts such free exercise via a neutral law of general application. In *Masterpiece Cakeshop*, this likely would have been the situation with the Colorado Anti-Discrimination Act if the administrative process had lacked the hostility toward religion on which Kennedy hung the Court's decision. As of *Masterpiece Cakeshop*, the standard for judicial review of neutral laws of general application that happen to burden free exercise remained rational basis, the most deferential form of judicial review. *See* Employment Division v. Smith, 494 U.S. 872 (1990). *See also* Erwin Chemerinsky, Constitutional Law: Principles and Policies 1375 (6th ed. 2019).
Employment Division v. Smith has been controversial, with some calls for overturning the decision to promote greater protection for free exercise rights. *See, e.g.*, *Church of Lukumi Babalu Aye*, 508 U.S. at 520 (Souter, J., concurring in part and concurring in the judgment); Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring in the judgment). In his *Fulton v. City of Philadelphia* concurrence, which Justices Clarence Thomas and Neil Gorsuch joined, Justice Samuel Alito stated, "As long as [*Smith*] remains on the books, it threatens a fundamental freedom". *Id.* at 1924. One possible replacement for *Smith* would be to require a law that would put "a substantial burden on religious exercise" to pass strict scrutiny review. *Id.* In effect, this would reinstate the standard prior to *Smith*. *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (articulating strict scrutiny as the standard of judicial review for a law that burdened free exercise of religion).
Despite *Smith*, the Supreme Court has assumed that the Religious Freedom Restoration Act of 1993 [hereinafter R.F.R.A.], a political response to *Smith* by the U.S. Congress, effectively elevated the standard of judicial review for infringement of free exercise of religion by neutral federal laws, as opposed to those of the states, to strict scrutiny. *See, e.g.*, Burwell v. Hobby Lobby, 573 U.S. 682, 694-95 (2014). The Court struck down R.F.R.A. as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (maintaining that Congress could not create or enhance rights under Section 5 of the Fourteenth Amendment). Nonetheless, the Court has applied R.F.R.A. against federal action. *See, e.g.*, *Hobby Lobby*, 573 U.S. at 682 (upholding, under R.F.R.A., the free exercise rights of owners of closely-held corporations against a U.S. Department of Health and Human Services requirement that for-profit companies provide employees with health insurance that included contraceptive methods, which the owners considered to be abortifacients, or pay fines).

[59] *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

[60] *See* Bickel, *supra* note 49, at 111-98.

[61] *See Masterpiece Cakeshop*, 138 S. Ct. at 1733.

[62] *Id.*

Because Phillips had not discussed a specific message for the cake with his two potential customers, Kagan saw the cake as something that celebrated a generic marriage.[63] Nonetheless, Kagan agreed with the Court that the state proceedings had suffered from an infusion of hostility toward religion.[64]

Justice Neil Gorsuch, writing for himself and Justice Clarence Thomas, also concurred.[65] Gorsuch offered a detailed treatment of what he agreed was a lack of religious neutrality to Phillips in the state proceedings. He noted that Phillips was aware that the two men were asking him to make a cake for their wedding, which would have involved making a cake for a same-sex wedding; preparing a cake for such a wedding violated Phillips' religious convictions.[66] Unlike Kagan, Gorsuch viewed the cake as one that celebrated same-sex marriage.[67] Phillips testified that he would have declined to make a cake for any customer, regardless of sexual orientation, who ordered a cake for a same-sex wedding.[68] As Gorsuch saw it, Phillips lacked the intent to discriminate based on the potential customers' sexual orientation; the cake, not the customers, made the difference.[69]

The concurring Justice pointed out that the Commission presumed Phillips to have had a negative intent, but did not so presume of the bakers in the Jack cases, the other bakery cases that Justice Kennedy had mentioned.[70] The Commission would not be allowed to "apply a more generous legal test to secular objections than religious ones".[71]

Gorsuch maintained that, whether they had words or not, wedding cakes were involved in communication. He suggested that if Jack had asked for a cake with a purely nonverbal message, rather than a verbal message, against same-sex marriage, the bakers still would have refused to make the cake.[72] A wedding cake was like a flag or an emblem; words were not necessary for a message to occur.[73]

On a related note, Gorsuch insisted that the Commission be consistent in applying the level of generality to different parties that appeared before it. The Commission should not have told Phillips that the wedding cake was "a generic wedding cake" when it had agreed with the bakers in the Jack cases "that the specific cakes Mr.

[63] *Id.*
[64] *Id.* at 1734.
[65] *Id.*
[66] *Id.* at 1735.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 1735-36.
[70] *Id.* at 1736.
[71] *Id.* at 1737.
[72] *Id.* at 1738.
[73] *Id.*

Jack requested conveyed a message offensive to their convictions and allowed them to refuse service".[74] "Such results-driven reasoning [was] improper", Gorsuch concluded.[75]

Justice Clarence Thomas, writing for himself and Justice Gorsuch, wrote an opinion that concurred in part and concurred in the judgment.[76] Acknowledging a free exercise violation, Thomas chose to focus on the free speech issues in the case.[77] Because case law on the First Amendment is often very pro-speaker, Thomas had much on which to draw. The Justice turned to the expressive conduct doctrine. Conduct that was expressive included "nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag".[78] Thomas acknowledged that, for expressive conduct to receive First Amendment protection, the Court had required both intent to communicate and a likelihood that the audience would understand the conduct as communicative.[79] Still, a message did not have to be "particularized".[80]

Applying these standards, Thomas noted that Phillips saw himself as an artist.[81] To Phillips, the designer of the cake, "a wedding cake inherently communicate[d] that a wedding ha[d] occurred, a marriage ha[d] begun, and the couple should be celebrated".[82] If someone entered a room with "a white, multi-tiered cake", Thomas pointed out, the person most likely would think that a wedding would take place.[83] Words were not necessary for the cake to be communicative.[84]

Thomas concluded that Phillips' making custom wedding cakes constituted expressive conduct.[85] Designing a cake for a same-sex wedding would mandate that Phillips "acknowledge that same-sex weddings [were] 'weddings' and suggest that they should be celebrated—the precise message he believe[d] his faith forb[ade]".[86] According

[74] *Id.* at 1738-39.
[75] *Id.* at 1739.
[76] *Id.* at 1740.
[77] *Id.*
[78] *Id.* at 1741-42 (citing Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565-66 (1991); Texas v. Johnson, 491 U.S. 397 (1989); Spence v. Washington, 418 U.S. 405, 406, 409-11 (1974) (per curiam); Schacht v. United States, 398 U.S. 58, 62-63 (1970); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 505-06 (1969); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (opinion of Fortas, J.); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 633-34 (1943); Stromberg v. California, 283 U.S. 359, 361, 369 (1931)).
[79] *See Masterpiece Cakeshop*, 138 S. Ct. at 1742.
[80] *Id.* (quoting Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc., 515 U.S. 557, 569 (1995)).
[81] *Id.*
[82] *Id.* at 1743.
[83] *Id.*
[84] *Id.* at 1743 n.2.
[85] *Id.* at 1743.
[86] *Id.* at 1744.

to Phillips, such a message would contradict messages that the baker sent via his conduct, including the following conduct: being closed on Sunday; paying employees wages above the minimum required by law; loaning employees funds when needed; not baking cakes with alcohol; not creating cakes with racist, homophobic, or anti-God messages; and not making cakes for Halloween.[87]

Due to the expressive nature of Phillips' conduct, and because the government normally would not have punished someone for refusal to make a custom wedding cake, Thomas decided that the government needed to satisfy strict scrutiny analysis, the most exacting standard of judicial review.[88] This standard followed from the *Texas v. Johnson* flag-burning case.[89]

Thomas examined one particular justification offered for the state law, which was to protect the dignity of same-sex couples.[90] Further drawing upon *Johnson*, Thomas insisted that the government "[could] not punish protected speech because some group [found] it offensive, hurtful, stigmatic, unreasonable, or undignified".[91] Also, in the wedding cake situation, any such offense, hurt, stigma, or similar response surely would be less than that which would have followed a sexual minority's viewing a sign with "'God Hates Fags'" on it or an African-American's witnessing the burning of a twenty-five-foot-tall cross by white supremacists—types of communication the Court had previously protected under the First Amendment.[92]

Thomas insisted that, after the controversial *Obergefell v. Hodges* decision, in which the Supreme Court had read the U.S. Constitution to protect a right to same-sex marriage, people who disagreed with same-sex marriage still had a constitutional right to voice their views.[93] Quoting Justice Samuel Alito's dissent in *Obergefell*, Thomas warned against using *Obergefell* "to 'stamp out every vestige of dissent' and 'vilify Americans who [were] unwilling to assent to the new orthodoxy'".[94] Consequently, in the absence of a compelling justification for the government action, Thomas found a violation of Phillips' right to free speech.

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[87] *Id.* at 1745.
[88] *Id.* at 1745-46.
[89] *Id.* at 1746. *See* Texas v. Johnson, 491 U.S. 397 (1989) (upholding the right of a protester to burn the U.S. flag). For a discussion of *Johnson* and the ensuing political debate over what proponents called a flag protection amendment to the U.S. Constitution, see David J. Vergobbi, Texas v. Johnson, *in* Free Speech on Trial: Communication Perspectives on Landmark Supreme Court Decisions 281 (Richard A. Parker ed., 2003).
[90] *Masterpiece Cakeshop*, 138 S. Ct. at 1746.
[91] *Id.*
[92] *Id.* at 1747.
[93] *Id. See* Obergefell v. Hodges, 576 U.S. 644 (2015).
[94] *Masterpiece Cakeshop*, 138 S. Ct. at 1748.

Justice Ruth Bader Ginsburg, writing for herself and Justice Sonya Sotomayor, provided the only dissenting opinion, claiming that Craig and Mullins should have won the case.[95] Ginsburg questioned whose message the wedding cake conveyed, the baker's or the couple's, and also queried what the message was.[96]

Ginsburg contrasted the Jack cases with the Craig and Mullins case. Jack had asked for two cakes that opposed same-sex marriage, and he had approached three bakers.[97] Craig and Mullins asked for a wedding cake without indicating a desire for distinguishing features on the cake.[98] In the Jack cases, Ginsburg felt that the bakers would have refused to create the anti-same-sex marriage cake for any customer, regardless of the customer's religion.[99] In contrast, Phillips would not bake a cake for Craig and Mullins, a gay couple, that he would bake for other customers.[100] Ginsburg claimed that, in the first case, the message, rather than the protected category of religion, had been at issue, but, in the second case, the protected category of sexual orientation, not the message, was at issue.[101]

Ginsburg believed that, in Phillips' case, the offensive nature of the message associated with the cake was a function of the identity of the customers who had requested the cake.[102] In the Jack cases, the bakers had refused to make cakes based on a negative message that was "literally display[ed]".[103] The cakes Jack had requested had "particular text".[104]

In terms of the issue of lack of neutrality toward religion in the administrative proceedings, the dissenting Justice downplayed what she described as "the comments of one or two Commissioners".[105] The process, she noted, had "involved several layers of independent decisionmaking, of which the Commission was but one".[106]

[95] *Id.*
[96] *Id.* at 1748 n.1.
[97] *Id.* at 1749.
[98] *Id.*
[99] *Id.* at 1750.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.* at 1750-51.
[104] *Id.* at 1751 n.5.
[105] *Id.* at 1751.
[106] *Id.*

3. THE OPINION OF THE U.K. SUPREME COURT

On the other side of the Atlantic Ocean, Lady Brenda Hale wrote an opinion for the U.K. Supreme Court on the substantive issue in *Lee v. Ashers Baking Company, Ltd.*[107] Lord Jonathan Mance provided an opinion for the Supreme Court on the Court's jurisdiction regarding an appeal,[108] which is beyond the scope of this paper. All five Justices who heard the case joined both opinions.[109]

Lady Hale inquired whether a bakery's declining, based on the religious beliefs of its owners, to make a cake with "'support gay marriage'" on it, was unlawful discrimination based on sexual orientation or religious belief or political opinion.[110] If there were unlawful discrimination, then questions would arise regarding the bakers' rights of freedom of religion and expression under the E.C.H.R.[111]

For sexual orientation discrimination, Hale considered the case under the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006, also known as S.O.R.s.[112] She looked at the various types of discrimination based on sexual orientation to see if any of those types had been present in the case.

She determined that there was no direct discrimination. Direct discrimination would occur if, based on sexual orientation, someone treated someone else less favorably than the first person would treat other people with different sexual orientations.[113] Hale noted that the district judge had found that the reason that the McArthurs refused to fulfill the order was that they opposed same-sex marriage.[114] The issue was with "the message, not the messenger".[115]

Hale also determined that there was no indissociability at work in any discrimination. Indissociability occurs in a situation when an express criterion employed to justify discrimination is a proxy for a protected characteristic.[116] In this case, people of differing sexual orientations, not just sexual minorities, could support same-sex

[107] *See* Lee v. Ashers Baking Company, Ltd. [2018] UKSC 49, [5] (N. Ir.). For a discussion of how the Northern Ireland Court of Appeal addressed the case under Article 10 of the E.C.H.R., see David Capper, *Free Speech Is Not a Piece of Cake*, *in* Free Speech and Media Law in the 21st Century 105 (Russell L. Weaver, András Koltay, Mark D. Cole & Steven I. Friedland eds., 2019).
[108] *See Ashers Baking*, UKSC 49 at [62.5].
[109] *Id.* at [.5], [62.5].
[110] *Id.* at [1].
[111] *Id.*
[112] *Id.* at [3], [20].
[113] *Id.* at [20].
[114] *Id.* at [22].
[115] *Id.*
[116] *Id.* at [25].

marriage, so supporting same-sex marriage would not necessarily be a proxy for someone to be a sexual minority.[117]

Likewise, Hale refused to find a case for associative discrimination. Such discrimination would be based on someone else's sexual orientation, rather than that of the person who made the claim.[118] In this case, the record indicated that the McArthurs had employed and done business with sexual minorities, just as the couple had employed and done business with straight people.[119] The couple had not acted based on Lee's association with sexual minorities, but on its religious belief about marriage.[120]

In terms of sexual orientation discrimination, Hale concluded that "the objection was to the message and not to any particular person or persons".[121] Nonetheless, she made an effort to acknowledge what she described as "the very real problem of discrimination against gay people".[122]

For religious belief or political opinion discrimination, Hale considered the case in light of various acts, including the Government of Ireland Act 1920, the Northern Ireland Constitution Act 1973, and the Northern Ireland Act 1998, all of which had afforded constitutional status to protection from discrimination based on religious belief or political opinion.[123] In particular, the Fair Employment and Treatment (Northern Ireland) Order 1998 [hereinafter F.E.T.O.] prohibited such discrimination regarding goods and services.[124]

At this point in her opinion, Hale saw three related questions. First, had the McArthurs discriminated against Lee because of his political opinions?[125] Second, if there were such discrimination, was F.E.T.O. invalid, or should the Court read down F.E.T.O.,[126] based on incompatibility with Articles 9 and 10 of the E.C.H.R.?[127] Third, if the answer to the first question were affirmative, and the answer to the second question were negative, would F.E.T.O. be invalid under the Northern Ireland Constitution Act

[117] *Id.*
[118] *Id.* at [27].
[119] *Id.* at [28].
[120] *Id.*
[121] *Id.* at [34].
[122] *Id.* at [35].
[123] *Id.* at [37].
[124] *Id.* at [3]. From the 1970s to the 1998 Good Friday Agreement, anti-discrimination legislation proved controversial in a politically divided Northern Ireland. Christopher McCrudden, *The Gay Cake Case: What the Supreme Court Did, and Didn't, Decide in* Ashers, 9 Oxford J.L. & Religion 238, 268 (2020).
[125] *See Ashers Baking*, UKSC 49 at [40].
[126] In this context, reading down a statute is reading the statute narrowly to facilitate its compatibility with the E.C.H.R. *See also* Neil Duxbury, *Reading Down*, 20 Green Bag 2D 155 (2017).
[127] *See Ashers Baking*, UKSC 49 at [40].

1974 for facilitating civil liability for the refusal to convey a politically-based opinion that violated the religious beliefs of the individuals who refused to convey that opinion?[128]

Hale determined that, under F.E.T.O., less favorable treatment had to be based on the religious belief or the political opinion of another person besides the person who discriminated.[129] Again, Hale accepted that any discrimination that may have occurred "was afforded to the message not to the man".[130] The McArthurs, she wrote, faced a situation similar to that of a Christian printing business that was "required to print leaflets promoting an atheist message".[131] Still, Hale acknowledged the possibility that Lee's political opinions and the message he sought to promote were indissociable.[132]

Because of the possibility of indissociability, Hale looked to the McArthurs' rights under the E.C.H.R. Article 9 of the E.C.H.R. protects freedom of thought, conscience, and religion.[133] The E.Ct.H.R. had decided that forcing someone to express a belief that contradicted that person's beliefs was a violation of Article 9.[134] This principle had arisen in a case in which non-believers, to retain their seats in their parliament, had to take a Christian oath.[135]

Hale also noted that Article 10 of the E.C.H.R., which protects freedom of expression, implied a freedom against expressing views one did not hold.[136] She expounded upon the principle by drawing upon the U.S. Supreme Court's development, under the First Amendment, of the compelled speech doctrine.[137] Hale accepted that, in

[128] *Id.* at [40].
[129] *Id.* at [45].
[130] *Id.* at [47].
[131] *Id.*
[132] *Id.* at [48].
[133] *Id.* at [49]. *See* European Convention on Human Rights §1, art. 9, Nov. 4, 1950, https://www.echr.coe.int/documents/convention_eng.pdf [hereinafter E.C.H.R.].
[134] *See Ashers Baking*, UKSC 49 at [50].
[135] *Id.*
[136] *Id.* at [52]. *See* E.C.H.R., *supra* note 133, at art. 10.
[137] *See Ashers Baking,* UKSC 49 at [53].
For U.S. case law on the compelled speech doctrine, see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that a state could not force public schoolchildren, whose parents objected on religious grounds, to salute the U.S. flag); *Wooley v. Maynard*, 430 U.S. 705 (1977) (determining that a state could not punish a driver for covering the state motto "Live Free or Die" on his license plate, when the driver objected to the motto on religious grounds); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that the government could not require a private group that organized a parade to include in the parade messages contrary to the group's views). In *Barnette*, Justice Robert Jackson wrote, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein". *See Barnette*, 319 U.S. at 642.
Prior to *Ashers Baking*, the Justices of the U.K. Supreme Court, including those who were sitting as the Judicial Committee of the Privy Council, had begun to sketch out their own understanding of the compelled speech doctrine. *See* RT (Zimbabwe) v. Secretary of State for the Home Department [2012] UKSC 38, [32]-[39] (consulting various international and comparative authorities to develop the compelled speech doctrine in the U.K.); Commodore of the Royal Bahamas Defence Force v. Laramore [2017] UKPC 13 (finding compelled participation of a member of the armed forces in a Christian ceremony to be unconstitutional).

having to make a cake that promoted same-sex marriage, the McArthurs were forced to communicate "a message with which they deeply disagreed".[138] A relatively specific message confronted the Court. While the nature of the cake in *Masterpiece Cakeshop* was not necessarily clear,[139] the nature of the cake in *Ashers Baking* was.[140] As noted above, the proposed cake in the U.K. case contained the Ernie and Bert characters, the logo of QueerSpace, and the words "'Support Gay Marriage'".[141] Although the McArthurs could not refuse to sell a cake to Lee based on his sexual orientation or his political views, the Court would not, in the absence of suitable justification, read F.E.T.O. as allowing the government to force the McArthurs to communicate against their beliefs.[142]

The Human Rights Act 1998 requires the higher courts in the U.K. to read legislation in a manner compatible with the rights in the E.C.H.R., provided that this is possible.[143] As such, and based on the above discussion, Hale read F.E.T.O. in a manner compatible with Articles 9 and 10 of the Convention.[144]

Of particular interest to the present paper, Hale included a postscript in her opinion that referred to the *Masterpiece Cakeshop* case decided earlier the same year. Hale distinguished the facts of the two cases. The U.S. case, Hale observed, did not include a specific message on the cake.[145]

Hale acknowledged that the majority in *Masterpiece Cakeshop* had focused on the apparent lack of neutrality toward religion in the prior proceedings, but she also paid attention to the other opinions in the case, even though they were not controlling.[146] She pointed out that Justices Ginsburg and Sotomayor had made a distinction between objecting to a cake's message and objecting to the individual who sought to purchase the cake; in *Masterpiece Cakeshop*, the dissenters thought that the objection was to the individual who sought to purchase the cake.[147] Hale read Justices Kagan and Breyer as

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[138] *Ashers Baking*, UKSC 49 at [54].
[139] *See* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719, 1724 (2018).
[140] *See Ashers Baking*, UKSC 49 at [12].
[141] *Id.*
[142] *Id.* at [55]-[56]. Hale did not explain how she balanced the McArthurs' rights of freedom of religion and speech against Lee's right to be free from discrimination. *See* Steve Foster, *Accomodating Intolerant Speech: Religious Free Speech Versus Equality and Diversity*, 2019 Eur. Hum. Rts. L. Rev. 609, 614-15.
Hale did note that technically the limited company Ashers Baking refused to sell the cake. *See Ashers Baking,* UKSC 49 at [57]. Companies do not have a right to freedom of religion under the E.C.H.R., but the McArthurs did. *Id.* Companies do have other rights under the Convention, including to property, fair trial, privacy, and freedom of expression. *See* Stéfanie Khoury, *Transnational Corporations and the E.Ct.H.R.: Reflections on the Indirect and Direct Approaches to Accountability*, 4 Sortuz: Onati J. Emergent Socio-Legal Stud. 68, 75, 75 n.17 (2010).
[143] *See Ashers Baking*, UKSC 49 at [56]. *See* Human Rights Act 1998 § 3(1) (UK).
[144] *See Ashers Baking*, UKSC 49 at [56].
[145] *Id.* at [59].
[146] *Id.* at [60]-[61].
[147] *Id.* at [61].

accepting the possibility that Phillips had objected to the sexual orientations of the potential customers.[148] To the contrary, Hale noted that Justices Thomas and Alito had focused on the idea that making a cake for a same-sex wedding was expressive conduct and that Justice Gorsuch had declined to distinguish between a cake that had words and a cake that lacked words.[149] Overall, Hale read the opinions in *Masterpiece Cakeshop*, as relevant to *Ashers Baking*, to say that denying the sale of a cake with a specific message to anyone was lawful, but that denying the sale of a cake to someone because of that person's sexual orientation was not.[150]

4. ANALYSIS OF KEY COMMUNICATION ISSUES IN THE CASES

Placed in conversation with each other, the opinions in *Masterpiece Cakeshop* and *Ashers Baking* present some thought-provoking communication issues. For instance, do both a specific cake and a generic cake convey messages? Who would be behind sending those messages? Who would constitute the audience? Does context matter? These issues draw upon many of the key elements in the process of human communication, including channel/medium, message, speaker/sender, listener/receiver/audience, feedback, and situation/context.[151] The precise nomenclature for elements of communication can vary from theorist to theorist.

To begin with, do both a specific cake and a generic cake convey messages? If communicative, the cakes would be the channels of communication. Flour, sugar, butter, eggs, baking powder, and other ingredients would serve communicative purposes. In terms of message, as Lady Hale saw it, the U.K. cake would have been specific, but the U.S. cake would not have been.[152] On the U.K. cake, Bert and Ernie from *Sesame Street* would have appeared along with "'Support Gay Marriage'" and the QueerSpace logo.[153] Although disputed, one reading of Bert and Ernie, two bachelors who live together, is queer.[154] The verbal imperative of the message would have been explicit in promoting

[148] *Id.*
[149] *Id.*
[150] *Id.* at [62].
[151] *See* Stephen E. Lucas & Paul Stob, The Art of Public Speaking 17-21 (13th ed. 2020). Interference/noise is another important element of human communication. *See id.* at 20. For a discussion of how models of communication developed from linear (one-way) to interactive (two-way) to transactional (communicators as both senders and receivers of messages), see Julia T. Wood, Communication in Our Lives 8-11 (8th ed. 2018).
[152] *See Ashers Baking*, UKSC 49 at [59].
[153] *Id.* at [12].
[154] *See* Martin Pengelly, *Sesame Street Disputes Writer's Claim That Bert and Ernie Are Gay*, Guardian (Sept. 18, 2018, 5:51 PM EDT), https://www.theguardian.com/tv-and-radio/2018/sep/18/sesame-street-bert-and-ernie-remain-puppets-and-do-not-have-a-sexual-orientation.

support for same-sex marriage, and the QueerSpace logo would have identified the associated organization. Thus, a specific message in support of same-sex marriage was present.

This U.K. cake may have been more specific than the cake that Craig and Mullins were going to order for their wedding. They apparently did not discuss a specific type of cake with Phillips.[155] For the sake of discussion, the assumption will be that they wanted a generic white wedding cake with flowers on it. A generic wedding cake does let the audience know that a wedding is taking place or will take place. While the cake is not necessarily clear about whether the wedding is civil or religious, queer or heterosexual, if someone entered a room with a generic white cake with flowers on it, the person most likely would know that two adults would be joined in marriage, a point Justice Thomas raised in his opinion.[156] Because of cultural conditioning via media and personal experience, an association exists between marriage and a white cake with flowers on it. Words are not necessary for communication,[157] a principle that Justice Gorsuch recognized.[158] With the generic wedding cake, a message exists, even in the absence of words or other symbols that would add specificity.

If a generic cake were not communicative,[159] it could not impart a message, but such a cake can impart a message, so it is communicative. Here, a hypothetical is instructive. First, one can imagine the inscription "Congratulations, Bill and Steve!" by itself. Without more, one may have little idea as to what the inscription refers. Perhaps Bill and Steve had a successful first year of operating a business, retired at the same time, won the men's doubles at Wimbledon, or returned safely from conquering Mount Everest. Any of these may be possible. Second, one can imagine the inscription "Congratulations, Bill and Steve!" placed upon an otherwise generic white cake with flowers on it. Under this scenario, Bill and Steve most likely are marrying each other. The otherwise generic cake, when carrying the inscription, changes the message of the inscription dramatically, from addressing almost anything positive that two men could have done to commemorating a marriage between two men.

Difference exists between a cake with a more explicit message and a cake with a less explicit message. The meaning of the former is less fuzzy. While not offering a full

[155] *See* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719, 1724 (2018).
[156] *Id.* at 1743.
[157] *See* Franklyn S. Haiman, *The Rhetoric of the Streets: Some Legal and Ethical Considerations*, 53 Q.J. Speech 99, 99 (1967).
[158] *See Masterpiece Cakeshop*, 138 S. Ct. at 1738.
[159] *See* András Koltay, *Confectionery Excellence in the Flow of Religion and Politics: Cakes and Constitutional Rights Before the British and American Supreme Courts*, *in* Christianity and Human Rights: Perspectives from Hungary 357, 374 (András Koltay ed., 2021) (maintaining that a cake, without an inscription, is not communicative).

policy plan, the cake with the specific message, "'Support Gay Marriage'",[160] did offer a position on a controversial political topic. A generic cake would not. Still, as noted above, a generic wedding cake would inform an audience that a wedding of some sort would be taking place. Although both cakes would be involved in the communication process, the latter would have a fuzzier message.

If both cakes would have served as channels for sending messages, who would have sent the messages? Justice Kennedy touched on this issue in his opinion but did not get very far with it because of the way the U.S. Supreme Court resolved the case on the grounds of a lack of government neutrality toward religion.[161] Nonetheless, since Craig and Mullins planned to order the cake to announce their wedding, they would have been behind the wedding cake's message. Likewise, since Lee ordered the cake to promote same-sex marriage, he would have been behind the cake's message. One could argue that an organization for whom someone volunteers is also behind a message, but, in this case, Lee apparently decided by himself to bring the particular cake to the party in question.[162]

The prospective purchasers may not have been the only people who would have been behind the proposed messages. If one thinks of bakers as ghostwriters, who are frequently anonymous, the bakers might not have been known to have been behind the proposed messages; no one other than the people who wished to hire the bakers would have known who would have crafted the cakes. To the contrary, if the bakers were known, something entirely possible when people at gatherings ask about where the cakes came from, especially in a smaller community, then members of the community might wonder whether the bakers were intending to send the messages. For example, if members of Phillips' worship community were aware that he knowingly had crafted a cake designed especially for a same-sex wedding, the members may have thought of Phillips as a hypocrite. However, if members of his worship community knew that he merely had sold a generic cake off the shelf, which later was used at a same-sex wedding, they may have been less likely to think of him as a hypocrite because the degree of involvement would have been lower. If members of the McArthurs' worship community were aware that the McArthurs had crafted a cake that called for support of same-sex marriage, the members may have thought of the McArthurs as hypocrites. Whether anyone besides those who attempted to place the orders knew that the bakers had crafted the cakes would be important to determining who may have sent, or been perceived to have sent, the messages.

[160] *See* Lee v. Ashers Baking Company, Ltd. [2018] UKSC 49, [12] (N. Ir.).
[161] *See Masterpiece Cakeshop*, 138 S. Ct. at 1730.
[162] *See Ashers Baking*, UKSC 49 at [10].

Who would constitute the audience for the message? Presumably, the guests at a wedding would be the intended audience for the message associated with a wedding cake. Likewise, the guests at a political event would be the intended audience for a politically-oriented cake. In a digital world, online individuals could also be secondary audiences, as people who attended an event may share photos of an event cake online. Furthermore, as suggested above, if members of a baker's religious or other community were to find out who made a cake in question, they could constitute an unintended audience for the message. Unintended audience perceptions of religious hypocrisy, specifically putting profit above one's beliefs, may have caused damage to the reputations of Phillips and the McArthurs in their respective worship communities. Such damage may have resulted in negative feedback from members of the worship communities.

Additionally, does the communication situation matter? A situation in which a baker, ignorant of the context in which a wedding cake would be used, merely sold a generic wedding cake, even one he had crafted himself for anyone's wedding, to a member of a same-sex couple for that couple's wedding would not involve the baker's knowingly having crafted a message, generic or specific, for a same-sex wedding. The baker would have sold someone a generic product, albeit still one with a message, without any discussion of the context for the cake. This situation would be somewhat akin to renting a hotel room to a gay couple, which, in *Bull v. Hall*,[163] the U.K. Supreme Court required an objecting Christian couple to do. However, the hypothetical situation would involve a lower level of knowledge than the actual situation in *Bull v. Hall*. Key is the absence of being forced to knowingly craft a message in violation of one's religious, political, or other beliefs that would fall under the rubric of compelled speech, which Lady Hale addressed in her opinion in *Ashers Baking*.[164] If Justices Kagan and Ginsburg's vision of a generic wedding cake had not included the baker's involvement in a creative process with knowledge of the context for the cake,[165] and thus involved compelled speech, their vision would be applicable here.

This discussion of various communication issues suggests that, at a minimum, legal systems ought to consider several factors in determining whether the law should require a baker to sell a baked good like a cake to a customer where the baked good conveys a message in opposition to the baker's religious, political, or other beliefs. As

[163] *See* Bull v. Hall [2013] UKSC 73.

[164] *See Ashers Baking*, UKSC 49 at [53].

[165] *See Masterpiece Cakeshop*, 138 S. Ct. at 1733. Ginsburg called the cake "a cake celebrating *their* wedding—not a cake celebrating heterosexual weddings or same-sex weddings". *See id.* However, the wedding for which Craig and Mullins tried to order a cake was a same-sex wedding. The situation would change the message associated with the cake.

Lady Hale wrote, the objection should be "to the message not to the man".[166] If the objection is to the potential customer and not the message, the legal inquiry would not need to proceed further. Otherwise, various factors, including the following, should be considered.

First, how specific is the message? The more specific the message is, the less likely the baker should be forced to help create it. For instance, a generic white wedding cake, already on display, would not be very specific, but a custom-made wedding cake with two women on it would be more specific, as would a custom-made wedding cake with the words "Congratulations on Your Wedding, Chantal and Judith".

Second, how likely is the baker to be identified as the creator of the baked good and potentially a sender of the associated message? Making a custom cake, even one with a somewhat fuzzier message, would take a greater degree of involvement than simply selling a cake off the shelf. Moreover, the size of the community is important. The larger the community is, the less likely a particular baker's involvement in making a baked good would be to stand out. Nonetheless, if a baker is known in the community for having taken a particular position on a religious matter in the public sphere, making a baked good that would contradict that position would be problematic.

Third, is the baker aware of the situation in which the baked good will be used? The more the baker knows the situation, and thus is potentially more actively involved in that context, such as by baking a custom-made wedding cake, the less likely the baker should be forced to create the baked good. To the contrary, selling a cake off the shelf would require minimal, if any, discussion of a wedding, and thus less knowledge of the situation by the baker.

While reflecting special concern about government-compelled speech, much like Justice Thomas[167] and Lady Hale,[168] the above factors recognize that the rights of freedom of religion and speech are not absolute.[169] The right to be free from discrimination based on a particular classification, itself also not absolute, has its place, too.[170]

[166] *See Ashers Baking*, UKSC 49 at [47].
[167] *See Masterpiece Cakeshop*, 138 S. Ct. at 1743-44.
[168] *See Ashers Baking*, UKSC 49 at [53]-[54].
[169] *See* René Reyes, Masterpiece Cakeshop *and* Ashers Baking Company*: A Comparative Analysis of Constitutional Confections*, 16 Stan. J. Civ. Rts. & Civ. Liberties 113, 139 (2020).
[170] *Id.*

Inevitably, some give and take will be necessary,[171] and these will play out in the balancing process in court.[172]

CONCLUSION

From a comparative perspective, this paper has examined the opinions of the U.S. and U.K. Supreme Courts in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* and *Lee v. Ashers Baking Company, Ltd*., focusing on key communication issues in the two cases. Based on this analysis, the paper has maintained that court systems should consider, at a minimum, several factors in cases in which anti-discrimination law clashes with the freedoms of religion and speech in the sale of baked goods such as cakes. The factors that courts should consider include the following: (1) the specificity of the message, (2) the likelihood that the baker will be identified as the creator of the baked good and thus potentially as a sender of the message, and (3) whether the baker knows the the situation in which the baked good is to be used. A particular concern, although not the only one, is the risk of compelled speech.

Despite objections from some commentators and members of the bench, "[c]onstitutional borrowing and transplantation" do occur.[173] The above discussion of *Masterpiece Cakeshop* and *Ashers Baking* should contribute to a greater understanding of the comparative legal issues, as well as the related communication issues, that these two important cases presented. The ongoing likelihood remains that clash between anti-discrimination law and the freedoms of religion and speech will occur again not only in the U.S. and the U.K., but in other jurisdictions as well.[174]

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[171] *See* Gerald A. Hornby, *Let Them Eat Cake: A Comparative Analysis of Recent British and American Law on Religious Liberty*, 58 Duq. L. Rev. 377, 405-07 (2020). *But see generally* Jeremiah A. Ho, *Queer Sacrifice in* Masterpiece Cakeshop, 31 Yale J.L. & Feminism 249 (2020).

[172] *See* Sarah Fraser Butlin, *Cakes in the Supreme Court*, 78 Cambridge L.J. 280, 283 (2019). *But see generally* Richard Moon, *Conscientious Objection and the Politics of Cake-Making*, 9 Oxford J.L. & Religion 329 (2020) (contending that courts should move away from balancing the competing rights of free exercise and freedom from discrimination).

[173] *See* Michel Rosenfeld & András Sajó, *Introduction*, *in* The Oxford Handbook of Comparative Constitutional Law 1, 13 (Michel Rosenfeld & András Sajó eds., 2012).

[174] *See generally* Elphick, *supra* note 6. In the U.S., several years after the Supreme Court decided *Masterpiece Cakeshop*, the Court agreed to hear *303 Creative, LLC v. Elenis*, a case in which a Colorado web designer wished to provide wedding webpages, but, based on religious belief, planned to refuse to offer her services for same-sex weddings. Adam Liptak, *Supreme Court to Hear Case of Web Designer Who Objects to Same-Sex Marriage*, N.Y. Times (Feb. 22, 2022), https://www.nytimes.com/2022/02/22/us/colorado-supreme-court-same-sexmarriage.html. The web designer wanted to post on her website a message that indicated why she would decline to serve potential clients who were involved with same-sex weddings, but such a message would have violated Colorado law. *Id.*

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The Questionable Polish-German Pandemic Mutual Agreement

Blazej Kuzniacki* & Wojciech Morawski**

*Błażej Kuźniacki is assistant Professor at the University of Amsterdam (Netherlands), research assistant professor at the Lazarski University (Poland), advisor at the PwC Global Tax Policy, senior manager at the International Tax Services of the PwC Netherlands. He is the author of around 100 publications and frequent guest lecturer at various universities word widely.
**Wojciech Morawski is a Professor at the Nicolaus Copernicus University (Poland), Head of the Chair of Public Finance Law and Chairman of the Council of the Scientific Discipline Law of NCU. He specialises in tax law, particularly: local taxes, income taxes and interpretation of tax law and examines the case law of the courts in tax matters. He conducted research at Masaryk University in Brno and Charles University in Prague. He is the author of over 300 publications in Polish, English and Czech.
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@ *blazej.kuzniacki@gmail.com ** wmoraw@umk.pl, wojciechmorawski.torun@gmail.com
*0000-0002-3459-7656 **0000-0002-2396-9434

ABSTRACT

The outbreak of the coronavirus (COVID-19) pandemic in 2020 prompted countries around the world to take countermeasures. One was to restrict the movement of citizens between countries for employment purposes amongst others. As a result, some employees were forced to continue working remotely in their resident states for employers in other states. In this paper, the authors focus on international tax issues related to the situation of cross-border Polish employees working for German employers. They critically analyse the Polish-German Pandemic Mutual Agreement, adopted on 27 November 2020 by the competent authorities of Poland and Germany, which introduced a legal fiction of performing work in the previous country of employment to maintain the taxation rules in force before the outbreak of the COVID-19 pandemic. The authors argue, mainly from the perspective of the Polish legal system, that the legal basis for the Polish-German Mutual Agreement, its content, and its legal effects are questionable. In addition to that entered into by the Polish competent authority, nearly identical mutual agreements were successfully initiated and concluded by the German authorities and those in Austria, Belgium, France, Luxembourg, the Netherlands, and Switzerland. Thus, although this note focuses on the Polish-German Mutual Agreement, the ramifications and impact are, by analogy and mutatis mutandis, much broader.

KEYWORDS

Interpretation of tax treaties; Mutual Agreement Procedure; Employment Income; COVID-19 cross border restrictions; O.E.C.D..

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INTRODUCTION

Poland and Germany are closely linked by economic and social ties. This link is due not only to cooperation between companies but also to the free movement of people. The circumstances are favourable for such movement, as major cities are located on both sides of the Polish-German border. Berlin (Germany) is less than an hour's drive from Szczecin (Poland) on a motorway, and the old towns were divided by the border in 1945, but they now function in harmony. For example, Gubin and Guben, Słubice and Frankfurt (along the Oder River), and Zgorzelec and Görlitz, in Poland and Germany respectively. The considerably higher level of earnings in Germany has led many Poles to seek work in Germany.[1] The ease of cross-border movement of workers between Poland and Germany, such as that between other countries in the world, was significantly restricted by the coronavirus [hereinafter COVID-19] pandemic in 2020.

The actions of Polish authorities aimed at controlling the COVID-19[2] pandemic did not differ significantly from those taken by other Member States of the European Union. In the situation relevant to our study, in the first year of the pandemic before mass vaccination began, any employee who lived in one country (in the case of Polish-German relations, most often an employee living in Poland) could not commute regularly to work in another country (here, most often Germany). As a result, Polish

[1] Salaries in Germany are, on average, three times higher than those in Poland. *See* Reinis Fisher, *Average Monthly Salary in European Union 2020*, (June. 16 2022), https://www.reinisfischer.com/average-monthly-salaryeuropean- union-2020; *See also* EUROSTAT, *Wages and Labour Costs*, https://ec.europa.eu/eurostat/statisticsexplained/index.php?title=Wages_and_labour_costs.

[2] "COVID-19" refers to a specific coronavirus disease caused by severe acute respiratory syndrome coronavirus, https://en.wikipedia.org/wiki/COVID-19.

employees had to choose between staying in Germany for a longer period or leaving their jobs in Germany and living with family in Poland. For some employees, a third option was available: to continue working, but remotely, from their homes in Poland. In this paper, we focus on international tax issues related to this situation of cross-border Polish workers.[3]

In principle, this situation is regulated by the Polish-German Tax Treaty signed in 2003[4] [hereinafter Polish-German Tax Treaty] which is largely based on the Organisation for Economic Co-operation and Development [hereinafter O.E.C.D.] Model Tax Convention on Income and on Capital [hereinafter O.E.C.D. Model Tax Convention].[5] In line with Article 15(1) of the Polish-German Tax Treaty, a Polish resident who works for an employer in Germany (source state) may be taxed in both states for work performed in Germany.[6] A problem arises when the work is not performed in Germany - for example due to restrictions imposed during the COVID-19 pandemic. In this case, employment income should be taxable only in Poland.

This causes practical problems particularly in relation to taxation in the source state. The employer, who usually made the advance income tax payments to the tax authority, is not a resident of the state to which these payments must be made. Thus, the employees are required to make such tax settlements on their own. Associated problems were highlighted by the O.E.C.D., inter alia, in § 60 of the Updated Guidance on Tax Treaties and Impact of the COVID-19 Pandemic from 21 January 2020[7] [hereinafter O.E.C.D. Pandemic Guidance of 21 January 2021] as follows:

> Employers may have withholding obligations, which are no longer underpinned by a substantive taxing right. These would therefore

[3] This is a situation strictly caused by the pandemic and thus should be distinguished from the situation of so-called "digital nomads", who perform work remotely with the mutual consent of employees and employers. The expression "digital nomad" refers to a person who is not limited to one geographic location for work, study, or leisure and whose mobility, particularly in remote working, has been enabled by new information technologies and the Internet, Tsugio Makimoto & David Manners, Digital Nomad (1997). For analysis of an application of tax treaties to digital nomads, Svetislav V. Kostic, *In Search of the Digital Nomad: Rethinking the Taxation of Employment Income under Tax Treaties*, 11 World Tax J. 189 (2019).

[4] Agreement between the Federal Republic of Germany and the Republic of Poland for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, Ger.-Pol., May 14, 2003, (entered into force Jan, 2015) (Journal of Laws [Dziennik Ustaw] 2005, item 90) [hereinafter Polish-German Tax Treaty].

[5] That is, the 2003 version of the O.E.C.D.'s Committee on Fiscal Affairs, O.E.C.D. Model Tax Convention on Income and on Capital, Jan. 28, 2003. For the various versions of the model, *see* https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-full-version_9a5b369e-en (last visited Aug. 23, 2022).

[6] To avoid double taxation in Poland, the exemption with progression will be applied according to Polish-German Tax Treaty, *supra* note 4, art. 24(29)(a).

[7] O.E.C.D., Updated Guidance on Tax Treaties and Impact of the COVID-19 Pandemic from 21 January 2020 [hereinafter O.E.C.D. Pandemic Guidance of 21 January 2021] § 60. Available online at: https://www.oecd-ilibrary.org/social-issues-migration-health/updated-guidance-on-tax-treaties-and-the-impact-of-the-covid-19-pandemic_df42be07-en (last visited Aug. 23, 2022).

> have to be suspended or a way found to refund the tax to the employee. The employee would have a new or enhanced liability in their jurisdiction of residence, which would result in new filling obligations.

Another problem arises where an employee's remuneration is to be taxed in Poland and, at the same time, deducted from the employer's income in Germany. This contradicts the logic of the O.E.C.D. Model Tax Convention and Polish-German Tax Treaty. Article 15 of the O.E.C.D. Model Tax Convention was created in accordance with the principle[8] that an employee's income would be taxed in the state in which the remuneration was deductible from the employer's income.

The governments of Poland and Germany have made efforts to resolve this concern. These efforts have resulted in a specific solution with respect to the application of articles 15(1) and 19(1) to cross-border workers and government officials, respectively. The agreement was adopted on 27 November 2020 by the competent authorities of Poland and Germany on the basis of Article 26(3) of the Polish-German Tax Treaty which regulates the mutual agreement procedure [hereinafter M.A.P.] initiated by the competent authorities of the contracting states [hereinafter Polish-German Pandemic Mutual Agreement].[9] This agreement introduced a legal fiction of performing work in the previous country of employment to maintain the taxation rules that were in force before the outbreak of COVID-19.[10] The aim of the present study is to critically analyse the Polish-German Pandemic Mutual Agreement, mainly from the perspective of the Polish legal system, to demonstrate that the legal basis for the mutual agreement, its content, and its legal effects are questionable. The legal form of the solution adopted by the Polish and German governments is so doubtful that it may entail a complete lack of binding force for taxpayers and tax agents (employees and employers), tax authorities, and courts. It is astonishing that such a solution appears to be endorsed by the O.E.C.D.- as is evident in the following statement:

[8] However, it is not explicitly formulated in any provision, so its legal significance in the interpretation of the tax treaty is limited.

[9] Available online at: https://www.podatki.gov.pl/media/6433/agreement-ca-niemcy.pdf (last visited Aug. 5, 2022).

[10] The Polish-German Pandemic Mutual Agreement does not apply to a situation where a Polish employee worked in Germany for a Polish employer, as that problem can be solved by applying § 5 of the commentary to Article 15 of the model, as suggested by the O.E.C.D. Pandemic Guidance of 21 January 2021, *See* O.E.C.D. Pandemic Guidance of 21 January 2021, *supra* note 7, §§ 54-57, that is, if the days of sickness "prevent the individual from leaving and he would have otherwise qualified for the exemption", they exceptionally do not count towards the days-of-presence test in Article 15(2)(a). The O.E.C.D. argued that this exception may cover many situations driven by the COVID-19 pandemic, such as banning travelling by governments and cases where it is, in practice, impossible to travel due, for example, to cancellation of flights. Wojciech Morawski & Błażej Kuźniacki, *The German-Polish Tax Problems of Cross-Border Workers in the COVID-19 Pandemic - When the Remedy is Worse than the Problem,* Białostockie Studia Prawnicze, Nov. 2021, at 98, 100.

> Exceptional circumstances call for an exceptional level of coordination between jurisdictions to mitigate the compliance and administrative costs for employees and employers associated with an involuntary and temporary change of the place where employment is performed. Where relevant, *MAP should be applied efficiently and pragmatically to help resolve issues arising out of the COVID-19 pandemic*. Jurisdictions have issued useful guidance and administrative relief to mitigate the unplanned tax implications and potential new burdens arising due to effects of the COVID-19 pandemic. A sample of that guidance is included in Box 4.[11]

Although we agree with the O.E.C.D. that the "M.A.P. should be applied efficiently and pragmatically to help resolve issues arising out of the COVID-19 pandemic", we can hardly subscribe to the arguments that "efficiency and pragmatism" may derogate international and constitutional laws. It is noteworthy that, in Box 3, the O.E.C.D. listed, inter alia, mutual agreements initiated by German authorities with those in Austria, Belgium, France, Luxembourg, the Netherlands, Poland, and Switzerland.[12] Hence, even though this study focuses on the bilateral solutions between Poland and Germany, the ramifications of the study and its impacts are, by analogy and *mutatis mutandis*, much broader. It is true that the Polish-German Pandemic Mutual Agreement deals with the taxpayer's right, rather than his or her obligation, to use the option of taxation of income in the country of the employer's registered office. However, once they opt for that legal fiction, documentational obligations are imposed on them. Taxpayers must be able to become aware of their rights and obligations. This matrix of rights-obligations may raise doubts as to the legality and validity of the Polish-German Pandemic Mutual Agreement, as discussed below.

[11] O.E.C.D. Pandemic Guidance of 21 January 2021, *supra* note 7, § 62. From the point of view of the O.E.C.D., the Polish-German Pandemic Mutual Agreement and other German-style Pandemic Mutual Agreements seem like a good solution because they reflect the logic of rules for the taxation of worker income; that is, such remuneration should be taxed in the state in which it constitutes a deductible tax cost and therefore reduces the tax base of the employer. Lynne Oats et al., Principles of International Taxation 175 (Bloomsbury Professional, 6th ed., 2017).

[12] O.E.C.D. Pandemic Guidance of 21 January 2021, *supra* note 7, § 62, at 19-20.

1. THE POLISH-GERMAN PANDEMIC MUTUAL AGREEMENT

The solution under the Polish-German Pandemic Mutual Agreement is based on the legal fiction of performing work in a place where it is not physically performed, as it stipulates that

> days of work for which wages are received and during which the employment was exercised at home (home-office-day) solely due to the measures taken to combat the COVID-19 pandemic by the German or Polish Government or their local subdivisions, may be deemed as day of work spent in the Contracting State where the cross-border worker would have exercised the employment without the measures taken to combat the COVID-19 pandemic.[13]

The competent authorities of Poland and Germany clearly expressed a will to apply this solution only to situations caused specifically by the COVID-19 pandemic, following thecaveat according to which the mentioned legal fiction "does not apply to working days that would have been spent either as home-office-days or in a third State, independent from these [anti-COVID-19 pandemic] measures". They added that this fiction "does not apply to cross-border workers insofar as they are exercising their employment at home according to their employment contract".[14] The latter situation is typical for so-called "digital nomads".[15]

As mentioned, the legal fiction functions as a right rather than as an obligation; thus, employees who acquire the right to make use of it must initiate its application in accordance with the suggestion that it "*may be deemed as* a day of work spent in the Contracting State".[16] However, once its application is chosen by the employee, the employee is "obliged to apply this fiction consistently in both Contracting States and to keep appropriate record (i.e., written confirmation of the employer stating which parts of the home-day-office were solely due to the COVID-19 pandemic related measures)".[17]

The Polish-German Mutual Agreement, in Section 3, also envisages the rule as aimed at the prevention of the misuse of the legal fiction, according to which it

> shall only apply to the extent that the respective wages for the days spent working at home are usually taxed by the Contracting State in

[13] Mutual Agreement between the Competent Authorities of Germany and Poland according to paragraph 3 of Article 26 of the Polish-German Tax Treaty, *supra* note 4, § 1, 2021.
[14] *See* 6. the Polish-German Pandemic Mutual Agreement § 1.
[15] *See* Makimoto & Manners, *supra* note 3.
[16] *See supra* note 14.
[17] Mutual Agreement between the Competent Authorities of Germany and Poland according to paragraph 3 of Article 26 of the Polish-German Tax Treaty, *supra* note 4, § 2, 2021.

> which cross-border worker would have exercised the employment without the measures taken to combat the COVID-19 pandemic. The cross-border worker accordingly agrees that these items of income will be actually taxed in the Contracting State where he would have exercised the employment without the measures taken to combat the COVID-19 pandemic. These items of income shall be regarded as "actually taxed" when they are included in the assessment basis used to calculate the tax.

Finally, after the mutual agreement was enforced on 28 November 2020, it was applied "to days in the period from 11th March 2020 until 31st December 2020" and, later, "[would] automatically be extended, unless it is terminated by either Competent Authority of a Contracting State".[18] Hence, although its retroactive application is precisely indicated, its prospective application is actually unknown, as it depends on a unilateral decision by the competent authorities of Poland or Germany.

2. LEGAL BASIS FOR THE POLISH-GERMAN PANDEMIC MUTUAL AGREEMENT AND INTERPRETATIVE DOUBTS

In general, a mutual agreement is not unusual in the treaty practice of O.E.C.D. Member States.[19] However, the Polish-German Pandemic Mutual Agreement appears to have a shaky legal basis considering the situation that it purported to regulate and the method of its regulation. In essence, the Polish-German Pandemic Mutual Agreement is based on Article 26(3) of the Polish-German Tax Treaty, which states that "[t]he Competent Authorities of the Contracting States shall endeavour by mutual agreement to *remove any difficulties or doubts [that] may arise in the interpretation or application of the Agreement.*" This raises the fundamental question of which doubts or difficulties must be resolved in the M.A.P.

In principle, the place where work is performed will determine the place of employment income taxation. The commentary to Article 15(1) of the O.E.C.D. Model Tax Convention in Section 1 clearly indicates that "work is exercised in the place *where the employee is physically present when performing the activities* for which the employment

[18] *Id.* §§ 5 - 6.

[19] Qiang Cai & Pengfei Zhang, *A Theoretical Reflection on the O.E.C.D.'s New Statistics Reporting Framework for the Mutual Agreement Procedure: Isolating, Measuring, and Monitoring,* 21 J. Int'l. Econ. L. 867 (2018); Hugh J. Ault, *Improving the Resolution of International Tax Disputes*, 7 Fla. Tax Rev. 137 (2005).

income is paid." A deviation from the above-mentioned principle of taxation of remuneration for cross-border work would require change in the tax law at both the international and national levels.

In spite of some hesitations in the case law, the prevailing view of courts is also consistent with the aforementioned principle according to which employment income may be taxed only in the country in which the work is actually performed. For example, in a judgement delivered on 22 December 2006, the Dutch Supreme Court (*Hoge Raad*) held that, in relation to standby fees, the place of work performance is where employees are present during the period for which they are paid, not where the employee would potentially perform the work.[20] In this specific case, which involved editorial and television presentation activities, an application of the principle meant splitting the taxation of remunerations between two countries, as the taxpayer in question was in the Netherlands for a few days as well as in their place of residence (Mexico) also for a few days.[21]

A similar interpretative approach was taken by the Supreme Administrative Court in Poland (*Naczelny Sąd Administracyjny* [hereinafter N.S.A.]) in respect to the Polish-German Tax Treaty. In a judgement delivered on 13 May 2011,[22] the N.S.A. made the following statement:

> The right to tax income in N. [an abbreviation from pol. *Niemcy*, Germany] is not determined, as a rule, by the place where the employer is located, nor by the place where the results of the work are used, nor by the place where the remuneration is paid, nor by the place where the entity paying the remuneration is located. The only criterion is the place where the work is performed. Thus, the Court of First Instance correctly interpreted Article 15(1) of the Tax Treaty by assuming that the place of taxation of salary, wages [,] and similar remuneration from paid employment *depends on the place where the work is performed* (emphasis added).

Individual interpretations by the Polish tax authorities have emphasised the place of the physical presence of an employee during the performance of their duties as the determinant of the place of work performance.[23] However, these have raised concerns

[20] *See* Hoge Raad der Nederlanden [HR] [the Dutch Supreme Court] Dec. 22, 2006, BNB 2007, 97 (Neth.).

[21] *See* Frank P.G. Pötgens, *Stand-By Fee Taxable in Residence State Under Art. 15 of the O.E.C.D. Model,* 48 Eur. Tax'n 85 (2008); *see also* Frank P.G. Pötgens, Income from International Private Employment 304 (2007).

[22] Naczelny Sąd Administracyjny [Polish Supreme Administrative Court] May. 13, 2011, *see* Poland: Case No. II FSK 2165/09 (Pol.).

[23] The Director of National Tax Information, *Against the Background of Article 14 of the Polish-Czech Double Taxation Convention: Interpretation of 9 October 2018* (0115-KDIT2-2.4011.336.2018.1.HD), https://sip.lex.pl/orzeczenia-i-pisma-urzedowe/pisma-urzedowe/0115-kdit2-2-4011-336-2018-1-hd-opodatkowanie-185028845.

regarding situations wherein performing work in a given place has been the result of the free decision of the person concerned - not an effect of restrictions on cross-border movement. In the Polish tax law literature, none of the different views have negated the reference to the employee's place of residence as the place of work performance.[24]

Contrary to the assertions of the competent authorities, the Polish-German Pandemic Mutual Agreement does not therefore, remove doubts in the interpretation of the Polish-German Tax Treaty. Nor does it confirm a particular understanding of the treaty. In fact, the Polish-German Pandemic Mutual Agreement has proposed an interpretation of the provisions of Article 15 in the Polish-German Tax Treaty that is completely different from the prevailing view in tax jurisprudence and academia. Moreover, the view presented by the competent authorities does not stem from the wording of the Polish-German Tax Treaty. It is a change in the wording thereof. In fact, the Polish-German Pandemic Mutual Agreement confirms this finding, as the Agreement uses the concept of "legal fiction" and makes it available to only some taxpayers. The interpretation of Article 15 of the Polish-German Tax Treaty does not allow its application under such a legal fiction, since it is not included in the wording of the Treaty.[25]

The competent authorities misapplied the interpretative guidance included in Section 5 of the commentary to Article 15 of the O.E.C.D. Model Tax Convention. As mentioned in the Introduction above, Section 5 applies to a situation wherein a Polish employee works in Germany for a Polish employer. In such a situation, the commentary reads that days of sickness count for calculation of the 183-day period, in Article 15(2)(a) of the O.E.C.D. Model Tax Convention, being the "days of physical presence" method, "unless they prevent the individual from leaving and he would have otherwise qualified for the exemption". This is clearly an exception from the principle that days of sickness count for the purposes of the "days of physical presence" method under Article 15(2)(a). This exception should be interpreted strictly,[26] and not be applied by analogy to situations that are not covered by Article 15(2)(a) in contradiction with the ordinary meaning of terms used in other treaty provisions.[27] In particular, this exception should by no means be extended to situations covered by Article 15(1) of the O.E.C.D. Model Tax Convention insofar as they concern employment which is exercised in the other

[24] *See* W. Morawski, *Opodatkowanie Dochodów z Pracy Najemnej w Świetle Umów o Unikaniu Podwójnego Opodatkowania (Cz. 1)* [Taxation of Income from Employment in the Light of Double Taxation Conventions (Part 1)], 9 Przegląd Podatkowy [Tax L. Rev.] 7 (2006).

[25] *See* Morawski & Kuźniacki, *supra* note 10, at 95, 102.

[26] Joined Cases C-283 & C-291 C-292/94, Denkavit Int'l B.V., VITIC Amsterdam B.V. and Voormeer B.V. v. Bundesamt für Finanzen, 1996 E.C.R. I-5063 §27.

[27] *See also* U. Linderfalk, On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties 286 (Springer Sci. & Bus. Media, 2007). *See generally* Lorand Bartels & Federica Paddeu, Exceptions in International Law (Oxford University Press, 2020).

Contracting State rather than the days of presence in the other State. Both authoritative scholarship[28] and international case law[29] confirm such an interpretation by arguing that work is performed under Article 15(1) where the individual is actually present for that purpose - either actually performing the work or being ready to do so. Whereas the term "is present" under Article 15(2)(a) has to be interpreted autonomously and literally, meaning the period of physical presence in the source state of work. Again, the only exception, solely for purposes of Article 15(2)(a), is included in Section 5 of the commentary to Article 15 of the O.E.C.D. Model Tax Convention and relates to sickness days that prevent the individual from leaving the source state of work, and said individual would have otherwise qualified for the exemption from taxation in the source state of work pursuant to Article 15(2) of the O.E.C.D. Model Tax Convention.

Furthermore, the Polish-German Pandemic Mutual Agreement clearly states that it is a legal fiction and not a particular way of interpreting a tax agreement. A "legal fiction" is, after all, something quite different from the interpretation of a tax treaty. The phrase "legal fiction" entails an acceptance that "reality" is different from the result of its application.

Consequently, the legal fiction introduced by the competent authorities in the Polish-German Mutual Agreement[30] stems from an interpretation *contra legem* of Article 15(1) of the Polish-German Tax Treaty. It is an example of extensive interpretation *per analogiam* of the "sickness's exception" under Section 5 of the commentary to Article 15(2)(a) of the O.E.C.D. Model Tax Convention to revise the meaning of treaty terms used in Article 15(1) of the Polish-German Tax Treaty.[31] Interestingly, such interpretation is not even supported by Sections 54-57 of the O.E.C.D. Pandemic Guidance of 21 January 2021, since they refer to the mentioned exception solely for purposes of Article 15(2)(a) of the O.E.C.D. Model Tax Convention, rather than to Article 15(1). Moreover, there are

[28] *See, e.g.*, Luc De Broe, *Income from Employment, in* Klaus Vogel on Double Taxation Conventions 1164-76 (Wolters Kluwer Law & Business eds., 4th ed., 2015).

[29] *See also* Bundesfinanzhof [BFH] [German Fiscal Court] Aug. 27, 2002, Case No. *BStBl. II* 883 (2002); BFH Oct. 17, 2004, Case No. I B 98/03 and NV 161 (2004); Amsterdam Court of Appeal Sep. 4, 2003, Case No. 01/1655, *VN* 2003/49.1.1; Hoge Raad [HR] [the Dutch Supreme Court] Feb. 21, 2003, Case Nos. 37011 and 7004, *BNB* 2003/177 and 178; Court of Appeals Brussels, Jun. 14, 2000, Case No. 197 *TFR* 258. De Broe, *supra* note 26, 1166-72.

[30] I.e., the assumption that

> days of work for which wages are received and during which the employment was exercised at home (home-office-day) solely due to the measures taken to combat the COVID-19 pandemic by the German or Polish Government or their local subdivisions, may be deemed as day of work spent in the Contracting State where the cross-border worker would have exercised the employment without the measures taken to combat the COVID-19 pandemic.

See supra Section 1.

[31] It must be admitted, however, that this interpretation does appear to be reasonable, to an extent, even if we consider it to be going too far.

critical contextual and factual differences between the situations covered by the juxtaposed Treaty provisions and the "sickness exception" vis-a-vis the COVID-19 pandemic cross-border restrictions, as follows:

1. The exception applies to derogate from the principle in a situation in which sickness prevents the individual from leaving the source state of work (e.g., Germany) to enter their residence State (e.g., Poland), whereas the COVID-19 pandemic cross-border restrictions prevent the individual from leaving their residence state (e.g., Poland) to perform work in the source state of work (e.g., Germany).

2. The sickness prevents the individual from actually performing work for their employer, whereas the pandemic restrictions do not (i.e., work is still actually performed by the individual, but it is done in their residence state instead of the state of the source of work).

3. The "sickness exception" works in favour of taxation only in the residence State of the individual, while the legal fiction in the Polish-German Mutual Agreement works in favour of the taxation of the individual in both Contracting States in accordance with Article 15(1) of the Polish-German Tax Treaty. Apparently, these differences were entirely ignored by the competent authorities while designing and introducing the legal fiction to Article 15(1) of the Polish-German Tax Treaty via the Polish-German Mutual Agreement.

Finally, it is noteworthy that the very fact that the legal fiction under the Polish-German Mutual Agreement is an option/right rather than an obligation does not change the above observations. The key observation remains untouched: the legal fiction, irrespective of its legal mechanism of functioning (right instead of obligation), does not find support in an appropriate interpretation of Article 15 of the Polish-German Tax Treaty. Also, it is not obvious that the use of the option to rely on legal fiction will always work in favour of the individual, as, in some cases, it may cause more problems instead of fewer practical problems.[32]

[32] *See infra* Section 6.

3. IGNORANCE OF THE STATUTORY FORM FOR SHAPING TAXPAYER RIGHTS AND OBLIGATIONS

The preamble of the Polish-German Pandemic Mutual Agreement indicates that the COVID-19 pandemic "is a situation of *force majeure"* and that "the measures taken in response to the pandemic can lead to substantial uncertainty with respect to the tax position of cross-border workers". This altogether justifies the introduction of the legal fiction via the mutual agreement pursuant to Article 26(3) of the Polish-German Tax Treaty. This solution, the preamble continues, has been agreed upon by the competent authorities of Germany and Poland, "with prudence and deliberation, to *minimise the personal burden* on cross-border workers". Two circumstances were crucial to the introduction of the mutual procedure, namely (i) the pandemic, considered a *force majeure*, and (ii) the desire to minimise (taxpayer) problems caused by the pandemic.

Despite the clearly good intentions and seemingly compelling reason for the Polish-German Pandemic Mutual Agreement, the introduction of the legal fiction appears to be at odds with the constitutional principle of legalism- according to which a public authority may act only on the basis of statutory provisions.[33] Facilitating the taxpayer's compliance with personal tax settlements, as in the case at hand, does not seem to be a goal meriting the disrespect of this constitutional principle, which is fundamental to the functioning of public authorities (such as the competent authorities).

Hypothetically, we could even argue that the Polish-German Pandemic Mutual Agreement does not give taxpayers the right to opt for their income to be taxed in Germany, rather than at their actual place of work performance. This follows from the requirements concerning the creation of such rights. Under Polish law, the determination of the amount of tax and its payment must have its basis in statutory law, that is, an act adopted by Parliament, such as a domestic tax act or an international agreement ratified with the consent of the Parliament (e.g., a tax treaty),[34] which means no taxation without representation (an emanation of the rule of law in the tax domain).[35] Neither the Polish Income Tax Act [P.I.T.A.][36] nor the Polish-German Tax Treaty mention such a choice in dealing with tax settlements as that under the Polish-German Pandemic Mutual Agreement. Of course, it is difficult to expect tax

[33] *See* Konstytucja Rzeczypospolitej Polskiej[Constitution of the Republic of Poland] Apr. 2, 1997, art. 7 (Dziennik Ustaw [Journal of Laws], no. 78, item 483) [hereinafter "Polish Constitution"].

[34] *See* Polish Constitution, art. 217.

[35] *See* P.J. Hattingh, *The Multilateral Instrument from a Legal Perspective: What May Be the Challenges?*, 71 Bulletin Int'l Tax'n 5, (2017). *See generally* Tom Bingham, The Rule of Law (Allen Lane, 1st ed. 2010).

[36] *See Ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych* [Personal Income Tax Act (1991)], 1128 Journal of Laws (consolidated version of 24 June 2021) (Pol.).

authorities to disregard the content of the Polish-German Mutual Agreement.[37] The taxpayer should retain a favourable position under the Mutual Agreement on the basis of the principle of protection of legitimate expectations, which is generally accepted in various legal systems.[38]

4. INTERNET WEBSITE INSTEAD OF OFFICIAL PROMULGATOR, ENGLISH INSTEAD OF POLISH

We also argue that introducing implied changes to the law through the Polish-German Pandemic Mutual Agreement may violate taxpayer rights. The Polish-German Tax Treaty (like any international agreement) was published appropriately in the official journal of promulgation, which in Poland is the *Journal of Laws* (*Dziennik Ustaw*). Mutual agreements are not published in Poland in the *Journal of Laws* or in any other official promulgating journal. The Polish-German Pandemic Mutual Agreement was published solely on the website of the Polish Ministry of Finance. Without having the exact location of this Polish-German Pandemic Mutual Agreement,[39] one must have excellent navigation skills in using the website. An ordinary person in Poland with knowledge of the Polish legal system knows that to consult the law, the generally accessible *Journal of Laws* must be consulted. To this end, people are not obligated to regularly search the website of the Ministry of Finance, which would, in any case, be quite troublesome.

Laws are published in the official language of the State in which they have binding force. Obviously, in Poland and in respect to Polish tax law, the official language is Polish. The position of the Polish language as the official language of the law is guaranteed by the Constitution. Article 27 of the Polish Constitution indicates that "[i]n the Republic of Poland, the official language is Polish". Moreover, Article 6 of the Polish Language Act of 7 October 1999[40] provides that "international agreements concluded by the Republic

[37] However, in some situations, even an administrative court has refused to protect a taxpayer when it acted on the basis of a position of the Minister of Finance which had no relevant legal basis, for example, a judgement of the N.S.A. on 10 October 1994, Case No. II SA 1836/93.

[38] *See*, *e.g.*, Gavin Barrett, *Protecting Legitimate Expectations in European Community Law and in Domestic Irish Law,* 20 Y.B. Eur. L. 191 (2001).

[39] Mutual Agreement between the Competent authorities of Germany and Poland according to paragraph 3 of Article 26 of the Agreement Between the Federal Republic of Germany and the Republic of Poland for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital signet at Berlin on 14 May 2003 with respect to the application of Paragraph 1 Article 15 on cross-border workers and of paragraph 1 Article 19 on government officials working cross-borders, Ger.-Pol., Nov. 12-Nov. 27, 2020, *available at* https://www.podatki.gov.pl/media/6433/agreement-ca-niemcy.pdf.

[40] USTAWA z dnia 7 października 1999 r. o języku polskim [The Polish Language Act (1999)] *Journal of Laws*, item 1480 (consolidated version from 7 August 2019).

of Poland should have the Polish language version as the basis for their interpretation, unless specific provisions provide otherwise". Through these provisions, Polish legislators attempt to guarantee Polish citizens access to the law in a language they know. Even the case law of the Court of Justice of the European Union underscores that the basic condition for imposing obligations on individuals is the ability to be acquainted with law in their first language - as stated in the following:[41]

> Article 58 of the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, *precludes the obligations* contained in Community legislation *which has not been published in the Official Journal of the European Union in the language of a new Member State*, where that language is an official language of the European Union, from being imposed on individuals in that State, *even though those persons could have learned of that legislation by other means* (emphasis added).

Shockingly, the Polish-German Pandemic Mutual Procedure was drafted and published only in English on the website of the Polish Ministry of Finance.[42] In comparison, the German government's website published information on the mutual agreement, including its content, in German, the official language of Germany.[43]

[41] *See* judgement of the Court (Grand Chamber) of 11 December in Case C-161/06, Skoma-Lux sro v. Celní ředitelství Olomouc, 2007 E.C.R.

[42] No version of the Polish-German Tax Treaty was ever drafted in English; it was drafted solely in Polish and German, *available at* https://www.podatki.gov.pl/media/1836/niemcy-konwencja-tekst-polski-niemiecki.pdf.

[43] Konsultationsvereinbarung zwischen der Bundesrepublik Deutschland und der Republik Polen vom 12./27. November 2020 [Consultation Agreement between the Federal Republic of Germany and the Republic of Poland of 12/27 November 2020], *available at* https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Polen/2020-12-08-Konsultationsvereinbarung-DE-PL-Covid-19-Besteuerung-Grenzpendler.html.

5. ALLEGED FORCE MAJEURE AS A KEY ARGUMENT TO DISRESPECT THE FUNDAMENTAL PRINCIPLES OF LAW

The competent authorities indicated that the COVID-19 pandemic constitutes a *force majeure*. Indeed, a pandemic is an event that is not, from a human point of view, something ordinary and routine. However, absolutely no consensus has been reached in legal circles, neither nationally nor internationally, as to whether the COVID-19 pandemic can be considered a *force majeure* in every case and for every subject (i.e. *erga omnes* and *in abstracto*).[44] None of Polish nor German law nor the Polish-German Tax Treaty defines COVID-19 as a "*force majeure*". In civil law, a *force majeure* is accepted as an event that is beyond the control of the parties in question, one that could not have been foreseen at the time the contract was concluded, and that has consequences that could not have been prevented by taking normal precautions.[45] The question as to whether the COVID-19 pandemic constitutes a *force majeure*, therefore, does not have a clear answer even in the area of contract law, as the pandemic has affected various individuals, including employees and employers in extremely different ways. Many have had, and continue to have, opportunities to take countermeasures, and some professionals should have been prepared for it. Thus, whether a COVID-19 pandemic constitutes a *force majeure* which is case-specific and varies by situation. This is widely accepted by legal communities in both Germany and Poland.[46]

There is no reason to treat the situation of employees from Poland working for German employers differently, as the legislation applicable to them does not make it clear whether the COVID-19 pandemic should be regarded as a *force majeure* - with all its consequences. Furthermore, neither Poland nor Germany has decided to impose a state of emergency due to the COVID-19 pandemic, while the Czech Republic, Slovakia, and

[44] *See* Carter B. Casady & David Baxter, *Pandemics, Public-Private Partnerships (PPPs), and Force Majeure | COVID-19 Expectations and Implications*, 38 CONSTR. MGMT. & ECON. 1077 (2020); Ş. Esra Kiraz & Esra Y. Üstün, *COVID-19 and Force Majeure Clauses: An Examination of Arbitral Tribunal's Awards*, 25 UNIF. L. REV. 437 (2020); *see also* Vasudha Luniya & Ankita Mehra, *Analysing the Concept of Force Majeure, Especially During the COVID-19 Pandemic,* LEXOLOGY (Apr. 19, 2021), https://www.internationallawoffice.com/Newsletters/Corporate-Commercial/India/Clasis-Law/Analysing-the-concept-of-force-majeure-especially-during-the-COVID-19-pandemic#Conclusion.

[45] *See* T. Hauss, M. Distler, & L. Nassi, *Germany: Force Majeure*, Legal 500 §§ 11-12 (2021), *available at* https://www.legal500.com/guides/chapter/germany-force-majeure/; C. Rapallo, *Kiedy Pandemia Wpływa na Zdolność do Wykonywania Zobowiązań: Siła Wyższa, Nadzwyczajna Zmiana Stosunków* [When a Pandemic Affects the Ability to Perform Obligations: Force Majeure, Extraordinary Change in Relations], Garrigues (Mar. 20, 2020), *available at* https://www.garrigues.com/pl/pl-PL/news/kiedy-pandemia-wplywa-na-zdolnosc-do-wykonywania-zobowiazan-sila-wyzsza-nadzwyczajna-zmiana.

[46] Hauss et al., *supra* note 43; Rapallo, *supra* note 43.

Estonia have decided to do so.[47] Similarly, neither Polish nor German tax authorities, unlike tax authorities in Ireland[48] and Finland,[49] have published official positions recognising the COVID-19 pandemic as a *force majeure*. Thus, the most important reason for the actions of the competent authorities of Poland and Germany, which is the elimination of the negative tax consequences of a *force majeure* on cross-border workers, has dubious justification. It is difficult to consider the unreflective identification by the competent authorities of the COVID-19 pandemic as a *force majeure* as an action of *prudence and deliberation* in the context of cross-border taxation.

Even if one recognises the pandemic as a *force majeure*, the proportionality of the measures taken in relation to the achievement of their purpose in the given circumstances remains questionable. As was demonstrated earlier, the Polish-German Pandemic Mutual Agreement undermines principles contained in the Polish Constitution. Some difficulties are related to the tax settlements of a certain group of employees, while other difficulties are related to constitutional standards. These standards were treated as less important than the tax difficulties.

6. MORE INSTEAD OF FEWER PRACTICAL PROBLEMS UNDER THE POLISH-GERMAN PANDEMIC MUTUAL AGREEMENT

The intention of the competent authorities was undoubtedly to ease the lives of some taxpayers (i.e., cross-border workers) during the difficult times of the pandemic. Paradoxically however, the legal fiction under the Polish-German Pandemic Mutual Agreement may generate more problems than solutions. This pertains, for example, to workers who partially worked remotely from the territory of Poland before the outbreak of the COVID-19 pandemic (this income was taxed in Poland) and then opted for the legal fiction under the mutual agreement. And, now it must be determined which days spent

[47] *See* K. Grzęda-Łozicka, *Koronawirus w Polsce. Stan Wyjątkowy. Co to Oznacza dla Mieszkańców?* [*Coronavirus in Poland. A State of Emergency. What Does it Mean for the Inhabitants?*], Portal Abczdrowie (2020), https://portal.abczdrowie.pl/koronawirus-w-polsce-stan-wyjatkowy-co-to-oznacza-dla-mieszkancow (last visited Aug. 21, 2022); A. Pokrywczyński, *Stan klęski żywiołowej czarnym scenariuszem pandemii koronawirusa?* [*State of Disaster Black Scenarios of Coronavirus?*], Info Security 24 (Oct. 12, 2020), https://infosecurity24.pl/stan-kleski-zywiolowej-czarnym-scenariuszem-pandemii-koronawirusa.

[48] *See COVID-19 Information and Advice for Taxpayers and Agents*, Revenue - Irish Tax and Custom, https://revenue.ie/en/covid-19-information/index.aspx (last visited Aug. 21, 2022).

[49] *See* Vero Skatt, *Effects of the Coronavirus Pandemic on Taxes on Income Received Under an Employment Contract in a Foreign Country (the Six-Month Rule and Forces Majeures)*, Vero (Sept. 10, 2020), https://www.vero.fi/en/detailed-guidance/statements/82178/effects-of-the-coronavirus-pandemic-on-taxes-on-income-received-under-an-employment-contract-in-a-foreign-country-the-six-month-rule-and-forces-majeures2/.

outside the territory of the country of usual employment (Germany) are to comply with the new rule in accordance with the legal fiction. Problems also arise from the retroactive implementation of the Polish-German Pandemic Mutual Agreement. It was enforced on 28 November, but according to its § 5, it "shall apply to days in the period from 11th March 2020 until 31st December 2020". Certainly, it accounted for monthly advance payments of personal income taxes by persons who performed remote work for German employers from the territory of Poland during the year and, with respect to this work, for advances on personal income taxes in accordance with the principles of the Polish-German Tax Treaty.[50]

In this context, it is worth noting that, in its final provisions, the Polish-German Pandemic Mutual Agreement vaguely indicates that it "shall apply to days in the period from 11th March 2020 until 31st December 2020," and then "[f]rom 31st December 2020 onwards, the application of this Mutual agreement will automatically be extended, unless it is terminated by either Competent Authority of a Contracting State". How can taxpayers determine whether this mutual agreement has been renewed?[51] If this were "normal law", an individual would learn about it from the *Journal of Laws* in the Polish language. However, in relation to the Polish-German Pandemic Mutual Agreement, individuals must search for it on the website of the Polish Ministry of Finance and attempt to interpret and understand rules based on a legal fiction written in a language that is not the official language in Poland.

In addition, pursuant to § 6 of the mutual agreement, either competent authority may terminate it unilaterally at any time without providing a reason. If the taxpayer (or the tax remitter-employer) did not notice its implementation or the extension of the possibility of using the solutions contained in the Polish-German Pandemic Mutual Agreement, this will not have negative consequences – only a missed option for (alleged) simplification of tax settlements. It would be worse if the taxpayer had opted to follow the legal fiction and then did not notice termination of the mutual

[50] *See* J. Chorązka & K. Rzeżnicka, *Nowe Polsko-Niemieckie Porozumienie Wpływa na Opodatkowanie Pracy Zdalnej Pracowników Transgranicznych* [*New Polish-German Agreement Affects Taxation of Remote Work of Cross-Border Workers*], PwC Studio (Dec. 4, 2020), https://studio.pwc.pl/aktualnosci/alerty/polsko-niemieckie-porozumienie-wplywa-na-opodatkowanie-pracy-zdalnej-pracownikow-transgranicznych.

[51] The agreement was valid until 30 June 2022. This follows from a further agreement "Mutual termination agreement of 12 and 27 November"("the Mutual Agreement") between the Competent Authorities of German and Poland according to paragraph 3 of article 26 of the Agreeemnt between the Federal Republic of Germany and Republic of Poland for the Avoidance of double Taxation with respect on Income and Capital signed at Berlin on 14 May 2003", available: https://www.podatki.gov.pl/media/8194/mutual-termination-kopia.pdf.

agreement. In this case, the taxpayer still does not pay tax in Poland and thus incurs tax arrears - with all the consequences thereof.

This shows that the requirement to publish "law" and, in general, to regulate the rights and obligations of the taxpayer by means of legislation (and not through interpretative acts such as a mutual agreement) through an official promulgation in the *Journal of Law* is not formalistic but rather a guarantee of protection of the taxpayer's rights. When an authority amends an international agreement published in the *Journal of Laws* by publishing the text of a mutual agreement on the website of the Ministry of Finance, this unfortunately results in problems for the taxpayer.

Moreover, from the perspective of employers, their cross-border employees following the legal fiction means that it is necessary to prepare appropriate documentation that enables the application of the new, special taxation rules for these employees. The Polish-German Pandemic M.A.P. imposes a requirement on employees to acquire written confirmation from employers of the impossibility of performing work in the employer's state of residence due to the COVID-19 pandemic.

The imposition of an obligation to document the fact of working at home due to the pandemic is obviously a rational solution. The problem is that the Polish-German Mutual Agreement is not an appropriate legal basis for imposing any obligation on a taxpayer. The rules on imposing obligations on taxpayers are clear in Poland. The principle of legalism applies, which has its basis in both the Polish Constitution[52] and the provisions of tax statutes.[53] This means that if a tax authority demands any action from a taxpayer, the authority must indicate its legal basis. The legal basis must be a provision of law. The formal confirmation that "something" is a "law" is actually a publication in the *Journal of Laws*.

Therefore, even if taxpayers did not have the relevant documentation required by the Polish-German Mutual Agreement, they could still otherwise prove (e.g. through witness testimony) that the conditions for benefiting from the agreement were met.

[52] Polish Constitution, art. 7.

[53] USTAWA z dnia 29 sierpnia 1997 r. Ordynacja podatkowa [Act of 29 August 1997 - Tax Ordinance], art. 120 (*Journal of Laws* of *2020*, item 1325, as amended) (Pol.).

CONCLUSION

Prima facie, the Polish-German Pandemic Mutual Agreement appears rational because it was created to simplify tax settlements, thus facilitating the functions of both taxpayers and tax administrations (even if this intention may in some cases bring about the opposite effect - as explained in Section 5). However, actions with benevolent intentions are not always legal. The following proverb applies to the Polish-German Pandemic Mutual Agreement: "The road to hell is paved with good intentions". Many principles of national and international laws have been trampled underfoot.

Certainly, difficulties in the application of the Polish-German Tax Treaty have arisen owing to the pandemic, but they are hardly problems that could be resolved by the introduction of the legal fiction in the Polish-German Pandemic Mutual Agreement. The mechanism contained in the O.E.C.D. Model Tax Convention was created in a different time - when the employee was present at the place of work. So, the principle of taxation of remuneration at the place of work was adopted. During the pandemic, the link between the employee and the workplace, understood as the place held by the employer, was broken, giving rise to problems concerning the application of tax treaties. However, this problem can only be solved by amending the Polish-German Tax Treaty, and not through a free interpretation of it.

The problem lies in the fact that a rational solution has been "dressed up" in a legal form, which is not appropriate for addressing the problem in question. Of course, one must be aware that the application of a "correct" legal formula, that is, an amendment to the Polish-German Tax Treaty limited to pandemic duration, would probably be both quite difficult to agree during the pandemic and certainly take additional time. In brief, the scope of the Polish-German Pandemic Mutual Agreement is not overly wide, but the extent of its impact is questionable. Does it herald the end of a solution adopted for the taxation of income from paid employment, one based on the link between the place where income is taxed and the place where the work is performed and therefore where the employee is a resident? The pandemic has clearly shown that, at present, this reasoning does not at all correspond to economic reality. Of course, this question involves "another story".

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Revision of the Energy Taxation Directive: A Brief Overview of Key Novelties

MERVE ERGUN

Merve Ergün is a PhD candidate in Civil Law & Constitutional Legality at the University of Camerino (Italy) and a fully qualified lawyer registered with the Izmir Bar Association. She holds an LLM degree in International Commercial Law with distinction from the UK and LLB and BA degrees from Turkey. Merve specialises in tax law, renewable energy law and complex commercial dispute resolution. Thanks to her professional and academic experiences in Turkey, Austria, Germany, the UK, Belgium and Italy, she is highly experienced in arbitration and familiar with practical knowledge in interpreting and applying the relevant laws.

@ merve.ergun@unicam.it.

0000-0002-8669-0553

ABSTRACT

Tax law has always been an important tool to promote existing energy policies and investments, and it is understood that new E.U. rules on energy taxation have the potential to accelerate the energy transition process.

Both the European Green Deal and Fit for 55 Package have pointed to the revision of the Energy Taxation Directive (E.T.D.) regulating the taxation of energy products and electricity. Besides, the idea of revising the legislation related to energy taxation has been emphasised in the European Climate Law which is binding in its entirety in all E.U. countries.

The E.T.D. is an important instrument that has been in force since 2003. However, it is widely accepted that this instrument must be updated in light of the E.U. 's Climate Change Policy and Sustainable Development Goals (S.D.G.s). Hence, on 13 April 2011, the E.U. Commission published a proposal for a Council Directive amending Directive 2003/96/EC. Should all procedural requirements be met, the revised E.T.D. is expected to enter into force; therefore, it is essential to evaluate the key novelties brought by the Revision of the Energy Taxation Directive.

This paper aims to provide an analysis of the E.U.'s existing energy taxation policy and recent developments related to the revision of the E.T.D.. To do this: firstly, energy transition, taxation and the link between them will be outlined. Secondly, the European environmental tax policy system and the E.U. general legal framework on energy taxation will be explained by considering the novelties introduced by the E.U.'s Fit for 55 Package and the European Green Deal. Lastly, the E.T.D. and the revised E.T.D. will be comparatively evaluated together with the questions regarding business taxation.

KEYWORDS

Energy Transition; Energy Taxation; Energy Taxation Directive; European Union

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H23, K34, H25

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1. ENERGY TRANSITION AND TAXATION

Energy transition[1] refers to the change of main energy sources used to sustain socio-economic activities. However, today, this term particularly points to the global energy industry's shift from fossil energy sources to renewable energy sources.[2] Due to the climate emergency, countries are expected to be part of the energy transition and update their legal frameworks accordingly. In this sense, behaviours of energy consumers play an essential role in the energy transition. Hence, public or private individuals and companies that engage with environmentally friendly activities should be supported through tax policies.

Tax systems are part of legal systems,[3] and are centred around the idea of legitimisation.[4] This also means that energy taxation does require a delicate balance between policy and legitimisation. Since it is not easy to balance factors associated with these spheres, energy taxation rules tend to remain a part of a domestic legal order rather than an international one. For instance, because the energy sector is classified as *different* from other sectors, neither the rules of the General Agreement on Tariffs and Trade [hereinafter G.A.T.T.] nor the World Trade Organisation [hereinafter W.T.O.] specifically address the general rules governing this area.[5] It is seen that energy and tax related issues are treated differently in the EU too.

[1] According to the International Renewable Energy Agency [hereinafter I.Re.n.a.], Energy transition refers to "transformation of the global energy sector from fossil-based to zero-carbon by the second half of this century." *I.Re.N.A., irena.org/energytransition*energy transition,https://www.irena.org/energytransition.

[2] *Id.*

[3] *See* Tulio Rosembuj, *Tax Complexity and the Return of the State*, Wolter Kluwers Italia Professionale 975, (2021).

[4] *Id.*

[5] *Energy in W.T.O. Law and Policy*, World Trade Organisation https://www.wto.org/english/res_e/publications_e/wtr10_forum_e/wtr10_7may10_e.htm.

Because of the climate crisis, the international legal order necessitates energy transition; therefore, even though the W.T.O. law does not clearly cover the energy sector, reducing CO2 emissions is also considered among the W.T.O.'s priorities.[6] The E.U.'s Climate Change Law aimed at reducing greenhouse gas emissions and achieving climate neutrality is another important example in this regard.

The energy transition can be eased thanks to public procurement or green taxation. In this way, , clean energies would be promoted and energy transition costs could be reduced with the help of governments.[7] Besides, true financial and fiscal measures can finance renewable energy technologies.[8] Governmental policy instruments, i.e., subsidies or tax benefits, are among the examples in this regard; therefore, it is believed that state aid rules are of particular importance in the E.U. energy taxation.[9]

It is predicted by some scholars that the energy transition process might not be sufficient to achieve indicated targets due to the current liberal market conditions and technological atmosphere.[10] This perspective can be true for many countries. However, by considering the E.U.'s previous reductions in greenhouse gas emissions[11] and binding emission targets,[12] it can be argued that climate neutrality is still possible for the E.U. by 2050.

There are many energy transitions in history and different driving forces behind them. Such driving forces can be associated with socio-economic and political factors. For instance, the first major energy transition was the shift from wood to fossil fuels, which happened after the Industrial Revolution.[13] Even though the current energy transition is heavily relied on technology and innovation, energy transition policies are regarded as more crucial tools than technology improvements.[14] In other words, the current energy transition is strongly interconnected with governmental policies.[15] Hence, it must not

[6] *Id.*
[7] Report of the U.N. Secretariat of the High-level Dialogue on Energy 2021 on Energy Access Towards the Achievement Of SDG 7 and Net-Zero Emissions, 25, (Sept., 2021).
[8] *Id.* at 20.
[9] *See* Marta Villar Ezcurra, *State Aids and Taxation in the Energy Sector: Looking for a New Approach in* 1 STATE AIDS, TAXATION AND THE ENERGY SECTOR (Marta Villar Ezcurra ed. 2017).
[10] *See* Jorge Blazquez et al., *A Road Map to Navigate the Energy Transition*, OXFORD INST. FOR ENERGY STUD., 2019, at 1.
[11] *See, e.g.*, Amanda M. Rosen, *The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change*, 43 POL. & POL'Y 30 (2015).
[12] *Climate Change: What the E.U. is Doing*, EUROPEAN COUNCIL, https://www.consilium.europa.eu/en/policies/climate-change/#:~:text=At%20least%2055%25%20fewer%20greenhouse%20gas%20emissions%20by%202030&text=By%202017%2C%20the%20EU%20had,three%20years%20ahead%20of%20schedule.
[13] *See, e.g.*, Barry D. Solomon & Karthik Krishna, *The Coming Sustainable Energy Transition: History, Strategies, and Outlook*, 39 ENERGY POL'Y, 7422 (2011).
[14] Blazquez, *supra* note 10.
[15] *Id.*

be unnoticed that environmental tax policies are of paramount importance for a just and speedy energy transition.

From a tax perspective, energy efficiency can be supported either by implementing new taxes on polluting energy sources or by providing incentives for the environmentally friendly activities of consumers. Unfortunately, the Organization for Economic Cooperation and Development [hereinafter O.E.C.D.] statistics show that polluting energy sources are not taxed enough. In fact, even the developed and emerging market countries have not taxed seventy percent of the CO2 emissions related to the energy field.[16] In this sense, the data on energy taxes in European countries can be evaluated comparatively. When the O.E.C.D.'s 2019 report on taxing energy use is examined, it is seen that the rates of fuel excise tax (outside road transportation) were quite common in some Member States. For instance, the Netherlands, Denmark, Italy, Greece, Lithuania and Norway can be considered the leading countries in this regard.[17] It has been observed that these leading countries also apply effective carbon taxes on energy use successfully.[18]

2. THE ENVIRONMENTAL TAX POLICY SYSTEM IN THE EU

The European Union, together with its twenty-seven Member States, is amongst the world's top emitters. On a sectoral basis, the primary source of CO2 emissions in the E.U. stems from the energy sector. Hence, the E.U.'s environmental taxation policy, which is a catalyst for energy transition, should be explained briefly.

Given the E.U. history, the very first concerns regarding taxation were about the removal of custom duties rather than environmental taxation.[19] Nevertheless, in the early 1970s, environmental protection was referred as a guarantee and a prerequisite for the development of economic activities in the European Economic Community.[20]

[16] *Taxes on Polluting Fuels Are too Low to Encourage a Shift to Low-Carbon Alternatives*, O.E.C.D. https://www.oecd.org/tax/taxes-on-polluting-fuels-are-too-low-to-encourage-a-shift-to-low-carbon-alternatives.htm.

[17] O.E.C.D, TAXING ENERGY USE 2019: USING TAXES FOR CLIMATE ACTION (2019), https://www.oecd-ilibrary.org/docserver/058ca239-en.pdf?expires=1667485866&id=id&accname=ocid71015720&checksum=F6193F68E0D8C4D385C517712BEB5EEF.

[18] *Id.*

[19] *See, e.g.*, Alice Pirlot, *Exploring the Impact of E.U. Law on Energy and Environmental Taxation* 1 (Saïd Business School, Working Paper, Paper No. 19/13, 2019).

[20] *See Id.* at 19.

Further, both the "polluter pays" principle and the nexus between environmental protection and taxation were highlighted by the Commission in 1972.[21]

The polluter pays principle was first introduced by the O.E.C.D. in 1972.[22] With the Single European Act [hereinafter S.E.A.], this principle has become a guiding principle for the E.U.'s Environmental Actions as well.[23] More importantly, the S.E.A. has brought the integration clause[24] which necessitates an E.U. level integration regarding environmental protection requirements.[25] The integration clause is included in Article 11 of the Treaty on the Functioning of the European Union [hereinafter T.F.E.U.] which states, "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development".[26]

The first political discussions regarding the environmental taxation in the E.U. can be traced back to the 1990s.[27] In spite of the Commission's efforts, previous harmonisation attempts in direct taxation fields failed in the beginning. Thus, the current approach has been preferred by the Commission since 1990.[28] Even though the Directive on the taxation of mineral oils was adopted by the E.U. in the 1990s,[29] Member States could not agree on an E.U.-level CO2 tax which was proposed by the Commission.[30] Even today, CO2 taxation is not the case at the Union level. Yet, following the Paris Climate Change Agreement, the main goal in the E.U. is now reducing emissions at certain levels with the help of environmental tax reforms[31] and different market based instruments, such as tradable permits and quotas, producer responsibility schemes, tariffs and environmental taxes.[32]

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[21] *See Id.* at 19.
[22] *See* European Court of Auditors, Special Report 12/2021, *The Polluter Pays Principle: Inconsistent Application Across EU Environmental Policies and Actions*, at 6 (July 5, 2021).
[23] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 191(2), May 9, 2008, 2008 O.J. (C 115) [hereinafter TFEU].
[24] *See* TFEU art. 11.
[25] *See* Pirlot, *supra* note 19 at 2.
[26] TFEU art 11.
[27] *See* Charalambos Louca, *Environmental Tax Policy Reforms in the European Union, in* Handbook of Research on Policies and Practices for Sustainable Economic Growth and Regional Development 318 (George M. Korres et al. eds., I.G.I. Global, U.S.A. 2017).
[28] *See* Georg Kofler, *EU Power to Tax: Competences in the Area of Direct Taxation, in* Research Handbook on European Union Taxation Law 13 (Christiana HJI Panayi et al. eds., Edward Elgar Publishing Ltd., U.K. 2020).
[29] *See* Council Directive 92/82, on the approximation of the rates of excise duties on mineral oils, 1992 O. J. (L 316), 19 (EC).
[30] *See* Pirlot, *supra* note 19 at 2.
[31] *See* Marta Villar Ezcurra et al., *State Aids and Taxation in the Energy Sector: Looking for a New Approach, in* State Aids, Taxation and the Energy Sector (Thomson Reuters Aranzadi ed., 2017).
[32] *See* European Environmental Agency [EEA], *Environmental Taxation and EU Environmental Policies*, at 5, EEA Report No.17/2016 (Aug. 22, 2016), Publications Office of the European Union .

The European Commission's early taxation policy is based on the Communication of 1 October 1997,[33] which highlights the need for greater tax coordination within the E.U.[34] It can be argued that several achievements in the direct and indirect taxation fields have been recorded after the publication of this communication, forming the basis for debates on the E.U.'s current taxation policy.[35]

The European Commission's Communication, published on 10 October 2001, namely "Tax policy in the European Union - Priorities for the years ahead",[36] explains the Union's current tax policy and objectives by focusing on the actualisation of a competitive market. This communication is important as it indicates that harmonisation is not necessary for each field of taxation, and it clarifies that Member States are free to choose their own tax system as long as they respect E.U. Rules. Harmful tax competition and the elimination of the tax obstacles to operation of internal market are among the other important headlines. Besides, it is seen that tax problems of private individuals and businesses have been at the forefront of this Communication.[37] As indicated in the Communication, harmonisation of direct taxation is *neither necessary nor desirable,* while it is crucial to achieve *a high degree of harmonisation* in indirect taxation.[38] Yet, it should be noted that areas affecting the establishment or functioning of the internal market can be excluded from this perspective.[39] In other words, by virtue of the T.F.E.U. Article 115 (*ex* Article 94), the approximation of laws, in the areas that fall within the scope of direct taxation and affect the internal market directly, is also possible. It should be noted that this general competence can exclusively be exercised, provided that unanimity in the Council is achieved.[40]

Even though tax remains the sole responsibility of each Member State in the E.U., national governments are asked to consider internal market rules while collecting taxes.[41] To be more precise, Article 110 of the T.F.E.U. particularly addresses the protection of competitive market conditions against internal discriminatory taxation.[42]

[33] *Communication from the Commission to the Council - Towards tax co-ordination in the European Union - A package to tackle harmful tax competition*, COM(1997) 495 (Oct. 1, 1997).
[34] *Id.* para. 3 -11.
[35] *See Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee. Tax policy in the European Union - Priorities for the Years Ahead*, COM (2001) 260 final (Oct. 10, 2001) - introduction.
[36] *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee. Tax policy in the European Union - Priorities for the Years Ahead*, , COM (2001) 260 final (Oct. 10, 2001).
[37] *See Taxation: Commission outlines its priorities)* , https://ec.europa.eu/commission/presscorner/detail/en/IP_01_737 (Last visited May 23, 2001).
[38] *Id.* at 36.
[39] *See Id.*
[40] Kofler, *supra* note 28.
[41] *Taxation*, European Union, https://european-union.europa.eu/priorities-and-actions/actions-topic/taxation_en (Last visited Nov. 1st, 2022).
[42] *See* TFEU, ch.2, arts. 110-113.

In order to facilitate competitive market conditions and operation of the internal market, Article 113 of the T.F.E.U. provides that indirect tax rules need to be harmonised because such taxes have the potential to hinder the free movement of goods or services.[43] For instance, while personal income taxation is not regarded as crucial for the operation of the internal market, it is widely accepted that the functioning of the internal market is linked with the Value Added Tax [hereinafter V.A.T.] and energy taxation.[44] In any case, Article 352 of the T.F.E.U. allows the European Council to take any action to protect the operation of the common market, and such actions can be tax-related as taxation is not excluded under this provision.[45]

There is a legal discussion as to whether Article 116 of T.F.E.U., which does not require unanimity in the Council, could be used as a legal basis for the harmonisation of direct taxation.[46] Some scholars also argue that the Union has a fairly limited competence allowing the positive harmonisation of direct tax matters under certain conditions.[47] These conditions refer to the matters that are affecting the realisation of the internal market and require unanimous harmonisation actions and the application of the subsidiarity principle.[48] Yet, due to the principle of conferral, it is widely accepted that the European Union is not competent in direct tax matters.[49] The principle of conferral, also known as the "principle of attribution of powers", is codified under Article 5(2) of the T.E.U., and according to this, if a competence is not explicitly conferred on the E.U. by the E.U. Treaties, it remains with the Member States.[50]

3. THE EU GENERAL LEGAL FRAMEWORK ON ENERGY TAXATION

In terms of indirect taxation, the Council Directive 2003/96/EC[51], regulating energy taxation at the Union level, can be considered one of the most important achievements.[52] This directive covers the taxation of energy products, including coal, gas and

[43] *See, e.g., Commission Tax Strategy (Frequently Asked Question)*, European Commission https://ec.europa.eu/commission/presscorner/detail/en/MEMO_01_193 (Last Visited May 23rd, 2001).
[44] *See* Christiana HJI Panayi et al., Research Handbook on European Union Taxation Law - Eu Power to Tax 13 (Edward Elgar Publishing Ltd, 2020).
[45] *See* Marjaana Heelminen, EU Tax Law Direct Taxation 4 (IBFD, 2021).
[46] *See* Panayi et al., *supra* note 44, at 17.
[47] *See* Heelminen, *supra* note 45.
[48] *Id.*
[49] *See* Christiana HJI Panayi, European Union-Corporate Tax Law 3 (Cambridge Tax Law Series, 2013).
[50] *See* TFEU art 5 (2).
[51] Council Directive 2003/96, Restructuring the Community Framework for the Taxation of Energy Products and Electricity, 2003 O.J. (L283) 51(EC).
[52] *Id.* at article 4 (2).

electricity.[53] However, because the thermal power of a nuclear reactor is not within the scope of the term of energy products,[54] the E.T.D. is not applicable for nuclear heat.[55]

Because energy taxation is connected with many other areas, tax harmonisation is not sufficient to achieve efficient results on its own. Therefore, the legislation governing energy prices, efficiency and security should be coordinated to support tax harmonisation.[56] In this sense, the General Block Exemption Regulation [hereinafter G.B.E.R.],[57] the Energy and Environmental Aid Guidelines [hereinafter E.E.A.G.].[58]and the Energy Efficiency Directive are noteworthy to mention.

Both the G.B.E.R. and the E.E.A.G. are relevant to the state aid rules. While the G.B.E.R. regulates the state aid categories that are in conformity with Articles 107 and 108 of the T.F.E.U.,[59] the revised E.E.A.G., which has been in force since 2014, includes rules for Member States to support energy projects associated with environmental protection.[60] The E.E.A.G. has been revised to keep up with the European Green Deal and 2050 targets.[61] Also, Directive 2012/27/EU on energy efficiency, setting rules and obligations to achieve energy efficiency targets, has been amended by the Directive 2018/2002/EU. Thus, a non-binding E.U. energy efficiency target (minimum 32.5 % efficiency improvements by 2030) has been brought forward.[62]

European Climate Law that is binding for all Member States is a remarkable development for the energy transition and taxation in the E.U.[63] As is known, this law

[53] *See, e.g.*, Ezcurra et al., *supra* note 9.

[54] Council Directive 2003/96, Restructuring the Community Framework for the Taxation of Energy Products and Electricity, Art 2, 2003 O.J. (L283) 51(EC). For more information see Art 2 O.J. of the E.T.D., < https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0096:en:HTML#d1e337-51-1> (Last visited Aug. 8, 2022).

[55] *See* Case C-606/13, OKG AB v. Skatteverket, 2015 E.C.R. VII - 636.

[56] *See* Ezcurra et al., *supra* note 9.

[57] *See* Commission Regulation 651/2014 of June.17, 2014, Declaring Certain Categories of Aid Compatible with the Internal Market in Application of Articles 107 and 108 of the Treaty (Text with E.E.A. relevance), 2014 O.J. (L 187) 1–78.

[58] Energy and Environmental State aid guidelines. *See* COMMUNICATION FROM THE COMMISSION- Guidelines on State aid for environmental protection and energy 2014-2020 (2014/C 200/01), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0628(01), https://ec.europa.eu/commission/presscorner/detail/en/ip$_2$1$_2$784

[59] *See Competition Policy*, European Commission, https://competition-policy.ec.europa.eu/public-consultations/2021-gber_en (last visited August 8, 2022).

[60] *See* European Commission Press Release IP/21/6982, State aid: Commission endorses the new Guidelines on State aid for Climate, Environmental protection and Energy (Dec. 21, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_2784 (Last visited Aug. 8, 2022).

[61] See Chaterine BaneT, State Aid Guidelines for Environmental Protection and Energy (EEAG): Review Process, Possible Changes and Opportunities (2020). https://cerre.eu/publications/state-aid-guidelines-energy-eeag/> accessed 8 August 2022.

[62] *See* International Energy Agency (I..E.A.): E.U. Directive 20orientamento.bologna@er-go.it18/2002 on Energy Efficiency <https://www.iea.org/policies/13353-eu-directive-20182002-on-energy-efficiency> accessed 8 August 2022.

[63] *See* Regulation 2021/1119 of the European Parliament and of the Council of June. 30, 2021, Establishing the Framework for Achieving Climate Neutrality and Amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), 2021 O.J. (L 243) 1–17.

has been adopted by virtue of Article 192(1) of the T.F.E.U. and is in the form of a Regulation.[64] In the preamble of this Climate Change Law, taxation has been mentioned twice clearly: in Paragraphs 26 and 37. Even though preambles or recitals are not binding as articles, they may take supplementary normative roles and consequently affect judicial interpretations.[65] Paragraph 37 of European Climate Law relates that the Commission would explore methods of benefiting from the E.U. tax system to promote the European Green Deal. In this sense, Regulation 2020/852/EU of the European Parliament and of the Council would be taken into account.[66]

In Paragraph 26, it is highlighted that relevant climate change and energy taxation legislations would be revised.[67] Having said that, the E.U.'s newly introduced Fit for 55 Package and the European Green Deal[68] include revision of the E.T.D.[69] According to the Commission, the E.T.D. no longer meets the E.U. 's environmental objectives as this directive facilitates and promotes the use of fossil fuels.[70].

In addition to the revision of the E.T.D., implementing environmental taxes at the Union level could reduce energy usage and improve energy efficiency as well. Environmental taxes, also called "green taxes", refer to the taxes relating to energy, transportation, pollution and resources.[71] Such taxes, for sure, are crucial tools in order to reduce the amount of CO2 and for the success of environmental policies. However, as of today, environmental taxes are not applied at the Union level because the adoption of fiscal measures requires the unanimous agreement of the Member States.[72] Moreover, due to complex procedures, this method cannot be actualised at the Union level in the short term. Yet, there are different methods developed in order to achieve E.U. climate targets under the European Green Deal; among them, the E.U. Emissions Trading System [hereinafter E.T.S.], set up in 2005, is worth mentioning because participation in this system is mandatory for some companies.[73] This system mainly measures carbon

[64] *Id.*

[65] *See generally* 19th Quality of Legislation Seminar "*EU Legislative Drafting: Views from those applying EU law in the Member States*" European Commission Service Juridique - Quality of Legislation Team Brussels, 3 July 2014 (Charlemagne Building) Complexity of EU law in the domestic implementing process <https://ec.europa.eu/dgs/legal_service/seminars/20140703_baratta_speech.pdf> accessed 4 July 2022.

[66] *See* Regulation 2021/1119 of the European Parliament and of the Council of June. 30, 2021, *supra* note 63.

[67] *Id.*

[68] *But see* Proposal for a Council Directive to Restructure the Union Framework for the Taxation of Energy Products and Electricity (Recast), COM (2021) 563 final (July 14, 2021).

[69] *See, e.g.*, Council Directive 2003/96, 2003 O.J. (L 283) 51–70.

[70] *See, e.g.*, Briefing of the Revision of the Energy Taxation Directive: Fit for 55 Package, (Jan. 19, 2022) https://www.europarl.europa.eu/thinktank/it/document/EPRS_BRI(2022)698883.

[71] *See Green Taxation – in Support of a more Sustainable Future*, European Commission, https://ec.europa.eu/taxation_customs/green-taxation-0_en.(last visit 10 August 2022).

[72] *See* Jaume Freire-González & Ignasi Puig-Ventosa, *Reformulating Taxes for an Energy Transition*, 78 Energy Econ. 312 (2019).

[73] *See* E.U. *Emissions Trading System (E.U. E.T.S.)*, European Commission, https://ec.europa.eu/clima/eu-action/eu-emissions-trading-system-eu-ets_en.

emissions by following the polluter pays principle.[74] The main areas covered by the E.T.S. are industrial activities, electricity generation and intra- European flights.[75]

4. E.T.D. AND E.T.S.

The European Union's climate change policy depends on energy transition which can be put into practice by means of individual components, such as pricing, targets or rules.[76] In this sense, the revision of the E.T.D. and E.T.S. is an important step towards a greener Europe. It is important to notice that the current E.T.D. is in force and will be in force till the revision takes place. As is known, unlike decisions and regulations, directives must be implemented into national laws.[77] Since the E.T.D. and its revision have been designed in the form of a "directive", Member States would be asked to achieve the goals set out in this directive by meeting the deadline given.[78] By virtue of the Commission's proposal, the deadline given for this is 31 December 2022.[79]

When it comes to the Council's voting system, some areas - including the harmonisation of national legislation on indirect taxation- are classified as sensitive matters.[80] It is unfortunate that the proposal is subject to the special legislative procedure, requiring the Council to decide by unanimity.[81] Between 2011 and 2015, previous revision attempts for the E.T.D. failed due to this requirement.[82] Hence, a major

[74] *See* E.U. *Emission Trading System (*E.U. E.T.S.*)*, Florence School of Regulation, https://fsr.eui.eu/eu-emission-trading-system-eu-ets (last visited February 19th 2021).

[75] *See Taxing Energy Use 2019 : Using Taxes for Climate Action (Executive Summary)*, o.e.c.d. ilibrary, https://www.oecd-ilibrary.org/sites/058ca239-en/index.html?itemId=/content/publication/058ca239-en.

[76] *See* KLoek Helderman , Barbara Bell, Warwick Ryan&Christopher Morgan, Energy Taxation Directive, KPMG(2021).

[77] *See*, e.g., *Types of Legislation*,European Unionhttps://european-union.europa.eu/institutions-law-budget/law/types-legislation_en.

[78] *See, e.g.*, *Applying EU Law*, European Commission, https://ec.europa.eu/info/law/law-making-process/applying-eu-law_en#: :text=Regulations%20and%20decisions%20become%20automatically,and%20takes%20action%20if%20not.

[79] *See* generally Revision of the ETD, Proposal for a Council Directive amending Council Directive 2003/96 restructuring the Community framework for the taxation of energy products and electricity, 23, art. 4 para 3, COM(2021) 563 final (Jul. 14, 2021)(EC).

[80] *See Voting System* (*Unanimity*), Council of Europe, https://www.consilium.europa.eu/en/council-eu/voting-system/unanimity/.

[81] *See* Proposal for a Council Directive amending Council Directive 2003/96 restructuring the Community framework for the taxation of energy products and electricity, 23, art. 4 para 3, COM(2021) 563 final (Jul. 14, 2021) (EC).

[82] Tim Gore, *The revision of the Energy Taxation Directive Could Underpin a Fair and Green Tax Reform in Europe*, Heinrich Boll Stiftung (Sept. 13, 2021) https://eu.boell.org/en/2021/09/13/revision-energy-taxation-directive-could-underpin-fair-and-green-tax-reform-europe.

challenge is to achieve a unanimous agreement on a revised text. Until this process is completed, the E.T.D. will continue to operate in the E.U.

Even though the special legislative procedure is set out in Article 113 of the T.F.E.U., there is no clear description thereof.[83] Yet, both Articles 113 and 192 of the T.F.E.U. refer to the special legislative procedure for the harmonisation of tax related issues. To be more precise, the legal basis for the Commission's proposal is Article 192, Paragraph 2 of the T.F.E.U. However , unlike the revision of the E.T.D., it is possible to follow the ordinary legislative procedure for the revision of the E.T.S. Directive.[84]

The Energy Taxation Directive (2003/96/EC) (E.T.D.) [85]	Revision of the Energy Taxation Directive (Revised E.T.D.) [86]
E.T.D. includes the minimum rates of excise duty. In other words, Member States are able to decide on their own taxes by determining their domestic rates, but they have to meet the E.T.D. minimum.[87] Both the E.T.D. and the revised E.T.D. consider the E.T.S. as the main instrument for reducing emissions.[88] E.T.D. grants exemptions to the aviation and shipping sectors by not considering the taxation of kerosene and heavy oil of the maritime sector.[89]	Broadly speaking, the revised E.T.D. brings the following novelties: • Introduction of the E.T.S.-2 [90] • New Tax Rates calculated based on the environmental impact (rather than the volume).[91] • Recognition and consideration of new energy products (such as hydrogen).[92] • Kerosene and heavy oil of the maritime sector will be taxed as well. • the use of CO2 taxation (in the circumstances where the E.U. E.T.S. is not applied). [93]

[83] *Legislative Procedures*, EUR-Lex, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0016 (accessed Feb. 9, 2022).

[84] *See* Sabine Schlacke, Helen Wentzien, Eva-Maria Thierjung, Miriam Köster, *Implementing the EU Climate Law via the "Fit for 55" Package 1*, Oxford Open Energy ioab003 (2022), https://academic.oup.com/ooenergy/article/doi/10.1093/ooenergy/oiab002/6501634.

[85] *See*, e.g., Directive 2003/96 of the Council of 27 October 2003 on the Restructuring the Community framework for the taxation of energy products and electricity, 2003 O.J. (L283) 51.

[86] *See, e.g.*, Proposal for a Council Directive amending Council Directive 2003/96, Restructuring the Community framework for the taxation of energy products and electricity, COM (2011) 169 final (Apr. 13, 2011).

[87] *See* Helderman et al., *supra* note 76.

[88] *Id.*

[89] *Id.*

[90] *See* Schlacke et al., *supra* note 84

[91] *See* Helderman et al., *supra* note 76.

[92] *Id.*

[93] *See* generally Proposal for a Council Directive amending Council Directive 2003/96, Restructuring the Community framework for the taxation of energy products and electricity, at 38, COM(2011) 169 final (Apr.13, 2011).

Another important point is that if the E.T.D. is revised, carbon tax would be applied in the E.U. countries too. For instance, Italy's current energy taxation is in conformity with the E.U. Energy Taxation Directive,[94] regulating minimum rates of energy taxation.[95] In this sense, electricity consumption taxes and excise duties are the main taxes on energy use in Italy.[96] As an active participant of the E.U. E.T.S. system, Italy imposes fuel excise levies on the road sector too.[97] On the other hand, even if Italy is among the top countries regulating the aforementioned "green taxes" on energy use, there is no explicit carbon tax applied in the country.[98] This can, for sure, change if the E.T.D. is revised.

Some scholars argue that electricity generation from fossil fuels should be taxed, while electricity generation from renewable energy should remain untaxed.[99] Thus, consumers opting for electricity generated *via* renewable energy sources could pay less tax, and the transition would gain *momentum*.[100] This perspective is similar to the *Pigouvian* role of the tax system.[101] The revised E.T.D. includes reduced tax rates for electricity generated from renewable energy sources.[102]

5. QUESTIONS REGARDING BUSINESS TAXATION

Successful Pigouvian taxes change the behaviour of taxpayers. As is known, mostly energy areas are taxed for consumption and production; therefore, rules as to energy taxation have effects on behaviour of energy consumers and producers.[103] For example, because the consumption tax increases the price of electricity, consumers may try to reduce their consumption; this also applies to the businesses which are consumers of energy. However, due to the existing tax burden on taxpayers, the introduction of new environmental taxes is not welcomed by taxpayers; therefore, there is no widespread use of environmental taxes in the E.U. yet.[104]

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[94] *See, e.g.*, Council Directive 2003/96, 2003 O.J. (L 283) (EC).
[95] *See* O.E.C.D., *supra* note 75.
[96] *Id.*
[97] *Id.*
[98] *Taxing Energy Use 2019*, O.E.C.D. https://www.oecd.org/tax/taxing-energy-use-efde7a25-en.htm.
[99] *See* Freire-González & Ventosa, *supra* note 72.
[100] *Id.*
[101] Also known as Taxe de Pigouvian. According to the information provided by the O.E.C.D.,this term refers to "the tax levied on an agent causing an environmental externality (environmental damage) as an incentive to avert or mitigate such damage." *Glossary of Statistical Terms (Pigouvian Tax)*, O.E.C.D., https://stats.oecd.org/glossary/detail.asp?ID=2065 (Last visited Nov. 20, 2001).
[102] *See* Miroslava Kostova Karaboytcheva, "Briefing- EU Legislation in Progress Revision of the Energy Taxation Directive: Fit for 55 package" (2022).
[103] *See* Freire-González & Ventosa, *supra* note 72.
[104] *See* Louca Charalambos, *Environmental Tax Policy Reforms in the European Union, in* 27 HANDBOOK OF RESEARCH ON POLICIES AND PRACTICES FOR SUSTAINABLE ECONOMIC GROWTH AND REGIONAL DEVELOPMENT 318 (2017).

Compliance by taxpayers ensures the operation of the system; however, non-compliance is also possible *via* exclusions that affect the most vulnerable taxpayers.[105] Therefore, at first glance, minimising tax exclusions may seem to be a sustainable and just way. However, it should be noted that businesses, as important energy consumers and probable actors of energy projects, play an essential role in the energy transition. Hence, businesses that engage with environmentally friendly activities should be supported through tax incentives. These tax incentives used by Member States to support clean energies must be in conformity with Article 107(1) of the T.F.E.U., the fundamental freedoms, the E.T.D., the G.B.E.R.,[106] the E.E.A.G.,[107] and any other E.U. level energy related specific provisions.[108] In fact, pursuant to established E.U.-case law practice, if there is no harmonisation of tax provisions in a particular field, Member States are enabled to provide tax advantages in this field.[109]

Even though eco-friendly or sustainable business terms are used in our daily lives, these terms mostly are not defined by existing laws. Yet, broadly speaking, businesses that are preventing pollution, reducing the amount of waste they produce, purchasing or producing renewable energy, adopting sustainable business travel policies etc. can be considered eco-friendly or sustainable.[110]

It is important to draw attention to the impact of taxation on businesses. As it is known, businesses investing in renewable energy projects can be encouraged through various routes, such as tax allowances, income tax deductions, tax credits, differentiated V.A.T., tax exemptions, public funds and accelerated or free depreciation and many other incentive regimes.[111] This support can also be actualised by promoting sustainable business practices. For example, some small businesses and cooperatives can be considered as prosumers by virtue of the Renewable Energy Directive [hereinafter R.E.D.I.I.].[112]

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[105] *See* Tulio Rosembuj, *Tax Complexity and the Return of the State*, Rassegna Tributaria Wolters Kluwer Italia s.r.l. (October 1, 2021), https://onefiscale.wolterskluwer.it/document/tax-complexity-and-the-return-of-the-state/10AR0000285244ART1?searchId=735509404&pathId=773a0938a7cd8&offset=3&contentModule Context=all.

[106] *See generally* General Block Exemption Regulation - Council Regulation No 994/98 of May 7, 1998, on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid, 1998 O.J. (L142) 1 (EC), amended by Council Regulation No 733/2013 of July 22, 2013.

[107] E.e.a.g.

[108] *See* Ezcurra et al., *supra* note 9.

[109] *Id.*

[110] *See* Georgia Makridou, *Why Should Business Embrace Sustainability? Lessons from the World's Most Sustainable Energy Companies*, ESCP Impact Paper No 2021-33-EN, https://academ.escpeurope.eu/pub/IP%20202133EN.pdf.

[111] *See* Silvia Rezessy, & Paolo Bertoldi, *Financing Energy Efficiency: Forging the Link Between Financing and Project Implementation* (Report prepared by the Joint Research Centre of the European Commission) (2010).

[112] *See generally* Directive (EU) 2018/2001, of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources, 2018 O.J. (L328) 82.
See Jens Lowitzsch, Energy Transition: Financing Consumer Co-Ownership in Renewables (Jens Lowitzsch ed. 2019).

Unlike the R.E.D.I.I., the revision of the E.T.D. introduces new rules to the detriment of Small and Medium-sized Enterprises [S.M.E.s] which are operating in the transportation sector. In fact, the revision of the E.T.D. includes the harmonisation of the tax levels for petrol and diesel used in the transportation sector, and this would neither promote the use of diesel nor distinguish diesel from the oil.[113] It is well-known that the use of diesel causes a clear increase in nitrogen oxide (NO) and nitrogen dioxide (NO2) emissions leading to health problems for humans.[114] Hence, the E.U.'s new strategy can be justified under health concerns. Besides, in the revision of the E.T.D., taxation of the non-commercial and commercial diesel consumption is treated in the same way, and it is believed by some scholars that this would result in certain anti-competitive situations or concern some countries which provide tax incentives for fuel-based manufacturing.[115]

CONCLUSION

The effect of governmental policies on the current energy transition is quite visible. Hence, the environmental tax policy, the European Green Deal and the Fit for 55 Package are of particular importance for energy taxation. Broadly speaking, other than the E.T.D., the harmonisation of energy taxation is not yet a reality at the E.U. level.[116] The reasons behind this is that energy and taxation fields tend to remain part of national legal orders because they are seen as integral parts of sovereignty. In the E.U., on the other hand, some energy related areas are in the scope of shared competences by virtue of Article 194 (1) of the T.F.E.U..[117] Also, in addition to environmental taxes, other market-based instruments are combined together to achieve environmental targets and increase efficiency.[118] As a result, it is not always possible to classify all energy taxes as direct, indirect or environmental taxes.[119] Hence, the E.U. energy taxation rules are quite complex.

[113] *See* Gerhand Huemer, *Revision of the Energy Taxation Directive*, SME UNITED (Jan. 18, 2022), https://www.smeunited.eu/admin/storage/smeunited/20220118-etdreview-pp-final.pdf.
[114] *See* Charles W. Schmidt, *Beyond a One-Time Scandal: Europe's Onging Diesel Pollution Problem*, 124 ENV'T HEALTH PERSPECT A19-A29 (2016).
[115] *See* Huemer, *supra* note 113.
[116] *See* Ezcurra et al., *supra* note 9.
[117] *See* TFEU art. 194 (1): "In the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment, Union policy on energy shall aim, in a spirit of solidarity between Member States, to: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks."
[118] *See, e.g.*, Ezcurra et al., *supra* note 9.
[119] *Id.*

The E.T.D., as its very name signifies, draws from the E.U.'s legal framework for the taxation of energy products and electricity. However, this legal instrument is not in conformity with the E.U.'s carbon neutrality goals and the polluter pays principle which has been promoted thanks to the European Green Deal. In other words, the E.U. tax system may require a more proactive *Pigouvian* role so that taxation can be used as a tool to limit the use of energy sources that have adverse effects on society and the environment.[120] Yet, it should be noted that it remains contentious whether the implementation of the revised E.T.D. and E.T.S.-2 would be possible by the deadlines given.[121] Besides, given the previous revision attempts that failed due to lack of consensus, the special legislative procedure can be an important barrier to the revision of E.T.D..

[120] *See Climate Change: What the EU Is Doing*, European Council , https://www.consilium.europa.eu/en/policies/climate-change/#:~:text=At%20least%2055%25%20fewer%20greenhouse%20gas%20emissions%20by%202030&text=By%202017%2C%20the%20EU%20had,three%20years%20ahead%20of%20schedule (last reviewed October 21, 2022).

[121] *See* Cécile Brokelind and Servaas van Thiel, Tax Sustainability in an EU and International Context (2020).

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When the Court Buildings Close: The Use of Technologies During COVID-19 in Portugal

Paula Casaleiro*, Joao Paulo Dias**, Filipa Queirós*** & Fernanda Jesus****

*Paula Casaleiro obtained a PhD in Sociology of Law at the Faculty of Economics, at the University of Coimbra (Portugal). She is currently a researcher at the Centre for Social Studies, University of Coimbra (Portugal). Currently, she is part of the research project "Q.U.A.L.I.S. - Quality of Justice in Portugal! Impact of working conditions in the performance of judges and public prosecutors", and "F.R.A.N.E.T. (multidisciplinary research network)". Her research interests and publications focus on the issues of family and children law and justice, law and science, and working conditions in judicial systems.

**João Paulo Dias obtained a PhD in Sociology of Law at the Faculty of Economics, at the University of Coimbra (Portugal). He is currently a researcher at the Centre for Social Studies of the University of Coimbra (Portugal), where he acted as Executive Director between 2011 and 2020. He is a member of the Permanent Observatory of Justice [O.P.J.C.E.S.] since 1996, where he coordinated, integrated, or collaborated in multiple national and international research on the issues of access to law and justice, rule(s) of law, the role of the Public Prosecutors, governance and judicial organization, legal and judicial professions and, more recently, working conditions in the judicial system.

***Filipa Queirós obtained a PhD in Sociology, from the Faculty of Economics, at the University of Coimbra (Portugal), and she is a currently a researcher at the Centre for Social Studies. Between 2015 and 2020 she had been a researcher in an E.R.C. project where she developed her doctoral thesis: "Biogenetic Suspicion: controversies and expectations about forensic DNA phenotyping in the context of criminal investigation". Within an approach from the social studies of science and technology and from the social studies of surveillance, her interests explore the role of science and technology in monitoring populations. More recently she has also been working on issues associated with working conditions in the judicial system.

****Fernanda Jesus obtained a Master degree in Psychology from the Faculty of Psychology and Educational Sciences, at the University of Coimbra (Portugal). She is currently a Junior Researcher at the Centre for Social Studies, where she is part of the research project "Q.U.A.L.I.S. - Quality of Justice in Portugal! Impact of working conditions in the performance of judges and public prosecutors". She is also a PhD student in Social Psychology at the Faculty of Psychology and Educational Sciences, at the University of Coimbra(Portugal), developing a thesis with the proposed theme "Values, attitudes and perceived risk in borrowing behavior".

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@ *pcasaleiro@ces.uc.pt **jpdias@ces.uc.pt ***filipaqueiros@ces.uc.pt ****fcostajesus@ces.uc.pt

*0000-0001-9312-7219 **0000-0003-0884-8746 ***0000-0002-4161-2973 ****0000-0002-4205-9209

ABSTRACT

The coronavirus outbreak showed the critical importance and usefulness of a robust technical infrastructure and end-to-end digital processes in the judicial system. Although some application difficulties and limitations were observed during this crisis, the modernization of the Portuguese judicial system was a key element to safeguard the continuity of the functioning of courts. This short article aims to analyse the implementation and use of technologies in the Portuguese courts, as an alternative mode of delivering and maintaining court service within the context of the COVID-19 crisis. For this purpose, several steps are made, namely the characterization of the modernization level of the Portuguese judicial system and the collection and critical analysis of the legal framework, concerning the response to the COVID-19 pandemic by the judicial bodies of governance. Additionally, the analysis relies on the results of a questionnaire and interviews applied to the judicial professions and on official statistical information regarding the functioning of Portuguese courts during the periods of confinement. Final remarks will preview different paths for the future needs of courts in terms of upgrading the use of technologies to contribute to a better, swift, fair, and trustworthy justice.

KEYWORDS

Courts; COVID-19; Technologies; Courts' Performance; Portugal

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INTRODUCTION

The pandemic posed substantive challenges to traditional court procedures, and more broadly, to the judicial system, with unprecedented impacts on the day-to-day work of the legal and judicial professions. Two of the main challenges were: maintaining a sufficient level of service while the traditional courts were closed or partially closed; and the subsequent backlog of cases that was accumulating while courts were not able to handle their normal workload.[1] Throughout the world, courts have attempted to address the pandemic crisis in various ways. Some closed their buildings entirely, others

[1] *See* Richard E. Susskind, *The Future of Courts*, The Practice, 2020, at 1.

remained partially open, but in both situations dealing only with urgent cases. Nonetheless, all the countries had to move swiftly to deliver justice remotely and through online platforms.[2] The coronavirus outbreak showed the critical importance and usefulness of a robust technical infrastructure and end-to-end digital processes in the judicial system and contributed to the acceleration of the uptake of various technologies, especially videoconference, in the justice systems of numerous countries.

In Portugal, following the World Health Organization [W.H.O.] declaration of the COVID-19 outbreak as an international public health emergency and the guidelines released by the Portuguese National Health Institution [hereinafter D.G.S.], a set of organizational, procedural, physical and technological measures was adopted by the Portuguese judicial system to ensure the safety and health of judicial professionals and users, while maintaining the functioning of Portuguese courts. In light of the partial closure of court buildings during the height of the pandemic, judicial system responses relied strongly on the use of technologies to safeguard the continuity of the functioning of justice within the imposed restrictions. This article aims to analyse the application and use of technologies in Portuguese courts as an alternative way of delivering and maintaining court service in the context of the COVID-19 crisis. In particular, it aims to: (1) identify the measures adopted, with a special focus on the technological measures; (2) analyse the use and adequacy of the technologies during the first confinement between March and May 2020; and (3) analyse the courts' performance during 2020.

For this purpose, we will first present a brief analysis of the judicial system's responses to the COVID-19 pandemic, focusing on the use of technologies. Secondly, the discussion will rely on the results of an online questionnaire applied to the judicial professionals, recurring simultaneously to some illustrative excerpts of interviews conducted with judicial professionals. And thirdly, we will consider the official statistical information regarding the court flow in the Portuguese courts during 2020. This work was developed within the research project Q.U.A.L.I.S. - Quality of Justice in Portugal Impact of working conditions in the performance of judges and public prosecutors [hereinafter Q.U.A.L.I.S.], which aims to examine the working conditions of judicial professionals in Portugal, evaluating their impact on professional performance and, consequently, on the quality of justice. The prevention and control measures of the COVID-19 infection had strong implications for judicial professionals, affecting their working contexts and the performance of courts. It also accelerated the introduction of multiple changes in diverse areas of its functioning, deeply disturbing several

[2] *Contra* O.S.C.E. Off. for Democratic Inst. & Hum. Rts., The functioning of Courts in the COVID-19 Pandemic: A Primer 20-21 (2020).

dimensions of the working conditions at courts and the "traditional" way in which justice was delivered to citizens.

1. PORTUGUESE JUDICIAL MODERNIZATION

The ability of the judicial system to manage the workload of courts and to maintain some functioning during lockdown required, among other things, that those involved have access to and are able to file and share documents electronically. And subsequently have access to an effective digital case management system.

In Portugal, the management of buildings, equipment and information technology is divided amongst different entities, such as the Directorate-General for the Administration of Justice [hereinafter D.G.A.J.][3] and the Institute of Financial Management and Judicial Infrastructures [hereinafter I.G.F.E.J.][4] of the Ministry of Justice; the Prosecutor General's Office; the various High Councils (of the Judiciary, Administrative and Tax Courts, Public Prosecution and Court Clerks); and different intermediate management boards such as the County Courts Management Board.

The management of courts is thus dispersed over different entities sometimes with competing and overlapping competences. Studies have characterized the model of governance of the Portuguese judicial system and management of the courts as a rigid structure, with poorly coordinated, dispersed authority.[5] For example, the management of each judicial district's court of first instance is carried out by a management board, composed of a presiding judge, a coordinating public prosecutor and a judicial administrator. Each district court has a small budget and has autonomy to distribute the budget and its execution. However, most of the expenses depend on the technical advice and previous approval of the D.G.A.J. and the I.G.F.E.J., decreasing the autonomy and responsiveness of the Management Councils and often preventing a timely response.[6]

[3] The Directorate-General of Justice Administration is a service of the Ministry of Justice tasked with ensuring operational support to the courts. D.G.A.J., https://dgaj.justica.gov.pt/English/About-DGAJ (last visited Mar. 16, 2022).

[4] The Institute of Financial Management and Judicial Infrastructures is in charge of several issues of a transversal nature to the Ministry of Justice, namely budget and financial, patrimonial and construction, technological infrastructures and information systems. I.G.F.E.J., https://igfej.justica.gov.pt/Sobre-o-IGFEJ/Quem-somos (last visited Mar. 16, 2022).

[5] *See* João Paulo Dias & Conceição Gomes, *Judicial Reforms "Under Pressure": The New Map/Organisation of the Portuguese Judicial System*, 14 Uthrect L. Rev. 174 (2018). *See also* Giuliana Palumbo et al., *Judicial Performance and its Determinants: A Cross-Country Perspective*, OECD Econ. Pol'y Papers, June 2013, at 28, 29.

[6] *See* António Gonçalves, *Administrador judiciário: um ano na nova estrutura judiciária* [Judicial Administrator: One year in the new judicial structure], 27 Revista Julgar [Rev. Julgar], 177-191 (2015) (Port.).

In relation to judicial modernization, in the past two decades, Portugal promoted several initiatives, such as the *Justica + Próxima* programme,[7] which encompasses the *Tribunal+* flagship project, as well as *Simplex +*, a cross-governmental modernization plan.[8] As part of the *Justica + Próxima* programme, Portugal is increasingly employing IT applications in the justice system, including for case management, e-filing, document management, digitalization of courtroom functions, human resources management tools, help desk and public information systems, in order to facilitate accessibility of justice, especially in courthouses. The digitalization (dematerialization) of case management and information made relevant documents easily accessible to different users - with the ability to read and annotate where deemed appropriate.

Over the past decade, Portugal has been investing in the dematerialization of case management and information, including the Citius electronic platform, which seeks to provide a single online solution for judges, public prosecutors, lawyers, solicitors, enforcement agents and insolvency practitioners. Citius involved the modernization of core I.T. systems in the courts, including judicial electronic processes from first instance courts to the supreme courts and more than 100 technological features in all Magistrate Information Systems.[9] A similar platform, the Sistema de Informação de gestão dos Tribunais Administrativos e Fiscais [hereinafter S.I.T.A.F.] has been developed in the administrative and fiscal jurisdiction, introducing digital transmission of tax proceedings from the administration to administrative and fiscal courts, an innovative feature. Recently, in order to facilitate the dematerialization process, the Ministry of Justice distributed laptop computers to all magistrates.[10]

Furthermore, the *Justiça + Próxima* programme envisages a series of measures, including strengthening court capacities for video conferencing, which aims to alleviate some concerns about the growing concentration and centralization of courts - associated with the distance between the courts and some population living in remote areas.[11] Since 2013, the Portuguese law foresees that witnesses, experts and parties may be heard

[7] *See* Paula Fernando, *Intertwining Judicial Reforms and the Use of ICT in Courts: A Brief Description of the Portuguese Experience*, 8 Eur. Q. Pol. Attitudes and Mentalities, no. 2, 2012, at 7.

[8] *See generally* O.E.C.D., Justice Transformation in Portugal: Building on Successes and Challenges (2020).

[9] In Portugal, the word "magistrate" refers to judges or public prosecutors, according to national legislation, more specifically the professional statutes.

[10] Ana Henriques, *Ministério da Justiça vai Substituir Computadores dos Magistrados. Juízes e Procuradores vão receber 3400 Portáteis Novos Ainda Este Ano, Para os Ajudarem no "Processo de Desmaterialização em Curso"*, [*Ministry of Justice will Replace Magistrates' Computers. Judges and Prosecutors Will Receive 3,400 New Laptops Later this Year, to Help them with the "Ongoing Dematerialization Process*"], Publico (Nov. 30, 2018, 7:43 PM), https://www.publico.pt/2018/11/30/sociedade/noticia/ministerio-justica-vai-substituir-computadores-magistrados-1853118.

[11] *See* Patricia Branco, *The Geographies of Justice in Portugal: Redefining the Judiciary's Territories*, 15 Int'l J. L. Context 450 (2019).

by videoconference.[12] Under Portuguese civil procedural law, as a rule, witnesses and parties must be heard by video conference in the same hearing and from the district court of the area of residence, and experts of laboratories or official services heard by teleconference from their workplace.[13]

2. THE JUDICIAL SYSTEM RESPONSES TO THE COVID-19 PANDEMIC: THE UPTAKE OF TECHNOLOGIES

In the middle of March 2020, in response to the rapid spread of the coronavirus SARS-CoV-2 and following the first declaration of the state of emergency, the access to Portuguese court buildings was conditioned, and face-to-face/in-person court services and proceedings were severely restricted. Simultaneously, alternative ways of delivering court service were adopted or reinforced, namely, through the uptake of various technologies.[14]

The state of emergency was first declared on 18 March, by Decree of the President of the Republic 14-A/2020, based on a situation of public calamity.[15] After this declaration, a set of measures related to deadlines and procedural steps were taken with immediate repercussions on the functioning of the courts. Law 1-A/2020 of 19th March, amended by Laws 4-A/2020 and 4-B/2020 of 6th April, established that only urgent acts and proceedings, in which fundamental rights are at stake, would be carried out in person (e.g., proceedings concerning minors at risk or urgent guardianship proceedings or criminal proceedings with persons in detention).[16] Additionally, the use of digital

[12] *See* Código de Processo Civil [Portuguese civil procedural law code], (Law n.º 41/2013, June 26, 2013), art. 502 (Port.).

[13] *See id.*

[14] For a more detailed and global analysis of the measures taken by the Portuguese government/public authorities and the implications of COVID in fundamental rights see Centre for Social Studies, *Coronavirus pandemic in the EU – Fundamental Rights Implications*, FRA (2020), https://fra.europa.eu/sites/default/files/fra_uploads/pt_report_on_coronavirus_pandemic_july_2020.pdf.

[15] *See* Decreto do Presidente da República n.º 14-A/2020 de 18 de março [Decree of the President of the Republic 14-A/2020], https://dre.pt/dre/detalhe/decreto-presidente-republica/14-a-2020-130399862 (Port.). For an overview of the legal framework on the state of emergency in Portugal see Vânia Magalhães, *Reflexões sobre o crime de desobediência em Estado de Emergência* [*Reflections on the Crime of Disobedience in a State of Emergency*], Julgar Online, Mar., 2020, http://julgar.pt/reflexoes-sobre-o-crime-de-desobediencia-em-estado-de-emergencia/.

[16] *See* Lei n.º 1-A/2020 de 19 de março [Act no. 1-A/2020 of 19 March] art. 7, 8, https://dre.pt/dre/detalhe/lei/1-a-2020-130473088 (Port.). For an overview and analysis of the measures adopted in Portugal, in relation to the COVID-19 pandemic, which affected the judicial system, see, among other: *Joaquim Oliveira Martins, A Lei n.º 1-A/2020, de 19 de março – uma primeira leitura e notas práticas*[Act no. 1-A/2020 of March 19 - a first reading and practical notes], Julgar Online, Mar. 2020, http://julgar.pt/a-lei-n-o-1-a2020-de-19-de-marco-uma-primeira-leitura-e-notas-praticas/.

tools was strengthened: any procedural acts were permitted through tele/video conference and the use of email instead of the telephone was recommended to seek information from courts.[17] The judicial proceedings were to be held, whenever feasible, through the appropriate means of long distance communication, namely by teleconference or video call. The proceedings were only to be carried out in person when this did not imply the presence of a higher number of persons than those foreseen by the health authorities' recommendations. It is important to note that the criteria concerning which proceedings were to be carried out in person or using digital platforms may not have been applied in the same way by all judges, as the clauses were too general and difficult to interpret.[18]

During this period, Decree no. 2-A/2020 made the adoption of the teleworking regime mandatory, whenever the nature of the work allowed it or the professional had risks of getting severe COVID-19 disease consequences due to prior health problems, as per the definition of the National Health Institution.[19] The electronic processing of files and the practice of non-urgent acts at a distance were only possible because most cases were already completely digitalized and available in the Citius and S.I.T.A.F. systems.

The implementation of these measures relied heavily, not only on the pre-existing technological infrastructure in Portuguese courts (such as the existence of complete digitalized judicial proceedings), but also on the provision of videoconferencing [hereinafter V.C.] solutions in the courts, such as the Cisco Webex Meetings tool. Although magistrates use portable computers with Virtual Private Network [hereinafter V.P.N.], which allows for remote access to the computer systems of justice, the survey carried out by the Association of Portuguese Judges, during the last two weeks of March 2020, showed that 70% of magistrates stated that it took longer to complete tasks remotely than under normal circumstances.[20] They point out two main reasons for the delay: (1) the fact that some files (notably: criminal and insolvency files) are not fully digitalized and (2) the difficulties in the remote connection. Nevertheless, a

[17] *See* Lei n.º 1-A/2020 de 19 de março [Act no. 1-A/2020 of 19 March] art. 7, https://dre.pt/dre/detalhe/lei/1-a-2020-130473088 (Port.).

[18] Joaquim Oliveira Martins, *(De novo a) Lei n.º 1-A/2020 – uma terceira leitura (talvez final?)* [*(Again a) Law 1-A/2020 - a third (perhaps final?) reading*], JULGAR ONLINE, MAY, 2020, http://julgar.pt/wp-content/uploads/2020/05/20200529-JULGAR-De-novo-a-Lei-1-A2020-uma-terceira-leitura-talvez-final-Jos%C3%A9-Joaquim-Martins-v2.pdf (Port.).

[19] *See* Decreto n.º 2-A/2020 de 20 de março [Decree-Law no. 2-A/2020 of 20 March] art. 6, https://dre.pt/dre/detalhe/decreto/2-a-2020-130473161 (Port.).

[20] Mariana Oliveira, *Juízes trabalham de casa, mas admitem dificuldades* [Judges work from home, but admit difficulties], PUBLICO (Apr. 3, 2020, 11:01 pm), https://www.publico.pt/2020/04/03/sociedade/noticia/juizes-trabalham-casa-admitem-dificuldades-1910958 (Port.).

significant part of the participants of that survey considered a positive evolution of the experience over the first two weeks of the confinement in March 2020.

Additionally, following Law 4-A/2020, which reviewed the exceptional measures to fight the pandemic, providing for the carrying out of diligences in non-urgent cases through means of remote communication,[21] the Institute of Financial Management and Equipment of Justice of the Ministry of Justice made a video conference tool available to courts, supported on the Cisco Webex platform - the so-called "virtual courtrooms". Nevertheless, I.G.F.E.J. recognized, in a technical note of 27th April 2020, a set of disturbances in the virtual sessions and issued recommendations to try to solve the problems.[22]

The availability of virtual courtrooms and the experience of their use has aroused several criticisms by different legal and judicial actors. At a press conference of 9th April 2020, the Vice President of the High Council of Judges, José Sousa Lameira, considered the 157 virtual courtrooms available in the first and second instance courts to be insufficient.[23] Later, the presiding judges of the county courts presented a joint complaint to the body responsible for providing this computer platform (I.G.F.E.J.), regarding technical problems that made several trials unfeasible, arguing that the virtual courtrooms did not work, or operated with major disabilities.[24] Also the President of the Bar Association, Luís Menezes Leitão, in the press release of 12th May 2020, highlighted the ineffectiveness of the existing platform to carry out virtual judgements, pointing out that it systematically failed and that it did not guarantee everything that was necessary for a trial (for example, ensuring that witnesses are not being influenced by third parties).[25]

After the end of the first period of the coronavirus state of emergency, a provisional and exceptional procedural regime for judicial proceedings was established, reopening the courts, ending the exceptional regime for the suspension of deadlines, and

[21] *See* Lei n.º 4-A/2020 de 6 de abril [Act no. 4-A/2020 of 6 April] art. 7, https://dre.pt/dre/detalhe/lei/4-a-2020-131193439 (Port.).

[22] I.G.F.E.J., *Sessões de videoconferência. Nota técnica* (Apr. 24, 2020), https://www.csm.org.pt/wp-content/uploads/2020/04/20200428-Videoconferencia-nota-tecnica.pdf(Port.).

[23] Ana Henriques, *Tribunais Querem Retomar Actividade, mas Queixam-se de Não lhes Facultarem Meios Suficientes* [*Courts Want to Resume Activity, but Aomplain for not Providing Them With Sufficient Resources*], Publico (Apr. 9, 2020), https://www.publico.pt/2020/04/09/sociedade/noticia/tribunais-querem-retomar-actividade-queixamse-nao-facultarem-meios-suficientes-1911729 (Port.).

[24] Ana Henriques, *Salas de Audiência Virtuais Não Funcionam, Reclamam Juízes* [*Virtual Courtrooms Don't Work, Judges Complain*], Publico (Apr. 23, 2020), https://www.publico.pt/2020/04/23/sociedade/noticia/salas-audiencia-virtuais-nao-funcionam-reclamam-juizes-1913625(Port.).

[25] *See Comunicado de Imprensa sobre a Reabertura dos Tribunais* [*Statement of the General Council on the Security Conditions of Courts*], Ordem dos Advogados [Bar Association] (June 8, 2020),https://portal.oa.pt/ordem/dossier-covid-19/imprensa/a-reabertura-dos-tribunais/ (Port.).

returning to on-site discussion and trial.[26] However, the use of digital tools remained an authorized option whenever necessary, according to the health authorities' guidelines. And the homeworking regime continued to be an option, whenever the nature of the work allowed it, for situations of higher professional health risk, and when office spaces and work organization did not fill the guidelines of D.G.S. and of the Authority for the Working Conditions [hereinafter A.C.T.].[27]

3. WHEN THE COURT BUILDINGS CLOSE: TECHNOLOGIES AND PERFORMANCE IN/OF PORTUGUESE COURTS DURING COVID-19 PANDEMIC

In order to understand how the technologies were used by the judicial system to deliver and maintain court service in the context of the COVID-19 crisis, considering the limitations and potentialities unveiled, we are going discuss part of the work developed within the research project Q.U.A.L.I.S.. Furthermore, we are going to look at the official statistical information regarding the functioning of Portuguese courts during the 2020 lockdown.

3.1. A PICTURE OF THE FIRST COVID-19 LOCKDOWN: JUDICIAL WORKING AND TECHNOLOGIES

The research project Q.U.A.L.I.S. adopted an interdisciplinary and multi-method approach to analyse the working conditions of the judicial professions in Portugal (judges, public prosecutors and court clerks), aiming to evaluate their impact on professional performance, family-work balance and health, through the use, among others, of a questionnaire and interviews. Both the questionnaire and interviews focused on six dimensions related to working conditions, each of them including several items (besides professional characterisation): organizational; environmental; personal/individual working experience; work-family balance; health and well-being; and impacts of COVID-19 on working conditions. In this section, we present the results of

[26] *See* Lei n.º 16/2020 de 29 de maio [Act no. 16/2020 of 29 May] art. 6-A, https://dre.pt/dre/detalhe/lei/16-2020-134762423, (Port.).

[27] *See* Decreto-Lei n.º 79-A/2020 de 1 de outubro [Decree-Law no. 79-A/2020 of 1 October] art. 3, https://dre.pt/dre/detalhe/decreto-lei/79-a-2020-144272529 (Port.).

the questionnaire related to the first COVID-19 lockdown and some illustrative excerpts of interviews.

3.1.1. PROCEDURES AND PARTICIPANTS

The questionnaire was online between October 1st and November 15th 2020, and was sent to all judicial professionals working in the courts (10978 on December 31st 2020) with no sampling procedure. The dissemination had the collaboration of the governing and management bodies of the judiciary (high councils) and other relevant entities of the justice system (professional associations and unions). In this analysis, we only take into consideration the results of the questionnaire applied to the judicial professionals of the judicial district courts (lower judicial courts), leaving outside higher judicial courts (appeal courts and the Supreme Court) and the administrative and fiscal courts.[28] There are twenty-three judicial courts of first instance, comprising 85% of the human resources working on all the judicial, administrative, and fiscal courts.[29] We had 1427 valid questionnaire responses from a universe of 9334 judges, public prosecutors, and court clerks from the judicial district courts (Table 1).

Judicial Profession	Universe[30]	Sample	% Responses
Judges	1268	223	17.6%
Public Prosecutors	1256	227	18.1%
Court Clerks	6810	977	14.3%
Total	9334	1427	15.3%

Table 1

The sample distribution by profession and sex follows the national distribution in the Portuguese courts. Court clerks comprised 65.2%, judges 20.1% and public prosecutors 14.7% of the respondents, which is similar to the distribution by judicial professions. Additionally, the respondents of the study sample were 62.6% female and 37.4% male, an over-representation of women which reflects the already known increasing feminization

[28] The Portuguese legal system contains two major jurisdictions: 1) ordinary; and 2) administrative and fiscal. The judicial courts deal with ordinary criminal and civil matters, whereas administrative and fiscal matters are heard in the separate administrative court system.

[29] D.G.P.J. JUSTICE STATISTICS, https://estatisticas.justica.gov.pt/sites/siej/en-us/Pages/tribunais.aspx (last visited Mar. 16, 2022).

[30] Reference data for the 31st December 2020. *Id.*

of the judicial and legal professions in Portugal (in a similar trend to what happens in other contexts) (Figure 1).[31]

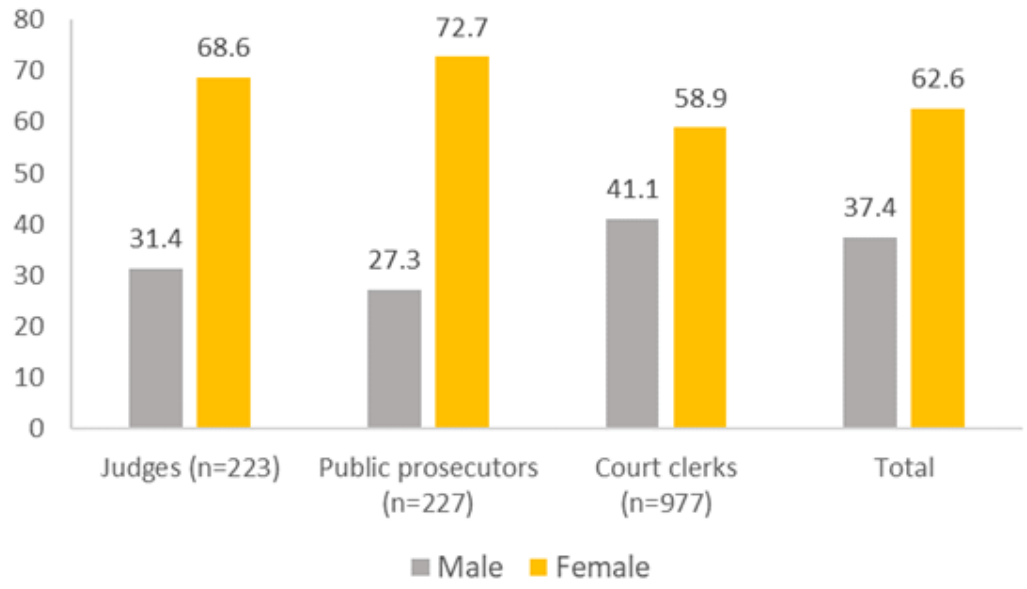

Figure 1: Sex by Judicial Profession and Total (%)

Respondents are aged between twenty and sixty-nine years old, with an average of approximately forty-eight years (M= 48.41; SD = 9.58). The figure shows differences in the age distribution of the judicial professions and a tendency to aging in the court clerks' group. In fact, the mean age of court clerks is higher than the one of judges and public prosecutors (Figure 2).

[31] *See, e.g.*, Ulrike Schultz & Gisela Shaw, Women in the Judiciary (2012).

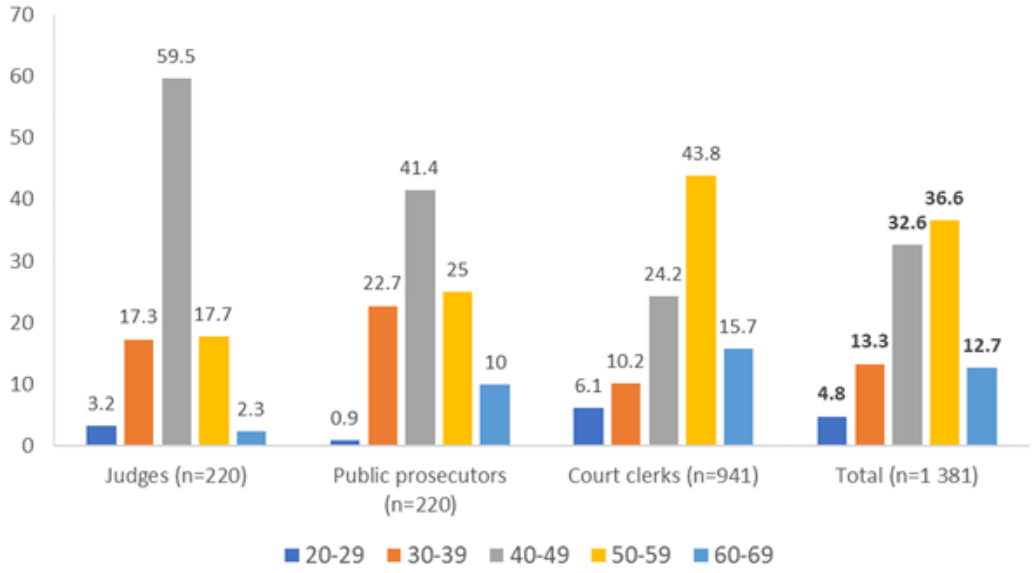

Figure 2: Age Groups by Judicial Professions and Total (%)

Seventy-three semi-structured interviews were conducted between April and July 2021 with judicial professionals (judges, public prosecutors, and court clerks) working in the diverse court buildings in Central Lisbon and Coimbra district courts (first instance) - which consists of the two Q.U.A.L.I.S.'s selected case studies. The Central Lisbon district comprises nine locations, including eleven buildings, where all the multiple services are distributed. The buildings are located in both margins of the Tejo River (metropolitan area of Lisbon), with a territorial competence embracing seven different municipalities. The Coimbra district includes twenty buildings spread over a large territorial area, which includes seventeen different municipalities. Despite the diverse dimensions of the buildings, and the nature of the services running in each of them, the interviews were conducted with the goal of ensuring that there was, at least, one interview per building. In most of the buildings, due to their dimensions, two or three interviews were conducted. In these last cases, it was mandatory that the interviews were from different professions.

Sixty-eight interviews occurred digitally, via Zoom, and five in person: four at the court's facilities and one at the Centre for Social Studies' facilities. Twenty-two judges, twenty-three public prosecutors and twenty-eight court clerks were interviewed. On average, the interviews were eighty-two minutes long. All participants signed an informed consent form in which they agreed to the recording of the interview. All interviews were transcribed and anonymized. To protect the anonymity of the interviewees, we only identified the city where they worked and their profession. This

form of anonymization will be presented in the interview quotations analysed in the following sections. The script of the interviews was built in close articulation with the questionnaire's structure, including a section related to the COVID-19 impacts.

3.2.1.PERCEPTIONS OF THE FIRST LOCKDOWN: INQUIRY RESULTS

The inquiry provides a picture of the use, application and performance of technologies in courts, during the first year of the COVID-19 pandemic, allowing the analysis of its capacity to respond and maintain the functioning of judicial services. In line with one survey carried out by the Association of Portuguese Judges, the results reveal that teleworking became the customary mode of working for judges and public prosecutors during the first period of confinement. In Portugal, between March and May of 2020, 78.2% of the judges and 64.7% of the public prosecutors' respondents worked at home most of the time. Of these, nearly 25% of the judges and 10% of the public prosecutors reported working exclusively from home. In the case of court clerks, the percentage of respondents who reported working at home most of the time was less than 17%. Actually, almost half of the court clerks' respondents worked mainly or exclusively in their workplace: the judicial court (Figure 3).

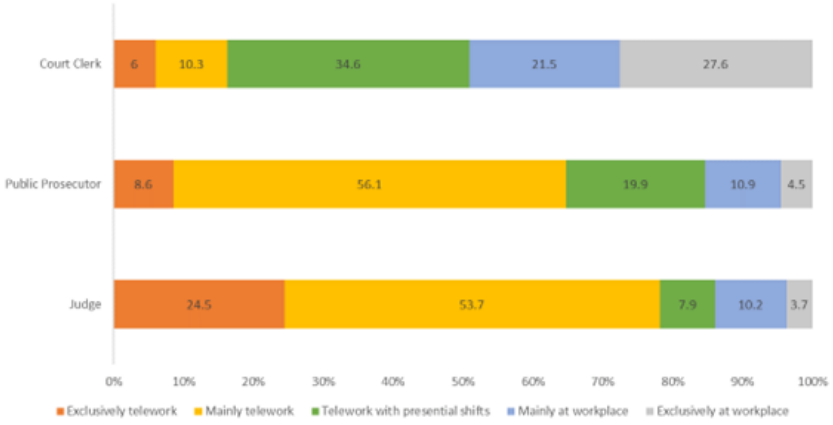

Figure 3: Work Regime During Confinement by Judicial Profession (%)

The asymmetries in the work regimes were also reported by the interviewees. The judge said:

> The pandemic and the confinement have brought less work. I didn't stop coming to the court, even at the most critical phase, even if it was only once a week, because the court clerks who work with me were

> here every day. I came to the court so that they would feel that their judge was not just at home waiting for this to pass. (Judge, Coimbra)

On the contrary, one of the court clerks interviewed, when asked about the workload during the covid-19 crisis, stated: "You know those ants we are used to seeing in those television documentaries, where you see the ant carrying a triple or quadruple weight of its size? That's how a court clerk feels today". (Clerk, Coimbra)

The work regime adopted during the lockdown is directly related to the technical resources available in the judicial district courts and the functions performed by each professional category, judges, public prosecutors and court clerks. On one hand, while all magistrates (judges and public prosecutors) had portable computers with V.P.N. before the pandemic, which allowed remote access to the computer systems of justice, the lack of portable computers for the court clerks hampered the implementation of teleworking in the case of these professionals. In the circular letter no. 6/2020, of March 26, issued by the D.G.A.J., it can be read:

> It was decided to: 1. make all the requested laptops available immediately, when this number does not exceed 20, and in the other Courts to make 50% of the requested laptops available. 2. To authorize that the desktop computers used by court clerks at the Court can be transported and used at their home, whenever necessary for teleworking, since the number of portable computers made available by [D.G.A.J.] and District Courts / Administrative Courts is insufficient.[32]

The court clerks interviewed also reported the lack of equipment and resources like personal laptops to work at home. On the other hand, the work of employees still depends heavily on the handling of physical and non-digital documents, which makes it difficult to opt for teleworking, as mentioned by the interviewed court clerks:

> When it was proposed to do teleworking, they immediately said that there were no laptops for everyone. My husband and I, and some of our colleagues in the court, are using their personal material. Other colleagues were given computers. As those of the magistrates were updated, they were given material so they could work from home. Those court clerks got what no one else wanted. Some [laptops] even

[32] D.G.A.J., Ofício circular n. 6/2020 [Circular letter n. 6/2020], 26 Mar. 2020, <https://dgaj.justica.gov.pt/Portals/26/10-OF%C3%8DCIOS-CIRCULARES/2020/Of%C3%ADcio-circular%206_2020_%20teletrabalho%20nos%20tribunais.pdf?ver=2020-03-26-113047-120> (last visited March 16, 2022).

> look like they were in World War II. They came with few conditions. (Clerk, Lisbon)

With regard to the equipment and digital platforms made available by the responsible judicial institutions to carry out procedures remotely in non-urgent cases, most respondents consider them acceptable. However, the group of workers who consider the equipment and digital platforms bad or very bad is bigger than to the group that considers it good or very good, a contrast that is more expressive of the computer equipment and internet connection (36.4% against 18% for the adequacy platforms to judicial activities, and 45.1% against 13.3% for the adequacy of the computer equipment and internet connection to platform requirements)(Figure 4).

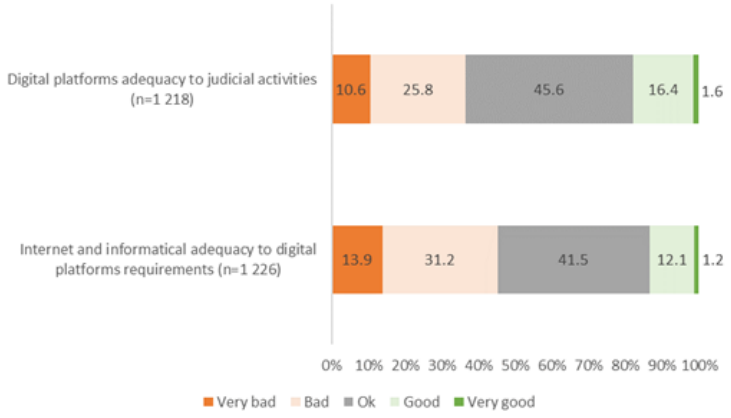

Figure 4: Equipment and Digital Platforms Adequacy (%)

The speedy adaptation to a range of technologies inevitably generated problems, such as poor internet connection, the lack of necessary equipment among court clerks and court users, systems that lacked the sophistication to cope with sudden demands, inadequate data protection, lack of training in the use of the new technology and lack of I.T.-assistance when difficulties arose.

> Some colleagues struggled with the connection. The most difficult sometimes was the V.P.N. connection because when we were all accessing at the same time, we had no system. The system couldn't handle it. I started to realize that there were rush hours. For example, from 10 am to 12 pm it was impossible to work, you couldn't get into the system. I would wake up very early like 7 am and work until 10 am. After 18 pm they also worked well, but only until 19 pm. At that time, backup copies should start because the system was very slow and wouldn't work. From 10 pm onwards, it was wonderful. I

> completely changed my schedule, changed the day to night and started working from 10 pm until 2 am/4 am. (Clerk, Lisbon)

These problems hampered the realization of procedural acts (e.g. trials and hearings) through videoconference, conditioning the functioning of the courts, as mentioned by the judge:

> Now I have had fewer problems, but at the beginning it was very difficult to manage when I had people being heard by videoconference and others by Zoom. The problem with these technologies is that they often take longer. It takes a while to get in, then you don't get in, then you can't hear and, at the end, what is done in person in half an hour, perhaps, at Zoom takes an hour or more. (Judge, Coimbra)

The questionnaire also provides a picture of the working time and work intensity in the Portuguese Courts during the COVID-19 pandemic's confinement. According to the survey applied by the Eurofound, during the COVID-19 pandemic, many persons in employment were working fewer hours than usual.[33] In the Portuguese courts, during the first lockdown, the questionnaire pointed out expressive differences between the judicial professionals (Figures 5 and 6). Magistrates[34] who worked mainly from home during the pandemic were more likely to say their working hours, volume and pace decreased, compared to court clerks. More than half of the magistrates revealed that the working volume and pace had decreased or decreased significantly, while less than 20% of the court clerks reported a decrease in the volume and pace of work. Actually, almost half of the court clerks reported that the volume and pace of work had increased or increased a lot.

[33] *See, e.g.*, Daphne Ahrendt et Al, *Living, Working and Covid-19* (2020).

[34] We jointly present judges and public prosecutors´ changes in working time and intensity once there were not found significant statistical differences between them on those aspects and as explained above, they distinguish themselves from court clerks concerning work schedule and flexibility.

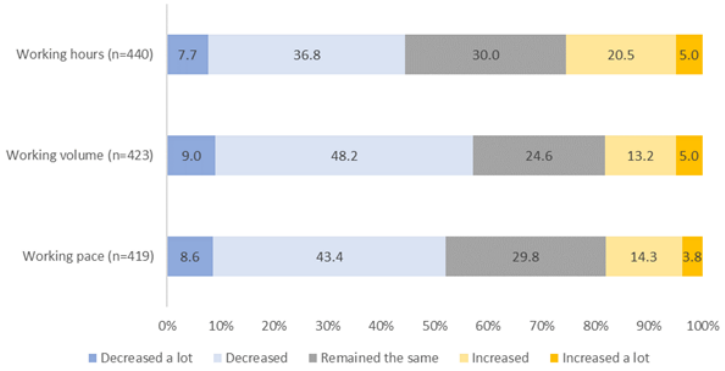

Figure 5: Changes on Working Time and Intensity Within Magistrates (%)

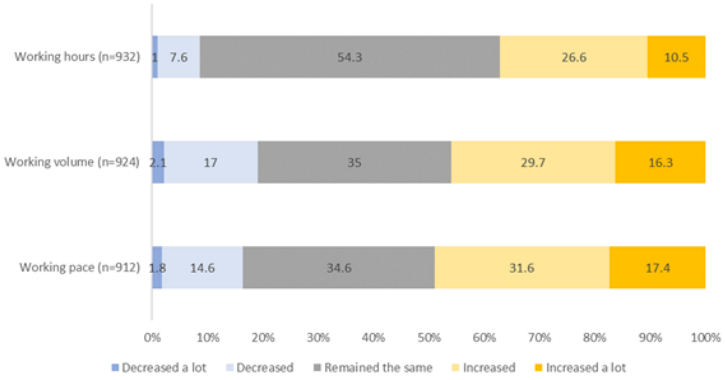

Figure 6: Changes on Working Time and Intensity Within Court Clerks (%)

With the courts partially closed and the activity reduced to urgent cases, the functions performed by the magistrates were the most affected, while the secretarial service could continue.

> In practice, the proceedings were suspended, stopped a lot. My workload went down, there were judgments without effect because the processes were not urgent and the parties did not want to carry out the diligence and this allowed me to have some time, otherwise it was impossible. Having two children at home and working at a normal pace is impossible. (Judge, Coimbra)

> I was talking to you about my work as a criminal investigation judge, in terms of urgent cases and prisoner cases, but there are more cases, aren't there? The investigation processes, for example (...), unless they involve arrested defendants or crimes of an urgent nature, are

> not urgent and all these non-urgent processes have stopped. (Judge, Lisbon)

Nevertheless, as mentioned by the court clerk, the secretarial service was used mainly to clear up pending issues and files:

> During the lockdown, we were even able to organize more things because the deadlines were suspended. It was great in that sense because we had a lot of secretarial services to do and we were able to do certain types of functions that [in a normal situation] we didn't have time for. We usually don't have time for everything. (Clerk, Lisbon)

3.2. THE PERFORMANCE OF COURTS DURING THE COVID- 19 PANDEMIC

In this Section, we analyse the official statistics regarding the performance of courts during the first year of the COVID-19 pandemic, which gives us an insight into the use of technologies, when the court buildings were closed. The official statistical information regarding the functioning of Portuguese courts was collected from the online database "Justice statistics",[35] produced by the Directorate General for Justice Policy [hereinafter D.G.P.J.], in the scope of the competences delegated to it by the National Statistical Institute. In order to understand the impact of COVID-19 and for comparative purposes, we collected performance indicators and case flow statistical information of the Portuguese first instance courts from 2018 and 2020. We opted for 2018 instead of 2019 because in the second quarter of 2019 the number of opened and closed cases was unusually high. According to D.G.P.J., this was a direct effect of internal transfers arising from the application of Decree-Law No. 38/2019, of March 18, which reorganized the judicial courts of first instance.

The official statistics[36] show a sharp decrease in the courts activity during the second quarter of 2020. In this period of general confinement, there was a decrease in the number of opened cases and in the number of closed cases. Furthermore, despite the growth in the number of opened and closed cases in the third and fourth quarters of 2020, after the reopening of the courts, the values are still far from those recorded in the same period of the reference year of 2018. COVID-19 confinements reduced the activities

[35] D.G.P.J., *supra* note 29.

[36] As mentioned above, we use the statistical data from 2018 instead of 2019, because in the second quarter of 2019, the number of opened and closed cases was unusually high. This was a direct effect of internal transfers arising from the application of Decree-Law No. 38/2019, of March 18, which reorganized the judicial courts of first instance.

in society and, therefore, there was a diminishing of potential conflicts that would arrive at courts. Additionally, following the Law 1-A/2020 of 19th March,[37] in judicial proceedings that are not urgent, limitation periods and prescription periods were suspended (e.g., the time limits for debtors to file applications to open insolvency proceedings weresuspended), which may have also contributed to the decrease in the case filling.

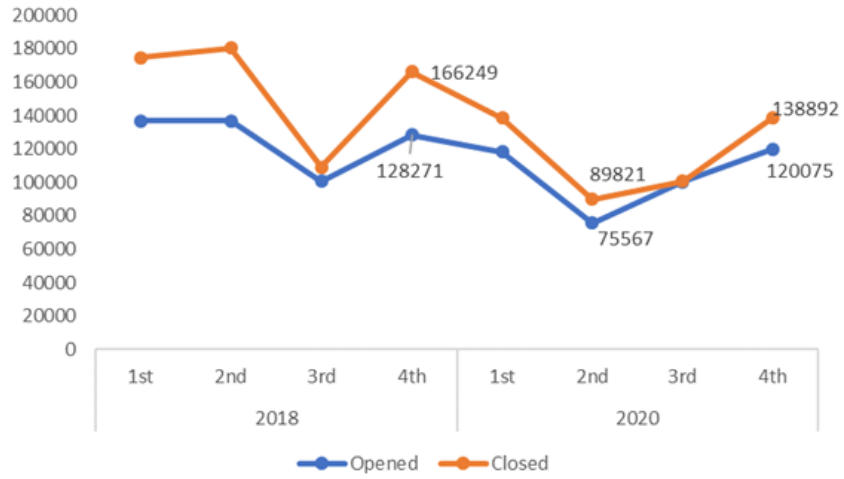

Figure 7: Case Flow at the Judicial District Courts by Quarter (2018 and 2020)[38]

In the annual statistics, the decrease of the case flow at the judicial district courts in 2020 stands out. In comparison to 2018, it was more expressive in the closed cases than in opened ones (Figure 7). While the number of opened cases reduced by about 20%, the closed cases decreased by 34.7%. Consequently, the clearance rate (C.R. indicator), i.e. the relationship between the new cases and completed cases within a period, in percentage, decreased in 2020. Despite the measures to maintain the functioning of Portuguese courts, while ensuring the safety and health of judicial professionals and citizens, the judicial system revealed difficulties in continuing with the proceedings. Thus, although any procedural acts were permitted through video conference and most cases are already completely digitalized and available in the C-platform, the results indicate that technologies were not used to their full capacity by the judicial professionals. The focus of this analysis was the global case flow at the Portuguese judicial district courts.

[37] Lei n.º 1-A/2020 de 19 de março [Act no. 1-A/2020 of 19 March] art.7, 8, https://dre.pt/dre/detalhe/lei/1-a-2020-130473088 (Port.).
[38] D.G.P.J., *supra note* 29.

Nevertheless, it is important to note that in some civil law areas, such as in the enforcement procedures,[39] this general downward trend does not occur, which requires further analysis by the legal area in order to reach more concrete conclusions.

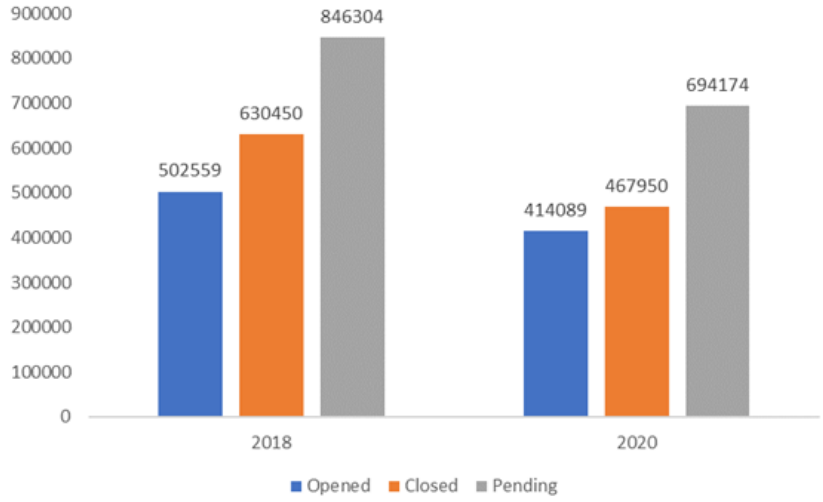

Figure 8: Case Flow at the Judicial District Courts[40]

CONCLUSIONS

The rapid increase in the use of technologies to maintain some functioning during confinement was one of the most discussed aspects of the impact of COVID-19 on courts. The use of technologies in Portuguese courts was strengthened during the COVID-19 crisis, but it also benefited from the previous modernization efforts of the judicial system, namely, the dematerialization and digitalization of proceedings and files. Therefore, three main conclusions can be elaborated with respect to the impacts of COVID-19 on courts.

The first considers the decrease in the volume and pace of work of judicial professionals (especially judges and public prosecutors) and on the courts case flow which revealed, regardless of the measures adopted in order to maintain the courts' functioning, the limitations of the technologies available (hardware and software). Both

[39] Pedro Correia & Neuza Martins, *O Impacto da Pandemia COVID-19 no Desempenho Estatístico das Ações Executivas Cíveis: O que nos Dizem os Dados até ao Momento*? (Encontro de Administração da Justiça – EnAJUS 2021, October, 2021) https://www.researchgate.net/publication/356288041_O_Impacto_da_Pandemia_COVID-19_no_Desempenho_Estatistico_das_Acoes_Executivas_Civeis_O_que_nos_Dizem_os_Dados_ate_ao_Momento

[40] D.G.P.J., *supra note* 29.

were not enough to ensure an alternative way of delivering and maintaining court services in the context of the COVID-19 crisis. It was clear that the professionals'/courts' performance was severely conditioned during the first year of the COVID-19 pandemic, with the exception of the proceedings classified as "urgent" cases by law.

Secondly, one can conclude that the use of the new technologies (remote access to Citius, videoconference and other communication tools, among others), for any procedural act, was not spread equally amid judicial professionals. The evaluation of the available equipment and digital platforms during the first confinement showed that the speedy adoption and adaptation to a range of technologies inevitably generated problems. These included slow internet connection, lack of necessary equipment, systems that could not cope with the sudden demand, and the inexistence of previous training in the use of the technologies.

Lastly, the analysis of the multiple collected data evinced that the responses to the COVID-19 pandemic took place against a backdrop of challenges that Portuguese courts were facing for many years. The lack of adequate computers for court clerks and the difficulties in the implementation of the V.P.N. system, videoconference systems and virtual courtrooms hampered the implementation of teleworking. This was far more evident in the case of the court clerks, and conditioned the realization of procedural acts (e.g. trials or hearings) through videoconference, impacting severely on the functioning of the courts. Court clerks felt more difficulties in operating in the regime of teleworking, being forced to work in court facilities where the working conditions were far from satisfactory. On the other hand, judges worked mainly from home during the confinement and were more likely to state that their working hours, volume and pace decreased compared to court clerks who remained in the courts.

COVID-19 provoked several damages in the functioning of courts similarly to what occurred to other public services. But the rigid organizational and management structure, with competencies divided by multiple governmental and judicial entities, made it more difficult to react and adapt to the new circumstances. Within this pandemic context, it was of public knowledge that courts were slower to adapt and even slower to resume the "normal" activity after the confinement period. Not only is it not possible to characterize the litigation that remained outside courts with the existing restrictions, but it would take long for it to be possible to evaluate the impacts on the regular procedural processing of files on courts. The judicial professionals were also not prepared to adapt to the new technological context and demands, showing difficulties in ensuring the necessary productivity. To sum up, the pandemic "rupture" calls for a new paradigm on judicial organization, working contexts and technological tools (hardware

and software). The justice that citizens have a right to also calls for a changing judicial culture, where training, cooperation and articulation can be placed in a central position of professional duties. The "call for justice" cannot be suspended by any future pandemic, or justice will be seen more as a "virus" than the "solution" for people's problems.


UBLR

University of Bologna Law Review
Department of Legal Studies
Via Zamboni, 42
40126 Bologna (Italy)

Email: bolognalawreview@unibo.it
Website: bolognalawreview.unibo.it
Facebook: www.facebook.com/ubolognalr
Twitter: twitter.com/unibolawreview