ALMA MATER STUDIORUM
UNIVERSITÀ DI BOLOGNA
DEPARTMENT OF LEGAL STUDIES

VOL. 4
ISSUE 2
2019

UNIVERSITY OF BOLOGNA LAW REVIEW

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E-ISSN 2531 – 6133

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UNIVERSITY OF BOLOGNA LAW REVIEW

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ADDRESS. University of Bologna, Department of Legal Studies, Via Zamboni 27/29, 40126, Bologna, Italy.

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Criminal Copyright Infringement: Forms, Extent, and Prosecution in the United States

IOANA VASIU & LUCIAN VASIU[†]

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ABSTRACT: This article highlights the importance of copyright industries for the developed economies and argues that criminal copyright infringement is a widespread offense, producing major economic losses for stakeholders, negatively impacting creativity, and raising significant cybersecurity and rule of law concerns. The article explains why there is a need for criminal protection of copyright protection and outlines the U.S. framework. In a comprehensive approach, based on a large corpus of data, consisting of cases brought to federal courts, in violation of Section 506 of Title 17 of the U.S. Code, and press releases and reports by law enforcement and industry groups, Section 3 describes the forms and extent of the phenomenon. Section 4 discusses essential aspects involved in the prosecution of these cases. Based on the number of cases brought to courts versus the criminal copyright infringing reports and estimates, the article concludes that this criminal phenomenon is significantly under-prosecuted and proposes a number of measures that could improve the criminal protection of copyrighted works.

KEYWORDS: *Copyright*; *Criminal Infringement*; *Streaming*; *Cyberlocker*; *Peer-to-Peer*

JEL CODES: *K14*, *K42*, *O34*

UNIVERSITY OF BOLOGNA LAW REVIEW

ISSN 2531-6133

[VOL.4:2 2019]

https://doi.org/10.6092/issn.2531-6133/9782

1. INTRODUCTION

The role played by intellectual property (hereinafter IP) in supporting the developed economies is emphasized by several important studies.[1] In the United States, for illustration, in 2014, the eighty-one industries identified to be IP-intensive, accounted for about $6.6 trillion in added value (38% of the GDP), and supported 27.9 million jobs;[2] in the European Union, the IP-intensive industries generate about €5.7 trillion annually (42% of the GDP) and 38% of all jobs.[3]

The industries involved in the creation and distribution of copyrighted materials represent an important part of the IP-intensive industries. Based on the level copyrighted products use, the most important are the "core industries", which comprise music, film, software, video, performing arts, and television.[4] The "interdependent industries", are those involved in the production, manufacture, or sale of equipment (e.g., computers), and have the important role of facilitating the creation and use of copyrighted works.[5]

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[1] *See, e.g.*, OECD Committee on Digital Economy Policy, *Enquiries into Intellectual Property's Economic Impact*, DSTI/ICCP(2014)17/CHAP1/FINAL (Aug. 10, 2015); *see also* World Intellectual Property Organization (WIPO), *WIPO Studies on the Economic Contribution of the Copyright Industries* (2014); United Nations Conference on Trade and Development, *Creative Economy Report 2010*, UNCTAD/DITC/TAB/2010/3 (2010).

[2] *See* U.S. Patent and Trademark Office, *Intellectual Property and the U.S. Economy: 2016 Update* (2016).

[3] *See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Council on a balanced IP enforcement system responding to today's societal challenges*, COM(2017) 707 final (Nov. 29, 2017).

[4] OECD, *supra* note 1, at 219-20; *see also* Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2018 Report* (2018), https://iipa.org/files/uploads/2018/12/2018CpyrtRptFull.pdf.

[5] *Id.*

https://doi.org/10.6092/issn.2531-6133/9782

In the E.U., the copyright-intensive industries generate €915 and 11.65 million jobs annually.[6] In the U.S., the related figures are also very compelling, for the aggregated core copyright industries,[7] and the individual industries: in 2016, the software industry, considering the direct, indirect, and induced impacts, had a total value-added contribution to the GDP of $1.14 trillion and supported 10.5 million jobs;[8] in 2017, the film industry generated revenues of $43.4 billion;[9] in 2018, the music industry generated about $19.6 billion.[10] Moreover, related research and development (hereinafter R&D) spending is also very strong;[11] in 2018, the revenue for the video game industry was $43.4 billion.[12]

[6] *See European Commission on a Digital Single Market for the Benefit of all Europeans*, at 5, NA-01-19-407-EN-C (2019).

[7] In 2017, the core copyright industries generated $1,328 billion and employed about 5.7 million workers (the total for the copyright industries was $2.2 trillion, with over 11.6 million workers). *See* Siwek, *supra* note 4, at 6, 10.

[8] *See* BSA, *The Growing $1 Trillion Economic Impact of Software*, SOFTWARE.ORG (2017), https://software.org/reports/2017-us-software-impact/ .

[9] *See* David Robb, *U.S. Film Industry Topped $43 Billion In Revenue Last Year, Study Finds, But It's Not All Good News*, DEADLINE (July 13, 2018), https://deadline.com/2018/07/film-industry-revenue-2017-ibisworld-report-gloomy-box-office-1202425692/ .

[10] *See* Amy Watson, *U.S. Music Industry - Statistics & Facts*, Statista (Jan. 17, 2019), https://www.statista.com/topics/4948/music-industry/ .

[11] *See* Shanhong Liu, *Research and development investments from the software to state economies in the United States in 2016, by key state*, Statista (Dec. 13, 2018), https://www.statista.com/statistics/572831/united-states-key-state-software-research-and-development-investment/ (for illustration, the software R&D contributed $24,403 billion to the economy of California and $9.6 billion to the economy of Washington state).

[12] *See U.S. Video Game Sales Reach Record-Breaking $43.4 Billion in 2018*, ENTERTAINMENT SOFTWARE ASSOCIATION (Jan. 22, 2019), http://www.theesa.com/article/u-s-video-game-sales-reach-record-breaking-43-4-billion-2018/ .

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Digital technologies, such as streaming,[13] cyberlockers,[14] and peer-to-peer (hereinafter P2P) networking,[15] however, increasingly threaten protected works, by significantly facilitating and expanding the scope of copyright infringement.[16] The vast majority of the academic literature agrees that copyright infringement causes a significant decrease in sales, reduces the incentives to create new high quality content, and negatively impacts the overall social welfare.[17] For example, as consequence of music piracy alone, the U.S. economy is losing billions of dollars and tens of thousands of jobs annually.[18]

Copyright infringement also undermines the value of the protected works, the ability of right holders to negotiate with clients, and erodes business goodwill.[19] Moreover, copyright infringement raises very significant cybersecurity concerns: the phenomenon can expose

[13] Streaming "refers to the delivery of digital media content in real time, so that it may be watched, listened to, or played contemporaneously with the transfer of the media data to a recipient's device;" for a discussion on streaming and copyright protection, see Thomas Y. Lu, *Understanding Streaming and Copyright: A Comparison of the United States and European Regimes*, 13 J. Bus. & Tech. L. 185 (2018). While streaming is an increasingly important method to lawfully copyrighted content, streaming piracy represents a massive phenomenon, see Motion Picture Association of America, *Review of Notorious Markets* (2018) at 2 ("In 2016, there were an estimated 21.4 billion total visits to streaming piracy sites worldwide").

[14] Also known as "cloud storage", "web storage", "webhards", or "one-click file hosting services" (OCHs), these are sites that offer centralized online storage, allowing download (direct download cyberlockers) or hosting content streamed to users (streaming cyberlockers). Cyberlockers facilitate criminal copyright infringement and money laundering on a very large scale United States v. Kim Dotcom et al., No. 1:12CR3, Indictment at 2 (E.D. Va. Jan. 5, 2012). Cyberlockers often provide several links to a file and employ proxy services, which compound the difficulty of enforcement efforts.

[15] P2P networking refers to "several different types of technology that have one thing in common: a decentralized infrastructure whereby each participant in the network (typically called a 'peer,' but sometimes called a 'node') acts as both a supplier and consumer of information resources;" there are "pure", "centralized", and "hybrid" P2P networks, see Columbia Pictures Industries, Inc. v. Fung, 710 F.3d 1020, 1024-6 (9th Cir. 2013). *See* the description of the evolution of the P2P architectures in Annemarie Bridy, *Is Online Copyright Enforcement Scalable*, 13 Vand. J. Ent. & Tech. L. 695, 698-704 (2010).

[16] *See* U.S. Dep't of Justice, *Prosecuting Intellectual Property Crimes* (4th ed. 2013); *see also Illegal Internet Streaming of Copyrighted Content: Legislation in the 112th Congress,* Brian t. Yeh, H. R. Misc. Doc. No 112-R41975 (2011).

[17] *See* Brett Danaher, Michael D. Smith & Rahul Telang, *Piracy and Copyright Enforcement Mechanisms*, Working Paper 19150, National Bureau of Economic Research (2013).

[18] *See* Stephen E. Siwek, *The True Cost of Sound Recording Piracy to the U.S. Economy*, Institute for Policy Innovation (Aug. 2007), https://www.riaa.com/wp-content/uploads/2015/09/20120515_SoundRecordingPiracy.pdf ; *see also* Robert G. Hammond, *Profit Leak? Pre-Release File Sharing and the Music Industry*, 81 Southern Economic Journal 387 (2014).

[19] *See* Synopsys, Inc. v. Inno GRIT, CORP., No. 19-CV-02082-LHK (N.D. Cal. Apr. 23, 2019).

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consumers to criminals, which, through the surreptitious collection of personal information, can result in fraud, identity theft, unwanted ads, or other harms,[20] such as, computer infection.[21] Another concerning aspect to take into consideration is the fact that these copyright infringement activities can be transnational, and include enterprises such as[22] conspiracy to commit racketeering,[23] money laundering schemes,[24] or alongside distribution of other illicit content, such as child pornography or terrorism propaganda videos.[25]

An effective copyright protection stimulates creative output[26] and development conditions in the digital economy.[27] The enforcing of copyright comprises a number of methods or mechanisms.[28] There is a

[20] *See Promoting Investment and Protecting Commerce Online: The ART Act, the NET Act, and Illegal Streaming: Hearing Before the Subcomm. on the Intellectual Property, Competition and the Internet of the H. Comm. on the Judiciary, 112th Cong.* (2011) (statement of Michael P. O'Leary, Senior Executive Vice President, Global Policy and External Affairs, Motion Picture Association of America).

[21] In these instances, copyright-protected content is used as malware disguise, see Andrew V. Moshirnia, *Typhoid Mario: Video Game Piracy as Viral Vector and National Security Threat*, 93 Ind. L.J. 975 (2018) (discussing the computer contamination risks in connection with copyright infringement); *see also* BSA, *Software Management: Security Imperative, Business Opportunity* (2018) (underlining that, those installing unlicensed software, face a high risk of getting infected by computer contaminants); *Digital Bait*, Digital Citizens Alliance (Dec. 2015), https://www.digitalcitizensalliance.org/clientuploads/directory/Reports/digitalbait.pdf (one-third of pirate websites had at least one malware incident) at 6.

[22] *See* United States v. Batato, 833 F.3d 413 (4th Cir. 2016).

[23] *See* United States v. All Assets Listed in Attachment A, 89 F. Supp. 3d 813, 818 (E.D. Va. 2015) (in violation of 18 U.S.C. § 1962(d) (2019)).

[24] In violation of 18 U.S.C. § 1956 (2019) (prohibiting the use of criminal activity proceeds for various purposes), see United States v. Vaulin, No. 16 CR 438-1 (N.D. Ill. Aug. 4, 2017).

[25] *See Dotcom,* No. 1:12CR3, Indictment at 11 (E.D. Va.).

[26] *See* U.S. Chamber of Commerce's Global Innovation Policy Center, *Inspiring Tomorrow, U.S. Chamber International IP Index* (7th Ed. 2019).

[27] Copyright infringement, for instance, undermines "the continued ability of publishers to invest in and publish high quality books and journals relied upon by consumers and the scientific, academic, and medical communities", *see* Amicus Curiae Brief in Support of Plaintiffs-Appellants, UMG Recordings, Inc. et al. v. Kurbanov, No. 1:18-cv-00957-CMH-TCB (No. 19-1124) (2019). The effective protection of copyrighted works supports numerous goals, for example, "inclusive and sustainable economic growth, employment and decent work for all" (United Nations' Development Goal 8), see United Nations, *Sustainable Development Goals* (2015), http://www.un.org/sustainabledevelopment/ .

[28] *See* U.S. Dep't of Commerce Internet Policy Task Force, *Copyright Policy, Creativity, and Innovation in the Digital Economy* (2013) at 42 *et seq.*; *see also* Maria Strong, *Enforcement Tools in the U.S. Government Toolbox to Support Countries' Compliance with Copyright Obligations*, 40 Colum. J.L. & Arts 359 (2017) (discussing the Government tools or mechanisms for copyright protection: for instance, bilateral and regional free trade agreements and the use of Special 301, an yearly review of the state of IPR protection and enforcement worldwide, to encourage the IP law improvement and compliance).

https://doi.org/10.6092/issn.2531-6133/9782

very large body of academic literature that discusses aspects pertaining to copyright's role and its protection in the digital environment,[29] however, there lacks a comprehensive examination of the phenomenon from a criminal enforcement perspective.

This article presents a comprehensive analysis of the most important aspects involved in cases of criminal infringement of copyright and argues that criminal copyright enforcement should play an important role in the protection of creativity, economic investment and growth, and the rule of law, in general. For instance, illegal proceeds,[30] obtained through the infringement of protected works, can be used in the perpetration of serious crimes, such as including human or drug trafficking.

The article proceeds as follows: Part 2, after introductory remarks, explains the copyright protection framework and why there is a need for criminal copyright provisions. Based on a large corpus of data, consisting of cases brought to federal courts, law enforcement press releases, and reports from industry groups, Part 3 describes the forms and extent of the phenomenon. Part 4 discusses important issues encountered in the prosecution of cases in violation of Section 506 of Title 17 of the U.S.C.:

[29] *See* Johnathan Ling, *Argh, No More Pirating America's Booty: Improving Copyright Protections for American Creators in China*, 29 Fordham Intell. Prop. Media & Ent. L.J. 313 (2019); *see also* Martin Husovec, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which Is Superior? And Why?*, 42 Colum. J.L. & Arts 53 (2018); Annemarie Bridy, *Internet Payment Blockades*, 67 Fla. L. Rev. 1523 (2016); Sara K. Morgan, *The International Reach of Criminal Copyright Infringement Laws—Can the Founders of The Pirate Bay Be Held Criminally Responsible in the United States For Copyright Infringement Abroad?*, 49 Vand. J. Transnat'l L. 553 (2016); Jeff Yostanto, *The Commercial Felony Streaming Act: The Call For Expansion of Criminal Copyright Infringement*, 20 Marq. Intellectual Property L. Rev. 315 (2016); Ross Drath, *Hotfile, Megaupload, and the Future of Copyright on the Internet: What can Cyberlockers Tell Us About DMCA Reform?*, 12 J. Marshall Rev. Intell. Prop. L. 205 (2012); Sean B. Karunaratne, Note, *The Case Against Combating Bittorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits*, 111 Mich. L. Rev. 283 (2012); Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2 Wis. L. Rev. 141 (2011); Julie L. Ross, *A Generation of Racketeers? Eliminating Civil RICO Liability for Copyright Infringement*, 13 Vand. J. Ent. & Tech. L. 55 (2010); Peter K. Yu, *Enforcement, Economics and Estimates*, 2 WIPO Journal 1 (2010); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement without Restricting Innovation*, 56 Stan. Tech. L. Rev. 1345 (2004); Eric Goldman, *A Road to No Warez: The No Electronic Theft Act and Criminal Copyright Infringement*, 82 Or. L. Rev. 369 (2003); Matt Jackson, *From Broadcast to Webcast: Copyright Law and Streaming Media*, 11 Tex. Intell. Prop. L.J. 447 (2003).

[30] Property obtained, directly or indirectly, as the result of criminal copyright infringement activity, see 18 U.S.C. § 981 (2019).

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legal elements, extraterritorial infringement, sentencing, and prosecution data. Finally, the article outlines a number of measures that could improve the criminal protection of copyrighted works.

2. COPYRIGHT PROTECTION

2.1. INTRODUCTORY REMARKS

Copyright protection is territorial: the law recognizes rights as national rights or regional rights (established by regional groupings, for instance, the E.U.), and it "recognizes the rights as extending only as far as the prescriptive jurisdiction of the country or the regional grouping that grants or recognizes the Rights".[31] The concept and the related rights in the national legislation are, however, consistent with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the Rome Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights, and other international conventions, which partially standardized copyright laws.

The predominant philosophical framework in the U.S. copyright law is utilitarian:[32] the fundamental objective of copyright protection is to foster creativity,[33] to "promote the Progress of Sciences and useful Arts".[34] Copyright protection aims to "motivate the creative activity of authors and inventors by the provision of a special reward",[35] and to ensure that there is a fair return for creative works. "The ultimate aim is,

[31] Marketa Trimble, *Undetected Conflict-of-Laws Problems in Cross-Border Online Copyright Infringement Cases*, 18 N.C. J.L. & Tech. 119, 122 (2016).
[32] *See* Peter S. Menell, Mark A. Lemley & Robert P. Merges, *Intellectual Property in the New Technological Age*: 2018 (2018) at 498-9 (discussing different philosophical perspectives of copyright protection).
[33] *See* Warner Bros. Inc. v. Am. Broad. Cos., 720 F.2d 231, 240 (2d Cir. 1983).
[34] U.S. Const. Art. I, § 8, cl. 8.
[35] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

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by this incentive, to stimulate artistic creativity for the general public good".[36] In other words, "the economic rationale for copyright is that without this protection, others could free ride on the efforts of creators and hence suppress the supply of creative works".[37]

Copyright protection also aims to trade off "the costs of limiting access to a work against the benefits of providing incentives to create the work in the first place".[38] Therefore, the copyright protection framework attempts to maintain a balance between "the interests of copyright owners in being compensated for uses of their works and deterring infringers from making market-harmful appropriations of their works, on the other"[39] and the larger public interest, such as education, research, or access to information.[40]

In the U.S., copyright protection dates back to 1789, when the Congress passed "a bill to promote the progress of science and useful arts, by securing to authors and inventors the exclusive right to their respective writings and discoveries".[41] A variety of works can enjoy copyright protection (e.g., literary and musical works, motion pictures, sound recordings, computer programs, photographs, audiovisual multimedia work, etc.).[42] However, the protection is limited to "original

[36] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151 (1975).
[37] OECD, *supra* note 1, at 218.
[38] William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud. 325, 326 (1989).
[39] Pamela Samuelson, *The Copyright Principles Project: Directions for Reform*, 25 Berkeley Tech. L.J. 1175, 1176 (2010).
[40] *See* Haochen Sun, *Copyright Law as an Engine of Public Interest Protection*, 16 Nw. J. Tech. & Intell. Prop. 123 (2019) (discussing aspects concerning the fair use doctrine in the context of copyright protection); *see also* Joseph A. Gerber, *Locking Out Locke: A New Natural Copyright Law*, 27 Fordham Intell. Prop. Media & Ent. L.J. 613, 644 (2017) ("gives owners their due but also facilitates a system for continuing greater social understanding and flourishing"); Howard B. Abrams, *Originality and Creativity in Copyright Law*, Law Contemp. Probs., Spring 1992, at 3 ("Copyright law can be broadly viewed as a system seeking an appropriate legal balance between the rights of authors and publishers on one hand and the rights of users and consumers on the other"); *Universal City Studios*, 464 U.S. at 429 ("balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand").
[41] Eldred v. Ashcroft, 537 U.S. 186, 123 S. Ct. 769, 154 L. Ed. 2d 683 (2003).
[42] Copyrightable subject matter are "original works of authorship fixed in any tangible medium of expression". *See* 17 U.S.C. § 102(a) (2019).

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intellectual conceptions of the author",[43] and cannot cover "any idea, procedure, process, system, method of operation, concept, principle, or discovery".[44] The federal copyright protection can be found primarily in Title 17 of the U.S.C.: Sections 101 through 1101 (the "Copyright Act").

Copyright protection subsists "in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, directly or with the aid of a machine or device".[45] A work is considered "fixed" when its embodiment "is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration".[46] The copyright in a protected work, "vests initially in the author or authors of the work", or, when there are more than one author of the work, the authors are co-owners of the copyright.[47]

Copyright protection "subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and 70 years after the author's death"; for joint works, which have two or more authors, "who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and 70 years after such last surviving author's death"; in the case of anonymous, pseudonymous, or works made for hire,[48] copyright lasts "for a term of 95 years from the year of its first publication, or a term of 120 years from the year of its creation, whichever expires first".[49]

[43] Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53 (1884).
[44] 17 U.S.C. § 102(b) (2019).
[45] *Id*, § 102(a).
[46] *Id*, § 101.
[47] *Id*, § 201(a).
[48] A "work made for hire" is "a work prepared by an employee within the scope of his or her employment" or "a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire". *See Id*, § 101.
[49] *Id*, § 302.

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2.2. EXCLUSIVE RIGHTS

Section 106 of Title 17 of the U.S.C. sets out the copyright owner's exclusive rights:

> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

These rights are subject to certain exceptions and limitations.[50] The term "copies" is defined as "material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device".[51] "Phonorecords" are "material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device".[52]

[50] *See Id*, §§ 107-122. Unauthorized uses of copyrighted works may not amount to infringing: "An unlicensed use of the copyright is not an infringement unless it conflicts with one of the specific exclusive rights conferred by the copyright statute", see *Universal City Studios*, 464 U.S. at 447.
[51] *Id*, § 101.
[52] *Id*.

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The term "reproduction" comprises a broad array of conduct, such as plagiarizing portions of someone's work, "ripping" audio tracks into MP3 format, making a copy of a movie on DVD; etc.[53] The term "display" refers to showing a copy of a work, "directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially".[54]

> To perform or display a work "publicly" means—
>
> > (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.[55]

The term "transmit" means to "communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent".[56] Illegal streaming of copyrighted works is considered to infringe "public performance" or "public display" rights, rather than the "reproduction" or "distribution" rights.[57] The term "distribution" is not defined; it can take several forms, including "by making available a copyrighted work, even without disseminating actual copies of it".[58]

[53] *See* U.S. Dep't of Justice, *supra* note 16, at 36.
[54] 17 U.S.C. § 101 (2019).
[55] *Id.*
[56] *Id.*
[57] United States v. Am. Soc'y of Composers, Authors, and Publishers, 485 F. Supp. 2d 438, 442-47 (S.D.N.Y. 2007).
[58] *Vaulin*, No. 16 CR 438-1 (N.D. Ill.). *See* Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y U.S.A. 1 (2011) (for a comprehensive analysis of the term "distribution"). For reference, the Italian Copyright Statute, defines "distribution" in Art. 17 as "the right to market, place in circulation or make available to the public, by whatever means and for whatever purpose a work or copies thereof and also includes the exclusive right to introduce into the territory of the countries of European Community, for distribution,

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2.3. TECHNOLOGICAL AND CONTRACTUAL PROTECTION

There are various methods through which protected works can be infringed. To protect their works, copyright holders can implement a number of binding norms, through technological protection measures (hereinafter T.P.M.) and rights management information.[59] These measures permit copyright owners to restrict or block the performance, execution, display, reproduction, or distribution of protected works, or to detect infringement, as applicable. Examples of T.P.M. are access control (i.e., through encrypting or content scrambling); fingerprinting;[60] watermarking[61] (e.g., visual cryptography); alphanumeric activation string or procedure; hardware key (dongle) or security device;[62] static or dynamic obfuscation;[63] blockchain-based smart contracts;[64] geo-blocking;[65] tracking mechanisms for online uses;[66] etc. However, technological means of copyright protection are not foolproof, as they are

copies of a work made in countries not members of the European Community", l.n. 633/1941 (It.), https://www.wipo.int/edocs/lexdocs/laws/en/it/it211en.pdf; the Copyright Law of Korea, in Art. 2(23), defines "distribution" as "the transfer by assignment or rental of the original or reproduction of works,etc. to the public with or without payment by the public", Law No. 3916, December 31, 1986 (as amended) (Kr.), https://www.wipo.int/edocs/lexdocs/laws/en/kr/kr058en.pdf.

[59] Information which identifies copyright-protected content, the owners of the rights and the acceptable terms or conditions of use.

[60] The marking of the copyrighted work with the identity of the licensed user, which would allow the tracing of infringements.

[61] A watermark is digital data or code, embedded into the protected work (file), containing information on the copyright owner, the permitted uses, etc. *See, e.g.,* Dolley Shukla & Manisha Sharma, *A Novel Scene-Based Video Watermarking Scheme for Copyright Protection*, 27 J. Intell. Sys. 47 (2018). For enhanced protection, watermarks can include a variety of data, such as Geographic Information Systems (GIS) vector maps, see Ahmed Abubahia & Mihaela Cocea, *Advancements in GIS Map Copyright Protection Schemes: A Critical Review*, 76 Multimedia Tools Applications 12205 (2017).

[62] Inserted in a computer's port, it makes possible the execution of the associated software (if it is not present, the software will not run, or will execute with reduced features).

[63] This technique, used primarily as software protection, involves the transformation of the code, to make it impossible or very hard to read/understand or reverse engineer.

[64] Used to automate copyright-related access and transactions, see Michèle Finck & Valentina Moscon, *Copyright Law on Blockchains: Between New Forms of Rights Administration and Digital Rights Management 2.0*, 50 IIC: Int'l Rev. Intell. Prop. Competition L. 77 (2019); *see also* Angelo Massagli, *The Sample Solution: How Blockchain Technology Can Clarify a Divided Copyright Doctrine on Music Sampling*, 27 U. Miami Bus. L. Rev. 129 (2018).

[65] This technology allows the restriction of access to content, based on geographical location.

[66] *See* Cadence Design Systems, Inc. v. Pounce Consulting, Inc., No. 17-cv-04732-PJH (SK) (N.D. Cal. Apr.1, 2019).

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vulnerable to a number of attacks, which can result in their circumvention or removal.

Where appropriate, rights owners can impose contractual obligations. Copyright enforcement through Internet Service Providers includes notice and action procedures,[67] and content filtering or website blocking or shutdown.[68] Contractual terms for consumers, expressed usually through end user licensing agreement (hereinafter E.U.L.A) and/or terms of use (hereinafter T.o.U.), stipulate the acceptable or permissible forms of use, sharing, or selling. However, a breach of the license agreement does not necessarily constitute copyright infringement.[69]

In order to constitute copyright infringement, licensee's violation of the E.U.L.A. or T.o.U. restrictions, there must be a nexus between the condition and the licensor's exclusive rights of copyright.[70] An example of such restrictions can be found in *Vernor v. Autodesk*:[71] the software maker distributes its products in accordance with the software licensing agreement (hereinafter S.L.A.), which must be accepted by consumers before they install the product. The S.L.A. "reserves title to the software copies and imposes significant use and transfer restrictions on its

[67] The "Notice and Takedown" mechanism, enacted by the Digital Millennium Copyright Act (DMCA), is considered a standard of copyright enforcement online, see Sharon Bar-Ziv & Niva Elkin-Koren, *Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown*, 50 CONN. L. REV. 1 (2017). *See also* Brett Danaher, Michael D. Smith & Rahul Telang, *Copyright Enforcement in the Digital Age: Empirical Evidence and Policy Implications*, 60 COMM. ACM, no. 6, 2017, at 68 (proposing demand-side and supply-side anti-piracy enforcement policies). For example, Google, as of April 22, 2019, had 4,062,447,717 URL removal requests and 2,345,678 removal requests for unique top-level domains, *see Requests to remove content due to copyright*, Google Transparency Report (2019), https://transparencyreport.google.com/copyright/overview?hl=en .

[68] The examination of data/Internet traffic, in order to detect copyright infringing content (for instance, through deep packet inspection (DPI), or the blocking of access to websites involved in that copyright infringements), see OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives,* at 154, OECD Doc. 58259 (Sept. 14, 2011). *See also* Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, art. 13, COM(2016) 593 final (Sept. 14, 2016) which requests the online platforms to block copyright-infringing materials.

[69] Microsoft Corporation v. A&S Electronics, Inc., No. 15-cv-03570-YGR (N.D. Cal. Dec. 11, 2015).

[70] *See* MDY Industries, LLC v. Blizzard Entertainment, Inc., 629 F.3d 928, 841 (9th Cir. 2010).

[71] Vernor v. Autodesk, Inc., 621 F.3d 1102 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 105 (U.S. 2011).

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customers", and, according to their type, have different restrictions.[72] The software publisher enforces and tracks the S.L.A. provisions via serial numbers and activation codes.[73] The software copies were conveyed as non-transferable licenses, and the resale of the software was construed as copyright infringement.[74] The court held that the copies at issue were licensed, and not sold (that is, the customer was a licensee, not an owner), therefore, the "sale" of the copies "did not convey ownership".[75]

The sale of a works in digital format does not offer physical property interest, and the license terms can prohibit the resale or any subsequent transfer.[76] The arguments around the right to resell copyrighted works, which illustrate the conflict between manufacturers' interest in maintaining revenues and consumers' interest in monetizing their digital assets, lead to intensive examinations, both scholarly[77] and in the courts. In *Capitol Records v. ReDigi*,[78] the defendant was a company that offered an online marketplace for "used" or "pre-owned" files, purchased on iTunes. ReDigi asserted that the resale by users of their digital music files, purchased lawfully, is protected by the first sale doctrine.[79] The court, however, held that the resell process involves "reproductions of the copyrighted code".[80] The appeal court affirmed this judgment.[81] The proceedings are still ongoing, on May 10, 2019,

[72] *Id.* at 1103.
[73] *See Id.* at 1104.
[74] *See Id.* at 1105.
[75] *Id.* at 1116.
[76] *See* Theodore Serra, *Rebalancing at Resale:* Redigi*, Royalties, and the Digital Secondary Market*, 93 Bos. U. L. Rev. 1753, 1759-60 (2013).
[77] *See* Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual and Personal Property*, 90 Notre Dame L. Rev. 1211 (2015).
[78] Capitol Records, LLC v. ReDigi, Inc., 934 F. Supp. 2d 640 (S.D.N.Y. 2013).
[79] *Id.* at 655.
[80] *Id.* at 649-651. The analysis of these issues is beyond the scope of this article, for in-depth discussions, see Kristin Cobb, *The Implications of Licensing Agreements and the First Sale Doctrine on U.S. and EU Secondary Markets for Digital Goods*, 24 Duke J. Comp. Int'l L. 529 (2014); John T. Soma & Michael K. Kugler, *Why Rent When You Can Own: How ReDigi, Apple, and Amazon Will Use the Cloud and the Digital First Sale Doctrine to Resell Music, E-Books, Games, and Movies*, 15 N. C. J. L. Tech. 425 (2014).
[81] Capitol Records, LLC v. ReDigi, Inc., 910 F.3d 649 (2d Cir. 2018).

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ReDigi requested the case to be heard at the U.S. Supreme Court.[82]

2.4. CRIMINAL PROTECTION

In situations where their rights were infringed, copyright owners can seek remedies through civil suits.[83] However, they often lack the required resources to effectively combat infringements through civil actions, such actions can alienate consumers, and are "unlikely to yield the copyright holder the full amount of awarded damages".[84] Moreover, the increasingly sophisticated deceit mechanisms used by perpetrators (e.g., reverse proxy services or third-party linking, aiming to make it difficult to identify the actual host used in the infringing activity, or the use of offshore companies, to mask the identity of the scheme operator), as well as, in a number of cases, the large-scale scope of the infringing activity and, in connection with this, the perpetration of other offenses, impose criminal provisions.[85] Criminal copyright provisions address this fact by proscribing the willful infringement of protected works, undertaken for commercial gain or for other personal benefits. Additionally, criminal prosecution is important from a general crime deterrence perspective.

Worldwide, criminal provisions differ in terms of profit motivation, criminality thresholds, criminal acts, and whether there

[82] *See ReDigi Heads To The Supreme Court*, PR Newswire (May 14, 2019), https://www.prnewswire.com/news-releases/redigi-heads-to-the-supreme-court-300849438.html.

[83] *See* 17 U.S.C. § 411 (2019); *see also* Christopher Anthony Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 Tex. L. Rev. 1981 (2014) (presenting the results of a study of about one thousand copyright cases).

[84] Geraldine Szott Moohr, *Defining Overcriminalization Through Cost-Benefit Analysis: The Example of Criminal Copyright Laws*, 54 Am. U. L. Rev. 783, 799 (2005).

[85] Criminal measures also satisfy the Agreement on Trade-Related Aspects of Intellectual Property Rights art. 61, Apr. 15, 1994, 1869 U.N.T.S. 299 ("Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent".) and Council of Europe Convention on Action Against Trafficking in Human Beings art. 10, May 16, 2005, ETS 185, the multilateral treaty on fighting cybercrimes, to which the U.S. is party ("Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law the infringement of copyright").

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should be a complaint by the victim.[86] In 1897, the U.S. Congress criminalized copyright for the first time.[87] The copyright legal framework has been modernized since.[88] Criminal copyright infringement can take numerous forms, which are reflected in the comprehensive legal framework: copyright infringement for profit;[89] copyright infringement without a profit motive;[90] pre-release distribution of a copyrighted work over a publicly accessible computer network;[91] circumvention of copyright protection systems;[92] trafficking in counterfeit or illicit labels or counterfeit documentation and packaging for copyrighted works;[93] unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances;[94] and unauthorized recording of motion pictures in exhibition facilities.[95]

Copyright "infringer" is a person that "violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 or of the author as provided in section 106A (a), or who imports copies or phonorecords into the U.S. in violation of section 602".[96] Infringement can take numerous forms, such as unauthorized

[86] In Korea, for instance, according to Art. 136 of the Copyright Act (*Jeojakkwonbeob*), the scope of criminal copyright provisions does not have a threshold for criminality, no commercial purpose requirement, and criminal liability extends to most infringing acts proscribed under the copyright law, see Law No. 3916, December 31, 1986 (as amended) (Kr.), *available at* https://www.wipo.int/edocs/lexdocs/laws/en/kr/kr058en.pdf .

[87] Act of January 6, 1897, ch. 4, 29 Stat. 481, 482.

[88] *See* the Amendments to the Copyright Act as a result of the Orrin G. Hatch–Bob Goodlatte Music Modernization Act of 2018; *see also* Prioritizing Resources and Organization for Intellectual Property (PRO IP) Act of 2008; Artists' Rights and Theft Prevention (ART) Act of 2005; Digital Theft Deterrence and Copyright Damages Improvement Act of 1999; No Electronic Theft (NET) Act of 1997; Anticounterfeiting Consumer Protection Act of 1996; Copyright Felony Act of 1992; Sentencing Reform Act of 1984; Piracy and Counterfeiting Amendments Act of 1982. For a review of the criminal copyright legislative history, see Benton Martin & Jeremiah Newhall, *Criminal Copyright Enforcement against Filesharing Services*, 15 N.C. J.L. TECH. 101, 107-11 (2013).

[89] *See* 17 U.S.C. § 506(a)(1)(A) (2016), 18 U.S.C. § 2319(b) (1986).

[90] *See* 17 U.S.C. § 506(a)(1)(B) (2016), 18 U.S.C. § 2319(c) (1986).

[91] *See* 17 U.S.C. § 506(a)(1)(C) (2016), 18 U.S.C. § 2319(d) (1986). *See* examples and a discussion about pre-release piracy in Liye Ma et al., *An Empirical Analysis of the Impact of Pre-release Movie Piracy on Box Office Revenue*, 25 Information Systems Research 590 (2014).

[92] *See* 17 U.S.C. § 1201 (2016).

[93] *See* 18 U.S.C. § 2318 (2019).

[94] *See Id*, § 2319A.

[95] *See Id*, § 2319B.

[96] 17 U.S.C. § 501(a) (2019).

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reproduction, distribution, modification, selling, leasing, marketing, giving away of protected works, etc.[97] Defendants can also be charged with violation of 18 U.S.C. § 2 (aiding and abetting criminal copyright infringement),[98] or conspiracy[99].

In general, direct copyright infringement requires the demonstration of ownership of the allegedly infringed work and the violation of at least one exclusive right granted under 17 U.S.C. § 106.[100] For civil liability, the general intent to copy is required; criminal liability, on the other hand, requires proof of specific intent to violate the law.[101]

The infringement of a copyrighted work is not always a straightforward determination, as underlined by the arguments found in a number of cases, for example: do search engines infringe copyrighted images when "display[ing] them on an 'image search' function in the form of 'thumbnails' but not infringe when, through inline linking, it displays copyrighted images served by another website?";[102] the embedding[103] of tweets on websites could violate the exclusive display right?[104] What adaptation of the source code can be authorized under 17 U.S.C. § 117?[105] For the purposes of 17 U.S.C. § 106(4), does playing of a video game and posting of footage of that gameplay on YouTube, amount to performing a copyrighted work publicly?[106]

[97] *See* Parts 3 and 4, *infra*.
[98] "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal"; *see*, *e.g.*, *Vaulin*, No. 16 CR 438-1 (N.D. Ill.).
[99] *See* 18 U.S.C. § 371 (2019); *see, e.g.*, United States v. All Assets Listed in Attachment A, Civil No. 1: 14-cv-969 (E.D. Va. Feb. 27, 2015).
[100] *See* A. & M. Records v. Napster, Inc., 239 F.3d 1004, 1013 (9th Cir. 2001).
[101] *See* Daniel Newman, Mangmang Cai & Rebecca Heugstenberg, *Intellectual Property Crimes*, 44 Am. Crim. L. Rev. 693 (2007).
[102] Perfect 10 v. Google, Inc., 416 F. Supp. 2d 828 (C.D. Cal. 2006).
[103] The HTML code that directs browsers to the third-party server, to retrieve content from a certain outside source; for a discussion on embedding of content and copyright infringement, see Jane C. Ginsburg & Luke A. Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 42 Colum. J.L. Arts 417 (2019).
[104] *See* Goldman v. Breitbart News Network, LLC, No. 17-cv-3144 (KBF) (S.D.N.Y. Feb. 15, 2018).
[105] *See* Universal Instruments Corp. v. Micro Systems Engineering, Inc., No. 17-2748-cv (2d Cir. May 8, 2019).
[106] *See* Epic Games, Inc. v. Mendes, No. 17-cv-06223-LB (N.D. Cal. June 12, 2018).

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Section 506 of Title 17 of the U.S.C. proscribes the willful infringement of a copyright if

> the infringement was committed—(A) for purposes of commercial advantage or private financial gain; (B) by the reproduction or distribution, including by electronic means, during any 180–day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than $1,000; or (C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

The term "financial gain" includes "receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works".[107] Section 503 of Title 17 of the U.S.C. contains provisions for the impounding and disposition of infringing articles, while Section 2323 of Title 18 of the U.S.C. contains forfeiture, destruction, and restitution provisions.[108] The punishment for criminal copyright infringement is imprisonment (up to ten years) or a fine (up to $250,000).[109]

[107] 17 U.S.C. § 101 (2019).

[108] 18 U.S.C. § 2323 (2019) provides that "when a person is convicted of an offense under section 506 of title 17 or section 2318, 2319, 2319A, 2319B, or 2320, or chapter 90, of this title, the court, pursuant to sections 3556, 3663A, and 3664 of this title, shall order the person to pay restitution to any victim of the offense as an offense against property referred to in section 3663A(c)(1)(A)(ii) of this title." If the government shows probable cause that the property in question is connected to the perpetration of criminal copyright infringement, courts will issue a seizure warrant under the authority of 18 U.S.C. §§ 981 and 2323. Seizure and forfeiture are different terms: in the online context, "seizure" results in "the domain name registry to redirect a suspected domain name to display a banner explaining that the site has been seized", while "forfeiture" involves "the *permanent* involuntary divestiture of property to the government or other party without compensation due to breach or default of a legal obligation or commission of a crime", *see* Karen Kopel, *Operation Seizing Our Sites: How the Federal Government is Taking Domain Names Without Prior Notice*, 28 Berkeley Tech. L.J. 859, 866 (2013). *See also*, Michael Joseph Harrell, *Fighting Piracy with Censorship: The Operation in Our Sites Domain Seizures v. Free Speech*, 21 J. Intell. Prop. L. 137 (2013); Brett Danaher & Michael D. Smith, *Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales*, 33 Int'l. J. Indus. Org. 1, 8 (2014) (showing that the shutdown of Megaupload, a very large cyberlocker and filesharing website, resulted in increased revenues for motion picture studios).

[109] 18 U.S.C. § 2319 (2019).

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3. NATURE AND SCOPE OF CRIMINAL COPYRIGHT INFRINGEMENT

Criminal copyright infringement can have physical and/or cyberspace components. The protected content can be obtained in a number of ways: illegal copying or unauthorized use of protected works; bootlegging;[110] unauthorized stream ripping sites;[111] etc. The illegal distribution vectors can take the form of selling counterfeited copies or illegally reproduced music, movies, and television programs, at flea markets;[112] warehouse for counterfeited copies distribution;[113] counterfeit software sold online;[114] CD and DVD replication plants;[115] etc.

Other significant copyright infringement vectors are: the use of "key generators", in order to create serial numbers, used to activate protected products;[116] the selling on eBay of pirated computer programs, with codes that allow the update that software;[117] the trading of unauthorized product key cards, containing codes that allow to fully exploit versions of copyrighted software;[118] the dissemination of unauthorized copies of reinstallation CDs;[119] Internet file-sharing;[120] TV signal theft;[121] the unauthorized decryption of premium TV channel;[122] etc.

[110] *See* United States v. Armstead, 524 F.3d 442, 443 (4th Cir. 2008).
[111] These sites convert, without authorization, copyrighted works from licensed streaming sites into downloadable files.
[112] *See* United States v. Frison, 825 F.3d 437 (8th Cir. 2016); *see also* United States v. Henneberger, Criminal Action No. 2: 13-CR-167-1 (S.D. Tex. Sept. 10, 2015).
[113] *See* Press Release, *Three Indicted for Criminal Copyright Infringement,* U.S. Dep't of Justice, (Mar 21, 2013), https://archives.fbi.gov/archives/sacramento/press-releases/2013/three-indicted-for-criminal-copyright-infringement .
[114] *See* United States v. Kononchuk, 485 F.3d 199 (3d Cir. 2007).
[115] *See* United States v. Liu, 731 F.3d 982 (9th Cir. 2013).
[116] United States v. Anderson, 741 F.3d 938 (9th Cir. 2013).
[117] *See* United States v. Fair, 699 F.3d 508 (D.C. Cir. 2012).
[118] *Florida Man Pleads Guilty to Software Piracy Scheme*, U.S. Dep't of Justice, (Mar 2, 2017), https://www.justice.gov/usao-wdmo/pr/florida-man-pleads-guilty-software-piracy-scheme.
[119] *See* United States v. Lundgren, No. 17-12466, Non-Argument Calendar (11th Cir. Apr. 11, 2018) (the defendant admitted to have shipped about 28,000 counterfeit discs).
[120] *See* Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899 (8th Cir. 2012).
[121] This involves "illegally tapping into cable TV systems as well as receiving satellite signals without authorization", see HEDI NASHERI, ADDRESSING GLOBAL SCOPE OF INTELLECTUAL PROPERTY LAW 18 (2005); *see*, *e.g.*, Operation Decrypt, in which the defendants developed sophisticated tools that allowed them to steal satellite TV signals, resulting in losses of about $15 million to the victims, *Id.* at 53.
[122] *See* United States v. Manzer, 69 F.3d 222 (8th Cir. 1995).

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Online technologies, as they facilitate especially in commercial-scale infringement or access to wide audiences, are often used by perpetrators: for instance, illegally uploading[123] of movies online prior to their release in theaters;[124] illegal posting of movies on Facebook pages;[125] eBay selling of counterfeited products, shipped from abroad;[126] selling of illegally copied products on Amazon;[127] etc. More sophisticated technologies are increasingly used, to provide infringing content on a very large scale, often for monetary gain: for example, Internet Protocol Television services;[128] linking and streaming websites;[129] direct download cyberlockers and illicit streaming devices (hereinafter I.S.D.s)[130] and

[123] "Uploading" means "making an infringing item available on the Internet or a similar electronic bulletin board with the intent to enable other persons to (A) download or otherwise copy the infringing item; or (B) have access to the infringing item, including by storing the infringing item as an openly shared file. "Uploading" does not include merely downloading or installing an infringing item on a hard drive on a defendant's personal computer unless the infringing item is an openly shared file". *See* U.S. Sentencing Guidelines § 2B5.3, cmt. n. 1 (2018).

[124] *See Lancaster Man Admits Illegally Uploading Screeners of 'The Revenant' and 'The Peanuts Movie' to BitTorrent Website,* U.S. Dep't of Justice (Feb 26, 2016), https://www.justice.gov/usao-cdca/pr/lancaster-man-admits-illegally-uploading-screeners-revenant-and-peanuts-movie (as result of the upload, the rights owner suffered losses of over $1 million).

[125] *See Fresno Man Arrested on Federal Copyright Violations for Alleged Illegal Upload of 'Deadpool' Movie to the Internet,* U.S. Dep't of Justice (Jun 13, 2017), https://www.justice.gov/usao-cdca/pr/fresno-man-arrested-federal-copyright-violations-alleged-illegal-upload-deadpool-movi-0.

[126] *See* United States v. Edward, No. 12-20705 (E.D. Mich. Dec. 10, 2013).

[127] *See* United States v. Vampire Nation, 451 F.3d 189 (3d Cir. 2006).

[128] *See* These services "provide stolen telecommunication signals/channels to a global audience via dedicated web portals, third-party applications and piracy devices configured to access the service", see Motion Picture Association of America, *supra* note 13.

[129] *See Id.* at 4-5: the ring of piracy services: b9good.com, which had 27.5 million visits per month; Cda.pl, which had 68.13 million worldwide visitors; Dytt8.net, which received around 20 million visits per month, users accessing more than 12,000 infringing film titles; etc.

[130] *See* Office of the United States Trade Representative, *2017 Out-of-Cycle Review of Notorious Markets* (2018) at 9: "ISD piracy ecosystem, including unlawful device sellers and unlicensed video providers and video hosts, stands to bring in revenue of an estimated $840 million a year in North America alone, at a cost to the entertainment industry of roughly $4-5 billion a year". I.S.D.s harm copyright owners and impair competition, by harming legitimate streaming services (e.g., Netflix or Hulu), see Federal Trade Commission, *Competition and Consumer Protection in the 21st Century* (2018) at 187.

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services;[131] file-swapping services;[132] P2P networks[133] and BitTorrent[134] portals.

The survey of cases reveals that the most commonly infringed works are musical compositions, computer programs, movies, video games, and television shows. The infringing activity can be on a massive scale. For instance, Megaupload, a worldwide criminal conspiracy, had "more than one billion visitors in its history, more than 180 million registered users to date, and an average of fifty million daily visits, and to account for approximately four percent of the total traffic on the Internet;"[135] Operation D-Elite involved over 133,000 members, involved in the illegal distribution of tens of thousand of works, including movies before their commercial distribution in retail stores or theaters, the number of downloads amounting to over two million.[136]

In numerous cases, the calculated harm to copyright holders was very significant: $6.3 billion, through the unauthorized downloading of about a billion copies of protected works;[137] over $100 million, in a scheme that involved the selling of illicit, unauthorized, and counterfeit software products;[138] over $500 million in the "Mega Conspiracy"

[131] For instance, for illegally streamed copyrighted sporting telecasts, see *Website Operator Indicted for Illegally Streaming Copyrighted Sporting Events*, U.S. Immigration and Customs Enforcement (Oct. 25, 2011), https://www.ice.gov/news/releases/website-operator-indicted-illegally-streaming-copyrighted-sporting-events; *see also* Motion Picture Association of America, *supra* note 13, at 7-9 (e.g., Openload.co/oload.tv, Rapidgator.net, Rapidvideo.com, etc.).

[132] *See In re* Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).

[133] *See* Neil Fried, *Comments of the Motion Picture Association of America, Inc.*, In the Matter of Competition and Consumer Protection in the 21st Century, Hearing 4: Oct. 23-24, 2018 (the number of pirated movies and television programs downloaded in the U.S. in 2017 using p2p protocols is estimated to be 542 millions).

[134] BitTorrent is a protocol used for P2P file sharing, allowing the rapid transfer of large amounts of data over the Internet, see Strike 3 Holdings, LLC v. Doe, No. 18-cv-01173-TSH (N.D. Cal. Mar. 20, 2019).

[135] *Dotcom*, No. 1:12CR3, Indictment at 2 (E.D. Va.).

[136] *See Federal Law Enforcement Announces Operation D-Elite, Crackdown on P2P Piracy Network,* U.S. Dep't of Justice (May 25, 2005), http://www.usdoj.gov/opa/pr/2005/May/05_crm_291.htm.

[137] *See Owner of Sharebeast.com sentenced for copyright infringement,* U.S. Dep't of Justice(Mar 22, 2018), https://www.justice.gov/usao-ndga/pr/owner-sharebeastcom-sentenced-copyright-infringement.

[138] *See Six Defendants Plead Guilty to $100 Million Software Piracy Scheme,* U.S. Dep't of Justice (Dec 17, 2015), https://www.justice.gov/usao-wdmo/pr/six-defendants-plead-guilty-100-million-software-piracy-scheme.

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copyright infringement scheme;[139] over $1 million in the "Pirates With Attitudes" case;[140] over $1.7 million in the SnappzMarket Group conspiracy.[141]

In *United States v. All Assets*,[142] the conspiracy made over $150 million in subscription and advertising fees. To conceal the copyright infringement illegal activity, the conspirators allegedly took a number of affirmative steps, including the exclusion of infringing files from the most downloaded list, the creation of fake accounts on the Megaupload and Megavideo sites, to upload files so that these would look as uploaded by users, not by the conspirators, and use of third party "linking" and "referrer" websites.[143]

In another major criminal copyright infringement case, the defendants operated KAT, which allowed the distribution and reproduction of copyrighted works online, without the copyright owner's permission.[144] The illegal proceeds of this conspiracy, in the order to millions of dollars, came from user donations and online advertisers.[145] In order to circumvent seizures and civil lawsuits, the servers used in this scheme were placed and moved in several locations around the world.[146] As part of their operations concealment, the defendants operated KAT and the related sites under the "Cryptoneat", a firm based in Ukraine.[147]

[139] *See Batato*, 833 F.3d (the reported income exceeding $175 million).
[140] *See* United States v. Slater, 348 F.3d 666 (7th Cir. 2003); United States v. Rothberg, 222 F. Supp. 2d 1009 (N.D. Ill. 2002) (the defendants facilitated the unauthorized dissemination of copyrighted software online).
[141] *See Fourth Conspirator in SnappzMarket Android Mobile Device App Piracy Group Convicted of Conspiracy to Commit Criminal Copyright Infringement*, U.S. Dep't of Justice (Nov. 17, 2016), https://www.justice.gov/opa/pr/fourth-conspirator-snappzmarket-android-mobile-device-app-piracy-group-convicted-conspiracy (the conspirators illegally reproduced and distributed over 1 million of Android mobile device apps that were copyrighted).
[142] United States v. All Assets Listed in Attachment A, Civil No. 1: 14-cv-969 (E.D. Va. Mar. 25, 2015).
[143] *Id.* (the linking/referrer sites do not host actual content, they link the users to third party sites).
[144] *See Vaulin*, No. 16 CR 438-1 (N.D. Ill.).
[145] *See Id.*
[146] *See Id.*
[147] *See Id.*

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4. PROSECUTION ASPECTS

The differences between criminal and civil infringement regard intent, willfulness, liabilities, and procedural and evidentiary requirements. Criminal proceedings can be initiated either by the owner of the rights or by a prosecutor.[148] Prosecutors have "wide discretion" in criminal matters, and may decline to prosecute if they consider that there is not enough to prosecution merit or if they consider that acceptable alternative are available (for instance, restitution).[149] The elements common to all criminal copyright offenses are the existence of a valid copyright and the willful infringement by reproduction or distribution of the copyrighted work.[150]

4.1. LEGAL ELEMENTS

To prove willful acting, the Government must demonstrate that the defendants knew that their acts infringed a valid copyright,[151] that the defendants "acted with reckless disregard for, or willful blindness to, plaintiff's rights".[152] This aspect was raised in *United States v. Wittich*,[153] where the defendants argued that "the [G]overnment has not properly alleged the copyright at issue here", that "there is no evidence that this copyright was registered with the Copyright Office", a "prerequisite to a copyright infringement claim", and that the copyright statute is vague[154] as applied to these defendants, and therefore, must be construed as

[148] *See* Int'l Association for the Prot. of Intellectual Prop., Criminal Protection of IP 12 (2018).
[149] "Prosecutors have essentially no formal external checks on their discretion", see also Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 Calif. L. Rev. 323, 331 (2004); see also AIPPI, *supra* note 148, at 12.
[150] *See* U.S. Dep't of Justice, *supra* note 16, at 16.
[151] *See Id.* at 16-8. To prove the existence of a valid copyright, the prosecution usually presents a certificate of registration, see also *id.* at 23.
[152] Boffoli v. Atemis, No. C18-795 TSZ (W.D. Wash. Feb. 7, 2019).
[153] United States v. Wittich, 54 F. Supp. 3d 613 (E.D. La. 2014).
[154] A criminal statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties", see Connally v. General Constr. Co., 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322, 391 (1926).

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unconstitutional.[155] Nonetheless, the court held that "the plain language of 17 U.S.C. §§ 102, 408, 506(a)(1)(A), 1201(a)(2)(A) and 1204(a)(1) establish that copyright protection may attach to a work regardless of whether a copyright is registered".[156] Criminal prosecution for copyright infringement "do[es] not require that the copyright at issue be registered".[157] The statutes cannot be construed "unconstitutionally vague simply because they do not require registration of the copyrighted work".[158]

Willful infringement does not require actual knowledge, "recklessness or willful blindness will be sufficient".[159] In criminal copyright infringement cases, courts interpret "willfulness" as infringement committed "with knowledge that the defendant's conduct constituted copyright infringement for purposes of 17 U.S.C. § 506(a)".[160] In *United States v. Anderson*, for instance, the court of appeals held that the infringement "is willful when (1) the defendant engaged in acts that infringed the copyrights, and (2) knew that those actions may infringe the copyrights [or acted with reckless disregard for, or willful blindness to the copyright holder's rights]".[161] "Willfulness" often can be proven by inference, based on the existing evidence.[162]

A very good illustration for the consideration of this element is *United States v. Liu*, where the defendant denied copyright infringement knowledge or involvement: his company manufactured DVDs for a different firm; when the defendant realized that he was deceived about

[155] *See Id.* at 615.
[156] *Id.* at 629.
[157] *Id.*
[158] *Id.*
[159] Unicolors, Inc. v. Urban Outfitters, Inc., 853 F.3d 980, 992 (9th Cir. 2017); Erickson Productions, Inc. v. Kast, No. 17-17157 (9th Cir. May 1, 2019).
[160] United States v. Acevedo-Cruz, Criminal No. 04-0381 (DRD) (D.P.R. Feb. 23, 2006); *see also* Jonathan S. Masur & Christopher Buccafusco, *Innovation and Incarceration: An Economic Analysis of Criminal Intellectual Property Law*, 87 S. CAL. L. REV. 275, 375 (2014) ("the defendant subjectively knew that the infringed works were subject to copyright and that his conduct was unlawful"). Infringement may be unintentional, for instance, in cases of misinformation regarding licensing rights or obligations.
[161] *Anderson*, 741 F.3d at 944.
[162] U.S. Dep't of Justice, *supra* note 16, at 30-2.

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the copyrights permissions involved, he filed a lawsuit against the latter.[163] The court of appeals held that "willfully", as used in 17 U.S.C. § 506(a), connotes a "voluntary, intentional violation of a known legal duty".[164] The court went on and held that "defining 'willfully infringed' without any requirement that the defendant knew he was committing copyright infringement, the district court instructed the jury to apply a civil liability standard".[165] Moreover, the court considered that the error was compounded by the instruction given to the jury that "[a]n act is done 'willfully' if the act is done knowingly and intentionally, not through ignorance, mistake, or accident".[166] The court's conclusion was that, by defining willfulness such that the jury could have convicted the defendant without finding that he knew that his actions were unlawful, the district court erred.[167]

4.2. EXTRATERRITORIAL INFRINGEMENT

Copyright's territorial nature gives owners rights within a certain territory. The Copyright Act does not apply extraterritorially, if the acts of infringement occur entirely abroad. However, the online environment involves activities and people that span multiple jurisdictions. The copyright infringement acts committed online "have the potential to cause effects that are territorially unlimited unless the infringer - or a service the infringer uses for committing the acts - limits the territory where the effects might be felt".[168]

In *United States v. Vaulin*,[169] for example, the co-defendants, charged with operating websites involved in criminal copyright infringement, argued that they cannot be prosecuted under the Copyright

[163] *Liu*, 731 F.3d at 986.
[164] *Id.* at 990.
[165] *Id.* at 991.
[166] *Id.*
[167] *See Id.* at 992.
[168] Marketa Trimble, *Undetected Conflict-of-Laws Problems in Cross-Border Online Copyright Infringement Cases*, 18 N.C. J.L. TECH. 119, 122 (2016).
[169] *Vaulin*, No. 16 CR 438-1 (N.D. Ill.).

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Act for any extraterritorial infringement, the court held that "the core theory underlying the indictment is that Vaulin aided, abetted, and conspired with users of his network to commit criminal copyright infringement in the United States". This approach can also be found in *Spanski Enterprises v. Telewizja Polska*,[170] where the court held that one of plaintiff's rights was infringed when, without authorization, the defendant made TV programs, protected by copyright, available to stream inside the U.S., even though the stream was hosted outside the U.S.

An important aspect of these cases regards the extradition of defendants, as illustrated, for instance, by the Dotcom case. The extradition of the defendant, the leader of the Mega Conspiracy, a citizen of Finland and Germany and a resident of New Zealand and Hong Kong,[171] already spanning seven years, is still pending in New Zealand.[172]

4.3. SENTENCING

The U.S. Sentencing Guidelines (U.S.S.G.) for criminal copyright infringement are contained in Section 2B5.3, which provides for an offense level of 8. The offense level for violations of 17 U.S.C. § 506 is determined, among other factors, by the value of the infringed materials that can be attributed to the defendants. The amount of infringement is the "retail value" of the "infringed item" or "infringing item", multiplied by the number of infringing items, depending on the nature of the case.[173] "Retail value" of an infringed item is defined as "the retail price of that item in the market in which it is sold".[174]

[170] Spanski Enterprises v. Telewizja Polska, S.A., No. 17-7051 (D.C. Cir. Mar. 2, 2018).
[171] *See Dotcom*, No. 1:12CR3, Indictment at 13 (E.D. Va.).
[172] *See* Melissa Nightingale, *Kim Dotcom Extradition Legal Battle in Supreme Court Coming to an End*, NZ HERALD (June 17, 2019), https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12241050 (the case reached the Supreme Court, the main issue being whether copyright infringement amounts to a criminal offense under the New Zealand law, making it an extradition offense; even if the court grants the extradition, the Minister of Justice would have to sign the extradition paperwork, and this could lead to a request for judicial review and further appeals).
[173] U.S. Sentencing Guidelines Manual § 2B5.3, cmt. n. 2(A).
[174] *Id*, § 2B5.3, cmt. n. 2(C).

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For infringement amounts that exceed $6,500, the base offense level is increased by the number of levels from the table in §2B1.1, according to the amount in question.[175] In cases where the number of infringing items cannot be determined precisely, reasonable estimate of the infringement amount will be used, determined from the relevant information available.[176] A reduction by two levels is applied in cases where the offense was not committed for "commercial advantage or private financial gain".[177]

In *United States v. Armstead*, the court of appeals held that

> 'value' is measured not only by actual transactions that define a market, but also by face or par values assigned to commodities or goods before reaching the market, and the statute instructs that the greatest of those 'values' be used.[178] 'Retail,' which is not defined at all, refers, in its ordinary meaning, to sales transactions of commodities or goods in small quantities to ultimate consumers.[179]

For an example of the U.S.S.G. application, in *United States v. Karadimos*, the defendant-appellant argued that, by using manufacturer's suggested retail prices for the software titles seized from him, the district court clearly calculated erroneously the amount of copyright infringement under U.S.S.G. § 2B5.3, cmt. n.2(A).[180] The appeal court held that "government's proffer of the manufacturer's suggested retail price did not demonstrate by clear and convincing evidence the retail value of the infringed software items in the market in which they were sold. U.S.S.G. § 2B5.3, cmt. n.2(C)", and remanded the case for a new sentencing hearing.[181]

[175] *See Id.* §2B5.3(b)(1)(B).
[176] *See Id*, §2B5.3, cmt. n. 2(E).
[177] *Id*, §2B5.3(b)(4).
[178] *Armstead*, 524 F.3d at 445.
[179] *Id.*
[180] United States v. Karadimos, No. 11-30199 (9th Cir. Sep. 19, 2012).
[181] *Id.*

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The calculation of the actual value of the infringing items was appealed in *United States v. Lundgren*.[182] The defendant admitted culpability for criminal copyright infringement, in violation of 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. § 2319(a) and (b)(1), in connection with a scheme conceived to sell copies of reinstallation discs for Microsoft Windows, without permission from the copyright owner.[183] The defendant, nevertheless, disputed the value of the reinstallation discs, and argued that the district court erred in calculating the infringement value by using the actual retail price of the infringing product "because the amount offered by the government was not for a substantially identical item", as the reinstallation discs "were fundamentally different than the discs sold by Microsoft to small registered refurbishers because the discs sold by Microsoft came with a license, and a reinstallation disc required the user to obtain a license from somewhere else".[184] The opinion of the prosecution's expert, however, held that the software in discussion "performed in a manner largely indistinguishable from the genuine versions created by Microsoft".[185] While experts identified differences in the functionality in the discs in question, the court of appeals held that the district court's valuation of the infringed item and the determination of defendant's base offense level were correctly determined.[186]

4.4. PROSECUTION DATA

An important component of copyright protection is criminal enforcement. However, due to a complex set of factors, the effective criminal enforcement of copyright faces numerous, complex, and evolving challenges.[187] The enforcement efforts are notable: in the years

[182] *Lundgren*, No. 17-12466 (11th Cir.).
[183] *See id.*
[184] *Id.*
[185] *Id.*
[186] *See id.* ("subject to a 14-level increase under § 2B5.3(b)(1) and § 2B1.1(b)(1)(H)").
[187] *See* Eldar Haber, *The Criminal Copyright Gap*, 18 STAN. TECH. L. REV. 247, 247-88 (2015) (argues that there is a "gap between legislation and enforcement of criminal copyright infringements," that "enforcement is problematic as the digital environment

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2018, 2017, and 2016, the number of cases prosecuted for criminal copyright infringement, were four, eight, and ten, respectively;[188] in the fiscal years 2017, 2016, and 2015, in the cases prosecuted for copyright and trademark infringement, the median infringement amount was $266,086, $148,006, and $107,808, respectively.[189] Notwithstanding that, copyright infringement remains startlingly high,[190] representing a very significant and growing concern for stakeholders.[191]

The in-depth examination of criminal copyright infringement cases and reports unveils the massive scope of this phenomenon: billions of protected works shared monthly without authorization;[192] globally, an estimated 100 million Internet Protocol addresses are daily involved in

possesses many difficulties to enforcement agencies, such as detection, identifying suspects, cross-over jurisdictions, overseas operators, and prosecuting juveniles," and discusses potential explanations for this situation); *see also* Luis Aguiar, Jörg Claussen & Christian Peukert, *Catch Me if You Can: Effectiveness and Consequences of Online Copyright Enforcement*, 29 Info. Sys. Res. 656 (2018) (discussing the effectiveness of illegal streaming sites shutdown); Motion Picture Association of America, *supra* note 13, at 2 ("enforcement efforts are complicated when intermediaries fail to take adequate steps to ensure their services are not being used to facilitate copyright infringement"); Jason Gull & Tim Flowers, *Prosecuting Copyright Infringement Cases and Emerging Issues*, 64 U.S. Att'ys' Bull. 18, 20 (2016); Peter K. Yu, *Enforcement, Enforcement, What Enforcement?*, 52 IDEA: J. L. Tech. 239 (2012) (discussing the challenges raised by cross-border and jurisdictional aspects and the architecture and capabilities of cyberspace); I. Trotter Hardy, *Criminal Copyright Infringement*, 11 Wm. & Mary Bill Rts. J. 305, 313 (2002) ("For many individuals using the Internet, for example, the chance of being caught for occasionally downloading a copyrighted song, or uploading a copyrighted piece of software, is almost zero.").

[188] In violation of 17 U.S.C. § 506 (2016) and 18 U.S.C. § 2319 (2019), see U.S. Intellectual Property Enforcement Coordinator, *Annual Intellectual Property Report to Congress* (2019) at 106; *see also* U.S. Intellectual Property Enforcement Coordinator, *Annual Intellectual Property Report to Congress* (2018) at 91; U.S. Intellectual Property Enforcement Coordinator, *2016 U.S. Intellectual Property Enforcement Coordinator Annual Report on Intellectual Property Enforcement* (2017) at 80.

[189] *See* U.S. Sentencing Commission, *Quick Facts: Copyright and Trademark Infringement Offenses* (2018); *see also* U.S. Sentencing Commission, *Quick Facts*: *Copyright and Trademark Infringement Offenses* (2017); U.S. Sentencing Commission, *Quick Facts: Copyright and Trademark Infringement Offenses* (2016).

[190] *See* Freddi Mack, *Has the Quest to Quelch Piracy Gone Too Far? Government Overreach in Forfeiture of Linking Websites*, 68 U. Miami L. Rev. 561, 587 (2014) ("Digital copyright infringement is indisputably one of the most widespread crimes in the United States.").

[191] "A lack of respect for the rule of law or widespread violations of intellectual property law will prevent the establishment of a safe and predictable environment for businesses and consumers alike," see generally U.S. Intellectual Property Enforcement Coordinator, *Annual Report on Intellectual Property Enforcement* (2010) at 6, https://www.ice.gov/doclib/iprcenter/pdf/ipec-annual-report.pdf.

[192] *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

https://doi.org/10.6092/issn.2531-6133/9782

illegal downloading;[193] in the U.S. alone, in 2017, there were about 27.9 billion visits to piracy websites;[194] over 78% of files on direct download cyberlockers and over 83% of files on streaming cyberlockers infringed copyright, resulting in profits of millions of dollars;[195] online access to illegal channels,[196] illegal downloads and streams,[197] or file sharing occurs on a massive scale, causing losses of millions of dollars to rightful owners.[198]

5. CONCLUSION

This article, in a comprehensive approach, discussed the characteristics of the criminal copyright infringement phenomenon and important

[193] *See* Todd Spangler, *Pirate Bay Shutdown Has Had Virtually No Effect on Digital Piracy Levels,* VARIETY (Dec. 13, 2014), http://variety.com/2014/digital/news/pirate-bay-shutdown-has-had-virtually-no-effect-on-digital-piracy-levels-1201378756/ .

[194] *See* Amy Watson, *Number of visits to media piracy sites worldwide in 2018, by country (in billions),* Statista (last edited May 27, 2019), https://www.statista.com/statistics/786046/media-piracy-site-visits-by-country/.

[195] *See* NetNames, *Behind the Cyberlocker Door: A Report on How Shadowy Cyberlocker Businesses* (2014) ("The most profitable direct download cyberlocker generated annual profit of $15.2m from revenue of $17.6m"); *see also* Damilola Ibosiola et al., *Movie Pirates of the Caribbean: Exploring Illegal Streaming Cyberlockers*, 2018 TWELFTH INT'L AAAI CONFERENCE ON WEB AND SOCIAL MEDIA. (discussing the online video piracy in the context of streaming cyberlockers).

[196] *See Publishing under threat as demand for illegal content rises over 2018*, MUSO (2019), https://www.muso.com/magazine/publishing-under-threat-as-demand-for-illegal-content-rises-over-2018/ (the publishing sector, for instance: the illegal channels visits was estimated to 21.83bn in 2018).

[197] *See Game of Thrones Season 7 Pirated over 1 Billion Times*, MUSO, https://www.muso.com/magazine/game-of-thrones-season-7-pirated-over-1-billion-times/ (as of September 3, 2017, the Season 7 of the "Game of Thrones" had over 1 billion illegal streams and downloads, mostly through by streaming); *see also* Travis Clark, *The 'Game of Thrones' season 8 premiere was pirated 54 million times in 24 hours, vastly outstripping its legal audience*, BusinessInsider (Apr. 17, 2019), https://www.businessinsider.com/game-of-thrones-premiere-pirated-54-million-times-in-24-hours-2019-4 (the premiere of the "Game of Thrones" was pirated 54 million times in 24 hours).

[198] *See Operator of music piracy website sentenced to 3 years in prison RockDizFile.com was second-largest online file sharing website in US*, U.S. Immigration and Customs Enforcement (Nov. 17, 2015), https://www.ice.gov/news/releases/operator-music-piracy-website-sentenced-3-years-prison (the site averaged about 4.5 million monthly visits, resulting in losses of more than $10 million per month to the copyright owners). The value of the loss is measured according to the retail value of the "infringed item", *see* U.S. SENTENCING GUIDELINES MANUAL § 2B5.3, cmt. n. 2.

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aspects involved in the prosecution of these cases. The article's findings demonstrate that criminal copyright infringement is a widespread offense, resulting in major losses for stakeholders every year, negatively impacting creativity, reducing the investments, the level of dividends and tax revenues, and raising significant cybersecurity and rule of law concerns. This would be a strong argument for the importance of criminal enforcement of copyright. However, taking into consideration the number of cases brought to courts and the criminal copyright infringement reports and estimates, it can be concluded that this criminal phenomenon is significantly under-prosecuted.

The effectiveness of the legal framework is directly linked to the extent to which it is enforced. Criminal enforcement has the very important role to ensure consistent prosecution. This would also act as deterrent for potential infringers. Consequently, there is a need to increase the determination to reduce this criminal phenomenon.

This requires a complex strategy, comprising several components: research, to determine the actual impact of criminal copyright infringement on the quality and quantity of creative output and on individual and related industries revenues; the study of approaches used in other countries, where criminal sanctions are used more commonly, in order to prioritize the enforcement efforts; the use of cost-benefit analysis tools, to determine the efficient allocation of resources; improved tools for copyright infringement reporting, takedown, seizure, illegal revenue flows blocking, and forfeiture mechanisms; enhanced international law enforcement and service providers cooperation; education of consumers and policymakers on the consequences of criminal copyright infringement and the potential security harms associated with this phenomenon; technical assistance programs; better defined responsibility for secondary liability; investigation assistance from firms and industry groups; and artificial intelligence solutions, to effectively detect and timely address criminal copyright infringements.

https://doi.org/10.6092/issn.2531-6133/9782

This article focused on one jurisdiction, however, the findings could be useful to a large, international audience. This would be particularly the case with respect to infringements committed in cyberspace. The numerous online copyright infringement cases cited in this article, potentially rendering the enforcement of rights very difficult or even impossible, imply that there is a need to better address aspects concerning cases that span cross-border, through bi- or multi-lateral Treaties or Partnership Agreements.

 https://doi.org/10.6092/issn.2531-6133/10023

The C.J.E.U. Case Law Relevant to the General Anti-Avoidance Rule (G.A.A.R.) Under the Anti-Tax Avoidance Directive (A.T.A.D.)

BŁAŻEJ KUŹNIACKI†

ABSTRACT: This study concentrates on the Court of Justice of the European Union (C.J.E.U.) case law in order to reconstruct from it an interpretative guidance for the proper understanding and thus the application of the general anti-abuse rule included in Article 6 A.T.A.D. (the A.T.A.D.'s G.A.A.R.). Although Article 6 aims to harmonise general anti-abuse rules in the domain of tax law among all M.S.s, its wide scope and its phraseology raises a plethora of issues, in particular in respect of its proper – E.U. compatible – understating and thus application. The analysis of the relevant C.J.E.U. case law, as undertaken in this paper, will set a scene for the question of compatibility of the A.T.A.D.'s G.A.A.R. with the concept of abuse developed by the C.J.E.U. in cases regarding abusive practices of taxpayers. This piece aims to contribute in determining the reasonable understanding of the core elements of the A.T.A.D.'s G.A.A.R. in accordance with E.U. primary law, as interpreted by the C.J.E.U.. This may provide the readers with a useful interpretative guideline to the A.T.A.D.'s G.A.A.R., which could be of assistance not only for tax authorities, but for all stakeholders, including taxpayers, courts, and M.S.s' legislative bodies.

KEYWORDS: *G.A.A.R.; A.T.A.D.; B.E.P.S.; C.J.E.U; Tax Avoidance*

JEL CODES: *K34, H26, H21*

UNIVERSITY OF BOLOGNA LAW REVIEW

ISSN 2531-6133

[VOL.4:2 2019]

https://doi.org/10.6092/issn.2531-6133/10023

1. INTRODUCTION

1.1. GENERAL REMARKS ON THE A.T.A.D.'S G.A.A.R.

The general anti-abuse rule embodied in Article 6 A.T.A.D. (the A.T.A.D.'s G.A.A.R.) is a unique European Union (hereinafter E.U.) provision, not least because it is the first provision under the E.U. law, which aims at preventing the abuse of tax law[1] by Member States (hereinafter M.S.s),[2] but also due to its challenging structure and wording which is supposed to fit all M.S.s in prevention of abuse of tax law. It reads as follows:

> General anti-abuse rule
>
> 1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a

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[1] More generally, even if one accepts that E.U. or international law prohibits the abuse of law (abuse of rights), it is still debatable whether or not the concept of "abuse of law" constitutes a general principle of international law or a general principle of E.U. law. For E.U. law see, e.g., Paul Farmer et al., Prohibition of Abuse of Law: A New General Principle of E.U.? (Rita de la Feria & Stefan Vogenauer eds., 2011); Paolo Piantavigna, *Conference Report: Prohibition of Abuse of Law: A New General Principle of E.U. Law?*, 37 Intertax 166 (2009); Alexandre Saydé, Abuse of E.U. Law and Regulation of the Internal Market (2014). Although some recent Court of Justice of the European Union's (hereinafter C.J.E.U.) case law implies that the prohibition of abuse of tax law stems from or is identified with general principle of E.U., such implication has a weak doctrinal foundation and seems to be at odds with its settled case law (*see infra* sec. 4). For international public law see 1 Gerald Fitzmaurice, The Law and Procedure of the International Court of Justice (1986); Alexandre Kiss, *Abuse of Rights*, *in* 1 Encyclopedia of Public International Law (R. Bernhardt ed., 1992); Ian Brownlie, Principles of Public International Law (6th ed. 2003); Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 McGill L. J. 389 (2002). *See also* Free Zone of Upper Savoy and Gex (Fr. v. Swaz.), Judgment, 1932 P.C.I.J. (ser. A/B,) No. 46, at 167 (June 7) and Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. Rep. 176, ¶ 212 (Aug. 27).

[2] Before its entry into force, i.e. 1 January 2019, several G.A.A.R.s have been contained in partially harmonised areas of direct tax law in order to prevent the abuse of the E.U. directives. *See* Council Directive 2011/96, art. 1(2)-(4), 2011 O.J. (L 345), 8, as amended by Council Directive 2013/13, 2013 O.J. (L 141), 30, Council Directive 2014/86, 2014 O.J. (L 219/40), and Council Directive 2015/121, 2015 O.J. (L 21/1); Council Directive 2003/49, art. 5, 2003 O.J. (L 157)(EC), 49, as amended by Council Directive 2006/98, 2006 O.J. (L 157)(EC), 203, and Council Directive 2013/13, 2013 O.J. (L 141), 30; Council Directive 2009/133, art. 15(1)(a), 2009 O.J. (L 310/34), as amended by Council Directive 2013/13, 2013 O.J. (L 141), 30.

https://doi.org/10.6092/issn.2531-6133/10023

> tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.
>
> 2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.
> 3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.

The crucial outcome of Article 6 is that it harmonises a general anti-abuse rule in the domain of tax law among all M.S.s. Hence, it has a wide scope and its phraseology is not too precise, including expressions such as "the main purpose or one of the main purposes", "defeats the object or purpose of the applicable tax law", and "not genuine [arrangement]".

Structurally, Article 6 is composed of three core elements: (i) an arrangement; (ii) a tax advantage; and (iii) abuse. All three must exist for Article 6 to be triggered. The structure of Article 6 is designed so that it initially opens its gate broadly by setting low thresholds for identifying "an arrangement" and "a tax advantage", but then narrows it down to what should be considered as "abusive".[3] However, the abusive part of Article 6 (at least linguistically) does not seem to be narrow enough (or high enough) to be in line with the standard of abuse developed by the C.J.E.U.[4] and it does not define the border between abusive and non-abusive arrangements with the clarity that is required to comply with the legal certainty and foreseeability principles. This puts Article 6 at odds with its balancing function, which is clearly articulated in the recital 11 of the preamble to the A.T.A.D.: "GAARs should be applied to arrangements that are not genuine; otherwise, the taxpayer should have

[3] *Cf.* to the U.K. G.A.A.R. at Anna Burchner, Jeremy Cape & Matthew Hodkin, *United Kingdom: Anti-Avoidance Measures of General Nature and Scope – G.A.A.R. and Other Rules*, 103A IFA Cahiers 805, 810 (2018).
[4] *See infra* sec. 2-5.

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the right to choose the most tax efficient structure for its commercial affairs."[5]

The approach of the E.U. Council follows from the essential nature of the G.A.A.R. which is to cover and prevent the widest possible range of tax abuse cases. It is also needed to achieve its purpose: to "tackle abusive tax practices that have not yet been dealt with through specifically targeted provisions", such as transfer pricing or C.F.C. rules.[6] That is to say, the drafters of Article 6 seem to have been motivated by a desire to design a vague and broad anti-abuse rule, which will function as a deterrent for taxpayers. To a certain extent the drafters also seem also to be inclined by a desire to undo what the C.J.E.U. had already achieved, i.e. to lower the standard of abuse in tax cases under E.U. law.

1.2. THE PIVOTAL IMPORTANCE OF CROSS-BORDER SITUATIONS FOR THE RELEVANCE OF THE C.J.E.U.'S CASE LAW

Article 6 aims to cover cross border situations (between M.S.s and between M.S.s and third countries) as well as domestic ones. In fact, recital 11 of the preamble to the A.T.A.D. emphasises that Article 6 should be applied in cross-border and domestic situations in a uniform manner. This a very important feature of the Article, which seeks to prevent the discriminatory application of E.U. harmonised G.A.A.R.s by requiring that the scope and results of their application in domestic and cross-border situations do not differ.[7] Moreover, this feature suggests that the

[5] *Cf.* Andrés Báez Moreno & Juan José Zornoza Pérez, *The General Anti-abuse Rule of the Anti-tax Avoidance Directive*, *in* Combating Tax Avoidance in the E.U.: Harmonization and Cooperation in Direct Taxation 118, 126-30 (José Manuel Almudí Cid, Jorge A. Ferreras Gutiérrez, Pablo A. Hernández González-Barreda eds., 2019); Maarten. Floris de Wilde, *Is The A.T.A.D.'s G.A.A.R. a Pandora's Box?*, *in* The Implementation of Anti-BEPS Rules in the E.U.: A Comprehensive Study 301, 308-14 (Pasquale Pistone & Dennis Weber eds., 2018).

[6] *See* recital 11 of the preamble to the A.T.A.D.. One could argue in accordance with recital 1 of the preamble to the A.T.A.D. that the broadest purpose of the G.A.A.R. is "the need for ensuring that tax is paid where profits and value are generated". This is, however, highly debatable and questionable. *Cf.* Wilde, *supra* note 5, at 319.

[7] See Adam Zalasiński & Agnieszka Olesińska, *Poland: Anti-Avoidance Measures of General Nature and Scope – G.A.A.R. and Other Rules*, 103A IFA CAHIERS 607, 620 (2018). *See generally* Andrés Báez Moreno, *A PAN-European G.A.A.R.? Some (Un)Expected Consequences*

https://doi.org/10.6092/issn.2531-6133/10023

practical impact of Article 6 is much wider than the one of international arrangements, since the rule covers the entire spectrum of corporate income tax, whereas many tax avoidance arrangements are purely domestic.

This feature of Article 6 should not be seen as a way to circumvent a possible scrutiny of the C.J.E.U. because of the lack of discrimination or restriction of cross-border situations compared to domestic ones.[8] Fundamentally, the A.T.A.D. is secondary E.U. law and given its inferiority to the primary law, all provisions of that Directive must be compatible with E.U. Treaties and the relevant C.J.E.U. case law, in particular in cases regarding abuse of tax law under fundamental freedoms.[9] Indeed, the E.U. Commission in the proposal of the A.T.A.D. pointed out that in "compliance with the *acquis*, the proposed G.A.A.R. is designed to reflect the artificiality tests of the C.J.E.U. where this is applied within the Union."

Moreover, as implied by the C.J.E.U. case law,[10] the consequences of evaluating whether domestic provisions are compatible with E.U. law should be drawn not only from their *formal* (ipso iure) scope of application, but also from their *actual* (ipso facto) scope of application. In that regards, it should be remembered that G.A.A.R.s target tax avoidance. This phenomenon, due to difference in levels of taxation on income among countries and disparities existing in their tax systems, typically occurs in cross border situations. Consequently, there is a risk that G.A.A.R.s' *actual* scope of application will cover resident taxpayers which are engaged in cross border arrangements more often than resident taxpayers involved in purely domestic arrangements. It means that the

of the Proposed E.U. Tax Avoidance Directive Combined with the Dzodzi Line of Cases, BRIT. TAX REV. 143 (2016).

[8] Such attempt was made by the O.E.C.D. in respect of C.F.C. rules, *see* Organization for Economic Cooperation and Development [O.E.C.D.], Designing Effective Controlled Foreign Company Rules, Action 3 – Final Report, at 22 (October 5, 2015).

[9] *See further* sec. D.

[10] *See* A.G. Léger's Opinion of 20 May 1999 and the corresponding judgment of Case C-439/97, Sandoz v. GmbH v Finanzlandesdirektion für Wien, 1999 E.C.R. I-07041 ¶ 19, 31-48. *See also* Case C-254/97, Baxter, 1999 E.C.R. I-04809 ¶ 12-13.

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G.A.A.R.s of M.S.s would not – in the C.J.E.U.'s eyes – be immune to analysis of their ipso facto (indirect) restrictive effect on fundamental freedoms even though there is case law confirming that, ipso iure, not treating domestic and foreign investments differently is enough to avoid a restriction. Only if their *actual* application to cross border and domestic situations were to be alike, no restrictions would arise.

This shows that the proper understanding of the relevant C.J.E.U.'s case law may prove to be invaluable for determining the appropriate implementation and application of the A.T.A.D.'s G.A.A.R. by M.S.s. This, naturally, pertains to cross border situations, as purely domestic situations are not within the purview of the C.J.E.U.. Hence, this study will focus on potential cross-border use of the A.T.A.D.'s G.A.A.R., although its application reaches not only cross-border, but also domestic arrangements and transactions.

1.3. THE SCOPE AND THE PURPOSE OF THIS STUDY

The C.J.E.U.'s case law in the field of abuse law (the relevant C.J.E.U.'s case law) plays a prominent role in an appropriate implementation and application of the A.T.A.D.'s G.A.A.R.. First, it delineates the compatibility range for the A.T.A.D.'s G.A.A.R. with E.U. fundamental freedoms. Second, it helps to understand the key concepts under the A.T.A.D.'s G.A.A.R., which aim to cover the notion of abuse of tax law. The importance of the C.J.E.U. case law for drafting the A.T.A.D.'s G.A.A.R. was duly noticed by the European Commission, which stated in the proposal to the A.T.A.D. that "[i]n compliance with the acquis, the proposed G.A.A.R. is designed to reflect the artificiality tests of the C.J.E.U. where this is applied within the Union."[11]

The analysis of the relevant C.J.E.U. case law in sections 2-5 below will set a scene for the question of compatibility of the A.T.A.D.'s G.A.A.R.

[11] *Commission Proposal for a Council Directive Laying Down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market*, at 9, COM (2016) 026 final (Jan. 1, 2016).

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with the concept of abuse developed by the C.J.E.U. in cases regarding abusive practices of taxpayers.[12] Attention is given to the structural elements of the concept of abuse under the C.J.E.U. case law and this Court's perception of threshold of abuse concerning the taxpayer's intention to obtain a tax advantage. The analysis will be followed by its synthesis and a conclusion in section 6.

This piece aims to contribute in determining the reasonable understanding of the core elements of the A.T.A.D.'s G.A.A.R. in accordance with E.U. primary law, as interpreted by the C.J.E.U.. This may provide the readers with a useful interpretative guideline to the A.T.A.D.'s G.A.A.R., which could be of assistance not only to tax authorities, but to all stakeholders, including taxpayers, courts, and M.S.s legislative bodies.

2. THE ORIGIN OF ABUSE

The C.J.E.U.'s concept of abuse of law has its origins in the 1970 judgment *Van Binsbergen*. In that case, the C.J.E.U. for the first time pointed out that a M.S. may restrict the fundamental freedom (here: the freedom to provide services) to prevent the circumvention of domestic rules insofar as E.U. law does not protect an activity that is "*entirely or principally* directed toward its territory . . . *for the purpose of avoiding* [its domestic rules] (emphasis added)".[13] This implies that for the C.J.E.U. the

[12] The present analysis focuses only on the milestones in the C.J.E.U. case law on abuse of law and it does not necessarily follow a chronological order of the judgments. The aim is to succinctly and effectively compose the historical and current state of art in the area of abuse of tax law as developed by the C.J.E.U. case law.

[13] Case C-33/74, Van Binsbergen v. Bestuur van de Bedrijfsvereniging, 1974 E.C.R. 01299 ¶ 13. The quoted findings stemming from this landmark judgment has been used by the C.J.E.U. in many other cases regarding the fundamental freedoms, i.e. freedom to provide services (the freedom of establishment, the free movement of goods and the free movement of workers). *Accord* Case C-52/79, Procureur du roi v. Debauve, 1980 E.C.R. 883; Case C-288/89, Stichting Collectieve Antennevoorziening Gouda et al. v. Commissariaat voor de Media, 1991 E.C.R. I-4007; Case C-211/91, Commission v. Belgium, 1992 E.C.R. I-6757; Case C-148/91, Veronica Omroep Organisatie v. Commissariaat voor de Media, 1993 E.C.R. I-00487; Case C-11/95, Commission v. Belgium, 1996 E.C.R. I-04115; Case C-222/94, Commission v. United Kingdom, 1996 E.C.R. I-4025; Case C-

https://doi.org/10.6092/issn.2531-6133/10023

circumvention of domestic rules in certain circumstances equals an abusive practice that is not protected by E.U. law. This in particular, is pertinent to U-turn schemes. Although U-turn schemes have been usually identified as a source of abusive practices in V.A.T. cases,[14] they have been also identified in blatant tax avoidance cases regarding direct taxation.[15] This shows that the reasoning of the C.J.E.U. used to initiate the concept of the abuse of law in respect of the freedom to provide services was from the very beginning relevant to some types of abuse in the field of tax law. Until 2000, however, not much guidance was given by the C.J.E.U. on the way to determine the abuse.

3. THE TWO-PRONGED TEST, THE OBJECTIFIED INTENTION, AND THE ESSENTIAL PURPOSE

The C.J.E.U. gave more clarity to the concept of abuse of law in its judgment of 14 December 2000 in the *Emsland-Stärke* case by introducing a two-pronged test to determine abuse: (i) a combination of objective circumstances in which, despite formal observance of the conditions laid down by the E.U. rules, the purpose of those rules has not been achieved;

56/96, VT4 Ltd. v. Vlaamse, 1997 E.C.R. I-3143 and Case C-34/95, C-35/95 and C-36/95, Konsumentombudsmannen v. De Agostini and TV-Shop, 1997 E.C.R. I-03843; Case C-115/78, Knoors v. Secretary of State, 1979 E.C.R. 399; Case C-246/80, Broekmeulen v Huisarts Registratie Commissie, 1981 E.C.R. 2311; Case C-271/82, Auer, 1983 E.C.R. 2727; Case C-292/86, Gullung v. Conseil de l'ordre des avocats, 1988 E.C.R. 00111; Case C-81/87, Daily Mail, 1988 E.C.R. 05483; Case C-130/88, Van de Bijl, 1989 E.C.R. 3039; Case C-61/89, Bouchoucha, 1990 E.C.R. I-03551; Case C-212/97, Centros v Erhvervs, 1999 E.C.R. I-01459 and Case C-167/01, Kamer van v. Inspire Art, 2003 E.C.R. I-10155; Case C-229/83, Leclerc, 1995 E.C.R. I-00179; Case C-53/81, Levin, 1982 E.C.R. 01035; Case C-249/83, Hoeckx, 1985 E.C.R. 973; Case C-139/85, Kempf, 1986 E.C.R. 01741; Case C-39/86, Lair, 1988 E.C.R. 03161; Case C-292/89, Antonissen, 1991 E.C.R. I-00745. The case law cited after: A. G. Prats et al., E.U. Report: Anti-avoidance measures of general nature and scope – G.A.A.R. and other rules, IFA Cashiers 2018, Vol. 103A, p. 7 at footnotes 7-10.

[14] For that see Dennis Weber, Tax Avoidance and the EC Treaty Freedoms A Study of the Limitations under European Law to the Prevention of Tax Avoidance 196-208 (2005).

[15] *See* B. Kuźniacki, *Tax Avoidance through Controlled Foreign Companies under European Union Law with Specific Reference to Poland*, in *Accounting, Economics, and Law: A Concivium*, sec. 3.4.2 (R. S. Avi-Yonah, Y. Biondi, S. Sunder (eds.), 1st edn., 2017).

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(ii) a subjective element consisting in the intention to obtain an advantage from the E.U. rules by artificially creating the conditions laid down for obtaining it.[16] This test turns out to be the role model for determining abuse in E.U.. It became useful for that purpose across all areas of the C.J.E.U.'s juridical purview and was integrated into several anti-abuse rules in E.U. secondary law which partly harmonises the area of taxation.[17]

The two-pronged test for the first time was applied by the C.J.E.U. in tax matters on 21 February 2006 in the *Halifax* case regarding V.A.T., i.e. fully harmonised area of taxation at the E.U. level. In this landmark case, the C.J.E.U. objectified the second prong of the abuse test by saying that in order to determine the abuse of V.A.T. Directive,[18] it must be "apparent from *a number of objective factors* that the *essential aim* of the transactions concerned is to obtain a tax advantage (emphasis added)".[19] This finding of the C.J.E.U. showed that a determination of the taxpayers' tax avoidance intention must not be based on the subjective, but solely on the objective elements of the taxpayers' arrangement (the objectified purpose/intention),[20] and that the *essential* rather than the *sole* purpose to avoid taxation is enough to pass the subjective part of the abusive test in the domain of V.A.T..

[16] Case C-110/99, Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas, 2000 E.C.R. I-11569 ¶ 52-53.
[17] *See* Prats et al., *supra* note 13, at 8.
[18] Sixth Council Directive 77/388/EEC of 17 May 1977 on the Harmonization of the Laws of the Member States Relating to Turnover Taxes - Common System of Value Added Tax: Uniform Basis of Assessment, 1977 O.J. (L 145) 1–40.
[19] Case C-255/02, Halifax plc et al. v. Commissioners of Customs & Excise, 2006 E.C.R. I-01609 ¶ 75.
[20] *Cf.* A.G. Maduro's Opinion of 7 April 2005 in Case C-255/02, Halifax plc, 2006 E.C.R. I-01609 ¶ 70. *See also* P. Tran, *Cadbury Schweppes plc v. Commissioners of Inland Revenue: Eliminating a Harmful Tax Practice or Encouraging Multinationals to Shop around the Bloc*, The Loyola of Los Angeles International & Comparative Law Review 2008, Vol. 30, No. 77, p. 86; D. Weber, "*Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the C.J.E.U. – Part 1*", European Taxation 2013, No.6, p. 252 (on the objectified intention in tax avoidance cases).

https://doi.org/10.6092/issn.2531-6133/10023

4. THE SOLE, THE ESSENTIAL, THE PREDOMINANT, THE MAIN, AND ONE OF THE MAIN PURPOSES' STANDARD OF ABUSE UNDER E.U. SECONDARY LAW

Historically, the C.J.E.U. used the threshold of abuse in line with the standard of sole/essential/predominant/main intention to obtain a tax advantage by a taxpayer under E.U. directives to identify the abuse of law. Interestingly, it was done so irrespective of the fact that the wording of the anti-abuse rules under the directives reflected the standard of one of the principal/primary intentions/motives. For instance, in the *Kofoed* case of 5 July 2007,[21] the C.J.E.U. dealt with the question of abuse which, the Merger Directive (hereinafter M.D.), identified according to the taxpayer's intention. Following the provision, "the principal objective" or "one of its principal objectives" has to be tax evasion or tax avoidance.[22] Despite this wording, the C.J.E.U. implied in paragraph thirty-eight of its judgement that the abusive practices in light of the M.D. exists only if transactions are carried out not in the context of normal commercial operations, but "*solely for the purpose of wrongfully obtaining advantages* provided for by Community [now: E.U.] law (emphasis added)."

This passage was repeated by the C.J.E.U. in paragraph 50 of its judgment of 10 November 2011 in the *Foggia* case.[23] Although in paragraph 35 of this judgment, the C.J.E.U. considered the lower threshold of abuse than the sole purpose by saying that "tax considerations, can constitute a valid commercial reason provided, however, that those considerations are not *predominant* in the context of the proposed transaction (emphasis added).", the abuse threshold was still more demanding for the tax authorities than under the M.D., i.e. *predominant* purpose according to the C.J.E.U.'s interpretation vs *one of the principal purposes* according to the wording of the M.D.. One can also infer from this juxtaposition that according to the C.J.E.U. the phrase "one of the

[21] Case C-321/05, Kofoed v. Skatteministeriet, 2007 E.C.R. I-05795.
[22] Council Directive 90/434/EEC of 23 July 1990 on the Common System of Taxation Applicable to Mergers, Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States, art. 11 (1)(a), 1990 O.J. (L 225).
[23] Case C-126/10, Foggia v. Secretário de Estado dos Assuntos Fiscais, 2011 E.C.R. I-10923.

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principal purposes" should be understood as "the predominant purpose". That is to say, the taxpayer's tax intention cannot be any less than *predominant* to meet the standard of abuse under E.U. secondary law.

More recently, in *Eqiom* (7 September 2017)[24] and in the joint cases *Deister Holding* and *Juhler Holding* (20 December 2017)[25] the C.J.E.U. further clarified that the objective of combating abuse under E.U. secondary law has the same scope as under E.U. primary law and therefore must be justified in the same way, i.e. by the need to exclusively target wholly artificial arrangements which do not reflect economic reality, the purpose of which is to unduly obtain a tax advantage.[26] Although the C.J.E.U. has not made any explicit reference to the degree of the taxpayer's intention to obtain a tax advantage, the use of the wholly artificial arrangement's mantra from the *Cadbury Schweppes*[27] implies that the Court had in mind the *sole* purpose rather than the *principal or one of the principal purposes.* This deviation from the wording of the anti-abuse rule under E.U. secondary law was implicitly justified by the C.J.E.U. by saying that the derogation from providing tax advantage under P.S.D. must be interpreted strictly. Otherwise the overarching purpose of this Directive, which is to ensure fiscal neutrality for distribution of profits from subsidiaries to their parent companies, may be frustrated.[28]

This settled case law of the C.J.E.U. indeed provided a far-reaching protection to taxpayers who optimize their taxation, including the use of

[24] Case C-6/16, Eqiom SAS and Enka SA v. Ministre des Finances et des Comptes publics, 2017 E.C.R. I-5795.
[25] Joined Cases C-504 & 613/16, Deister Holding AG, Juhler Holding A/S v. Bundeszentralamt für Steuern, 2017 E.C.R. 1009.
[26] *See* Case C-6/16, Eqiom SAS and Enka SA v. Ministre des Finances et des Comptes publics, 2017 E.C.R. 641 ¶ 30; *see also* Joined Cases C-504 & 613/16, Deister Holding AG, Juhler Holding A/S v. Bundeszentralamt für Steuern, 2017 E.C.R. 1009 ¶ 60.
[27] Case C-196/04, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd. v. Commissioners of Inland Revenue, 2006 E.C.R. I-7995 (Indeed, the C.J.E.U. in *Eqiom* directly referred to the *Cadbury Schweppes* in ¶ 30 and indirectly did so in the *Deister Holding and Juhler Holding* by referring in ¶ 60 to ¶ 30 of the *Eqiom* in the case law cited there, i.e. also *Cadbury Schweppes*).
[28] *See* Case C-6/16, Eqiom SAS and Enka SA v. Ministre des Finances et des Comptes publics, 2017 E.C.R. 641 ¶ 26 and Joined Cases C-504 & 613/16, Deister Holding AG, Juhler Holding A/S v. Bundeszentralamt für Steuern, 2017 E.C.R. 1009 ¶ 49-50. *See also* Case C-58/01, Océ van der Grinten NV v. Commissioners of Inland Revenue, 2003 E.C.R. I-9827 ¶ 86.

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pure holding companies or pure management companies in the E.U. with ultimate shareholders in third countries.[29]

In the Danish Beneficial Ownership cases of 26 February 2019 regarding the abuse of I.R.D. and P.S.D., the C.J.E.U. seems to interpret the concept of abuse under E.U. secondary law by referring to the *principal objective or one of the principal objectives* to obtain a tax advantage, i.e. by sticking to the wording of anti-abuse rules under I.R.D. and P.S.D., rather than to the *sole* or the *essential* or the *predominant* objective of doing so. However, a closer look at the entire sentence of the C.J.E.U. in which the abovementioned phrase was used, implies that the standard of abuse under E.U. secondary law does not appear to be lowered at all, at most, it seems it was lowered only in respect of the taxpayer's intention to obtain a tax advantage.

> A group of companies may be regarded as being an artificial arrangement where it is *not set up for reasons that reflect economic reality*, its structure is *purely one of form* and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law (emphasis added).[30]

In the author's opinion, if an arrangement is not set up for reasons that reflect economic reality and its structure is purely one of form, it is inconceivable that only one of its principal objectives is to obtain a tax advantage. The sole, or at least the essential/predominant/main objective that outranks all other objectives, seems to be associated to this artificial arrangement. Accordingly, the use of the phrase "one of the primary objectives" by the C.J.E.U. does not seem to change much (if anything at all) in relation to determining the standard of abuse of E.U. secondary law.

[29] *See also* B. Kuźniacki, *The C.J.E.U. as a Protector of Tax Optimization via Holding Companies*, 47 Intertax 2019, No. 3, pp. 312–323.

[30] Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, N Luxembourg 1, X Denmark A/S, C Danmark I, Z Denmark ApS v. Skatteministeriet, ECLI:EU:C:2019:134 ¶ 127 and Joined Cases C-116/16 and C-117/16, Skatteministeriet v. T Danmark, Y Denmark Aps, 2019 ECLI:EU:C:2019:134 ¶ 100.

https://doi.org/10.6092/issn.2531-6133/10023

It is also worth mentioning that the C.J.E.U. with the Danish Beneficial Ownership cases has introduced the obligation for the M.S.s' tax authorities to deny a tax advantage in the area of partly harmonised direct taxation by relying on an unwritten, general E.U. principle to prevent abuse, even in the absence of domestic or agreement-based anti-abuse provisions.[31] Despite a weak doctrinal foundation of this conclusion of the C.J.E.U.,[32] being at odds with its settled case law,[33] which may only be explained on account of the specificities of Danish legislation and socio-political after-B.E.P.S. (Base erosion and profit shifting) pressure, this finding of the Court is of little practical relevance at the present and in the future due to the implementation of A.T.A.D.'s G.A.A.R. by M.S.s. Since that rule embodies the general principle of prevention of abuse in the area of taxation, M.S.s will always have in force a written rule to deny

[31] In relation to the fully harmonised indirect taxation, see Joined Cases C-131/13, C-163/13 and C-164/13, Staatssecretaris van Financiën v. Schoenimport 'Italmoda' Mariano Previti vof, Turbu.com BV, Turbu.com Mobile Phone's BV and Staatssecretaris van Financiën, 2014 EU:C:2014:2455 ¶ 62, Case C-251/16, Edward Cussens et al. v. T. G. Brosman, 2017 ECLI:EU:C:2017:881 ¶ 33. *See* Case C-115/16, N Luxembourg et al. v. Skatteministeriet, 2016 ECLI:EU:C:2019:134 ¶ 117-118 and Case C-115/16, N Luxembourg et al. v. Skatteministeriet, 2019 ECLI:EU:C:2019:134 ¶ 89-90.

[32] *See* W. Haslehner & G. Kofler, *Three Observations on the Danish Beneficial Ownership* Cases, Kluwer International Tax Blog (Mar. 13, 2019), http://kluwertaxblog.com/2019/03/13/three-observations-on-the-danish-beneficial-ownership-cases. *Cf.* A. Zalasiński, *The Principle of Prevention of (Direct Tax) Abuse: Scope and Legal Nature – Remarks on the 3M Italia Case*, 52 European Taxation 2012, No. 9, Published online: 27 July 2012, sec. 5. *See generally* D. Weber, *Tax Avoidance and the EC Treaty Freedoms: A Study of the Limitations under European Law for the Prevention of Tax Avoidance* (Kluwer Law International, 2005); R. de la Feria and S. Vogenauer (eds.), *Prohibition of Abuse of Law – A New General Principle of EU Law?*, Hart Publishing, 2011; A. P. Dourado (ed.), *Tax Avoidance Revisited in the E.U. BEPS Context*, European Association of Tax Law Professors International Tax Series Vol. 15, Amsterdam: IBFD, 2017.

[33] *See* Case C-321/05, Hans Markus Kofoed v. Skatteministeriet, 2007 E.C.R. I-5818 ¶ 42 (where the C.J.E.U. stated that: "[t]he principle of legal certainty precludes directives from being able by themselves to create obligations for individuals. Directives cannot therefore be relied upon per se by the Member State as against individuals"). *See also* the opinion of AG Kokott, who clarified that recourse to "any existing general principle of [E.U.] law prohibiting the misuse of law" would be barred, as the anti-abuse rule under E.U. secondary law is a concrete expression of such principle. *See also* A.G. Kokott's Opinions in Case C-321/05, Hans Markus Kofoed v. Skatteministeriet, 2007 E.C.R. I-5798 ¶ 67 and in Case C-352/08, Modehuis A. Zwijnenburg BV v. Staatssecretaris van Financiën, 2009 E.C.R. I-04303 ¶ 62 ("[I]t is clear that no general principle exists in European Union law which might entail an obligation of the member states to combat abusive practices in the field of direct taxation and which would preclude the application of a provision such as that at issue in the main proceedings where the taxable transaction proceeds from such practices and European Union law is not involved", as noted by C.J.E.U. in Case C-417/10, Ministero dell'Economia e delle Finanze, Agenzia delle Entrate v. 3M Italia SpA, 2012 ECLI:EU:C:2012:184 ¶ 32).

https://doi.org/10.6092/issn.2531-6133/10023

a tax advantage. The retrospective effect of that C.J.E.U. judgment, in turn, appears to be very doubtful under the principles of rule of law and legal certainty.

5. FROM THE SOLE TO ONE OF THE PRINCIPAL PURPOSES' STANDARD OF ABUSE UNDER E.U. PRIMARY LAW BETWEEN M.S.S AND BETWEEN M.S.S AND THIRD COUNTRIES

After the analysis of cases in the field of indirect taxes fully harmonised under E.U. secondary law and direct taxes partly harmonized under E.U. secondary law, it is now wise to turn the attention to C.J.E.U. case law in the area of direct taxes, which is not fully or even largely harmonised under E.U. secondary law. Although the A.T.A.D.'s G.A.A.R. sets the general standard of abuse, thus applicable to both harmonised and not harmonised areas of taxation, it appears reasonable to argue that the G.A.A.R.s under Directives (E.U. secondary law) should trump the A.T.A.D.'s G.A.A.R. Consequently, C.J.E.U. case law analysed below seems to be of outmost relevance and importance in completing the scene for a proper understanding of the abuse standard under the A.T.A.D.'s G.A.A.R..

Already in 1986 with *Avoir Fiscal* The C.J.E.U. acknowledged that a taxpayer may rely on E.U. law to choose and enforce the most favourable tax route in their affairs.[34] Since then such finding constituted a point of departure in the C.J.E.U.'s reasoning in all tax avoidance cases.[35] This is why recital 11 of the preamble to A.T.A.D. says that the taxpayer should have the right to choose the most tax efficient structure for its

[34] Case 270/83, Commission v. France, 1986 E.C.R. 00273 ¶ 25; *see also* Case C-294/97, Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna, 1999 E.C.R. I-07447 ¶ 44 et seq.; Case C-364/01, The heirs of H. Barbier v. Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen, 2003 E.C.R. I-15013 ¶ 71.

[35] *See*, *e.g.*, Case C-294/97, Eurowings Luftverkehrs AG v. Finanzamt Dortmund-Unna, 1999 E.C.R. I-07447 ¶ 44 et seq.; Case C-364/01, The heirs of H. Barbier v. Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland te Heerlen, 2003 E.C.R. I-15013 ¶ 71.

https://doi.org/10.6092/issn.2531-6133/10023

commercial affairs. That is also why simply counteracting a tax avoidance does not amount to abuse of E.U. primary law.[36] Such abuse, in turn, constitutes only the qualified tax avoidance, i.e. through the use of wholly artificial arrangements intended solely to escape taxation.

The C.J.E.U. for the first time coined the phrase "wholly artificial arrangement" for the first time in Imperial Chemical Industries, a 1998 judgment.[37] Since then the expression has been repeated in nearly all cases on tax avoidance,[38] including the landmark case Cadbury Schweppes of 12 September 2006.[39]

In paragraph 64 of the judgement in the *Cadbury Schweppes* case, the C.J.E.U. stated that the two-pronged test applies to determine the existence of a wholly artificial arrangement. In that respect, the references were made to paragraphs 52-53 of the judgements in the *Emsland-Stärke* and *Halifax* cases,[40] even though the terms used in those paragraphs were "abuse" and "an abusive practice", not "wholly artificial arrangement". This implies that the phrase "a wholly artificial arrangement" could be understood as "an abusive practice" in the area of not harmonised direct taxes,[41] as well in the area of harmonised direct taxes, by analogy.

Also, from the *Cadbury Schweppes* it follows that in order to amount to abuse the intention to avoid taxes must be the *sole* one.

[36] *See* Joined Cases C-39/13 to C-41/13, SCA Group Holding BV (C-39/13), X AG, X1 Holding GmbH, X2 Holding GmbH, X3 Holding GmbH, D1 BV, D2 BV, D3 BV v. Inspecteur van de Belastingdienst Amsterdam and Inspecteur van de Belastingdienst Holland-Noord/kantoor Zaandam v. MSA International Holdings BV, MSA Nederland BV, 2014 ECLI:EU:C:2014:1758 ¶ 42 and A.G. Kokott's Opinion in Case C-231/05, Oy AA, 2006 ECLI:EU:C:2002:545 ¶ 62.

[37] Case C-264/96, Imperial Chemical Industries plc v. Kenneth Hall Colmer, 1998 E.C.R. I-04695 ¶ 26.

[38] *See*, *e.g.*, C-436/00 X and Y v. Riksskatteverket, 2000 ECR I-10829 ¶ 61.; *see also* Case C-324/00, Lankhorst-Hohorst v. Finanzamt Steinfurt, 2000 E.C.R. I-11779 ¶ 37 and Case C-446/03, Marks & Spencer plc v. David Halsey, 2005 E.C.R. I-10837 ¶ 57.

[39] Case C-196/04, Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd. v. Commissioners of Inland Revenue, 2006 E.C.R. I-8031 ¶ 51, 55-57, 61, 63, 68, 69, 72, 75-76.

[40] C-110/99 and C-255/02 respectively.

[41] A. Saydé, *Abuse of E.U. Law and Regulation of the Internal Market*, Oxford: Hart Publishing, 2014, p. 92.

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> It follows that, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to *prevent* conduct involving the creation of *wholly artificial arrangements* which do not reflect economic reality, *with a view to escaping the tax normally due* on the profits generated by activities carried out on national territory.
>
> . . . [T]he fact that none of the exceptions provided for by the legislation on CFCs applies and that the intention to obtain tax relief prompted the incorporation of the CFC and the conclusion of the transactions between the latter and the resident company does not suffice to conclude that there is a wholly artificial arrangement *intended solely to escape that tax*.[42]

A contrario, there is no abuse if a taxpayer shifts its *genuine economic activities* to other M.S.s for the sole purpose to avoid taxation.[43] That being said, the abuse exists only if: (i) there is no genuine economic activity being conducted by the taxpayer and (ii) their sole purpose is to conduct that non-genuine activity in order to avoid taxation.

The C.J.E.U. recognized the abuse in the field of direct taxation in a more nuanced way than by referring to wholly artificial arrangements in cases regarding the free transfer of profits in the form of tax deductible expenses/losses at the choice of a taxpayer.[44] Arrangements or transactions which trigger transfers of expenses/losses, typically covered by domestic transfer pricing or thin capitalisation rules, can be considered abusive (artificial), even if they are conducted by entities engaged in genuine economic activities, *to the extent* that they *exceed* the arm's length "compatible" value.[45] In such cases, however, the taxpayer should have an opportunity to provide a commercial justification for their

[42] *Cadbury Schweppes*, ¶ 55. *Id*, ¶ 63.
[43] *See* Prats et al., *supra* note 13, at 12.
[44] *See* Case C-231/05, Oy AA, 2007 E.C.R. I–6373 252 ¶ 63; *see also* Case C-311/08, Société de Gestion Industrielle SA (SGI) v. État belge, 2010 E.C.R. I-487 ¶ 66.
[45] *See* Case C-524/04, Test Claimants in the Thin Cap Group Litigation v. Commissioners of Inland Revenue, 2007 E.C.R. I-2107 ¶ 92.

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non-arm's length arrangements or transactions, without being subject to undue administrative constraints.[46]

The cross border non-arm's length arrangements or transactions, according to the C.J.E.U., may undermine a balanced allocation of the power to impose taxes between the M.S.s by increasing the taxable base in the low-tax M.S. and reducing it in the high-tax M.S. to the extent that the losses/expenses will be transferred on non-arm's length basis.[47] Thus, in such cases, safeguarding the balanced allocation of taxing powers between M.S.s can be considered a separate autonomous justification.[48] In other cases, the balanced allocation of taxing powers between M.S.s may constitute a justification in combination with other reasons, e.g. prevention of tax avoidance or ensuring coherence of the tax system. Therefore, one may observe that M.S.s have more scope to apply domestic anti-avoidance provisions within the E.U. for excluding cross-border offsetting of losses with profits than to apply other types of anti-avoidance provisions,[49] i.e. they can prevent abuse beyond wholly artificial arrangements.[50]

[46] *See* Case C-382/16, Hornbach-Baumarkt-AG v. Finanzamt Landau, 2018 ECLI:EU:C:2018: 366 ¶ 49 (according to the C.J.E.U., the concept of "commercial justification" must be interpreted in light of the principle of free competition which, by its nature, rules out acceptance of economic reasons resulting from the position of the shareholder).

[47] *See, e.g.,* Case C-446/03, Marks & Spencer plc v. David Halsey, 2005 E.C.R. I-10837 ¶ 46, Case C-231/05, Oy AA., 2007 E.C.R. I-06373 ¶ 54-56 and Case C-337/08, X Holding BV v. Staatssecretaris van Financiën, 2010 ECR I-1215 ¶ 32-33. *See also* D. Smit, *E.U. freedoms, non E.U.-countries and Company Taxation*, EUCOTAX Series on European Taxation, Alphen aan den Rijn: Wolters Kluwer Law & Business 2012, p. 269; D. Weber, *Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the E.C.J. – Part 1*, European Taxation 2013, No.6, pp. 320-322; P. Pistone, *Public Discussion Draft BEPS Action 3: Strengthening CFC Rules Comments by Prof. Dr Pasquale Pistone*, Comments received on Public Discussion draft BEPS Action 3: Strengthening CFC Rules, 5 May 2015 – Part 2, pp. 445-446 (Apr. 23, 2015), http://www.oecd.org/tax/aggressive/public-comments-beps-action-3-strengthening-cfc-rules-part2.pdf.

[48] The prevention of double compensation of losses is an autonomous justification for restricting fundamental freedoms since the C.J.E.U. judgments of 12 June 2018 in *Bevola* case, see Case C-650/16, A/S Bevola and Jens W. Trock ApS v. Skatteministeriet, 2018 ECLI:EU:C:2018:424 ¶ 52-52 and see also Case C-28/17, NN A/S v. Skatteministeriet, 2018 ECLI:EU:C:2018:526 ¶ 42-48.

[49] *Cf.* Weber, *supra* note 47, at 320-322. Pistone, *supra* note 47, at 445-446.

[50] It should be bear in mind, however, that double compensation of losses may not be abusive at all. For instance, a compensation of losses by a foreign P.E. in its state of location and in the residence state of its head office does not constitute an abusive practice, if stemming from an ordinary course of business of the P.E. and its head office.

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The C.J.E.U. through the case law discussed above suggest that a balanced allocation of the power to impose taxes between M.S.s would be threatened if tax avoidance via wholly artificial arrangements were to be permitted. In other words, there is a direct causal link between the creation and exploitation of wholly artificial arrangements for the sole purpose of tax avoidance and a risk to the balanced allocation of taxing rights.[51] While preventing the former automatically protects the latter, the causal chain does not work in the opposite direction, showing that the C.J.E.U. did not consider the need to protect the balanced allocation of taxing powers between Member States as a separate justification to apply anti-avoidance provisions in a restrictive manner. Instead the Court regarded that issue as immanently linked with the need to prevent the use of wholly artificial arrangements to avoid tax, or, to put it differently, that the need to safeguard the balanced allocation of taxing powers among M.S.s is part of an economic substance analysis.

A subtle economic substance analysis, i.e. assessing a transfer of the profits rather than the entire arrangement, can also be found in the recent *X GmbH* case of 26 February 2019.[52] In *X GmbH*, the Court stated that the free movement of capital between Member States and third countries is intended not to frame the conditions under which companies can establish themselves within the internal market. Therefore:

> [i]n the context of the free movement of capital, the concept of 'wholly artificial arrangement' cannot necessarily be limited to merely the indications, referred to in paragraphs 67 and 68 of the judgment of 12 September 2006 in *Cadbury Schweppes* case, that the establishment of a company does not reflect economic reality . . . . That concept is also capable of covering, in the context of the free movement of capital, any scheme which has as *its primary objective or one of its primary objectives the artificial*

[51] *See* Weber, *supra* note 47, at 258.
[52] Case C-135/17, X-GmbH v. Finanzamt Stuttgart - Körperschaften, 2019 ECLI:EU:C:2019: 136.

https://doi.org/10.6092/issn.2531-6133/10023

> *transfer of the profits made by way of activities carried out in the territory of a Member State to third countries with a low tax rate.*[53]

These findings of the C.J.E.U. imply that for the purpose of examining the proportionality of the domestic legislation, which restricts free movement of capital between M.S.s and third countries, the understanding of the concept of the wholly artificial arrangement may be more nuanced than under the *Cadbury Schweppes*. This concept may cover any scheme which has as its primary objective or one of its primary objectives the artificial transfer of the profits made by way of activities carried out in the territory of a M.S. to third countries with a low tax rate. In the author's view, there would be no difference in an intra-E.U. situation. The main driver for differentiating the approach in determining the standard of abuse may, however, the differences among the scope and the substantive requirements protected under different fundamental freedoms. The freedom of establishment will always trigger the need to scrutinize premises, people on the ground, physical offices, while the freedom to provide services or the free movement of capital may require to focus on more subtle constituencies of the arrangements, such as contracts between the companies, or the transfers of profits between companies (their circularity).

6. SYNTHESIS AND CONCLUSIONS

Since the origin of the concept of abuse under C.J.E.U. case law, it was clear that the taxpayers have the right to choose the most efficient way to route their tax affairs and that their intention to obtain a tax advantage has to be the sole or at least the essential/predominant/main reason to enter under the radar of abuse. Identifying the degree of that intention

[53] Case C-135/17, X-GmbH v. Finanzamt Stuttgart - Körperschaften, 2019 ECLI:EU:C:2019: 136 ¶ 84.

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matters for the second prong of the two-pronged test in finding the abuse. The first prong, in turn, requires a combination of objective circumstances in which, despite formal observance of the conditions laid down by the E.U. rules, the purpose of those rules has not been achieved.

As a result of both social and political (especially in the course of post-B.E.P.S.) changes in company tax landscapes since *Cadbury Schweppes* and the preceding cases, the C.J.E.U. nowadays is more prone to deviate from its settled case law in setting the threshold for abuse. Nevertheless, despite moving from the sole/essential/predominant/ principal intention of a taxpayer to obtain a tax advantage to *one of the main purposes*, the C.J.E.U. keeps saying that an abusive (artificial) arrangement is that which is not set up for reasons that reflect economic reality and its structure is purely one of form. In the context of tax cases, it is hard to imagine that such arrangement is designed by a taxpayer for any other purpose than to solely or essentially/predominantly/mainly obtain a tax advantage.

Furthermore, the C.J.E.U. has never in the area of not harmonised direct tax law cases among M.S.s stated that the standard for abuse may rely on the threshold lower than the sole intention to obtain a tax advantage. In the scope of partly harmonised direct tax law or fully harmonised indirect tax law, this threshold was lowered below to the essential, predominant or main intention, but never lower, except for the recent Danish beneficial ownership cases where the phrase "one of the primary objectives" has been used.[54] Only in *X GmbH*, the C.J.E.U. used the phrase "one of the primary objectives" in not harmonised direct tax law, but that case concerned the artificial transfer of the profits from a M.S. to a low tax third country. Again, it is implausible to consider such transfers are realised by a taxpayer for one of the primary objectives to obtain a tax advantage. Rather they are deliberately designed and conducted to solely or essentially/predominantly/mainly obtain a tax advantage.

[54] But, as observed before, it does not change much in that respect.

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To sum up: (i) there is nothing in the C.J.E.U. relevant case law implying that one of the main purposes to obtain a tax advantage can constitute a threshold of abuse among M.S.s in not harmonised areas of direct tax law; and (ii) beyond that, i.e. partly harmonised direct tax law or not harmonised direct tax law in situations between M.S.s and third countries, coining the phrase "one of the principal/primary purposes/objectives" is of little relevance insofar as the phrase "artificial" in respect to an arrangement or transaction has been always used. In the reality of corporate tax avoidance, artificial arrangements or transactions are not designed by taxpayers to obtain a tax advantage for other than sole or essential, predominant or main purpose. Furthermore, the C.J.E.U. relevant case law implies that different circumstances should be taken into account to identify the existence of abuse, especially when determining the artificiality of the arrangements or transactions, under different fundamental freedoms, different national legislations, and different types of specific arrangements or transactions.[55] In particular, the relevant circumstances to be taken into account include the geolocations of arrangements or transactions (within or outside the E.U.) and their type and nature (purely passive financial transactions concluded on paper versus active business transactions triggering changes in the physical world).

The overall analysis of the C.J.E.U. relevant case law implies that the phrases "the main purpose" and "one of the main purposes" should be understood alike as "the main purpose", but more typically as the essential or the predominant purpose. Any lower standard of abuse under the A.T.A.D.'s G.A.A.R. would make this rule either applicable disproportionally (not only to abusive but also to non-abusive practices)

[55] *Cf.* Communication from the Commission, *The Application of Anti-Abuse Measures in the Area of Direct Taxation within the E.U. and in Relation to Third Countries*, at 5, COM (2007) 785 final (Dec. 10, 2007). *Cf., e.g.,* Dennis Weber, *The New Common Minimum Anti-Abuse Rule in the E.U. Parent-Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect*, 44 INTERTAX 117 (2016); Koen Lenaerts, *The Concept of 'Abuse of Law' in the Case Law of the European Court of Justice on Direct Taxation*, 22 MAASTRICHT J. EUR. COMP. L. 329 (2015); Eric Robert & DrissTof, *The Substance Requirement and the Future of Domestic Anti-Abuse Rules within the Internal Market*, 51 EUR. TAX'N 436 (2011).

https://doi.org/10.6092/issn.2531-6133/10023

or largely dysfunctional by the lack of compatibility with the second and the third test: it is highly unlikely that the taxpayer's arrangement is to be artificial enough to defeat the object and purpose of the tax law if only one of its main purposes was to obtain a tax advantage. This guidance, as stemming from the C.J.E.U. relevant case law, once followed, may contribute to a reasonable, proportional and E.U. compatible way of reading and applying the A.T.A.D.'s G.A.A.R. by the M.S.s tax authorities.

 https://doi.org/10.6092/issn.2531-6133/10333

Party Laws and Party Nationalization: a Critique of Afghan Political Party Laws

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TABLE OF CONTENTS: 1. Introduction; 2. The Legal Approach to Party Development; 2.1. What's Wrong with Ethnic Parties?; 2.2. Why an Implicit Approach to Party Nationalization?; 3. A New Perspective on the Flawed Party Laws; 3.1. Lack of Interest in Party Development; 3.2. Command and Control Rules; 3.3. Laws of Not the Emerging Coalitions; 4. Reforming Afghan Party Laws; 4.1. Recognizing and Promoting the Emerging Coalitions; 4.2. Public Funding of Cross-ethnic Coalitions and Parties; 5. Other Measures; 5.1. WJ Rules of Procedure and Parliamentary Parties and Coalitions; 5.2. Anti-Switching Provisions; 6. Conclusion.

ABSTRACT: Afghan party laws have consistently discouraged ethnic parties and politics. Taking an implicit approach to party nationalization, the laws have set three qualification thresholds for parties: consisting of at least 10,000 members; having offices in at least 20 provinces; and having at least 35 founders, who represent a minimum of 20 provinces. Although these thresholds have not explicitly referred to the ethnic composition of political parties, they were indeed designed to encourage broad-based parties given the regional concentration of ethnic groups. Even so, these laws have failed to encourage cross-ethnic parties or coalitions. Afghan parties have remained fragmented, personalized, and ethnic-based. In fact, no cross-ethnic party has grown in Afghanistan. Although some cross-ethnic coalitions have emerged during elections, they have failed to institutionalize as stable and cohesive political forces. This paper shows that the failure of laws to encourage cross-ethnic parties and coalitions has been due to their command-and control nature (as compared to incentive-based) and the fact that the laws have failed to set a regulatory framework for the cross-ethnic coalitions that have emerged, particularly during the presidential elections.

KEYWORDS: *Party Laws; Party Nationalization; Constitution; Institutionalization; Elections*

UNIVERSITY OF BOLOGNA LAW REVIEW

ISSN 2531-6133

[VOL.4:2 2019]

https://doi.org/10.6092/issn.2531-6133/10333

1. INTRODUCTION

Afghan party laws and regulations have consistently discouraged ethnic parties and politics. By prohibiting parties from forming or functioning on the basis of ethnicity, region, language, or religious sectarianism, Article 35 of the Constitution sets a principal framework towards nationalization of parties.[1] Subsequently, Article 6 of the Political Party Law provides that, "political parties shall not incite to ethnic, racial, religious or regional discrimination".[2] To further encourage nationalization of parties, the Political Party Law of Afghanistan has set some thresholds, compelling parties to expand their membership, leadership positions and regional offices across over twenty provinces.[3] Although none of the thresholds have explicitly referred to the ethnic composition of political parties, they were indeed designed to encourage broad-based parties given the regional concentration of ethnic groups.[4]

Despite these laws and efforts, however, the so-called "parties" have remained fragmented, personalized and ethnic-based in Afghanistan.[5] In fact, no inclusive and programmatic party has grown out of the existing fluid party system.[6] Most parties have been one-man shows, functioning as the property of their leaders and serving only their interests.[7] These parties have continued to remain organizationally unstable, politically incohesive, programmatically indistinguishable, and

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[1] Qānoon-ı Assāsı-ye Jamhūrı-ye Islāmı-ye Afghanistan [Constitution of the Islamic Republic of Afghanistan], 2004, art. 35. hereinafter Constitution.
[2] *See* Qanun-ı-Ahzab Siassi [Political Party Law], 2003, art. 5; Qanun-ı-Ahzab Siassi [Political Party Law], 2009, art. 6 hereinafter Political Party Law.
[3] *See* Political Party Law, art. 9 (amended, 2012).
[4] *See Id.*
[5] *See* Noah Coburn & Anna Larson, Derailing Democracy in Afghanistan: Elections in an Unstable Political Landscape 73 (2013).
[6] *See* Mohammad Shafaq Khawati, *Qawmcracy Wa Qabila Salari [Ethnocracy and Tribalism], in* Democracy Afghani: Fursat Ha Wa Chalish Ha [Afghan Democracy: Challenges and Opportunities] 27 (Mohammad Nabi Ahmadi & Majid Ismaelzada eds., 2014).
[7] *See* S. Yaqub Ibrahimi, *Political Parties and Political Development in Afghanistan* 10 (Working Paper, 2014), http://www.atlantic-community.org/documents/10180/dd2703aa-ff86-4553-a47c-369dcdfefcaf.

https://doi.org/10.6092/issn.2531-6133/10333

internally undemocratic.[8] Since they have failed to constitute parties in the conventional sense,[9] some scholars have referred to them as proto-parties[10] and other as factions,[11] *shabaka-hai siyasi* (political networks), *jiryanat siyasi* (political currents),[12] or *grohak-ha* (cliques).[13]

This article examines some important features of Afghan party laws to unravel their failures in party nationalization. The first section begins with a conventional typological analysis locating Afghan's regulation of party nationalization. Then, it discusses why Afghan party laws would ban ethnic parties and why they would take an implicit approach to party nationalization. The second section deals with whether the laws have been able to transform and nationalize parties in Afghanistan. Revealing that they have not, it introduces the main question: why have these laws failed to encourage cross-ethnic parties? To answer this question, it examines the scale and the content of party related regulations and whether they truly value development of parties and coalitions. The last section of this article examines alternative regulations and designs that would help institutionalize cross-ethnic coalitions and parties.

This article grew out of a single outcome case study as it compares Afghan party laws with those of other divided societies. These supporting cases are Bolivia, Burundi, Ghana, Indonesia, Kenya, Malawi, Nigeria,

[8] *See* Thomas Rutting, *Islamists, Leftists – and a Void in the Center: Afghanistan's Political Parties and Where They Come From (1902-2006),* Afghanistan Analysts Network (Jan. 1, 2006) https://www.afghanistan-analysts.org/publication/other-publications/islamists-leftists-and-a-void-in-the-center-afghanistans-political-parties-and-where-they-come-from-1902-2006-2/.

[9] *See* Anna Larson, *Afghanistan's New Democratic Parties: A Means to Organize Democratization?*, Afg. Research and Evaluation Unit, (Mar. 2009), http://www.refworld.org/pdfid/49c254a02.pdf. ("They do not resemble parties in established and/or Western democracies, in that they are largely based on the ethnic ex-military factions that fought in the civil war.").

[10] *See id.* at 1; *See* Ana Larson, Anna Larson, *The Wolesi Jirga in Flux, 2010: Elections and Instability,* Afghanistan Research and Evaluation Unit, 5 (2010), http://www.operationspaix.net/DATA/DOCUMENT/4581v The_Wolesi_Jirga_in_Flux_2010___Elections_and_Instability_I.pdf.

[11] *See* Antonio Giustozzi, *The Ethnicisation of An Afghan Faction: Junbesh-I-Milli From Its Origins to the Presidential Elections* (Crisis States Research Center, Working Paper No. 67, Sept. 2005), http://eprints.lse.ac.uk/13315/1/WP67.pdf.

[12] *See* Rutting, *supra* note 8, at 1.

[13] *See* Khawati, *supra* note 6, at 27.

https://doi.org/10.6092/issn.2531-6133/10333

Philippines, Sierra Leone, Sri Lanka, and Tanzania. Although political laws are undergoing changes in most of these countries, their innovative approaches and designs offer more exemplars/material to teach their counterpart societies than the centuries old laws and institutions in advanced democracies. Rules such as anti-switching provisions, ethnic party banning, merger provisions, party qualification thresholds, and party nomination thresholds are either the product of innovations of democratizing societies or are more prevalent in these countries.[14]

All countries in Table 1 are multi-ethnic societies. The scale of ethnic fractionalization ranges from 0.161 to 0.953 in these countries, with Afghanistan sitting almost in the middle.[15] Ethnic distributions in Ghana, Malawi, Nigeria, Indonesia and Sierra Leone are particularly similar to that of Afghanistan: they are all countries of minorities (*see* Table 1). Additionally, these countries are democratizing societies with mostly undeveloped party systems. Freedom House has categorized most of these countries, including Afghanistan, as partly free or not free.[16] Ghana is the only country that is marked as a free country by Freedom House.[17] Afghanistan's score of democratization is better only than Burundi;[18] notably, its score of democratization has worsened from 5 to 6 between 2007 to 2017. It only improved to 5.5 since 2018.[19] Based on their recent elections, most countries in the table have fewer effective parties and coalitions than Afghanistan. The countries with the fewest number of parties are Ghana and Sierra Leone, each having two prominent parties.

[14] *Infra* note 76; *infra* note 77; *infra* note 156.
[15] *See* James D. Fearon, *Ethnic and Cultural Diversity by Country,* 8 J. E. Growth 195 (2003).
[16] *Populists and Autocrats: The Dual Threat to Global Democracy*, Freedom House (2017), https://freedomhouse.org/report/freedom-world/freedom-world-2017.
[17] *Ghana,* Freedom House, https://freedomhouse.org/report/freedom-world/2017/ghana.
[18] *See Burundi*, Freedom House, https://freedomhouse.org/report/freedom-world/2017/burundi.
[19] *See Afghanistan*, Freedom House, https://freedomhouse.org/report/freedom-world/2017/afghanistan.

https://doi.org/10.6092/issn.2531-6133/10333

Country	Ethnic Distribution					Rate of Democratization			Parties & Coalitions		
	Largest	2nd Largest	3rd Largest	4th Largest	Fractionaliz.	Categorization	Score in 2018	Score in 2008	Elections	Parties	Coalitions
Tanzania	16	less than 5	less than 5	less than 5	0.953	Partly Free	4	3.5	2015	5	/
Kenya	22	14	13	12	0.852	Partly Free	4	3.5	2013	20 (in 3 Coal.)	3
Ghana	47.5	16.6	13.9	7.4	0.846	Free	1.5	1.5	2016	2	/
Malawi	35.1	18.9	13.1	12	0.829	Partly Free	3	4	2014	6	/
Nigeria	29	21	18	10	0.801	Partly Free	4	4	2015	4	1
Indonesia	40.1	15.5	3.7	3.6	0.766	Partly Free	3	2.5	2014	10 (in 2 Coal.)	2
Sierra Leone	35	31	8	5	0.764	Partly Free	3	3	2012	2	/
Afghanistan	40-44	25-27	9.-12	6.-9	0.751	Not Free	5.5	5	2010,2014	23 (in 5 Coal.)	5
Bolivia	68	20	5		0.743	Partly Free	3	3	2014	2	1
Sri-Lanka	74.9	11.2	9.2	4.2	0.428	Partly Free	3.5	4	2015	3	3
Burundi	85	14			0.328	Not Free	6.5	4.5	2015	2	1
Philippines	28.1	13.1	9	7.6	0.161	Partly Free	3	3.5	2016	16	1

Table 1: Afghanistan here is compared with eleven other divided societies. The comparison includes ethnic distribution, democratization scale, and number of parties and coalitions.[20]

As Table 1 indicates, Afghanistan is a divided society with at least four large ethnic groups, namely Pashtuns, Tajiks, Hazaras and Uzbeks, as well as numerous smaller groups. The population of ethnic groups ranges from below one percent to over forty percent, although every ethnic group tends to overstate its population.[21] Each ethnic group is likely to have at least one political faction or party; even so, most studies concur that parties tend to represent the interests of a few ethno-political elites rather than concerns of the ethnic masses.[22] While using parties repeatedly to mobilize communities for political gains, elites have remained hesitant to expand parties beyond their control primarily to avoid losing their leverage.[23] In addition to these elites, state policies, electoral systems, and historical misdeeds of parties have thwarted party development as well. However, exploring the role of these factors in party

[20] *World Factbook: Afghanistan*, Central Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/af.html; *see also Freedom in World*, Freedom House, https://freedomhouse.org/report/freedom-world/freedom-world-2017; Fearon, *supra* note 15, at 195-222.

[21] No scientific census of ethnic populations in Afghanistan has been conducted yet. Instead, numerous estimations of ethnic demographics have been produced by different domestic and international organizations which are almost all disputed by different groups. The most cited estimation is the one by C.I.A. sheet. Some international organizations including the U.N. Agencies, N.A.T.O., and the European Union have relied on C.I.A. Factbook for their analysis of Afghan society. Between 2001 and 2016, C.I.A. Factbook estimated Pashtuns between 40 to 44% of the population, Tajiks between 25 to 27%, Hazaras between 9 to 10%, and Uzbeks between 6 to 9%. Since 2016, the C.I.A. Factbook stopped releasing estimations on ethnic distribution in Afghanistan perhaps because of the doubt in such numbers. *See World Factbook: Afghanistan*, Central Intelligence Agency, https://www.cia.gov/library/publications/theworldfactbook/geos/print/country/countrypdf_af.

[22] *See, e.g.*, Ibrahimi *supra* note 7; Larson *supra* note 9; Rutting *supra* note 8.

[23] *See* Ibrahimi, *supra* note 7.

https://doi.org/10.6092/issn.2531-6133/10333

development is beyond the scope of this article which intends to examine party laws only.

In literature, party laws are defined either in a narrow sense or in a general sense. In the narrow sense, as Richard Katz defines it, "*Party Law* refers to statutes regulating political parties and codified under a comparably descriptive title *Political Party Law*" or *Qanun-i-Ahzab Siassi* in the case of Afghanistan.[24] This chapter uses the term *Political Party Law,* with capitals, to refer to *Qanun-i-Ahzab Siassi*. In a more general sense, party laws consist of any formal rules and regulations about the structure, activities, and finances of political parties and coalitions.[25] In this way, party laws in Afghanistan include party related provisions in the Constitution, Political Party Law, electoral laws, and Parliamentary Rules of Procedure. Engaging with all these bodies of party laws, this article examines their influence on party transformation and nationalization in Afghanistan.

2. THE LEGAL APPROACH TO PARTY DEVELOPMENT IN AFGHANISTAN

Typically, making a decision about an appropriate party regulation is a technical matter that comes after the lawmakers decide what kind of parties best suit their society.[26] Taking this into account, different countries have adopted different types of party laws, some permissive and some very controlling. Explaining these different regulatory approaches, Kenneth Janda distinguishes five different types of party laws:

[24] Richard S. Katz, *Democracy and the Legal Regulation of Political Parties,* 2 (USAID Conference on Changes in Political Parties, Conference Paper, Oct. 1, 2004), https://www.scribd.com/document/190180368/Democracy-and-the-Legal-Regulation-of-Political-Parties.
[25] *See id.*; *see also* Abeje, *infra* note 187, at 315.
[26] *See* Matthijs Bogaards, *Strategies of Political Party Regulation, in* Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development 48, 48-9 (Benjamin Reilly & Per Nordlund, eds., 2008).

https://doi.org/10.6092/issn.2531-6133/10333

In general, nations that *proscribe* parties by law forbid them from operating entirely; nations that *permit* parties allow them to operate freely; nations that *promote* parties [adopt laws to] actively support them; nations that *protect* parties favor certain ones over others; and nations that *prescribe* for parties seek [a legal framework] to mold them to fit an ideal.[27]

Matthias Bogaard is another prominent scholar who, by focusing on the regulation of ethno-religious parties, distinguishes three types of party regulations:[28] (a) articulating regulations that by default allow translation of ethnic groups into ethnic parties; (b) blocking regulations that forbid the formation of ethnic parties; and, (c) aggregating regulations that require and encourage cross-ethnic parties.[29] Bogaard posits that a party law may combine a mix of these rules. Both Janda's and Bogaard's typologies have been popularly used by numerous scholars in different articles and books.[30]

These typologies are very helpful for a better understanding of how parties and party systems are perceived by the public and government and how they are regulated. For example, using Janda's typology, Afghan party laws fall within the prescriptive framework since the laws require transformation and nationalization of parties. Based on Bogaard's typology, Afghan party laws have incorporated both blocking and aggregating regulations: the blocking regulations include Article 35 of the Constitution, Article 6 of the Political Party Law, and rule 13 of the Wolesi Jirga (House of Representatives, hereinafter W.J.) Rules of Procedure, which explicitly prevent ethnic parties.[31] The aggregating regulations include Article 9 of the Political Party Law and its amendments that

[27] Kenneth Janda, The Nat'l Democratic Inst. for Int'l Affairs, Political Parties and Democracy in Theoretical and Practical Perspectives: Adopting Party Law 8 (2005).
[28] Bogaards, *supra* note 26, at 49.
[29] *Id.*, at 59.
[30] *See, e.g.,* Ingrid van Biezen et al., Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development (Benjamin Reilly & Per Nordlund, eds., 2008); *see also* Katz, *supra* note 24, at 2.
[31] Constitution art. 35; Qanun-i-Ahzab Siassi [Political Party Law], 2003, art. 5; Qanun-i-Ahzab Siassi [Political Party Law], 2009, art. 6; Rules of Procedures, 2016, Rule 13.

https://doi.org/10.6092/issn.2531-6133/10333

require structural and functional presence of parties across twenty provinces that naturally inhibit more than one ethnic groups.[32]

Although Janda's and Bogaard's typologies highlight some important distinctions between different types of party regulations, they do not explain why a country adopts any of the regulatory approaches. Additionally, they do not differentiate between explicit and implicit approaches to party nationalization; neither do they explain why party laws often fail to nationalize parties when they are intended to do so. This paper is intended to tackle these questions one by one in the particular case of Afghanistan.

2.1. WHAT IS WRONG WITH ETHNIC PARTIES?

A careful analysis of Afghanistan's case reveals that despite the prominence of ethnic affiliations in electoral practices and party politics, the political ideals value the nationalization of parties and de-ethnicization of politics in general. This gap between political practices and political ideals is well documented in the findings of a survey that I conducted for another research project from over 2900 respondents from all thirty-four provinces.[33]

Based on the survey, only 18% of respondents had a sympathetic view of the existing ethnic parties.[34] In contrast, 38% of respondents favored the institutionalization of the emerging cross-ethnic coalitions.[35] The other 45% thought that Afghanistan would be better off without parties and coalitions.[36] The primary reason for the latter group of

[32] *Id.*, art. 9 (2, amended, 2012).
[33] M. Bashir Mobasher, *Centrifugal Practices & Centripetal Ideals: An Overview of Afghan Political Practices, Ideals and Institutions*, 2019, International Conference on Global Risk, Security and Ethnicity (unpublished conference paper). With the help of academics from several universities including American University of Afghanistan, Kabul University and Alberoni University, I conducted this survey between August of 2016 and February of 2019.
[34] *Id.*
[35] *Id.*
[36] *Id.*

https://doi.org/10.6092/issn.2531-6133/10333

respondents was the involvement of ethnic parties in the civil wars and the clientelistic politics of both parties and coalitions.[37]

Since banning parties and coalitions would be counterproductive for a democratizing society, the option of banning was replaced with "keeping both political organizations" in a later question in the questionnaire. With this change, the number of those who favored cross-ethnic parties increased dramatically to 57%. Again, only 21% of respondents favored an ethnic party system and the remaining 23% were open to both kinds of parties but personally preferred cross-ethnic parties mostly.[38] With relatively small variations, these numbers reflect respondents from all ethnic groups, as illustrated in Table 1. In other words, a concurrent majority of ethnic groups prefer party nationalization over ethnic parties. Although pro-coalition majorities of Uzbeks and other groups are less than 50%, they are still twice as much as those who prefer ethnic parties.

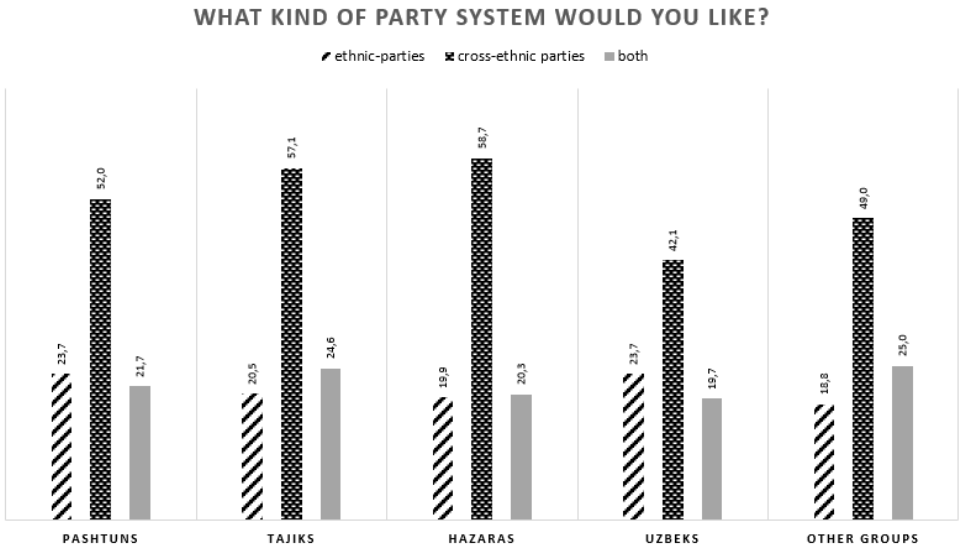

Table 2: Responses of subjects about their preferred party system for Afghanistan.[39]

[37] *Id.*
[38] *Id.*
[39] The data is based on a survey from 2900 respondents from all 34 provinces, used for a different research project entitled *Centrifugal Practices & Centripetal Ideals: An Overview of Afghan Political Practices, Ideals and Institutions*.

https://doi.org/10.6092/issn.2531-6133/10333

The urge for party nationalization was ironically confirmed by the findings of a series of semi-structured interviews, which I conducted with over forty party and non-party elites.[40] Of the twenty-nine interviewees, who were asked about their ideal party system, twenty-eight favored cross-ethnic parties. Interestingly, the interviewees included seventeen party elites, from which the leader of only one party suggested that ethnic parties could function democratically as well.[41] Out of the seventeen parties' representatives who were interviewed, only three admitted that their parties were ethnic or mostly ethnic. The other fourteen claimed that they represented different groups and gender; at the same time, most parties would also suggest that no other party was cross-ethnic in Afghanistan. Not surprisingly, similar claims by party representatives were recorded by other researchers as well[42] while most studies on parties concur that finding a truly inclusive party is barely possible in Afghanistan.[43]

The survey and interview findings demonstrate that popular political ideals favor party nationalization pressuring even ethnic parties to claim that they are cross-ethnic. Reflecting these centripetal ideals, Afghan party laws challenge parties to nationalize. Afghan party laws not only indicate a centripetal approach but also a de-ethnicizing approach to party nationalization, which will be discussed in the following section.

2.2. WHY AN IMPLICIT APPROACH TO PARTY NATIONALIZATION?

If party laws of Afghanistan are to be appreciated for one thing, it is their implicit approach to party nationalization as they were meant to encourage

[40] *Supra* note 30. (The interview included leaders orspokesperson of parties (17); leaders or spokesperson of coalitions (10); members of The Independent Commission for Overseeing the Implementation of the Constitution (2); board members and advisors of Electoral Commissions (6); MP's from the Wolesi Jirga (4); and two officials from the M.o.J., which registers parties (2).

[41] Based on an interview with one of the party leaders in 2016 (on file with author).

[42] *See, e.g.*, National Democratic Institute (NDI), Political Parties in Afghanistan, 16 (2011), https://www.ndi.org/sites/default/files/Afghanistan-political-parties-july-2011.pdf.

[43] *See, e.g.*, *Id.*; Ibrahimi *supra* note 7; Rutting *supra* note 8; *infra* note 50.

https://doi.org/10.6092/issn.2531-6133/10333

cross-ethnic parties without setting an ethnic-based threshold to do so. This implicit approach to party nationalization sets a *de-ethnicizing legal framework* as opposed to *ethnicizing* or *indifferent laws*.

De-ethnicizing party laws encourage cross-ethnic parties without addressing their ethnic distribution in explicit terms. Afghan party laws have used three non-ethnic thresholds to implicitly encourage ethnic pluralism of parties: the threshold of membership requires that a registering party must have at least 10,000 members; the threshold of founders requires that a party must have a minimum of thirty-five founders from at least twenty provinces;[44] finally, the threshold of party offices requires a registering party to open offices in at least twenty provinces within a year from registration.[45] The thresholds of party offices and founders were specifically intended to have an aggregating effect since ethnic groups are regionally concentrated in Afghanistan. Since no single ethnic group has a substantial population in at least twenty provinces, a political party has to draw support from different ethnic groups to satisfy these thresholds. Therefore, while the threshold of party founders implicitly requires ethnic representation at the highest level of political parties, the office threshold commands parties' presence in more than one ethnic constituency.

This de-ethnicizing approach to party nationalization has two advantages. First, at least on the surface, the laws have taken away the political prominence of the ethnic divide. This is important because the decision whether the thresholds explicitly or implicitly address ethnic composition of parties has long-term social and psychological impacts.[46] While encouraging cross-ethnic parties, the thresholds are intended to minimize the role of ethnicity in politics in the long run. The other advantage of a de-ethnicizing approach is its recognition of alternative

[44] *See* Muqarera Tarz Tasis Wa Sabt Ahzab Siassi [The Regulation on the Procedures of Formation Registration of Political Parties] , 2010, art. 9.
[45] *See* Muqarera Tarz Tasis Wa Sabt Ahzab Siassi [The Regulation on the Procedures of Formation Registration of Political Parties] , 2010, art. 9; art. 9 (amended 2012).
[46] *See* Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism,* 80 U. Chi. L. Rev. 769, 842 (2013).

https://doi.org/10.6092/issn.2531-6133/10333

identities to challenge the dominance of ethnic identity. Relying on provincial expansion of parties, the thresholds bring provincial affiliations into the political equation. In fact, by recognizing provincial affiliations, but not ethnic ones, the party laws leave ethnic identity in a comparatively disadvantaged position in the long-run. Given that many provinces cut across ethnic groups, party laws are likely to reduce inter-ethnic divide and intra-ethnic cohesion.[47]

Contrary to a de-ethnicizing law, *an ethnicizing party law* explicitly codifies the role of ethnicity in party politics. Ethnicizing party laws may be exemplified by the Kenyan and Burundi's party laws. Article 7 of Kenya's Political Party Act provides that "the composition of [the party's] governing body reflects regional and ethnic diversity, gender balance and representation of minorities and marginalized groups".[48] Article 168 of Burundi's Constitution states that during elections "Of three candidates registered together on a [party] list, only two may belong to the same ethnic group . . .".[49] Article 31 of Burundi's Political Party Act provides that the national leadership of a party may not have more than three-quarters of its leadership members belonging to a single ethnicity or gender.[50] These rules are referred to as ethnicizing laws because while encouraging the nationalization of parties, these laws emphasize the ethnic affiliation of party leaders and members. Such party regulations openly and permanently bring ethnic affiliations into the political equation.[51] More importantly, these rules "lock in" a political

[47] *See id.*, at 239.
[48] Kenya: Political Parties Act (2007), art. 7, http://kenyalaw.org/kl/fileadmin/pdfdownloads/RepealedStatutes/PoliticalPartiesActCap7A.pdf.
[49] La Constitution Du Burundi [The Constitution of Burundi], 2005, art. 168, https://www.constituteproject.org/constitution/Burundi_2005.pdf.
[50] Loi Portant Organisation Et Fonctionnement Des Partis Politiques [Law on Organization and Operation of Political Parties], 2003, http://www.grandslacs.net/doc/3964.pdf.
[51] *See* Stephanopoulos, *supra* note 46, at 842 ("such techniques [explicit rules] are often controversial because they openly take race into account and deviate from the ideal of the color-blind state."); Anika Becher and Mathias Basedau, *Promoting Peace and Democracy Through Party Regulation? Ethnic Party Bans in Africa*, 8 (Working Paper, GIGA Research Programme: Violence, Power and Security, 2008).

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environment, where civil and political actors are conscious of ethnicity and ethnic affiliation is politically salient.

Although it explicitly refers to ethnicity, Article 35 of the Afghan Constitution does not institutionalize ethnic politics because it is a blocking provision. A blocking regulation basically denies ethnicity a role in party politics. In other words, even though Article 35 and similar blocking provisions explicitly refer to ethnicity, their references do not imply recognition of ethnicity in party politics, but rather disallow it. Therefore, such blocking provisions are not ethnicizing laws.

Indifferent legal frameworks neither codify nor acknowledge the political role of ethnicity. Designing such laws is problematic in divided societies, where ethnic politics and ethnic tensions are real and need to be addressed by laws and institutions. The fact that Afghanistan's previous Political Party Law required only 700 members for a party to qualify and nothing else indicated that the law had adopted an indifferent approach to ethnic politics in party development.[52] The result was the registration of an overwhelming number of ethnic parties.

In light of this comparison, arguably the adoption of de-ethnicizing party laws was necessary to mitigate the role of ethnicity in politics in the long run. But the question remains as to whether these laws have been successful in encouraging cross-ethnic parties in Afghanistan. The following section reveals a negative answer.

3. A NEW PERSPECTIVE ON THE FLAWED PARTY LAWS

Afghanistan's 2009 Political Party Law and its amendments were slightly successful in reducing party fragmentation. This was mainly because the new law had a retroactive effect, requiring the already registered parties to

[52] *See* Qanun-i-Ahzab Siassi [Political Party Law], 2003, art. 9.

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meet the new thresholds. Since many parties were far from meeting the thresholds, almost half of them failed to re-register under the new law.[53] Indeed, the new law was adopted to remedy the negative effects of the previous law (2003), under which any party with over 700 members had been able to register in the Ministry of Justice (hereinafter M.o.J.).[54] The low threshold had led to the fragmentation of political parties and the registration of over 100 parties by 2009.[55] By imposing an obligation on the parties to re-register, the new law reduced their number to just over 50 parties.[56] In 2016, their number was further reduced temporarily to around 40 when the M.o.J. suspended 11 parties and issued warnings to 20 others for failing to meet the thresholds.[57] Even so, the impact of the new law remained limited to new and weak parties.

Many parties criticized the law and its sporadic enforcement by the Registrar Office, an office of the M.o.J that registers political parties in Afghanistan. Some questioned the constitutionality of the law for having retroactive effect on already-registered parties.[58] Many criticized that the laws were enforced only on new and weak parties while old *Jihadi* parties[59] continued to exist even though they had failed to meet the registration threshold.[60] These criticisms were warranted since several studies and reports indicated that indeed none of the political parties had

[53] *See* Anna Larson, *Political Parties in Afghanistan*, United States Special Report 362 (Mar., 2015), http://www.usip.org/sites/default/files/SR362-Political-Parties-in-Afghanistan. http://www.usip.org/sites/default/files/SR362-Political-Parties-in-Afghanistan.pdf

[54] *See* Qanun-i-Ahzab Siassi [Political Party Law], 2003, art. 9.

[55] *Fehrest-i-Kamel Ahzab Siassi Afghanistan* [*The Complete List of Political Parties of Afghanistan*], BBC (Jun.12, 2009), http://www.bbc.com/persian/afghanistan/2009/07/090718_a-af-election-political-parties.shtml.

[56] Interestingly, the number of registered parties is different from English version (fifty parties) to Dari and Pashtu lists of parties (fifty-seven parties) in the M.o.J. Website. *Cf.* Ministry of Justice [Parties' List in English] (May 4, 2016); Ministry of Justice [Parties' List in Pashtu] (May 4, 2016); Ministry of Justice [Parties' List in Persian] (May 4, 2016).

[57] Mukhtar Wafayee, *Ministry of Justice: 11 Suspensions and 20 Alerts,* Hasht Subh News (Feb. 27, 2016), [12/8/1394] http://www.elonat.com/jantari_converter.php.

[58] Interview with elites of three political parties in 2016 (on file with author).

[59] *Jihadi* parties are the parties that declared *Jihad* and engaged in war against Soviet backed regimes in Afghanistan between 1979 to 1992. According to Islamic scholars, one interpretation of *Jihad* is holy war.

[60] Interview with elites of five political parties in 2016 (on file with author).

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perfectly satisfied all the qualification thresholds.[61] In fact, in a 2016 interview, the head of the Registrar Office confirmed that most registered parties had not met the required thresholds.[62]

The failure of party nationalization should be observable by the lack of electoral support across provinces.[63] However, since most party members ran as independents in Afghanistan, documenting electoral support of parties is highly unlikely.[64] An alternative way of assessing party nationalization is to look at the ethnic distribution of their representatives in the W.J.. Unlike a party's electoral support across the nation, parties' members can be easily verified in a given legislature. Additionally, an ethnic party may be able to recruit or even attract supporters from other groups but it may not have higher ranking, elected officials from other groups. Table 3 illustrates ethnic distribution of parties' representatives in the W.J..

Ethnic Representation of Parties in the Parliament (2010-2017)							
Title (Persian)	Title (English)	Seats #	Pashtuns	Tajiks	Hazaras	Uzbeks	Arab
Hezb-i-Islami Afghanistan	Islamic Party of Afghanistan	24	16	4		1+1	2
Hezb-i-Jamiat Islami	Islamic People's Party Of Afghanistan	18		17			1
Hezb-i-Wahdat Islami Mardom Afg.	Islamic Unity Party of Afghan People	12			12		
Hezb-i-Junbesh-e-Milli Afghanistan	National Movement Party of Afgh.	5				4	
Hizb-i-Wahdat Islami Afghanistan	Islamic Unity Party of Afghanistan	5			5		
Ehzab-i-Chappi	Ulomi, Aryan, Ranjbar, Tanai	4				4	
Hezb-i-Paiwand-e-Milli	National Solidarity Party of Afg.	4			4		
Hizb-i-Afghan Milat Party	Social Democrat Party	3	3				
Hizb-i-Dawat Islami Afghanistan	Afghanistan's Islamic Mission Org.	3	2	1			
Hizb-i-Iqtedar Islami Afghanistan	Islamic Movement of Afghanistan)	3			3		
Hezb-i-Jamhorikhwahan	Republican Party	3		3			
Hezb-i-Mahaz-i-Milli Islami Afg.	National Movement Party of Afgh.	2	2				
Hezb-i-Afghanistan Naween	The New Afghanistan Party	1		1			
Hizb-i-Harakat Milli Afghanistan	National Sovereignty Party	1			1		
Nuzhat-i-Hambastagee Milli Afg.	The Solidarity of Afghan Nation Party	1	1				
Hizb-i-Kangra Mili Afghanistan	National Congress Party of Afg.	1		1			
Hizb-e Kongra-ye Melli-ye Afg.	National Congress Party of Afg.	1		1			
Hizb-e-Niyaaz Melli	National Need Party	1			1		
Hizb-e-Wahdat Islami Milat	Islamic Unity Party of Nation	1			1		
Hizb-i-Musharekat Milli	National partnership Party	1	1				
Hizb-i-Jama'at Dawa	United Mission Party	1	1				

Table 3: Illustration of the composition of proto-parties in the W.J.[65]

[61] *See Political Parties in Afghanistan*, National Democratic Institute (NDI) 16 (June 2011),https://www.ndi.org/sites/default/files/Afghanistan-political-parties-july-2011.pdf.

[62] Interview with the head of registrar office in 2016 (on file with author).

[63] One way of examining electoral support of parties across provinces is through Party Nationalization Score (P.N.S.) or Party System Nationalization Score (P.S.N.S.), using Gini Index. *See* Anika Moroff, *Comparing Ethnic Party Regulation in East Africa*, 17 Democratization 750, 759 (2010).

[64] *See* Andrew Reynolds & John Carey, Afg. Research and Evaluation Unit, Fixing Afghanistan's Electoral System: Arguments And Options For Reform 9 (2012); *see also Afghanistan's parties in transition*, International Crisis Group (Policy Briefing n°141) (Jun. 26, 2013), https://www.files.ethz.ch/isn/166110/b141-afghanistans-parties-in-transition.pdf

https://doi.org/10.6092/issn.2531-6133/10333

As Table 3 illustrates, only *Hizb-i-Islami Afghanistan* [Islamic Party of Afghanistan] has some representatives from different ethnic groups. Even so, 78% of its representatives are ethnic Pashtuns, which constitute its main base of support. *Hizb-i-Jamiat-i-Islami* [Islamic Society Party] and *Hizb-i-Dawat Islami* [Islamic Mission Party] have only one M.P. from a different ethnic group. Other parties simply represent only one ethnic group in the W.J..

To sum up, Afghan party laws have prescribed thresholds that are too high for new parties to qualify for registration, and too futile to incentivize old, powerful parties to transform and nationalize. This issue is coupled with the lack of a proper enforcement mechanism, which also naturally favors the old, traditional parties over the new ones. The failure of party development in Afghanistan raises three questions. First, whether the drafters and the party laws have invested enough value to party development; second, whether party laws have provided enough incentive for party nationalization; and third, whether the laws have recognized the prospect for institutionalizing the emerging cross-ethnic coalitions. Each question is discussed below.

3.1. LACK OF INTEREST IN PARTY DEVELOPMENT

Enforcing a few banning and aggregating provisions is not enough to guarantee institutionalization of broad-based parties; the general attitude of both laws and lawmakers towards party development is just as important. Unfortunately for the parties the party laws of Afghanistan were developed under the dominant influence of political outsiders who were more invested in party fragmentation than party development. Both incumbents, President Ashraf Ghani and his predecessor, Hamid Karzai, came to office as political outsiders and both were concerned about the

[65] *The 2010-2015 Wolesi Jirga Directory*, National Democratic Institute (May 2012), https://www.ndi.org/files/AFG-2010-2015-Wolesi-Jirga-Directory.pdf; Reynolds, at 9-10.

https://doi.org/10.6092/issn.2531-6133/10333

empowerment of *Jihadi* parties which they considered hostile to their administrations.[66]

Karzai was particularly concerned that facilitating party development would allow *Jihadi* elites of the north and opposition elites among the unsatisfied Pashtuns in the south to challenge his presidential authority.[67] To address his own concern, he even issued a presidential decree for the first parliamentary election that prohibited candidates from using their party symbols on ballots or from publicly demonstrating any party affiliation in their campaigns.[68]

Embarrassed about their past, intimidated by the presence of international forces, and factionalized in even smaller patronage groups, party elites have exercised little influence in the development of party laws. Parties had little support among the masses and the government due to their notorious past in Afghanistan.[69] Communist and *Jihadi* parties have both perpetuated war, violence, and mass killings in their own eras of ruling the country (1979-1991 and 1992-1996 respectively).[70] After the Bonn Conference in 2001, the *Jihadi* elites—not necessarily their parties—have particularly gained significant political grounds in Afghanistan, generating serious concerns among the masses and the

[66] *See* Anna Larson, *Political Parties in Afghanistan*, United States Institute Of Peace (Special Report 362) (Mar. 2015), http://www.usip.org/sites/default/files/SR362-Political-Parties-in-Afghanistan.pdf; *see also* ICG, *supra* note 64, at 3, 5.

[67] *See* NDI, *supra* note 42, at 14.

[68] *See* Reynolds Carey , *supra* note 64, at 6. Even though Karzai's decree banned announcing party affiliations by candidates, around four candidates of 2004 presidential election and 14% of candidates in the parliamentary election of 2005 did so. *See id.*

[69] *See* Andrew Wilder, *A House Divided? Analyzing the 2005 Afghan Elections*, Afghanistan Research and Evaluation Unit (Dec., 2005), http://www.refworld.org/pdfid/47c3f3c01b.pdf. ("But by far the biggest challenge confronting political parties in Afghanistan is their major image problem among Afghans, who associate them with the various communist or *jihad*-era political parties that have played such a negative role in Afghanistan's tragic history"); *see also* USAID, *Formative Research for Civic Education Programs on Elections: Focus Group Discussions in the North, West, Southeast and South of Afghanistan* (2005), http://pdf.usaid.gov/pdf_docs/pnadz213.pdf. ("The most common definition in the north was that parties were groups of people aligned on an ethnic basis in order to conspire against others. In the Pashtun areas of the south and southeast, the most common answer was that parties were groups of self-interested individuals organized to serve their own interests.").

[70] *See* Reynolds Carey , *supra* note 64, at 6; *see also*, Zekria Barakzai, United States Institute of Peace, Special Report 338: 2014 Presidential & Provincial Council Elections, 6 (Nov 2013), https://www.usip.org/publications/2013/10/2014-presidential-and-provincial-council-elections-afghanistan.

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government, resulting in a push for laws that would constrain party development.[71] This has led to a set of party laws that were little invested in strengthening the party system in Afghanistan. This can be indicated by the number as well as the content of provisions specifically dedicated to parties in the Constitution, election law, Political Party Law, and parliamentary rules of procedures.

The Afghan Constitution is among the recent constitutions to include few provisions about political parties. Notably, it has fewer references to political parties than most of the plural societies that are included in Table 4.[72] As Table 4 indicates, the Afghan Constitution has seven references to political parties in just four articles, compared to eighty-one references in the Kenyan Constitution and seventy references in the Sri-Lankan Constitution.[73] In fact, the Afghan Constitution ranks third from the bottom in Table 4 in terms of its references to and articles about political parties. Unlike the Afghan Constitution, the constitutions of Kenya and Nigeria as well as Ghana and Philippine have assigned an entire chapter or section to political party development.[74]

Political Party in the Constitutions					Political Party in Election Laws			
Country	Adoption Year	Dedicated Sections	References	Articles	Country	Adoption Year	Dedicated Sections	References
Tanzania	1977	Articles	58	/	Tanzania	85 (Amended, -201	Articles	38
Kenya	2010	Part	81	26	Kenya	2011	Chapters	206
Burund	2005	Chapter	38	22	Burund	2009	Chapters	74
Nigeria	1999	Section	53	20	Nigeria	2010	Chapters	243
Sri- Lanka	1978	Articles	70	11	Sri- Lanka	1981 (2 Acts)	Articles	439
Ghana	1992	Part	38	11	Ghana	2016	Articles	27
Sierra Leone	1991	Articles	40	10	Sierra Leone	2012, 2012	Articles	147
Philippines	1987	Chapter	17	8	Philippines	2016	Chapter	185
Malawi	1994	Articles	44	8	Malawi	1998	Articles	92
Afghanistan	2004	Articles	7	4	Afghanistan	1985	Articles	20
Indonesia	1945	Articles	6	4	Indonesia	2012	Chapters	280
Bolivia	2009	Articles	5	4	Bolivia	2010	Articles	3

Table 4: constitutions & election laws of twelve countries including Afghanistan in relation to their regulation of political parties.[75]

[71] *See* Sonali Kohatkar & James Ingalls, Bleeding Afghanistan: Washington, Warlords, and the Propaganda of Silence (2006).

[72] The Indonesian Constitution, which appears to have fewer references to political parties, was initially adopted in 1945, which was over half a century prior to the adoption of Afghan Constitution. Additionally, the Indonesian Constitution has two references to merger of political parties. Therefore, the Bolivian Constitution is the only recent constitution with fewer reference to political parties than the Afghan Constitution.

[73] The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978; The Constitution of Kenya (2010).

[74] The Constitution of Kenya (2010); The Constitution of Ghana, 1992; The Constitution of Nigeria (1999); Saligang Batas ng Pilipinas [Philippine's Constitution] (1987).

[75] Qanun Assassi Jumhuri Islamai Afghanistan [The Constitution of the Islamic Republic of Afghanistan], 2004; Katiba Ya Jamhuri Ya Muungano Wa Tanzania Ya Mwaka 1977

https://doi.org/10.6092/issn.2531-6133/10333

Of the four articles of the Afghan Constitution that address political parties, only Article 35 pertains specifically to political parties, their formation and activities.[76] Under this article, individuals are entitled to form or join political parties provided that parties cannot form or operate on the basis of ethnicity.[77] Additionally, Article 35 has a number of clauses preventing parties from forming militia, using arms, receiving aid from foreign states, and having an anti-Islamic agenda.[78] The last clause of Article 35 is the key provision because it bans parties on the basis of ethnicity, sect, language and region.[79]

The three other articles of the Afghan Constitution that address political parties are rather aimed at restricting party participation in state affairs. Article 118 disallows the Justices of the Supreme Court to be party members.[80] Articles 66 and 80 of the Constitution respectively prevent the president and the ministers from using their offices for their partisan considerations and interests.[81] Interestingly, the executives in all three administrations since 2003 have interpreted the latter two provisions to mean that government officials cannot be party members. In both of his presidential terms, Hamid Karzai used these constitutional provisions to

[The Constitution Of The United Republic Of Tanzania Of 1977] 1977; The Constitution of Nigeria (1999) (hereafter "Nigeria Constitution"); Constitución Política del Estado [Constitution of plurinational state], 2009 (hereafter Bolivia's Constitution); The Constitution of Sierra Leone, 1991; The Constitution of the Democratic Socialist Republic of Sri Lanka, 1978; The Constitution of Kenya (2010); The Constitution of Ghana, 1992; La Constitution Du Burundi [The Constitution of Burundi], 2005; Undang-Undang Dasar Republik Indonesia 1945 [The 1945 Constitution of the Republic of Indonesia], 1945; The Constitution of Malawi, 1994; Salingang Batas ng philipinas [Constitution of the Philippines], 1987; Constitution of Cyprus, 1960.
Portant Code Electoral [Bearing Electoral Code], Revision N° 1/22 (2009); Public Election Regulation (2016); Elections Act (Revised Edition, 2012); The Public Elections Act, Gazette Vol. CXLIII, No. 26 (2012); Code Of Election Campaign Ethics (2012); Parliamentary And Presidential Elections Act (1993); Electoral Act, Official Gazette No. 65 (2010); The Revised Election Code, No. 1012 (1965); Omnibus Election Code Of The Philippines (1985); Presidential Elections Act No. 15 (1981); Parliamentary Elections Act, No.1 (1981); The National Elections Act (2010).

[76] Constitution, art. 35.

[77] *Id.*, art. 35.

[78] *Id.*, art. 35.

[79] *Id.*, art. 35.

[80] *Id.*, art. 118.

[81] *Id.*, art. 66 ("During the term of office, the Presidential position shall not be used for linguistic, sectarian, tribal, and religious as well as party considerations"); *Id.*, art. 80 ("During their terms in office, the Ministers shall not use their positions for linguistic, sectarian, tribal, religious or partisan purposes.").

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form a party-free executive branch as he encouraged his cabinet members to drop their party affiliations.[82] In a separate case, after running as a party member in the presidential election of 2014 and becoming the Chief Executive Officer—equivalent to prime minister—Abdullah disassociated himself from the *Jamiat-i-Islami* Party, suggesting that it was due to "his political post [in the government]."[83]

Lack of interest in party development can also be noticed in the election laws, which typically regulate parties directly through explicit provisions as well as indirectly through electoral systems. Incumbents in Afghanistan have purposefully pushed for the adoption of the single non-transferable vote (hereinafter S.N.T.V.) system to effectively disenfranchise parties.[84] Although numerous election laws were revoked, replaced, and amended, the electoral system remained the same. S.N.T.V.'s negative impacts on party development is beyond the scope of this paper; however, it is well documented in Afghan parliamentary elections that S.N.T.V. encourages intra-party competition, personalistic politics, large number of candidates, and ultimately party fragmentation.[85] Therefore, the prospect for development of a cross-ethnic party system under an S.N.T.V. system is almost non-existent.

Furthermore, as Table 4 indicates, the Election Law has twenty references to political parties, which puts Afghanistan at the bottom of the list of all countries compared in this study. Adopted in 2016, the Ghanaian Election Law is the closest to the Afghan Election Law in terms of the number of references to political parties; and, Ghana already has a

[82] *See Afghan Report,* Radio Free Europe (Dec. 30, 2004), http://www.rferl.org/a/1340603.html.

[83] *Jamiat Split as Supporters Defy New Interim Council*, TOLONEWS.COM (May 25, 2017) http://www.tolonews.com/afghanistan/jamiat-split-supporters-defy-new-interim-council .

[84] *See* ICG, *supra* note 64, at 6; *see also* LARSON, *supra* note 66, at 3.

[85] *See* NAT'L DEMOCRATIC INST. FOR INT'L AFFAIRS, THE SEPTEMBER 2005 PARLIAMENTARY AND PROVINCIAL COUNCIL ELECTIONS IN AFGHANISTAN 13 (2006); *see also* Reynolds & Carey, *supra* note 64, at 4; BERNARD GROFMAN ET AL., ELECTIONS IN JAPAN, KOREA, AND TAIWAN UNDER THE SINGLE NON-TRANSFERABLE VOTE: THE COMPARATIVE STUDY OF AN EMBEDDED INSTITUTION 390 (Bernard Grofman, Sung-Chull Lee, Edwin A. Winckler & Brian Woodall eds., 1999); Coburn & Larson, *supra* note 5, at 115.

https://doi.org/10.6092/issn.2531-6133/10333

two-party system.[86] Other countries, however, have many more references to political parties than the Afghan Election Law. Election laws of some countries, such as Sri-Lanka, Indonesia and Nigeria, are party-dominant because parties are the only or main electoral actors according to these laws. In other words, only party affiliates can run in presidential or parliamentary elections in these countries. By contrast, the Afghan election law refers to political parties as one of the many political actors in the elections rather than as the main or even an important actor.

According to the thirteen articles of the Afghan Election Law, parties can launch campaigns,[87] have fair access to state-owned media,[88] attend electoral commission's meetings,[89] send observers,[90] attend referendum,[91] and make complaints.[92] Although these provisions imply the electoral participation of parties, surprisingly there is no explicit provision suggesting that parties can introduce candidates in elections. The remaining provisions are restrictive, preventing parties from having members in the Independent Electoral Commission,[93] Electoral Complaint Commission,[94] and Provincial Complaint Commission.[95]

Afghanistan's W.J. Rules of Procedure makes no reference to political parties and their functions in the Assembly.[96] Instead, the W.J. Rules of Procedure introduced the concept of parliamentary groups to encourage the creation of political blocs in the Assembly.[97] Under these

[86] *See Ghana: Party System and Campaigning*, EISA, https://www.eisa.org.za/wep/ghapartiessystem.htm, (last updated Dec., 2012).
[87] *See* QANOON INTIKHABAT [ELECTION LAW], 2016, art. 4 [hereinafter, Election Law].
[88] *See Id.*, art 19
[89] *See Id.*, art. 20.
[90] *See Id.*, 19(13).
[91] *See Id.*, art 102.
[92] *See Id.*, art. 27(4), 91 (1).
[93] *See Id.*, art. 12
[94] *See Id.*, art. 17
[95] *See Id.*, art. 31.
[96] The Rules of Procedure has no reference to political parties or coalitions at all while the regulation has twenty-eight references to parliamentary groups. Chapter five of the Rules of Procedure is about parliamentary groups with four articles. *See* THE RULES OF PROCEDURE, WOLESI JIRGA, art. 18.
[97] *See* COBURN & LARSON, *supra* note 5, at 85.

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rules, a parliamentary group must have a minimum of twenty-three members.[98] These rules ban the formation of any parliamentary group that pursues ethnic interests or an ethnic agenda.[99] In their book, *Derailing Democracy in Afghanistan*, Anna Larson and Noah Coburn suggest that these rules are designed to prevent the re-emergence of ethnic parties in the Assembly.[100] When the Assemblies were formed after the 2005 and 2010 elections, a number of scholars optimistically categorized members of the Assembly into conservatives, liberals and moderate-traditionalists; others divided the M.Ps. into pro-government, pro-opposition, and independents.[101] However, these categorizations were misleading since such parliamentary groups were never formed.[102] In practice, M.Ps. stayed in ethnic boxes and alliances shifted on issue-by-issue bases.[103]

Although four parliamentary groups initially registered by 2007, forming parliamentary groups gradually became unpopular.[104] Members of the existing groups have failed again and again to vote in blocs.[105] Today, only one registered parliamentary group is listed on the website of the National Assembly.[106] Notably, even political parties have failed to form their own parliamentary groups partly due to their own organizational failures and to the lack of any legal framework for parliamentary parties in the W.J. Rules of Procedure.[107]

[98] *See* THE RULES OF PROCEDURE, WOLESI JIRGA, Mar. 2017, art. 18.
[99] *See id.* ("No group may be formed for the purpose of representing personal, regional, professional, religious, ethnic, tribal or linguist interests").
[100] COBURN & LARSON, *supra* note 5, at 89.
[101] *See* WILDER, *supra* note 69, at 4.
[102] *See id.*
[103] *See Id*; *see also* Wahabuddin Ra'ees, *Democratizing Afghanistan: An Analysis of the 2005 Parliamentary Elections*, 14 INTELL. DISCOURSE 33, 42 (2006) ("Despite their strong presence in the Wolesi Jirga, observers of government and politics of Afghanistan believe that the Islamist right will not speak with one voice. Ethnic and regional divisions and even differences over adoption of a specific strategy will keep them divided."); THE ASIA FOUND., VOTER BEHAVIOR SURVEY: AFGHANISTAN'S 2010 PARLIAMENTARY ELECTION (2012).
[104] *See* COBURN & LARSON, *supra* note 5, at 85.
[105] This information was obtained from interviews with four M.Ps. All Interviewees confirmed that members of parliamentary groups were not able to vote collectively (On file with author).
[106] *See Parliamentary Groups,* WOLESI JIRGA.
[107] There is no evidence that the party members in the Assembly have even attempted to form their own parliamentary groups.

https://doi.org/10.6092/issn.2531-6133/10333

3.2. COMMAND AND CONTROL RULES

The true influence of party regulations depends on the level of incentive the rules offer for party development. As such, blocking regulations such as Article 35 of the Constitution, Article 9 of the Political Party Law, and Article 13 of the W.J. Rules of Procedure fall short of bringing about the desired party development.[108] These regulations are conventionally referred to as command and control rules since they offer no rewards or sanctions to modify parties' behavior or structure.[109] They merely set requirements about what parties should be like and what they should do. As Horowitz posited, such regulations function as aspirational provisions corresponding "to the illusion of a 'non-ethnic' society".[110]

Unlike the above regulations, as an aggregating regulation, article 9 of the Political Party Law imposes a sanction of suspension against parties that fail to meet the three qualification thresholds.[111] However, the question is whether the suspension of parties offer sufficient incentives to modify parties' behavior. The answer seems to be no, given the failure of party development in Afghanistan. As a sanction, party suspension has not been able to outperform patronage politics that tend to induce parties in the opposite direction. Most party elites have had access to patronage based on their ethnic affiliation and support. Suspension of parties targets their registration only and not their access to power, which is what the parties are interested in the most. More notably, after obtaining permanent registration, parties have even less incentive to nationalize. Even if they are suspended and deregistered, they can easily reregister.[112]

Additionally, Afghanistan's Political Party Law imposes a much higher burden on the Registrar Office than on parties to prove whether

[108] *See* Bogaards, *supra* note 26, at 60.
[109] *See Training Package - Module 5: Structure, Composition, and Role of an Energy Regulator*, United Nations Industrial Development Organization, https://www.unido.org/sites/default/files/2009-02/Module5_0.pdf.
[110] Matthijs Bogaards *Ethnic Party Bans and Institutional Engineering in Nigeria,* 17 Democratization 730, 741 (2010).
[111] Election Law, art. 9.
[112] *See* Political Party Law, art 12 (7).

https://doi.org/10.6092/issn.2531-6133/10333

the parties have met the requirements. The Registrar Office of the M.o.J. does not have regional agencies to investigate or monitor whether, for example, the parties have offices across twenty provinces to meet the office threshold for registration. The Registrar Office also lacks sufficient financial and human resources to launch regional investigations on whether parties have met such thresholds. In fact, the office has only four staff members, which is not enough even to process party registration in Kabul.[113] This overload of the under-resourced Registrar Office has allowed proto-parties to exist by simply claiming to have met or surpassed all of the required thresholds.

A party law has to provide sufficient incentives to help transform parties. In other words, the law should offer rewards or sanctions greater than those offered by other formal or informal rules, and greater than those imposed by the same rule on the government for enforcement. A good example of a truly incentive-based rule is the constitutional amendment in Comoros that restrict parliamentary representation only to those parties that won at least two seats on each of the three islands that make up the republic.[114] Another example is that of Nigeria wherein a party can gain a full registration only if it wins at least five percent of the votes in twenty-four of thirty-six states.[115] With these regulations, the Registrar Offices do not have to bear any cost of investigating whether the party has met the requirement since compliance can be determined by the electoral results. Since parties in these countries exist to compete in elections and win offices, these regulations provide sufficient incentives to encourage parties to seek support across regional and ethnic lines. In these countries, any party that neglects the importance of cross-ethnic support, is likely to lose the chance of entry into the parliament.

Generally, election-based thresholds tend to generate more incentives to shape party development than registration thresholds like those set by the Afghan Party Law. The registration thresholds normally

[113] It was brought up by the head of the Registrar Office in an interview (on file with author).
[114] *See* Bogaards, *supra* note 26, at 53.
[115] *Id.*, at 54.

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impose suspension, denial of registration, and de-registration while the election-based thresholds put the electoral participation of parties at stake. The following table (Table 5.1) shows different types of party regulations and their incentivizing potentials. These potentials are illustrated in Table 5.2 with examples and the colors of the designated numbers: white (close to zero incentives), blue (insufficient incentives), and brown (sufficient incentives).

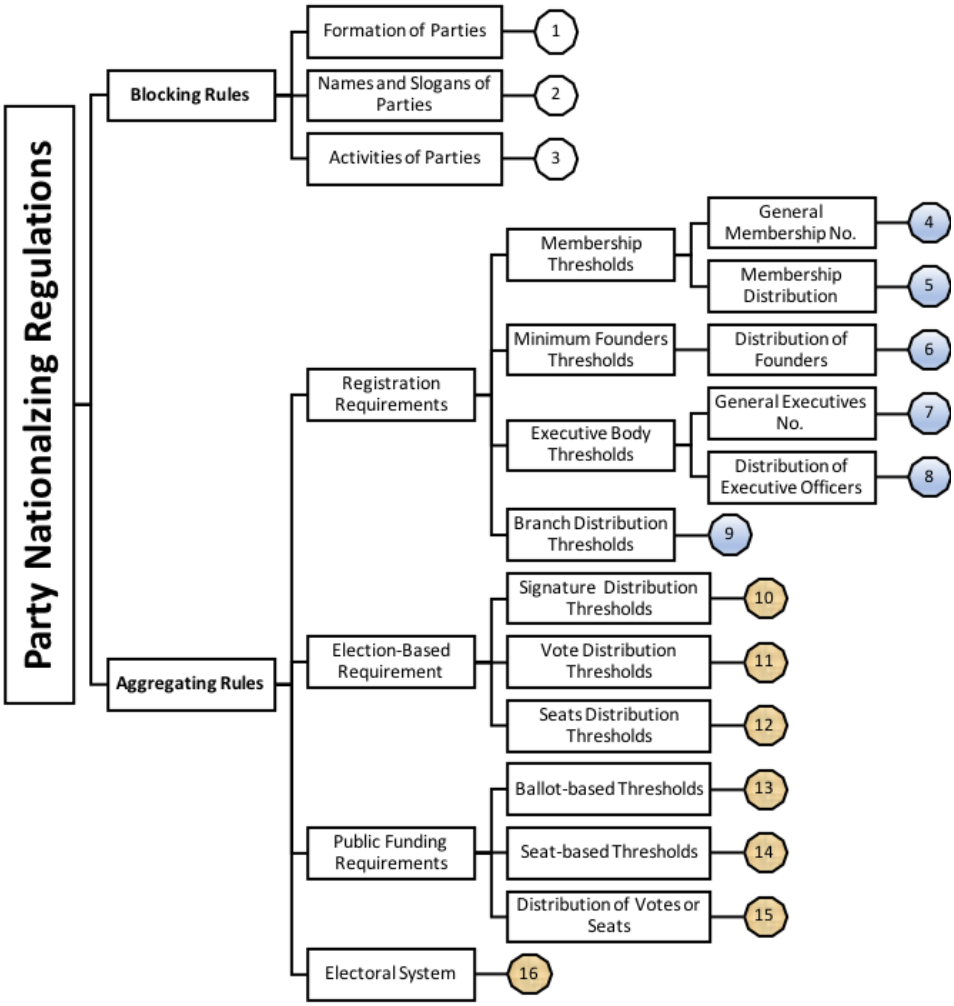

Table 5.1

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1	• Afghan Con. Art. 35: a party cannot be formed on the basis of ethnicity.
2	• Ghanaian Party Law, Art 9(e): the party's name, emblem, colour, motto or any other symbol has not ethnic, gender, regional, religious or other sectional connotations...
3	• Afghan Party Law , Art. 6: a party cannot incite to ethnic and other forms of discrimination.
4	• Afghan Party Law, Art. 9: to avoid deregistration or suspension, a party must have at least 10,000 members.
5	• Tanzanian Party Law, Art. : a party must have 200 members from each of 10 regions.
6	• Afghan Party Law, Art. 9(1): a party must have at least 35 founders from 20 provinces.
7	• Sirra Leone, Party Law: a party must have xecutive members not from one ethnic group only.
8	• Nigerian Party Law, 203 (2, b): the executive committee or other governing body belong to different States not being less in number than two-thirds of all the States.
9	• Afghan Party Law, Art 9(2 amended): within a year of registration, a party must open offices in at least 20 provinces.
10	• Kenya, Political Parties Act, 7 (2, a): A provisionally registered political party shall be qualified to be fully registered [to be electable] if it has recruited as members, not fewer than one thousand registered voters from each of more than half of the counties;
11	• Nigerian Election law: to gain a permanent registration, a party must gain a least 5% of the vote in 24 of 36 states.
12	• Comoros Con.Amend.: parliamentary representation is restricted to parties that win at least two seats on each of three islands that make up the republic.
13	• Malawi Con. Art. 40(2): any political party that can win over one-tenth of votes nationwide can receive public funds.
14	• Burundi Con. Art. 84: the government provides public funds to parties proportional to their seats in the legislature.
15	• Not yet.
16	• Papua New Guinea Election Law, Art. 65(1): A ballot-paper shall have three spaces or boxes for a voter to indicate his preferences-1,2, and 3--either by the prescribed candidate identification number or by candidate name.

Table 5.2

https://doi.org/10.6092/issn.2531-6133/10333

3.3. LAWS OF NOT THE EMERGING COALITIONS

The prospect for the emergence of a broad coalition system has attracted little attention among Afghan lawmakers. The Afghan Constitution has no provisions dealing with political coalitions of any kind. The Election Law has only four references to coalitions referring to them merely as groupings of parties rather than as emerging distinct entities requiring a regulatory framework of their own. Specifically, in all four articles, the word coalition is used in the context of "parties or coalitions of parties", implying that coalitions are extensions of parties.[116] Therefore, the Afghan Election Law seems to have given prominence to parties over coalitions, whose very existence the law considers to be based on collaboration of parties.

The emerging coalitions in Afghanistan, however, have been far beyond the alliance of merely ethnic, proto-parties. Although most coalitions have a core of a few prominent elites, they are indeed an amalgamation of party factions, civil society groups, cleric circles, village elders, district councils, sports clubs, women societies, and art associations as well.[117] In practice, Afghan coalitions are far larger, more participatory, and grassroots-based than alliances of some unpopular ethnic parties. Also, cross-ethnic coalitions have emerged in Afghan elections to replace the unpopular, ethnic parties than to bring them together.[118] Presidential elections in particular, while experiencing disintegration of ethnic parties, have witnessed the rise of cross-ethnic coalitions as viable alternatives.[119] In order to win a required minimum of fifty percent votes, viable presidential candidates have been compelled to form cross-ethnic coalitions instead of relying on ethnic parties.[120] To

[116] ELECTION LAW, art. 4, 9, 27, 105.
[117] *See* Mohammad Bashir Mobasher, *Understanding Ethnic-Electoral Dynamics: How Ethnic Politics Affect Electoral Laws and Election Outcomes in Afghanistan,* 51 GONZ. L. REV. 355 (2016).
[118] *See* Mohammad Bashir Mobasher, *Electoral Choices, Ethnic Accommodations, and the Consolidation of Coalitions: Critiquing the Runoff Clause of The Afghan Constitution*, 26 WASH. INT'L L. J. 413 (2017).
[119] *See id.*
[120] *See id.*

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build their coalitions, they have reached out to political groups and communities beyond parties and their factions.[121] The most inclusive coalitions have indeed been the most viable ones. President Karzai, President Ghani and C.E.O. Abdullah have all formed larger coalitions than other candidates, by including elites and communities of different ethnic backgrounds.[122] The ever growing political prominence of these coalitions, however, has remained unappreciated in the laws of Afghanistan.

The Afghan Political Party Law has only a single reference to coalitions.[123] Similar to the election law, the single reference to coalitions in the Political Party Law has a rather party-oriented approach. Article 12 of the Political Party Law provides that, "A registered political party shall enjoy [the ability to join or form a] . . . permanent or temporary political alliance or coalition with other political parties".[124] It has not set any particular legal framework as to whether the coalitions should register for elections, have logos, or even be cross-ethnic. As a result, while some coalitions have formed officially with titles, symbols, and constitutions, others have functioned merely as political networks and clientalistic groups. Ironically, unlike the proto-parties that have to expand in a manner which is formal, cross-ethnic, and programmatic according to the law, coalitions are free to be either formal or informal, ideologue or clientalistic, financially sovereign or puppet organizations.

Nonetheless, the most viable coalitions in Afghanistan have demonstrated that they are better positioned than parties to earn the support and votes of different ethnic groups. This is primarily because they are formed by equally important elites and factions from different groups. Since their interests are likely to be protected in such cross-ethnic coalitions, different ethnic groups are willing to endorse them. Additionally, these coalitions provide a constructive environment

[121] *See* Mobasher, *supra note* 119, 355.
[122] *See id.*
[123] Political Party Law, art. 12.
[124] *Id.*, art. 12.

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for inter-ethnic dialogue, especially when all negotiating partners share the goal of winning and governing, for which they need to make concessions and compromises.[125] Institutionalizing coalitions will further engage these partners in inter-ethnic dialogue. In his seminal work, *Ethnic Groups in Conflict*, Donald Horowitz suggested that inter-ethnic dialogue at the coalition level helps depoliticize ethnicity at the national and governmental levels.[126] Coalition-building by its very nature tends to minimize ethnic politics even though ethnic talks may dominate negotiations within coalitions.[127]

Afghanistan's existing proto-parties are not any more institutionalized than the emerging coalitions. Afghan parties have traditional structures and bureaucracies centered around single leaders.[128] They do not hold general assemblies regularly—or even once, in most cases.[129] They lack modern institutional and functional features, and most importantly, they are isolated from the electoral and political scenes.[130] Most members of political parties run as independents in both presidential and parliamentary elections, only to declare their party affiliations after elections.[131] Even then, shares of parties in the W.J. decreased from 62.4% seats in 2005 to 37.6% seats in 2010.[132] The number of truly independent M.Ps. almost doubled in 2010.[133] Parties have been even less relevant to presidential elections in Afghanistan since no party has engaged in a solo campaign in any of the last three presidential elections. It is true that the emerging coalitions are unstable

[125] *See* Danielle Resnick, *Do Electoral Coalitions Facilitate Democratic Consolidation In Africa?* 5/19 Party Politics 736-747, 739 (2011); *see also* M. A. Mohamed Salih and Per Nordlund, *Political Parties in Africa: Challenges for Sustained Multiparty Democracy*, International IDEA Research and Dialogue Coordination (2007) http://www.idea.int/sites/default/files/publications/political-parties-in-africa-challenges-for-sustained-multiparty-democracy.pdf.
[126] Donald L. Horowitz, Ethnic Groups In Conflict 419 (2nd Ed., 2001).
[127] *See* Herbert Kitschelt, *The Formation of Party Systems in East-Central Europe,* 20/1 Politics and Society 7-50, 20 (1992).
[128] *See* Ibrahimi, *supra note* 7, at 10.
[129] *See id.*
[130] *See id.,* at 5.
[131] *See* Reynolds & Carey, *supra* note 64, at 9; ICG, *supra* note 64, at 5.
[132] Reynolds & Carey, *supra* note 64, at 10.
[133] *Id.*

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and clientelistic, but so are the proto-parties. In terms of inclusiveness, however, the emerging coalitions come closer to the objective of Article 35 of the Constitution than proto-parties.[134]

Afghanistan is not a unique case in which party laws have failed to regulate coalitions effectively. Although most democratizing states witness the emergence of cross-ethnic coalitions, their laws have failed to grasp an appreciation for these coalitions. As Table 6 indicates, very few countries on the list have set a legal framework for coalitions in their constitutions (six countries), election laws (four countries), and party laws (five countries).

Coalitions (+Mergers) in Party Laws of Eleven Countries								
Country	In Con.		In EL		In PPL		Total	
	No. of References	No. of Articles	No. of References	No. of Articles	No. of References	No. of Articles	References	Articles
Ghana	2 (+1)	1	0	0	4(+3)	1(+1)	10	4
Kenya	4	4	0	0	33(+19)	11	56	15
Philippines	4	3	14(+3)	2	10(+1)	4	32	9
Nigeria	2 (+2)	2	(+16)	(+2)	0	0	20	4
Burundi	2	2	4	3	13(+3)	5	22	10
Indonesia	2	2	0	0	(+3)	2	5	4
Bolivia	0	0	10	7	47(+16)	26	73	33
Sierra Leone	0	0	2	1	1(+6)	1	9	2
Afghanistan	0	0	4	4	1	1	5	2
Sri-Lanka	0	0	0	0	0	0	0	0
Tanzania	0	0	0	0	0	0	0	0
Malawi	0	0	0	0	0	0	0	0

Table 6: Political coalitions and merger of parties in party laws of twelve countries.[135]

Among these countries, the constitutions of only Nigeria and Ghana refer not only to political coalitions but also merger of parties.[136] Only the Philippines, Nigeria, and Bolivia have more references to coalitions and mergers of parties in their election laws than Afghanistan.[137] Even so, these countries have not provided sufficient legal framework to help consolidate cross-ethnic coalitions. Except for Kenya and Bolivia, no country in the Table offers public fund or requires registration of coalitions because they do not consider coalitions to be permanent or structurally independent from political parties. The laws have instead

[134] Qanun Assassi Jumhuri Islamai Afghanistan [The Constitution of the Islamic Republic of Afghanistan], 2004, art. 35 (the "formation and operation of a party on the basis of ethnocentrism, regionalism, language, as well as religious sectarianism shall not be permitted").

[135] *Supra* note 76; *supra* note 77; *infra* 156.

[136] The Constitution of Ghana, 1992, art. 97; The Constitution of Nigeria (1999), art. 68, 109.

[137] Philippine: The Political Party Development Act of 2007 (2007); Bolivia: Ley De Partidos Politicos [Political Party Law] (1999); Nigeria: Election Act (2010).

https://doi.org/10.6092/issn.2531-6133/10333

focused on transformation of parties, which probably explains why the laws have suffered failures in most cases.

Analyzing party regulations in five African countries, Denis D. Kadima posited that "the laissez-faire approach to [electoral coalitions] has made such grouping dysfunctional".[138] He criticized party laws for focusing too much on parties without producing an optimal outcome.[139] Kadima argued that despite the abundance of laws encouraging the nationalization of parties, ethnic parties tended to exist and even flourish.[140] Other studies have brought to light the failure of party regulations to transform unpopular, proto-parties in South America,[141] Eastern Europe,[142] Southeast Asia,[143] East Africa,[144] and other African countries.[145] In his book, *Political Parties in Conflict-Prone Societies,* Benjamin Reilly concluded that in most cases party laws have functioned as aspirational provisions, lacking real enforcement measures.[146]

[138] Denis K. Kadima, *Party Regulations, Nation-building, and Party Systems in Southern and Eastern Africa, in* Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development, 201 (Benjamin Reilly & Per Nordlund, eds., 2008).
[139] *Id.*
[140] *Id.*
[141] *See* Marta Lagos, *How People View Democracy: Between Stability and Crisis in Latin America*, J. Dem., Table 4, (Jan, 2001).
[142] *See* Richard Rose and Christian Haerpfer, *New Democracies Barometer V: A 12-Nation Survey,* Studies in Pub. Pol'y, 59-62, 206 (1999).
[143] *See* Bogaards, *supra* note 26, at 60; *see also* Aurel Croissant & Philip Volkel, *Party System Types and Party System Institutionalization: Comparing New Democracies in East and Southeast Asia*, Party Politics, 2/18, 248 (2012) (Partisanship has a much lower rate in Southeast Asian countries. For example, party roots in the society is 30% in Indonesia, 54% in Philippines, 41% in Thailaind, 57% in Taiwan, and 73% in South Korea... "the results of the Asian Barometer Survey (2005–07) show that the percentage of party members is low across most countries: 0.3 percent of respondents in Thailand, 0.5 percent in the Philippines, 1.2 percent in South Korea, 1.6 percent in Taiwan and 2.2 percent in Indonesia. Again, Mongolia is the exception here with 24.2 percent").
[144] *See* Moroff, *supra* note 63, at 750, 762 ("In sum, in the three countries, results for P.N.S. do not point to a clear effect of the party laws in favour of parties with a more national support base. Banning particularistic parties and requiring parties to have members all over the country clearly does not translate into a nationwide following for these parties. Almost all opposition parties in the three East African countries therefore failed to mobilize support nationwide, no matter if they fulfilled the strict representation requirements, as in Tanzania and Uganda, or if they did not, as in Kenya").
[145] *See* Anika Moroff, *Party Bans in Africa: An Empirical Overview,* 17 Democratization 618–41. (2011).
[146] Benjamin Reilly, *Introduction* to Ingrid van Biezen et al., Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development 12 (Benjamin Reilly & Per Nordlund, eds., 2008).

https://doi.org/10.6092/issn.2531-6133/10333

While critics and proponents have debated the need and efficacy of banning regulation of ethnic-based parties, none has pointed to the importance of a proper legal framework for the emerging cross-ethnic coalitions. A legal framework to promote cross-ethnic coalitions is more effective than a law aiming to transform political parties. Under the current laws in Afghanistan, building new cross-ethnic parties is too difficult since the thresholds are too high for them to meet. Older ethnic parties are too difficult to transform since the institutional incentives are too weak to compensate for their past violence, constituency shifts, and benefits. Unlike a new party, an emerging cross-ethnic coalition can easily meet the thresholds and, unlike an old ethnic party, a cross-ethnic coalition does not need to transform into something else (larger). Emerging cross-ethnic coalitions only need a proper legal framework to incentivize sustainability and consolidation. An appropriate legal framework would and should focus more on promoting cross-ethnic coalitions through public funding, electoral advantages, and registration requirements than on banning proto-parties or requiring their transformation.

4. REFORMING AFGHAN PARTY LAWS

It is important that the laws should first recognize and regulate coalitions. Then, the laws should provide some financial and electoral advantages to cross-ethnic coalitions and parties over ethnic parties. In other words, they must raise the cost for ethnic parties and the prize for cross-ethnic coalitions. This section first explains the importance and effects of formal recognition and public funding of cross-ethnic coalitions and parties. Next, it proposes some additional regulatory designs that have been used to institutionalize parties, but which also can be used to promote cross-ethnic coalitions.

https://doi.org/10.6092/issn.2531-6133/10333

4.1. RECOGNIZING AND PROMOTING THE EMERGING COALITIONS

Article 35 of the Afghan Constitution was meant to encourage ethnically inclusive parties, an objective that is better met by the emerging coalitions than by existing proto-parties.[147] Cross-ethnic coalitions are formed primarily to aggregate broad-based support to win elections. Ethnic parties, however, exist to serve a different purpose and interest: mobilizing ethnic groups, encouraging communal action, and gaining power or patronage on behalf of their groups.[148] Therefore, promoting the emerging coalitions is an incremental step to achieving the objective of Article 35.[149]

Adopting a legal framework that primarily entails registering cross-ethnic coalitions would likely encourage coalitions to become something more than just a gentlemen's agreement. In addition to registration thresholds, the political laws may include an electoral threshold, where only registered, qualifying coalitions can win offices in national elections. As indicated earlier, electoral thresholds generate more incentives than registration thresholds. Electoral thresholds may be based on the performance of coalitions in the past elections to promote their sustainability as well as based on their distribution of offices, votes, candidates, or seats across provinces to promote their inclusiveness. These measures have popularly been used in some countries to encourage nationalization of parties. In many countries, the law requires registration of parties before every election, although in those countries the electoral commission rather than a government body is responsible for registration and monitoring parties.[150]

[147] Qanun Assassi Jumhuri Islamai Afghanistan [The Constitution of the Islamic Republic of Afghanistan], 2004, art. 35 (the "formation and operation of a party on the basis of ethnocentrism, regionalism, language, as well as religious sectarianism shall not be permitted").
[148] *See* Horowitz, *supra* note 127, 291-295.
[149] Qanun Assassi Jumhuri Islamai Afghanistan [The Constitution of the Islamic Republic of Afghanistan], 2004, art. 35.
[150] *See generally* Johanna Kristin Birnir, *Party Regulation in Central and Eastern Europe and Latin America: The Effect on Minority Representation and the Propensity for Conflict*, *in* Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development 159 (Benjamin Reilly & Per Nordlund, eds., 2008).

https://doi.org/10.6092/issn.2531-6133/10333

Switching the responsibility of registration from the M.o.J. to the electoral commission would lead to effective registration and monitoring of parties and coalitions. An electoral commission is better positioned than the M.o.J. to evaluate and incentivize the development of cross-ethnic coalitions and parties for several reasons. First, by running elections regularly, electoral commissions are better-positioned to generate incentives for institutionalization of cross-ethnic coalitions and parties through setting electoral, administrative, and procedural rules than the M.o.J.'s Registrar Office. Second, unlike the Registrar Office of the M.o.J., the electoral commission has branches in all provinces and districts, allowing the commission to make assessments about coalitions and parties across provinces without bearing considerable financial and transportation costs. And finally, a registrar's office under an electoral commission is more independent and less susceptible to the government's policy towards parties and coalitions than a Registrar Office under the M.o.J..

Many countries have transferred the responsibility of party registration from executives to their electoral commissions.[151] Table 7 indicates that only four of twelve countries, including Afghanistan, have authorized an executive body for the registration of parties. In six countries, their electoral commissions manage party registrations. In Indonesia, both the Ministry of Human Rights and the electoral commission are responsible for the registration of parties and coalitions in two different stages: registration as a party and registration as an electoral party, which is to allow a party to compete in an election.

[151] *See, e.g.*, Moroff, *supra* note 63, at 750, 757.
[152] *Ghana: Party System and Campaigning*, EISA, https://www.eisa.org.za/wep/ghapartiessystem.htm (last updated Dec., 2012); *see also* Nigeria: Election Act (2010); Philippine, The Political Party Development Act of 2007 (2007) Sec. 6, https://www.senate.gov.ph/lis/bill_res.aspx?congress=15&q=SBN-3214; Indonesia, Nomor 2 Tahun 2008 Tentang Partai Politik [Law Number 2 Of 2008 On Political Parties] (2008), art. 2 and 3; Law On The General Election Of Members Of House Of Representatives, People's Representatives Council And Regional House Of Representatives (2012), art. 14; Bolivia: LEY No. 1983 LEY DE PARTIDOS POLITICOS [THE POLITICAL PARTY ACT], 1999, art. 5.

https://doi.org/10.6092/issn.2531-6133/10333

Country	Party Registrar Body *in*	Registration Tiers	
Kenya	Electoral Commission	Provisional Registration	Full Registration
Nigeria	Electoral Commission	Provisional Registration	Full/Electoral Registration
Sierra Leone	Independent	Provisional Registration	Full Registration
Ghana	Electoral Commission	Provisional Registration	Ful Registratior
Philippines	Electoral Commission	Full Registration	Electora Registration
Indonesia	Min./Electora Commission	Full Registration	Electora Registration
Tanzania	Executive	Provisional Registration	Full Registration
Burundi	Executive	Single Tier Registration	
Malawi	Executive	Single Tier Registration	
Afghanistan	Executive	Single Tier Registration	
Sri-Lanka	Electoral Commission	Single Tier Registration	
Bolivia	Electoral Commission	Single Tier Registration	

Table 7: Party Registrar Offices and registration processes of twelve divided societies.[152]

Countries have adopted different approaches to party registration. In some countries, including Afghanistan, there is only a single phase of party registration. Other countries, like Kenya, Ghana, and Tanzania, require a registration process that has two phases: provisional registration and full registration.[153] Provisional registration allows parties to recruit members, hold public meetings, have access to media, introduce their programs, and publicize the party. However, to participate in an election, conduct campaigns, or support candidates, parties need full registration. This may require different sets of conditions to be met by the parties. In Kenya, for example, a party must have a name that is not offensive, excessively long, or resembling the name of another registered party.[154] For full registration, however, the party must have a minimum of two hundred voters in each province, a governing member from each province,[155] and a founding member from each district.[156] Some countries like Indonesia require an additional electoral registration of parties in each election, for which the parties must meet certain electoral thresholds.[157]

[153] *See Ghana: Party System and Campaigning*, EISA, https://www.eisa.org.za/wep/ghapartiessystem.htm(last updated Dec., 2012).
[154] *See* Political Parties Act (2007), art. 20.
[155] *See Id.*, art. 23(1)(a)-(c), (Political Parties Act 2007, 23(1)(a)-(c)).
[156] *See Id.*,art. 23(1)(a)-(d), (Political Parties Act 2007, 23(1)(a)-(c))
[157] *See* Law On The General Election Of Members Of House Of Representatives, People's Representatives Council And Regional House Of Representatives (2012), art. 14.

https://doi.org/10.6092/issn.2531-6133/10333

4.2. PUBLIC FUNDING OF CROSS-ETHNIC COALITIONS AND PARTIES

Public funding of political coalitions is vital to their survival. One reason that coalitions in Afghanistan have not been sustainable is because of the lack of financial support. This is particularly true in the case of opposition coalitions that lack the resources to survive between elections, let alone institutionalize. As of now, the only provision about public funding is Article 15 of the Political Party Law. Article 15 states that parties can use "[s]ubsidies by the government in connection with elections".[158] The law seems to have excluded coalitions from public funding. In practice, neither coalitions nor parties have received any public funds.[159]

Afghanistan is not the only case where party laws have neglected to provide for public financing of political coalitions. Although most countries provide public funds to political parties, they are reluctant to do the same for political coalitions. The only two countries under study in this article that provide public funding for coalitions, at least on paper, are Kenya and Bolivia (see Table 7).[160] However, a study by Ingrid van Biezen in 2007 indicated that the governments provide subsidies to parties in over 77% of consolidated democracies and 73% of democratizing societies.[161] Malawi not only requires public funding of parties by a constitutional provision but also ensures that fund to be drawn from 0.25% of the national revenue.[162]

[158] Qanun-i-Ahzab Siassi [Political Party Law], 2003, art. 15.
[159] This information was obtained through interviews with leaders of political parties and coalitions (on file with author).
[160] *See Ghana: Party System and Campaigning*, EISA, https://www.eisa.org.za/wep/ghapartiessystem.htm (last updated Dec., 2012); see also Bolivia: Ley De Partidos Politicos [Political Party Law], 1999, art. 5.
[161] Ingrid van Biezen, *Party Regulation and Constitutionalization: A Comparative Overview, in* Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development 34 (Benjamin Reilly & Per Nordlund, eds., 2008).
[162] *See* The Constitution of the Republic of Malwai, 1994, art. 40(2).

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Country	Do Parties Receive Direct Funding?	When Receive Pub. Funding?	Why Parties Receive Pub. Funding?	What is the Threshold for Funding?	Free Media Access?
Indonesia	Direct	Election	Campaign Activities	Performanc at Previous Election	No
Bolivia	Direct and Indirect	Elections Between Elections	1. Campaign Activities 2. Other	Performanc at Previous Election	Yes
Malawi	Direct and Indirect	Elections	Campaign Activities	Number of Candidates Present	Yes
Sri_Lanka	Direct and Indirect	Election	Campaign Activities	Equal Funding	Yes
Cyprus	Direct and Indirect	Between Elections	N/A	N/A	N/A
Burundi	Direct and Indirect	Between Elections	Campaign Activities, Other	Number of Candidates Present	No
Kenya	Direct and Indirect	Elections/Between Elections	Campaign Activities, Other	Equal Funding	No
Sierra Leone	Indirect	N/A	N/A	Equal Time	Yes
Ghana	Indirect	N/A	N/A	Equal Time	Yes
Nigeria	Indirect	N/A	N/A	N/A	No
Philippines	No	N/A	N/A	N/A	No
Afghanistan	No	N/A	N/A	N/A	No

Table 8: Direct and indirect funds that parties receive in tweleve countries including Afghanistan.[163]

For the most part, public funding of parties has primarily been aimed at levelling the playing field and providing equal opportunity to all parties.[164] However, this cannot be the aim in Afghanistan, where the intention is to reduce party fragmentation and encourage broad-based coalitions. The latter goal requires the use of public funding to marginalize ethnic proto-parties while giving an edge to broad-based and inclusive coalitions. For this very reason, the laws need to set high thresholds so that only large and broad-based coalitions can receive funds. These thresholds should include (a) longevity of coalitions to encourage their stability, (b) a specified number of seats in the Assembly to strengthen their discipline, (c) and regional representation of parties and coalitions to promote their inclusiveness.

Some of these thresholds have been used in different countries although with regard to parties and not coalitions. For instance, in Malawi, any political party that can win over one-tenth of the votes nationwide can receive public funds from the government.[165] In Burundi the government is required to provide public funds proportional to parties' seats in the legislature.[166] Similarly, public funding in Germany,

[163] *Id.*, at 209-215.

[164] *See id.* at 14; Cass R. Sunstein, *Paradoxes of the Regulatory State,* 57 U. Chi. L. Rev. 407, 412 (1990).

[165] *See* The Constitution of Malwai,1994, art. 40 (2) ("The State shall provide funds so as to ensure that, during the life of any Parliament, any political party which has secured more than one-tenth of the national vote in elections to that Parliament has sufficient funds to continue to represent its constituency") Political Party Act, 2011, art 25(2)(b) ("A party is not eligible for public funding if more than 2/3 of its elected officials are of one gender").

[166] *See* La Constitution Du Burundi [The Constitution of Burundi], 2005, art. 84. ("To the end of promoting democracy, the law may authorize the financing of the political

https://doi.org/10.6092/issn.2531-6133/10333

Austria, Sweden, and Nordic countries depends on the presence of parties in the legislatures.[167] In the United Kingdom, financial aid is provided to parties for the purpose of policy research.[168]

5. OTHER MEASURES:

5.1. W.J. RULES OF PROCEDURE AND PARLIAMENTARY PARTIES AND COALITIONS

The W.J. Rules of Procedure is a potentially important body of party laws, even though it does not have a single provision about parties or coalitions. It is an important body of party laws because students of party studies have conventionally given special consideration to parliamentary parties and coalitions. The analyses of party systems, party institutionalization, and effective number of parties are primarily based on measuring parliamentary parties and coalitions. In spite of that, however, in the literature, as well as in practice, few have advocated for well-designed Rules of Procedure to foster parliamentary parties and coalitions. Nonetheless, if designed properly, the Rules of Procedure can bring great discipline to parliamentary parties and coalitions.

In fact, one reason for the failure of undisciplined parties and the prevalence of personalistic politics in the Wolesi Jirga is that the W.J. Rules of Procedure have no provisions with regard to parties and their functions in the Assembly.[169] Likewise, the Rules of Procedure have failed to regulate coalitions, merger of parties, or their splits in the assembly.

parties in an equitable manner, proportionally to the number of seats that they hold at the National Assembly. This financing may apply both to the functioning of the political parties and to the electoral campaigns, and must be transparent. The types of subventions, advantages and facilities that the State may grant to the political parties are established by the law").

[167] *See* Fritz Plasser and Gunda Plasser, Global Political Campaigning: A Worldwide Analysis of Campaign Professionals and Their Practices, 159 (2002).

[168] *See* Biezen, *supra* note at 162, at 35.

[169] The Rules of Procedure has no reference to political parties or coalitions at all while the regulation has twenty-eight references to parliamentary groups. Chapter five of the Rules of Procedure is about parliamentary groups with four articles. *See* The Rules of Procedure, Wolesi Jirga [Afghanistan House of The People], 2017, Rule 18.

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Instead, the Rules provided for a new political group called, parliamentary groups. However, parliamentary groups have failed to take hold in Afghanistan as much as parties, and coalitions have failed to hold their representatives together in blocs in the W.J..

One reason for the failure of parliamentary groups, coalitions, and parties to function cohesively is the way the legislators vote on policies and laws. Although public voting is required on principle by the rules of procedure,[170] it is performed mostly by showing hands and cards. The names of those voting for or against a policy is not recorded. Specific places in the legislature have not been designated for these political groups. Even though the new hall of the parliament is equipped with screens for electronic voting, legislators have refused to use it mainly to keep their voting hidden in the crowd. Therefore, the Rules of Procedure should allow for and even require recording of M.Ps.' votes so that M.Ps. of the same coalition or party are compelled to vote along the same line of policies or draw attention to the fact that they have voted against their coalition.

5.2. ANTI-SWITCHING PROVISIONS

For cross-ethnic coalitions to sustain, an effective political law should provide incentives for coalitions to remain functional and cohesive beyond elections. W.J. Rules of Procedure and other regulations can achieve this end by incorporating anti-switching provisions: mandating the removal of W.J. members from an office as soon as those members decide to disassociate from their parties or coalitions. Many new democratizing societies have adopted anti-switching laws to promote party discipline in their legislatures. As Table 8 indicates, in eight out of ten countries, legislators may lose their seats as soon as they disaffiliate from their parties or coalitions. Similar provisions exist in other diverse

[170] *See* RULES OF PROCEDURE (2017), Rule 64, 65, 66.

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societies such as South Africa,[171] Mozambique,[172] Brazil, Fiji, India, Papua New Guinea, Thailand,[173] Belize, Namibia, Nepal, Singapore, and Zimbabwe.[174]

Country	Constitution Year	Anti-Switching Provision
Indonesia	1945	Yes
Sri-Lanka	1978	Yes
Philippines	1987	Yes
Sierra Leone	1991	Yes
Ghana	1992	Yes
Malawi	1994	Yes
Nigeria	1999	Yes
Afghanistan	2004	No
Burundi	2005	Yes
Bolivia	2009	No
Kenya	2010	Yes

Table 9: Rules on whether a party/coalition associate can defect his or her party once elected.[175]

Some scholars have expressed concerns that anti-switching provisions may encourage independent candidates, which in turn discourage party/coalition development.[176] For instance, in Malawi the existence of an anti-switching provision[177] incentivized more candidates to run as independents.[178] Nonetheless, such provisions may discourage party/coalition development only when individual candidates have the option of running as independent candidates under the election law. Why would a candidate choose to run as a party nominee if he or she later loses his or her seat because of voluntary party disaffiliation? In Malawi, the

[171] See, *e.g.*, Denis Kadima, *Party Coalitions in Post-Apartheid South Africa and their Impact on National Cohesion and Ideological Rapprochement, in* The Politics of Party Coalitions in Africa, 69 (Denis Kadima, ed., 2006).

[172] *See, e.g.*, Denis Kadima & Zefanias Matsimbe, *RENAMO União Eleitoral: Understanding the Longevity and Challenges of an Opposition Party Coalition in Mozambique, in* Politics of Party Coalitions in Africa 149 (Denis Kadima ed., 2006) ("The amendment of 65 of the Constitution to provide for the expulsion from Parliament of any MP who associates with any party or grouping other than that which sponsored his or her parliamentary campaign").

[173] *See* Reilly, *supra* note 147, at 15.

[174] *See* Janda, *supra* note 27, at 24.

[175] *Supra* note 76.

[176] *See, e.g.*, Lise Rakner & Nicolas van de Walle, *Opposition Weakness in Africa,* J. Democracy, July 2009, at 108, 121 (2009).

[177] The Constitution of Malwai, 1994, art. 40 (2) ("The Speaker shall declare vacant the seat of any member of the National Assembly who was, at the time of his or her election, a member of one political party represented in the National Assembly, other than by that member alone but who has voluntarily ceased to be a member of that party and has joined another political party represented in the National Assembly").

[178] *See* Rakner & van de Walle, *supra* note 177.

https://doi.org/10.6092/issn.2531-6133/10333

law does not require party affiliation for parliamentary candidates.[179] Therefore, it is no wonder that anti-switching provisions have indeed favored personalistic politics rather than party discipline there.

A similar effect could result in Afghanistan if an anti-switching provision were adopted within the existing Election Law since neither the law nor S.N.T.V. requires party affiliation for parliamentary candidates. However, the law could have a different impact if a mixed system were adopted, where for the P.R. elections, only parties could field candidates. The adoption of an anti-switching rule along with a mixed system (S.N.T.V.-P.R.), which has been proposed by a number of scholars and organizations, would be expected to bring some discipline within parties and coalitions in Afghanistan.[180]

6. CONCLUSION

Party laws have traditionally been meant to gatekeep party proliferation while promoting party institutionalization.[181] Party laws deal with parties' legal status, definition, registration requirements, finance, and even internal organization.[182] As such, some scholars have suggested that party laws have an important influence on party development in a divided society.[183] However, this contribution of the party law has yet to be seen in most divided societies which are still struggling to build a functional

[179] *See* Denis Kadima and Samson Lembani, *Making, Unmaking and Remaking Political Party Coalitions in Malawi: Explaining the Prevalence of Office-Seeking Behaviour, in* THE POLITICS OF PARTY COALITIONS IN AFRICA (ed., Denis Kadima, 2006).

[180] *See* Reynolds & Carey, *supra* note 64, at 18-21; ASADULLAH SA'ADATI, ET. AL. ELECTORAL REFORM: A REPORT ON THE STUDIES, PERFORMANCE, RECOMMENDATIONS OF THE SPECIAL ELECTORAL REFORM COMMISSION, 100-111 (2016).

[181] *See* F. Casal-Bértoa, D. R. Piccio & E. R. Rashkova, *Party Law in Comparative Perspective* (The Legal Regulation of Political Parties, Working Paper No. 16, 2012), http://www.partylaw.leidenuniv.nl/uploads/wp1612.pdf.

[182] *See* Dan Avnon, *Parties Laws in Democratic Systems of Government*, J. OF LEGIS. STUD. 287 (1995).

[183] *See, e.g.*, Benjamin Reilly, *Political Stability and Party Law in New Democracies* 12 (International Political Science Association Congress, Seminar Paper, 2009), http://paperroom.ipsa.org/papers/paper_1084.pdf.

https://doi.org/10.6092/issn.2531-6133/10333

party system. After analyzing party laws in sixteen countries, Biezen and Rashkova concluded that, "in nine out of the 16 states, an increase in regulation does not correspond to a decrease . . . in the number of political contestants".[184] Benjamin Reilly posited that in most cases party laws have functioned as aspirational provisions.[185] Therefore, Afghanistan is not a unique case where despite some reforms party laws have failed to nationalize parties or consolidate some emerging cross-ethnic coalitions. By examining parties and party laws in Afghanistan, this article explains why party laws fail to produce their intended outcomes.

The failure of Afghan party laws has been due to the laws being drafted at times when political parties were unpopular, and they had the least influence in drafting Political Party Law. In fact, the laws were originally meant to weaken the extant parties without proper regulations to encourage new broader parties and coalitions. The extant parties were mostly *Jihadi* party who have been involved in civil war and ethnic violence for decades now.[186]

Intended for party nationalization, the blocking and aggregating regulations are insufficient because they are mostly command and control rules that offer little incentives for parties to reconfigure their politics, missions and organization. Additionally, the laws have remained indifferent towards cross-ethnic coalitions that tend to emerge particularly during the presidential elections. The general issue that this article finds in the literature and the laws is that both have over-emphasized on the arduous transformation of ethnic parties while neglecting the more feasible institutionalization of the already emerging cross-ethnic coalitions.

[184] I. Van Biezen & E. R. Rashkova, *Breaking the Cartel: The Effect of State Regulation on New Party Entry*, 14 (Economic and Social Research Council, Working Paper No. 12, Aug. 2011), http://www.partylaw. leidenuniv.nl/uploads/wp1211.pdf.
[185] *See* Reilly, *supra* note 147, at 12.
[186] *See* Reynolds & Carey, *supra* note 64, at 6; see also Barakzai, *supra* note 70, at 6.

 https://doi.org/10.6092/issn.2531-6133/10402

A Mistake of Natural Law: Sir William Blackstone and the Anglican Way

CRAIG A. STERN †

TABLE OF CONTENTS: 1. Introduction; 2. The *Commentaries* and the Commentators; 3. Blackstone and Justinian; 4.Blackstone and the Church of England; 4.1 Richard Hooker; 4.2 The Latitudinarians; 5. The Anglican Blackstone and the Natural Law; 6. Conclusion.

ABSTRACT: It is said that no book on the common law surpasses the importance of Sir William Blackstone's *Commentaries on the Laws of England*. But it is also said that the *Commentaries* is of questionable merit, with aspects of it downright incoherent. The most fundamental element of the *Commentaries* to attract this disparaging characterization is its discussion and use of what it usually calls "the law of nature" — and what we these days usually call "natural law." Does the *Commentaries* perpetrate a mistake — actually many mistakes — of natural law? This article answers that it is not the *Commentaries*, but rather its critics that perpetrate mistakes of natural law. The mistakes arise from the expectation that Blackstone's natural law would take after Thomas Aquinas's (or even Christopher St. German's) natural law. But readers of the *Commentaries* who allow Blackstone his own way with natural law will find it a valuable treatment that animates the whole. Blackstone's natural law owes much to two influences, Roman law and the Anglican Church. The second influence is the more distinctive and guides Blackstone's response to the first. Both led Blackstone to view the natural law as an order immanent in human law, an order especially prominent within the common law. Seen in this light, natural law provides the foundation for the *Commentaries* and a foundation for understanding law in our own day.

KEYWORDS: *Blackstone*; *Natural Law*; *Roman Law*; *Anglicanism*; *Law and Religion*

UNIVERSITY OF BOLOGNA LAW REVIEW

ISSN 2531-6133

[VOL.4:2 2019]

https://doi.org/10.6092/issn.2531-6133/10402

1. INTRODUCTION

"[P]erhaps the most important single book . . . in the history of the common law" is Sir William Blackstone's *Commentaries on the Laws of England* (hereinafter *Commentaries*).[1] No other book but the Bible had a greater role in generating American institutions[2] and the nineteenth century alone saw about one hundred American versions.[3] It is said that the *Commentaries* led early American courts to decide from principles, not precedents.[4] But it is said also that the *Commentaries* is of questionable merit,[5] with aspects of it downright incoherent.[6]

The most fundamental element of the *Commentaries* to attract this disparaging characterization is its discussion and use of what it usually calls "the law of nature."[7] "Natural law" is the term more frequently used these days for a transcendent legal order to which human law necessarily bears some relationship. Because Blackstone's concept of the "law of nature" is similar to that of contemporary "natural law," this article

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[1] DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW, at vii (Peter Smith 1973) (1941); *see also* Albert W. Alschuler, *Rediscovering Blackstone,* 145 U. PA. L. REV. 1, 2 (1996). The *Commentaries* was hugely popular in the eighteenth and nineteenth centuries. *See* WILFRID PREST, WILLIAM BLACKSTONE 307 (2008).

[2] *See* BOORSTIN, *supra* note 1, at iii; *see also* Alschuler, *supra* note 1, at 5-9; Joseph W. McKnight, *Blackstone: Quasi-Jurisprudent*, 13 SW L.J. 399, 411 (1959). The present article happens to highlight elements of the *Commentaries* that commended it to Americans of the Founding: "Even those who rejected Blackstone's anti-republican emphasis on parliamentary omnipotence . . . had no difficulty in accepting the validity of Blackstone's exposition of English common law as founded on custom, divine law, and the law of nature, hence providing an entirely appropriate legal foundation for the incipient USA." Wilfrid Prest, *General Editor's Introduction* to 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, at vii, xiv (Wilfrid Prest ed., Oxford Univ. Press 2016) (1765) (footnote omitted).

[3] *See* Wilfrid Prest, *Blackstone as Architect: Constructing the Commentaries*, 15 YALE J.L. & HUMAN. 103, 107-08 (2003).

[4] McKnight, *supra* note 2, at 401.

[5] *See* Emily Kadens, *Justice Blackstone's Common Law Orthodoxy*, 103 NW. U. L. REV. 1553, 1566 (2009).

[6] *See infra* notes 45-54 and accompanying text.

[7] Sometimes the *Commentaries* seems to use "natural law" or some similar term for the law of nature. *See infra* text accompanying notes 41-42. This seeming lack of uniformity and rigor in terminology certainly does not foster coherence in the *Commentaries*. On the other hand, Aquinas seems to do likewise. *See infra* note 33.

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often will use the latter term instead. In this parlance, the concern becomes the charge of incoherence in Blackstone's discussion and use of natural law. Does the *Commentaries* perpetrate a mistake — actually many mistakes — of natural law?

This article proposes that it is not the *Commentaries*, but rather its critics that perpetrate mistakes of natural law. The mistakes arise from the expectation that Blackstone's natural law would take after Thomas Aquinas's[8] (or even Christopher St.German's)[9] natural law. As Blackstone disappoints these expectations, he has met with criticisms that his treatment of natural law is a sloppy pro forma performance that even he himself does not take seriously. But readers of the *Commentaries* who allow Blackstone his own way with natural law will find it a valuable treatment that animates the whole of the *Commentaries*.

Blackstone's natural law owes much to two influences. The first is Roman law, especially as captured in the *Corpus Juris Civilis*.[10] The second is the Anglican church,[11] which is the more distinctive and guides Blackstone's response to the first. Both led Blackstone to view the natural law as an order immanent in human law, an order especially prominent within the common law. Seen in this light, natural law provides the foundation for the *Commentaries*. While doing so, it also provides a foundation for understanding law even today, a foundation actually in use far more than some might think.

[8] *See infra* notes 34-44 and accompanying text.
[9] In the early sixteenth century, St. German wrote *Doctor and Student*, "the first major law book published in English," "also the first purely analytical English law book," a work of "analytical theology and philosophy." Daniel R. Coquillette, The Anglo-American Legal Heritage: Introductory Materials 187-88 (2d ed. 2004). He drew in part upon Aquinas. Christopher Saint German, St. German's Doctor and Student, at xxiii-iv, li, lvi (T. F. T. Plucknett & J. L. Barton eds., 1975).
[10] *See infra* notes 55-96 and accompanying text.
[11] *See infra* notes 97-329 and accompanying text.

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2. THE *COMMENTARIES* AND THE COMMENTATORS

After unproductive struggles to develop a successful practice at the bar, Blackstone's professional life began to flourish with his Oxford lectures on the common law.[12] The *Commentaries* is not these lectures merely recast, delivered as they were to an audience of mere teenagers.[13] Nevertheless, the *Commentaries* is designed to teach and Blackstone wanted his readers to learn.[14] The readers for whom he wrote were "young nobility and gentry,"[15] the leading laymen of the realm.[16] Chief among these were those who were or would become legislators, and Blackstone was determined to instruct them not to harm by statute the liberties of Englishmen.[17]

Blackstone's aim to instruct lay readers shaped the *Commentaries*. This aim trained the focus of the *Commentaries* upon substantive rules of law, lending the *Commentaries* both its pathbreaking distinctive and also the daunting obstacle to its creation.[18] Blackstone's object was to teach laymen the laws of property, crimes, torts, and such — not how to draft legal instruments or plead at bar.[19] Beyond teaching the substance of the law to laymen, this substantive-law focus gave "lawyers a new vision of the law."[20] The *Commentaries* imposed order and a clarifying system on the

[12] *See* Douglas H. Cook, *Sir William Blackstone: A Life and Legacy Set Apart for God's Work*, 13 Regent U. L. Rev. 169, 172-173 (2000-01).
[13] *See* McKnight, *supra* note 2, at 400.
[14] *See* John H. Langbein, *Blackstone on Judging, in* Blackstone and his Commentaries: Biography, Law, History 65, 77 (Wilfrid Prest ed., 2009).
[15] David Lieberman, The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain 65 (1989).
[16] *See* Robert C. Berring, *The Ultimate Oldie But Goodie: William Blackstone's* Commentaries on the Law of England, 4 J.L. 189, 190 (2014). This is not to say that Blackstone disregarded the education of lawyers by means of his *Commentaries. See* David Lemmings, *Blackstone and Law Reform by Education: Preparation for the Bar and Lawyerly Culture in Eighteenth-Century England*, 16 Law Hist. Rev. 211, 215, 251-52 (1998); Prest, *supra* note 2, at ix.
[17] *See* Lieberman, *supra* note 15, at 56, 66.
[18] *See* S. F. C. Milsom, *The Nature of Blackstone's Achievement*, 1 Oxford J. Legal Stud. 1, 4, 6 (1981).
[19] *See id.* at 2, 5, 12.
[20] *Id.* at 10, 12; *see also* Lemmings, *supra* note 16, at 243, 252.

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jumble that was English law.[21] This arrangement was a key to its success.[22] It is Blackstone's use of natural law that undergirds this arrangement.[23]

Near the beginning of the *Commentaries* is Blackstone's introductory discussion of law.[24] Law is "a rule of action dictated by some superior being," and laws considered as rules for human conduct are "the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behavior."[25] The obligation to obey law derives from dependence upon the lawgiver, "[a]nd consequently as man depends absolutely upon his maker for every thing, it is necessary that he should in all points conform to his maker's will. THIS will of his maker is called the law of nature."[26] In its scope, Blackstone's law of nature reminds one of Aquinas's natural law.[27]

[21] *See* Jessie Allen, *Law and Artifice in Blackstone's* Commentaries, 4 J.L. 195, 195 (2014).

[22] *See* LIEBERMAN, *supra* note 15, at 33-36.

[23] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 37 (The Legal Classics Library 1983) (1765-70) (quoting with approval John Fortescue's endorsement that lay students "trace[] up the principles and grounds of the law, even to their original elements"). Blackstone's use of natural law in the *Commentaries* may also reflect his own introduction to the law. It was St. German's *Doctor and Student*, a work integrating theological and legal thought, that drew Blackstone to the law. Cook, *supra* note 12, at 170. Perhaps for similar reasons, the *Commentaries* turned students from theology to law. McKnight, *supra* note 2, at 401.
Note that the pagination of the various editions of the *Commentaries* has become more or less standardized. This move is not without its problems, however. *See* Alschuler, *supra* note 1, at 3 n.4; *cf.*Carli N. Conklin, *The Origins of the Pursuit of Happiness*, 7 WASH. U. JURIS. REV. 195, 200 (2015)) (selecting for use the first edition, as does the present article); Alan Watson, *The Structure of Blackstone's Commentaries*, 97 YALE L.J. 795, 801 (1988) (same).

[24] *See* 1 BLACKSTONE, *supra* note 23, at 38-62. Blackstone's approach reflects Christian and classical roots. Conklin, *supra* note 23, at 246. It owes a debt to Burlamaqui,HENRY SUMNER MAINE, ANCIENT LAW 94 (Oxford Univ. Press 1931) (1861).; McKnight, *supra* note 2, at 406-07, but not in its definition of law, J. M. Finnis, *Blackstone's Theoretical Intentions*, 12 NAT. L.F. 163, 171 (1967). Blackstone's definition of municipal law follows his organization of the *Commentaries*. *See id.* at 167-69.

[25] 1 BLACKSTONE, *supra* note 23, at 39.

[26] *Id.*

[27] *See* THOMAS AQUINAS, THE SUMMA THEOLOGICA 209 (Daniel J. Sullivan ed., Fathers of the English Dominican Province trans., Encyclopaedia Britannica 1952) (1265-73). (I-II, 91, 2, observing, "Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Therefore it has a share of the Eternal Reason, by which it has a natural inclination to its due act and end; and this participation of the eternal law in the rational creature is called the natural law . . . [T]he natural law is nothing else than the rational creature's participation of the eternal law").

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The voluntaristic stamp of Blackstone's law of nature — it is the *will* of God — diminishes somewhat in the next words of the *Commentaries*. God's wisdom leads him to prescribe only what corresponds to the nature of things and in this he conforms to "the eternal, immutable laws of good and evil."[28] Human reason is able to discover these laws, and God's goodness leads him to link our happiness with obedience to the law of nature. "For he has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each individual, that the latter cannot be obtained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter."[29] This link between the law of nature and human happiness "is the foundation of what we call ethics, or natural law."[30] Natural law comprises articles that "amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature."[31]

Blackstone then renders explicit the supreme authority of the law of nature:

> THIS law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.[32]

Again, Blackstone's law of nature brings to mind Aquinas's natural law.[33]

But Blackstone's approach to what he calls natural law differs profoundly from that of Aquinas. We already have noted that the

[28] 1 BLACKSTONE, *supra* note 23, at 40.
[29] *Id.*
[30] *Id.* at 41.
[31] *Id.*
[32] *Id.*
[33] *See* 2 AQUINAS, *supra* note 27, at 227-28 (I-II, 95, 2, observing, in an article on the relation of "human law" to "natural law," that "every human law has just so much of the character of law as it is derived from the law of nature. But if in any point it differs from the law of nature, it is no longer a law but a corruption of law.").

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Commentaries describes natural law as a set of demonstrations that certain human conduct leads to human happiness and consequently comports with the law of nature.[34] This description is nothing like Aquinas's description of natural law as the participation of human beings in the eternal law, or perhaps vice versa.[35] This difference between Blackstone and Aquinas becomes yet clearer in the former's comparison of divine law with natural law.

Although human reason before the Fall sufficed to discover the precepts of the law of nature, human reason after the Fall "is corrupt, and [human] understanding full of ignorance and error."[36] Therefore, God of his compassion has informed us of the law of nature "by . . . immediate and direct revelation."[37] "The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures."[38] So the natural law and the divine law both bespeak the law of nature.

> Yet undoubtedly the revealed law is (humanly speaking) of infinite more authority than what we generally call the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as

[34] *See supra* text accompanying note 31.
[35] *See supra* note 27.
[36] 1 Blackstone, *supra* note 23, at 41. For discussions of Aquinas's approach to the impact of the Fall upon the operation of the natural law, see also Charles E. Rice, 50 Questions on the Natural Law 159-63 (1993) and Russell Hittinger, *Natural Law and Catholic Moral Philosophy, in* A Preserving Grace 1, 7-8 (Michael Cromartie ed., 1997). Hittinger finds that Aquinas, "[i]n his last recorded remarks on the subject of natural law," said:

> Now although God in creating man gave him this law of nature, the devil oversowed another law in man, namely, the law of concupiscence. . . . Since then the law of nature was destroyed by concupiscence, man needed to be brought back to works of virtue, and to be drawn away from vice: for which purpose he needed the written law.

Id. at 7 (citing Thomas Aquinas, *Collations in Decem Praeceptis* (1273)).
[37] 1 Blackstone, *supra* note 23, at 42.
[38] *Id.* In tension with his formulation here, elsewhere in the *Commentaries* Blackstone will write of "divine law, either natural or revealed," 2 *id.* at 420, and "divine law both natural and revealed," *id.* at 455. In these two instances, it appears that he uses "divine" to denote the divine origin of the law of nature rather than to denote divine law proper. So, in yet a third place, he writes of "those laws which the creator has given us; the divine laws, I mean, of either nature or revelation." 4 *id.* at 177.

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> certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.[39]

Natural law is "only what . . . we imagine to be" the law of nature.[40]

The *Commentaries* continues with further observations on the relationship between these laws and human law:

> UPON these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There is, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former.[41]

Two elements of this excerpt warrant special notice. First is Blackstone's usage of the "law of nature" and the "natural law." As mentioned above,[42] his usage sometimes seems to depart from distinguishing the two, with natural law as a merely human construct thought to resemble the actual law of nature. On one reading, such a departure appears in this passage. The second element is the connection between matters indifferent — matters for which the law of nature does not prescribe a specific rule — and human law. While there is a firm link between the laws of nature and human law, it appears that human law largely

[39] 1 *id.* at 42.
[40] *Id.*
[41] *Id.* Examples of Blackstone's references to the divine law include his discussion of the law of nuisance as enforcing "that excellent rule of gospel-morality, of 'doing to others as we would they should do unto ourselves,'" 3 *id.* at 218, and of the criminal law, 4 *id.* at 11, 30, 42, 43, 60, including laws against homicide, *id.* at 177, dueling, *id.* at 199, and sodomy, *id.* at 216. John Finnis has noted that Blackstone's endorsement of the role divine law is to play in the formulation of human law does not lead him to confuse crime with sin. *See* Finnis, *supra* note 24, at 177.
[42] *See supra* note 7.

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concerns itself with matters indifferent. Whereas Aquinas casts human law essentially in the position of providing determinations that apply rules of the natural law in particular contexts,[43] Blackstone sees human law having greatest play where the law of nature appears mute. This significant role in his analysis for things indifferent owes a major debt to Blackstone's Anglican point of view.[44]

Blackstone's introductory remarks on law and their relation to the rest of the *Commentaries* (and, for that matter, Blackstone's entire project) have drawn sharp criticism. It is reported that no less an authority than Dr. Johnson remarked that Blackstone "thought clearly, but he thought faintly."[45] The *Commentaries* "is widely believed to rest on silly, ponderous, formal, conceptual, outdated, deductive, mechanistic, naive and hopelessly unrealistic jurisprudence,"[46] to be lacking in rigor,[47] and apparently riven by inconsistencies.[48] Especially for his effort to satisfy the customary requirement of supplying his treatise with a general introduction on the law,[49] Blackstone has received much criticism.[50] Beyond this, Blackstone seems largely to ignore the introductory doctrine

[43] *See* 2 AQUINAS, *supra* note 27, at 209-10 (I-II, 91, 3, observing that, "it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws . . ."). The *Commentaries* is not wholly lacking this approach. For example: "And sometimes, where the thing itself has it's [sic] rise from the law of nature, the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct." 1 BLACKSTONE, *supra* note 23, at 55.

[44] The significant role in the *Commentaries* for human law to supply rules for matters indifferent does not preclude a role for the law of nature (or natural law) in supplying specific rules for human law. *See*, *e.g.,* 1 BLACKSTONE, *supra* note 23, at 435-36, 441 (discussing parents and children); 2 *Id.* at 390, 392-93 (discussing property in animals); 4 *Id.* at 11 (discussing capital punishment), 29 (discussing wife's defense of duress), 30 (discussing self-defense), 42 (discussing guilt from crime), 67, 117 (discussing international law).

[45] Richard A. Posner, *Blackstone and Bentham*, 19 J.L. & ECON. 569, 570 (1976) (quoting C. HERBERT STUART FIFOOT, LORD MANSFIELD 26 (1936)). The early classic effort to debunk the *Commentaries* is JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (London, Thomas Payne et al. 1776), but Bentham's target is as much the notion of natural law as the *Commentaries* itself. Posner's article explains that Bentham's is a "fundamentally misconceived attack on the *Commentaries*." *Id.* at 569.

[46] Alschuler, *supra* note 1, at 2.

[47] *See* BOORSTIN, *supra* note 1, at 189.

[48] *See* Posner, *supra* note 45, at 571.

[49] *See* McKnight, *supra* note 2, at 402.

[50] *See* Michael Lobban, *Blackstone and the Science of Law*, 30 HIST. J. 311, 311 (1987); McKnight, *supra* note 2, at 402, 404. Lobban's criticisms are answered in Harold J. Berman & Charles

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he supplies once his introduction is behind him.[51] H.L.A. Hart has argued that Blackstone does not use the law of nature to support English law, and that his natural law test of the validity of positive law is vacuous in any event.[52] Although these arguments have not gone unanswered,[53] they actually point not to defects but rather to the very natural law technique Blackstone uses in his discussion of English law in the *Commentaries*, the technique based upon his Anglican understanding.[54]

The *Commentaries* has suffered at the hands of some commentators. The introductory explanation of the law of nature and natural law has been a popular target of criticism. So has Blackstone's use — or rather non-use — of these elements when he develops his commentaries on the laws of England proper. Nevertheless, a more liberal appreciation of his work will notice a highly developed and broadly used natural law approach in those commentaries. This appreciation, however, must be attuned to discerning

J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackstone*, 45 Emory L.J. 437, 490 n.107 (1996).

[51] See *supra* notes 41 and 44 for instances where the *Commentaries* explicitly draws upon specific rules of the law of nature, natural law, or divine law.

[52] H. L. A. Hart, *Blackstone's Use of the Law of Nature,* 1956 Butterworths S. Afr. L. Rev. 169, 169-71.

[53] *See* Finnis, *supra* note 24, at 171-74.

[54] McKnight concurs in Hart's view of Blackstone's treatment of the law of nature and sees it as making way for Blackstone's focus on indifferent matters. *See* McKnight, *supra* note 2, at 405. McKnight's understanding also supports, if ironically, the argument that Blackstone thereby paves the way for his own brand of natural law analysis. *See infra* notes 309-12 and accompanying text.
Two other criticisms of the *Commentaries* deserve scant mention here. First, the radical critique of Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205 (1979), that finds Blackstone "supremely unconvincing." *Id.* at 211. Kennedy's critique itself has been found supremely unconvincing. *See, e.g.,* Alschuler, *supra* note 1, at 45-46; Berman & Reid, *supra* note 50, at 492 n.108; John W. Cairns, *Blackstone, an English Institutist: Legal Literature and the Rise of the Nation State*, 4 Oxford J. Legal Stud. 318, 350-52 (1984); Watson, *supra* note 23, at 795, 802. Second, some commentators criticize Blackstone on his discussion of absolute rights, as if his use of "absolute" means incapable of diminishment or compromise. *See, e.g.,* Lobban, *supra* note 50, at 329-30; McKnight, *supra* note 2, at 401 n.16. This criticism falls aside upon paying more careful attention to Blackstone's usage:

> The rights of persons considered in their natural capacities are also of two sorts, absolute, and relative. Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other.

1 Blackstone, *supra* note 23, at 119. "Absolute" means apart from social context, not sacrosanct. *See* Watson, *supra* note 23, at 803.

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a use of the natural law that Blackstone's own introduction may not have foretold for his readers today.

3. BLACKSTONE AND JUSTINIAN

Before seeing Blackstone as an Anglican it helps to see him as a civilian — a master of the *Corpus Juris Civilis*, the body of Roman law assembled under the Byzantine Emperor Justinian in the early sixth century.[55] Blackstone's own studies at Oxford made him well acquainted with Roman law.[56] This acquaintance primed him for cultivating his Anglican approach to the natural law, an approach that ends up looking very much like that of Justinian.

As noted already, the *Commentaries* presents the laws of England primarily as a body of substantive law.[57] This approach enabled Blackstone to present the laws as a system, arranging them conceptually by categories.[58] In this, the *Commentaries* resembles the Roman law treatises of the ancient jurisconsult Gaius and of Justinian, whose *Institutes* is a component of the *Corpus Juris Civilis*.[59] The *Commentaries* has been likened to Justinian's work in both content and effect.[60]

[55] For an introduction to Justinian and his work, see Craig A. Stern, *Justinian: Lieutenant of Christ, Legislator for Christendom*, 11 Regent U. L. Rev. 1 (1998). Helmholz has remarked that Blackstone was perhaps one-fifth a civilian, R.H. Helmholz, *Natural Law and Human Rights in English Law: From Bracton to Blackstone*, 3 Ave Maria L. Rev. 1, 5 (2005), not so small a fraction considering how imbued Blackstone was with the common law.

[56] *See* Cook, *supra* note 12, at 170-72.

[57] *See supra* text accompanying note 18.

[58] *See* Berring, *supra* note 16, at 191; Watson, *supra* note 23, at 810. It may be that Blackstone came to this method owing to his "academic persona." Wilfrid Prest, *The Religion of a Lawyer?: William Blackstone's Anglicanism*, 21 Parergon 153, 158 (2004).

[59] *See* Milsom , *supra* note 18, at 10-11; Watson, *supra* note 23, at 810 (finding the *Commentaries* to be a "direct descendant of Justinian's *Institutes*"); *see also* Cairns, *supra* note 54, at 320, 340, 350, 359 (finding the *Commentaries* to be largely an "Institutional" work).

[60] *See* Boorstin, *supra* note 1, at 3. Others have written that Blackstone's work is fundamentally unlike Justinian's, Berman & Reid, *supra* note 50, at 492-96, or failed fundamentally by forcing the content of the common law into an unwelcoming structure from Roman law. Lobban, *supra* note 50, at 312, 321-23.

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Like the *Commentaries*, the *Corpus Juris Civilis* presents abstract introductory discussions of natural law[61] and manifests its actual use of natural law in the body of the work, the treatment of the law of Rome. Drawing on the universal and supreme authority of natural law, Justinian used it to support and explain Roman law. Intent on promulgating law for the entire Roman world, Justinian hoped to justify Roman law as universal by demonstrating that it reflected universal principles of law. Of course, the Emperor looked to support his own legal regime, not to supply arguments to criticize or attack it. The dignity and universal authority of the natural law lay ready to lend dignity and universal authority to Roman law.[62]

Beyond lending this support, the natural law helped explain the rules of Roman law. Natural and Roman law were viewed as intertwined, so much so that natural law was best seen through existing Roman law, the celebrated simplicity and harmony of which derived from this relationship.[63] As in classical Greek thought on natural law, natural law was understood to be from the "aboriginal design of nature," but Roman thinking also understood actual, positive Roman law to approximate the ideal natural law, gradually conforming to it more fully.[64] Far from a revolutionary doctrine, the Roman natural law approach encouraged Roman lawyers to find the natural law in positive law.[65]

In actual operation, Roman natural law concerned itself with conforming legal rules to the nature of things.[66] It sought the intrinsic character of legal subjects, applying natural reason to the facts of the

[61] *See* Alexander Passerin d'Entrèves, Natural Law 24-25, 27-33 (Transaction Publishers 1994) (1951).
[62] *See id.* at 23-24, 31-32.
[63] *See* Maine, *supra* note 24, at 60, 63-64.
[64] *Id.* at 44-45, 60-63.
[65] *See id.* at 63, 73.
[66] *See* Barry Nicholas, An Introduction to Roman Law 57 (1962).

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matter at hand.[67] A master of both natural law theory and Roman law likens this work to developing rules for preparing flaky piecrust.[68]

The *Commentaries* makes use of natural law in much the same way.[69] Far from using natural law to trump the law of England,[70] and only rarely using natural law to criticize English law,[71] Blackstone follows the Roman natural law tradition in explaining why English law is as it is.[72] This use is in keeping with Blackstone's practical rather than theoretical bent.[73] Like the natural law of the Roman lawyer,[74] Blackstone's natural law unites *is* with *ought*, seeking norms from the nature of things,[75] but with more warrant.[76]

A good example of this technique is offered by Blackstone's explanation of the law of property. As Professor Graham has explained, the *Commentaries* does not present irrational support of old ways but rather a studied focus on the physical nature of things.[77] From nature and the natural order in physical context, for example, Blackstone evolves a "natural history" of property to rationalize English property law.[78]. Natural law inheres in the nature of things, and the law of England, like

[67] *See id.*
[68] *See* D'Entrèves, *supra* note 61, at 148; s*ee also* McKnight, *supra* note 2, at 406 n.67 (agreeing with Maine on the somewhat utilitarian cast of Roman natural law).
[69] Although it may be that Blackstone never explicitly asserted that one could discover the law of nature from English law, or vice versa. McKnight, *supra* note 2, at 403 n.33. At least one commentator has written that the common-law tradition reflects the notion that innate reason has led the positive law to hold within itself the natural law. Lobban, *supra* note 50, at 314. Similar to this link is the one Blackstone approvingly found to be advanced by Aristotle: learning positive law is a good way to learn ethics. *See* Conklin, *supra* note 23, at 205.
[70] *See* Lieberman, *supra* note 15, at 49-55.
[71] *See id.* at 46.
[72] *See* Langbein, *supra* note 14, at 77.
[73] *See* Prest, *supra* note 1, at 310; *see also* Posner, *supra* note 45, at 576 (pronouncing Blackstone "better at particulars than at generalization").
[74] *See* D'Entrèves, *supra* note 61, at 151.
[75] *See* Boorstin, *supra* note 1, at 60. One commentator has tagged Blackstone a "natural law maverick" for constructing a "pastiche" of natural law and his own views. McKnight, *supra* note 2, at 407. Perhaps the link of *is* with *ought* in his romanesque approach invites such criticism.
[76] *See infra* notes 290-97 and accompanying text.
[77] Nicole Graham, *Restoring the "Real" to Real Property Law: A Return to Blackstone?, in* Blackstone and his Commentaries, *supra* note 14, at 151.
[78] *See id.* at 154-55, 160.

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Roman law, developed in light of this natural law.[79]

The *Commentaries* holds many instances where Blackstone explicitly explains that English law is true to the nature of things — sometimes presented as fulfilling the obligation of the law to reflect "necessity." This, after he notes that the law of nature inheres in the nature of things,[80] and that sound Roman laws took "the nature of things for their guide."[81] Some examples: Blackstone establishes the obligation of allegiance to civil government upon the nature of civil government.[82] The legal relationship between husband and wife is founded in nature.[83] Necessity has given rise to the law of property,[84] and laws on personal property take into account their transitory nature.[85] The laws of civil wrongs derive in several respects from the nature of things, often human nature,[86] and criminal laws likewise derive from the nature of things or reflect the nature of things.[87] In these instances, Blackstone seems to hark back to the Roman law, rooted as it was in the nature of things.

Roman law makes its appearance in the *Commentaries* in at least two other general ways that support Blackstone's Anglican approach to the law. First is its concept of the jus gentium, the law of nations. If the natural law truly is universal, one would expect it — or projections from it — to be found in the laws of all nations. The law of nations, understood as the body of laws to be found widespread among the nations of the earth, therefore becomes a window on natural law, as the Romans believed.[88]

[79] The *Commentaries* suggests that natural law inheres in the nature of things in such language as, "when the supreme being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be." 1 BLACKSTONE, *supra* note 23, at 38. If Blackstone tags the law of property as governing things indifferent, *see infra* note 152 and accompanying text, he does not thereby hold that property law is wholly without natural law principles. *See infra* notes 309-12 and accompanying text.
[80] *See* 1 BLACKSTONE, *supra* note 23, at 40.
[81] *See id.* at 58.
[82] *Id.* at 354, 358.
[83] *See id.* at 410.
[84] *See* 2 *id.* at 4, 7.
[85] *See* 3 *id.* at 146.
[86] *See id.* at 4, 22, 116, 379, 434.
[87] *See* 4 *id.* at 20-21, 27, 74, 186, 216.
[88] *See* D'ENTRÈVES, *supra* note 61, at 32-33; MAINE, *supra* note 24, at 46; NICHOLAS, *supra* note 66, at 55.

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This value of the jus gentium is evident in Blackstone's use of comparative law. He looks to law outside England not so much to disparage non-English law as to find points of commonality. Those points support English law by suggesting that it rests upon natural law foundations.[89] A similar cast in Anglican theology could therefore offer a link and support to Blackstone's approach to the law.

Beyond its content, another aspect of Roman law that influenced the *Commentaries* and would harmonize well with an Anglican understanding of the law is the process of the development of Roman law. Roman law developed over hundreds of years, largely case by case.[90] In this respect, its development paralleled that of English common law. While Roman law came to repose nearly exclusively in the *Corpus Juris Civilis*,[91] English law rejected such codification in favor of its commitment to the method by which Roman law developed.[92] Some have noted that Blackstone took the view of a practicing lawyer and judge in the *Commentaries*,[93] and though it was famously said that, "In England less attention is paid to natural law than anywhere else in the world,"[94] Blackstone used natural law arguments successfully at the bar.[95] The common law — the law of cases — required barristers and judges to consider cases with an eye to their context. This technique largely provided the materials Blackstone assembled in the *Commentaries*. It is a technique that befits the Anglican way, a technique that developed law that itself befits the Anglican way. It also was the way of Roman lawyers.

[89] *See infra* notes 279-89 and accompanying text.
[90] *See* Nicholas, *supra* note 66, at 28-32.
[91] *See* 2 Edward Gibbon, The Decline and Fall of the Roman Empire 80 (Encyclopaedia Britannica Inc. 1952) (1788).
[92] *See* 2 Frederick Pollock & Frederic William Maitland, The History of English Law Before the Time of Edward I 585 (Liberty Fund, Inc. 2010) (1898). So the English were "more Roman than the Romanists," those who received as authority the *Corpus Juris Civilis* rather than adhering to the method by which Roman law developed. *Id.* at 705.
[93] *See* Berman & Reid, *supra* note 50, at 503. *But see infra* note 235.
[94] Helmholz , *supra* note 55, at 20; *see also* d'Entrèves, *supra* note 61, at 119 n.1.
[95] McKnight, *supra* note 2, at 407-09.

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If common law judges in deciding cases were making law up, they were making it up to fit.[96]

Blackstone, student of Roman law, reflected a Roman law approach to the natural law in the *Commentaries.* Beginning, like the *Digest* and *Institutes* of the *Corpus Juris Civilis,* with an abstract exposition of natural law and related formulations, the body of the *Commentaries* puts natural law most to use in explaining and justifying particular rules of law. Seeking the dictates of reason and the guide of reasonableness, Blackstone rests rules of law upon the nature of the matter at hand — a typically Roman technique. In this and other respects, Blackstone's use of natural law fits well with the Anglican stance on natural law that he adopts in the *Commentaries.*

4. BLACKSTONE AND THE CHURCH OF ENGLAND

No surprise that Sir William Blackstone, Oxford don, justice of both the King's Bench and Common Pleas, was an Anglican. What may surprise is how serious an Anglican Blackstone was, and how deeply his Anglicanism influenced the jurisprudence of his *Commentaries*.

Blackstone's deep and pervasive Christian faith was manifest.[97] As a young man he took a serious interest in religion,[98] and made a careful investigation of Anglicanism[99] before committing himself wholeheartedly to orthodox Anglicanism.[100] He celebrated his commitment in a poem, a vision of diverse faiths in which he praised the Church of England for its moderation, liberty, support of science,

[96] *See* Milsom, *supra* note 18, at 11-12. Milsom here speaks of fit according to patterns of legal rules, but the notion of judges in a sense creating rules that at the same time are seen as compelled by antecedent norms is apropos.
[97] *See* Cook, *supra* note 12, at 169.
[98] *See* Prest, *supra* note 58, at 163.
[99] *See* Cook, *supra* note 12, at 174.
[100] *See* Prest, *supra* note 1, at 309; Prest, *supra* note 3, at 123; Prest, *supra* note 58, at 161.

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reforming influence, and virtue.[101] Although a committed Anglican, Blackstone was not so committed that he could brook no Dissenters,[102] going so far as to alter the *Commentaries* in light of Dissenter reaction to an earlier edition of the work.[103] The general Anglican understanding of providential development from primitive sources[104] and the important role reason plays in perceiving truth[105] would support Blackstone's construction of the *Commentaries.*

The substantial alignments between Anglican theology and the *Commentaries* are the focus of the next pages of this article.

4.1. RICHARD HOOKER

Key to the Church of England is the work of the Elizabethan divine, Richard Hooker.[106] Beyond helping to shape the contours of Anglicanism as a whole, Hooker's influence on legal theory was especially pronounced.[107] Blackstone's Anglican understanding of the law necessarily reflects Hooker's understanding.

Hooker held law in high esteem:

> [O]f Law there can be no less acknowledged, than that her seat is the bosom of God, her voice the harmony of the world: all things in heaven and in earth do her homage, the very least as feeling her care, and the greatest as not exempted from her power: both Angels and men and creatures of what condition soever, though

[101] *See* William Blackstone, The Pantheon 27-32 (photo. reprint, Gale Ecco Print Editions 2010) (1747). Prest has called Blackstone a "comparative theologian." Prest, *supra* note 3, at 110.
[102] *See* Prest, *supra* note 58, at 153, 165-66.
[103] *See id.* at 155-56.
[104] *See* Boorstin, *supra* note 1, at 74-75.
[105] *See* Raymond D. Tumbleson, *"Reason and Religion": The Science of Anglicanism*, 57 J. Hist. Ideas 131, 133, 151 (1996).
[106] *See* Nigel Atkinson, Richard Hooker and the Authority of Scripture, Tradition and Reason, at ix (1997). Though such, his work earned surprising approval from the leader of the Roman Catholic Church. *See* Russell Kirk, The Roots of American Order 246 (1974).
[107] Harold Berman highlights Hooker's influence as to political authority and consent, the importance of history, and the large role played by matters indifferent—those not determined by transcendent sources of law. *See* Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 Yale L.J. 1651, 1665-66 (1994).

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> each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy.[108]

Law for Hooker is fundamental.[109] Furthermore, his treatment of law is no incidental matter but derives from his theology.[110] Law, as one might gather from the excerpt just quoted, reigns over politics. In this, Hooker departs from an Aristotelian view,[111] and follows, as elsewhere, the magisterial reformers rather than Augustine or Aquinas.[112]

Hooker goes so far as to hold that God himself works according to law,[113] and for at least one commentator, Hooker holds that God *is* law.[114] A famous apothegm of Hooker states that "the being of God is a kind of law to his working."[115]

In some respects, Hooker's general discussion of the fundamental types of law adumbrates that of Blackstone. Hooker explains that, in his usage, both the law of nature and divine law reveal eternal law to humankind.[116] At the same time, however, Hooker holds divine law to be positive law, a creature of God's reason and will both, whereas for Blackstone it is simply a revelation of the law of nature.[117] Likewise, Hooker sees some human law as an adaptation of natural law, and other human law as an ordinance "merely human," reasonable and convenient

[108] 1 Richard Hooker, Of the Laws of Ecclesiastical Polity 232 (J.M. Dent & Sons, Ltd. 1907) (1594, 1597).
[109] *See* W.J. Torrance Kirby, Richard Hooker, Reformer and Platonist 48 (2005). "Perhaps the most influential Anglican thinker to make explicit use of natural law is the Elizabethan divine, Richard Hooker . . . ." Will Adam, *Natural Law in the Anglican Tradition, in* Christianity and Natural Law 58, 63 (Norman Doe ed., 2017).
[110] *See id.* at 55.
[111] *See* Robert K. Faulkner, Richard Hooker and the Politics of a Christian England 114-16 (1981).
[112] *See* Kirby, *supra* note 109, at 52, 58-78.
[113] *See* W.J. Torrance Kirby, *Reason and Law*, *in* A Companion to Richard Hooker 251, 253, 255 (Torrance Kirby ed., 2008).
[114] *See* Kirby, *supra* note 109, at 51; Kirby, *supra* note 113, at 251.
[115] 1 Hooker, *supra* note 108, at 150.
[116] *See* Kirby, *supra* note 113, at 265. Elsewhere, Kirby notes that the question of Hooker's doctrine of natural law is controversial. *See* Kirby, *supra* note 109, at 57.
[117] *See* L.S. Thornton, Richard Hooker 32, 107 (1924). In this context Hooker calls law "positive" if express revelation is necessary to know it. 1 Hooker, *supra* note 108, at 220 n.1. Also, apparently unlike Blackstone, Hooker observes that the evidence of the senses is clear and strong while that of revelation is complicated and complex. Thornton, *supra*, at 16. At the same time, however, the object held out in the Scriptures is more certain than that in the senses. *Id.* at 18.

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for the time and place.[118] A similar formulation of human law will find its way into the *Commentaries.*[119]

The line from Hooker to Blackstone is more clearly traced along particular elements to be found in the works of both. One is the role of human reason in the development of law.[120] Like other Reformation theologians, Hooker asserts that Scripture and reason both convey to humans the knowledge of God and of his eternal law.[121] "It was part of God's nature to work in an orderly and reasonable way . . . ."[122] Consequently, "God's own creation also worked in an orderly and reasonable way,"[123] a way ruled by law. God acts to accomplish his "rational purpose."[124] So for Hooker, the appeal to reason becomes key.[125] The law of reason is for all humans,[126] endowed as they are with "a natural practical wisdom."[127] Humans find themselves ruled by the law of reason, divine law, and human law[128] — the last resting upon rational human nature[129] and either resolving "probable matters" or "clarify[ing]

[118] Nigel Voak, Richard Hooker and Reformed Theology 117 (2003); *see also* Faulkner, *supra* note 111, at 114 (reading Hooker to state that human law is discovered naturally, but that the authority to do so is from God); Rowan Williams, *Foreword:* Of the Lawes of Ecclesiastical Politie *Revisited*, *in* A Companion to Richard Hooker, supra note 113, at xv, xviii-xix (distinguishing in Hooker laws for humanity from laws for particular societies, with both legitimate and binding).

[119] *See infra* notes 305-12 and accompanying text. Also finding its way into the *Commentaries* is Hooker's usage of the term *lex gentium* to mean international law rather than something like the Roman usage of jus gentium discussed above at notes 88 to 89. Finnis, *supra* note 24, at 177.

[120] Of course, some role for human reason is found in standard views on the making of law, with perhaps the classic being that of Aquinas. *See, e.g., supra* note 43. Nevertheless, the uses to which Hooker and Blackstone put reason bear a special affinity, as discussed below. *See infra* notes 305-12 and accompanying text.

[121] *See* Kirby, *supra* note 109, at 74; *see also* Kirk, *supra* note 106, at 243.

[122] Atkinson, *supra* note 106, at 13.

[123] *Id.*

[124] Kirby, *supra* note 109, at 51.

[125] *See* Thornton, *supra* note 117, at 13; *see also* Adam, *supra* note 109, at 63 (Hooker "often uses the term 'law of reason' as synonymous with 'natural law'"), 73 (Hooker took "the explicit doctrine of natural law of the Thomistic tradition and repackaged it as the law of reason"), 76 ("The concept of natural law, and its derivative—the law of reason, played a central role in the thought of Richard Hooker . . . .").

[126] *See* Faulkner, *supra* note 11, at 63, 72.

[127] Kirby, *supra* note 109, at 55. And reason shows the good, Thornton, *supra* note 117, at 37, presumably the key to the happiness all humans seek. *See* Kirby, *supra* note 109, at 75; Thornton, *supra* note 117, at 38. This idea too finds its way into Blackstone. *See supra* notes 28-31 and accompanying text.

[128] *See* Atkinson, *supra* note 106, at 14.

[129] *See* Thornton, *supra* note 117, at 36-37.

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and enforc[ing] the necessary precepts of reason."[130] The authority Hooker grants to human reason, a touchstone of Anglicanism, holds sway in the *Commentaries*, as shall appear.[131]

A second major influence of Hooker upon Blackstone is his endorsement of the authority of custom. Against the Puritan threat of "singularity," lack of consensus,[132] Hooker counterpoised consent,[133] a distant consent presumed to continue.[134] Custom, modified appropriately by customarily legitimate written law, is authoritative and likely to induce obedience.[135] This appreciation for custom fits well with Hooker's view that God teaches through human experience.[136] It also supports Blackstone's hailing custom as the common law, a move that enabled him to capture the advantages of both primitive sources and traditional developments.[137]

Third is the related matter of Hooker's use of history. For Hooker, Scripture supports the value of experience.[138] Joined with his notion that God delivers law providentially,[139] these views support Hooker's position that attaining truth is a gradual affair played out in history.[140] Humans may make laws, but in a sense those laws are God's as he works his providential will.[141] History as the unfolding of gradual development[142] is normative for Hooker.[143] Consequently, Harold Berman has found in Hooker a key to English historical jurisprudence and its continuing influence[144] as well as

[130] FAULKNER, *supra* note 111, at 115.
[131] *See infra* notes 305-12 and accompanying text.
[132] ATKINSON, *supra* note 106, at 50.
[133] *See* FAULKNER, *supra* note 111, at 103, 111.
[134] *See id.* at 112.
[135] *See* 1 HOOKER, *supra* note 108, at 422; *see also* ATKINSON, *supra* note 106, at 55; KIRK, *supra* note 106, at 244.
[136] *See* KIRK, *supra* note 106, at 244-45; Williams, *supra* note 118, at xix.
[137] *See* BOORSTIN, *supra* note 1, at 73.
[138] *See* THORNTON, *supra* note 117, at 17.
[139] *See* FAULKNER, *supra* note 111, at 114.
[140] *See* THORNTON, *supra* note 117, at 45-46.
[141] *See id.* at 37. Such a commitment to historical development, adapted to local conditions, lies at the core of Hooker's chief aim—to explain and defend the ecclesiastical polity of the Church of England. *See* ATKINSON, *supra* note 106, at 58.
[142] *See* ATKINSON, *supra* note 106, at 47.
[143] *See id.* at 54.
[144] Berman, *supra* note 107, at 1664-66.

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an emphasis on historical continuity.[145] For Blackstone, history is the key to understanding English law.[146]

The last marked influence of Hooker on Blackstone is the importance of the concept of things indifferent, matters not conclusively ordained by transcendent law but rather left more to human determination.[147] Positive laws may resolve matters that God leaves to human liberty.[148] So, while some human laws are based upon natural law,[149] its necessary tenets are few, leaving most matters to public authority.[150] Blackstone takes a similar tack[151]: Daniel Boorstin has discussed the remarkable degree to which Blackstone holds that private property itself is a creature of civil law.[152] Crimes not *mala in se* but rather those "with regard to things in themselves indifferent . . . become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper."[153] "Lands are not naturally descendible any more than thrones: but the law has thought proper, for the benefit and peace of the public, to establish hereditary succession in one as well

[145] *See id.* at 1666.
[146] *See* Boorstin, *supra* note 1, at 36; Lieberman, *supra* note 15, at 42; Conklin, *supra* note 23, at 218. Lobban finds in Blackstone a commitment to authority and history over deductive reasoning, *see* Lobban, *supra* note 50, at 328, and views the *Commentaries* as intertwining theory with history. *Id.* at 330. And Boorstin finds a telling example of Blackstone's commitment to history in his treatment of the Revolution of 1688. Boorstin, *supra* note 1, at 26.
[147] *See* Atkinson, *supra* note 106, at 59-60.
[148] *See* 2 Hooker, *supra* note 108, at 363.
[149] Thornton, *supra* note 117, at 32.
[150] *See* Faulkner, *supra* note 111, at 113; *see also id.* at 100 (observing that, after the law of reason, human law holds prominence for Hooker), 112 (observing that, once natural necessity calls for a rule, nearly any rule will do).
[151] While for Blackstone "indifferent" can mean diverse things, Finnis, *supra* note 24, at 172-73, Blackstone imitates Hooker on biblical law, for example, acceding to its authority but finding its still-obligatory moral law pertinent to very few issues. *See* D. Seaborn Davies, The Bible in English Law 20 (1954). As to one such instance, it is both intriguing and relevant to note that Blackstone observes that blood guilt—a concept harking back to biblical standards—would adhere to Parliament were it to over-extend capital punishment. 4 Blackstone, *supra* note 23, at 11. The Bible also speaks specifically of blood guilt for over-extension of capital punishment. *See* Deuteronomy 19:4-10. *See generally* Craig A. Stern, *Torah and Murder: The Cities of Refuge and Anglo-American Law*, 35 Val. U. L. Rev. 461 (2001) (demonstrating the influence of the biblical law of homicide upon the Anglo-American law of homicide).
[152] Boorstin, *supra* note 1, at 170-74, 179-80. See 1 Blackstone, *supra* note 23, at 185; 2 *Id.* at 2, 210-11, 491 for pertinent passages from the *Commentaries*.
[153] 1 Blackstone, *supra* note 23, at 55.

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as the other."[154] Regarding the jurisdiction of courts, "[e]very nation must and will abide by it's [sic] own municipal laws; which various accidents conspire to render different in almost every country in Europe."[155] Apart from these specific observations regarding indifferent matters, Blackstone's chief use of natural law paradoxically guides the resolution of matters that, in a sense, are indifferent.[156] More on this use later.[157]

The teaching of Hooker was not lost on the English legal theorists that followed. Edward Coke viewed the law as reason in history — reason in the sense of reasonable, not rationalistic — and understood that natural law was incorporated into human law.[158] Even more than Coke, Matthew Hale especially influenced Blackstone in the *Commentaries*.[159] Like Hooker, Hale saw natural law and divine law as authoritative but also as speaking only to a limited set of questions.[160] Likewise, Hale understood history as providence,[161] with positive law accordingly developed through time.[162] This historical focus finds its way from Hale into the *Commentaries*.[163] Also, both Hale's locating reason within a particular object (in addition to its being a human faculty) and his debt to natural science and empiricism[164] seem reflected in the *Commentaries*.[165]

The Anglicanism of Hooker, Coke, and Hale, and their emphasis on reason and history alongside the authority of natural law and Holy Writ, are to be seen in Blackstone's *Commentaries*. An even clearer influence on

[154] *Id.* at 185.
[155] 3 *id.* at 87.
[156] So, as for Hooker, such human law is "grounded upon the Word," 1 Hooker, *supra* note 108, at 309, but not dictated by it.
[157] *See infra* notes 305-12 and accompanying text.
[158] *See* Berman, *supra* note 107, at 1690-93.
[159] *See* Berman & Reid, *supra* note 50, at 443, 489-94; Cairns, *supra* note 54, at 340, 352; Finnis, *supra* note 24, at 164-65; Watson, *supra* note 23, at 810-12.
[160] *See* Berman, *supra* note 107, at 1709.
[161] *See id.* at 1722.
[162] *See id.* at 1708, 1711-14.
[163] *See id.* at 1733.
[164] *See id.* at 1715, 1729.
[165] *See infra* notes 241-46, 291-93 and accompanying text.

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Blackstone, however, is Anglican thought closer to his own time. It is to that thought that we now turn.

4.2. THE LATITUDINARIANS

The Anglican Church faced the Age of Reason and Deism with Latitudinarianism.[166] Though standing in opposition to those two developments, the Latitudinarians, as their name implies, embraced tolerance as their major theme.[167] This theme in no way compromised their commitment to God and the Christian faith. The Latitudinarians believed that God holds an absolute claim on humanity and that all our powers depend upon his will.[168] Christianity is to govern all of life.[169] Education for moral and spiritual reformation is especially important.[170] With these tenets Latitudinarianism was a major force in seventeenth century Anglicanism.

It also was in important respects a movement in continuity with the work of Hooker, a continuity that would support the work of Blackstone. The Latitudinarians in their tolerance relied upon Hooker's emphasis on things indifferent.[171] They also shared Hooker's endorsement of strong laws.[172]

Beyond these particulars, the most important influence of Latitudinarianism to be seen in the *Commentaries*, and well within the trajectory Hooker set for the Anglican Church, was its appreciation for reason as a guide in human affairs. Latitudinarian thought was well

[166] *See* W. M. Spellman, The Latitudinarians and the Church of England 1600-1700 10-83 (1993).
[167] *See* Ernest Campell Mossner, Bishop Butler and the Age of Reason: A Study in the History of Thought (1936).
[168] *See* Spellman, *supra* note 166, at 120.
[169] *See id.* at 7.
[170] *See id.* at 4, 61, 128.
[171] *See id.* at 157.
[172] *See id.* at 70. Other Latitudinarian notions to find their way into the *Commentaries* are the endorsement of strong civil government, *id.* at 122, and self-interest as sound motivation, *see id.* at 118-19, 122.

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suited to the development of science[173]: it is no accident that Isaac Newton was an Anglican.[174] The Latitudinarians understood that human reason did not survive the Fall unimpaired.[175] At the same time, however, some power of human reason persists.[176] Human reason *under* God is able to understand nature, itself existing under the Sovereign God.[177] This human reason is not the reason of rationalism, but instead more like common sense.[178] And just as reason is an aid to understanding the Bible,[179] so is the Bible a necessary aid to the use of reason.[180] Latitudinarians favored reason and the philosophical explanation of reality,[181] but more important to Blackstone's jurisprudence was their view that reason was useful especially for discerning natural law.[182]

One who could be viewed as the leading exponent of Latitudinarianism in the next century, the century of Blackstone, is Bishop Joseph Butler.[183] Butler published his most important work, *The Analogy of Religion Natural and Revealed*, in 1736 and it became hugely influential in the middle of the century during the height of Blackstone's career and the writing of the *Commentaries*.[184] Relying on the same principles that served Hooker,[185] Butler aimed to refute the deists on the grounds of natural theology.[186] As Blackstone would argue,[187] the

[173] See James R. Jacob & Margaret C. Jacob, *The Anglican Origins of Modern Science: The Metaphysical Foundations of the Whig Constitution*, 71 Isis 251, 258 (1980); Spellman, *supra* note 166, at 6-7.
[174] *See* Jacob & Jacob, *supra* note 173, at 254, 262, 265. The Anglican mix of authority from the Bible, reason, and the senses—a mix hospitable to science—is one of its distinctives. *See id.* at 256; Tumbleson, *supra* note 105, at 134-35, 139, 148, 151-53, 156.
[175] Spellman, *supra* note 166, at 111.
[176] *See id.* at 74-77.
[177] *See id.* at 87-88, 160.
[178] *See id.* at 4.
[179] *See id.* at 156.
[180] *See id.* at 83-86.
[181] *See id.* at 106-07.
[182] *See id.* at 8, 66, 76-77, 81-82. The association of reason with natural law is typically English. Helmholz, *supra* note 55, at 12, 21.
[183] *See* Conklin, *supra* note 23, at 213.
[184] *See* Mossner, *supra* note 167, at 178-87.
[185] *See* Thornton, *supra* note 117, at 103.
[186] *See* Boorstin, *supra* note 1, at 15. The project of natural theology itself received impetus from Hooker. *See* Kirby, *supra* note 113, at 270-71. Butler also aligned himself with the empiricism of Locke and Newton. Mossner, *supra* note 167, at 82.
[187] *See supra* notes 24-27 and accompanying text.

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creature owes a duty to the creator, and design proves a designer.[188] Likewise, general laws govern nature,[189] with the nature of things giving rise to right and wrong, thus determining God's will.[190] Humans are able to discover their duties through reason — more the reasonable dictate of God's will than the deliverances of logic.[191] Blackstone would also endorse Butler's view of civil government as an agency of God's government concerned with social consequences.[192]

Two major aspects of Butler's theology to lodge in the *Commentaries* command attention here. The first is emphasis on experience. We have noted Butler's emphasis on reason, that is on reasonableness more than cold logic.[193] Nevertheless, humankind cannot by speculation judge what leads to human perfection or happiness.[194] Hooker had held that the degree of certainty we attain is relative to the nature of things.[195] Like him, Butler held that we should not expect to plumb the depths of all knowledge and understanding, but rather follow the light we do have.[196]

That light largely is the product of experience. The laws by which God governs are known to us by reason along with experience.[197] As science and medicine developed by progressive advances,[198] so ethics depends upon empirical evidence and common sense, and morality itself

[188] *See* Joseph Butler, The Analogy of Religion Natural and Revealed 245 (J.M. Dent & Co. 1906) (1736).
[189] *See id.* at 105.
[190] *See id.* at 243. So, for those designed for society God's laws prescribe justice and charity. *Id.* at 245.
[191] *See* Mossner, *supra* note 167, at 14. Butler did not suppose that all elements of moral government are clear to humans. *Id.* at 90. Mossner also discerns some sleight of hand in Butler's treatment of the matter of law and will. *Id.* at 102.
[192] *Compare* 1 Blackstone, *supra* note 23, at 45, 54, *with* Butler, *supra* note 188, at 37-38, 41, 98.
[193] *See supra* text accompanying note 191. Again, this emphasis reminds one of Hooker, Atkinson, *supra* note 106, at 13, as does Butler's division of the precepts of religion into moral and positive according as the reasons for the precept are seen or not seen, Mossner, *supra* note 167, at 92, and the acknowledgement that reason needs support from God's inspiration, *id.* at 123-24.
[194] *See* Butler, *supra* note 188, at xxx.
[195] *See* Atkinson, *supra* note 106, at 91-92, 98.
[196] Joseph Butler, Fifteen Sermons Preached at the Rolls Chapel and a Dissertation Upon the Nature of Virtue 237-38 (G. Bell Sons 1914) (1726).
[197] *See* Butler, *supra* note 188, at 143.
[198] *See id.* at 152-53.

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is a science of human action with attention paid to the facts of results.[199] God uses our experience to teach us duties.[200] As with physics, so with human laws, experiment, inductive method, and judgment based upon the generality of observations are sound guides.[201] Experience, resting upon God's governance by punishment and reward,[202] is a surer guide than abstract reason.[203]

Blackstone suited the *Commentaries* to his readers, enlightened eighteenth-century Anglicans.[204] He himself was committed to English enlightenment principles[205] and Butler's welcome to progress, knowledge, and experience[206] suited Blackstone well. Like Edmund Burke,[207] Blackstone embraced Latitudinarianism and the work of Joseph Butler.[208] He subscribed to the test of probability rather than certainty,[209]

[199] *See* Mossner, *supra* note 167, at 105, 117.
[200] *See id.* at 96.
[201] *See* Butler, *supra* note 188, at xviii, xxx, 79.
[202] *See id.* at 25, 180.
[203] *See id.* at 104, 143-44, 148. As Blackstone would remark regarding the changing of human laws, *see infra* notes 272-78 and accompanying text, Butler observed that we hazard unknown effects by changing the regime God has instituted for his rule. *See* Butler, *supra* note 188, at 101, 106, 108-09. With the results yet to be experienced, we cannot assess the outcome of such a move.
[204] *See* Crane Brinton, Book Review, 55 Harv. L. Rev. 703, 703 (1942) (reviewing *The Mysterious Science of the Law: An Essay on Blackstone's Commentaries* (1941)).
[205] *See* Prest, *supra* note 1, at 308; Graham, *supra* note 77, at 152; Tim Stretton, *Coverture and Unity of Person in Blackstone's Commentaries, in* Blackstone and his Commentaries, *supra* note 14, at 111, 125.
[206] *See* Butler, *supra* note 188, at 162.
[207] *See* Mossner, *supra* note 167, at 189.
[208] *See* Conklin, *supra* note 23, at 213-15. Conklin points out especially the affinity in epistemology and the role of happiness.
[209] *See* Blackstone's probabilism here, for example: "But this [move of the Restoration Parliament] was for the necessity of the thing, which supersedes all law; for if they had not so met, it was *morally impossible* that the kingdom should have been settled in peace." 1 Blackstone, *supra* note 23, at 147 (emphasis added). And here: "So that it is *morally impossible* to trace out, with any degree of accuracy, *when* the several mutations of the common law were made . . . ." 4 *id.* at 402 (first emphasis added). The probabilism in this use of "morally impossible" finds an explanation from Blackstone's contemporary, Samuel Johnson:

> He thus defined the difference between physical and moral truth: "Physical truth is, when you tell a thing as it actually is. Moral truth is, when you tell a thing sincerely and precisely as it appears to you. I say such a one walked across the street; if he really did so, I told a physical truth. If I thought so, though I should have been mistaken, I told a moral truth."

James Boswell, the Life of Samuel Johnson 510-11 (C.P. Chadsey ed., Doubleday 1946) (1791).

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reasonableness as a touchstone of truth,[210] and common sense coupled with experience.[211] The large role in the *Commentaries* played by history may be ascribed, at least in part, to this regard for experience.[212]

A second aspect of Butler's theology that helped shape the *Commentaries* is the importance and function of human happiness.[213] God governs mankind by reward, by the consequences of human actions.[214] Therefore, true happiness directs us towards doing God's will.[215] This happiness (supplemented by conscience[216]) defies certain demonstration, but does make itself known with "practical proof."[217] To pursue virtue is to pursue happiness, and to pursue happiness is to pursue virtue.[218]

Again, Blackstone concurs with Butler in his argument that God has ordered human affairs so that we need only pursue our own happiness to find ourselves pursuing the law of nature that God has established for the right ordering of our affairs.[219] For both Butler and Blackstone, reasonable self-love motivates us to adhere to God's rule.[220] So here too, Blackstone shows himself in the *Commentaries* aligning with the work of Butler as he aligns with other elements of the Anglican tradition.

Blackstone had every reason to write the *Commentaries* from an Anglican point of view. It was good rhetoric for reaching his intended

[210] *See* Boorstin, *supra* note 1, at 23.
[211] *See id.* 55, 117-19. In these last commitments, Blackstone owed a debt also to Locke, *id.* at 31, and the Common Sense school of philosophy, Conklin, *supra* note 23, at 216-17.
[212] *See* Boorstin, *supra* note 1, at 31-40, 55.
[213] Blackstone's crucial use of happiness has been noted already in these pages. *See supra* notes 29-31 and accompanying text.
[214] *See* Butler, *supra* note 188, at 93, 238.
[215] *See id.* at 26, 236, 271.
[216] *See* Butler, *supra* note 196, at 68.
[217] Mossner, *supra* note 167, at 100. So probabilism is the method for pursuing happiness. *See* Butler, *supra* note 188, at xxv-xxvii.
[218] *See* Butler, *supra* note 188, at xxx, 36, 56, 61, 72, 93, 112, 268-70; Butler, *supra* note 196, at 240. At the same time, God has given us some power over the happiness of others. Butler, *supra* note 188, at 42.
[219] *See supra* notes 29-31 and accompanying text; *see also* Boorstin, *supra* note 1, at 92; Alschuler, *supra* note 1, at 52.
[220] *Compare* Butler, *supra* note 196, at 68 (for Butler) *with* Boorstin, *supra* note 1, at 53 (for Blackstone). Conklin also finds that the pursuit of happiness is a linchpin for Blackstone, Conklin, *supra* note 23, at 224, 260, but she places his approach also within the Common Sense school, *id.* at 215-17. She attributes the phrase "the pursuit of happiness" in the *Declaration of Independence* to Blackstone. *Id.* at 200-02. *But see* Craig A. Stern & Gregory M. Jones, *The Coherence of Natural Inalienable Rights*, 76 UMKC L. Rev. 939, 973-74 (2008).

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audience. It was true to his own convictions. We have seen thus far particular elements of the *Commentaries* signaling Blackstone's Anglican approach. The main topic of this article, however, is his use of natural law—the concept and body of transcendent law—and the degree to which Blackstone's Anglican understanding shapes this use.

5. THE ANGLICAN BLACKSTONE AND THE NATURAL LAW

As we have seen, Blackstone's *Commentaries* bears the impress of its author's Anglican faith. This impress shapes the appearance of natural law in the *Commentaries*, but by no means minimizes the role of natural law. To be sure, if using natural law means using it as Aquinas used it, Blackstone does not use natural law.[221] In fact, Anglican Blackstone lodges criticism at the scholastic tradition.[222] But the use of natural law, a transcendent norm that guides human law, may transcend Aquinas's use. In fact, the *Commentaries* more than anything takes the common law back to natural law, to first principles,[223] portraying the common law as blended with the natural law into one body.[224] Its use of natural law is not

[221] While Blackstone does subscribe to the notion that natural law bounds the validity of human law, *see supra* text accompanying notes 32, 41; Posner, *supra* note 45, at 605, his use of natural law embraces far more, Finnis, *supra* note 24, at 183.

[222] *See* Boorstin, *supra* note 1, at 78; *see also* 2 Blackstone, *supra* note 23, at 58 (describing the "ingenuity" of the middle ages as one "which perplexed all theology with the subtilty of scholastic disquisitions, and bewildered philosophy in the mazes of metaphysical jargon"); 4 *id.* at 410-11 (bemoaning the scholastic intricacies of Norman jurisprudence). Blackstone's approach avoided the complexities of the scholastics. *See* Conklin, *supra* note 23, at 224. At the same time, while some note Blackstone's modern emphasis on individual rights rather than on the classic common good, Finnis, *supra* note 24, at 181, and on peace as the end of civil society, Boorstin, *supra* note 1, at 179, and his "social" rather than philosophical consistency, Brinton, *supra* note 204, at 704, Blackstone does hold that society has a "moral purpose," Boorstin, *supra* note 1, at 190, and shares also with Aquinas, *see, e.g.,* 2 Aquinas, *supra* note 27, at 213-14 (I-II, 92, 1), 232-33 (I-II, 96, 3), the belief that law has moral content, teaches right and wrong, and improves human beings. *See* 1 Blackstone, *supra* note 23, at 27, 45; 2 *id.* at 8; 3 *id.* at 162.

[223] *See* Conklin, *supra* note 23, at 211.

[224] *Cf.* Helmholz, *supra* note 55, at 21-22 (noting that English lawyers traditionally assumed that the common law and natural law "complemented each other"). *But see* Allen, *supra* note 21, at 196-98 (questioning the impact of natural law upon the *Commentaries*).

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muddled or unnecessary.[225] After its conventional introductory treatment of natural law[226] it frequently adverts to natural law principles when discussing the common law itself.[227] Blackstone held that the natural law was the only sure guide to English law.[228] Desiring not just to understand but also to admire,[229] he sought beauty in the law, a beauty lent to English law by God's design in natural law.[230] The *Commentaries* continuously pursues this project and shapes its discussion from principles,[231] being structured to align positive law with natural law[232] and organized to demonstrate order in the English law from divine simplicity.[233] While it melded law and equity together into one overall, integral system,[234] it treated not the whole of the common law, but rather only what was susceptible of rational appreciation.[235]

The integral connection in the *Commentaries* between English law and natural law constituted English law a handbook on natural law. As the spirit of law is a product of natural law,[236] so natural law can be seen from the laws of England.[237] At the same time, English common law contained a strong cultural component,[238] adapted as it was "to the genius of the

[225] *See* Lieberman, *supra* note 15, at 38-55.
[226] *See* Lobban, *supra* note 50, at 323.
[227] *See* Lieberman, *supra* note 15, at 37; Finnis, *supra* note 24, at 175-76 (listing scores of references in note 94).
[228] *See* Boorstin, *supra* note 1, at 142.
[229] *See id.* at 30.
[230] *See* Boorstin, *supra* note 1, at 85. In like manner, Maine has remarked the importance of simplicity, harmony, and elegance as guides to Roman jurisconsults. Maine, *supra* note 24, at 65.
[231] *See* Boorstin, *supra* note 1, at 28.
[232] *See* Finnis, *supra* note 24, at 176.
[233] *See* Boorstin, *supra* note 1, at 92.
[234] *See id.* at 98.
[235] *See* Lobban, *supra* note 50, at 332-33. Emily Kadens has emphasized that Blackstone's approach to the law differed in its systemization and generalization from that of the practitioner. Kadens, *supra* note 5, at 1559; *see also id.* 1563 (stating that the *Commentaries* was said to depart from the common law as practiced), 1575 (stating that even in practice Blackstone acted as if legal questions held one correct answer without doubt), 1605 (stating that Blackstone even as judge knew the law, but not the "legal mind").
[236] *See* Boorstin, *supra* note 1, at 58.
[237] *See id.* at 53, 60. Following Hale, Blackstone in the *Commentaries* treats the general phenomenon of law under the guise of the law of England as an example historically considered. *Id.* at 35-36. The experience of generations of wise men had rendered the common law the nearest human approach to the natural law. Kirk, *supra* note 106, at 371.
[238] *See* Watson, *supra* note 23, at 795.

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English nation."[239] Taking liberty as the signal English virtue led, as we shall see, only to emphasizing all the more the importance of natural law to the laws of England.[240]

The Anglican context lent Blackstone's natural law an empirical cast akin to Sir Isaac Newton's physics.[241] His approach was descriptive, not deductive.[242] Blackstone was not unaware of the dangers of arguing from particular to general,[243] but he nonetheless endorsed the scientific approach.[244] The *Commentaries* is a quest for reasonableness, for the rational principles — the natural law — undergirding the positive particulars of English common law.[245] Because law is a rational science, natural law suffuses the text.[246] In this commitment to empirical science for fleshing out the natural law embedded in English law, Blackstone treats law much as Butler treated theology.

Hooker more than Butler animates Blackstone's emphasis on history, but that emphasis likewise demonstrates an Anglican approach to natural law.[247] It is in progressive human experience that Providence gradually works the natural law into human law.[248] As with Burke's view, natural law makes itself known in history.[249] But history is no sure

[239] 1 Blackstone, *supra* note 23, at 17; *cf.* 4 *Id.* at 256 (rooting a legal principle in "the genius and spirit of the law of England").

[240] *See infra* notes 306-08 and accompanying text. Blackstone emphasized English civil freedom, Lieberman, *supra* note 15, at 39-40, and liberty, Boorstin, *supra* note 1, at 154, giving rights a central position in his analysis, *id.* at 162; *see also* Allen, *supra* note 21, at 196-97.

[241] *See supra* notes 173-74 and accompanying text; Berman & Reid, *supra* note 50, at 498-500, 511.

[242] *See* Lobban, *supra* note 50, at 333.

[243] *See* 1 Blackstone, *supra* note 23, at 59.

[244] *See id.* at 34; 2 *id.* at 2.

[245] *See* Boorstin, *supra* note 1, at 11-12, 20-23.

[246] *See* Lieberman, *supra* note 15, at 37. Blackstone's dedication to the scientific approach to the common law did not rule out what Boorstin calls "mystery" when needed to supplement science, much as Edmund Burke called upon mystery in aid of his arguments. Boorstin, *supra* note 1, at 25. Similarly, the *Commentaries* has been tagged as "formalistic, in the sense of describing the nominal power relationships, while failing to acknowledge what he and other lawyers of his day knew to be the actual division of power and influence." Langbein, *supra* note 14, at 70.

[247] Hooker's use of history is treated above at notes 138 to 145.

[248] *See* Boorstin, *supra* note 1, at 62-64, 78.

[249] *See id.* at 72-73; Richard Tuck, Natural Rights Theories 84 (1979). One is reminded also of Maine's characterization of the Roman law as aspiring to an "indefinite approximation" to perfect law. *See* Maine, *supra* note 24, at 63. Here again, Blackstone's roots in Roman law complement his Anglicanism.

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guarantee that the human law has taken on its shape from natural law. Blackstone held that awkward complexity too comes from history,[250] and history must bow to reason if found to contradict it.[251] Nevertheless, Blackstone held history both descriptive of the law and prescriptive,[252] obviating the need to distinguish "historical explanation" from "moral justification."[253] The providential, historical development of the law enabled Blackstone to portray law as possessing both the appropriate degree of fixity and the appropriate degree of change. On the one hand, common law and justice itself are fixed and uniform.[254] On the other hand, natural law leads to growth and change in the law,[255] and it is susceptible of diverse interpretations.[256] Far from his being an uncompromising apologist for the status quo,[257] Blackstone's very commitment to history also committed him to progress.[258] Correction and improvement — in continuity with historical development — are welcome.[259] Accordingly, the *Commentaries* ends with this charge:

> We have taken occasion to admire at every turn the noble monuments of antient simplicity, and the more curious refinements of modern art. Nor have it's [sic; i.e., that of the body of English law] faults been concealed from view; for faults

[250] *See* Boorstin, *supra* note 1, at 104.
[251] *See* Lieberman, *supra* note 15, at 45. Boorstin writes that Blackstone employs a fiction that English law expresses both "the perfection of reason" and "the fullness of experience," Boorstin, *supra* note 1, at 135, but Blackstone asserts that legal customs, while often rooted in natural law, are not always reasonable and so may stand in need of correction. *Compare, e.g.,* 1 Blackstone, *supra* note 23, at 251 (suggesting that a custom "seems dictated by nature herself") *with id.* at 280 (observing how an ancient rule of common law "was consonant neither to reason nor humanity" and so endorsing its later alteration).
[252] *See* Boorstin, *supra* note 1, at 63.
[253] Lieberman, *supra* note 15, at 49. This approach was typical of English eighteenth-century treatment of the law. Berman & Reid, *supra* note 50, at 438.
[254] *See* 1 Blackstone, *supra* note 23, at 137 (asserting that the law of England "is permanent, fixed, and unchangeable, unless by authority of parliament"); 3 *id.* at 429 (observing that "truth and justice are always uniform"). Langbein suggests that Blackstone himself viewed the fixed and settled character of the law as a myth. Langbein, *supra* note 14, at 68.
[255] *See* Boorstin, *supra* note 1, at 57.
[256] *See* 1 Blackstone, *supra* note 23, at 226 (opining that the terms of the theoretical social contract are "only deducible by reason and the rules of natural law; in which deduction different understandings might very considerably differ").
[257] *See* Prest, *supra* note 1, at 307-08. Elsewhere Prest notes Blackstone's Tory opposition to the Whig establishment. Prest, *supra* note 58, at 154.
[258] *See* Alschuler, *supra* note 1, at 37-38.
[259] *See* Boorstin, *supra* note 1, at 81; Lieberman, *supra* note 15, at 43-44.

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> it has, lest we should be tempted to think it of more than human structure: defects, chiefly arising from the decays of time, or the rage of unskilful [sic] improvements in later ages. To sustain, to repair, to beautify this noble pile, is a charge intrusted principally to the nobility, and such gentlemen of the kingdom, as are delegated by their country to parliament. The protection of THE LIBERTY OF BRITAIN is a duty which they owe to themselves, who enjoy it; to their ancestors, who transmitted it down; and to their posterity, who will claim at their hands this, the best birthright, and noblest inheritance of mankind.[260]

As the common law embodies and expresses the natural law, it is to be reformed when lapses from that transcendent standard appear. Blackstone calls English law of "human structure." Though eighteenth-century English lawyers may have called their law "the perfection of reason,"[261] Blackstone acknowledges it to be a somewhat faulty human application of natural law,[262] sometimes more honored in the breach.[263]

One means of developing the law with both Anglican continuity and an eye to the principles of natural law is by legal fiction.[264] Blackstone held that legal fictions permit the law to do justice in changed circumstances,[265] as in bypassing Norman errors.[266] In the *Commentaries*, fictions, along with history, ground the law.[267] Legal

[260] 4 BLACKSTONE, *supra* note 23, at 436. Other passages urging modification of English law include *id.* at 3-5, 88-89, 165-66, 175, 239, 278-79, 349, 353, 381-82, and 409.
[261] MAINE, *supra* note 24, at 64.
[262] *See* BOORSTIN, *supra* note 1, at 111, 145.
[263] *See id.* at 146-50.
[264] The classic discussion is to be found in MAINE, *supra* note 24, at 17-36.
[265] *See* LIEBERMAN, *supra* note 15, at 47.
[266] *See* BOORSTIN, *supra* note 1, at 69.
[267] Allen, *supra* note 21, at 202-05. Allen would have this use of fictions establish that the *Commentaries* sees the law as a fabrication that does not reflect the way things really are. *Id.* at 205. Fabrication the law may be, *see supra* text accompanying note 260, but the point of fictions is to shape this fabric more accurately to reflect the way things really are notwithstanding formulations of the positive law that otherwise would depart from the way things really are. After all, that is the driving force behind fictions. *See* MAINE, *supra* note 24, at 17-36.

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fictions enable the common law to embody the principles of the natural law.[268]

Of course, statutes also might help the law embody the principles of natural law.[269] To some degree, the *Commentaries* portrays statutes as declaring the natural law,[270] lending necessary correction to the common law while simultaneously rooted in the common law.[271] But statutes present a danger:

> THE mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy of the public attention. The common law of England has fared like other venerable edifices of antiquity, which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently it's [sic] symmetry has been destroyed, it's [sic] proportions distorted, and it's [sic] majestic simplicity exchanged for specious embellishments and fantastic novelties.[272]

Architecture was important to Blackstone.[273] As a "rule-bound art," it attracted his keen interest.[274] He used architectural metaphors in the *Commentaries*,[275] and elsewhere portrayed the old common law as a well-designed building.[276] Damning accusation it was, then, for

[268] *See, e.g.,* Stretton, *supra* note 205, at 119-20, 122, 126-27 (casting Blackstone's (?) "one person" theory of marriage as a legal fiction to serve his "scientific organizing principle" though, according to Stretton, not directly dictated by natural law).
[269] Again, the classic discussion is to be found in MAINE, *supra* note 24, at 17-36.
[270] *See* Lobban, *supra* note 50, at 325.
[271] *See* 1 BLACKSTONE, *supra* note 23, at 86, 353; 3 *Id.* at 328, 410; 4 *Id.* at 431-33. Blackstone presupposed and endorsed ameliorative legislation in his charge quoted above at note 260.
[272] 1 BLACKSTONE, *supra* note 23, at 10.
[273] *See* Conklin, *supra* note 23, at 220-24.
[274] Prest, *supra* note 3, at 115-18.
[275] *See id.* at 118-21.

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Blackstone to picture some statutes as monstrous add-ons.[277] But the fault of such statutes is that they are in a sense ahistorical — they reflect "visionary schemes" and "have not the foundation of the common law to build on."[278] Statutes that bring the law closer to the natural law will find their basis not in imagined exploits but rather in the principles already to be found in the common law itself, the generally trustworthy, if imperfect, presentation of the natural law.

Blackstone's commitment to the common law as holding within it immanent natural law reflects both the Roman law and also the Roman notion that the jus gentium, the law of nations, is a sound guide to the content of the natural law.[279] While the common law may embody the natural law more perfectly than do other systems of human law, those other systems may shed light on the natural law to be found within the common law. Blackstone subscribed to the uniformity of human nature and God's purpose, to the consequent uniformity of natural law, and to the expectation that the laws of all nations, past and present, would reflect these truths.[280] Comparative law illuminates the universality of English legal principles, the deposit of natural law.[281] The Age of Reason looked for the natural law in the jus gentium,[282] and the *Commentaries* looks to other legal systems to help find reason in the English law.[283] In the spirit of Hooker, Blackstone found natural law principles behind the diversity of laws even on aspects indifferent under the natural law. And in the spirit of Butler, he found marks of reasonableness in the similarity of English law to the law of other nations. (The dominant role of reasonableness in the *Commentaries* occupies our attention soon.)

[276] *See id.* at 104.
[277] *See* Cook, *supra* note 12, at 175-76 (noting Blackstone's preference for the common law over statutes); Kadens, *supra* note 5, at 1561 (discussing Blackstone's imagery of the law as a house deformed by statutes).
[278] 1 Blackstone, *supra* note 23, at 353.
[279] *See supra* text accompanying notes 63-65; Maine, *supra* note 24, at 41-43.
[280] *See* Boorstin, *supra* note 1, at 47.
[281] *See generally* Alschuler, *supra* note 1, at 27; McKnight, *supra* note 2, at 404.
[282] *See* Mossner, *supra* note 167, at 26.
[283] *See* Boorstin, *supra* note 1, at 43. Blackstone reflects upon comparative law several times in the *Commentaries*. *See* 1 Blackstone, *supra* note 23, at 5, 21, 35-36; 2 *id.* at 258; 3 *id.* at 108; 4 *id.* at 181, 237, 241.

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The Bible itself often found its way into the *Commentaries* under the aspect of comparative law — again, this was similar to the approach of Hooker.[284] Blackstone kept the Bible close to him while writing the *Commentaries*,[285] and he considered the divine law to be found therein the authoritative source on what he called the "law of nature"[286] and on the development of legal rules and doctrine.[287] Most typically, however, he used the Bible as a source of comparative law, a source presenting a body of law perfectly devised to embrace the natural law for a specific people at a specific time.[288] Natural law then was to be found within biblical law and not to be identified with it in its particulars.[289]

In these diverse ways — from finding natural law embedded within the common law, to the use of science, history, and comparative law — the *Commentaries* takes account of natural law in its treatment of English law, all in keeping with an Anglican understanding of natural law and its application to human affairs. But the most distinctively Anglican feature of how the *Commentaries* treats the natural law has escaped for the most part our attention until now. That feature is the testing and justification of the law of England by its reasonableness. Hooker, and especially Butler and the Latitudinarians, lent to Anglican theology its distinct emphasis on reasonableness. It is in this aspect of his jurisprudence that Blackstone most shows himself an Anglican.

For Blackstone, natural law does not dictate the content of most human law.[290] It supplies a few core principles, and those few do not

[284] *See supra* notes 116-18 and accompanying text.
[285] *See* Cook, *supra* note 12, at 175.
[286] *See supra* text accompanying note 39. Again, this paper uses the term "natural law" for what Blackstone usually called "the law of nature." He himself defined "natural law" to be human theorizing about the law of nature, *see id.*, though his actual usage seems not to be uniform on this point, see *supra* note 7.
[287] *See* Wilfrid Prest, *William Blackstone's Anglicanism*, *in* Great Christian Jurists in English History 213, 231-32 (Mark Hill & R. H. Helmholz eds., 2017).
[288] *See* Davies, *supra* note 151, at 16, 21.
[289] In keeping with its comparatist approach, the *Commentaries* with seeming approval notes within or alongside the common law itself a diversity of sources and even of rules of law. *See* 1 Blackstone, *supra* note 23, at 63-64, 74-78; 4 *Id.* at 403.

https://doi.org/10.6092/issn.2531-6133/10402

fundamentally overbear human law.[291] Furthermore, the state of civil society itself modifies primordial natural law, introducing a context where natural law principles take on a different cast or a subservient role.[292] For Blackstone, the application of natural law is not so much a matter of tracing specific precepts in human law. Rather, it is more like the practice of Roman lawyers, finding reasonable and appropriate legal norms suited to the situation at hand — the nature of the thing. The *Commentaries* presents the common law as a "rational, integrated" system, but also consistently traces its reasonableness, the reasons behind its details.[293]

The quest for life in accordance with nature, and therefore with reason, was a mark of the Age of Reason.[294] But Blackstone sought reasons for the law as a mark of God's own perfection, to be discerned through human experience.[295] Blackstone derived his passion for "reasonableness" in the law, and the consequent searching out of reasons for the law, from his Anglican theology.[296] The very core of the *Commentaries* is this essential use of natural law, this examination of reasonableness in light of the way things are. Reasons for the law, reasons resting upon on fundamental principles, animate the *Commentaries*.[297]

[290] *See* Alschuler, *supra* note 1, at 2, 24-27.
[291] *See id.* at 26.
[292] *See* 1 Blackstone, *supra* note 23, at 410, 423; 2 *id.* at 8-13, 258, 293; 3 *id.* at 145, 168, 208, 327; 4 *id.* at 3, 9-12, 42, 375.
[293] Posner, *supra* note 45, at 579, 590. The *Commentaries* is so dedicated to this tracing of reasons that at least one commentator tags the reasons as "often shallow, formalistic, indeed sometimes plain dishonest." Langbein, *supra* note 14, at 77.
[294] *See* Mossner, *supra* note 167, at 25.
[295] Boorstin, *supra* note 1, at 121.
[296] *See* Berman & Reid, *supra* note 50, at 502. Although reasonableness became a hallmark of Butler and the Latitudinarians, reasonableness figures in Hooker's work also. *See* Voak, *supra* note 118, at 137. Perhaps in some distinction from "reasonableness," "reason" had longed served as a touchstone of English law. *See* Norman Doe, Fundamental Authority in Late Medieval English Law 83, 106-31, 153, 176-77 (1990). Blackstone no doubt draws upon this tradition as well as upon post-Reformation Anglicanism.
[297] *See* Lobban, *supra* note 50, at 334; Posner, *supra* note 45, at 572. Posner discovers the maximization of welfare in Blackstone's approach, Posner 573-74, much as Maine found "utilitarianism" in the Roman law, McKnight, *supra* note 2, at 406 n.67. Finnis notes that Blackstone in some respects bases even the human institution of rights upon reason. Finnis, *supra* note 24, at 166.

https://doi.org/10.6092/issn.2531-6133/10402

Throughout the *Commentaries*, Blackstone weighs law against the standard of reasonableness.[298] The weighing is not rigorous. Fallen humans cannot understand all by reason, and the reason for some law may now evade our discovery.[299] It is enough that the law not be contrary to reason:[300]

> [W]hat is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded.[301]

Most often, however, the *Commentaries* highlights the place of reason in the formulation of the law and supports the reasonableness of its rules.[302] Furthermore, the *Commentaries* endorses reasonableness in interpreting laws according to their equity, reason, and justice.[303] This overall emphasis on reasonableness in the law, seeking sound reasons for rules and for their proper application, largely shapes the *Commentaries*.[304]

Blackstone thought human law most significant on matters indifferent, taking full advantage of the Anglican tradition regarding such matters, an essential contribution of Hooker.[305] But though "indifferent" may describe a matter not dictated by a precept of natural law, it does not describe a matter to be determined by human will undirected by reason. Support for this proposition derives from Blackstone's theory of natural rights. We already have noticed the emphasis Blackstone placed upon

[298] Lobban describes this as supplying a natural law "external test of reasonableness of the law." Lobban, *supra* note 50, at 333.
[299] *See* Boorstin, *supra* note 1, at 27.
[300] *See id*.
[301] 1 Blackstone, *supra* note 23, at 70 (footnote omitted); *see also id.* at 77-78, 91.
[302] *See id.* at 47, 146, 148, 150, 163, 165, 185-86, 211, 226-27, 238, 246, 280, 287, 411, 443, 446, 449-50, 464; 2 *id.* at 4, 8, 10-15, 68, 128, 162, 210-11, 228, 230, 385, 390, 401, 411-12, 453-54, 486; 3 *id.* at 31, 158, 161, 176-77, 188, 219, 226, 241, 244, 271, 379-80, 385, 430, 434; 4 *id.* at 14-16, 32, 51, 103, 105, 186, 216, 237, 248, 280, 364, 382-81, 409-12, 416, 425, 428-29.
[303] *See* 1 *id.* at 61; 3 *id.* at 192, 207, 226, 392, 429; 4 *id.* at 423.
[304] This search for sound reasons is not for Blackstone an individual affair; he distrusted individual reason. *See* Boorstin, *supra* note 1, at 50, 103, 117; Posner, *supra* note 45, at 603.
[305] *See supra* notes 147-56 and accompanying text.

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liberty as a mark of English culture.[306] Liberty — personal freedom — is so important that only reasonable constraint upon it is licit.[307] "[L]aws themselves, whether made with or without our consent, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are laws destructive of our liberty."[308] Rights therefore play a fundamental role in the *Commentaries*, and help support the natural law test of reason even in matters indifferent according to the more limited reach of explicit natural law precepts.

And Blackstone does make much of the notion of matters indifferent, a mark of Hooker's theology and the Anglican tradition.[309] His frequent use of the test of reasonableness supplies a natural law standard in the absence of precise precepts themselves drawn from nature.[310] In a sense then, the *Commentaries* presents most human law as prescribing rules for matters indifferent.[311] In another sense, however, Blackstone's insistence upon the reasonableness of human law supplies a standard and justification much like that of the Roman law, a standard and justification from natural law assuring that human law is suited to the reality of things.[312]

The reality of things can become clouded by human artifice, so the primitive state — and primitive law — offer a useful corrective.[313] For Blackstone, Saxon law stood for law based upon reason, not authority,[314]

[306] *See supra* note 240 and accompanying text.
[307] Social contract theory plays a role in Blackstone's development of natural law, *see* Finnis, *supra* note 24, at 178-79, and even property rights are contingent, developed in the context of society, *see supra* note 152 and accompanying text; Allen, *supra* note 21, at 197. Natural liberty yields to social convention, but only for good reasons.
[308] 1 BLACKSTONE, *supra* note 23, at 122.
[309] *See, e.g., id.* at 54-55, 185; 2 *id.* at 2, 211, 491; 3 *id.* at 87; 4 *id.* at 238; *see also supra* notes 147-56 and accompanying text.
[310] *See* Finnis, *supra* note 24, at 181; David Lemmings, *Editor's Introduction to Book I* of 1 BLACKSTONE, *supra* note 2, at xvii, xxxi. H.L.A. Hart has suggested that Blackstone's presentation of natural law is expressly to provide gaps to be filled by human law settling matters indifferent, Hart, *supra* note 52, at 174, but Finnis has demonstrated the difficulty with Hart's view. *See* Finnis, *supra* note 24, at 171-74.
[311] *See* Lobban, *supra* note 50, at 324; McKnight, *supra* note 2, at 404-06.
[312] Again, it bears repeating that "the reality of things" speaks not only of mere physicality but also of the norms appropriate to the situation at hand. The reality of things holds as much o*ught* as *is*. *See supra* notes 66-76 and accompanying text.
[313] *See* BOORSTIN, *supra* note 1, at 65, 68.
[314] *See* Posner, *supra* note 45, at 604.

https://doi.org/10.6092/issn.2531-6133/10402

he himself esteeming primitive law the most rational and therefore most true to nature.[315] The corruption of Saxon law by "Norman subtlety"[316] left it an ideal to be recovered by progress under the hand of Providence.[317] The law is to conform to reason, and Saxon law points the way to reasonable law untainted by later human error.

Likewise, Blackstone's emphasis on the reasonableness of the law helps make sense of his theory of judging. A judge is "sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one."[318] This declaratory theory of judging has come under wide-ranging attack,[319] and some doubt has been cast on whether Blackstone himself really subscribed to it.[320] Though judges even now may pay lip service to the theory,[321] it may seem unlikely that the development of the common law and the decision of difficult questions proceed simply from the declaration of pre-existing principles and rules, and not from judicial invention.[322] But the matter might be less puzzling if, rather than thinking that the theory entails some preexistent code of natural-law rules ready to fill gaps in the previously declared

[315] *See* BOORSTIN, *supra* note 1, at 70.

[316] *Id.* at 69.

[317] *See id.* at 83-84; McKnight, *supra* note 2, at 403; Posner, *supra* note 45, at 583; *cf.* MAINE, *supra* note 24, at 60 (noting that Roman lawyers respected the natural law within their own law for its "descent from the aboriginal reign of nature"). Presumably, Blackstone melds his endorsement of both Saxon primitivism and historical development in the notion of sound development upon Saxon principle.

[318] 1 BLACKSTONE, *supra* note 23, at 69; *see also* 3 *id.* at 327 ("For though in many other countries every thing is left in the breast of the judge to determine, yet with us he is only to *declare* and *pronounce*, not to *make* or *new-model*, the law"). This understanding of the work of the judge is in keeping with Blackstone's view of the use of reason in law to discover, not to invent. *See* BOORSTIN, *supra* note 1, at 51, 123. So law apparently created by human beings has also a divine quality. *Id.* at 59.

[319] *See, e.g.,* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 59-64 (David Campbell & Philip Thomas eds., Dartmouth Publ'g 1997) (1921); William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22 J.L. & RELIGION 255 (2006).

[320] *See* Alschuler, *supra* note 1, at 4, 37, 42.

[321] *See, e.g.,* Frankland & Moore v. Regina [1987] 1 AC 576, 585, 594 (PC) (appeals taken from Isle of Man).

[322] At the same time, however, Helmholz has noted the traditional role for natural law in adjudging cases, Helmholz, *supra* note 55, at 18, and one may wonder how the rule of law could be respected were judges to invent rules to apply to cases before them but arising from facts long past. *See* STEVEN D. SMITH, LAW'S QUANDARY 61-64 (2004).

https://doi.org/10.6092/issn.2531-6133/10402

common law, one could see instead that the question in any case is governed either by principles marked in precedent or by whichever of the rules proposed by the parties is the more reasonable in the light of precedent and the facts of the instant case.[323] The judicial resolution of otherwise uncertain questions of law demands the application of reason and not ex post legislative will.

As we have seen, Blackstone does take natural law seriously, but in an Anglican sense. The common law reflects the natural law, understood as the rule of reasonableness, a norm that aligns the law with the realities of the situation at hand, much as the Roman law is celebrated for doing so well. That is the natural law as the *Commentaries* most often applies it.

6. CONCLUSION

> After the spread of the Benthamite positivism, the sense of the natural law enterprise was forgotten and (despite the eclipse of Bentham's epistemology) it has remained usual to believe that the heart of any theory of natural law is, not the problem of the varying derivation of positive from natural law, but the thesis that positive law is "for all purposes" void if it contradicts natural law. Thus Blackstone's introductory discourse and definition of municipal law have standardly been interpreted on the assumption that any discussion of the relation between natural and positive law must be headed for an assertion or denial of that crude slogan, *lex iniusta non est lex*.[324]

[323] Apparently, on the bench Blackstone himself adhered to the declaratory theory and faithfully applied precedent. *See* Kadens, *supra* note 5, at 1556-58, 1578, 1580, 1583, 1586, 1590, 1598, 1600-01. That Blackstone does not subscribe to judicial review, *see* 1 Blackstone, *supra* note 23, at 91; Helmholz, *supra* note 55, at 14, in no way compromises his commitment to natural law. Finnis, *supra* note 24, at 169-70.

[324] Finnis, *supra* note 24, at 182-83 (footnote omitted).

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Readers of the *Commentaries* committed to a narrow understanding of natural law — often so committed only to reject the concept of natural law altogether — find Blackstone at best an epigone of natural law thinkers. He pays his natural-law lip service and then goes about his merry (and disguised) positivist way.[325] Ignoring the relation of law to morals as well as historical normativity,[326] we lack eyes to see Blackstone's use of natural law in explaining, justifying, and criticizing English law.

At the same time, how strange to think that human law somehow exists apart from reasons for its existence, reasons that connect it to the world it is to govern. Holmes supplies such reasons.[327] Posner supplies such reasons.[328] Blackstone does too. His reasons, his general recursion to reasonableness, is not simply a platitudinous reference. Within his Anglican context, reason and reasonableness are notes of God's order and providence. They are notes of natural law.

The concept of law without values is incoherent. The "reason" and "reasonableness" peppering the *Commentaries* are meant to supply the link between the laws of England and the values that developed and undergird them. Blackstone's Anglican approach to systematizing and explaining English law — the systematizing and explaining that made his *Commentaries* such a success — renders this link a natural-law enterprise.[329] And this enterprise should strike lawyers, and especially law students, as something familiar. They may not share Blackstone's theological commitments, but when they strive to make sense of the rules of law, to see the rules as reasonable, to find reasons for the rules, they

[325] *See* Alschuler, *supra* note 1, at 54; *cf.* Allen, *supra* note 21, at 198 (stating that "the *Commentaries* is a checkerboard of natural law and positivist perspectives").
[326] *See* Berman & Reid, *supra* note 50, at 521.
[327] *See* Oliver Wendell Holmes, Jr., The Common Law (1881).
[328] *See* Richard A. Posner, Economic Analysis of Law (9th ed. 2014).
[329] This approach bears a resemblance to the natural law of Roman law, "smuggling" into the law values under the guise of a merely "technological" approach. *See* d'Entrèves,*supra* note 61, at 151. Also, Lon Fuller's explanation of the development of the common law case-by-case comes to mind: he described each case presenting to the court the opportunity to discern the necessary implications of the enterprise the law at issue is to govern. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 357-77 (1978).

https://doi.org/10.6092/issn.2531-6133/10402

follow a course not unlike the course Blackstone famously set for his celebrated *Commentaries*, a course marked by natural law.

 https://doi.org/10.6092/issn.2531-6133/9820

Eu-China Bit and FTA Enhance Labor Cooperation and Protection

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TABLE OF CONTENTS: 1. Introduction; 2. Pathways to EU-China FTA, BIT, Labor Cooperation, and Increased Labor Protections; 2.1. Trade and FDI; 2.2. Pathways to EU-China BIT and FTA.; 3. EU and China Labor Protections in BITs and FTAs; 3.1. BITs; 3.2. FTAs; 4. Labor Cooperation; 5. Conclusion.

CONFERENCE & MEETING PROCEEDING: Presentation at the 17th International Conference in Commemoration of Professor Marco Biagi, "The Collective Dimensions of Employment Relations: Organisational and Regulatory Challenges in a World of Work in Transformation", March 18th-19th, 2019, Marco Biagi Foundation - University of Modena and Reggio Emilia (Modena, Italy).

KEYWORDS: *China*; *EU-China Free Trade Agreement*; *International Labor Cooperation EU and China*

UNIVERSITY OF BOLOGNA LAW REVIEW

ISSN 2531-6133

[VOL.4:2 2019]

https://doi.org/10.6092/issn.2531-6133/9820

1. INTRODUCTION

An EU-China Free Trade Agreement (hereinafter FTA) and Bilateral Investment Treaty (hereinafter BIT) can stimulate new labor protections and collective labor union cooperation in Chinese and European Union (hereinafter EU) workplaces, benefitting individual workers. Not only will it bring possible substantive improvements provided by the sustainability provisions calling for compliance with I.L.O. labor standards, but most importantly, the interface of EU trade unions with Chinese workers, employers, and the local All-China Federation of Trade Unions (hereinafter A.C.F.T.U.), brought about by its accompanying labor cooperation provisions and activities, will enhance workers' rights.[1] It will also provide a measure of certainty with rules to guide the evolving Belt and Road Initiative (hereinafter B.R.I.) across the New Silk Road.

For example, the 2013 Switzerland-China FTA has minimal protection of labour standards, but it includes a Memorandum of Understanding on Labor (hereinafter M.O.U.) that commits to I.L.O. core labor obligations and also states cooperative activities may, inter alia, take place through dialogue, joint studies, and capacity building.[2] Swiss trade unions initially resisted the FTA but came to support it when it determined the official linkages under the agreement to facilitate cooperation between unions in Switzerland and China. It also have the opportunity to educate the companies and workers regarding labor

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[1] *See* Ronald C. Brown, *Asian and US Perspectives on Labor Rights Under International Trade Agreements Compared*, *in* Global Governance of Labor Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives 83, 96-112 (Axel Marx et al. eds., 2015).

[2] Memorandum of Understanding on Labor and Social Security Cooperation, and the Environmental Cooperation Agreement between the Parties. FTA, China-Chile, art. 108, Nov. 18, 2005.

https://doi.org/10.6092/issn.2531-6133/9820

standards.[3] Likewise, EU FTAs incorporate not only state commitments to I.L.O. labor standards, but also to modes of labor cooperation.

Labor cooperation and involvement arises from trade-related activities and from Foreign Direct Investment (hereinafter FDI) in China or in the EU. A current example of German trade union involvement is with the Midea Group, a Chinese electrical appliance manufacturer, that purchased Kuka, a German manufacturer of industrial robots and solutions for factory automation.[4] Within this arrangement, the IG Metall Trade Union through its Works Council,[5] in tandem with other stakeholders in China, promote worker benefits and protections for the Chinese workers. It is reported that this engagement and labor cooperation of IG Metall Trade Union with China and the A.C.F.T.U. has been going on for some years.[6] This is a cutting edge need in China's manufacturing industry (and other targeted industries) as China promotes its Made in China 2025 Initiative, noted as "robot replaces man". This initiative has resulted large numbers of *displaced* workers and the need for appropriate consideration of those workers, as well as the *retained, retrained, and the newly-hired workers.*[7] In this case, the experience and the expertise of the German trade union and its

[3] *See* Vasco Pedrina and Zoltan Doka, *Switzerland-China Free Trade Agreement and Labour Rights,* GLOBAL LABOUR COLUMN (Oct., 2014), http://column.global-labour-university.org/2014/10/switzerland-china-free-trade-agreement.html.

[4] *See* Jens Kastner, *Layoffs cloud outlook for Chinese takeovers in Germany*, NIKKEI ASIAN REVIEW (Jan. 30, 2018), https://asia.nikkei.com/Asia300/Layoffs-cloud-outlook-for-Chinese-takeovers-in-Germany ("Kuka was acquired by Chinese appliance-maker Midea Group, the world's largest maker of home appliances, for approximately 4.6 billion euros in December 2016. In 2016, those acquisitions totaled nearly 13 billion euros, or 5% of all industrial investment in Germany"). Kuka has also set up operations in China and there is concern by the IG Metal Workers Union that many of the German jobs will be moved to China. The Union protested recent layoffs at Kuka and Ledvance plants.

[5] L. Fulton, *Worker representation in Europe. Labor Research Department*, WORKER-PARTICIPATION.EU (2015) https://www.worker-participation.eu/National-Industrial-Relations/Countries/Germany/Workplace-Representation ("Works councils provide representation for employees at the workplace and they have substantial powers – extending to an effective right of veto on some issues. Although not formally union bodies, union members normally play a key role within them").

[6] *See* Anne Sander, *German Trade Unions and China: From Non-Interference to Cooperation?,* EU-CHINA CIVIL SOCIETY FORUM (July 20, 2009) https://www.eu-china.net/uploads/tx_news/28_German_Trade_Unions_and_China_01.pdf.

[7] *See* Ronald C. Brown, *Made in China 2025: Implications of Robotization and Digitalization on MNC Labor Supply Chains and Workers' Labor Rights in China*, 9 TSINGHUA CHINA L. REV. 186 (2017).

https://doi.org/10.6092/issn.2531-6133/9820

cooperation with the other stakeholders directly provides individual workers' benefits and protections that would not have otherwise been achieved.

Another legal approach to bring labor cooperation is through bilateral investment treaties (BITs) which are often absorbed into the FTAs. While typically they do not themselves contain labor provisions, the proposed EU-China BIT is reported to contain labor provisions.[8]

In 2014, Chinese President Xi Jinping called for the EU and China to "actively explore" a bilateral FTA.[9] The EU-China connection is one of the key corridors of China's B.R.I..[10] There are many reasons and opportunities why China and the EU should contemplate a EU-China FTA.[11] Current trade is $1.5 billion per day, and against a background in which the United States is increasingly drawing into question its commitment to free trade and the global commons. Furthermore, with the uncertainty resulting from Brexit, there clearly exists a need for China and the EU not only to increase the breadth and depth of their

[8] *See generally EU and China Agree on Scope of the Future Investment Deal*, EUROPEAN COMMISSION, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1435 (last updated Jan. 15, 2016). (In 2016, the EU and China negotiators reached clear conclusions on an ambitious and comprehensive scope of the upcoming EU-China investment agreement and moved into a phase of specific text-based negotiations. The EU and China agreed in particular that the future deal should improve market access opportunities for their investors by establishing a genuine right to invest and by guaranteeing that they will not discriminate against their respective companies. The EU and China are also determined to address key challenges of the regulatory environment, including those related to transparency, licensing and authorization procedures, and to provide for a high and balanced level of protection for investors and their investments. The agreement will also include rules on environmental and *labor-related dimensions of foreign investment*).

[9] *China, EU Pledge to Consider Bilateral Trade Pact*, INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT (Apr. 3, 2014), https://www.ictsd.org/bridges-news/bridges/news/china-eu-pledge-to-consider-bilateral-trade-pact. ("The EU and China agreed on Monday to consider the possibility of a bilateral trade pact, should their current negotiations for an investment deal prove fruitful. The announcement came as part of Chinese President Xi Jinping's high-profile visit to Brussels, which also saw the EU publicly support Beijing's bid for joining talks on a plurilateral deal in services trade").

[10] *See* THE STATE COUNCIL, *Full text: Action plan on the Belt and road Initiative,* ENGLISH.GOV.CN, http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm (last updated Mar. 30, 2015), (China's State Council labels its "Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiatives" as B.R.I.).

[11] *See* Alicia García-Herrero et al., *EU–China Economic Relations to 2025 Building a Common Future*, BRUEGEL.ORG (Sept. 13, 2017), http://bruegel.org/wpcontent/uploads/2017/09/CHHJ5627_China_EU_Report_170913_WEB.pdf.

https://doi.org/10.6092/issn.2531-6133/9820

cooperation, but also to act more strategically in the way they relate to each other.[12] Likewise, there is expanding FDI flowing both ways between EU and China,[13] with the promise of the new BIT increasing that flow.

Perhaps it is time for the EU and Chinese leaders to build on the existing EU–China 2020 Strategic Agenda for Cooperation, to quickly conclude on-going negotiations on their EU-China BIT, and to embrace substantive negotiations on an EU-China FTA? China is now the EU's second-biggest trading partner behind the United States and the EU is China's biggest trading partner. The resulting BIT and FTA could enhance trade and investment opportunities, as well as contribute to employment opportunities and rising labor standards, bringing with it increased labor cooperation and worker protections. There are recent precedents, discussed herein, indicating China is open to more substantive and cooperative labor provisions in their FTAs and BITs.

This paper focuses on enhanced labor protections and collective labor cooperation under China and EU Members' existing and proposed FTAs and BITs. Following the Introduction, Part II discusses the economic connections of trade and Foreign Direct Investment (hereinafter FDI) between EU and China and the pathways to further the relationship. Part III provides a legal comparison of their different approaches on labor protections, dispute resolution, and labor cooperation in FTAs and BITs. Part IV provides an analysis on the current and varying approaches of enhanced labor cooperation. Part V states the conclusion and suggests that the EU-China corridor of the new Silk Road could and should be paved with labor protections consistent with international labor standards and emanating from a EU-China FTA, with its accompanying labor cooperation activities that exist within and behind the legal terms.

[12] *See* Study on a New Era in EU-China Relations: More Wide Ranging Strategic Cooperation?, EUR. PARL. DOC. (PE 570.493) 12 (2018). *See also* Ronald C. Brown, *A New Leader in Asian Free Trade Agreements? Chinese Style Global Trade: New Rules, No Labor Protections*, 35 UCLA PAC. BASIN L. J. 1 (2017).

[13] García-Herrero et al., *supra* note 11. ("In 2015, the stock of EU FDI in mainland China (not including Hong Kong) amounted to €168 billion, and investment stock from mainland China in the EU was only €35 billion (€115 billion including Hong Kong), even though Chinese investment flows into the EU have grown substantially in recent years").

https://doi.org/10.6092/issn.2531-6133/9820

2. PATHWAYS TO EU-CHINA FTA, BIT, LABOR COOPERATION, AND INCREASED LABOR PROTECTIONS

2.1. TRADE AND FDI

China is striving to become a leader in globalism[14] and is investing heavily in making it happen. One of the world's largest projects, the B.R.I.[15] is a primary driver of China's development strategy. A key aim of the B.R.I. is to promote economic connectivity among countries in Eurasia by recreating the historic Silk Road by a land and a sea route along several corridors. A growing number of FTAs, such as Comprehensive and Progressive Agreement for Trans-Pacific Partnership and Comprehensive Economic and Trade Agreement, are already establishing new trading areas and, the fact EU and China each have FTAs with some of the same countries – e.g., South Korea; suggests that China should act promptly to set their rules of trade.[16] Further pressures may come from the soon-to-be-completed US-Mexico-Canada FTA.[17] China is now the EU's

[14] *See* Brown, *supra* note 12.

[15] *See* THE STATE COUNCIL, *supra* note 10. (China's State Council labels its "Silk Road Economic Belt and the 21st Century Maritime Silk Road Initiatives" as B.R.I., which is explained as follows:

> The Belt and Road run through the continents of Asia, Europe and Africa, connecting the vibrant East Asia economic circle at one end and developed European economic circle at the other, and encompassing countries with huge potential for economic development. The Silk Road Economic Belt focuses on bringing together China, Central Asia, Russia and Europe (the Baltic); linking China with the Persian Gulf and the Mediterranean Sea through Central Asia and West Asia; and connecting China with Southeast Asia, South Asia and the Indian Ocean. The 21st-Century Maritime Silk Road is designed to go from China's coast to Europe through the South China Sea and the Indian Ocean in one route, and from China's coast through the South China Sea to the South Pacific in the other.

See also H.E. Xi Jinping, *Work Together to Build the Silk Road Economic Belt and the 21st Century Maritime Silk Road: Speech by H.E. Xi Jinping, President of the People's Republic of China, At the Opening Ceremony of the Belt and Road Forum for International Cooperation*, XINHUANET (May 14, 2017), http://www.xinhuanet.com/english/2017-05/14/c_136282982.htm.

[16] *See*, *supra* note 12.

[17] Agreement between the United States of America, the United Mexican States, and Canada, Nov. 30, 2018. The three partners hope to sign and ratify it in 2019. The agreement also requires the three nations to give three-months' notice if they start trade negotiations with a non-market economy (Art. 32.10), an indirect reference to China. The US can terminate its pact with Mexico or Canada if either of them strikes a deal with a non-market economy. *See also* Geoffrey Gertz, *5 things to know about*

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second-biggest trading partner behind the United States and the EU is China's biggest trading partner. The resulting BIT and FTA could enhance trade and FDI opportunities and contribute to China's employment opportunities and rising labor standards.

Trade

> In 2017, the EU continues to be China's largest trading partner and China is the EU's second biggest trading partner in trade in goods, after the US. China and Europe trade goods worth well over EUR 1.5 billion a day. Trade with China is worth a total of EUR 375 billion in terms of EU goods imports and EUR 198 billion in terms of EU goods exports. The EU continues to record a significant trade deficit with China, amounting to EUR 176 billion in 2017.[18]

Even with the growing economic integration of EU and China, with China being EU's biggest source of imports and its second-biggest export market, there is still much room for growth, especially in the areas of FDI and services.[19]

> The European Union (EU) and China have much in common. Their GDPs (€14.72 trillion and €9.75 trillion, respectively, in 2015) rank number two and number three in the world, behind the United States (€16.64 trillion). They are two of the most externally-integrated economies in the world, with annual international trade in goods and services of €15 trillion (€5 trillion if only trade external to the EU is considered) and €4.75 trillion, respectively, in 2015. Their annual bilateral trade in

U.S.M.C.A., the new NAFTA, Brookings (Oct. 2, 2018) https://www.brookings.edu/blog/up-front/2018/10/02/5-things-to-know-about-usmca-the-new-nafta/. *See also*, *Trump has cleared deck for China trade war by striking new Nafta deal, says analyst*, The Straits Times (Oct. 2, 2018), https://www.straitstimes.com/world/united-states/trump-has-cleared-deck-for-china-trade-war-by-striking-new-nafta-deal-say.

[18] Eur. Parl. Doc. (PE 570.493) 12 (2018), *supra* note 12.

[19] *See China*, European Commission, http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/ (last updated May 7, 2019).

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> goods and services stood at €580 billion in 2015, with each being the other's largest source of imports and second-largest export destination. . . . [M]any areas of economic interaction remain under-developed, including trade in services, levels of foreign investment, cooperation on industrial and technological innovation, and financial market integration.[20]

An example of how EU-China trade often blends with FDI is illustrated below.

> Chinese firm CATL will build a battery factory in central Germany to supply the country's key auto industry in its transformation toward electric cars, an investment hailed Monday by Chancellor Angela Merkel as a "new step" in Sino-European cooperation. . . . Industrial workers' union IG Metall also hailed the deal, which it said could create around 1,000 new jobs in the high-tech sector. Earlier Monday, luxury carmaker BMW had already announced that it had struck a 4.0 billion-euro ($4.7 billion) deal to buy batteries from the Chinese giant, with 1.5 billion euros worth of sales in Germany and 2.5 billion in China. BMW said the Chinese battery manufacturer would supply the cells for the electric Mini and for BMW's upcoming "iNext" electric limousine, slated for production from 2021.[21]

[20] García-Herrero et al., *supra* note 11, at vi. ("Chinese imports of services grew at an average annual rate of more than 25 per cent between 2010 and 2015, and the EU's trade surplus in services with China has been growing at an average annual rate of 37 per cent since 2010, reaching €11 billion in 2015. . . . Growing Chinese consumption, especially of services, has the potential to create new markets for European businesses, while rising Chinese investment in the EU, in addition to increasing EU GDP and employment, also provides Chinese companies with a platform to improve their global competitiveness").

[21] *China's CATL to build first EU electric car battery plant in Germany*, PHYS.ORG (Jul. 9, 2018), https://phys.org/news/2018-07-china-catl-electric-car-battery.html.

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FDI[22]

Government information on EU-China FDI shows:

> Foreign direct investment (FDI) in Europe from China hit a record 65 billion euros (USD 79 billion) in 2017, thanks largely to ChemChina's takeover of agribusiness company Syngenta for USD 43 billion in Switzerland in May 2017. Without that deal, Chinese FDI into Europe would have fallen by 22 %, to around USD 38 billion, according to Chinese authorities.[23]

Chinese outbound FDI has dramatically swung toward Europe in the first half of 2018; in the first six months of the year, newly-announced Chinese mergers and acquisitions (hereinafter M&A) into Europe were $20 billion, with completed investments at $12 billion.[24]

> Sweden was the top European destination for Chinese investment in the first half of 2018 with $3.6 billion, followed by the U.K. at $1.6 billion, Germany at $1.5 billion and France at $1.4 billion. Automotive, health and biotech, and consumer

[22] *See* The Levin Institute - The State University of New York, *What Are the Different Kinds of Foreign Investment?*, Globalization 101 (2017), http://www.globalization101.org/what-are-the-different-kinds-of-foreign-investment/. ("Foreign direct investment (FDI) pertains to international investment in which the investor obtains a lasting interest in an enterprise in another country. Most concretely, it may take the form of buying or constructing a factory in a foreign country or adding improvements to such a facility, in the form of property, plants, or equipment. FDI is calculated to include all kinds of capital contributions, such as the purchases of stocks, as well as the reinvestment of earnings by a wholly owned company incorporated abroad (subsidiary), and the lending of funds to a foreign subsidiary or branch. The reinvestment of earnings and transfer of assets between a parent company and its subsidiary often constitutes a significant part of FDI calculations").

[23] Eur. Parl. Doc. (PE 570.493) 12 (2018), *supra* note 12, at 14 ("Annual Chinese outbound foreign direct investment (FDI) in the 28 EU economies has grown from EUR 700 million in 2008 to EUR 35 billion in 2017; whereas, EU investment in China is about EUR 10 billion annually"). *See also* Thilo Hanemann and Mikko Huotari, *EU-China FDI: Working towards reciprocity in investment relations*, Merics Papers on China (May, 2018), https://www.merics.org/sites/default/files/2018-08/180723.pdf ("According to Chinese authorities, in 2017 the main destinations for China's merchandise exports remained the United States 19%; the EU 16%"). *See also* UNCTAD, *World Investment Report 2018*, https://unctad.org/en/PublicationsLibrary/.pdf. *See also* European Think-tank Network on China, *Chinese Investment in Europe: A Country-level Approach*, Mercator Institute for China Studies (Dec., 2017), https://www.merics.org/en/about-us/programs/ecpu/etnc/chinese-investment-in-europe ("Chinese global FDI in 2016 was at the top at $893 billion versus the U.S. in third place at $595 billion").

[24] *See* Natasha Turak, *China is investing 9 times more into Europe than into North America*, CNBC (July 17, 2018).

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> products and services have become the top recipients for Chinese FDI in both the U.S. and Europe.[25]

Because of a gap in investment openness between EU and China, concerns have been raised about detrimental economic impacts such as unfair competition and resulting market distortions and a sense among EU citizens and businesses that the playing field between Europe and China is not level.[26] This strengthens protectionist sentiment and fuels political backlash against economic engagement with China. Thus, the resolution of reciprocity concerns is critical for future EU-China economic relations and is, of course part of the discussion in the EU-China BIT negotiations.[27]

FDI brings about increased employment and thus possible labor impacts. In 2018 BMW in Germany reported that Chinese firm CATL will build a battery factory in Germany to supply it's auto industry's transformation to electric cars. German "industrial workers' union IG Metall" also hailed the deal, which it said could create around 1,000 new jobs in the high-tech sector.[28] Additionally, it is reported that "global

[25] *Id.*

[26] *See* Till Hoppe and Stephan Scheuer, *Stopping the Chinese*, HANDELSBLATT TODAY (June 19, 2017) https://global.handelsblatt.com/companies/stopping-the-chinese-783166 ("The European Union is drawing up proposals [draft EU law] that will allow it to monitor and possibly block the takeover of European companies by state-owned Chinese businesses, but German car makers fear the law could hit their Chinese markets"). *See also* Norbert Häring et al., *Warnings Over State Intervention in Kuka Deal*, HANDELSBLATT TODAY (June 3, 2016), https://www.handelsblatt.com/today/companies/chinese-investment-warnings-over-state-intervention-in-kuka-deal/23538330.html.

[27] HANEMANN & HUOTARI, *supra* note 23, at 3-8. ("Chinese investments in Europe, especially in Germany, reveal a strong move toward market and asset-seeking investments. German companies acquired by Chinese investors, especially in the machinery industry, are often not only leaders in their fields, but also strongly focused on RD. This Investment Motive seems to be the predominant MA strategy of Chinese companies in Germany"). *See also* Dr. Margot Schüller, *Globalisation of Chinese Companies*, GIGA (2013), https://www.giga-hamburg.de/de/projekt/globalization-of-chinese-companies. *See also* FRANKFURT BUREAU, *Factbox: Chinese investments in German companies*, REUTERS (Feb. 26, 2018), https://www.reuters.com/article/us-daimler-geely-factbox/factbox-chinese-investments-in-german-companies-idUSKCN1GA1RO (for a partial list of Chinese companies FDI in Germany). *See also* Miriam Widman, *Chinese Takeovers of German Firms on the Rise*, HANDELSBLATT TODAY (Sept. 3, 2014), https://global.handelsblatt.com/companies/chinese-takeovers-of-german-firms-on-the-rise-12623. *See also New Chinese battery factory electrifies German e-car revolution*, THE LOCAL GERMANY (July 9, 2018), https://www.thelocal.de/20180709/chinas-catl-to-build-electric-car-battery-plant-in-germany.

[28] *Id.*

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automakers are planning a $300 billion surge in spending on electric vehicle technology over the next five to ten years, with nearly half of the money targeted at China, accelerating the industry's transition from fossil fuels and shifting power to Asian battery and electric vehicle technology suppliers."[29]

FDI and BITs

"While the early literature was skeptical on the effectiveness of BITs, more recent empirical studies generally find that BITs do actually stimulate the inflow of FDI."[30]

> We find strong evidence that liberal admission rules promote bilateral FDI. We focus on two investment provisions which constitute important legal innovations relating to the liberalization and protection of FDI: (i) guarantees of market access for foreign investors by means of NT and MFN treatment in the pre-establishment phase; and (ii) credible commitments against discriminatory and discretionary treatment by means of ISDS mechanisms in the post-establishment phase.[31]

With increasing FDI, more foreign companies will be establishing business in the foreign location which will employ workers who may be represented by labor unions, thus raising the question of the role of labor union cooperation with the foreign employer.[32] Unions in Switzerland are

[29] This is an unprecedented level of spending – fueled by Germany's Volkswagen AG. It is reported, "the future of Volkswagen will be decided in the Chinese market," said Herbert Diess, chief executive of VW. Paul Lienert et al., *Exclusive: VW, China spearhead $300 billion global drive to electrify cars*, Reuters (Jan. 10, 2019), https://www.reuters.com/article/us-autoshow-detroit-electric-exclusive/exclusive-vw-china-spearhead-300-billion-global-drive-to-electrify-cars-idUSKCN1P40G6?utm_source=applenews.

[30] Liesbeth Colen and Andrea Guariso, *What Type of FDI Is Attracted by Bilateral Investment Treaties?*, LICOS Centre for Institutions and Economic Performance (June 12, 2012), https://www.etsg.org/ETSG2012/Programme/Papers/197.pdf.

[31] Axel Berger, Matthias Busse, Peter Nunnenkamp and Martin Roy, *Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box*, Kiel Working Papers IFW (2010), https://ideas.repec.org/p/zbw/wtowps/ersd201013.html.

[32] *See* Tian Ameng,*FTA a win-win for China and Switzerland*, Chinadaily (Jan. 19, 2017), http://www.chinadaily.com.cn/business/2017wef/2017-01/19/content_27996541.htm. In 2017, China and Switzerland upgraded their 2013 FTA and data showed that: "in 2015, Sino-Swiss bilateral trade reached $44.27 billion, of which China's imports from Switzerland amounted to $41.1 billion. There are currently around 100 Chinese companies

https://doi.org/10.6092/issn.2531-6133/9820

reported to have agreed in 2013 to the Switzerland-China FTA (which incorporated BIT provisions),[33] notwithstanding concerns over protection of labor rights based on their conviction that: "first, a policy of economic opening towards China is better than one of isolating that country, . . . secondly, the durability provisions that were negotiated . . . provide better means of pressing both countries to combat human and labor rights breaches than would have been the case without such an FTA".[34]

2.2. PATHWAYS TO EU-CHINA BIT AND FTA

The pathway to an eventual successful bilateral FTA would be to build on the existing EU–China 2020 Strategic Agenda for Cooperation that places an EU-China BIT[35] as central to the EU's long-term bilateral relations

in Switzerland. There's also a growing interest from Chinese investor for Swiss brands in terms of M&A, targeting commodities but also sports, media and technologies, such as the deals between ChemChina and Syngenta, between Dalian Wanda and Infront Sports & Media".

[33] *See* FTA, Switz.-China, Chapter 8, July 5, 2013 (includes all aspects of a BIT for investment).

[34] Pedrina & Doka, *supra* note 3. Switzerland-China FTA, Art. 3: 1. The Parties reaffirm the importance of cooperation to further improve their respective labour standards and practices in line with their national labour policy objectives and according to the obligations set out in applicable I.L.O. Conventions. 2. In pursuit of this objective, the Parties agree that cooperation relating to labour and employment, including administrative and technical cooperation as well as capacity building, shall be conducted under the bilateral M.O.U..

[35] *See* Axel Berger, *Investment Treaties and the Search for Market Access in China,* International Institute for Sustainable Development (June 26, 2013), https://www.iisd.org/itn/2013/06/26/investment-treaties-and-the-search-for-market-access-in-china/ (EU-China BIT has also been referred to as the Comprehensive Agreement on Investment (CAI) and the terms appear to have flexibility as the latter may omit some terms present in a BIT). *See also* Iuliu Winkler, *EU-China Investment Agreement - Legislative Train Schedule*, European Parliament (May 20, 2019), http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-china-investment-agreement. For example, China also negotiates Preferential Trade Investment Agreements (hereinafter P.T.I.A.) of which four include comprehensive rules on investment:

> These treaties where negotiated with Pakistan (2006), New Zealand (2008), Peru (2009) and ASEAN (2009). The P.T.I.A. with Singapore just incorporates the China-ASEAN investment agreement and the P.T.I.A. with Costa Rica from 2010 just reaffirms the China-Costa Rica BIT signed in 2007. The P.T.I.A. recently signed with Iceland follows this approach and "recognizes the importance" (Art. 92) of the China-Iceland BIT from 1994.

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with China.[36] The BIT would accelerate the process toward an FTA and create a more open and transparent environment for increased flows of investment. It would also improve investment for European and Chinese investors by creating investment rights and guaranteeing non-discrimination, improving transparency, and providing investment rules on environmental and labor-related aspects of foreign investment, as all are potential obstacles for agreement on an FTA.[37]

In 2014, China, supported by the EU, joined the US-led and on-going negotiations under the WTO towards a global Trade in Services Agreement that also seeks to open markets and improve rules.[38]

Furthermore, there is a Working Group from high levels of EU and Chinese governments, underscoring the seriousness of the work; the EU-China Trade Project II (hereinafter E.U.C.T.P.), works on the many substantive issues underlying an EU-China FTA and suggests appropriate positions and accommodations to support China's continued integration into the global trading system.[39]

[36] *See* EU External Action, EU-China 2020 Strategic Agenda for Cooperation http://eeas.europa.eu/archives/docs/china/docs/eu-china_2020_strategic_agenda_en.pdf.

[37] *Id.*

[38] *See Trade in Services Agreement*, European Commission, http://ec.europa.eu/trade/policy/in-focus/tisa/ (last updated July 14, 2017). *See also* Shawn Donnan and Andrew Byrne, *China Courts EU on Bilateral Trade Agreement*, Financial Times https://www.ft.com/content/77dc2efc-b9b4-11e3-a3ef-00144feabdc0.

[39] *See Project Background*, E.U.C.T.P., http://www.euctp.org/index.php/en/project-background.html.("The E.U.C.T.P. works with Chinese and European ministries, directorates general and other organizations to develop and deliver results, as well as other international and donor organizations working in the field of trade and sustainable development in China. China partners include: Ministry of Commerce, National Development and Reform Commission, State Administration of Industry and Commerce, Ministry of Justice, Ministry of Housing and Urban-rural Development, Ministry of Agriculture, General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), Legislative Affairs Office of the State Council, The People's Bank of China, China Banking Regulatory Commission, China Securities Regulatory Commission, China Insurance Regulatory Commission, State Administration of Foreign Exchange, Certification and Accreditation Administration of the People's Republic of China, Beijing Municipal Commission of Commerce, Beijing WTO Affairs Center, China Science and Technology Exchange Center EU Partners: Directorate Generals for Trade, Directorate General for Health and Consumers, Directorate General for the Internal Market, Directorate General for Agriculture, Directorate General for Taxation and Customs Union, Directorate General for Information Society and Media, Directorate General for Mobility and Transport, Directorate General for Economic and Financial Affairs, Directorate General for Climate Action, Directorate General for Energy, Directorate General for Enterprise and Industry, Directorate General for Competition, and, EU

https://doi.org/10.6092/issn.2531-6133/9820

Further opportunities to move discussions on the EU-China BIT toward completion will arise in the second half of 2020 when the EU and China appear to be having a summit meeting. [40]

3. EU AND CHINA LABOR PROTECTIONS IN BITS AND FTAS

3.1. BITS

The EU Members have a number of BITs,[41] most of which do not include labor provisions. However, three Member States have entered into four BITs that include labor provisions, including Belgium-Luxembourg[42] and Austria, [43] that entered three separate BITs and commit to the I.L.O. core labor standards. Currently, though there are China BITs with EU

Delegation to China and Mongolia, EU China Project on the Protection of Intellectual Property Rights (IPR2), European Union Chamber of Commerce in China (EUCCC)").

[40] *See* Andreas Rinke, *Merkel planning EU-China summit for Germany's 2020 presidency*, REUTERS (Jan. 14, 2019), https://uk.reuters.com/article/uk-eu-china-germany/merkel-planning-eu-china-summit-for-germanys-2020-presidency-sources-idUKKCN1P81FC. ("Chancellor Angela Merkel has proposed a China-European Union summit during Germany's 2020 EU presidency that would include national leaders of EU countries as well as officials from Brussels and Beijing, EU diplomats said. The summit, which is likely to coincide with China's displacement of the United States as the EU's largest trade partner, would aim to counter what Berlin sees as Beijing's divide-and-rule approach to dealing with the bloc. Projects like the Belt-and-Road debt-for-development initiative has made China an influential player in poorer eastern EU members like Hungary and Greece").

[41] *See How to Understand the China-EU Bilateral Investment Treaty Negotiation*, INSTITUTE OF EUROPEAN STUDIES OF CHINESE ACADEMY OF SOCIAL SCIENCES, (May 13, 2019), http://ies.cass.cn/english/chinare/cer/201309/t20130903_2464193.shtml. It has been noted that the BITs of EU members "are still incomplete as there is a lack of completeness and coordination from the overall perspective of the EU. Moreover, the BITs concluded by China with different EU Member States, although quite similar, may result in large differences in specific content such as standards of treatment, currency exchange and different provisions with regard to dispute settlement." *See also* Jie Hao and Dawe Li, *Progress, Difficulties and Promotion Strategies of the EU-China BIT Negotiation*, http://english.cciee.org.cn/archiver/ccieeen/UpFile/Files/Default/2017121.pdf. *See also International Investment Agreements Navigator*, UN INVESTMENT POLICY HUB, http://investmentpolicyhub.unctad.org/IIA/mappedContent. ("International investment agreements (IIAs) are divided into two types: (1) bilateral investment treaties and (2) treaties with investment provisions").

[42] *See* Agreement for Reciprocal Promotion and Protection of Investment, BLEU - Montenegro, art. 1(6), Apr. 22, 2016.

[43] *See* Agreement for the Promotion and Protection of Investment, Austria - Taj., art. 5, Dec. 15, 2010.

https://doi.org/10.6092/issn.2531-6133/9820

members, none include labor provisions. As EU and China trade continues to grow, it is also expected that FDI will increase in both countries. This will result in more interaction with workers and foreign labor unions and increases the need for attention to labor issues and labor union cooperation.[44] Meanwhile, the negotiations for an EU-China BIT continue.[45] "It will replace the 26 existing Bilateral Investment Treaties between 27 individual EU Member States and China by one single comprehensive investment Agreement."[46]

The EU Government stated: "The EU's top priorities remain the conclusion of the Comprehensive EU-China Agreement on Investment [BIT]."[47] Further, German Chancellor Merkel said she "wanted quick progress on an EU-China investment deal and that this would be a precondition to any free trade talks, a move Premier Li said would be timely."[48]

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[44] *See* John Seaman, Mikko Huotari, Miguel Otero-Iglesias, (eds.),, *Chinese Investment in Europe: A Country-Level Approach*, EUROPEAN THINK-TANK NETWORK ON CHINA, p. 154-155 (Dec. 2017), https://www.merics.org/sites/default/files/2018-01/171216_ETNC%20Report%202017_0.pdf.

[45] *See Overview of FTA and Other Trade Negotiations*, EUROPEAN COMMISSION http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (The 18th round of negotiations took place in Brussels from 12 to 13 July 2018). For a more comprehensive analysis, see Ronald C. Brown, *China-EU BIT and FTA: Building a Bridge on the Silk Road Not Detoured by Labor Standard Provisions*, UNIV. WASH. INT'L L. J. (forthcoming 2019-20).

[46] *Id.* ("In 2016 the EU and China negotiators reached clear conclusions on an ambitious and comprehensive scope for the EU-China investment agreement and established a joint negotiating text").

[47] EUR. PARL. DOC. (PE 570.493) 12 (2018), *supra* note 12, at 6.

> Negotiations, launched in 2013, on the EU's first bilateral Comprehensive Agreement on Investment are the EU's immediate top priority with a view to deepening and rebalancing relations with China. The aim is to reach the same level of openness in China's market that is already available in the EU's market. The objective is to facilitate market access by addressing both discriminatory and quantitative restrictions. Both investment and investor protection and reciprocal market access are important aspects for the EU. The EU Member States' Bilateral Investment Treaties (BITs) with China do not provide for investment market access. So far, 17 rounds of negotiations have taken place, the most recent one from 22 to 24 May 2018.

[48] *Germany and China Vow to Expand Partnership Amid Concerns About Trump's Policies*, BLACK CHRISTIAN NEWS NETWORK ONE, https://bcnn1wp.wordpress.com/2017/06/01/germany-and-china-vow-to-expand-partnership-amid-concerns-about-trumps-policies/ (Jun. 1, 2017).

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It is perhaps noteworthy that the EU-China 2020 Strategic Agenda for Cooperation placed as a goal in its EU-China BIT negotiations – to negotiate "rules on environmental and *labor-related aspects* of foreign investment" (emphasis added).[49]

Although current China BITs, included those concluded with EU Member States do not contain labor protections or references to I.L.O. standards,[50] it is not uncommon for a BIT to precede an FTA and is often incorporated into the FTA. It was recently[51] noted that as "a precursor to their free trade agreement (FTA) negotiations, which launched in March 2013, China, Japan, and Korea (CJK) signed a trilateral investment agreement in May 2012."[52] And, as noted above, it is reported to be included in the currently negotiated EU-China BIT.

3.2. FTAS

EU FTAs all contain labor protection provisions committing to I.L.O. core labor standards and have a dispute resolution system with a tripartite format, though without penalties for violations (e.g., Japan, Canada, S. Korea). First, there are substantive standards committing to I.L.O. core

[49] *Trade*, European Commission http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/ (last updated May 7, 2019). *See also* Frank Bickenbach et al., Kiel Institute for the World Economy, The EU-China Bilateral Investment Agreement in Negotiation: Motivation, Conflicts and Perspective 95 (2015).

[50] *See* European Commission, *supra* note 45. There are 26 existing Bilateral Investment Treaties between 27 individual EU Member States and China. *See also* Investment Policy Hub, http://investmentpolicyhub.unctad.org/IIA.

[51] *See* Jeffrey J. Schott and Cathleen Cimino, *The China-Japan-Korea Trilateral Investment Agreement: Implications for US Policy and the US-China Bilateral Investment Treaty*, PIIE Briefing (Feb., 2015), https://www.goldmansachs.com/our-thinking/pages/us-china-bilateral-investment-dialogue/multimedia/papers/toward-a-us-china-investment-treaty.pdf.

[52] Agreement among the Government of Japan, the Government of the Republic of Korea, and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment, May 13, 2012. For discussion of difficulties of negotiating a trilateral FTA, *see* Jonathan D. Greenberg, *The Elusive China-Japan-South Korea Free Trade Agreement* (Sept., 2015) (thesis, NPS Monterey, California), http://www.dtic.mil/dtic/tr/fulltext/u2/1008948.pdf (the author suggests there are "four potential explanations for the trilateral FTA's current lack of progress: perceptions of the deal not being an economic priority, the power of influential domestic business interests negatively affected by the FTA, regional competition over China's growing domestic market, and regional political-historical animosities").

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labor standards and the Decent Work Agenda; second, there are obligations and procedural commitments relating to implementation; third, there are institutional mechanisms to resolve disputes. [53]

Of China's thirteen FTAs, five include labor protection standards (Chile, Iceland, New Zealand, Peru, and Switzerland). Of the five FTAs that have references to labor issues, substantive provisions are not in the texts of FTAs but are in M.O.Us. There is diversity ranging from the China-Iceland FTA[54] where the parties agree to enhanced labor communication and cooperation, to other agreements, such as with New Zealand and Switzerland[55] where, as in EU FTAs, the parties reaffirm their obligations under the I.L.O. and recognize that it is inappropriate to encourage trade or investment by weakening or failing to enforce labor laws, and that it is inappropriate to set or use labor laws, regulations, policies and practices for trade protectionist purposes, but there is no enforcement mechanism.[56]

The text of the 2013 Switzerland-China FTA itself has very minimal language regarding labor standards. Chapter 13.5, Economic and Technical Cooperation, refers to the 2011 and the 2013 China-Swiss M.O.U..[57] This M.O.U. has language that largely parallels the language of the EU's FTA labor provisions. Likewise, China's FTAs with non-EU

[53] *See* James Harrison et al., *Governing Labor Standards through Free Trade Agreements: Limits of the European Union's Trade and Sustainable Development*, 57 J. Common Mkt. Stud. 260 (2018).

[54] *See* FTA, China-Iceland, art. 96, Apr. 15, 2013.

[55] *See, e.g.*, FTA, Switz.-China, July, 2013.

[56] *See* FTA, N.Z.-China, Apr. 7, 2008.

[57] *See* Agreement on Labor and Employment Cooperation, Switz.-China, 2013. *See also* the 2013 M.O.U. also referenced an earlier more generally-worded 2011 Memo of Understanding.

> Considering the objectives and principles of the International Labor Organization (hereinafter I.L.O.) of which Switzerland and the People's Republic of China are members; including their commitment under the 1998 Declaration on Fundamental Principles and Rights at Work and its follow-up, as well as the 2008 I.L.O. Declaration on Social Justice for a Fair Globalization, Determined to improve working conditions and living standards in their respective countries and protect, enhance and enforce basic workers' rights as embodied in the core labor standards, have reached the following understanding.

See also Agreement on Labor and Employment Cooperation, Switz.-China, 2011.

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members, Chile and New Zealand have similar language in their labor provisions committing to I.L.O. core labor standards.[58]

In sum, comparing past BITs of China and the EU, respectively, neither includes labor provisions. However, three EU Members – Austria and Belgium-Luxembourg (in tandem) have concluded BITs containing labor provisions that are quite like those in the recent EU's FTAs. China's FTA-related M.O.U.s regarding labor standards and dispute resolution are like those of the EU.

4. LABOR COOPERATION

Labor cooperation, with or without an FTA, occurs in different forms, formal and informal, with the former sometimes hosted by the governments and include conducting training and workshops, frequently in cooperation with other organizations, such as the I.L.O., O.E.C.D., International Trade Union Confederation (hereinafter I.T.U.C.). Informal education of labor rights and issues is often undertaken by labor unions themselves.

For example, in Switzerland, that has an FTA with China, the unions are working to create labor education and cooperation between Swiss and Chinese labor unions and workers.[59] Although it remains to be seen whether this FTA can really become a lever in the struggle for human and labor rights in China, their strategic plan is described below.

> The Swiss multisectoral trade union, Unia, together with the development organization, Solidar Suisse, has chosen an interesting approach, with the dual aim of both contributing to the application of labor rights in China and promoting the notion of solidarity among their own members and the general public. The main element is the provision of support to

[58] *See* FTA, China-Chile, Nov. 18, 2005. *See also* FTA, N.Z.-China,Apr. 7, 2008.
[59] *See, e.g.*, Pedrina & Doka, *supra* note 3.

https://doi.org/10.6092/issn.2531-6133/9820

> rank-and-file groups in China that have set out to assist workers in their struggle to get their rights applied. Chinese labor law does provide scope for this, but the big problem is implementation. As part of this program, support is given to grassroots organizations which advise and mentor workers regarding problems with overtime, social insurance and occupational health.
>
> A second objective, in both countries, is to establish a link between employee representatives within Swiss firms active in China (whether subsidiaries or joint ventures). The aim here is to get labor rights respected by promoting collective agreements. In China, the conditions for this have been slightly improved recently by the creation of a new legal basis for collective bargaining policy. In several provinces, it is now quite possible to conclude collective agreements. This raises the question of the form to be given to relations with the official trade unions affiliated to the A.C.F.T.U. federation. These are the only organizations with a recognized entitlement to represent employees.[60]

German labor cooperation provides another illustration. Inside the workplace itself, the goals of labor education, reform, and cooperation may be taking place, where as a result of FDI, foreign employers must deal with the local laws and labor unions in working out understandings and accommodations. For example, the Chinese company Midea, that recently purchased German robotic company Kuka in Germany, continues to have the IG Metall Worker's Union influencing employer labor decisions. In November 2017, the employer announced that 250 of the unit's 5000 employees would be cut, and immediately, the union head of the

[60] *Id.* ("The third element is awareness-raising in Switzerland. "My colleague Li" is the slogan that Unia and Solidar Suisse have chosen for regional events, a film, workplace leafleting etc. The aim is to inform union members about the realities of labor struggles in China today and our solidarity action, thus encouraging them to play an active part. By denouncing abuses, the intention is also to put pressure on the Swiss authorities and on China to start changing things. The durability provisions in the new FTA are to be used as a lever for this").

https://doi.org/10.6092/issn.2531-6133/9820

Augsburg branch of IG Metall, Germany's largest labor union said, "talks with management are underway to 'get to the bottom of it".[61] The engagement of labor unions and employers in collective bargaining is an attribute of labor cooperation and is at the core of labor cooperation to benefit the workers.

The strategies of German unions towards China began with research, training, and visits along with some grassroots assistance; and, they also participate in joint programs with I.T.U.C. and other sector international unions.[62] As early as 2009 there was cooperation between China's A.C.F.T.U. and Germany's IG Metall Trade Union and it has proven to be by far the most active foreign union in China with the longest experience in cooperation.

> German unions have adopted a variety of strategies for dealing and cooperating with the ACFTU and on a much smaller scale also with Chinese workers. This however can be explained quite easily, given that roughly 75% of German enterprises investing in China fall within the scope of the IG Metall.[63]

The IG Metall Trade Union determined that coping with the ongoing globalization, had to be by transnational trade union cooperation and strived for adjustment of labor standards worldwide as an instrument to both preserve German jobs and fight for social justice in developing economies.[64] For specific strategies, it targeted companies, not workers,

[61] Daniel Ron, *German robot maker Kuka eyes €1b sales in China by tapping parent's Midea Group's network*, SOUTH CHINA MORNING POST (Mar. 7, 2018), https://www.scmp.com/business/companies/article/2136197/german-robot-maker-kuka-eyes-eu1b-sales-china-tapping-parents. *See also*, Barbara Woolsey, *Robot maker Kuka feels the squeeze,* HANDELSBLATT TODAY (Dec. 17, 2017), https://global.handelsblatt.com/companies/robot-maker-kuka-feels-the-squeeze-861702 (Under the investor agreement spanning to 2023, Midea said it would not interfere in management or close any plants and would support Kuka's growth strategies. The agreement also said it would not delist Kuka from the German stock exchange or access Kuka's intellectual property and client data). *See also* KASTNER, *supra* note 4. *See also*, Kuka Sustainability Report 2017, https://www.kuka.com/-/media/kuka-corporate/documents/ir/reports-and-presentations/sustainability-reports/kuka-sustainability-report-2017.pdf.

[62] *See* SANDER, *supra* note 6.

[63] *Id.*

[64] *See Id.* ("One of the earliest attempts of enterprise-level international engagement and cooperation was made by parts of the IG Metall in the auto industry. As a forum for union

https://doi.org/10.6092/issn.2531-6133/9820

codes of conduct, and international framework agreements[65]and established "trade union cooperation in MNCs and Joint Ventures through their international partners (notably the IMF)."[66]

> [T]he most active and successful engagement has not been targeted at those Chinese workers most affected by appalling working conditions (e.g. unskilled migrant laborers working in the informal sector or the Export processing enterprises of most notably the textile and toy industry) but rather at big companies (Bayer, Siemens, VW or Daimler Chrysler to name only a few) employing skilled Chinese labor. This is however not surprising, as the main focus of national unions in the international arena has always been on labor issues in subsidiary companies of these big companies' German unions.[67]

At the same time, the goals of labor education, reform, and cooperation are taking place at the workplace level, where as a result of FDI, foreign employers must deal with the local laws and labor unions in working out understandings and accommodations.

Sweden, an EU Member without a bilateral FTA with China, has ongoing labor workshops with China dealing with labor themes and Corporate Social Responsibility, including for example, training on "social responsibility and international trade, labor contract, working

workplace representatives and shop stewards they sought to establish communication and exchange of information between workforces of plants worldwide. Solidarity action is organized if necessary, as well as qualification and training of unionists for international trade union work").

[65] *See Id.*("Daimler Chrysler has established a Code of Conduct in their Chinese production plants, Faber Castell has implemented a Social Charta which is monitored by IG Metall and IMF. IG Metall's especially tried to establish trade union structures particularly in German-Chinese Joint Ventures. Additionally, strived to implement social minimum standards through Codes of Conduct – as for instance for Daimler Chrysler. International Framework Agreements have so far been the most effective means of engagement in China").

[66] *Id.*

[67] *Id.* ("An early IMF and Asia Monitor Resource Centre report in China-based plants of German MNCs found that workers were largely unaware of such agreements and that there were not shown to be effective. The same report also revealed that the impact of trade unions is bigger in joint ventures where some board members are German and thus closer consultation with German unions takes place (e.g. Beijing Daimler Chrysler)").

https://doi.org/10.6092/issn.2531-6133/9820

hour, wage and benefit, harmonious working relationship, international standard of working hour and wage, factory inspection as well as requirements and management for young workers."[68] Swedish labor union cooperation with the Chinese labor union is also ongoing.

> "The Swedish model is unique because it is an agreement between trade unions, the employers' organizations and the government," said Mr. Anders Ferbe, Chairman of the Swedish trade union IF Metall at a seminar about democratic management in business in Beijing [in 2015]. The event offered a unique and first-time opportunity for Swedish companies to meet representatives from the ACTFUs.[69]

Likewise, China participates in ongoing labor workshops; for example, a recent seminar co-hosted by the A.C.F.T.U. and Trade Union Advisory Committee to the O.E.C.D. (hereinafter O.E.C.D.-T.U.A.C.) has dealt specifically with the sustainable development of multinational corporations and the role of trade union. The seminar dealt with "China's initiatives to build a Silk Road Economic Belt and 21st Century Maritime Silk Road, [and how] to regulate the behavior of multinational corporations, safeguard workers' rights and promote sustainable growth".[70]

There is also an international organization, the Trade Union Development Cooperation Network (hereinafter T.U.D.C.N.) whose

[68] *Joint Activities*, SINO-SWEDISH CORPORATE SOCIAL RESPONSIBILITY WEBSITE, http://csr2.mofcom.gov.cn/article/wangzhanjianjie/about2.shtml#jinzhan28. (A list of the many joint activities is provided).

[69] *See The Swedish model: a win-win-win solution to industrial relations*, SINO-SWEDISH CORPORATE SOCIAL RESPONSIBILITY WEBSITE (Apr. 22, 2015), http://csr2.mofcom.gov.cn/article/csrnews/news2015/201505/20150500959653.shtml.

> For example, Swedish fashion brand H&M is helping its suppliers in China to build a good industrial relation in the factories with the support of IF Metall. We are working from different angles, including internal communication, cooperation with other brands, engagement of local governments and capacity building for the suppliers. . . . Mr. Zhang Zhijun, Director of Supervision Division of Legal Department of A.C.F.T.U. suggested, "It is very important for companies to build up an internal communication mechanism between the workers and management".

[70] *A.C.F.T.U./O.E.C.D.-T.U.A.C. Seminar*, ALL-CHINA FEDERATION OF TRADE UNIONS (May 28, 2015), http://en.acftu.org/28612/201505/28/150528142253162.shtml.

https://doi.org/10.6092/issn.2531-6133/9820

objective is to bring the trade union perspective to the international development policy debates and improve the coordination and effectiveness of trade union development cooperation activities. T.U.D.C.N. is an initiative of the I.T.U.C. bringing together affiliated trade union organizations, solidarity support organizations, regional ITUC organizations, the Global Union Federations (GUFs), the European Trade Union Confederation (ETUC) and the O.E.C.D.-T.U.A.C..[71]

5. CONCLUSION

An EU-China BIT and FTA with stabilizing "rules of the road" provisions and labor provisions will increase FDI and provide more inter-union and union-foreign employer interaction and cooperation and impetus for increased worker protection. The EU-China corridor of the new Silk Road could and should be paved with standards consistent with international labor standards and emanating from an EU-China BIT and FTA and with its accompanying labor cooperation that exists within and behind the legal terms. This provides an additional approach to enforcement and improvement of workers' conditions whether it occurs accompanying the formal levels of treaties, by the I.L.O., or by the informal changes "on the ground", coming from the diverse avenues of labor cooperation.

[71] *See generally Trade unions as actors of development education and awareness raising for global solidarity*, Trade Union development Cooperation Network (2016), https://www.ituc-csi.org/IMG/pdf/tudcn_brochure_dear_2016_en.pdf.

 https://doi.org/10.6092/issn.2531-6133/10426

The Constitutional Dimension of European Criminal Law

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Conference & Meeting Proceeding: Keynote speech for the Annual Colloquium of the University of Bologna Law Review, February 20th, 2019, Alma Mater Studiorum University of Bologna (Bologna, Italy).

Keywords: *Constitutional Law*; *European Criminal Law*; *Supranational Litigation*; *Taricco Case*; *European Integration*

University Of Bologna Law Review

ISSN 2531-6133

[VOL.4:2 2019]

https://doi.org/10.6092/issn.2531-6133/10426

Thank you very much for the introduction and kind invitation. I hope you can hear me. It is a pleasure to address you. I think this is a great initiative. I know it is challenging and complicated but congratulations to you and your team for sustaining this journal, this serves as a forum for change. I am very pleased because I have met some of you before and I have been really impressed by the level and quality of the student body at all levels. It is amazing that so many people are here today.

You assigned me the brief to speak about European Criminal Law. I chose to speak about European criminal law in broad terms, so I will focus on the intersection between European criminal law and constitutional law. The aim of my talk today is to cover the three main aspects of the previously mentioned relationship. First of all, the aspect of power: what can the EU do? What is its competence in the criminal sphere? How is this field evolving? The second aspect will be about principles: what are the principles of EU law as of now in the field of criminal law? And does criminal law in that sense transform the meaning and content of the constitutional principles of EU law or vice versa? And lastly, something which is very important in this context are rights: what is the impact of the integration in the European Criminal Justice on the protection of fundamental rights? And what, if any, role does the integration of the Charter play in the reconfiguration of this landscape?

I will focus on these topics, but first I want to start by giving you a more defined context, especially for those of you who have not been following closely the development of European criminal law. This is an area of European integration which is very young compared to the others. The EU has defined express competence in the complex Maastricht Treaty in 1992, but the fact is that EU law has been influencing national criminal law in a number of ways. There have been a lot of discussions on how criminal law is at the heart of state sovereignty and at the heart of our modern understanding of state and state power so obviously the ceding of powers to organizations which lie beyond the state is always a challenge.

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https://doi.org/10.6092/issn.2531-6133/10426

The second aspect which I forgot to highlight earlier is that questions on criminal enforcement and the extent and content of European integration in criminal matters become questions of constitutional law. This is the case when one studies a number of recent landmark judgments of the Court of Justice of the European Union. These rulings aim to address the potential and real conflict between criminal law and constitutional law principles and they have resulted in the development of constitutional principles in EU criminal law.

The third aspect, that is worth to be mentioned is that the development of European criminal law goes beyond traditional 'zero-sum' assumptions by scholars and politicians on the adverse impact of Europeanization on national sovereignty. European criminal law is not unified criminal law. We do not have a European criminal court and neither do we have a European criminal code. European criminal law is actually a system of continuous interaction and integration between EU law and each national law. Judicial co-operation takes place within the framework of mutual recognition, which requires the interaction between national systems. Criminalisation takes place in the form of Directives, which provide a leeway for member states in terms of implementation-criminalisation thus occurs under national law. Even the most 'avant-garde' instrument of European criminal law, the Regulation establishing a European Public Prosecutor's Office, establishes not a centralised, top-down system of investigation and prosecution, but rather a system based on the interaction between EU law and national law.

So bearing this in mind, European integration in criminal matters is a complex process involving the interaction between the EU and national law in a field which is highly politicised. This is what makes the field of European criminal law an exciting field for people like me and for some of the PhD scholars today in this room.

First of all, in terms of competence, what did the EU do in the field of criminal law? I would focus mostly on the production of substantive criminal law and on the organisation of criminal law and criminal

https://doi.org/10.6092/issn.2531-6133/10426

sanctions. What are the compromises necessary for the evolution of European integration in this sensitive field? We have witnessed a major constitutional change from the inter-governmental third pillar to the entry into force of the Lisbon Treaty.

The EU has traditionally had the competence to adopt rules on all serious crimes for example on the big areas as terrorism, organized crimes and so on. There could be a case for supranational criminal law and for essential policies where the EU was involved. This was tested in two very important cases by the Court of Justice in the 1990s whose concern was about the protection of environment. So the member states came up with a framework decision on harmonizing criminal law and environment law (previously mentioned third pillar) and the Commission challenged this in the Court of Justice as this was a matter under normal community law because these cases did not only involved criminal or criminality but they also involved the protection of environment. The Court of Justice agreed. It treated criminal law not as a self-standing EU policy, but rather as a means to an end used to achieve the objectives of the Union. These rulings have been translated into Treaty provisions under 'functional criminalisation' which is the legal basis of Article 83(2) TFEU.

The Lisbon Treaty explains the constitutionalisation of the European criminal law in different ways: first of all, it aims to clarify and strengthen the European Parliament's legislative power in criminal matters. Secondly, it supranationalizes the EU criminal law in terms of the powers of EU institutions and the applicability of EU law principles such as primacy and, where applicable, direct effect. What is also important is that the Charter of Fundamental Rights is applicable in EU criminal law. The Lisbon Treaty also attempted to clarify EU competence to harmonise criminal offences and sanctions, via the introduction of 'securitised' criminalisation (competence on major areas of crime) in Article 83(1) TFEU, and, as said above, 'functional criminalisation' in Article 83(2) TFEU.

https://doi.org/10.6092/issn.2531-6133/10426

In spite of the attempt to clarify the Union's criminalisation competence in Article 83 TFEU, there are still a number of questions regarding its scope. Article 83(1) requires criminalisation for areas of crime having a 'cross-border dimension.' The meaning of 'cross-border' in this context is contested. There is a view treating this term as synonymous with cross-border crime, limiting the Union's competence in criminality which involves more than one jurisdictions. A different view, with which I would subscribe, interprets the scope of Article 83(1) TFEU more extensively to include areas of crime with a cross-border dimension even if these occur in a single jurisdiction. The extent of the 'functional criminalisation' competence of the EU in Article 83(2) TFEU is also contested with the provision granting competence to the EU to legislate when this is essential to ensure the effectiveness of EU policies which have already been implemented. It is unclear what constitutes 'essential' and what the implementation requirements are for the provision to apply. Moreover, Article 83(2) TFEU raises the question of the relationship between criminal law and administrative law in cases where dual instruments have been adopted- such as in the case of market abuse. One can consider in these cases that the adoption of administrative sanctions could lead to decriminalisation, by precluding Member States from treating conducts sanctioned by administrative law as criminal in the national legal orders.

Another key development post-Lisbon has been the establishment of a European Public Prosecutor's office. The idea had a long gestation since the days of the Corpus Juris and stems from the distrust of European institutions- in particular the Commission – on the political will and capacity of Member States to protect effectively the EU budget. The logic behind this was that national prosecutors are either unwilling or unable to prosecute effectively against the EU budget and this would thus require a European response in the form of a European prosecutor. The logic here is that a European body is needed to effectively protect European interests. However, the project of a European prosecutor was contested in

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a number of European states in view of its potentially adverse impact on state sovereignty and the state monopoly on prosecution in criminal matters. This is why the Lisbon Treaty has introduced in Article 86 TFEU possibilities for establishing a European Public Prosecutor's Office (EPPO) through enhanced co-operation. This has led to the adoption of the EPPO Regulation, and at the time of writing the vast majority of EU Member States are participating. However, the current non-participation of states which are significant recipients of EU funds, such as Hungary and Poland, is a matter of concern.

In terms of the structure and powers of the EPPO, we have moved from a Commission- proposed centralised model to a multi-level system involving multiple layers of EPPO offices and officers- with day to day work handled by the European Delegated Prosecutors based in Member States. From the point of view of the citizen and from the point of view of legal certainty, this multi-layered system is problematic. Jurisdiction of the Court of Justice is limited and applicable law (national or EU law) is contested and unclear at times. The absence of harmonisation and the over-reliance on national law, as well as the legal uncertainty can have considerable negative consequences for the protection of fundamental rights and for the position of individuals investigated or prosecuted by the EPPO. However, this was the price to pay for a political compromise. For the first time we have an EU criminal justice agency with direct powers on the national criminal justice systems, and the EPPO is a system which can serve as a laboratory for further integration in European criminal law.

In terms of the applicability of constitutional principles of EU law, it is important to see how European criminal law is testing the Court's approach with regard to key constitutional principles. I think there are two key cases that show how difficult it is sometimes to explain the relationship between EU law and national laws.

The first case is the Taricco case, Taricco I and Taricco II as we EU lawyers say – or the Taricco saga as it has been called by some scholars. I will analyse Taricco from an EU perspective. In Taricco I, we get the

https://doi.org/10.6092/issn.2531-6133/10426

reference by a lower Italian court by a judge who said that he cannot prosecute in Italy - it is difficult to do so because of the Italian statute of limitations applies - so the Italian judge asked Luxembourg what could he do to give effectiveness to EU Law. The Court of Justice answered that this situation is incompatible with the principle of effectiveness of EU law- the national judge is under an obligation to disapply the national law if he thinks that EU law would be breached. Taricco I was also important as a successful example of the preliminary reference procedure, whereby a judge from a lower court can send a question on interpetation directly to the Court of Justice in Luxembourg.

The beauty of Taricco was that first of all it comes from a lower judge and secondly, it involves a true question of effectiveness of the EU. The question can be seen as a cry for help. The national judge was cocnerned about the potential of national law to lead to impunity as far as fraud against the EU budget is concerned. Subsequent litigation in Italian courts and in the Court of Jusice in 'Taricco II' centered on the compatibility of the Court's judgment in Taricco I with the principle of legality. This generated an inconclusive judicial dialogue as to the legal meaning and extent of the principle of legality. The Court of Jusitce in Taricco II attempted to accommodate the Italian courts even if this meant legal inconsistencies in its ruling. However, the response in Italy was not so accommodating with one of the key concerns from the perspective of EU law being attempts by the Italian higher judiciary to limit the avenues of preliminary references from Italian lower courts to Luxembourg- undermining thus this bottom-up collaborative mechanism on the interpretation of EU law.

A further constitutional aspect concerns the protection of fundamental rights in Europe's area of freedom, security and justice. Key questions arise here from the operation of the system of mutual recognition in criminal matters, and most notably on the operation of the European Arrest Warrant system. The system is based on mutual trust. I accept your request as a judge of another EU member state because I trust

https://doi.org/10.6092/issn.2531-6133/10426

your system and I do not ask many questions about what lies behind your decision, I comply because we are all located in an Area of Freedom, Security and Justice and we do not want criminals to take advantage of the abolition of borders. Initially the European Arrest Warrant system based on uncritical mutual trust did not include a ground of refusal to execute on grounds relating to fundamental rights concerns. We are all 'good guys', we have signed the ECHR at the end of the day. In its initial case-law, the Court of Justice defended this approach, linking it to the effectiveness of EU law and EU criminal enforcement. A key judgment in this context has been Melloni, whereby the Court of Justice found that EU secondary law has primacy over national constitutional law, even if the latter provides a higher level of human rights protection. In view of reactions by national courts since, the Court of Justice has revised its case-law to move from a model of blind trust to a model of earned trust: in the case of Aranyosi, the Court of Justice established a model of judicial dialogue between the issuing and the executing authority; if the latter has doubts on the adequacy of the human rights protection of the requested individual after the execution of the warrant, and stated for the first time that if human rights concerns persist, the execution of the warrant can be suspended. In the subsequent case of LM, the Court of Justice extended this reasoning in cases where concerns relate to the rule of law, when the judicial authorities of the issuing member state are not deemed to be independent. Thus, the Court of Justice made a decisive step towards taking meaningful account of human rights, through a system of dialogue both between national courts and between national courts and the Luxembourg Court.

It is through this process of evolution and learning that the constitutionalisation of European criminal law will take flesh.

Thank you very much for your attention.

Editorial Note

Starting from this Volume the Law Review will include a new editorial section called "Obiter Dictum".

This project represents an opportunity for our Advisors and for other selected authors to share directly with our readers their own thoughts and considerations by focusing in medias res on current social and legal affairs by means of brief and incisive notes.

The aim is to promote a dynamic debate within legal experts, enriching it with persuasive, valid and solid insights and arguments.

The Editor-in-Chief

Brexit is a Crisis of Leadership, not Democracy

In June 2016, the United Kingdom saw a surprise result with 52% of voters supporting the country's leaving the European Union. This was a surprise on many levels not least that 'Remain' was the dominant campaign and ahead in virtually every poll throughout the contest. While this result is sometimes discussed as a rise in popular nationalism, it is best viewed as a crisis of political leadership – where Brexit is a means, not an end, to a Conservative partisan project which also explains the failure of two Prime Ministers to enact it and a third to 'get Brexit done' as promised.

The first point is that Brexit didn't originally mean Brexit. At the beginning, the purpose of Brexit was to stop UKIP from draining support from the Conservatives. Then Prime Minister David Cameron entered office in an unwanted coalition government in 2010. A large part of the reason was that many Tory votes had gone instead to UKIP and its vote share was growing each election. So to stop it, Cameron offered a referendum on the UK's membership in EU. His plan was never for Britain to leave, but to get voters to leave UKIP.

The plan was remarkably successful. At the 2015 general election, Cameron managed what few Prime Ministers achieve: an increased number of MPs and overall majority. UKIP's votes had collapsed and his trick had worked ensuring his Conservative government would continue. On the heels of his surprise national victory, Cameron raced to conclude the referendum campaigning against Brexit – to get it over with and then get onto his domestic legislative agenda. Obviously, things did not go as he planned.

The second point is that Brexit then came to mean not Brexit, but becoming the next Tory Prime Minister. Leadership rivals all claimed they could bring the country together but the real issue was unifying the Tories. When Cameron resigned, it was only Tory members of Parliament who were

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choosing the next leader after all – and most had backed Leave. Theresa May emerged victorious by promising her support for Brexit and winning over just enough initial credibility for not having much campaigned for the other side, but she had backed Remain and was able to win over anti-Brexit voices too.

The third point is Brexit was not going to happen, or at least not in the timescale of two years. While I was heavily criticised at the time for saying in August 2016 that May would not deliver Brexit, I turned out to be the only one right about that. Brexit of any variety will damage Britain's economy and global standing. When people are worse off, it will be no consolation for them to be told that they should be happy with their declining fortunes because they had been convinced they should vote for it. Instead, the governing party will get blamed not least because Brexit was promised to increase prosperity. This is a heavy incentive not to deliver a Brexit beyond name only.

And then there is Brexit's complexity. No one seems certain about how many EU laws the UK would need to divide into what they want to keep, what they want to change (and if so, how so) and what they want to scrap. One conservative estimate is there are 18,000 laws to deal with. Without any vision for what Brexit should look like and after a campaign that lacked a manifesto, the UK government was never in a position to get to the detail of sorting out what to do with these 18,000 laws other than keep as is and make everyone wonder what the point of Brexit really is if it doesn't lead to any changes.

It was unsurprising therefore to see May take the first six months fighting an impossible court battle over whether she needed Parliament's approval to start Brexit. She knew such support would come in a stonking majority – and ultimately did. But the seemingly vexatious litigation which she lost had all the appearances of someone trying to get the courts from stopping Brexit and being a useful scape goat to avoid an outcome the government didn't truly want.

May was then soon replaced by Boris Johnson, who colourfully promised Brexit 'do or die' and that he'd rather be 'dead in a ditch' than see Brexit fail by 31 October. Yet curiously for someone making such strong statements, he actually pulled votes on getting Brexit done a week before the deadline not even bothering to make any serious attempt. More the actions of

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someone using Brexit to rally supporters to keep power than to ensure Brexit happens come what may in fact.

At the time of writing, Johnson's pledge to 'get Brexit done' appears to have helped him win a large majority coupled with a poorly campaign by the opposition Labour Party. But there are three takeaway points. First, the success of 'get Brexit done' is not down to support for Brexit, but for bringing to an end the thus far abstract, endless chatter about Brexit. Voters want to move on and talk about something else after three years of political paralysis. Secondly, Johnson has seen the UK technically withdraw from the EU, but otherwise remain a member in all but name. Freedom of movement continues, the ECJ remains top and much else.

And finally, Brexit beyond name only break seems further away than ever. This is mostly because of the complexity of delivering it and partly a failure of leadership to come clean on its costs. But it is also a political failure in a wider sense of being a electioneering football used as a means to secure power, not an end to be delivered. Without any change in leadership or context, Britain's paralysis over Brexit may well continue even with a Tory victory.

Some might say democracy has been betrayed by a failure to deliver Brexit, but this overlooks the damage to democracy goes much further and deeper than that. All the while the Prime Minister refuses to publish a report signed off by the security services for release to public that confirms what, if any, alleged foreign interference took place in the EU referendum and what impact this had. One can only speculate why – and therein in secret lies the greater threat.

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